

FIEC

*Amendment to Limit
Government
Interference with
Abortion*

23-07

2024
Book 2

Financial Impact Estimating Conference

Amendment to Limit Government Interference with Abortion Serial Number 23-07 Book 2

Table of Contents

Authorization	Tab 1
• Letter from Senate President and Speaker of the House, June 10, 2024	
Notice of Conference	Tab 2
• Financial Impact Estimating Conference, June 10, 2024	
• Financial Impact Estimating Conference, revised July 8, 2024	
Financial Information Statement	Tab 3
• Complete Financial Information Statement, November, 16, 2023	
Law Relating to FIECs	Tab 4
• Section 100.371, F.S. - Initiatives; procedure for placement on ballot	
Discussion Documents	Tab 5
• Office of Economic & Demographic Research (EDR) – Background (Summary of Current Law), July 1, 2024	
• EDR – Discussion of Impact of Proposed Amendment, July 1, 2024	
• EDR – Criminal Justice System, July 1, 2024	
• EDR – Education Services, July 1, 2024	
• EDR – Health and Human Services, July 1, 2024	
• EDR – Federal and State Funds for Abortion, July 1, 2024	
• EDR – Revenue Impact from Out-of-State Abortions Occurring in Florida, July 1, 2024	
• EDR – Criminal Justice System, July 8, 2024	
• EDR – Education Services, July 8, 2024	
○ EDR – Reported Induced Terminations of Pregnancy per 1,000 Live Births Calendar Year 2023	
• EDR – Health and Human Services – Federal Medical Assistance Percentage, July 8, 2024	
• EDR – Education Services, July 15, 2024	
• EDR – Health and Human Services, July 15, 2024	
• Principal from the Executive Office of the Governor – Education Services, July 8, 2024	
• Principal from the Executive Office of the Governor – Health and Human Services, July 8, 2024	
• Principal from the Executive Office of the Governor – Litigation Costs, July 8, 2024	

- Principal from the Executive Office of the Governor – Health and Human Services, July 15, 2024
- Principal from the Executive Office of the Governor – Litigation Costs, July 15, 2024
- Principal from the Executive Office of the Governor – Fertility Effect on Long-Term Government Revenues, July 15, 2024
- Principal from the Executive Office of the Governor – Combined 150 Word and 500 Word Financial Impact Statements, July 15, 2024
- Principal from the Executive Office of the Governor – The Executive Office of the Governor General Counsel Office – Judicial Rulings on Medicaid Coverage for Abortions, July 15, 2024
- Principal from the Executive Office of the Governor – Agency for Health Care Administration – Induced Termination of Pregnancy (ITOP) by Minors in Florida
- Principal from the House of Representatives – Value of a Statistical Life and Fertility Long Term Impacts Statements, July 8, 2024
- Principal from the House of Representatives – State and Local Revenues, July 15, 2024
- Principal from the Office of Economic & Demographic Research – Draft Complete Financial Information Statement 23-07, Including 150 and 500 Word Statements, July 14, 2024

Materials from the Sponsor..... Tab 6

- Floridians Protecting Freedom’s Submission to the FIEC, July 1, 2024
- Floridians Protecting Freedom’s Additional Submission to the FIEC, July 3, 2024
- Floridians Protecting Freedom – FIEC Presentation, July 8, 2024
- Floridians Protecting Freedom’s Second Additional Submission to the FIEC, July 13, 2024
- Floridians Protecting Freedom – FIEC Presentation, July 15, 2024
- Floridians Protecting Freedom – The Guttmacher Institute – State Funding of Abortion Under Medicaid, August 31, 2023

Materials from Proponents..... Tab 7

- Institute for Women’s Policy Research – The Economic Impacts of Reproductive Restrictions in Florida, June 2024
- The Florida Policy Institute – IZA Institute of Labor Economics – The Economics of Abortion Policy, August 2023
- The Florida Policy Institute – Brief for Jackson Women’s Health Organization as Amici Curiae, Dobbs v Jackson, September 20, 2021
- The Florida Policy Institute – AAMC Research and Action Institute – States with Abortion Bans See Continued Decrease in U.S. MD Senior Residency Applicants, May 9, 2024

Materials from Opponents Tab 8

- Florida Conference of Catholic Bishops – FIEC Workshop re Amendment to Limit Government Interference with Abortion, July 1, 2024
- Vote No on 4 – Remarks from Sara Johnson On Behalf of Vote No on 4 Florida Before the Financial Impact Estimating Conference, July 1, 2024
- Vote No on 4 – Remarks from Sara Johnson On Behalf of Vote No on 4 Florida Before the Financial Impact Estimating Conference, July 8, 2024

- Vote No on 4 – Remarks from Sara Johnson On Behalf of Vote No on 4 Florida Before the Financial Impact Estimating Conference, July 15, 2024
- Protect Women Florida – Comment on Amendment to Limit Government Interference with Abortion (23-07), July 1, 2024
- Protect Women Florida – Taxpayer Funded Abortion under Amendment 4, July 8, 2024
 - Protect Women Florida – Caselaw on Public Funding for Abortion on the Basis of State Constitutional Provisions
- The Heritage Foundation – Information for FIEC, Originally submitted: November 9, 2023, Updated: July 4, 2024

Materials from Interested Parties..... Tab 9

- Michael J. New, Ph.D. – Fiscal Impact Statement for Amendment 4, July 7, 2024

Communications from State Agencies..... Tab 10

- Office of the Attorney General – Question Regarding Amendment 4 FIEC Consideration, July 8, 2024
- Office of the Attorney General – Question Regarding Amendment 4 FIEC Consideration, July 13, 2024

Impact Tab 11

- Florida Financial Impact Estimating Conference – Complete Financial Information Statement

Tab 1

Authorization

THE FLORIDA LEGISLATURE



KATHLEEN PASSIDOMO
President of the Senate



PAUL RENNER
Speaker of the House of Representatives

June 10, 2024

Ms. Amy Baker
Office of Economic and Demographic Research
Pepper Building
111 W Madison St # 574
Tallahassee, FL 32399

Dear Ms. Baker,

You are hereby directed to convene the Financial Impact Estimating Conference on July 1, 2024, for the purpose of reviewing the Financial Impact Statement for the proposed constitutional amendment entitled "Limiting Government Interference with Abortion," and making changes, if any, the conference deems appropriate.

Respectfully,

A handwritten signature in blue ink, appearing to read "K. Passidomo".

Kathleen Passidomo, President

A handwritten signature in blue ink, appearing to read "P. Renner".

Paul Renner, Speaker

Tab 2

Notice of Conference

NOTICE OF CONFERENCES
FINANCIAL IMPACT ESTIMATING CONFERENCE

The Financial Impact Estimating Conference (FIEC) will be holding a series of conference meetings regarding the petition initiative entitled “***Amendment to Limit Government Interference with Abortion (23-07)***.” Unless otherwise indicated on the schedule below, all meetings will be held in Room 117, Knott Building, 415 W. St. Augustine Street, Tallahassee, Florida. Once begun, they will continue until completion of the agenda. Due to construction at the capitol, attendees must enter through the Knott Building.

The FIEC is required by s. 100.371, Florida Statutes, to review, analyze, and estimate the financial impact of amendments to or revisions of the State Constitution proposed by initiative. On November 16, 2023, the FIEC issued a financial impact statement regarding the above referenced petition initiative. The purpose of this Notice of Conferences is to consider potential revisions to the financial impact statement to be placed on the ballot that shows the estimated increase or decrease in any revenues or costs to state and local governments resulting from the proposed initiative. The FIEC will also be considering the overall impact to the state budget. All meetings are designated as active sessions of the Conference, and official action may be taken on any of the noticed dates below:

Amendment to Limit Government Interference with Abortion (23-07)

- Monday, July 1st at 9:00 a.m.
- Monday, July 8th at 9:00 a.m.

Any changes to the meeting times shown on this schedule will be posted at the public entry to Room 117 and displayed as a revised notice on the Legislative Office of Economic and Demographic Research’s website at the following link:

<http://edr.state.fl.us/Content/constitutional-amendments/2024Ballot/LimitGovernmentInterferencewithAbortionAdditionalInformation.cfm>

Opportunity will be provided during the meetings for sponsors, interested parties, proponents and opponents of the initiative to address the FIEC regarding the probable financial impact of the initiative. In addition, information may be submitted at any time to the FIEC by contacting the Legislative Office of Economic and Demographic Research at the addresses or phone numbers provided below:

The Florida Legislature
Office of Economic and Demographic Research
111 West Madison, Suite 574
Tallahassee, FL 32399-6588
Email: edrcoordinator@leg.state.fl.us
FAX: (850) 922-6436
MAIN LINE: (850) 487-1402.

--REVISED--
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Tab 3

**Financial Information
Statement**

FLORIDA FINANCIAL IMPACT ESTIMATING CONFERENCE
Amendment to Limit Government Interference with Abortion
Serial Number 23-07
November 16, 2023

FINANCIAL IMPACT STATEMENT

The proposed amendment was analyzed late in the 2023 calendar year. At that time, litigation was pending before the Florida Supreme Court challenging the Legislature's 2022 enactment of a prohibition on most abortions being performed if the gestational age of the fetus is more than 15 weeks. If the Court upholds the 2022 law, a 2023 law further reducing the 15 weeks to 6 weeks will take effect 30 days later. This could lead to additional litigation. In order to measure the proposed amendment's impact on state and local government revenues and costs, a reasonable expectation of what the state of the law will be at the time of the election is required. Because there are several possible outcomes related to this litigation that differ widely in their effects, the impact of the proposed amendment on state and local government revenues and costs, if any, cannot be determined.

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

One year prior to the election, it is impossible to predict with any reasonable certainty what the legal landscape will be when the proposed amendment is on the ballot in November 2024. When this proposed amendment was analyzed, litigation was pending before the Florida Supreme Court challenging the Legislature's 2022 enactment of a prohibition on most abortions being performed if the gestational age of the fetus is more than 15 weeks. If the Court upholds the 2022 law, a 2023 law further reducing the 15 weeks to 6 weeks will take effect 30 days later. This could lead to additional litigation.

At least four possible outcomes could occur from these events. Not knowing which outcome will be in place makes a material difference to the financial impacts of the proposed amendment, if any. At a minimum, there is a significant difference in the number of abortions that occur up to and including 6 weeks and 15 weeks. This is because the number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. For this reason, budgetary or revenue effects that are limited or undetectable at 15 weeks may be much stronger at 6 weeks.

- With respect to abortions themselves, prior case law in Florida indicates that the state does not have an obligation to pay for them. The Florida Legislature has made no changes to its policies regarding state abortion funding under either the 15-week or 6-week prohibitions. Future legislative changes, if any, in response to the passage of the proposed amendment are unknown.
- Some state programs may be affected by differences in the number of live births in the state. With respect to the education system and health and human services, if the 15-week prohibition is upheld by the Florida Supreme Court, regardless of whether the 6-week prohibition goes into effect, it is probable that the state will experience cost savings because of the proposed amendment. Alternatively, if the 15-week prohibition is not upheld, there would be no savings as the baseline policy would be essentially equivalent to the proposed amendment.
- At least one government program may be affected by the proposed amendment's requirement that no law shall prohibit, penalize, delay, or restrict abortion. If the 15-week prohibition is upheld, regardless of whether the 6-week prohibition goes into effect, it is probable that there will be cost savings to the criminal justice system as certain criminal penalties are invalidated. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within the criminal justice system as the baseline policy would be essentially equivalent to the proposed amendment.

- With respect to state and local revenues, the baseline for the analysis is uncertain. While increased travel to the state would be expected to result in higher sales tax collections, this result, if it occurred, would not be a direct effect of the proposed amendment.

SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

Amendment to Limit Government Interference with Abortion

Ballot Summary:

No law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider. This amendment does not change the Legislature’s constitutional authority to require notification to a parent or guardian before a minor has an abortion.

Article and Section Being Created or Amended:

Creates – Article 1, New Section

Full Text of the Proposed Amendment:

New Section, Amendment to Limit Government Interference with Abortion

Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider.

B. Effective Date

Article XI, Section 5(e), Florida Constitution, states: “Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.”

Assuming the initiative is on the ballot in 2024, the effective date would be January 7, 2025.

C. Formal Communications to and from the Sponsor, Proponents, and Opponents

The Sponsor, Floridians Protecting Freedom, Inc., designated four representatives to speak on its behalf at meetings held by the Financial Impact Estimating Conference (FIEC): Kara Gross, Sara Latshaw, Pamela Burch Fort, and Michelle Morton.

D. Input Received from the Sponsor, Proponents, Opponents, and Interested Parties

The FIEC allows any proponent, opponent, or interested party to present or provide the conference with materials to consider. The FIEC received input from a designated representative from the Sponsor, both in writing and orally at the first workshop. Follow-up information was submitted by the Sponsor after each of the first two meetings for the FIEC's review and consideration.

In addition, a representative from an opponent, Susan B. Anthony Pro-Life America, presented to the FIEC and submitted written comments. Follow-up information was also submitted. In addition, materials were received from a proponent of the amendment, the Institute for Women's Policy Research, and one opponent of the amendment, The Heritage Foundation.

The FIEC requested and received input and/or materials for staff analysis from the following state agencies: the Agency for Health Care Administration (AHCA), the Department of Children and Families, the Department of Corrections, and the Department of Management Services. A representative from AHCA's Division of Health Care Policy & Oversight also submitted materials and presented to the FIEC on two occasions.

Representatives for both the Florida League of Cities and the Florida Association of Counties were contacted, but no response was received from either organization.

Documentation of all written comments and materials received by the FIEC can be found in the EDR Notebook on the website at: <http://edr.state.fl.us/Content/constitutional-amendments/2024Ballot/LimitGovernmentInterferencewithAbortionNotebook.pdf>

In addition, the public meetings were recorded and archived by The Florida Channel. These recordings may be viewed at: <https://thefloridachannel.org>.

E. Background (Summary of Current Law)

In 2022, the Legislature passed HB 5 (ch. 2022-69, L.O.F.) prohibiting a physician from performing an abortion if the physician determines the gestational age of the fetus is more than 15 weeks.¹ The bill became law and maintains medical exceptions² to the prohibitions that were in effect under prior law while creating a new exception for fatal fetal abnormalities.^{3,4} Shortly before the law was to take effect on July 1, 2022, various abortion providers filed a legal challenge to the 15-week prohibition. The case is currently pending before the Florida Supreme Court in *Planned Parenthood of Southwest and Central Florida v. State of Florida*.⁵ The law is not enjoined and remains in effect throughout the duration of the pending litigation.

In 2023, the Legislature passed SB 300 (ch. 2023-21, L.O.F.) prohibiting abortions if the gestational age of the fetus is more than 6 weeks. The bill retains the medical and fatal fetal abnormality exceptions and adds exceptions for rape, incest, or human trafficking if the gestational age of the fetus is less than 15 weeks and

¹ 15 weeks is calculated based upon the first day of the woman's last menstrual period.

² The medical exception applies if two physicians, or one physician in the case of an emergency, certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition.

³ A "fatal fetal abnormality" is a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter.

⁴ Section 390.0111, F.S.

⁵ The Florida Supreme Court heard oral arguments on September 8, 2023, but to date has not rendered an opinion in this matter.

the pregnant woman provides specified documentation. However, the provisions of SB 300 only take effect if specified events occur that change Florida’s jurisprudence on the privacy clause in the state constitution, which include:

- The Florida Supreme Court:
 - Recedes from its decision in *In Re T.W.*⁶ or its progeny; or
 - Determines that the Florida Constitution’s privacy provision does not include abortion; or
 - Rules in favor of the state in the current case challenging the 15-week abortion prohibition (*Planned Parenthood of Southwest and Central Florida v. State of Florida*).

or

- Florida voters adopt a state constitutional amendment clarifying that the right to privacy does not include abortion.

To date, none of these events have occurred, and the provisions of HB 5 remain in effect.

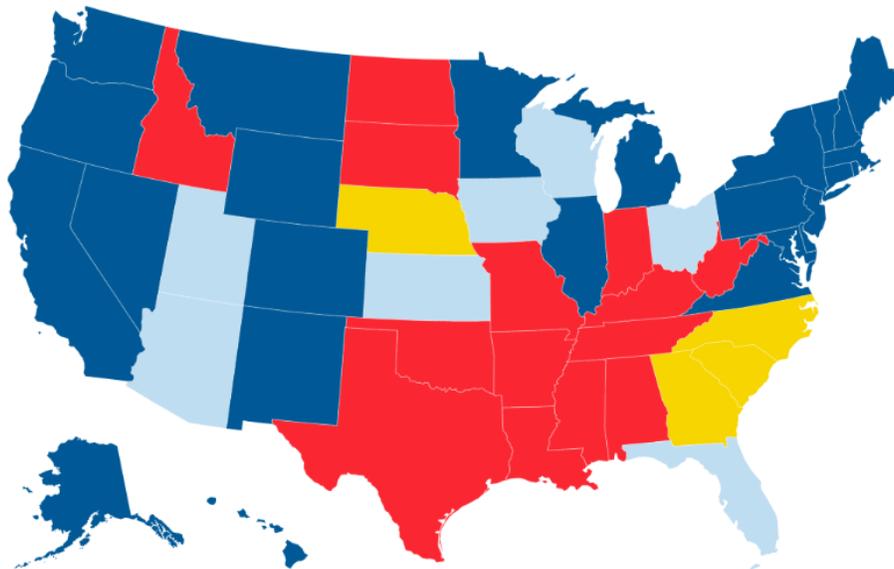
Below is a map showing the status of abortion bans in the United States as of October 24, 2023. This map was extracted from the KFF website on that date and can be found at <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/#state>⁷.

As the map displays, Florida was one of seven states that had an abortion ban with a gestational limit between 15 and 22 week LMP (last menstrual period).

Status of Abortion Bans in the United States as of October 24, 2023

Hover over state for more details

- Abortion Banned (14 states)
- Gestational limit between 6 and 12 weeks LMP (4 states)
- Gestational limit between 15 and 22 weeks LMP (7 states)
- Abortion legal beyond 22 weeks LMP (25 states & DC)



NOTE: LMP = Last Menstrual Period. For more information on state policies, please see our briefs on state actions to protect abortion, states without laws protecting or restricting abortion, our brief on the *Dobbs* case, our KFF State Health Facts page on abortion policies, our brief on legal challenges to state abortion bans, and our brief on abortion ban exceptions. Since the *Dobbs* decision, 25 states have tried to implement a complete ban or a pre-viability ban. In 5 states, these laws are currently blocked by courts. The 25 states are: AL, AZ, AR, FL, GA, ID, IN, IA, KY, LA, MS, MO, NE, NC, ND, OH, OK, SC, SD, TN, TX, UT, WV, WI, and WY. SOURCE: KFF analysis of state policies and court decisions, as of October 24, 2023. • Embed • PNG **KFF**

⁶ The Florida Supreme Court held in *In re T.W.* that the express right to privacy contained within Article I, s. 23 of the Florida Constitution “is clearly implicated in a woman’s decision whether or not to continue her pregnancy”.

⁷ Formally known as the Kaiser Family Foundation.

F. Discussion of Impact of Proposed Amendment

Potential Conflicts with Current Statutes

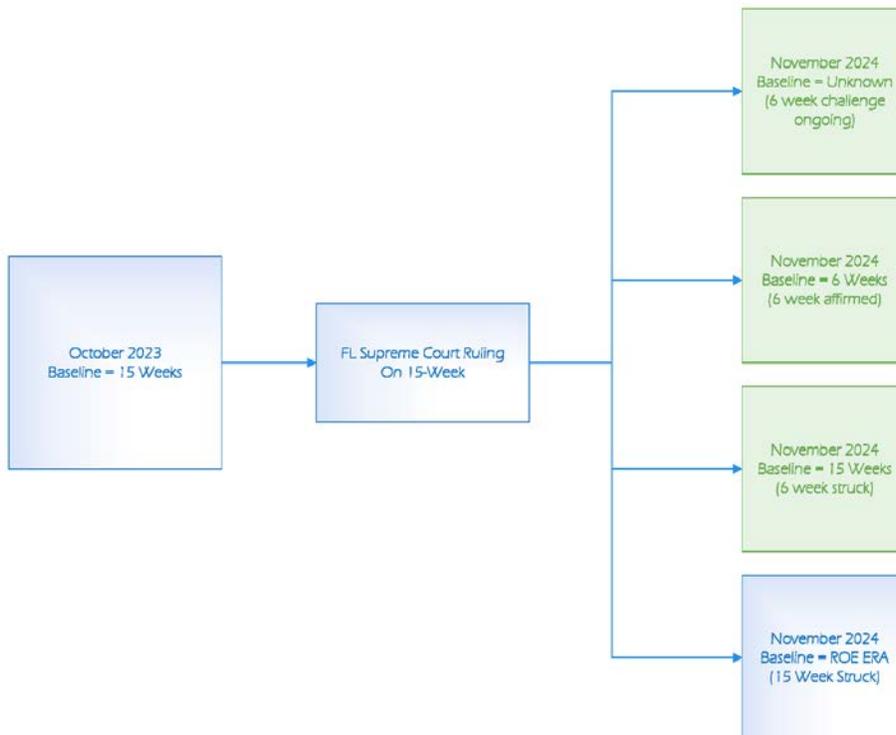
The proposed constitutional amendment would supersede many provisions in Chapter 390, F.S., which are directly related to abortion procedures.

Potential Impact of the Amendment

At the time this analysis was prepared, the 15-week prohibition was in effect. Relative to the 15-week prohibition, the proposed constitutional amendment has the potential to affect the state's costs, primarily through savings. Likewise, the state's revenues may be affected.

The major programs and revenues are described in the remainder of this document; however, to calculate the proposed constitutional amendment's financial impacts, the appropriate baseline for measurement must first be determined. This baseline represents the status quo or pre-change condition. The difference estimated to result from the proposed change (positive or negative) is then determined by measuring the post-change condition against the baseline. An increased cost would be expected to increase or a savings would be expected to decrease the state's budget in the future, while an increase in tax or fee collections would be expected to increase the state's revenue and the opposite would be expected to decrease it in the future. In the case of the proposed amendment, at the time this analysis was prepared, the appropriate baseline for November 2024 was unclear.

The graphic below illustrates both the uncertainty and complexity of the legal landscape that will be in place when the amendment is on the ballot in November 2024.



This legal uncertainty makes a material difference to the potential financial impacts of the proposed amendment. For example, there is a significant difference in the number of abortions that occur up to and

including 6 weeks and 15 weeks. The table below shows the number of reported abortions in Florida by known week of gestation during different calendar years. The 2020 calendar year uses the most recent published data from CDC, while 2021 and 2022 use unpublished data from the Agency for Health Care Administration. The weeks of gestation starting July 1, 2022 use a revised state definition that is calculated from the first day of the pregnant woman’s last menstrual period. Prior to this, the calculation was based on the clinician’s estimate.

Weeks of Gestation	2020		2021		2022 <i>(definitional change)</i>	
	Number	Percent	Number	Percent	Number	Percent
≤6	55,834	74.6	58,136	72.8	46,011	55.7
7–9	11,686	15.6	13,436	16.8	24,015	29.1
10–13	4,768	6.4	5,321	6.7	9,384	11.4
14–15	1,005	1.3	1,140	1.4	1,859	2.3
16–17	652	0.9	734	0.9	527	0.6
18–20	704	0.9	764	1.0	572	0.7
≥21	219	0.3	286	0.4	213	0.3
Total abortions reported by known gestational age	74,868		79,817		82,581	

Percentages may not add to 100.0 due to rounding.

The number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. For this reason, budgetary or revenue effects that are limited or undetectable at 15 weeks of gestation may be much stronger at 6 weeks of gestation.

State and Local Costs:

A. Criminal Justice System

Under current law, there are four felonies related to abortion that exist under Chapter 390, F.S. Section 390.0111, F.S., includes a Level 1, 3rd degree felony for “any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of” how pregnancies should be terminated, including when it is permitted to terminate a pregnancy after the gestational age of 15 weeks, and when a partial-birth abortion or experimentation on a fetus is permitted. A Level 4, 2nd degree felony is also included for “any person who performs, or actively participates in, a termination of pregnancy in violation of this section or s. 390.01112, F.S., which results in the death of the woman.” Additionally, it includes a Level 1, 3rd degree felony for a person who violates the requirements that an infant “born alive during or immediately after an attempted abortion” be treated like “any other child born alive in the course of natural birth.” Section 390.01112, F.S., states that “no termination of pregnancy shall be performed on any human being if the physician determines that, in reasonable medical judgment, the fetus has achieved viability,” with exceptions. Section 390.01114, F.S., includes a Level 1, 3rd degree felony for “a physician who intentionally or recklessly performs or induces, or attempts to perform or induce, a termination of a pregnancy of a minor without obtaining the required consent” from a parent or legal guardian.

Given the data available from the Florida Department of Corrections, there have been no commitments to prison for any of the felonies described above—either before or after the enactment of the 2022 legislative change to 15 weeks (ch. 2022-69, L.O.F.).⁸ It should be noted that the 15-week language just went into effect last year, and given the time it would take from arrest to adjudication, it is likely that

⁸ The data series from the Florida Department of Corrections begins in 1979.

few, if any, current or future offenders would have moved through the criminal justice system at this point.

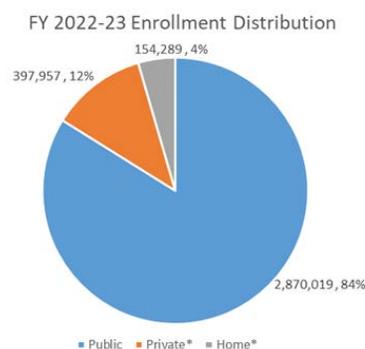
Conclusion: As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, it is probable that there will be cost savings to the criminal justice system. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within the criminal justice system as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers, the impact is indeterminate.

B. Education Services

Florida resident births directly influence the state’s future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three to four years following the change. The first educational setting that could experience differences would be Florida’s Exceptional Student Education programs, including public schools and the Family Empowerment Scholarship Program for Students with Unique Abilities. In 2022-23, these two programs for three and four year olds with additional needs for learning support served roughly 15 percent of this age group. The next program preschoolers can participate in is Florida’s universal Voluntary Prekindergarten Program (VPK), which serves 65.7 percent of four year olds.

The full-effect of policies that influence birth rates and their interactions with Florida’s schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida’s school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, Hope Scholarship Program, and Sales Tax Credit Scholarship Program) would ultimately feel the full effect of policies influencing birth rates.

In FY 2023-24, the typical VPK cost is \$2,839 per student. As of July 2023, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was \$8,668, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.



*Private and Home education settings include FES and FTC scholarship students

FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast							
	FY 2022-23 SE* 4/14/2023	FY 2023-24 Forecast 8/7/2023	FY 2024-25 Forecast 8/7/2023	FY 2025-26 Forecast 8/7/2023	FY 2026-27 Forecast 8/7/2023	FY 2027-28 Forecast 8/7/2023	FY 2028-29 Forecast 8/7/2023
Total PreK-12 FEFP FTE (Excl. Scholarships)	2,832,246	2,867,520	2,871,840	2,872,278	2,861,645	2,862,123	2,865,229
Family Empowerment Scholarship (FES)	155,183	219,790	274,265	324,878	364,761	402,109	437,073
FES-Education Opportunity (EO)	87,402	126,433	156,128	181,194	195,326	206,443	214,744
FES-Unique Ability (UA)	67,781	93,357	118,137	143,684	169,435	195,666	222,329
Florida Tax Credit Scholarship (FTC)	94,518	134,891	114,576	101,721	100,377	99,111	97,840
	* FY 2022-23 SE = recalibrated survey 3 (February 2023) data excluding scholarship FTE, with adjustments to reflect scholarship payment data						

Conclusion: As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, it is probable that there will be cost savings to education services. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within education services as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers, the impact is indeterminate.

C. Health and Human Services

Florida offers a wide range of social services to support residents with medical, food, and cash assistance that are partially dependent on Florida’s population and birth rate. While there are programs that are purely federally funded, many programs use a mix of state and federal funding. An example of the latter is the Medicaid program that provides medical assistance to individuals and families to cover or assist in the cost of services that are medically necessary. Another example is the Temporary Cash Assistance program that provides financial assistance to pregnant women in their third trimester and families with dependent children to assist in the payment of rent, utilities and other household expenses. As many of these programs serve children as well as new or expecting mothers, any changes in Florida resident births affect the number of people potentially eligible for these various social services for both the birthed and the birthing.

For children in Florida needing medical assistance, the state offers Medicaid and Kidcare (Title XXI Children’s Health Program—CHIP). Children from birth until their first birthday are eligible for Medicaid if the household income is below 200 percent of the Federal Poverty Level (FPL). After their first birthday, the household income threshold drops to 133 percent of the FPL. Those children remain Medicaid eligible up until their nineteenth birthday (there are special programs for 19 and 20 years old based on a fixed income dollar amount). If household income is above 133 percent but below 300 percent of the FPL, children are eligible for Medikids Title XXI. If household income is above 300 percent, children are eligible for Medikids Full Pay. Eligibility for both Medikids programs covers children until their fifth birthday. From ages 5 to 18 years old, under the same FPL thresholds, children are eligible for Florida Healthy Kids Title XXI or Full Pay. Children in income eligible households with special healthcare needs that require extensive preventive and ongoing care are eligible for the Children’s Medical Services health plan (CMS).

Florida Medicaid and CHIP Income Requirements (Children)	
Medicaid	
Children Under Age 1	200% FPL
Children ages 1 through 18	133% FPL
Parents, Caretakers, Children ages 19-20	Fixed dollar amount
Children's Health Insurance Program (CHIP)	
Medikids (Ages 1-4)	
Title XXI	133% up to 300%
Full Pay	300%
Florida Healthy Kids (Ages 5-18)	
Title XXI	133% up to 300%
Full Pay	300%
CMS	133% up to 300%

With coverage beginning as early as birth, the effects of any changes to the birth rate can be cumulative and varying. Medicaid covers almost one-half of the births (45.47 percent CY 2021) in the state. They maintain that coverage until their first birthday is reached and their eligibility is reassessed. Many remain on Medicaid, move to a CHIP program, or are able to find health insurance elsewhere. As of August 2023, 47.4 percent (2,490,633) of the 5.3 million Medicaid enrollees were under the age of 18 with ages from 0 to five years making up approximately 33 percent of the total under 18. CHIP covers a further 138,293 children under the age of 18 with Medikids covering 12,281, Healthy Kids covering 118,281 and CMS covering 7,731. It should also be noted that the federal Public Health Emergency (PHE) significantly affected enrollment leading into this period. The tables below show current enrollment as of August 2023 and December 2019, the month before the PHE retroactively went into effect (the PHE began in March 2020 but continuous enrollment was retroactive to January 1, 2020).

Florida Medicaid Enrollment by Age Group and Date				
Group	8/31/2023		12/31/2019	
	Enrolled	% of Total	Enrolled	% of Total
Ages 0-5	827,024	15.7%	769,120	19.9%
Ages 6 -10	661,289	12.6%	543,814	14.1%
Ages 11-18	1,002,320	19.1%	770,549	19.9%
Total 0-18	2,490,633	47.4%	2,083,483	53.9%
Total	5,254,460	100.0%	3,868,723	100.0%

Florida Children's Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full pay	CMS
	9/30/2023				
Ages 1-5	9,014	3,267	-	-	574
Ages 6-10	-	-	28,709	8,540	2,458
Ages 11-18	-	-	67,614	13,418	4,699
12/31/2019					
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6-10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

While children under the age of 18 make up almost one-half of the Medicaid enrollees, they account for approximately a quarter of the total Medicaid expenditure. In SFY 2021-22, children were 49.06 percent of enrollees and 24.5 percent of expenditures. The 2023 Rate Year (October 2022 – September 2023) statewide average MMA capitation rate for a child between the age of one month and eleven months without a serious mental illness (SMI) was \$274.25 per month (\$3,291.00 per year). For a similar child between a year and 13 years old, that rate was \$134.86 per month (\$1,618.32 per year). There are

circumstances where the expenditure on a child is higher than these statewide averages. Children on the CMS plan typically have higher per person per month expenditures, but they account for a small portion of the total children on Medicaid.

As mentioned above, Medicaid covers a significant number of the births in Florida (see table below). There is also pre- and postnatal public assistance for the mothers. Medical assistance for pregnant women is available through various Medicaid programs. A pregnant woman who is eligible for regular Medicaid (income below 185 percent FPL) for at least one month, including a retroactive month, is eligible to receive Medicaid throughout her pregnancy and until the end of the 12th month after the birth (postpartum period). The family planning waiver program covers family planning services to eligible women, ages 14 through 55. Services are provided up to 24 months. Eligibility is limited to women with family incomes at or below 191 percent of the FPL who have lost or are losing Florida Medicaid State Plan eligibility and are not otherwise eligible for Medicaid, Children’s Health Insurance Program, or health insurance coverage that provides family planning services.

Recipients losing SOBRA (pregnancy Medicaid) eligibility will have passive enrollment during the first 12 months of losing Medicaid. Non-SOBRA women have to actively apply for the first year of benefits at their local county health departments. All women enrolled in the family planning waiver have active re-determination of eligibility through their local county health departments after 12 months of family planning waiver eligibility. In order to receive the second year of benefits, recipients must reapply at their local county health departments.

As of August 2023, there were 333,510 individuals receiving Medicaid or the Family Planning waiver to assist with the pregnancies. Of the total, 150,546 receive Pregnant Women Medicaid and 182,964 utilize the Family Planning Waiver.

Florida Births Covered by Medicaid, Percent of Total births			
CY	Medicaid	Total	Rate
2017	109,225	223,579	48.85%
2018	106,695	221,508	48.17%
2019	102,636	220,010	46.65%
2020	98,018	209,645	46.75%
2021	98,297	216,189	45.47%

Pregnant Women and Family Planning Enrollment by Program and Date				
	SOBRA PREGNANT WOMEN UP TO 100% FPL	SOBRA PREGNANT WOMEN OVER 100% OF FPL UP TO 185% OF FPL	Family Planning Waiver	Total
8/31/2023	114,432	36,043	182,964	333,439
% of Total	34.32%	10.81%	54.87%	100.00%
12/31/2019	67,810	19,124	69,250	156,184
% of Total	43.42%	12.24%	44.34%	100.00%

The Temporary Assistance for Needy Families – Temporary Cash Assistance (TCA) program provides cash assistance to families with children under the age of 18 or under age 19 if full time secondary (high school) school students. The program helps families become self-supporting while allowing children to remain in their own homes. Pregnant women may also receive TCA, either in the third trimester of pregnancy if unable to work, or in the 9th month of pregnancy. Eligibility for the TCA program is similar

to Medicaid eligibility with a few other technical requirements. Gross income must be less than 185 percent of the FPL and countable income cannot be higher than the payment standard for the family size. Individuals get a \$90 deduction from their gross earned income. Some people must participate in work activities unless they meet an exemption. Regional Workforce Boards provide work activities and services needed to get or keep a job. Individuals who receive TCA are eligible for Medicaid. Individuals who are eligible for TCA, but choose not to receive it, may still be eligible for Medicaid. Florida law creates four categories of families who may be eligible for TCA. While many of the basic eligibility requirements apply to all of these categories, there are some distinctions between the categories in terms of requirements and restrictions:

- **Child-Only Families:** These families include situations where the child is living with a relative or situations where a custodial parent is not eligible to be included in the eligibility group.
- **Relative Caregiver Program:** A specialized program for child-only families where the child has been adjudicated dependent due to abuse or neglect and has been placed with a grandparent or other relative by the court. These relatives are eligible for a payment that is higher than the typical child-only payment, but less than the payment for licensed foster care
- **Single-Family Parents with Children:** Parents with children can receive cash assistance for the parent and the children.
- **Two-Parent Families with Children:** Are eligible on the same basis as single-parent families except the work requirement for two-parent families includes a higher number of hours of participation per week (35 hours or 55 hours if childcare is subsidized) than required for single-parent families (30 hours).

In FY 2022-23, these four programs assisted 67,224 individuals (in FY 2019-20 that number was 61,260). Both the Child-Only Families and Relative Caregiver programs have experienced steady declines in terms of cases and persons served. The other two programs have seen increases over the last few fiscal years that are mostly driven by increased activity among non-citizens seeking assistance.

Temporary Cash Assistance by Program and Date		
Programs	FY 2022-23	FY 2019-20
Child Only Cases	13,840	19,191
Relative Caregiver	9,495	16,461
Single-Family Parents with Children	21,613	22,884
Unemployed Two-Parent Families with Children Parent	22,276	2,723
Total	67,224	61,260

Looking at the age groups served by the TCA programs, ages six and over represent the majority of those receiving assistance (approximately 70 percent). Children from birth to 5 years old make up a smaller proportion of TCA recipients, but are usually also receiving other forms of public assistance as well. While these individuals are treated separately from Medicaid, they are included in the total caseload counts reported each month.

Temporary Cash Assistance by Age and Date				
	9/30/2023		12/31/2019	
	Eligible	%total	Eligible	%total
Age 0 to 5	12,795	29%	16,014	32%
Age 6 to 12	18,755	42%	21,137	42%
Age 13 to 17	13,209	30%	12,989	26%
Total	44,759	100%	50,140	100%

Finally, the foster care system in Florida serves children from birth until their 18th birthday. There are specialty programs to extend foster care services to those older than eighteen, but the majority of those receiving these services are seventeen or younger. In 2022, 24,245 children (aged 0-17) received foster care services. These services are federally funded through Title IV of the Social Security Act with matching state funds (similar to Medicaid and CHIP). Title IV-E provides federal funding to help provide foster care, independent living services, adoption assistance, and guardianship assistance. Like all states that receive Title IV-E funds for foster care, independent living services, adoption assistance, and guardianship assistance, Florida must follow a Title IV-E State Plan.

Conclusion: As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, it is probable that there will be cost savings to health and human services. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within health and human services as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers, the impact is indeterminate.

D. Federal and State Funds for Abortion

First passed in 1976, the Hyde Amendment refers to annual funding restrictions that Congress has regularly included in the annual appropriations acts for the Departments of Labor, Health and Human Services, Education, and related agencies.

The most recently enacted version of the Hyde Amendment (P.L. 117-103. Div. H, §§ 506–507), applicable for federal fiscal year 2022, prohibits covered funds to be expended for any abortion or to provide health benefits coverage that includes abortion. This restriction, however, does not apply to abortions of pregnancies that are the result of rape or incest (“rape or incest exception”), or where a woman would be in danger of death if an abortion were not performed (“life-saving exception”).

As a statutory provision included in annual appropriations acts, Congress can modify, and has modified, the Hyde Amendment’s scope over the years, both as to the parameters of exceptions and the sources of funding subject to this restriction.

The Hyde Amendment would continue to restrict the use of federal Medicaid funds even with the adoption of the proposed Florida constitutional amendment. While some states have elected to provide coverage for abortions that are not medically necessary, these states do so through the use of state funds, not federal funds that are restricted by the Hyde Amendment.

In Florida, the issue of whether there is a state coverage obligation under the current privacy clause of the Florida Constitution was previously litigated - see, *Renee B. v. Florida Agency for Health Care*

Administration, 790 So. 2d 1036 (Fla. 2001). The Florida Supreme Court held that the Legislature’s choice not to fund abortions with state funds did not violate the right to privacy in the Florida Constitution, specifically noting: “[t]here is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it” (quoting, *Renee B.*, No. 97–3983 (Fla.2d Cir.Ct. Oct. 9, 1998)).

Conclusion: Under current law, the state does not have an obligation to pay for abortions. The proposed constitutional amendment does not expressly create a new obligation for the state to pay for abortions. The Florida Legislature has made no changes to its policies regarding state abortion funding under either the 15-week or 6-week prohibitions. Future legislative changes, if any, in response to the passage of the proposed amendment are unknown.

State and Local Revenues:

Revenue Impact from Out-of-State Abortions Occurring in Florida

In the post-Roe landscape, where many states have enacted stricter regulations on abortion, many people seeking an abortion are traveling across state lines to get the medical care they want. In 2020, approximately 9 percent of all abortions in the United States were obtained by individuals traveling across state lines.⁹ This percentage has increased dramatically. For example, in Illinois, where abortion laws are not restrictive, one abortion clinic reported a 700 percent increase in out-of-state abortions in the 11 months after *Roe vs Wade* was overturned.¹⁰ Illinois has seen a 28 percent increase in abortions from April 2022 to August 2022 for the entire state.¹¹ This documented increase in abortion travel has been witnessed in several states, including Colorado, Kansas, and New Mexico.

Geographically, the most restrictive region in the United States is the Southeast. A 2022 study of the estimated travel time to the nearest abortion clinic found Texas, Louisiana, Mississippi, Alabama, and Arkansas to have the longest travel times to the nearest abortion clinic that did post-6 week abortions.¹² For example, the study estimated that the nearest abortion clinic to a Louisiana resident was a 9.61 hour drive.¹³ With its 15-week threshold, Florida could be a destination for abortion travel since it is located within the Southeast region. To the extent that atypical travel to Florida has occurred or will occur, it generates additional sales tax collections.

In 2022, Florida reported 82,581 abortions.¹⁴ Of those 82,581 abortions, 6,726 were related to out-of-state individuals.¹⁵ When compared to 2021, total abortions increased by 3 percent, but out-of-state abortions increased by 38 percent. While this signals that more individuals are traveling to Florida for abortions, the total level of out-of-state abortions remains low. In comparison, Florida’s total visitors in 2022 reached approximately 137.6 million.¹⁶

⁹ <https://www.gutmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across>

¹⁰ <https://www.plannedparenthood.org/reproductive-health-services-planned-parenthood-st-louis-region/press-releases/post-dobbs-planned-parenthood-sees-700-increase-in-abortion-patients-traveling-to-illinois-from-outside-the-bi-state-region-for-care>

¹¹ <https://ci3.uchicago.edu/il-abortion-stats/>

¹² Rader, Benjamin, “Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the *Dobbs v Jackson Women’s Health Decision*” Published: November 1, 2022. *Journal of American Medical Association*.

¹³ *Ibid.*

¹⁴ <https://ahca.myflorida.com/health-care-policy-and-oversight/bureau-of-central-services/frequently-requested-data>

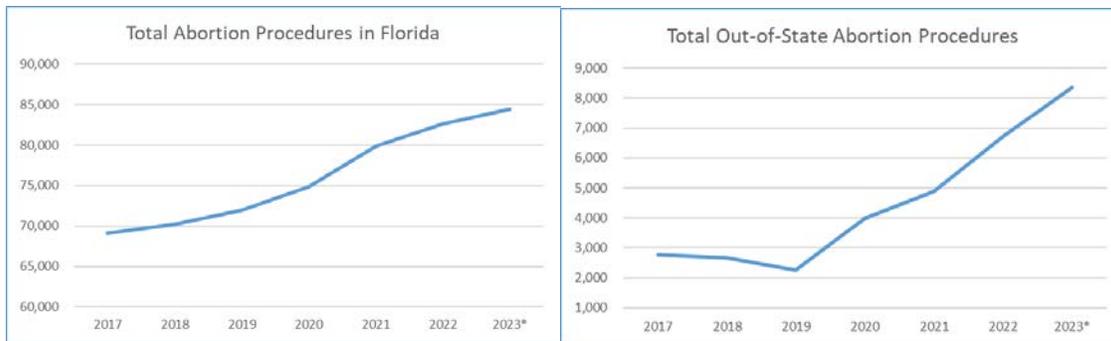
¹⁵ *Ibid.*

¹⁶ <https://www.visitflorida.org/resources/research/research-faq/>

For 2023, only nine months of data are currently available. To project the 2023 annual number, the growth rate between 2023Q1-Q3 and 2022Q1-Q3 was used to grow the 2022Q4 level, producing an estimate for 2023Q4. This estimate was then added to the data for the current year. The results indicate a small increase in total abortions (2 percent growth) and a significant increase in out-of-state abortions (24 percent growth). Charts and graphs of Florida’s abortion data can be found below.

Florida Abortion Statistics				
Year	Total	Growth	Out-of-State	Growth
2017	69,102	-	2,771	-
2018	70,239	2%	2,654	-4%
2019	71,914	2%	2,256	-15%
2020	74,868	4%	3,988	77%
2021	79,817	7%	4,873	22%
2022	82,581	3%	6,726	38%
2023*	84,263	2%	8,351	24%

* 2023 Data is a forecast based-on the first 9 months of data and an estimate of Q4 data.



The data from Florida is inconclusive. While the state has seen an increase in out-of-state abortions since Roe vs Wade was overturned, Florida also saw a significant increase in out-of-state abortions prior to that decision. It is not clear that the current increase is related to Florida’s position (legally and geographically) relative to the other states in the Southeast.

Conclusion: As previously noted, the baseline for the analysis is uncertain. While atypical travel to the state would be expected to result in higher sales tax collections, this result would not be a direct effect of the proposed amendment.

Tab 4

Law Relating to FIECs

100.371 Initiatives; procedure for placement on ballot. –

(1) Constitutional amendments proposed by initiative shall be placed on the ballot for the general election, provided the initiative petition has been filed with the Secretary of State no later than February 1 of the year the general election is held. A petition shall be deemed to be filed with the Secretary of State upon the date the secretary determines that valid and verified petition forms have been signed by the constitutionally required number and distribution of electors under this code.

(2) The sponsor of an initiative amendment shall, prior to obtaining any signatures, register as a political committee pursuant to s. [106.03](#) and submit the text of the proposed amendment to the Secretary of State, with the form on which the signatures will be affixed, and shall obtain the approval of the Secretary of State of such form. The Secretary of State shall adopt rules pursuant to s. [120.54](#) prescribing the style and requirements of such form. Upon filing with the Secretary of State, the text of the proposed amendment and all forms filed in connection with this section must, upon request, be made available in alternative formats.

(3)(a) A person may not collect signatures or initiative petitions for compensation unless the person is registered as a petition circulator with the Secretary of State.

(b) A citizen may challenge a petition circulator's registration under this section by filing a petition in circuit court. If the court finds that the respondent is not a registered petition circulator, the court may enjoin the respondent from collecting signatures or initiative petitions for compensation until she or he is lawfully registered.

(4) An application for registration must be submitted in the format required by the Secretary of State and must include the following:

(a) The information required to be on the petition form under s. [101.161](#), including the ballot summary and title as approved by the Secretary of State.

(b) The applicant's name, permanent address, temporary address, if applicable, and date of birth.

(c) An address in this state at which the applicant will accept service of process related to disputes concerning the petition process, if the applicant is not a resident of this state.

(d) A statement that the applicant consents to the jurisdiction of the courts of this state in resolving disputes concerning the petition process.

(e) Any information required by the Secretary of State to verify the applicant's identity or address.

(5) All petitions collected by a petition circulator must contain, in a format required by the Secretary of State, a completed Petition Circulator's Affidavit which includes:

(a) The circulator's name and permanent address;

(b) The following statement, which must be signed by the circulator:

By my signature below, as petition circulator, I verify that the petition was signed in my presence. Under penalties of perjury, I declare that I have read the foregoing Petition Circulator's Affidavit and the facts stated in it are true.

(6) The division or the supervisor of elections shall make hard copy petition forms or electronic portable document format petition forms available to registered petition circulators. All such forms must contain information identifying the petition circulator to which the forms are provided. The division shall maintain a database of all registered petition circulators and the petition forms assigned to each. Each supervisor of elections shall provide to the division information on petition forms assigned to and received from petition circulators. The information must be provided in a format and at times as required by the division by rule. The division must update information on petition forms daily and make the information publicly available.

(7)(a) A sponsor that collects petition forms or uses a petition circulator to collect petition forms serves as a fiduciary to the elector signing the petition form, ensuring that any petition form entrusted to the petition circulator shall be promptly delivered to the supervisor of elections within 30 days after the elector signs the form. If a petition form collected by any petition circulator is not promptly delivered to the supervisor of elections, the sponsor is liable for the following fines:

1. A fine in the amount of \$50 for each petition form received by the supervisor of elections more than 30 days after the elector signed the petition form or the next business day, if the office is closed. A fine in the amount of \$250 for each petition form received if the sponsor or petition circulator acted willfully.

2. A fine in the amount of \$500 for each petition form collected by a petition circulator which is not submitted to the supervisor of elections. A fine in the amount of \$1,000 for any petition form not submitted if the sponsor or petition circulator acted willfully.

(b) A showing by the sponsor that the failure to deliver the petition form within the required timeframe is based upon force majeure or impossibility of performance is an affirmative defense to a violation of this subsection. The fines described in this subsection may be waived upon a showing that the failure to deliver the petition form promptly is based upon force majeure or impossibility of performance.

(8) If the Secretary of State reasonably believes that a person or entity has committed a violation of this section, the secretary may refer the matter to the Attorney General for enforcement. The Attorney General may institute a civil action for a violation of this section or to prevent a violation of this section. An action for relief may include a permanent or temporary injunction, a restraining order, or any other appropriate order.

(9) The division shall adopt by rule a complaint form for an elector who claims to have had his or her signature misrepresented, forged, or not delivered to the supervisor. The division shall also adopt

rules to ensure the integrity of the petition form gathering process, including rules requiring sponsors to account for all petition forms used by their agents. Such rules may require a sponsor or petition circulator to provide identification information on each petition form as determined by the department as needed to assist in the accounting of petition forms.

(10) The date on which an elector signs a petition form is presumed to be the date on which the petition circulator received or collected the petition form.

(11)(a) An initiative petition form circulated for signature may not be bundled with or attached to any other petition. Each signature shall be dated when made and shall be valid until the next February 1 occurring in an even-numbered year for the purpose of the amendment appearing on the ballot for the general election occurring in that same year, provided all other requirements of law are met. The sponsor shall submit signed and dated forms to the supervisor of elections for the county of residence listed by the person signing the form for verification of the number of valid signatures obtained. If a signature on a petition is from a registered voter in another county, the supervisor shall notify the petition sponsor of the misfiled petition. The supervisor shall promptly verify the signatures within 60 days after receipt of the petition forms and payment of a fee for the actual cost of signature verification incurred by the supervisor. However, for petition forms submitted less than 60 days before February 1 of an even-numbered year, the supervisor shall promptly verify the signatures within 30 days after receipt of the form and payment of the fee for signature verification. The supervisor shall promptly record, in the manner prescribed by the Secretary of State, the date each form is received by the supervisor, and the date the signature on the form is verified as valid. The supervisor may verify that the signature on a form is valid only if:

1. The form contains the original signature of the purported elector.
2. The purported elector has accurately recorded on the form the date on which he or she signed the form.
3. The form sets forth the purported elector's name, address, city, county, and voter registration number or date of birth.
4. The purported elector is, at the time he or she signs the form and at the time the form is verified, a duly qualified and registered elector in the state.
5. The signature was obtained legally, including that if a paid petition circulator was used, the circulator was validly registered under subsection (3) when the signature was obtained.

The supervisor shall retain all signature forms, separating forms verified as valid from those deemed invalid, for at least 1 year following the election for which the petition was circulated.

(b) Each supervisor shall post the actual cost of signature verification on his or her website and may increase such cost, as necessary, on February 2 of each even-numbered year. The division shall also

publish each county's current cost on its website. The division and each supervisor shall biennially review available technology aimed at reducing verification costs.

(c) On the last day of each month, or on the last day of each week from December 1 of an odd-numbered year through February 1 of the following year, each supervisor shall post on his or her website the total number of signatures submitted, the total number of invalid signatures, the total number of signatures processed, and the aggregate number of verified valid signatures and the distribution of such signatures by congressional district for each proposed amendment proposed by initiative, along with the following information specific to the reporting period: the total number of signed petition forms received, the total number of signatures verified, the distribution of verified valid signatures by congressional district, and the total number of verified petition forms forwarded to the Secretary of State.

(12) The Secretary of State shall determine from the signatures verified by the supervisors of elections the total number of verified valid signatures and the distribution of such signatures by congressional districts, and the division shall post such information on its website at the same intervals specified in paragraph (11)(c). Upon a determination that the requisite number and distribution of valid signatures have been obtained, the secretary shall issue a certificate of ballot position for that proposed amendment and shall assign a designating number pursuant to s. [101.161](#).

(13)(a) At the same time the Secretary of State submits an initiative petition to the Attorney General pursuant to s. [15.21](#), the secretary shall submit a copy of the initiative petition to the Financial Impact Estimating Conference. Within 75 days after receipt of a proposed revision or amendment to the State Constitution by initiative petition from the Secretary of State, the Financial Impact Estimating Conference shall complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative. The 75-day time limit is tolled when the Legislature is in session. The Financial Impact Estimating Conference shall submit the financial impact statement to the Attorney General and Secretary of State. If the initiative petition has been submitted to the Financial Impact Estimating Conference but the validity of signatures has expired and the initiative petition no longer qualifies for ballot placement at the ensuing general election, the Secretary of State must notify the Financial Impact Estimating Conference. The Financial Impact Estimating Conference is not required to complete an analysis and financial impact statement for an initiative petition that fails to meet the requirements of subsection (1) for placement on the ballot before the 75-day time limit, including any tolling period, expires. The initiative petition may be resubmitted to the Financial Impact Estimating Conference if the initiative petition meets the requisite criteria for a subsequent general election cycle. A new Financial Impact Estimating Conference shall be established at such time as the initiative petition again satisfies the criteria in s. [15.21](#)(1).

(b) Immediately upon receipt of a proposed revision or amendment from the Secretary of State, the coordinator of the Office of Economic and Demographic Research shall contact the person identified as the sponsor to request an official list of all persons authorized to speak on behalf of the named sponsor and, if there is one, the sponsoring organization at meetings held by the Financial Impact Estimating Conference. All other persons shall be deemed interested parties or proponents or opponents of the initiative. The Financial Impact Estimating Conference shall provide an opportunity for any representatives of the sponsor, interested parties, proponents, or opponents of the initiative to submit information and may solicit information or analysis from any other entities or agencies, including the Office of Economic and Demographic Research.

(c) All meetings of the Financial Impact Estimating Conference shall be open to the public. The President of the Senate and the Speaker of the House of Representatives, jointly, shall be the sole judge for the interpretation, implementation, and enforcement of this subsection.

1. The Financial Impact Estimating Conference is established to review, analyze, and estimate the financial impact of amendments to or revisions of the State Constitution proposed by initiative. The Financial Impact Estimating Conference shall consist of four principals: one person from the Executive Office of the Governor; the coordinator of the Office of Economic and Demographic Research, or his or her designee; one person from the professional staff of the Senate; and one person from the professional staff of the House of Representatives. Each principal shall have appropriate fiscal expertise in the subject matter of the initiative. A Financial Impact Estimating Conference may be appointed for each initiative.

2. Principals of the Financial Impact Estimating Conference shall reach a consensus or majority concurrence on a clear and unambiguous financial impact statement, no more than 150 words in length, and immediately submit the statement to the Attorney General. Nothing in this subsection prohibits the Financial Impact Estimating Conference from setting forth a range of potential impacts in the financial impact statement. Any financial impact statement that a court finds not to be in accordance with this section shall be remanded solely to the Financial Impact Estimating Conference for redrafting. The Financial Impact Estimating Conference shall redraft the financial impact statement within 15 days.

3. If the Supreme Court has rejected the initial submission by the Financial Impact Estimating Conference and no redraft has been approved by the Supreme Court by 5 p.m. on the 75th day before the election, the following statement shall appear on the ballot: "The impact of this measure, if any, has not been determined at this time."

(d) The financial impact statement must be separately contained and be set forth after the ballot summary as required in s. [101.161\(1\)](#).

1. If the financial impact statement projects a net negative impact on the state budget, the ballot must include the statement required by s. [101.161\(1\)\(b\)](#).

2. If the financial impact statement projects a net positive impact on the state budget, the ballot must include the statement required by s. [101.161\(1\)\(c\)](#).

3. If the financial impact statement estimates an indeterminate financial impact or if the members of the Financial Impact Estimating Conference are unable to agree on the statement required by this subsection, the ballot must include the statement required by s. [101.161\(1\)\(d\)](#).

(e)1. Any financial impact statement that the Supreme Court finds not to be in accordance with this subsection shall be remanded solely to the Financial Impact Estimating Conference for redrafting, provided the court's advisory opinion is rendered at least 75 days before the election at which the question of ratifying the amendment will be presented. The Financial Impact Estimating Conference shall prepare and adopt a revised financial impact statement no later than 5 p.m. on the 15th day after the date of the court's opinion.

2. If, by 5 p.m. on the 75th day before the election, the Supreme Court has not issued an advisory opinion on the initial financial impact statement prepared by the Financial Impact Estimating Conference for an initiative amendment that otherwise meets the legal requirements for ballot placement, the financial impact statement shall be deemed approved for placement on the ballot.

3. In addition to the financial impact statement required by this subsection, the Financial Impact Estimating Conference shall draft an initiative financial information statement. The initiative financial information statement should describe in greater detail than the financial impact statement any projected increase or decrease in revenues or costs that the state or local governments would likely experience if the ballot measure were approved. If appropriate, the initiative financial information statement may include both estimated dollar amounts and a description placing the estimated dollar amounts into context. The initiative financial information statement must include both a summary of not more than 500 words and additional detailed information that includes the assumptions that were made to develop the financial impacts, workpapers, and any other information deemed relevant by the Financial Impact Estimating Conference.

4. The Department of State shall have printed, and shall furnish to each supervisor of elections, a copy of the summary from the initiative financial information statements. The supervisors shall have the summary from the initiative financial information statements available at each polling place and at the main office of the supervisor of elections upon request.

5. The Secretary of State and the Office of Economic and Demographic Research shall make available on the Internet each initiative financial information statement in its entirety. In addition, each supervisor of elections whose office has a website shall post the summary from each initiative financial information statement on the website. Each supervisor shall include a copy of each summary from the initiative financial information statements and the Internet addresses for the information statements on the Secretary of State's and the Office of Economic and Demographic Research's websites in the publication or mailing required by s. [101.20](#).

(14) The Department of State may adopt rules in accordance with s. [120.54](#) to carry out the provisions of subsections (1)-(14).

(15) No provision of this code shall be deemed to prohibit a private person exercising lawful control over privately owned property, including property held open to the public for the purposes of a commercial enterprise, from excluding from such property persons seeking to engage in activity supporting or opposing initiative amendments.

History.—s. 15, ch. 79-365; s. 12, ch. 83-251; s. 30, ch. 84-302; s. 22, ch. 97-13; s. 9, ch. 2002-281; s. 3, ch. 2002-390; s. 3, ch. 2004-33; s. 28, ch. 2005-278; s. 4, ch. 2006-119; s. 25, ch. 2007-30; s. 1, ch. 2007-231; s. 14, ch. 2008-95; s. 23, ch. 2011-40; s. 3, ch. 2019-64; s. 3, ch. 2020-15; s. 13, ch. 2022-73.

Tab 5

Discussion Documents

E. Background (Summary of Current Law)

In 2022, the Legislature passed HB 5 (ch. 2022-69, L.O.F.) prohibiting a physician from performing an abortion if the physician determines the gestational age of the fetus is more than 15 weeks.¹ The bill became law and maintains medical exceptions² to the prohibitions that were in effect under prior law while creating a new exception for fatal fetal abnormalities.^{3,4} Shortly before the law was to take effect on July 1, 2022, various abortion providers filed a legal challenge to the 15-week prohibition. The case is currently pending before the Florida Supreme Court in *Planned Parenthood of Southwest and Central Florida v. State of Florida*.⁵ The law is not enjoined and remains in effect throughout the duration of the pending litigation.

In 2023, the Legislature passed SB 300 (ch. 2023-21, L.O.F., also known as the Heartbeat Protection Act), prohibiting abortions if the gestational age of the fetus is more than 6 weeks. The bill retains the medical and fatal fetal abnormality exceptions and adds exceptions for rape, incest, or human trafficking if the gestational age of the fetus is less than 15 weeks and the pregnant woman provides specified documentation. However, the provisions of SB 300 took effect on May 1, 2024, thirty days after the Florida Supreme Court ruling on HB 5 (ch. 2022-69, L.O.F.) which permitted a 15-week ban.⁶ Only take effect if specified events occur that change Florida's jurisprudence on the privacy clause in the state constitution, which include:

- The Florida Supreme Court:
 - Recedes from its decision in *In Re T.W.*⁷ or its progeny; or
 - Determines that the Florida Constitution's privacy provision does not include abortion; or
 - Rules in favor of the state in the current case challenging the 15-week abortion prohibition (*Planned Parenthood of Southwest and Central Florida v. State of Florida*).

or

- Florida voters adopt a state constitutional amendment clarifying that the right to privacy does not include abortion.

To date, none of these events have occurred, and the provisions of HB 5 remain in effect.

Below is a map showing the status of abortion bans in the United States as of ~~May 23, 2024~~ October 24, 2023. This map was extracted from the KFF website ~~on that date~~ and can be found at <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/#state>⁸.

As the map displays, Florida was one of ~~seven~~ five states that had an abortion ban with a gestational limit between ~~15 and 22~~ 6 and 12 weeks LMP (last menstrual period).

¹ 15 weeks is calculated based upon the first day of the woman's last menstrual period.

² The medical exception applies if two physicians, or one physician in the case of an emergency, certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition.

³ A "fatal fetal abnormality" is a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter.

⁴ Section 390.0111, F.S.

⁵ The Florida Supreme Court heard oral arguments on September 8, 2023, but to date has not rendered an opinion in this matter.

⁶ The Florida Supreme Court ruled on *Planned Parenthood of Southwest and Central Florida v. State of Florida* on April 1, 2024.

⁷ The Florida Supreme Court held in *In re T.W.* that the express right to privacy contained within Article I, s. 23 of the Florida Constitution "is clearly implicated in a woman's decision whether or not to continue her pregnancy".

⁸ Formally known as the Kaiser Family Foundation.

F. Discussion of Impact of Proposed Amendment

Potential Conflicts with Current Statutes

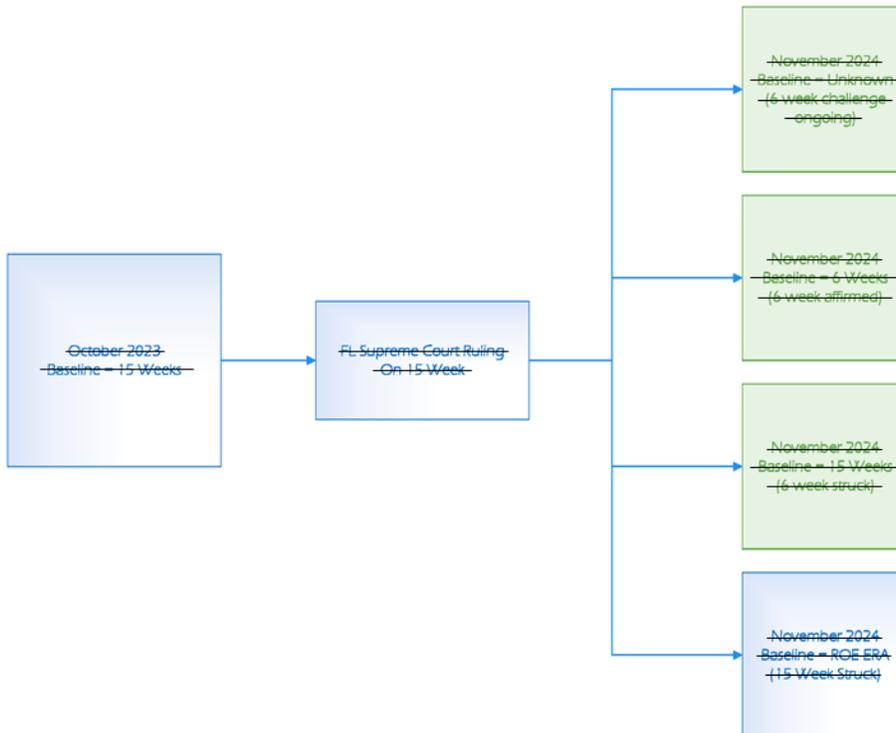
The proposed constitutional amendment would supersede many provisions in Chapter 390, F.S., which are directly related to abortion procedures.

Potential Impact of the Amendment

At the time this analysis was prepared in July 2024, ~~the a 15-6-week~~ prohibition was in effect. Relative to ~~the this 15-week~~ prohibition, the proposed constitutional amendment has the potential to affect the state's costs, primarily through savings. Likewise, the state's revenues may be affected.

The major programs and revenues are described in the remainder of this document; ~~however, I to~~ calculate the proposed constitutional amendment's financial impacts, ~~the appropriate current law is used~~ as the baseline for measurement must first be determined, which. This baseline represents the status quo or pre-change condition. The difference estimated to result from the proposed change (positive or negative) is then determined by measuring the post-change condition against the baseline. An increased cost would be expected to increase or a savings would be expected to decrease the state's budget in the future, while an increase in tax or fee collections would be expected to increase the state's revenue and the opposite would be expected to decrease it in the future. ~~In the case of the proposed amendment, at the time this analysis was prepared, the appropriate baseline for November 2024 was unclear.~~

The graphic below illustrates both the uncertainty and complexity of the legal landscape that will be in place when the amendment is on the ballot in November 2024.



This legal uncertainty makes a material difference to the potential financial impacts of the proposed amendment. For example, there is a significant difference in the number of abortions that occur up to and including 6 weeks and 15 weeks. The table below shows the number of reported abortions in Florida by known week of gestation during different calendar years. The 2020 and 2021 calendar years uses the most recent are published data from CDC, while 2022 and 2023 use unpublished data from the Agency for Health Care Administration (AHCA). The weeks of gestation starting July 1, 2022 use a revised state definition that is calculated from the first day of the pregnant woman’s last menstrual period. Prior to this, the calculation was based on the clinician’s estimate.

Weeks of Gestation	CY 2020		CY 2021		CY 2022 <i>(definitional change as of July 1, 2022)</i>		CY 2023	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
≤6	55,834	74.6	58,136	72.8	46,011	55.7	33,453	39.8
7–9	11,686	15.6	13,436	16.8	24,015	29.1	34,854	41.5
10–13	4,768	6.4	5,321	6.7	9,384	11.4	12,577	15.0
14–15	1,005	1.3	1,140	1.4	1,859	2.3	3,013	3.6
16–17	652	0.9	734	0.9	527	0.6	46	0.1
18–20	704	0.9	764	1.0	572	0.7	71	0.1
≥21	219	0.3	286	0.4	213	0.3	38	0.0
Total abortions reported by known gestational age	74,868		79,817		82,581		84,052	

2023 data received from AHCA on June 27, 2024. Percentages may not add to 100.0 due to rounding.

The number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. For this reason, budgetary or revenue effects that are limited or undetectable at 15 weeks of gestation may be much stronger at 6 weeks of gestation. Data related to the 6-week ban are not yet available.

A. Criminal Justice System

Under current law, there are four felonies related to abortion that exist under Chapter 390, F.S. Section 390.0111, F.S., includes a Level 1, 3rd degree felony for “any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of” how pregnancies should be terminated, including when it is permitted to terminate a pregnancy after the gestational age of 15 6 weeks, and when a partial-birth abortion or experimentation on a fetus is permitted. A Level 4, 2nd degree felony is also included for “any person who performs, or actively participates in, a termination of pregnancy in violation of this section ~~or s. 390.01112, F.S.,~~ which results in the death of the woman.” Additionally, it includes a Level 1, 3rd degree felony for a person who violates the requirements that an infant “born alive during or immediately after an attempted abortion” be treated like “any other child born alive in the course of natural birth.” ~~Section 390.01112, F.S., states that “no termination of pregnancy shall be performed on any human being if the physician determines that, in reasonable medical judgment, the fetus has achieved viability,” with exceptions.~~ Section 390.01114, F.S., includes a Level 1, 3rd degree felony for “a physician who intentionally or recklessly performs or induces, or attempts to perform or induce, a termination of a pregnancy of a minor without obtaining the required consent” from a parent or legal guardian.

Given the data available from the Florida Department of Corrections, there have been no commitments to prison for any of the felonies described above—either before or after the enactment of the ~~2022-2023~~ legislative change to 15 6 weeks (ch. ~~2022-69~~ 2023-21, L.O.F.), ~~which went into effect on May 1, 2024.~~¹ It should be noted that the 15-6-week language just went into effect ~~last~~ this year, and given the time it would take from arrest to adjudication, it is ~~likely that few, if any,~~ highly unlikely that any current or future offenders would have moved through the entire criminal justice system at this point.

Conclusion: ~~As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, i~~ It is probable that there will be cost savings to the criminal justice system. However, the impact on the criminal justice system is not expected to be significant based on prior law. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within the criminal justice system as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers, the impact is indeterminate.

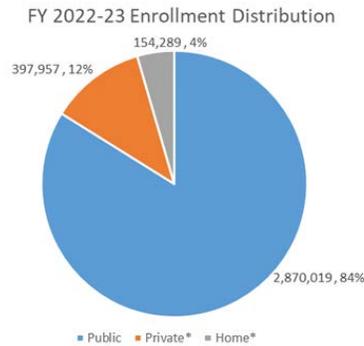
¹ The data series from the Florida Department of Corrections begins in 1979.

B. Education Services

Florida resident births directly influence the state’s future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three to four years following the change. The first educational setting that could experience differences would be Florida’s Exceptional Student Education programs, including public schools and the Family Empowerment Scholarship Program for Students with Unique Abilities. In ~~2022-23~~ 2023-24, these two programs for three and four year olds with additional needs for learning support served roughly ~~15~~ 16 percent of this age group. The next program preschoolers can participate in is Florida’s universal Voluntary Prekindergarten Program (VPK), which serves ~~65.7~~ 64.8 percent of four year olds.

The full-effect of policies that influence birth rates and their interactions with Florida’s schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida’s school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, ~~Hope~~ Motor Vehicle Sales Tax Credit Scholarship Program, and Commercial Rental Sales Tax Credit Scholarship Program) would ultimately feel the full effect of policies influencing birth rates.

In FY 2023-24, the typical VPK cost is \$2,839 per student. As of ~~July 2023~~ June 2024, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was ~~\$8,668~~ \$8,716, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.



*Private and Home education settings include FES and FTC scholarship students

FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast

	FY 2022-23 SE* 4/14/2023	FY 2023-24 Forecast 8/7/2023	FY 2024-25 Forecast 8/7/2023	FY 2025-26 Forecast 8/7/2023	FY 2026-27 Forecast 8/7/2023	FY 2027-28 Forecast 8/7/2023	FY 2028-29 Forecast 8/7/2023
Total PreK-12 FEFP FTE (Excl. Scholarships)	2,832,246	2,867,520	2,871,840	2,872,278	2,861,645	2,862,123	2,865,229
Family Empowerment Scholarship (FES)	155,183	219,790	274,265	324,878	364,761	402,109	437,073
— FES-Education Opportunity (EO)	87,402	126,433	156,128	181,194	195,326	206,443	214,744
— FES-Unique Ability (UA)	67,781	93,357	118,137	143,684	169,435	195,666	222,329
Florida Tax Credit Scholarship (FTC)	94,518	134,891	114,576	101,721	100,377	99,111	97,840

* FY 2022-23 SE = recalibrated survey 3 (February 2023) data excluding scholarship FTE, with adjustments to reflect scholarship payment data

	FY 2022-23 Final 1/12/2024	FY 2023-24 3rd Calc 1/23/2024	FY 2024-25 Forecast 2/21/2024	FY 2025-26 Forecast 2/21/2024	FY 2026-27 Forecast 2/21/2024	FY 2027-28 Forecast 2/21/2024	FY 2028-29 Forecast 2/21/2024
K-12 FEFP FTE (Excl. Scholarships)	2,823,723	2,835,236	2,854,409	2,863,759	2,864,675	2,880,547	2,901,502
Family Empowerment Scholarship (FES)	155,183	216,857	315,892	360,113	394,804	429,985	465,772
<i>FES-Education Opportunity (EO)</i>	87,402	134,801	216,960	240,967	255,094	269,423	283,645
<i>FES-Unique Ability (UA)</i>	67,781	82,056	98,932	119,146	139,710	160,562	182,127
Florida Tax Credit Scholarship (FTC)	94,518	147,041	114,587	106,751	105,647	104,501	103,331

Conclusion: As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, it is probable that there will be Limiting government interference with abortion would result in cost savings to education services.

C. Health and Human Services

Florida offers a wide range of social services to support residents with medical, food, and cash assistance that are partially dependent on Florida’s population and birth rate. While there are programs that are purely federally funded, many programs use a mix of state and federal funding. An example of the latter is the Medicaid program that provides medical assistance to individuals and families to cover or assist in the cost of services that are medically necessary. Another example is the Temporary Cash Assistance program that provides financial assistance to pregnant women in their third trimester and families with dependent children to assist in the payment of rent, utilities and other household expenses. As many of these programs serve children as well as new or expecting mothers, any changes in Florida resident births affect the number of people potentially eligible for these various social services for both the birthed and the birthing.

For children in Florida needing medical assistance, the state offers Medicaid and Kidcare (Title XXI Children’s Health Program—CHIP). Children from birth until their first birthday are eligible for Medicaid if the household income is below 200 percent of the Federal Poverty Level (FPL). After their first birthday, the household income threshold drops to 133 percent of the FPL. Those children remain Medicaid eligible up until their nineteenth birthday (there are special programs for 19 and 20 years old based on a fixed income dollar amount). If household income is above 133 percent but below 300 percent of the FPL, children are eligible for Medikids Title XXI. If household income is above 300 percent, children are eligible for Medikids Full Pay. Eligibility for both Medikids programs covers children until their fifth birthday. From ages 5 to 18 years old, under the same FPL thresholds, children are eligible for Florida Healthy Kids Title XXI or Full Pay. Children in income eligible households with special healthcare needs that require extensive preventive and ongoing care are eligible for the Children’s Medical Services health plan (CMS).

Florida Medicaid and CHIP Income Requirements (Children)	
Medicaid	
Children Under Age 1	200% FPL
Children ages 1 through 18	133% FPL
Parents, Caretakers, Children ages 19-20	Fixed dollar amount
Children’s Health Insurance Program (CHIP)	
Medikids (Ages 1-4)	
Title XXI	133% up to 300%
Full Pay	300%
Florida Healthy Kids (Ages 5-18)	
Title XXI	133% up to 300%
Full Pay	300%
CMS	133% up to 300%

With coverage beginning as early as birth, the effects of any changes to the birth rate can be cumulative and varying. Medicaid covers almost one-half of the births (~~45.47~~ 43.9 percent ~~CY 2021~~ 2022) in the state. They maintain that coverage until their first birthday is reached and their eligibility is reassessed. Many remain on Medicaid, move to a CHIP program, or are able to find health insurance elsewhere. As of ~~August 2023~~ May 2024, ~~47.4~~ 48.6 percent (~~2,490,633~~ 2,149,107) of the ~~5.3~~ 4.4 million Medicaid enrollees were under the age of 18 with ages from 0 to five years making up approximately ~~33~~ 34 percent of the total under 18. CHIP covers a further ~~138,293~~ 243,944 children under the age of 18 with Medikids covering ~~12,281~~ 20,748, Healthy Kids covering ~~118,281~~ 209,671 and CMS covering ~~7,731~~ 13,525. It should also be noted that the federal Public Health Emergency (PHE) significantly affected enrollment leading into this period. The tables below show current enrollment as of ~~August 2023~~ May

2024 and December 2019, the month before the PHE retroactively went into effect (the PHE began in March 2020 but continuous enrollment was retroactive to January 1, 2020).

Florida Medicaid Enrollment by Age Group and Date						
	5/31/2024		8/31/2023		12/31/2019	
Group	Enrolled	% of Total	Enrolled	% of Total	Enrolled	% of Total
Ages 0-5	721,308	16.3%	827,024	15.7%	769,120	19.9%
Ages 6 -10	570,910	12.9%	661,289	12.6%	543,814	14.1%
Ages 11-18	856,889	19.4%	1,002,320	19.1%	770,549	19.9%
Total 0-18	2,149,107	48.6%	2,490,633	47.4%	2,083,483	53.9%
Total	4,423,280	100.0%	5,254,460	100.0%	3,868,723	100.0%

Florida Children’s Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full pay	CMS
<u>5/31/2024</u>					
Ages 1-5	16,660	4,088	-	-	1,196
Ages 6 -10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227
-	<u>9/30/2023</u>				
Ages 1-5	9,014	3,267	-	-	574
Ages 6 -10	-	-	28,709	8,540	2,458
Ages 11-18	-	-	67,614	13,418	4,699
<u>12/31/2019</u>					
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6 -10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

While children under the age of 18 make up almost one-half of the Medicaid enrollees, they account for approximately a quarter of the total Medicaid expenditure. In SFY ~~2021-22~~ 2022-23, children were ~~49.06~~ 47.2 percent of enrollees and ~~24.5~~ 27.0 percent of expenditures. The ~~2023~~ 2024 Rate Year (October ~~2022~~ 2023 – September ~~2023~~ 2024) statewide average MMA capitation rate for a child between the age of one month and eleven months without a serious mental illness (SMI) was ~~\$274.25~~ 325.19 per month (~~\$3,291.00~~ 3,902.28 per year). For a similar child between a year and 13 years old, that rate was ~~\$134.86~~ 159.62 per month (~~\$1,618.32~~ 1915.44 per year). There are circumstances where the expenditure on a child is higher than these statewide averages. Children on the CMS plan typically have higher per person per month expenditures, but they account for a small portion of the total children on Medicaid.

As mentioned above, Medicaid covers a significant number of the births in Florida (see table below). There is also pre- and postnatal public assistance for the mothers. Medical assistance for pregnant women is available through various Medicaid programs. A pregnant woman who is eligible for regular Medicaid (income below 185 percent FPL) for at least one month, including a retroactive month, is eligible to receive Medicaid throughout her pregnancy and until the end of the 12th month after the birth (postpartum period). The family planning waiver program covers family planning services to eligible women, ages 14 through 55. Services are provided up to 24 months. Eligibility is limited to women with family incomes at or below 191 percent of the FPL who have lost or are losing Florida

Medicaid State Plan eligibility and are not otherwise eligible for Medicaid, Children’s Health Insurance Program, or health insurance coverage that provides family planning services.

Recipients losing SOBRA (pregnancy Medicaid) eligibility will have passive enrollment during the first 12 months of losing Medicaid. Non-SOBRA women have to actively apply for the first year of benefits at their local county health departments. All women enrolled in the family planning waiver have active re-determination of eligibility through their local county health departments after 12 months of family planning waiver eligibility. In order to receive the second year of benefits, recipients must reapply at their local county health departments.

As of ~~August 2023~~ May 2024, there were ~~333,510~~ 427,463 individuals receiving Medicaid or the Family Planning waiver to assist with the pregnancies. Of the total, ~~150,546~~ 143,606 receive Pregnant Women Medicaid and ~~182,964~~ 283,857 utilize the Family Planning Waiver.

Florida Births Covered by Medicaid, Percent of Total births			
CY	Medicaid	Total	Rate
2017	109,225	223,579	48.85%
2018	106,695	221,508	48.17%
2019	102,636	220,010	46.65%
2020	98,018	209,645	46.75%
2021	98,297	216,189	45.47%
<u>2022</u>	<u>97,966</u>	<u>222,976</u>	<u>43.90%</u>

Pregnant Women and Family Planning Enrollment by Program and Date				
	SOBRA PREGNANT WOMEN UP TO 100% FPL	SOBRA PREGNANT WOMEN OVER 100% OF FPL UP TO 185% OF FPL	Family Planning Waiver	Total
<u>5/31/2024</u>	<u>110,142</u>	<u>33,464</u>	<u>283,857</u>	<u>427,463</u>
<u>% of Total</u>	<u>25.77%</u>	<u>7.83%</u>	<u>66.41%</u>	<u>100.00%</u>
8/31/2023	114,432	36,043	182,964	333,439
% of Total	34.32%	10.81%	54.87%	100.00%
12/31/2019	67,810	19,124	69,250	156,184
% of Total	43.42%	12.24%	44.34%	100.00%

The Temporary Assistance for Needy Families – Temporary Cash Assistance (TCA) program provides cash assistance to families with children under the age of 18 or under age 19 if full time secondary (high school) school students. The program helps families become self-supporting while allowing children to remain in their own homes. Pregnant women may also receive TCA, either in the third trimester of pregnancy if unable to work, or in the 9th month of pregnancy. Eligibility for the TCA program is similar to Medicaid eligibility with a few other technical requirements. Gross income must be less than 185 percent of the FPL and countable income cannot be higher than the payment standard for the family size. Individuals get a \$90 deduction from their gross earned income. Some people must participate in work activities unless they meet an exemption. Regional Workforce Boards provide work activities and services needed to get or keep a job. Individuals who receive TCA are eligible for Medicaid. Individuals who are eligible for TCA, but choose not to receive it, may still be eligible for Medicaid. Florida law

creates four categories of families who may be eligible for TCA. While many of the basic eligibility requirements apply to all of these categories, there are some distinctions between the categories in terms of requirements and restrictions:

- **Child-Only Families:** These families include situations where the child is living with a relative or situations where a custodial parent is not eligible to be included in the eligibility group.
- **Relative Caregiver Program:** A specialized program for child-only families where the child has been adjudicated dependent due to abuse or neglect and has been placed with a grandparent or other relative by the court. These relatives are eligible for a payment that is higher than the typical child-only payment, but less than the payment for licensed foster care
- **Single-Family Parents with Children:** Parents with children can receive cash assistance for the parent and the children.
- **Two-Parent Families with Children:** Are eligible on the same basis as single-parent families except the work requirement for two-parent families includes a higher number of hours of participation per week (35 hours or 55 hours if childcare is subsidized) than required for single-parent families (30 hours).

In FY 2022-23, these four programs assisted 67,224 individuals (in FY 2019-20 that number was 61,260). Both the Child-Only Families and Relative Caregiver programs have experienced steady declines in terms of cases and persons served. The other two programs have seen increases over the last few fiscal years that are mostly driven by increased activity among non-citizens seeking assistance.

Temporary Cash Assistance by Program and Date		
Programs	FY 2022-23	FY 2019-20
Child Only Cases	13,840	19,191
Relative Caregiver	9,495	16,461
Single-Family Parents with Children	21,613	22,884
Unemployed Two-Parent Families with Children Parent	22,276	2,723
Total	67,224	61,260

Looking at the age groups served by the TCA programs, ages six and over represent the majority of those receiving assistance (approximately 70 percent). Children from birth to 5 years old make up a smaller proportion of TCA recipients, but are usually also receiving other forms of public assistance as well. While these individuals are treated separately from Medicaid, they are included in the total caseload counts reported each month.

Temporary Cash Assistance by Age and Date				
	9/30/2023		12/31/2019	
	Eligible	%total	Eligible	%total
Age 0 to 5	12,795	29%	16,014	32%
Age 6 to 12	18,755	42%	21,137	42%
Age 13 to 17	13,209	30%	12,989	26%
Total	44,759	100%	50,140	100%

Finally, the foster care system in Florida serves children from birth until their 18th birthday. There are specialty programs to extend foster care services to those older than eighteen, but the majority of those receiving these services are seventeen or younger. In ~~2022~~ 2023, ~~24,245~~ 21,031 children (aged 0-

17) received foster care services. These services are federally funded through Title IV of the Social Security Act with matching state funds (similar to Medicaid and CHIP). Title IV-E provides federal funding to help provide foster care, independent living services, adoption assistance, and guardianship assistance. Like all states that receive Title IV-E funds for foster care, independent living services, adoption assistance, and guardianship assistance, Florida must follow a Title IV-E State Plan.

Conclusion: The health and human services in Florida serve children as well as new or expecting mothers. Any changes in Florida resident births affect the number of people potentially eligible for these services. ~~As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event,~~ It is probable that there will be cost savings to health and human services when comparing current law to the proposed amendment. ~~The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within health and human services as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers,~~ The magnitude of those savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. Due to this, the impact is indeterminate.

D. Federal and State Funds for Abortion

First passed in 1976, the Hyde Amendment refers to annual funding restrictions that Congress has regularly included in the annual appropriations acts for the Departments of Labor, Health and Human Services, Education, and related agencies.

The most recently enacted version of the Hyde Amendment (P.L. 117-103. Div. H, §§ 506–507), applicable for federal fiscal year 2022, prohibits covered funds to be expended for any abortion or to provide health benefits coverage that includes abortion. This restriction, however, does not apply to abortions of pregnancies that are the result of rape or incest (“rape or incest exception”), or where a woman would be in danger of death if an abortion were not performed (“life-saving exception”).

As a statutory provision included in annual appropriations acts, Congress can modify, and has modified, the Hyde Amendment’s scope over the years, both as to the parameters of exceptions and the sources of funding subject to this restriction.

The Hyde Amendment would continue to restrict the use of federal Medicaid funds even with the adoption of the proposed Florida constitutional amendment. While some states have elected to provide coverage for abortions that are not medically necessary, these states do so through the use of state funds, not federal funds that are restricted by the Hyde Amendment.

In Florida, the issue of whether there is a state coverage obligation under the current privacy clause of the Florida Constitution was previously litigated - see, *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). The Florida Supreme Court held that the Legislature’s choice not to fund abortions with state funds did not violate the right to privacy in the Florida Constitution, specifically noting: “[t]here is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it” (quoting, *Renee B.*, No. 97–3983 (Fla.2d Cir.Ct. Oct. 9, 1998)).

Conclusion: Under current law, the state does not have an obligation to pay for abortions. The proposed constitutional amendment does not expressly create a new obligation for the state to pay for abortions. The Florida Legislature has made no changes to its policies regarding state abortion funding under ~~either the 15-week or the~~ the 6-week prohibitions. Future legislative changes, if any, in response to the passage of the proposed amendment are unknown.

Revenue Impact from Out-of-State Abortions Occurring in Florida

In the post-Roe landscape, where many states have enacted stricter regulations on abortion, many people seeking an abortion are traveling across state lines to get the medical care they want. In 2020, approximately 9 percent of all abortions in the United States were obtained by individuals traveling across state lines.¹ This percentage has increased dramatically. For example, in Illinois, where abortion laws are not restrictive, one abortion clinic reported a 700 percent increase in out-of-state abortions in the 11 months after Roe vs Wade was overturned.² Illinois has seen a 28 percent increase in abortions from April 2022 to August 2022 for the entire state.³ This documented increase in abortion travel has been witnessed in several states, including Colorado, Kansas, and New Mexico.

Geographically, the most restrictive region in the United States is the Southeast. A 2022 study of the estimated travel time to the nearest abortion clinic found Texas, Louisiana, Mississippi, Alabama, and Arkansas to have the longest travel times to the nearest abortion clinic that did post-6 week abortions.⁴ For example, the study estimated that the nearest abortion clinic to a Louisiana resident was a 9.61 hour drive.⁵ ~~With its 15-week threshold, Florida could be a destination for abortion travel since it is located within the Southeast region. Before the enactment of the 6-week abortion ban, Florida may have been a destination for abortion travel; however, to the extent that atypical travel to Florida has occurred or will occur, it generates additional sales tax collections. now with the 6week abortion ban, Florida will not be a destination for abortion travel.~~

~~In 2022, Florida reported 82,581 abortions.⁶ Of those 82,581 abortions, 6,726 were related to out of state individuals.⁷ When compared to 2021, total abortions increased by 3 percent, but out of state abortions increased by 38 percent. In 2023, Florida reported 84,052 abortions.⁸ When compared to 2022, total abortions increased by 2 percent, but out of state abortions increased by 15 percent.⁹ While this signals that more individuals are traveling to Florida for abortions, the total level of out-of-state abortions remains low. In comparison, Florida's total visitors in 2022 ~~2023~~ reached approximately ~~137.6~~ 140.62 million.¹⁰~~

~~For 2023-2024, only nine five months of data are currently available. To project the 2023 annual number, the growth rate between 2023Q1-Q3 and 2022Q1-Q3 was used to grow the 2022Q4 level, producing an estimate for 2023Q4. This estimate was then added to the data for the current year. The results indicate a small increase in total abortions (2 percent growth) and a significant increase in out-of-state abortions (24 percent growth). A forecast of the remaining 2024 year was not done, because of the change in the abortion law that occurred on May 1st. The new law places additional restrictions and any estimate would be inaccurate given the change in the law. Charts and graphs of Florida's abortion data can be found below.~~

¹ <https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across>

² <https://www.plannedparenthood.org/reproductive-health-services-planned-parenthood-st-louis-region/press-releases/post-dobbs-planned-parenthood-sees-700-increase-in-abortion-patients-traveling-to-illinois-from-outside-the-bi-state-region-for-care>

³ <https://ci3.uchicago.edu/il-abortion-stats/>

⁴ Rader, Benjamin, "Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the *Dobbs v Jackson Women's Health* Decision" Published: November 1, 2022. Journal of American Medical Association.

⁵ Ibid.

⁶ <https://ahca.myflorida.com/health-care-policy-and-oversight/bureau-of-central-services/frequently-requested-data>

⁷ Ibid.

⁸ <https://ahca.myflorida.com/health-care-policy-and-oversight/bureau-of-central-services/frequently-requested-data>

⁹ Ibid.

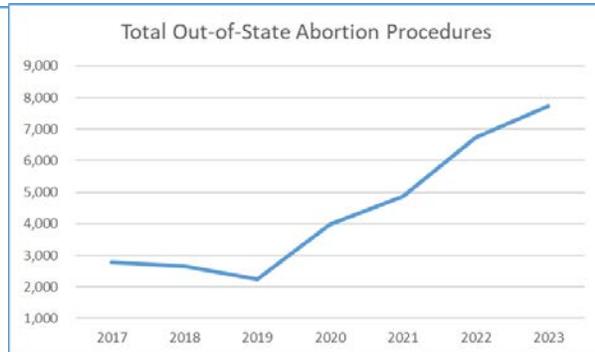
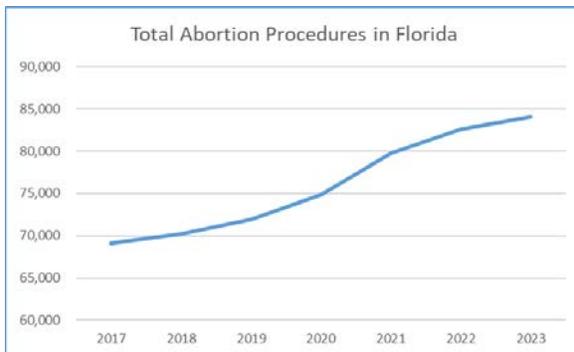
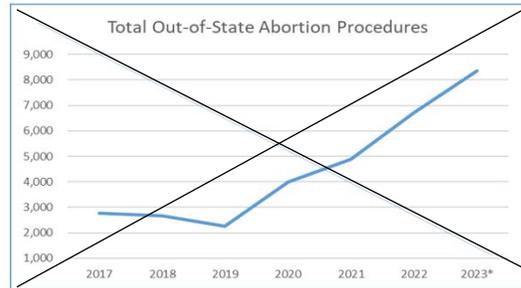
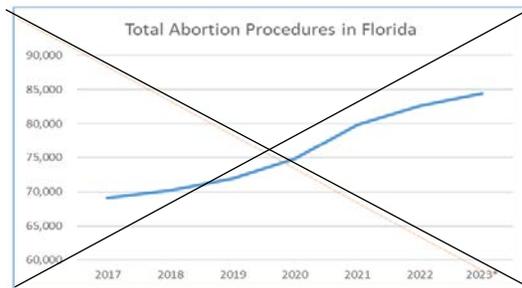
¹⁰ <https://www.visitflorida.org/resources/research/research-faq/>

Florida Abortion Statistics				
Year	Total	Growth	Out-of-State	Growth
2017	69,102	-	2,771	-
2018	70,239	2%	2,654	-4%
2019	71,914	2%	2,256	-15%
2020	74,868	4%	3,988	77%
2021	79,817	7%	4,873	22%
2022	82,581	3%	6,726	38%
2023*	84,263	2%	8,351	24%

* 2023 Data is a forecast based on the first 9 months of data and an estimate of Q4 data.

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Year	Total	Growth	Out-of-State	Growth
2017	69,102	-	2,771	-
2018	70,239	2%	2,654	-4%
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2020	74,868	4%	3,988	77%
2021	79,817	7%	4,873	22%
2022	82,581	3%	6,726	38%
2023	84,052	2%	7,736	15%
2024*	32,081	N/A	2,693	N/A

* 2024 Data is only up to June 3, 2024. This is not forecast of what is expected for the remaining year.



The data from Florida is inconclusive. While the state has seen an increase in out-of-state abortions since Roe vs Wade was overturned, Florida also saw a significant increase in out-of-state abortions prior to that decision. It is not clear that the current 2022 and 2023 increase is was related to Florida's position (legally prior legality and geographically) relative to the other states in the Southeast.

However, if the amendment passes, the number of out-of-state abortions could potentially increase because the 6-week ban has created a restriction that is curtailing the number of out-of-state abortions

from presently occurring. Whether this is from abortion tourism or the normal flow of out-of-state abortions (pre-Roe vs Wade decision) is debatable.

Conclusion: ~~As previously noted, the baseline for the analysis is uncertain. While~~ Atypical travel to the state would be expected to result in higher sales tax collections. This result would ~~not~~ be a direct effect of the proposed amendment.

A. Criminal Justice System

Under current law, there are four felonies related to abortion that exist under Chapter 390, F.S. Section 390.0111, F.S., includes a Level 1, 3rd degree felony for “any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of” how pregnancies should be terminated, including when it is permitted to terminate a pregnancy after the gestational age of 6 weeks, and when a partial-birth abortion or experimentation on a fetus is permitted. A Level 4, 2nd degree felony is also included for “any person who performs, or actively participates in, a termination of pregnancy in violation of this section which results in the death of the woman.” Additionally, it includes a Level 1, 3rd degree felony for a person who violates the requirements that an infant “born alive during or immediately after an attempted abortion” be treated like “any other child born alive in the course of natural birth.” Section 390.01114, F.S., includes a Level 1, 3rd degree felony for “a physician who intentionally or recklessly performs or induces, or attempts to perform or induce, a termination of a pregnancy of a minor without obtaining the required consent” from a parent or legal guardian. Section 390.011, F.S. specifically defines the term “physician” and Section 390.0111, F.S. states that “only a physician may perform or induce a termination of pregnancy.” The proposed amendment states that a patient’s healthcare provider can make such determinations, rather than strictly physicians. However, healthcare provider is defined under Section 381.026, F.S. as “a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, a podiatric physician licensed under chapter 461, or an advanced practice registered nurse registered under s. 464.0123, F.S.” Further, healthcare providers are limited by the scope of what they are licensed to practice. For example, Section 461.003, F.S. defines the practice of podiatric medicine as “the diagnosis or medical, surgical, palliative, and mechanical treatment of ailments of the human foot and leg.”

Given the data available from the Florida Department of Corrections, there have been no commitments to prison for any of the felonies described above—either before or after the enactment of the 2023 legislative change to 6 weeks (ch. 2023-21, L.O.F.), which went into effect on May 1, 2024.¹ It should be noted that the 6-week language just went into effect this year, and given the time it would take from arrest to adjudication, it is highly unlikely that any current offenders would have moved through the entire criminal justice system at this point.

~~Conclusion: As previously noted, the baseline for the analysis is uncertain. As illustrated in the graphic in Section F of this document, there are scenarios where either a 6-week prohibition or a 15-week prohibition could be in effect in November 2024. In either event, it is probable that there will be cost savings to the criminal justice system. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within the criminal justice system as the baseline policy would be essentially equivalent to the proposed amendment. Without knowing these answers, the impact is indeterminate. To be discussed at the conference.~~

¹ The data series from the Florida Department of Corrections begins in 1979.

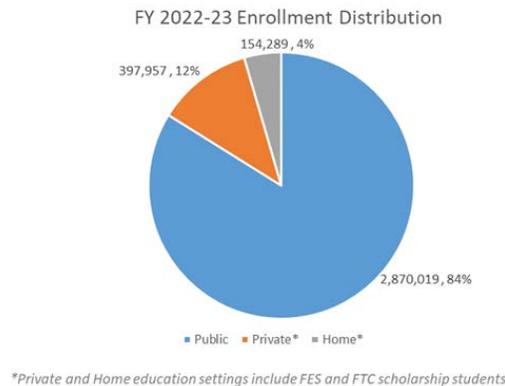
B. Education Services

With the School Readiness program offering financial assistance for care and early education, education services begin as early as birth. Although primarily funded by the federal Child Care and Development Fund Block Grant, the School Readiness program is partially supported by state and local funds. Children in eligible low-income households can participate in this program’s range of services from birth through the age of 12.

Florida resident births also directly influence the state’s future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three to four years following the change. The first educational setting that could experience differences would be Florida’s Exceptional Student Education programs, including state and locally-funded public schools and the state-funded Family Empowerment Scholarship Program for Students with Unique Abilities. In 2023-24, these two programs for three and four year olds with additional needs for learning support served roughly 16 percent of this age group. The next state-funded program preschoolers can participate in is Florida’s universal Voluntary Prekindergarten Program (VPK), which serves 64.8 percent of four year olds.

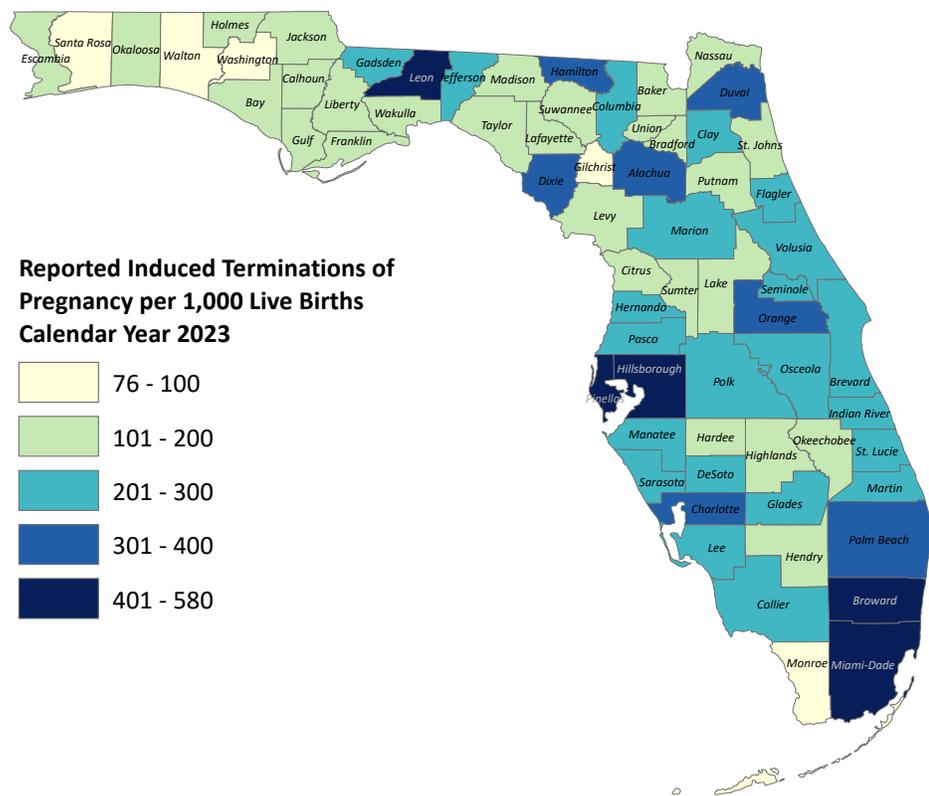
The full-effect of policies that influence birth rates and their interactions with Florida’s schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida’s school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, Motor Vehicle Sales Tax Credit Scholarship Program, and Commercial Rental Sales Tax Credit Scholarship Program) would feel the full effect of policies influencing birth rates.

In FY 2023-24, the typical VPK cost is \$2,839 per student. As of June 2024, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was \$8,716, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.



FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast							
	FY 2022-23 Final 1/12/2024	FY 2023-24 3rd Calc 1/23/2024	FY 2024-25 Forecast 2/21/2024	FY 2025-26 Forecast 2/21/2024	FY 2026-27 Forecast 2/21/2024	FY 2027-28 Forecast 2/21/2024	FY 2028-29 Forecast 2/21/2024
Total PreK-12 FEFP FTE (Excl. Scholarships)	2,823,723	2,835,236	2,854,409	2,863,759	2,864,675	2,880,547	2,901,502
Family Empowerment Scholarship (FES)	155,183	216,857	315,892	360,113	394,804	429,985	465,772
FES-Education Opportunity (EO)	87,402	134,801	216,960	240,967	255,094	269,423	283,645
FES-Unique Ability (UA)	67,781	82,056	98,932	119,146	139,710	160,562	182,127
Florida Tax Credit Scholarship (FTC)	94,518	147,041	114,587	106,751	105,647	104,501	103,331

Conclusion: Limiting government interference with abortion would result in cost savings to education services.



Sources: AHCA Abortion Data by County, 2023; FLHealthCHARTS.gov Birth Data by County, 2023.

Note: Rates for Calhoun, Franklin, Gilchrist, Holmes, Lafayette, Liberty, and Washington counties are a result of a simulation using suppressed data.

Federal Medical Assistance Percentage

The federal government uses state per capita personal income to calculate each state's federal reimbursement rate for Medicaid and other grants. This is the Federal Medical Assistance Percentage (FMAP) and is the share of state Medicaid benefit costs paid by the federal government. The FMAP is based on a three-year average of state per capita personal income compared to the national average. The FMAP is the federal share of a state's Medicaid expenditure. The state's share is 100% minus the FMAP. The Children's Health Insurance Program (CHIP) uses an enhanced FMAP, which is higher than the Medicaid FMAP. The enhanced FMAPs are calculated by reducing each state's Medicaid share by 30% and are capped at 85%. The table below shows 10 years of Florida's FMAP. Between January 2020 and March 2023 there was a temporary Enhanced FMAP due to the Public Health Emergency that added 6.2 percentage points to the FMAP (FFY 20-21 through FFY 23-24). Starting on April 2023, the enhanced PHE FMAP was phased out ending in December 2023.

Federal Fiscal Year	FMAP	EFMAP
FY 15-16	60.46%	72.32%
FY 16-17	60.99%	72.69%
FY 17-18	61.62%	73.13%
FY 18-19	61.10%	72.77%
FY 19-20	61.47%	73.03%
FY 20-21	61.96%	73.37%
FY 21-22	61.03%	72.72%
FY 22-23	60.05%	72.04%
FY 23-24	57.96%	70.57%
FY 24-25	57.17%	70.02%

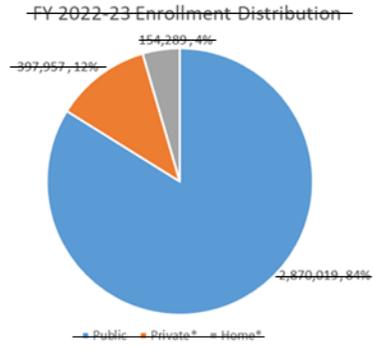
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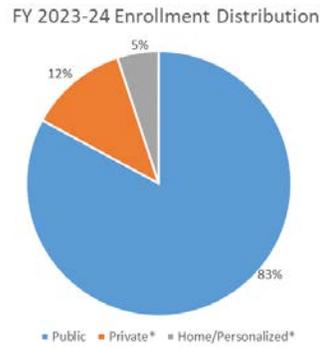
Florida resident births also directly influence the state's future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three to four years following the change. The first educational setting that could experience differences would be Florida's Exceptional Student Education programs, including state and locally-funded public schools and the state-funded Family Empowerment Scholarship Program for Students with Unique Abilities. In 2023-24, these two programs for three and four year olds with additional needs for learning support served roughly 16 percent of this age group. The next state-funded program preschoolers can participate in is Florida's universal Voluntary Prekindergarten Program (VPK), which serves 64.8 percent of four year olds.

The full-effect of policies that influence birth rates and their interactions with Florida's schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida's school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, Motor Vehicle Sales Tax Credit Scholarship Program, and Commercial Rental Sales Tax Credit Scholarship Program) would feel the full effect of policies influencing birth rates.

In FY 2023-24, the typical school year base student allocation for VPK cost is was \$2,839,941 per student, which increases to \$3,029 in FY 2024-25 (3.0%). As of June 2024, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was \$8,716, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Looking ahead to FY 2024-25, the average cost per unweighted PreK-12 FTE is initially estimated to be \$8,959, a 3.6% increase relative to FY 2023-24's initial estimate (\$8,648). This increase is similar to the average annual increase of 3.2% over the preceding 5 years of change in initial estimates. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.



*Private and Home education settings include FES and FTC scholarship students



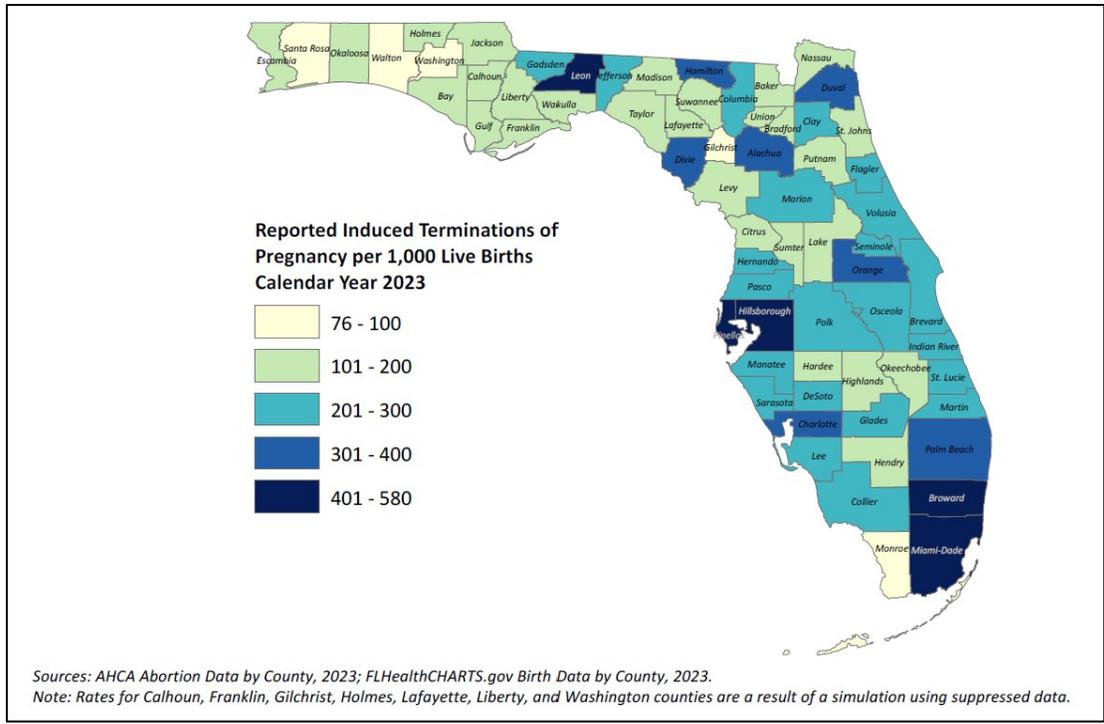
*Non-public education settings include FES and FTC scholarship students

FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast							
	FY 2022-23 Final 1/12/2024	FY 2023-24 3rd Calc 1/23/2024	FY 2024-25 Forecast 2/21/2024	FY 2025-26 Forecast 2/21/2024	FY 2026-27 Forecast 2/21/2024	FY 2027-28 Forecast 2/21/2024	FY 2028-29 Forecast 2/21/2024
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Florida Tax Credit Scholarship (FTC)	94,518	147,041	114,587	106,751	105,647	104,501	103,331

Florida’s education system allocates funds to school districts for K-12 operations based on student count through the Florida Education Finance Program (FEFP), which consists of both state and local funds. Local funds are generated from property tax revenue and are comprised of the .748 discretionary millage levy and the required local effort (RLE) levy. The RLE is the amount of funds a district generates from levying the state certified local effort millage rate on the district’s ad valorem property.

School districts are also authorized to levy up to an additional 1.5 mills against the taxable value for school purposes, including charter schools, new construction, maintenance and renovation of existing facilities, school buses, and equipment, among other allowable uses.

The amendment will result in fewer live births relative to the current law. The impact on individual districts will be unequally distributed.



All things being equal, a declining student population would result in less funding allocated to school districts to maintain operations. School districts could increase the discretionary millage levies, however most districts are currently levying the maximum millage. There are multiple actions the state and local governments could take to address a declining student enrollment.

Conclusion: While the constitutional amendment would result in an aggregate statewide cost savings from a reduction in the provision of educational services due to fewer live births, the effects of the proposed amendment could exacerbate financial constraints for individual districts already experiencing a decline in student enrollment ~~the effects of the proposed amendment could exacerbate financial constraints.~~

C. Health and Human Services

Florida offers a wide range of social services to support residents with medical, food, and cash assistance that are partially dependent on Florida’s population and birth rate. While there are programs that are purely federally funded, many programs use a mix of state and federal funding. An example of the latter is the Medicaid program that provides medical assistance to individuals and families to cover or assist in the cost of services that are medically necessary. Another example is the Temporary Cash Assistance program that provides financial assistance to pregnant women in their third trimester and families with dependent children to assist in the payment of rent, utilities and other household expenses. As many of these programs serve children as well as new or expecting mothers, any changes in Florida resident births affect the number of people potentially eligible for these various social services for both the birthed and the birthing.

For children in Florida needing medical assistance, the state offers Medicaid and Kidcare (Title XXI Children’s Health Program—CHIP). Children from birth until their first birthday are eligible for Medicaid if the household income is below 200 percent of the Federal Poverty Level (FPL). After their first birthday, the household income threshold drops to 133 percent of the FPL. Those children remain Medicaid eligible up until their nineteenth birthday (there are special programs for 19 and 20 years old based on a fixed income dollar amount). If household income is above 133 percent but below 300 percent of the FPL, children are eligible for Medikids Title XXI. If household income is above 300 percent, children are eligible for Medikids Full Pay. Eligibility for both Medikids programs covers children until their fifth birthday. From ages 5 to 18 years old, under the same FPL thresholds, children are eligible for Florida Healthy Kids Title XXI or Full Pay. Children in income eligible households with special healthcare needs that require extensive preventive and ongoing care are eligible for the Children’s Medical Services health plan (CMS).

Florida Medicaid and CHIP Income Requirements (Children)	
Medicaid	
Children Under Age 1	200% FPL
Children ages 1 through 18	133% FPL
Parents, Caretakers, Children ages 19-20	Fixed dollar amount
Children’s Health Insurance Program (CHIP)	
Medikids (Ages 1-4)	
Title XXI	133% up to 300%
Full Pay	300%
Florida Healthy Kids (Ages 5-18)	
Title XXI	133% up to 300%
Full Pay	300%
CMS	133% up to 300%

With coverage beginning as early as birth, the effects of any changes to the birth rate can be cumulative and varying. Medicaid covers almost one-half of the births (43.9 percent CY 2022) in the state. They maintain that coverage until their first birthday is reached and their eligibility is reassessed. Many remain on Medicaid, move to a CHIP program, or are able to find health insurance elsewhere. As of May 2024, 48.6 percent (2,149,107) of the 4.4 million Medicaid enrollees were under the age of 18 with ages from 0 to five years making up approximately 34 percent of the total under 18. CHIP covers a further 243,944 children under the age of 18 with Medikids covering 20,748, Healthy Kids covering 209,671 and CMS covering 13,525. It should also be noted that the federal Public Health Emergency (PHE) significantly affected enrollment leading into this period. The tables below show current

enrollment as of May 2024 and December 2019, the month before the PHE retroactively went into effect (the PHE began in March 2020 but continuous enrollment was retroactive to January 1, 2020).

Florida Medicaid Enrollment by Age Group and Date				
	5/31/2024		12/31/2019	
Group	Enrolled	% of Total	Enrolled	% of Total
Ages 0-5	721,308	16.3%	769,120	19.9%
Ages 6 -10	570,910	12.9%	543,814	14.1%
Ages 11-18	856,889	19.4%	770,549	19.9%
Total 0-18	2,149,107	48.6%	2,083,483	53.9%
Total All Ages	4,423,280	100.0%	3,868,723	100.0%

Florida Children’s Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full pay	CMS
5/31/2024					
Ages 1-5	16,660	4,088	-	-	1,207
Ages 6 -10	-	-	42,232	9,176	4,010
Ages 11-18	-	-	90,625	14,746	6,308
12/31/2019					
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6 -10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

While children under the age of 18 make up almost one-half of the Medicaid enrollees, they account for approximately a quarter of the total Medicaid expenditure. In SFY 2022-23, children were 47.2 percent of enrollees and 27.0 percent of expenditures. The 2024 Rate Year (October 2023 – September 2024) statewide average MMA capitation rate for a child between the age of one month and eleven months without a serious mental illness (SMI) was \$325.19 per month (\$3,902.28 per year). For a similar child between a year and 13 years old, that rate was \$159.62 per month (\$1,915.44 per year). There are circumstances where the expenditure on a child is higher than these statewide averages. Children on the CMS plan typically have higher per person per month expenditures, but they account for a small portion of the total children on Medicaid.

As mentioned above, Medicaid covers a significant number of the births in Florida (see table below). There is also pre- and postnatal public assistance for the mothers. Medical assistance for pregnant women is available through various Medicaid programs. A pregnant woman who is eligible for regular Medicaid (income below 185 percent FPL) for at least one month, including a retroactive month, is eligible to receive Medicaid throughout her pregnancy and until the end of the 12th month after the birth (postpartum period). The family planning waiver program covers family planning services to eligible women, ages 14 through 55. Services are provided up to 24 months. Eligibility is limited to women with family incomes at or below 191 percent of the FPL who have lost or are losing Florida Medicaid State Plan eligibility and are not otherwise eligible for Medicaid, Children’s Health Insurance Program, or health insurance coverage that provides family planning services.

Recipients losing SOBRA (pregnancy Medicaid) eligibility will have passive enrollment during the first 12 months of losing Medicaid. Non-SOBRA women have to actively apply for the first year of benefits at

their local county health departments. All women enrolled in the family planning waiver have active re-determination of eligibility through their local county health departments after 12 months of family planning waiver eligibility. In order to receive the second year of benefits, recipients must reapply at their local county health departments.

As of May 2024, there were 427,463 individuals receiving Medicaid or the Family Planning waiver to assist with the pregnancies. Of the total, 143,606 receive Pregnant Women Medicaid and 283,857 utilize the Family Planning Waiver.

Florida Births Covered by Medicaid, Percent of Total births			
CY	Medicaid	Total	Rate
2017	109,225	223,579	48.85%
2018	106,695	221,508	48.17%
2019	102,636	220,010	46.65%
2020	98,018	209,645	46.75%
2021	98,297	216,189	45.47%
2022	97,966	222,976	43.90%

Pregnant Women and Family Planning Enrollment by Program and Date				
	SOBRA PREGNANT WOMEN UP TO 100% FPL	SOBRA PREGNANT WOMEN OVER 100% OF FPL UP TO 185% OF FPL	Family Planning Waiver	Total
5/31/2024	110,142	33,464	283,857	427,463
% of Total	25.77%	7.83%	66.41%	100.00%
12/31/2019	67,810	19,124	69,250	156,184
% of Total	43.42%	12.24%	44.34%	100.00%

The Temporary Assistance for Needy Families – Temporary Cash Assistance (TCA) program provides cash assistance to families with children under the age of 18 or under age 19 if full time secondary (high school) school students. The program helps families become self-supporting while allowing children to remain in their own homes. Pregnant women may also receive TCA, either in the third trimester of pregnancy if unable to work, or in the 9th month of pregnancy. Eligibility for the TCA program is similar to Medicaid eligibility with a few other technical requirements. Gross income must be less than 185 percent of the FPL and countable income cannot be higher than the payment standard for the family size. Individuals get a \$90 deduction from their gross earned income. Some people must participate in work activities unless they meet an exemption. Regional Workforce Boards provide work activities and services needed to get or keep a job. Individuals who receive TCA are eligible for Medicaid. Individuals who are eligible for TCA, but choose not to receive it, may still be eligible for Medicaid. Florida law creates four categories of families who may be eligible for TCA. While many of the basic eligibility requirements apply to all of these categories, there are some distinctions between the categories in terms of requirements and restrictions:

- **Child-Only Families:** These families include situations where the child is living with a relative or situations where a custodial parent is not eligible to be included in the eligibility group.

- Relative Caregiver Program: A specialized program for child-only families where the child has been adjudicated dependent due to abuse or neglect and has been placed with a grandparent or other relative by the court. These relatives are eligible for a payment that is higher than the typical child-only payment, but less than the payment for licensed foster care
- Single-Family Parents with Children: Parents with children can receive cash assistance for the parent and the children.
- Two-Parent Families with Children: Are eligible on the same basis as single-parent families except the work requirement for two-parent families includes a higher number of hours of participation per week (35 hours or 55 hours if childcare is subsidized) than required for single-parent families (30 hours).

In FY 2022-23, these four programs assisted 67,224 individuals (in FY 2019-20 that number was 61,260). Both the Child-Only Families and Relative Caregiver programs have experienced steady declines in terms of cases and persons served. The other two programs have seen increases over the last few fiscal years that are mostly driven by increased activity among non-citizens seeking assistance.

Temporary Cash Assistance by Program and Date		
Programs	FY 2022-23	FY 2019-20
Child Only Cases	13,840	19,191
Relative Caregiver	9,495	16,461
Single-Family Parents with Children	21,613	22,884
Unemployed Two-Parent Families with Children Parent	22,276	2,723
Total	67,224	61,260

Looking at the age groups served by the TCA programs, ages six and over represent the majority of those receiving assistance (approximately 70 percent). Children from birth to 5 years old make up a smaller proportion of TCA recipients, but are usually also receiving other forms of public assistance as well. While these individuals are treated separately from Medicaid, they are included in the total caseload counts reported each month.

Temporary Cash Assistance by Age and Date				
	9/30/2023		12/31/2019	
	Eligible	%total	Eligible	%total
Age 0 to 5	12,795	29%	16,014	32%
Age 6 to 12	18,755	42%	21,137	42%
Age 13 to 17	13,209	30%	12,989	26%
Total	44,759	100%	50,140	100%

Finally, the foster care system in Florida serves children from birth until their 18th birthday. There are specialty programs to extend foster care services to those older than eighteen, but the majority of those receiving these services are seventeen or younger. In 2023, 21,031 children (aged 0-17) received foster care services. These services are federally funded through Title IV of the Social Security Act with matching state funds (similar to Medicaid and CHIP). Title IV-E provides federal funding to help provide foster care, independent living services, adoption assistance, and guardianship assistance. Like all states that receive Title IV-E funds for foster care, independent living services, adoption assistance, and guardianship assistance, Florida must follow a Title IV-E State Plan.

Conclusion: The health and human services in Florida serve children as well as new or expecting mothers. Any changes in Florida resident births affect the number of people potentially eligible for these services. It is probable that there will be cost savings to health and human services when comparing current law to the proposed amendment. The magnitude of those savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. Due to this, the impact is indeterminate.

Florida's education system allocates funds to school districts for K-12 operations based on student count through the Florida Education Finance Program (FEFP), which consists of both state and local funds. Local funds are generated from property tax revenue and are comprised of the .748 discretionary millage levy and the required local effort (RLE) levy. The RLE is the amount of funds a district generates from levying the state certified local effort millage rate on the district's ad valorem property.

School districts are also authorized to levy up to an additional 1.5 mills against the taxable value for school purposes, including charter schools, new construction, maintenance and renovation of existing facilities, school buses, and equipment, among other allowable uses.

A declining or slower growing student population would result in less funding allocated to school districts to maintain operations. School districts could increase the discretionary millage levies, however most districts are currently levying the maximum millage. This would disproportionately affect school districts where the property tax base does not generate as much revenue as other districts. The State may need to provide increased funding to school districts to supplement a declining student enrollment in order to maintain operations and aging infrastructure to provide an accessible, quality free education.

Conclusion: While the constitutional amendment could result in an aggregate statewide cost savings from a reduction in the provision of educational services due to fewer live births, the negative impacts of a declining student population may be acutely felt in school districts that rely heavily on state funding for district operations and capital needs and could necessitate an increase in state subsidy to those districts. Therefore, the fiscal impact on state and local education budgets is indeterminate.

References:

- Section 1011.62, F.S., establishes the FEFP funding formula, RLE, and the discretionary millage
 - All 67 school districts levy maximum .748 discretionary mills
- Section 1011.71(2), F.S., authorizes 1.5 mills against taxable value for school purposes
 - 58 of 67 school districts levy maximum 1.5 discretionary mills

C. Health and Human Services

Consolidated Appropriations Act, Pub. L. No. 117-103, §506-507, 136 Stat. 49, 336 (2022), the Hyde Amendment, prohibits any federal “funds appropriated in [the] Act” to be “expended for any abortion.” In practice, this functions to prevent federal Medicaid coverage of abortions except in certain situations (i.e. if the pregnancy is the result of an act of rape or incest; or, generally, if the pregnancy is jeopardizing the health of the mother). The Hyde Amendment specifically indicates that it does not preempt state funding of abortions.

The Florida Statutes contain a mirror of the Hyde Amendment which prevents the expenditure of state funds on abortions except in cases where conception was through rape or incest or where the life of the mother is in jeopardy. Fla. Stat. §390.0111(15).

If the proposed amendment is approved, section 390.0111(15) will be challenged as being violative of a woman’s right to an abortion because the prohibition on funding “prohibit[s], penalize[s], delay[s], or restrict[s] abortion” Costly litigation will undoubtedly ensue, and a court may likely find that the section is unconstitutional. This likely scenario has borne out in many other states. Currently, 17 state “Medicaid” programs cover elective abortions. In 10 of these 17 states, courts have intervened (through affirmative litigation) to mandate that states provide this funding coverage. This is a precedential trend. Whether Florida would follow this trend is an open question but one which seems more likely than not. The likelihood of this eventuality is bolstered by the fact that the proposed constitutional amendment would create a constitutional abortion right that is broader, more direct, and more affirmative than its counterparts in other states where legislatures, regulatory agencies, or courts have mandated state “Medicaid” coverage for elective abortions.

The Florida Supreme Court in 2001 concluded that the State need not subsidize abortions, however that was at a time when the Court believed an implicit right to elective abortion existed within the constitution’s privacy clause language. see, *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). Of course, the Florida Supreme Court has now rejected that the constitution recognizes any right to elective abortion, a doctrinal shift Amendment 4 seeks to address with an explicit right to abortion. If the proposed amendment was adopted and litigation brought to compel the state to subsidize abortions, the Florida Supreme Court could not, therefore, rely upon *Renee B.* as precedent of a binding or persuasive nature. The abortion right Amendment 4 seeks to constitutionalize is broader and explicit, as compared to the abortion right previously believed to be implicit within other privacy rights guaranteed by the constitution. Additionally, current Florida law allows public funding for abortions in cases of pregnancy by rape or incest or when “medically necessary to preserve the life of the pregnant woman or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition.” Fla. Stat. §390.0111(15)(a)(2). But because Amendment 4 does not define “patient’s health,” we must assume that “patient’s health”—as determined by undefined “healthcare providers” would contemplate conditions far broader than those contained in section 390.0111(15)(a)(2)—including psychological conditions which the statute expressly proscribes. This not only guarantees future litigation on whether that funding prohibition exception is unconstitutionally narrow, it demonstrates that a court could conclude that the State must expand the circumstances under which the State must subsidize abortions.

If section 390.0111(15) is found to be unconstitutional and Florida is required to cover the cost of elective abortions or abortions deemed necessary to protect a much-expanded view of the patient's health as contemplated in Amendment 4, the state will incur millions of dollars of new Medicaid costs.

In fact, a comprehensive review of the financial impacts of abortion policy¹ submitted to the Conference shows that when states subsidize the costs of abortions, the rate of abortions in those states increase, thereby compounding the cost.

If the state covers the cost of abortions, the rate of abortions will increase thereby decreasing the birth rate. The decrease in birth rate will necessarily have an impact on the state's fiscal health. As shown in materials submitted to the Conference, a decrease in birth rate could affect Florida's revenue by decreasing sales taxes and property taxes. Additionally, credit rating agencies score a declining birth rate negatively which could affect the state's overall credit rating. The credit worthiness of Florida is essential to the state's ability to borrow money and build and maintain infrastructure. Especially important to Florida is the ability to attract and support affordable insurance options for Floridians.

Approval of the proposed amendment will lead to costly litigation regarding the state funding of abortions. A court could find that Florida's statutory prohibition on state funds for abortions is unconstitutional and may mandate funding. This will correspondingly increase the rate of abortions and decrease the birth rate. A decrease in birth rate could decrease Florida's fiscal health and credit rating thereby decreasing revenues and increasing costs.

Conclusion: The health and human services in Florida serve children as well as new or expecting mothers. Any changes in Florida resident births affect the number of people potentially eligible for these services. While there could be cost savings to health and human services due to fewer live births, the magnitude of any potential savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. Also, under current law, the state does not have an obligation to pay for abortions. The proposed constitutional amendment does not expressly create a new obligation for the state to pay for abortions, however it is highly probable—based on the experience of many other states—that abortion proponents will bring affirmative litigation arguing that the state must subsidize elective abortions. In that case, it is likely that a court could find Florida's statutory prohibition on state funds for abortions to be unconstitutional and could mandate public funding of abortions. Due to the costs associated with the probable increase in complex and prolonged litigation, and specifically around the question of state Medicaid funding of abortion, the specific impact cannot be determined.

¹ "Fiscal Impact Statement for Amendment 4" by Michael J. New, Ph.D., submitted to the FIEC July 2024 Conference on July __, 2024.

Proposed new D. Litigation Costs

Florida Supreme Court and FIEC precedent suggests that a financial impact statement (FIS) may—and should—account for increased litigation costs that may result from passage of the proposed amendment. In *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, the Supreme Court approved the following FIS:

The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment’s absence.

24 So. 3d 1198, 1199 (Fla. 2009). It made no difference to the Court that the potential for increased litigation costs in that case depended on future legislative action. *Id.* at 1201-02 (observing that the Court has approved FISs that “explained that the probable impact of . . . proposed amendments was dependent on future action by the Legislature and, therefore, could not be determined”) (citing *Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So.2d 471 (Fla. 2007)).¹

If passed, Amendment 4 would generate protracted litigation concerning all existing abortion statutes, rules, and ordinances regulating abortion and any abortion regulation passed by the Legislature or a political subdivision in the future. At oral argument in the advisory opinion proceedings for Initiative Petition 23-07, the sponsor’s advocate conceded that Amendment 4 would return Florida to a pre-*Dobbs* legal landscape, where all attempts to regulate abortion regulations will necessitate litigation in the circuit courts, through the district courts of appeal, and up to the Florida Supreme Court:

JUSTICE COURIEL: “Is it your position that a reasonable voter would understand that this does away with all existing regulation of where an abortion can be performed, for example? Because the plain effect of the text, say your opponents, could say that a reasonable reader of this language, is indeed quite sweeping, and might have that effect”

SPONSOR’S ADVOCATE: “The plain language does not . . . limit the State in its ability to regulate healthcare”

JUSTICE COURIEL: “. . . The plain text of the language says you can’t ‘delay’ an abortion. Well, causing someone to go to a licensed clinic might be a ‘delay,’ as opposed to . . . using some abortifacient at home.”

SPONSOR’S ADVOCATE: “. . . Regulation encompasses prohibitions, it encompass penalizations, but those terms do not encompass all regulations the State may impose”

JUSTICE COURIEL: “But we have 50 years of abortion jurisprudence where so much of the fight was about ‘delay’ or ‘restrict,’ was about you know, regulation”

¹ See also *Advisory Opinion to the Att’y Gen. re Standards for Establishing Legislative Dist. Boundaries*, 2 So. 3d 161, 166 (Fla. 2009) (disputing the FIEC’s determination that the proposed amendment would lead to increased litigation costs for state and local governments and finding the estimate of “millions of dollars” impermissibly vague but acknowledging that the FIS may and should notify voters of increased litigation costs when they are likely to occur).

SPONSOR’S ADVOCATE: “Well of course. If there was a regulation that was challenged as being a prohibition, delay, restriction, or penaliz[ation of] abortion, it would be back before this Court. It will be before this Court to make that determination”

Florida Channel, *2/7/24 Florida Supreme Court Oral Arguments: SC 2023-1392 Advisory Opinion to the Attorney General Re: Limiting Government Interference with Abortion* at 36:17-38:46, available at <https://thefloridachannel.org/videos/2-7-24-florida-supreme-court-oral-arguments-sc2023-1392-advisory-opinion-to-the-attorney-general-re-limiting-government-interference-with-abortion/>.

Before *Dobbs* held that a right to abortion does not exist under the United States Constitution, abortion regulations were subject to judicial review under the “trimester framework” established by *Roe v. Wade*, and later the “undue burden standard” announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Roe*, 410 US 113 (1973); *Casey*, 505 US 833 (1992).² As the colloquy between Justice Couriel and the sponsor’s advocate shows, if Amendment 4 passes and takes effect, Florida laws attempting to regulate abortion would be subject to judicial review, likely under an “undue delay” or “undue restriction” standard reminiscent of *Casey*’s undue burden standard. Existing abortion regulations that would likely be challenged include but are not necessarily limited to:

- **Heartbeat Protection Act:** statute prohibits a physician from knowingly performing or inducing an abortion if the physician determines the gestational age of the fetus is more than 6 weeks (with exceptions for medical necessity, rape, and incest).³
- **Parental consent:** statute requires physician to obtain written consent from a parent or legal guardian before performing or inducing the termination of a pregnancy of a minor.⁴
- **Physician requirement:** statute prohibits abortions from being performed at any time except by a physician as defined in section 390.011, Florida Statutes.⁵
- **Licensing & sanitation:** statute and AHCA rules restrict where abortions may be performed, impose sanitization standards for those facilities, and mandate annual agency inspections.⁶
- **Admitting privileges:** statute requires physicians who perform abortions to have admitting privileges at a hospital within reasonable proximity to the abortion clinic and requires abortion clinics to have a written patient transfer agreement with a hospital within reasonable proximity to the clinic.⁷
- **Medical screening:** statute and AHCA rules require physician to obtain the pregnant woman’s medical history, perform a physical examination, and conduct appropriate laboratory tests.⁸

² According to the Center for Reproductive Rights, states defending abortion regulations spent \$10 million *in attorney’s fees alone* from 2015-2019. Texas faced the highest costs, with \$2,297,860 in attorney’s fees. Dan Keating, *Abortion restrictions are costing states millions of dollars — in fees for the other side*, Washington Post (Sept. 23, 2019), <https://www.washingtonpost.com/national/2019/09/23/abortion-restrictions-are-costing-states-millions-dollars-fees-other-side/>.

³ § 390.0111(1), Fla. Stat. If The Heartbeat Protection Act is successfully challenged, the effect of state’s 15-week ban may also be litigated.

⁴ § 390.01114, Fla. Stat.

⁵ § 390.0111(2), Fla. Stat.

⁶ § 390.012(3), Fla. Stat.

⁷ § 390.012(2), Fla. Stat.

⁸ § 390.012(3)(d), Fla. Stat.

- **Waiting period:** statute requires a physician to inform a pregnant woman at least 24 hours before the abortion about the risks and the nature of the procedure.⁹
- **In-person counseling:** statute requires disclosure of risks and nature of the abortion procedure to be disclosed orally, while the physician and pregnant woman are physically present in the same room.¹⁰
- **Informed consent materials:** statute requires pregnant woman to be provided printed materials prepared by the Department of Health describing various stages of fetal development, listing entities that offer alternatives to terminating the pregnancy, and detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.¹¹
- **Ultrasound requirements:** statute requires physician performing abortion to perform an ultrasound to determine the probable gestational age of the fetus and to offer the pregnant woman an opportunity to view the images.¹²
- **Regulation of abortion procedure:** statute and AHCA rules require appropriate use of general and local anesthesia, appropriate precautions such as the establishment of intravenous access, and appropriate monitoring of vital signs throughout the abortion procedure.¹³
- **Regulation of abortion method:** statute prohibits physician from performing “partial-birth abortion” by partially vaginally delivering a living fetus before killing the fetus and completing the delivery and creates a civil action on the part of the father.¹⁴
- **Disposal of fetal remains:** statute and AHCA rules require fetal remains to be disposed of in a sanitary manner.¹⁵
- **Regulation of recovery and follow-up care:** statute and AHCA rules require abortion clinics to provide for monitorization by medical professionals capable of providing basic cardiopulmonary resuscitation, instructions regarding access to medical care for complications, and a postabortion medical visit that includes a medical examination and a review of the results of laboratory tests and a urine pregnancy test.¹⁶
- **Failed abortions:** statute entitles an infant born alive during or immediately after an attempted abortion to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive in the course of natural birth.¹⁷
- **Refusal to participate:** statute immunizes hospitals and other persons from liability for refusing to participate in abortions.¹⁸
- **Restriction on state funding and contracting:** statute precludes state agencies, local governmental entities, and managed care plans from expending funds for the benefit of, paying funds to, or initiating or renew a contract with an organization that owns, operates, or

⁹ § 390.0111(3)(a)1., Fla. Stat.

¹⁰ § 390.0111(3)(a)1.a., Fla. Stat.

¹¹ § 390.0111(3)(a)2., Fla. Stat.

¹² § 390.0111(3)(a)1.b., Fla. Stat.

¹³ § 390.012(3)(e), Fla. Stat.

¹⁴ § 390.0111(5), Fla. Stat.; § 390.011(10), Fla. Stat.

¹⁵ § 390.0111(7), Fla. Stat.

¹⁶ § 390.012(3)(f-g), Fla. Stat.

¹⁷ § 390.0111(12), Fla. Stat.

¹⁸ § 390.0111(8), Fla. Stat.

is affiliated with one or more clinics that are licensed under this chapter and perform abortions (with exceptions for medical necessity, rape, and incest).¹⁹

- **Medicaid reimbursement:** AHCA rules withhold Medicaid reimbursement for abortions (with exceptions for medical necessity, rape, and incest).²⁰
- **ACA plan coverage:** statute prohibits healthcare plans purchased with state or federal funds through an Affordable Care Act exchange to cover abortions (with exceptions for danger of death, rape, and incest).²¹
- **Recordkeeping & reporting:** AHCA rules impose monthly reporting requirements on abortion clinics.²²

These types of regulations were litigated exhaustively under *Roe* and *Casey* and would likely be relitigated under Amendment 4.²³ These cases confirm the public comment at the July 1, 2024 hearing that

¹⁹ § 390.0111(15), Fla. Stat.

²⁰ Fla. Admin. Code R. 59G-1.045(6) (incorporating by reference the State of Florida Abortion Certification Form, AHCA MedServ Form 011, June 2016, <http://www.flrules.org/Gateway/reference.asp?No=Ref-07013>).

²¹ § 627.6699(16), Fla. Stat.

²² Fla. Admin. Code R. 59AER24-2.

²³ **Physician requirement:** see § 408.07(25), Fla. Stat. (defining “healthcare provider”); see also, e.g., *Whole Woman’s Health All. v. Hill*, 493 F. Supp. 3d 694, 715 (S.D. Ind. 2020) (reviewing Indiana statute providing that only a physician is authorized to perform a first trimester abortion); *Wright v. State*, 351 So. 2d 708 (Fla. 1977) (reviewing Florida statute making it a crime for non-physicians to perform abortions). **Heartbeat Protection Act:** see, e.g., *Roe*, 410 US 113 (subjecting state abortion bans to strict scrutiny before viability); *Casey*, 505 US 833 (similar); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (reviewing Missouri statute defining “viability”). **Parental consent:** see, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (reviewing Massachusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of 18); *In Re T.W.*, 551 So. 2d 1186 (1989). **Licensing & sanitation:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana statute prohibiting the performance of abortions outside licensed abortions clinics, ambulatory surgical centers, or hospitals); *State, Agency for Healthcare Admin. v. Planned Parenthood of Sw. & Cent. Fla., Inc.*, 207 So. 3d 1032 (Fla. 1st DCA 2017). **Admitting privileges:** see, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (reviewing Texas law requiring admitting privileges and surgical center requirements for abortion facilities); *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299 (2020) (reviewing similar Louisiana law); *EMW Women’s Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (reviewing similar Kentucky law); *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana law requiring abortionists to have admitting privileges). **Medical screening:** see, e.g., *Hopkins v. Jegley*, 508 F. Supp. 3d 361 (E.D. Ark. 2020) (reviewing Arkansas statute imposing criminal and civil penalties on physicians who failed make reasonable efforts to obtain pregnant woman’s medical records relating to her entire pregnancy history before performing an abortion). **Waiting period:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute requiring a 24-hour waiting period); *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Noem*, 584 F. Supp. 3d 759 (D.S.D. 2022) (reviewing South Dakota statute requiring third appointment and waiting period before providing two-medication regimen to induce abortion); *Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (reviewing an Ohio statute requiring a 24-hour waiting period); *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216 (Fla. Dist. Ct. App. 1st Dist. 2019), *State v. Presidential Women’s Ctr.*, 937 So. 2d 114 (Fla. 2006) (reviewing Florida’s informed consent requirements). **In-person counseling:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana’s “telemedicine ban” prohibiting healthcare providers from using telemedicine to prescribe “an abortion inducing drug”). **Informed consent materials:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute that prohibited an abortion being performed unless the woman certified in writing that she had been informed of the availability of materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion). **Ultrasound requirements:** see, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (reviewing Missouri statute specifying that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is “viable” by performing “such

constitutional challenges to abortion regulations are not amenable to settlement and are therefore protracted and costly for state government.

Conclusion: The proposed constitutional amendment will directly lead to multiple prolonged constitutional challenges of existing state law and the state's abortion regulations, which will increase the state's litigation costs. The increase in prolonged and complex litigation will substantially increase the amount of funds expended by the State for litigation expense on an annual basis, but because specific litigation costs are dependent on a multitude of case-specific factors that manifest when any particular case is filed and tried, the precise amount of this increase in litigation expenses cannot be determined at this time.

medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity"). **Regulation of abortion method:** see, e.g., *Danforth*, 428 U.S. at 69 (reviewing Missouri statute prohibiting, after the first 12 weeks of pregnancy, the abortion procedure of saline amniocentesis); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (reviewing Nebraska statute criminalizing the performance of partial birth abortions); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (similar). **Disposal of fetal remains:** see, e.g., *Jegley*, 508 F. Supp. 3d 361 (reviewing Arkansas statute requiring physicians to ensure disposal of embryonic and fetal tissue in accordance with Arkansas Final Disposition Rights Act). **Refusal to participate:** see Harris Meyer, *Malpractice lawsuits over denied abortion care may be on the horizon*, KFF Health News (June 23, 2023), <https://www.cbsnews.com/news/abortion-laws-medical-malpractice-lawsuits-after-dobbs-ruling/>. **Medicaid reimbursement:** see section [redacted] of this report, *supra*. **Recordkeeping & reporting:** see, e.g., *Casey*, 505 U.S. at 881; *Danforth*, 428 U.S. at 69.

Consolidated Appropriations Act, Pub. L. No. 117-103, §506-507, 136 Stat. 49, 336 (2022), the Hyde Amendment, prohibits any federal “funds appropriated in [the] Act” to be “expended for any abortion.” In practice, this functions to prevent federal Medicaid coverage of abortions except in certain situations (i.e. if the pregnancy is the result of an act of rape or incest; or generally, if the pregnancy is jeopardizing the health of the mother). The Hyde Amendment specifically indicates that it does not preempt state funding of abortions.

Florida law has similar prohibitions to the Hyde amendment. Section 390.0111(15), Florida Statutes contains a prohibition on expending funds for the benefit of, payment of funds to, or contracting with organizations that provide abortion services, which include managed care plans. Under this statute, public funds may cover abortions resulting from rape and incest and when “medically necessary to preserve the life of the pregnant woman or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition.” Section 627.6696 applies similar restrictions for public funds expended for state health exchanges and for Health Maintenance Organizations.

If Amendment 4 is adopted, counsel for the Florida Attorney General has advised it is inevitable that there will be litigation about whether the amendment renders Florida’s funding restrictions unconstitutional because—it will be argued—the restrictions “prohibit, penalize, delay, or restrict abortion...” In answering that open question which will inevitably arise, a court could find that these funding restrictions are unconstitutional. This scenario has borne in 15 other states where courts have concluded that those state’s abortion funding restrictions are unconstitutional or unconstitutionally narrow.

Michigan’s example is instructive. Its Medicaid restrictions were upheld in a 1992 court decision but are now being relitigated under the pro-abortion amendment adopted by Michigan voters in 2022. The complaint, filed on June 27, 2024, cites other states where Medicaid restrictions have been struck down and argues that the new right to an abortion in Michigan is even clearer than it was in those cases: “[Other states] have relied on general equal rights amendments—which do not address reproductive care as directly as the Michigan Constitution—in finding that government health care programs that single out abortion from coverage are unconstitutional.”¹ Plaintiffs, who—like Amendment 4’s proponents, here—are represented by the ACLU, also argue that “the coverage ban burdens and infringes on the constitutional rights of Medicaid eligible patients by denying them coverage for abortion care *and delaying their care.*”² It’s important to note that a court could likely conclude that Amendment 4, as written, intends to provide broader abortion protections than Michigan’s 2022 amendment. Michigan’s “right to reproductive freedom” still contemplates allowable government regulation that prohibits, penalizes, delays, or restricts abortion.³ Amendment 4, meanwhile, prohibits any government action that prohibits, penalizes, delays, or restricts abortion.

The Florida Supreme Court in 2001 concluded that the state need not subsidize abortions, however that ruling was issued at a time when the Court believed an implicit right to elective abortion existed within

¹ See Complaint, *Young Women’s Christian Ass’n of Kalamazoo, Mich. v. State*, No. 24-000093-MM at ¶181, (Mich. Ct. Cl.) (filed June 27, 2024) available at https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf.

² *Id.* at p. 10.

³ *Id.* at ¶ 4.

the State Constitution's right to privacy. See *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). The Florida Supreme Court adopted the trial court's reasoning that "[t]he plaintiffs' argument, in effect, says to the government: leave me alone, stay out of my private affairs, and let me chose [sic] what it is I want to do concerning reproduction, except that I want you to finance my choice. This the constitution does not require." *Id.* at 1040. But Amendment 4 would dramatically alter the legal landscape. Rather than an abortion right deriving from privacy guarantees, Amendment 4 would constitutionally prohibit any government action that prohibits, penalizes, delays, or restricts abortion. The question would not be whether the Supreme Court should recede from *Renee B.*, but whether amendment itself abrogates *Renee B.* Put simply, it would likely be much easier for future plaintiffs to argue that Florida's Medicaid restrictions "penalize," "delay," or "restrict" abortion than it was for the *Renee B.* plaintiffs to argue that Florida's Medicaid restrictions constituted "government intrusion into private affairs." In sum, *Renee B.* would not foreclose a Florida court from ruling that Florida's existing funding restrictions are unconstitutional under Amendment 4.⁴

State government and state courts will incur increased litigation costs related to Amendment 4, if adopted.

If a court ruled that the state is required to cover the cost of more abortions, the state would incur higher costs in the health and human services system. Further, a comprehensive review of the financial impacts of public abortion subsidies submitted to the Conference indicates that the rate of abortions increases under regimes where public subsidy exists, thereby potentially compounding that cost.

Conclusion: The health and human services programs in Florida serve children as well as new or expecting mothers. Any changes to resident births affect the number of people potentially eligible for these services. While there could be cost savings to health and human services due to fewer live births, the magnitude of any savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. The state does not currently have an obligation to pay for most abortions, and the proposed amendment does not expressly create a new obligation for the state to pay for elective abortions. However, if Amendment 4 is adopted, it is probable that there will be litigation challenging the constitutionality of Florida's funding restrictions. Should those statutes be found unconstitutional under Amendment 4, the state would incur higher costs subsidizing more abortions than those that qualify for public funding under current law. Because the precise potential savings depend on variable factors, and the precise potential costs depend on complex litigation, the effect of the passage of the amendment on the state budget cannot be determined.

⁴ Amendment 4 additionally prohibits laws that penalize, delay, or restrict post-viability abortions when necessary to protect the "patient's health." "Patient's health" is not defined but necessarily covers a broader range of conditions than those set forth in Fla. Stat. § 390.0111(15), which specifically defines medical necessity and excludes psychological conditions. It is highly probable that this, too, would give rise to litigation challenging that statute as unconstitutionally narrow under Amendment 4. Florida courts would have to resolve is uncertainty and could conclude that Florida must subsidize a broader category of abortions than it does under current law.

Proposed new D. Litigation Costs

A financial impact statement (FIS) may—and should—account for likely increased litigation costs that will result from passage of a proposed amendment. *See Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 24 So. 3d 1198, 1199-1202 (Fla. 2009) (approving an indeterminate FIS even when it observed the potential for increased litigation costs *that depended on future legislative action*).

If adopted, Amendment 4 will generate protracted litigation from challengers asserting that the amendment “protects a broader range of abortion rights” than previously recognized in Florida, and therefore should invalidate any state or local abortion-related statute or regulation that “prohibit(s), penalize(s), delay(s), or restrict(s) abortion”¹ During oral argument in the advisory opinion proceedings for Initiative Petition 23-07, the sponsor’s advocate conceded that Amendment 4 would “of course” lead to litigation challenging regulations that run afoul of the amendment’s language—challenges that would have to be ultimately decided in the Florida Supreme Court.²

If Amendment 4 is adopted, existing abortion regulations that would likely be challenged include but are not limited to:

- **Heartbeat Protection Act:** statute prohibits a physician from knowingly performing or inducing an abortion if the physician determines the gestational age of the fetus is more than 6 weeks (with exceptions for medical necessity, rape, and incest).³
- **Parental consent:** statute requires physician to obtain written consent from a parent or legal guardian before performing or inducing the termination of a pregnancy of a minor.⁴
- **Physician requirement:** statute prohibits abortions from being performed at any time except by a physician as defined in section 390.011, Florida Statutes.⁵
- **Restrictions on taxpayer funding for abortions:** statute precludes state agencies, local governmental entities, and managed care plans from expending funds for the benefit of, paying funds to, or initiating or renewing a contract with an organization that owns, operates, or is affiliated with one or more clinics that are licensed under this chapter and perform abortions (with exceptions for rape, and incest, and medical necessity).⁶
- **Medicaid reimbursement:** AHCA rules withhold Medicaid reimbursement for abortions (with exceptions for rape, and incest, and medical necessity).⁷
- **Licensing & sanitation:** statute and AHCA rules restrict where abortions may be performed, impose sanitization standards for those facilities, and mandate annual agency inspections.⁸

¹ See Email from Deputy Solicitor General Daniel Bell sent to Chris Spencer, Governor’s Principal submitted July 8, 2024.

² Florida Channel, *2/7/24 Florida Supreme Court Oral Arguments: SC 2023-1392 Advisory Opinion to the Attorney General Re: Limiting Government Interference with Abortion* at 36:17-38:46, available at <https://thefloridachannel.org/videos/2-7-24-florida-supreme-court-oral-arguments-sc2023-1392-advisory-opinion-to-the-attorney-general-re-limiting-government-interference-with-abortion/>.

³ § 390.0111(1), Fla. Stat. If The Heartbeat Protection Act is successfully challenged, the effect of state’s 15-week ban may also be litigated.

⁴ § 390.01114, Fla. Stat.

⁵ § 390.0111(2), Fla. Stat.

⁶ § 390.0111(15), Fla. Stat.

⁷ Fla. Admin. Code R. 59G-1.045(6) (incorporating by reference the State of Florida Abortion Certification Form, AHCA MedServ Form 011, June 2016, <http://www.flrules.org/Gateway/reference.asp?No=Ref-07013>).

⁸ § 390.012(3), Fla. Stat.

- **Admitting privileges:** statute requires physicians who perform abortions to have admitting privileges at a hospital within reasonable proximity to the abortion clinic and requires abortion clinics to have a written patient transfer agreement with a hospital within reasonable proximity to the clinic.⁹
- **Medical screening:** statute and AHCA rules require physician to obtain the pregnant woman’s medical history, perform a physical examination, and conduct appropriate laboratory tests.¹⁰
- **Waiting period:** statute requires a physician to inform a pregnant woman at least 24 hours before the abortion about the risks and nature of the procedure.¹¹
- **In-person counseling:** statute requires disclosure of risks and nature of the abortion procedure to be disclosed orally, while the physician and pregnant woman are physically present in the same room.¹²
- **Informed consent materials:** statute requires pregnant woman to be provided printed materials prepared by the Department of Health describing various stages of fetal development, listing entities that offer alternatives to terminating the pregnancy, and detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.¹³
- **Ultrasound requirements:** statute requires physician performing abortion to perform an ultrasound to determine the probable gestational age of the fetus and to offer the pregnant woman an opportunity to view the images.¹⁴
- **Regulation of abortion procedure:** statute and AHCA rules require appropriate use of general and local anesthesia, appropriate precautions such as the establishment of intravenous access, and appropriate monitoring of vital signs throughout the abortion procedure.¹⁵
- **Regulation of abortion method:** statute prohibits physician from performing “partial-birth abortion” by partially vaginally delivering a living fetus before killing the fetus and completing the delivery and creates a civil action on the part of the father.¹⁶
- **Disposal of fetal remains:** statute and AHCA rules require fetal remains to be disposed of in a sanitary manner.¹⁷
- **Regulation of recovery and follow-up care:** statute and AHCA rules require abortion clinics to provide for monitorization by medical professionals capable of providing basic cardiopulmonary resuscitation, instructions regarding access to medical care for complications, and a postabortion medical visit that includes a medical examination and a review of the results of laboratory tests and a urine pregnancy test.¹⁸
- **Failed abortions:** statute entitles an infant born alive during or immediately after an attempted abortion to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive in the course of natural birth.¹⁹

⁹ § 390.012(2), Fla. Stat.

¹⁰ § 390.012(3)(d), Fla. Stat.

¹¹ § 390.0111(3)(a)1., Fla. Stat.

¹² § 390.0111(3)(a)1.a., Fla. Stat.

¹³ § 390.0111(3)(a)2., Fla. Stat.

¹⁴ § 390.0111(3)(a)1.b., Fla. Stat.

¹⁵ § 390.012(3)(e), Fla. Stat.

¹⁶ § 390.0111(5), Fla. Stat.; § 390.011(10), Fla. Stat.

¹⁷ § 390.0111(7), Fla. Stat.

¹⁸ § 390.012(3)(f-g), Fla. Stat.

¹⁹ § 390.0111(12), Fla. Stat.

- **Refusal to participate:** statute immunizes hospitals and other persons from liability for refusing to participate in abortions.²⁰
- **ACA plan coverage:** statute prohibits healthcare plans purchased with state or federal funds through an Affordable Care Act exchange to cover abortions (with exceptions for danger of death, rape, and incest).²¹
- **Recordkeeping & reporting:** AHCA rules impose monthly reporting requirements on abortion clinics.²²

Before the Florida Supreme Court ruled that the state constitution protected no right to abortion in 2024, the state was compelled to defend against many challenges to these precise types of abortion laws and regulations in state and federal courts.²³ The state’s defense of those lawsuits was costly and often

²⁰ § 390.0111(8), Fla. Stat.

²¹ § 627.6699(16), Fla. Stat.

²² Fla. Admin. Code R. 59AER24-2.

²³ **Physician requirement:** see § 408.07(25), Fla. Stat. (defining “healthcare provider”); see also, e.g., *Whole Woman’s Health All. v. Hill*, 493 F. Supp. 3d 694, 715 (S.D. Ind. 2020) (reviewing Indiana statute providing that only a physician is authorized to perform a first trimester abortion); *Wright v. State*, 351 So. 2d 708 (Fla. 1977) (reviewing Florida statute making it a crime for non-physicians to perform abortions). **Heartbeat Protection Act:** see, e.g., *Roe*, 410 US 113 (subjecting state abortion bans to strict scrutiny before viability); *Casey*, 505 US 833 (similar); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (reviewing Missouri statute defining “viability”). **Parental consent:** see, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (reviewing Massachusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of 18); *In Re T.W.*, 551 So. 2d 1186 (1989). **Licensing & sanitation:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana statute prohibiting the performance of abortions outside licensed abortions clinics, ambulatory surgical centers, or hospitals); *State, Agency for Healthcare Admin. v. Planned Parenthood of Sw. & Cent. Fla., Inc.*, 207 So. 3d 1032 (Fla. 1st DCA 2017). **Admitting privileges:** see, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (reviewing Texas law requiring admitting privileges and surgical center requirements for abortion facilities); *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299 (2020) (reviewing similar Louisiana law); *EMW Women’s Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (reviewing similar Kentucky law); *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana law requiring abortionists to have admitting privileges). **Medical screening:** see, e.g., *Hopkins v. Jegley*, 508 F. Supp. 3d 361 (E.D. Ark. 2020) (reviewing Arkansas statute imposing criminal and civil penalties on physicians who failed make reasonable efforts to obtain pregnant woman’s medical records relating to her entire pregnancy history before performing an abortion). **Waiting period:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute requiring a 24-hour waiting period); *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Noem*, 584 F. Supp. 3d 759 (D.S.D. 2022) (reviewing South Dakota statute requiring third appointment and waiting period before providing two-medication regimen to induce abortion); *Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (reviewing an Ohio statute requiring a 24-hour waiting period); *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216 (Fla. Dist. Ct. App. 1st Dist. 2019), *State v. Presidential Women’s Ctr.*, 937 So. 2d 114 (Fla. 2006) (reviewing Florida’s informed consent requirements). **In-person counseling:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana’s “telemedicine ban” prohibiting healthcare providers from using telemedicine to prescribe “an abortion inducing drug”). **Informed consent materials:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute that prohibited an abortion being performed unless the woman certified in writing that she had been informed of the availability of materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion). **Ultrasound requirements:** see, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (reviewing Missouri statute specifying that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is “viable” by performing “such medical examinations and tests as are necessary to make a finding of [the fetus’] gestational age, weight, and lung maturity”). **Regulation of abortion method:** see, e.g., *Danforth*, 428 U.S. at 69 (reviewing Missouri statute prohibiting, after the first 12 weeks of pregnancy, the abortion procedure of saline amniocentesis); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (reviewing Nebraska statute criminalizing the performance of partial birth abortions);

protracted.²⁴ If, therefore, Amendment 4 is adopted, state government and state courts will incur increased litigation costs. Multiple submissions to the Conference confirm that litigation on these issues is far from speculative.²⁵ And experience in other states confirms the high probability that Florida will incur new and substantial litigation expenses if Amendment 4 is adopted.²⁶

Even more abortions will occur in the state if lawsuits succeed invalidating Florida’s laws listed above. For example, if a court strikes down Florida’s parental consent requirement, the state will expect to see more abortions performed on minors²⁷; or if a court invalidates Florida’s physician-only requirement²⁸, more abortions will result because healthcare providers beyond physicians would then be eligible to perform those procedures.

Conclusion: If the voters adopt Amendment 4, there is a high probability state government and state courts will face costly and prolonged litigation to defend Florida’s abortion laws and regulations. Because the instances of litigation will increase beyond that which would occur in Amendment 4’s absence, adoption of the amendment will substantially increase the state’s litigation costs. Because, however, specific litigation costs are dependent on a multitude of case-specific factors that manifest when particular cases are filed and tried, the precise amount of this increase in litigation expenses cannot be determined at this time.

Gonzales v. Carhart, 550 U.S. 124 (2007) (similar). **Disposal of fetal remains:** see, e.g., *Jegley*, 508 F. Supp. 3d 361 (reviewing Arkansas statute requiring physicians to ensure disposal of embryonic and fetal tissue in accordance with Arkansas Final Disposition Rights Act). **Refusal to participate:** see Harris Meyer, *Malpractice lawsuits over denied abortion care may be on the horizon*, KFF Health News (June 23, 2023), <https://www.cbsnews.com/news/abortion-laws-medical-malpractice-lawsuits-after-dobbs-ruling/>. **Medicaid reimbursement:** see section [redacted] of this report, *supra*. **Recordkeeping & reporting:** see, e.g., *Casey*, 505 U.S. at 881; *Danforth*, 428 U.S. at 69.

²⁴ According to the Center for Reproductive Rights, states defending abortion regulations spent \$10 million *in attorney’s fees alone* from 2015-2019. Texas faced the highest costs, with \$2,297,860 in attorney’s fees. Dan Keating, *Abortion restrictions are costing states millions of dollars — in fees for the other side*, Washington Post (Sept. 23, 2019), <https://www.washingtonpost.com/national/2019/09/23/abortion-restrictions-are-costing-states-millions-dollars-fees-other-side/>.

²⁵ See e.g., Email from Deputy Solicitor General Daniel Bell sent to Chris Spencer, Governor’s Principal submitted July 8, 2024; “Comment on Amendment to Limit government Interference with Abortion (23-07) by Protect Women Florida submitted July 1, 2024; “Fiscal Impact Statement for Amendment 4” by Michael J. New, PHD., submitted to the FIEC July 2024 Conference on July 7, 2024.

²⁶ See Complaint, Young Women’s Christian Ass’n of Kalamazoo, Mich. v. State of Mich. and Dep’t of Health and Hum. Services, No. 24-000093-MM (Mich. Ct. Cl.) (filed June 27, 2024); “Comment on Amendment to Limit government Interference with Abortion (23-07) by Protect Women Florida submitted July 1, 2024.

²⁷ Data submitted by the Florida Agency for Health Care Administration, submitted to the FIEC July 2024 Conference on July __, 2024 (in the 18 months following Florida’s enactment of the parental consent requirement law compared to the 18 months before, there were 82 fewer minor abortions, a drop from 2,081 to 1,999 minor abortions, a 3.94 percentage decrease).

²⁸ See e.g., *Planned Parenthood of Mont. v. State of Mont.*, No. ADV-23-299 (Mont. 1st Jud. Dist. Ct. Lewis & Clark Cnty.) (Challenge by plaintiffs seeking to invalidate statute allowing only physicians and physician assistants to perform abortions); *Eight Ways State Policymakers Can Protect and Expand Abortion Rights and Access in 2023*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/2023/01/eight-ways-state-policymakers-can-protect-and-expand-abortion-rights-and-access-2023> (advocating for repeal of physician-only provision requirements because allowing more types of healthcare providers to perform abortions will increase abortion access and thus, the number of abortions).

Fertility Effect on Long-Term Government Revenues

The conference has unanimously determined that the proposed amendment will increase the number of abortions in Florida. Several submissions from interested parties made this same point.¹ Because of more abortions, the state's fertility rate will decrease and there will be a reduction in population growth which will negatively impact state and local budgets over time.² A 2022 report from the Pew Charitable Trusts, titled "The Long-Term Decline in Fertility—and What It Means for State Budgets," explained the potential long-term harm for state budgets of a declining fertility rate.³ The report noted that while states may experience short-term cost reductions from reduced fertility rates, "many of the most significant potential hits to tax revenues won't occur for decades." As the report explained, "Although many of [a declining] fertility's short-term fiscal effects—such as reducing the cost of education and children's health care—should be positive for state balance sheets, in the longer term the decline could lead to a decrease in major revenue streams, mirroring reductions in the labor force."⁴

An increase in the number of abortions similarly will affect the labor force participation rate in the short-term in two ways that will slightly reduce the labor force. On one hand, fewer individuals will need to leave the labor force in order to care for a child, but on the other hand fewer individuals will need to enter the labor force in order to earn additional income to provide for a child. The combination of slower population growth and a lower labor force participation rate would cause a reduction in the size of the labor force.⁵

A reduction in the labor force could reduce personal income which would reduce personal consumption of goods and services which will directly impact the state's budget. One of the state's main sources of income is sales tax. If individuals purchase fewer goods and services, this will have a direct negative effect on state and local government revenues.⁶

The economic impacts discussed above build over time as each year adds the effect of an additional cohort of abortions. While the impact in the year immediately following the adoption of the proposed amendment is based on the number of additional abortions during the first year, the impact in the tenth year following adoption of the proposed amendment will be based on the number of additional

¹ "Information for FIEC" submitted by The Heritage Foundation, submitted to the FIEC July 2024 Conference on July 4, 2024; "Comment on Amendment to Limit government Interference with Abortion (23-07)" by Protect Women Florida submitted to the FIEC July 2024 Conference on July 1, 2024; "Fiscal Impact Statement for Amendment 4" by Michael J. New, PHD., submitted to the FIEC July 2024 Conference on July 7, 2024.

² Pew Charitable Trusts, "The Long-Term Decline in Fertility—and What It Means for State Budgets," Issue Brief, December 5, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets#:~:text=State%20budgets%20have%20started%20to,may%20eventually%20threaten%20tax%20bases.> (accessed July 7, 2024).

³ *Id.*

⁴ *Id.*

⁵ "Information for FIEC" submitted by The Heritage Foundation, submitted to the FIEC July 2024 Conference on July 4, 2024; "Comment on Amendment to Limit government Interference with Abortion (23-07)" by Protect Women Florida submitted to the FIEC July 2024 Conference on July 1, 2024 (concluding that there will be a lower labor force if Amendment 4 is adopted).

⁶ Pew Charitable Trusts, *supra* note 2.

abortions throughout those ten years. After fifty years, the impact will be based on five decades of additional abortions, and so on.

Conclusion: Given the many variables that would drive the precise long-term revenue loss which is likely to be experienced by state and local governments over time, those effects cannot be estimated precisely and the effect on the state budget is indeterminate.

150 Word (138 words)

The proposed amendment could result in tens of thousands more abortions per year in Florida. The increase in abortions could be even greater if the amendment invalidates laws requiring parental consent before minors undergo abortions and those ensuring only licensed physicians perform abortions. There is also uncertainty about whether the amendment will require the state to subsidize abortions with public funds. Litigation to resolve those and other uncertainties will result in additional costs to state government and the state courts that will negatively impact the state budget. An increase in abortions may negatively affect the growth of state and local revenues over time. It may also result in short-term cost savings to certain government programs. But because those fiscal impacts cannot be estimated with precision, the total impact of the proposed amendment on the state budget is indeterminate.

500 Word (441 words)

Florida law currently prevents most abortions after a fetal heartbeat is detected. The proposed amendment prohibits any government action that prohibits, penalizes, delays, or restricts abortion before a fetus attains viability or after viability if necessary to protect a woman's health, as determined by a healthcare provider. If the proposed amendment is adopted, therefore, there could be tens of thousands more abortions in Florida each year. If adopted, many additional state and local statutes and rules regulating abortion would also likely be challenged as unconstitutional, including:

- **The Parental Consent for Abortion Act**, Fla.Stat. 390.01114, which requires physicians to obtain written consent from a parent before performing an abortion on a minor;
- **The Physician requirement**, Fla.Stat. 390.0111(2), which allows only licensed physicians to perform abortions; and
- **Restrictions on taxpayer funding for abortions**, Fla.Stat. 390.0111(15), which restricts the use of public funds to subsidize abortions, with exceptions for rape, incest, and medical necessity.

If such challenges succeed, even more abortions will result. The proposed amendment will likely lead to costly lawsuits which will negatively impact the state budget.

The outcomes of these lawsuits could further negatively impact the state budget. Courts could invalidate (as they have in 15 other states where challenges have been filed) Florida's restrictions on public funding for abortions and mandate public funding for more abortions. This possible outcome would likely offset or exceed any health care cost savings the State would experience due to fewer live births. However, the exact revenue impacts of the proposed amendment cannot be estimated with precision and are therefore indeterminate.

While the proposed amendment would result in likely cost savings from a reduction in educational services due to fewer live births, those possible savings may be outweighed by negative impacts to districts already experiencing a decline in student enrollment, where the effects of the amendment could exacerbate their financial constraints.

Economic literature links higher fertility rates to positive economic outcomes, including increases to state and local revenues in the form of sales taxes (Florida's main revenue source), property taxes, and registration fees. For this reason, demographic analysis is the first step taken by state economists when projecting Florida's revenues. Because more abortions would lead to fewer live births, the State's fertility rate would naturally decrease. In other jurisdictions, declining fertility rates have led to deteriorating

fiscal health and credit ratings. However, because there are highly variable interactions between birth outcomes and economic factors affecting personal or family income, the state and local revenue losses and cost savings resulting from more abortions cannot be determined with specificity.

Because these fiscal impacts cannot be estimated with precision, the total impact of the proposed amendment is indeterminate.

Judicial Rulings on Medicaid Coverage for Abortions

Laws restricting Medicaid funding for abortion (“Medicaid restrictions”) have been challenged under the United States Constitution and the state constitutions of at least 22 states. These challenges have been overwhelmingly successful. They have totally or partially invalidated Medicaid restrictions in 15 states.¹ These challenges have failed in five states, although in one of those states—Michigan—a new challenge has just been filed following the state’s adoption of a post-*Dobbs*, pro-abortion constitutional amendment.² Challenges in two states are unresolved.³

Of the five states that have rejected challenges to Medicaid restrictions, Florida is the only state whose high court had previously recognized a state constitutional right to abortion.⁴ Four of those five cases, therefore, do not relevantly inform the question Florida courts would face if Amendment 4 is adopted and litigation arises challenging the constitutionality of Florida’s current Medicaid restrictions. In the Florida case, *Renee B. v. Florida Agency for Health Care Administration*, the statutory prohibition on the use of state funds for abortion did not violate the Florida Constitution’s right to privacy—where the court then believed an abortion right implicitly resided.⁵ The FIEC previously concluded that Amendment 4 would not affect state funding of abortion, based on *Renee B.* and the fact that the proposed text “does not expressly create a new obligation for the state to pay for abortions.”⁶ The FIEC professed the belief that increased taxpayer funding would be contingent on “future legislative changes.”

¹ See table, *infra*. Alaska, Arizona, California, Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, and West Virginia.

² Florida, Idaho, Michigan, North Carolina, and Texas. The Pennsylvania Supreme Court initially rejected such challenges but later reversed itself. See *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1985).

³ Georgia and Nevada. As discussed below, there is now ongoing litigation in Michigan.

⁴ See *Doe v. Dep’t of Soc. Servs.*, 439 Mich. 650, 487 N.W.2d 166, 174 (1992) (“Whatever the merit of these and other arguments available to both sides concerning the existence of a separate state right to an abortion, we find it is unnecessary to decide that issue in this case, given our conclusion with regard to the funding question. As the discussion that follows makes clear, even if it is assumed arguendo that a state constitutional abortion right coextensive with the federal right exists, we are able to conclude that § 109a does not violate the Michigan Constitution, just as the United States Supreme Court was able to uphold the denial of public funding in *Maher* and *Harris*, without need to question the validity of *Roe*.”); *Rosie J. v. N. Carolina Dep’t of Hum. Res.*, 347 N.C. 247, 491 S.E.2d 535, 538 (1997) (Parker, J., dissenting) (dissenting opinion argued that Medicaid restrictions impermissibly interfered “with a pregnant woman’s right to choose abortion without unduly burdensome governmental interference” under *Roe*); *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2001 WL 34157539, at *2 (Idaho Dist. Aug. 17, 2001) (“Idaho’s appellate courts have never had an opportunity to address directly the issue of procreation and specifically the issue of abortion.”); *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 265 (Tex. 2002) (“[W]e have never decided whether the Texas Constitution creates privacy rights coextensive with those recognized under the United States Constitution[.]”).

⁵ 790 So.2d 1036 (Fla. 2001).

⁶ See Complete Financial Information Statement at 12 and 13, <http://edr.state.fl.us/Content/constitutional-amendments/2024Ballot/LimitGovernmentInterferencewithAbortionComplete%20Financial%20Information%20Statement%2023-07.pdf>.

This conclusion misreads *Renee B.*, misunderstands Amendment 4’s broad language, and ignores relevant case law throughout the country. **First, neither *Renee B.* nor any other judicial resolution of a challenge to a state Medicaid restriction has ever involved an explicit right to abortion, let alone a constitutional provision “expressly creat[ing] a new obligation for the state to pay for abortions.”** This is a crucially important distinction. Where challenges have succeeded, courts have relied on state constitutional abortion rights stronger than the federal right recognized by *Roe*. Unlike the rights recognized in *Roe* and *In re T.W.*, which were rooted in the “privacy” of reproductive decisions, Amendment 4 could arguably preempt any law “prohibit[ing], penaliz[ing], delay[ing], or restrict[ing] abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider.” It will be much easier for future plaintiffs to argue that Florida’s Medicaid restrictions “penalize,” “delay,” or “restrict” abortion than it was for the *Renee B.* plaintiffs to argue that Florida’s Medicaid restrictions constituted “government intrusion into private affairs.” If some questioned whether Amendment 4 creates an abortion right versus simply restricting government actions related to abortion, that would be a distinction without a difference. Under Amendment 4’s plain terms, challengers will argue that Florida’s existing Medicaid restrictions penalize, delay, or restrict abortion for Medicaid eligible women.

They already have. Medicaid restrictions previously upheld in state courts are already being challenged under pro-abortion amendments enacted after *Dobbs*. Michigan is a case in point. Its Medicaid restrictions were upheld in the 1992 *Doe* decision but are now being relitigated under the pro-abortion amendment adopted by Michigan voters in 2022. The complaint, filed on June 27, 2024, cites the other states where Medicaid restrictions have been struck down and argues that the new right to an abortion in Michigan is even clearer than it was in those cases: “[Other states] have relied on general equal rights amendments—which do not address reproductive care as directly as the Michigan Constitution—in finding that government health care programs that single out abortion from coverage are unconstitutional.”⁷ Plaintiffs, who—like Amendment 4’s proponents, here—are represented by the ACLU, also argue that “the coverage ban burdens and infringes on the constitutional rights of Medicaid eligible patients by denying them coverage for abortion care *and delaying their care*.”⁸ And it’s important to note that Amendment 4 is written to provide broader abortion protections than the amendment adopted by Michigan voters in 2022. A court could read Amendment 4’s absolute prohibition on government action that even arguably prohibits, penalizes, delays, or restricts abortion to be broader than Michigan’s “right to reproductive freedom,” which still contemplates allowable government regulation that prohibits, penalizes, delays, or restricts abortion.

Second, *Renee B.* did not address plaintiffs’ equal protection argument, and in fact expressly noted that the claim could be “raised in an appropriate tribunal in the future.” *Renee B.*, 790 So. 2d at 1041. *Renee B.* cannot be said to foreclose the

⁷ See Complaint in *The Young Women’s Christian Association in Kalamazoo v. State*, No. 24-000093-MM at ¶81, available at https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf.

⁸ *Id.* at page 10.

possibility of increased taxpayer funding of abortion in Florida when it did not even consider the argument on which plaintiffs have prevailed in many other states.

In short, it is a mistake to think that a highly probable challenge to Florida's Medicaid restrictions brought under Amendment 4 will result in the same judicial conclusion as *Renee B*. Whether Florida's existing Medicaid restrictions would be unconstitutional under Amendment 4 is an open question that would arise under a different legal landscape and that Florida courts would have to authoritatively resolve.

APPENDIX

States where court order mandated coverage for medically necessary and/or elective abortions in state Medicaid program:

Currently, three states – Alaska, California, and Connecticut – are under court orders to include coverage for both medically necessary *and* elective abortions in their state Medicaid programs. In twelve other states – Arizona, Illinois, Indiana, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, and West Virginia – state courts ordered increased coverage of non-elective abortions.

Alaska

The supreme court of Alaska held that statutes and regulations that limited abortions covered under Medicaid to only “medically necessary” abortions violated the Equal Protection Clause of the Alaska Constitution. *The Commissioner for the Department of Health & Social Services v. Planned Parenthood*, 436 P.3d 984 (Alaska 2019). Therefore, the court required the state to fund both medically necessary and elective abortions. *Id.*

Relevant constitutional provision: Art. 1 § 1 – “This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.”

Arizona

In *Simat Corp. v. Arizona Health Care Cost Containment Systems*, 56 P.3d 28 (Ariz. 2002), the Arizona supreme court held that, under privileges and immunities clause of the Arizona Constitution, the state could not refuse to pay for abortions for indigent women whose health was endangered by pregnancy, where it had already funded abortions for indigent women whose lives were endangered, or who were victims of rape or incest.

Relevant constitutional provision: Art. 2 § 13 – “No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.”

California

The state provided coverage for indigent women who decided to give birth but restricted funding for indigent women seeking an abortion. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 780 (Cal. 1981). The California supreme court held that this policy violated the right to privacy, equal protection, and due process. *Id.* The court noted that the state has no constitutional obligation to provide medical care to the poor, but once the state decided to make benefits available it bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise their “constitutional right” to abortion. *Id.* at 781.

Relevant constitutional provision: Art. 1 § 1 – “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” The supreme court of California held that this provision granted all women the “fundamental” right to choose whether or not to bear a child. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 785 (Cal. 1981).

Connecticut

A state regulation restricted abortion funding to cases where abortion was necessary to save the life of the mother. *Doe v. Maher*, 515 A.2d 134 (Conn.Super. 1986). The Superior Court of Connecticut held that this rule was contrary to the implementing statute of the state Medicaid program. Additionally, the court held that the regulation violated the plaintiffs right to privacy and equal protection under the state constitution. *Id.*

Relevant constitutional provisions: Art. I, § 10 – “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” [It is the court’s understanding in *Doe v. Maher* that there is a right to privacy implicit in this due process clause.]

Art. I, § 20 – “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.”

Illinois

Illinois’s Medicaid funding law was rewritten after *Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994), where an Illinois trial court enjoined the previous law which funded Medicaid abortions necessary to preserve a woman’s life but not those necessary to protect a woman’s health.

Indiana

In *Humphreys v. Clinic for Women, Inc.*, the Indiana Supreme Court held that “[s]o long as the Indiana Medicaid program pays for abortions for Medicaid-eligible women where necessary to preserve the life of the pregnant woman or where the pregnancy was caused by rape or incest, . . . it must pay for abortions for Medicaid-eligible women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function.” The statutory restriction on funding “medically necessary” abortions was upheld. 796 N.E.2d 247, 259 (Ind. 2003).

Relevant constitutional provision: Art. 1, § 23 – “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Massachusetts

Medicaid eligible pregnant women seeking abortions for medical reasons that were not life-threatening challenged a Massachusetts statute restricting Medicaid coverage for

abortions to cases in which the woman's life was at risk. *Moe v. Secretary of Admin & Finance*, 417 N.E.2d 387 (Mass. 1981). Relying on *Roe v. Wade*, the Massachusetts Supreme Court held that the state could not use its control over Medicaid funding to burden a "fundamental right" to abortion. Additionally, the court found that the challenged statute violated the due process clause of the state constitution, which the court understood to provide a fundamental right to choose to have an abortion. *Id.*

Relevant constitutional provisions: Art. 1 – "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Art. X – "[...] no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent."

Art. XII – "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

Minnesota

The Minnesota Supreme Court held that women's fundamental right to privacy found in the Minnesota constitution required that public medical assistance and general assistance funds pay for therapeutic abortions. *Women of the State of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995).

Relevant constitutional provisions: Art. I, § 2: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted."

Montana

A Montana trial court held that the state's constitutional right to privacy and equal protection necessitated public funding for medically necessary abortions because the state

already provided funding for childbirth for indigent women. *Jeanette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795.

Currently, Planned Parenthood is challenging a state law that limits Medicaid coverage of abortion. This statute prohibits coverage for abortions provided by advanced practice clinicians, prohibits funding for telehealth abortions, and narrowly defines “medically necessary.” This case is currently being litigated in a Montana district court (*Planned Parenthood of Mont. v. State of Mont.*, No. ADV-23-299 (Mont. 1st Jud. Dist. Ct. Lewis & Clark Cnty.)).

New Jersey

Following *Roe v. Wade*, New Jersey provided Medicaid funding for abortions for eligible women with no restrictions. *Right to Choose v. Byrne*, 450 A.2d 925, 928 (N.J. 1982). In 1976, the state adopted a statute that restricted Medicaid funding of abortions only to those procedures needed to preserve the life – but not the health – of the mother. *Id.* In 1982, the Supreme Court of New Jersey held that by providing Medicaid funding for abortions only when a woman’s life is at risk, state law was denying equal protection to Medicaid eligible women. *Id.* at 934.

Relevant constitutional provision: Art. 1, Para. 1: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

New Mexico

The Supreme Court of New Mexico held that limiting abortion funding to specific instances of “medically necessary” (i.e., when necessary to save the life of the mother or in cases of ectopic pregnancy) and when the pregnancy was the result of rape or incest violated the state’s Equal Rights Amendment, as the rule employed a gender-based classification that operated to the disadvantage of women. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998). As a result of this decision, the state covers medically-necessary abortions, defined as a pregnancy that “aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.” *Id.* at 844.

Relevant constitutional provision: Art. 2, § 18 - “No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.”

Oregon

In 1983, Oregon’s Court of Appeals held that a Department of Human Resources rule limiting state medical assistance for abortions was unconstitutional to the extent that it denied funding for medically necessary abortions under the privileges and immunities clause of the Oregon Constitution. *Planned Parenthood Ass’n, Inc. v. Dep’t of Hum. Res. of State of Or.*, 663 P.2d 1247 (Or.Ct.App. 1983).

Relevant constitutional provision: Art. I, § 20 – “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Pennsylvania

The Pennsylvania Supreme Court initially rejected a challenge to Pennsylvania’s Medicaid restrictions, tracking the United State Supreme Court’s reasoning in *Maier v. Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1985). But later, in *Allegheny Reproductive Health Ctr. v. Pennsylvania Department of Hum. Services*, 309 A.3d 808, 938 (Pa. 2024), the Court reversed itself and invalidated the Medicaid restrictions under a constitutional provision commanding that the government will not “discriminate against any person in the exercise of any civil right.”

Relevant constitutional provision: Art. 1, § 26 – “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

Vermont

In 1985, a lower state court held in *Doe v. Celani* that a Vermont law banning Medicaid funding for abortions was a violation of the state constitution and required funding of “medically necessary” abortions.⁹

West Virginia

The Supreme Court of West Virginia enjoined enforcement of a state law that limited the cases in which Medicaid could cover medically necessary abortions. *Women’s Health Ctr. of W. Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993). The court said that Art. III § 1 of the state constitution functioned as an equal protection clause and that, as a result, the state could not cover childbearing costs for indigent women but not all medically necessary abortions.

Relevant constitutional provision: Art. III § 1: “All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.”

Jurisdictions where courts rejected challenges to Medicaid funding restrictions:

United States

Generally speaking, plaintiffs in these federal challenges make two interrelated arguments: (1) Medicaid restrictions directly burden an indigent woman’s right to obtain an abortion; or, in the alternative, (2) Medicaid restrictions violate equal protection by discriminating on the basis of the exercise of a constitutional right. In *Maier v. Roe*, 432 U.S. 464 (1977), the Supreme Court held that “*Roe* did not declare an unqualified ‘constitutional

⁹ *Doe v. Celani*, No. S81-84CnC at 5 (Vt. Super. Ct. May 23, 1986) (Not published on Westlaw).

right to an abortion' Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” As for equal protection, the Court quickly determined that Medicaid restrictions “involve[] no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases” *Id.* at 470-71. It applied rational basis review and upheld the Medicaid restrictions. The Court later affirmed its decision in *Harris v. McRae*, 448 U.S. 297 (1980).

Florida

The Florida Supreme Court recognized a constitutional right to abortion in Florida’s privacy clause in *In re T.W.*, 551 So.2d 1186 (Fla. 1989).¹⁰ Nevertheless, relying on *Maher*, the Florida Supreme Court held that Florida’s Medicaid restrictions did not directly violate indigent women’s right to abortion. The Court adopted the trial court’s reasoning that “There is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it The plaintiffs’ argument, in effect, says to the government: leave me alone, stay out of my private affairs, and let me chose [sic] what it is I want to do concerning reproduction, except that I want you to finance my choice. This the constitution does not require.” *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1040 (Fla. 2001). The Court did not reach the equal protection claim “[d]ue to the inadequate record . . . and the fact that neither the trial court nor the district court ruled on this issue.” *Id.* at 1041.

Idaho

In *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2001 WL 34157539, (Idaho Dist. Aug. 17, 2001), an Idaho Supreme Court rejected a challenge to the state’s Medicaid restrictions. No state constitutional right to abortion existed when the case was decided. *Id.* at *2 (“Idaho’s appellate courts have never had an opportunity to address directly the issue of procreation and specifically the issue of abortion.”).

Michigan

In *Doe v. Dep’t of Soc. Servs.*, 439 Mich. 650, 487 N.W.2d 166 (1992) the Michigan Supreme Court rejected a challenge to the state’s Medicaid restrictions. No state constitutional right to abortion existed when the case was decided. *Id.* at 174 (“Whatever the merit of these and other arguments available to both sides concerning the existence of a separate state right to an abortion, we find it is unnecessary to decide that issue in this case, given our conclusion with regard to the funding question. As the discussion that follows makes clear, even if it is assumed *arguendo* that a state constitutional abortion right

¹⁰ Art. I, § 23, Fla. Const. (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”). *In re T.W.* was overturned by *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 73 (Fla. 2024). Presently, there is no recognized right to an abortion under either the federal or Florida constitutions.

coextensive with the federal right exists, we are able to conclude that § 109a does not violate the Michigan Constitution, just as the United States Supreme Court was able to uphold the denial of public funding in *Maher* and *Harris*, without need to question the validity of *Roe*.”).

North Carolina

In *Rosie J. v. N. Carolina Dep't of Hum. Res.*, 491 S.E.2d 535 (N.C. 1997), the North Carolina Supreme Court rejected a challenge to the state’s Medicaid restrictions. No state constitutional right to abortion existed when the case was decided. *See id.* at 174 (Parker, J., dissenting) (arguing that Medicaid restrictions impermissibly interfered “with a pregnant woman's right to choose abortion without unduly burdensome governmental interference” under *Roe* and acknowledging no analogous state right).

Texas

In *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002), the Texas Supreme Court rejected a challenge to the state’s Medicaid restrictions. No state constitutional right to abortion existed when the case was decided. *Id.* at 265 (“[W]e have never decided whether the Texas Constitution creates privacy rights coextensive with those recognized under the United States Constitution[.]”).

States with unresolved/ongoing litigation:

Georgia

Georgia’s Medicaid restrictions were challenged in *Feminist Women's Health Ctr. v. Burgess*, 651 S.E.2d 36 (Ga. 2007). While the Georgia supreme court held that the abortion providers had standing, the case did not reach the merits.

Michigan

Michigan’s Medicaid restrictions were upheld in the 1992 *Doe* decision but are now being relitigated under the abortion rights amendment adopted by Michigan voters in 2022. The complaint, which was filed on June 27, 2024, cites the other states where Medicaid restrictions have been struck down by the judiciary, and argues that the new right to an abortion in Michigan is even clearer than it was in those cases.¹¹

Nevada

In 2023, Nevada adopted an Equal Rights Amendment in its state constitution. As a result, an advocacy group challenged the state’s prohibition on Medicaid abortion coverage. The group argues that the ban constitutes sex discrimination and thus violates newly-adopted Art. 1 §24 of the Nevada Constitution. This case is pending in a Nevada district court

¹¹ See Complaint in *The Young Women’s Christian Association in Kalamazoo v. State*, No. 24-000093-MM at ¶81, available at https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf (“[Other states] have relied on general equal rights amendments—which do not address reproductive care as directly as the Michigan Constitution—in finding that government health care programs that single out abortion from coverage are unconstitutional.”).

(Silver State Hope Fund v. Nevada Dep't of Health & Human Servs., No. A-23-876702-W (Nev. Dist. Ct. Clark Cnty.)).

Relevant constitutional provision: Art. 1, § 24 – “Equality of rights under the law shall not be denied or abridged by this State or any of its political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry or national origin.”

TABLE

AK	<i>Commissioner for the Department of Health & Social Services v. Planned Parenthood</i> , 436 P.3d 984 (2019)
AZ	<i>Simat Corp. v. Arizona Health Care Cost Containment Sys.</i> , 203 Ariz. 454, 56 P.3d 28 (2002)
CA	<i>Comm. to Defend Reprod. Rights v. Myers</i> , 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779, 799 (1981)
CT	<i>Doe v. Maher</i> , 40 Conn.Supp. 394, 515 A.2d 134, 157–62 (1986)
FL	<i>Renee B. v. Florida Agency for Health Care Admin.</i> , 790 So.2d 1036, 1040 (Fla. 2001)
GA	<i>Feminist Women's Health Ctr. v. Burgess</i> , 282 Ga. 433, 651 S.E.2d 36 (2007)
ID	<i>Planned Parenthood of Idaho, Inc. v. Kurtz</i> , No. CVOC0103909D, 2001 WL 34157539 (Idaho Dist. Aug. 17, 2001)
IL	<i>Doe v. Wright</i> , No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994)
IN	<i>Humphreys v. Clinic for Women, Inc.</i> , 796 N.E.2d 247, 259 (Ind. 2003)
MA	<i>Moe v. Sec'y of Admin. & Fin.</i> , 382 Mass. 629, 417 N.E.2d 387, 397–404 (1981)
MI	<i>Doe v. Dep't of Soc. Servs.</i> , 439 Mich. 650, 487 N.W.2d 166, 178 (1992)
MN	<i>Women of the State of Minn. v. Gomez</i> , 542 N.W.2d 17, 29–32 (Minn.1995)
MT	<i>Planned Parenthood of Mont. v. State of Mont.</i> , No. ADV-23-299 (Mont. 1st Jud. Dist. Ct. Lewis & Clark Cnty.)
NV	<i>Silver State Hope Fund v. Nevada Dep't of Health & Human Servs.</i> , No. A-23-876702-W (Nev. Dist. Ct. Clark Cnty.)
NJ	<i>Right to Choose v. Byrne</i> , 450 A.2d 925, 928 (New Jersey 1982)
NM	<i>New Mexico Right to Choose/NARAL v. Johnson</i> , 975 P.2d 841 (N.M. 1998)
NC	<i>Rosie J. v. N. Carolina Dep't of Hum. Res.</i> , 347 N.C. 247, 491 S.E.2d 535 (1997)
OR	<i>Planned Parenthood Ass'n, Inc. v. Dep't of Hum. Res. of State of Or.</i> , 63 Or. App. 41, 663 P.2d 1247 (1983)
PA	<i>Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.</i> , 309 A.3d 808, 938 (Pa. 2024)
TX	<i>Bell v. Low Income Women of Texas</i> , 95 S.W.3d 253, 265 (Tex. 2002)
USA	<i>Maher v. Roe</i> , 432 U.S. 464, 473–74, 97 S. Ct. 2376, 2382, 53 L. Ed. 2d 484 (1977)
VT	<i>Doe v. Celani</i> , No. S81-84CnC at 5 (Vt. Super. Ct. May 23, 1986)
WV	<i>Women's Health Ctr. of W. Virginia, Inc. v. Panepinto</i> , 191 W. Va. 436, 446 S.E.2d 658 (1993)

Courts invalidated restrictions

Courts upheld restrictions

Courts upheld restrictions but currently being challenged

Challenges unresolved

Induced Termination of Pregnancy (ITOP) by Minors in Florida
Agency for Health Care Administration

Calendar Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total	
2019		120	127	145	98	113	132	126	113	96	85	114	125	1,394
2020		127	119	103	102	117	119	115	107	111	90	89	103	1,302
2021		119	103	121	114	134	128	122	106	95	100	104	138	1,384
Total		366	349	369	314	364	379	363	326	302	275	307	366	4,080

**SB 404 went into effect July 1, 2020*

Proportion of abortions among minors to total abortion

	Total	Minor	
January 1, 2019 - June 30, 2020	111,309	2,081	1.87%
July 1, 2020 - December 31, 2021	115,290	1,999	1.73%
Percent change	3.58%	-3.94%	

E. Value of a Statistical Life

When assessing the impact of a potential change in the probability of death introduced by a regulation, federal agencies use something called the value of a statistical life, or VSL. While the VSL does not attempt to place a monetary value on an individual life, it is used as a proxy for the societal value of changes in law that either increase or decrease the probability of death. The VSL is based on the amount that people are willing to pay for a reduction in the probability of death, or how much they must be compensated to take on an additional probability of death. Agencies consistently assess this value at over \$10 million per statistical human life.

Recently, the Consumer Product Safety Commission (CPSC) issued new, final guidance on its use of VSLs for children. After evaluating the literature, the CPSC decided that while children themselves cannot place a value on their own lives, the value that society places on a the life of a child is significantly higher than the value placed on an adult. The CPSC decided to apply a VSL for children equal to two times that of an adult. Thus, the CPSC uses a VSL of \$13.1 million for adults and a VSL of \$26.2 million for children.¹

The impact of the proposed amendment is to significantly increase the risk of morbidity for unborn children in Florida. Applying the VSL to upwards of 10,000 additional abortions per year in Florida would translate to hundreds of billions of dollars per year in costs, but the VSL does not represent a cost to state governments.

The VSL discussion is provided as a reference to the way in which federal agencies have, for decades, consider the economic impact of laws and regulations, such as the proposed amendment, that affect the probability of death.

¹ The Value of a Statistical Life. Consumer Product Safety Commission: [Federal Register :: Notice of Availability of Final Guidance for Estimating Value per Statistical Life](#)

New research shows a higher willingness to pay for risk reduction in children's fatality risk than adults.^[5] CPSC recommends a specific VSL for children based on this research. In addition to this research, there are anecdotal observations that strongly suggest that society prioritizes the safety of children over the adult population and invests significantly in child safety.

A majority of the studies other agencies have used to estimate VSL are wage-risk studies examining labor market data for working age adults. This approach is not transferable to children, who are not part of the labor market, do not control financial resources, and may not understand or be able to express their willingness to pay for such reductions. As such, the revealed preference literature is limited to a few, lower-quality averting behavior studies for valuation of mortality risks to children.^[12] The stated preference literature is more prevalent for children VSL, and stated preference studies have been employed in many instances by Federal agencies in mortality valuation. Failing to acknowledge the importance of child safety within society, and the research on individuals' willingness to exchange money to reduce fatality risks to children that aligns with these societal preferences,^[15] runs the risk of undervaluing the perceived benefits of regulations that protect children. Therefore, applying a uniform VSL likely disadvantages regulations meant to protect the lives of those whose safety society values most.

Summary of the Final VSL Guidelines

CPSC's VSL guidelines (stated in section VI) state that:

1. CPSC will use HHS's VSL estimates for adults. ([currently \\$13.1 million](#))
2. CPSC will double the adult VSL to establish the child VSL.

F. Fertility Effects on Long-Term State Budget

The proposed amendment will increase abortions in Florida, resulting in fewer live births, a lower fertility rate, and a reduction in the state's population growth. The impact of changes in fertility rates play out over decades. Thus, a proper fiscal analysis must consider the full lifetime impacts of a proposal that alters the number of live births in the state.

A multitude of economic studies have examined the impact of declining fertility rates on economies and government budgets. Globally, fertility rates have generally declined since the 1950s. The impacts of declining fertility have—decades later—caused significant economic and fiscal struggles across the globe. That is because declining fertility rates can: lead to shortages in the workforce necessary to produce the goods and services needed to support an aging population; reduce per-capita tax revenues; create large fiscal imbalances for governments' old-age programs; and negatively affect states' credit ratings. Consequently, many countries have enacted policies that include spending large amounts of taxpayer dollars in a desperate attempt to increase fertility rates.

The Federal Reserve Bank of Kansas City examined the impact of demographic trends on state budgets in a 2013 report titled, "The Impact of an Aging U.S. Population on State Tax Revenues."² The report noted that demographic trends of declining fertility rates and an aging population will result in rising per capita expenditures and declining per capita revenues. This is because an aging population increases the demand for government services, and most people dramatically reduce their consumption during retirement. Most relevant to Florida, which collects the majority of its revenues from sales taxes, is the report's estimate that current demographic trends are expected to reduce sales tax revenues by 0.5 percent per person by 2030.

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²Alison Felix and Kate Watkins, "The Impact of an Aging U.S. Population on State Tax Revenues," Federal Reserve Bank of Kansas City, December 5, 2013, <https://www.kansascityfed.org/Economic%20Bulletin/documents/114/macrobulletins-The%20Impact%20of%20an%20Aging%20Population%20on%20State%20Tax%20Revenues.pdf> (accessed July 7, 2024).

³Pew Charitable Trusts, "The Long-Term Decline in Fertility—and What It Means for State Budgets," Issue Brief, December 5, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets#:~:text=State%20budgets%20have%20started%20to,may%20eventually%20threaten%20tax%20bases.> (accessed July 7, 2024).

fertility rate trend. In the report's rankings, Florida had the 14th highest projected decline in fertility across the 50 states.

Conclusion: The proposed amendment would have the impact of further reducing already declining fertility rates in Florida. Consequently, it is likely that the amendment would increase pressure on the state budget by increasing per capita spending, reducing per capita revenues, and potentially affecting the state's credit rating.

E. State and Local Revenues

The proposed amendment will increase abortions in Florida, resulting in fewer live births, a lower fertility rate, and a reduction in the state's population growth. A November 2023 economic analysis by Dench, Pineda-Torres, and Myers titled "The Effect of the Dobbs Decision on Fertility Rates" found that births were 2.3 percent lower in states without abortion restrictions compared to states with abortion bans. Relevant to Florida's population, the authors noted that the fertility effects, "were especially large for Hispanic women (4.7 percent)" and "in states such as Mississippi (4.4 percent) and Texas (5.1 percent), where the geography of bans renders interstate travel more costly."¹

The impact of changes in fertility rates on state and local revenues play out over decades because the revenue impact of an additional life is highly dependent on that individual's age. According to the most recent revenue estimates for fiscal year 2023-2024, Florida's largest state and local revenue sources include: ad valorem property taxes (\$50.5 billion), federal assistance (\$35.8 billion) and sales taxes (\$34.3 billion).² When considering revenue impacts, demographics matter. Children, for example, do not pay sales or property taxes themselves, so their impact on revenues is indirect: the presence of children tends to affect parents' incomes and spending patterns, generally causing them to earn more, spend more, and pay for more expensive housing—all of which affect state and local revenues.³ When children become adults, they have a more direct impact on state and local revenues by earning income and spending that income on things that are taxed by the state and local governments. Incomes and spending, and thus tax contributions, tend to rise over time until individuals reach retirement, when spending generally declines. Moreover, federal assistance to states is directly related to population size, and the per-capita value of that assistance can vary based on individuals' ages. Thus, a proper fiscal analysis must consider the full lifetime impacts of a proposal that affects the number of births and the state's long-run population.

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¹Daniel Dench, Mayra Pineda-Torres, and Caitlin Myers, "The Effects of the Dobbs Decision on Fertility," IZA Institute of Labor Economics, November 2023, <https://docs.iza.org/dp16608.pdf> (accessed July 14, 2024).

²Florida Revenue Estimating Conference, "2023 Florida Tax Handbook Including Fiscal Impact of Potential Changes," Legislative Office of Economic and Demographic Research, October 2023, edr.state.fl.us/content/revenues/reports/tax-handbook/taxhandbook2023.pdf (accessed July 14, 2024).

³Becoming a parent tends to impact an individual's earnings. A study by the Joint Economic Committee cited a consensus estimate of women experiencing a \$26,000 reduction in earnings as a result of having a child. For men, having a child is generally associated with a so-called fatherhood premium, or increase in pay. Census data on household incomes indicates that households with children earn more than those without. In particular: single women with children earn more (median income of \$47,870 and mean income of \$65,080) than single women without children (median income of \$40,110 and mean income of \$58,770); and married couples with children have higher earnings (median income of \$122,700 and mean income of \$162,100) than married couples without children (median income of \$102,000 and mean income of \$135,300). See: Joint Economic Committee, "The Economic Cost of Abortion," Joint Economic Committee Republicans, June 15, 2022, https://www.jec.senate.gov/public/_cache/files/b8807501-210c-4554-9d72-31de4e939578/the-economic-cost-of-abortion.pdf (accessed June 27, 2024); and U.S. Census Bureau, Current Population Survey Annual Social and Economic Supplement, Household Income in 2022, available for download at: <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-hinc/hinc-04.html> (accessed June 27, 2024).

globe. That is because declining fertility rates can: lead to shortages in the workforce necessary to produce the goods and services needed to support an aging population; reduce per-capita tax revenues; create large fiscal imbalances for governments' old-age programs; and negatively affect states' credit ratings. Consequently, many countries have enacted policies that include spending large amounts of taxpayer dollars in a desperate attempt to increase fertility rates.

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Whereas the effect of general declines in fertility provide directional evidence of a further decline in fertility rates stemming from the proposed Amendment, a submission to the FIEC from statistician Jonathan Abbamonte and economist Parker Sheppard, Ph.D. of the Heritage Foundation specifically analyzed the potential impact of the proposed Amendment on Florida's population and state revenues. That study, included in this report's accompanying documentation, estimated that, "the abortion rate among Florida residents would increase by 23.6 percent if the proposed amendment were to be adopted compared to a 6-week abortion limit." The authors estimated that, "The resultant higher

⁴Alison Felix and Kate Watkins, "The Impact of an Aging U.S. Population on State Tax Revenues," Federal Reserve Bank of Kansas City, December 5, 2013, <https://www.kansascityfed.org/Economic%20Bulletin/documents/114/macrobulletins-The%20Impact%20of%20an%20Aging%20Population%20on%20State%20Tax%20Revenues.pdf> (accessed July 7, 2024).

⁵Ibid.

⁶Pew Charitable Trusts, "The Long-Term Decline in Fertility—and What It Means for State Budgets," Issue Brief, December 5, 2022, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets#:~:text=State%20budgets%20have%20started%20to,may%20eventually%20threaten%20tax%20bases.> (accessed July 7, 2024).

incidence in abortions and reduced fertility would lead to a decline in the population by 2060 of nearly 790,000 people,” and an \$8.13 billion reduction in nominal sales and use tax revenues between 2025 and 2060. The study did not estimate the impact of the proposed amendment on ad valorem property taxes or on federal assistance to Florida.

Conclusion: The proposed amendment would have the impact of further reducing already declining fertility rates in Florida, which would affect Florida’s population and revenues. A smaller population would reduce state and local tax revenues and federal assistance by increasing amounts over time, and could negatively impact the state’s credit rating. The net impact on the state budget depends on both revenues and spending. While evidence suggests that reduced fertility and an aging population has a net negative impact on national and state budgets in the long-term, the precise impact of the proposed amendment on Florida’s budget is indeterminate.

FLORIDA FINANCIAL IMPACT ESTIMATING CONFERENCE
Amendment to Limit Government Interference with Abortion
Serial Number 23-07
Draft: July 8~~14~~, 2024

FINANCIAL IMPACT STATEMENT [145 WORDS]

~~The financial impact of the proposed amendment on state and local governments varies in magnitude and direction for revenues and across the policy areas used to make appropriations. The probable cost savings dominate all budgetary effects. Both government-provided educational services and health and human services are the source of these cost savings. While these savings cannot be determined precisely, they are expected to be significant. With respect to the criminal justice system, the Financial Impact Estimating Conference could not agree to the direction of the budgetary impact, however, the Conference agreed that the impact is not expected to be significant under any reasonable scenario. With respect to litigation costs, state government may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the proposed amendment's absence. With respect to state and local revenues, the impact is indeterminate. The proposed amendment was analyzed late in the 2023 calendar year. At that time, litigation was pending before the Florida Supreme Court challenging the Legislature's 2022 enactment of a prohibition on most abortions being performed if the gestational age of the fetus is more than 15 weeks. If the Court upholds the 2022 law, a 2023 law further reducing the 15 weeks to 6 weeks will take effect 30 days later. This could lead to additional litigation. In order to measure the proposed amendment's impact on state and local government revenues and costs, a reasonable expectation of what the state of the law will be at the time of the election is required. Because there are several possible outcomes related to this litigation that differ widely in their effects, the impact of the proposed amendment on state and local government revenues and costs, if any, cannot be determined.~~

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT [497 WORDS]

~~One year prior to the election, it is impossible to predict with any reasonable certainty what the legal landscape will be when the proposed amendment is on the ballot in November 2024. When this proposed amendment was analyzed, litigation was pending before the Florida Supreme Court challenging the Legislature's 2022 enactment of a prohibition on most abortions being performed if the gestational age of the fetus is more than 15 weeks. If the Court upholds the 2022 law, a 2023 law further reducing the 15 weeks to 6 weeks will take effect 30 days later. This could lead to additional litigation.~~

~~In 2023, the Legislature passed SB 300 (ch. 2023-21, L.O.F., also known as the Heartbeat Protection Act) prohibiting abortions if the gestational age of the fetus is more than 6 weeks. The bill retains the medical and fatal fetal abnormality exceptions and adds exceptions for rape, incest, or human trafficking if the gestational age of the fetus is less than 15 weeks and the pregnant woman provides specified documentation. The provisions of SB 300 took effect on May 1, 2024. This information informs the baseline for the analysis. If approved, the amendment will have varying effects on state and local budgets and revenues. At least four possible outcomes could occur from these events. Not knowing which outcome will be in place makes a material difference to the financial impacts of the proposed amendment, if any. At a minimum, there is a significant difference in the number of abortions that occur up to and including 6 weeks and 15 weeks. This is because the number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. For this reason, budgetary or revenue effects that are limited or undetectable at 15 weeks may be much stronger at 6 weeks.~~

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- With respect to the criminal justice system, the Conference could not agree to the direction of the budgetary impact, however, the Conference agreed the impact to the Criminal Justice System is not expected to be significant under any scenario. With respect to abortions themselves, prior case law in Florida indicates that the state does not have an obligation to pay for them. The Florida Legislature has made no changes to its policies regarding state abortion funding under either the 15-week or 6-week prohibitions. Future legislative changes, if any, in response to the passage of the proposed amendment are unknown.
- With respect to the provision of educational services, the proposed amendment would result in an statewide cost savings from a reduction in the provision of these services due to fewer live births. While the savings are unambiguous, the effects at the local level could exacerbate financial constraints for individual school districts already experiencing a decline in student enrollment leading to varying local impacts. Some state programs may be affected by differences in the number of live births in the state. With respect to the education system and health and human services, if the 15-week prohibition is upheld by the Florida Supreme Court, regardless of whether the 6-week prohibition goes into effect, it is probable that the state will experience cost savings because of the proposed amendment. Alternatively, if the 15-week prohibition is not upheld, there would be no savings as the baseline policy would be essentially equivalent to the proposed amendment.
- With respect to health and human services, the proposed amendment would result in cost savings from a reduction in the provision of these services due to fewer live births. The magnitude of those savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. At least one government program may be affected by the proposed amendment's requirement that no law shall prohibit, penalize, delay, or restrict abortion. If the 15-week prohibition is upheld, regardless of whether the 6-week prohibition goes into effect, it is probable that there will be cost savings to the criminal justice system as certain criminal penalties are invalidated. Alternatively, if the 15-week prohibition is not upheld, there would be no savings within the criminal justice system as the baseline policy would be essentially equivalent to the proposed amendment.
- With respect to state funding for abortions, the State does not have an obligation to pay for abortions under current law, and the proposed amendment does not expressly create a new obligation for the state to pay for abortions. Future judicial and legislative changes, if any, in response to the passage of the proposed amendment are unknown and speculative.
- With respect to litigation costs, the fiscal impact cannot be determined because the areas of future litigation are unknown, even though the number of existing laws and regulations potentially affected by the proposed amendment is significant. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the proposed amendment's absence. The outcomes of any such litigation are speculative. With respect to state and local revenues, the baseline for the analysis is uncertain. While increased travel to the state would be expected to result in higher sales tax collections, this result, if it occurred, would not be a direct effect of the proposed amendment.
- With respect to state and local revenues, the impact is indeterminate. While there would be a loss to state and local tax collections in the long-term from fewer births, that amount cannot be determined and would not be detectable until FY 2042-43. Tax gains may be experienced prior to that point as prevented pregnancies and the avoided costs of child-rearing free disposable personal income for a bundle of purchases that contains more items that are taxable. The net effect of the

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two opposing forces within any given year is indeterminate as to magnitude and direction since multiple cohorts at differing life-cycle stages would be in place at the same time.

SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

Amendment to Limit Government Interference with Abortion

Ballot Summary:

No law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider. This amendment does not change the Legislature's constitutional authority to require notification to a parent or guardian before a minor has an abortion.

Article and Section Being Created or Amended:

Creates – Article 1, New Section

Full Text of the Proposed Amendment:

New Section, Amendment to Limit Government Interference with Abortion

Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider.

B. Effective Date

Article XI, Section 5(e), Florida Constitution, states: "Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision."

The effective date would be January 7, 2025.

C. Formal Communications to and from the Sponsor, Proponents, and Opponents

The FIEC for the proposed amendment met in two sessions: the Fall of 2023 and the Summer of 2024. The Sponsor, Floridians Protecting Freedom, Inc., designated five representatives to speak on its behalf at meetings held by the Financial Impact Estimating Conference (FIEC): Pamela Burch Fort, Margaret Good, Kara Gross, Sara Latshaw, and Michelle Morton.

D. Input Received from the Sponsor, Proponents, Opponents, and Interested Parties

The FIEC allows any proponent, opponent, or interested party to present or provide the conference with materials to consider. Over its two series of meetings, the FIEC received input from designated representatives from the Sponsor, both in writing and orally. Follow-up information was also submitted by the Sponsor.

In addition, representatives from an opponent, Susan B. Anthony Pro-Life America, presented to the FIEC and submitted written comments. ~~Follow-up information was also submitted. In addition, Further,~~ materials were received from a proponent of the amendment, the Institute for Women's Policy Research, and one opponent of the amendment, The Heritage Foundation.

The FIEC requested and received input and/or materials for staff analysis from the following state agencies: the Agency for Health Care Administration (AHCA), the Department of Children and Families, the Department of Corrections, and the Department of Management Services. A representative from AHCA's Division of Health Care Policy & Oversight also submitted materials and presented to the FIEC on two occasions.

Representatives for both the Florida League of Cities and the Florida Association of Counties were contacted prior to the first series of meetings, but no response was received from either organization.

Documentation of all written comments and materials received by the FIEC can be found in the EDR Notebooks (Book 1 and Book 2) on the website at: <http://edr.state.fl.us/Content/constitutional-amendments/2024Ballot/LimitGovernmentInterferencewithAbortionAdditionalInformation.cfm>

In addition, the public meetings were recorded and archived by The Florida Channel. These recordings may be viewed at: <https://thefloridachannel.org>.

E. Background (Summary of Current Law)

In 2023, the Legislature passed SB 300 (ch. 2023-21, L.O.F., also known as the Heartbeat Protection Act), prohibiting abortions if the gestational age of the fetus is more than 6 weeks. The bill retains the medical and fatal fetal abnormality exceptions and adds exceptions for rape, incest, or human trafficking if the gestational age of the fetus is less than 15 weeks and the pregnant woman provides specified documentation. The provisions of SB 300 took effect on May 1, 2024, thirty days after the Florida Supreme Court ruling on HB 5 (ch. 2022-69, L.O.F.) which permitted a 15-week ban.¹

Below is a map showing the status of abortion bans in the United States as of May 23, 2024. This map was extracted from the KFF website and can be found at <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/#state>.

As the map displays, Florida was one of five states that had an abortion ban with a gestational limit between 6 and 12 weeks LMP (last menstrual period).

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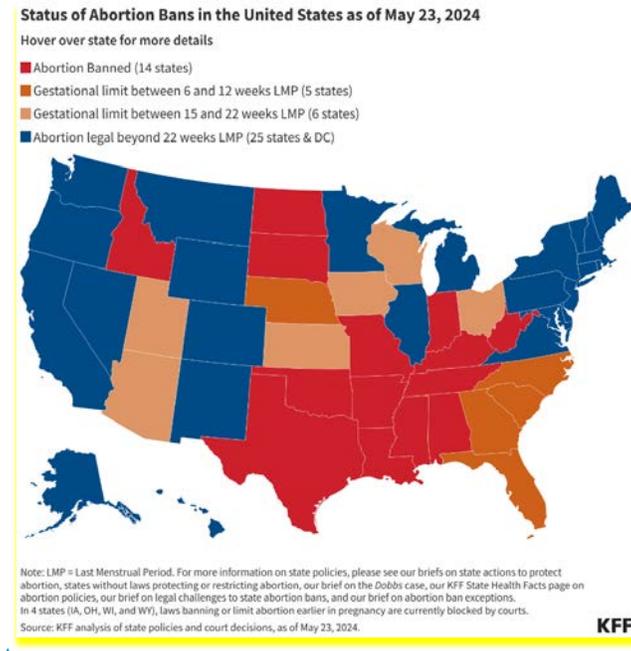
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¹ The Florida Supreme Court ruled on *Planned Parenthood of Southwest and Central Florida v. State of Florida* on April 1, 2024.

² Formally known as the Kaiser Family Foundation.



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F. Discussion of Impact of Proposed Amendment

Potential Conflicts with Current Statutes

The proposed constitutional amendment ~~would may supersede nullify necessitate changes to~~ many provisions in Chapter 390, F.S., and administrative rules, which are directly related to abortion procedures and the State’s regulatory functions.

Potential Impact of the Amendment

At the time this analysis was prepared in July 2024, ~~t~~he Heartbeat Protection Act, a 6-week prohibition with exceptions, was in effect. Relative to this act, the proposed constitutional amendment has the potential to affect the state’s budget, primarily through cost savings. Likewise, the state’s revenues ~~may be~~ affected.

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The major programs and revenues are described in the remainder of this document. To calculate the proposed constitutional amendment’s financial impacts, current law is used as the baseline for measurement, which represents the status quo or pre-change condition. The difference estimated to result from the proposed change (positive or negative) is then determined by measuring the post-change condition against the baseline. An increased cost would be expected to increase—or a savings would be expected to decrease—the state’s budget in the future, while an increase in tax or fee collections would be expected to increase the state’s revenue and the opposite would be expected to decrease it in the future.

The table below shows the number of reported abortions in Florida by known week of gestation during different calendar years. The 2020 and 2021 calendar years are published data from [the Centers for Disease Control and Prevention \(CDC\)](#), while 2022 and 2023 use unpublished data from the Agency for Health Care Administration (AHCA). The weeks of gestation starting July 1, 2022 use a revised state definition that is calculated from the first day of the pregnant woman’s last menstrual period. Prior to this, the calculation was based on the clinician’s estimate.

Weeks of Gestation	CY 2020		CY 2021		CY 2022 <i>(definitional change as of July 1, 2022)</i>		CY 2023	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
≤6	55,834	74.6	58,136	72.8	46,011	55.7	33,453	39.8
7–9	11,686	15.6	13,436	16.8	24,015	29.1	34,854	41.5
10–13	4,768	6.4	5,321	6.7	9,384	11.4	12,577	15.0
14–15	1,005	1.3	1,140	1.4	1,859	2.3	3,013	3.6
16–17	652	0.9	734	0.9	527	0.6	46	0.1
18–20	704	0.9	764	1.0	572	0.7	71	0.1
≥21	219	0.3	286	0.4	213	0.3	38	0.0
Total abortions reported by known gestational age	74,868		79,817		82,581		84,052	

2023 data received from AHCA on June 27, 2024. Percentages may not add to 100.0 due to rounding.

The number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. Data related to [the Heartbeat Protection Act](#), a 6-week prohibition with exceptions, are not yet available. However, for the purpose of this analysis, the conference concludes that the passage of the constitutional amendment will result in more abortions and fewer live births in Florida [relative to a baseline reflecting the Heartbeat Protection Act](#).

[In 2023, there were 84,052 abortions in Florida. Of these, 33,453 occurred during the first six weeks of gestation. Florida’s Heartbeat Protection Act bans abortions after 6 weeks of gestation, with exceptions for various reasons. The table below provides an example of projected abortions that would not be allowed under the Heartbeat Protection Act based on 2023 data. These estimates do not include any behavioral changes or increased use of: out-of-state abortions, telehealth, or contraceptive methods.](#)

Projected Abortions Not Allowed Under the Heartbeat Protection Act with Exceptions in Florida

	CY 2023
Total Abortions	84,052
Abortions allowed under the Heartbeat Protection Act with exceptions	35,274
≤6 weeks of gestation	33,453
<i>Abortion Performed due to Physical Health of Mother that is not Life Endangering</i> ¹	1,334
<i>Abortion Performed due to a Life Endangering Physical Condition</i> ¹	251
<i>Abortion Performed due to Incest</i> ²	8
<i>Abortion Performed due to Rape</i> ²	85
<i>Abortion Performed due to Victim of Human Trafficking</i> ²	2
<i>Abortion Performed due to Fatal Fetal Abnormality</i> ³	141
Projected Abortions Not Allowed Under the Heartbeat Protection Act	48,778

¹ Includes all abortions under this exception regardless of timing

² Includes only abortions that occurred during the 1st trimester

³ Includes only abortions that occurred prior to the 3rd trimester

Sources:

1) 2023 AHCA data by weeks of gestation, received June 27, 2024

2) Agency for Health Care Administration, Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Trimester, 2023, <https://ahca.myflorida.com/content/download/22078/file/TrimesterByReason.pdf>

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State and Local Costs:

A. Criminal Justice System

Under current law, there are four felonies related to abortion that exist under Chapter 390, F.S. Section 390.0111, F.S., includes a Level 1, 3rd degree felony for “any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of” how pregnancies should be terminated, including when it is permitted to terminate a pregnancy after the gestational age of 6 weeks, and when a partial-birth abortion or experimentation on a fetus is permitted. A Level 4, 2nd degree felony is also included for “any person who performs, or actively participates in, a termination of pregnancy in violation of this section which results in the death of the woman.” Additionally, it includes a Level 1, 3rd degree felony for a person who violates the requirements that an infant “born alive during or immediately after an attempted abortion” be treated like “any other child born alive in the course of natural birth.” Section 390.0114, F.S., includes a Level 1, 3rd degree felony for “a physician who intentionally or recklessly performs or induces, or attempts to perform or induce, a termination of a pregnancy of a minor without obtaining the required consent” from a parent or legal guardian. Section 390.011, F.S. specifically defines the term “physician” and Section 390.0111, F.S. states that “only a physician may perform or induce a termination of pregnancy.” The proposed amendment states that a patient’s healthcare provider can make such determinations, rather than strictly physicians. However, healthcare provider is defined under Section 381.026, F.S., for the purposes of that section, as “a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, a podiatric physician licensed under chapter 461, or an advanced practice registered nurse registered under s. 464.0123, F.S.” Further, healthcare providers are limited by the scope of what they are licensed to practice. For example, Section 461.003, F.S. defines the practice of podiatric medicine as “the diagnosis or medical, surgical, palliative, and mechanical treatment of ailments of the human foot and leg.”

Given the data available from the Florida Department of Corrections, there have been no commitments to prison for any of the felonies described above—either before or after the enactment of the 2023 legislative change to 6 weeks (ch. 2023-21, L.O.F.), which went into effect on May 1, 2024.³ It should be noted that the 6-week language just went into effect this year, and given the time it would take from arrest to adjudication, it is highly unlikely that any current offenders would have moved through the entire criminal justice system at this point.

Conclusion: The Conference could not agree to the direction of the budgetary impact, however, the Conference agreed the impact to the Criminal Justice System is not expected to be significant [under any reasonable scenario](#).

B. Education Services

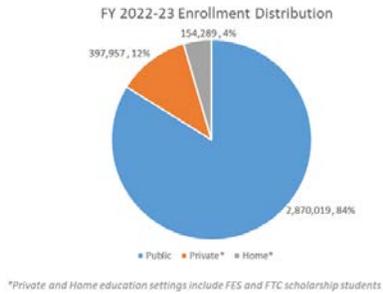
With the School Readiness program offering financial assistance for care and early education, education services begin as early as birth. Although primarily funded by the federal Child Care and Development Fund Block Grant, the School Readiness program is partially supported by state and local funds. Children in eligible low-income households can participate in this program's range of services from birth through the age of 12.

Florida resident births also directly influence the state's future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three to four years following the change. The first educational setting that could experience differences would be Florida's Exceptional Student Education programs, including state and locally-funded public schools and the state-funded Family Empowerment Scholarship Program for Students with Unique Abilities. In 2023-24, these two programs for three and four year olds with additional needs for learning support served roughly 16 percent of this age group. The next state-funded program preschoolers can participate in is Florida's universal Voluntary Prekindergarten Program (VPK), which serves 64.8 percent of four year olds.

The full-effect of policies that influence birth rates and their interactions with Florida's schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida's school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, Motor Vehicle Sales Tax Credit Scholarship Program, and Commercial Rental Sales Tax Credit Scholarship Program) would feel the full effect of policies influencing birth rates.

In FY 2023-24, the typical VPK cost is \$2,839 per student. As of June 2024, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was \$8,716, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.

³ The data series from the Florida Department of Corrections begins in 1979.



FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast

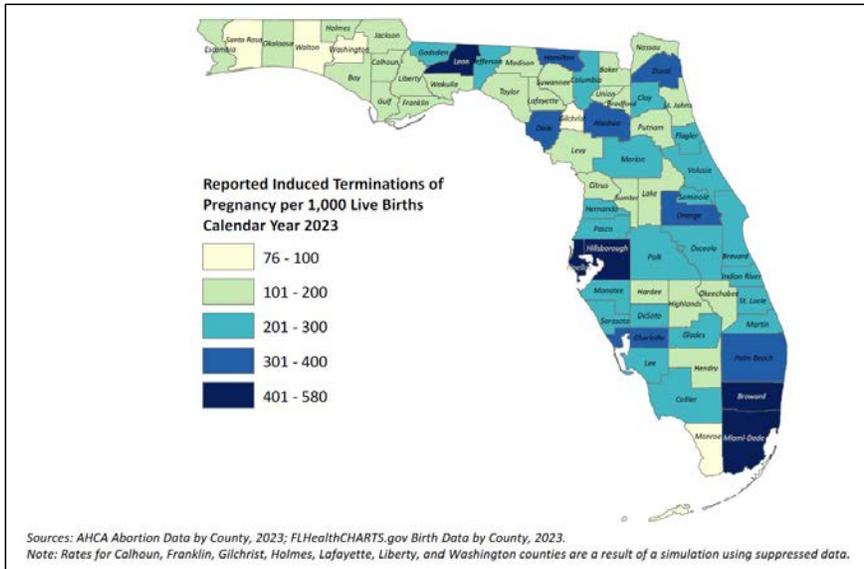
	FY 2022-23 Final 1/12/2024	FY 2023-24 3rd Calc 1/23/2024	FY 2024-25 Forecast 2/21/2024	FY 2025-26 Forecast 2/21/2024	FY 2026-27 Forecast 2/21/2024	FY 2027-28 Forecast 2/21/2024	FY 2028-29 Forecast 2/21/2024
Total PreK-12 FEFP FTE (Excl. Scholarships)	2,823,723	2,835,236	2,854,409	2,863,759	2,864,675	2,880,547	2,901,502
Family Empowerment Scholarship (FES)	155,183	216,857	315,892	360,113	394,804	429,985	465,772
FES-Education Opportunity (EO)	87,402	134,801	216,960	240,967	255,094	269,423	283,645
FES-Unique Ability (UA)	67,781	82,056	98,932	119,146	139,710	160,562	182,127
Florida Tax Credit Scholarship (FTC)	94,518	147,041	114,587	106,751	105,647	104,501	103,331

Florida’s education system allocates funds to school districts for K-12 operations based on student count through the Florida Education Finance Program (FEFP), which consists of both state and local funds. Local funds are generated from property tax revenue and are comprised of the .748 discretionary millage levy and the required local effort (RLE) levy. The RLE is the amount of funds a district generates from levying the state certified local effort millage rate on the district’s ad valorem property.

School districts are also authorized to levy up to an additional 1.5 mills against the taxable value for school purposes, including charter schools, new construction, maintenance and renovation of existing facilities, school buses, and equipment, among other allowable uses.

The amendment will result in fewer live births relative to the current law. The impact on individual districts will be unequally distributed.

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All things being equal, a declining student population would result in less funding allocated to school districts to maintain operations. [School districts could increase the discretionary millage levies, however most districts are currently levying the maximum millage.](#) There are [multiple-multiple](#) actions [the](#) state and local governments [could-can](#) take to address [a](#) declining student enrollment, [some of which would not result in the provision of additional money.](#)

Conclusion: While the constitutional amendment would result in an aggregate statewide cost savings from a reduction in the provision of educational services due to fewer live births, [for districts already experiencing a decline in student enrollment](#) the effects of the proposed amendment could exacerbate financial constraints [for individual districts already experiencing a decline in student enrollment.](#)

C. [Health and Human Services](#) —[\[see discussion document\]](#)

Florida offers a wide range of social services to support residents with medical, food, and cash assistance that are partially dependent on Florida’s population and birth rate. While there are programs that are purely federally funded, many programs use a mix of state and federal funding. An example of the latter is the Medicaid program that provides medical assistance to individuals and families to cover or assist in the cost of services that are medically necessary. Another example is the Temporary Cash Assistance program that provides financial assistance to pregnant women in their third trimester and families with dependent children to assist in the payment of rent, utilities and other household expenses. As many of these programs serve children as well as new or expecting mothers, any changes [in Florida resident births affects](#) the number of people potentially eligible for these various social services for both the birthed and the birthing.

For children in Florida needing medical assistance, the state offers Medicaid and Kidcare (Title XXI Children’s Health Program—CHIP). Children from birth until their first birthday are eligible for Medicaid if the household income is below 200 percent of the Federal Poverty Level (FPL). After their first

birthday, the household income threshold drops to 133 percent of the FPL. Those children remain Medicaid eligible up until their nineteenth birthday (there are special programs for 19 and 20 years old based on a fixed income dollar amount). If household income is above 133 percent but below 300 percent of the FPL, children are eligible for Medikids Title XXI. If household income is above 300 percent, children are eligible for Medikids Full Pay. Eligibility for both Medikids programs covers children until their fifth birthday. From ages 5 to 18 years old, under the same FPL thresholds, children are eligible for Florida Healthy Kids Title XXI or Full Pay. Children in income eligible households with special healthcare needs that require extensive preventive and ongoing care are eligible for the Children’s Medical Services (CMS) health plan.

Florida Medicaid and CHIP Income Requirements (Children)	
Medicaid	
Children Under Age 1	200% FPL
Children ages 1 through 18	133% FPL
Parents, Caretakers, Children ages 19-20	Fixed dollar amount
Children’s Health Insurance Program (CHIP)	
Medikids (Ages 1-4)	
Title XXI	133% up to 300%
Full Pay	300%
Florida Healthy Kids (Ages 5-18)	
Title XXI	133% up to 300%
Full Pay	300%
CMS	133% up to 300%

Federal Medical Assistance Percentage

The federal government uses state per capita personal income to calculate each state’s federal reimbursement rate for Medicaid and other grants. This is the Federal Medical Assistance Percentage (FMAP) and is the share of state Medicaid benefit costs paid by the federal government. The FMAP is based on a three-year average of state per capita personal income compared to the national average. ~~The FMAP is the federal share of a state’s Medicaid expenditure.~~ The state’s share is 100% minus the FMAP. The Children’s Health Insurance Program (CHIP) uses an enhanced FMAP, which is higher than the Medicaid FMAP. The enhanced FMAPs are calculated by reducing each state’s Medicaid share by 30% and are capped at 85%. ~~The table below shows 10 years of Florida’s FMAP.~~ Between January 2020 and March 2023, there was a temporary ~~Enhanced FMAP adjustment due to during~~ the Public Health Emergency ~~that added 6.2 percentage points to the FMAP (FFY 20-21 through FFY 23-24) (PHE).~~ Starting on April 2023, ~~the enhanced PHE FMAP~~ ~~this adjustment~~ was phased out ~~ending and ultimately ended~~ in December 2023. The table shows the base FMAP excluding the addition of temporary PHE adjustments.

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Federal Fiscal		
Year	FMAP	EFMAP
FY 15-16	60.46%	72.32%
FY 16-17	60.99%	72.69%
FY 17-18	61.62%	73.13%
FY 18-19	61.10%	72.77%
FY 19-20	61.47%	73.03%
FY 20-21	61.96%	73.37%
FY 21-22	61.03%	72.72%
FY 22-23	60.05%	72.04%
FY 23-24	57.96%	70.57%

FY 24-25	57.17%	70.02%
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With coverage beginning as early as birth, the effects of any changes to the birth rate can be cumulative and varying. Medicaid covers almost one-half of the births (43.9 percent CY 2022) in the state. They maintain that coverage until their first birthday is reached and their eligibility is reassessed. Many remain on Medicaid, move to a CHIP program, or are able to find health insurance elsewhere. As of May 2024, 48.6 percent (2,149,107) of the 4.4 million Medicaid enrollees were under the age of 18 with ages from 0 to five years making up approximately 34 percent of the total under 18. CHIP covers a further 243,944 children under the age of 18 with Medikids covering 20,748, Healthy Kids covering 209,671 and CMS covering 13,525. It should also be noted that the [federal Public Health Emergency \(PHE\)](#) significantly affected enrollment leading into this period. The tables below show current enrollment as of May 2024 and December 2019, the month before the PHE retroactively went into effect (the PHE began in March 2020 but continuous enrollment was retroactive to January 1, 2020).

Florida Medicaid Enrollment by Age Group and Date				
Group	5/31/2024		12/31/2019	
	Enrolled	% of Total	Enrolled	% of Total
<i>Ages 0-5</i>	721,308	16.3%	769,120	19.9%
<i>Ages 6-10</i>	570,910	12.9%	543,814	14.1%
<i>Ages 11-18</i>	856,889	19.4%	770,549	19.9%
Total 0-18	2,149,107	48.6%	2,083,483	53.9%
Medicaid Total	4,423,280	100.0%	3,868,723	100.0%

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Florida Children's Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full pay	CMS
-	5/31/2024				
Ages 1-5	16,660	4,088	-	-	1,196
Ages 6-10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227
-	12/31/2019				
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6-10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

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Florida Children's Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full Pay	CMS
5/31/2024					
Ages 1-5	16,660	4,088	-	-	1,207
Ages 6 -10	-	-	42,232	9,176	4,010
Ages 11-18	-	-	90,625	14,746	6,308
12/31/2019					
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6 -10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

While children under the age of 18 make up almost one-half of the Medicaid enrollees, they account for approximately a quarter of the total Medicaid expenditure. In SFY 2022-23, children were 47.2 percent of enrollees and 27.0 percent of expenditures. The 2024 Rate Year (October 2023 – September 2024) statewide average MMA capitation rate for a child between the age of one month and eleven months without a serious mental illness (SMI) was \$325.19 per month (\$3,902.28 per year). For a similar child between a year and 13 years old, that rate was \$159.62 per month (\$1915.44 per year). There are circumstances where the expenditure on a child is higher than these statewide averages. Children on the CMS plan typically have higher per person per month expenditures, but they account for a small portion of the total children on Medicaid.

As mentioned above, Medicaid covers a significant number of the births in Florida (see table below). There is also pre- and postnatal public assistance for the mothers. Medical assistance for pregnant women is available through various Medicaid programs. A pregnant woman who is eligible for regular Medicaid (income below 185 percent FPL) for at least one month, including a retroactive month, is eligible to receive Medicaid throughout her pregnancy and until the end of the 12th month after the birth (postpartum period). The family planning waiver program covers family planning services to eligible women, ages 14 through 55. Services are provided up to 24 months. Eligibility is limited to women with family incomes at or below 191 percent of the FPL who have lost or are losing Florida Medicaid State Plan eligibility and are not otherwise eligible for Medicaid, Children's Health Insurance Program, or health insurance coverage that provides family planning services.

Recipients losing SOBRA (pregnancy Medicaid) eligibility ~~will~~ have passive enrollment during the first 12 months of losing Medicaid. Non-SOBRA women have to actively apply for the first year of benefits at their local county health departments. All women enrolled in the family planning waiver have active re-determination of eligibility through their local county health departments after 12 months of family planning waiver eligibility. In order to receive the second year of benefits, recipients must reapply at their local county health departments.

As of May 2024, there were 427,463 individuals receiving Medicaid or the Family Planning waiver to assist with the pregnancies. Of the total, 143,606 receive Pregnant Women Medicaid and 283,857 utilize the Family Planning Waiver.

Florida Births Covered by Medicaid, Percent of Total births				
CY	Medicaid	Total	Rate	
2017	109,225	223,579	48.85%	
2018	106,695	221,508	48.17%	
2019	102,636	220,010	46.65%	

2020	98,018	209,645	46.75%
2021	98,297	216,189	45.47%
2022	97,966	222,976	43.90%

Pregnant Women and Family Planning Enrollment by Program and Date				
	SOBRA PREGNANT WOMEN UP TO 100% FPL	SOBRA PREGNANT WOMEN OVER 100% OF FPL UP TO 185% OF FPL	Family Planning Waiver	Total
5/31/2024	110,142	33,464	283,857	427,463
% of Total	25.77%	7.83%	66.41%	100.00%
12/31/2019	67,810	19,124	69,250	156,184
% of Total	43.42%	12.24%	44.34%	100.00%

The Temporary Assistance for Needy Families – Temporary Cash Assistance (TCA) program provides cash assistance to families with children under the age of 18 or under age 19 if full time secondary ~~(high school)~~ school students (high school). The program helps families become self-supporting while allowing children to remain in their own homes. Pregnant women may also receive TCA, either in the third trimester of pregnancy if unable to work, or in the 9th month of pregnancy. Eligibility for the TCA program is similar to Medicaid eligibility with a few other technical requirements. Gross income must be less than 185 percent of the FPL and countable income cannot be higher than the payment standard for the family size. Individuals get a \$90 deduction from their gross earned income. Some people must participate in work activities unless they meet an exemption. Regional Workforce Boards provide work activities and services needed to get or keep a job. Individuals who receive TCA are eligible for Medicaid. Individuals who are eligible for TCA, but choose not to receive it, may still be eligible for Medicaid. Florida law creates four categories of families who may be eligible for TCA. While many of the basic eligibility requirements apply to all of these categories, there are some distinctions between the categories in terms of requirements and restrictions:

- **Child-Only Families:** These families include situations where the child is living with a relative or situations where a custodial parent is not eligible to be included in the eligibility group.
- **Relative Caregiver Program:** A specialized program for child-only families where the child has been adjudicated dependent due to abuse or neglect and has been placed with a grandparent or other relative by the court. These relatives are eligible for a payment that is higher than the typical child-only payment, but less than the payment for licensed foster care.
- **Single-Family Parents with Children:** Parents with children can receive cash assistance for the parent and the children.
- **Two-Parent Families with Children:** Are eligible on the same basis as single-parent families except the work requirement for two-parent families includes a higher number of hours of participation per week (35 hours or 55 hours if childcare is subsidized) than required for single-parent families (30 hours).

In FY 2022-23, these four programs assisted 67,224 individuals (in FY 2019-20 that number was 61,260). Both the Child-Only Families and Relative Caregiver programs have experienced steady declines in terms of cases and persons served. The other two programs have seen increases over the last few fiscal years that are mostly driven by increased activity among non-citizens seeking assistance.

Temporary Cash Assistance by Program and Date		
Programs	FY 2022-23	FY 2019-20
Child Only Cases	13,840	19,191
Relative Caregiver	9,495	16,461
Single-Family Parents with Children	21,613	22,884
Unemployed Two-Parent Families with Children Parent	22,276	2,723
Total	67,224	61,260

Looking at the age groups served by the TCA programs, ages six and over represent the majority of those receiving assistance (approximately 70 percent). Children from birth to 5 years old make up a smaller proportion of TCA recipients, but are usually also receiving other forms of public assistance as well. While these individuals are treated separately from Medicaid, they are included in the total caseload counts reported each month.

Temporary Cash Assistance by Age and Date				
	9/30/2023		12/31/2019	
	Eligible	%total	Eligible	%total
Age 0 to 5	12,795	29%	16,014	32%
Age 6 to 12	18,755	42%	21,137	42%
Age 13 to 17	13,209	30%	12,989	26%
Total	44,759	100%	50,140	100%

Finally, the foster care system in Florida serves children from birth until their 18th birthday. There are specialty programs to extend foster care services to those older than eighteen, but the majority of those receiving these services are seventeen or younger. In 2023, 21,031 children (aged 0-17) received foster care services. These services are federally funded through Title IV of the Social Security Act with matching state funds (similar to Medicaid and CHIP). Title IV-E provides federal funding to help provide foster care, independent living services, adoption assistance, and guardianship assistance. Like all states that receive Title IV-E funds for foster care, independent living services, adoption assistance, and guardianship assistance, Florida must follow a Title IV-E State Plan.

Conclusion: The health and human services in Florida serve children as well as new or expecting mothers. Any changes in Florida resident births affect the number of people potentially eligible for these services. It is probable that there will be cost savings to health and human services when comparing current law to the proposed amendment. The magnitude of those savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. [Due to this, the impact is indeterminate. Because of this, a specific dollar amount of savings has not been quantified.](#)

D. Federal and State Funds for Abortion

First passed in 1976, the Hyde Amendment refers to annual funding restrictions that Congress has regularly included in the annual appropriations acts for the Departments of Labor, Health and Human Services, Education, and related agencies.

The most recently enacted version of the Hyde Amendment (P.L. 117-103, Div. H, §§ 506–507), applicable for federal fiscal year 2022, prohibits covered funds to be expended for any abortion or to provide health benefits coverage that includes abortion. This restriction, however, does not apply to abortions of pregnancies that are the result of rape or incest (“rape or incest exception”), or where a woman would be in danger of death if an abortion were not performed (“life-saving exception”).

As a statutory provision included in annual appropriations acts, Congress can modify, and has modified, the Hyde Amendment’s scope over the years, both as to the parameters of exceptions and the sources of funding subject to this restriction.

The Hyde Amendment would continue to restrict the use of federal Medicaid funds even with the adoption of the proposed Florida constitutional amendment. While some states have elected to provide coverage for abortions that are not medically necessary, these states do so through the use of state funds, not federal funds that are restricted by the Hyde Amendment.

In Florida, the issue of whether there is a state coverage obligation under the current privacy clause of the Florida Constitution was previously litigated - see, *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). The Florida Supreme Court held that the Legislature’s choice not to fund abortions with state funds did not violate the right to privacy in the Florida Constitution, specifically noting: “[t]here is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it” (quoting, *Renee B.*, No. 97–3983 (Fla.2d Cir.Ct. Oct. 9, 1998)).

Conclusion: Under current law, the state does not have an obligation to pay for abortions. The proposed constitutional amendment does not expressly create a new obligation for the state to pay for abortions. The Florida Legislature has made no changes to its policies regarding state abortion funding under the 6-week prohibition. Future judicial and legislative changes, if any, in response to the passage of the proposed amendment are unknown and speculative.

E. Cost of Litigation

According to the State of Florida’s Long-Range Financial Outlook: “Numerous lawsuits against the state exist at any point in time. Some have the capacity to disrupt specific programs and services and to force changes and adjustments to the Outlook. These lawsuits relate to a broad cross-section of the state’s activities including, but not limited to, education funding, environmental matters, Medicaid, agricultural programs, and state revenue sources.” This documentThe Outlook is constitutionally required and highlights litigation against the State as a significant risk to the forecast.

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The Department of Legal Affairs’ most recent Long-Range Program Plan provides expenditures associated with various departmental functions. Perhaps most on point are those costs associated with the Civil Litigation Division. According to the department’s plan, this division discharges the Attorney General’s responsibilities under section 16.01, Florida Statutes, by providing statewide representation on behalf of the state, its agencies, officers, employees, and agents, at the trial and appellate level. These actions can involve constitutional challenges to statutes, civil rights, employment discrimination, torts, contract disputes, eminent domain, forfeiture, prisoner litigation, declaratory judgments, charitable trusts, and class action suits. Clients include state officers and agencies from all three branches of state government. Civil litigation defense of state agencies in FY 2022-23 generated expenditures in excess of \$10.74 million. Another \$2.85 million was associated with administrative law cases and \$2.74 million was associated with the Solicitor General’s complex litigation work. These figures do not include internal costs incurred by the participating agenciesy-costs which can also be significant.

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The cost of litigation does not address the specific outcomes associated with the individual cases. Each Florida Annual Comprehensive Financial Report contains a note about significant loss contingencies associated with legal proceedings. The 2023 report notes two cases, each of which had projected losses between \$30 million and \$35 million.

According to the Brennan Center for Justice, as of January 11, 2024, a total of 40 cases had been filed challenging abortion bans in 23 states, of which 22 were pending at either the trial or appellate levels. On the current website for the Center for Reproductive Rights, the following statement is provided, “The Center for Reproductive Rights is litigating dozens of cases in state, national and regional courts against harmful laws that restrict access to abortion and other reproductive rights.”⁴

Conclusion: Because the number of existing laws and regulations potentially affected by the proposed constitutional amendment is significant and areas of future litigation are unknown, the fiscal impact associated with litigation cannot be determined. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment’s absence. The outcomes of any such litigation are speculative.

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State and Local Revenues:

The tax structure of an economy depends on its tax base and tax rate, which shape how the effective tax rate varies across persons and circumstances. Florida’s overall tax structure is established both constitutionally and statutorily. It is important to note that the amendment’s overall effect on the economy is not colored by the specific constraints brought about by the state and local tax codes, those results may differ materially from the discrete revenue impacts. An analysis of that type is no longer a part of the charge given to the Financial Impact Estimating Conference (FIEC).

A discussion of the amendment’s effects on state and local taxes relies in part on who bears the burden of paying and how that burden changes as a result of the policy change. The capacity to pay and incur taxes is typically associated with adulthood and employment. While a parent (or parents) makes purchases on behalf of his or her child, these are viewed as substitutions away from the purchases they would have made in the child’s absence. As such, there is no net gain to tax collections from these purchases. Moreover, there may be a relative-comparative loss to tax collections during this period if the total bundle of all child-related expenditures contains a greater number of nontaxable items (such as healthcare, medicines, child care, diapers and food) than would be found in the bundle of purchases for a similarly situated family without the child. The corollary: Relative to a baseline containing a greater number of births, is that fewer births may result in an actual gain into taxes during the childhood-rearing years period as household income is freed to make a greater number of purchases that are taxable.

Given that, unique taxes associated with a new life would not be expected until the child reaches the age of 18, the age typically associated with graduation from high school and entry into the workforce. Most analyses conducted by the Legislature’s Office of Economic and Demographic Research (EDR) and the State’s formal estimating conference process do not reach this far into the future. According to s. 216.134(1), Florida Statutes, “The official information developed by each consensus estimating conference shall include forecasts for a period of at least 10 years, unless the principals of the conference unanimously agree otherwise.” Nevertheless, the FIEC is not bound by this section of the statutes. It is, however, obligated to follow standard economic principles and widely accepted

⁴ <https://reproductiverights.org/our-work/case-highlights/>. Accessed July 12, 2024.

protocols. There are special techniques to evaluate taxes that are generated and received in a distant future.

The most important feature of these techniques is to determine the present value of the expected lifetime taxes, given a specified discount rate. The discount rate is the factor used to bring the future tax collections back to the present day, after accounting for the time value of money. For a simple one-person example, assume the following information on a person who is 18 years old in FY 2042-43 (this would reflect the cohort of children born in FY 2025-26):

- Using an annual growth rate of 2.8% and a discount rate of 5.0%, the expected annual state and local tax collections from each person 18 years and older in FY 2042-43 would be \$8,038.55, but the present value would only be \$3,181.13.⁵
- Assuming a last working year at 65 years of age (FY 2089-90 for the first year of the first cohort), the cumulative value of lifetime collections would be \$764,134.74, but the present value would only be \$95,705.30.

As a further demonstration of the power of discounting, the cost for educational services alone would be greater than the tax collections for the cohort used in this example since those costs occur early on and receive comparatively little discounting. For all analyses of long-term receipts and expenditures, the present values must be used.

Further complicating this analysis is the difference in purchase bundles brought about by poverty. The Guttmacher Institute reports that 41.8% of women who had abortions in 2021-22 had a family income of less than 100 percent of the federal poverty level. The poverty rate for the overall population was well less than this; the official poverty rate reported by the U.S. Census Bureau in 2021 was 11.6%, and in 2022 was 12.4%. Almost certainly, the purchase bundle of persons living in poverty includes fewer taxable items.

Conclusion: While there would be a loss to state and local tax collections in the long-term from fewer births, that amount cannot be determined and would not be detectable until FY 2042-43. Tax gains may be experienced prior to that point as prevented pregnancies and the avoided costs of child-rearing free disposable personal income for a bundle of other purchases that are taxable contains more items that are taxable. The net effect of the two opposing forces within any given year is indeterminate as to magnitude and direction since multiple cohorts at differing life-cycle stages would be in place at the same time.

[Needs Conclusion]

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⁵ The Tax Foundation provides an annual analysis of state and local tax burdens. The latest version is available for the 2022 calendar year. One of the reported metrics is "Taxes Paid to Own State per Capita." Recalculating this data to shift the per capita to the 18+ population results in a tax burden of \$4,378.54 in 2022—the reported value was \$3,533.00. See <https://taxfoundation.org/data/all/state/tax-burden-by-state-2022/#results>.

Tab 6

Materials from Sponsor

**Floridians Protecting Freedom’s
Submission to the Financial Impact Estimating Conference**

Re: Amendment to Limit Government Interference with Abortion, 23-07

July 1, 2024

Floridians Protecting Freedom submits this information as the Financial Impact Estimating Conference considers revisions to the Financial Impact Statement for the Amendment to Limit Government Interference with Abortion. We request the Conference adhere to its initial analysis, ensure there is clarity regarding the statement’s purpose, and ensure the statement is clear and accurate.

In this document, we discuss the following:

- The Conference’s previous analysis should inform its revision..... 1**
- Court-identified issues with the initial Financial Impact Statement.....2**
- Ways to ensure clarity in financial impact statements..... 3**

The Conference’s previous analysis should inform its revision

The Conference’s charge is to provide an analysis of the “estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative,” if it becomes law.¹ The baseline for this analysis is now clear: Abortion in Florida is prohibited after six weeks gestation and penalized as a felony.

In its initial analysis, the Conference determined that the proposed amendment’s impact on state and local budgets would be “essentially equivalent” to what existed until 2022, during what was characterized by the Conference as the “Roe Era,”² when state law prohibited abortions after viability. The Conference determined that there would be a probable financial impact, specifically a cost savings, on the following state and local costs:

Criminal Justice System: In either event, it is probable that there will be cost savings to the criminal justice system. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect.³

¹ Fla. Stat. § 100.371(13)(a).

² Complete Financial Information Statement (Nov. 16, 2023), p. 5.

³ *Id.* at p. 7.

Education Services: In either event, it is probable that there will be cost savings to education services. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect.⁴

Health and Human Services: In either event, it is probable that there will be cost savings to health and human services. The magnitude of those savings will differ depending on which prohibition (15-week or 6-week) is in effect.⁵

The Conference did not identify any other sources of probable financial impacts of the amendment.

When determining the extent of these impacts, the Conference should consider that the State has not adjusted State budgets, estimated demands on State resources,⁶ or population estimates⁷ due to any of the recent changes in abortion law. Additionally, legislative staff analyses of the recent abortion bans noted no fiscal impact.⁸

Court-identified issues with the initial Financial Impact Statement

The district court identified the following issues with the initial Financial Impact Statement in its order remanding the statement to the Conference for redrafting:

- (1) the Financial Impact Statement's conclusion is inaccurate and presents outdated facts;
- (2) the Financial Impact Statement is not limited to summarizing Amendment 4's probable impact to state and local government revenues or costs and to the state budget; and
- (3) the Financial Impact Statement is ambiguous, vague, confusing, and misleading.⁹

⁴ *Id.* at p. 8.

⁵ *Id.* at p. 12.

⁶ Office of Economic and Demographic Research, Resource Demand Forecasting, <http://edr.state.fl.us/Content/resource-demand/index.cfm>.

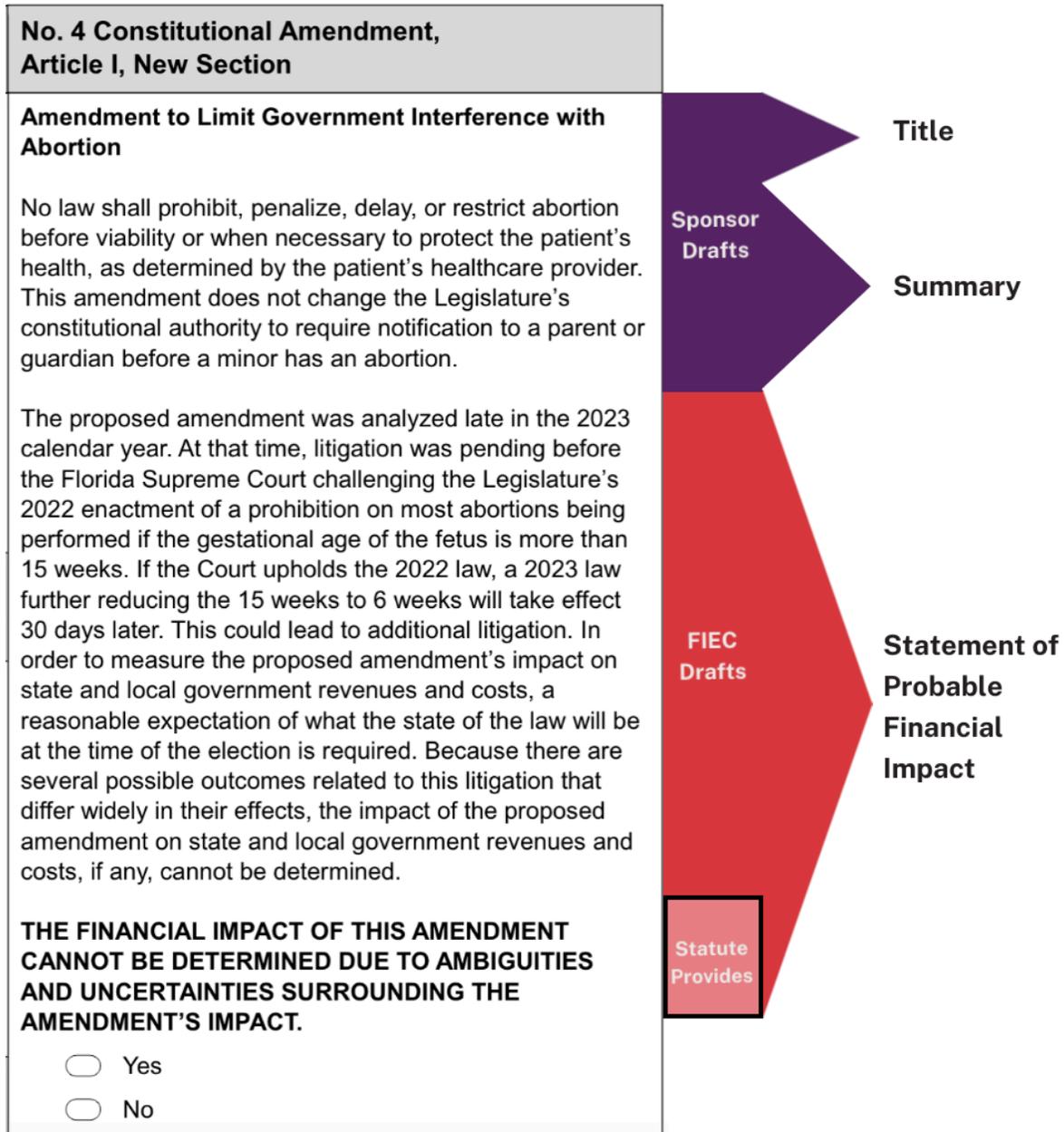
⁷ Office of Economic and Demographic Research, Population & Demographics, <http://edr.state.fl.us/Content/population-demographics/index.cfm>.

⁸ See Staff analyses gathered in Tab 2, EDR Notebook - from the Formal Workshop help (November 16, 2023).

⁹ Circuit Court Order, p. 7.

Ways to ensure clarity in financial impact statements

The illustration below shows how financial impact statements generally appear on Florida voters' ballot, using the initial statement as an example. Florida statute requires that the Conference-drafted financial impact statement be printed on the ballot after the amendment's ballot summary and title. A statutorily provided statement follows in bold, all-capital type.



As the illustration above indicates, there is no subtitle or introductory signal between the ballot summary and the Financial Impact Statement. While the Conference prints “FLORIDA FINANCIAL IMPACT ESTIMATING CONFERENCE FINANCIAL IMPACT STATEMENT” on its financial impact statements, this has not traditionally been included on the ballot.

For clarity, the Conference should begin the Financial Impact Statement with a clear reference to the statement’s purpose.¹⁰ Such a signal makes clear to voters that they are no longer reading the summary of the amendment, but rather a statement on the amendment’s probable financial impact. An early draft of the initial financial impact statement, for example, began “State law required *this Financial Impact Statement* to be completed by November 22, 2023.” Should the 150-word limit¹¹ constrain this effort, the Conference should use an introductory signal, such as “Financial Impact Statement:” or “Financial Impact:”.

Recent financial impact statements serve as additional examples, as follows:

Amendment	Introductory Sentence
Adult Personal Use of Marijuana, 22-05	The amendment’s financial impact primarily comes from expected sales tax collections.
Raising Florida’s Minimum Wage, 18-01	State and local government costs will increase to comply with the new minimum wage levels.
All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet, 19-07	It is probable that the proposed amendment will result in additional local government costs to conduct elections in Florida.
Voter Approval of Constitutional Amendments, 19-08	It is probable that the proposed amendment will result in additional state and local government costs to conduct elections in Florida.
Voter Control of Gambling in Florida, 15-22	The amendment’s impact on state and local government revenues and costs , if any, cannot be determined at this time because of its unknown effect on gambling operations that have not been approved by voters through a constitutional amendment proposed by a citizens’ initiative petition process.

¹⁰ See Circuit Court Order, page 8, paragraph 10: “Instead, voters must read 77 words about unrelated, non-extant litigation before getting to the idea that this paragraph has something to do with the amendment’s financial impact.”

¹¹ Until 2019, the financial impact statement was limited to 75 words, like the ballot summary. Today, the financial impact statement can be up to 150 words.

For your reference, since 2020, the statement the Conference adopted has been followed by statutorily provided language, depending on the Conference’s conclusion, unless no impact is expected.

Conference’s conclusion	Statutory statement for ballot
Net negative impact on the state budget	THIS PROPOSED CONSTITUTIONAL AMENDMENT IS ESTIMATED TO HAVE A NET NEGATIVE IMPACT ON THE STATE BUDGET. THIS IMPACT MAY RESULT IN HIGHER TAXES OR A LOSS OF GOVERNMENT SERVICES IN ORDER TO MAINTAIN A BALANCED STATE BUDGET AS REQUIRED BY THE CONSTITUTION.
Net positive impact on the state budget resulting in whole or in part from additional tax revenue	THIS PROPOSED CONSTITUTIONAL AMENDMENT IS ESTIMATED TO HAVE A NET POSITIVE IMPACT ON THE STATE BUDGET. THIS IMPACT MAY RESULT IN GENERATING ADDITIONAL REVENUE OR AN INCREASE IN GOVERNMENT SERVICES.
Net positive impact on the state budget for other reasons	THIS PROPOSED CONSTITUTIONAL AMENDMENT IS ESTIMATED TO HAVE A NET POSITIVE IMPACT ON THE STATE BUDGET. THIS IMPACT MAY RESULT IN LOWER TAXES OR AN INCREASE IN GOVERNMENT SERVICES.
Indeterminate or FIEC principals unable to agree	THE FINANCIAL IMPACT OF THIS AMENDMENT CANNOT BE DETERMINED DUE TO AMBIGUITIES AND UNCERTAINTIES SURROUNDING THE AMENDMENT’S IMPACT.

Conclusion

The Conference has a responsibility to the People of Florida to present a clear and accurate statement of Amendment 4’s probable financial impact that provides voters the ability to evaluate the proposal on its merits. To fulfill this responsibility, the Conference must adhere to its initial analysis, ensure the statement’s purpose is straightforwardly communicated to voters, and ensure the statement is clear and accurate.

**Floridians Protecting Freedom’s
Additional Submission to the Financial Impact Estimating
Conference**

Re: Amendment to Limit Government Interference with Abortion, 23-07

July 3, 2024

Floridians Protecting Freedom submits this additional information as the Financial Impact Estimating Conference considers revisions to the Financial Impact Statement for the Amendment to Limit Government Interference with Abortion. We request the Conference adhere to its initial analysis, ensure there is clarity regarding the statement’s purpose, and ensure the statement is clear and accurate. We provide the following information to provide context and clarity regarding some of the issues raised at the meeting on July 1, 2024.

In this document, we discuss the following:

The Conference should adhere to its original analysis.....	1
The Conference is limited to the <i>probable financial impact of the amendment</i>	4
Speculation about future litigation is unlawful.....	5
It is not probable that litigation costs will increase under the amendment.....	8
Speculation about economic impact is unlawful.	10
It is not probable that the amendment will significantly impact the birth rate.	13

The Conference should adhere to its original analysis.

The Conference should adhere to its original analysis of the financial impact of Amendment 4, namely that the passage of the amendment would provide cost savings to the state.¹

The Conference has been ordered to redraft the Financial Impact Statement and, in its order, the court made clear that the Conference should adhere to its previous analysis:

Amendment 4’s Complete Financial Information Statement makes clear that whether the Amendment is enacted while a 15- or 6-week prohibition on abortion is in place, “it is probable that there would be a cost savings” to the state, with the magnitude of such savings

¹ Complete Financial Information Statement (Nov. 16, 2023).

depending on which law is in place. If the FIEC's redrafted FIS does not reflect this analysis that it already completed, it must justify to this Court the departure from its prior determination.

Order Granting Motion for Summary Judgment at 8 ¶ 11.

In its initial analysis, the Conference determined that the proposed amendment's impact on state and local budgets would be "essentially equivalent" to the impact that existed until 2022, during what the Conference characterized as the "Roe Era,"² when state law prohibited abortions after viability. The Conference determined that there would be a probable financial impact should the amendment be adopted while the six-week ban was in force—specifically a cost savings.³

The only thing that has changed since this initial analysis is that the prohibition on abortion after six weeks gestation has gone into effect. Any changes to the analysis outside of that new development is unnecessary and violates the Court's order absent significant justification for a new analysis, which the FIEC has not provided.

There is no new information that would justify changing the finding of probable cost savings to the criminal justice system, education services, or health and human services. A change in the Conference's composition is not justification for abandoning the Conference's previous well-supported findings.⁴

As to the criminal justice system, the Conference's initial analysis finding probable cost savings was accurate. While the abortion bans are new and therefore there is no current data, there is evidence that when states make abortion earlier in pregnancy a crime, people are prosecuted for abortion. In Florida, the Governor removed a state attorney from office for "publicly [declaring] that his office will not prosecute violations of Florida criminal laws that prohibit providers from

² *Id.* at 5.

³ *Id.* at 1.

⁴ Since the first Conference, the "person from the professional staff of the House of Representatives" and "person from the Executive Office of the Governor" have been replaced with other individuals. Fla. Stat. § 100.371(13)(c)1.

performing certain abortions.”⁵ Women have been arrested and prosecuted after miscarriages⁶ and self-managed abortions,⁷ and hospital staff have been threatened with felonies for administering a court-sanctioned abortion.⁸

It is not probable that the number of potential offenders will increase because of the amendment's use of the phrase “healthcare provider.” The argument was made that *if* someone sues and *if* the courts agree that the term includes such medical professionals as speech pathologists, then speech pathologists will also be subject to criminal penalties and therefore, because the potential offender pool may increase (although, let's be clear: no one goes to the dentist for heart surgery and no one would—or could—go to a speech pathologist for an abortion, and any representation otherwise by a neutral body such as the FIEC is extremely disingenuous), there will be an increase in costs to the criminal justice system. Healthcare providers are heavily regulated and cannot practice beyond their scope and there is no evidence speech pathologists, or any other unqualified healthcare provider, wants to perform abortions. Moreover, the pool of potential criminal cases will decrease significantly when abortion access is restored relative to the current situation where abortions are criminalized after six weeks gestation. The argument that there could be increased costs to the criminal justice system is speculative beyond reason, and it is inappropriate for a financial impact statement.

The Conference in its initial analysis accurately characterized the Amendment as providing a cost-savings to the criminal justice system, and the Conference's conclusion should remain.

⁵ Exec. Order 22-176, (Aug. 4, 2022) <https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf>.

⁶ Claretta Bellamy, *Black woman charged after miscarrying in bathroom shares feelings about arrest*, NBC News (January 26, 2024), <https://www.nbcnews.com/news/nbcblk/brittany-watts-miscarriage-bathroom-charged-rcna135861>

⁷ Cybele Mayes-Osterman, *Lizelle Gonzalez is suing the Texas prosecutors who charged her criminally after abortion* (Apr. 3, 2024), <https://www.usatoday.com/story/news/nation/2024/04/03/texas-murder-charge-abortion-lawsuit-lizelle-gonzalez/73189414007/>.

⁸ Eleanor Klibanoff, *Kate Cox's case reveals how far Texas intends to go to enforce abortion laws*, Texas Tribune (Dec. 13, 2023), <https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit>.

The Conference is limited to the *probable financial impact of the amendment*.

The Florida Constitution provides in relevant part:

The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the ***probable*** financial impact of any amendment proposed by initiative pursuant to section 3.

Art. XI, § 5(c), Fla. Const. (emphasis added).

The Florida Supreme Court has ruled that the Legislature has no authority to adopt financial impact statements outside of this provision.⁹ In complying with this constitutional mandate, the Legislature further defined “probable financial impact” in section 100.371(13), Florida Statutes, as “the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.”

The FIEC’s mandate is clear—it does not analyze the *economic* impact and instead must only consider the probable changes in “revenues or costs to state and local governments and the overall impact to the state budget.” To ensure the Conference only looks at the probable effects, as was discussed at the Conference’s October 19, 2024, meeting, the Conference’s analysis is usually based on a single year. (“In the [EDR] conferences, we tend to say the fifth year out [for analysis], but not in FIECs - we don’t normally go out that far.”¹⁰). In fact, the State’s “Long-Range Financial Outlook,” which it uses to ensure financial stability in the long term, spans only three years. (Of note, this outlook has not been updated in anticipation of a purported significant increase in birth rates due to recent abortion bans.). To consider financial impacts that may span decades is completely speculative and runs afoul of this Conference’s mandate.

Probable effects are *direct* effects—the further away from the amendment the Conference treads, the more likely it is in unconstitutional territory. For example, the Florida Supreme Court has

⁹ *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 960 (Fla. 2002); *see also Browning v. Fla. Hometown Democracy*, 29 So. 3d 1053, 1063 (Fla. 2010) (governmental actions affecting the initiative process must either be “neutral, nondiscriminatory regulations of petition-circulation and voting procedure, which are explicitly or implicitly contemplated by article XI, or, if otherwise, [must be] ‘necessary for ballot integrity’”).

¹⁰ Statement of Amy Baker, Oct. 19, 2023, FIEC Conference at 2:03.

rejected statements like, “if the amendment results in shortages of physicians, there could be some increase in Medicaid and health insurance costs paid by state and local governments.”¹¹

Finally, the probable effects must be presented neutrally, without editorializing. For example, the Florida Supreme Court has rejected a statement that referred to “problem gambling,” but approved a redraft that dropped this phrase.¹²

Speculation about future litigation is unlawful.

Judicial precedent, as well as the court order in *FPF v. FIEC*, makes clear: the financial impact statement cannot speculate about future litigation. As the court directed: “The potential of future litigation impacting state and local government revenues and expenses outside of the amendment’s effects is not appropriate for inclusion in the FIS. The FIS must be limited to the probable effects of the amendment.”¹³

Litigation is too far removed from the probable effect of the amendment because the amendment does not require litigation. At the July 1, 2024, meeting, it was argued that *if* the State declines to follow the Constitution, and *if* someone whose right has been impacted by that failure chooses to bring a lawsuit, then the State would *probably* see increased litigation costs. That argument is simply too speculative to include in the financial impact of this Amendment. Indeed, it would be extraordinary for the Conference to incorporate into its estimate of the Amendment’s probable financial impact an assumption that the State will violate the Constitution.

If this were the standard, every financial impact statement would include litigation costs. While every amendment is likely to be relied upon in future litigation, the fact that “lawyers are adept at finding ambiguity”¹⁴ does not mean litigation costs are the direct result of an amendment. This is

¹¹ *Advisory Op. to Att’y Gen. re Pub. Prot. from Repeated Med. Malpractice*, 880 So. 2d 686 (Fla. 2004).

¹² *Advisory Op. to Att’y Gen. re Authorizes Miami-Dade & Broward Cnty. Voters to Approve Slot Machines in Parimutuel Facilities*, 882 So. 2d 966, 967 (Fla. 2004).

¹³ Order Granting Motion for Summary Judgment at 8 ¶ 7 (citing Art. XI, §§ 5(c), (e), Fla. Const.; § 100.371(13)(a), Fla. Stat.).

¹⁴ *Advisory Op. to Att’y Gen. re Limiting Gov’t Interference with Abortion*, 384 So. 3d 122, 138 (Fla. 2024) (“Lawyers are adept at finding ambiguity. Show me the text and I’ll show you the ambiguity.”).

further illustrated by the fact the state faced litigation following the adoption of seven of the last ten citizens' initiatives, yet the only financial impact statements that referenced such litigation costs were related to redistricting.¹⁵

Those amendments—Standards for Legislature to Follow in Legislative/Congressional Redistricting—added standards to an existing *required* judicial review process for legislative districts; in other words, litigation was *constitutionally mandated*, and therefore a legal certainty.¹⁶ Even there, the Florida Supreme Court rejected the Conference's first attempt and remanded the following statement for redrafting:

The amendment's fiscal impact cannot be determined precisely. State government will probably incur increased costs (millions of dollars), including attorney and expert witness fees, due to expected additional litigation regarding the application and interpretation of the amendment standards as they relate to proposed redistricting plans. Also, state courts will likely incur additional costs to preside over hearings and render rulings. There is no expected impact to local government expenditures or government revenues.^[17]

The Court found the Conference's "purported establishment of a litigation-cost baseline . . . from which to measure any alleged increased cost" to be "dubious and highly speculative" and the statement's reference to "millions of dollars" as unlawfully "vague" and "ambiguous."¹⁸

¹⁵ See, e.g., *W. Flagler Assocs. v. DeSantis*, 382 So. 3d 1284 (Fla. 2024); *Advisory Op. to Gov. re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1072 (Fla. 2020); *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1105 (Fla. 2021); *Oliva v. Fla. Wildlife Fed.*, 281 So. 3d 531, 533 (Fla. 1st DCA 2019); *Fla. House of Reps. v. League of Women Voters of Fla.*, 118 So. 3d 198, 200 (Fla. 2013); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014), *order clarified*, No. 4:14-cv-107, 2015 WL 44260 (N.D. Fla. 2015).

At the Conference's July 1, 2024, meeting, one opponent prophesied that Amendment 4 "will cause much more litigation than even the medical marijuana amendment that we litigated from the circuit court to the district court of appeal then all the way through the Supreme Court." But neither the financial impact statement for that amendment (Use of Marijuana for Debilitating Medical Conditions, 15-01) nor the Conference's full analysis made any mention of anticipated litigation costs, properly reflecting the Conference's responsibility and duty.

¹⁶ *Advisory Op. to Att'y Gen. re Standards for Establishing Legis. Dist. Boundaries*, 2 So. 3d 161 (Fla. 2009).

¹⁷ *Id.* at 161.

¹⁸ *Id.* at 165.

On remand, the Conference adopted the following redraft:

The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence.

In approving this redraft, the Court noted the absence of the “vague and speculative reference to “millions of dollars” in increased costs” and lack of “nonmonetary impacts or financial impacts beyond the revenues or costs to state or local governments.”¹⁹ The Court ultimately accepted the final sentence's reference to conditional impacts of litigation, but cautioned that “it may become necessary to reconsider whether to allow financial impact statements that contain conditional phrases on the ballot in light of our constitutional duty to protect and preserve the integrity of the amendment process.”²⁰ The Court saw such conditional statements as potential sources of abuse, whereby financial impact statements could “devolve into a tool used to manipulate the public based solely upon whether the entity empowered and entrusted with preparing the statements favors or disfavors a proposal.”²¹ The Court cautioned, as it had in the past that, “[s]care tactics and vague, unsupported predictions of financial disaster have no place in this constitutional-amendment process, and any predictions of financial impact must be grounded in fact, not partisan ideology. Otherwise, the core purpose of financial impact statements (i.e., to inform voters so that an educated decision may be made with regard to a proposed amendment) would be completely defeated.”²²

There have been times the Conference has considered the probability of increased litigation, but never has it been included in the financial impact statement as a probable impact of the amendment. For example, when the Conference considered that the Florida Marriage Protection Amendment (05-10) “could lead to increased litigation,” the financial impact statement made no reference to increased costs of litigation: “The direct financial impact this amendment will have on state and

¹⁹ *Advisory Op. to Att'y Gen. re Standards for Establishing Legis. Dist. Boundaries (FIS)*, 24 So. 3d 1198, 1200 (Fla. 2009).

²⁰ *Id.* at 1202.

²¹ *Id.* (quoting *Legis. Dist. Boundaries*, 2 So. 3d at 165).

²² *Id.*

local government revenues and expenditures cannot be determined but is expected to be minor.”²³

Lastly, unlike the certainty of judicial review of legislative reapportionment, a “prediction of increased litigation is premised on the unsupported assumption that the Legislature will fail to adhere to the guidelines and fail to fulfill its constitutional duty.”²⁴ The Florida Supreme Court has rejected this premise, just as it has rejected giving “the misleading impression that the proposed amendment will not have its intended effect,”²⁵ here limiting government interference with abortion.

It is not probable that litigation costs will increase under the amendment.

Even if litigation costs were appropriate to include in this financial impact statement, the Conference must first establish a baseline to which to compare the amendment. Abortion access has been heavily litigated for decades, and litigation continues even following the overruling of *Roe*, and even in states whose constitutions do not provide explicit protections for access to abortion care. In the absence of a state constitutional right to abortion, direct challenges to state bans on abortion access have been brought under state provisions providing religious freedom, equal protection, and due process rights.²⁶ Litigation has also continued challenging vague

²³ The amendment, of course, resulted in litigation, prompting costs to the state for both defending the amendment and paying the successful plaintiffs’ attorneys’ fees. *See, e.g., Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014).

²⁴ *Legis. Dist. Boundaries*, 2 So. 3d at 166.

²⁵ *Comprehensive Land Use Plans*, 992 So. 2d at 192; *see also Advisory Op. to Att’y Gen. re Referenda Required for Adoption and Amend. of Loc. Gov’t Comprehensive Land Use Plans.*, 963 So. 2d 210, 215 (Fla. 2007).

²⁶ *See, e.g., Sistersong v. Georgia*, No. 2022CV367796 (Ga. Super. Ct. Jul. 26, 2022); *Adkins v. Idaho*, No. CV01-23-14744 (Idaho Dist. Ct. Sept. 11, 2023); *Anonymous Plaintiffs v. Members of the Medical Licensing Board of Indiana*, No. 49D01-2209-PL-31056 (Ind. Cir. Ct. Aug. 31, 2022); *Planned Parenthood v. Reynolds*, No. EQCE 89066 (Iowa Dist. Ct. July 12, 2023); *EMW Women’s Surgical Center v. Cameron*, No. 22-CI-3225 (Ky. Cir. Ct. June 27, 2022); *Sobel v. Cameron*, No. 22-CI-5189 (Ky. Cir. Ct. Oct. 6, 2022); *June Med. Servs. v. Landry*, No. C-720988 (La. Dist. Ct. June 24, 2022); *Planned Parenthood v. Att’y Gen. of Mich.*, No. 22-44-MM (Mich. Ct. Ct. Apr. 7, 2022); *Access Indep. Health Servs., Inc. v. Wrigley*, No. 08-2022-CV-1608 (N.D. Dist. Ct. July 6, 2022); *Okla. Call for Reproductive Just. v. O’Connor*, No. CV-2021-2072 (Okla. Dist. Ct. Sept. 2, 2021); *Planned Parenthood v. South Carolina*, No. 2022-CP-2023-CP-40-002745 (S.C. C.P. Richland Cnty. May 25, 2023); *Planned Parenthood v. Utah*, No. 220903886 (Utah Dist. Ct. June 25, 2022); *Johnson v. Wyoming*, No. 18732, (Wyo. Dist. Ct. July 25, 2022).

provisions, including exceptions and ill-defined terms.²⁷ Before 2022, many Floridians who needed an abortion for health reasons, for example, did not need their doctor to prove that they met the criteria under the exception because their pregnancy had not yet reached viability, so these exceptions have not been tested. As these exceptions have been invoked in the face of these bans, their ambiguity has become pronounced.²⁸ Similarly, the new exception for instances of rape or human trafficking lacks definitions for those terms,²⁹ and similar provisions requiring victims “prove” their rape have been subject to litigation.³⁰ It is clear that the pre-amendment baseline for litigation over abortion law is far from zero.

Turning to the probable post-amendment scope of litigation: Opponents claim litigation will be necessary to define the amendment’s plain language. However, as the Florida Supreme Court explained, “it is difficult to imagine a Florida voter in 2024 who would be befuddled in any material way by the ballot summary or proposed amendment due to the use of the terms ‘viability,’ ‘health,’ and ‘healthcare provider.’”³¹ If “it is difficult to imagine a Florida voter in 2024 who would be befuddled in any material way” by the amendment, surely the State can be trusted to comply with it, if it is passed. After all, “by its plain language, [the amendment] limits government interference before viability or when necessary to protect the mother’s health.”³² “[T]he proposed amendment would not prohibit the Legislature from passing laws “interfering” with abortion after the point of viability and when the mother’s health is not in jeopardy.”³³

²⁷ See, e.g., *Planned Parenthood v. South Carolina*, No. 2024-CP-4000762 (S.C. Sept. 14, 2023); *Blackmon v. Tennessee*, 23-1191-I, (Tenn. Ch. Ct. Sept. 11, 2023); *Zurawski v. Texas*, No. D-1-GN-23-000968 (Tex. Dist. Ct. Mar. 6, 2023).

²⁸ Regan McCarthy, *Why providers say abortion ban exceptions continue to cause confusion*, NPR (June 14, 2024), <https://www.npr.org/2024/06/06/nx-s1-4995739/abortion-exceptions-life-mother-florida>.

²⁹ Ana Goñi-Lessan, *‘Rape’ not defined in Florida law. How will doctors know if they can perform an abortion?*, Tallahassee Democrat (May 23, 2024), <https://www.tallahassee.com/story/news/politics/2024/05/23/florida-abortion-law-rape-not-defined-doctors-consequences/73605648007/>

³⁰ See, e.g., *Planned Parenthood v. South Carolina*, No. 2022-CP-2023-CP-40-002745 (S.C. C.P. Richland Cnty. May 25, 2023).

³¹ *Limiting Gov’t Interference with Abortion*, 384 So. 3d at 136.

³² *Id.* at 134.

³³ *Id.*

Speculation about economic impact is unlawful.

As discussed above, the financial impact statement is limited to the probable “increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget.” While the Legislature briefly expanded this scope to economic impacts, that was repealed the following year.³⁴ Determining the economic impact of any proposal is a lengthy, complicated process that requires in-depth modeling that is not part of this process. Skipping that economic analysis to predict how distant economic output might impact the state and local budgets based on the Conference’s assumptions would be an unprecedented leap that would be dubious, at best, and would most certainly violate Florida law.

For example, to get to the suggested, and preposterous, conclusion that the amendment would decrease documentary stamp revenue due to people denied abortions under current law “buying bigger houses,” one must assume:

1. The pregnancy rate does not continue to decline. The total estimated number of pregnancies nationwide declined by 9% between 2010 and 2019.³⁵ The percentage of pregnancies that were unintended declined from 43.3% to 41.6% during this time.³⁶
2. The person denied the abortion in-state goes on to give birth. Note that the birth rate in Texas, which has had a similar abortion ban since August 2022, has not significantly increased.³⁷ This assumption requires assuming that:
 - a. The person does not have the option to, or chooses not to, travel to another state to receive the abortion. In 2023, despite the Texas abortion ban, 35,000 Texans traveled out of state to get an abortion.³⁸
 - b. The person does not have the option to, or chooses not to, receive care through

³⁴ Compare ch. 2019-64, Laws of Fla., with ch. 2020-15, Laws of Fla.

³⁵ Rossen, et al., *Updated methodology to estimate overall and unintended pregnancy rates in the United States*, National Center for Health Statistics. Vital Health Stat 2(201). 2023. DOI: <https://dx.doi.org/10.15620/cdc:124395>.

³⁶ *Id.*

³⁷ See Live Births by Month, Florida vs Texas January 2022 - September 2023, CDC Provisional Counts, <https://www.cdc.gov/nchs/nvss/vsrr/provisional-tables.htm>.

³⁸ Eleanor Klivanoff, *Five abortions a month: How Dobbs changed Texas*, Texas Tribune (June 24, 2024). <https://www.texastribune.org/2024/06/24/abortion-dobbs-anniversary-pregnancy-complications/>

telehealth from a doctor in a state with laws shielding doctors from prosecution. In 2023, telehealth accounted for a monthly average of nearly 17,000 abortions, with an average of 5,800 provided under shield laws to people in states with total abortion bans or 6-week abortion bans and nearly 2,000 monthly telehealth abortions provided under shield laws to people in states with restrictions on telehealth abortion.³⁹

- c. The person does not have the option to, or chooses not to, self-administer abortion medication acquired online outside of telehealth and other formal medical settings. An estimated 26,000 additional self-managed medication abortions were obtained outside the formal health care system in the six months following *Dobbs*.⁴⁰
 - d. A live birth results. Twenty percent of pregnancies end in miscarriage or stillbirth.⁴¹ The Texas abortion ban was associated with unexpected increases in infant and neonatal deaths in 2022.⁴²
3. The person has the financial resources to invest in housing. Financial reasons are the most often cited reason for seeking an abortion.⁴³ Florida abortion data illustrates that more than 80% of the time a reason is provided for seeking an abortion, it is due to social or economic reasons.⁴⁴ Moreover, six months after being denied an abortion, women are more likely to be living in poverty, less likely to be employed full time and more likely to be receiving public assistance than those who were able to obtain an abortion.⁴⁵ These differences

³⁹ Society of Family Planning, #WeCount Report (2024), <https://societyfp.org/research/wecount/>.

⁴⁰ Abigail Aiken et al., "Provision of Medications for Self-Managed Abortion Before and After the *Dobbs v. Jackson Women's Health Organization* Decision," *JAMA* 331, no. 18 (2024): 1558-64., doi:10.1001/jama.2024.4266.

⁴¹ Rossen et al., *Updated methodology to estimate overall and unintended pregnancy rates in the United States*. National Center for Health Statistics. *Vital Health Stat* 2(201). 2023. DOI: <https://dx.doi.org/10.15620/cdc:124395>.

⁴² Gemmill et al., *Infant Deaths After Texas' 2021 Ban on Abortion in Early Pregnancy*. *JAMA Pediatr.* June 24, 2024. doi:10.1001/jamapediatrics.2024.0885.

⁴³ See, e.g., Biggs et al. *Understanding why women seek abortions in the US*. *BMC Women's Health* 13, 29 (2013). <https://doi.org/10.1186/1472-6874-13-29>.

⁴⁴ AHCA, *Reported Induced Terminations of Pregnancy by Reason, by Trimester, 2024 Year-to-Date*.

⁴⁵ D. G. Foster et al., 2022, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, *Am. J. Pub. Health* 112, 1290_1296, <https://doi.org/10.2105/AJPH.2017.304247>

remained significant for four years.⁴⁶

4. The person can, and chooses to buy, in the current housing market and a house in their price range is available. For many, especially those who already own a home at low interest rates, purchasing a new house in today's market is either unobtainable or an unattractive financial decision due to high interest rates and soaring insurance premiums.⁴⁷ The State has been accounting for this. Documentary Stamp Tax collections have fallen from a peak spurred by record low interest rates during the pandemic. As interest rates have increased and affordability became an issue, collections have declined, with the State's Revenue Estimating Conference expecting another decline in FY 2023-24, with a modest recovery in FY 2024-25 and FY 2025-26, before a return to typical growth.⁴⁸ Likewise the Revenue Estimating Conference expected to see significant declines in single-family building permit activity, which is an indicator of new construction, in FY 2022-23 and FY 2024-25, with an intervening positive year in FY 2023-24.⁴⁹ Furthermore, home ownership rates by the younger generations most impacted by the current ban are lower than their parents' and grandparents'. "Even though millennials are the largest adult generation in the U.S., they had a shrinking share of buyers in the market last year."⁵⁰

And this is just one example. The number of compounding assumptions necessary to determine how state budgets will be impacted decades in the future is absurd. There are too many intervening variables and personal choices between the amendment's direct effect—restoring access to abortion up until viability, which existed until less than two years ago⁵¹—and the potential economic impacts, let alone the impact to state and local budgets from those economic impacts. This approach requires a level of speculation that is far beyond the Conference's constitutional

⁴⁶ *Id.*

⁴⁷ See, e.g., Giulia Carbonaro, *Florida Housing Market Warning Issued by One of America's Biggest Banks*, Newsweek (July 3, 2024), <https://www.newsweek.com/florida-housing-market-warning-issued-one-americas-biggest-banks-1920589>

⁴⁸ http://edr.state.fl.us/content/presentations/economic/FIEconomicOverview_1-22-24.pdf

⁴⁹ *Id.*

⁵⁰ Jessica Lautz, *Economists' Outlook: Millennials Still Underperforming Amid Gains in Homeownership Rate*, Nat'l Assoc. of Realtors (Aug. 2, 2023), <https://www.nar.realtor/blogs/economists-outlook/millennials-still-underperforming-amid-gains-in-homeownership-rate>

⁵¹ As discussed in FPF's initial submission, the state has not projected any revenue differential between the viability standard from two years ago and the six-week ban.

mandate. Engaging in such speculative assumption after speculative assumption would ultimately be a creative exercise, not a methodological one. That is not the Conference's role.

Even assuming that it would be lawful for the Conference to consider economic impacts of the amendment or to venture downstream of those economic impacts to look for budgetary impacts, it is more probable that the amendment would lead to a positive financial impact to the state: when women have autonomy to make their own reproductive health care decisions, that leads to better economic, health, and family outcomes, resulting in increased tax collections and decreased demand on health care and social services. Moreover, if the Conference were to consider the budgetary consequences of economic impacts from increases in the birth rate, it must also consider the budgetary consequences of the economic impacts of residents of Florida being denied abortion.

Women experience a decline in earnings after the birth of a child.⁵² Women who have been denied an abortion experience increases in financial distress, such as lateness in paying bills, evictions, and bankruptcies, that last for several years.⁵³ For state revenues, this means that as impacted populations' spending power constricts and shifts to largely untaxed services and necessities, such as childcare and groceries, they contribute less to the State through sales tax on other goods. While engaging in this economic analysis is outside of the purview of this Conference, it illustrates that what the Conference discussed regarding the long-term financial impacts of prohibiting abortion in its July 1st meeting was one-sided and didn't account for all the economic variables that would be required to be analyzed to fully complete this type of economic analysis.

It is not probable that the amendment will significantly impact the birth rate.

It is not probable that the amendment will substantially impact the birth rate in Florida. The amendment restores access to abortion before viability, which existed in Florida until July 1, 2022. Looking at Texas, the first state to enact an abortion ban similar to Florida's six-week ban, it is clear that it is not reasonable to expect a significant increase in birth rates due to changes in abortion law. As discussed above, people have found ways to access abortion, even when it is

⁵² Ewa Cukrowska-Torzewska et al., *The motherhood wage penalty: A meta-analysis*. Soc. Sci. Research 88:102416 (2020), <https://www.sciencedirect.com/science/article/pii/S0049089X20300144>.

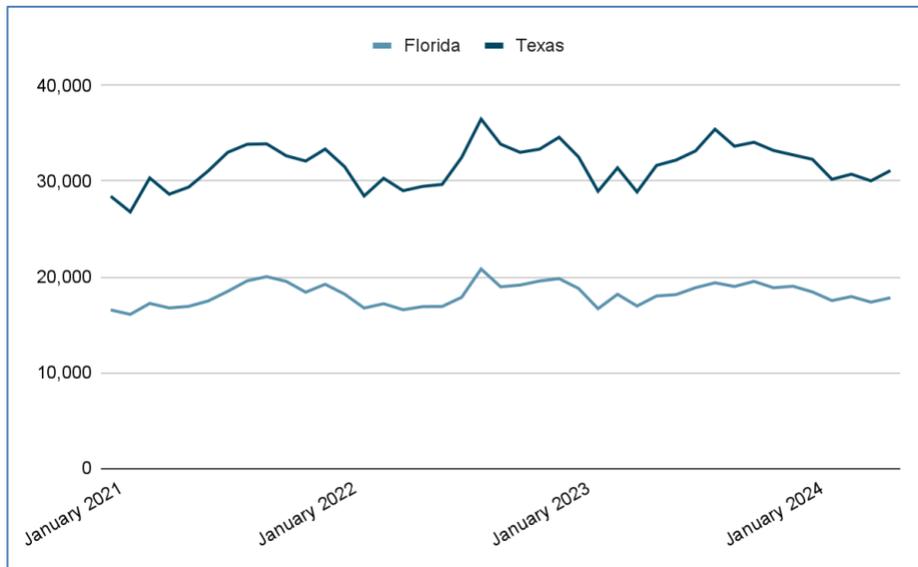
⁵³ Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, Am. Econ. J.: Econ. Pol., 15 (1): 394–437 (2023), <https://www.aeaweb.org/articles?id=10.1257/pol.20210159>.

banned in their resident state. Furthermore, more people are seeking sterilization in response to abortion bans.⁵⁴

While the number of abortions performed in Texas has dropped from 55,140 in 2018 to 62 in 2023,⁵⁵ the number of live births only increased by 9,315 during that same period.⁵⁶ From the following chart illustrating the

Annual Birth Rates ⁵⁸			
	Florida	Texas	National
2018	9.8	13.6	11.5
2019	9.6	13.4	11.2
2020	9.0	12.9	10.8
2021	9.1	12.9	10.8
2022	9.2	13.2	10.7
2023	8.9	13.0	10.5

monthly number of live births in Texas and Florida before and after Texas’s ban went into effect August 2022,⁵⁷ one sees little movement in monthly live births and that, despite its ban, Texas’s monthly birth trends do not substantially differ from Florida’s.



⁵⁴ Aaron Bolton, *How ob-gyns are handling more requests for sterilization after ‘Roe’ was overturned*, NPR (July 2, 2024), <https://www.npr.org/sections/shots-health-news/2024/07/02/nx-s1-5025682>.

⁵⁵ *Compare 2018 Selected Characteristics of Induced Terminations of Pregnancy with 2023 Selected Characteristics of Induced Terminations of Pregnancy*, Tex. Dep’t of Health & Human Services, <https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics>.

⁵⁶ CDC, Nat’l Center for Health Statistics, *Provisional Natality, Natality Records 2023 through Last Month*, <http://wonder.cdc.gov/natality-expanded-provisional.html>; *Natality, Natality Records 2016-2022*, <http://wonder.cdc.gov/natality-expanded-current.html>.

⁵⁷ *Id.*

⁵⁸ CDC, Nat’l Center for Health Statistics, *Provisional Natality, Natality Records 2023 through Last Month*, <http://wonder.cdc.gov/natality-expanded-provisional.html>; *Natality, CDC WONDER Online Database, Natality Records 2016-2022*, <http://wonder.cdc.gov/natality-expanded-current.html>; *Population Projections, United States, 2004 - 2030, CDC WONDER Online Database*, <http://wonder.cdc.gov/population-projections.html>.

Conclusion

The Conference has a responsibility to the People of Florida to present a clear and accurate statement of Amendment 4's probable financial impact that provides voters the ability to evaluate the proposal on its merits. To fulfill this responsibility, the Conference must adhere to its initial analysis, ensure the statement's purpose is straightforwardly communicated to voters, and ensure the statement is clear and accurate.

FLORIDIANS PROTECTING FREEDOM

**Financial Impact Estimating Conference
July 8, 2024**



The Conference should adhere to its original analysis

The Court Requires It:

Amendment 4's Complete Financial Information Statement makes clear that whether the Amendment is enacted while a 15- or six-week prohibition on abortion is in place, "it is probable that there would be a cost savings" to the state, with the magnitude of such savings depending on which law is in place. If the FIEC's redrafted FIS does not reflect this analysis that it already completed, it must justify to this Court the departure from its prior determination.

Order Granting Motion for Summary Judgment at 8.

The Conference should adhere to its original analysis

No new information justifies changing the original conclusion that under a six-week ban, the probable financial impact of Amendment 4 would be:

1. **Criminal Justice:** “cost savings to the criminal justice system.” (page 7 of the November 16, 2023 analysis).
2. **Education Services:** “cost savings to education services.” (page 8 of the November 16, 2023 analysis).
3. **Health and Human Services:** “cost savings to health and human services.” (page 12 of the November 16, 2023 analysis).

The Conference should adhere to its original analysis

No new information justifies changing the original conclusion that under a six-week ban, the probable financial impact of Amendment 4 would be a cost savings to the State:

4. **Federal and State Funds for Abortion:** As the FIEC noted, the Florida Supreme Court has already said, “[t]here is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to **prohibit, restrict, or interfere** with it.” The analysis should remain that “Future legislative changes, if any, in response to the passage of the proposed amendment are unknown.”

Renee B. v. Florida Agency for Health Care Administration, 790 So. 2d 1036 (Fla. 2001).

The FIEC is Limited to the “Probable Financial Impact”

The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the *probable* financial impact of any amendment proposed by initiative pursuant to section 3.

Art. XI, § 5(c), Florida Constitution



The FIEC is Limited to the “Probable Financial Impact”

“Probable financial impact” is defined as

“the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.”

§ 100.371(13), Florida Statutes

Economic, indirect or contingent impacts are not *probable financial impacts*

Rejected by Florida Supreme Court:

“if the amendment results in shortages of physicians, there could be some increase in Medicaid and health insurance costs paid by state and local governments.”

In re Advisory Opinion to the Atty. Gen. re Pub. Prot. from Repeated Med. Malpractice, 880 So. 2d 686, 687 (Fla. 2004).

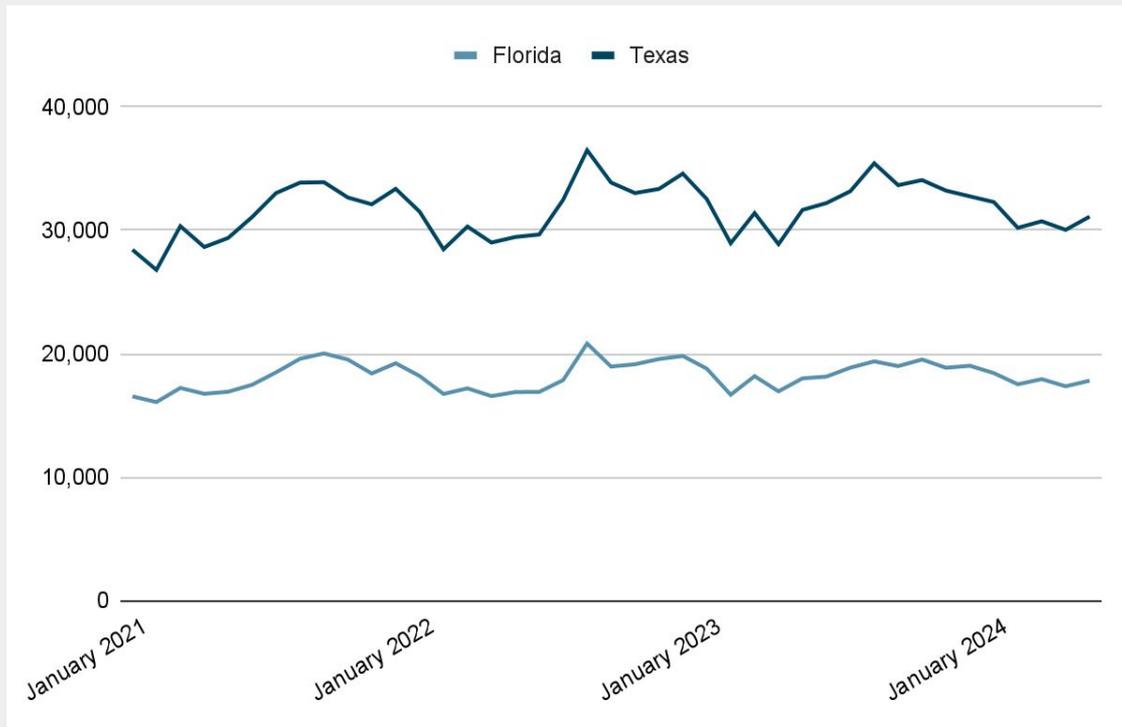
Impacts based on long-term economic analyses are inappropriate and faulty

Abortion was legal before viability until July 2022. The State has not altered its financial planning in response to recent bans.

People with resources have options when they face an abortion ban:

- ❑ More abortions were performed nationwide in 2023 than in 2022.
- ❑ Last year, 35,000 Texans traveled out of state to get abortion services.
- ❑ Monthly, an average of 5,800 patients in ban states access abortion through telehealth.
- ❑ Following Dobbs, self-managed abortions increased by 26,000.

Texas has not seen a dramatic increase in births



NBC NEWS CH LIVE

ABORTION RIGHTS

Texas abortion ban linked to 13% increase in infant and newborn deaths

"This might foreshadow what is happening in other states," said Johns Hopkins public health researcher Alison Gemmill. "Texas is basically a year ahead."

U.S. News

Health News / Big Rise in Young Adults Undergoing

Big Rise in Young Adults Undergoing Permanent Sterilization After Dobbs Decision

By [HealthDay](#)

April 12, 2024

FLORIDIANS
PROTECTING FREEDOM

Impacts based on long-term economic analyses are inappropriate and faulty

People impacted by the six-week ban are those who do not have options.

People who are denied an abortion are more likely to go on to experience:

- Household poverty lasting at least four years.
- Financial distress - late bills, bankruptcies, evictions.
- By five years, raising children alone.



62 percent of young adults wouldn't live in state with abortion ban: Survey

BY SARAH FORTINSKY - 05/07/24 12:13 PM ET

Women who are denied abortions risk falling deeper into poverty. So do their kids

MAY 26, 2022 · 5:00 AM ET

HEARD ON MORNING EDITION



Jennifer Ludden

Costs based on potential future litigation are not *probable financial impacts*

Probable financial impacts do not include future litigation.

“The potential of future litigation impacting state and local government revenues and expenses outside of the amendment’s effects is not appropriate for inclusion in the FIS.”

Circuit Court, Floridians Protecting Freedom vs. Financial Impact Estimating Conference



Costs based on potential future litigation are not *probable financial impacts*

FIEC cannot assume that the Legislature will not follow the Constitution

A “prediction of increased litigation is premised on the unsupported assumption that the Legislature will fail to adhere to the guidelines and fail to fulfill its constitutional duty.”

Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 166 (2009).

Costs based on potential future litigation are not *probable financial impacts*

FIEC cannot assume or imply that Amendment 4 will fail to be effective

“The language of the revised statement simply continues to give the the misleading impression that the proposed amendment will not have its intended effect.”

In re Advisory Op. to Att’y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov’t Comprehensive Land Use Plans, 992 So. 2d 190, 192 (Fla. 2008).

Costs based on potential future litigation are not *probable financial impacts*

When the Conference considered that the Florida Marriage Protection Amendment (05-10) “could lead to increased litigation,” the financial impact statement made no reference to increased costs of litigation. Instead, it read:

“The direct financial impact this amendment will have on state and local government revenues and expenditures cannot be determined, but is expected to be minor.”

Costs based on potential future litigation are not *probable financial impacts*

Only one reference to litigation costs has been approved

“The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment’s absence.”

- ❑ Litigation was **required**, not speculative.
- ❑ Redraft cut references to increases of “millions of dollars” in litigation costs “due to expected additional litigation regarding the application and interpretation of the amendment standards.”

Costs based on potential future litigation are not *probable financial impacts*

When litigation costs are appropriate, baseline must be based in fact

“the purported establishment of a litigation-cost baseline by the Conference from which to measure any alleged increased cost of the proposed amendments is dubious and highly speculative.”

Advisory Opinion to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 165–66 (Fla. 2009).

Costs based on potential future litigation are not *probable financial impacts*

When litigation costs are appropriate, baseline must be based in fact



This woman is suing Texas over its abortion bans because she wants to be a mother again

NADINE EL-BAWAB

December 6, 2023 · 7 min read



Three judge panel hears arguments over 'unconstitutionally vague' exceptions to abortion ban

BY: ANITA WADHWANI - APRIL 5, 2024 5:00 AM



Abortion ban likely violates religious freedoms, Indiana appeals court says

Jewish women in Indiana fought against one of the nation's strictest abortion laws, arguing that the restrictions conflict with their religious belief that abortions are necessary if the health of the pregnant person is compromised.

DAVID WELLS / April 4, 2024



Kansas physicians challenge law requiring public release of patients' reasons for abortions

The challenge was added to an ongoing lawsuit over abortion restrictions.

By **Nadine El-Bawab**

May 21, 2024, 3:33 PM



It is not probable that litigation costs will increase.

The State can be expected to comply with the Amendment

“it is difficult to imagine a Florida voter in 2024 who would be befuddled in any material way by the ballot summary or proposed amendment due to the use of the terms “viability,” “health,” and “healthcare provider.””

Advisory Opinion to Att'y Gen. re Limiting Gov't Interference With Abortion, 384 So. 3d 122, 136 (Fla. 2024).

Financial impact statements must be unambiguous.

Statement must be clear about its purpose:

“[v]oters must read 77 words about unrelated, non-extant litigation before getting to the idea that this paragraph has something to do with the amendment’s financial impact.”

Order Granting Motion for Summary Judgment at 8.

Financial impact statements must be unambiguous and stated in neutral, nonpolitical terms.

Advisory Opinion to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 165 (Fla. 2009).

Financial impact statements may not be “used to manipulate the public based solely upon whether the entity empowered and entrusted with preparing the statements favors or disfavors a proposal.”

Rejected by Fla. Supreme Court:

“problem gambling”

“millions of dollars”

Caution from the Florida Supreme Court:

“Scare tactics and vague, unsupported predictions of financial disaster have no place in this constitutional-amendment process, and any predictions of financial impact must be grounded in fact, not partisan ideology. Otherwise, the core purpose of financial impact statements (i.e., to inform voters so that an educated decision may be made with regard to a proposed amendment) would be completely defeated.”

Advisory Opinion to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 165 (Fla. 2009).

Conclusion

1. Adhere to the 2023 FIEC analysis; i.e. that passage of Amendment 4 will provide a probable a cost-savings to the State.
2. Costs arising from speculation of future litigation or long-term economic impact should not be included.
3. The Financial Impact Statement should clearly state its purpose and “be grounded in fact, not partisan ideology.”

**Floridians Protecting Freedom’s
Second Additional Submission to the
Financial Impact Estimating Conference**

Re: Amendment to Limit Government Interference with Abortion, 23-07

July 13, 2024

Floridians Protecting Freedom submits this additional information as the Financial Impact Estimating Conference considers revisions to the financial impact statement for the Amendment to Limit Government Interference with Abortion. We provide the following information to provide context and clarity regarding some of the issues raised at previous meetings.

In this document, we discuss the following:

Amendment 4’s ballot summary is clear and unambiguous. The financial impact statement must be as well..... 2

The Conference should comply with its legal obligation to neutrally determine the probable direct effects of this amendment.....3

Speculation about the potential for future litigation and any theoretical impacts contingent on such litigation should not be included..... 4

Speculation about the potential economic impact of the amendment and any theoretical impacts contingent on such economic impact should not be included..... 8

The Conference should adhere to its original analysis of the probable financial impacts of Amendment 4..... 10

Conclusion.....11

Appendix..... 12

Amendment 4's ballot summary is clear and unambiguous. The financial impact statement must be as well.

There has been a lot of misinformation about this very simple amendment in an attempt to portray it as 'deceptive.' The Florida Supreme Court has already rejected these arguments.

Amendment 4 adds this provision to the constitution:

Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider.

Many of the arguments and talking points presented to the Conference were previously presented by the Attorney General and other opponents during the Florida Supreme Court review of the amendment for ballot placement. At that time, the Court explained that “by its plain language, [the amendment] limits government interference before viability or when necessary to protect the mother's health.”¹ “[T]he proposed amendment would not prohibit the Legislature from passing laws “interfering” with abortion after the point of viability and when the mother's health is not in jeopardy.”²

In reviewing Amendment 4's ballot title and summary, the Court rejected arguments that it contained political rhetoric or misled voters. These same practices are forbidden in financial impact statements. There are passionate feelings on all sides of this issue, but the financial impact statement must be impassionate, neutral, and factual. It must also not mislead voters. It would be unlawful to imply that Amendment 4 would dramatically impact state and local costs and revenues when it would actually maintain the reality Floridians have experienced for the last 50 years and a future for which the State has already planned. The state has yet to see or even identify the budgetary, demographic, or workforce impacts of the criminalization of abortion. For voters, reading that the amendment would cause a decrease in births, for example, would imply that it would cause the birth rate to fall from current levels, not prevent potential future growth spurred by forced births.

¹ *Advisory Op. to Att'y Gen. re Limiting Gov't Interference With Abortion*, 384 So. 3d 122, 134 (Fla. 2024).

² *Id.*

The Conference should comply with its legal obligation to neutrally determine the probable direct effects of this amendment.

The Conference cannot speculate and is permitted only to look at probable direct impacts to revenues and costs to state and local governments. The Florida Constitution provides in relevant part:

The legislature shall provide by general law, prior to the holding of an election pursuant to this section, for the provision of a statement to the public regarding the *probable* financial impact of any amendment proposed by initiative pursuant to section 3.

Art. XI, § 5(c), Fla. Const. (emphasis added). The Florida Supreme Court has ruled that the Legislature has no authority to adopt financial impact statements outside of this provision.³ In complying with this constitutional mandate, the Legislature further defined “probable financial impact” in section 100.371(13), Florida Statutes, as “the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.” The Conference is limited to direct impacts, as evidenced by its decision to not include the potential for indirect increases in revenues of out-of-state abortion patients, so speculation about impacts derived from personal choices of individuals, the courts, or the Legislature are clearly unlawful.

When identifying these probable direct impacts to state and local budgets, the Conference typically only looks at a one year forecast horizon; even five years is unusual.⁴ The further one projects out, the more speculative the analysis becomes as more and more assumptions have to be made, yet some principals are advocating for a lifetime horizon for this amendment. If the Conference were to adopt such a long horizon, it would have to include not just potential long-term revenues, but also potential additional costs, as increases in population, especially

³ *Smith v. Coal. to Reduce Class Size*, 827 So. 2d 959, 960 (Fla. 2002); *see also Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1063 (Fla. 2010) (governmental actions affecting the initiative process must either be “neutral, nondiscriminatory regulations of petition-circulation and voting procedure, which are explicitly or implicitly contemplated by article XI, or, if otherwise, [must be] ‘necessary for ballot integrity.’”);

⁴ 10/19/23 Financial Impact Estimating Conference: Principals’ Workshop – Amendment to Limit Government Interference with Abortion at 2:03-2:05.

increases in a particularly at-risk population,⁵ increase costs throughout the state budget, not just in education and health and human services.

The notion that for the first time, *for this particular amendment*, a lifetime horizon is selectively appropriate also ignores that the imagined impacts are due to Amendment 4 returning the limit on abortions to viability—where it was until two years ago. The initial 2023 analysis was developed with the involvement of the House's current representative on both the Demographic and Workforce estimating conferences, who raised no alarms about the impacts to those forecasts, in fact, they found the amendment would create cost savings. All of the data the Conference is using—all of the data the State is using in all of its planning—are based on this *Roe* Era baseline. None of the state analyses of the current ban have hinted at any financial or economic impacts.⁶ Notably, opponents of the amendment who are advocating for the lifetime forecast approach are selectively applying it to revenues, not costs. For example, the Conference explicitly considered and rejected impacts to sales tax revenue based on out-of-state abortion patients, based in part on the notion that it was insignificant over the short-term.

Speculation about the potential for future litigation and any theoretical impacts contingent on such litigation should not be included.

The courts have been clear that the potential of litigation costs are not probable direct impacts appropriate for inclusion in financial impact statements. *See Sponsor's Additional Submission to the Financial Impact Estimating Conference* ("Sponsor July 3 submission" at 5-8). As discussed, the Florida Supreme Court has only assented to the inclusion of litigation costs, with explicit reservations about the practice, when litigation was a *required* aspect of the constitutional scheme being amended.⁷ What's more, the Circuit Court that invalidated the Conference's initial

⁵ *See, e.g.*, Hajdu, G., & Hajdu, T. (2021). The long-term impact of restricted access to abortion on children's socioeconomic outcomes, *PLOS ONE: Public Library of Science*, vol. 16(3), 1-14, <https://doi.org/10.1371/journal.pone.0248638>; Ananat, E. O., Gruber, J., Levine, P. B., & Staiger, D. (2009). Abortion and selection. *The Review of Economics and Statistics*, 91(1), 124-136, DOI:10.1162/rest.91.1.124, available at https://www.researchgate.net/publication/24008767_Abortion_and_Selection

⁶ *See* Staff analyses gathered in Tab 2, EDR Notebook - from the Formal Workshop help (November 16, 2023).

⁷ *Advisory Opinion to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries (FIS)*, 24 So. 3d 1198, 1202 (Fla. 2009)(The Court ultimately accepted the statement "The fiscal impact cannot be determined precisely. State government and state courts may incur additional

2023 analysis specifically noted that its contemplation of potential future litigation was inappropriate.⁸

Contrary to the Attorney General's position in its July 8, 2024, email to the Conference, it is not within the Conference's authority to include litigation costs in the financial impact statement.⁹ This is not the usual practice of the Conference, illustrated by the fact that of the last ten initiatives, only one referenced litigation costs—and in that one judicial review was required as part of the redistricting process.¹⁰ That single time the Court allowed the reference to litigation costs, it rejected the Conference's initial draft, finding in part that the “purported establishment of a litigation-cost baseline ... from which to measure any alleged increased cost” was “dubious and highly speculative.”¹¹

Here, too, the Conference is contemplating a baseline that is dubious and highly speculative. Abortion is an area of law that has always been litigated, as some states push to encroach as far as they can on personal liberty and the people resist the infringement. In this post-*Roe* era,

costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence,” but cautioned that “**it may become necessary to reconsider whether to allow financial impact statements that contain conditional phrases on the ballot in light of our constitutional duty to protect and preserve the integrity of the amendment process.**”

⁸ Circuit Court Order, paragraph 7, p. 8, citing Art. XI, § 5(c), Fla. Const.; Art. XI, § 5(e), Fla. Const.; § 100.371(13)(a), Fla. Stat. (“The potential of future litigation impacting state and local government revenues and expenses outside of the amendment's effects is not appropriate for inclusion in the FIS. The FIS must be limited to the probable effects of the amendment.”).

⁹ EDR Notebook- Book 2 at 435 (July 8, 2024).

¹⁰ See, e.g., *W. Flagler Assocs., Ltd. v. DeSantis*, 382 So.3d 1284 (Fla. 2024); *Advisory Op. to Governor re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1072 (Fla. 2020); *Fla. Dep't of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1105 (Fla. 2021); *Oliva v. Fla. Wildlife Fed'n, Inc.*, 281 So. 3d 531, 533 (Fla. 1st DCA 2019); *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198, 200 (Fla. 2013); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014), *order clarified*, No. 4:14-cv-107, 2015 WL 44260 (N.D. Fla. 2015).

At the Conference's July 1, 2024 meeting, one opponent prophesied that Amendment 4 “will cause much more litigation than even the medical marijuana amendment that we litigated from the circuit court to the district court of appeal then all the way through the Supreme Court.” But neither the financial impact statement for that amendment (Use of Marijuana for Debilitating Medical Conditions, 15-01) nor the Conference's full analysis made any mention of anticipated litigation costs, properly reflecting the Conference's responsibility and duty.

¹¹ *Advisory Op. to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d 161, 165 (Fla. 2009).

litigation has undoubtedly increased, but that is due to government efforts to criminalize what was previously legal. The specific arguments may change under Amendment 4, but it is clear that the baseline includes significant litigation. *See Sponsor July 3 Submission* at 8-9.

Likewise, in approving that single allowed reference to litigation costs after a redraft, the Court noted the absence of “vague and speculative reference to ‘millions of dollars’ in increased costs”¹² and lack of “nonmonetary impacts or financial impacts beyond the revenues or costs to state or local governments.” Here, those opposed to the amendment advocate for including these vague and speculative costs and urge the Conference go further and speculate even about *what sorts of litigation could be filed* and *what specific provisions might be challenged*. There is no precedent for this sort of fantasizing in financial impact statements.

It is also unlawful to include a “prediction of increased litigation [which is] premised on the unsupported assumption that the Legislature will fail to adhere to the guidelines and fail to fulfill its constitutional duty”¹³ because the Conference may not give “the misleading impression that the proposed amendment will not have its intended effect.”¹⁴ By referencing litigation, the Conference could do just that.

Here, the theory of litigation costs being advanced by opponents of this amendment goes far beyond what the courts have already rejected. Some want to include discussion of the *potential* impacts of the outcome of what they claim is probable, but is actually *highly improbable*, litigation, such as litigation regarding the use of state funds for medically necessary abortions for indigent patients. First, even if we set probability and precedent aside and consider the impact, the cost of funding medically necessary abortions for indigent patients would pale in comparison to the costs of paying for the high-risk pregnancies that made the abortions medically necessary, let alone the costs of supporting low-income medically vulnerable families that could not receive medically necessary abortions. Consider also that even in states operating under court orders,

¹² *Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries* (FIS), 24 So. 3d 1198, 1200 (Fla. 2009).

¹³ *Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d at 166.

¹⁴ *In re Advisory Op. to Att’y Gen. re Referenda Required for Adoption & Amend. of Loc. Gov’t Comprehensive Land Use Plans*, 992 So. 2d 190, 192 (Fla. 2008); *see also Advisory Op. to Att’y Gen. re Referenda Required for Adoption*, 963 So. 2d 210, 215 (Fla. 2007).

coverage for these abortions can be sparse. Arizona, for example, paid for only one abortion in 2022.¹⁵

In the context of funding medically necessary abortions for indigent patients, the Florida Supreme Court has already ruled that a “right to choose an abortion” “does not create an entitlement to the financial resources to avail herself of this choice.”¹⁶ Florida is not alone in reaching this decision. Along with the U.S. Supreme Court,¹⁷ at least seven states have rejected claims that the state had an obligation to fund medically necessary abortions, regardless of a right to abortion. The cases are detailed in the Appendix. The recently filed case in Michigan is irrelevant here, as it is based on a different amendment in a different state and has not yet been decided.¹⁸

The Florida Supreme Court has cautioned against these sorts of irrelevant, speculative forays into rhetoric in financial impact statements, saying the statements must not “devolve into a tool used

¹⁵ 2022 Abortion Report, Arizona Dept. of Health Services, Abortions in Arizona (Dec. 5, 2023), <https://www.azdhs.gov/documents/preparedness/public-health-statistics/abortions/2022-arizona-abortion-report.pdf>.

¹⁶ *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001).

¹⁷ *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”).

¹⁸ The Michigan constitutional Right to Reproductive Freedom provision, provides, in part:

(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.

...

(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. ...

Mich. Const. Art. 1, § 28.

to manipulate the public based solely upon whether the entity empowered and entrusted with preparing the statements favors or disfavors a proposal”¹⁹ and that “[s]care tactics and vague, unsupported predictions of financial disaster have no place in this constitutional-amendment process, and any predictions of financial impact must be grounded in fact, not partisan ideology. Otherwise, the core purpose of financial impact statements (i.e., to inform voters so that an educated decision may be made with regard to a proposed amendment) would be completely defeated.”²⁰

Speculation about the potential economic impact of the amendment and any theoretical impacts contingent on such economic impact should not be included

As discussed above, the financial impact statement is limited to the probable “increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget.” While the Legislature briefly expanded this scope to economic impacts, that was repealed the following year.²¹ Now that the Legislature has repealed that provision, the Conference is *prohibited* from considering the economic impact.²² As the Legislature did not amend the statute to provide that the Conference *may* consider economic impacts, especially considering the practice had already developed to first determine whether an economic impact analysis was warranted, it cannot be said that the Conference now has the option to consider economic impacts and resulting budgetary effects. The Conference only has the authority granted by Florida Statutes, as limited by the Florida Constitution.

Even assuming that it would be lawful for the Conference to consider economic impacts of the amendment or to venture downstream of those economic impacts to look for budgetary impacts, what has been advocated in this Conference is not a legitimate economic analysis. The Conference has done no literature review to inform an actual economic analysis. It has identified no quantitative direct impacts to enter into the statewide model to model impacts based on

¹⁹ *Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries* (FIS), 24 So. 3d at 1202 (quoting *Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d at 165).

²⁰ *Id.*

²¹ Compare ch. 2019-64, Laws of Fla., with ch. 2020-15, Laws of Fla.

²² See, e.g., *Mikos v. Ringling Bros.–Barnum & Bailey Combined Shows, Inc.*, 497 So.2d 630, 633 (Fla.1986) (“[T]here is a strong presumption that, when the legislature amends a statute, it intends to alter the meaning of the statute.”).

informed assumptions. Instead, what is being advocated is to present one-sided talking points against this amendment with a veil of economics. This will not inform voters about the probable impact of Amendment 4 and is not lawful to include in the financial impact statement.

If the Conference was doing an economic impact analysis, it would consider the evidence that when women have autonomy to make their own reproductive health care decisions, that leads to better economic, health, and family outcomes, resulting in increased economic activity which would increase tax collections and decrease demand on services. There is evidence that men benefit as well, for example through higher education attainment.²³ Conversely, women who have been denied an abortion experience a decline in earnings,²⁴ and increases in financial distress, such as lateness in paying bills, evictions, and bankruptcies, that last for several years.²⁵ Living in poverty means less discretionary income, less taxable purchases, and more need for help from the state.

Similarly, if the Conference was doing an economic impact analysis, it would consider the growing evidence that in-migration will likely be impacted by the current ban,²⁶ so Amendment 4 would increase future tax revenues by stopping this trend in Florida. For example, states that have banned abortion have seen a decrease in residency program applicants from recent medical

²³ Everett, B. G., Myers, K., Sanders, J. N., & Turok, D. K. (2019). Male abortion beneficiaries: exploring the long-term educational and economic associations of abortion among men who report teen pregnancy. *Journal of Adolescent Health*, 65(4), 520-526. *See also* Everett, B. G., Sanders, J. N., & Higgins, J. A. (2023). Abortion policy context in adolescence and men's future educational achievement. *Population Research and Policy Review*, 42(3), 42.

²⁴ Cukrowska-Torzewska, E., & Matysiak, A. (2020). The motherhood wage penalty: A meta-analysis. *Social science research*, 88, 102416, <https://www.sciencedirect.com/science/article/pii/S0049089X20300144>.

²⁵ Miller, Sarah, Laura R. Wherry, and Diana Greene Foster. 2023. "The Economic Consequences of Being Denied an Abortion." *American Economic Journal: Economic Policy*, 15 (1): 394–437, <https://www.aeaweb.org/articles?id=10.1257/pol.20210159>.

²⁶ *See, e.g.* Baumle, A.K., Miller, A. & Gregory, E. Effects of State-Level Abortion and LGBT Laws and Policies on Interstate Migration Attitudes. *Popul Res Policy Rev* 42, 90 (2023). <https://doi.org/10.1007/s11113-023-09842-7>, summary available at https://www.uh.edu/class/ws/irwgs/_docs/2023/migration-study-report.pdf (Women, those with income levels at or above the median, and those willing to move to another state for work or education were more averse to moving to states with abortion bans). others to moving to states with restrictive abortion and LGBT laws.

school graduates,²⁷ something already apparent in Florida.²⁸ It would also consider the impact to the healthcare industry, as evidence exists that bans have far-reaching impacts on healthcare providers²⁹ and patient access.³⁰

While engaging in an economic analysis is outside of the purview of this Conference, these limited examples illustrate that the Conference has not begun to scratch the surface of identifying the true economic impact of Florida's current ban, so cannot selectively point to theoretical downstream effects of Amendment 4 under the guise of an economic impact analysis.

The Conference should adhere to its original analysis of the probable financial impacts of Amendment 4.

The Conference should adhere to its original analysis of the financial impact of Amendment 4, namely that the passage of the amendment would provide cost savings to the state.³¹ The Conference has been ordered to redraft the financial impact statement and, in its order, the court made clear that the Conference should adhere to its previous analysis:

Amendment 4's Complete Financial Information Statement makes clear that whether the Amendment is enacted while a 15- or 6-week prohibition on abortion is in place, "it is probable that there would be a cost savings" to the state, with the magnitude of such savings depending on which law is in place. If the FIEC's redrafted

²⁷ Orgera, K., & Grover, A. (2024). States with abortion bans see continued decrease in U.S. MD senior residency applicants. Association of American Medical Colleges Research and Action Institute. https://doi.org/10.15766/rai_dnhob2ma

²⁸ Ogozalek, S. (2024, July 8). Florida records drop in doctor residency applicants post-Roe v. Wade. *Tampa Bay Times*. <https://www.tampabay.com/news/health/2024/07/08/florida-records-drop-doctor-residency-applicants-post-roe-v-wade/>

²⁹ Davies, M., Rajput, M.. (2024). Issue Brief: Dobbs' erosion of the health care workforce: harms to providers and patients. *Physicians for Reproductive Health and the National Partnership for Women and Families* | <https://prh.org/wp-content/uploads/2024/03/dobbs-erosion-health-care-workforce.pdf>

³⁰ Gaffney, T. (2023, June 14). Maternity care 'deserts' on the rise across the U.S., report finds. STAT. <https://www.statnews.com/2022/10/11/maternity-care-deserts-on-the-rise-across-the-u-s-report-finds/>

³¹ Complete Financial Information Statement (Nov. 16, 2023).

FIS does not reflect this analysis that it already completed, it must justify to this Court the departure from its prior determination.

Order Granting Motion for Summary Judgment at 8 ¶ 11.

In its initial analysis, the Conference determined that the proposed amendment’s impact on state and local budgets would be “essentially equivalent” to the impact that existed until 2022, during what the Conference characterized as the “*Roe* Era,”³² when state law prohibited abortions after viability. The Conference determined that there would be a probable financial impact should the amendment be adopted while the six-week ban was in force—specifically a cost savings.³³

The only thing that has changed since this initial analysis is that the prohibition on abortion after six weeks gestation has gone into effect and because that change was already contemplated in the 2023 Conference analysis, it is unnecessary to engage in new analysis and violates the Court’s order absent significant justification, which the FIEC has not provided. There is no new information that would justify changing the finding of probable cost savings to the criminal justice system, education services, or health and human services. A change in the Conference’s composition is not justification for abandoning the Conference’s previous well-supported findings.³⁴

Conclusion

The Conference has a responsibility to the People of Florida to present a clear and accurate statement of Amendment 4’s probable financial impact that provides voters the ability to evaluate the proposal on its merits. To fulfill this responsibility, the Conference must adhere to its initial analysis, ensure the statement’s purpose is straightforwardly communicated to voters, and ensure the statement is clear and accurate.

³² *Id.* at 5.

³³ *Id.* at 1.

³⁴ Since the first Conference, the “person from the professional staff of the House of Representatives” and “person from the Executive Office of the Governor” have been replaced with other individuals. Fla. Stat. § 100.371(13)(c)1.

Appendix

- I. In seven states, including Florida, the Court rejected arguments that the state had an obligation to fund abortions.
 1. The **Florida** Supreme Court ruled that the state “right to privacy in the Florida Constitution [protecting] the right to choose an abortion,” “does not create an entitlement to the financial resources to avail herself of this choice.” *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001).
 2. The **Michigan** Supreme Court found that, even if there was a state right to abortion, the state had no obligation to fund abortions, saying, “In the absence of some burden on the government to provide funds for the exercise of a right, a decision by the Legislature not to fund the exercise of a right is distinct from a legislative action that impinges upon that right.”³⁵ A lawsuit was filed this month challenging the state’s prohibition on funding as discriminatory in violation of a constitutional amendment adopted in 2022, but a decision has not yet been rendered in that case.
 3. **New York** voluntarily covers medically necessary abortions, but the issue has been litigated and the Court of Appeals reversed a lower court ruling and allowed a prohibition on funding to stand.³⁶
 4. **North Carolina** rejected arguments based on the state constitutional right to equal rights or equal protection, or a constitutional provision requiring provision for the poor, finding that “To have the State pay for an abortion is not a right protected by the North Carolina Constitution and is not a fundamental right.”³⁷
 5. Opponents included **Oregon** as a state providing coverage under a court order. In actuality, Oregon voluntarily covers medically necessary abortion for indigent patients, but the state supreme court rejected a constitutional claim as premature and found that the administrative agency lacked authority to prohibit coverage under the statute.³⁸
 6. **Pennsylvania** rejected a claim that the state equal protection provision required coverage, but that decision was recently overruled in a renewed challenge to the prohibition. The state supreme court recently found the state’s privacy clause included a right to reproductive autonomy, the state’s equal protection provisions provided more protections than the federal constitution, and that the state’s Equal Rights Amendment required sex-based distinctions to be presumptively unconstitutional. The court did not decide the constitutionality of a prohibition on

³⁵ *Doe v. Dep't of Soc. Servs.*, 439 Mich. 650 (1992).

³⁶ *City of New York v. Wyman*, 30 N.Y.2d 537 (1972).

³⁷ *Rosie J. v. N. Carolina Dep't of Hum. Res.*, 491 S.E.2d 535 (1997).

³⁸ *Planned Parenthood Ass'n, Inc. v. Dep't of Hum. Res. of State of Oregon*, 687 P.2d 785 (1984).

funding but remanded for further proceedings consistent with the court's analysis.³⁹

7. **Texas** has an equal rights amendment and a privacy right, but rejected claims under those state rights, saying “to say that the State cannot affirmatively restrict certain activities does not mean that the State is not free to employ its resources to encourage activities it deems in the public interest.”⁴⁰
- II. Of the 12 states opponents have pointed to, two have found an obligation to fund abortions for indigent women facing only limited medically necessary abortions.
1. **Arizona**, despite a court order requiring coverage for abortions to preserve indigent patient's health, does not cover abortions in practice. In 2022, the state paid for one abortion.⁴¹
 2. Prior to abortion being banned entirely in Indiana, the **Indiana** Supreme Court upheld that state's prohibition on funding but required funding for abortions in cases where indigent women faced a serious risk of substantial and irreversible impairment of major bodily function, based on a state law equating abortions necessary for life and those necessary for these sorts of cases.⁴²

³⁹ *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (1985), overruled by *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 309 A.3d 808 (Pa. 2024)(allowing challenge to funding prohibition).

⁴⁰ *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002).

⁴¹ 2022 Abortion Report, Arizona Dept. of Health Services, Abortions in Arizona (Dec. 5, 2023), <https://www.azdhs.gov/documents/preparedness/public-health-statistics/abortions/2022-arizona-abortion-report.pdf>.

⁴² *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003).

FLORIDIANS PROTECTING FREEDOM

**Financial Impact Estimating Conference
July 15, 2024**



Good morning, Michelle Morton, I'm here on behalf of the sponsor, Floridians Protecting Freedom. As before, we have submitted a more detailed memo for the conference's consideration, and I'll be summarizing our points.

The FIEC's mandate is to provide the “probable financial impact,” i.e. “the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.”

Art. XI, § 5, Florida Constitution; § 100.371(13), Florida Statutes.



We continue to urge the Conference to adhere to its legal obligation to neutrally determine the probable direct financial impacts of this amendment on state and local costs and revenues.

First, I'd like to talk about the use of an economic analysis to identify probable direct costs. To be clear, the sponsor's position is that the FIEC lost the authority to consider economic impacts when the legislature repealed that authority.

When the Legislature briefly expanded the FIEC's analysis to include the economic impacts, the Florida Supreme Court gave the FIEC an opportunity to revise its financial impact statements for two amendments - Raising Minimum Wage and the Right to Competitive Energy Markets. That Conference, which included long-time economists who served on both FIECs and state estimating conferences, reconvened and swiftly agreed that 30 days would not be enough time to do an economic analysis. While one principal suggested a literature review to inform a statement of directionality, the majority were in agreement that a literature review, while a necessary first step, was not an economic analysis.

Here, the Conference isn't even considering a literature review. What is being advocated instead is the inclusion of one-sided speculation.

Economic Analysis

- A comprehensive policy analysis technique that evaluates the direct, indirect and induced economic impacts of a policy change, where:
 - **Direct economic effects** – are the changes in expenditures made by the industry(ies) directly impacted by a change in policy. Most analyses by the various estimating conferences focus on direct effects, which are generally static, immediate and “first round” effects.
 - **Indirect economic effects** – are the changes in expenditures made by industries that supply goods/services to the directly impacted industry(ies).
 - **Induced economic effects** – are most commonly measured as the changes in expenditures by households whose income is changed by the direct and indirect activity; however, other examples exist.
- In this case, the goal is to predict and quantify the probable path of economic responses over time to the change brought about by the petition initiative.
 - Projections are relative to a forecast of the expected path of the economy absent the change caused by the petition; this is referred to as the economic baseline.
 - In some cases, there will be no discernible or probable effects.

Secondary Effects—The “Ripple”

2

Financial Impact Estimating Conference: Required Economic Analysis

© The Wisconsin Legislative Council
2011

This slide illustrates what is involved in an economic analysis. It was written by EDR and this description was included in each time the FIEC did these analyses for proposed amendments:

Here, advocates for going down this path as long as it takes to find revenues aren't advocating for including more immediate impacts, such as increased revenue from women and their partners whose discretionary income will increase under the amendment, allowing them to increase their taxable spending

Nor are they advocating for including more immediate effects to the population, like the amendment stopping the brain drain caused by the current ban whereby potential medical residents and other young people are already choosing to avoid the state

Instead what's being advocated is to skip a few decades into the future, assume that the current ban would have increased overall population and assume that would have resulted in increased revenues through new economic activity, to then find that the Amendment would reduce those potential future revenues. Even in this, advocates want to be willfully blind to evidence that these induced effects cannot be accurately based on the “average American” living under legal access to abortion until viability, which is of course what this amendment restores

Impact of Amendment 4 Goes Beyond Birthrate

- Prevents decreases in earnings, and persistent increases in financial distress, such as lateness in paying bills, evictions, and bankruptcies due to the current ban.
- Prevents decreases in in-migration for certain groups (women, high earners, those willing to move to another state for work or education, medical residents, healthcare providers) avoiding states that ban abortion.
- Prevents negative impact on children's socioeconomic outcomes associated with abortion bans.
- Increases college graduation, lowers rates of welfare use, and decreases single-parent households, as compared to the current ban.



Most of America is free. People are free to choose where to live and when to grow their families. All of the available numbers are based on an America and Florida where abortion access is legal until viability - again, exactly what this Amendment accomplishes. In this world, babies are mostly born to parents who are ready, willing, and able to provide for them. For some, this sadly isn't the case and they need help.

* Eventually, they show up in our health and human services programs, our foster care system, our juvenile justice system, and our criminal justice system.

* But for the most part, parents are setting their kids up for success. The first step parents take toward this goal is planning when to have or grow their families - to ensure they can give them what they need to succeed.

This is not the world in Florida today. While Florida's statistics still reflect that world because not enough time has passed, Florida's reality is that under the current ban, the composition of this state's population is going to change.

Children are going to be born in environments where their parents did not believe they were ready, willing, or able to care for them and who had no options. There is a mountain of evidence from other places and times where abortion was criminalized that the current ban will increase the needs of our population. That will impact the economy and state budgets; and Amendment 4 would prevent those impacts. It would be biased to turn a blind eye to this and assume economic activity due to this population growth would be comparable to averages developed under a viability limit.

Longterm impacts of increased population

- Criminal Justice (prison population)
- Education (Florida college system enrollment, post-secondary financial aid, state university system enrollment)
- Florida Retirement System Actuarial Assumptions & Retiree Health Insurance
- Medicaid Caseload and Expenditures
- TANF/WAGES Caseload and Expenditures



Even if it were appropriate to say that future revenues would fall due to Amendment 4 preventing the current ban's potential to increase the population, it would not be enough.

Under that lengthy horizon, wouldn't it be true that the state's costs throughout the budget would also rise under the ban, and by preventing those increased costs, Amendment 4 would lead to more cost savings?

With a larger population comes increased costs in nearly every area of the budget from increased demands on higher education and criminal justice to infrastructure - Florida will be forced to invest in meeting the needs of more people, many of whom, the evidence tells us, will have increased needs.

Not only that, but the ban will require the generation of working-age people to support not just the aging population the state is planning for but also a growing at-risk population that is too young to work. And that working-age population is likely to shrink, as evidence grows that young people are avoiding moving to states, like ours, that criminalize abortion. You can't selectively choose the horizon.

The FIEC's mandate is to provide the “probable financial impact,” i.e. “the estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.”

Art. XI, § 5, Florida Constitution; § 100.371(13), Florida Statutes.



Regardless, that's not the analysis before you. You aren't coming up with what to feed into the statewide model. You aren't using that to determine what the budgetary impact downstream of the economic impact actually would be. You are determining the amendment's probable direct impact on state and local costs and revenues. That's it. Anything else would be unlawful.

Litigation costs are not appropriate here.

Only one reference to litigation costs has been approved:

- Litigation was constitutionally **required**.
- The approved redraft read: “The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment’s absence.”



So too is it unlawful to speculate about litigation.

As discussed in the last meetings, the Florida Supreme Court has only allowed the inclusion of litigation costs once, when litigation was a required aspect of the constitutional scheme being amended. Even there, the court was explicit that it had strong reservations about including conditional statements such as these and saw the potential for misuse.

Baseline: Current ban will be litigated

Two friends were denied care after Florida banned abortion. One almost died.

New abortion restrictions have disrupted the standard of care for a pregnancy complication both women experienced late last year

NBC NEWS CH LIVE

ABORTION RIGHTS

Florida's 6-week abortion ban could set up clash with shield law states

...law prohibits telehealth
...options for abortion-but some

Because of Florida abortion laws, she carried her baby to term knowing he would die

By Elizabeth Cohen, Carma Hassan and Amanda Musa, CNN
Updated 10:32 AM EDT, Wed May 3, 2024

NATIONAL

Why providers say abortion ban exceptions continue to cause confusion

JUNE 14, 2024 · 1:34 PM ET **wfsu**
By Regan McCarthy

'Rape' not defined in Florida law. How will doctors know if they can perform an abortion?

'Doctors and nurses may be afraid to provide care because they don't know what circumstances legally fall under the exception,' one legal expert says.

Ana Goñi-Lessan
Tallahassee Democrat
Published 5:05 a.m. ET May 23, 2024 | Updated 3:58 p.m. ET May 23, 2024

EXCLUSIVE

Faced with abortion bans, doctors beg hospitals for help with key decisions

Vague state laws, and a lack of guidance on how to interpret them, have led to some patients being denied care until they are critically ill

SunSentinel

'Gray area' of life or death: The horrible scenario that faces many pregnant women rushed to Florida's ERs

US Supreme Court to decide on emergency abortion care

By CINDY KRISCHER GOODMAN | cgoodman@sunsentinel.com | South Florida Sun Sentinel
UPDATED: June 21, 2024 at 5:55 p.m.

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The Court also rejected the baseline for litigation as “dubious and highly speculative”; adjectives that apply here where we know this issue has been litigated for decades, with a recent uptick in response to state efforts, like Florida’s, to limit access. Whether this amendment passes or not, there will be litigation. The arguments may differ but the existence of litigation will continue.

This is true even with the Florida Supreme Court finding that privacy rights no longer apply to abortion. There are serious, I personally would say unintended, consequences of the current ban. There are ambiguities throughout the statutes that are resulting in real harm to real people. Doctors are struggling to determine how to treat their patients without risking losing their license or prison. People have been turned away from hospitals with antibiotics and prayers to traumatic, unnecessary results. When you have these sorts of consequences, you can expect legal challenges.

Litigation costs are not appropriate here.

- A “prediction of increased litigation is premised on the unsupported assumption that the Legislature will fail to adhere to the guidelines and fail to fulfill its constitutional duty.”
- The statement cannot “give the misleading impression that the proposed amendment will not have its intended effect.”

Advisory Opinion to Att’y Gen. re Limiting Gov’t Interference With Abortion, 384 So. 3d 122, 136 (Fla. 2024); Advisory Op. to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries, 2 So. 3d 161, 166 (2009).



As to Amendment 4, this conference has already been counseled by the circuit court not to include speculation of potential future litigation.

The Florida Supreme Court considered many of these talking points in its review of the amendment. The Attorney General, a vocal opponent, did their very best to convince the court not to allow a vote on this amendment. And yet, the Court rejected each of the AG’s conclusions of law and found that Amendment 4’s ballot title and summary were clear and unambiguous. While it’s understandable for this conference to seek the advice of impacted agencies, in this case, the AG has proven to be biased and wrong, when it comes to this amendment.

Should Amendment 4 pass, subsequent litigation would be a consequence of State efforts to continue interfering with abortion despite the clear will of the people. And the Court has already rejected relying on an assumption that the Legislature won’t fulfill their constitutional duty.

The clarity provided by Amendment 4 will simplify future litigation by making constitutional protection explicit.

Speculation is not appropriate here.

The “right to choose an abortion,” “does not create an entitlement to the financial resources to avail herself of this choice.”

Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1041 (Fla. 2001).



But opponents here want to go even further than including a statement of potential litigation costs, they want to include, for the first time, speculation about not only what exact laws might be challenged, but also what the outcome of those challenges might be. This is so far removed from FIEC past practices and the law.

What is to be gained from this? What will telling voters that “someone, somewhere, at some future time, might rely on this amendment to challenge this law or that law or maybe that law. And, if the court agrees with them, there could be a cost to the state.” How is that informing voters of the *probable financial impact* of this amendment?

This level of speculation is unlawful, and in the case of coverage for medically necessary abortions for low-income patients, the supposed increased costs illustrate how far we are from the usual financial analysis of probable budgetary impacts.

What costs more: an abortion, or the healthcare required throughout a high-risk pregnancy and the continued cost of supporting that medically vulnerable low-income family when they can’t access a medically necessary abortion? In our submission, we’ve also included cases from states, that, like Florida and the U.S. Supreme Court, have rejected claims that a right to abortion creates an entitlement to the financial resources to avail oneself of that choice. While the Michigan case hasn’t been decided, we’ve also included that state’s constitutional provision on the right to reproductive freedom to illustrate how that amendment differs.

The Conference's Task is Limited

The **probable** estimated increase or decrease in any revenues or costs to state or local governments and the overall impact to the state budget resulting from the proposed initiative.



- There have been FIECs before this. There will be FIECs in the future.
- This one somehow seems unique.
 - Normally, when a FIEC reconvenes, the panel does not change.
 - It's made up of existing full-time professional staff pulled from relevant estimating conferences.
 - Normally, the FIEC focuses on the direct impacts of proposed amendments.
 - Normally, the FIEC cites the peer-reviewed studies, including competing evidence, underlying its assumptions.
- I understand that this issue evokes passionate debate. It's also clear that the government opposes this amendment, which is predictable: Amendment 4 would reverse the criminalization of abortion that the government just enacted.
- But, you are not part of that debate. You are informing voters of the probable direct budgetary impact of the amendment so they can consider the financial impact of their vote. That's it.
- Yet, all of the impacts you are discussing outside of the direct cost savings are rooted in opposition talking points. The Attorney General and other opponents argued these same points before the Florida Supreme Court, which rejected them. The Court was able to set aside personal beliefs and perform their constitutional duty. You should do the same.
- This matters, not just for this amendment, but for future amendments. You are setting precedent for how future FIECs will be conducted. If this FIEC includes these speculative arguments, FIECs will be pressured to continue to do so, even more so if the courts accept the argument that these statements are automatically approved to be printed on ballots, with no avenue for review. This is not what the constitution allows, and it certainly isn't what voters deserve.

Amendment 4 restores pre-viability abortion legality.

- This is the reality Floridians lived under for 50 years.
- This is the reality underlying all of the State's estimates and plans.
- It would be disingenuous to imply that this would dramatically change the state's financial situation. If Amendment 4 passes:
 - The current ban will have been in effect for only **eight** months.
 - Estimating conferences would not need to update their analyses and the state's plans for the future would continue unchanged.



- So, what does Amendment 4 do? It returns Florida to a time when abortion was legal until viability. This is the reality we have all lived in for 50 years. This is the reality all of the State's estimates and plans are based on - from population to demographics to resource demand to revenues. To imply otherwise would be unlawful.
- Which presents an interesting problem for you - if all you know is how the world will look under this amendment, how do you estimate its impact? You don't know and haven't thoroughly analyzed how Florida will look with abortion a crime before many women know they are pregnant. Last week, the demographic estimating conference once again declined to change projections based on the current ban, as it follows the data as it comes in.
- So, your task is actually to estimate what the criminalization of abortion will do. You have identified that banning abortion will increase direct costs to the state, specifically in the criminal justice, education and health and human services budgets.
- Amendment 4 stops those effects, returning us to the baseline. To imply that this amendment would dramatically change the state's financial situation would be disingenuous.
- Should the amendment pass, the current ban will have been in effect for only eight months. In all likelihood, the estimating conferences will not update their analyses and the state's plans for the future will continue unchanged.

Financial impact statement must be clear and neutral.

- Be clear about the statement's purpose, i.e. to provide a statement of the amendment's financial impact.
- Include only probable direct budgetary impacts.
- Be clear that population impacts are as compared to anticipated effects of the current ban, not as compared to the current or past realities voters know.
- “Be grounded in fact, not partisan ideology.”



Your task is done. You identified the probable direct financial impacts last fall. Now you need to write a unambiguous, neutral statement of those impacts that is clear about its purposes, limited to probable direct budgetary impacts, is clear about the impact it is measuring, and is grounded in fact, not ideology.



State Funding of Abortion Under Medicaid

August 31, 2023

Laws and policies on abortion have been changing rapidly across the United States since the US Supreme Court overturned the federal constitutional right to abortion in late June in *Dobbs v. Jackson*. As a result, some information here may be out of date. Our team is working diligently to update this resource. Thank you for your patience.

First implemented in 1977, the Hyde Amendment, which currently forbids the use of federal funds for abortions except in cases of life endangerment, rape or incest, has guided public funding for abortions under the joint federal-state Medicaid programs for low-income people. At a minimum, states must cover those abortions that meet the federal exceptions. Although most states meet the requirements, one state is in violation of federal Medicaid law, because it pays for abortions only in cases of life endangerment. Some states use their own funds to pay for all or most medically necessary abortions, although most do so as a result of a specific court order.

Highlights

- 32 states and the District of Columbia follow the federal standard and provide abortions in cases of life endangerment, rape and incest.
 - 4 of these states also provide state funds for abortions in cases of fetal impairment.
 - 4 of these states also provide state funds for abortions that are necessary to prevent grave, long-lasting damage to the person's physical health.
- 1 state provides abortions only in cases of life endangerment, in apparent violation of the federal standard.
- 17 states have a policy that directs Medicaid to pay for all or most medically necessary abortions.
 - 8 of these states provide such funds voluntarily.
 - 9 of these states do so pursuant to a court order.

Current Policy Status Table

STATE FUNDING OF ABORTION UNDER MEDICAID

STATE	GENERALLY FOLLOWS THE FEDERAL STANDARD, FUNDS IN CASES OF:		FUNDS ALL OR MOST MEDICALLY NECESSARY ABORTIONS
	Life Endangerment, Rape and Incest	Other Exceptions	
Alabama	X		
Alaska			Court order*
Arizona	X [†]		
Arkansas	X		
California			Court order
Colorado	X		
Connecticut			Court order
Delaware	X		
Dist. of Columbia	X		
Florida	X		
Georgia	X		
Hawaii			Voluntarily
Idaho	X		
Illinois			Voluntarily
Indiana	X	Physical health	
Iowa [‡]	X	Fetal impairment	

Kansas	X		
Kentucky	X		
Louisiana	X		
Maine			Voluntarily
Maryland			Voluntarily
Massachusetts			Court order
Michigan	X		
Minnesota			Court order
Mississippi	X	Fetal impairment	
Missouri	X		
Montana			Court order
Nebraska	X		
Nevada	X		
New Hampshire	X		
New Jersey			Court order
New Mexico			Court order
New York			Voluntarily
North Carolina	X		
North Dakota	X		

Ohio	X		
Oklahoma	X		
Oregon			Voluntarily
Pennsylvania	X		
Rhode Island			Voluntarily
South Carolina	X		
South Dakota	Ω		
Tennessee	X		
Texas	X		
Utah	X	Physical health	
Vermont			Court order
Virginia	X	Fetal impairment	
Washington			Voluntarily
West Virginia	X	Physical health, fetal impairment	
Wisconsin	X	Physical health	
Wyoming	X		
TOTAL	32+DC		17

- * A law that defines medically necessary is permanently blocked by a court.
- † Despite the court order, the state Medicaid program does not pay for medically necessary abortions.
- ‡ The Iowa governor must approve any abortion paid for by the Medicaid program.
- Ω State only pays for abortions when necessary to protect the patient's life.

Source URL: <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid>

Tab 7

Materials from Proponents

The Economic Impacts of Reproductive Restrictions in Florida

Restrictions on reproductive health, like the gestational abortion ban implemented in Florida, have devastating and far-reaching impacts on the health and well-being of women. Furthermore, reproductive restrictions create barriers to women's pursuit of education and their participation in the labor force, therefore inflicting adverse financial repercussions on women, families, and the entire state economy.

The 15-week abortion ban in Florida that was in effect throughout 2023 is no exception. IWPR estimates that reproductive health restrictions cost the Florida economy \$14 billion in 2023.¹ This estimate builds upon the work highlighted in the State Policy at a Glance report published by IWPR on October 18, 2023, which discussed the serious and negative impacts on Florida's economy of reproductive health restrictions over the past five years.²

Triggered by the Supreme Court's decision to overturn the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*, Florida Governor Ron DeSantis signed into law a 15-week statewide abortion ban, effective July 1, 2022. He subsequently signed a stricter ban, passed in April 2023, but the implementation of this six-week ban had been contingent upon the outcome of legal challenges to the 15-week restriction and, therefore, did not take effect until May 1, 2024.³

Sweeping restrictions like the gestational age limitations passed by the Florida state legislature are just one policy tool that lawmakers use to restrict abortion access and reproductive rights. Other restrictions in Florida include prohibitions on the use of public funds for abortion services and requirements that abortion providers treating minors must first notify the patient's parents and obtain parental consent. There is no mandatory, quality sex education in Florida to promote safe sex practices and informed consent among young people.⁴

When compared to other states, Florida's economy experienced one of the greatest financial losses related to reproductive restrictions, totaling \$14 billion in 2023. According to economic analysis conducted by IWPR, 1.5 percent more women of reproductive age (15–44) would have entered the Florida labor force in 2023 absent the legal restrictions that limited abortion access.⁵ As high as these estimated costs already are, IWPR reasonably projects that these numbers will only increase in 2024 due to the implementation of a stricter six-week abortion ban.

Comparative Analysis

Florida is one of 16 states that ban or severely restrict abortion access, and those states are seeing similarly devastating and wide-ranging impacts, including economic harm. In 2023, Florida experienced some of the greatest economic losses related to reproductive restrictions nationwide, second only to Texas in total dollars lost.⁶

Reproductive health restrictions threaten the economic security of women and families, but they also reduce the economic competitiveness of states within the national economy. Collectively, Florida and the 15 states with severe restrictions on abortion access cost the national economy \$68 billion annually.⁷ This estimate accounts for states that have taken legislative action to expand and protect abortion access, thus offsetting the adverse economic impacts that abortion bans like the one in Florida are contributing to the national economy. The total loss to the national economy would be \$45 billion greater if it weren't for those proactive states that have expanded and protected abortion access.

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⁵ IWPR, "2024 Analysis Costs of Reproductive Health Restrictions."

⁶ IWPR, "2024 Analysis Costs of Reproductive Health Restrictions."

⁷ IWPR, "2024 Analysis Costs of Reproductive Health Restrictions."

DISCUSSION PAPER SERIES

IZA DP No. 16395

The Economics of Abortion Policy

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University of Exeter, University of Chile, IZA, MIPP and CAGE

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ABSTRACT

The Economics of Abortion Policy*

This article provides a review of the economics of abortion policy. In particular, it focuses on the determinants of abortion reform, as well as the effects of abortion reform on individual circumstances. The economic literature on abortion policy is broad, studying abortion reforms that have occurred over the past two centuries, although there is a concentration of studies examining policy reform over the 20th and 21st centuries. The literature has examined a range of policies: both those which restrict access and those which legalise elective abortion, but within these two broad classes, the precise nature of policy reform can vary greatly. Policy reforms studied range from particular types of limits or financial barriers restricting access for particular age groups, up to policies which entirely criminalise or legalise elective abortion. The economic literature on abortion reform has illuminated a number of clear links, showing that increased availability of abortion decreases rates of undesired births, and vice versa when access to abortion is limited. These effects have been shown to have downstream impacts in many domains such as family formation, educational attainment, labour market attachment, as well as impacts on health, empowerment and well-being. There is mixed evidence when examining the impact which abortion reform has on cohorts of children exposed to reform variation. Much of what is known in the economic literature on abortion is gleaned from country-level case studies and cohort variation in access, with this evidence generated from a relatively small number of countries in which reforms have occurred and data is available. In general, much of the literature available covers low fertility and industrialised settings. Additional evidence from other settings would allow for a more broad understanding of how abortion reform affects well-being.

JEL Classification: A33, I18, J10, K36, O57

Keywords: abortion, contraceptives, labour markets, fertility, child outcomes, crime, health, political economy

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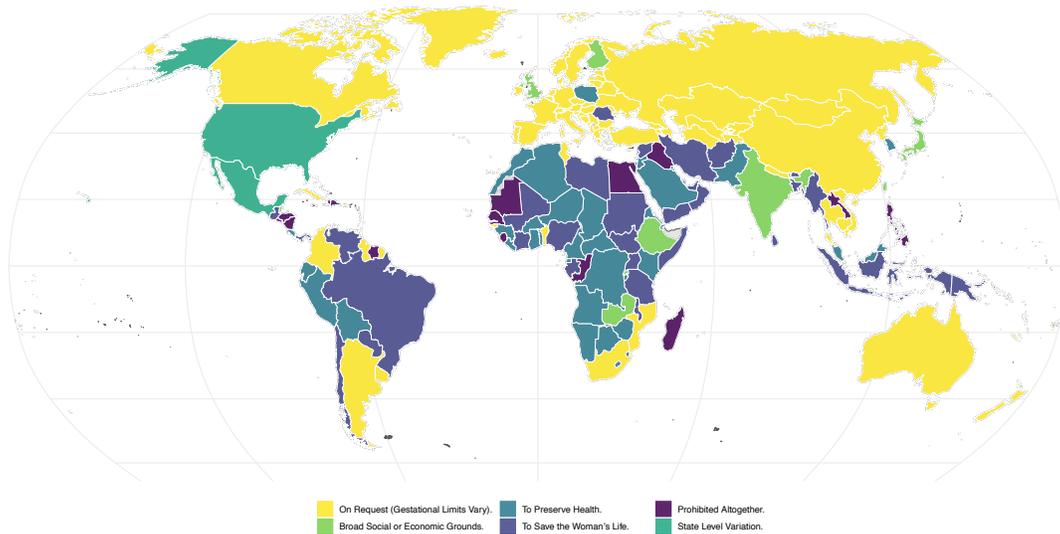
Contents

1	Introduction	3
2	What Precipitates Abortion Reforms?	6
2.1	Political Determinants and Politician Identity	7
2.2	Economic and Other Determinants	8
2.3	Context Dependence in Abortion Policy	9
3	What Can We Learn from Studying Abortion Reforms?	10
3.1	Identifying Variation	10
3.2	The Nature of Abortion Reforms Studied	11
3.2.1	Liberalizations or Restrictions	11
3.2.2	Causes	12
3.2.3	Types of Restrictions	13
3.2.4	Age Limits	14
3.3	Limits to the Current Knowledge of Abortion Reform in Economics	14
4	Evidence on the Nature and Magnitude of Effects of Abortion Reform	16
4.1	Abortion Reform and Abortion Access	16
4.2	How Does Abortion Reform Shape The Outcomes of Affected Cohorts of Women?	20
4.2.1	Fertility and Family Formation	20
4.2.2	Women’s Human Capital Attainment	23
4.2.3	Labour Market Outcomes	24
4.2.4	Health Outcomes	25
4.2.5	Other Outcomes	26
4.3	How Does Abortion Reform Shape the Composition of Birth Cohorts?	27
4.3.1	Abortion and Living Conditions	28
4.3.2	Characteristics of Cohorts in Adulthood	29
4.3.3	Abortion, Child Circumstances and Crime	30
5	Policy and Behavioural Interactions with Abortion Reform	33
6	Conclusion	36

1 Introduction

Few reproductive health policies, and arguably few health policies more generally, change with the frequency and polarity as laws related to abortion. By one measure, over the last 30 years there have been 64 national-level reforms to the rights that govern individual access to abortion, corresponding to around two reform changes per year (Center for Reproductive Rights, 2023). What’s more, these reforms cover quite similar ground, and move in both directions, at times liberalising and at times rolling-back access to abortion. The current state of abortion legislation worldwide suggests substantial differences in access across countries and by continent, as documented in Figure 1. Whilst the broad current over the past three decades has been in progressively increasing access to abortion when considering national-level legislative changes, there have similarly been movements to restrict access. These reforms have received substantial attention in both the academic literature and the popular press.

Figure 1: Exposure to National Level Abortion Laws (2023)



Notes: Classifications of abortion legality by country are compiled by the Centre for Reproductive Rights, and these figures refer to laws as at June 2022.

The considerable attention paid to these policies is warranted given the far-reaching impacts which abortion policy has on the lives of affected individuals. When women and families can optimally plan their desired number of children, the timing of these births, and, potentially, the spacing between births, this allows them to balance their own desires for economic security and career advancement, as well as

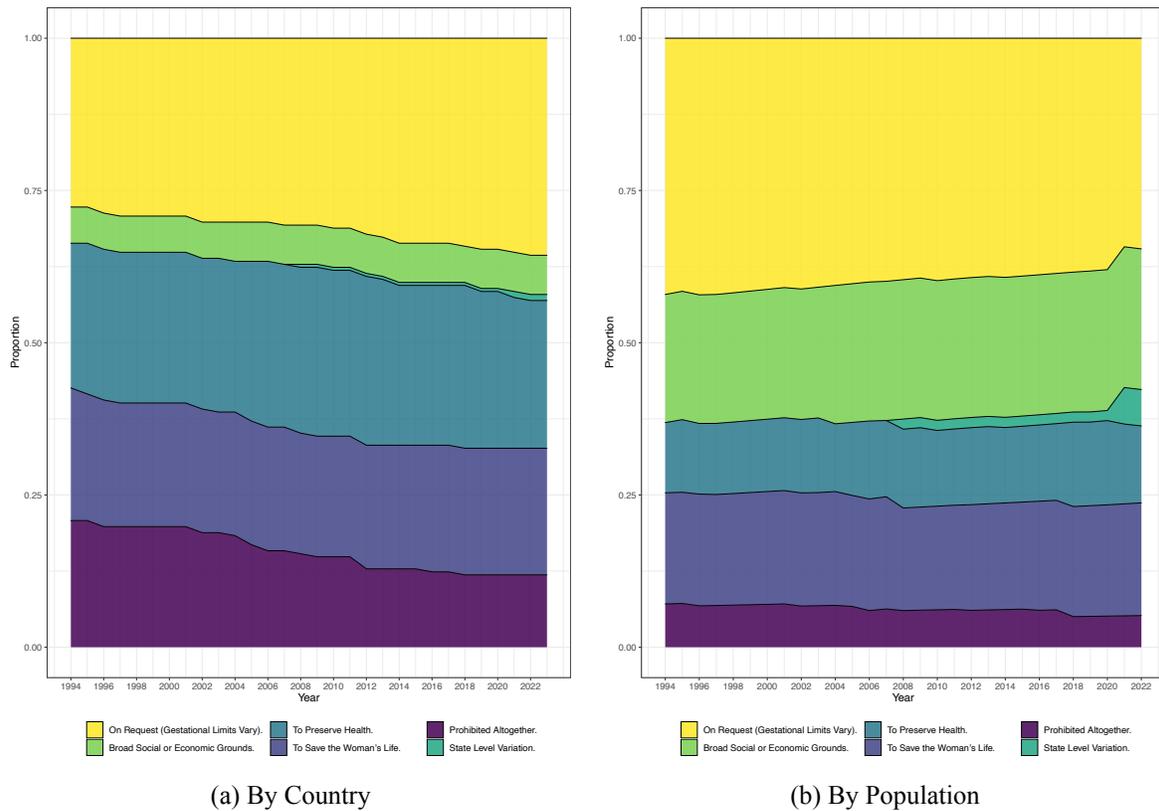
optimally plan investment in any desired children. And when children are desired, the environments in which they live, the types of care they receive, and their well-being across their entire life course is, on average, different to when they are undesired. Historical and recent policy decisions taken with regards to access to abortion have undeniably shaped the outcomes of generations of women, families, and children.

This review seeks to provide a broad overview of the economics of abortion policy. The economic literature on abortion offers a number of important lessons. Abortion reform is both a highly relevant input to many factors of central importance to economists including individual well-being, human capital accumulation, demographic structures, and labour force participation. Abortion policy is itself also shaped by economic factors (Blank et al., 1996; Gonzalez and Quast, 2022), suggesting that economic research on abortion can help us understand both how abortion policy is set, as well as how it shapes micro- and macro-level outcomes. The relevance of questions related to abortion and abortion reform in economics is reflected in its coverage in the economic literature. The quantity of papers published across economic journals suggests that understanding the impacts of abortion on individuals, families, and population cohorts is a question of general interest, as well as of particular interest to fields including demographic economics, labour economics, health economics, development economics, and law and economics.

This review is structured to first seek to synthesise how economic research shapes our understanding of the passage of abortion policy, as well as what we can learn from studying abortion reforms. It then covers a number of substantive questions related to the impacts of abortion policy on individual outcomes and well-being. Specifically, it covers three key themes in this regard: understanding how abortion policy shapes abortion *access*, understanding how abortion policy shapes the outcomes of women and families during their fertile years, and understanding how abortion policy shapes the composition of birth cohorts both at the time of reform, as well as during the lives of these individuals. Finally, some discussion is provided related to how policy makers and individuals may change their behaviour as a result of abortion policy decisions.

Despite the fact that the economic literature on abortion reform is large, many of the lessons which can be drawn from this literature flow from policy changes in a relatively small number of settings. This is a relevant limitation when examining the current body of knowledge from the economic literature focused on abortion policy. This is especially so when considering that many of the countries

Figure 2: Changes in Exposure to National Level Abortion Laws (1994-2023)



Notes: Figures present the proportion of countries classified as being subject to alternative policy regimes (Panel (a)), and the proportion of individuals world-wide classified as being subject to these policy regimes (Panel (b)). Figures are plotted based on the legal classification provided by [Center for Reproductive Rights \(2023\)](#).

which are currently exposed to the most restrictive abortion laws—and hence potentially most likely to see shifts in their abortion laws if recent trends in liberalisation continue—are located in high fertility environments in the developing world. The majority of the papers in economics relating to abortion focus on relatively lower fertility environments, often in industrialised countries.

Nevertheless, the economic literature on abortion policy offers relevant findings when considering both the effects of liberalising abortion policy as well as the effects of criminalisation. Despite the well-documented fact that policy changes over the past decades have been broadly progressive in nature, it may be surprising to note that the total world population living in countries with abortion available upon request is actually falling, given varying population growth rates world-wide. Figure 2 plots these trends where we can observe that in 1994 around 30% of countries allow abortion upon

request, while in 2023 this proportion has grown to around 40% of countries. However, due to differential population growth rates, in 1994 around 45% of the world lived in a country where abortion was available upon request, while today this figure stands at closer to 30%. These broad trends, combined with the frequency of changes in abortion policy, make clear the relevance of understanding how abortion policy decisions are made, and what these decisions imply for individual well-being for populations exposed to a range of policy regimes.

This article seeks to cover both early and more recent literature in the economics of abortion policy, laying out the broad scope of questions studied in this literature and key points of agreement and divergence within the literature. A number of additional texts provide overviews on the economics of abortion and are likely to be of relevance to interested scholars. This includes a book by [Levine \(2004\)](#) which comprehensively covers the literature up to that time with a focus on abortion reform and its impacts on abortion access and fertility, a scoping review by [van der Meulen Rodgers et al. \(2021\)](#) with a particular interest in the abortion reform and macro-economic outcomes, a review by [Bernstein and Jones \(2019\)](#) focused on abortion access and micro-level economic outcomes, and a handbook chapter by [Joyce \(2010\)](#) particularly focused on the line of research seeking to delineate links between abortion and crime. This present article aims to cut across themes, providing an overview of the state of the art of economic research as well as discuss implications for where the literature may go from here.

2 What Precipitates Abortion Reforms?

What can explain the policy landscape with regards to abortion access, and what precipitates changes in abortion policy? The economic literature on abortion reform has pointed to a number of determinants of *policy change*, though in general, the complexity of abortion legislation and the way which legal reform occurs depends on a country's specific institutions including legal origins, cultural norms, political systems and the interaction between law-makers and the judiciary. Nevertheless, studies which focus particularly on determinants of abortion policies have pointed to a number of important direct and proximate factors that precipitate voting and eventual legal reform.

2.1 Political Determinants and Politician Identity

Given that legal reform is, in many cases, an overwhelmingly political process, much of the literature focuses on political determinants. Indeed, politician identity and personal circumstance of politicians have been documented to affect both voting on laws related to abortion, as well as *de facto* access to abortion. Unsurprisingly, voting for abortion law is strongly polarised across political party lines. For example, [Bouton et al. \(2021\)](#) document that in the United States of America, Democratic Senators are much more likely to vote in favour of pro-choice positions on Senate roll-call votes, while Republican senators are less likely to support such positions in a sample of Senate votes between 1997-2012.

However, beyond party affiliation, individual politician identity has also been shown to affect voting behaviour. An influential paper by [Washington \(2008\)](#) documents that US Congress-people with daughters are substantially more likely to vote liberally than those with sons. This holds in particular with votes related to abortion and reproductive health. Using voting records from the members of four houses of US Congress (all houses between 1997-2004), She estimates, for example, that having an additional daughter makes a Congress-person 3.5pp and 3.2pp more likely to vote in favour of pro-choice positions on laws considering an abortion ban, and teen access to abortion (respectively), with this particularly the case for fathers.¹ [Van Effenterre \(2020\)](#), considering voting patterns in both France and the US, finds that these results are heterogeneous by country and party of politicians. In the case of France, she examines the decriminalization of abortion with the passage of the “Veil-law” in 1974,² finding that for a right-wing politician, having an additional daughter makes them less likely to vote in favour of the law, while for a left wing politician, no precisely estimated impact of a daughter is observed. However, in the US, she finds that left-wing politicians are substantially more likely to vote for a pro-choice stance in a law regarding teenage access to abortion for each additional daughter, while no such result is observed for right-wing politicians. [Bhalotra et al. \(2021\)](#) note that a politician’s religious identity can shape *de facto* rates of sex-selective abortion in India. The authors document in a sample of close elections that increasing the proportion of Muslim state legislators rather than Hindu legislators results in declines in use of sex-selective abortion, in line with greater aversion to abortion among Muslims rather than Hindus. Finally, politician gender has been documented as an

¹Recent work has pointed to evidence that these results may be time- and context-specific, with [Green et al. \(2023\)](#) not observing similar patterns if extending to earlier and later Congresses to those studied by [Washington \(2008\)](#).

²This law was named after Simone Veil, the Health Minister who drafted the bill, and legalised abortion, permitting abortion on request up to the tenth gestational week.

important determinant in voting patterns in certain contexts. For example, [Washington \(2008\)](#) documents that women politicians are much more likely to vote in favour of pro-choice positions, although [Bhalotra et al. \(2023\)](#), studying the passage of parliamentary gender quotas world-wide do not observe that reserving seats in parliament (and subsequent increases in female legislators) results in reform to abortion laws in the 10 subsequent years.

While the aforementioned evidence all refers to the impact of national politics on the passage of abortion reform, it is worth noting that international policy may also shape access to abortion. The Global Gag Rule, or Mexico City policy, is a US foreign policy which since 1984 has been invoked by Republican Presidents, and repealed by their Democratic counterparts. This policy directly limits how overseas NGOs can conduct reproductive health programs ([van der Meulen Rodgers, 2018](#)), and this has been shown to have substantial effects on access to contraceptives, as well as downstream outcomes in low-income countries ([Jones, 2015](#)).

2.2 Economic and Other Determinants

While much of the literature studying inputs to abortion policy and legislation is focused on political determinants, [Elías et al. \(2017\)](#) suggest that economic development may be a relevant determinant of the passage of more liberal abortion policy, additionally noting that democratic regimes and greater rights for women are associated with passage of more liberal abortion policy, as well as noting that certain legal origins (specifically Socialist legal origins) are associated with more permissive abortion policy. Descriptive evidence from [Medoff \(2002\)](#) also suggests that interest groups and characteristics of constituents are relevant correlates of the severity of abortion restrictions in the US, finding for example that state-level restrictions are less severe in states with a greater presence of the National Abortion Rights Action League, and more severe in states where a greater proportion of the population is Roman Catholic. While not being relevant for abortion reform but rather directly relevant for *de facto* access to abortion in a setting where abortion is legally available, [Jacobson and Royer \(2011\)](#) note that extremist activities may curb access of women seeking abortion. They find that acts of domestic terrorism in which violence is exercised against abortion providers or at abortion clinics both reduces provider availability limiting access to abortion, and geographically shifts patterns of access.

2.3 Context Dependence in Abortion Policy

Despite these precedents from certain settings, the nature of abortion policy reform is highly context specific. To see this, consider two emblematic examples studied in the abortion literature in economics: the first the many policy changes in the United States of America from the 1970s to the 2020s, and the second the case of Romania in the 20th century (Pop-Eleches, 2006, 2010; Mitrut and Wolff, 2011). In the United States, abortion policy is dictated by the interpretation of the Constitution, which depends on how the Supreme Court parses relevant passages of the Constitution at the federal level, and many state-level laws, which can eventually be referred to the Supreme Court if their validity is questioned. According to Myers's work on the last 60 years' history of contraceptive reform in the US:

State policies governing young women's legal and confidential access to abortion and prescription contraception have evolved for six decades, determined by a complex and varying interplay of U.S. Supreme Court rulings and state regulations.

Myers (2022, p. 1437)

What is more, this complex interplay between the Supreme Court and states at times has been lead far more by states, and at other times been lead far more by the Supreme Court. In practice, this has meant many disperse changes such as the imposition and repeal of parental access laws, the closure of clinics due to requirements that they have admitting privileges at hospitals, and sharp changes in gestational week limits given the passage of state-level laws. It has also meant large sharp changes such as the legalisation of abortion given the Supreme Court's decision in Roe vs. Wade in 1973. However, this complex interplay between politicians and the judiciary is not always observed. If we consider the case of Romania, in 1966 the government of Ceaușescu, the Romanian dictator, imposed Constitutional Decree 770, which immediately banned abortion and contraception, except in specific and very limiting circumstances. This near total ban remained in place until the Romanian Revolution in December 1989 and the fall of Ceaușescu, at which point the new government legalised abortion on January 1, 1990, on only their fifth day in power. Thus, while the economic literature points to a number of specific factors which are inputs to abortion policy in particular contexts, the vast differences in experiences of abortion reform across countries illustrated in these two-particular cases suggests that the evidence must be viewed through this lens.

3 What Can We Learn from Studying Abortion Reforms?

3.1 Identifying Variation

The large majority of empirical studies in economics seeking to estimate the impact of abortion availability draw identification from legal reforms. There are certain exceptions, such as evidence from the Turnaway Study (Miller et al., 2020, 2023) discussed in Section 4.2.5, but overwhelmingly, evidence is driven by natural experiments based on policy or legal reform. These nature of these natural experiments have key implications for what can be learned about abortion reform. Reforms may work at different margins: for example limiting access or liberalizing access, may deal with particular restrictions: for example changing access to abortion in particular circumstances, may work with particular age groups, and are naturally context dependent, both in terms of the time period studied as well as the particular country, countries or regions considered. These are points of *external validity* and in section 3.2 these are enumerated at more length, with a discussion of the types of settings in which the literature can inform us.

Additionally, the suitability of using policy reform to understand the impacts of abortion on individual outcomes presumes *internal validity*. In particular, if we wish to estimate the impact of abortion availability or restrictions for a particular group exposed to some policy reform, we must estimate an unbiased counterfactual for what would have happened to this group in the state of the world in which such a reform had not been passed. Assuming that such a counterfactual can be estimated, an average treatment effect on the treated (ATT) can be generated. This is challenging, as discussed for example by Joyce (2013), who notes that at a minimum if we wish to learn lessons about the impact of abortion access from such abortion reform we require that (a) the reform actually affect access to abortion; (b) the reform may not affect other relevant factors apart from abortion; (c) we must understand the assignment mechanism which results in certain populations being affected by the reform and others not; and (d) that a causal channel exists allowing for downstream results to be considered. This is also a point made clear by Besley and Case (2000). They note that policies are naturally endogenous decisions, and understanding the impact of any policy change requires separating the effect of the reform from any underlying processes which may have propelled the reform to occur, and at the same time be related to outcomes of interest. Particularly, in the case of abortion, we may be concerned that states which impose more draconian abortion reforms may be generally engaging in policies which

limit the rights of women, and vice versa in times of liberalising policy. In general, plausibly estimating the effect of abortion policy on outcomes of interest requires separating the specific effect of abortion reform from any suite of policy decisions. Typically, the empirical studies discussed in this review spend considerable time laying out the requirements for internal validity, and the identification strategy will be a key element of any such study. As discussed below, perhaps principally in Section 4.3.3, discussions of identification strategies themselves have spurred substantial strands of literature in work on the impacts of abortion policy.

Finally, it is worth noting that where within-country variation in abortion access is used to identify the impact of abortion policy on outcomes of interest, and where reforms of interest occurred long in the past, measurement of reform is not necessarily trivial. While in certain cases law changes are unambiguous; based on widely documented political events (for example, [Pop-Eleches \(2006, 2010\)](#)) or policy reforms (for example, [Brooks and Zohar \(2021\)](#); [Clarke and Mühlrad \(2021\)](#)), in other cases, multiple state-level reforms and contradictory legislative findings may mean that the exact dating of reforms is not straightforward and requires substantial archival work. The importance of measurement, as well as documentation that measurement errors may exist in the literature is discussed by [Myers \(2022\)](#), who additionally proposes a clear coding for US state-level reform in the 1960s and 1970s.

3.2 The Nature of Abortion Reforms Studied

3.2.1 Liberalizations or Restrictions

Likely the most salient element of abortion reform is the whether the reform acts to restrict access to abortion, or liberalize access to abortion. It is generally clear with a particular reform whether its passage results in increased access to abortion or decreased access to abortion. For example, the passage of *Roe vs. Wade* in 1973 codified access to abortion in the United States, implying that the reform was liberal in nature. Similarly, [Mølland \(2016\)](#) studies a reform of abortion law in Norway in which access was liberalised for teenagers in Oslo four years earlier than in the rest of the country. A particularly interesting case is that of Romania. In Romania, abortion was widely accessed before being immediately criminalized in 1966 and then legalized once again 34 years later in 1990. This reform has been influential in studies in economics given that it has provided two sharp changes

with considerable pre and post-study periods available (see for example [Pop-Eleches \(2006, 2010\)](#); [Hjalmarsson et al. \(2021\)](#); [Mitrut and Wolff \(2011\)](#)), all of which study one or both of these particular legal shifts.

Apart from the aforementioned cases, clear examples of liberalisations studied in the economic literature on abortion include Canada ([Sen, 2007](#)), the USA ([Myers, 2017](#), *inter alia*), England and Wales ([Kahane et al., 2008](#)), all during the period of the 1960s-'70s, and later liberalisations such as Spain and Taiwan in the 1980s ([González et al., 2018](#); [Lin et al., 2014](#)), a number of Eastern European countries in the 1980s and '90s ([Levine and Staiger, 2004](#)), Nepal in the early 2000s ([Valente, 2014](#)), Mexico in 2007 ([Clarke and Mühlrad, 2021](#)), and Uruguay in 2012 ([Antón et al., 2018](#)). Examples of restrictions have been studied in a broad range of time periods, ranging from anti-abortion laws in the US in the 1850s-1910s ([Lahey, 2014a,b](#)), the Romanian policy shift of 1966 discussed previously, to very recent state-level restrictions limiting both provision of abortion (for example [Arnold \(2022\)](#)) and individual access to abortion in the US (for example [Lindo and Pineda-Torres \(2021\)](#)), as well as certain state-level legal tightenings in Mexico examined in [Clarke and Mühlrad \(2021\)](#).

3.2.2 Causes

Abortion reform may impose or remove limits. In certain settings, abortion may be allowed in particular circumstances such as in cases of risk to the mother's life or health, in cases of fetal inviability, or in cases of rape, but not broadly upon request. Thus, reforms may move particular margins of these restrictions, or eliminate restrictions all together. This includes cases such as the passage of *Roe v. Wade* in the US which codified access to abortion upon request, similarly to abortion reform studied in Mexico, Uruguay, and Norway (among others). In other cases, abortion reform may be more moderate, for example the case of abortion reform in Spain in 1985 and the UK in 1967 where abortion was not available upon request, but was available in the other three specific clauses mentioned above ([González et al., 2018](#); [Kahane et al., 2008](#)).

However, it is important to note that both the causes and the interpretation of the causes may vary substantially. An interesting case in point is the abortion liberalisation in both Spain and in the UK, which, while nominally putting limits on access to abortion, in a *de facto* sense did not imply substantial limits, given that in both settings the maternal health criterion was widely used to include

mental health concerns. In other settings, the interpretation of abortion restrictions may also vary, with quite different implementations of criminal sanctions imposed in settings where abortion was illegal; see, for example, the case of Mexican states studied in [Clarke and Mühlrad \(2021\)](#), or Draconian measures to ensure compliance with the law in [Pop-Eleches \(2006\)](#), compared with state-level policy reform in the US, where it has been well documented that individuals with means to travel over state lines can access abortion in states with less strict policies ([Joyce and Kaestner, 2001](#); [Lindo et al., 2020a](#)).

3.2.3 Types of Restrictions

The nature of reforms varies considerably by countries and time periods. These include outright legalisations (eg [Myers \(2017\)](#); [Sen \(2007\)](#); [Antón et al. \(2018\)](#)) or criminalisations (for example [Pop-Eleches \(2006\)](#); [Lahey \(2014a\)](#)), but additionally include restrictions which are more piecemeal, making access harder by either reducing access to abortion at the supply side (providers) or demand side (individuals).

Examples of demand side policies include funding reforms such as restrictions that limit the coverage of abortion from public funds; see, for example, [Blank et al. \(1996\)](#) for discussion of a US Medicaid funding restrictions, or [Brooks and Zohar \(2021\)](#) which consider the converse setting, where reforms occur to increase the provision of free access to abortion without changing any underlying restrictions. Similarly, other restrictions on the demand side include the passage of laws which impose mandatory minimum waiting periods and which require women to receive information about abortion procedures and then wait some pre-stipulated amount of time before being able to access the procedure have been put in place, see, for example [Altındağ and Joyce \(2022\)](#); [Lindo and Pineda-Torres \(2021\)](#). More invasive laws in a similar vein have been studied; for example, [Gius \(2019\)](#) considers laws requiring ultrasounds prior to abortions being performed. Additional examples include the passage of parental consent laws requiring parents of women under 18 years of age to be informed or otherwise provide consent prior to an abortion being provided ([Joyce and Kaestner, 2001](#)). A number of papers, for example [Bitler and Zavodny \(2004\)](#) consider multiple such restrictions in a single setting.

Examples of supply side policies include laws which impose restrictions on providers such as hospital admitting privileges or that they meet specific medical or infrastructure criteria, as well as

other licensing criteria. These laws, known in the United States as TRAP laws (for Targeted Regulation of Abortion Providers) have been widely studied in a this setting, given the proliferation of such policies across US states over the last 2-3 decades (Fischer et al., 2018; Lindo et al., 2020a; Arnold, 2022; Jones and Pineda-Torres, 2021). A description of the full nature of these laws can be found in Jones and Pineda-Torres (2021). Later in this article, further detail is provided on the nature of these reforms, as well as their implications.

3.2.4 Age Limits

Policies may inherently target specific age groups, and in cases such as these, any findings will naturally be limited to the age groups affected by policies. Along with the aforementioned parental consent laws which affect women under the ages of 18, certain policies only affect other specific age groups such as a roll-out of free abortion provision in Israel to 20-32 year-olds (Brooks and Zohar, 2021), or abortion restrictions which were put in place in Romania for all women, with exceptions for women above certain age cut-offs (Pop-Eleches, 2006). Even within the country studied in such settings, results will provide lessons for the particular population groups which are affected by marginal reform changes, and as such, external validity to other groups *within the same country* cannot be assumed.

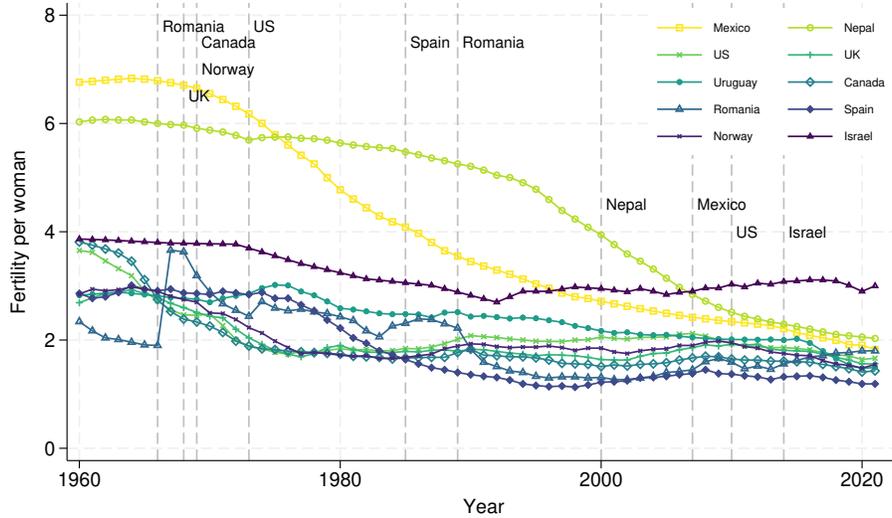
3.3 Limits to the Current Knowledge of Abortion Reform in Economics

More generally, it is important to note that the external validity of the reasonably large literature on abortion reform in economics may be limited. While quite a large number of papers have been published on abortion in the economic literature, the number of settings studied has been quite selected, in large part owing to the availability of reforms and data. Indeed, a large majority of the papers in the literature are from a single country – the United States – though from a number of policy reforms. While these papers provide a large body of evidence to understand the impacts of abortion reform in the US over the last 50 years, they may provide limited evidence on the implications for abortion reform in other settings.

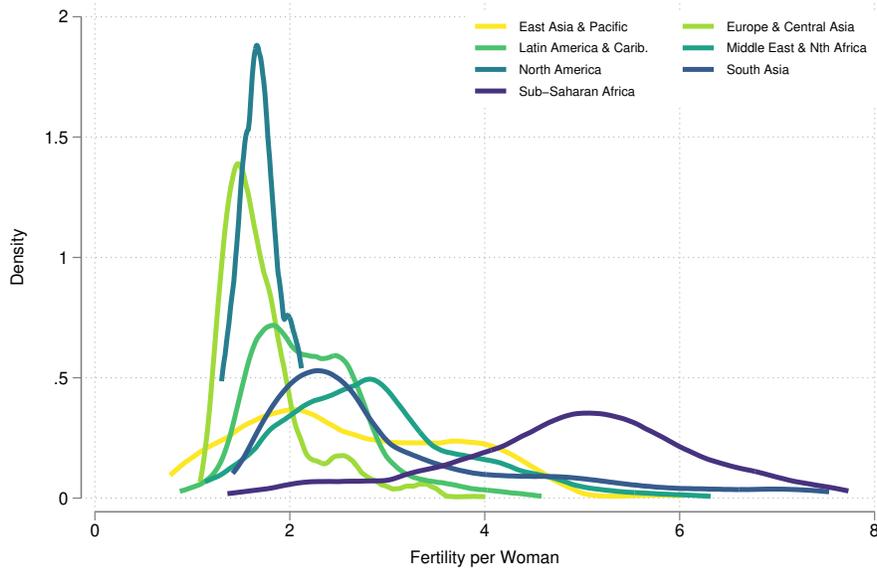
Throughout this paper abortion reforms are discussed which have been studied in papers published in academic journals in economics.³ Figure 3a provides a plot covering the period of 1960-2021

³This is a limit to this article, given that there is a substantial literature on abortion policy outside of economic journals,

Figure 3: Studied Abortion Reforms and Fertility Levels



(a) A Selection of Abortion Reforms Covered in Studies in Economics



(b) Fertility by World Region

Notes: Fertility rates are drawn from the World Bank Databank (indicator sp.dyn.tfrt.in). Reform dates in panel (a) refer to reforms discussed in this article, though at times refer to ranges of reform dates (such as state-level legal reforms in the US which occurred over a wide-period, though are signalled in 2010 in the plot). Fertility distributions in panel (b) are plotted for all countries in each region for years 2000-2020 only to provide a more recent snapshot of fertility levels, pooling all country by year observations.

indicating the dates when studied reforms took place (dashed grey lines), as well as the fertility rates of the countries in which reforms were studied. Despite the fact that these reforms occur over a substantial period of time, virtually all reforms occur in relatively low fertility environments. Indeed, the majority of reforms studied occur in countries and time periods in which fertility is close to the replacement rate (around 2 births per woman over her lifetime), though historical reforms such as those in the 1960s and 1970s in the US occurred in higher fertility environments, at closer to 3 births per woman. One exception to this is the reform studied by [Brooks and Zohar \(2021\)](#) in Israel in 2014, where the total fertility rate was slightly higher than 3 births per woman over her lifetime, however this reform is a financial shift where abortion was permitted both pre and post-reform.

When comparing fertility rates in these reform contexts to fertility rates worldwide (Figure 3b), it seems that these may provide limited lessons in certain contexts. This Figure provides density plots of country fertility rates over years 2000-2020 by world region, where a substantial portion of countries have fertility rates well in excess of those in reform countries, especially in Sub-Saharan Africa, though average fertility is well above 2 births per woman in all regions except North America, and Europe and Central Asia. When considering that the vast majority of countries which could conceivably liberalise abortion laws are located outside of North America, Europe and Central Asia, lessons from the reforms studied to date in the economic literature may be limited in terms of their predictive power for the impact of any reforms in these settings, at least if impacts depend on baseline fertility rates.

4 Evidence on the Nature and Magnitude of Effects of Abortion Reform

4.1 Abortion Reform and Abortion Access

A precursor to considering any impacts of abortion policy on outcomes of women and families is to understand how these policies affect access to abortion in the first instance. Such ‘first stage’ policy impacts are necessary for these policy changes to have any downstream effects ([Joyce, 2013](#)). Being able to convincingly document reform impacts on rates of abortion is, at times, challenging, as in many contexts, the policy reform implies that elective abortion is illegal in either the pre-policy or

which in the interests of space is not reviewed here.

post-policy period. In cases where abortion is illegal, measuring rates of abortion is very difficult⁴ and even in cases where abortion is legal, many of the reforms studied in the economic literature on abortion occurred more than 50 years ago, implying that access to data on abortion rates can be challenging (Blank et al., 1996).

Nevertheless, a range of papers have provided credible estimates of the impact of both historical and more recent abortion reforms on actual rates of abortion. In general, these studies leverage identifying variation from differences in access across geographic areas within countries over time (for example state-level, or even county-level variation in the United States), however in certain settings even time-series variation provides credible information on the impact of abortion laws on rates of abortion. Much of the evidence base on the impact of abortion policy on abortion rates comes from the United States covering the period from the late 1970s to the 2020s. This is a period in which US states were emboldened to enact their own laws related to abortion access as a result of a number of political events and legal findings; in particular, the passage of the Hyde Amendment in 1976 which restricts the use of federal funds such as Medicaid to finance abortion, as well as the Supreme Court decision in *Planned Parenthood vs. Casey* in 1992, which allowed states to impose restrictions on access to abortion, provided that those restrictions did not result in an “undue burden” on a woman’s access to abortion before a fetus became viable. Studies from the US thus examine the impact of reforms such as Medicaid funding changes, laws which seek to restrict individual access to abortion including parental involvement laws and waiting periods, and laws which seek to restrict providers’ ability to offer abortion, such as the need for clinics to have admitting privileges in hospitals.

Among studies to consider the impact of cuts to Medicaid funding on rates of abortion Blank et al. (1996) and Levine et al. (1996) provide early evidence of the relevance of changes in funding on access to abortion. Using data on abortion rates collected by the Guttmacher Institute Levine et al. (1996) find that funding restrictions reduce rates of abortion by 5.5% among women aged 15-44. Blank et al. (1996), who additionally considers data on abortion rates from the Center for Disease Control finds that rates of abortion decline by a similar rate if considering residents of states, but also have cross-state effects, with important reductions in the usage of abortion in state when spending restrictions are in place owing to declines in individuals travelling from across state lines. She finds that the total effect

⁴In certain settings, proxies have been proposed as a noisy way to measure access to abortion procedures. For example Pop-Eleches (2010) notes that in cases where abortion is illegal, and given risks inherent in clandestine abortion, maternal mortality is a proxy of access to clandestine abortion in the absence of safe alternatives.

of funding restrictions may be as high as 13%, and additionally notes that these effects are much higher among Medicaid eligible women: at between 19-25%. While Medicaid funding cuts were imposed at the Federal level, certain states made funds available at the state level to cover abortion for women on Medicaid. [Cook et al. \(1999\)](#) use a particular situation in North Carolina where state-level abortion funds ran out before the end of a number of financial years, and estimate that for affected women, around one third of abortions which would have been performed were actually taken to term given the lack of funding availability. Taken together, these findings suggest that the availability of financing is a highly relevant element in access to abortion.

The impact of laws that restrict access has also been documented in considering parental involvement laws for young women. Such laws, which were passed in a reasonably large proportion of US states from the late 1970s onwards and require that parents are notified where women under 18 seek an abortion, have been found to have substantial impacts on abortion rates for young women. [Haas-Wilson \(1996\)](#) finds that the laws decreased rates of abortion by between 13 and 25%, with [Levine \(2003\)](#) finding broadly similar effects. [Bitler and Zavodny \(2001\)](#) additionally note that declines in access to abortion owing to these laws result in increased rates of later-gestational abortion, with implications for the health and well-being of women. More recent analyses based on event study models ([Joyce et al., 2020](#)) suggest the impacts of such laws may be limited to earlier time-periods (pre-1990), while [Joyce and Kaestner \(2001\)](#) note that minors may travel out of state to blunt the impact of such reforms. A further review of these laws, as well as discussions related to data quality is provided by [Dennis et al. \(2009\)](#), and [Myers and Ladd \(2020\)](#) provides considerable further discussion related to challenges in measuring abortion rates, and suggests that these estimates should be viewed with caution.

A final set of demand-side laws considered are the imposition of mandatory waiting periods. Mandatory delay laws, which can require that individuals travel twice to abortion facilities to seek an abortion have been documented to have substantial impacts on abortion rates ([Altındağ and Joyce, 2022](#)), the proportion of abortions conducted in the second trimester ([Lindo and Pineda-Torres, 2021](#)), and, in certain contexts, to increase the rate of out-of-state abortions ([Joyce and Kaestner, 2001](#)). [Altındağ and Joyce \(2022\)](#), using a regression discontinuity design and a law change in Arkansas in 2015 which required that women make two trips to abortion providers prior to accessing abortion found that these mandatory delay laws reduced rates of abortion by 17%. While these studies suggest that these

laws can be highly relevant in affecting access to abortion, earlier evidence from [Bitler and Zavodny \(2001\)](#) suggests that this may not always be the case. In their setting, studying earlier mandatory delay laws, they found relatively little evidence on impacts of these laws on rates of abortion, potentially because unlike the laws studied in [Lindo and Pineda-Torres \(2021\)](#); [Altındağ and Joyce \(2022\)](#), the earlier laws principally required a single trip to abortion providers. This is supported by [Myers \(2021\)](#) who explicitly considers the differential impacts of mandatory waiting periods which imply two-trip versus one-trip to abortion clinics. She finds that while one-trip waiting period restrictions do not have substantial effects on rates of abortion or birth, in cases where two-trip limits are imposed, this results in substantial increases in rates of abortion occurring in the second trimester, declines in abortion rates among state residents by around 9%, and increases in birth rates of around 1.5%. Such results are larger among low income and among hispanic and black women, while also being larger in states with larger travel times to out of state abortion clinics.

An alternative set of studies examines recent laws in the US which seek to limit the provision of abortion from the *supply* side. These laws, referred to as Targeted Regulation of Abortion Providers (or TRAP laws), impose a series of restrictions on abortion providers including requiring that they meet the requirements of Ambulatory Surgical Centres (ASCs) which can be costly, especially for small clinics, or that they have admitting privileges at a nearby hospital. Such reforms have been studied by (among others) [Colman and Joyce \(2011\)](#) who focus on ASCs in Texas, [Fischer et al. \(2018\)](#); [Lindo et al. \(2020a\)](#) who study Texas' HB2 law, which imposed ASC and hospital admitting privileges (including maximum distances to nearby hospitals), [Venator and Fletcher \(2020\)](#), who study a series of laws in Wisconsin including ultrasound requirements and [Arnold \(2022\)](#); [Caraher \(2023\)](#); [Jones and Pineda-Torres \(2021\)](#) who consider state-level reforms nation-wide. All told, these papers suggest that demand side laws can have substantial effects on rates of clinic closures, the distance individuals must travel to reach their nearest clinic, and finally on rates of abortion. For example [Arnold \(2022\)](#) presents convincing event-study evidence which suggests that the passage of TRAP laws reduces rates of abortion by 5% in the short run, and by more than 10% in the medium run. Studies by [Fischer et al. \(2018\)](#); [Lindo et al. \(2020a\)](#); [Venator and Fletcher \(2020\)](#); [Myers \(2023\)](#) as well as earlier work by [Joyce et al. \(2013\)](#) all provide convincing evidence that a relevant mechanism is increasing travel times owing to clinic closures. For example, the estimates of [Fischer et al. \(2018\)](#) based on clinic closures in Texas, show that the when a county does not have an abortion clinic within

25 miles, abortion rates fall by 16.6% compared to counties which do. Recent work by [Caraher \(2023\)](#) provides an analysis based on rich data with abortion rates at the level of the county in the US and considering both demand side (mandatory waiting period) and supply side (TRAP) laws, and finds that supply side laws result in larger declines in abortion rates.

While the majority of the economic literature focusing on abortion reforms and abortion access is set in the US, [Brooks and Zohar \(2021\)](#) are also able to provide evidence from the expansion of free provision of elective abortion in Israel in 2014. In this settings, free provision is found to result in relatively smaller effects on abortion rates than those found based on funding cuts due to Medicaid in the US, with the authors documenting that free provision increases rates of abortion by 4.5-7%, however there is a socioeconomic gradient in this result, consistent with findings from Medicaid in the US.

4.2 How Does Abortion Reform Shape The Outcomes of Affected Cohorts of Women?

4.2.1 Fertility and Family Formation

In line with abortion reform affecting abortion rates, there is considerable evidence in a number of settings that changes in abortion availability have important impacts on fertility, with evidence that it also affects young women's marriage decisions. Results are observed from both liberalizations in abortion policy, which have been shown to result in declines in birth rates, as well as in the implementation of abortion restrictions, which have been shown to bring about sharp increases in birth rates.

Naturally, the effect of reforms is highly context-dependent. The magnitude of the effect depends upon how much *De Jure* legislative change generates *De facto* policy change. For example, certain reforms are radical changes, dramatically altering the nature of access to abortion when comparing pre-reform to post-reform circumstances. Situations of this nature include cases such as the Romanian criminalisation (1966) and legalization (1990), as initially prior to 1966 abortion was widely used, and post-1966 sanctions were extremely strict and highly monitored. A similar case, though slightly less extreme was that of *Roe v. Wade* in 1973 in the US. Prior to the reform abortion was available in only certain early-access states ([Myers, 2022](#)), while post-reform abortion was available nation-wide upon request. Both of these reforms could be conceivably expected to generate large changes in fertility

given that they reforms have substantial bite (see Section 4.1). Other reforms, on the other hand, are likely to have smaller effects on fertility given that their *De facto* impact is lower. For example, a number of state-level legal tightenings in Mexico are considered by [Clarke and Mühlrad \(2021\)](#), but given that these simply increase sanctions on (already criminalised) abortion, any fertility effects are likely to be modest.

In a land-mark study in the United States, [Myers \(2017\)](#) suggests that liberalisation in abortion access during the 1970s lead to large changes in rates of fertility as well as shotgun marriage among young women. Using state-level variation in abortion availability for young women during the period of 1970–1973 and a difference-in-difference design, she estimates that abortion liberalization is responsible for a three percentage point (or 34 percent) decline in first births, and 19 percent decline in first marriages prior to the age of 19, with even larger declines observed in so called “shotgun marriages”.⁵ These results condition on the availability of the contraceptive pill, with the effects of the contraceptive pill observed to be small in comparison to those of abortion availability, particularly when abortion is available to minors without parental consent restrictions.

These effects cohere with other estimates documented from liberalising policy changes which similarly resulted in large effective changes in abortion law. [Mølland \(2016\)](#) estimates that liberalising reform in Norway in 1969 resulted in a 3pp decline in teenage motherhood (a 16% decline), with no effect on completed fertility. [Pop-Eleches \(2010\)](#) finds even larger effects following the Romanian liberalisation of 1989: a decline in 30% in fertility rates, which *does* affect completed fertility. Liberalisation in Mexico in 2007 is similarly observed to produce declines in birth rates of around 8% for all women [Clarke and Mühlrad \(2021\)](#) with similar figures observed following liberalisation in Uruguay, at least among unplanned birth ([Antón et al., 2018](#)). What all these reforms share is that they increase access to abortion, and generate a substantial discontinuity in the nature of the policy environment moving from pre- to post-policy, in each case removing any limits (apart from gestational limits) in how abortion can be sought. It is important to note that even in cases where certain limits remain in place, liberalisations can still result in substantial declines in fertility: see for example the case of Spain studied in [González et al. \(2018\)](#), who document a 6% decline in fertility among young women exposed to legalised abortion despite the fact that abortion was limited to three particular cases (additional discussion of this case was provided in Section 4.1).

⁵These are defined as marriages which are followed by a birth within the next 8 months.

Such results are not limited to liberalising abortion reforms. Indeed, generally speaking, effects of approximately the same size (or larger) but the opposite direction are observed when abortion restrictions are put in place. One example of this in an historical setting is [Lahey \(2014a\)](#) who studies US state-level anti-abortion laws put in place between 1850–1910. Using census micro-data and difference-in-differences style modeling she finds that the existence of a state-level anti-abortion law increases the child to woman ratio by 12%. This finding is echoed in more recent literature. When abortion was criminalised in Romania in 1966, the number of births was immediately observed to more than double, with [Hjalmarsson et al. \(2021\)](#) estimating an increase in the number of births by 133% following the abolition of abortion. While this context resulted in the highest change in birth rates documented in the literature, this likely owes to (a) the relative frequency of abortion at baseline in Romania (b) the strict nature of the ban and its enforcement, and (c) the fact that use of clandestine abortion only grew in later years, rather than at the (surprise) announcement of the legal reform.

A number of papers document how impacts on fertility occur over the life-cycle. A key-question in this setting is whether any impacts of abortion reform on fertility are transitory, simply allowing individuals to time the births they would like to have in a more optimal way, or permanent, implying that the availability of abortion results in fewer births on average when individuals reach the end of their childbearing years. [Ananat et al. \(2007\)](#), studying the case of early legal access in the US in the 1970s find that in this setting, fertility declines are permanent: women not giving birth as a result of increased abortion availability in this period do not tend to go on to increase births later in life. What's more, they find that much of this result owes to women being more likely to remain childless. A similar effect from abortion restrictions is observed in Romania, with [Pop-Eleches \(2010\)](#) documenting that women who spent much of their fertile life under periods with sharp limits on abortion access had higher life cycle fertility than later cohorts after abortion bans were lifted. However, these results are not observed in all contexts. Both [Mølland \(2016\)](#) and [González et al. \(2018\)](#) find that while liberalising abortion reforms in Norway and Spain respectively resulted in declines in fertility early in life, these are transitory rather than permanent, principally affecting timing rather than total fertility.

While in many contexts including those discussed above the impact of abortion reform on fertility is clear, in other cases impacts are less clear cut. One such example are parental involvement laws in the US, where the literature suggests divergent results. Early work from [Kane and Staiger \(1996\)](#); [Levine \(2003\)](#) suggests that there is relatively little evidence that these laws have aggregate effects

on teen fertility, though more recent work suggests that the bite of these laws have increased, with significant increases in fertility observed with the passage of laws [Myers and Ladd \(2020\)](#). As [Myers and Ladd \(2020\)](#) note, these results may owe to the broader context in which reforms take place, as the growing frequency of parental involvement laws means that the existence of nearby states which offer abortion without parental involvement is limited, unlike in earlier periods where out-of-state travel may act as an imperfect substitute for in-state access to abortion without parental involvement.

Notwithstanding some particular settings in which the fertility effects of abortion reforms may be more moderate, the general picture painted from the economic literature is that abortion availability has important impacts on birth rates, fertility timing, and at times, total fertility. This is observed in a range of studies, covering abortion restrictions and liberalisations, a range of time periods from as early as 1850 to as late as the 2020s, and a range of countries and continents, pointing to the enduring importance of abortion as a birth control method across space and time. There is relatively little evidence in the economic literature on abortion to suggest that abortion access is irrelevant as a fertility control mechanism, even in settings where modern contraceptives such as the pill are available.

4.2.2 Women's Human Capital Attainment

The impact of abortion reform on fertility has myriad longer term impacts on women and families. Consider the legalisation of abortion and the corresponding changes in timing of fertility. If women's ability to control their fertility improves, this potentially allows delays in marriage and allows women to invest more in their own human capital ([Katz and Goldin, 2002](#)). Empirical evidence of the relevance of this relationship has been documented in a number of contexts.

In 1960s Norway, [Mølland \(2016\)](#) substantiates this link between abortion legalisation and women's education, finding that after the early passage of abortion reforms in Oslo, women were 1.8% more likely to graduate with a college degree, and 0.8% more likely to gain an advanced degree. She does not observe evidence of impacts on completion of high school. Educational effects are also documented by [Angrist and Evans \(1996\)](#) who study US state abortion reforms progressively legalising abortion between 1967 and 1973 (similar results are discussed by [Ananat et al. \(2007\)](#), though results are mixed). They document that these abortion reforms increase the likelihood that black women attend college by around 3pp, with no similar effect observed for white women (or for men). Finally,

evidence from Spain presented in [González et al. \(2018\)](#) suggests that greater availability of abortion reduces the likelihood of high-school dropout. As in the case of fertility, in the case of education effects are observed to be bi-directional: [Pop-Eleches \(2006\)](#) documents that mothers exposed to the 1966 Romanian abortion ban are 4.8pp less likely to have primary education as their highest level of education, and 4.5pp more likely to have a secondary education. [Jones and Pineda-Torres \(2021\)](#) document that abortion restrictions can translated into declines in educational attainment quite quickly. Studying black women in the USA, they find that TRAP laws implemented in the 1990s and 2000s resulted in declines in rates of college initiation of around 2% for women exposed to restrictions during their adolescence. All of these results point in the direction of greater agency in birth timing owing to abortion liberalisation being positive for human capital accumulation, and reduced agency compressing educational attainment.

4.2.3 Labour Market Outcomes

Effects similar to those on education are observed when considering labour market participation (both at the extensive and intensive margin), salaries, and financial security. Many papers which study women's human capital accumulation, also document follow on effects on labour market outcomes. This includes [Angrist and Evans \(1996\)](#) who find that as with educational attainment, employment rates for black women (but not white women) are higher by around 1.2pp when abortion is available, though they find no evidence of impacts on log earnings. [Kalist \(2004\)](#), who examines this context with different data and slightly modified design also finds that black women have substantially larger labour market effects than white women, though does find small effects of abortion legalization during the 60's and 70's in the US for white women. This results is expanded upon by [Mølland \(2016\)](#) who documents substantial effects of abortion legalisation on labour market participation across the life course for women: with around 2pp higher rates of participation up to around the age of 35, at which point effects become negative, in line with re-optimised fertility timing. Similarly, in a US setting [Lindo et al. \(2020b\)](#) document that access to abortion increases the likelihood that women work in jobs with Social Security coverage early in life (in their 20s and 30s), with negative impacts later in life, reminiscent of the cyclicalities documented by [Mølland \(2016\)](#). While the majority of this literature examines laws which liberalise access to abortion, [Bahn et al. \(2020\)](#) provide evidence from US "TRAP" laws which reduce access. They find results which suggest that, conversely to

the liberalising effect of abortion availability, the targeting of abortion providers results in depressed labour market opportunities for women, specifically by reducing the ability which women have to move between jobs, and access higher paying occupations.

While the principal channel which likely explains these effects is greater flexibility to accumulate human capital (Section 4.2.2) and participate more freely in the labour market when fertility is more optimally timed, an additional channel has been noted in the economic literature. Theoretically, [Chiappori and Oreffice \(2008\)](#) note that abortion legalisation will increase bargaining power of women, and via an income effect, lead to increases in men's labour supply, and declines in women's labour supply. [Oreffice \(2007\)](#) finds support for this model empirically, noting immediate changes in labour supply of men and women surrounding abortion legalisation in the US in the 1960s and 1970s. In the long-run, any empowerment effect will be combined with effects flowing from additional human capital gains, meaning that these short-run effects will no longer be able to be identified cleanly, however at least in the short run, [Oreffice \(2007\)](#) documents the existence of such effects.

4.2.4 Health Outcomes

There are a small number of studies considering the impacts of abortion availability on women's health outcomes. These are largely focused on reproductive health measures, with access to safe and legal abortion being convincingly found to reduce health complications and rates of maternal death. A clear example based on a recent reform is studied in [Clarke and Mühlrad \(2021\)](#), who consider the passage of legal abortion in Mexico City, in 2007. They document declines in hospitalisation both in examining rates of haemorrhage and abortion-related morbidity. They do not find evidence that contemporaneous increases in penalisations of abortion in other states in Mexico had any clear impact on rates of morbidity.

Evidence from an historical setting has been recently studied by [Farin et al. \(2022\)](#). Examining state-level changes in abortion law in the US between 1969-1971 (pre *Roe vs. Wade*) and in 1973 (*Roe vs. Wade*), they document that the availability of legal abortion brought about declines in maternal mortality, and abortion-related mortality in particular, and that this was driven by declines in mortality rates among non-white women. Both sets of results – those from Mexico considering morbidity and from the US considering mortality – point to substantially-sized impacts. [Farin et al. \(2022\)](#)

find declines in non-white maternal mortality rates of between 30-40%, while [Clarke and Mühlrad \(2021\)](#) find declines in morbidity of between 20-35%. Strikingly, as a headline figure [Farin et al. \(2022\)](#) estimate that nationwide in the US, 113 non-white maternal deaths were averted the first year abortion was legalised, suggesting major welfare implications which cannot be ignored in any policy considerations related to abortion reform.

4.2.5 Other Outcomes

Abortion policies have also been documented to affect a number of other dimensions when focusing on cohorts of women exposed to reforms. This includes empowerment, financial well-being, and life-satisfaction.

A particularly clean counterfactual for considering access to abortion is the Turnaway study, discussed in [Miller et al. \(2020, 2023\)](#). Based on gestational length limits and access to abortion, this study worked with a sample of women who requested abortions and were either just below the gestational length limit (a Near Limit group), or just over the gestational length limit (the Turnaway group). The Turnaway study followed these two groups over a substantial period of time (5 years), leveraging the vastly different trajectories owing to accessing or being turned away from abortion owing to the gestational length limit. In [Miller et al. \(2023\)](#), these data are additionally matched to data on financial outcomes from credit reports. The authors find that when compared to the Near Limit group, the Turn Away group was observed to have substantially worse financial outcomes, being more likely to have overdue debts or to have suffered adverse events such as bankruptcy or eviction. What's more, these effects are observed to persist for an extended period of time.

A small number of studies have documented impacts of abortion reform on empowerment of women. One such series of papers, mentioned above, is [Chiappori and Oreffice \(2008\)](#); [Oreffice \(2007\)](#) who note a theoretical channel whereby abortion legalisation will empower women, with [Oreffice \(2007\)](#) documenting empirical results in support of this model. A handbook chapter by [Bernstein and Jones \(2021\)](#) notes more generally a range of findings linking women's reproductive health – including access to abortion – to empowerment.

Finally, recent results from [González et al. \(2018\)](#) suggest that abortion access may be relevant for women's life satisfaction. Using household survey data and subjective measures of life satisfaction,

they find some evidence to suggest the women with greater access to abortion at younger ages are satisfied, at least when considering their living conditions and time devoted to leisure.

4.3 How Does Abortion Reform Shape the Composition of Birth Cohorts?

A series of influential papers in the late 1990s and early 2000s brought into focus the question of how access to abortion shaped the characteristics of birth cohorts. If access to abortion implies that women and families are more likely to take desired pregnancies to term, and not continue pregnancies which are unwanted, this will imply that children born after the legalisation are more likely to have been planned, and potentially exposed to different home environments and family investments. These ideas were formalised in [Gruber et al. \(1999\)](#) examining the circumstances of cohorts of children at young ages, with later work of [Donohue and Levitt \(2001\)](#) considering the implications of this for later life outcomes (namely, crime rates). These papers have been followed by a substantial literature with the modelling implications of “Abortion and Selection” laid out in [Ananat et al. \(2009\)](#).

This focus on abortion and selection has precedents in earlier work. [Kane and Staiger \(1996\)](#) document that restrictions in access to abortion in the US lead to declines in rates of teen births in the population, and [Lundberg and Plotnick \(1995\)](#) note potentially divergent impacts of abortion reform by race in the US, with both of these results suggestive that changes in abortion legislation will be reflected in changes in the mean characteristics of affected birth cohorts. [Currie et al. \(1996\)](#) additionally examine the impact of abortion restrictions on average health at birth of affected cohorts, suggesting that they observe weak evidence of a decline in birth weight. At an aggregate level [Blank et al. \(1996\)](#) document that rates of abortion correlate with state-level economic factors as well as demographic factors, again potentially suggesting that changes in abortion laws will map into changes in cohort characteristics.

Conceptually, the impacts of abortion reform on cohorts could owe to a number of mechanisms. [Pop-Eleches \(2006\)](#) notes three principal mechanisms by which abortion policy may affect the composition of children. The first is an “**unwantedness**” channel: if children are more likely to be planned, parents may invest differentially or have more to invest in their children. The second is a **compositional** channel: if certain groups are more or less likely request an abortion, legalisation of abortion will change the aggregate characteristics of families giving birth. And the third is a potential **crowding**

channel: if abortion reform affects total cohort size, this may have some general equilibrium effects, such as more overcrowding in schools.

4.3.1 Abortion and Living Conditions

The impact of changes in abortion law on living conditions early in life have been documented in a number of papers and across settings. Studying variations in access to abortion in the 1970s in the US, the work of [Gruber et al. \(1999\)](#) documents that the ‘marginal child’ affected by abortion policy would have been at least 60% more likely to live in single parent households had abortion not been available, 50% more likely to live in poverty, 45% more likely to receive welfare, and 40% more likely to have died in the first year after birth. The early-life impacts of abortion legalisation in this period is similarly documented in [Ananat et al. \(2009\)](#), who find that the immediate impacts of legalization in the US in the 1970s is to reduce rates of teen motherhood among affected cohorts by 8.5%, and reduce the likelihood of non-white births by 5.3%. Both of these sets of results can be considered to be estimates of the compositional channel, as they refer to how changes in usage of abortion across groups shapes the characteristics of cohorts. What’s more these changes have been documented to have effects on hard measures of child well being. [Bitler and Zavodny \(2001, 2002\)](#) show that the legalisation of abortion propelled declines in child abuse and neglect, with this result potentially owing to all three channels above.

Impacts of abortion law on child living conditions have been documented in other contexts. Specifically, [Mitrut and Wolff \(2011\)](#) document impacts of abortion legalisation in Romania on child abandonment. They document that following legalisation of abortion in 1989, rates of child abandonment fell by around four children per 10,000 births, evidence of quite extreme impacts of abortion legalization on the living conditions of the marginal child in certain situations. The earlier criminalisation of abortion in Romania has been comprehensively demonstrated to result in positive selection in terms of mothers’ characteristics. [Pop-Eleches \(2006\)](#) documents that prior to the criminalisation of abortion in 1966, mothers which were highly educated and who lived in urban areas were more likely to seek abortions, and as such, following criminalisation the proportion of children living in more educated and urban household increased (see also discussion in [Hjalmarsson et al. \(2021\)](#)). It is noteworthy that in this particular case, the compositional effects are quite different to those documented with the

passage of abortion laws in the US in 1970s. In the United States, when abortion was legal, it was more common among socioeconomically disadvantaged groups (Gruber et al., 1999). In contrast, in Romania, the situation was reversed, with abortion being more prevalent among socioeconomically advantaged groups. Below we return to discuss how impacts on characteristics at birth (a compositional channel) may shape outcomes in adulthood, where both composition, as well as other channels, may be relevant.

4.3.2 Characteristics of Cohorts in Adulthood

When considering outcomes later in life, a number of results have been documented. Early evidence from the US presents clear results consistent with abortion legalisation resulting in positive changes in mean life outcomes for cohorts when they reach maturity. Ananat et al. (2009) finds that at around the age of 30, individual from birth cohorts which were subject to legal abortion have a substantially lower likelihood of living in poverty, being a single parent, being on welfare, and not having graduated from college than cohorts in which abortion was not legally available. Charles and Stephens (2006), considering the same context and using data on substance abuse, document lower rates of drug abuse among cohorts where abortion was available when these cohorts reach adolescence. In a non-US context, Mølland (2016) finds that the legalisation of abortion in Norway similarly resulted in positive human capital outcomes for children of exposed cohorts at adulthood, both in terms of educational outcomes, labour market participation at age 30, and a reduced reliance on welfare. Gutierrez (2022) also documents that cohorts exposed to abortion at birth have impacts beyond human capital, finding that in Romania, children of mothers exposed to the abortion ban have significantly lower rates of fertility across their entire fertile life when they reach maturity.

A particularly clear case considering the multiple possible channels by which abortion may shape adult outcomes is Pop-Eleches (2006). Examining the criminalisation of abortion in Romania, he documents that at adulthood children of cohorts where sharp limits were in place restricting access to abortion had considerably *improved* outcomes in terms of education and labour market measures. This result is the opposite of what one may have suspected from the aforementioned studies, given that in the other contexts, following abortion legalisation cohorts of mothers were observed to be – on average – more positively selected on socio-economic status. However, Pop-Eleches (2006) documents that this

result also owes to a compositional channel. In the case of Romania, he documents that where abortion was legal, individuals who accessed abortion were selectively more highly educated, and more likely to live in urban areas. Thus, when abortion was legalised these individuals were relatively more likely to give birth, and as a result the composition of birth cohorts moved towards more highly educated mothers. A key result from the study by [Pop-Eleches \(2006\)](#) is that despite this selection channel, he can additionally document impacts of the unwantedness channel. In particular, he notes that when conditioning on the composition of mothers, effectively shutting off the compositional channel, he observes the individuals born following the abortion ban have worse outcomes than similar individuals born prior to the abortion ban. Thus, in this particular setting [Pop-Eleches \(2006\)](#) is able to document the relevance of both of these channels, additionally showing that the nature of any compositional effects is context-dependent.

4.3.3 Abortion, Child Circumstances and Crime

Arguably one of the most visible debates in the economic literature of abortion has been given to questions related to abortion legalisation and crime. [Donohue and Levitt's 2001](#) landmark study proposes the “abortion–crime” hypothesis. Their paper proposes the theory that a decline in rates of homicides and other violent crime in the early 1990s in the US may be largely explained by the legalisation of abortion two decades earlier. This explanation coheres with the literature discussed in this section which suggests that abortion legalisation resulted in substantial changes in characteristics of birth cohorts, and additionally, broadly lines up with macro-level trends in crime in the United States in the period in which the work was published. The original authors propose a quite clear link between abortion legalisation and crime (see for example [Donohue and Levitt \(2020\)](#)): namely (a) if children are not desired, they are at an elevated risk of facing unfavourable life circumstances including criminal involvement, (b) abortion reduces rates of undesired births, and (c) as a consequence, cohorts exposed to abortion should engage in less criminal activity. This argument makes clear that the selection channel, and in particular the argument relating to unwantedness, is key in mediating the proposed hypothesis.

Despite these broad facts in favour of the abortion–crime hypothesis, the estimated impact of abortion legalisation on crime rates is very large (the authors estimate that abortion legalisation may

explain around half of the total crime reduction observed in the 1990s), and the empirical results underlying this paper have been questioned both in terms of a coding mistake in specific models (Foote and Goetz, 2008), as well as substantive contextual questions (Joyce, 2004, 2009; Foote and Goetz, 2008; Belloni et al., 2013; Hjalmarsson et al., 2021, for example). Reading across studies and contexts, it appears that the weight of the evidence in the literature suggests that the abortion-crime hypothesis – and especially the argument that wantedness of births results in declines in rates of crime – may not hold up to substantial scrutiny. Nevertheless, the early work of Donohue and Levitt has propelled a considerable and still-active literature examining the abortion crime hypothesis, capturing both academic and popular interest. This literature is substantial, and indeed, a number of papers provide broad overviews of the main findings and controversies. To capture the full nuance of the discussion and academic debate regarding the abortion–crime hypothesis, these papers are likely worthwhile starting points. Specifically, Joyce (2010) provides a handbook-length discussion of the first 10 years or so of debate on the abortion–crime hypothesis, proposing a number of key facts which appear to disprove the posited causal link, while Donohue and Levitt (2020) revisit their original work 20 years later suggesting original models still hold up. Below, the broad lines of this research are laid out, as well as key questions which challenge the veracity of the abortion-crime hypothesis.

The original paper by Donohue and Levitt (2001) examines the impact of state-level abortion rates which particular cohorts were exposed to at birth on rates of crime per capita and on raw total arrests by age group. For the period covering 1985-1997, they present estimates which suggest that crime was between 15-25% lower in 1997 than it would have been in the absence of legalised abortion. Given the total decline in crime during the 1990s, this result leads to the striking headline that the legalisation of abortion can explain around half of the decline observed in violent crime over this period. This result has been questioned for a number of reasons. Foote and Goetz (2008) raise three concerns that range from coding errors in which state-year fixed effects were not included in regressions, to failure to account for rates in models examining total arrests. In Donohue and Levitt (2001), the log of total arrests by age group is regressed on abortion rates, and Foote and Goetz (2008) note that when crime rates rather than total crimes are regressed on abortion rates, significant effects often do not remain. This appears to be an important point, because the selection argument posits not that total criminal activity should fall, but rather rates of criminal activity should fall, or in other words, that crime should not simply scale with any declines in cohort size due to the legalisation of abortion. A

second argument put forward by [Joyce \(2004\)](#) raises additional concerns: namely the possibility that unmeasured exposure to the Crack-cocaine epidemic may explain a substantial portion of the affect attributed to abortion on crime. The original authors have responded to these points suggesting that revised estimates still point to evidence in favour of their original hypothesis [Donohue and Levitt \(2004\)](#); [Donohue III and Levitt \(2008\)](#); [Donohue and Levitt \(2020\)](#). Two other pieces of important evidence are raised in [Joyce \(2009\)](#) and [Belloni et al. \(2013\)](#). [Joyce \(2009\)](#) notes that if abortion availability alters cohort composition and crime rates, declines in crime should be observed differentially over time in cohorts progressively exposed to abortion legalisation. In [Joyce \(2009, 2010\)](#) he documents that such cohort-specific patterns are not observed, a point similarly noted by [Lott Jr and Whitley \(2007\)](#). Finally, [Belloni et al. \(2013\)](#) in a methodological paper introducing their post-double selection estimator consider the abortion-crime hypothesis as an empirical example with which to apply their methods. When conducting variable selection using double-debiased machine learning techniques, they fail to find statistically significant effects of abortion legalisation on changes in crime, noting that the hypothesis is thus sensitive to considerations of covariates included in [Donohue and Levitt \(2001\)](#)'s original analysis.

Given that there is substantial debate related to the specific empirical example studied by [Donohue and Levitt \(2001\)](#) (United States abortion legalisation in the 1970s), to further clarify thinking on this issues it is useful to examine results from other contexts. Recent work by [Hjalmarsson et al. \(2021\)](#) studies the impact of the large changes in Romania's abortion policies on crime rates as an additional test of the abortion crime hypothesis.⁶ In their setting, they consider both the criminalisation of abortion in 1966, and the legalisation of abortion in 1990. While they document a large increase in rates of crime with the abolition of abortion and a decline in rates of crime with its legalisation, it turns out that this effect simply owes to changes in the number of births, with smaller cohorts mechanically committing less crime (and vice versa with larger cohorts). When considering rates, they find no evidence of changes in crime *rates*, leading them to conclude that any effect of abortion on crime in this setting is simply mechanical, rather than owing to any compositional or wantedness channels. Interestingly, a similar conclusion was reached by [Ananat et al. \(2009\)](#) in the United States, suggesting that any abortion-crime link is likely largely mechanical rather than owing to selection. There are a number of additional studies which have examined international experiences including [Kahane et al.](#)

⁶[Pop-Eleches \(2006\)](#) also touches on this debate, however [Hjalmarsson et al. \(2021\)](#) is focused exclusively on the abortion-crime link and interacts closely with [Pop-Eleches \(2006\)](#), and so we focus on this study here.

(2008) (England and Wales), [Kahane et al. \(2008\)](#) (Canada) and [Buonanno et al. \(2014\)](#); [François et al. \(2014\)](#) (panel of European countries and US). Overall, these studies suggest mixed results with no clear consensus in these four settings.

In summary, despite a compelling hypothesis and multiple descriptive facts which appear to be consistent with the abortion–crime hypothesis, a number of highly credible recent papers suggest that this hypothesis should be viewed with considerable caution. While in multiple contexts there is strong evidence that abortion passage results in declines in the *absolute number* of crimes (consistent with smaller cohorts mechanically committing fewer crimes), the evidence in favour of a selection effect are much weaker, with a number of key tests which do not appear to suggest that changes in abortion rates drive down *rates* in crime.

5 Policy and Behavioural Interactions with Abortion Reform

A final point of interest in the economic literature on abortion reform is related to how individuals, policy makers and policy more generally may interact with abortion reform. The discussion provided up to this point suggests that abortion reform may have substantial implications for individual outcomes in a partial equilibrium sense. However, it is of interest to consider what the ripples of abortion policy may be in a more broad sense.

A small number of papers have studied how abortion reform interacts with available technologies and social norms. Two of these papers consider the routine availability of ultrasounds which are capable of reliably detecting fetal sex early in gestation. These papers ([Lin et al., 2014](#); [Anukriti et al., 2021](#)) both take place in settings where there is a well-documented preference for sons, namely Taiwan and India. [Lin et al. \(2014\)](#) document that the legalisation of abortion in Taiwan in 1985 in a setting where sex-detecting technology is widely available increased the rate of boys born at higher parities, and reduced rates of relative neonatal mortality among girls at higher parities. [Anukriti et al. \(2021\)](#) considers a similar interaction, however in this case studying the introduction of ultrasound in a setting where abortion was already available and where sex-detecting ultra-sound has been documented to substantially alter the gender composition of birth cohorts ([Bhalotra and Cochrane, 2010](#)). They find clear evidence that the interaction of these reforms improves the well-being of girls in a number of dimensions – most clearly reducing excess female mortality, but also reducing dispari-

ties in the duration of breastfeeding of boys compared to girls, and rates of vaccination of boys to girls. These policy interactions can be conceived as complementarities between abortion policy and ultra-sound technologies. However, [Goff et al. \(2023\)](#) document in quite a different setting that such complementarities do not occur when considering the interaction between abortion legalisation and access to improved school environments. While they separately find that abortion reform and higher quality schools improve test scores, they do not find evidence of complementary interactions between improved home environments owing to abortion reform and higher school quality.

In general, these studies suggest that the implications of abortion policy may play out in a number of ways depending on the specific context of countries in which reforms occur. At times, the impacts of abortion policy decisions may result in unexpected, and entirely undesired responses from individuals or policy makers. One such case is documented by [Jones \(2015\)](#) who studies the impact of the Global Gag Rule (GGR) in Ghana. While the GGR ostensibly aims to reduce rates of abortion by cutting US Aid funding for overseas NGOs which provide information related to abortion, [Jones \(2015\)](#) documents that the policy has the converse effect, given that it drives down access to a broad range of contraceptive methods, resulting in a corresponding increase in pregnancies, abortion and birth rates. In another context, [Clarke and Mühlrad \(2021\)](#) note that policy makers may respond to abortion policy outside their jurisdiction and themselves implement policy reform. They document that progressive abortion policy in one state in Mexico lead to a backlash in other states, at least in the short term, with criminal codes in other states being tightened to seek to further discourage access to clandestine abortion.

The effects of abortion policy have been shown to depend more generally on the way policy changes occur in space. A growing literature has shown that the way *local* (ie state-level) reforms work will depend more generally on interactions between each area and nearby localities. Specifically, where abortion restrictions are imposed in a sub-national setting, the travel distance to the nearest available abortion provider has substantial impacts on both access to abortion and birth rates. Some discussion of this is provided in [Section 4](#), and given a spate of state-level reforms in the US over the last two decades, this question has attracted considerable recent attention. Overall, a range of papers point to the costs of distance to the nearest abortion clinic being substantial, non-linear, relevant both historically as well as at present, and depend considerably on individual characteristics. Work by [Joyce et al. \(2013\)](#) shows that in the 1970s in the United States, distance to the nearest available abortion

clinic had an important impact on access to abortion. The authors suggest that a 100 mile increase in distance for women living around 180 miles from an abortion clinic reduces rates of abortion by 12.2%, whereas the same distance change for individuals living 830 miles away reduces rates of abortion 3.3%. Certain groups were found to be particularly sensitive to distance: in particular younger women, and non-white women. Across a range of studies examining recent policy reforms these results have been found to still be relevant (Fischer et al., 2018; Lindo et al., 2020a; Myers, 2023; Venator and Fletcher, 2020), both in terms of the magnitude of the effect on access to abortion, as well as in finding the existence of substantial non-linear effects. Using novel data on the location of abortion clinics as well as state-level reforms across the entire US, Myers (2023) documents the importance of distance in both explaining abortion rates, *as well* as explaining birth rates. Like impacts of distance on access to abortion, impacts on birth rates are found to be non-linear. Myers (2023) documents that increasing distance to the nearest clinic by 100 miles increases birth rates by 2.2% for the first 100 mile increase, and this figure declines to 1.6% for the next 100 mile increase. She estimates that the costs of these changes in distance are largest for younger women, especially teens and individuals in their early 20s.

Finally, a number of studies note that individuals themselves may react to abortion policy altering their behaviours over a range of dimensions. One consideration is that individuals will react to abortion laws by reducing rates of sex. In considering parental involvement laws in the US which increase the challenges which teenagers face when seeking abortion, Colman et al. (2013); Levine (2003); Sen (2006) do not find evidence consistent with teens reducing sexual behaviour, but both Levine (2003); Sabia and Anderson (2016) do find evidence consistent with these laws increasing usage of other birth control methods. In a related setting, Ananat and Hungerman (2012) document evidence both at a micro- and state-level consistent with the availability of the oral contraceptive pill reducing young women's use of abortion. More recently, when considering reductions in access to abortion clinics in Texas and all age contraceptive purchase, Fischer et al. (2018) do not find any substantial response in terms of purchases of condoms or the emergency contraceptive pill.

6 Conclusion

This article provides an overview of the state of economics research on abortion. It seeks to cover the range of abortion policies in place world-wide and provide a review of the reforms studied in the economic literature, which have generally occurred over the last 50+ years. It covers a number of key questions, ranging from a limited literature on the determinants of abortion reform, to a substantially broader literature on the impacts of abortion policy on women, families, and cohorts of children. This research has largely been motivated by policy changes which have occurred over the last half century, and so has been more focused on liberalising reforms to abortion policy in low fertility settings. Nevertheless, the literature covers a vast array of types of policy changes including a recent spate of restrictions limiting both demand for abortion and supply of abortion.

In the interests of space, this article has focused on the economic literature on abortion. While this is a large field of study with a number of key themes and questions, this restriction necessarily reduces the breadth of questions and methods. A comprehensive review of abortion policy could productively draw on links with studies from reproductive health, public health, sociology, anthropology, legal studies, gender studies, demography, philosophy, and psychology, among other fields, although this is outside the scope of this article.

Despite being a broad literature spanning multiple sub-fields of economics a number of open questions remain. Principally, and as discussed in this article, much of the extant literature in economics is driven off policy changes in a relatively small number of countries. Expanding the contexts studied will thus expand the frontier of knowledge in this area. Beyond expanding the scope of available evidence, the literature on the impacts of abortion policy will constantly evolve to the degree that policies and access to abortion evolve. This has been clear with the uptick in recent studies examining TRAP laws in the USA, in line with their growing relevance in limiting access in this setting. Future themes in abortion research will likely similarly track innovations and key changes in access. Thus, growing use of technologies such as abortion pills which can be taken at home and delivered by post, limits in access owing to global funding restrictions in aid directed to maternal and reproductive health, and the use of tele-medicine services to bypass within-country restrictions are all potential areas of future fruitful work.

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IN THE
Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL
CAPACITY AS STATE HEALTH OFFICER OF THE
MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION,
ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF *AMICI CURIAE* ECONOMISTS
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
I. Since <i>Casey</i> , advances in statistical methodologies have led to the development of powerful and credible tools to measure the causal effects of policy changes.....	4
II. Causal-inference research confirms that <i>Roe</i> changed the arc of women’s lives	6
A. Abortion legalization impacted birth rates, separate and apart from the impact of contraception and other developments.....	7
B. Abortion legalization particularly impacted young women and Black women.....	10
C. Abortion legalization has had downstream impacts on women’s social and economic lives	11
III. Women continue to rely on abortion access to plan their reproductive, economic, and social lives	16
A. Contraception has neither eliminated unintended pregnancies nor obviated the demand for abortion.....	17

TABLE OF CONTENTS—Continued

	Page
B. Employment policies are woefully inadequate; women continue to face real obstacles to balancing motherhood and careers.....	19
C. Abortion access continues to measurably impact women’s lives.....	23
IV. Overturning or limiting <i>Roe</i> and <i>Casey</i> would cause direct harm to women seeking abortions	26
A. If <i>Roe</i> and <i>Casey</i> were overturned (even in part), travel distances to abortion providers would drastically increase, impeding women’s access to clinical abortions	27
CONCLUSION	35
APPENDIX: List of <i>Amici Curiae</i>	1a

TABLE OF AUTHORITIES

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Troy Quast et al., <i>Abortion Facility Closings and Abortion Rates in Texas</i> , 54 <i>Inquiry: J. of Health Care Org., Provision, & Financing</i> 1 (2017)	30

INTEREST OF *AMICI CURIAE*¹

Amici curiae are 154 distinguished economists and researchers with extensive experience in the field of causal inference. They occupy prominent positions at preeminent universities and institutions and include officers and distinguished fellows of the American Economic Association, affiliates of the National Bureau of Economic Research, and members of the National Academies of Sciences. *Amici* submit this brief to assist this Court in understanding the developments in causal-inference methodologies over the last three decades. Specifically, *amici* seek to highlight for the Court how causal-inference tools have been used to isolate and measure the impacts of abortion legalization in the United States and to model what would happen if *Roe v. Wade* were overturned or limited.

Amici also have an interest in correcting the information before the Court, as the State of Mississippi, along with its *amici curiae* 240 Women Scholars and Professionals, and Pro-Life Feminist Organizations (hereafter “240 Women”) have erroneously suggested that it is impossible to measure the impacts of abortion legalization and that abortion access is no longer relevant to women or their families. In fact, there is a substantial body of well-developed and credible research that shows that abortion legalization and access in the United States has

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accordance with Supreme Court Rule 37.3.

had—and continues to have—a significant effect on birth rates as well as broad downstream social and economic effects, including on women’s educational attainment and job opportunities.

A full list of *amici* is attached as an appendix to this brief.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that a woman has the constitutional right to make decisions about her reproductive life, including whether to continue or end her pregnancy before viability. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Court re-affirmed that core holding of *Roe*. 505 U.S. at 871 (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”). Among other reasons to re-affirm, this Court noted that in the two decades following *Roe*, people had “organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion.” *Id.* at 856. Indeed, this Court observed then that an “entire generation” had “come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions” such that people had important reliance interests in the access to abortion guaranteed by *Roe*. *Id.* at 860. That observation remains even truer today—nearly thirty years since *Casey*.

Mississippi and its *amici* insist, however, that at the time of *Casey*, there was “no good reason to believe” that women had in fact relied on *Roe* or that access to legal abortion had any impact on the role of women in

society. Pet’rs’ Br. at 35. Further still, they argue, there remains no way to know *Roe*’s impact, such that the Court should not consider reliance on *Roe*, or on abortion access more broadly, in deciding this case. *Id.* at 34. Not so. This argument ignores universally accepted advances in the field of “causal inference” that have allowed economists to credibly and rigorously measure the causal impact of a wide range of policies, including the impact of abortion access on women’s lives. Using causal-inference methodologies, economists have isolated and measured the effects of abortion access (both in the past and present) on birth rates as well as marriage, educational attainment, occupations, earnings, and financial stability.

For example, recent studies show that the expansion of abortion access ushered in by *Roe* reduced teen motherhood by 34% and teen marriage by 20%. Studies also demonstrate that for women experiencing unintended pregnancies, access to abortion has increased the probability that they attend college and enter professional occupations. Mississippi and its *amici* have entirely ignored this robust body of work—studies that can provide the Court with scientifically rigorous evidence of the impact of *Roe* over the last 50 years.

Similarly, economists can demonstrate that social, cultural, and legal shifts in the thirty years since *Casey* have not erased the need for abortion access in our society. Abortion remains a critical component of women’s reproductive healthcare and decision-making. Contrary to Mississippi’s assertion, for significant segments of the population, reliable and affordable contraception remains out of reach. And for many women, affordable childcare is as illusory as employment policies that accommodate working parents.

The purpose of this brief is to summarize for the Court the causal-inference literature measuring the impacts of abortion legalization and access. As *amici* will demonstrate, ample evidence indicates that *Roe* is causally connected to women’s advancements in social and economic life. This brief will also present research that demonstrates that abortion policy still matters for women’s progress and that if *Roe* and *Casey* were overturned, or significantly curtailed, it would have a significant and negative impact on women’s lives.

ARGUMENT

I. Since *Casey*, advances in statistical methodologies have led to the development of powerful and credible tools to measure the causal effects of policy changes.

At the time of *Casey*, statistical tools to empirically measure the causal impacts of public policies were in their nascency and were just beginning to be utilized to understand the effects of abortion policy. Since the early 1990s, the development of new statistical methods, advances in computing technology, and expansions in data availability have fueled a “credibility revolution” in economics, marked by new and improved ways to isolate and measure the causal effects of public policies.²

While many know the familiar mantra that “correlation does not necessarily equal causation,” the field

² Joshua D. Angrist & Jörn-Steffen Pischke, *The Credibility Revolution in Empirical Economics: How Better Research Design Is Taking the Con out of Econometrics*, 24 *J. of Econ. Persp.* 3, 4 (2010); Janet Currie et al., *Technology and Big Data are Changing Economics*, 110 *AEA Papers & Proc.* 42, 42 (2020).

of causal inference focuses precisely on figuring out when correlation *does* equal causation. Causal inference generally utilizes multiple regression analysis³ but also extends well beyond that. The gold standard in the causal-inference toolbox is—to borrow from the language of medical research—a well-executed randomized controlled trial.⁴ But in many real-world situations, randomization cannot be feasibly or ethically achieved. For example, as relevant here, economists cannot rewind history and analyze women’s labor market outcomes with and without various abortion policies in place. In these situations, causal inference allows us to assess previously implemented policies using existing observational data. Causal inference thus allows us to exploit “natural experiments”—where, for example, a policy is enacted in one state but not another—such that researchers can think about the natural assignment of subjects to groups as being “akin to randomization.”⁵

One of the most common methodologies economists apply to analyze causal effects is the “difference-in-differences” method. This methodology analyzes the effect of an “intervention” (*e.g.*, a policy change) by measuring changes in outcomes (or “differences”) for a “treatment group” that experiences the intervention as compared to changes in outcomes for a “control group” that does not receive the intervention (or undergo that policy change). By comparing changes for the treatment group to those for the control group, the difference-in-differences methodology inherently

³ Nat’l Research Council, *Reference Manual on Scientific Evidence: Third Edition* 298 (2011).

⁴ *Id.* at 555.

⁵ *Id.* at 290.

controls for any differences that were present between the two groups, even without the policy change, while simultaneously controlling for other events occurring around the time of the policy change that potentially impacted outcomes for both groups. This is a powerful statistical approach to measuring causal effects because it controls for potentially confounding factors (other factors that could also be affecting the outcome) even if they cannot be directly observed.⁶

In the years since *Casey*, economists have applied the methods of causal inference—including difference-in-differences designs and other tools in the causal-inference toolbox such as “event studies,” “regression discontinuity design,” and “instrumental variables estimation”⁷—to understand the causal effects of many policies and legal changes. Examples include the effects of the minimum legal drinking age on mortality, the effects of air pollution on worker productivity, the effects of the Earned Income Tax Credit on employment and earnings, and relevant here: the effects of abortion legalization and access on birth rates as well as women’s educational attainment and labor market outcomes.

II. Causal-inference research confirms that *Roe* changed the arc of women’s lives.

The long arc of American history has bent more steeply towards gender equality in the past few decades.⁸ To be sure, various factors contributed to

⁶ Joshua D. Angrist & Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist’s Companion* 221-47 (2009).

⁷ See *id.* at *passim* for a detailed discussion of these methods.

⁸ See generally Claudia Dale Goldin, *Understanding the Gender Gap: An Economic History of American Women* (1990); Francine D.

women’s progress during this time, including technological change, the rise of white-collar work, shifting social and cultural norms, increased access to the birth control pill, and the enactment of anti-discrimination policies.⁹ But even in the presence of these significant changes, state-by-state differences have offered natural experiments that economists have taken advantage of to isolate and measure the causal effects of abortion legalization on women’s lives.

A. Abortion legalization impacted birth rates, separate and apart from the impact of contraception and other developments.

Applying the tools of causal inference, economists have shown that abortion legalization, independent of other factors such as contraception, has had a direct and significant impact on birth rates.

The first study to examine this question (“Levine et al.” published in 1999) exploited two natural experiments: (1) the repeal of abortion bans in certain states in 1970, and (2) the *Roe* decision in 1973.¹⁰ The first natural experiment occurred in 1970, when bans on elective abortions were repealed or invalidated in five states—Alaska, California, Hawaii, New York, and Washington—commonly referred to as the “repeal states.” In this experiment, these repeal states were regarded as a treatment group experiencing a policy

Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 *J. of Econ. Literature* 789 (2017).

⁹ Goldin, *supra* note 8; Blau & Kahn, *supra* note 8.

¹⁰ Phillip B. Levine et al., *Roe v Wade and American Fertility*, 89 *Am. J. of Pub. Health* 199 (1999).

change, while the rest of the country formed a control group. The second natural experiment occurred in 1973 when *Roe* had the effect of legalizing abortion in the rest of the country. In this experiment, the repeal states where abortion had already been legalized were the control group, while the rest of the country (now experiencing a policy change) was the treatment group.

Levine et al.'s analytic framework is represented in **Figure 1** below. The authors demonstrated that differences in birth rates between repeal states and the rest of the country were stable in the 1960s, when abortion was largely illegal everywhere. Then in 1970, when abortion was legalized in the repeal states, birth rates dropped by about 5% in the repeal states relative to the rest of the country. In 1973, with *Roe* legalizing abortion nationwide, the rest of the country caught up with the repeal states. Using a multiple regression model, controlling for the possibility of other potentially confounding factors, the authors estimated that legalization of abortion alone—independent of other factors such as contraception—reduced birth rates by 4 to 11%.¹¹

¹¹ A conservative estimate is that legalization reduced birth rates by 4%. However, some of the decline in births in even the non-repeal states between 1969 and 1971 might in fact have been due to increased abortion access via proximity to repeal states. Levine et al. recognized this possibility and conducted additional analyses for states that were closer and states that were more distant from repeal states. Those analyses suggest that legalization reduced birth rates by up to 11%. *Id.* at 200-01.

Figure 1: Trends in birth rates in repeal states relative to the rest of the country



Source: Levine et al. (1999) Figure 1.¹²

Levine et al.'s work was the foundation for subsequent studies that explored the effects of abortion legalization in the early 1970s. Subsequent work introduced new data sets, new designs, and additional controls, allowing researchers to control more precisely for confounding factors such as state laws governing workplace discrimination, no-fault divorce, and new controls for contraceptive access. Notwithstanding these changes, this later work confirmed Levine et al.'s substantive finding that abortion legalization has had a large and direct effect on births.¹³

¹² Percent differences normalized to equal zero in 1970.

¹³ See, e.g., Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms* (Nat'l Bureau of Econ. Research, Working Paper No.

B. Abortion legalization particularly impacted young women and Black women.

The birth-rate reduction caused by abortion legalization has not been uniform across all groups of women. Studies reveal that two groups—young women and Black women—experienced the greatest impact.

For young women, the estimated reduction in birth rates due to abortion legalization was three times as much as that of all women.¹⁴ Legalization of abortion, together with policies specifically granting young women the ability to obtain an abortion without parental consent, reduced teen motherhood by 34% and reduced teen marriage by 20%.¹⁵

Another group disproportionately affected by abortion legalization was Black women. For Black women, the estimated reduction in birth rate was two to three times greater than the reduction for white

5406, 1996), https://www.nber.org/system/files/working_papers/w5406/w5406.pdf; Jonathan Gruber et al., *Abortion Legalization and Child Living Circumstances: Who Is the ‘Marginal Child’?*, 114 Q. J. of Econ. 263 (1999); Elizabeth Oltmans Ananat et al., *Abortion and Selection*, 91 Rev. of Econ. & Stat. 124 (2009); Melanie Guldi, *Fertility Effects of Abortion and Birth Control Pill Access for Minors*, 45 Demography 817 (2008); Caitlin Knowles Myers, *The Power of Abortion Policy: Reexamining the Effects of Young Women’s Access to Reproductive Control*, 125 J. of Pol. Econ. 2178 (2017); Ali Abboud, *The Impact of Early Fertility Shocks on Women’s Fertility and Labor Market Outcomes* (Nov. 22, 2019), <https://ssrn.com/abstract=3512913>; Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes* (American Univ. Working Paper, 2021), <https://doi.org/10.17606/0Q51-0R11>.

¹⁴ Levine et al., *supra* note 10, at 201.

¹⁵ Myers, *supra* note 13, at 2178-2224.

women.¹⁶ Black women also experienced a 28 to 40% decline in maternal mortality due to legalization.¹⁷ This greater impact for Black women aligns with historical narratives that, pre-legalization, white women were more often able to access clandestine abortions through trusted physicians or travel to repeal states. Accordingly, the practical importance of legalization was greater for Black women than white women.¹⁸

C. Abortion legalization has had downstream impacts on women’s social and economic lives.

Economists have also used the tools of causal inference to measure the effect of abortion legalization on women’s social and economic outcomes more broadly. Although Mississippi and its *amici* suggest that abortion has had no meaningful impact on women’s lives, *see, e.g.*, Br. of 240 Women at 6, a substantial body of research supports the opposite conclusion. Studies show that in addition to impacting births, abortion legalization has had a significant impact on women’s wages and educational attainment, with impacts most strongly felt by Black women.

The 240 Women cherry-pick and critique one early study and ignore the large body of evidence developed since. They focus on a 1996 working paper by Joshua Angrist and William Evans (“Angrist and Evans”), which was the first study that attempted to isolate the

¹⁶ Levine et al., *supra* note 10, at 201.

¹⁷ Sherajum Monira Farin et al., *The Impact of Legal Abortion on Maternal Health: Looking to the Past to Inform the Present* 3 (Sept. 2021), <https://ssrn.com/abstract=3913899>.

¹⁸ *Id.*

effects of abortion legalization on education and labor market outcomes.¹⁹ Angrist and Evans focused specifically on teenage women and concluded that abortion legalization improved these women’s education and labor-market outcomes.²⁰ The 240 Women, however, suggest that the paper is statistically weak. Br. of 240 Women at 20. But the “weakness” of the paper, if anything, is that it *underestimated* the effect of abortion legalization because it treated abortion reforms in the 1960s—which made abortions available under very limited circumstances—as equivalent to the repeal of abortion bans in the 1970s.²¹ Those early reforms involved rather modest expansions of access and accordingly had much more modest effects.²²

And even despite the underestimation caused by conflating reforms and repeals, Angrist and Evans still found large effects for Black teenage women. Specifically, they found a 22 to 24 percentage point increase in the probability that Black teenage women graduated high school and a 23 to 27 percentage point increase in their probability of attending college.²³ Thus, despite any alleged “weaknesses” in the paper, its conclusions remain significant.

In any event, subsequent authors have revised Angrist and Evans’s research by (1) disaggregating modest abortion reforms from abortion legalization, (2) looking at women beyond just their teenage years, and (3) adopting new research designs to address some

¹⁹ Angrist & Evans, *supra* note 13.

²⁰ *Id.* at 2.

²¹ *Id.* at 4-5.

²² Myers, *supra* note 13, at 2200.

²³ Angrist & Evans, *supra* note 13, at 28.

of the methodological challenges of measuring education and labor market effects. The subsequent research indicates that although abortion *reforms* had at most modest effects,²⁴ abortion *legalization* had large effects on women's education,²⁵ labor force participation,²⁶ occupations,²⁷ and earnings.²⁸ These effects were particularly strong among Black women.²⁹

For instance, one such study showed that young women who utilized legal abortion to delay an unplanned start to motherhood by just one year realized an 11% increase in hourly wages later in their careers.³⁰ Another found that, for young women who experienced an unintended pregnancy, access to abortion increased the probability they finished college by nearly 20 percentage points, and the probability that they entered a professional occupation by nearly 40 percentage points. Again, these effects tended to be greater among Black women.³¹

²⁴ David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to Roe v. Wade*, 25 *J. of Lab. Research* 503, 510 (2004).

²⁵ Jones, *supra* note 13, at 14-15.

²⁶ Jones, *supra* note 13, at 15; Kalist, *supra* note 24, at 512.

²⁷ Jones, *supra* note 13, at 15-16.

²⁸ Jones, *supra* note 13, at 16; Abboud, *supra* note 13, at 4; Jason M. Lindo et al., *Legal Access to Reproductive Control Technology, Women's Education, and Earnings Approaching Retirement*, 110 *AEA Papers & Proc.* 231, 234 (2020).

²⁹ Kalist, *supra* note 24, at 503; Jones, *supra* note 13, at 14-17; Lindo et al., *supra* note 28, at 233-234.

³⁰ Abboud, *supra* note 13, at 4.

³¹ Jones, *supra* note 13, at 14-15.

Moreover, abortion legalization has shaped families and the circumstances into which children are born. One study showed that legalization in repeal states reduced the number of children who lived in single-parent households, who lived in poverty, and who received social services.³² Another found that abortion legalization reduced cases of child neglect and abuse.³³ Yet other studies have explored long-run downstream effects as the children of the *Roe* era grew into adulthood. One such study showed that as these children became adults, they had higher rates of college graduation, lower rates of single parenthood, and lower rates of welfare receipt.³⁴ Another showed that abortion legalization in the 1970s continued to reduce births to unwed teen women in the early 1990s.³⁵

In addition to criticizing the Angrist and Evans study (while ignoring the robust body of work post-dating it), the 240 Women also falsely suggest that it is “so very difficult to untangle” the effects of abortion legalization from other factors potentially contributing to women’s progress. Br. of 240 Women at 19. Their argument purports to rely on an article by

³² Gruber et al., *supra* note 13, at 280-81.

³³ Marianne Bitler & Madeline Zavodny, *Child Abuse and Abortion Availability*, 92 *Amer. Econ. Rev.* 363, 365 (2002); Marianne P. Bitler & Madeline Zavodny, *Child Maltreatment, Abortion Availability, and Economic Conditions*, 2 *Rev. of Econ. of the Household* 119, 135 (2004).

³⁴ Oltmans, *supra* note 13, at 124-36.

³⁵ John J. Donohue III et al., *The Impact of Legalized Abortion on Teen Childbearing*, 11 *Am. L. & Econ. Rev.* 24, 26 (2009); Serkan Ozbeklik, *The Effect of Abortion Legalization on Childbearing by Unwed Teenagers in Future Cohorts*, 52 *Econ. Inquiry* 100, 100 (2014).

Martha Bailey and Thomas DiPrete, which they claim highlights the statistical difficulties of untangling causation, including because of “conflicting studies,” “different methodologies,” “widely varying statistical significance of the results,” and “the potential importance of selection effects using assumptions it declares ‘almost impossible to test.’” *Id.* But the article in fact makes no such arguments or claims. Nowhere does it state that the causal effects of abortion policy cannot be determined due to these factors. In fact, Bailey and DiPrete acknowledge in the article that causal-inference research designs have succeeded in studying the causal effects of abortion policy, observing that “a growing literature in economics suggests many of the longer-term changes in family formation and childbearing—as well as the previously described changes in women’s education and labor-force outcomes—are related to the introduction of modern contraception and abortion.”³⁶ The 240 Women could not be more misleading in their characterization of Bailey and DiPrete’s article.

Ultimately, advancements in causal-inference methodologies support what even early studies revealed: that abortion legalization has had profound effects on birth rates and other downstream consequences. These effects have been felt most prominently by young and Black women and have extended beyond women to families more broadly.

³⁶ Martha J. Bailey & Thomas A. DiPrete, *Five Decades of Remarkable but Slowing Change in U.S. Women’s Economic and Social Status and Political Participation*, 2(4) Russell Sage Found. J. of the Soc. Sci. 1, 14 (2016).

III. Women continue to rely on abortion access to plan their reproductive, economic, and social lives.

Causal inference tells us that abortion legalization has caused profound changes in women's lives. But those changes are neither sufficient nor permanent: abortion access is still relevant and necessary to women's equal and full participation in society. Mississippi and its *amici* have argued that the availability of contraception and the existence of employment policies intended to support working women have erased the need for abortion access. Pet'rs' Br. at 35. But the facts—and a substantial body of research—show the opposite. Today, nearly half of all pregnancies are unintended, and nearly half of these unintended pregnancies end in abortion.³⁷ In 2017, approximately one-fifth of all pregnancies ended in abortion, with 1.4% of women of reproductive age having an abortion in that year.³⁸ These statistics alone lead to the inevitable (and obvious) conclusion that contraception and existing policies are not perfect substitutes for abortion access. On closer examination, it is easy to see the reasons why contraception and existing employment policies fall short.

³⁷ See Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 *New Eng. J. Med.* 843, 845–47 (2016).

³⁸ Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, Guttmacher Inst., 7 (Sept. 18, 2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

A. Contraception has neither eliminated unintended pregnancies nor obviated the demand for abortion.

Mississippi argues that expanded access to contraception and improvements in contraceptive technology have obviated the need for abortion. But this glaringly overstates the current state of both contraceptive access and technology.

Turning first to accessibility, Mississippi quotes from a policy brief to suggest that “[b]y 2013, most women had no out-of-pocket costs for their contraception.” Pet’rs’ Br. at 29. But Mississippi fails to acknowledge that the universe of women considered for that proposition were a select group of women who were *both* covered by private insurance *and* using a prescription contraception method. Of that group, 59 to 67% had no out-of-pocket contraception costs.³⁹ This is a much narrower group than “most women” as Mississippi misleadingly suggests, and the distinction is meaningful. Statistics based on privately insured women fail to capture the very different healthcare costs for the uninsured. For example, the average annual cost for birth control pills for the uninsured is \$268, plus \$87 in related doctors’ visits.⁴⁰ Implantable devices (IUDs) cost approximately \$1,000 up front for the uninsured, in addition to charges for doctors’

³⁹ See Laurie Sobel et al., *The Future of Contraceptive Coverage*, Kaiser Family Found., 4 (Jan. 2017), <https://perma.cc/T7TY-FVTT>, citing Adam Sonfield et al., *Impact of the Federal Contraceptive Coverage Guarantee on Out-of-Pocket Payments for Contraceptives: 2014 Update*, 91 *Contraception* 44, 45-46 (2015).

⁴⁰ Sasha Guttentag, *The Annual Cost of Birth Control*, GoodRx (Apr. 6, 2021), <https://www.goodrx.com/conditions/birth-control/annual-cost-of-birth-control>.

visits.⁴¹ Given that nationally, 15.6% of young adults aged 19-34 lack health insurance,⁴²—and in Mississippi, 25% of young adults lack health insurance⁴³—large numbers of women (particularly young and poor women) encounter steep barriers to contraceptive affordability and accessibility. Thus, Mississippi’s suggestion that the United States has universal no-cost access to contraception is just wrong.

Even where contraceptives are accessible, the technology is nowhere near as advanced as Mississippi argues. No contraceptive method is 100% effective; in fact, the birth control pill is estimated to fail for about 7% of women in the first year of use.⁴⁴ Much of this is caused by user error—mistakes as simple as failing to take the pills at the exact same time each day. Based on survey evidence, even with widespread contraceptive use of all forms, about 6% of all women aged 15-34 in the United States are likely to experience an unintended pregnancy *each year*.⁴⁵

⁴¹ *Id.*

⁴² Douglas Conway, *Uninsured Rates Highest For Young Adults Aged 19 to 34*, U.S. Census Bureau (Aug. 18, 2021), <https://www.census.gov/library/stories/2020/10/uninsured-rates-highest-for-young-adults-aged-19-to-34.html>.

⁴³ *Id.*

⁴⁴ Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006–2010 National Survey of Family Growth*, 49 *Persp. on Sexual & Reprod. Health* 7, 11 (2017).

⁴⁵ Lawrence B. Finer et al., *A Prospective Measure of Unintended Pregnancy in the United States*, 98 *Contraception* 522, 525 (2018).

B. Employment policies are woefully inadequate; women continue to face real obstacles to balancing motherhood and careers.

While the past 50 years have seen remarkable social and economic progress for women in the United States, significant hurdles remain—particularly for working mothers. Studies show that up to the point of parenthood, men’s and women’s earnings evolve similarly. But as parents, their earnings diverge sharply: mothers experience an immediate and persistent *one-third* drop in expected earnings while fathers’ earnings remain largely unaffected.⁴⁶

Despite the volume of clear evidence of the “motherhood penalty” women face at work, Mississippi claims that numerous federal policies ensure that women can readily “reach the highest echelons of economic and social life,” while simultaneously balancing motherhood. Pet’rs’ Br. at 35. Specifically, Mississippi touts the successes of federal policies around parental leave, childcare support, and pregnancy discrimination. *Id.* But Mississippi’s claim that “[s]weeping policy advances now promote women’s full pursuit of both career and family” is premature and false. Pet’rs’ Br. at 5. In any event, those policy “successes” occurred while *Roe* has been firmly in place for women to determine whether or not they wanted to continue their pregnancies.

Mississippi’s celebration of parental leave policies is particularly bizarre, as the United States is one of only two countries *without* a national paid maternity

⁴⁶ Henrik Kleven et al., *Child Penalties Across Countries: Evidence and Explanations*, 109 AEA Papers & Proc. 122, 123 (2019).

leave policy.⁴⁷ While scores of countries, including Bulgaria and Latvia offer more than a year of paid leave to new mothers,⁴⁸ the United States provides for only twelve weeks of *unpaid* leave under the Family and Medical Leave Act of 1993 (“FMLA”).⁴⁹ Making matters worse, half of all working women are not covered by the FMLA due to various exemptions.⁵⁰ Applying the tools of causal inference, economists have concluded that the FMLA has had *no* significant effect on women’s employment or wages.⁵¹ While a handful of states have enacted paid leave policies since the FMLA, and some employers voluntarily offer paid parental leave, evidence from large national surveys indicates that 81% of workers lack formal paid leave.⁵²

⁴⁷ The other is Papua New Guinea. See Maya Rossin-Slater, *Maternity and Family Leave Policy* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 23069, 2017), https://www.nber.org/system/files/working_papers/w23069/w23069.pdf.

⁴⁸ Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, Pew Research Center (Aug. 17, 2021), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

⁴⁹ See Katherine Guyot et al., *A Primer on Access to and Use of Paid Family Leave*, Brookings Inst. (Dec. 5, 2019), <https://www.brookings.edu/research/a-primer-on-access-to-and-use-of-paid-family-leave/>; see also Rossin-Slater, *supra* note 47, at 7-8.

⁵⁰ Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys* iii (July 2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf.

⁵¹ Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. of Econ. Persp. 175, 184-85 (1997); Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. of Pol’y Analysis & Mgmt. 281, 281 (1999).

⁵² Guyot et al., *supra* note 49, Table 3.

Mississippi’s claims about childcare fare no better. The real (inflation-adjusted) price of childcare has increased by nearly 50% since 1993,⁵³ to a median price of \$10,400/year for infants and \$6,500/year for four-year-olds.⁵⁴ Thus, a hypothetical mother working full-time and making \$15 per hour—which is more than double the federal minimum wage—faces infant childcare costs that total one-third of her gross pay. The U.S. Department of Health and Human Services defines “affordable childcare” as less than 7% of family income,⁵⁵ but there is only one state in the country, Louisiana, where daycare costs qualify as “affordable” under that rubric.⁵⁶ Further, federal childcare subsidy programs are underfunded and reach only about 1 in 6 eligible children.⁵⁷

⁵³ Sam Khater et al., *Family Budget Burdens Squeezing Housing: Child Care Costs*, Freddie Mac Economic & Housing Research Group (Dec. 2019), <http://www.freddiemac.com/fmac-resources/research/pdf/201911-Insight-12.pdf>.

⁵⁴ Grover J. “Russ” Whitehurst, *What Is the Market Price of Daycare and Preschool?*, Econ. Stud. at Brookings, 1 (Apr. 19, 2018), <https://www.brookings.edu/wp-content/uploads/2018/04/report.pdf>.

⁵⁵ Child Care and Development Fund Program, 81 Fed. Reg. 67440 (2016).

⁵⁶ Grover J. “Russ” Whitehurst, *Why The Federal Government Should Subsidize Childcare and How to Pay For It*, Econ. Stud. at Brookings, 2 (Mar. 9, 2017), https://www.brookings.edu/wp-content/uploads/2017/03/es_20170309_whitehurst_evidence_speaks3.pdf.

⁵⁷ Nina Chien, *Factsheet: Estimates of Child Care Eligibility & Receipt for Fiscal Year 2018*, U.S. Dep’t of Health and Human Servs., 1-2 (Aug. 2021), <https://aspe.hhs.gov/sites/default/files/2021-08/cy-2018-child-care-subsidy-eligibility.pdf>; Sophia Quinton, *Child Care Subsidies, Vital for Many Workers, Are Dwindling*, Pew Stateline Blog (Dec. 9, 2016), <http://pew.org/2gpl8zi>.

Affordability is not the only barrier to childcare access. Working mothers also deal with schedules that are erratic or misaligned with daycare hours. For instance, a recent survey of workers in the food service and retail sectors—which together employ nearly 1 in 5 American workers—indicates that 80% have little to no input in their work schedules, 66% receive less than two weeks’ notice of their schedules, 69% are required to keep their schedules “open and available,” and 70% report being asked to make at least one change to their schedules in the past month.⁵⁸ These unstable and unpredictable work schedules create significant barriers to securing reliable childcare.⁵⁹

Mississippi is also mistaken when it suggests that the Pregnancy Discrimination Act of 1978 (PDA) has served to protect pregnant women. Despite the protections the PDA appears to confer on paper, a new study estimates that about 250,000 pregnant women are denied accommodations related to their pregnancies each year.⁶⁰ Moreover, research suggests that the PDA has actually reduced women’s wages and employment

⁵⁸ Daniel Schneider & Kristen Harknett, *It’s About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality*, SHIFT Project Research Brief, 1-2 (Oct. 16, 2019), <https://shift.hks.harvard.edu/files/2019/10/Its-About-Time-How-Work-Schedule-Instability-Matters-for-Workers-Families-and-Racial-Inequality.pdf>.

⁵⁹ Kristen Harknett et al., *Who Cares If Parents Have Unpredictable Work Schedules?: Just-in-Time Work Schedules and Child Care Arrangements*, Soc. Problems 2 (2020), <https://doi.org/10.1093/socpro/spaa020>.

⁶⁰ Carly McCann & Donald Tomaskovic-Devey, *Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed with the U.S. Equal Employment Opportunity Commission*, Ctr. for Emp’t Equity, 8-9 (2021).

overall because it has made employers reluctant to hire women.⁶¹

Thus, Mississippi’s suggestion that employment policies and childcare access have solved the challenges for working mothers is completely unsupported. And its broader claim that such policies, combined with improvements in contraception, have eliminated the need for abortion access is just wrong.

C. Abortion access continues to measurably impact women’s lives.

Although women experience unintended pregnancies and seek abortions at varying stages of life, one common thread is that many of these women already face difficult financial circumstances. Approximately 49% of women who seek abortions are poor, 75% are low income,⁶² 59% already have children, and 55% report a recent disruptive life event such as the death of a close friend or family member, job loss, the termination of a relationship with a partner, or

⁶¹ Brenden Timpe, *The Labor Market Impacts of America’s First Paid Maternity Leave Policy* 1-4 (Working Paper, Mar. 12, 2021), <https://www.brendentimpe.com/home/research>.

⁶² Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 *Am. J. of Pub. Health* 1904, 1906 (2017); Rachel K. Jones & Jenna Jerman, *Characteristics and Circumstances of U.S. Women Who Obtain Very Early and Second-Trimester Abortions*, 12 *PLoS ONE* e0169969 (2017). “Poor” is defined as family income below the federal poverty level, which in 2020 was \$17,839. “Low-income” is defined as incomes below 200% of the federal poverty level. See *Poverty Thresholds*, U.S. Census Bureau (Sept. 14, 2021), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html>.

overdue rent or mortgage obligations.⁶³ As explained above, these women also overwhelmingly lack access to paid maternity leave or to affordable childcare.

Given these circumstances, questions abound as to what happens to women who cannot obtain an abortion they wanted to have. The Turnaway Study is a longitudinal study that focuses on financial outcomes for women in this situation.⁶⁴ It compares women who arrived at abortion facilities just prior to a gestational age cut-off and were able to obtain an abortion—the “near-limit group”—to women who arrived just past this cut-off and were turned away—the “turnaway group.” Researchers linked study participants to their annual Experian credit report data, providing an objective measurement of what happened next in the financial lives of these women. The study identified 536 women in the near-limit group and 292 women in the turnaway group. Researchers were able to match credit information and analyze financial outcomes for women over 20 years old and therefore more likely to have credit reports—thus, the study ultimately focused on 383 near-limit women and 180 turnaways. The authors demonstrated that, up until the point that they sought abortions, financial outcomes were trending very similarly for the near-limit and turnaway groups. Then, exactly at the point in their lives where one group obtained an abortion and the other group was turned away, the turnaway group began to experience substantial financial distress relative to the near-limit group, such that over the subsequent

⁶³ Jones & Jerman, *Characteristics and Circumstances*, *supra* note 62, at 6, Table 1.

⁶⁴ Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* (Nat’l Bureau of Econ. Research, Working Paper No. 26662, 2020), <https://www.nber.org/papers/w26662>.

five years, the average woman in the turnaway group experienced a 78% increase in past-due debt and an 81% increase in public records related to bankruptcies, evictions, and court judgments.⁶⁵ The financial effects of being denied an abortion are thus as large or larger than those of being evicted, losing health insurance, being hospitalized, or being exposed to flooding due to a hurricane.⁶⁶

The 240 Women try to dismiss the Turnaway Study for having a small sample size. *See* Br. of 240 Women at 25. But while the sample is smaller than those obtained from large national surveys, the authors used standard measures of statistical precision and thresholds for statistical significance. Accordingly, the sample is sufficiently large for a causal-inference analysis. Moreover, whereas national surveys necessarily include *all* women (including those unaffected by unintended pregnancies), the Turnaway Study's power is in being able to home in on a group of women who were seeking abortions and who were unable to obtain them from a provider they initially approached. The 240 Women also take issue with the fact that some of the turned-away women had other children. *Id.* at 26. But that does not detract from the study's findings about the impact of being denied access to abortion. Again, the Turnaway Study attempts to answer questions about what happens when one obtains a *particular* abortion or not, not about whether one has *any* children at all. And on that question, the Turnaway Study's conclusions are clear: being

⁶⁵ *Id.* at 29. These estimates are likely conservative because the most disadvantaged women were disproportionately excluded from the analysis because they could not be matched to credit reports.

⁶⁶ *Id.*

denied an abortion has significant deleterious financial consequences.

IV. Overturning or limiting *Roe* and *Casey* would cause direct harm to women seeking abortions.

Given the importance of abortion access to women's reproductive health and decision-making, it follows that eliminating legal protections for abortion would significantly harm women. Studies indicate that if *Roe* and *Casey* were overturned or limited, hundreds of thousands of women would be forced to carry an unwanted pregnancy to term for lack of access to an abortion provider.

If *Roe* and *Casey* were overturned or limited, many states are predicted to ban abortion entirely. For women in or near those states, the travel distance to the nearest abortion provider is expected to increase significantly. As travel distances increase, fewer women are likely to be able to get to abortion providers. Indeed, studies show that requiring women to travel as few as 50 miles prevents substantial numbers of women from reaching providers.⁶⁷ Based on these findings, below we forecast the immediate aftermath of a decision overturning or substantially weakening *Roe* and *Casey* by modelling likely changes in travel distances to predict the number of women who will be unable to reach abortion providers.⁶⁸

⁶⁷ Jason Lindo et al., *How Far Is Too Far? New Evidence on Abortion Clinic Closures, Access, and Abortions*, 55 J. of Hum. Resources 1137, 1217 (2020).

⁶⁸ Caitlin Myers et al., *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 Contraception 367 (2019).

A. If *Roe* and *Casey* were overturned (even in part), travel distances to abortion providers would drastically increase, impeding women’s access to clinical abortions.

To understand the implications of overturning *Roe* and *Casey*, one must first understand that abortion access is already extremely limited in some areas. The data shows that the average woman of childbearing age currently resides 25 miles from the nearest abortion provider.⁶⁹ But there is enormous variation across states. For instance, the average Florida woman faces a travel distance of 15 miles compared to 47 miles for the average Louisiana woman and 62 miles for the average Missouri woman.⁷⁰ **Figure 2a** below depicts the current landscape of abortion providers and average travel distance to a provider at the county level. Gray dots indicate the locations of abortion providers, and travel distance is shown in blue shading.

If *Roe* were overturned or substantially limited, at least 23 states are considered highly likely to ban abortion.⁷¹ Twelve states—Arkansas, Idaho, Kentucky, Louisiana, Missouri, Mississippi, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Utah—have enacted “trigger bans,” which are abortion bans designed to become effective if *Roe* is overturned or weakened. Eleven more states—Alabama, Arizona, Georgia, Indiana, Michigan, North Carolina,

⁶⁹ Myers et al., *supra* note 68, at Table 1 (updated by author).

⁷⁰ *Id.*

⁷¹ Center for Reproductive Rights, *What If Roe Fell*, <https://maps.reproductiverights.org/what-if-roe-fell> (last visited Aug. 20, 2021).

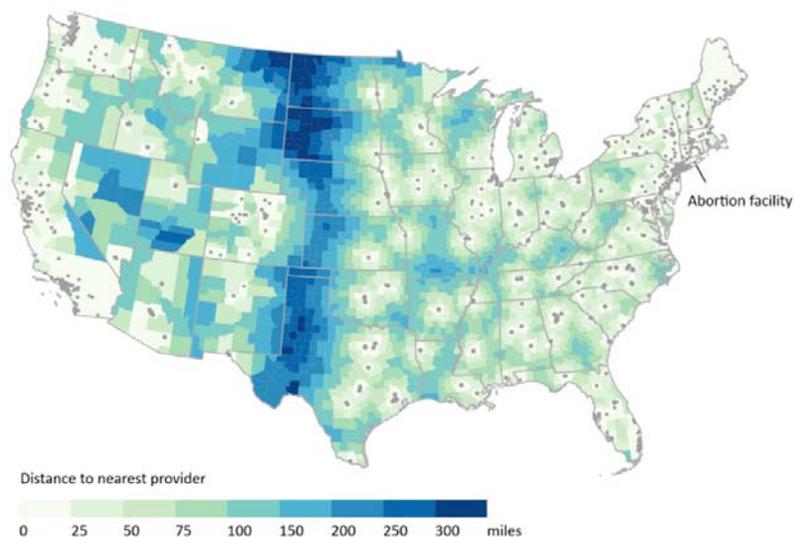
Nebraska, Ohio, South Carolina, Wisconsin, and West Virginia—are likely to either resume enforcement of pre-*Roe* bans that were never repealed or quickly implement new bans.

Figure 2b illustrates travel distances to abortion providers in such a scenario. The 23 states are shown with a darkened red state border. Providers that are predicted to remain open are indicated by gray dots, those that are predicted to close are indicated by pink dots, and travel distances to the nearest abortion provider are reflected in blue shading. With bans in effect in those 23 states, travel distances to the nearest abortion provider would increase for 26 million women of childbearing age. The increases are drastic: in counties where travel distances are predicted to change, the average travel distance would increase from 35 miles to 279 miles. Seventy percent of women in these counties would be more than 200 miles from their nearest provider.

As shown in **Figure 2b**, entire swaths of the South and Midwest would likely be without access to clinic-based abortion. Those with the means to travel may nevertheless be required to cross multiple state lines to get to an abortion clinic. For example, the average Mississippi woman would be 250 miles from the nearest clinic and would have to travel at least two states away to reach one.

Figure 2a: Current locations of abortion facilities⁷² and county-level travel distances to the nearest facility⁷³

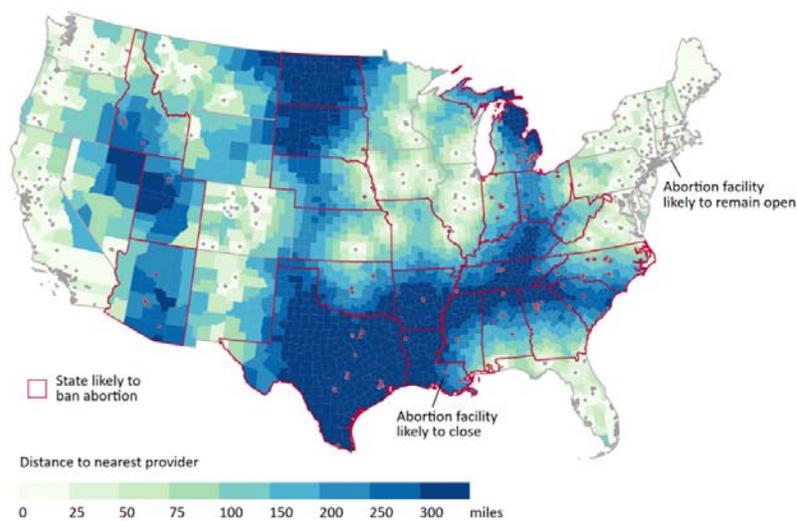
June 2021



⁷² Caitlin Myers, *Myers Abortion Facility Database* (July 29, 2021), <https://doi.org/10.17605/OSF.IO/8DG7R>.

⁷³ Travel distances are calculated between the population centroid of each county to the nearest operating abortion facility as of June 15, 2021 using the Stata georoute module. See Sylvain Weber & Martin Péclat, *A Simple Command to Calculate Travel Distance and Travel Time*, 17 *Stata J.* 962 (2017).

Figure 2b: Locations of abortion facilities and county-level travel distances to the nearest facility if *Roe* and *Casey* were overturned or limited



Multiple teams of authors have studied the effects of travel distances and have found that increases in travel distances keep women from obtaining abortions. For example, several studies focused on Texas's 2013 HB-2 law, which shuttered Texas abortion clinics and thereby increased distances to abortion providers for women in that state.⁷⁴ Other studies have measured the effects of travel distance by focusing on

⁷⁴ Troy Quast et al., *Abortion Facility Closings and Abortion Rates in Texas*, 54 *Inquiry: J. of Health Care Org., Provision, & Financing* 1 (2017); Stefanie Fischer et al., *The Impacts of Reduced Access to Abortion and Family Planning Services on Abortions, Births, and Contraceptive Purchases*, 167 *J. of Pub. Econ.* 43 (2018); Lindo et al., *supra* note 67.

clinic closures in Wisconsin⁷⁵ or on changes in clinic operations across the entire country.⁷⁶ These studies have generally found that travel distances impact abortions. For instance, increases in travel distances by as few as 25 miles decreased abortion rates by 10%, and increases by 50 miles decreased abortion rates by 18%.⁷⁷ Other studies measured the causal effects of policies requiring women to receive counseling 24 hours prior to an abortion—so called “mandatory waiting periods.”⁷⁸ These studies found that such policies reduce abortion rates, especially where such counseling must be provided in-person, thus necessitating two separate trips to a provider. Two-trip mandatory wait policies decreased abortion rates by 8.9%.⁷⁹ Together, these studies confirm that travel

⁷⁵ Joanna Venator & Jason Fletcher, *Undue Burden Beyond Texas: An Analysis of Abortion Clinic Closures, Births, and Abortions in Wisconsin*, 40 J. Pol’y Analysis & Mgmt. 774 (2021).

⁷⁶ Benjamin P. Brown et al., *Distance to an Abortion Provider and Its Association with the Abortion Rate: A Multistate Longitudinal Analysis*, 52 Persp. On Sexual & Reprod. Health 227 (2020); Caitlin Myers, *Measuring the Burden: The Effect of Travel Distance on Abortions and Births* (IZA Inst. of Lab. Econ., Discussion Paper Series No. 14556, 2021), <https://ftp.iza.org/dp14556.pdf>.

⁷⁷ Lindo et al., *supra* note 67, at 18, Appendix C.

⁷⁸ See, e.g., Theodore Joyce et al., *The Impact of Mississippi’s Mandatory Delay Law on Abortions and Births*, 278 JAMA 653 (1997); Jason M. Lindo & Mayra Pineda-Torres, *New Evidence on the Effects of Mandatory Waiting Periods for Abortion* (Nat’l Bureau of Econ. Research, Working Paper No. 26228, 2019); Caitlin Myers, *Cooling off or Burdened? The Effects of Mandatory Waiting Periods on Abortions and Births* (IZA Inst. of Lab. Econ., Discussion Paper Series No. 14434, 2021), <https://ftp.iza.org/dp14434.pdf>.

⁷⁹ Myers, *supra* note 78, at 2.

distance is highly consequential to women seeking abortions.

Building upon this literature, economists have predicted how many women seeking abortions would likely be prevented from reaching a provider because of the increase in distances if *Roe* and *Casey* were overturned or limited.⁸⁰ **Figure 3** below illustrates where and by how much abortion rates would likely change.

Under this scenario, nationwide clinic-based abortion rates are predicted to fall by 14% in the year following any change, equating to approximately 120,000 women who want to obtain an abortion but are unable to reach a provider in just that first year alone.⁸¹ As shown in **Figure 3**, the greatest effects of *Roe* and *Casey* being overturned or curtailed are predicted to occur in urban areas in the 23 states most likely to ban abortions. For example, travel distances in cities like Atlanta, Houston, and Detroit are predicted to increase from currently low levels to more than 100 miles. In Georgia, 36% of women seeking abortions are predicted to be unable to reach a provider due to the increased travel distance under a ban. The corresponding predictions are 40% in Michigan and 37% in Texas.⁸² Impacts in rural

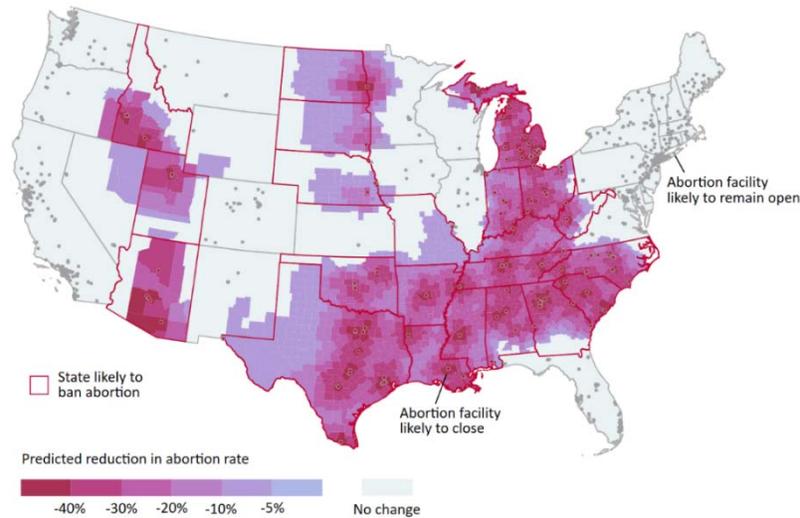
⁸⁰ Lindo et al., *supra* note 67; Myers et al., *supra* note 68.

⁸¹ This prediction is based on 862,320 abortions performed nationally in 2017, the most recent year for which a national count is available. See Jones et al., *supra* note 38, at 1.

⁸² These estimates of the short-run effects of overturning *Roe* are likely to be conservative. First, they model increases in travel distance beyond 300 miles as having no additional effect on abortion rates. However, increases in such already “high-distance” areas have yet to be observed in recent U.S. history, such that further effects are possible. Second, the models do not

counties are predicted to be fairly modest, but only due to pre-existing high travel distances.

Figure 3: Predicted decline in abortion rates if *Roe* and *Casey* were overturned or limited



In a scenario where *Roe* and *Casey* are overturned or limited, women seeking abortions who are unable to reach a provider due to travel distance have limited options: (1) they may become more likely to attempt to perform an abortion on their own outside the view of health authorities; or (2) they may carry their pregnancies to term and have more unintended births. While we cannot precisely determine how many women may choose the former, recent studies show that the majority of women who are prevented

account for the congestion that is likely to arise as thousands of women travel to states where abortion remains legal. If remaining abortion providers cannot fully absorb this influx, the estimated reductions in abortions would be even greater.

from reaching an abortion provider due to travel distance give birth as a result.⁸³

Research also shows that women of every demographic group are affected—but reduced abortion access would have the greatest effect on young women and women of color. For instance, an increase in travel distance from 0 to 100 miles increases births for women aged 20-24 by 3.4% versus by 1.4% for women aged 25-29, and it increases births for Black women by 3.3% versus by 2.1% for white women.⁸⁴

In summary, if *Roe* and *Casey* were overturned, in the first year alone, over 100,000 women seeking abortions—women from entire states and regions—will likely be unable to reach an abortion provider.

⁸³ Myers et al., *supra* note 68, at 11.

⁸⁴ Myers, *supra* note 76, at 11-12.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the court of appeal.

Respectfully submitted,

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APPENDIX

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APPENDIX A

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DATA SNAPSHOT

States With Abortion Bans See Continued Decrease in U.S. MD Senior Residency Applicants

By Kendal Orgera, MPH, MPP, Senior Research Analyst, AAMC Research and Action Institute and Atul Grover, MD, PhD, Executive Director, AAMC Research and Action Institute

May 9, 2024

A 2023 analysis by the AAMC Research and Action Institute found that fewer new graduates of U.S. medical schools applied to residency programs in states that banned or restricted access to abortion than to residency programs in states where abortion remained legal. That analysis was performed after the U.S. Supreme Court issued its decision on [Dobbs v. Jackson Women's Health Organization](#) in June 2022, immediately prior to the submission of residency applications through the Electronic Residency Application Service[®] (ERAS[®]) for the 2022-2023 application cycle. The ERAS program is a centralized online application service created and maintained by the AAMC as a resource for applicants, program directors, designated institutional officials, and deans of medical schools. The following analysis is an update of the 2023 data snapshot, [Training Location Preferences of U.S. Medical School Graduates Post Dobbs v. Jackson Women's Health](#).

The new data analysis finds continued reductions in applicants to residency programs located in states with abortion bans two years after the Dobbs decision (during the 2023-2024 application cycle). As of April 1, 2024, [14 states](#) have enacted full bans on abortion (up from 13 in 2023¹). Because these policy decisions appear to affect where physicians plan to practice, state governments and health care leaders need to consider the potential impact of those decisions on the physician workforce. This analysis examines residency applicant and application data by separating states into three cohorts: those with abortion bans, those with

gestational limits, and those without gestational limits or abortion bans. While the number of unique medical school graduates, referred to as “U.S. MD seniors,” who applied to residency programs declined slightly in 2023-2024 from the previous application cycle, states with complete abortion bans saw greater decreases in the number of U.S. MD senior applicants than states with gestational limits or no restrictions. Continued disproportionate decreases in the number of applicants to programs in states with limits or restrictions were observed across all specialties in aggregate.

In this analysis, and in the 2023 analysis, the authors chose to focus on U.S. MD seniors, who historically have the greatest chance of matching into specialties and programs of their choice compared with osteopathic physicians (DOs) and international medical graduate (IMG) applicants; U.S. MD seniors are likely to be most sensitive to practice and training restrictions in states with total abortion bans or gestational limits on abortion.²

Compared to previous years, U.S. MD seniors submitted fewer applications per person in the 2023-2024 cycle. The reduction in applications per person resulted in applicants (on average) applying to programs across fewer states than in previous years, which should be considered when interpreting the figures below.

Despite a decrease of only 72 U.S. MD senior applicants this cycle compared to last year, the number of total *applications* submitted by all U.S. MD seniors decreased by over 100,000. The average state saw a 10.1% decline in U.S. MD senior applicants, but the change varied by state – ranging from a decrease of 19.3% to an increase of 30.3%. The reduction in applications per applicant has been a stated goal of the ERAS[®] program and residency program directors, yet a disproportionate decrease in applicants to programs in states with abortion bans is still observable.

For the second year in a row, decreases were observed in the total number of U.S. MD senior applicants to programs in states across ban status, with larger decreases in states with complete bans (Figure 1). Overall, the number of unique U.S. MD senior applicants to residencies in states with abortion bans decreased from the previous cycle by 4.2%, compared with a smaller decrease in states where abortions remained legal (0.6%).

States’ abortion-ban status may be correlated with program number and size, but these findings suggest that applicants may be responding to something independent of program size, particularly given two years of similar patterns. In other words, while states with more severe

restrictions are often less populous (and have fewer residency programs) than other states, U.S. MD applicants may be selectively reducing their likelihood of applying to programs in states with more state-imposed restrictions on health care regardless of the number of available residency programs. The relative decrease in applicants to programs in states with abortion restrictions compared with the number of applicants to programs in states where abortion remains legal was also greater in 2024 than in 2023.

IMAGE DESCRIPTION ►

Changes in the number of applicants to specialties whose patients are most likely to be affected, including emergency medicine, family medicine, internal medicine, obstetrics and gynecology (OB/GYN), and pediatrics, were examined separately from all other specialties combined. In these categories, the largest drop in unique applicants across all states in the 2023-2024 application cycle was seen in pediatrics (-8.5%; -171 applicants); and a 1.8% (-141 applicants) drop was seen in internal medicine (Table 1). Unlike in the 2023 report analyzing the 2022-2023 applicants, there was a small overall **increase** in the number of unique U.S. MD senior applicants in OB/GYN and emergency medicine in the 2023-2024 residency application cycle. Nonetheless, the numbers of unique applicants for both OB/GYN and emergency medicine in 2024 were lower in states with complete abortion bans than in those without bans.

Specialty	2020	2021	2022	2023	2024
All Specialties	2.2%	2.9%	0.5%	-1.8%	-0.4%
Emergency Medicine	7.1%	7.8%	-18.8%	-21.4%	3.2%
Family Medicine	-3.4%	-3.3%	-1.7%	-3.0%	-1.1%
Internal Medicine	1.7%	0.6%	3.7%	0.7%	-1.8%
Obstetrics and Gynecology	0.0%	0.1%	4.6%	-5.2%	0.6%
Other	2.6%	3.6%	5.9%	-1.1%	1.3%
Pediatrics	1.8%	0.0%	-4.5%	-1.3%	-8.5%

Table 1. Percent Change in U.S. MD Senior Applicants From the Previous Application Cycle by Specialty

Similar to the trend seen for all residency applicants, the decrease in unique U.S. MD senior OB/GYN applicants year over year was largest in states with complete bans (-6.7%) while states without restrictions saw a small increase in unique applicants (0.4%) (Figure 2).

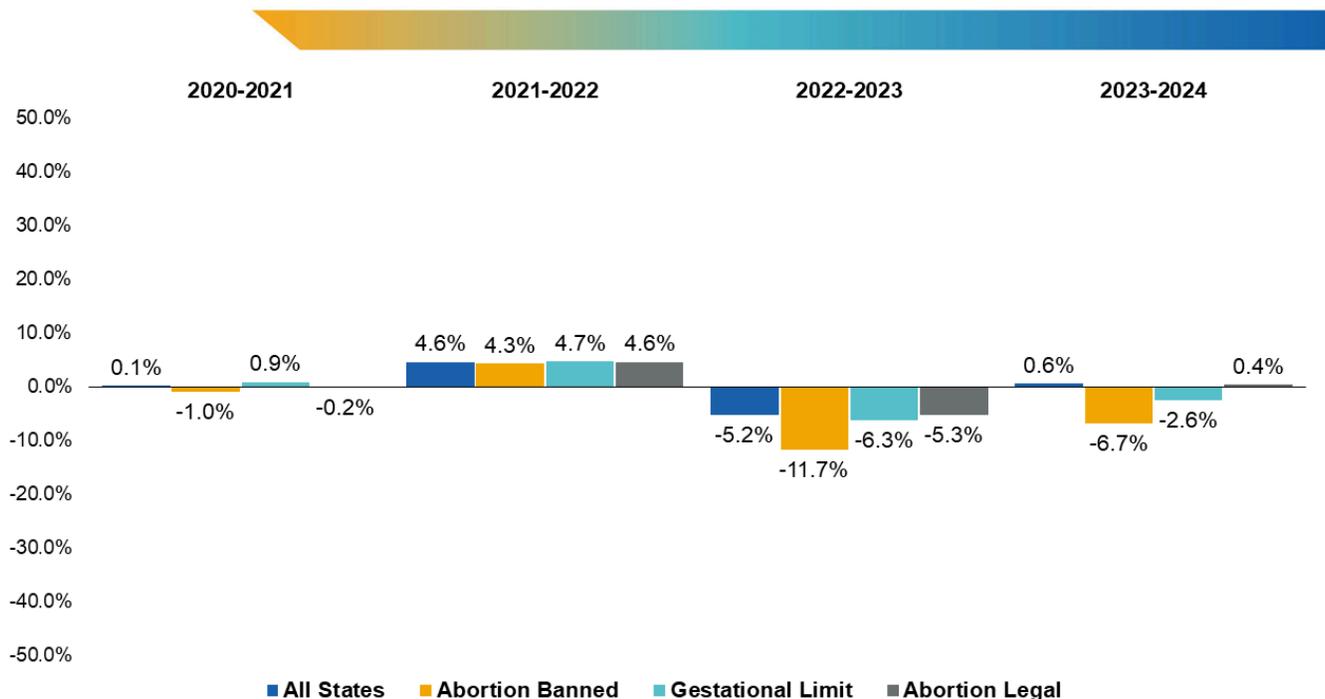


Figure 2. Percent change in U.S. MD senior OB/GYN applicants from the previous application cycle by state abortion-ban status. Note: State abortion ban status has been updated as of April 1, 2024, and will not be identical to previous publications.

IMAGE DESCRIPTION ▶

Unique residency applicants are a potentially early and more sensitive indicator of physician interest than other available indicators because the desire to match into a specialty of choice is likely greater than the desire to avoid training in states with major restrictions on reproductive health care. Put simply, applicants are likely to want to match *somewhere* – even the least desirable location – rather than *nowhere*. **The examination of two years of data suggests that restrictions on women’s health care may continue to disproportionately decrease the**

likelihood that U.S. MD seniors will apply for residencies in states with the most restrictive practice environments.

As noted previously, the decline in residency program applications submitted by U.S. MD senior applicants dropped substantially following more than five years of growth. This decrease has been an intentional goal of both the AAMC ERAS® program as well as individual specialties; multiple specialties have worked with the centralized application service to reduce the number of applications submitted by applicants through signaling and other approaches.³

Despite these changes, nearly all residency positions in OB/GYN were filled again this year, and a similar number of U.S. MD seniors matched into first-year positions this year and last year.⁴ Residency positions for most large specialties also filled at rates similar to previous years. Across all applicant types (MD, DO, and IMG) in 2024, the number of unique OB/GYN applicants increased slightly from 2023; DOs saw a considerable increase in unique applicants, while IMGs applying to OB/GYN programs decreased across state groupings (Figure 3).

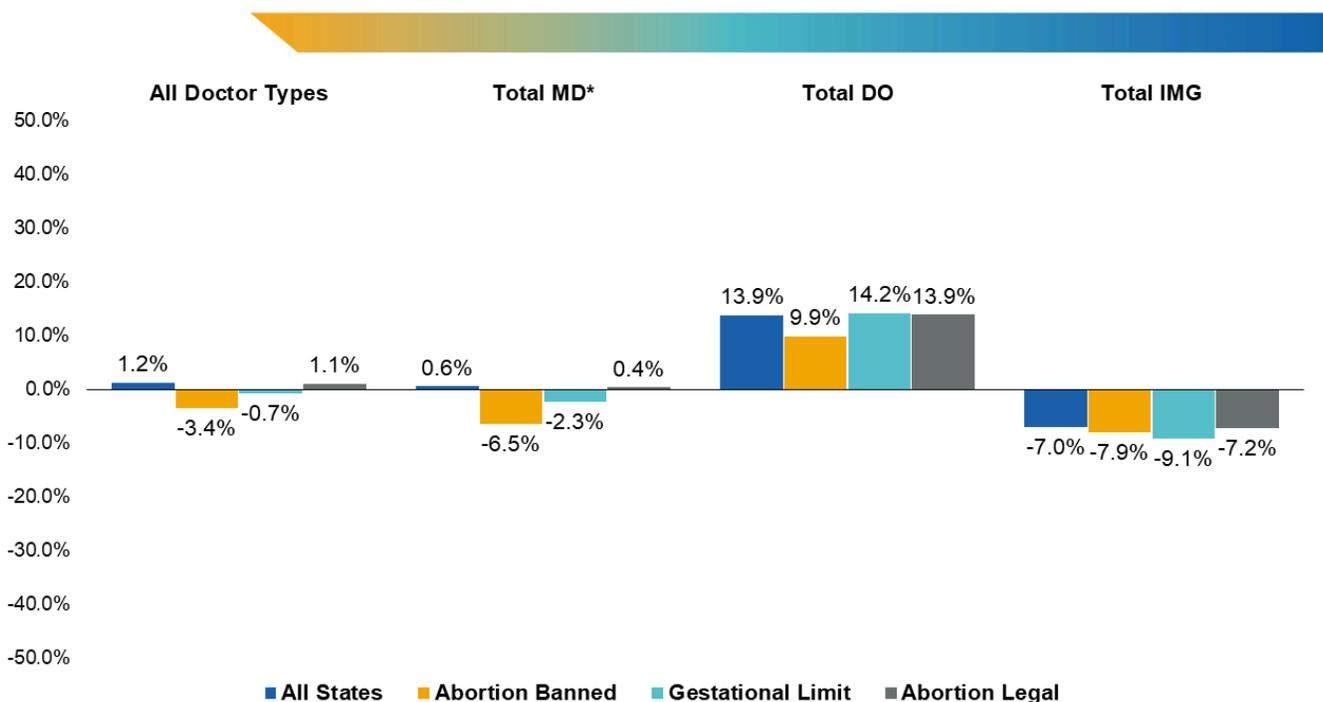


Figure 3. Percent change from 2023 to 2024 in OB/GYN applicants by graduate type and state abortion-ban status. *Includes seniors and previous medical school graduates.

IMAGE DESCRIPTION ▶

The implications of fewer applicants across specialties applying to programs in states with abortion bans has been discussed extensively since June 2022. [5](#) [6](#) [7](#) [8](#) [9](#) Nationally, the total number of MD, DO, and IMG residency applicants continues to exceed the number of training slots available; residency programs in states with complete abortion bans continue to fill their residency positions. However, this additional year of findings suggests that the continued decreased interest of U.S. MD seniors in training in states with abortion bans or restrictions may negatively affect access to care in those states; any impact will likely first affect communities who already have limited access to care (such as rural, lower socioeconomic, and marginalized racial and ethnic groups).

It is important to note that these analyses allow us to follow the trends in residency applications but do not provide definitive information about U.S. MD seniors' motivations and reasons for applying to specific programs. Forthcoming analyses of data from the AAMC's Graduation Questionnaire will include questions related to graduates' views on reproductive health laws in states.

These findings suggest that residency programs and states will need to collect more data about their trainees and licensees to better understand how state abortion bans may be affecting their ability to attract qualified trainees and physicians in the future.

Methods

All analyses were conducted using ERAS[®] data from 2019 to 2024. This snapshot examines the changes in the number of individual applicants across application cycles and abortion-ban status; data at the application level were not examined for this analysis. The data are a subset of applicant data as of March 1 each year. The sample population was U.S. MD senior applicants in Figures 1 and 2, and Table 1, and they exclude applicants who attended Canadian medical schools, IMGs, and DOs.

State abortion-ban status is from [KFF](#) as of April 1, 2024. States with abortion bans are Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. States with gestational limits are Arizona, Florida, Georgia, Iowa, Kansas, Nebraska, North Carolina, Ohio, South Carolina, Utah, and Wisconsin. States where abortion is legal are Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts,

Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wyoming.

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Notes

1. The AAMC Research and Action Institute's 2024 analysis examined changes in the number of unique applicants using KFF's state abortion-ban status as of Jan. 20, 2023. Since that date, and as of April 1, 2024, Wisconsin switched from being a state with an abortion ban to a state with gestational limits. Since 2023, both Indiana and North Dakota became states with abortion bans. [Back to text ↑](#)
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3. AAMC. The ERAS[®] application and program signaling for 2023-24: specialties participating in program signaling for the 2024 ERAS[®] application season. <https://students-residents.aamc.org/applying-residencies-eras/eras-application-and-program-signaling-2023-24#SpecialtiesParticipating>. Accessed April 30, 2024. [Back to text ↑](#)
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TOPIC: HEALTH CARE WORKFORCE



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Tab 8

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MEMORANDUM

TO: Financial Impact Estimating Conference – Office of Economic & Demographic Research

FROM: Tammy Fecci, Associate for Life and Dignity; Michael Barrett, In-House Counsel

DATE: July 1, 2024

RE: FIEC Workshop re Amendment to Limit Government Interference with Abortion

The purpose of this document is to assist the Financial Impact Estimating Conference (FIEC) with its analysis of the financial impact of Amendment 4 (Amendment to Limit Government Interference with Abortion). This memo offers several considerations for the FIEC including:

1. The passage of Amendment 4 could potentially result in significant litigation costs to the state because abortion advocates will likely challenge almost every Florida law that touches abortion.
2. One of the laws that will likely be challenged if Amendment 4 passes is Florida's restriction on Medicaid coverage for abortion. If this law is struck down, it could lead to increased state spending on Medicaid.
3. Florida's birth rate is below replacement level and this demographic trend, if it continues, will likely have negative long-term economic impacts for the state. Passage of Amendment 4 could exacerbate these trends further or hinder efforts to reverse them.

Please see below for more information. We hope this analysis is helpful to the FIEC as it conducts its workshop.

Considerations for Financial Impact Analysis of Amendment 4

Amendment 4 is extremely broad and, if passed, will significantly impact all of Florida abortion law. There are many reasons why passage of the Amendment may have a negative fiscal impact on the state. We offer the following information to the Financial Impact Estimating Conference to consider as they conduct their analysis of the amendment:

I. Passage of Amendment 4 could potentially result in significant litigation costs to the state because abortion advocates will likely challenge almost every Florida law that touches abortion.

Abortion advocacy groups oppose any law that they consider to be a regulatory burden on abortion clinics. Advocacy groups refer to these regulations as “targeted regulation of abortion provider laws” (TRAP laws).¹

Regulations that fall into the category of TRAP Laws include, but are not limited to:

- Basic health and safety requirements for abortion clinics;
- Requirements that doctors obtain admitting privileges at nearby hospitals prior to performing abortions;
- Requiring abortion providers to be located within a certain distance to a hospital.
- Reporting requirements for abortion procedures;
- Mandatory waiting period laws;
- Requirements to provide information about gestational phases, ultrasounds, or the identification of a heartbeat.

If Amendment 4 passes, it is likely that any law in Florida that could be considered a TRAP law or that restricts or limits abortion in any way will be challenged in court.² This has already occurred in other states after state constitutional amendments similar to Amendment 4 have passed.

Michigan

In 2022, Michigan passed Proposal 3, a state constitutional amendment similar to Amendment 4, prohibiting government restrictions on abortion access pre-viability while allowing for government restrictions post-viability subject to a broad health exception. This amendment was promoted as an attempt to keep abortion access safe and legal after the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*. However, after the Michigan amendment passed, instead of restoring the status quo, abortion advocates used the amendment to repeal or challenge almost every law that regulated abortion in Michigan.

In November 2023, the Michigan Legislature passed the Reproductive Health Act³ which did the following:

¹ Guttmacher Institute, *Targeted Regulation of Abortion Providers*, Guttmacher Institute (Aug. 31, 2023), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>.

² Planned Parenthood Action Fund, *What are TRAP Laws?*, Planned Parenthood Action Fund (2024), <https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws>.

³ Press Release, *Governor Whitmer Signs Final Piece of Reproductive Health Act*, Michigan Governor Gretchen Whitmer (Dec. 11, 2023), <https://www.michigan.gov/whitmer/news/press-releases/2023/12/11/governor->

- Repealed criminal penalties for performing abortions.
- Repealed a law providing opt-outs for abortion insurance coverage.
- Clarified that when determining post-viability health exceptions for abortion procedures, the attending health care professional may consider any factor relevant to the well-being of the mother, including, but not limited to, the mother’s age, physical, emotional, psychological, and familial factors.
- Repealed a ban on partial-birth abortion.
- Repealed a requirement that physicians report abortions to state health care agencies.
- Repealed regulations governing the disposal of fetal remains from abortion.
- Repealed a requirement that a patient seeking an abortion be screened to determine whether they had been coerced to do so and that prescribed protocols for the screening process.
- Repealed a requirement for a personal physical exam by a physician before administering prescription drugs for a chemical abortion.

Additionally, the Reproductive Health Act repealed almost all Michigan health and safety regulations related to abortion clinics.⁴ This included regulations that did the following:

- Required abortion providers to have a written policy and procedure to provide adequate surgical hand-scrub stations throughout the surgical and post-operative procedure.⁵
- Required surgical equipment, instruments, and supplies to be maintained in sufficient quantities, stored in a sanitary environment and maintained in accordance with applicable manufacturer guidelines and nationally recognized infection prevention and control guidelines published by a reputable organization.⁶
- Required policies and protocols for onsite and offsite processing of surgical instruments and equipment to include sterilization, high-level disinfection, immediate-use steam sterilization, and indicators to capture sterilization or disinfection failures.⁷
- Required collection, storage, and disposal of solid wastes, including garbage, refuse, and dressings, to be accomplished in a manner that would minimize the danger of disease transmission and avoid creating a public nuisance or a breeding place for insects and rodents.⁸
- Required that the sewage disposal system be maintained in a sanitary manner.⁹

The abortion clinic regulations repealed by the Michigan Reproductive Health Act are very similar to abortion clinic regulations in Florida. This is evident by comparing the rescinded regulations in Michigan (MAR 325.45101 – MAR 325.4543) with the Florida regulations in FAC Rule 59A-9.018 – 59A-9.035.

[whitmer-signs-final-piece-of-reproductive-health-act](#) (The Reproductive Health Act was a package of bills passed during the 2023-2024 Michigan Legislative Session that included: HB 4949, HB 4951, HB 4953, HB 4954, HB 4955, HB 4956, SB 474, SB 476, and SB 477).

⁴ SB 474 of the Reproductive Health Act amended MCL 333.20115 and removed the requirement that abortion clinics that perform 120 or more surgical abortions per year and that publicly advertise outpatient abortion services be subject to the Michigan administrative rules governing freestanding surgical outpatient facilities.

⁵ Michigan Administrative Rule (MAR) 325.45335

⁶ MAR 325.45337

⁷ *Id.*

⁸ MAR 325.54307

⁹ *Id.*

After the Reproductive Health Act was passed the Chief Medical Operating Officer of Planned Parenthood Michigan stated:

Today's passage of the Reproductive Health Act is an important step forward for Michiganders, but sadly, only an incremental one. While we are grateful that Michigan's TRAP laws will finally be repealed, making it less burdensome for abortion providers to expand into areas of the state that need them most, I am deeply disappointed that some of the worst restrictions that directly target my patients will remain on our law books. Every single day, I see patients who have struggled to pull together needed funds because Medicaid won't cover their care. Every single day, we have to cancel and reschedule appointments because of insignificant clerical errors in state-mandated paperwork. This is not reproductive freedom.¹⁰

Subsequently, in February of 2024, the Center for Reproductive Rights filed a lawsuit on behalf of an abortion clinic challenging some of the only remaining abortion regulations in Michigan law.¹¹ The lawsuit challenges:

- a mandatory 24-hour waiting period law prior to receiving an abortion;
- a requirement that abortion providers: (1) confirm the patient is pregnant and determine the probable gestational age of the fetus; (2) orally describe to the patient the gestational age, information about what to do should any complications arise from the abortion, and information about how to obtain pregnancy prevention resources; and (3) provide the patient with physical copies of the following: a summary of the procedure, a medically accurate depiction of a fetus at the gestational age nearest the probable gestational age of the patient's fetus, a prenatal care and parenting information packet, and a prescreening summary on prevention of coercion to abort
 - Before a patient signs the acknowledgment and consent form, a physician must also: (1) confirm that the patient received a screening on coercion to abort; (2) inform the patient of the right to withhold or withdraw consent at any time before performance of the abortion; and (3) orally describe risks of any complications associated with abortion as well as risks of any complications that could arise should the patient choose to continue pregnancy.
- A requirement that abortions be performed by a physician and that the physician perform the abortion with the patient's informed written consent.¹²

¹⁰ Press Release, *Reproductive Health Act Passes, Repealing Some Restrictions on Abortion Care in Michigan*, Planned Parenthood of Michigan (Nov. 2, 2023), <https://www.plannedparenthood.org/planned-parenthood-michigan/newsroom/reproductive-health-act-passes-repealing-some-restrictions-on-abortion-care-in-michigan>.

¹¹ *Northland Family Planning Center v. Nessel*, No. 24-000011-MM (Mich. Ct. Cl. 2024).

¹² *Northland Family Planning Center v. Nessel*, No. 24-000011-MM (Mich. Ct. Cl. 2024), Verified Complaint for Declaratory and Injunctive Relief, February 6, 2024, at 36 ("But for the Provider Ban, Northland and other providers in Michigan could hire Advanced Practice Clinicians ("APCs") like Certified Nurse Midwives ("CNMs"), Nurse Practitioners ("NPs"), and Physician Assistants/Associates ("PAs") to provide early abortions and thus greatly expand available services and appointments.").

On June 25, 2024, the Michigan Court of Claims granted a preliminary injunction against the 24-hour waiting period, the requirement that abortions be performed by a physician, and the informed consent requirement.¹³

Ohio

The events that have unfolded in Michigan subsequent to the passage of Proposal 3 demonstrate abortion advocates' intent to repeal all laws that regulate abortion. However, abortion advocates in Michigan pursued this strategy mainly through legislative action. If Amendment 4 passes in Florida, it is unlikely that a similar legislative effort will take place. Therefore, Michigan is not the best comparison of what might happen in Florida if Amendment 4 passes.

Ohio provides a better example of a post-amendment litigation strategy that is likely to occur in Florida. In 2023, Ohio passed an amendment very similar to Michigan's Proposal 3 and Florida's Amendment 4. After the Ohio amendment passed, abortion advocates filed several lawsuits (or filed new motions or amended complaints in existing law suits) challenging a host of abortion regulations under the recently passed constitutional amendment.

The Ohio Amendment states, in pertinent part, that:

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.

However, an 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.¹⁴

After the Ohio Amendment passed, the Ohio Capital Journal reported that:

In the meantime, those who supported the amendment are working through court cases regarding abortion that were started before the amendment was put to voters.

"All of us who have been continuing to fight litigation will continue to work together to ensure that restrictions and bans that are currently in place are no longer in place," said Lauren Blauvelt, co-chair of Ohioans

¹³ *Northland Family Planning Center v. Nessel*, No. 24-000011-MM (Mich. Ct. Cl. 2024), Opinion and Order, June 25, 2024, at 50.

¹⁴ Ohio Constitution, Article 1, Section 22.

United for Reproductive Rights, a coalition who led the amendment campaign.

While Blauvelt said the group was not yet revealing their legal strategy as they move forward, she acknowledged that previous lawsuits regarding the six-week abortion ban would have to be resolved.

That could mean a motion to dismiss the Hamilton County case in which the injunction was set for the six-week ban, or some other legal maneuver to deem the case moot based on the amendment's passage.

Jessie Hill, an attorney and Case Western Reserve University law professor who presented the case against lifting a pause on the six-week ban to the Ohio Supreme Court in September, said the state could agree that the six-week ban law is now unenforceable, but she is prepared for the alternative.

"This gives us a new claim we can add into our pending litigation, and we can fight it out from there if the state insists on trying to defend its laws," Hill told the OCJ. "But we are now in a very strong position based on the new amendment."¹⁵

In June 2024, a Wall Street Journal report on abortion litigation after passage of the Ohio Amendment stated that:

Since 2011, Ohio lawmakers passed some 30 new abortion restrictions, according to a list compiled by abortion-rights groups. Long term, the groups say they hope to challenge every one of them in court.

"We're not on the defense anymore," said Kellie Copeland, executive director of Abortion Forward, a state organization that recently rebranded from Pro-Choice Ohio.¹⁶

Currently, there are several cases pending in Ohio state courts challenging various abortion regulations under the new constitutional amendment. These cases include challenges to the following regulations:

- A requirement that abortion clinics maintain an ambulatory surgical facility license which mandates that clinics either (1) have a written transfer agreement with a local hospital; or (2) be granted a variance from that requirement by the Department of Health.¹⁷

¹⁵ Susan Tebben, *Abortion is Now a Constitutional Right in Ohio. But the Work Isn't Done*, Ohio Capital Journal (Nov. 8, 2023), <https://ohiocapitaljournal.com/2023/11/08/abortion-is-now-a-constitutional-right-in-ohio-but-the-work-isnt-done/>.

¹⁶ Laura Kusisto, *Abortion-Rights Advocates Deploy a New Red State Playbook*, Wall St. J., June 19, 2024, <https://www.wsj.com/politics/policy/abortion-rights-advocates-deploy-a-new-red-state-playbook-8f13a644>

¹⁷ *Women's Medical Group Professional Corp. v. Vanderhoff*, No. A 2200704 (Ohio C.P. Hamilton Cnty. Apr. 15, 2024), First Amended Complaint for Declaratory and Injunctive Relief.

- A requirement that embryonic and fetal remains from a procedural abortion at an abortion facility must be disposed of by cremation or interment.¹⁸
- A requirement that a patient must be provided with a notification form listing the options for disposition of embryonic or fetal remains and that patient must certify in writing that they have received the notification form.¹⁹
- A requirement that a physician must meet with a woman in an in-person, individual, private setting and inform the patient verbally of the nature and purpose of the abortion as well as its medical risks, the probable gestational age of the embryo or fetus, and the medical risks associated with carrying the pregnancy to term.²⁰
- A requirement that a physician provide the patient with copies of state-produced materials concerning gestational development, family planning information, and publicly-funded support options. The physician must also inform that patient that these materials are published by the state and describe the zygote, blastocyte, embryo, or fetus and list agencies that offer alternatives to abortion.²¹
- A requirement that the physician obtain informed consent from the patient.²²
- A requirement that a health care provider test for a fetal heartbeat. If a heartbeat is detected, then the patient is required to delay the abortion for 24 hours.²³
- A requirement that, if a fetal/embryonic heartbeat is detected, the physician give patient written confirmation of the heartbeat and provide information about the statistical probability of carrying the pregnancy to term based on gestational age, and the patient must sign and acknowledge receipt of this information.²⁴

These cases demonstrate that, if Amendment 4 passes, abortion advocates will likely pursue a litigation strategy aimed at achieving overall de-regulation of the abortion industry similar to what was achieved in Michigan and is currently being pursued in Ohio. Ultimately, if Amendment 4 passes in Florida, abortion advocates are likely to challenge almost any law that regulates abortion. It will be important for the state of Florida to defend against such attacks. As the Ohio Attorney General recently stated in a case where abortion advocates are seeking to overturn Ohio’s six-week abortion ban:

To the extent Plaintiffs in this case seek to expand the Amendment beyond its language, they are not alone. Plaintiffs in other currently-pending cases likewise seek to commandeer the Amendment for their own purposes, claiming in the aggregate that the Amendment bars all laws that touch on abortion – and even some laws that have nothing to do with abortion or anything else the Amendment mentions. Just as it is the State Government’s duty to respect the will of the People by conceding the invalidity of a statutory provision that conflicts with the

¹⁸ *Planned Parenthood Sw. Ohio Region v. Ohio Dep’t of Health*, No. A21 00870 (Ohio C.P. Hamilton Cnty. Apr. 15, 2024), Second Amended Complaint for Declaratory and Injunctive Relief.

¹⁹ *Id.*

²⁰ *Preterm-Cleveland v. Yost*, No. 24 CV 002634 (Ohio C.P. Franklin Cnty.), Amended Complaint, at 13.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 15.

²⁴ *Id.*

current language of the Ohio Constitution, it is also the State Government's duty to respect the will of the People by defending statutory provisions that the Amendment does *not* invalidate against meritless attack. Against such overreach, the State will stand fast.²⁵

Other States

There are many cases (both past and current) in other states that are also worth highlighting. Below are just a few examples. Many states have not passed a constitutional amendment similar to Amendment 4, however, the plethora of cases involving abortion law challenges in those states serve to demonstrate how abortion advocates view almost all abortion regulation as a limitation or restriction on abortion access.

- *Silver State Hope Fund v. Nevada Dep't of Health & Human Servs.*, No. A-23-876702-W (Nev. Dist. Ct. Clark Cnty)
 - In 2023, Nevada adopted an Equal Rights Amendment in its state constitution. The state's Medicaid abortion coverage ban was subsequently challenged as a violation of Nevada's Equal Rights Amendment arguing that the ban constitutes sex discrimination under the Equal Rights Amendment. The lawsuit requests a court order to Nevada Division of Health Care Financing and Policy to remove the abortion coverage ban in Nevada's Medicaid Program.
 - Case status: Ongoing.
- *Planned Parenthood of Mont. v. State of Mont.*, No. ADV-23-299 (Mont. 1st Jud. Dist. Ct. Lewis & Clark Cnty).
 - Challenge to MT state laws that limit Medicaid coverage of abortions by:
 - Prohibiting coverage for abortions provided by advanced practice clinicians including physician assistants;
 - Prohibiting coverage for telehealth abortions; and
 - Narrowly defining "medically necessary service."
 - Case status: Ongoing.
- *Planned Parenthood South Atlantic v. Moore*, No. 20CVS500147-910 (N.C. Super. Ct. Wake Cnty 2022).
 - Challenge to several North Carolina abortion restrictions including:
 - A requirement that abortions be performed by licensed physicians;
 - A prohibition on abortions performed via telemedicine;
 - Licensing and facility regulations for abortion providers;
 - Requirement that providers deliver state-mandated counseling prior to an abortion;
 - Requirement that patients wait 72-hours before undergoing an abortion procedure.
 - Case status: Voluntarily dismissed in 2022.

²⁵ *Pre-Term Cleveland, et al. v. Dave Yost, et al.*, No. A 2203203 (Ohio C.P. Hamilton Cnty. Mar. 29, 2024), State Defendants' Response to Plaintiffs' Motion for Judgment on the Pleadings.

- *Planned Parenthood Arizona, et al. v. Brnovich, et al.*, No. 4:19-cv-00207-JGZ (D. Ariz. Apr. 11, 2019).
 - Challenged a ban on telehealth abortions, mandatory waiting periods, licensing requirements for abortion clinics, physician only requirements, counseling requirements, ultrasound requirements, bans on state health plan coverage for abortions. All considered TRAP laws that restrict abortion access.
 - Case status: Voluntarily dismissed in 2020.

Florida and Amendment 4

Abortion advocates may argue that constitutional amendments in other states go much farther than Amendment 4 because they create an individual right to abortion access under the state constitution while Amendment 4 does not. However, when it comes to challenging state abortion regulations, Amendment 4 may actually create a lower threshold for striking down existing state abortion regulations because challengers will not have to prove that a regulation infringes on an individual’s constitutional right. Instead challengers will merely have to prove that the regulation limits or restricts abortion in any way. Therefore, Florida’s Amendment 4 may in fact turn out to be even more extreme than amendments that create a constitutional right to abortion. This, in turn, could potentially result in even more litigation compared to other states.

Regardless, current litigation in other states like Michigan and Ohio demonstrate that there is a significant likelihood that the passage of Amendment 4 will result in increased litigation costs to the state. The absolute breadth of the amendment will only become clear once courts determine the contours of the prohibition on government regulation of abortion. As the amendment sponsors noted in their brief before the Florida Supreme Court:

Opponent’s fears about the Proposed Amendment’s potential application are not germane to this Court’s review. As explained *supra*, the question of how specific laws would be construed under the proposed Amendment must, as a matter of law, be “left to subsequent litigation should the amendment pass.” *Med. Liab. Claimant’s Comp.*, 880 So.2d at 679.²⁶

II. One of the laws that will likely be challenged if Amendment 4 passes is Florida’s restriction on Medicaid coverage for abortion. If this law is struck down, it could lead to increased state spending on Medicaid.

If Amendment 4 passes, it is likely that most of the provisions in section 390.0111, *Florida Statutes* will be challenged. This includes, section 390.0111(15) which precludes the use of state funds to pay for abortions. Currently, Florida excludes abortion coverage in state Medicaid plans with the exception of

²⁶ *Advisory Opinion to the Attorney General Re: Limiting Government Interference with Abortion*, Answer Brief of Floridians Protecting Freedom, Sponsor, at 52; *Oral Argument for Advisory Opinion to the Attorney General Re: Limiting Government Interference with Abortion*, YouTube Feb. 7, 2024 <https://www.youtube.com/watch?v=kdTCtxBJd9w> (47:00) (Counsel for amendment sponsor stating: “If there was a regulation that was challenged as being a prohibition, delay, restriction, or penalizing abortion it would be back before this court. It will be for this court to make that determination.”)

instances of rape, incest, or if a physician finds that the life of the mother would be endangered if the fetus were carried to term.²⁷ This coverage policy is set by the Agency for Health Care Administration which determines coverage in state Medicaid plans. ACHA is required to exclude such coverage under section 390.0111(15).

However, if Amendment 4 passes, it is likely that section 390.0111(15) will be challenged as restricting or limiting abortion access. This will likely include a challenge that abortion coverage exclusions in state Medicaid plans also restrict and limit abortion access for women covered by Medicaid.

If, section 390.0111(15) is struck down, any subsequent decision by AHCA to limit or restrict Florida Medicaid coverage of abortion would similarly be challenged as restricting and limiting abortion access for Medicaid participants. This would likely result in AHCA being required to allow Medicaid insurance plans to cover abortion procedures using state Medicaid funds. This would increase spending on Florida Medicaid resulting in a negative fiscal impact for the state.

III. Florida's birth rate is below replacement level and current demographic trends, if they continue, will likely have negative long-term economic impacts on the state. Passage of Amendment 4 could exacerbate these trends further or hinder efforts to reverse them.

The total fertility rate (TFR) in the United States has dropped from 2.12 in 2007 to 1.65 in 2022.²⁸ Similarly, the TFR in Florida has dropped from 2.12 in 2007 to 1.64 today.²⁹ The birth rate in Florida and in the U.S. is now below the replacement level birth rate of 2.1.³⁰ Therefore, both the U.S. and Florida are experiencing below-replacement-level fertility rates which could lead to declining population growth.³¹ This has potential negative long-term impacts for the economy.

²⁷ Agency for Health Care Administration, *Florida Medicaid: Reproductive Services Coverage Policy*, at 4; FAC Rule 59G-4.030 *Reproductive Services*.

²⁸ Melissa S. Kearney and Phillip B. Levine, *The Causes and Consequences of Declining US Fertility. Economic Policy in a More Uncertain World: Aspen Economic Strategy Group* (Jan. 2023), https://www.economicstrategygroup.org/wp-content/uploads/2022/08/Kearney_Levine_081222.pdf (Describing total fertility rate as “a simulated measure that calculates expected lifetime births by assuming that women will follow current age-specific birth rates over their childbearing years.”); Osterman, M. J., Hamilton, B. E., Martin, J. A., Driscoll, A. K., & Valenzuela, J. M., *Births: Final Data for 2022, National Vital Statistics Reports*, Centers for Disease Control, Vol. 72, No. 2 (Apr. 4, 2024), p. 27, Table 8, <https://www.cdc.gov/nchs/data/nvsr/nvsr73/nvsr73-02.pdf>.

²⁹ Martin, J. A., Hamilton, B. E., Sutton, P. D., Ventura, S. J., Mathews, T. J., Kirmeyer, S., & Osterman, M. J., *Births: Final Data for 2007, Vital Statistics Reports*, Centers for Disease Control, Vol. 58, No. 24 (Aug. 9, 2010), p. 41, Table 11. https://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_24.pdf; *Births: Final Data for 2022, supra* note 27 at 27.

³⁰ *Id* at 5. (“The TFR for the nation in 2022 remained below replacement, the level at which a given generation can exactly replace itself (generally considered to be 2,100 births per 1,000 women). The U.S. TFR has generally been below replacement since 1971 and has consistently been below replacement since 2008.”)

³¹ *The Causes and Consequences of Declining US Fertility* at 75 (Noting that “lower fertility implies lower population growth and eventually a smaller working-age population, which will have consequences for social, fiscal, and economic conditions.”); *The Demographic Outlook: 2024 to 2054*, Congressional Budget Office (January 18, 2024), <https://www.cbo.gov/system/files/2024-01/59697-Demographic-Outlook.pdf> (“Population growth generally slows over the next 30 years, from 0.6 percent per year, on average, between 2024 and 2034 to 0.2 percent per year, on average, between 2045 and 2054. Net immigration increasingly drives population growth and accounts for all population growth beginning in 2040, in part because fertility rates remain below the rate that would be required for a generation to replace itself in the absence of immigration.”).

Lower birth rates and shrinking populations are associated with negative long-term economic impacts, including:

- Difficulty supporting pensions, social security, Medicare, and other programs designed to assist aging populations;³²
- Decreased tax base for state and federal budgets;³³
- Slower economic growth;³⁴
- Smaller labor force;³⁵
- Lower federal funding for state programs based on population counts.³⁶

Florida's population is projected to grow by an average of 1.27% per year between 2022 and 2030.³⁷ However, this overall growth will not reverse Florida's aging population trends. In 2030, the population of Floridians age 65 and over is forecast to represent at least 24.4% of the population, compared with 21.2% in 2020 and 17.3% in 2010.³⁸ Florida's prime working age population (ages 25-54) is forecast to represent only 35.8% of the population by 2030, down from 36.8% in 2020 and 41.5% in 2000.³⁹ The youngest cohort (ages 0-17) represented 22.8% of the total population in 2000 but is forecast to see zero growth through the end of the decade, remaining at 19.5% of the total population.⁴⁰ Therefore, it is likely that Florida's population of individuals 65 and over will continue to grow while the percentage of younger cohorts shrink or remain the same.

There were 82,600 abortions performed in Florida in 2023.⁴¹ Of these, 92% were performed on Florida residents.⁴² Passage of Amendment 4 would broadly expand abortion access in Florida. Unlimited abortion

³² *The Causes and Consequences of Declining US Fertility* at p. 90-92.

³³ *The Long-Term Decline in Fertility – and What It Means for State Budgets*, Pew Charitable Trusts, Issue Brief (Dec. 5, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets>.

³⁴ Nicole Maestas, Kathleen J. Mullen, & David Powell, *The Effect of Population Aging on Economic Growth, the Labor Force, and Productivity*, 15 Am. Econ. J.: Macroecon. 306 (2023). (Finding that each 10 percent increase in the fraction of the population age 60+ decreased per capita GDP by 5.5%.); Jinill Kim, *The Effects of Demographic Change on GDP Growth in OECD Economies*, IFDP Notes, Board of Governors of the Federal Reserve System (Sept. 28, 2016), <https://doi.org/10.17016/2573-2129.22>.

³⁵ *Demographic Overview and Population Trends*, The Florida Legislature Office of Economic and Demographic Research, Jan. 28, 2020, p. 9, http://edr.state.fl.us/Content/presentations/population-demographics/DemographicTrends_1-28-20.pdf.

³⁶ For example, Title I funding under ESSA and IDEA funding for students with special needs are both determined by student population counts.

³⁷ *Florida: Long-Range Financial Outlook*, The Florida Legislature Office of Economic and Demographic Research, November 14, 2023. p. 6. http://edr.state.fl.us/Content/presentations/long-range-financial-outlook/3YearPlan2023FallUpdate_House.pdf.

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Mia Steupert & Tessa Cox. *Abortion Reporting: Florida (2022)*, Charlotte Lozier Institute (July 25, 2023), <https://lozierinstitute.org/abortion-reporting-florida-2022/>

⁴² *Id.*

access is generally associated with decreased fertility rates.⁴³ Additionally, initial research, post-Dobbs, has demonstrated that states with a total abortion ban have seen an average birthrate increase of 2.3%.⁴⁴

If a pregnancy is carried to term a child is born. However, every completed abortion terminates a pregnancy. Therefore, each abortion results in less people than there would have been if the abortion had not occurred and the pregnancy was carried to term. As a result, passage of Amendment 4, and broad access to abortion in Florida, could potentially exacerbate current demographic trends that negatively impact the economy and hinder any efforts that may contribute to reversing those trends.

⁴³ Brief of Amici Curiae Economists in Support of Respondents, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, Supreme Court of the United States, Sept. 20, 2021, pp. 7-9. ("Applying tools of causal inference, economists have shown that abortion legalization, independent of other factors such as contraception, has had a direct and significant impact on birth rates." Also noting that after Roe legalized abortion nationwide reduced birth rates by 4 to 11%, independent of other factors such as contraception.) https://www.supremecourt.gov/DocketPDF/19/19-1392/193084/20210920175559884_19-1392bsacEconomists.pdf; PB Levine et al., *Roe v. Wade and American Fertility*, 89 Am. J. Pub. Health 199 (Feb. 1, 1999) (Comparing fertility rates over time between states that varied in the timing of abortion legalization. Finding that states legalizing abortion experienced a 4% decline in fertility relative to states where the legal status of abortion was unchanged. Also concluding that a complete recriminalization of abortion nationwide could result in 440,000 additional births per year.) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1508542/>

⁴⁴ Dench, Pineda-Torres, & Myers, *The Effects of Post-Dobbs Abortion Bans on Fertility*, 234 J. Pub. Econ. (June 2024). <https://doi.org/10.1016/j.jpubeco.2024.105124>

**Remarks from Sara Johnson
On Behalf of Vote No on 4 Florida
Before the Financial Impact Estimating Conference
July 1, 2024**



My name is Sara Johnson, on behalf of Vote No On 4 Florida.

Since my time is limited, I'll address just one point.

Contrary to Circuit Court Judge Cooper's pronouncements, Amendment 4 **would** certainly result in significant financial impacts from litigation, and voters must be advised of these impacts.

How do we know? Because of history, because of necessity, and because the sponsors admitted it in front of the Supreme Court.

First, history: In any of our lifetimes, how many policy matters have been litigated more than abortion?

The fact that we are gathered here today is proof that, when it comes to abortion, anything that can be litigated, will be litigated.

Second, is necessity: Amendment 4 is neither self-implementing, nor does it lend itself to legislative implementation. The words "No Law Shall..." make legislative implementation virtually impossible. Since Amendment 4 is neither self-implementing nor legislatively implementable – it would have to be implemented judicially, through costly litigation.

If Amendment 4 passes, there will be at least two separate realms of litigation. The first involves constitutional challenges to existing laws. Not just the laws that make headlines now, but laws that almost every Floridian supports, regardless of their position on abortion.

Like requiring minors to have parental consent for an abortion. Or laws that provide for informed consent. Amendment 4 backers are currently litigating to overturn these types of laws in states where similar abortion amendments have passed.

But Amendment 4 also requires another realm of litigation, because at merely 34 words, it is deliberately vague. In fact, the ballot summary is longer than the amendment itself. None of its operative terms "government interference" -- "healthcare provider" -- "patient's health" -- or "viability" are defined, creating more litigation to define each term.

Finally, the sponsors admitted to the Florida Supreme Court that much of what Amendment 4 would do must be determined by the courts.

Amendment 4 is deliberately vague – to hide from voters what it would actually do – which is to allow abortion at any time during pregnancy if it is approved by any undefined "healthcare provider" – and to make abortion the only medical procedure that can be performed on a minor without parental consent.

Amendment 4's sponsors didn't have to write it so deceptively vague, but they did. And now they want you to reward their deception; by having you fail to disclose to voters that there will be costly litigation, and additional costs that will cascade from each judicial decision.

The litigation described in your original statement may have been decided, but as I've described, Amendment 4 would cause exponentially more litigation and resulting costs.

Florida voters deserve to be advised of these economic impacts.

Thank you.

**Remarks from Sara Johnson
On Behalf of Vote No on 4 Florida
Before the Financial Impact Estimating Conference
July 8, 2024**



Good morning, my name is Sara Johnson and I'm here on behalf of the Vote No on 4 Florida campaign. The sponsors of Amendment 4 want to have it both ways. They want a new financial impact statement to reflect new realities. Yet they don't want you to reflect on new realities while drafting your statement.

One illuminating new reality is a lawsuit filed by the sponsors' counterparts in Michigan.

Just 4 days before your last meeting, lawyers with Michigan's ACLU sued the state based on Michigan's version of Amendment 4. That suit seeks public funding for abortions under Medicaid. This example from Michigan is both comparable and instructive as it sheds light onto what would happen in Florida if Amendment 4 were to pass. I would have mentioned this issue last Monday, but it was so recently filed that we were not aware of it yet.

The Michigan case makes the same claims that abortion proponents will bring here if Amendment 4 is adopted: Paragraphs 29 – 30 of their complaint reads: "The denial of [Medicaid] coverage to patients considering abortion care may delay their access to health care Accordingly, the coverage ban burdens and infringes upon Medicaid-eligible patients' constitutional right to reproductive freedom."

If Amendment 4 is adopted and if history, very recent history, is any indication of the future — the ACLU will file lawsuits attempting to compel the state to expand Medicaid coverage for abortions. It's also very likely that a court in Florida could agree with them. After all, many other states' courts have reached precisely that decision, and none of those were dealing with an abortion right as sweeping as the one Amendment 4 would create.

Secondly, the sponsors' arguments that this FIEC is somehow bound by its previous analysis is self-seeking and incorrect. The court's order that they cite has been stayed ... not once, but twice by the District Court of Appeals. It is not currently in effect, and this Conference is assembled in its normal course of business. We believe you are therefore duty-bound to conduct a thoughtful, full and fresh analysis based not just on what was known *then*, but also what is known *now*. The previous report did not delve very deeply into the issue of Medicaid funding for abortions in Florida, but based on the proposed amendment's breadth, current Florida law, and litigation that is being filed in other states such as the Michigan case I mentioned—it is very likely that Florida taxpayers could be paying for a much larger number of abortions and possibly even elective abortions. The impact on the state budget could be enormous.

Finally, the proponents' interpretation of the standards this Conference must meet are similarly self-seeking, and incorrect. A careful reading of the caselaw shows that the FIEC can and should notify voters about the likelihood of expensive litigation the State could incur. And even if the Conference ultimately determines it cannot exactly estimate future costs and expenses, it can and should make known to voters the types and causes of likely negative fiscal impacts that Amendment 4 would cause.

Thank you.

Michigan Case Reference:

The Young Women's Christian Association of Kalamazoo, Michigan v. State of Michigan and Department of Health and Human Services

https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf

**Remarks from Sara Johnson
On Behalf of Vote No on 4 Florida
Before the Financial Impact Estimating Conference
July 15, 2024**



Good morning, I'm Sara Johnson, here on behalf of Vote No on 4 Florida.

I'd like to use my, hopefully final, testimony to remind you that while we know what Amendment 4 says – we don't know what it does. That mystery will only become clear in the litigation following this amendment should it pass in November.

This amendment was deliberately written to require litigation and to be vague and sweeping. Initial litigation is required to discover implementation and definitions as this amendment lacks both of those components. That litigation will answer a lot of questions as to the actual policy established by this amendment.

But Floridians should also be made aware of additional litigation. Let's remember that this amendment says "No law shall..." without any indication that those three words apply exclusively to future laws. The proponents have testified three times in this room and have refused to say what Florida laws would be wiped from statute by Amendment 4.

We can be certain that it would remove the Heartbeat Bill and the 15-week bill, that limits abortion when a baby is capable of feeling pain, and according to CDC data for 2021 that would result in tens of thousands of additional abortions in Florida.

But following "no law shall" the amendment says "prohibit, penalize, delay, or restrict" and there are countless other Florida laws that would be considered a "delay" of abortion.

Let's be clear, this amendment is NOT a time machine that transports Florida's abortion laws back to 2021 and the standard of Roe v. Wade. Roe v. Wade included a balancing of interests between the patient's health and the life of the second patient, the viable infant. Amendment 4 includes no such contemplation.

The sponsors told the Supreme Court this amendment was "sweeping" and it's important to your contemplation today to know what Florida laws would be considered a prohibition, penalization, delay, or restriction on abortion.

Given this broad allowance for post-viable abortions at the determination of an un-defined "healthcare provider" for the patient's health, which also lacks definitions or any diagnoses, it's not just possible but

probable that: Florida's requirement that exclusively physicians administer both chemical and surgical abortions in person, the 24-hour waiting period, in-person counseling and ultrasound requirements, and parental consent could all be considered laws that "delay" abortion. Similarly, as I mentioned last week Michigan could be spending taxpayer dollars on abortion because of a lawsuit saying that paying for an elective abortion often "delays" care. All of these existing laws and Florida's ban on Medicaid coverage for elective abortions could be "swept" away by litigation and each case will have a separate fiscal impact.

Amendment 4 was written to be litigated – that is not speculation and it's important for Florida voters to know that what you see is not what you get, but what we will get is costly litigation for years to come that results in policies we have not yet seen and therefore cannot analyze.

Thank you.



Comment on Amendment to Limit Government Interference with Abortion (23-07)

Date: July 1, 2024

To: The Financial Impact Estimating Conference (FIEC)
Office of Economic & Demographic Research

Protect Women Florida Action, a partner of Susan B. Anthony Pro-Life America, strongly believes that 23-07 will result in significant, negative financial impacts for the State of Florida. The FIEC understandably concluded previously that the financial impact of 23-07 on state and local government revenues and costs cannot be determined. The proponents of 23-07 have failed to date to articulate the full scope of the amendment, knowing the extreme impact would be rejected by voters, and therefore the significant costs the state will incur are not calculable given the undefined terms of the amendment. However, 23-07 as explained here, will have a significant and negative impact on Florida and Florida taxpayers through ballooning costs in the state Medicaid program as well as subjecting the state to a certain endless future of litigation. The FIEC should acknowledge and clearly inform voters of this negative impact on the financial summary.

Today, we reassert the arguments made previously by Susan B. Anthony Pro-life America and submitted to the FIEC on October 31, 2023. Those arguments “based on analyzing legal precedent and longitudinal medical data” concluded significant financial impacts are likely. That prior testimony is attached here for review by the committee. The conclusion made is based on the likelihood proponents of the amendment will contend the amendment requires the State to use taxpayer dollars to fund abortion and the trend of legal precedent where when a right to abortion has been found in a state it has led to a requirement of using expanded taxpayer funding in support of abortion. Additionally, the amendment seeks to eliminate existing safety requirements in place for abortion providers and expand the utilization of abortion within the state. The expansion, at the time of reduced safety of abortion, will lead to increased complications resulting in an increase of the state’s Medicaid costs – not just for covering the abortion – but also for subsequently covering the treatment of the increased number of complications following the higher number of abortions within Florida.

This is only further evidenced by a lawsuit filed by the ACLU on June 27, 2024 arguing a ban on Medicaid coverage for abortion in Michigan “violates the newly enacted fundamental right to reproductive freedom in the Michigan Constitution, which voters approved as Proposal 3 in 2022.”

The proponents of 23-07 openly campaign to increase the number of abortions, and per the language of their amendment eliminate any burden to abortion. While the proponents chose to obfuscate what burden they believe would remain constitutional under their amendment in an effort to withhold the true impact of the amendment from the public, the FIEC is under no obligation to assess the financial impact of the 23-07 based on the deceit of the proponents. In fact, the Supreme Court of Florida has already confirmed the “broad sweep” of the amendment language that will inarguably lead to an unknown increase in the number of abortions across Florida, and until additional further litigation is brought, litigated and concluded, it is unknowable under what safety protocols or lack of safety protocols abortions will be performed. While numerous data confirm the complications from and risks of abortion, because the increased number of future of abortions and increased number of future complications from abortions cannot be known the FIEC must inform voters of the significant increase in Medicaid costs that will ensue if the amendment is passed.

In addition to arguments submitted on October 31, 2023 by Susan B. Anthony Pro-Life America, the FIEC must also account for the assured litigation that will be brought by the proponents. The Florida Office of Attorney General, state agencies, and Florida judiciary will be saddled with the costs associated with litigation on numerous occasions and at every level of the judiciary. As discussed during oral testimony on behalf of Protect Women Florida Action, the cost of that litigation from the executive branch only can be expected to be around five million dollars annually.

The Florida Supreme Court conceded that the text of the amendment “presents interpretive questions” and assured costly litigation surrounding the amendment into the future. Simply based on the Florida Supreme Court’s opinion and the text of the amendment that fails to provide definitions to any term of importance the FIEC must conclude significant costs to the state are guaranteed, however how many lawsuits the proponents are expected to bring against the state is unknowable.

The FIEC, like the general public, are limited to assessing actions of the proponents and their allies. That assessment includes the ACLU, the attorneys and a leading contributor of the proponent, leading lawsuits in both Michigan and Ohio following passage of amendments with the same stated purpose. Since November after an analogous amendment was passed in Ohio, the ACLU has now filed three separate amended complaints to strike down the Ohio Heartbeat Law, eliminate informed consent and waiting period requirements, and to eliminate restrictions on use of telehealth for abortion all based on the argument the existing laws “violate the Ohio Constitution, as amended by voters to include an explicit right to abortion on November 7, 2023.”

As stated, in Michigan the ACLU also filed a lawsuit to mandate coverage of abortion in Medicaid based on a similar premise. And even where a state attorney general fails to defend a challenged law, like the Michigan Attorney General did in a suit seeking to eliminate the Michigan waiting period requirement, the state will still incur costs from staff and agencies who must defend the law and costs incurred by the judiciary.

The committee would also be correct in assessing how ambiguity around the issue of abortion played out in the federal judiciary over the past 50 years. Nearly each decade a seminal case was decided at the Supreme Court of the United States. The costs for those cases do not include the additional dozens of cases at the district and circuit courts throughout the country. Should 23-07 pass, Florida will without question replicate that series of federal litigation within the state for years and decades to come.

The proponent's allies in other states have maintained they have a legal strategy planned to effectuate their vision of the abortion amendments, however having not stated the current filings are the end to their strategy they are implying additional costly lawsuits will be brought against the states of Michigan and Ohio. When looking at the fact the attorneys representing the proponents are actively carrying out a multi-pronged litigation strategy on similar amendments and taking into account the litigious history surrounding the regulation of abortion, it is a certainty the state of Florida will be facing a cost of tens of millions of dollars related only to the cost of litigation.

The proponents in Florida could bring clarity to the issue and provide the FIEC the information necessary to provide a better estimate of the financial impact by informing the FIEC what current Florida laws the proponents intend to challenge as unconstitutional under their amendment. Absent that, the financial impact is not calculable and, as the FIEC correctly stated initially, the financial impact cannot be determined with specificity – the FIEC is left then in a position to describe with the best clarity possible the expected impact of enormous financial costs associated with 23-07. If the proponents informed the FIEC of what laws they intend to challenge the FIEC would at least have an ability to estimate the number of potential lawsuits. Additionally, knowing what existing safety protocols would be at risk the FIEC would have some way to understand what the increased scope of abortions may be, and what current medical safety protocols would no longer be in place for the health and safety of women so as to calculate an estimate on the increased number of complications.

Absent the proponents of 23-07 providing the FIEC this information, and based on the arguments made prior, the FIEC has a duty to inform voters with clarity the significant expansion of costs and taxpayer funding that will be a direct result of 23-07. Failure of the proponents to provide this necessary information to the committee would lead to the FIEC correctly again finding the fiscal impact of 23-07 cannot be determined with specificity, however the summary should acknowledge the breadth and scope of the likely financial increase due to the amendment, so voters are fully and accurately informed.



Taxpayer-Funded Abortions under Amendment 4

Date: July 8, 2024

To: The Financial Impact Estimating Conference (FIEC) Office of Economic & Demographic Research

Based on the experience of other states, Amendment 4 will result in taxpayer-funded abortions not currently required under state or federal law. Whenever a state incorporates an enhanced right to an abortion into its state constitution, courts routinely strike down state statutes and regulations that limit the use of state Medicaid funds for abortions.

For your reference, enclosed are twelve court orders from other states mandating taxpayer-funded abortions on state constitutional grounds. In each case, the state court (usually the state supreme court) found that its state constitution enshrined abortion rights to a greater extent than federal law. The courts then used strict scrutiny—or even a lesser standard—to overturn state laws that limited taxpayer-funded abortions.

Significantly, the fact that there is no federal right to a taxpayer-funded abortion did not prevent state courts from requiring state Medicaid programs to fund abortion. The overwhelming number of state courts held that states must choose between funding nearly all abortions through Medicaid or not having a Medicaid program at all.

Current Florida law is similar to the laws that were struck down in other states. Section 390.011(15), Florida Statutes, only permits Medicaid funds to be used for abortion in limited circumstances, including abortions on “fetuses that are conceived through rape or incest” as well as abortions deemed “medically necessary to preserve the life of the pregnant woman or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition.” If Amendment 4 passes, then its supporters will undoubtedly challenge Section 390.011(15) and seek to expand Florida’s Medicaid program to cover all abortions “before viability or when necessary to protect the patient’s health,” including mental health, as stated in Amendment 4.

In the event of a legal challenge, Florida courts are unlikely to give any precedential value to *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). By its own terms, Amendment 4 is far broader and more explicit than the amorphous right to privacy considered in that case. A key purpose of Amendment 4 is to create a new legal framework upon which taxpayer-funded abortion can be expanded throughout the state.

Considering the expected application of this overwhelming precedent, Florida voters ought to be informed of the high cost of taxpayer-funded abortions.

STATE	CITATION	SUMMARY	STANDARD APPLIED
Alaska	<i>State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.</i> , 28 P.3d 904 (Alaska 2001).	Alaska's Medicaid program was required to fund "medically necessary" abortions pursuant to Alaska's constitutional guarantee of equal protection.	Court applied strict scrutiny analysis.
Arizona	<i>Simat Corp. v. Arizona Health Care Cost Containment System</i> , 56 P.3d 28 (Ariz. 2002).	<p>Arizona compelled to use the state Medicaid program to fund abortions deemed "medically necessary" for the health of the mother pursuant to privileges and immunities clause of the Arizona Constitution.</p> <p>Arizona could not choose to only fund abortions to save the life of the mother, but not abortions for the health of the mother.</p>	<p>Court expressly rejected the argument that the state could decline to provide Medicaid funding for abortion because of the Hyde Amendment.</p> <p>Court applied strict scrutiny analysis.</p>
California	<i>Committee to Defend Reproductive Rights v. Myers</i> , 625 P.2d 779 (Cal. 1981).	<p>California laws that limited Medi-Cal funding for abortion were held to be unconstitutional under the California Constitution's guarantee of the right to an abortion and other state constitutional provisions.</p> <p>"Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion."</p>	Court applied a three-part standard that is similar to strict scrutiny but not the same.
Connecticut	<i>Doe v. Maher</i> , 515 A.2d 134 (Conn. Super. Ct. 1986).	Connecticut regulation restricting Medicaid funding of therapeutic abortions deemed	Court applied strict scrutiny analysis.

STATE	CITATION	SUMMARY	STANDARD APPLIED
		violative of state constitution's due process and equal protection clauses as well as the equal rights amendment.	The Court also made clear that it disagreed with federal precedent holding the Hyde Amendment to be constitutional.
Indiana	<i>Humphreys v. Clinic for Women, Inc.</i> , 796 N.E.2d 247 (Ind. 2003) (limited partial invalidity).	Indiana's Medicaid program could not pay for abortions in cases of rape or incest but not abortions in cases in which abortions were sought for the health of the mother.	Court applied an Indiana standard of review that does not neatly correspond to a federal equal protection analytical methodology.
Massachusetts	<i>Moe v. Secretary of Administration & Finance</i> , 417 N.E.2d 387 (Mass. 1981).	Statute restricting the funding of abortions to cases involving the life of the mother was deemed unconstitutional under the Massachusetts Declaration of Rights.	Court applied a somewhat "more flexible" standard than strict scrutiny.
Minnesota	<i>Women of the State of Minnesota v. Gomez</i> , 542 N.W.2d 17 (Minn. 1995).	The Minnesota Medicaid program infringed on a woman's fundamental right of privacy under the Minnesota Constitution by only funding "medically necessary" abortions or abortions in the cases of rape or incest, but not therapeutic abortions.	Court applied strict scrutiny.
Montana	<i>Jeannette R. v. Ellery</i> , No. BDV-94-811 (Lewis & Clark County), Order of Motions for Summary Judgment (May 22, 1995).	Trial court held that the Montana Constitution's right to privacy compels the Montana Medicaid program to provide funding for abortion since the state was already subsidizing the costs of carrying a pregnancy to term.	Court made new law on a motion for summary judgment. Court applies strict scrutiny analysis although it did not label it as such.

<u>STATE</u>	<u>CITATION</u>	<u>SUMMARY</u>	<u>STANDARD APPLIED</u>
New Jersey	<i>Right to Choose v. Byrne</i> , 450 A.2d 925 (N.J. 1982).	New Jersey Supreme Court held that the New Jersey Medicaid program violated the New Jersey Constitution by only funding abortions necessary to save the life of the mother.	Court applied intermediate scrutiny.
New Mexico	<i>New Mexico Right to Choose/NARAL v. Johnson</i> , 975 P.2d 841 (N.M. 1998).	New Mexico Medicaid Program violated the New Mexico Equal Rights Amendment because it employed a gender-based classification when it restricted funding to abortions for the life of the mother as well as cases of rape and incest; Court found that this policy was neither grounded in a compelling justification nor the least restrictive means.	Court applied “heightened scrutiny,” which is strikingly similar to strict scrutiny.
Oregon	<i>Planned Parenthood Ass’n, Inc. v. Dep’t of Human Resources of the State of Oregon</i> , 663 P.2d 1247 (Or. Ct. App. 1983), <i>aff’d</i> on other grounds, 687 P.2d 785 (Or. 1984).	Oregon Supreme Court struck down rule denying Medicaid funding for medically necessary abortion as violative of the Oregon Constitution.	Court applied a balance test akin to intermediate scrutiny.
West Virginia	<i>Women’s Health Center of West Virginia, Inc. v. Panepinto</i> , 446 S.E.2d 658 (W. Va. 1993).	Given West Virginia’s “enhanced constitutional protections,” the West Virginia Code impermissibly restricted public funding for abortion under the state’s Medicaid program.	Court did not use strict scrutiny but struck down the statute because not funding abortion for Medicaid recipients constituted “undue government interference” with the right to an abortion.

STATE of Alaska, DEPARTMENT OF HEALTH & SOCIAL SERVICES, Karen Perdue, Commissioner, Appellant,

v.

PLANNED PARENTHOOD OF ALASKA, INC., Jan Whitefield, M.D., and Susan Lemagie, M.D., Appellees.

No. S-9109.

Supreme Court of Alaska.

July 27, 2001.

Two medical doctors and an abortion provider filed a complaint against the Department of Health and Social Service (DHSS), seeking to enjoin enforcement of Department regulation that denied funding for medically necessary abortions, and requesting declaratory relief. The Superior Court, Third Judicial District, Sen K. Tan, J., granted summary judgment in favor of plaintiffs and permanently enjoined the Department from enforcing the regulation. Department appealed. The Supreme Court, Fabe, C.J., held that: (1) regulation violated Alaska's constitutional guarantee of equal protection, and (2) separation of powers doctrine does not preclude a court from ordering the state to provide equal funding for women whose health is endangered by pregnancy.

Affirmed.

1. Appeal and Error \Leftrightarrow 893(1), 895(2)

Supreme Court will review a grant of summary judgment de novo, exercising its independent judgment to determine whether the parties genuinely dispute any material facts and, if not, whether the undisputed facts entitle the moving party to judgment as a matter of law.

2. Appeal and Error \Leftrightarrow 840(3), 856(1)

On questions of constitutional law, Supreme Court will apply its independent judgment, and may affirm the superior court on any ground supported by the record.

3. Constitutional Law \Leftrightarrow 242.3(1)

Social Security and Public Welfare
 \Leftrightarrow 241.95

State regulation denying Medicaid funding for medically necessary abortions, except

for pregnant women at risk of dying or pregnant from rape or incest, violates Alaska's constitutional guarantee of equal protection by providing medically necessary care to all indigents except women who need abortions; once the State undertook to fund medically necessary services for poor Alaskans, it could not selectively exclude women from that program merely because the threat to their health arose from pregnancy, which would affect their constitutional right to reproductive freedom, despite state's interest in providing healthcare to women who carry pregnancies to term and in protecting the fetus. Const. Art. 1, § 1; Alaska Admin. Code title 7, § 43.140.

4. Constitutional Law \Leftrightarrow 209

In analyzing a challenged law under Alaska's equal protection provision, Supreme Court must first determine what level of scrutiny to apply, using Alaska's "sliding scale" standard, the Court must next examine the State's interests served by the challenged regulation and determine whether the burden placed on constitutional rights by the regulation is minimal, or whether the objective degree to which the challenged legislation tends to deter exercise of constitutional rights is significant and cannot survive constitutional challenge absent a compelling state interest, and if the State has shown that its interests justify burdening the rights of citizens, the Court must finally determine whether State has demonstrated that the means it has chosen to advance those goals are well-fitted to the ends, and that its goals could not be accomplished by less restrictive means. Const. Art. 1, § 1.

5. Constitutional Law \Leftrightarrow 213.1(1), 225.1

A regulation that affects the constitutional right to reproductive freedom, or selectively denies a benefit to those who exercise a constitutional right, is subject to the most searching judicial scrutiny, that is, "strict scrutiny" in analyzing the regulation under Alaska's equal protection provision. Const. Art. 1, § 1.

6. Social Security and Public Welfare
 \Leftrightarrow 241

Government agency is constitutionally bound to apply neutral criteria in allocating

health care benefits to poor Alaskans, even if considerations of expense, medical feasibility, or the necessity of particular services otherwise limit the health care it provides. Const. Art. 1, § 1.

7. Constitutional Law ⇔242.3(1)

Social Security and Public Welfare ⇔241.95

State regulation denying Medicaid funding for medically necessary abortions, except for pregnant women at risk of dying or pregnant from rape or incest, fails equal protection analysis under any standard, given that under the regulation, the State grants needed health care to some Medicaid-eligible Alaskans, but denies it to others, based on criteria entirely unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons in the state. Const. Art. 1, § 1; Alaska Admin. Code title 7, § 43.140.

8. Constitutional Law ⇔213.1(2)

Federal rational basis review for equal protection analysis is a less rigorous standard than Alaska's rational basis review. U.S.C.A. Const.Amend. 5; Const. Art. 1, § 1.

9. Constitutional Law ⇔67

Under Alaska's constitutional structure of government, the Judicial branch has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.

10. Constitutional Law ⇔70.1(12)

Separation of powers doctrine does not preclude a court from ordering the state to provide equal funding for women whose health is endangered by pregnancy, even if legislature's appropriations power underlies the funding.

11. Constitutional Law ⇔50

Separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution.

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Christine Schleuss, Suddock & Schleuss, Cooperating Counsel to the Alaska Civil Lib-

1. AS 47.07.010.

2. See *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625

erties Union, Anchorage, and Louise Melling, Jody Yetzer, Talcott Camp, and Jennifer Dalven, ACLU Foundation, Reproductive Freedom Project, New York, NY, for Appellees.

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Before FABE, Chief Justice,
MATTHEWS, EASTAUGH, BRYNER, and
CARPENETI, Justices.

OPINION

FABE, Chief Justice.

I. INTRODUCTION

Alaska's Medicaid program funds virtually all necessary medical services for poor Alaskans—"regardless of race, age, national origin, or economic standing"¹—but it denies funding for medically necessary abortions. Alone among Medicaid-eligible Alaskans, women whose health is endangered by pregnancy are denied health care based solely on political disapproval of the medically necessary procedure. This selective denial of medical benefits violates Alaska's constitutional guarantee of equal protection. Our conclusion is supported by the majority of jurisdictions that have considered comparable restrictions on state funding of medically necessary abortions: these state courts have concluded that, under their state constitutions, government health care programs that fund other medically necessary procedures may not deny assistance to eligible women whose health depends on obtaining abortions.²

This case concerns the State's denial of public assistance to eligible women whose health is in danger. It does not concern State payment for elective abortions; nor

P.2d 779 (1981); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Women of Minnesota v. Gomez*, 542 N.W.2d 17

does it concern philosophical questions about abortion which we, as a court of law, cannot aspire to answer. We join the California Supreme Court in clarifying that “this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman’s individual decision whether or not to bear a child.”³ Indeed, as the California Supreme Court emphasized, “similar constitutional issues would arise if the Legislature . . . funded [Medicaid] abortions but refused to provide comparable medical care for poor women who choose childbirth.”⁴ The constitutional issue in this case therefore “does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.”⁵ As the California court recognized, the issue presented is “not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so.”⁶ Rather, the

(Minn.1995); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (1998), *cert. denied*, 526 U.S. 1020, 119 S.Ct. 1256, 143 L.Ed.2d 352 (1999); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993); *but see Renee B. v. State, Agency for Health Care Admin.*, 790 So.2d 1036 (Fla.2001); *Doe v. Department of Soc. Servs.*, 439 Mich. 650, 487 N.W.2d 166 (1992); *Rosie J. v. North Carolina Dep’t of Human Resources*, 347 N.C. 247, 491 S.E.2d 535 (1997); *Hope v. Perales*, 83 N.Y.2d 563, 611 N.Y.S.2d 811, 634 N.E.2d 183 (1994); *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114 (1985).

A number of lower state courts have also found that funding restrictions similar to those challenged today violated their state constitutions. *See Simat Corp. v. Arizona Cost Containment System Admin.*, No. CV1999014614 (Ariz.Super. May 23, 2000); *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134 (1986); *Roe v. Harris*, NO. 96977 (Idaho Dist. Feb. 1, 1994); *Doe v. Wright*, No. 91-CH-1958 (Ill.Cir. Dec. 2, 1994); *Clinic for Women v. Humphreys*, No. 49D12-9908-MI-1137 (Ind.Super. Oct. 18, 2000); *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont.Dist. May 19, 1995); *Planned Parenthood Ass’n v. Department of Human Resources of Oregon*, 63 Or.App. 41, 663 P.2d 1247 (1983), *aff’d on other grounds*, 297 Or. 562, 687 P.2d 785 (1984) (declining to reach constitutional issue); *Low-Income Women of Tex-*

issue is whether the State, having enacted a benefits program, may discriminate between recipients in the manner attempted by the Department of Health and Social Services (DHSS) today. We hold that it may not. **Once the State undertakes to fund medically necessary services for poor Alaskans, it may not selectively exclude from that program women who medically require abortions.**

Although the State argues that courts may not enjoin unconstitutional use of the legislative appropriations power, this proposition is unsupported by case law from any jurisdiction. The legislature’s spending power does not create license to disregard citizens’ constitutional rights. In rejecting this part of the State’s argument, we concur with every state and federal court that has considered this issue.

II. FACTS AND PROCEEDINGS

Alaska provides medical services for poor Alaskans primarily through the Medicaid program.⁷ Medicaid is a comprehensive health care program designed to provide medical assistance for all eligible poor per-

as v. Bost, 38 S.W.3d 689 (Tex.App.2000); *Doe v. Celani*, No. S81-84CnC (Vt.Super. May 23, 1986); *but see Doe v. Childers*, No. 94CI02183 (Ky.Cir. Aug. 7, 1995).

3. *Myers*, 172 Cal.Rptr. 866, 625 P.2d at 780.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See AS 47.07*; *see also 42 U.S.C. §§ 1396-1396v* (1997).

A second program, Chronic and Acute Medical Assistance (CAMA) complements Medicaid by providing some medical care for Alaskans who are poor but ineligible for Medicaid. *See AS 47.08.150*. CAMA’s predecessor, the General Relief Medical program (GRM), funded abortions for eligible women when the procedure was necessary to protect their health or when pregnancy resulted from sexual assault, sexual abuse of a minor, or incest. *See 7 AAC 47.200(a)(4)(F)* (2000); *7 AAC 47.290(8)* (2000). In 1998, after nearly 30 years of government support for medically necessary abortions through GRM, the legislature stopped funding the program and enacted CAMA as a replacement. CAMA covers essentially the same services as GRM, except that it does not fund any

sons in the state.⁸ But a DHSS regulation, 7 Alaska Administrative Code (AAC) 43.140, imposes a limit on the state's health care funding: It denies Medicaid assistance for medically necessary abortions unless a pregnant woman is at risk of dying or her pregnancy resulted from rape or incest.⁹ Because DHSS offers no other funding source for abortions, 7 AAC 43.140 ensures that a woman who medically requires an abortion will receive no assistance from the state.

The range of women whose access to medical care is restricted by the regulation is broad. According to medical evidence provided to the superior court, some women—particularly those who suffer from pre-existing health problems—face significant risks if they cannot obtain abortions. Women with diabetes risk kidney failure, blindness, and preeclampsia or eclampsia—conditions characterized by simultaneous convulsions and comas—when their disease is complicated by pregnancy. Women with renal disease may lose a kidney and face a lifetime of dialysis if they cannot obtain an abortion. And pregnancy in women with sickle cell anemia can accelerate the disease, leading to pneumonia, kidney infections, congestive heart failure, and pulmonary conditions such as embolus. Poor women who suffer from conditions such as epilepsy or bipolar disorder face a particularly brutal dilemma as a result of DHSS's regulation—medication needed by the women to control their own seizures or other symp-

abortions. Compare AS 47.08.150 with 7 AAC 47.200.

8. See AS 47.07.010. Medicaid relies on joint state-federal funding, with the federal government paying a portion of the state's costs. See 42 U.S.C. §§ 1396b(a), 1396d(b). The "Hyde Amendment" limits federal Medicaid contributions for abortions: Federal funding is available for abortions in cases of rape or incest or where the woman's life is in danger, but not for abortions necessary to protect a woman's health. See Pub.L. No. 106-554, §§ 508-509, 114 Stat. 2763 (2000); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925, 928-29 (1982) (discussing history of Hyde Amendment).

9. 7 AAC 43.140 (2000) provides in part:

(a) Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician services invoice is accompanied by certification that the

(1) life of the mother would be endangered if the pregnancy were carried to term; or

toms can be highly dangerous to a developing fetus. Without funding for medically necessary abortions, pregnant women with these conditions must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger the developing fetus by continuing medication. Finally, without state funding, Medicaid-eligible women may reach an advanced stage of pregnancy before they can gather enough money for an abortion; resulting late-term abortions pose far greater health risks than earlier procedures.

In June 1998 the plaintiffs—two medical doctors and Planned Parenthood of Alaska—filed a complaint against DHSS. They sought to enjoin enforcement of 7 AAC 43.140 and also sought a judgment declaring that the State's denial of funding for medically necessary abortions violates Alaska's Constitution. Superior Court Judge Sen K. Tan granted summary judgment in favor of Planned Parenthood. Based on this court's holding that "reproductive rights are fundamental . . . [and] include the right to an abortion,"¹⁰ the superior court concluded that 7 AAC 43.140 impermissibly interferes with Medicaid-eligible women's constitutional rights to privacy. Because the State failed to articulate a compelling state interest for this interference, the superior court permanently enjoined DHSS from enforcing the regulation "so as to deny coverage for medically necessary abortions." The State now appeals.¹¹

(2) pregnancy is the result of an act of rape or incest.

10. *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997).

11. For part of the time that this appeal was pending, DHSS continued to withhold funding for medically necessary abortions, despite the superior court's injunction. On Planned Parenthood's motion, the superior court held a show cause hearing to determine whether the Department was in contempt of court. The court heard DHSS's claim that funding was unavailable, and determined, after a "struggle", not to hold the agency in contempt. However, the court issued a new injunction to reiterate the terms of the first injunction and explicitly direct that, while DHSS retained discretion over its use of resources, it should consider state Medicaid funds available to pay for medically necessary abortions. The parties on appeal presented records from these proceedings and additional related briefing.

III. STANDARD OF REVIEW

[1, 2] We review a grant of summary judgment de novo, exercising our independent judgment to “determine whether the parties genuinely dispute any material facts and, if not, whether the undisputed facts entitle the moving party to judgment as a matter of law.”¹² On questions of constitutional law, we also apply our independent judgment.¹³ We may affirm the superior court on any ground supported by the record.¹⁴

IV. DISCUSSION

A. *The Challenged Regulation Violates Equal Protection.*

[3] By providing health care to all poor Alaskans except women who need abortions, the challenged regulation violates the state constitutional guarantee of “equal rights, opportunities, and protection under the law.”¹⁵ The State, having established a health care program for the poor, may not selectively deny necessary care to eligible women mere-

ly because the threat to their health arises from pregnancy. Because we decide this case on state constitutional equal protection grounds, we do not review the superior court’s privacy-based ruling. We do note, however, that our analysis today closely parallels that applied by many of the fifteen courts that have rejected similar restrictions.¹⁶ Although other courts’ decisions have rested on a variety of state constitutional provisions, including equal protection,¹⁷ constitutional equal-rights-for-women clauses,¹⁸ due process,¹⁹ and privacy,²⁰ the underlying logic has been the same in decision after decision: “[W]hen state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens.”²¹ As the Massachusetts Supreme Judicial Court observed, the constitutional principle at issue is straightforward: “It is elementary that ‘when a State decides to alleviate some of the hardships of poverty by

12. *M.C. v. Northern Ins. Co. of N.Y.*, 1 P.3d 673, 674–75 (Alaska 2000).

13. *See Rollins v. State, Dep’t of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 206 (Alaska 1999).

14. *See James v. McCombs*, 936 P.2d 520, 523 n. 2 (Alaska 1997); *see also Dixon v. Dixon*, 747 P.2d 1169, 1175 n. 5 (Alaska 1987).

15. Alaska Const. art. I, § 1.

16. *See supra* note 2.

17. *See, e.g., Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134, 157–59 (1986); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925, 934–37 (1982); *Planned Parenthood Ass’n v. Department of Human Resources of Oregon*, 63 Or.App. 41, 663 P.2d 1247, 1257–61 (1983), *aff’d on other grounds*, 297 Or. 562, 687 P.2d 785 (1984); *see also Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981).

18. *See, e.g., New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841, 850–57 (1998); *Doe v. Maher*, 515 A.2d at 159–62.

19. *See, e.g., Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387, 398–99 (1981); *Doe v. Maher*, 515 A.2d at 146–57.

20. *See, e.g., Women of Minnesota v. Gomez*, 542 N.W.2d 17, 26–32 (Minn.1995); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658, 664–66 (1993).

21. *Panepinto*, 446 S.E.2d at 667; *see also Myers*, 172 Cal.Rptr. 866, 625 P.2d at 781 (addressing the narrow question “whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support” and holding that it may not); *Gomez*, 542 N.W.2d at 28 (defining the “relevant inquiry” as “whether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons solely because they make constitutionally protected health care decisions with which the state disagrees,” and concluding that the state may not); *Byrne*, 450 A.2d at 937 (“[W]e hold that the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent.”); *Johnson*, 975 P.2d at 856 (“[C]ourts very rarely require the government to fund its citizens’ exercise of their constitutional rights. . . . But that is not to say that when the Department elects to provide medically necessary services to indigent persons, it can do so in a way that discriminates against some recipients on account of their gender.”).

providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.’”²² The State’s spending discretion is limited by the constitution— “[w]hile the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right.”²³

[4] Alaska’s constitutional equal protection clause mandates “equal treatment of those similarly situated;”²⁴ it protects Alaskans’ right to non-discriminatory treatment more robustly than does the federal equal protection clause.²⁵ In analyzing a challenged law under Alaska’s equal protection provision, we first determine what level of scrutiny to apply, using Alaska’s “sliding scale” standard.²⁶ The “weight [that] should be afforded the constitutional interest impaired by the challenged enactment” is “the most important variable in fixing the appropriate level of review.”²⁷ Second, we examine the State’s interests served by the challenged regulation.²⁸ If the burden placed on constitutional rights by the regulation is minimal, then the State need only show that its objectives were legitimate for the regulation to survive an equal protection challenge.²⁹ But if “the objective degree to which the challenged legislation tends to deter [exercise of constitutional rights]”³⁰ is significant, the regulation cannot survive constitutional challenge unless it serves a compelling state interest.³¹ Finally, if the State shows that its

interests justify burdening the rights of citizens, for the regulation to survive constitutional challenge the State must demonstrate that the means it has chosen to advance those goals are well-fitted to the ends, and that its goals could not be accomplished by less restrictive means.³²

[5] The regulation at issue in this case affects the exercise of a constitutional right, the right to reproductive freedom.³³ Therefore, the regulation is subject to the most searching judicial scrutiny, often called “strict scrutiny.”³⁴ We have explained in the past that such scrutiny is appropriate where a challenged enactment affects “fundamental rights,” including “the exercise of intimate personal choices.”³⁵ This court has specified that the right to reproductive freedom “may be legally constrained only when the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest.”³⁶

Judicial scrutiny of state action is equally strict where the government, by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right. In *Alaska Pacific Assurance Co. v. Brown*, we held the State to a “very high” burden to justify a statute that reduced workers’ compensation benefits paid to workers who exercised their constitutional right to leave the state.³⁷ We concluded that the challenged regulation did not meet this high standard and thus violated equal protection.³⁸ Like the regulation at issue today,

22. *Moe*, 417 N.E.2d at 401 (quoting *Maher v. Roe*, 432 U.S. 464, 469–70, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977)).

23. *Id.*

24. *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 271 (Alaska 1984).

25. *See State v. Anthony*, 810 P.2d 155, 157 (Alaska 1991).

26. *See Matanuska–Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 396 (Alaska 1997).

27. *Id.* (quoting *Alaska Pacific Assurance Co.*, 687 P.2d at 269).

28. *See id.*; *State v. Ostrosky*, 667 P.2d 1184, 1192 (Alaska 1983).

29. *See id.*

30. *Alaska Pacific Assurance Co.*, 687 P.2d at 271.

31. *See Matanuska–Susitna Borough Sch. Dist.*, 931 P.2d at 396 (quoting *Alaska Pacific Assurance Co.*, 687 P.2d at 269–70).

32. *See id.* at 396–97.

33. *See Valley Hosp. Ass’n v. Mat–Su Coalition for Choice*, 948 P.2d 963, 968–69 (Alaska 1997).

34. *See State v. Ostrosky*, 667 P.2d 1184, 1192 (Alaska 1983).

35. *Id.*

36. *Valley Hosp.*, 948 P.2d at 969.

37. 687 P.2d at 273–74.

38. *See id.* We have since applied more relaxed scrutiny where “[t]he infringement on [the] right to travel is relatively small and would not be likely to deter a person from traveling.” *Church*

the challenged statute in *Alaska Pacific Assurance Co.* did not forbid individual exercise of constitutional rights; rather, it limited the government benefits distributed to the class of individuals who exercised that right.³⁹ As we explained in that case, we look to the real-world effects of government action to determine the appropriate level of equal protection scrutiny: “The suspicion with which this court will view infringements upon [constitutional rights] depends upon . . . the objective degree to which the challenged legislation tends to deter [the exercise of those rights].”⁴⁰

[6] We reached a similar conclusion in *Alaska Gay Coalition v. Sullivan*, holding that the Municipality of Anchorage could not constitutionally withhold a public benefit based on a potential recipient’s beliefs and public expression.⁴¹ The municipality had undertaken to publish a guidebook to public and private organizations in Anchorage, but excluded the Alaska Gay Coalition from the book.⁴² We held that this exclusion violated the Coalition’s constitutional rights to equal protection under the law.⁴³ We explained:

When the Municipality decided to publish a limited informational guide to public and private local resources, it did not thereby assume the obligation of providing space to every possible group. . . . Had the Municipality deleted groups at random or used criteria not related to the nature of the particular organizations, constitutional violations may not have resulted. In deleting the Alaska Gay Coalition . . . however, appellees denied that group access to a public forum based solely on the nature of its beliefs. In so doing, they violated appellant’s constitutional rights to . . . equal protection under the law.⁴⁴

v. State, Dep’t of Revenue, 973 P.2d 1125, 1131 (Alaska 1999). In this case the likelihood of deterring exercise of the right is very high: The State’s own statistics and the findings of the superior court indicate that, under the challenged regulation, some women “will have no choice but to go forward with the pregnancy.” We therefore follow *Alaska Pacific Assurance Co.* in applying strict scrutiny.

39. See 687 P.2d at 266–67.

40. *Id.* at 271.

41. 578 P.2d 951, 960 (Alaska 1978).

Similarly, in the instant case, the State’s obligations do not depend on whether the State has undertaken to provide limitless health care services to all poor Alaskans. Rather, DHSS is constitutionally bound to apply neutral criteria in allocating health care benefits, even if considerations of expense, medical feasibility, or the necessity of particular services otherwise limit the health care it provides to poor Alaskans.

The State argues in this case that it does not provide all necessary medical care to indigent Alaskans. For support, it cites 7 AAC 43.385, a regulation that excludes from Medicaid coverage such services as medically unnecessary inpatient treatment,⁴⁵ beautifying cosmetic surgery,⁴⁶ and transplants of organs other than kidney, cornea, skin, and bone marrow.⁴⁷ This regulation has not been challenged, and the issue has not been thoroughly briefed by the parties, but the restrictions appear to relate to medical necessity, cost, and feasibility—all politically neutral criteria. Such spending limits are irrelevant to the constitutional issue raised by the State’s denial of coverage for medically necessary abortions. As the United States Supreme Court noted in *Shapiro v. Thompson*:

We recognize that the State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.⁴⁸

Like *Alaska Pacific Assurance Co.*, *Alaska Gay Coalition* establishes that under Alaska’s equal protection provision the govern-

42. *Id.*

43. *Id.*

44. *Id.*

45. 7 AAC 43.385(2), (6), (9), (11) & (12).

46. 7 AAC 43.385(4).

47. 7 AAC 43.385(17).

48. 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

ment may not allocate state benefits so as to deter citizens' exercise of constitutional rights.

In this case, it is undisputed that 7 AAC 43.140 deters women from obtaining abortions. The State itself stated that eliminating public assistance for medically necessary abortions would cause about thirty-five percent of women who would otherwise have obtained abortions to instead carry their pregnancies to term, despite the associated threat to their health. Under *Alaska Pacific Assurance Co.*, such a restriction warrants the highest degree of judicial scrutiny.

In the seminal *Shapiro v. Thompson* decision, the United States Supreme Court also strictly scrutinized—and ultimately held unconstitutional—state programs that denied benefits to citizens based on their exercise of constitutional rights.⁴⁹ *Shapiro* invalidated state laws that denied welfare benefits to persons who had moved into the jurisdiction within the past year.⁵⁰ The Court found that “the prohibition of benefits . . . creates a classification which constitutes an invidious discrimination denying [new residents] equal protection of the laws.”⁵¹ The Court held that states could not constitutionally tailor their benefits programs to deter immigration from other states: “If a law has no other

purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.”⁵²

[7, 8] Although *Shapiro* and *Alaska Pacific Assurance Co.* applied strict scrutiny to reject restrictions like the one at issue in this case, 7 AAC 43.140 would fail equal protection analysis under any standard. Under the regulation, the State grants needed health care to some Medicaid-eligible Alaskans, but denies it to others, based on criteria entirely unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state.⁵³ Thus, even if 7 AAC 43.140 did not affect constitutional privacy rights and we applied our most deferential standard of review, the regulation still could not withstand equal protection challenge. Under Alaska's rational basis standard,⁵⁴ differential treatment of similarly situated people is permissible only if the distinction between the persons “rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.”⁵⁵ DHSS provides necessary medical care to all Medicaid-eligible Alaskans except women who medically require abortions. This differential treatment lacks a fair and substantial relation to the object of the Medicaid program, and therefore violates equal protection.⁵⁶

49. 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), partly rev'd on other grounds, *Edelman v. Jordan*, 415 U.S. 651, 670–71, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

50. See *id.* at 621, 89 S.Ct. 1322.

51. *Id.* at 627, 89 S.Ct. 1322.

52. *Id.* at 631, 89 S.Ct. 1322 (internal quotations omitted) (alteration in original) (quoting *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)). This precedent was not discussed in the U.S. Supreme Court's later decision, in *Harris v. McRae*, that the Hyde Amendment was permissible under the federal constitution. 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). But in *Valley Hospital*, we explained that Alaska's broader constitutional protection at times mandates parting ways with federal precedent. See 948 P.2d at 969. In that case, we rejected the plurality opinion of *Planned Parenthood v. Casey*, 505 U.S. 833, 877–78, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), in order to declare that a woman's right to an abortion is fundamental. See *Valley Hosp.*, 948 P.2d at 969. We now join the majority of state courts in concluding that the federal Supreme Court's de-

cision in *McRae* provides inadequate protection under our state constitution.

53. In the “Purpose” section of the Medicaid statute, the legislature “declare[s] as a matter of public concern that the needy persons of this state receive uniform and high quality medical care, regardless of race, age, national origin, or economic standing.” AS 47.07.010.

54. See *Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990) (using term “rational basis” to describe lowest standard of review under Alaska's sliding scale).

55. *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (quoting *State v. Wylie*, 516 P.2d 142, 145 (Alaska 1973)). *Isakson* establishes that Alaska's rational basis review is more rigorous than that of the United States Supreme Court. *Id.*

56. We note that the United States Supreme Court reached the opposite conclusion regarding the analogous federal regulation in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). However, as noted above, federal rational basis review is a less rigorous standard

The United States Supreme Court reached a similar conclusion in *Shapiro*: although the Court invalidated states' differential treatment of similarly situated welfare recipients under strict scrutiny, it also noted that the differentiation would be deemed "irrational and unconstitutional" even under federal rational basis review.⁵⁷ In *United States Department of Agriculture v. Moreno*, the United States Supreme Court invalidated a similar restriction under rational basis scrutiny alone.⁵⁸ The Court found no rational basis for a statute denying food stamps to unrelated persons who shared a household; it therefore concluded that the statute violated equal protection.⁵⁹

Lower court decisions have applied this principle to states' allocation of health care benefits, and concluded that "classification [among recipients] must be based upon some difference between the classes which is pertinent to the purpose for which the legislation is designed."⁶⁰ A California court found that the state violated equal protection by paying for attendant services by spouses of elderly

and blind aid recipients, but denying payment for the same services by the spouses of otherwise disabled aid recipients.⁶¹ And New York's highest court held that equal protection was violated by a statute that "effectively provide[d] . . . that the aged, disabled, and blind are entitled to less public assistance than other needy persons."⁶²

DHSS's differential treatment of Medicaid-eligible Alaskans violates equal protection under rational basis review as surely as it does under strict scrutiny. Under any standard of review, "the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent."⁶³

Because 7 AAC 43.140 infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation.⁶⁴ Unless the State asserts a compelling state interest, the statute will necessarily fail constitutional scrutiny.⁶⁵ The State has failed to demonstrate such an interest in this case. It primarily defends 7 AAC 43.140 on

than Alaska's rational basis review. See *Isakson*, 550 P.2d at 362. We have explained that Alaska's broader constitutional protection at times mandates parting ways with federal precedent. See *Valley Hospital*, 948 P.2d at 969. The United States Supreme Court in *Harris v. McRae* did not consider the discriminatory allocation of government benefits cases, *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) and *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), discussed in this opinion.

57. *Shapiro*, 394 U.S. at 638, 89 S.Ct. 1322.

58. 413 U.S. at 538, 93 S.Ct. 2821.

59. See *id.* The Court noted legislative history indicating congressional intent to exclude "so[-]called 'hippies' and 'hippie communes'" from the food stamp program. *Id.* at 534, 93 S.Ct. 2821. But it concluded:

The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest. As a result, [a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the [challenged] amendment.

Id. at 534-35, 93 S.Ct. 2821 (internal quotations omitted, third alteration added).

60. *Vincent v. State*, 22 Cal.App.3d 566, 572, 99 Cal.Rptr. 410 (Cal.App.1971).

61. See *id.*

62. *Lee v. Smith*, 43 N.Y.2d 453, 402 N.Y.S.2d 351, 352, 373 N.E.2d 247, 248 (1977); see also *White v. Beal*, 555 F.2d 1146, 1149-50 (3d Cir. 1977) (finding equal protection issue sufficient to support jurisdiction, but not deciding on equal protection grounds, where remedial eye-care was available only if a person's visual impairment resulted from eye disease or pathology); *County of Orange v. Ivansco*, 67 Cal.App.4th 328, 337-38, 78 Cal.Rptr.2d 886 (1998) (finding equal protection violation where parents supporting noncustodial children received different benefits depending on the children's eligibility for AFDC); but see *Moreno v. Draper*, 70 Cal.App.4th 886, 888-89, 83 Cal.Rptr.2d 82 (1999) (analyzing same regulation as in *County of Orange* and finding no equal protection violation).

63. *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925, 937 (1982).

64. See *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 396-97 (Alaska 1997) (outlining State's burden for justifying regulations); *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 971 (Alaska 1997) ("Since the right is fundamental, it cannot be interfered with unless the interference is justified by a compelling state interest.").

65. See *Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 396-97.

the grounds that “medical and public welfare interests . . . are served by the legislature’s decision to fund childbirth.” But the regulation does not relate to funding for childbirth, and the State’s decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska’s equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State’s undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State’s interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.

The State also asserts an interest in minimizing health risks to mother and child, and submits that these interests are often closely aligned. But those interests are not aligned in precisely the situation contemplated by 7 AAC 43.140’s Medicaid exclusion: when pregnancy threatens a woman’s health. Under the U.S. Supreme Court’s analysis in *Roe v. Wade*, the State’s interest in the life and health of the mother is paramount at every stage of pregnancy.⁶⁶ And in Alaska, “[t]he scope of the fundamental right to an abortion . . . is similar to that expressed in *Roe v. Wade*.”⁶⁷ Thus, although the State has a legitimate interest in protecting a fetus, at no

point does that interest outweigh the State’s interest in the life and health of the pregnant woman.⁶⁸

Because the State has not asserted an interest sufficiently compelling to justify denying medically necessary care to women who need abortions, we need not consider the means-ends fit of the challenged regulation. We conclude that 7 AAC 43.140 violates equal protection under the Alaska Constitution.

B. *The Separation of Powers Doctrine Cannot Shield Unconstitutional Legislation.*

[9] The State argues that by holding the Medicaid program to constitutional standards, the superior court effected an appropriation of funds in violation of the separation of powers between branches of government. We disagree. Under Alaska’s constitutional structure of government, “the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.”⁶⁹ The superior court had not only the power but the duty to strike the challenged restriction and any underlying legislation if it found them to violate constitutional rights; the same duty mandates our decision today.

[10, 11] The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution.⁷⁰ In light of the separation

66. 410 U.S. 113, 163–64, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

67. *Valley Hospital*, 948 P.2d at 969.

68. *Accord Byrne*, 450 A.2d at 935 (holding, based on *Roe*, that “at no point in pregnancy may [the state’s interest in protection of potential life] outweigh the superior interest in the life and health of the mother”).

69. *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

70. See *State v. Dupere*, 709 P.2d 493, 496 (Alaska 1985), modified, 721 P.2d 638 (Alaska 1986) (“The separation of powers doctrine must be considered along with the complementary doctrine of checks and balances.”); *Alaska State-Operated Sch. Sys. v. Mueller*, 536 P.2d 99, 103

(Alaska 1975); *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1975).

The United States Supreme Court recently discussed the division of powers within the federal system of government. See *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). It reiterated the duty of courts to limit acts of legislation when those acts conflict with rights guaranteed by the Constitution, explaining that the framers of the Constitution divided power among the three branches of government

so that the Constitution’s provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature’s self-restraint. It is thus a permanent and indispensable feature of our constitutional system that the . . . judiciary is supreme in the exposition of the law of the Constitution.

Id. at 1753 n. 7, 120 S.Ct. 1740 (internal quotations and citations omitted).

of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature.⁷¹ But under the same doctrine, we “cannot defer to the legislature when infringement of a constitutional right results from legislative action”; legislative intent is not paramount when that intent conflicts with the constitution.⁷² And the mere fact that the legislature’s appropriations power underlies Medicaid funding cannot insulate the program from constitutional review. As the California Supreme Court observed in rejecting nearly identical restrictions on abortion funding, the State’s claim would remove all constitutional restraints from legislative exercise of the spending power:

There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper.⁷³

Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens’ constitutional rights. Indeed, constitutional legal rulings commonly affect state programs and funding. Many of the most heralded constitutional decisions of the past century have, as a practical matter, effectively required state expenditures. In *Green v. County School Board*, the United States Supreme Court ordered effective desegregation of public schools;⁷⁴ in *Gideon v. Wainwright*, it required funding of counsel for indigent criminal defendants;⁷⁵ and in *Shapiro v. Thompson*, it required states to give newcomers to the jurisdiction equal welfare benefits.⁷⁶ In each of these cases, a judicial decision up-

holding constitutional rights required state expenditures to support those rights. As appellee doctors and Planned Parenthood point out, the funding implications and separation of powers issue in this case would be identical if the State relied on other suspect criteria, such as race, to deny Medicaid benefits. Following the State’s argument, the exclusion of one ethnic group—or inclusion only of other specified groups—within legislative Medicaid appropriations would be immunized from constitutional review, merely because the legislature had exercised its spending power. We emphatically reject such a claim. Like the Supreme Court decisions listed above, today’s holding is squarely within the authority of the court, not in spite of, but *because* of, the judiciary’s role within our divided system of government.

Our conclusion that the separation of powers doctrine supports today’s decision is firmly supported by twenty-one other courts that have considered a state’s exclusion of medically necessary abortions from state-funded health care programs.⁷⁷ The State has not identified a single state or federal case holding that the separation of powers precludes a court from ordering the state to provide equal funding for women whose health is endangered by pregnancy.⁷⁸ Courts that have explicitly considered separation of powers challenges to holdings like the one we reach today have dismissed the challenges in no uncertain terms. The Massachusetts Supreme Judicial Court, for example, wrote:

[W]e have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. [We reject] the

71. See *Abood v. League of Women Voters*, 743 P.2d 333, 338 (Alaska 1987); *Malone*, 650 P.2d at 356–57.

72. *Valley Hosp. Ass’n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 972 (Alaska 1997).

73. *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981).

74. 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

75. 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

76. 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), *partly rev’d on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 670–71, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

77. See *supra* note 2.

78. A single justice in a concurring opinion stated that the judiciary may not, under the equal protection clause of Michigan’s constitution, require legislative funding for medically necessary abortion. *Doe v. Department of Soc. Servs.*, 439 Mich. 650, 487 N.W.2d 166, 182–83 (1992) (Levin, J., concurring). To our knowledge, this is the sole dissenting voice on this issue.

argument that either the doctrine of separation of powers or the political question doctrine requires that result. Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have a duty, certainly since *Marbury v. Madison*, to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. “This,” in the words of Mr. Chief Justice Marshall, “is of the very essence of judicial duty.”⁷⁹

We agree with this articulation of the court’s fundamental powers and duties.

A federal case, *State of Georgia v. Heckler*, also directly supports our conclusion.⁸⁰ In that case, the state of Georgia sought reimbursement from the federal Department of Health and Human Services (HHS) for money spent by the state to fund medically necessary abortions. Although the Court of Appeals for the Eleventh Circuit ultimately denied Georgia’s claim, it emphatically rejected HHS’s argument that because Congress had not appropriated money for medically necessary abortions, a district court could not compel HHS to pay the claims.⁸¹ As the Eleventh Circuit court noted, the statute could preclude payment only if an interpreting court so determined.⁸² “There is no doubt,” the *Heckler* court concluded, “that if this Court decided that these payments were legally required, HHS would be authorized to make them.”⁸³

We agree with the Eleventh Circuit: It is legally indisputable that a trial court order requiring state compliance with constitutional

79. *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387, 395 (1981) (internal citations omitted); see also *Committee to Defend Reprod. Rights v. Cory*, 132 Cal.App.3d 852, 183 Cal.Rptr. 475, 478 (1982) (“When there is an unconstitutional restriction in an existing appropriation, it offends no constitutional principle to direct that the disputed payments be made from funds already appropriated for the same general purpose.”); *Clinic for Women, Inc. v. Humphreys*, No. 49D12-9908-MI-1137, Slip Op. at 12 (Ind.Super., Oct. 18, 2000) (“If the challenged enactments violate the state Constitution, the Court can grant relief even if doing so means that state funds will be spent in a manner not explicitly approved by the Legislature. The Court has the power to shape appropriate remedies and the Legislature has a duty to appropriate funds to meet its constitutional obligations.”); *Low-Income Women v. Bost*, 38

standards does not violate the separation of powers doctrine.

V. CONCLUSION

The manner in which the State allocates public benefits is subject to constitutional limitation under Alaska’s equal protection provision. The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care. It may not deny medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program. Moreover, the DHSS regulation in this case discriminatorily burdens the exercise of a constitutional right. Because we conclude that denial of Medicaid assistance to poor women who medically require abortions violates equal protection, we AFFIRM the decision of the superior court.



L.C.H., Appellant,

v.

T.S., Appellee.

No. S-9387.

Supreme Court of Alaska.

Aug. 17, 2001.

Step-granddaughter brought action against step-grandfather, claiming childhood

S.W.3d 689, 702 (Tex.App.2000) (“The relief sought by Low-Income Women—funding medically necessary abortions—cannot be characterized as a new appropriation. They do not ask for a new appropriation of funds to the Medical Assistance Program. Rather, they seek declaratory and injunctive relief against unconstitutional restrictions placed on the use of funds already appropriated pursuant to a pre-existing law authorizing funds to be used for health care under the program.”).

80. 768 F.2d 1293 (11th Cir.1985).

81. See *id.* at 1295-96.

82. See *id.* at 1296.

83. *Id.*

203 Ariz. 454

SIMAT CORP. d/b/a Abortion Services of Phoenix; Arizona Reproductive Medicine & Gynecology, Ltd., Robert H. Tami, M.D.; Family Planning Associates Medical Group; Joel B. Bettigole, M.D.; Damon S. Raphael, M.D.; Tucson Woman's Clinic; and William A. Meyer, Jr., M.D., Plaintiffs—Appellees,

v.

ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM, and Phyllis Biedess, in her capacity as Director of AHCCCS, Defendants—Appellants.

No. CV-01-0324-PR.

Supreme Court of Arizona.

Oct. 22, 2002.

Reconsideration Denied Dec. 1, 2002.

Physicians who provided abortion services sued state for declaratory and injunctive relief with respect to statute prohibiting public funding of medically necessary abortions unless abortion was necessary to save life of mother. The Superior Court, Maricopa County, No. CV 99-014614, Kenneth L. Fields, J., entered summary judgment for physicians, issued permanent injunction against enforcement of statute, and ordered state to fund medically-necessary abortions to same extent that it funded other pregnancy-related services. State appealed. The Court of Appeals, 200 Ariz. 506, 29 P.3d 281, reversed and remanded. Physicians petitioned for review. After granting review, the Supreme Court, Feldman, J., held that the state could not refuse to fund abortions for indigent women whose health was threatened by pregnancy.

Trial court opinion affirmed in part and remanded, and opinion of Court of Appeals vacated.

Berch, J., dissented and filed opinion in which Jones, C.J., joined.

1. Constitutional Law ⇌205(1)

In the usual privileges and immunities case under the Arizona Constitution, legislative regulation that results in disparate treat-

ment of an affected class is upheld so long as there is a legitimate state interest to be served and the legislative classification rationally furthers that interest. A.R.S. Const. Art. 2, § 13.

2. Constitutional Law ⇌205(1)

A level of means-end scrutiny is occasionally required for discriminatory regulations that affect classifications such as those based on gender and illegitimacy of birth, for purposes of privileges-and-immunities clause in Arizona constitution; to uphold statutes under this test, a court must find the interest served by governmental action is important and the means adopted to achieve the state's goals are reasonable, not arbitrary, and have a fair relation to those goals. A.R.S. Const. Art. 2, § 13.

3. Constitutional Law ⇌205(1)

Under privileges-and-immunities clause in Arizona constitution, when a right that is to be affected by legislation is considered fundamental or the class affected is suspect, discriminatory regulation will be upheld only if there is a compelling state interest to be served, and the regulation is necessary and narrowly tailored to achieve the legislative objective. A.R.S. Const. Art. 2, § 13.

4. Abortion and Birth Control ⇌.5

Constitutional Law ⇌205(2)

Under privileges and immunities clause of the Arizona constitution, the state could not refuse to pay for abortions for indigent women whose health was endangered by pregnancy, where it had already funded abortions for indigent women whose lives were endangered, or who were victims of rape or incest. A.R.S. Const. Art. 2, § 13; A.R.S. § 35-196.02.

West Codenotes

Held Unconstitutional

A.R.S. § 35-196.02

LaVoy & Chernoff, P.C. by Christopher A. LaVoy, Mark D. Chernoff, Phoenix, and Center for Reproductive Law & Policy by Bebe J. Anderson, Hillary Schwab, New York, for

Plaintiffs–Appellees, Simat Corporation, Abortion Services of Phoenix; Arizona Reproductive Medicine & Gynecology, Ltd.; Robert H. Tamis, M.D.; Family Planning Associates Medical Group; Joel B. Bettigole, M.D.; Damon S. Raphael, M.D.; Tucson Woman’s Clinic; and William A. Meyer, Jr.

Johnston & Kelly, P.L.C. by Logan T. Johnston, III, Phoenix, for Defendants–Appellants, Arizona Health Care Cost Containment System and Phyllis Biedess.

Paul Benjamin Linton, Northbrook, Illinois, and Center for Arizona Policy by Lynden L. Munsil, Gary S. McCaleb, Scottsdale, for Amicus Curiae Members of the Arizona Legislature.

Greenberg Traurig, L.L.P. by Leigh Anne Ciccarelli, Phoenix, for Amici Curiae Southern Arizona Chapter of the National Lawyers Guild and Arizona Civil Liberties Union.

Wilmer, Cutler & Pickering by M. Carolyn Cox, Washington, D.C., and Bonnie L. Booden, Phoenix, for Amicus Curiae Southern Arizona People’s Law Center and National Network of Abortion Funds.

OPINION

FELDMAN, Justice.

¶1 We granted review to decide whether the state constitution permits the state and the Arizona Health Care Cost Containment System (AHCCCS) to refuse to fund medically necessary abortion procedures for pregnant women suffering from serious illness while, at the same time, funding such procedures for victims of rape or incest or when the abortion is necessary to save the woman’s life.

¶2 The court of appeals held that AHCCCS’ funding scheme was constitutionally permitted. *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 200 Ariz. 506, 512 ¶20, 29 P.3d 281, 287 ¶20 (App.2001). Having ordered supplemental briefing and heard oral argument, we now conclude, as have the great majority of other states that have considered this question, that insofar as the state scheme permits funding of abortions for one class of pregnant women, the state constitution will not permit

it to deny funding for others for whom abortions are medically necessary to save the mother’s health.

¶3 We are aware, of course, of the controversy surrounding any issue pertaining to abortion. We therefore think it appropriate to state what this case is *not* about. It is not about the right to an abortion. The right to choose was established by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 152–53, 93 S.Ct. 705, 726–27, 35 L.Ed.2d 147 (1973). It is not about whether the Arizona Constitution provides a more expansive abortion choice than the federal constitution—that issue is not presented. It is not about whether the state must fund abortions for non-therapeutic or contraceptive purposes or, for that matter, any purpose—those issues are not presented. The narrow and only question decided is this: Once the state has chosen to fund abortions for one group of indigent, pregnant women for whom abortions are medically necessary to save their lives, may the state deny the same option to another group of women for whom the procedure is also medically necessary to save their health?

FACTS

¶4 Appellees (the doctors) are providers of medical services, including abortions, in the field of obstetrics and gynecology. AHCCCS is a state agency that provides Medicaid services to qualified Arizona women with incomes at or below 140 percent of the federally set poverty level. Each of the doctors is a provider to AHCCCS patients, among others. All of the doctors have and have had patients suffering from medical conditions that are serious but not immediately life-threatening. To treat many of these conditions, an abortion must be performed before the necessary therapy can be administered. An example is cancer, for which chemo- or radiation therapy ordinarily cannot be provided if the patient is pregnant, making an abortion necessary before proceeding with the recognized medical treatment. Other conditions for which the administration of drug or other therapy regimens must at times be suspended during pregnancy include heart disease, diabetes, kidney disease, liver disease, chron-

ic renal failure, asthma, sickle cell anemia, Marfan's syndrome, arthritis, inflammatory bowel disease, gall bladder disease, severe mental illness, hypertension, uterine fibroid tumors, epilepsy, toxemia, and lupus erythematosus. In many of the women suffering from these diseases, suspension of recognized therapy during pregnancy will have serious and permanent adverse effects on their health and lessen their life span.¹

¶5 AHCCCS will not fund abortion services unless the procedure "is necessary to save the life of the woman having the abortion." A.R.S. § 35-196.02. AHCCCS will, however, fund abortion services for victims of rape or incest. See AHCCCS Medical Policy Manual, Ch. 400—Medical Policy for Maternal and Child Health, Policy 410—Maternity Care Services. The regulations are broader than the statute but required by federal law as a condition of obtaining federal funds. AHCCCS does not challenge the validity of the regulations.

PROCEDURAL BACKGROUND

¶6 The doctors' complaint asked for declaratory and injunctive relief on the grounds that the funding policy that prevents medically necessary abortions for AHCCCS patients violates various provisions of the Arizona Constitution. Among these are the privacy clause (art. II, § 8), the due process clause (art. II, § 4), and the equal privileges and immunities clause (art. II, § 13). The doctors and the state filed cross-motions for summary judgment. The trial judge denied the state's motion and granted the doctors' motion. He enjoined AHCCCS from enforcing A.R.S. § 35-196.02 in cases

in which the abortion procedure was medically necessary to protect the health of the mother and ordered the state to fund medically necessary abortions to the same extent it funds other services for pregnant women. Minute Entry, May 19, 2000, at 5.

¶7 In reaching this result, the judge first noted that the doctors did not claim their patients had a right to state-funded abortions, but stated that once the state did fund necessary medical care for indigents, the Arizona Constitution required it to do so in a neutral manner. *Id.* at 2. The judge then noted that in the case of abortions, AHCCCS uses "completely different standard[s] of medical necessity." *Id.* at 3. Instead of the general definition of certification that services are medically necessary, for abortion procedures there must be certification that the pregnancy is the product of rape or incest or is necessary to save the life of the woman. *Id.*; AHCCCS Medical Policy Manual, *supra*. The judge therefore found the AHCCCS program is not neutral with respect to reproductive choice and its policy violates fundamental rights under Arizona's constitution. Minute Entry at 5.

¶8 The judge concluded that under our case law, the privacy clause, article II, § 8, gives each Arizona woman the fundamental right to decide on her "own plan of medical treatment." *Id.* at 4 (citing *Rasmussen v. Fleming*, 154 Ariz. 207, 215, 741 P.2d 674, 682 (1987)). Thus, the judge determined, statutes or agency regulations that impair or infringe on such rights must be examined with strict scrutiny and can be upheld only when essential to serve a compelling state interest. *Id.* Finding that the state had not established that it had "a compelling State

1. We do not pretend to any special medical training or expertise. Because summary judgment was granted, the record does not indicate the extent to which abortion may be required but unavailable to address serious diseases that the parties agree, threaten the health of some pregnant women. A moment's thought enables one to reach certain assumptions about cancer therapy. A moment's research reveals, for instance, that lupus may be safely treated without abortion in many if not most cases but is a serious complication in women whose disease becomes active during pregnancy. See *Lupus: A Patient Care Guide For Nurses and Other Health Professionals, Patient Information Sheet # 11, Pregnancy and*

Lupus, THE NATIONAL INSTITUTE OF ARTHRITIS AND MUSCULOSKELETAL AND SKIN DISEASES, available at <http://www.niams.nih.gov/hi/topics/lupus/lupus-guide/chppis11.htm> (January 26, 1999).

Marfan's syndrome is a disease that enlarges the heart and is a serious complication for pregnant women. How well pregnancy may be tolerated evidently depends on the degree of aortic enlargement. If the root of the aorta is greatly enlarged, the risk of maternal and fetal death approaches fifty percent. See Denise M. Chism and the RGA Publishing Group, THE HIGH-RISK PREGNANCY SOURCEBOOK, available at <http://my.webmd.com/content/article/1680.51819> (copyright 1998).

interest that must be advanced by endangering indigent women” through denial of medical treatment necessary to preserve their health, the judge held the statutory and regulatory provisions at issue unconstitutional. *Id.* at 4–5.

¶ 9 The court of appeals reversed, holding that the statutory scheme does not violate any Arizona constitutional provision, and remanded the case to the superior court for entry of summary judgment in favor of the state. *Simat Corp.*, 200 Ariz. at 512 ¶ 20, 29 P.3d at 287 ¶ 20. The court relied on *Harris v. McRae*, a case in which the United States Supreme Court upheld the constitutionality of the so-called Hyde Amendment, a statute that prohibits the use of federal funds under the Medicaid program of Social Security to reimburse states for the cost of abortions. 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784 (1980). The Hyde Amendment contains exceptions to the prohibition that are similar to but somewhat broader than those contained in A.R.S. § 35–196.02. The exceptions are when the mother’s life “would be endangered” if the abortion were not performed and when the “procedures [are] necessary for the victims of rape or incest. . . .” Pub.L. 96–123 § 109, 93 Stat. 923 (1979).

BACKGROUND

¶ 10 In *McRae*, the Supreme Court held that the states participating in the Medicaid system were not required by federal law to fund therapeutic abortions for which federal reimbursement was unavailable because of the Hyde Amendment. 448 U.S. at 309–10, 100 S.Ct. at 2684. This holding, of course, applies to Arizona. Nothing in the federal law requires Arizona to fund abortions other than in accordance with the Medicaid statutes and regulations, as modified by the Hyde Amendment.

¶ 11 The Supreme Court then held that the Hyde Amendment’s funding restrictions did not violate a patient’s right of choice as described in *Roe* or the religion clauses of the First Amendment. *Id.* at 315–19, 100 S.Ct. at 2687–89. We reach the same result under the Arizona Constitution. Whatever right of choice may be provided by our constitution is irrelevant to the issue here. Even if our

state constitution gives our citizens a right of choice, it certainly does not give them the right to have the government fund those choices.

¶ 12 The more serious constitutional challenge in *McRae* was the question of equal protection. The *McRae* Court found no violation of the equal protection clause because there was no substantive constitutional right impaired by the Hyde Amendment’s funding restrictions. The right, recognized in *Roe*, to choose abortion was left unimpaired because Medicaid patients were free to make that choice. They were only deprived of the ability to require the government to fund their choice, and this, the Court said, did not deprive patients of a substantive, fundamental constitutional right. *Id.* at 325–26, 100 S.Ct. at 2692–93. Because indigency was not a suspect class, there was no discriminatory effect that would require strict scrutiny. *Id.* at 323–24, 100 S.Ct. at 2691–92. Thus, the Court applied the rational relationship test to the provisions of the Hyde Amendment and found that its restrictions were rationally related to the government’s legitimate interest in protecting potential life. *Id.* at 325, 100 S.Ct. at 2692.

DISCUSSION

A. Arizona Constitution—privacy rights and equal protection

¶ 13 We do not believe that *McRae* is dispositive of the issue that arises under the Arizona Constitution. Unlike the federal constitution, our constitution confers an explicit right of privacy on our citizens. See Ariz. Const. art. II, § 8 (“No person shall be disturbed in his private affairs . . .”). Further, the Arizona Constitution expressly prohibited the legislature from denying to some citizens those privileges granted to others. See Ariz. Const. art. II, § 13 (“No law shall be enacted granting to any citizen [or] class of citizens . . . privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”). Our court of appeals addressed privacy, noting that nothing “in Article 2, § 8 suggests that the framers of the Arizona Constitution intended the right to privacy . . . to create a right of Arizona

citizens to subsidized abortions . . .” *Simat Corp.*, 200 Ariz. at 510 ¶ 10, 29 P.3d at 285 ¶ 10. This statement is certainly inarguable, and we do *not* hold that Arizona’s right of privacy entitles citizens to subsidized abortions.²

¶ 14 This case arose because the legislature chose to provide medically necessary treatment to one class of pregnant citizens and to withhold medically necessary treatment from another class of pregnant citizens. While a woman who requires chemotherapy for breast cancer may have no right to have the state finance the cost of such therapy, she does have the right to have the state treat her in a neutral manner as compared to the manner in which it treats others in the same class. AHCCCS provides “medically necessary” health care to those who meet stringent standards to qualify for state-provided services. A.R.S. §§ 36-2901(4), 36-2907(A). The question we must answer is whether the state, once it undertakes to provide medically necessary treatment to AHCCCS patients, can deny such treatment to one group of patients simply because they choose to exercise a constitutionally protected right. To state the issue is to answer it. Having undertaken to provide medically necessary health care for the indigent, the state must do so in a neutral manner.

B. Disparate treatment—level of scrutiny

[1-3] ¶ 15 We have long recognized that our equal privileges and immunities clause, article II, § 13, allows the government to enact discriminatory legislation so long as the burden on the affected class may be justified. With us, as with the equal protection analysis used by the United States Supreme Court, the degree of justification required depends, of course, on the nature of the right burdened. In the usual case, legis-

2. However, we have found that our citizens have rights under that clause to care for their health and to choose or refuse the treatment they deem best for themselves. *Rasmussen*, 154 Ariz. at 215, 741 P.2d at 682 (the “individual’s right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual’s home or automobile.”). In *Rasmussen*, we found that the constitutional right given by article II, § 8 to control one’s course of medical treatment al-

lative regulation that results in disparate treatment of an affected class is upheld so long as there is a legitimate state interest to be served and the legislative classification rationally furthers that interest. *Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984). A second level of scrutiny is occasionally required, however, for discriminatory regulations that affect classifications such as those based on gender and illegitimacy of birth. To uphold statutes under this test, a court must find the interest served by governmental action is important and the means adopted to achieve the state’s goals are reasonable, not arbitrary, and have a fair relation to those goals. *Id.*; see also *State v. Gray*, 122 Ariz. 445, 447, 595 P.2d 990, 992 (1979); *Church v. Rawson*, 173 Ariz. 342, 349, 842 P.2d 1355, 1362 (App.1992). Finally, when the right that is to be affected is considered fundamental or the class affected is suspect, discriminatory regulation will be upheld only if there is a compelling state interest to be served and the regulation is necessary and narrowly tailored to achieve the legislative objective. *Kenyon*, 142 Ariz. at 78-79, 688 P.2d at 970-71.

¶ 16 The regulation in question discriminates between two classes of women: those who require recognized and necessary medical treatment to save their lives and those who require such treatment to save their health and perhaps eventually their lives. Arizona citizens enjoy a fundamental right to choose abortion, a right settled by the United States Supreme Court under the federal constitution. Our citizens also enjoy a right to equal treatment under our own constitution. When the right in question is fundamental, our constitution requires that a strict scrutiny analysis be applied. *Kenyon*, 142 Ariz. at 79, 688 P.2d at 971; *Arizona Downs v. Arizona Horsemen’s Found.*, 130 Ariz. 550, 555,

allowed a person in a chronic vegetative state to choose suspension of treatment and death over continued life; the state could therefore not prevent the exercise of that right. 154 Ariz. at 217, 741 P.2d at 684. This is a right not found, or at least not yet found or recognized, under federal law. *But see Doe v. Bolton*, 410 U.S. 179, 213, 93 S.Ct. 739, 755, 35 L.Ed.2d 201 (1973) (Douglas, J., concurring and urging constitutional protection for “freedom to care for one’s health and person”).

637 P.2d 1053, 1058 (1981); *see also Hunter Contracting Co. v. Superior Court*, 190 Ariz. 318, 320, 947 P.2d 892, 894 (App.1997). Thus, A.R.S. § 35-196.02 can be upheld only if it serves a compelling state interest and is narrowly tailored and necessary to achieve that interest.

C. Compelling state interest

¶ 17 The compelling interest advanced by the state and the legislative amici is the state's legitimate interest in preserving and protecting potential life and promoting childbirth. We agree that the state has such an interest. So, too, did the court of appeals in holding there was a rational basis for the statutory scheme because the state has a "legitimate interest in protecting unborn life and promoting childbirth." *Simat Corp.*, 200 Ariz. at 512 ¶ 18, 29 P.3d at 287 ¶ 18.

¶ 18 The court of appeals applied only the rational basis test because, in part, it concluded that Arizona's statutory scheme "is not predicated on a constitutionally suspect classification" and the right affected is not fundamental. *Id.* at 511 ¶ 18, 29 P.3d at 286 ¶ 18. In reaching the latter conclusion, the court relied on a United States Supreme Court decision holding that the Hyde Amendment's restrictions did not impinge on a fundamental right because it saw no impairment of the "fundamental right [to abortion] recognized in *Roe v. Wade*]." *Maher v. Roe*, 432 U.S. 464, 474, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977). *McRae* was decided on the same basis. 448 U.S. at 317, 100 S.Ct. at 2688. The appeals court also determined that *Rasmussen* and the privacy rights of article II, § 8 controlled the decision in this case. At least for now we will put aside that analysis.

¶ 19 The court of appeals relied on a portion of *Maher* in which the Supreme Court held that when the state adopted restrictions similar to Arizona's, it had only "made childbirth a more attractive alternative, thereby influencing the woman's decision. . . ." *Id.* at 511 ¶ 12, 29 P.3d at 286 ¶ 12 (quoting *Maher*, 432 U.S. at 474, 97 S.Ct. at 2383). We do not agree with this view. The state has undertaken to provide necessary medical services for indigent women and therefore provide

care for both serious illness and pregnancy. Thus, pregnant women may receive needed prenatal care; women suffering from cancer or other serious conditions may receive such care for those conditions as proper medical standards may require; but some pregnant women may receive neither because the state has decided that its interest in promoting childbirth takes precedence over the need to save a woman's health. Given the Hyde-like restrictions embodied in A.R.S. § 35-196.02, we believe the state has done much more than make childbirth a more attractive alternative. For many women, childbirth cannot be an attractive alternative in such a predicament. Having undertaken to provide necessary medical care for pregnant women, the state has withheld care from one class of women who need it badly, while at the same time providing such care—prenatal and therapeutic—to others, some of whom who are not in the dire predicament of the women here in question. We are asked to uphold this disparate treatment under a constitutional provision that prohibits the enactment of any law "granting to any citizen, class of citizens, . . . privileges . . . which, upon the same terms, shall not equally belong to all citizens . . ." Ariz. Const. art. II, § 13.

D. Resolution

[4] ¶ 20 It is at this point that we conclude that the laws in question cannot survive strict scrutiny. While the state certainly has a legitimate interest in protecting the fetus and promoting childbirth, we cannot see how that is any more compelling than the state's interest in protecting the health of pregnant women afflicted with serious disease by treating health problems before they become terminal. Promoting childbirth is a legitimate state interest, but it seems almost inarguable that promoting and actually saving the health and perhaps eventually the life of a mother is at least as compelling a state interest. The Supreme Court, in fact, held that the state's interest in promoting childbirth is not even compelling until the fetus is viable. *Roe*, 410 U.S. at 165-66, 93 S.Ct. at 733.

¶ 21 In cases subsequent to *McRae*, moreover, the United States Supreme Court has

recognized that the state has a compelling interest in preserving the health of expectant mothers, so that state restrictions on abortions must give way to the state's interest in preserving the health of pregnant women. *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992) (plurality opinion). The Court held that while the state's interest in protecting potential life is strong after fetal viability, even then it must give way to the more compelling interest of protecting a woman's health. *Id.* at 872, 112 S.Ct. at 2817–18.

¶ 22 The Court recently went even further, holding unconstitutional a state prohibition on second trimester “partial birth abortion.” *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). The statute allowed such abortions when “necessary to save the life of the mother . . . endangered by . . . illness” but contained no such exception for situations in which the mother's health was endangered. *See* Neb.Rev.Stat. Ann. § 28–328(1) (Supp.1999). The Court found the statute unconstitutional for lack of “any exception ‘for the preservation of the . . . health of the mother.’” *Stenberg*, 530 U.S. at 930, 120 S.Ct. at 2609 (quoting *Casey*, 505 U.S. at 837, 112 S.Ct. at 2799). These cases, of course, do not touch on the state's funding obligation, but they do unequivocally express the Supreme Court's view as to the state's compelling interest in preserving women's health. It is a view that we would share even without *Casey* and *Stenberg*.³

¶ 23 Refusing abortions and thus preventing administration of the needed therapy for seriously ill women may promote childbirth and protect the fetus, but in some cases it will undoubtedly destroy the health and perhaps eventually the life of the mother. In such a situation, the state is not simply influencing a woman's choice but actually conferring the privilege of treatment on one class and withholding it from another. Under the

3. We cannot explain the decision in *Harris*, on which the dissent relies. It is difficult to reconcile that decision with the basic teaching of *Roe v. Wade*, and we question that *Harris* could survive the more recent opinions in *Stenberg*, *Casey*, and *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990). Whereas *Stenberg* was invalidated because a statute permitted an exception only for the life, but not the

circumstances presented in this case, we cannot find any compelling interest in so doing. Surely, a woman's right to choose preservation and protection of her health, and therefore, in many cases, her life, is at least as compelling as the state's interest in promoting childbirth. The restrictions in the AHCCCS funding scheme thus not only endanger the health of women being treated in their program but prevent those women from choosing a medical procedure, abortion, when necessary to preserve their health.

¶ 24 The state would perhaps have a better case if it withheld funding for all abortions. But, given the right of choice announced in *Roe*, once the state allows abortion funding if immediately necessary to save the mother's life, the state's interest in promoting childbirth cannot be considered sufficiently compelling to justify refusing to protect the health of a seriously ill woman. It can justify the distinction in classifications and privileges even less when the law allows abortion of a healthy fetus when the pregnancy results from rape or incest, even though in many cases that mother's life or physical health may not be endangered by carrying the pregnancy to term.

¶ 25 Thus, we conclude that the laws and regulations in question violate the provisions of article II, § 13 of the Arizona Constitution, which prohibit the enactment of any law granting any citizen privileges that shall not on the same terms “equally belong to all citizens.” Because this answer is so clear, we do not reach the question of whether the greater privacy right contained in article II, § 8 of Arizona's constitution would yield the same result. *See* ¶ 13, *supra*. In reaching the conclusion we do today, we do not intimate that the state may not have valid reasons for discriminating in the type of medical treatment provided AHCCCS patients. We hold only that it must justify such discrimina-

health, of the mother, the AHCCCS regulations and A.R.S. § 35–196.02 do not simply lack a health-preservation exception, they actually remove the state's health-preservation obligation for one category of AHCCCS patients. In any event, regardless of the Supreme Court's interpretation of the federal constitution, we are bound by oath and obligation to examine our own state constitution.

tion. The only justification advanced here—and none other is apparent to us—is protection of the fetus and promotion of childbirth. But as we have said, this cannot be considered so compelling as to outweigh a woman’s fundamental right to choose and the state’s obligation to be even-handed in the design and application of its health care policies.

E. Holdings in other states

¶ 26 Given the issue before us, it is important, we think, to test our conclusions by considering the views of other states. Courts in at least twenty other states have considered questions of public funding of a medically necessary abortion and have made decisions based on the law of their state. Fifteen of those courts have refused to follow *McRae*, deciding that statutes or constitutions in their state provided protections that required them to invalidate restrictions similar to the Hyde Amendment and to reject *McRae*.⁴ Some of those decisions are not published or are at a local trial court level.⁵ They are therefore not cited as precedents here although they have been by other courts. See, e.g., *Low-Income Women v. Bost*, 38 S.W.3d 689, 696 (Tex.App.2000) (review granted Aug. 23, 2001). We do not feel a survey of each of those cases is needed to support our conclusion, but a brief discussion of published opinions is helpful.⁶ One court noted the tendency of finding state constitutional and statutory rights on these issues even though *McRae* found none.

4. In addition to the seven cases mentioned in the text of this section, see *Roe v. Harris*, No. 96977 (Idaho Dist.Ct. Feb. 1, 1994), result approved by *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403, 405 (1996); *Clinic for Women, Inc. v. Humphreys*, No. 49D12-9908-MI-1137 (Ind.Super.Ct. Oct. 18, 2000), review granted sub nom. *Hamilton v. Clinic for Women, Inc.* (2001); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (1998), cert. denied, 526 U.S. 1020, 119 S.Ct. 1256, 143 L.Ed.2d 352 (1999); *Planned Parenthood Ass’n v. Dep’t of Human Resources*, 63 Or.App. 41, 663 P.2d 1247 (1983); *Women’s Health Ctr. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993).

5. The following unpublished opinions reached the same results: *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont.Dist.Ct. May 26, 1994); *Doe v. Celani*, No. S81-84CnC (Vt.Super.Ct. May 26, 1986).

The majority of states that have examined similar Medicaid funding restrictions have determined that their state statutes or constitutions offer broader protection of individual rights than does the United States Constitution and have found that medically necessary abortions should be funded if the state also funds medically necessary expenses related to childbirth.

Id.

¶ 27 The Minnesota Supreme Court described the question it saw and defined it sharply:

The relevant inquiry, then, is whether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons solely because they make constitutionally protected health care decisions with which the state disagrees.

Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 28 (Minn.1995).

¶ 28 Commenting on a state argument that it has a compelling interest in prospective or potential life that justified the funding ban on abortions for indigent women whose lives were not in immediate danger, the New Jersey Supreme Court said:

Although that is a legitimate state interest, at no point in a pregnancy may it outweigh the superior interest in the life and health of the mother. Yet the funding restriction gives priority to potential life at the expense of maternal health. From a differ-

6. Unpublished cases were cited in briefs filed in this court and in the lower court. While we have taken judicial notice of the decisions in those cases only for the purpose of thoroughness, we remind counsel of Rule 28(c), Ariz.R.Civ.App.P., that provides in part, “Memorandum decisions shall not be regarded as precedent nor cited” except in certain circumstances not relevant in this case. A memorandum decision is “a written disposition of a case not intended for publication.” Rule 28(a)(2), Ariz.R.Civ.App.P. Our court of appeals discussed memorandum decisions and said, “We find no reason for out-of-state memorandum decisions to be more citable than in-state memorandum decisions.” *Walden Books Co. v. Dep’t of Revenue*, 198 Ariz. 584, 589 ¶ 23, 12 P.3d 809, 814 ¶ 23 (App.2000).

ent perspective, the statute deprives indigent women of a governmental benefit for which they are otherwise eligible, solely because they have attempted to exercise a constitutional right.

Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925, 935 (1982) (citations and quotations omitted) (emphasis added).

¶ 29 That same general health concern was echoed by the Connecticut Supreme Court when it held a right to abortion was covered by that state's right to privacy and said:

This right to privacy also encompasses the doctor-patient relationship regarding the woman's health, including the physician's right to advise the woman on the abortion decision based upon her well-being. Finally, the right to make decisions which are necessary for the preservation and protection of one's health, if not covered within the realm of privacy, stands in a separate category as a fundamental right protected by the state constitution.

Doe v. Maher, 40 Conn.Supp. 394, 515 A.2d 134, 150 (1986) (citations omitted).

¶ 30 The Alaska Supreme Court measured a statute similar to ours against its state's equal protection clause:

[A] woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person.

State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 913 (Alaska 2001).

¶ 31 In 1981 Massachusetts was one of the earliest states to consider public funding of abortion. We agree with the Supreme Judicial Court's holding:

[T]he Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this

area, government is not free to "achieve with carrots what (it) is forbidden to achieve with sticks."

Moe v. Secretary of Administration & Finance, 382 Mass. 629, 417 N.E.2d 387, 402 (1981) (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 933 n. 77 (1978)).

¶ 32 Later that same year, when the California Supreme Court held funding bans were unconstitutional, the court asked rhetorically:

If the state cannot directly prohibit a woman's right to obtain an abortion, may the state by discriminatory financing indirectly nullify that constitutional right? Can the state tell an indigent person that the state will provide him with welfare benefits only upon the condition that he join a designated political party or subscribe to a particular newspaper that is favored by the government? Can the state tell a poor woman that it will pay for her needed medical care but only if she gives up her constitutional right to choose whether or not to have a child?

Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779, 798 (1981).

¶ 33 Because state constitutions and state statutes vary, the reasons for striking down abortion funding bans also vary. The principle on which the ban was overturned in the various states thus stemmed from privacy rights, due process, equal protection, statutory language, and in some cases from the state's Equal Rights Amendment. However, there was consistency in the view that funding bans that discriminate against abortions medically necessary only to preserve the health of indigent women were unsustainable once the state had undertaken to provide medically necessary care.

COMMENTS ON THE DISSENT

¶ 34 The nature of this case makes it necessary to comment on several points raised in the dissent. First, the dissent believes the state would treat an abortion necessary to save the health of a pregnant woman suffering from a disease such as cancer the same

as an abortion necessary to save the life of a woman. Dissent at ¶ 53. One would hope that the dissent is correct on this point, but we proceed on the contrary premise because the state has not asserted such an argument but instead argues that the distinction is valid. The trial judge granted summary judgment in favor of the doctors, and the court of appeals reversed, ordering summary judgment in favor of the state; thus, there is no record from which to determine how AHCCCS applies A.R.S. § 35–196.02 in practice. Because AHCCCS has not argued that an abortion necessary to save a woman’s health is, in many cases, also necessary to save her life, we must presume it is not applying the statute in that manner.

¶ 35 Second, the dissent assumes this opinion holds that the Arizona Constitution provides a greater right of choice than that provided by the United States Constitution. Dissent at ¶ 55. We reach no conclusion about whether the Arizona Constitution provides a right of choice, let alone one broader than that found in the federal constitution. We need not address the question because Arizona’s citizens, like those of other states, are entitled to assert the right to choose as defined and articulated by the United States Supreme Court.

¶ 36 Third, citing *Maher*, the dissent questions “whether the Arizona constitution requires payment for medically necessary abortions.” Dissent at ¶ 50; *see also* ¶¶ 47, 55. But this is not the point. Whether or not it is required to do so, *Arizona has decided to fund abortions*. Having made such decision, the question put to us is whether the Arizona Constitution permits the state to distinguish between those women for whom an abortion is necessary to save their life and those for whom it is medically necessary to save their health and thus prolong their life. Applying strict scrutiny to the fundamental right to choose, we must conclude that the state’s legitimate interest in promoting childbirth is not so compelling as to permit it to effectively destroy an indigent woman’s opportunity to choose to take medically necessary steps to preserve her health.

¶ 37 Finally, the dissent is concerned that today’s decision will require AHCCCS to

provide “greatly expanded medical care” to all AHCCCS patients. Dissent at ¶ 52 n. 4. This opinion does not so hold. We only hold that the state cannot deprive a woman of the right of choice by conditioning the receipt of benefits upon a citizen’s willingness to give up a fundamental right.

CONCLUSION

¶ 38 The issue, and the answer, become clear if we reverse the current rule to suppose an AHCCCS rule that provides state care for an abortion necessary to save a woman’s life but denies medically necessary care to a woman who elects to continue a pregnancy. That rule could no more withstand scrutiny than can the current rule that denies coverage for medically necessary abortion when the state provides that standard of care to women who continue a pregnancy.

¶ 39 The court of appeals’ opinion is therefore vacated. The trial court’s judgment is affirmed insofar as it precludes application of A.R.S. § 35–196.02 to situations in which therapeutic abortions are medically necessary to enable doctors to administer treatment necessary to address serious health problems of pregnant AHCCCS patients.

¶ 40 The trial judge also required that AHCCCS fund medically necessary abortions to the same extent that it funds other pregnancy-related services. We believe this requirement is too broad insofar as it might be interpreted to require funding of abortions for non-therapeutic reasons or when not medically necessary to address a pregnant woman’s serious health issues.

¶ 41 Our decision is entirely based on the Arizona Constitution and Arizona cases interpreting the relevant provisions of that constitution. Federal cases are cited only for illustrative or comparative purposes and have not been relied on in reaching our conclusions. *See Michigan v. Long*, 463 U.S. 1032, 1040–41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). Even though our decision is rooted in our own constitution, we feel it is important to note that our decision puts Arizona firmly with the majority of states that have considered the issue of the treatment of

women who experience the unfortunate coinciding circumstances of being both indigent and ill while pregnant.

¶42 The case is remanded to the trial court for further proceedings consistent with this opinion.

CONCURRING: RUTH V. MCGREGOR, Vice Chief Justice, and THOMAS A. ZLAKET, Justice (retired).

BERCH, Justice, dissenting.

¶43 I respectfully dissent.

¶44 The question before this court is whether a state statute is unconstitutional. In deciding such questions, we usually indulge the presumption that state statutes are constitutional, *see Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 148, 800 P.2d 1251, 1256 (1990), and construe ambiguous statutes, if possible, so as to harmonize them with the constitution. *Schechter v. Killingsworth*, 93 Ariz. 273, 282, 380 P.2d 136, 142 (1963).

¶45 The statute at issue here has not been construed by the courts of this State. The majority opinion assumes that the conditions listed in ¶4 of this opinion, if left untreated for the duration of a pregnancy, will not jeopardize the mother's life, and therefore abortion procedures to terminate the pregnancies that impede treatment for those conditions would not be covered by AHCCCS. It seems clear to me that, if confronted by specific fact situations, the court may well find several of the procedures covered, specifically in those situations in which failure to treat the condition jeopardizes the mother's life, even if not immediately.¹ If this question

is in doubt, this court should refrain from engaging in a constitutional adjudication on this less than fully developed record.

¶46 Even assuming, however, that the statute would not allow funding for abortions to allow treatment for some of the conditions referenced in ¶4, I have still another point of divergence with the majority position: The question before us has been resolved by the United States Supreme Court, as respects the federal constitutional claims, in a manner adverse to Plaintiffs' position. Thus, unless the Arizona Constitution compels payment for the abortion procedures in question, the State need not fund them. The majority concludes that the Arizona Constitution does compel the State to fund this medical procedure. I do not agree.

¶47 Because Arizona courts have always followed the United States Supreme Court's equal protection and due process analysis,² the court of appeals relied upon that Court's analyses in *Harris* and *Maher* of issues similar to the one now before us. In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671 (1980), the Court held that a federal statute prohibiting states from using federal funds for abortions, except to protect the life of the mother and in cases of rape or incest, did not violate any federal constitutional right. It concluded that a woman's right to choose to undergo an abortion "did not translate into a [federal] constitutional obligation of [the State] to subsidize abortions." *Id.* at 315, 100 S.Ct. 2671. The Court distinguished "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," noting that "[c]onstitutional concerns

1. This case was brought by health care providers, rather than by any woman whose decision to abort might have been affected by the state law at issue. Thus, while the record contains unspecific claims of AHCCCS denials of requests to pay for abortions, no claims of improper denial have been brought before the courts of this State and there are no concrete facts for adjudication presented in this case. I also note that the statute at issue was passed in 1980 and wonder why the nineteen-year delay in bringing suit.

2. *See Valley Nat'l Bank v. Glover*, 62 Ariz. 538, 554, 159 P.2d 292, 299 (1945) (observing that state and federal equal protection clauses "have for all practical purposes the same effect"); *Mar-*

tin v. Reinstein, 195 Ariz. 293, 313, ¶62, 987 P.2d 779, 799 (App.1999) (finding "no difference in underlying rationale that would militate in favor of interpreting the Arizona Equal Privileges and Immunities Clause differently from its federal counterpart"); *see also State v. Melendez*, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992) ("The touchstone of due process under both the Arizona and federal constitutions is fundamental fairness."); *Martin*, 195 Ariz. at 316, ¶76, 987 P.2d at 802 (finding "no support for the proposition that the Arizona Constitution provides greater [due process] protection than the United States Constitution").

are greatest when the State attempts to impose its will by force of law; the State's power to *encourage* actions deemed to be in the public interest is necessarily far broader." *Maher v. Roe*, 432 U.S. 464, 475–76, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (emphasis added). Thus, the federal constitution requires that while a state may not interfere with a woman's right to choose to have an abortion, it need not fund abortions.

¶ 48 The Court reasoned as follows in upholding a funding prohibition similar to Arizona's:

[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher [v. Roe]*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977): although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an

entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.

Harris, 448 U.S. at 316–18, 100 S.Ct. 2671 (footnotes omitted).³

¶ 49 The United States Supreme Court has also analyzed whether the constitutional right to choose entitled women to Medicaid payments for abortions that were not medically necessary. *Maher*, 432 U.S. at 464, 97 S.Ct. 2376. In holding that it did not, the Court explained that the abortion right recognized in *Roe v. Wade* and its progeny did not prevent the State from making a "value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U.S. at 474, 97 S.Ct. 2376. The Court reasoned that

3. The majority finds it "difficult to reconcile [Harris] with the basic teaching of *Roe v. Wade*." *Supra* n. 3. Yet *Harris* was decided seven years after *Roe* and while the Supreme Court has con-

tinued to decide abortion cases, it has not overruled or questioned the holdings of *Harris* or *Maher*.

[t]he Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Id.

¶ 50 In sum, the Supreme Court has concluded that (1) neither the Due Process Clause nor the Equal Protection Clause requires states to fund abortions, and (2) whether to do so is a policy choice appropriately left to the states. Therefore, if there is to be any state payment for therapeutic abortions for indigent women in Arizona, the right to such payment must derive from the vote of the Arizona legislature or be compelled by the constitution of this State. The Arizona legislature has chosen not to fund abortions that are not necessary to save the life of the mother, *see* A.R.S. § 35-196.02, leaving for decision only whether the Arizona Constitution requires payment for medically necessary abortions.

¶ 51 The majority concludes that it does. That obligation, according to the majority, emanates from a fundamental duty under the Equal Privileges and Immunities Clause to have the State act in a neutral manner with respect to providing medical treatment. *See id.* ¶ 14. Yet despite the acknowledged fundamental nature of the federal right to choose, the Supreme Court scrutinized statutes affecting abortion funding only to determine whether they had a rational basis, find-

ing the classifications at issue in such an analysis—gender and wealth—not suspect categories. *See Harris*, 448 U.S. at 322–23, 100 S.Ct. 2671; *Maher*, 432 U.S. at 470, 97 S.Ct. 2376. This court, however, has chosen to apply the strict scrutiny test to this funding decision. Construing Arizona’s Privileges and Immunities Clause in a manner at odds with the traditional analysis, which has always been to interpret “the equal protection clauses of the Fourteenth Amendment and the state constitution” in similar fashion, constitutes a dramatic departure from prior Arizona case law. *See Glover*, 62 Ariz. at 554, 159 P.2d at 299; *Martin*, 195 Ariz. at 313, ¶ 62, 987 P.2d at 799. Calling the right to neutral funding fundamental, the majority of necessity applies the strict scrutiny test, which precipitates the finding of unconstitutionality. To narrow the question to the *funding of abortion*, as the Supreme Court has done, reveals that the pivotal question—funding, not choice—has never been defined as fundamental and therefore the applicable standard of review is not strict scrutiny, but rather the rational basis standard. The statute meets that standard.

¶ 52 The Arizona legislature has the power to enact policy and funding laws for the general welfare. *See McKinley v. Reilly*, 96 Ariz. 176, 179, 393 P.2d 268, 270 (1964); *State v. Harold*, 74 Ariz. 210, 216, 246 P.2d 178, 181 (1952). This power encompasses the right to draw lines regarding funding. We must therefore presume that the legislature has determined that the public’s safety, health, or moral well being is best served by not prohibiting or restricting—but not funding—abortions unless necessary to save the life of the mother.⁴ This is the type of policy choice routinely entrusted to the legislature and, unless the choice is unlawful or unconstitutional, our jurisprudence and notions of separation of powers require that we defer to the legislature’s choice. *See Republic Inv. Fund I*, 166 Ariz. at 147–48, 800 P.2d at 1255–56; *Harold*, 74 Ariz. at 216, 246 P.2d at 181. If

4. On the limited record before us, we cannot know whether the AHCCCS program contains other exceptions to funding of which we are now unaware, such as limiting care of potentially non-eligible individuals to “emergency care,” or precluding experimental, risky, or greatly expen-

sive procedures. The newly discovered fundamental right to have the State fund chosen medical procedures in a neutral manner through AHCCCS may well call these exceptions into question and require funding for greatly expanded medical care for indigent Arizonans.

the public disagrees with the choices of its elected representatives, its recourse is to turn those representatives out of office. It is not for this court to make such policy decisions.

¶ 53 In enacting A.R.S. § 35-196.02, the legislature was undoubtedly aware of the Supreme Court's holding that a woman has a fundamental right in the first trimester of pregnancy to choose to abort a fetus, *Roe v. Wade*, 410 U.S. at 113, 93 S.Ct. 705, unhampered by "interference from the State." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (citing *Roe v. Wade*, 410 U.S. at 164, 93 S.Ct. 705). It was probably also aware that the Court had recognized, in this contentious policy area, the State's "important and legitimate interest in . . . the potentiality of human life," *Planned Parenthood v. Casey*, 505 U.S. 833, 875-76, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quoting *Roe v. Wade*, 410 U.S. at 162, 93 S.Ct. 705), at all stages of development. *Id.* at 876, 112 S.Ct. 2791 (O'Connor, Kennedy, and Souter, JJ.); 944 (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part). This court's analysis minimizes the State's interest in potential human life and ignores the fact that abortion differs in a profound way from other kinds of medical treatment. In no other "treatment" is a potential life terminated. Thus, the State has a heightened interest in protecting life that the majority dismisses too lightly.⁵

¶ 54 I have a final concern: Generally, when a court finds a statute unconstitutional, it strikes the offending provision, clause, or word. In this case, however, the court has taken the liberty of simply rewriting the statute, substituting the word "health" for the legislature's chosen term, "life." This

5. The majority criticizes the legislature for acting inconsistently in protecting fetal life because it allows payment for abortions to terminate pregnancies resulting from rape or incest. *Op.* at ¶ 24. The record reflects, however, that the rape and incest exception is embodied in an administrative definition of "medical necessity." It is not found in A.R.S. § 35-196.02. While that exception may be necessary to comply with requirements for federal reimbursement, it appears to violate Arizona law. *See* Pub. Law 106-554, §§ 508-09, 3

court has cautioned others against construing "the words of a statute to mean something other than what they plainly state." *Canon School Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994). We should follow our own admonition. "Life" is plainly stated and has an ascertainable meaning, one that differs from "health." This court has also previously warned that "[i]t is only where there is no doubt as to the intention of those who frame [a] . . . statute that a court may modify, alter or supply words that will . . . permit 'particular provisions' to be read or construed otherwise than 'according to their literal meaning.'" *Id.* (quoting *Bd. of Supervisors v. Pratt*, 47 Ariz. 536, 542-43, 57 P.2d 1220, 1223 (1936) (citations omitted)). That is not the case here. The alteration by this court amends the statute to mean something clearly not intended by the legislature.

¶ 55 In sum, I see nothing in the Arizona Constitution that provides greater protection for a woman's right to choose abortion than is provided by the federal constitution, nor do I see any provision compelling payment for the procedure. Whatever one may think of the merits of the statute at issue, it embodies the type of policy choice that is routinely entrusted to the legislature, an elected body, to make. It is not the province of the court to substitute its judgment for that of the public's elected representatives.

¶ 56 I would affirm the judgment of the court of appeals.

CONCURRING: CHARLES E. JONES,
Chief Justice.



USCCAN (2000) at Stat. 2763A-70 (requiring states to provide the benefits authorized by federal law in order to qualify for federal funds). *But cf.* A.R.S. § 35-196.02 (allowing state funding of abortions only to save the life of the mother); *KAET v. Ariz. State Pers. Bd.*, 195 Ariz. 173, 175, ¶ 9, 985 P.2d 1032, 1034 (1999) (holding that agency powers are limited by the agency's enabling legislation; agency rule that conflicts with a statute must yield).

COMMITTEE TO DEFEND REPROD. RIGHTS v. MYERS Cal. 779

Cite as, Cal., 625 P.2d 779

172 Cal.Rptr. 866

**COMMITTEE TO DEFEND REPRODUC-
TIVE RIGHTS et al., Plaintiffs
and Appellants,**

v.

**Beverlee A. MYERS, as Director, etc., et
al., Defendants and Respondents.**

**COMMITTEE TO DEFEND REPRODUC-
TIVE RIGHTS et al., Petitioners,**

v.

**Kenneth CORY, as State Controller, et
al., Respondents.**

**COMMITTEE TO DEFEND REPRODUC-
TIVE RIGHTS et al., Petitioners,**

v.

**Jesse M. UNRUH, as State Treasurer,
etc., et al., Respondents.**

S.F. 24069, S.F. 24053, and S.F. 24192.

Supreme Court of California.

March 20, 1981.

Rehearing Denied April 22, 1981.

Various welfare and health care rights organizations, and others, brought suit against the Director of the State Health Department, challenging implementation of provisions of the state's Budget Act of 1978 which restricts circumstances under which public funds would be authorized to pay for abortions for Medi-Cal recipients. The Superior Court, City and County of San Francisco, Ira A. Brown, Jr., J., denied preliminary injunction, and plaintiffs appealed. While suit was pending, Budget Acts of 1979 and 1980 were enacted and plaintiffs filed original petitions for mandate to restrain enforcement of those acts. Alternative writ was issued and enforcement of funding restrictions stayed pending resolution of controversy. The Supreme Court, Tobriner, J., held that Budget Acts of 1978, 1979 and 1980 excluding funds for payment of elective abortions are unconstitutional.

Reversed as to S.F. 24069; alternative writ discharged and peremptory writ denied in S.F. 24053; peremptory writ issued in S.F. 24192.

Bird, C. J., filed concurring opinion.

Richardson, J., filed dissenting opinion in which Clark, J., joined.

Vacating, 93 Cal.App.3d 492, 156 Cal. Rptr. 73.

1. Constitutional Law ⇐11

The Supreme Court has the constitutional obligation to interpret the safeguards guaranteed by the California Constitution in a manner consistent with governing principles of California law. West's Ann.Const. Art. 1, § 24.

2. Social Security and Public Welfare
⇐241

Although state has no constitutional obligation to provide medical care to the poor, once the state has decided to make such benefits available, it bears the heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise their constitutional right. West's Ann.Const. Art. 1, § 1.

3. Social Security and Public Welfare ⇐4

In order for the state to justify a scheme involving conditional benefit programs, the state must demonstrate that conditions imposed relate to purposes of legislation which provide the benefit, that utility of conditions imposed clearly outweigh resulting impairment of constitutional rights, and that there are no less offensive alternatives available to achieve the state's objective.

4. Constitutional Law ⇐82(10)

Social Security and Public Welfare
⇐241.95

Budget Acts of 1978, 1979, and 1980 excluding funds for payment of elective abortions are unconstitutional in view of fact that restrictions imposed on poor women's right of procreative choice does not relate to purposes of Medi-Cal program administering funds to the poor for medical treatment, in light of fundamental and intimate nature of constitutional right of pro-

creative choice and severe impairment of that right that would in practice result from statutory restrictions at issue, utility of imposing such restrictions does not manifestly outweigh the resulting impairment of constitutional rights, and in view of fact that the statutory scheme does not serve the state interest in providing medical care for indigents in a manner least offensive to the woman's right of procreative choice. West's Ann. Welfare & Inst. Code, §§ 14000, 14132(a, b); St.1978, c. 359, § 2; St.1979, c. 259, § 2; St.1980, c. 510, § 2; West's Ann.Const. Art. 1, § 1.

Patti Roberts, Tamara Dahn, Michelle Murphy, Barbara Weiner, Abigail English, Pauline Tesler, Vilma Martinez, Carmen Estrada, Linda Hanten, Nancy L. Davis, Joan Messing Graff, Margaret C. Crosby, Alan L. Schlosser, Amitai Schwartz, San Francisco, Fred Okrand, Mark D. Rosenbaum, Terry Smerling, Los Angeles, and Ralph Santiago Abascal, Sacramento, for plaintiffs and appellants and for petitioners.

Dorothy T. Lang, Sacramento, Sylvia Drew Ivie, Ashburn, Diane Morrison, Roberta Ranstrom, Barbara Steinhardt, Sacramento, William G. Harris, Larson, Weinberg & Harris, James R. Abernathy II, San Francisco, Jan G. Levine, Los Angeles, Alletta d'A. Belin, Timothy B. Flynn, Carlyle W. Hall, Jr., A. Thomas Hunt, John R. Phillips, Los Angeles, David E. Willett and Hassard, Bonnington, Rogers & Huber, San Francisco, as amici curiae for plaintiffs and appellants.

George Deukmejian and Evelle J. Younger, Attys. Gen., Charlton G. Holland and Asher Rubin, Deputy Attys. Gen., for defendants and respondents.

Burton Shamsky, Shamsky & Vreeland, Solana Beach, George D. Crook, Richard J. Morillo, Ochoa, Holderness, Barbosa & Crook, Los Angeles, Robert A. Destro, James Bopp, Jr., and Francis X. Driscoll, Walnut Creek, as amici curiae for defendants and respondents.

TOBRINER, Justice.

Plaintiffs, representing indigent women throughout the state, challenge the constitutionality under the California Constitution of provisions in the 1978, 1979, and 1980 California Budget Acts that limit Medi-Cal funding for abortions. Although the acts differ in minor respects, all afford full funding of medical expenses incurred by indigent women who decide to bear a child, but, except in a few limited circumstances, deny funding to those indigent women who choose to have an abortion. Plaintiffs contend that this selective or discriminatory public funding scheme violates a number of distinct constitutional guarantees, in particular the women's rights of privacy, due process, and equal protection of the laws.

At the outset, to dispel certain misconceptions that have appeared in this case, we must clarify the precise, narrow legal issue before this court. First, this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child. Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature—as a population control measure, for example—funded Medi-Cal abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.

Second, contrary to the suggestion of the defendants and the dissent, the question presented is not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so; plaintiffs do not contend that the state would be required to

fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child. Rather, we face the much narrower question of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support.

In defending the constitutionality of the provisions in question, the Attorney General relies most prominently upon the recent decision of the United States Supreme Court in *Harris v. McRae* (1980), — U.S. —, 100 S.Ct. 2671, 65 L.Ed.2d 784 (hereafter *McRae*). In *McRae*, the Supreme Court, by a closely divided vote (five to four), upheld restrictions on federal Medicaid funding of abortions similar to those in the state acts before us. As the Attorney General acknowledges, however, the *McRae* case did not present any question under the California Constitution and consequently the justices of the high court neither addressed nor resolved the question of the compatibility of such a statutory scheme with our state constitutional guarantees. It is this question of state constitutional law, not resolved by *McRae*, which we must decide in the present case.

In addressing this issue, we shall explain initially that the analysis utilized by the majority of the United States Supreme Court in *McRae* differs substantially from the analysis mandated by the controlling California authorities and thus cannot be followed here. In *McRae*, the five-justice majority acknowledged that the governmental program provided unequal treatment in the distribution of public benefits solely on the basis of how an individual woman exercised her basic constitutional right of procreative choice. The court concluded, however, that the federal Constitution required no special justification for such discriminatory treatment so long as the program placed no new obstacles in the path of the woman seeking to exercise her constitutional right. (100 S.Ct. at p. 2688.)

By contrast, the governing California cases, discussed at length below, have long held that a discriminatory or restricted government benefit program demands special scrutiny whether or not it erects some new or additional obstacle that impedes the exercise of constitutional rights. In a series of cases reaching back more than three decades, this court has developed and applied a three-part test for evaluating the constitutionality of statutory schemes, like the program at issue here, that condition the receipt of benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approves.

In order to sustain the constitutionality of such a scheme under the California Constitution, the state must demonstrate (1) "that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege"; (2) that "the utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights"; and (3) that there are no "less offensive alternatives" available for achieving the state's objective. (*Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505-507, 55 Cal. Rptr. 401, 421 P.2d 409.)

As we shall see, when measured against this established standard, the statutory scheme at issue is plainly unconstitutional. First, the Budget Act restrictions are antithetical to the purpose of the Medi-Cal program—to provide indigents with access to medical services comparable to that enjoyed by more affluent persons. Second, the benefits of the funding restrictions do not manifestly outweigh the impairment of the constitutional rights; the fiscal advantages of the restrictions are illusory, and the asserted state interest in protecting fetal life cannot constitutionally claim priority over the woman's fundamental right of procreative choice. Third, the Medi-Cal program as qualified by the Budget Act restrictions clearly does not aid poor women who choose to bear children in a manner least offensive to the rights of those who choose abortion. Accordingly, we conclude that the challenged restrictions cannot stand.

1. *Background of the present litigation*

The California Medi-Cal program funds "physician, hospital or clinic outpatient, [and] surgical center" services, as well as "inpatient hospital services," for "recipients of public assistance [and] medically indigent aged and other persons." (Welf. & Inst. Code, §§ 14000, 14132, subs. (a) & (b).) No one disputes that abortions performed by a physician, whether in a hospital, clinic, or office, are medical services which, in the absence of special funding restrictions, would be funded under the foregoing provisions. Prior to 1978, the Medi-Cal program paid for legal abortions obtained by Medi-Cal recipients.

The California Legislature, however, inserted into the 1978, 1979, and 1980 Budget Acts provisions restricting Medi-Cal funding of abortions. (Stats.1978, ch. 359, § 2, item 248, pp. 823-825; Stats.1979, ch. 259, § 2, item 261.5, pp. ———; Stats. 1980, ch. 510, § 2, item 287.5, pp. ———)

1. The 1979 and 1980 Budget Acts restrict Medi-Cal abortion funding by specifying that none of the funds appropriated for Medi-Cal shall be used to pay for abortions, except under any of the following circumstances:

"(a) Where the life of the mother would be endangered if the fetus were carried to full term.

"(b) Where the pregnancy is ectopic.

"(c) Where the pregnancy results from an act punishable under Section 261 of the Penal Code, and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.

"(d) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and the female is under 18 years of age, and the abortion is performed no later than the first trimester, provided the female's parent or guardian or, if none, an adult of the female's choice is notified at least five days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the State Director of Health Services.

"(e) Where the pregnancy results from an act punishable under Section 285 of the Penal Code, and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.

Although the 1978 enactment differs slightly from the 1979 and 1980 restrictions, all in essence provide funding for abortions only (1) when pregnancy would endanger the mother's life; (2) when pregnancy would cause severe and long-lasting physical health damage to the mother; (3) when pregnancy is the result of illegal intercourse (rape, incest, or unlawful intercourse with a minor); or (4) when abortion is necessary to prevent the birth of severely defective infants.¹

Before the 1978 restrictions could take effect, plaintiffs filed this suit against Beverlee A. Myers, Director of the State Department of Health Services, to enjoin her from enforcing the restrictions. The trial court upheld the funding restrictions and refused injunctive relief. Plaintiffs appealed from the judgment, the Court of Appeal affirmed in a two-to-one decision, and we granted a hearing to decide the important constitutional issue presented.²

While the suit attacking the 1978 Budget Act restrictions was pending before us on

"(f) Where it is determined by prenatal studies limited to amniocentesis, fetal blood sampling, fetal angiography, ultrasound, X-ray, or maternal blood examination that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoglobinopathies, sex-linked diseases, and infectious processes.

"(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment."

The primary difference between the 1978 act and the later acts is that the 1978 act provided funding for abortions to avoid severe and long-lasting physical health damage only when that damage arose from 10 enumerated medical conditions. Since the Legislature deleted that language in the 1979 and 1980 enactments, the question of the validity of the 1978 language is moot.

2. Because both the trial court and Court of Appeal issued temporary stay orders, the restrictive provisions of the 1978 act were never implemented.

petition for hearing, that act expired, to be replaced by the essentially identical provisions of the 1979 Budget Act. Plaintiffs thereupon filed an original petition in this court (*Committee to Defend Reproductive Rights v. Cory*) seeking mandate to bar enforcement of the 1979 act. We granted an alternative writ and stayed enforcement of the restrictions pending resolution of the merits.

The 1979 Budget Act expired June 30, 1980. On July 16 the Legislature enacted the 1980 Budget Act, which imposed restrictions on abortion funding identical to those in the 1979 act. Plaintiffs promptly filed an original petition for mandate (*Committee to Defend Reproductive Rights v. Unruh*) to restrain enforcement of the 1980 act. We issued an alternative writ and stayed enforcement of the funding restrictions pending resolution of the controversy.³

2. *Our court bears an independent obligation to resolve plaintiffs' claims under the California Constitution on the basis of the governing state constitutional principles.*

In these actions, plaintiffs contend that the statutes violate a number of provisions of both the California and United States Constitutions. As already noted, in defending the challenged budget restrictions the Attorney General relies most heavily on the United States Supreme Court's recent decision in *McRae*, in which a five-justice majority concluded that similar funding restrictions in the federal Medicaid program did not violate the provisions of the *federal*

3. Since the 1978 and 1979 Budget Acts have expired, the two suits seeking to restrain enforcement of these laws are technically moot. The action involving the 1980 law presently in effect is sufficient to present all issues which the parties seek to raise. The trial record and most of the briefs, however, were filed in connection with the 1978 and 1979 proceedings. Under these circumstances, we concluded that it would be appropriate to consolidate the three actions for purposes of both oral argument and opinion.

4. Following this reasoning, we have on numerous occasions construed the California Constitution as providing greater protection than that

Constitution. *McRae*, of course, did not resolve or even address the question of the validity of such a statutory scheme under the California Constitution.

Under these circumstances, we think it important to reiterate the basic principles of federalism which illuminate our responsibilities in construing our state Constitution. In emphasizing, in *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550, 119 Cal.Rptr. 315, 531 P.2d 1099, "the incontrovertible conclusion that the California Constitution is, and always has been, a document of independent force," our court explained that "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. . . . The federal Constitution was designed to guard the states as sovereignties against potential abuses of centralized government; state charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials." Accordingly, we affirmed in *Brisendine* that state courts, in interpreting constitutional guarantees contained in state constitutions, are "*independently responsible* for safeguarding the rights of their citizens." (Italics added.) (*Id.* at p. 551, 119 Cal.Rptr. 315, 531 P.2d 1099.)⁴

[1] Contrary to the Attorney General's rhetoric, such independent construction does not represent an unprincipled exercise of

afforded by parallel provisions of the United States Constitution. A partial listing of such holdings includes: *People v. Pettingill* (1978) 21 Cal.3d 231, 145 Cal.Rptr. 861, 578 P.2d 108 (protection against self-incrimination); *People v. Hannon* (1977) 19 Cal.3d 588, 138 Cal.Rptr. 885, 564 P.2d 1203 (right to speedy trial); *Serrano v. Priest* (1976) 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (equal protection); *People v. Disbrow* (1976) 16 Cal.3d 101, 127 Cal.Rptr. 360, 545 P.2d 272 (protection against self-incrimination); *People v. Longwill* (1975) 14 Cal.3d 943, 123 Cal.Rptr. 297, 538 P.2d 753 (search of arrestees); *People v. Brisendine, supra*, 13 Cal.3d 528, 119 Cal.Rptr. 315, 531 P.2d 1099 (same); *Curry v. Superior Court* (1970) 2

power, but a means of fulfilling our solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law. As we explained very recently in *People v. Chavez* (1980) 26 Cal.3d 334, 352, 161 Cal.Rptr. 762, 605 P.2d 401: “[J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. [Citations.] In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.”⁵

It is from this perspective that we must analyze plaintiffs’ claims that the statutes in question are invalid under the California Constitution.

3. *Although the state has no constitutional obligation to provide medical care to the poor, a long line of California decisions establishes that once the state has decided to make such benefits available, it bears a heavy burden of justification in defending any provision which withholds such benefits from otherwise qualified individuals solely because they choose to exercise a constitutional right.*

[2] In analyzing the constitutionality of the challenged statutory scheme, we start

Cal.3d 707, 87 Cal.Rptr. 361, 470 P.2d 345 (double jeopardy); *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 14 Cal.Rptr. 657, 363 P.2d 889 (same); *People v. Martin* (1955) 45 Cal.2d 755, 290 P.2d 855 (vicarious exclusionary rule).

5. In 1972, the people adopted article I, section 24, of the California Constitution which provides that the rights “guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” This declaration of constitutional independence, as we stressed in *People v. Brisendine*, *supra*, 13 Cal.3d 528, 551, 119 Cal.Rptr. 315, 531 P.2d

from the premise, not challenged by the Attorney General, that under article I, section 1 of the California Constitution all women in this state—rich and poor alike—possess a fundamental constitutional right to choose whether or not to bear a child. Our court first recognized the existence of this constitutional right of procreative choice in *People v. Belous* (1969) 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, four years before the United States Supreme Court in *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d, 147 acknowledged the existence of a comparable constitutional right under the federal Constitution.

In 1972, moreover, the people of this state specifically added the right of “privacy” to the other inalienable rights of individuals enumerated in article I, section 1 of the state Constitution.⁶ The federal constitutional right of privacy, by contrast, enjoys no such *explicit* constitutional status. Consequently, in *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436, this court recently refused to rely on federal precedent to restrict the ambit of the California right of privacy. The federal right, we noted, “appears to be narrower than what the voters approved in 1972 when they added ‘privacy’ to the California Constitution.” (27 Cal.3d at p. 130, fn. 3, 164 Cal.Rptr. 539, 610 P.2d 436.)

The Attorney General concedes that under article I, section 1 the state has no authority directly to prohibit rich or poor women from exercising their right of procreative choice as they see fit. He argues, however, that the state violates no constitu-

1099, “did not originate at [the] election; indeed the voters were told the provision was a mere reaffirmation of existing law.”

6. Article I, section 1 (as reworded by constitutional amendment in 1974) presently provides: “All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy.”

tional precept when it does not directly prohibit the protected activity but simply declines to extend a public benefit—in this case publicly funded medical care—to those who choose to exercise their constitutional right in a manner the state does not approve and does not wish to subsidize.

This court faced a nearly identical legal contention in a different factual context over 30 years ago in *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, 171 P.2d 885. In *Danskin* the state had established a general program under which private organizations were permitted to utilize public school buildings for public meetings, but had structured the program so as to exclude “subversive elements” from the use of such school property. In defending the statutory scheme, the government argued, as the Attorney General does here, that since the state was under no constitutional obligation to make school buildings available to private organizations, it was free to permit or withhold access to such facilities as it saw fit in order to avoid “subsidizing” the exercise of subversive ideas it did not wish to encourage.

In *Danskin*, Justice Traynor—writing for the court—rejected the state’s argument in no uncertain terms: “The state is under no duty to make school buildings available for public meetings. [Citations.] If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding

such meetings. [Citations.] Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is use of state property. [Citations.] [¶] Since the state cannot compel ‘subversive elements’ directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building.” (28 Cal.2d at pp. 545–546, 171 P.2d 885.

In the more than three decades that have passed since the *Danskin* decision, both this court and the California Courts of Appeal have applied the legal principles underlying *Danskin* in a wide variety of factual settings, involving a host of different “public benefit” programs which conditioned the receipt of benefits on the waiver or forfeiture of a broad range of constitutional rights. As these numerous decisions teach, the *Danskin* principles apply whether the public benefit program at issue is access to a public forum,⁷ public employment,⁸ welfare benefits,⁹ public housing,¹⁰ unemployment benefits,¹¹ or the use of public property¹² and whether the constitutional right singled out for discriminatory treatment is the right of free speech,¹³ or, as in this case,

7. See e. g., *Danskin, supra*; *American Civil Liberties Union v. Board of Education* (1961) 55 Cal.2d 167, 10 Cal.Rptr. 647, 359 P.2d 45; *Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 Cal.2d 51, 64 Cal.Rptr. 430, 434 P.2d 982.

8. See, e. g., *Fort v. Civil Service Commission* (1964) 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385; *Kinnear v. City etc. of San Francisco* (1964) 61 Cal.2d 341, 38 Cal.Rptr. 631, 392 P.2d 391; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409; *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 561, 55 Cal.Rptr. 505, 421 P.2d 697; *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 64 Cal.Rptr. 409, 434 P.2d 961; *City of Carmel-By-The-Sea v. Young* (1970) 2 Cal.3d 259, 85 Cal.Rptr. 1, 466 P.2d 225; *Finot v. Pasadena City Bd. of Education* (1967) 250 Cal.App.2d 189, 58 Cal.Rptr. 520.

9. See, e. g., *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 57 Cal.Rptr. 623, 425 P.2d 223.

10. See, e. g., *Housing Authority v. Cordova* (1955) 130 Cal.App.2d Supp. 883, 279 P.2d 215; *Atkisson v. Kern County Housing Authority* (1976) 59 Cal.App.3d 89, 130 Cal.Rptr. 375.

11. See, e. g., *King v. Unemployment Ins. Appeals Bd.* (1972) 25 Cal.App.3d 199, 101 Cal.Rptr. 660; *Thornton v. Department of Human Resources Dev.* (1973) 32 Cal.App.3d 180, 107 Cal.Rptr. 892.

12. See, e. g., *Binet-Montessori, Inc. v. San Francisco Unified School Dist.* (1979) 98 Cal.App.3d 991, 160 Cal.Rptr. 38.

13. See, e. g., *Danskin, supra*; *Vogel, supra*.

the right of privacy.¹⁴ In these varying contexts, California courts have repeatedly rejected the argument that because the state is not obligated to provide a general benefit, it may confer such a benefit on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right.¹⁵

Our decision in *Bagley v. Washington Township Hospital Dist.*, *supra*, 65 Cal.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409 served as a touchstone for many of these crucial precedents. (See, e. g., *Vogel, supra*; *Parrish, supra*; *City of Carmel-By-The-Sea, supra*; *Finot, supra*.) In *Bagley*, plaintiff, a nurse's aide employed by the defendant hospital district, was discharged when she refused to discontinue her off-duty pamphletting and petition circulating activities in support of an election campaign to recall several of the hospital district's directors. The district defended the discharge by reference to a Government Code section which provided broadly that "[n]o . . . employee . . . of a local agency . . . shall take an active part in any campaign . . . for or against any ballot measure relating to the recall of any elected official of the local agency." (Former Gov.Code, § 3205.) In *Bagley*, our court rejected the district's defense and struck down the statute on constitutional grounds.

In reaching our conclusion in *Bagley*, we drew upon the cited prior holdings involving conditional benefit programs and on scholarly legal commentaries¹⁶ to construct a framework for judicial analysis of restrictions, like those here at issue, which exclude

14. See, e. g., *Parrish, supra*; *City of Carmel-By-The-Sea, supra*; *Finot, supra*; *King, supra*; *Thornton, supra*.

15. We have not, of course, held that the government may never condition the receipt of benefits or privileges upon the nonassertion of constitutional rights. Rather, as we explained in *Bagley v. Washington Township Hospital Dist.*, *supra*, 65 Cal.2d 499, 505, 55 Cal.Rptr. 401, 421 P.2d 409: "Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limit, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment

from government benefit programs potential recipients solely on the basis of their exercise of constitutional rights. Stressing that the "government bears a heavy burden of demonstrating the practical necessity" for such unequal treatment (65 Cal.2d at p. 505, 55 Cal.Rptr. 401, 421 P.2d 409), our court in *Bagley* established a three-part standard that the state must satisfy to justify such a scheme.

First, we held that "[the state] must establish that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege." (65 Cal.2d at pp. 505-506, 55 Cal.Rptr. 401, 421 P.2d 409.) Second, we declared that "[n]ot only must the conditions annexed to the enjoyment of a publicly conferred benefit reasonably tend to further the purpose sought by conferment of that benefit, but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights." (*Id.*, at p. 506, 55 Cal.Rptr. 401, 421 P.2d 409.) Third, and finally, we established that "in imposing conditions upon the enjoyment of publicly conferred benefits, as in the restriction of constitutional rights by more direct means, the state must establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits." (*Id.*, at p. 507, 55 Cal.Rptr. 401, 421 P.2d 409.)

In attempting to avoid the analytical scrutiny mandated in California by the

of publicly conferred benefits despite a resulting qualification of constitutional rights."

16. See, e. g., O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached* (1966) 54 Cal.L.Rev. 443; Linde, *Constitutional Rights in the Public Sector* (1965) 40 Wash.L. Rev. 10; Note, *Unconstitutional Conditions* (1960) 73 Harv.L.Rev. 1595; Willcox, *Invasions of the First Amendment Through Conditioned Public Spending* (1955) 41 Cornell L.Q. 12; Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 Colum.L.Rev. 321; Powell, *The Right to Work for the State* (1916) 16 Colum.L.Rev. 99.

Danskin-Bagley line of decisions, the Attorney General relies on the recent federal decision in *McRae*. The Attorney General is simply mistaken, however, in suggesting that the federal approach to unconstitutional conditions corresponds to the California standard established by the *Danskin-Bagley* line of cases. Indeed, a comparison of several recent California and United States Supreme Court decisions demonstrates quite vividly the divergence between state and federal constitutional doctrine in this realm.

In *Parrish v. Civil Service Commission*, *supra*, 66 Cal.2d 260, 57 Cal.Rptr. 623, 425 P.2d 223, for example, this court applied the *Bagley* standard in evaluating the constitutionality of a government practice of conditioning the receipt of welfare benefits upon a recipient's waiver of his constitutional right of privacy in his home. Because the government could not satisfy the *Bagley* test, we held the practice unconstitutional. In *Wyman v. James* (1971) 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408, by contrast, the United States Supreme Court subjected a similar governmental intrusion upon the rights of welfare recipients to a lesser degree of scrutiny, and—contrary to our *Parrish* decision—upheld the government policy against constitutional challenge.

Similarly, in *Wirta v. Alameda-Contra Costa Transit Dist.*, *supra*, 68 Cal.2d 51, 64 Cal.Rptr. 430, 434 P.2d 982, our court, applying the principles of *Danskin* and *Bagley*, struck down a discriminatory public transit advertising policy which made advertising space on public buses available for commercial expression but denied this "public benefit" to those who wished to advertise their views upon noncommercial, political subjects. In *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770, however, the United States Supreme Court, when faced with the identical issue presented in *Wirta*, declined to engage in the demanding scrutiny called for

by the California precedents and sustained the unequal advertising policy under the federal Constitution.

Finally, our court, in *Bagley* itself and in *Fort v. Civil Service Com.* (1964) 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385, tested the constitutionality of limitations on the political activities of public employees by stringent standards and found broadly worded restrictions on such activities to be unconstitutional. In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers* (1973) 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796, however, the United States Supreme Court applied a less demanding standard and upheld comparably broad restrictions on political activities of federal employees.

As these cases indicate, for at least the past decade the federal decisions in this area have not been a reliable barometer of the governing California constitutional principles. Indeed, an examination of *McRae* itself plainly demonstrates that the *McRae* majority, in refusing to closely scrutinize the discriminatory Medicaid funding scheme, relied on factors which have no bearing on our task in applying California law.

First, the *McRae* court conceptualized the selective funding program as placing no additional "obstacles in the path of a woman's exercise of her freedom of choice" (100 S.Ct. at p. 2688) but simply leaving "an indigent woman with at least the same range of choices in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all." (*Id.*) This reasoning, which was central to the *McRae* decision, cannot be reconciled with the analysis adopted in the *Danskin-Bagley* line of decisions.¹⁷

In *Danskin* itself, for example, the government, by providing a public forum for nonsubversive groups, did not place any

17. Indeed, recent academic commentaries on the *McRae* decision have criticized the majority's conclusion on the ground that the ruling is incompatible with the prior federal unconstitutional condition precedents. (See, e. g., Note,

The Supreme Court, 1979 Term (1980) 94 Harv. L.Rev. 75 96-107. See also Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae* (1980) 32 Stan.L.Rev. 1113.)

additional obstacle in the path of subversive groups who wanted to hold meetings in private buildings, public parks, or any other previously available forum. Nonetheless, our court held that the discriminatory aspect of the government's benefit program rendered it unconstitutional. Similarly, in *Parrish*, the condition which was placed on the receipt of welfare benefits posed no additional threat to the privacy rights of those who did not seek such benefits; we recognized, however, that the limitation would, in fact, impair the constitutional rights of would-be recipients and accordingly tested it by the standard announced in *Bagley*.

Indeed, the entire *Danskin-Bagley* doctrine is concerned solely with the validity of conditional prerequisites for the receipt of various benefits which the government has no obligation to provide. In all of these cases, it may be said that the limitation or condition at issue creates no "additional" obstacle to the exercise of rights, for a recipient unhappy with any such condition is always free—at least theoretically—to go without the public benefit in question. The California courts, however, have acknowledged both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify important constitutional rights. Thus, California holdings uniformly confirm that the absence of an "additional obstacle" to the exercise of one's constitutional rights does not eliminate the government's burden of demonstrating the propriety of the condition or limitation under the *Bagley* test.

The Attorney General finds dictum in *McRae* on which he erects two additional arguments against our reliance upon the California doctrine of unconstitutional conditions. First, he argues that we should draw a distinction between a measure which denies other governmental benefits

to women who choose to have an abortion and one which simply denies funding for the abortion itself.¹⁸ The former measure, he suggests, imposes an unconstitutional penalty; the latter merely withholds funding for actions which the state does not want to subsidize.

The proffered distinction does not conform to California precedent. In *Danskin* itself, for example, the challenged provisions did not broadly disqualify subversive elements from a wide range of benefits, but rather withheld a single benefit—the use of public schools as a forum—from those who wanted to use those facilities to exercise constitutional rights the state did not desire to subsidize. Similarly, under the California cases, the state could not escape application of the *Bagley* standard if, instead of denying all welfare benefits, to recipients who marry someone of another race, the state provided free marriages for poor intraracial couples but declined to extend that "single benefit" to poor interracial couples. (See Note, *The Supreme Court-1976 Term* (1977) 91 Harv.L.Rev. 70, 144. See also *Binet-Montessori, Inc. v. San Francisco Unified School Dist.*, *supra*, 98 Cal.App.3d 991, 995, 160 Cal.Rptr. 38.) Under *Danskin-Bagley* principles, whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state must demonstrate the propriety of the condition in terms of the governing three-part test.

The Attorney General also draws upon *McRae's* analogy (see 100 S.Ct. at pp. 2688–2689) between the state's decision to fund childbirth but not abortion and its decision to fund public education but not "private education." In the decisions recognizing a constitutional right to obtain a private education upon which the ostensible analogy rests, however, the principal question presented was whether the state could com-

18. Although the *McRae* majority upheld restrictions which denied poor women federal Medicaid funds for abortion, the majority opinion notes that "[a] substantial constitutional question would arise if Congress had attempted

to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion." (100 S.Ct. at p. 2688, fn. 19.)

pel all children to attend state-run schools; these decisions concluded that the state could not. (See, e. g., *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070.) An analogous medical care case would arise if a state law requiring, for example, that all medical care be obtained from a public hospital clashed with an individual's asserted constitutional right to reject state-provided medical care in favor of medical care that he himself chooses. In the present case, of course, no such constitutional right is at issue because the statutory scheme in question does not interfere with an individual's right to go elsewhere for medical care.

Thus, the Attorney General's attempted analogy is misleading. It is obvious, of course, that the state, in providing a benefit such as public education, is not thereby compelled to pay the costs incurred by those who choose to relinquish the public benefit in favor of a comparable privately funded benefit. *Danskin* itself, for example, does not suggest that the state in making public schools available as a public forum, obligated itself to reimburse those who chose to exercise their First Amendment right by speaking in private meeting halls or, indeed, by refraining from speaking at all.

In short, the *Danskin-Bagley* line of cases is not concerned with a person's liberty to reject an offered public benefit in favor of a private counterpart—the issue in the private school cases. Instead, *Danskin* and *Bagley* hold that when the state implements a general public benefit program, the

19. The state cannot rebut this conclusion by attempting to portray the program as one that does not provide general medical care but rather reimburses only specified medical expenses, such as those for childbirth, while withholding funds for other medical expenses, such as those for abortion. In the first place, the breadth of the Medi-Cal program belies any suggestion that the state in this case is affording only the specialized benefit of medical expense for childbirth. As we have noted, under Medi-Cal the state pays for virtually all necessary medical expenses of the poor, and does not confine its funding only to childbirth expenses.

Moreover, it is obvious that the state cannot circumvent the principles of the *Danskin-Bagley* doctrine by defining the benefit offered in a

California Constitution imposes definite limitations on the state's ability to offer such a benefit in a fashion which discriminates against the exercise of constitutional rights. The statutory program at issue here does afford medical care on just such a selective or discriminatory basis.¹⁹

Accordingly, in evaluating the constitutionality of the challenged statutory provisions under the California Constitution, we employ the test established by the California unconstitutional condition cases.

4. *Under the constitutional standard established in Bagley, the statutory provisions which discriminatorily deny generally available medical benefits to poor women solely because they choose to have an abortion are unconstitutional.*

[3, 4] As noted previously, *Bagley* posits a threefold inquiry: (1) whether the conditions which are imposed relate to the purposes of the legislation which provide the benefit; (2) whether the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights; and (3) whether there are no less offensive alternatives available to achieve the state's objective. We follow these avenues of inquiry, placing particular emphasis upon the second prong of the test in which we must weigh the utility of the funding restrictions against the resulting impairment to the woman's right of procreative choice.

constitutionally discriminatory fashion. Thus, for example, the result in *Danskin* clearly would not have differed if the state had announced that it was making public schools available solely for patriotic meetings. (Cf. *Wirta v. Alameda-Contra Costa Transit Dist.*, *supra*.) Similarly, the *Bagley* analysis could not be avoided by a hospital district's declaration that it has an opening for the position of "apolitical nurse's aide." Contrary to the dissent's reasoning (see p. 894 of 172 Cal.Rptr., at p. 807 of 625 P.2d, *post*), the foregoing examples are not rendered constitutionally palatable simply because "everyone" would be free to make patriotic speeches or because "everyone" would be permitted to apply for the apolitical nurse's aide job.

- (a) *The restrictions imposed on poor women's right of procreative choice do not relate to the purposes of the Medi-Cal program.*

As noted above, *Bagley* provides that, as an initial matter, the state "must establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege." (65 Cal.2d at pp. 505-506, 55 Cal.Rptr. 401, 421 P.2d 409.) Elaborating on this requirement in *Bagley*, we quoted with approval Justice Frankfurter's observation that "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." (Italics added.) (*American Communication Assn. v. Douds* (1950) 339 U.S. 382, 417, 70 S.Ct. 674, 693, 94 L.Ed. 925 (separate opinion).)

In most of the California public benefit cases, the restrictions on constitutional rights adopted as part of the government programs have borne at least some relation to the purpose of the program. Thus, for example, in cases such as *Bagley* that involved restrictions on the exercise of First Amendment activities by those who obtain the "benefit" of public employment, the restrictions were apparently intended to curtail activities thought to have a potential for interfering with the effective perform-

ance of the public employee's job. Similarly, in *Parrish*, the restrictions imposed on welfare recipients' right of privacy related to the elimination of fraud in the welfare system and thus again could be said to further the aims of the benefit program in question.

In the instant case, by contrast, the restriction imposed on poor women who seek to exercise their constitutional right to decide whether or not to have a child bears no relation whatsoever to the fundamental purposes of the Medi-Cal program. Welfare and Institutions Code section 14000 declares that "[t]he purpose [of the Medi-Cal program] is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons . . .";²⁰ thus, the program's primary objective is to alleviate the hardship and suffering incurred by those who cannot afford needed medical care by enabling them to obtain such medical treatment. The restrictions at issue here directly impede this fundamental purpose. Even when an abortion represents the appropriate medical treatment for a poor pregnant woman, the statute virtually bars payment for that treatment and thus subjects the poor woman to significant health hazards and in some cases to death.²¹

20. Section 14000 provides in full:

"The purpose of this chapter is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons, including related social services which are necessary for those receiving health care under this chapter.

"The intent of the Legislature is to provide, to the extent practicable, through the provisions of this chapter, for health care for those aged and other persons, including family persons who lack sufficient annual income to meet the costs of health care, and whose other assets are so limited that their application toward the costs of such care would jeopardize the person or family's future minimum self-maintenance and security. It is intended that whenever possible and feasible:

"(a) The means employed shall be such as to allow, to the extent practicable, eligible persons to secure health care in the same manner employed by the public generally, and without

discrimination or segregation based purely on their economic disability.

"(b) The benefits available under this chapter shall not duplicate those provided under other federal or state laws or under other contractual or legal entitlements of the person or persons receiving them.

"(c) In the administration of this chapter and in establishing the means to be used, the department shall give due consideration both to the appropriate organization and to the ready accessibility and availability of the facilities and resources for health care to persons eligible under this chapter, and to new and innovative approaches to the delivery of health care services."

21. The trial court in *McRae* (*McRae v. Califano* (E.D.N.Y.1980) 491 F.Supp. 630) conducted a lengthy factual hearing with extensive medical evidence and concluded that the federal funding restrictions, which are comparable to those under the California Budget Act, hazard the

In this respect, the state's denial of Medi-Cal funds to otherwise qualified women solely because they choose to have an abortion bears a marked similarity to the Los Angeles Housing Authority's policy of excluding so-called subversive persons from public-supported low-rent housing projects, a policy that was invalidated by a California decision over 25 years ago in *Housing Authority v. Cordova* (1955) 130 Cal.App.2d Supp. 883, 279 P.2d 215. In finding that exclusionary policy unconstitutional, the *Cordova* court explained: "The purpose of the [housing act] is to eradicate slums and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." (130 Cal.App.2d Supp., at p. 888, 279 P.2d 215.)

The state can show a relationship between the Budget Act limitations and the purpose of the Medi-Cal program only by claiming that Medi-Cal seeks not only to provide necessary health care to indigents but also to protect the life and health of the fetus. Any attempt to reconcile Medi-Cal objectives with abortion limitations on the theory that the latter protect the fetus, however, impermissibly denigrates the woman's right of choice.

woman's life and health in a variety of ways. The comparable California Budget Act restrictions, we conclude, pose the same hazards to the health of indigent California women. Specifically:

(1) The act permits funding of abortions "[w]here the life of the mother would be endangered if the fetus were carried to full term." (Stats.1979, ch. 259, item 261.5(a), p. 87.) The phrase "would be endangered," however, is vague—so vague that we held similar language unconstitutional in *People v. Belous*, *supra*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194. If interpreted to require a substantial certainty or even a reasonable probability of death, it excludes funding in many cases in which the risk of death is sufficient to induce a physician to recommend abortion.

(2) The act also permits abortion "[w]here severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term." That language by nec-

As we explain in discussing the second part of the *Bagley* test, both California and federal authorities establish that, at least prior to viability, the state may not subordinate a woman's own medical interests or her right of procreative choice to the interests of the fetus. We therefore turn to consider the second part of the *Bagley* test.

(b) *In light of the fundamental and intimate nature of the constitutional right of procreative choice and the severe impairment of that right that will in practice result from the statutory restrictions at issue, the utility of imposing such restrictions does not "manifestly outweigh [the] resulting impairment of constitutional rights."*

Under the second part of *Bagley*, the state must demonstrate that "the utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights." (65 Cal.2d at p. 506, 55 Cal.Rptr. 401, 421 P.2d 409.) As numerous cases since *Bagley* have elaborated, a court in undertaking this "weighing" or "balancing" process must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further the court must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is

essary implication excludes cases in which the damage cannot be described as both severe and long lasting. It also excludes damage to mental health regardless of severity and duration.

(3) A denial of funding will induce some women to attempt abortion without medical assistance, a procedure which carries an extreme risk of injury or death. (See *People v. Belous*, *supra*, 71 Cal.2d at pp. 965-966, 80 Cal.Rptr. 354, 458 P.2d 194.)

(4) A denial of funding will induce some women to delay abortion until they can somehow raise the money to pay for a private abortion, although abortions later in pregnancy present a greater risk to life and health.

(5) The denial of funding will induce some women to carry the child to term even though relevant medical considerations—one of which may be the psychological impact of carrying an unwanted child—make childbirth much more risky than abortion.

threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue. (See, e. g., *Parrish v. Civil Service Commission*, *supra*, 66 Cal.2d 260, 270-274, 57 Cal.Rptr. 623, 425 P.2d 223; *City of Carmel-by-the-Sea v. Young*, *supra*, 2 Cal.3d 259, 265-272, 85 Cal.Rptr. 1, 466 P.2d 225; *Finot v. Pasadena City Bd. of Education*, *supra*, 250 Cal.App.2d 189, 196-202, 58 Cal.Rptr. 520.) We must canvass the various factors on each side of the scale in order to determine whether the utility of the restrictions "manifestly outweighs" the resulting impairment of constitutional rights. (See generally O'Neil, *op. cit. supra*, 54 Cal.L.Rev. 443, 460-478; Comment, *Another Look at Unconstitutional Conditions* (1968) 117 U.Pa.L.Rev. 144.)

In undertaking this analysis, we begin by examining the nature and importance of the constitutional right at issue, and then consider the degree to which this right is actually threatened by the challenged statutory scheme. In *People v. Belous*, *supra*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, the seminal California case in this area, we recognized that the constitutional rights at stake are in essence two-fold: "The rights involved . . . are the woman's rights to life and to choose whether to bear children." (*Id.*, at p. 963, 80 Cal.Rptr. 354, 458 P.2d 194.) The first right is implicated because the choice between childbirth and abortion in some instances involves potential risks to the life of the pregnant woman. Moreover, even when a life-threatening condition is not present, the constitutional choice directly involves the woman's fundamental interest in the preservation of her personal health. As this court stated in *Ballard v. Anderson* (1971) 4 Cal.3d 873, 879, 95 Cal.Rptr. 1, 484 P.2d 1345: "In California, law and medicine recognize that therapeutic abortion is a legitimate medical treatment which may be necessary for the preservation of a pregnant woman's life and health."

Closely related to this fundamental interest in life and health is the basic recognition that, for a woman, the constitutional right of choice is essential to her ability to retain personal control over her own body. As

Professor Tribe has observed: "If a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater. . . . [I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary." (Tribe, *American Constitutional Law* (1977) § 15-10, p. 924.)

Moreover, as *Belous* makes clear, the restriction at issue undermines the right of privacy guaranteed under our California Constitution in that it threatens not only the woman's interests in life, health, and personal bodily autonomy but also her right to decide for herself whether to parent a child: "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." (71 Cal.2d at p. 963, 80 Cal.Rptr. 354, 458 P.2d 194.)

The Supreme Court has defined the woman's right to choose as an aspect of the privacy right in even more explicit terms: "[I]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Original italics.) (*Eisenstadt v. Baird* (1972) 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349.) This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. (See Karst, *The Supreme Court, 1976 Term: Forward Equal Citizenship Under the Fourteenth Amendment* (1977) 91 Harv.L.Rev. 1, 57-58.) As Professor Karst has recently observed: "The implications of an unwanted child for a wom-

an's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion." (Karst, *The Freedom of Intimate Association* (1980) 89 Yale L.J. 624, 641, fn. 90.)

Thus, the constitutional rights at issue here are clearly among the most intimate and fundamental of all constitutional rights. With that understanding in mind, we must consider the extent to which the statutory limitations in controversy will actually impair the individual's exercise of these vitally important constitutional rights.

In resolving that issue, we need only consider the nature of the program in question to recognize that the actual impairment of constitutional rights will be severe indeed. The medical benefits provided by the Medi-Cal program are available only to poor persons who are unable to pay for their own health care; by definition, then, the only women affected by the restrictions at issue are those who lack the money or resources to pay for a medically supervised abortion on their own. Although it may be possible for some poor women to obtain medical abortions with the help of private charities, the existence of the Medi-Cal program itself testifies to the fact that private charitable resources do not suffice to meet the medical needs of the poor. Thus, from a realistic perspective, we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights. On the contrary, the state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.

In this respect, the impairment of constitutional rights resulting from the present

22. Our analysis at this point closely parallels the strict judicial scrutiny used to determine whether an enactment which discriminates against the exercise of a fundamental right denies equal protection of the law. Because the state cannot demonstrate that the statutory scheme is supported by a compelling state in-

terest, we believe that the statutes in question are additionally unconstitutional under established equal protection principles. In light of the similarity of the applicable principles in this context, however, we see no need to undertake a separate analysis of the statutes' equal protection defects.

statutory restrictions is significantly greater than the impairment of rights involved in almost all the past California cases in this field. In *Danskin*, for example, while the discriminatory benefit scheme denied disfavored persons the use of public school buildings for meetings, it did not effectively preclude them from holding meetings or disseminating their views to the public. Similarly, although the restrictive government employment policy in *Bagley* directly impinged upon the public employee's free speech rights in significant respects, it nonetheless left the employee free to engage in much political activity. In the instant case, by contrast, the state's discriminatory treatment will prevent the vast majority of poor women from exercising their constitutional right to choose whether or not to bear a child. As Justice Brennan has observed, "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the government literally makes an offer that the indigent woman cannot afford to refuse." (*McRae*, 100 S.Ct. at p. 2704 (dis. opn.))

Having found that the statutory restrictions in question will severely impair or totally deny the actual exercise of this intimate and fundamental constitutional right, we must determine whether the benefits which the state derives from the restrictions "manifestly outweigh" such significant impairment. Obviously, in view of the foregoing discussion, only the most compelling of state interests could possibly satisfy this test. As we shall see, however, it is doubtful whether the restrictions in this case serve any constitutionally legitimate, let alone compelling state interest; furthermore, the interest that the statute does serve is furthered in an underinclusive and discriminatory manner.²²

We begin by identifying the precise state interest that is served by the statutory re-

terest, we believe that the statutes in question are additionally unconstitutional under established equal protection principles. In light of the similarity of the applicable principles in this context, however, we see no need to undertake a separate analysis of the statutes' equal protection defects.

restrictions at issue. We note that although the restrictions take the form of curtailing state expenditures, they do not in reality serve the state's legitimate interest in conserving its limited fiscal resources; whatever money is saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers.²³ In the first place, the cost of an abortion is much less than the cost of maternity care and delivery.²⁴ Thus, the present statutory scheme, by withholding funds for abortions, requires the state to pay the more expensive childbirth expenses for every poor woman or teenager who becomes pregnant.²⁵

Second, because the present statutes frequently deny funding of abortions to women who face special medical risks if they

23. In *Williams v. Zbaraz* (1980), 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831, a companion case to *McRae*, it was estimated that funding restrictions similar to those at issue here would impose upon the State of Illinois an additional cost "of about \$20,000,000 per year." (See 100 S.Ct. at p. 2715 (dis. opn. by Stevens, J.)) Because the population of California is significantly greater than that of Illinois, the added costs would presumably be much higher.

24. The dissenting opinion asserts that we overlook a third procreative choice available to the indigent woman—avoiding pregnancy. For the woman who is already pregnant, of course, that choice is unavailable, whether her pregnancy resulted from intentional act, carelessness, ignorance of contraceptive methods, or contraceptive failure. Perhaps in an ideal world no woman who does not want a child would ever become pregnant, and nothing would ever happen after conception to change matters, but that utopian vision is no comfort to the persons whose constitutional freedom of choice is affected by the restrictions on abortion funding.

25. In the *Zbaraz* case (see fn. 23, *ante*), the trial court found that the average cost to the State of Illinois of an abortion was less than \$150, while the average cost of childbirth exceeded \$1,350. (See 100 S.Ct. at p. 2715, fn. 9 (dis. opn. of Stevens, J.))

26. Ironically, the Supreme Court decision in *McRae*, filed in June 1980, supplies for the 1980 California Budget Act a conceivable economic justification that did not apply to the 1978 and 1979 acts. The 1980 Budget Act abortion funding restrictions, as we have noted, will substantially increase total government outlay, because childbirth is much more expensive than abor-

carry a fetus to term, such limitations—under the current comprehensive Medi-Cal scheme—will oblige the state to provide additional and often expensive medical care for such women before, during, and after childbirth. But for the challenged restrictions, such expenses would not have been incurred. Finally, this limitation on poor women's constitutional rights will prove enormously expensive in terms of long-range economic costs. As Justice Blackmun has observed: "[T]he cost of a[n] . . . abortion . . . holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead." (*Beal v. Doe* (1977) 432 U.S. 438, 463, 97 S.Ct. 2366, 2399, 53 L.Ed.2d 464 (dis. opn.))²⁶

The Attorney General and amici suggest, however, that the restrictions on the fund-

tion. As a result of the *McRae* decision upholding the Hyde Amendment, however, some of those increased costs will shift from the state to the federal taxpayer; under *McRae*, federal funds are no longer available to subsidize state abortion payments, but remain available to subsidize state maternity and childbirth payments.

The state's interest in shifting expenditures to the federal fisc, however, can hardly be described as a significant one. In the first place, the California taxpayer is also a federal taxpayer, and derives no benefit when money is taken from one pocket instead of another. Second, taking into account not only the required state contribution to maternity and childbirth expenses under Medi-Cal but also the substantial expense of providing state support for unwanted minors, the Budget Act restrictions will ultimately cost the California taxpayer more than would abortion funding. The serious impairment of a fundamental right inflicted by the abortion funding limitations cannot be justified on so flimsy a basis.

The Attorney General also suggests that the Budget Act provisions reflect the state's desire to accommodate those taxpayers who are conscientiously opposed to abortion. The antagonism of taxpayers toward the exercise of a constitutional right, of course, in no way justifies state discrimination against persons who exercise that right. If the Attorney General is suggesting that the state could accommodate objecting taxpayers by allocating their taxes to other state purposes, the short answer is that the Budget Act enacts no such allocation; it bars funding of abortions from all revenue sources whatever, including taxpayers who favor funding of abortions and those who are indifferent on the matter.

ing of abortions through Medi-Cal relate to a state interest alternatively defined as an interest in "encouraging childbirth" or an interest in "protecting the potential life of the fetus." As far as the interest in "encouraging childbirth" is concerned, the California Legislature has not embraced a general policy of encouraging *unwanted* children; under the present provisions of the Medi-Cal program, for example, funds are specifically authorized to pay for the medical expense of contraception and sterilization. Furthermore, as we explain in the following section, to the extent that the challenged provisions are defended as simply a method of aiding poor women who want to bear children, the provisions clearly do not serve that interest in a manner least offensive to the rights of women who choose not to bear children.

That brings us to the state interest in "protecting the potential life of the fetus," an objective which we think does realistically underlie the funding restrictions at issue here. There is no question, of course, that phrased in general terms the state has a legitimate interest in protecting the potential life of a fetus. Thus, the state may without doubt legitimately prosecute a person who deliberately injures a fetus, even if no corresponding harm befalls the woman who carries the fetus. In the instant case, however, the state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecting a fetus vis-a-vis the woman of whom the fetus is an integral part. Such a claimed interest, of course, clashes head-on with the woman's own fundamental right of procreative choice.

The argument that the state advances here essentially parallels that presented to the United States Supreme Court in *Roe v. Wade*, *supra*, when the State of Texas argued that its asserted interest in protecting the fetus justified criminal proscriptions on abortion. The high court carefully examined and weighed the interests implicated by this contention: the woman's interest in deciding for herself a matter which so inti-

mately and fundamentally affects her future life and happiness; her interest in protecting her own life and health; the corresponding state interest in safeguarding the woman's life and health; and, finally, the state's interest in protecting the fetus. After an extensive review of the history of abortion laws and consideration of the medical risks of abortion and childbirth, the court held that during the first two trimesters of pregnancy, when the fetus is not viable, the state's interest in protecting the fetus is not of compelling character. Consequently, the court concluded, the state may not subordinate the woman's fundamental right of procreative choice to the state's interest in protecting a nonviable fetus.

Roe v. Wade went on to explain the extent and purpose for which state regulation of abortion is permissible. Prior to the third trimester of pregnancy, it held, the state may regulate only to protect the woman's health—not to protect the fetus. In the third trimester the state may enact restrictions to protect the fetus, but may not proscribe abortions necessary to preserve the woman's life or health. (410 U.S. at pp. 164-165, 93 S.Ct. at p. 732.)

The restrictions of the California Budget Act do not conform to the careful calculation of competing rights and interests set out in *Roe v. Wade*. The Budget Act seeks to limit first and second trimester abortions, not for the permissible purpose of protecting the woman's health, but to protect the fetus. The act thus inverts the priority of interests established in *Roe* and improperly subordinates the woman's right of choice to the lesser state interest in protecting a nonviable fetus. Furthermore, although *Roe v. Wade* recognized a compelling interest in protecting a viable fetus, even that interest cannot be invoked to restrict abortions necessary to preserve the woman's health; the Budget Act, however, gives no consideration to danger to the woman's health unless the threatened harm is severe, long-lasting, and relates to physical health.

In short, *Roe v. Wade* settled that protection of a nonviable fetus is not a compelling state interest. The subsequent high court decision in *McRae* does not detract from that holding. *McRae* did not measure the restrictions at issue against a compelling interest test. Rather, the Supreme Court assumed that a discriminatory withholding of government benefits, because it imposes no new obstacle to abortion, required only minimal justification. That proposition, as we have explained, is inconsistent with California constitutional law. The assumption underlying the high court's analysis, however—that funding restrictions would fail if required to meet a compelling interest standard—provides further support for our decision today.

Neither do California decisions support the Attorney General's claim. We considered the state's asserted interest in protecting fetal life in *People v. Belous, supra*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, holding unconstitutionally vague a statute which barred abortions unless necessary to preserve the mother's life. At the outset, we stressed that a woman's right to choose may be infringed only by regulations necessary to further a compelling interest. (See 71 Cal.2d at p. 964, 80 Cal.Rptr. 354, 458 P.2d 194.) Although the state urged that it had "a compelling interest in the protection of the embryo and fetus and that such interest warrants the limitation on the woman's constitutional rights" (pp. 967-968, 80 Cal.Rptr. 354, 458 P.2d 194), we replied that the asserted state interest derived from statutes and rules which either "require a live birth or reflect the interest of the parents." (*Id.*)

We have already noted that three years after *People v. Belous*, the people of California amended our state Constitution to provide explicit protection for the right of privacy, a protection not found in the federal text. We have noted also that the federal right of privacy, the foundation for the decision in *Roe v. Wade, supra*, is more limited than the corresponding right in the California Constitution. (See *City of Santa Barbara v. Adamson, supra*, 27 Cal.3d 123, 130, fn. 3, 164 Cal.Rptr. 539, 610 P.2d 436.)

We therefore conclude that the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*. Consequently, we further conclude that the asserted state's interest in protecting a nonviable fetus is subordinate to the woman's right of privacy.

Moreover, even if the state could assert a compelling interest in protecting a nonviable fetus, we would have grave doubts that the state could pursue such interest in the discriminatory fashion adopted here. Under the present statutory scheme, the state has not undertaken to protect the potential life of *all* fetuses by promoting their interests over the constitutional rights of all women. Instead, by implementing this state interest through restrictions on Medi-Cal funds rather than through more broadly applicable legislation, the state has singled out poor women and has subordinated only their constitutional right of procreative choice to the concern for fetal life.

In the past, this court has been particularly critical of statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society. (See, e. g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 765-767, 135 Cal.Rptr. 345, 557 P.2d 929; *Serrano v. Priest* (1971) 5 Cal.3d 584, 597-604, 96 Cal.Rptr. 601, 487 P.2d 1241; *In re Antazo* (1970) 3 Cal.3d 100, 108-112, 89 Cal.Rptr. 255, 473 P.2d 999.) Thus, we have implicitly recognized that the indigent poor share many characteristics of other "insular minorities" who may not be adequately protected from discriminatory treatment by the general safeguards of the legislative process. (See generally *U. S. v. Carolene Products Co.* (1938) 304 U.S. 144, 152-153, fn. 4, 58 S.Ct. 778, 783-84, fn. 4, 82 L.Ed. 1234.) Although prior cases have generally considered this factor in connection with equal protection analysis, Professor O'Neil has identified its relevance to the unconstitutional condition doctrine: limitations upon governmental benefits which apply to rich and poor alike are obviously less invidious than conditions, like

those at issue here, in which the state effectively tells a poor woman "that because [she] is poor . . . [she] must restrict [her exercise of constitutional rights] in ways that the government does not ask self-sufficient people to do." (O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, *supra*, 54 Cal.L.Rev. 443, 472.)²⁷

From this review of the factors which enter into the *Bagley* analysis, we conclude that the alleged "benefits" which flow from the statutory restrictions on Medi-Cal funds in no sense "manifestly outweigh" the resulting impairment of constitutional rights. As we have seen, the state is hard-pressed to demonstrate that the restrictions further any constitutionally legitimate interests at all; at the same time, the restrictions effectively nullify the poor woman's fundamental constitutional right to retain personal control over her own body and her own destiny. The challenged statutory scheme, then, clearly does not pass muster under the second part of the *Bagley* standard.

(c) *The statutory scheme does not serve the state interest in providing medical care for indigents in a manner least offensive to the woman's right of procreative choice.*

The third and final component of the constitutional standard established in *Bagley* requires the state to "establish the una-

vailability of less offensive alternatives and [to] demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits." (65 Cal.2d at p. 507, 55 Cal.Rptr. 401, 421 P.2d 409.) In effect, this part of the *Bagley* test requires the state to adopt the "least offensive alternative" adequate to achieve any legitimate state interest.²⁸

If we view the Budget Act restrictions as intended to prevent indigent women from obtaining abortions, the doctrine of "least offensive alternative" plays no role; the restrictions fail because the state's interest in protecting the fetus cannot be pursued by subordinating the woman's right of procreative choice. In an effort to avoid the unconstitutionality of the funding restrictions, however, the Attorney General suggests an alternative interpretation: he argues that the restrictions should not be considered a legislative attempt to prevent the poor from obtaining abortions, but rather as an effort to aid poor women who have already decided to bear a child but cannot afford the expenses of childbirth. That argument, however, fails the "least restrictive alternative" test, since the state could readily meet the needs of indigent women without burdening their right of procreative choice simply by funding impartially the expenses of childbirth and abortion.²⁹

27. Indeed, the California Legislature has itself recognized the importance of avoiding such discrimination against the poor as one general purpose of the Medi-Cal program. Section 14000 of the Welfare and Institutions Code, in defining the purpose of the Medi-Cal program, emphasizes that "[i]t is intended that whenever possible and feasible . . . [i]t means employed shall be such as to allow, to the extent practicable, eligible persons to secure health care in the same manner employed by the public generally, and without discrimination or segregation based purely on their economic disability." As we have seen, the elimination of funds for abortion is not related to preserving the feasibility or practicability of the Medi-Cal program.

28. Again, this requirement parallels the requirement that the state, to sustain legislation subject to strict judicial scrutiny under the equal protection clause, must demonstrate "not only that it has a *compelling* interest

which justifies the law, but that the distinctions drawn by the law are *necessary* to further its purpose." (Original italics.) (*Serrano v. Priest* (1976) 18 Cal.3d 728, 761, 135 Cal.Rptr. 345, 557 P.2d 929.)

29. The Pregnancy Freedom of Choice Act (Welf. & Inst.Code, § 16145 et seq.) provides an excellent example of a program designed to aid indigent women who choose to bear children without impinging upon the rights of those who choose abortion. Section 16145 states the purpose of this act: "The Legislature finds that pregnancy among unmarried persons under 21 years of age constitutes an increasing social problem in the State of California. In order to have effective freedom of choice between an abortion and carrying pregnancy to term, the assistance of the state in addition to medical services is required. The problem can be alleviated effectively by a program of structured

Moreover, the legislative background of the statute in question belies the Attorney General's suggestion that the legislature was aimed solely at aiding poor women who have already chosen to bear a child. The Budget Act provisions do not increase preexisting levels of childbirth-related benefits or provide any additional aid at all to poor women who choose to bear a child. Instead, the statute simply curtails the medical benefits previously available to poor women who desire to have an abortion. Quite clearly, this legislation cannot be defended as aiding poor women who wish to have children by the means least offensive to the constitutional rights of other women.

5. Conclusion.

As noted at the outset, our opinion in this case does not rest upon this court's views as to the morality or immorality of abortion. The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.³⁰

By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state—rich or poor—is guaranteed the constitutional right to make that

services, including counseling and residential treatment services, provided by licensed maternity homes." Subsequent sections provide for state reimbursement of expenses incurred by maternity homes in providing the specified services.

The act, by its title and declared purpose, signifies a legislative recognition that women are entitled to *effective* freedom of choice, and that effective freedom of choice may require state-assisted medical services. Because childbirth may involve care and counseling needs beyond those required for abortion, the act establishes a state program to provide those needs. It thus serves a state objective to eliminate financial considerations that make one choice more expensive than the other, thereby granting the woman effective freedom of choice; the Budget Act, by contrast, seeks to make abortion prohibitively expensive relative

decision *as an individual*, uncoerced by governmental intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.

If the state cannot directly prohibit a woman's right to obtain an abortion, may the state by discriminatory financing indirectly nullify that constitutional right? Can the state tell an indigent person that the state will provide him with welfare benefits only upon the condition that he join a designated political party or subscribe to a particular newspaper that is favored by the government? Can the state tell a poor woman that it will pay for her needed medical care but only if she gives up her constitutional right to choose whether or not to have a child?

There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper. Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.³¹

to childbirth and thereby to control the woman's choice.

30. In *Roe v. Wade, supra*, the United States Supreme Court expressly took note of "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, . . . and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experience, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." (410 U.S. at p. 116, 93 S.Ct. at p. 708.)

31. The dissenting opinion incorrectly asserts that our opinion assumes that the state must

Indeed, the statutory scheme before us is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich.³² An affluent woman who desires to terminate her pregnancy enjoys the full right to obtain a medical abortion, regardless of the opposition of any legislative majority. By contrast, when the state finances the cost of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she has the constitutional right to refuse to do so.

Thus, we conclude that the restrictions in question are invalid under the California Constitution. We note that the Supreme Judicial Court of Massachusetts has very recently reached precisely the same conclusion in adjudicating the validity of a comparable state statute against the guarantees of that state's Constitution. (*Moe v. Secretary of Administration & Finance* (1981) — Mass. —, 417 N.E.2d 388.) As the Massachusetts high court observed, although "the Legislature need not subsidize any of the costs associated with childbearing, or with health care generally . . . once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.' L. Tribe, *American Constitutional Law*, § 15-10 at p. 933 n. 77 (1978)." (*Id.* at p. —, 417 N.E.2d at p. 402.)

In S.F. 24069, the judgment is reversed. In S.F. 24053, the alternative writ, having served its purpose, is discharged and the peremptory writ is denied. In S.F. 24192, a peremptory writ of mandate shall issue, directing respondents to refrain from enforcing the unconstitutional restrictions in the

fund the exercise of constitutional rights. To avoid any possible misunderstanding, we reiterate: the state need not fund abortions, childbirth, appendectomies, or any other medical procedure, but when it undertakes to fund medical treatment for indigents, it cannot with-

Budget Act of 1980 challenged herein. Plaintiffs shall recover their costs in these proceedings, including reasonable attorneys fees pursuant to the provisions of section 1021.5 of the Code of Civil Procedure. Because these three proceedings are inextricably interrelated, on remand of S.F. 24069 the San Francisco Superior Court shall fix an appropriate cost award, including attorneys fees, by reference to the costs and attorney services expended in all three proceedings.

MOSK and NEWMAN, JJ., concur.

BIRD, Chief Justice, concurring.

If a citizen's freedom to choose how to deal with procreation—contraception, abortion, or childbirth—is a fundamental constitutional right protected by the right to privacy, may the state constitutionally limit that choice for poor women when their choice is not one of the methods favored by the state? I agree with the lead opinion that the answer to this question is "no." However, I would reach that conclusion by a somewhat different route.

It should be emphasized that this court is not called upon today to enter into the contemporary debate over various moral, religious, and social questions concerning abortion. Emotions on that subject have always run high. However, what we justices, as individuals, may think about these questions bears no relationship to the legal issue presented in this case.

That issue is a narrow one. Once the state undertakes funding of medical care for the poor, including all types of procreative care, may the state refuse funding for an unpopular but constitutionally protected alternative? There is no claim that poor women have an absolute right to abortion funding. Rather, petitioners argue that the state should not be able to select that choice

hold funds from some eligible persons because they exercise a constitutional right.

32. As described in a familiar Tin Pan Alley lyric: "The rich get richer and the poor get . . . children." (Excerpted from "Ain't We Got Fun" by Richard Whitney.)

and influence that private decision by discriminatorily denying funds for one procreative alternative which the state deems unacceptable.

It is important to note that this is *not* a case in which this court must decide whether abortion is the best alternative to pregnancy or whether abortion is morally justifiable. Under the California Constitution, the people of the state have decided that those value judgments must be reserved to the individual citizens whose lives are affected by such decisions. Neither legislators nor judges may constitutionally impose their system of values on a woman who must decide how to deal with procreation.

A woman who faces an unplanned pregnancy confronts a critical and uniquely important decision, the consequences of which will follow her throughout her life. Because her value system, her life, and her relationships with others are all involved in any determination she makes, a woman's right to decide for herself without the interference of the state is central in a free society. In recognition of the importance of that right, both this court in *People v. Belous* (1969) 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 and the Supreme Court in *Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 have held that such a private decision must be given *constitutional* protection.

It is unfortunate that the dissent focuses on an issue that is not even present here. The court is not appropriating public funds for anything. (Dis. opn. of Richardson, J., *post*, at p. 895 of 172 Cal.Rptr., at p. 808 of 625 P.2d.) The Legislature appropriated funds in its 1980 Budget Act to pay for

1. "Provided further, that if any of the provisions of this item or the application thereof to any person or circumstances is stayed, enjoined, otherwise delayed, or invalidated by court action, the Department of Finance shall authorize the State Controller to transfer from Item 287 to this item such sums determined by the Director of Finance which are necessary to provide for the costs of those abortions fundable as a result of such court action." (Stats. 1980, ch. 510, item 287.5.)

It is clear that the power of the judiciary to invalidate statutes found inconsistent with the

abortions for Medi-Cal recipients in the event that its restrictions were held to be unconstitutional.¹ In so doing, the Legislature signaled the fact that it harbored doubts about the constitutional validity of the restrictions.

A fundamental right has been defined as one which is "implicit in the concept of ordered liberty." (*Palko v. Connecticut* (1937) 302 U.S. 319, 325, 58 S.Ct. 149, 151, 82 L.Ed. 288.) It is the state's obligation to protect and safeguard these rights. If any action by the state burdens the exercise of any fundamental liberty, the state must justify such an act by a showing of compelling necessity. (E. g., *People v. Belous*, *supra*, 71 Cal.2d 954, 963-964, 80 Cal.Rptr. 354, 458 P.2d 194; *Roe v. Wade*, *supra*, 410 U.S. 113, 155-156, 93 S.Ct. 705, 727-28, 35 L.Ed.2d 147.) As the guardian of our rights, the state is required to show a critical need for any action which curbs the exercise of these freedoms. This is true whether the incursion involves a direct attack on the exercise of the right or an indirect interference with its exercise.

An artificial distinction between so-called direct and indirect infringements begs the question as to whether the state has infringed a fundamental right. In California, there is no precedent for permitting government to burden the exercise of vital constitutional rights without establishing a compelling need. The fact that the state has not banned the exercise of the right entirely is irrelevant to the basic issue. Our courts have frequently struck down restrictions that did not completely prohibit the exercise of a fundamental right. (See, e. g., *Danskin v. San Diego Unified Sch. Dist.*

Constitution is not limited to those cases in which there is no resulting fiscal burden on the state. (*Moe v. Secretary of Administration & Finance* (Mass.1981) 417 N.E.2d 388 at pp. 395-396. See, e. g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Salas v. Cortez* (1979) 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 132 Cal.Rptr. 405, 553 P.2d 565; *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 57 Cal.Rptr. 623, 425 P.2d 223.

(1946) 28 Cal.2d 536, 171 P.2d 885; *Parrish v. Civil Service Commission*, supra, 66 Cal.2d 260, 57 Cal.Rptr. 623, 425 P.2d 223; *Salas v. Cortez*, supra, 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226; *White v. Davis* (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 533 P.2d 222.) If the exercise of the right is burdened, a compelling interest must be shown to avoid constitutional invalidity regardless of the manner of infringement.

The fundamental right at issue is the right to private procreative choice free from governmental interference. Petitioners assert that where an individual's decision is constitutionally protected, the government is obligated to maintain a neutral stance. As Justice Brennan has observed, "[t]he proposition for which these cases stand thus is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion. The [restriction's] denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have." (Fn. omitted; emphasis added.) (*Harris v. McRae* (1980) 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784, *Williams v. Zbaraz* (1980), 448 U.S. 358, 100 S.Ct. 2694, 2702, 65 L.Ed.2d 831, (dis. opn. of Brennan,

J.); see also, *id.*, at pp. 2712, 2715 (dis. opn. of Stevens, J.); *Moe v. Secretary of Administration & Finance*, supra, 417 N.E.2d 388 at pp. 399-402.)

The practical impact of these restrictions is to burden the right of choice. Women, who are dependent on Medi-Cal for all of their health care needs because of indigency, are effectively denied the choice of abortion except under the most stringent conditions approved by the state. Justice Brennan's words are once again instructive. These restrictions are "a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, [the restriction] does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality." (*Harris v. McRae*, supra; *Williams v. Zbaraz*, supra, 100 S.Ct. at p. 2703.)

I agree with the result reached in the lead opinion of this court. However, I would evaluate these restrictions under the strict judicial scrutiny test used to assess any governmental action which burdens the exercise of a fundamental right. (*People v. Belous*, supra, 71 Cal.2d at pp. 963-964, 80 Cal.Rptr. 354, 458 P.2d 194.)² In this case,

2. The majority suggests that the test of *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409, must be used to evaluate governmental benefit programs that restrict the exercise of a fundamental right through the imposition of an indirect burden or a condition. Since I find no constitutional distinction between direct burdens and indirect burdens or conditions (see *post* at pp. 889-890 of 172 Cal.Rptr., at pp. 802-803 of 625 P.2d), I would apply the traditional strict scrutiny standard.

Bagley was one case in a line of California cases which held that conditions on the exercise of a fundamental right must be reviewed with the same close scrutiny as a direct burden on those rights. (Cf. *Danskin v. San Diego*

Unified Sch. Dist., supra, 28 Cal.2d 536, 171 P.2d 885.) At the time *Bagley* was written, the concept of close scrutiny had not been fully developed. *Bagley* represents an early attempt by this court to formulate a standard for this close scrutiny. As such, it contains many of the concepts that were later incorporated into the doctrine of strict scrutiny. However, *Bagley* was not the final word of this court on the subject. Its precise formulation of the standard to be used has been superseded by later developments. (See *Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578-586, 79 Cal.Rptr. 77, 456 P.2d 645; *People v. Belous*, supra.)

Bagley has generated some confusion in the Courts of Appeal precisely because its language does not match the language of strict

the state must show a compelling interest to justify a curtailment of the right of privacy, a right expressly protected by the California Constitution in its Declaration of Rights (Cal.Const., art. I, § 1). (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, 164 Cal.Rptr. 539, 610 P.2d 436; *White v. Davis, supra*, 13 Cal.3d 757, 772, 775, 120 Cal.Rptr. 94, 533 P.2d 222. Cf. *People v. Belous, supra*, 71 Cal.2d at p. 964, 80 Cal.Rptr. 354, 458 P.2d 194.) This compelling interest must be proven by the state whether it directly or indirectly interferes with the exercise of a fundamental right. The facts of this case illustrate how direct or indirect governmental infringement can, with equal force, stifle the assertion of a constitutionally protected right.³ (*Moe v. Secretary of Administration and Finance, supra*, 417 N.E.2d 388 at pp. 401-402; see,

scrutiny found in the cases which followed it. In 1971, this court cited *Bagley* as authority for the proposition that the state could not impair the exercise of a fundamental right without demonstrating a compelling interest. (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 778-779, 97 Cal.Rptr. 657, 489 P.2d 537.) Over the years, the three-pronged test of *Bagley* has not been followed. The only part of the test which has been consistently applied deals with the infringement by the state of a fundamental right and the requirement of greater scrutiny by the courts. (*Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 585-586, 100 Cal.Rptr. 16, 493 P.2d 480; *White v. Davis, supra*, 13 Cal.3d 757, 772, 120 Cal.Rptr. 94, 533 P.2d 222; *Merco Constr. Engineers, Inc. v. Los Angeles Unified Sch. Dist.* (1969) 274 Cal.App.2d 154, 169, 79 Cal.Rptr. 23; *Healdsburg Police Officers Assn. v. City of Healdsburg* (1976) 57 Cal.App.3d 444, 450, 129 Cal.Rptr. 216. See also *Bogacki v. Board of Supervisors, supra*, 5 Cal.3d 771, 796-797, fn. 12, 97 Cal.Rptr. 657, 489 P.2d 537 (dis. opn. of Tobriner, J.). But see *Binet-Montessori, Inc. v. San Francisco Unified School Dist.* (1979) 98 Cal.App.3d 991, 160 Cal.Rptr. 38.

The conclusion in these cases that the *Bagley* standard is equivalent to a compelling state interest standard is understandable in light of its history. (Compare the language of the *Belous* test, *post*, at fn. 3.) *Bagley* has been applied exclusively to cases which involved restrictions on a fundamental right. When the language and result reached in *Bagley* are closely examined, it becomes clear that this court employed a de facto strict scrutiny test.

I disagree with any implication that in future cases an impairment of a right not currently deemed fundamental may be justifiable if the state can show a less than compelling interest. Since the facts of this case do not present this

e. g., *Harris v. McRae, supra*; *Williams v. Zbaraz, supra*, 100 S.Ct. at pp. 2704-2705 (dis. opn. of Brennan, J.). Cf. *Healy v. James* (1972) 408 U.S. 169, 183, 92 S.Ct. 2338, 2347, 33 L.Ed.2d 266; *N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 460-463, 78 S.Ct. 1163, 1170-72, 2 L.Ed.2d 1488; *Sherbert v. Verner* (1963) 374 U.S. 398, 404-406, 83 S.Ct. 1790, 1794-95, 10 L.Ed.2d 965; *Danskin v. San Diego Unified Sch. Dist., supra*, 28 Cal.2d 536, 171 P.2d 885; *Perry, The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government* (1978) 66 Geo.L.J. 1191, 1196, 1198 [hereinafter cited as *Abortion Funding Cases*].) Consequently, the funding restrictions by the Legislature must be judged by the same standard applicable to any direct burden placed by the state on the right of

issue, I think it unwise to lay the groundwork for such a decision through dictum, particularly where the issue was neither presented nor briefed. Further, a balancing of degrees of burden and degrees of "fundamentalness" presents a task that the judiciary is no more capable of performing in the area of due process than it is in the area of equal protection. (See *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 607-610, 150 Cal.Rptr. 435, 586 P.2d 916 (conc. opn. of Bird, C.J.).)

Bagley does not compel such a balancing of rights and interests. The implication in *Bagley* that restrictions on a less than fundamental right would call for a lesser standard of review is dictum and has been superseded by later developments in the doctrine of fundamental rights.

3. The former criminal statutes prohibiting abortion provide an example of direct infringement in this area. Those statutes were declared unconstitutional. Their impact fell most heavily on women who could not afford costly illegal abortions locally or legal abortions in other countries. (See Callahan, *Abortion: Law, Choice and Morality* (1970) pp. 136-137; Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy, in Abortion and the Law* (Smith ed. 1967) pp. 90-92; Charles & Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection* (1971) 23 Hastings.L.J. 147, 150-156.) This case presents an indirect infringement the results of which are the same. Thus, it is a distinction without a difference to assert that because the governmental action is indirect rather than direct, the infringements which result are of less significance constitutionally.

privacy. This is exactly what the Massachusetts Supreme Court did in *Moe v. Secretary of Administration and Finance*, *supra*, 417 N.E.2d 388, at pp. 396, 401-402.

In California, this argument is even more compelling by virtue of this state's long history of providing substantial protection to the right of private choice in intimate affairs. Years before the federal courts adopted a similar rule nationally, the California courts recognized the right of privacy in making a decision concerning whether to carry a child to full term or to abort. (*People v. Belous*, *supra*, 71 Cal.2d at pp. 963-964, 80 Cal.Rptr. 354, 458 P.2d 194.)⁴

Moreover, before the federal courts came to acknowledge that the freedom of choice in this intimate area of human activity involved the fundamental right of privacy, the voters of California added an express right of privacy to the state Declaration of Rights. In November 1972, article I, section 1 of the state Constitution was amended to include privacy among this state's citizens' inalienable rights.⁵ The election brochure given to the voters asserted that "[t]he right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose [¶] . . . The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to

the U.S. Constitution. This right should be abridged only where there is *compelling public need.*" (Emphasis added.)

The proponents, in arguing for the amendment's passage, stated that, "[t]he right to privacy is much more than 'unnecessary wordage.' It is fundamental in any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will *extend* various court decisions on privacy to insure protection of our basic rights."⁶ (Emphasis added.)

Our Constitution and our case law have placed California in the forefront of protecting privacy rights. Consistently, decisions by our state courts involving privacy have recognized these important interests before the federal courts and have more broadly defined them. For example, in *Ballard v. Anderson*, *supra*, 4 Cal.3d 873, 95 Cal.Rptr. 1, 484 P.2d 1345, this court prohibited the invasion of a minor's right of privacy when it refused to rewrite a statute to require parental consent for a minor's abortion. The analogous federal case, *Planned Parenthood of Missouri v. Danforth* (1976) 428 U.S. 52, 72-75, 96 S.Ct. 2831, 2842-43, 49 L.Ed.2d 788, came to a similar conclusion some five years later. (And compare, e. g., *Perez v. Sharp* (1948) 32 Cal.2d 711, 198 P.2d 17, with *Loving v. Virginia* (1967) 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [right to marry person of one's choice irrespective of race]; *In re Klor* (1966) 64 Cal.2d 816, 51 Cal.Rptr. 903, 415 P.2d 791 with *Stanley v. Georgia* (1969) 394 U.S. 557, 89 S.Ct. 1243,

4. This court in *Belous* recognized "[t]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. [Citations.] . . . [¶] The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state [citations], whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' [citations], and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' [citations]." (71 Cal.2d at pp. 963-964, 80 Cal.Rptr. 354, 458 P.2d 194.)

5. Article I, section 1 now reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy.*" (Emphasis added.)

6. This extension of court decisions obviously included the extant decisions of this court in the area of freedom of choice and a citizen's right to privacy in areas dealing with procreation. (See *Ballard v. Anderson* (1971) 4 Cal.3d 873, 95 Cal.Rptr. 1, 484 P.2d 1345; *People v. Belous*, *supra*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194.)

22 L.Ed.2d 542 [right to private possession of obscene material in one's home]; *People v. Ramey* (1976) 16 Cal.3d 263, 275-276, 127 Cal.Rptr. 629, 545 P.2d 1333, cert. den., 429 U.S. 929, 97 S.Ct. 335, 50 L.Ed.2d 299 with *Payton v. New York* (1980) 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 [protection from warrantless arrest in the home].)

In addition, the constitutional provision giving each California citizen a right of privacy has been held to be greater in scope than similar federal rights. (Compare *City of Santa Barbara v. Adamson*, *supra*, 27 Cal.3d 123, 129, 164 Cal.Rptr. 539, 610 P.2d 436 with *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 and *Moore v. East Cleveland* (1977) 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531.)

Further, the California Legislature has often acknowledged the importance of privacy protections. For example, California has recognized that adults have a fundamental right to control decisions relating to their medical care. In this regard, the Legislature enacted the Natural Death Act (Health & Saf. Code § 7185 et seq.), which concerns the right of an adult to decide whether to have life-sustaining procedures withheld or withdrawn in the event of a terminal illness. Also, section 1708.5 was added to the Health and Safety Code enabling physicians to lawfully prescribe laetrile or amygdalin to any terminal cancer patient who chooses that form of cancer therapy. (See *People v. Privitera* (1979) 23 Cal.3d 697, 711, 153 Cal.Rptr. 431, 591 P.2d 919 (dis. opn. of Bird, C.J.); *id.*, at p. 740 (dis. opn. of Newman, J.).)

The Legislature has also acted to protect privacy in other areas of its citizens' lives. (See, e. g., Civ.Code, §§ 34.5-34.10 [right of a minor to obtain medical care without parental consent, for, inter alia, the prevention or treatment of pregnancy, and for rape, sexual assault, and drug or alcohol related problems]; Ed.Code, § 67140 et seq. [protecting the privacy of students' rec-

ords]; Pen.Code, § 626.11 [protecting the right of privacy of persons renting rooms in student dormitories owned or operated by a state university, state college, or community college]; Civ.Code, § 1785.1 et seq. [the Consumer Credit Reporting Agencies Act]; *id.*, § 1786 et seq. [the Investigative Consumer Reporting Agencies Act]; *id.*, § 1798 et seq. [the Information Practices Act of 1977]; *id.*, § 1799 et seq. [prohibiting the unauthorized disclosure of business records]; Welf. & Inst. Code, § 5325.1 [protecting privacy rights of the mentally ill]; Note, *California "Consenting Adults" Law: The Sex Act in Perspective* (1976) 13 San Diego L.Rev. 439 [discussing the Legislature's repeal of former Penal Code restrictions on private sexual behavior between consenting adults].)

Thus, the right of privacy in California has never been dependent upon analogous federal decisions.⁷ This state's special concern for individual privacy is understandable when viewed from an historical perspective. The California Constitution has traditionally embodied innovations and concerns for individual liberties. (David, *Our California Constitutions: Retrospections In This Bicentennial Year* (1976) 3 Hastings Const.L.Q. 697.)⁸ This is a reflection of California's origins, for this state developed from a pioneer society comprised of a diverse group of people. (*Id.*, at pp. 698-699.)

As the lead opinion ably demonstrates, California's protection of individual rights has been a bulwark against an erosion of our citizens' liberties. Predictably, California has advanced beyond the federal analysis when dealing with the selective withholding of governmental benefits based solely on the recipients' exercise of their rights. (*Ante*, at pp. 868, 872-874 of 172 Cal.Rptr., at pp. 781, 785-787 of 625 P.2d.)

Recognition of the right of privacy in California is an historical fact underscored by our decisional law. California citizens' basic right of privacy has never been de-

7. Our Constitution provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal.Const., art. I, § 24.)

8. Judge David notes, for example, the prohibitions against slavery and the grant of women's suffrage long before such tenets were nationally adopted. (*Id.* at pp. 713, 727-728.)

pendent upon federal recognition of a similar right. Therefore, this court is not obligated to limit our citizens' rights simply because the federal courts have decided to change direction. The independent obligation to interpret this state's Constitution (*ante*, at pp. 870-871 of 172 Cal.Rptr., at pp. 783-784 of 625 P.2d) imposes upon this court the responsibility to be consistent in giving life to the principles which that document embodies. When the federal courts radically depart from *Roe* and its progeny,⁹ it is this court's duty to examine this state's constitutional requirements in order to decide if such a change is permissible.

As a result, the federal cases are of limited use in this context. Our state Constitution mandates a stricter standard than that used by the Supreme Court when examining funding restrictions which impair the right of privacy.

However, it is instructive to consider the reasoning of the Supreme Court when it dealt with this politically sensitive issue. That court held that legislative restrictions on abortion funding do not impair a citizen's right of private choice since they merely discourage the choice of abortion by granting a benefit (maternity care) to "encourage[] [an] alternative activity." (*Harris v. McRae*, *supra*, 100 S.Ct. at p. 2687.) This view allows the state to avoid the requirement of establishing a compelling state interest by engaging in the sophistry that there has been no barrier erected around a woman's right of choice.

Further, such a holding encourages the state to set up devious intrusions on its citizens' fundamental right since it can do so with impunity. It is clear that the state

may not directly prohibit its citizens' right to choose abortion as a method by which to deal with procreation. (*People v. Belous*, *supra*, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194.) That rule of constitutional law is circumvented when the state refuses to fund abortions for those dependent on the state for medical care. "[A]rticulating the purpose [of the challenged restrictions] as 'encouraging normal childbirth' does not camouflage the simple fact that the purpose, more starkly expressed, is discouraging abortion." (Perry, *Abortion Funding Cases*, *supra*, 66 Geo.L.J. at p. 1196.)

Additionally, the distinction between prohibitions and benefits arbitrarily separates the existence of a right from the realization and enjoyment of that right. (*Beal v. Doe* (1977) 432 U.S. 438, 462-463, 97 S.Ct. 2366, 2398-99, 53 L.Ed.2d 464 (dis. opn. of Blackmun, J.); see, *Tribe*, *supra*, § 15-10, p. 933, fn. 77.)

In California, traditional constitutional interpretation does not permit such spurious distinctions.¹⁰ For example, in *Salas v. Cortez*, *supra*, 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P.2d 226, this court held that due process entitles an indigent defendant to appointed counsel in a state prosecuted civil suit to determine paternity. The indigent defendant was not prohibited from appearing in propria persona or from attempting to secure the funds to retain counsel or the services of pro bono counsel. Nevertheless, this court held that the significant infringement of both due process rights to a fair trial and a person's fundamental interest in a correct adjudication of the parental relationship could not be upheld absent a com-

9. The abortion funding cases of the United States Supreme Court have been criticized as inconsistent with *Roe v. Wade*, *supra*, and other federal cases. (*Moe v. Secretary of Administration and Finance*, *supra*, 417 N.E.2d 388 at p. 402; *Harris v. McRae*, *supra*, *Williams v. Zbaraz*, *supra*, 100 S.Ct. at p. 2702 (dis. opn. of Brennan, J.); *id.* at p. 2706 (dis. opn. of Marshall, J.); *Abortion Funding Cases*, *supra*, 66 Geo.L.J. at pp. 1197-1201; Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae* (1980) 32 Stan.L.Rev. 1113; *Tribe*, *American Constitutional Law* (1978) § 15-10,

pp. 933-934, fn. 77 [hereinafter cited as *Tribe*]; Note, *The Supreme Court, 1979 Term* (1980) 94 Harv.L.Rev. 1, 96, 99-102; Note, *Committee to Defend Reproductive Rights v. Myers: Medical Funding of Abortion* (1979) 9 Golden Gate L.Rev. 361, 384-387.)

10. Some writers have noted that federal cases do not permit such a distinction either. (*Harris v. McRae*, *supra*, *Williams v. Zbaraz*, *supra*, 100 S.Ct. at pp. 2704-2705 (dis. opn. of Brennan, J.); Note, *The Supreme Court, 1979 Term*, *supra*, 94 Harv.L.Rev. at pp. 96-107.)

elling state interest. (*Id.*, at p. 32, 154 Cal.Rptr. 529, 593 P.2d 226.)

Another important case along these lines is *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341, *affd.* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741. There, this court held that individuals must be permitted to exercise their First Amendment rights at a private shopping center notwithstanding the fact that the petitioners admittedly were not prohibited from exercising their free speech rights in other places. (See also, *In re Hoffman* (1967) 67 Cal.2d 845, 852, fn. 7, 64 Cal.Rptr. 97, 434 P.2d 353 [invalidating restrictions on First Amendment activities in railroad station].)

Similarly, *Danskin v. San Diego Unified Sch. Dist.*, *supra*, 28 Cal.2d 536, 171 P.2d 885 stands for the proposition that the state may not grant benefits in a manner which discriminates against the exercise of fundamental rights. In that case, this court held unconstitutional a public school's refusal to permit use of its auditorium by "subversive" groups. The court stated, "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable." (*Id.*, at p. 547, 171 P.2d 885.) Since the state could not directly compel renunciation of beliefs, it could not make such renunciation a condition of receiving a public benefit. (*Id.*, at p. 546, 171 P.2d 885.) Also, in *Fort v. Civil Service Commission* (1964) 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385, *Kinnear v. City etc. of San Francisco* (1964) 61 Cal.2d 341, 38 Cal.Rptr. 631, 392 P.2d 391, and *Bagley v. Washington Township Hospital Dist.*, *supra*, 65 Cal.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409, this court invalidated restrictions on public employment which forced employees to choose between public employment and their First Amendment rights.

11. The lead opinion's thorough analysis of the state's interest correctly concludes that the justifications advanced by the state are not com-

These cases graphically illustrate the principle that a compelling interest must be found to justify direct or indirect burdens on the exercise of fundamental rights. Thus, the question here is simply whether the Budget Act restrictions at issue actually impair or burden a poor woman's right to procreative choice. It is clear that they do.

The Budget Act limitations are all the more troublesome because they result in increased health hazards to the indigent woman. *Harris v. McRae*, *supra*, *Williams v. Zbaraz*, *supra*, 100 S.Ct. at pp. 2714-2715 (dis. opn. of Stevens, J.). By disallowing the funding for most abortions, the state leaves the pregnant woman to carry an unwanted pregnancy to term or encourages her to abort without medical assistance. Thus, the funding restrictions inject a coercive financial incentive that forces the individual to accept the state's choice of either contraception or childbirth. It forces the indigent woman to exercise her choice in the fashion advocated by the state.

The Budget Act restrictions impermissibly limit the constitutionally protected choice of our female citizens. The state's attempt to justify these limitations as non-coercive is illusory. "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men [and women] . . ." (*Ho Ah Kow v. Nunan* (D.Cal.1879) 12 F.Cas. 252, 255 (No. 6546).) As judges and as citizens, we cannot fail to see that if the state is allowed to restrict the exercise of choice for the poor alone in this intimate area, indigent women in our society are forced to become second class citizens.¹¹

RICHARDSON, Justice, dissenting.

I respectfully dissent. The consequences of the majority's extended legal analysis may be reduced to a simple proposition: The State of California and its taxpayers are *constitutionally* compelled to pay for the abortions of all Medi-Cal recipients who desire them. The highest court in the land

elling. (*Ante*, at pp. 878-886 of 172 Cal.Rptr., at pp. 791-799 of 625 P.2d.)

has twice held directly to the contrary. No matter. Accepting as valid the very arguments which failed to persuade the Legislature, and disregarding all deference to a co-equal branch of government, the majority reaches its conclusion relying on the now familiar "independent state grounds" and on the right of "privacy" embodied in the California Constitution in 1972. As I develop below, in my view this is very dubious reasoning. Before today I had thought that it was very well settled that it was the Legislature, not the courts, which had the ultimate authority to select those benefits and services to be included in a public welfare program.

The majority's thesis is that the Legislature's decision to give public monetary assistance to welfare mothers for their childbirth expenses thereby violates the constitutional rights of mothers who prefer to abort their child. By funding the childbirth of some women, it is contended that the state "forces" other indigent women to forego their constitutional right to abort. I suggest that such distorted logic defies constitutional analysis and makes no sense. The Legislature's decision to pay for the expenses of childbirth may make birth a more financially attractive alternative than an abortion, but such a decision no more "forces" women to give up abortion than funding the purchase of false teeth forces one to give up toothbrushes.

The majority indulges in semantic legerdemain, phrasing the issue in terms of the "right to procreative choice," thus broadening the question to permit its argument. It is essential that we remain very clear on what this case is *not* about. The issue is not whether a woman's constitutional right to abort may be exercised without undue governmental *interference* (*Roe v. Wade* (1973) 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147) or whether women have a right to an abortion. They do. The essential question before us is whether they have a right to abort *free of charge and at taxpayer expense*. As I will develop, these two questions involve vastly different considerations.

The majority relies primarily upon a line of cases which is wholly inapposite to the issue before us. (See *Parrish v. Civil Service Commission* (1967) 66 Cal.2d 260, 57 Cal.Rptr. 623, 425 P.2d 223; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409; *Danskin v. San Diego Unified Sch. Dist.* (1946) 28 Cal.2d 536, 171 P.2d 885.) It is not surprising that, using a 13-inch ruler as a constitutional measure for the challenged legislation, the majority reaches such an erroneous result.

Thus, in *Danskin* the state improperly required loyalty oaths from those persons who sought permission to use school buildings for their meetings. We held that although the state had no duty to make school buildings available for public meetings, nevertheless, if it elected to do so, it could neither arbitrarily select among permitted users nor impose unconstitutional conditions upon that use. (28 Cal.2d at pp. 545-546, 171 P.2d 885.) Application of this *Danskin* principle to the case before us would result in prohibiting the state from the arbitrary extension of either childbirth or abortion benefits to some but not all recipients or, alternatively, the conditioning of the receipt of such benefits upon the waiver of some constitutional right. Nothing remotely resembling such selective or coercive conduct is involved in the case before us. Contrary to the majority's claim of "discriminatory governmental treatment" (*ante*, p. 867 of 172 Cal.Rptr., at p. 780 of 625 P.2d), childbirth benefits are available to *everyone* on a nondiscriminatory basis. Such benefits are not conditioned upon the waiver of the right to abort, for that decision remains the untrammelled and voluntary choice of each aid recipient. Similarly, the limited abortion benefits which are offered by Medi-Cal are available to *everyone* meeting the objective criteria prescribed in the legislation. (See *id.*, at p. 869, fn. 1 of 172 Cal.Rptr., at p. 782, fn. 1 of 625 P.2d.) The majority makes no attempt to demonstrate the arbitrariness of any of these criteria. How then can *Danskin* support the majority's holding herein?

Bagley is wholly inapposite. In that case, a hospital district attempted to discharge an employee because of her political activities involving district board elections. In *Bagley*, we established strict standards for measuring the propriety of governmental restrictions upon the exercise of constitutional rights as a condition to public employment. (65 Cal.2d at pp. 505-507, 55 Cal. Rptr. 401, 421 P.2d 409.) The *Bagley* rationale is not relevant to our consideration of the present case. Its "three-part test" so readily borrowed by the majority is plainly ill-suited for the analytical task before us. As previously noted, the legislative action in the present case imposes no conditions whatever upon the right of particular recipients of available benefits. In contrast, the *Bagley* employee was told to forego her political rights if she wished to remain employed. No similar demands or conditions are imposed upon the beneficiaries which the Legislature has selected for inclusion in the Medi-Cal program. In short, the *Bagley* tripartite test measures the validity of conditions imposed upon the receipt of public benefits. The test is wholly inappropriate to measure the constitutional adequacy of the benefits so provided, which is the only issue before us in this case.

The third principal case, *Parrish*, is no closer on point than either *Bagley* or *Danskin*. The *Parrish* welfare recipients were required to consent to predawn eligibility searches as a condition to the receipt of public aid. We there applied the *Bagley* standards and concluded that this conditional intrusion on constitutional rights was unjustified and improper. In contrast, the present case presents no such similar conditions upon the right to receive the kinds of aid which were funded by the Legislature. With due respect, I must suggest that the majority's attempt to find refuge in such weak precedents graphically illustrates the poverty of its argument.

The cases on which the majority relies involve the imposition of unconstitutional conditions upon the receipt of public benefits. This is entirely different from the problem herein presented. Yet, relevant precedent is not lacking. It simply will not

support the result which the majority obviously struggles to achieve.

Two very recent decisions of the United States Supreme Court are directly in point. The high court decided identical issues in *Harris v. McRae* (1980) — U.S. —, 100 S.Ct. 2671, 65 L.Ed.2d 784, and *Maher v. Roe* (1977) 432 U.S. 464, 471-474, 97 S.Ct. 2376, 2381-82, 53 L.Ed.2d 484, with results diametrically opposite to those achieved by the majority here. In each case the Supreme Court sustained budgetary restrictions upon aid for abortions. The *Maher* court upheld a Connecticut welfare regulation which, as here, provided benefits for medical services incident to childbirth but denied those which related to nontherapeutic abortions. In *Harris*, the Supreme Court upheld the federal "Medicaid" Act and the so-called "Hyde Amendment" thereto which in combined effect denied public funding for some medically necessary abortions. In both cases the high tribunal rejected several constitutional arguments raised against these funding restrictions which are identical to those adopted by the majority, including challenges based on privacy, due process and equal protection principles. The majority herein chooses to ignore the rationale of the highest court in the land which deals specifically with the precise issues presented to us.

The primary issue in *Maher* was whether restrictions upon state aid for nontherapeutic abortions impermissibly infringed upon the rights of privacy or "freedom of choice" which the Supreme Court described in *Roe v. Wade*, supra, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. The *Maher* court observed that although its *Roe* holding "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (432 U.S., at pp. 473-474, 97 S.Ct. at p. 2382) such a decision does not prevent the state from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." (*Id.*, at p. 474, 97 S.Ct. at p. 2382.) In its further amplification in *Maher* the United States Supreme Court spoke directly, and

with compelling authority, to the precise point which is before us, explaining: "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortions decisions. The Connecticut [one may substitute *California*] regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. *The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.*" (*Id.*, at p. 474, 97 S.Ct. at p. 2382, italics added.) This reasoning, in my view, is directly applicable to the present case. It is also unanswerable. The California Legislature may constitutionally make "a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds." (*Ibid.*) Such a choice may be sociologically unwise but it is not constitutionally illegal.

Last year in *Harris* the high tribunal again focused its attention on the precise issue before us, and flatly rejected the constitutional analysis advanced by the majority that "a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indi-

gency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*." (448 U.S. at p. 318, 100 S.Ct. at p. 2688, fn. omitted.)

In similar fashion, the Supreme Court disposed of the due process argument, holding that there is no Fifth Amendment affirmative entitlement to government funds necessary to "realize all the advantages of that freedom" recognized by *Roe v. Wade* (pp. 317-318, 100 S.Ct. at pp. 2688-2689).

Finally, *Harris* rejected the reasoning of the majority that the funding restrictions violated equal protection principles by providing medically necessary services other than abortions. (Pp. 321-326, 100 S.Ct. at pp. 2690-2693.) The high court noted that although the impact of the federal law falls upon the indigent, prior decisions had repeatedly held that poverty, standing alone, is not a suspect classification which would invoke the strict scrutiny form of analysis. (P. 323, 100 S.Ct. at p. 2691.)

Applying this traditional rational basis test to determine whether the federal restrictions bore such a "relationship to its legitimate interest in protecting the potential life of the fetus" (p. 324, 100 S.Ct. at pp. 2691-2692), the Supreme Court found such a rational basis in the state's interest in protecting the potentiality of human life. The high tribunal observed: "By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligi-

ble for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions. Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life. [¶] Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard." (P. 326, 100 S.Ct. at pp. 2692-2693, fns. omitted.)

The majority questions the propriety of the California Legislature's interest in promoting childbirth and protecting potential life in the course of applying its inapposite *Bagley* "three-pronged test." Contrary to the high court analysis in *Maher and Harris*, the majority bases its holding on the faulty premise that California must somehow demonstrate not only that its foregoing interests *might* be fostered by the funding restriction but that they inevitably *must* be so fostered, and in addition, in a manner "least offensive" to the aid recipient's "right of procreative choice." (E. g., pp. 883, 884 of 172 Cal.Rptr., at pp. 796, 797 of 625 P.2d.) The majority's test is not only unduly strict in its evaluation of California's legitimate interests, but the majority's reasoning is wholly circular, entirely begging the question whether, indeed, there exists a right to choose between childbirth and a *free abortion performed at state expense*.

The California Legislature could reasonably believe that if free abortions "on demand" were unavailable, some women would elect to bear their children which would thereby promote the legitimate goals of encouraging childbirth and protecting fetal life. We cannot assume that the California Legislature is less protective of po-

tential life than is the United States Congress. The Legislature also could assume that other women, no longer able to obtain abortions paid for by the taxpayers, might be encouraged before conception to discover and practice more effective birth control methods, thereby reducing to a considerable degree public welfare expenditures.

Thus, while the majority compares the cost of abortions with the cost of child bearing (*ante*, pp. 880-881 of 172 Cal.Rptr., at pp. 793-794 of 625 P.2d), it disregards a third "procreative choice" available to the indigent woman who prefers not to bear a child: use of effective contraception. Numerous birth control methods and techniques of varying degrees of effectiveness are available as alternatives to either pregnancy or abortion. Recognizing of course that no present method is infallible, I suggest that the majority errs in its assumption that "when the state finances the costs of childbirth, but will not finance the termination of pregnancy, it realistically forces the indigent woman to choose childbirth" (*Ante*, pp. 885-886 of 172 Cal.Rptr., at pp. 798-799 of 625 P.2d.) Instead, the Legislature may well have wished to encourage a "procreative choice" at an earlier stage by promoting the use of voluntary birth control.

The principal flaw, however, which runs throughout the entirety of the majority's theory is the erroneous assumption that if a woman has a constitutional right of "freedom of choice" in the matter of whether or not to bear her child it necessarily follows that the State of California and its taxpayers must pay for the costs of the exercise of that right. Fortunately, that sweeping generalization is not so, and never has been so in our constitutional history. A citizen clearly has a constitutional right to travel where and when he pleases. I have never heard it suggested that he is constitutionally entitled to a free trip to the Bahamas paid for from the public treasury. Every citizen has a constitutional right to vote, but he has no constitutional right to a free taxi ride to the polling place. Every citizen may run for public office, but I know of no

case holding that he has a constitutional right to public funds to help him get elected. He has a constitutional right to express his views on public affairs, but he has no constitutional right to a free mailing of his views, or a free hall paid for by the taxpayers within which he may expound them. Even when, by a divided court, we recently recognized a right of representation for incarcerated indigent civil defendants we very carefully abstained from recognizing that such a right constituted any enforceable claim against the public treasury for the payment of such representation. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 920, fn. 6, 132 Cal.Rptr. 405, 553 P.2d 565.) In short, the recognition of constitutional rights does not carry with it any corollary constitutional obligation on the state Legislature to furnish, out of public funds, the full and unrestricted implementation of those rights. This fact is unaffected by the majority's effort to cast the issue in the form of a "protection of either procreative choice." (*Ante*, p. 867 of 172 Cal.Rptr., at p. 780 of 625 P.2d.)

Finally, I think it very doubtful that when the people of California in 1972 approved the Legislature's proposed constitutional amendment adding the "right of privacy" to the list of inalienable rights, they thought they were committing themselves to the payment of free abortions. There is nothing whatever in the history of the initiative to suggest such a bizarre result. Rather, when they added the "right of privacy" to their "inalienable rights" the people were told that the right of privacy "prevents government and business interests from collecting and stockpiling necessary information gathered for one purpose in order to serve other purposes or to embarrass us.

"Fundamental to our privacy is the ability to control circulation of personal information The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

"Even more dangerous is the loss of control over the accuracy of government and business records on individuals.

"The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we apply for a credit card, or a life insurance policy, file a tax return, interview for a job, or get a drivers license, a dossier is opened and an informational profile is sketched. Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27.)

The foregoing extracts from the ballot arguments persuade me that when the people in 1972 adopted the constitutional "privacy" measure they thought they were approving restrictions on the dissemination of record information affecting and intruding upon their personal lives. This is the whole spirit of the ballot argument. It may have had wider constitutional implications, but there is nothing in the history of the amendment to suggest that the people intended to create a constitutionally protected right that was broader than the federal right of privacy declared in *Roe v. Wade*, supra. Certainly, the people did not intend to extend "privacy" to encompass a constitutional access to the public treasury for all indigents who want free abortions. Such a speculative jump in reasoning is of Olympian proportions—from a restriction on information distribution to a constitutional obligation to pay for abortions. With due deference, I suggest that such a consequence is the pure invention of the majority and not constitutionally ordained by any California "right of privacy."

It is the exclusive legislative prerogative, and not ours, to determine how public monies shall be appropriated, and for what purposes. The United States Supreme

Court in disposing of the identical arguments adopted by the majority herein has explicitly held "[n]or is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions." (448 U.S. 325, 100 S.Ct. 2692.) The same constitutional considerations which moved the high court to defer to congressional judgment should similarly prompt us to accept the judgment of the California Legislature in its adoption of the Budget Act. The California Constitution prohibits us from rewriting the Budget Act, which budget, it bears repeating, is the Governor's responsibility to propose and the Legislature's to adopt. We seriously err when we continue, on misguided constitutional grounds, to usurp the lawmaking function of the California Legislature.

I would affirm the judgment in S.F. 20469, and deny the peremptory writs sought in S.F. 24053 and S.F. 24192.

CLARK, J., concurs.

Rehearing denied; RICHARDSON, J., dissenting.



172 Cal.Rptr. 899

Steven EDMONDSON, Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

L.A. 31328.

Supreme Court of California.

April 16, 1981.

Petition was filed for review of state bar's recommendation of suspension from practice of law. The Supreme Court held that one-year actual suspension is justified for misappropriation of client funds, absent showing of circumstances in mitigation.

Suspension ordered.

1. Evidence ⇌75

Rejection of testimony does not create affirmative evidence to contrary of that which is discarded.

2. Evidence ⇌75

Fact that one testifies falsely may afford inference that he or she is concealing truth but it does not reveal truth itself or warrant inference that truth is direct converse of rejected testimony.

3. Attorney and Client ⇌53(2)

State bar, in attorney disciplinary proceedings, may not arbitrarily disregard attorney's uncontradicted and unimpeached denials.

4. Attorney and Client ⇌53(2)

Where charge brought against attorney which is not supported by convincing proof and to reasonable certainty, it will be dismissed.

5. Attorney and Client ⇌57

Supreme Court is not bound by recommendations as to discipline of either hearing panel of state bar or state bar review board.

6. Attorney and Client ⇌58

One-year period of actual suspension from practice of law is justified for knowingly and intentionally misappropriating client funds for purpose of satisfying debts of other business.

7. Attorney and Client ⇌58

Fact that attorney does not lie to his clients or that their property is not levied upon cannot be considered in mitigation of state bar's recommendation of suspension from practice of law for knowingly and intentionally misappropriating client's funds to satisfy debts of his other business.

8. Attorney and Client ⇌58

Restitution made following filing of charges before state bar is not entitled to weight as mitigating circumstance.

9. Attorney and Client ⇌58

Prior private reproof for similar misconduct is factor in favor of imposition of discipline.

40 Conn.Sup. 394

1³⁹⁴Rosie J. DOE et al.

v.

Edward MAHER et al.

No. 196874.

Superior Court of Connecticut,
Judicial District of New Haven.

April 9, 1986.

Class action, seeking injunctive relief, was brought on behalf of indigent pregnant women and physicians willing to perform medically necessary abortions challenging regulation restricting medicaid payment for therapeutic abortions to those necessary to save life of mother. The Superior Court, Judicial District of New Haven, Berdon, J., held that: (1) regulation was contrary to statutory provisions of medicaid program; (2) regulation was in violation of plaintiffs' state constitutional rights of due process; and (3) regulation was in violation of plaintiffs' state constitutional rights of equal protection.

Injunction granted.

1. States ⇨191(1.20)

Action for declaratory judgment challenging adoption of administrative regulation as being ultra vires was not barred by doctrine of sovereign immunity.

2. Administrative Law and Procedure ⇨229**Social Security and Public Welfare** ⇨241.115

Indigent woman, challenging validity of state medicaid regulation allowing payment only for those abortions necessary to preserve life of the woman, was not required to exhaust administrative remedies where evidence was conclusive that indigent woman's condition did not require abortion to preserve her life, and thus administrative remedy would have been futile.

3. Judgment ⇨731

Where court in first action had jurisdiction, but declined to exercise jurisdiction as matter of discretion, second action on undetermined issues is not precluded.

4. Parties ⇨11

Class of indigent pregnant women and class of medicaid physicians had standing to contest validity of administrative regulation restricting medicaid funding of abortions to those necessary to save life of mother.

5. Social Security and Public Welfare ⇨241.95

Regulation restricting medicaid funding of abortions to those necessary to save life of mother was invalid where authorizing statute, providing for medical assistance to "any otherwise eligible person," made no exceptions for particular procedures like therapeutic abortions not necessary to save life of pregnant woman. C.G.S.A. § 17-134b.

6. Social Security and Public Welfare ⇨241.95

Regulation restricting medicaid funding of abortions to those necessary to save life of mother unconstitutionally deprived physicians and indigent women seeking therapeutic abortions of right to privacy guaranteed by due process clause of State Constitution; state's asserted compelling interest in protecting potentiality of human life did not outweigh health of women at any stage of pregnancy. C.G.S.A. Const. Art. 1, § 10.

7. Social Security and Public Welfare ⇨241.95

Regulation restricting medicaid funding of abortions to those necessary to save life of mother violated equal protection clause of State Constitution and, more specifically, state equal rights amendment where state funded all medically necessary procedures and services provided indigents except therapeutic abortions for indigent women. C.G.S.A. Const. Art. 1, §§ 1, 20.

¹³⁹⁵Martha Stone, Catherine Hartford, Roraback Canaan, and Shelley Geballe, Stony Creek, for plaintiffs.

Michael Arcari, Paige Everin and Richard Couture, Asst. Attys. Gen., Hartford, for defendants.

BERDON, Judge.

The plaintiffs, Rosie J. Doe and her physician, Marshall Holley,¹ have brought this class action against the defendant commissioner of income maintenance (commissioner)² challenging the legality and constitutionality of Policy 275 of 3 Manual, Department of Income Maintenance Medical Assistance Program, c. III. (Revised January 22, 1981) (regulation).³ The regulation restricts the funding of abortions under the Connecticut Medical Assistance Program (hereinafter medicaid); General Statutes § 17-134a et seq.; to those abortions "necessary because the life of the mother would be endangered if the fetus were carried to term."

The court concludes that the regulation exceeds the statutory authority of the commissioner and is violative of the due process clause (article first, § 10) and equal protection clause (article first, §§ 1 and 20), and more specifically the equal rights amendment (article fifth) of the constitution of the state of Connecticut.

Before setting forth the background and facts, and evaluating the statutory and con-

1. The court authorized the named plaintiff to prosecute this suit under the fictitious name of Rosie J. Doe. See *Buxton v. Ullman*, 147 Conn. 48, 50, 156 A.2d 508 (1959), appeal dismissed, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989, reh. denied, 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 69 (1961). The plaintiff Marshall Holley is a licensed physician who practices in the city of New Haven and performs medicaid abortions.
2. In addition to the commissioner of income maintenance, the treasurer of the state of Connecticut is also a party defendant. References to the commissioner also include his successor in office and the department of income maintenance and its predecessor, the department of social services and welfare. Of course, this is, in effect, a suit against the state of Connecticut. *Sentner v. Board of Trustees*, 184 Conn. 339, 342, 439 A.2d 1033 (1981).

stitutional claims of ¹³⁹⁶the plaintiffs, the court deems it advisable to put the case in its proper perspective. It is *not* "a referendum on the morality of abortion"; it does *not* seek to delve into "the profound questions about the moral, medical, and societal implications of abortion," and it does not attempt "to determine when life begins or at what point a fetus is a person." *Right to Choose v. Byrne*, 91 N.J. 287, 299, 450 A.2d 925 (1982). This case is concerned only with the narrow issue of funding of medically necessary or therapeutic abortions.⁴ The issue of whether our state constitution mandates that the state fund nontherapeutic abortions for the poor has not been raised by the parties and is not addressed in this decision.⁵

I

CHRONOLOGY OF THERAPEUTIC ABORTION FOR THE POOR IN CONNECTICUT

It is helpful to review the chronology of events pertaining to therapeutic abortions in Connecticut. Shortly after the Supreme Court of the United States in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, reh. denied, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973), held that the constitutional right of privacy protects a woman's right to terminate her pregnancy, the commissioner revised his policies to provide

3. See note 10, *infra*; the regulation was adopted by the present commissioner Stephen B. Heintz's predecessor.
4. The court uses the terms medically necessary and therapeutic abortions synonymously. The court defines medically necessary or therapeutic abortions as follows: abortions necessary to ameliorate a condition that is deleterious to a woman's physical and or psychological health.
5. Cf. *Right to Choose v. Byrne*, 91 N.J. 287, 318-19, 450 A.2d 925 (1982) (Pashman, J., concurring in part, dissenting in part) (reasoning that the funding of nontherapeutic abortions, as well as medically necessary abortions, is mandated by the equal protection clause of the New Jersey constitution).

that therapeutic abortions would be funded through the state medicaid program. Prior thereto, the regulation permitted medicaid funding for abortions "only when necessary to preserve the physical life of the mother."

¹⁹⁹⁷The commissioner, thereafter, made further changes in the regulation mirroring those of the federal medicaid program; Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq.; which provides for partial reimbursement to the states of medical expenses for the poor. These changes in the federal program, referred to as the Hyde amendment,⁶ restricted funding to abortions necessary to preserve the woman's life or, at varying times, to termination of pregnancies resulting from rape or incest.⁷

The regulation was in effect until July 17, 1979, when the Federal District Court in the case of *Women's Health Services, Inc. v. Maher*, 482 F.Supp. 725 (D.Conn. 1980) (*Women's Health Case I*), held that it was "not rationally related to any legitimate, articulated state interest and the exclusion of therapeutic abortions from medicaid coverage, being irrational, violates the equal protection clause [of the United States constitution]." *Id.*, 735. The court in *Women's Health Case I* issued an injunction ordering the state to pay the expenses for all medically necessary abortions under its medicaid program. After the United States Supreme Court decided in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784, reh. denied, 448 U.S. ¹⁹⁹⁸917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980), that the Hyde amendment met federal constitutional standards, and in *Williams v.*

Zbaraz, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831, reh. denied, 448 U.S. 917, 101 S.Ct. 38, 65 L.Ed.2d 1180 (1980), that the state could restrict the payment for abortions to the reimbursement limits provided in the Hyde amendment, the Second Circuit Court of Appeals reversed and remanded *Women's Health Case I*. *Women's Health Services, Inc. v. Maher*, 636 F.2d 23 (2d Cir.1980) (the remand was granted because of the claim of the plaintiffs that *Women's Health Case I* was factually distinguishable from *McRae* and *Zbaraz*). On December 16, 1980, the District Court, Blumenfeld, J., denied the plaintiffs' petition to restrain the commissioner from enforcing the regulation, and on May 6, 1981, granted the state's motion to dismiss the case for failure to state a cause of action.

Thereafter, on February 15, 1981, the commissioner reinstated his prior restrictive policy on abortion by revising the regulation to coincide with the then current Hyde amendment.

On March 2, 1981, an action was commenced in the Superior Court of Connecticut for the Judicial District of New Haven entitled *Women's Health Services, Inc. v. Maher*, No. 190341 (hereinafter *Women's Health Case II*), seeking to declare that the regulation violated the constitution of Connecticut and to require the state to pay for all medically necessary abortions. *Women's Health Case II* was dismissed by the court, *Fracasse, J.*, on the grounds that the plaintiffs in that case had failed to exhaust their administrative remedies and that they lacked standing.

6. "Since September 1976, Congress has prohibited—by means of the 'Hyde Amendment' to the annual appropriations for the Department of Health, Education, and Welfare (now divided into the Department of Health and Human Services and the Department of Education)—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances." *Williams v. Zbaraz*, 448 U.S. 358, 362 n. 4, 100 S.Ct. 2694, 2697 n. 4, 65 L.Ed.2d 831, reh. denied, 448 U.S. 917, 191 S.Ct. 38, 65 L.Ed.2d 1180 (1980).

7. The current version of the Hyde amendment provides that the state will be eligible for federal reimbursement for the costs of abortion only if "the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service...." Pub.L. No. 96-123, § 102.

Effective July 15, 1981, the commissioner again revised the regulation by restricting the payment for abortions under the medicaid program to life-threatening conditions.

¹³⁹⁹In August, 1981, the plaintiffs brought this action seeking class certification, a declaratory judgment and temporary and permanent injunctions. The court, *Berdon, J.*, entered, ex parte, a temporary mandatory injunction ordering the state to pay for the abortion of the named plaintiff, Rosie J. Doe.⁸ At that time Doe was thirty-five years old, had five children, was a welfare recipient, and was eligible for medicaid. Although her life was not endangered as a result of her pregnancy, Doe required an abortion for medical reasons. After she became pregnant, it was necessary to perform a conization (a cutting of the cervix) in order to determine whether she had cervical cancer because the endocervical curetage showed dysplasia (precancerous cells). If an abortion were not performed, there would have been a risk that the conization would cause bleeding and hemorrhaging which could result in a miscarriage. Doe faced the possibility of further severe complications from the continuation of the pregnancy which included the following: She had been on methadone for the three preceding years. Her last two children had been born suffering from methadone withdrawal and they had to be

hospitalized. If her pregnancy were to continue while she was on methadone, she also would have been placed at risk of cardiac arrest, shock, respiratory depression, circulatory depression and gastrointestinal problems. Because of Doe's age, her pregnancy could have caused further serious complications, including emotional and psychological distress.

On October 9, 1981, after hearing the parties, the court certified the following two classes: indigent pregnant women who qualify for medicaid and who desire a medically necessary abortion (hereinafter "poor ¹⁴⁰⁰women class"), and physicians who are certified by the state to provide medical care under medicaid and who agree to perform or advise women on medically necessary abortions (hereinafter "physician class"). The court then entered a temporary mandatory injunction in favor of the classes ordering the defendants to pay, under the medicaid program, for the costs of all therapeutic abortions whether or not the life of the woman was endangered by carrying the fetus to term.⁹

Pursuant to the court's order, the commissioner adopted Policy 173G which provides, in part, that effective October 9, 1981, the state will pay for abortions when the attending physician has certified "that the abortion is medically necessary for the patient's health."¹⁰

8. Although the order was issued ex parte, it was done after an informal conference with counsel for the plaintiffs and the defendants. See also in this case "Memorandum of Decision and Orders" dated August 21, 1981.

9. Reference is made to the court's memorandum of decision dated October 9, 1981.

On November 30, 1984 an order of notice of the pendency of this action was directed to all indigent Connecticut women who qualify for medicaid, all physicians who are certified by the state to provide medical care under medicaid, all Connecticut town and city welfare officials and selectmen, and all hospitals, clinics and other medical facilities which are certified by the state to provide medically necessary abortions under medicaid. A certificate of compliance with the order of notice was filed on March 29, 1985.

10. At the time this action was instituted, the limitation on medicaid abortions was merely a policy adopted by the commissioner. It was never adopted as a regulation in accordance with the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. (hereinafter UAPA). In the temporary injunction the court ruled that policies such as 275 that define medicaid benefits come within the definition of a "regulation" and can only be promulgated in accordance with UAPA. The court, therefore, held that the regulation was void. *Persico v. Maher*, 191 Conn. 384, 465 A.2d 308 (1983). The test to determine if it is a regulation is whether the "rule has a substantial impact on the rights and obligations of parties who may appear before the agency in the future." *Salmon Brook Convalescent Home, Inc. v. Commission on Hospitals & Health Care*, 177 Conn. 356, 362, 417 A.2d 358 (1979). Thereafter, the legislature en-

1401II

SPECIAL DEFENSES

On October 9, 1981, the court also denied the defendants' motion to dismiss which challenged the court's jurisdiction. The same issues raised in the motion are included in the special defenses filed by the defendants. For those issues previously raised and ruled upon, the court affirms its decision of October 9, 1981, and incorporates its findings herein. In addition, the court will specifically, but in a summary manner, rule on each special defense.¹¹

A

FIRST SPECIAL DEFENSE—SOVEREIGN IMMUNITY

[1] The harsh doctrine of sovereign immunity was relaxed by the Connecticut Supreme Court in *Sentner v. Board of Trustees*, 184 Conn. 339, 439 A.2d 1033 (1981). In *Sentner* the court held that the doctrine does not bar an action for declaratory judgment where the acts complained of are unconstitutional or unauthorized by statute. "In a constitutional democracy sovereign immunity must relax its bar when suits against government complain of unconstitutional acts." *Id.* at 343, 439 A.2d 1033. Since the present case is an action

acted Public Acts 1984, No. 84-150 (codified as part of General Statutes § 17-3f), in order to save the department of income maintenance from complete chaos because of the substantial numbers of policy statements which should have been adopted as regulations under UAPA and were not. Public Acts 1984, No. 84-150, provides in part: "All policy manuals of the department [of income maintenance], as they exist on [May 23, 1984], including the supporting bulletins but not including statements concerning only the internal management of the department and not affecting private rights or procedures available to the public, shall be construed to have been adopted as regulations in accordance with the provisions of chapter 54 [UAPA]...."

The plaintiffs, however, argue that as of October 9, 1981, Policy 275 was superseded by Policy 173 which authorizes (under 173.G) payment for all medically necessary abortions under the medicaid program and, therefore, Policy 275 was not validated but rather Policy 173.G. This

for declaratory judgment, the court has jurisdiction to grant the relief requested.

Furthermore, the aspect of this case that challenges the commissioner's adoption of the regulation as being ultra vires clearly is not subject to the defense of sovereign immunity. *Weaver v. Ives*, 152 Conn. 586, 590-91, 210 A.2d 661 (1965); see *Sentner v. Board of Trustees*, supra, 184 Conn. at 351 n. 4, 439 A.2d 1033 (*Healey, J.*, dissenting).

B

SECOND SPECIAL DEFENSE—EXHAUSTION OF ADMINISTRATIVE REMEDY

[2] Although a party ordinarily must exhaust his or her administrative remedies; *Laurel Park, Inc. v. Pac*, 194 Conn. 677, 685, 485 A.2d 1272 (1984); there are several well recognized exceptions to the rule which apply to this case. First, and most important, the available administrative remedy is not adequate. In the present case time was of the essence. Every day that went by impaired the health of not only the named welfare recipient plaintiff but also the members of her class. In this instance, the plaintiff was able to obtain relief through an ex parte order of the court; members of her class were also given relief during the course of the years this complex case moved through the court at a

argument has no merit. Policy 173.G was adopted by the commissioner solely to comply with the court's temporary mandatory injunction issued on October 9, 1981. It was not the policy of the commissioner, but merely written instruction for subordinates directing them to comply with the court order. At the time of the effective date of Public Acts 1984, No. 84-150, Policy 275 was and continues to be the policy of the commissioner, which was validated by the legislature as a regulation.

11. The defendants also raise a seventh special defense addressed to the issue of attorney's fees. This issue was bifurcated and will be the subject of a subsequent trial.

In the eighth special defense, the defendants claim the issues are moot if the court accepts the plaintiff's argument that the regulation was not validated by Public Acts 1984, No. 84-150. This argument of the plaintiffs has been rejected; see note 10, supra; and, therefore, this special defense is moot.

Cite as 515 A.2d 134 (Conn.Super. 1986)

snail's pace. Resort to the administrative remedy is not necessary when to do so "might . . . work severe harm on the party seeking relief." *Sharkey v. Stamford*, 196 Conn. 253, 257, 492 A.2d 171 (1985). "To deny declaratory relief on the ground of the existence of other remedies,⁴⁰⁸ it must appear that the asserted remedies are not only available but that they are speedy and adequate and as appropriate as the requested relief." *Aaron v. Conservation Commission*, 178 Conn. 173, 179, 422 A.2d 290 (1979).

Moreover, the commissioner already had made it clear that it was his policy and that of the state to fund only those abortions that are necessary to preserve the life of the woman. The evidence is conclusive that Doe's medical condition did not require an abortion to preserve her life, but only to preserve her health.¹² Accordingly, the administrative remedy would have been futile and the plaintiff was not required to pursue it. *Kosinski v. Lawlor*, 177 Conn. 420, 424-25, 418 A.2d 66 (1979); *Bianco v. Darien*, 157 Conn. 548, 554, 254 A.2d 898 (1969); see *Sharkey v. Stamford*, supra. Furthermore, just as in *Friedson v. Westport*, 181 Conn. 230, 435 A.2d 17 (1980), the plaintiffs challenge the enactment of the regulation as ultra vires and unconstitutional. "Under these circumstances the statutory relief 'falls short of effectively,

12. Holley, Doe's attending physician, was of the opinion (and this court finds) that although she required a medically necessary abortion, her condition was not life-threatening. Moreover, pursuant to the regulation, his decision is controlling. The regulation provides in part: "On the basis of his professional judgment, the attending physician has certified in writing that the abortion is necessary because the life of the mother would be endangered if the fetus were carried to term." Indeed, the defendants have conceded that the commissioner solely relies on and does not question the attending physician's judgment on this issue.

13. "This court's decision today holds simply that, based on the decision of the Supreme Court, section 275 does not constitute a denial of equal protection under the United States Constitution, U.S.Const. amend. XIV. This holding does not, however, preclude a Connecticut court from determining that the regulation violates

conveniently and directly determining whether the [plaintiff is] entitled to the relief claimed.'" Id. at 233, 435 A.2d 17.

In regard to the plaintiff Holley, the defendants point to no administrative remedy that was available to him. For all the above reasons, there was no need for either plaintiff to pursue an administrative remedy.

—1404C

THIRD, FOURTH, FIFTH AND SIXTH SPECIAL DEFENSES—RES JUDICATA AND COLLATERAL ESTOPPEL

[3] The defendants claim that the issues raised by the plaintiffs are barred under the principles of res judicata and or collateral estoppel. They argue that the state constitutional issues should have been raised in *Women's Health Case I*. The simple answer is that the federal court specifically reserved the state constitutional issues for the state courts.¹³ If a court in the first action does not have jurisdiction, or having such jurisdiction, it declines to exercise that jurisdiction as a matter of discretion, then the second action is not precluded. 1 Restatement (Second), Judgments § 25, comment (e).

The defendants next claim that the dismissal by the court, *Fracasse, J., of Wom-*

the equal protection clause of the Connecticut constitution, Art. first, sec. 20, or runs afoul of Connecticut statutory requirements. See, e.g., *Horton v. Meskill*, 172 Conn. 615, 639-51 [376 A.2d 359] (1977) (holding that Connecticut's school financing system violated Connecticut, though not federal, constitution); *Roundhouse Construction [Corporation] v. Telesco Masons Supply [Supplies] Co., Inc.*, 170 Conn. 155, 157-59, [365 A.2d 393,] cert. denied, 429 U.S. 889 [97 S.Ct. 246, 50 L.Ed.2d 172] (1976) (determining on remand from U.S. Supreme Court that its earlier finding of a constitutional violation implicated both the Connecticut and federal constitutions). A decision based on a state constitution constitutes an adequate and independent state ground of decision which is immune from federal review. See *Minnesota v. National Tea Co.*, 309 U.S. 551 [60 S.Ct. 676, 84 L.Ed. 920] (1940)." *Women's Health Services, Inc. v. Maher*, slip op. at 12, n. 6 (D.Conn., Dec. 16, 1980).

en's Health Case II, for failure to exhaust administrative remedies and for lack of standing, is also conclusive on the plaintiffs' claims in this suit. Although counsel representing the named plaintiffs in this case are the same as those who represented⁴⁰⁵ the plaintiffs in *Women's Health Case II*, the plaintiffs in each case are different parties. Furthermore, no class was certified in *Women's Health Case II*. It is beyond question that the doctrine of res judicata applies only when the same parties are involved in both actions—that is, there must be identity of parties. *State v. Ellis*, 197 Conn. 436, 463, 497 A.2d 974 (1985); *In re Juvenile Appeal (83-DE)*, 190 Conn. 310, 316, 460 A.2d 1277 (1983).

D

NINTH AND TENTH SPECIAL
DEFENSES—STANDING

[4] Finally, the defendants claim that the plaintiffs lack standing to pursue this matter. "Standing focuses on whether a party is the proper party to request adjudication of the issues, rather than on the substantive rights of the aggrieved parties. . . . It has long been recognized that a person is not 'entitled to set the machinery of the courts in operation except to obtain redress for an injury he has suffered or to prevent an injury he may suffer, either in an individual or a representative capacity. . . .' Standing is aptly described as 'a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests. . ..'" (Citations omitted.) *Nye v. Marcus*, 198 Conn. 138, 141-42, 502 A.2d 869 (1985).

To support their claim of lack of standing the defendants first claim that the named plaintiff Doe, given her circumstances, could have obtained an abortion on the basis that continued pregnancy for her was life-threatening. As previously indicated, the evidence does not support this claim.¹⁴

14. See note 12, supra.

Furthermore, although the defendants initially raised the issue of standing, they did so without specifying¹⁴⁰⁶ their reasons. Indeed, in its memorandum of decision in the initial motion to dismiss, the court stated the following: "The defendants cite no reason why these plaintiffs do not have standing; the defendants obviously attempt another broad sweep of the brush." Since then the court certified a class of poor women that must have standing by virtue of the class definition. It is further clear that the standing of the plaintiff Holley is not dependent upon that of the named plaintiff Doe. The issue of the physician's standing was decided by the Supreme Court of the United States in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), a case involving the constitutionality of statutes that prohibited the sale of contraceptives or the distribution of information concerning their use. Justice Douglas, in writing for the majority, held that physicians had "standing to raise the constitutional right of the married people with whom they had a professional relationship. . . . The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Id.*, at 481, 85 S.Ct. at 1680; *Singleton v. Wulff*, 428 U.S. 106, 118, 96 S.Ct. 2868, 2876, 49 L.Ed.2d 826 (1976).

In this case, both the plaintiffs and their respective classes have standing to seek adjudication of the validity of the regulation.

III

THE PLAINTIFF CLASS OF POOR WOMEN AND
THEIR MEDICAL PROBLEMS

"THE POOREST OF THE POOR"

The plaintiff class of women has been described as the "poorest of the poor."¹⁵

15. Dr. Frederick Naftolin, professor and chairman of the department of obstetrics and gynecology.

Cite as 515 A.2d 134 (Conn.Super. 1986)

They are women who, ¹⁴⁰⁷ because of either limited or no income, are eligible for Connecticut's medicaid program. Most are recipients of "Aid to Dependent Children" (AFDC). General Statutes § 17-85 et seq. The income of this class of poor women is barely adequate to meet their basic needs and that of their children, which is 66 percent of the federal poverty level.¹⁶ The AFDC grant does not include a cash allowance for medical care because these costs are paid directly to the medical providers under medicaid. The financial circumstances of the plaintiff class of poor women is aggravated by the AFDC flat grant for rent which is inadequate to cover the fair market value of rents. The commissioner concedes that it "is virtually impossible to find apartments which are affordable using the AFDC standard for rent."¹⁷ He also admits that for "the majority of AFDC households, whose only cash income is their AFDC benefit check, the current standard is inadequate to either attain or maintain any decent living standard."¹⁸

Members of this class of poor women descriptively characterized their poverty at the time they sought an abortion. Rosie J. Doe No. 2¹⁹ testified as follows: "¹⁴⁰⁸ I had a piece of wood that I used on top of crates with a little table cloth over that and pillows around that, and that was my table... I slept on a mattress. And my

cology of Yale University School of Medicine, describes this class of women as the "poorest of the poor." Indeed, the department of income maintenance has described them as "Connecticut's most vulnerable residents." As of June 30, 1984, approximately 64,000 women between the ages of 12 and 60 were eligible for medicaid in Connecticut.

16. The following facts were admitted by the defendants: The federal poverty level of income is that income which is judged to be barely sufficient to meet the needs of a family; it varies depending on family size; it is adjusted each year by a factor usually based upon the consumer price index, one measure of the rate of inflation; and Connecticut's basic AFDC grant is generally set at about 66 percent of the federal poverty level.

daughter slept on a used mattress that I got from a friend." Rosie J. Doe No. 3 explained she had to make diapers from rags because "diapers were very expensive" and she could not afford them. Rosie J. Doe No. 4 testified that she and her four children "were living in a one-room kitchenette efficiency" and "shared a community bathroom with three other tenants... My four children and I lived, slept, ate in the same room." It took her longer to pay off the layaway on her eldest son's shoes than it took for her son's foot to grow to the next larger size. The abject poverty these women and their children are compelled to endure conclusively establishes that there is absolutely no fat in the AFDC grant that would enable a woman to skim enough from her budget for a medically necessary abortion. This is so even if time was not of the essence and a woman could pay for the abortion on a "layaway" plan.

The "poorest of the poor" also accurately describes the general health of these indigent women. Members of the class have significantly more medical problems than the general population as a result of their existence under poverty conditions. Therefore, they are likely to encounter significantly more medical problems as a result of their pregnancies which may not necessarily be life-threatening but for which a medically necessary abortion may be indicated.

17. Defendants' admission of fact.

18. Defendants' admission of fact.

19. In addition to the named plaintiff Doe, three other members of the plaintiff class of poor women testified under pseudonyms in order to protect their privacy and are referred to as Rosie J. Doe Nos. 2, 3 and 4. The testimony of these four women was taken in chambers with only counsel and essential court personnel present. The court ordered the record of their identity sealed and a transcript of their testimony, with the deletion of names, was made available to the public by placing the same in the file.

Expert witnesses testified²⁰ as follows regarding those medical conditions that may require an abortion:¹⁴⁰⁹ There are many pre-existing medical conditions that are aggravated by pregnancy. These include cardiovascular problems, gastrointestinal problems, renal disorders, degenerative nerve diseases, lung diseases, diabetes, anemia, phlebitis, asthma, malnutrition, urinary tract infections, medical problems associated with prior pregnancies, medical conditions and risks related to the youth of the pregnant female (such as inadequate development of the pelvis), medical conditions and risks related to advanced age of the pregnant female, autoimmune diseases, cancer, adjustment disorder, psychotic illness, mental retardation, depression and personality disorders.

Even if the pregnancy itself does not aggravate the condition, it may make treatment of the condition difficult, if not impossible. For example, chemotherapy or radiation treatment for certain malignancies may be contraindicated if a fetus is to be carried to term. Pregnancy also makes it difficult to treat women with asthma and psychiatric disorders.

Pregnancy can also interfere with and hamper a diagnosis, as was the case with Doe's conization. Another¹⁴¹⁰ example is where a woman requires an x-ray as a diagnostic procedure to determine whether her health is at risk for some other reason.

Finally, some pregnancies have a profound effect upon women which materially affect their physical and mental health, but

are not life-threatening, such as pregnancies which are a result of rape and incest.

To be sure, some of the foregoing conditions which, at the beginning of the pregnancy pose only a threat to the woman's health, could result, if she continues on with the pregnancy, in severe permanent damage or even death. A condition that begins as merely a medical problem could evolve into a situation that imperils her life. By the time this threat to life is discovered it may be too late; her condition may have deteriorated beyond repair. Furthermore, the abortion procedure itself, when performed in the advanced stages of pregnancy, can be life-threatening.

In sum, it has been made abundantly clear that some pregnancies, although not reaching the level of threatening the woman's life, could have a devastating effect upon her physical and psychological health.

IV

THE PHYSICIAN CLASS

The physician class is composed of the doctors who treat the poor and are willing to perform or advise on medically necessary abortions. Physicians are charged with the responsibility of furnishing medical advice to their patients in order to help preserve their health. The relationship between the patient and physician is a unique one protected by professional standards. Constraints on this relationship that jeop-

20. The plaintiffs' experts, who testified on the multitude of medical problems, both physical and psychological, which justified a therapeutic abortion and the devastating effect that pregnancy has upon these poor women, were: Dr. Marshall Rud Holley, assistant clinical professor of obstetrics and gynecology, Yale University, and practicing physician of obstetrics and gynecology (plaintiff); Dr. David Bingham, chief of department of obstetrics and gynecology, Backus Hospital, and Director, Planned Parenthood Out-Patient Abortion Clinic of Norwich; H. Ann McLendon, health educator, Hartford Area Health Education Center; Dr. Frances M. Baker, assistant professor, department of psychiatry, Yale University, and director, psychiat-

ric services in emergency room, Yale-New Haven Hospital; Dr. Joan Griggs Babbott, executive director of Planned Parenthood League of Connecticut; Dr. Victor C. Strasburger, director of adolescent medicine and associate professor of pediatrics, Yale University and University of Connecticut; Dr. Ellen Frank, associate professor of psychiatry and psychology, University of Pittsburgh School of Medicine; Dr. Barbara Fibel, assistant professor, department of psychiatry, Cornell University Medical College and Yale School of Medicine; Dr. Frederick Naftolin, professor and chairman, department of obstetrics and gynecology, Yale School of Medicine, and chief, department of obstetrics and gynecology, Yale-New Haven Hospital.

ardize the health of the woman are alien and antithetical to the practice of medicine.

1411V

STATUTORY REQUIREMENT FOR FUNDING OF
THERAPEUTIC ABORTIONS

The plaintiffs' complaint seeking to compel the state to pay under its medicaid program for therapeutic abortions is based upon statutory and constitutional grounds. The court will first consider the statutory grounds.

[5] The plaintiffs' claim that the regulation is invalid because it is inconsistent with § 17-134b of the General Statutes which provides in part: "Medical assistance shall be provided for any otherwise eligible person whose income . . . is not more than the minimum income permissible under federal law for such eligibility. . . ." The court agrees with the plaintiffs that the regulation exceeds the commissioner's statutory authority as prescribed in § 17-134b.

Section 17-134b clearly provides that medical assistance "shall" be provided. "The use of word 'shall' in the statute connotes that the performance of the statutory requirements is mandatory rather than permissive." *Thornton Real Estate, Inc. v. Lobdell*, 184 Conn. 228, 230, 439 A.2d 946 (1981). The legislature did not provide for any exceptions to this mandate. It is apparent that the commissioner also attached to the statute the same construction. The commissioner adopted formal regulations implementing § 17-134b which

21. Furthermore, the conclusion that § 17-134b requires the state to fund medically necessary abortions for this class of poor women is clearly consistent with the commissioner's goals under medicaid. He admits that there is a medical need for certain abortions that do not reach a life-threatening level. The commissioner also concedes that providing such a medical service contributes to the goals of medicaid which is to "provide a broad array of medical services so that . . . [the Commissioner] is meeting the basic health care needs of [the] citizens." Defendant's admission of fact.

22. See, e.g., Code of 1650 of the General Court p. 80; Book of the General Laws (1672) p. 57; Acts and Laws of his Majesty's Colony of Con-

necticut (1702) pp. 94-95; Acts and Laws of the State of Connecticut (1784) pp. 193, 228-29; Statutes (1808 Rev.) tit. CXXX; Statutes (1821 Rev.) tits. 65, 73; Statutes (1838) tit. LII, chs. II, III; Statutes (1849 Rev.) tit. XLII, §§ 13 through 31; Statutes (1854) tit. XLII, §§ 13 through 30; General Statutes (1866 Rev.) tit. L; General Statutes (1888 Rev.) §§ 3295 through 3319; General Statutes (1902 Rev.) §§ 2476 through 2500; General Statutes (1918 Rev.) §§ 1623 through 1629; General Statutes (1930 Rev.) §§ 1693 through 1698; esp. §§ 1695, 1710 through 1716; General Statutes (1949 Rev.) §§ 2574 through 3586, 2603, esp. § 2586; General Statutes (1955 Sup.) §§ 1426d through 1434d.

provide that the state must pay for all services which are medically necessary for an eligible person, including those "which are deemed by the department to be necessary for the prevention, diagnosis and treatment of illness, disease, injury or infirmity, the promotion and the maintenance of physical and mental health, and the rehabilitation after illness or injury. . . ." Regs., Conn. State Agencies § 17-134d-1(1). Section 17-134d-2¹⁴¹² of the regulations, which lists the medical and other care that the state is required to provide, includes every conceivable nonexperimental medical service.²¹

This construction of § 17-134b requiring the state to pay, under the medicaid program, for medically necessary abortions finds strong support in the unbroken 350 years of statutory laws and public policy of the state of Connecticut of paying for all necessary medical expenses for the poor. From 1650, the year of the earliest recorded code of our state, to the present, the state's legislative bodies have directed that the colony, the state and or their political subdivisions pay for the medical care of the indigent.²² Christopher Collier, a professor and historian for the state of Connecticut, who was called as an expert, summarized the state's rich history of caring for the medical needs of the poor as follows: "[W]e have a continuous unbroken tradition in Connecticut dating from the middle of the seventeenth century right down to the present that the public will be responsible for all medical care and other needs

necticut (1702) pp. 94-95; Acts and Laws of the State of Connecticut (1784) pp. 193, 228-29; Statutes (1808 Rev.) tit. CXXX; Statutes (1821 Rev.) tits. 65, 73; Statutes (1838) tit. LII, chs. II, III; Statutes (1849 Rev.) tit. XLII, §§ 13 through 31; Statutes (1854) tit. XLII, §§ 13 through 30; General Statutes (1866 Rev.) tit. L; General Statutes (1888 Rev.) §§ 3295 through 3319; General Statutes (1902 Rev.) §§ 2476 through 2500; General Statutes (1918 Rev.) §§ 1623 through 1629; General Statutes (1930 Rev.) §§ 1693 through 1698; esp. §§ 1695, 1710 through 1716; General Statutes (1949 Rev.) §§ 2574 through 3586, 2603, esp. § 2586; General Statutes (1955 Sup.) §§ 1426d through 1434d.

¹⁴¹³Of [the] poor in the state of Connecticut. . . . Right from the start the care was to be fully supported by the public.”²³

Two tenets emerge from this distinguished history of paying for the medical expense of the poor from the public purse. First, the state or its political subdivisions must fund all medically necessary services for the poor.²⁴ Second, the attending physician is the one who determines the nature and extent of the medical care provided at public expense based upon the medical needs of the indigent person²⁵ (pursuant, of course, to such reasonable regulations as are required for the efficient administration of this vast program).

Statutes must be examined in the light of their historical development and legislative evolution. *Penfield v. Jarvis*, 175 Conn. 463, 466, 399 A.2d 1280 (1978); *Rivera v. I.S. Spencer's Sons, Inc.*, 154 Conn. 162, 164-65, 223 A.2d 808 (1966). “In the interpretation of a statute, a radical departure from an established policy cannot be implied. It must be expressed in unequivocal language.” *Jennings v. Connecticut Light & Power Co.*, 140 Conn. 650, 667, 103 A.2d 535 (1954). Since § 17-134b does not exempt any particular medical procedure or service, it must be read in the manner which ¹⁴¹⁴is consistent with the long established public policy of this state of providing for all necessary medical services.

The defendants argue, however, that § 17-134b of the General Statutes requires that the state's medicaid program mirror the federal program and thus the commissioner is mandated to provide only those medical services that are eligible for partial reimbursement by the federal program.

23. Connecticut's tradition of caring for the indigent was wholly public rather than private or mixed public and private. “It is the duty of every government to protect and to provide for the poor. . . .” I Root XXVIII (1789-1793).

24. Collier testified as follows: “That it has been over three hundred and fifty years time in which the public assumed responsibility for the indigent ill who have no family legally responsible for them who can in fact take care of them. And that similarly anyone coming into

Since the Hyde amendment restricts federal reimbursement to only those abortions necessary to preserve the life of the woman, the commissioner claims he is likewise required to limit the Connecticut program. The defendants offer in support of this claim an argument that is similar to that which they advanced in *Persico v. Maher*, 191 Conn. 384, 465 A.2d 308 (1983). In *Persico* they claimed that regulations under the medicaid program need not be adopted under UAPA because the department of income maintenance “is not a state agency in this regard, but an agent of the federal government in administering the national Medicaid program locally”; the Supreme Court rejected this argument, labelling it “unusual.” *Id.*, at 405, 465 A.2d 308.

Section 17-134a does provide that the commissioner “is authorized to take advantage of the medical assistance programs provided in Title XIX, entitled ‘Grants to States for Medical Assistance Programs,’ contained in the Social Security Amendments of 1965 and may administer the same in accordance with the requirements provided therein. . . .” This, however, refers to *administering* the program in such a manner that the state is eligible for available federal reimbursement; § 17-134a cannot be construed to mean anything more or less than this. *Persico* makes it clear that § 17-134a authorizes the commissioner “to accept federal medicaid grants and administer [the grants] in accordance with the federal requirements.” *Persico v. Maher*, *supra*, at 405, 465 A.2d 308. Yet it is certain the state has its own medicaid⁴¹⁵ program to administer and the

the state of Connecticut can expect fully to have his needs taken care of if should he fall on hard times.”

25. Collier answered the question as to who determined the medical treatment to be provided as follows: “The statutes indicate that all necessary medical aid was to be paid for. And there is no indication that anyone made any judgments about what was necessary medical aid other than the physician.”

Cite as 515 A.2d 134 (Conn.Super. 1986)

commissioner must adopt regulations consistent with the statutes of the state of Connecticut. General Statutes § 17-134d. Surely, the state is free to include in its program medically necessary abortions, whether or not it is subject to federal reimbursement. *Harris v. McRae*, supra, 448 U.S. at 311 n. 16, 100 S.Ct. at 2685 n. 16. Federal law merely sets the minimum which the state must provide. *Persico v. Maher*, supra, 191 Conn. at 392, 465 A.2d 308.

The defendants also argue that the phrase "otherwise eligible" in § 17-134b requires that the medical services be eligible for federal reimbursement. This construction would require the court to layer a requirement that is not there. "Courts cannot, by construction, read into statutes provisions which are not clearly stated." *Houston v. Warden*, 169 Conn. 247, 251, 363 A.2d 121 (1975); *Johnson v. Manson*, 196 Conn. 309, 314, 493 A.2d 846 (1985), cert. denied, — U.S. —, 106 S.Ct. 813, 88 L.Ed.2d 787 (1986). If this is what the legislature intended, it should have made it explicit. *Gomeau v. Forrest*, 176 Conn. 523, 526-27, 409 A.2d 1006 (1979). The phrase "otherwise eligible" has obvious reference to whether the person is categorically and financially eligible; see *Persico v. Maher*, supra, 191 Conn. at 396, 465 A.2d 308; neither of these requirements are at issue in this case.

Finally, since § 17-134b is remedial, it must be given a liberal construction in favor of providing all necessary medical services for the indigent. *Id.*, at 395, 465 A.2d 308. "Remedial statutes are to be liberally construed in favor of those whom the legislature intended to benefit." *Hinchliffe v. American Motors Corporation*, 184 Conn. 607, 615 n. 4, 440 A.2d 810 (1981).

The commissioner may adopt only those regulations that are within his statutory authority. "An administrative agency, in making rules and regulations, must act within its statutory authority, within constitutional limitations, and in a lawful

and reasonable manner." *Page v. Welfare Commissioner*, 170 Conn. 258, 262, 365 A.2d 1118 (1976). Likewise, [n]o administrative or regulatory body can modify, abridge or otherwise change the statutory provisions under which it acquires authority unless the statute specifically grants it that power." *State ex rel. Huntington v. McNulty*, 151 Conn. 447, 449, 199 A.2d 5 (1964); *Lundy Electronics & Systems, Inc. v. Tax Commissioner*, 189 Conn. 690, 695, 458 A.2d 387 (1983). It is clear that the legislature has made no exceptions to the medicaid program and the commissioner is not at liberty to do so. The court concludes that the commissioner's adoption of the regulation which prohibits funding for abortions except when the woman's life is threatened was not authorized under the provisions of § 17-134b.

Decisions of jurisdictions are in accord with this finding. *Planned Parenthood Assn. v. Department of Human Resources*, 297 Or. 562, 687 P.2d 785 (1984); see *Dodge v. Department of Social Services*, 198 Colo. 379, 600 P.2d 70 (1979), after remand, 657 P.2d 969 (Colo.App.1982); *Stopczynski v. Governor*, 92 Mich.App. 191, 285 N.W.2d 62 (1979).

VI

CONSTITUTIONAL ADJUDICATION

The plaintiffs also seek to have the regulation invalidated on state constitutional grounds.²⁶ Ordinarily, the court's inquiry would stop with the finding that the defendants have no authority under the statutes to deny funding for medically necessary abortions for this class of poor women. Deciding the case on statutory claims enables the court to effectively dispose of the controversy without adjudicating difficult and sensitive constitutional issues. *Maloney v. Pac*, 183 Conn. 313, 324, 437 A.2d 349 (1981); *Hartford v. Powers*, 183 Conn. 76, 84-85, 438 A.2d 824 (1981); *Pepin v. Danbury*, 171 Conn. 74, 88, 368 A.2d

26. See footnote 29, infra.

88 (1976). "Appropriate deference to a coordinate branch of government exercising its essential functions demands that . . . [the court] refrain from deciding constitutional challenges to its enactments until the need to do so is plainly evident." *State v. Madera*, 198 Conn. 92, 105, 503 A.2d 136 (1985). Indeed, it "is a 'fundamental rule of judicial restraint.'" *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 2998, 86 L.Ed.2d 664 (1985).

There are, however, several exceptions to this general rule which are applicable in this case. First, the constitutional review the plaintiffs seek is of a mere regulation which was not even formally adopted under the scrutiny of the legislature,²⁷ but only validated through saving legislation together with hundreds of other policies adopted by the commissioner.²⁸ Since it does not require invalidation of a legislative enactment, this rule of abstention should be relaxed. *State v. Madera*, supra, 198 Conn. at 108-109, 503 A.2d 136.

Second, this case raises important issues of great public concern and the court would be remiss in its duty if it did not address them. *Green v. State*, 166 So.2d 585, 587 (Fla.1964); *State v. Campbell*, 75 N.M. 86, 92, 400 P.2d 956 (1965). So in *Cyphers v. Allyn*, 142 Conn. 699, 702, 118 A.2d 318 (1955), the Supreme Court entertained the constitutional argument because the case presented questions of "public interest" even though the plaintiff may have had no standing. See *State v. Sul*, 146 Conn. 78, 83, 147 A.2d 686 (1958). The real issue in

27. Conn. Const., art. II (as amended by art. XVII); General Statutes § 4-168 et seq.

28. See footnote 10, supra.

29. The plaintiffs raise only state constitutional grounds to invalidate the regulation. In making these determinations, the court must interpret our state constitution independently of the United States constitution when required by its text, history, tradition and intent. *State v. Kimbro*, 197 Conn. 219, 234-35, 496 A.2d 498 (1985); *Horton v. Meskill*, 195 Conn. 24, 35, 486 A.2d 1099 (1985); Williams, "In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result," 35 S.C.L. Rev. 353 (1984); see generally Special Section:

this case is whether the prohibition of funding medically necessary abortions under Connecticut's medicaid program—be it by policy, regulation 1418 or statute—meets state constitutional standards, and that issue should be answered. See *Yoo v. Moynihan*, 28 Conn.Sup. 375, 378, 262 A.2d 814 (1969).

Third, a decision grounded solely on a regulation exceeding statutory authority may well bring about statutory change. The legislature is entitled to guidance. This agonizing issue, which affects the health and life of thousands of poor women, must be put to rest on constitutional grounds. See *Lightfoot v. Walker*, 486 F.Supp. 504, 508-509 (S.D.Ill.1980).

Finally, in order for the court to determine whether the plaintiffs are entitled to attorney's fees incurred on behalf of the class of poor women, it must determine if the defendants violated their constitutional right. The plaintiffs clearly would not be entitled to attorney's fees on the sole basis that the defendants exceeded their statutory authority.

VII

SUBSTANTIVE DUE PROCESS OF LAW

[6] The plaintiffs first raise the claim that their due process rights are violated because the regulation impinges on their right of privacy guaranteed by the state constitution. Although proceeding on state grounds,²⁹ the 1419 court is not precluded

The Connecticut Constitution, 15 Conn.L.Rev. 7 (1982). It is clear that the federal constitution merely establishes a minimum national standard for the exercise of individual liberties and rights. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-81, 100 S.Ct. 2035, 2040-2041, 64 L.Ed.2d 741 (1980); *Cologne v. Westfarms Associates*, 192 Conn. 48, 57, 469 A.2d 1201 (1984). Nevertheless, the underpinnings of any such decision must rest on independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1038, 103 S.Ct. 3469, 3474, 77 L.Ed.2d 1201 (1983); see *State v. Cohane*, 193 Conn. 474, 498 n. 19, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984); *State v. Ferrell*, 191 Conn. 37, 45 n. 12, 463 A.2d 573

Cite as 515 A.2d 134 (Conn.Super. 1986)

from the use of federal precedent in the formulation of state constitutional law. "Just as it is wrong to assume that state constitutions are mere mirror images of the federal constitution, so it is wrong to assume that independent state constitutions share no principles with their federal counterpart. The interstices of open-ended state constitutions remain to be filled, and many of them will best be filled by adopting into state law, on a case-by-case basis, persuasive constitutional doctrines from federal law and from sister states." Peters, "State Constitutional Law: Federalism in the Common Law Tradition," 84 Mich.L.Rev. 401, 410-11 (1986). For example, the reasoning that has led the Supreme Court of the United States to hold that implicit in the liberty clause of the fourteenth amendment is that the guaranty of certain fundamental rights may have equal applicability in establishing implicit rights afforded by our state constitution. See, e.g., *Frazier v. Manson*, 176 Conn. 638, 646, 410 A.2d 475 (1979). It is clear, however, that the federal decisional law is not a lid on the protections guaranteed under our state constitution. "[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by

Connecticut law." *Horton v. Meskill*, 172 Conn. 615, 642, 376 A.2d 359 (1977).

¹⁴²⁰In 1973, the United States Supreme Court held in *Roe v. Wade*, supra, that the constitutional right to privacy encompasses a woman's decision whether or not to terminate her pregnancy. Justice Blackmun, writing the majority opinion for six justices, held that although the constitution does not explicitly mention the right of privacy, it is protected as fundamental and "implicit in the concept of ordered liberty." Id., 410 U.S. at 152, 93 S.Ct. at 726. The court in *Roe* pointed out that this right to decide whether or not to terminate a pregnancy has its roots in a line of previous cases relating to marriage, procreation, contraception, family relationships, child rearing and education. Id., at 152-53, 93 S.Ct. at 726-27.³⁰ "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153, 93 S.Ct. at 727. This right to terminate the pregnancy coexists with the right of a person to preserve and protect their body. See *Harris v. McRae*, supra, 448 U.S. at 316, 100 S.Ct. at 2687. Any question about this federal constitutional right was put to ¹⁴²¹rest when the

(1983); Utter, "Swimming in the Jaws of the Crocodile; State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds," 63 Texas L.Rev. 1025 (1985); Greenhalgh, "Independent And Adequate State Grounds: The Long and the Short of It," (published in McGraw, Developments in State Constitutional Law, pp. 222-34 (1985)).

30. For example, in the 1965 landmark case of *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court of the United States struck down a Connecticut law forbidding the use of contraceptives. The decision was based upon the fundamental right of privacy, which the Supreme Court held to be implicit in our federal constitution and protected by the due process clause of the fourteenth

amendment. In reasoning that such laws were unconstitutional, Justice Douglas asked the following rhetorical question. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." Id., at 484-86, 85 S.Ct. at 1681-83. Although there was obvious disagreement among the justices as to the source of the constitutional right, *Griswold* articulated in clear language the right of privacy that is guaranteed by the Constitution. See also *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

court reaffirmed its holding in *Roe v. Wade* in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419, 103 S.Ct. 2481, 2487, 76 L.Ed.2d 687 (1983).

Moreover, the constitutional protection of privacy extends to the right of the woman and her physician to make decisions about her health and for the physician "to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to these points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." *Roe v. Wade*, supra, 410 U.S. at 165-66, 93 S.Ct. at 732-33. "The court . . . has recognized, because abortion is a medical procedure, that the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' *Doe v. Bolton*, 410 U.S. 179, 192 [93 S.Ct. 739, 747, 35 L.Ed.2d 201, reh. denied, 410 U.S. 959, 93 S.Ct. 1410, 35 L.Ed.2d 694] (1973). The physician's exercise of this medical judgment encompasses both assisting the woman in the decision making process and implementing her decision should she choose abortion." (Citations omitted.) *Akron v. Akron Center for Reproductive Health, Inc.*, supra, 462 U.S. at 427, 103 S.Ct. at 2491.

The setting which led to the state's first formal constitution of 1818 compels the conclusion that the right of privacy is also implicitly guaranteed under our state charter of liberty. The constitution of 1818 not only limited the power of government, but also guaranteed to the people of this state liberty and secured for them fundamental rights. It protected "individual liberties against infringement by government." *Co-*

logne v. Westfarms Associates, 192 Conn. 48, 61, 469 A.2d 1201 (1984). The provisions of the constitution ensure our citizens that no branch of government, not even the legislature (which prior thereto had inclusive power), could encroach upon these fundamental rights except for the most compelling reasons. *State v. Coleman*, 96 Conn. 190, 192, 113 A. 385 (1921).

Some of these fundamental rights were explicitly stated in the declaration of rights, and others were implied. These latter rights are recognized in the preamble of the constitution and that of the declaration of rights; and all are guaranteed by the due process clause. These clauses, first incorporated in the constitution of 1818, were carried forward in their original language through several revisions to the present constitution of 1965. The preamble of the constitution makes clear that it reserves to the people "the liberties, rights and privileges which they have derived from their ancestors"; and the preface clause to the declaration of rights, article first, broadly incorporates the concept of ordered liberty by stating "[t]hat the great and essential principles of liberty and free government may be recognized and established . . ." which clause is followed by a declaration of specific rights. Section 10 of article first, the due process clause,³¹ provides that "every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law . . ."

The framers of our state constitution, like those of the federal constitution, when drafting these clauses had in mind those fundamental rights, sometimes referred to as "natural rights," which the people took for granted as being deeply rooted in the core of liberty.³² Justice Zephaniah Swift,

31. There are two due process clauses in article first. Section 8 is generally applied to criminal matters and § 10 to civil matters.

32. It has been "insisted that an intense and widely shared adherence to natural rights ideas by the Constitution's framers led them to neglect more specific mention of rights deemed

too obvious to require elaboration." Tribe, *American Constitutional Law* (1978) § 15-3, p. 894; Antieau, *Modern Constitutional Law* (1969) § 15-44. "The notion that governmental authority has implied limits which preserve private autonomy predates the establishment of the American Republic. During the 17th and 18th

Cite as 515 A.2d 134 (Conn.Super. 1986)

who was instrumental¹⁴²³ in the drafting and adoption of the constitution of 1818, recognized and defended natural rights as follows: "Natural rights consist in the enjoyment and exercise of a power to do as we think proper, without any other restraint than what results from the law of nature, or what may be denominated the moral law...." 1 Swift, Digest (1822) c. 1., p. 15; Collier, "The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition," 15 Conn.L.Rev. 87, 94-97 (1982). To be sure, the Connecticut Supreme Court in early decisions has recognized this. Our Supreme Court has held that the legislature "cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void." *Welch v. Wadsworth*, 30 Conn. 149, 155 (1861); *Camp v. Rogers*, 44 Conn. 291, 296-97 (1877) ("natural justice"); *Booth v. Woodbury*, 32 Conn. 118, 127 (1864) ("principles of natural justice"); *Goshen v. Stonington*, 4 Conn. 209, 225 (1822) ("vested rights").

¹⁴²⁴Indeed, the Supreme Court of Connecticut in 1895 made it clear that there are implicit fundamental rights protected by the state constitution. In speaking of our state declaration of rights, the court held: "It is patent that not everything that can be called a right is included in this guaranty. The protected rights are those that inhere in 'the great and essential principles of liberty and free government' recognized in the course of events that resulted in our

centuries, there evolved an American tradition of 'natural law', postulating that 'certain principles of right and justice ... are entitled to prevail of their own intrinsic excellence.'" Tribe, *supra*, § 8-1, p. 427.

Although determination of fundamental rights protected by the federal constitution currently does not usually involve natural right analysis or debate; Tribe, *supra*, p. 894; the doctrine is very significant historically in understanding the thinking of the framers when determining whether rights are implicit under the state constitution. Probably, natural right analysis came

independence, and established by the adoption of our Constitution. The language used is purposely broad...." *State v. Conlon*, 65 Conn. 478, 489, 33 A. 519 (1895). And these rights are protected through the due process clause. *Camp v. Rogers*, *supra*, 297. "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] ... as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)]. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"....' *Powell v. Alabama*, 287 U.S. 45, 67 [53 S.Ct. 55, 63, 77 L.Ed. 158 (1932)]. 'Liberty' also 'gains content from the emanations of ... specific [constitutional] guarantees' and 'from experience with the requirements of a free society.' *Poe v. Ullman*, 367 U.S. 497, 517 [81 S.Ct. 1752, 1763, 6 L.Ed.2d 989 (1961)] (dissenting opinion of Mr. Justice Douglas)." *Griswold v. Connecticut*, *supra*, 381 U.S. at 493-94, 85 S.Ct. at 1686-87 (Goldberg, J., concurring).

The right to be let alone is fundamental. Justice Brandeis, in his dissent in *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928), put it quite well when he wrote: "The makers of our ¹⁴²⁵Constitution undertook to secure conditions favorable to the pursuit of hap-

into disfavor because of its conservative application during the early part of the century in striking down progressive legislation which today would certainly be upheld as being within the legitimate police powers of the state. See, e.g., *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (ultra-conservative application of the right to contract under the liberty clause. The court held that state legislation which prohibited a person from working in a bakery more than sixty hours in a week or ten hours a day was unconstitutional.).

piness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men." (Emphasis added.) This right to privacy is older than the Bill of Rights. *Griswold v. Connecticut*, supra, 381 U.S. at 486, 85 S.Ct. at 1682.

It is absolutely clear that the right of privacy is implicit in Connecticut's ordered liberty.³³ *State v. Butkus*, 37 Conn.Sup. 515, 517, 424 A.2d 659 (1980); *State v. Allen*, 37 Conn.Sup. 506, 513, 424 A.2d 651 (1980). The Connecticut Supreme Court has recognized that aspect of privacy which includes procreative choice as a fundamental right. See *Frazier v. Manson*, supra, 176 Conn. at 646, 410 A.2d 475. And more recently, the Supreme Court of Connecticut again recognized the right of privacy in *Ochs v. Borrelli*, 187 Conn. 253, 258, 445 A.2d 883 (1982). See *Foody v. Manchester Memorial Hospital*, 40 Conn.Sup. 127, 132, 482 A.2d 713 (1984).

¹⁴²Surely, the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice. "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding

33. The plaintiffs also argue that the class of poor women have an implicit fundamental right to appropriate medical treatment including a medically necessary abortion protected by the Connecticut constitution. The argument is predicated on the unbroken 350 years of statutory laws of our state and its predecessor governments which have mandated publicly funded appropriate medical care for the poor. See part V, supra. Certain long established rights are "viewed as fundamental, although . . . [they are] statutory rather than constitutional." *D'Amico v. Manson*, 193 Conn. 144, 147, 481

unconstitutional a statute prohibiting the use of contraceptives . . . and most prominently vindicated in recent years in the context of contraception . . . and abortion. This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. 'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" (Citations omitted.) *Carey v. Population Services International*, 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977); see also Tribe, *American Constitutional Law* (1978) § 15-10, p. 924; Tribe, *Constitutional Choices* (1985) pp. 243-45.

This right to privacy also encompasses the doctor-patient relationship regarding the woman's health, including the physician's right to advise the woman on the abortion decision based upon her well-being. *Roe v. Wade*, supra, 410 U.S. at 166, 93 S.Ct. at 733. Finally, the right to make decisions which are necessary for the preservation and protection of one's health, if not covered within the realm of privacy, stands in a separate category as a fundamental right protected by the state constitution. This point is made clear in *Roe v. Wade* wherein it was held that at *any stage* of the pregnancy the woman's health is paramount. *Harris v. McRae*, supra, 448 U.S. at 316, 100 S.Ct. at 2687.

A.2d 1084 (1984); See *Gaines v. Manson*, 194 Conn. 510, 516, 481 A.2d 1084 (1984); *Horton v. Meskill*, 172 Conn. 615, 647, 376 A.2d 359 (1977). Of course, if the right to such medical care reached the level of being fundamental, and based upon the overwhelming weight of evidence that an abortion is the only appropriate medical treatment for these women (which was not contested by the defendant), failure to fund such medically necessary abortions would clearly and explicitly impinge on this constitutional right. The court, however, is not required to decide this issue in this case.

Cite as 515 A.2d 134 (Conn.Super. 1986)

¹⁴²⁷It must next be determined whether the regulation impinges on these three fundamental rights of privacy—the right to secure an abortion, the right to preserve one’s health, and the right to maintain the patient-physician relationship. In the face of a fundamental right protected by the constitution, the state must maintain its neutrality unless an intrusion is justified by a compelling state interest. “It is well settled that, quite apart from the guarantee of equal protection, if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’ *Mobile v. Bolden*, 446 U.S. 55, 76 [100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980)] (plurality opinion).” *Harris v. McRae*, supra, 448 U.S. at 312, 100 S.Ct. at 2685.

Even if the state is not obligated to pay for medical expenses of an indigent person, “when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.” *Maher v. Roe*, 432 U.S. 464, 469–70, 97 S.Ct. 2376, 2380–81, 53 L.Ed.2d 484 (1977). The plaintiffs here do not argue that the state is required to pay for nontherapeutic abortions; their claim is simply that as long as the state has decided to pay for all other medical expenses for the poor, it must also pay for medically necessary abortions.

The United States Supreme Court in *McRae* ruled on the constitutionality of the Hyde amendment which allowed medical reimbursement to the states for the termination of only those pregnancies that were life-threatening or a result of rape or incest. In *McRae*, a bare bones majority of the Supreme Court (five to four) held that the Hyde amendment did not contravene the liberty guaranties of the due process clause of the fifth amendment to the United States constitution. On the same day, the same slim majority in *Williams v.*

Zbaraz, supra, upheld the constitutionality of an Illinois statute which prohibited state medical assistance ¹⁴²⁸payments for all abortions except those necessary for the preservation of the life of the woman. The *McRae* majority held that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.” *Harris v. McRae*, supra, 448 U.S. at 316, 100 S.Ct. at 2688.

This court is unable to reconcile the mandate and logic of the United States Supreme Court in *Roe v. Wade*, (to which at least eight of the justices of the Supreme Court adhered as of the date *McRae* was decided) with the *McRae* and *Zbaraz* decisions. Medicaid reimbursement funds are made available for all the health care costs of women, including these medical costs necessary to carry the fetus to term, but not for the medically necessary abortion.³⁴ Surely, this constitutes infringement on the right to an abortion. The United States Supreme Court has consistently held that even though there is no constitutional right to benefits, the state cannot extend or refuse to extend them on a constitutionally impermissible basis. See, e.g., *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974) (durational residence requirement for medical benefits infringed on right to travel); *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) (refusal to recognize a group by a state college infringed on freedom of association); Cox, “The Supreme Court, 1979 Term,” 94 Harv.L.Rev. 1, 99 (1980). “Freedoms such as these ¹⁴²⁹are protected not only against heavy-handed frontal attack, but also from being

34. Indeed, the state’s cost for providing comprehensive maternity and childbirth care is significantly more than the costs of an abortion. As

of March, 1985, these medical costs for child-bearing increased to \$3149.65 and the cost of a first trimester abortion was about \$175.00.

stified by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960).

Since we are proceeding solely under the state constitution, *McRae* and *Zbaraz* are not controlling. As previously indicated in this decision, the court must look to state law. In construing our state charter or liberties, we must put to rest "the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights..." Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv.L.Rev. 489, 501 (1977); Margulies, "A Lawyer's View of the Connecticut Constitution," 15 Conn.L.J. 107, 119 (1982). "We are ... free, in appropriate circumstances, to follow a different route and thus to recognize that the Connecticut constitution may provide for the people of this state greater rights and liberties than they are afforded under the federal constitution." *State v. Fleming*, 198 Conn. 255, 261, 502 A.2d 886 (1986). And it is clear that the "due process clause of the Connecticut constitution shares *but is not limited* by the content of its federal counterpart." (Emphasis added.) *Fasulo v. Arafteh*, 173 Conn. 473, 475, 378 A.2d 553 (1977).

In the present case, even though the poverty of the plaintiff women was not of the state's making and there may have been no constitutional obligation to pay for the medical treatment of the poor,³⁵ once the state has chosen to do so it must preserve neutrality. In making this determination, it therefore becomes important to review the purposes and goals of medicaid—the state's medical treatment program for the poor. The primary goals of medicaid are to promote the health of the indigent by providing them with all the "health services¹⁴³⁰ and medical supplies necessary to prevent or treat illness or

injury..."³⁶ Not only does the program provide that this medical care be "adequate" but also it must be of a "quality that does not penalize them for being poor."³⁷ To be sure, the Connecticut medicaid program (except for the regulation) was adopted and operated in the finest traditions of the 350 year history of the state's caring for the medical needs of the poor.

In adopting the regulation, however, the state has ceased to preserve its neutrality at least under our state constitution. Under the program it provides funds for childbirth, but denies funds to terminate the pregnancy; it provides for all other necessary medical needs of the woman, save one—the medically necessary abortion. The fact that the regulation singles out one medical procedure flies in the face of the medicaid program's admitted goals. Indeed, the defendant commissioner admits that funding "medically-necessary abortions which protect a woman's health ... contribute to [his] goals for the medicaid program."³⁸ And since that one exception also is a subject of a woman's constitutional rights, the regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion.

Justice Brennan's perspective of impingement on the constitutional right to privacy as expressed in his dissent in *McRae* has clear applicability to our state constitution. He wrote: "In every pregnancy, one of these two courses of treatment [termination of the pregnancy or medical procedures to bring the pregnancy to term] is medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay¹⁴³¹ for the expenses associated with that procedure. But under the Hyde Amendment, the Government will fund only those procedures incidental to child-

35. But see footnote 33, supra.

36. Budget Request of the Commissioner for the Fiscal Year of 1985.

37. The defendants' admission of facts.

38. The defendants' admission of facts.

Cite as 515 A.2d 134 (Conn.Super. 1986)

birth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.³⁹ *Harris v. McRae*, supra, 448 U.S. at 333, 100 S.Ct. at 2703 (Brennan, J., dissenting).

Since the poor woman's right of privacy is infringed by the regulation, so are the physician's rights. "[T]he full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.' *Doe v. Bolton*, [supra]. . . . The physician's exercise of this medical judgment encompasses both assisting the woman in the decision making process and implementing her decision should she choose abortion." *Akron v. Akron Center for Reproductive Health, Inc.*, supra 462 U.S. at 427, 103 S.Ct. at 2491.

The Massachusetts Supreme Court likewise has found that the failure to pay for medically necessary abortions violated the due process clause of its state constitution. In *Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 654-55, 417 N.E.2d 387 (1981), it was held that once the state "chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weight the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.' L. Tribe, *American Constitutional Law*, § 15-10, [p.] 933 n. 77 (1978)." Likewise, in striking down a similar statute which would restrict the funding of medically necessary abortions, the Supreme Court of California in *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 264, 625 P.2d 779, 172 Cal.Rptr.

866 (1981), affirmed its long standing state constitutional principle that once benefits are conferred, it may not be done on "a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right."

Moreover, infringement must be measured in the light of the "reality of the situation" that is, the effective removal of the choice for poor women of whether to have an abortion by not funding it as referred to by Justice Brennan in *Harris v. McRae*, supra, 448 U.S. at 333, 100 S.Ct. at 2703 (Brennan, J., dissenting), and the "practical considerations" of the person the regulation affects (that is, their inability to protect themselves) referred to by Justice Longo in *Fasulo v. Arafah*, supra, 173 Conn. at 481, 378 A.2d 553.³⁹ As Justice Powell pointed out in *Healy v. James*, supra, 408 U.S. at 183, 92 S.Ct. at 2347, "[w]e are not free to disregard the practical realities."

THE POOR WOMAN'S DILEMMA

The "realities" and "practicalities" of this class of poor women is their abject poverty and desperate need of medical care in the form of therapeutic abortions interwoven with the dilemma with which the state has confronted them.

Under the Connecticut medicaid program, except for abortion, all necessary medical expenses for eligible recipients are paid for by the state. General Statutes, § 17-134b; Regs., Conn. State Agencies §§ 17-134d-1 and 17-134d-2. On the other hand, the state pays for all incidents necessary for childbirth, including delivery and the costs of medical care resulting from complications during pregnancy. So if the pregnant poor woman finds herself requiring an abortion to preserve her health, she has no place to turn. The state has placed her in a trap. The cash welfare allowance (AFDC) the state grants is barely sufficient to maintain an adequate level

39. The plaintiffs were involuntarily confined psychiatric patients in *Fasulo v. Arafah*, 173

Conn. 473, 378 A.2d 553 (1977).

of living for her and her family. Her benefits from the state are substantially under the poverty levels, and the cash allotment is hardly enough to cover food, shelter and clothing.⁴⁰ Through an intricate network of statutes, she is not allowed to receive funds from other sources without those funds being deducted from her welfare cash allowance the following month.⁴¹ Thus, even a loan from a friend or family member would not help her, the obligations of repayment notwithstanding. And if she should fail to report the receipt of other income and assets, she could become disqualified for future benefits and subject to criminal charges.⁴² Because payments are made directly to the provider and no cash allowance is given for medical assistance, she is not even given the choice of being able to forego other medical necessities in favor of the abortion. In short, the state has boxed her into accepting the pregnancy and carrying the fetus to term, notwithstanding the sometimes substantial impairment to her health. Faced with this dilemma, some women have resorted to desperate and dangerous acts of self-abortion,⁴³ criminal activity and illegal abortions in § 434 order to exercise their constitutional rights. The only legal relief available is to allow the indigent woman's medical condition to worsen to a point where her life is endangered—only then, will the state come to her aid and fund the abortion. By then, however, it may be too late, for even if the medical condition does not kill her, the

40. See § III, supra.

41. General Statutes §§ 17-82j, 17-83e.

42. General Statutes §§ 17-82d, 17-82i(b); Regs., Conn. State Agencies §§ 17-2-9, 17-2-39 through 17-2-43.

43. Doe No. 3 testified as follows:

"Q: What would you have done [if the state had not paid for the abortion under the injunction]? What were you thinking that you would have had to do if welfare had not paid for your abortion?"

"A: Well, when you are in such a situation, you . . . do crazy things really, you know, even though you do not have the right to do it or

abortion procedure at an advanced stage of pregnancy may.

The cruelty of the regulation is demonstrated by a sampling of the medically necessary abortions which would not have been eligible for funding under a life-endangerment standard but were funded by the state pursuant to the temporary mandatory injunction ordered by the court. For example: a thirteen year old girl who began vomiting five times a day, and developed an acute state of depression which was characterized by frequent crying spells and which interfered with her progress at school; a woman whose pregnancy was the result of rape and who was acutely depressed; a woman who was at risk of septic abortion because she became pregnant with an intrauterine contraceptive device in place which could not be removed; a woman with a reaction of anxiety and stress who also had hepatitis; a woman with an anxiety reaction who also had hypertension; a woman who had lupus erythematosus; a woman with pancreatitis; a woman with serious threats to her health from a failed prior attempt at an abortion with subsequent pain, bleeding and probably severe infection; a woman at risk because of a cardiac valve lesion who is also on medication § 435 known to have ill effects on pregnancy; a woman whose fetus could not survive outside of the womb because it had anencephaly; a woman who was at risk because she was both hypertensive and asthmatic; a woman who was at risk and

anything. I would have probably done something very dumb.

"Q: What would you have done?"

"A: You know, in Columbia, people do a lot of dumb things that I know. I probably would have. I know people who does this. I would have done it. I could have grabbed a handle and make a wire and put it over there and do something.

"Q: You would have tried to abort yourself?"

"A: I would have done it, yes. I would have tried. I don't know. Because you have to do something if it was going to be a torment. I was not physically ready to have a baby. And, it was going to be a big, big, problem. I don't know how I would have handled it, but I would have done something real bad."

whose fetus was also at risk because she had a history of drug abuse and was currently on a methadone program; a woman with a history of psychiatric illness who became emotionally unstable during pregnancy and needed medication for her mental health; and a woman who was at risk because she had sickle-cell anemia which is associated with a high rate of complication during pregnancy.

THE PHYSICIAN'S DILEMMA

The failure to pay for medically necessary abortions interferes with the physician-patient relationship. The inability to perform this medical procedure places physicians in an untenable position. They may be forced to witness the deterioration of their patient's health and the shortening of her life expectancy. They may face the increase likelihood of having to perform the abortion at an advanced stage of the pregnancy when the abortion procedure is more dangerous.⁴⁴ They know of the possibility that their patients may attempt to abort themselves and that they will then be forced to render vigorous time-consuming and difficult treatment to save her. Indeed, because the physician was unable to perform the abortion when it was medically necessary,⁴³⁶ he or she may be put in the position of not being able to save her life when the abortion is performed under the

44. Frederick Naftolin, chairman of the department of obstetrics and gynecology at Yale Medical School and at Yale-New Haven Hospital, testified as follows:

"Naftolin: First I should say at the outset that in general it is a very difficult standard because life endangerment means that one has to be able to foresee the outcome of a pregnancy at the very beginning of the pregnancy, which is, I wish it were easier, but it is not."

"The Court: By that you mean that at the initial stages of the pregnancy, it might just be medically necessary, but as the pregnancy continues, it might become life endangerment?"

"Naftolin: Precisely."

45. Indeed, because *appropriate* medical care is the mark of the Medicaid program, the case fits the mold of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The *McRae* majority conceded the following: "A substantial constitutional question would arise if Congress

regulation. Moreover, at each of these phases, the physician must apply life-endangerment standards that are alien and antithetical to the medical profession. Dr. David Bingham, an obstetrician and gynecologist summed it up as follows: "I feel that the state has obstructed my ability to give the best care that I know how to give. That it has a policy . . . which may drive some patients to the brink before we can help them and which has forced many women to continue their pregnancies to the detriment of their health. And as a physician whose life work is to protect their health, it's clearly an enormous burden that, I believe, the state placed on us as well as on our patients."

Although the court decides this case on state constitutional grounds, it is clear that in light of the present facts the regulation could not pass federal constitutional standards even under the majority's analysis in *Harris v. McRae*. In *McRae* the United States Supreme Court held that the "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Harris v. McRae*, supra, 448 U.S. at 317 n. 19, 100 S.Ct. at 2688 n. 19. In this case, however, the dilemma in which poor women find themselves as a request of the failure to fund medically necessary abortions is the "more."⁴⁵ The ⁴³⁷infringement of the pro-

had attempted to withhold all Medicaid benefits from an otherwise eligible candidate, simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, [supra], where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath." (Emphasis in original.) *Harris v. McRae*, 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784, reh. denied, 448 U.S. 917, 101 S.Ct. 39, 65 L.Ed.2d 1180 (1980). In the present case the "benefit" at stake under the Medicaid program goes further than just necessary medical care. Under the Connecticut program *appropriate* medical care is the benefit which is provided and the only appropriate medical care for these

tected right is not only the failure to fund the therapeutic abortion, but it is also the additional obstacles placed in the path of the woman which make it impossible for her to exercise her constitutional right to obtain an abortion and preserve her health without violating the law. Although, under federal constitutional law, "a state is not constitutionally compelled to pay to remove financial burdens it did not impose, the cases clearly gave no license to the converse, the idea that government is free to create financial [or other] obstacles to abortion." (Emphasis in original.) *National Education Assn. of Rhode Island v. Garrahy*, 598 F.Supp. 1374, 1384 (D.R.I. 1984), aff'd, 779 F.2d 790 (1st Cir.1986); *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 303 (3d Cir. 1984).

The Hyde amendment is no mere "omission"; it is a deliberate attempt to curb abortion. Just because the regulation piggybacks the amendment, it doesn't wash any differently in its effects on the women's constitutional right of privacy. "[W]hat appears at first to be merely a governmental 'omission'—for example, failure to fund therapeutic abortions for poor women accompanied by funding of childbirth procedures for the same women—might be regarded, and has in fact⁴⁶ been viewed by some Supreme Court justices, as a deliberate, 'active' choice by government to discourage exercise of a negative individual right." Tribe, "The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence," 99 Harv.L.Rev. 330, 331 (1985). "That a state may not structure its programs of benefits so as to deter or penalize

poor women is an abortion. It is undisputed that when a woman requires a therapeutic abortion, carrying the fetus to term which jeopardizes her health and possibly her life, is not appropriate medical care. The benefit (the right to appropriate medical care) is withheld in its entirety when the state will not fund this single, appropriate medically necessary procedure. Therefore, because the poor woman chooses to exercise her constitutional right for an abortion, all of the appropriate care is withdrawn. And

the exercise of protected rights without compelling justification is the rule even though it may be exceedingly difficult in particular cases to decide whether a program really does have such a forbidden effect or structure." Tribe, *Constitutional Choices* (1985) p. 56. In this case, however, the court has no difficulty determining that the regulation, within the framework of the Connecticut medicaid program, does impinge on the constitutional right of privacy.

Whatever the analysis and no matter how tight and opaque the state's blindfold becomes, the excepting from the medicaid program of one single medical procedure which is absolutely necessary to preserve the health of the woman (the medically necessary abortion) constitutes an infringement of the right of privacy at least under the constitution of the state of Connecticut. Such infringement triggers a judicial review as to whether the regulation meets constitutional muster.

Both the woman's and physician's right of privacy are not unqualified even under the state constitution. Since the regulation impairs a fundamental right, its validity requires "strict scrutiny to determine whether the regulation was compellingly justified and narrowly drafted." *Campbell v. Board of Education*, 193 Conn. 93, 104, 475 A.2d 289 (1984).

The federal courts have identified two such interests that may justify state regulation of abortion; *Akron v. Akron Center for Reproductive Health, Inc.*, supra 462 U.S. at 427, 103 S.Ct. at 2490; and it makes logical sense that these could also be⁴⁶ advanced as compelling reasons under the state constitution.⁴⁶ First, "the State

clearly this not only fails to pass state, but also federal, constitutional muster.

46. The defendants, in their brief, identify four reasons they advance as compelling—that is, "protect[ing] and preserv[ing] human life from the moment of conception," "favoring childbirth over abortion," "safeguarding health" and "maintaining medical standards." In regard to potential life and childbirth, it is clear, as indicated in this decision, that these reasons must give way to the woman's health. The abortion

Cite as 515 A.2d 134 (Conn.Super. 1986)

does have an important and legitimate interest in preserving and protecting the health of the pregnant woman." *Id.*, at 428, 103 S.Ct. at 2491. Of course, this reason has no application to the present case because the interest would compel an abortion rather than deny it.

Second, the state "has still *another* important and legitimate interest in protecting the potentiality of human life." *Id.* The state asserts the interest as controlling here, citing for support § 53-31a of the General Statutes, which, although it has been declared unconstitutional,⁴⁷ is still carried forward by the state from revision to revision of the statutes. That statute provides in part: "The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception. . . ." Under the judicial review of strict scrutiny, however, this reason cannot justify the impingement of the right to an abortion. Although the protection of potential life is important, it cannot outweigh the health of the woman at any stage of the pregnancy (first, second or third trimesters). *Akron v. Akron Center for Reproductive Health, Inc.*, supra, at 428, 103 S.Ct. at 2491; *Roe v. Wade*, supra, 410 U.S. at 163-65, 93 S.Ct. at 731-33; *Moe v. Secretary of Administration &*

procedure itself serves the reason of safeguarding health. It is further clear that the standards of the medical profession do not prohibit, but rather require and are consistent with the abortion for medically necessary reasons.

47. *Abele v. Markle*, 369 F.Supp. 807 (D.Conn. 1973).

48. It is difficult to understand the state's claim of justification. If the potential for human life is compelling, why during the period of the temporary injunction did it voluntarily fund abortions for children and women who did not come within the medicaid program, and therefore was not in the purview of the injunction? For example, medically necessary abortions were funded for those who were not eligible for medicaid in the state-funded program for eighteen to twenty-one year olds, persons eligible

Finance, supra, 382 Mass. 658, 417 N.E.2d 387; *Right to Choose v. Byrne*, supra, 91 N.J. at 306, 450 A.2d 925. It is crystal clear the poor woman may not be denied medical benefits solely to protect the potentiality of human ¹⁴⁴⁰life or life itself when her physician "in appropriate medical judgment" determines the abortion is medically necessary "for the preservation of the life or health" of the woman. (Emphasis added.) *Roe v. Wade*, supra, 410 U.S. at 164-65, 93 S.Ct. at 732-33.

The state has failed to prove that there is any compelling reason to justify the regulation.⁴⁸ Accordingly, the court finds that the regulation which prohibits the funding of medically necessary abortions under the medicaid program except if the life of the woman is endangered violates the rights of privacy of the plaintiff poor woman class and the physician class under the state's due process clause.

VIII

EQUAL PROTECTION AND THE EQUAL RIGHTS AMENDMENT

[7] The plaintiffs also argue that the regulation violates the equal protection clauses of our state constitution ¹⁴⁴¹con-

for general assistance and youth in the care of the Connecticut department of children and youth services.

It should also be noted, which the defendants apparently find difficult to explain, that the State Health Plan prepared by the health coordinating council (promulgated pursuant to General Statutes § 19a-7 and National Health Planning Resources Development Act of 1974, Publ.L. No. 93-641, 42 U.S.C. § 300k et seq.) provides in part: "A full spectrum of reproductive and maternal services (e.g., prenatal, delivery, post-natal, family planning, *pregnancy termination*, infertility, genetic screening and counseling, and male and female sterilization) should be made available to all regardless of method of payment, socio-economic or ethnic status, age, sex, or geographic location." (Emphasis added.)

tained in §§ 1⁴⁹ and 20⁵⁰ of article first and more specifically under the equal rights amendment (hereinafter "ERA") adopted as an amendment to § 20 in 1974.⁵¹

The five member majority in *Harris v. McRae*, supra, held that the Hyde amendment did not violate the federal equal protection clause.⁵² In *McRae*, the court held that since the restriction on medicaid abortions does not impinge on the constitutional right of liberty and the classification is not predicated on "criteria that are, in a constitutional sense, 'suspect,'" the validity of this classification must stand unless it fails to meet the rational basis test. *Id.*, 448 U.S. at 322, 100 S.Ct. at 2691. The court found that such discriminatory restrictions on funding medically necessary abortions were rationally related to the legitimate governmental objective of "protecting the potential life of the fetus." *Id.*, at 324, 100 S.Ct. at 2692.

This court also finds it difficult to accept the rationale of the majority of the United States Supreme Court in *McRae*, even under the traditional two-tiered equal¹⁴⁴² protection review. Indeed, Justice Stevens vigorously dissented in *McRae* and argued that the Hyde amendment was violative of the federal equal protection clause. He stated the following: "If a woman has a constitutional right to place a higher value on avoiding either serious harm to her own health or perhaps an abnormal childbirth than on protecting potential life, the exercise of that right cannot provide the basis

49. "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community." Conn. Const., art. I § 1.

50. Prior to November 27, 1974, the equal protection clause was as follows: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin." Conn. Const., art. I § 20.

51. Section 20 was amended on November 27, 1974 (article fifth of amendments) by adding "her" and "sex," and on November 28, 1984

for the denial of a benefit to which she would otherwise be entitled. The Court's sterile equal protection analysis evades this critical though simple point. The Court focuses exclusively on the 'legitimate interest in protecting the potential life of the fetus. . . . It concludes that since the Hyde Amendments further that interest, the exclusion they create is rational and therefore constitutional. But it is misleading to speak of the government's legitimate interest in the fetus without reference to the context in which that interest was held to be legitimate. For *Roe v. Wade* squarely held that the States may not protect that interest when a conflict with the interest in a pregnant woman's health exists. It is thus perfectly clear that neither the Federal Government nor the States may exclude a woman from medical benefits to which she would otherwise be entitled solely to further an interest in potential life when a physician, 'in appropriate medical judgment,' certifies that an abortion is necessary 'for the preservation of the life or health of the mother. . . .' The Court totally fails to explain why this reasoning is not dispositive here." (Citations omitted.) *Harris v. McRae*, supra, 448 U.S. 351-52, 100 S.Ct. at 2713.

The Connecticut equal protection clauses require the state when extending benefits to keep them " 'free of unreasoned distinctions that can only impede [the] open and equal' " exercise of fundamental rights. *D'Amico v. Manson*, 193 Conn. 144, 147,

(article sixteen of amendments) by adding "or physical or mental disability." Section 20 now reads as follows: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

52. The court in *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed. 831, reh. denied, 448 U.S. 917, 101 S.Ct. 38, 65 L.Ed.2d 1180 (1980), also refused to strike down, on equal protection grounds, the Illinois statute which restricted the funding of abortions to those which were life-threatening.

Cite as 515 A.2d 134 (Conn.Super. 1986)

476 A.2d 543 (1984), quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1443, 1497, 1500, 16 L.Ed.2d 577 (1966); *Gaines v. Manson*, 194 Conn. 510, 516, 481 A.2d 1084 (1984). The regulation does not satisfy this requirement. Clearly, the regulation discriminates by funding all medically necessary procedures and services except therapeutic abortions. As the court held in part VII of this decision, the selective funding of medically necessary abortions and the willingness of the state to fund all necessary medical procedures to bring the fetus to term at least implicitly impinges on the fundamental right of privacy guaranteed to all pregnant women—rich and poor alike—and that is, the right to choose whether to have an abortion. Since it impinges on a fundamental right, the defendants must establish both a compelling state interest in support of the classification and that no less restrictive alternative is available. See *Carofano v. Bridgeport*, 196 Conn. 623, 640, 495 A.2d 1011 (1985). Just as the state lacks a compelling reason under due process analysis to exclude abortion from medicaid funding at any stage of the pregnancy when the health of the woman is at stake, it also lacks such an interest for equal protection purposes. Under either analysis, the regulation which encourages a woman through financial coercion to bear children at the risk of their health does not meet constitutional standards.

The case of the plaintiff class of poor women is even stronger given Connecticut's ERA. By adopting the ERA, the "people of this state and their legislators have unambiguously indicated an intent to abolish sex discrimination." *Evening Sentinel v. National Organization for Women*, 168 Conn. 26, 34, 357 A.2d 498 (1975).

The regulation discriminates on the basis of sex in several ways. First, under the medicaid program, all the medical expenses necessary to restore the male to health are paid and likewise for the female except for

therapeutic abortions that are not life-threatening. Second, all the male's medical expenses associated with their reproductive health, for family planning and for conditions unique to his sex are paid and the same is provided for women except for the medically necessary abortion that does not endanger her life.

The third, and the most important way in which the regulation violates the ERA, requires some background. Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them. See generally Law, "Rethinking Sex and the Constitution," 132 U.Pa.L.Rev. 955 (1984). For some outrageous examples of this, see *Hoyt v. Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 162, 7 L.Ed.2d 118 (1961) (statute exempting women from jury duty because they are "regarded as the center of home and family life"); *Muller v. Oregon*, 208 U.S. 412, 421, 28 S.Ct. 324, 326, 52 L.Ed. 551 (1908) (statute that restricted the hours women could work but did not place similar restrictions on men); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42, 21 L.Ed. 442 (1872) (Bradley, J., concurring) (decision prohibiting women from the practice of law because of "natural" differences between the sexes). This discrimination has had a devastating effect upon women.

Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.⁵³ "Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex." *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*, 375 Mass. 160, 167, 375 N.E.2d 1192 (1978); see also *General Electric Co. v. Gilbert*, 429 U.S. 125,

53. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1985); but see trial court opinion, 85 Pa.Comm.w. 215, 482 A.2d 1137

(1984); exceptions sustained in part and overruled in part, 85 Pa.Comm.w. 240, 482 A.2d 1148 (1984).

149, 97 S.Ct. 401, 414, 50 L.Ed.2d 343 (1976) (Brennan, J., dissenting); Tribe, American Constitutional Law § 16.27; Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," 95 Yale L.J. 599, 621-22 (1986). Tribe put it well when he wrote: "If one were . . . to recognize, as the Supreme Court sometimes has, that 'the grossest discrimination can lie in treating things that are different as though they were exactly alike' [quoting from *Jennness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971)], then it might be possible to discern an invidious discrimination against women, or at least a constitutionally problematic subordination of women, in the law's very indifference to the biological reality that sometimes requires them, but never requires their male counterparts, to resort to abortion procedures if they are to avoid pregnancy and childbearing." Tribe, Constitutional Choices (1985) p. 244.⁵⁴

¹⁴⁴⁶It is absolutely clear that the framers intended that pregnancy discrimination would come within the purview of the sex discrimination prohibited by Connecticut's ERA and should be subject to heightened judicial review. Senator Joseph I. Lieberman, who led the ERA debate on the floor of the Senate, used as an example a law denying women "unemployment compensation two months before and after childbirth," as an example of a law that would be barred by the ERA. 15 S.Proc., Pt. 4,

54. Justice Frankfurter, in his concurring opinion in *Griffin v. Illinois*, 351 U.S. 12, 23, 76 S.Ct. 585, 100 L.Ed. 891, reh. denied, 351 U.S. 958, 76 S.Ct. 844, 100 L.Ed. 1480 (1956), which held that due process and equal protection requires the state to pay for the transcript of a criminal trial for an indigent defendant, stated the following: "Law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to

1972 Sess., p. 1526. Senator Lawrence J. DeNardis expressed the intention of the vast majority of the senate as follows: "[T]here often comes a point when in the life of a body politic, it must reassert the values that are inherent in the spirit of the Constitution." *Id.*, p. 1543. In sum, by adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities. It is therefore clear, under the Connecticut ERA, that the regulation excepting medically necessary abortions from the medicaid program discriminates against women, and, indeed, poor women.

Having concluded that the regulation discriminates based upon sex, the court must next determine the appropriate level of judicial review to apply in order to determine whether it offends the ERA. The defendants argue, based upon *McRae*, that the rational relationship test should be applied. Although the Supreme Court of Connecticut has often stated that the equal protection provisions of the Connecticut and United States constitutions "have the same meaning and limitations"; *Keogh v. Bridgeport*, 187 Conn. 53, 66, 444 A.2d 225 (1982); those pronouncements were made ¹⁴⁴⁷without reference to the ERA. Since the adoption of the ERA those decisions of the Supreme Court of Connecticut which paid lip service to this traditional language did not involve gender classification. To equate our ERA with the equal protection

correct or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' (John Cournois, A Modern Plutarch, p. 27)."

Cite as 515 A.2d 134 (Conn.Super. 1986)

clause of the federal constitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable.

Some jurisdictions have interpreted their state ERAs as requiring *absolute scrutiny*, that is, the court will not consider any justification for sex discrimination once it has been found. For example, the Supreme Court of Washington has held that "[t]he ERA, on the other hand, is a very different animal from the equal protection clause—indeed, it has no counterpart in the federal constitution. The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.' . . . The ERA mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling, though separate equality may be permissible in some very limited circumstances. . . ." (Emphasis in original.) *Electrical Contractors v. Pierce County*, 100 Wash.2d 109, 127, 667 P.2d 1092 (1983);⁵⁵ See also *Rand v. Rand*, 280 Md. 508,

511-16, 374 A.2d 900 (1977); Brown, Emerson, Falk & Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871, 904 (1971). Although the argument for absolute scrutiny is impressive, the court need not decide whether it is required by the Connecticut ERA since the regulation cannot survive strict scrutiny and, indeed, not even an intermediate review.⁵⁶

At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny. Surely the effect of the ERA was to raise the standard of review. In *Page v. Welfare Commissioner*, 170 Conn. 258, 267, 365 A.2d 1118 (1976), the Supreme Court of Connecticut made a point of noting that the state did not deny "that the passage of the equal rights amendment mandates the use of a 'strict scrutiny' test. . . ." In *Page*, however, the court did not need to decide whether strict scrutiny applied because it concluded⁴⁴⁹ that the legislation could not survive any test. Likewise, in *Stern v. Stern*, 165 Conn. 190, 193, 332 A.2d 78 (1973), Justice Loisell, speaking for a unanimous court, acknowledged that the level of

55. "Presumably the people in adopting . . . [the ERA] intended to do more than repeat what was already contained in the otherwise governing constitutional provisions, federal and state, by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests. Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination. . . . Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment. See Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 Syracuse L.Rev. 535, 570-74 (1974). . . . The overriding compelling state interest as adopted by the people of this state . . . is that: 'Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.'" *Darrin v. Gould*, 85 Wash.2d 859, 871, 877, 540 P.2d 882 (1975).

56. Even if the court was to apply an intermediate standard of review, the regulation could not pass constitutional muster. "Courts have tended to depart from the minimal standard where the interests affected by the governmental restriction are sufficiently elevated in the

hierarchy of social values and to devise various formulae less rigid than the compelling state interest criterion that essentially necessitate balancing private against governmental concerns with varying degrees of deference to legislative judgment." *Carafano v. Bridgeport*, 196 Conn. 623, 641, 495 A.2d 1011 (1985); *Horton v. Meskill*, 195 Conn. 24, 37, 486 A.2d 1099 (1985). Such a balancing standard was applied by the Supreme Court of New Jersey in *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982). Although New Jersey does not have an equal rights amendment, in *Right to Choose* the court held "where an important personal right is affected by governmental action, the Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." *Id.* 91 N.J. at 309, 450 A.2d 925. The court went on to hold: "This balancing test is particularly appropriate when, as here, the statutory classification indirectly infringes on a fundamental right. In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable." *Id.* at 310, 450 A.2d 925.

review would be a different ballgame under ERA. See also *R.McG. v. J.W.*, 200 Colo. 345, 615 P.2d 666 (1980); *People v. Ellis*, 57 Ill.2d 127, 311 N.E.2d 98 (1974); *Attorney General v. Massachusetts Interscholastic Athletic Assn., Inc.*, 378 Mass. 342, 393 N.E.2d 284 (1979). It is certain, as previously stated in part VII of this decision, that the defendants are unable to meet their burden of proving that a compelling state interest supports the classification and that no less restrictive alternative is available.

The court concludes that the regulation that restricts the funding for medically necessary abortions except when the woman's life is endangered violates the equal protection clause of the constitution of the state of Connecticut and more specifically Connecticut's equal rights amendment.

IX

CONCLUSION AND REMEDY

The court finds the issues in favor of the plaintiff classes of poor women and physicians. The court does not take lightly the issuance of this injunction against the defendants, but the circumstances here are compelling. *Monroe v. Middlebury Conservation Commission*, 187 Conn. 476, 480, 447 A.2d 1 (1982). The commissioner has clearly acted in excess of his statutory authority which has resulted in the deprivation of the plaintiff classes of their constitutional rights. For the plaintiff class of poor woman, the regulation has jeopardized their health and could reach a level for them where it becomes life-threatening. We do not deal here with mere property or privileges—but with life itself. Furthermore, an important consideration is that the 1450 action which the court finds to be illegal and unconstitutional is not predicated upon a legislative enactment, but that which first had its existence as a mere policy of the commissioner.⁵⁷ It is clear, and the court so finds, that the enforcement of the regulation would cause the plaintiffs irreparable injury and they have no adequate remedy at law. *Connecticut*

57. See footnote 10, supra.

Mobile Home Assn., Inc. v. Jensen's, Inc., 178 Conn. 586, 592, 424 A.2d 285 (1979).

The court declares that the regulation; 3 Manual, Department of Income Maintenance Medical Assistance Program, c. III, Policy 275; which provides for the funding of abortion under the medicaid program only when necessary to preserve the physical life of the woman or when pregnancy is the result of rape or incest, to be:

(a) contrary to the statutory provisions of the medicaid program; General Statutes § 17-134a et seq.; and specifically § 17-134b of the General Statutes, and that therefore the commissioner of income maintenance exceeded his authority in adopting it;

(b) in violation of the plaintiff class of poor women's and the plaintiff class of physicians' constitutional rights of due process under article first, § 10, of the constitution of the state of Connecticut;

(c) in violation of the plaintiff class of poor women's constitutional right of equal protection under article first, §§ 1 and 20 (including the equal rights amendment, article five of the amendments), of the constitution of the state of Connecticut.

The court enjoins the defendant commissioner from enforcing said regulation and orders that the defendants pay for the costs of all medically necessary abortions; see footnote 4, supra; on the same basis, to the same extent and with the same limitations as the 1451 defendants pay for all other medical expenses under the Medicaid program.

Counsel for the plaintiffs, within seven days, shall prepare a judgment file and submit it to counsel for the defendants for their comments as to form. The court will hear the parties on the form of the judgment at the time the bifurcated issue of attorney's fees is considered.



Katherine HUMPHREYS, Secretary,
Indiana Family & Social Services Ad-
ministration, Appellant (Defendant
below),

v.

CLINIC FOR WOMEN, INC., Women's
Pavilion, Inc., Ulrich G. Klopfer, D.O.,
and Martin Haskell, M.D., Appellees
(Plaintiffs below).

No. 49S00-0011-CV-714.

Supreme Court of Indiana.

Sept. 24, 2003.

Medical clinic, advocacy organization, and doctors challenged state statutes and regulations governing Indiana's Medicaid program, alleging that restrictions on funding of abortions violated the Equal Privileges and Immunities Clause of the State Constitution. The Superior Court, Marion County, Susan Macey Thompson, J., granted summary judgment for plaintiffs. State appealed directly to Supreme Court, based on state statute having been declared unconstitutional. The Supreme Court, Sullivan, J., held that: (1) on their face, state statutes and regulations providing Medicaid funding for abortions for indigent women in order to preserve the woman's life or if rape or incest caused the pregnancy, but not providing abortion funding for all medically necessary abortions for indigent women, did not violate Equal Privileges and Immunities Clause of State Constitution, but (2) under such Clause, so long as Indiana's Medicaid program paid for abortions to preserve the lives of pregnant women or where rape or incest caused the pregnancy, the program also had to pay for abortions in cases of pregnancies that created for pregnant women serious risk of substantial and irre-

versible impairment of major bodily function.

Affirmed in part and reversed in part.

Shepard, C.J., filed an opinion concurring in Part I and dissenting from Part II.

Dickson, J., filed an opinion concurring in Part I and dissenting from Part II.

Boehm, J., filed an opinion dissenting from Part I and concurring in Part II, in which Rucker, J., concurred.

1. Constitutional Law ⇌205(2)

Health ⇌455

State statutes and regulations providing Medicaid funding for abortions for indigent women in order to preserve the woman's life or if rape or incest caused the pregnancy, but not providing abortion funding for all medically necessary abortions for indigent women, did not, on their face, violate Equal Privileges and Immunities Clause of State Constitution; such classification was supported by unavailability of federal financial participation, State's interest in protecting fetal life, fiscal policy, and administrative efficiency, and Medicaid would pay for abortions for all persons in the classification of Medicaid-eligible pregnant women seeking to terminate their pregnancies to preserve their life or where the pregnancy resulted from rape or incest. (Per Sullivan, J., with one Justice concurring and one Justice concurring in the holding.) Medicaid Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.; West's A.I.C. Const. Art. 1, § 23; West's A.I.C. 12-15-5-1(17), 16-34-1-2; 405 IAC 5-28-7.

2. Constitutional Law ⇌38

A statute that is constitutional on its face may be unconstitutional as applied to a particular plaintiff.

3. Constitutional Law ⇌205(2)

Health ⇌455

State statutes and regulations governing Indiana's Medicaid program for the indigent violated the Equal Privileges and Immunities Clause of the State Constitution, as applied, so long as the program paid for abortions to preserve the lives of pregnant women or where rape or incest caused the pregnancy, but did not pay for abortions in cases of pregnancies that created for pregnant women serious risk of substantial and irreversible impairment of major bodily function. Medicaid Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.; West's A.I.C. Const. Art. 1, § 23; West's A.I.C. 12-15-5-1(17), 16-34-1-2; 405 IAC 5-28-7.

4. Constitutional Law ⇌70.1(12)

Health ⇌480

Separation of Functions Clause of State Constitution did not preclude court from granting relief, as to State statutes and regulations providing Medicaid funding for abortions for indigent women only in order to preserve the woman's life or if rape or incest caused the pregnancy, where the relief granted did not tread impermissibly upon Legislature's appropriation prerogatives; Medicaid program was general and open-ended, and court provided only limited relief, by holding that so long as Medicaid program paid for abortions to preserve lives of pregnant women or where rape or incest caused pregnancy, Equal Privileges and Immunities Clause of State Constitution required payment for abortions in cases of pregnancies that created for pregnant women serious risk of substantial and irreversible impairment of major bodily function. Medicaid Act, § 1901 et seq., as amended, 42 U.S.C.A. § 1396 et seq.; West's A.I.C. Const. Art. 1, § 23; Art. 3, § 1; West's A.I.C. 12-15-5-1(17), 16-34-1-2; 405 IAC 5-28-7.

West Codenotes

Unconstitutional as Applied

West's A.I.C. 12-15-5-1, 16-34-1-2

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SULLIVAN, Justice.

Indiana's Medicaid program will pay for a poor woman to have an abortion but only if necessary to preserve her life or if rape or incest caused her pregnancy. The plaintiffs in this case argue, and the trial court held, that Medicaid must pay for any abortion that is medically necessary, citing the Indiana Constitution's requirement that privileges or immunities cannot be granted to a citizen or class of citizens that do not equally belong to all citizens on the same terms.

For the reasons set forth in this opinion in part I under "Discussion," I believe that this provision of the Indiana Constitution does not require Medicaid to pay for all abortions that are medically necessary.

Chief Justice Shepard and Justice Dickson join in this part of this opinion.

However, for the reasons set forth in this opinion in part II under “Discussion,” I also conclude that, so long as the Indiana Medicaid program pays for abortions to preserve the lives of pregnant women and where rape or incest cause pregnancy, it must also pay for abortions in cases of pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function. Justices Boehm and Rucker join in this part of this opinion.

Background

In 1965, Congress established the Medicaid program, a joint federal-state program that pays for some health care costs of low-income people, by amending Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396v. Under the Medicaid program, the federal government reimburses participating states for the health care services provided pursuant to the state’s medical assistance or Medicaid plan. *Id.* at §§ 1396a(a)(10), 1396d(a). States are not

required to participate in the Medicaid program but states that choose to participate must conform their Medicaid program to federal Medicaid law. *Id.* at § 1396a(a).

In 1973, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment protected, to a certain extent, the freedom of a woman to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

In 1976, Congress first adopted legislation, referred to as the “Hyde Amendment” for its author, Representative Henry J. Hyde, that prohibits the federal government from reimbursing states under the Medicaid program for abortions except where a woman would be placed “in danger of death unless an abortion is performed” or where “the pregnancy is the result of an act of rape or incest.” Pub.L. No. 106–113, §§ 508–509, 113 Stat. 1501, 1501A–274 (1999). Although the provisions of the Hyde Amendment have varied from time to time, this is the language of the prohibition and exception in effect today.¹

1. The Hyde Amendment has never had the status of permanent law but instead has been attached annually to legislation appropriating funds for certain departments of the federal government for a given fiscal year or has been adopted as a stand-alone joint resolution. The full version of the Hyde Amendment in effect on the date this lawsuit was filed states:

“Sec. 508. (a) None of the funds appropriated under this Act, and none of the funds in any trust funds are appropriated under this Act shall be expended for any abortion.

(b) None of the funds appropriated under this Act, and none of the funds in any trust fund to which funds are appropriated under this Act, shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term “health benefits coverage” means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

Sec. 509 (a) The limitations established in the preceding section shall not apply to an abortion

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).” Consolidated Appropriations Act of 2000, Pub.L. No. 106–113,

In 1977, the Supreme Court held that the constitutional right to abortion recognized in *Roe v. Wade* did not include an entitlement to Medicaid payments that were not medically necessary. *Maher v. Roe*, 432 U.S. 464, 470, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). In 1980, the Supreme Court was faced with a challenge to the constitutionality of the Hyde Amendment, *i.e.*, whether Congress could prohibit the use of federal Medicaid funds to reimburse states for medically necessary abortions. The court held that the Hyde Amendment did not violate either the Due Process or the Equal Protection Clauses of the Fourteenth Amendment. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

Any state that participates in the Medicaid program must cover those abortions for which federal funds are available. *Zbaraz v. Quern*, 596 F.2d 196, 201 (7th Cir.1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980). Nevertheless, “[a] participating state is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable . . .” *Harris*, 448 U.S. at 309, 100 S.Ct. 2671.

Indiana participates in the federal Medicaid program and is bound by all of its requirements. Ind.Code § 12-15-1-1. The Indiana Medicaid program provides low-income Hoosier citizens with virtually all non-experimental, medically necessary

health care, including some services for which federal reimbursement is not available. *See e.g.*, Ind.Code § 12-15-5-1(18) (providing coverage for nonmedical nursing care given in accordance with tenants and practices of a recognized church); *cf.* 42 C.F.R. § 440.170(b) (restricting federal funding for such institutions to those organized pursuant to Section 501(c)(3) of the Internal Revenue Code). Indiana Medicaid covers inpatient hospital services, physicians’ services, and outpatient hospital or clinic services for all recipients and provides a full range of reproductive health care for Medicaid-eligible men. Ind.Code § 12-15-5-1. Covered services must be “medically reasonable and necessary” and are required to be provided to Medicaid recipients in a uniformly equitable manner. Ind.Code § 12-15-1-10. Indiana Medicaid defines a “medically reasonable and necessary service” as one that “meets current professional standards commonly held to be applicable to the case.” Ind. Admin. Code tit. 405, r. 5-2-17 (2001). However, in the case of abortion services, the program defines an abortion as necessary (and therefore covered under the program) only if “performed to preserve the life of the pregnant woman or in other circumstances if the abortion is required to be covered by Medicaid under federal law,” *e.g.*, where the pregnancy was caused by rape or incest. Ind.Code § 12-15-5-1(17);² Ind.Code § 16-34-1-2;³ Ind. Admin. Code tit. 405, r. 5-28-7.⁴

§§ 508-509, 113 Stat. 1501, 1501A-274 (1999).

2. “Except as provided in IC 12-15-2-12, IC 12-15-6, and IC 12-15-21, the following services and supplies are provided under Medicaid: (17) Family planning services except the performance of abortions.” Ind.Code § 12-15-5-1.
3. “Neither the state nor any political subdivision of the state may make a payment from

any fund under its control for the performance of an abortion unless the abortion is necessary to preserve the life of the pregnant woman.” Ind.Code § 16-34-1-2.

4. “Medicaid reimbursement is available for abortions only if performed to preserve the life of the pregnant woman or in other circumstances if the abortion is required to be covered by Medicaid under federal law. Termination of an ectopic pregnancy is not considered an abortion. All appropriate docu-

The plaintiffs in this case, Clinic for Women, Inc., Women's Pavilion, Inc., Ulrich G. Klopfer, D.O., and Martin Haskell, M.D., challenge the constitutionality of these two statutes and this regulation. The plaintiffs contend that the statutes' and regulation's collective prohibition on the use of state Medicaid funds to pay for abortions violates the Equal Privileges and Immunities Clause of Art. I, § 23, as well as Art I, §§ 1 and 12, of the Indiana Constitution.⁵

After hearing oral argument of the parties, the trial court granted the plaintiff's motion for summary judgment and denied the state's cross-motion for summary judgment, ruling that the challenged statutes and regulation violated Art. I, § 23. The trial court did not address plaintiffs' Art. I, § 1 and 12, claims and they are not before us here.

Article I, § 23, of the Indiana Constitution reads as follows:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

From at least 1971 until about nine years ago, this court analyzed claims under the state Equal Privileges and Immunities Clause using the same techniques as those employed by the United States Supreme Court to analyze claims under the Equal Protection Clause of the Fourteenth

mentation must be attached to the claim and to claims for directly related services before reimbursement shall be made." Ind. Admin. Code tit. 405, r. 5-28-7 (2001).

5. "We declare, that all people are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and

Amendment. *See Collins v. Day*, 644 N.E.2d 72, 75 (Ind.1994). In *Collins*, this court jettisoned the use of federal equal protection analytical methodology to claims alleging violations of Art. I, § 23, and held that such claims should be analyzed using a different standard. *Id.* That standard was summarized as follows:

Article 1, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Id. at 80. Indiana courts have made frequent use of the *Collins* standard since its promulgation, including the trial court here.

The trial court found that the ban on funding abortions contained in the challenged statutes and regulation failed both prongs of the *Collins* standard summarized *supra*.

The first prong of the *Collins* test requires that "where the Legislature singles

well-being. For the advancement of these ends, the people have, at all times, an infeasible right to alter and reform their government." Art. I, § 1.

"All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Art. I, § 12.

out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics." *Id.* at 78-79. The trial court started its analysis of this prong with the proposition that the "Medicaid program is a government program through which a benefit—government payment for medically necessary treatment—is provided to indigent Hoosiers." (Supp. R. 8.) "However," the trial court continued, "that benefit is not provided equally to all indigent Hoosiers—women who, for medical reasons, need to terminate their pregnancy in order to preserve and protect their health did not receive that funding benefit. Under the Indiana Medicaid program, indigent men and indigent pregnant women who need treatment (other than abortion) which is medically necessary to preserve their health are singled out for a benefit which is denied to indigent pregnant women needing to terminate their pregnancy to preserve and protect their health." (Supp. R. 8.)

The second prong of the *Collins* analysis requires that the preferential treatment "be uniformly applicable and equally available to all persons similarly situated." *Collins*, 644 N.E.2d at 80. Here the trial court found that "[a]ll Medicaid-eligible pregnant women are similarly situated in that all may require, from time to time, an array of medically necessary treatment to protect and preserve their health." But, under the challenged Medicaid statutes and regulations, "Medicaid coverage of needed medical services is not 'uniformly applicable and equally available' to those similarly situated. Pregnant women who require a medically necessary abortion to preserve their health will not receive state

funding while pregnant women who require other types of medically necessary treatment will receive state funding." (Supp. R. 9.)

Under *Collins*, legislative discretion is accorded substantial deference. *Collins*, 644 N.E.2d at 80-81. The trial court identified the State's interests claimed to be served by the challenged statutes and regulation as potential life, administrative simplicity, and cost containment. But it found these justifications insufficient.

[P]ursuing the goal of promoting fetal life at the expense of preserving the health of women who need to terminate their pregnancy for medical reasons contravenes the purpose of the Medicaid program, which is designed to enable indigent Hoosiers to obtain medically necessary treatment. The State's asserted interest in administrative simplicity and cost containment also do not justify the funding ban. First, the goal of achieving administrative simplicity in itself can never serve as a sufficient goal to justify depriving some citizens of privileges accorded others. Second, the goal of cost containment is also not reasonably related to the funding ban. Abortions are less expensive than the costs associated with childbirth. Moreover, preventing a Medicaid-eligible woman from terminating her pregnancy to protect and preserve her health will necessarily mean that she will have increased health problems that the Indiana Medicaid program must cover. Cost containment is not served by the funding ban and cannot be the basis to depriving some citizens of a privilege accorded others.

(Supp. R. 10.)

The State appealed the judgment directly to our Court pursuant to Ind. Appellate

Rule 4(A)(1)(b).⁶

Our Court has been informed in this matter by a substantial number of decisions from sister courts on similar claims under their respective state constitutions, including some with constitutional provisions the same as our Equal Privileges and Immunities Clause. Many of these are identified and discussed in an excellent law journal article, Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State courts on the Issue of Sexuality*, 33 Ind. L.Rev. 863, 875–879 (2000).

The Court also appreciates the assistance of amicus curiae Indiana Civil Liberties Union, Inc., Indiana Right to Life Committee, Inc., and twelve members of the Indiana General Assembly (Senators Frank Mrvan, Jr., Kent Adams, David C. Ford, Allie V. Craycraft, Jr., and R. Michael Young, and Representatives Gary L. Cook, Jeffrey A. Thompson, P. Eric Turner, James Russell Buck, Dennis K. Kruse, and Jerry L. Denbo), and their respective counsel.

Discussion

I

The Equal Privileges and Immunities Clause of Art. I, § 23, of the Indiana Constitution states, “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”

Article I, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent char-

acteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all person similarly situated.

Collins, 644 N.E.2d at 80. In determining whether a statute complies with or violates this provision, the Court shows substantial deference to the discretion of the Legislature in attempting to “balance the competing interest involved,” and the Legislature’s basis in creating the distinction. *Id.* To resolve conflicts between the state constitution and a challenged statute, this Court has stated that “the better course is to construe or reconstruct the statute in such a way as to further the purpose of the legislature without offending the Indiana Constitution.” *Van Dusen v. Stotts*, 712 N.E.2d 491, 496 (Ind.1999).

Under the first prong of the *Collins* test, any “disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Collins*, 644 N.E.2d at 80.

Where the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.

Id. at 78–79.

Before we can determine whether the legislative classification under the first prong of *Collins* is permissible, we need to identify the legislative classification at issue. The parties here define the relevant

6. “The Supreme Court shall have mandatory and exclusive jurisdiction over the following cases: . . . Appeals of Final Judgments declar-

ing a state or federal statute unconstitutional in whole or in part.” Ind. Appellate Rule 4(A)(1)(b).

classification differently. The plaintiffs contend (and the trial court agreed) that the legislative classification at issue places (1) “indigent men and indigent women who need treatment (other than abortion) which is medically necessary to preserve their health” into a class for which the necessary treatment is provided, and (2) “indigent pregnant women needing to terminate their pregnancy to preserve and protect their health” into a class for which the necessary treatment is not provided. (Supp. R. 8.) The State argues that the relevant classification is between (1) “medically necessary services and supplies” for which federal Medicaid reimbursement at some level is available (a class that includes abortions to save a woman’s life and where pregnancy resulted from rape or incest) and (2) medically necessary services and supplies for which it is not (a class that includes all other medically necessary abortions). Br. of Appellants at 14.

In *McIntosh v. Melroe Co.*, Justice Boehm examined the way in which the legislative classification at issue in the first prong of *Collins* is to be determined:

Although *Collins* itself uses the word “inherent” to describe the characteristic that defines the class, this cannot be equated with “innate” characteristics of members of the class. The worker’s compensation scheme [the statute at issue in *Collins*], like the Product Liability Act [the statute at issue in *McIntosh*], turns on the characteristics of the employers, not the injured workers. Similarly, under the Product Liability Act, everyone may potentially recover for an injury from a product not yet ten years old, and everyone injured from an older product is barred. It is the claim, not any innate characteristic of the person, that defines the class.

729 N.E.2d 972, 981 (Ind.2000). We think the claim here, reduced to its essentials, is

that some Medicaid-eligible pregnant women in Indiana are entitled to Medicaid-financed medically necessary abortions and others are not. We think this “claim . . . defines the class:” (1) Medicaid-eligible pregnant women who seek to terminate their pregnancies in order to preserve their lives or where their pregnancies resulted from rape or incest are in a class where Medicaid pays for their abortions; and (2) Medicaid-eligible pregnant women who seek to terminate their pregnancies for any other medically necessary reason are in a class where Medicaid will not pay for their abortions. Although this formulation of the classification at issue differs somewhat from those advanced by the parties, we believe it sufficiently similar to each that their arguments against and in favor of the classifications retain their full force.

As already discussed, in analyzing the constitutional permissibility of the classification identified, we “accord considerable deference to the manner in which the legislature has balanced the competing interest involved.” *Collins*, 644 N.E.2d at 80 (citing *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404–05, 404 N.E.2d 585, 604 (1980)). Indeed, we frequently recite that the challenger to the constitutionality of the legislative scheme bears the burden “to negate every conceivable basis which might have supported the classification.” *Johnson*, 273 Ind. at 392, 404 N.E.2d at 597. In *Collins*, we quoted from an earlier opinion of this Court in this regard:

Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable. So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into

the legislative motives prompting such classification.

Collins, 644 N.E.2d at 80 (quoting *Chaffin v. Nicosia*, 261 Ind. 698, 701, 310 N.E.2d 867, 869 (1974)).

The plaintiffs contend that even this deferential standard of review is violated by the statutory and regulatory scheme challenged here. Calling the classification “manifestly unreasonable,” Br. of Appellees at 21, they argue that the

... classes of persons granted and denied the privilege are inherently the same in ways that relate directly to the subject matter of the Medicaid legislation: they are low-income, such that they meet the Medicaid eligibility requirements, and they seek medical care for which they have a medical need. What distinguishes between the two is that the members of the group denied the privilege have health conditions which cause them to need an abortion to preserve their health, while members of the class granted the privilege have health conditions which cause them to need medical care other than abortion to preserve their health. However, that difference does not relate to the subject matter of the Medicaid statutes. In fact, denying funding to a woman whose health will deteriorate if she does not have an abortion runs directly counter to the subject matter of the legislation.

Id. at 19.

The State offers four justifications for the classification.

First, the State argues that the unavailability of federal financial participation means that it would not be “fiscally prudent and rational” and that it would otherwise be “administrative[ly] inconvenien[t]”

for the State to pay for abortions that are not eligible for federal reimbursement. Br. of Appellants at 14, 15.

Second, the State argues that it has a “valid and compelling” interest in protecting fetal life, quoting from this court’s decision in *Cheaney v. State*, 259 Ind. 138, 147, 285 N.E.2d 265, 270 (1972), *cert. denied*, 410 U.S. 991, 93 S.Ct. 1516, 36 L.Ed.2d 189 (1973).⁷ The State quotes from *Harris v. McRae* for support in pressing its point that “limiting government funding for abortion is a rational means for indicating the government’s interest in protecting fetal life.” Br. of Appellants at 17 (quoting *Harris*, 448 U.S. at 325, 100 S.Ct. 2671).

Third, in addition to the fiscal and administrative efficiency dimensions of the federal funding argument made *supra*, the State advances additional fiscal and administrative justifications for the classification. It argues that a more liberal system of government payments for abortion “will result in more of that activity” and “may have a dramatic impact on the State’s future tax base.” Its broader point here is that the allocation of Medicaid spending is a fiscal policy determination for the legislative and executive branches. Br. of Appellants at 18–19.

The plaintiffs respond that the State should not be entitled to offer justifications for the classification extraneous to the purpose of the Medicaid program itself. “If the State’s position is accepted, the Legislature could insulate any discriminatory statute from constitutional challenge by simply claiming that it serves multiple purposes. Thus, the State could withhold any and all government benefits from women who have had abortions, irrespective of the

7. *Cheaney v. State*, decided about six months prior to *Roe v. Wade*, rejected (over the dissent of Justice DeBruker) a federal constitu-

tional challenge to Indiana’s criminal abortion statute.

subject matter or goal of the statute at issue. For example, the State could grant free tuition to state universities to all its citizens except for those who have had an abortion, on the grounds that the statute furthers the State's interest in protecting fetal life." Br. of Appellees at 21.

We appreciate the point plaintiffs make but think it only has force if our determination is binary. To the contrary, *Collins*, its precursors, and its progeny all indicate that we look at the Legislature's "balancing of the competing interest involved." See *American Legion Post No. 113 v. State*, 656 N.E.2d 1190, 1192 (Ind.Ct.App. 1995) (citing *Collins*, 644 N.E.2d at 80 (citing *Johnson*, 273 Ind. at 404-05, 404 N.E.2d at 604)), *trans. denied*.

In balancing the interests here, we have given careful attention to the evidence presented by the plaintiffs in the trial court demonstrating a number of different health risks faced by pregnant women with respect to which an abortion is medically necessary. In support of their motion for summary judgment, the plaintiffs submitted the affidavit of Dr. Jane Hodgson, a physician specializing in obstetrics and gynecology and an expert in the field. Dr. Hodgson testified that many women confront serious health risk when pregnant. Hypertension complicates about 8-10% of pregnancies. Hypertensive pregnant women are at a higher risk for cerebrovascular accidents (strokes), abruptio placentae (premature separation of the placenta from the uterus), and disseminated intravascular coagulation (a severe bleeding disorder). Dr. Hodgson further testified that pregnancy-induced diabetes occurs in approximately 1-3% of pregnancies. Women with preexisting diabetes have ten times the risk of pregnancy-related death than do non-diabetic women. Diabetes-associated retinopathy (eye disease) or nephropathy (kidney disease) often worsen

significantly during pregnancy. Dr. Hodgson added that pregnancy jeopardizes the health of a woman with advanced coronary artery disease or severe impairment of the heart valve, and all pregnant women with heart disease have a higher risk of congestive heart failure, cardiac infections, and arrhythmia (abnormal heart rhythms). The health of a pregnant woman is seriously impaired when she suffers from chronic renal failure, myasthenia gravis, or pulmonary embolism from a previous pregnancy. Pregnant women with lupus may experience aggravation of their disease.

Dr. Hodgson also testified that pregnant women with sickle cell anemia experience more frequent and more severe crises, especially in bones, infections such as pneumonia and urinary tract infections, increasingly severe anemia, congestive heart failure, and pulmonary complications such as embolus. Other conditions exacerbated by pregnancy include asthma, arthritis, inflammatory bowel disease, gall bladder disease, liver disease, and epilepsy. Dr. Hodgson added that when cancer threatens a pregnant woman's life, the pregnancy puts further strain on the woman's health, and may require a suspension of cancer treatment because of harm to the fetus from such treatments. Thus, if treatment of the disease requires radiation or chemotherapy, a choice must be made between the health of the patient and the fetus, since these forms of therapy are likely to result in fetal malformation or death. Pregnancy may accelerate the condition of women with malignant breast tumors that are estrogen receptor positive. Dr. Hodgson's testimony was bolstered by the other affidavits submitted by the plaintiffs from Dr. Judith Belsky and Dr. William Mudd Haskell.

[1] The question for this Court is whether the Legislature may prohibit the State from paying for an abortion for a

Medicaid-eligible pregnant woman facing any of these health risks while at the same time it authorizes the State to pay for an abortion to preserve the life of a Medicaid-eligible pregnant woman or where the pregnancy was caused by rape or incest. We find the State's justifications of unavailability of federal financial participation, interest in protecting fetal life, fiscal policy, and administrative efficiency sufficient to sustain the constitutionality of the classification under the first prong of the *Collins* test. We are in no position to deny plaintiffs' argument that the statutes and regulation at issue impose significant financial, physical, and emotional hardship on many low-income Hoosier women. But we hold that the State's justifications for the classification do not rise to the level of being "arbitrary or manifestly unreasonable." *Collins*, 644 N.E.2d at 80 (quoting *Chaffin*, 261 Ind. at 701, 310 N.E.2d at 869).

The second prong of the *Collins* test requires that the "privileged" legislative classification "be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with the special treatment accorded to any particular classification extended equally to all such persons." *Collins*, 644 N.E.2d at 79.

The trial court found this aspect of *Collins* violated because "[p]regnant women who require a medically necessary abortion to preserve their health will not receive state funding while those who require other types of medically necessary treatment will receive state funding." (Supp. R. 9.) We believe the State is correct when it responds that, because the plaintiffs "challenge not the provision of Medicaid benefits to indigent people gen-

erally, but rather the deprivation of Medicaid benefits to some who seek abortions, it is clearer to frame the issue as whether that deprivation is uniformly applicable to all who share the inherent characteristics that justify the classification." Brief of Appellants at 23. We find the requirement of the second prong of *Collins* met because Medicaid will pay for abortions for all persons in the classification of Medicaid eligible pregnant women seeking to terminate their pregnancies to preserve their life or where the pregnancy resulted from rape or incest.

II

[2, 3] A statute that is constitutional on its face may be unconstitutional as applied to a particular plaintiff. See *Martin v. Richey*, 711 N.E.2d 1273, 1284–85 (Ind. 1999) (holding Indiana Medical Malpractice Act statute of limitations constitutional on its face but unconstitutional as applied to plaintiffs whose medical condition and the nature of the asserted malpractice make it unreasonable to expect that they could discover the asserted malpractice and resulting injury within the limitations period); *City of Fort Wayne v. Cameron*, 267 Ind. 329, 334, 370 N.E.2d 338, 341 (1977) (holding Indiana Tort Claims Act notice requirement constitutional on its face but unconstitutional as applied to plaintiffs whose mental and physical incapacity render them unable to comply with the notice requirement). For the reasons set forth below, we believe that the statute and regulations challenged here are unconstitutional as applied to Medicaid-eligible pregnant women whose pregnancies "create serious risk of substantial and irreversible impairment of a major bodily function."⁸

8. The quoted language is from Ind.Code § 16-18-2-223.5 (1998), the State abortion

control statute, discussed *infra*.

Article I, § 23, of our Constitution prohibits a statute from providing disparate treatment to different classes of persons if the disparate treatment is not reasonably related to inherent characteristics that distinguish the unequally treated classes. *McIntosh*, 729 N.E.2d at 981; *Martin*, 711 N.E.2d at 1280; *Collins*, 644 N.E.2d at 80. We believe that the characteristics that distinguish Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function to be virtually indistinguishable from the characteristics of women for whose abortions the State does pay. To the extent there is a distinction, it is too insubstantial to be sustained by the State's justifications.

The challenged statutory and regulatory scheme here provides disparate treatment to different classes of persons: Medicaid (1) will pay for abortions where necessary to preserve the life of the pregnant woman or where the pregnancy was caused by rape or incest but (2) will not pay for any other abortions. Thus the Constitution requires that the disparate treatment be reasonably related to inherent characteristics that distinguish the "preserve the life, rape, or incest" classification from the "any other abortions" classification. Within this "any other abortions" classification is a subset consisting of abortions where the pregnancies create for Medicaid-eligible women a serious risk of substantial and irreversible impairment of a major bodily function.

The State's argument is that there are "inherent characteristics . . . reasonably related to permissible legislative goals" that justify Medicaid-funded abortions where necessary to preserve the life of the pregnant woman or where the pregnancy was caused by rape or incest. Br. of Appellants at 17. This is because "[a]bortions in those circumstances raise problems and concerns that abortions in other

circumstances do not." *Id.* Although it does not elaborate, the State says that these problems are the result of certain "medical, moral, social, and ethical concerns" that "do not arise in other abortion cases." *Id.* at 18.

That is, the State says that providing Medicaid-financed abortions is reasonably related to the "inherent characteristics" that distinguish the "preserve the life, rape, or incest" classification from the "any other abortions" classification (and, therefore, makes the distinction constitutionally permissible). Those inherent characteristics are the "medical, moral, social, and ethical concerns" raised by the "preserve the life, rape, or incest" classification that are not raised by the "any other abortions" classification.

It is clear that the inherent characteristics of the "preserve the life, rape, or incest" classification do not require that the life of the pregnant woman be at stake. This classification includes abortions where the pregnancy was caused by rape or incest where there is no inherent threat to life. But if the "medical, moral, social, and ethical concerns" that justify Medicaid-funded abortions do not *require* that the life of the pregnant woman be at stake, what are the inherent characteristics that distinguish the abortions permitted by the "preserve the life, rape, or incest" classification from cases where the pregnant woman faces substantial and irreversible impairment of a major bodily function? The medical, moral, social, and ethical concerns are the same or at least the differences too insubstantial to be sustained by the State's justifications.

The application of the challenged statute and regulations to pregnant women who face substantial and irreversible impairment of a major bodily function is significant because the Legislature itself has identified it for special treatment in the State abortion control statute. For that

purpose, the Legislature has treated in exactly the same way cases where the life of the pregnant woman is at stake and cases where the woman faces substantial and irreversible impairment of a major bodily function. Indiana law forbids an abortion to be performed in Indiana unless the pregnant woman consents following specified disclosures provided to her at least 18 hours before the abortion is performed. Ind.Code § 16-34-2-1.1. However, the Legislature has exempted from these disclosure and waiting period cases where “the medical condition of a pregnant woman . . . necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create *serious risk of substantial and irreversible impairment of a major bodily function.*” Ind.Code §§ 16-18-2-223.5 (emphasis supplied) & 16-34-2-1.1; *A Woman’s Choice—East Side Women’s Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind.1996) (“severe-but-temporary conditions in which an abortion is not the medically necessary treatment are not covered by the exception”).

[4] The fact that the Legislature has treated as a single classification in the abortion control statute “abortions for which a delay would create serious risk of

9. The State, in addition to its arguments on Art I, § 23, sought summary judgment on two additional grounds.

First, it argued that the plaintiffs were barred from the relief they sought by Ind. Code § 12-15-5-2, which prohibits Indiana Medicaid from funding any service for which the federal government does not provide reimbursement. The trial court found, first, that one statute cannot save another found to be unconstitutional, and second, that the State does not strictly abide by the statute because the Indiana Medicaid program covers services for which federal financial participation is unavailable.

The State also argued that the Separation of Functions clause of Art. III, § 1, of the Indiana Constitution barred the court from granting the relief that the plaintiffs requested. The trial court found that if the chal-

lenged enactments violate the state Constitution, the Court could grant relief even if doing so means that state funds will be spent in a manner not explicitly approved of by the Legislature. “The Court has the power to shape appropriate remedies and the Legislature has a duty to appropriate funds to meet its constitutional obligations.” (Supp. R. 12 (quoting *State v. Monfort*, 723 N.E.2d 407, 413 (Ind. 2000).))

While we do not necessarily agree with the trial court’s reasoning, we affirm as to these issues. We believe the course of these proceedings effectively placed Ind.Code § 12-15-5-2 at issue. And as to the separation of powers issue, we believe that the general and open-ended nature of the Medicaid appropriation, combined with the limited relief provided, does not tread impermissibly upon the Legislature’s appropriation prerogatives.

Conclusion

It is the judgment of the Court that the challenged Medicaid statutes and regula-

tion do not violate the Equal Privileges and Immunities Clause of the Indiana Constitution and are, therefore, constitutional except that, so long as the Indiana Medicaid program pays for abortions to preserve the lives of pregnant women and where pregnancies are caused by rape or incest, it must also pay for abortions for Medicaid-eligible women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function. The trial court is reversed in part and affirmed in part.

SHEPARD, C.J., and DICKSON, J., concur in Part I and dissent from Part II.

BOEHM and RUCKER, JJ., dissent from Part I and concur in Part II.

SHEPARD, C.J., concurs and dissents with separate opinion.

DICKSON, J., concurs and dissents with separate opinion.

BOEHM, J., concurs and dissents with separate opinion in which RUCKER, J., concurs.

SHEPARD, Chief Justice, concurring and dissenting.

I join in Part I of Justice Sullivan's opinion, but not in Part II, which I think produces the wrong result.

A former colleague of ours once told us in conference (but never took occasion to say in writing) that for all the jurisprudential effort put into devising standards for trial and appellate review, the most that any articulated standard can achieve is to "tell the judge what mood to be in as he or she approaches a topic." Various standards tell us to be strict or liberal, deferential or non-deferential, to name a few.

The Court correctly announces the standard applicable to the present case. It is that the judiciary should defer to the lines

drawn by the General Assembly and Governors Bowen and Bayh unless they are "arbitrary or manifestly unreasonable." Op. at 257, citing *Collins v. Day*, 644 N.E.2d 72, 80 (Ind.1994).

I cannot say that the decisions made on the very difficult topic of public payments for abortion, made by Indiana's elected representatives (and for that matter by the Congress and President Carter) are so arbitrary and unreasonable that they are unconstitutional.

DICKSON, Justice, concurring with Part I and dissenting from Part II.

I concur with the holding of Part I of Justice Sullivan's opinion for the Court, that Indiana's Medicaid abortion coverage restrictions do not violate the requirements of *Collins v. Day*, 644 N.E.2d 72 (Ind.1994), and thus do not violate Article 1, Section 23 of the Indiana Constitution.

The Indiana Privileges and Immunities Clause, Article 1, Section 23 of the Indiana Constitution, clearly permits enactment of laws that provide "disparate treatment" for different classes where the legislation is "reasonably related to inherent characteristics which distinguish the unequally treated classes." *Collins*, 644 N.E.2d at 80.

The Court correctly acknowledges that "the State's justifications of unavailability of federal financial participation, interest in protecting fetal life, fiscal policy, and administrative efficiency," and the uniform applicability of the Medicaid abortion benefit to all who qualify, are sufficient to sustain the constitutionality of the classification. Sullivan opin. at 257.

I believe it preferable, however, to address the specific classifications that were identified by the plaintiffs-appellees and trial court as receiving unequal treatment: (1) indigent men and women who need

treatment (other than abortion) which is medically necessary to preserve their health, and (2) indigent pregnant women needing to terminate their pregnancy to preserve and protect their health but whose pregnancies do not threaten their lives and were not the result of rape or incest. These two asserted classifications do not contrast the persons entitled to receive Medicaid abortions with those ineligible. Rather, they compare the treatment received by persons entitled to Medicaid benefits provided for non-abortion medical services with those seeking Medicaid-funded abortions. These two classifications receive different treatment in that the medical services for the second are limited to exclude abortions except in narrow circumstances. This disparate treatment is clearly related to the inherent characteristic that distinguishes the unequally treated classes: namely, the medical treatment in the second classification, abortion, requires the termination of fetal life. The legislative decision to impose restrictions upon Medicaid-funded abortions is obviously and reasonably related to whether the medical services involve the termination of fetal life. Thus, even using the classifications identified by the trial court and the appellees, the Indiana Medicaid abortion restrictions do not violate Section 23.

I dissent, however, from Part II and the Conclusion of the Court's opinion, which appears to condition the holding in Part I by judicially expanding Indiana's Medicaid abortion coverage to require the state to provide abortion benefits clearly not intended by the Indiana General Assembly.

Under Part II, the Indiana Medicaid program must now begin paying for abortions for Medicaid-eligible women whose pregnancies create a "serious risk of substantial and irreversible impairment of a major bodily function," even though the

pregnancy does not present a threat to the woman's life. Sullivan opin. at 257. I believe that this conclusion and its rationale are erroneous.

The majority in Part II of Justice Sullivan's opinion purports to apply *Collins* but does so only by framing and then comparing its own two "classifications" of Medicaid-eligible pregnant women: (1) those for whom abortions are necessary to preserve their lives or where their pregnancies were caused by rape and incest, and (2) those who seek abortions for all other reasons, particularly the subset consisting of pregnant women whose pregnancies present a serious, but not life-threatening, risk of substantial and irreversible impairment of a major bodily function. Having combined in a single classification both those abortions needed to preserve the life of a pregnant woman and those abortions for pregnancies resulting from rape and incest, the majority in Part II then questions and dismisses the validity of the independent factors that reasonably relate to each sub-classification by observing that these factors are not applicable in common to both sub-classifications. Upon this highly questionable premise, the majority then declares that the factors supporting each sub-classification are the same or their differences "too insubstantial" to justify different treatment. With this rhetorical device, Part II disregards the protection of fetal life, and the medical, moral, social, and ethical concerns that properly distinguish and justify the restrictions on Medicaid abortions.

Proper application of *Collins* to the majority's classifications would seem to require that the first one be separated into its two independent components: (a) pregnancies for which abortions are necessary to preserve the life of the pregnant woman, and (b) pregnancies resulting from rape or incest. As between those

abortions necessary to preserve the life of the pregnant woman and the majority's "substantial and irreversible impairment" subclass, the access to Medicaid-funded abortions for the former is clearly and reasonably related to the inherent difference that distinguishes the classes—the risk of the woman's death without an abortion. It is the legislature's prerogative to balance its interest in preserving fetal life with its interest in not placing the mother at risk of death. Likewise, as between abortions in pregnancies resulting from rape or incest and those in the "substantial and irreversible impairment" subclass, the access to Medicaid-funded abortions for the former is obviously related to the inherent difference distinguishing the classes—whether the pregnancy was caused by criminal conduct. It is neither arbitrary nor manifestly unreasonable for the legislature to conclude that the medical, moral, social, and ethical implications of a compelled pregnancy under these circumstances outweighs the government's interest in the preservation of fetal life. Furthermore, as to both subclasses ("risk of death" and "rape or incest"), the access to Medicaid-funded abortions that are denied to the "substantial and irreversible impairment" classification is reasonably related to the fact that the federal government reimbursement is not available for the latter. Such fiscal considerations by the legislature are within the considerable legislative discretion accorded under *Collins*.

The legitimate reasons that separately justify the Medicaid program's funding for abortions needed to preserve a woman's life and its funding for abortions where the pregnancy results from rape or incest cannot be neutralized by declaring these two groups merged into the same classification, and then finding their independent separate justifications thereby inconsequential because they do not simultaneously apply

to both "risk of death" and "rape or incest" abortions.

Despite the requirement of *Collins* that we show substantial deference to the discretion of the legislature, the majority in Part II of Justice Sullivan's opinion disregards the clear and unequivocal language and intent of the Indiana General Assembly. Indiana Code section 16-34-1-2 explicitly declares: "Neither the state nor any political subdivision of the state may make a payment from any fund under its control for the performance of an abortion unless the abortion is necessary to preserve the life of the pregnant woman." The effect of Part II is to nullify this legislative limitation and to substantially expand the obligation of the Indiana Medicaid program to henceforth fund abortions for medical conditions that are not needed to save the mother's life.

An examination of Indiana Code section 16-34 *et seq.* makes clear that the legislature clearly intended and articulated a deliberate distinction between the two classes of women. Some statutes use broader language that is not limited to situations in which a pregnant woman is at risk of death. For example, section 16-34-2-1(a)(3)(C) criminalizes abortion performed after viability of the fetus unless the abortion is "necessary to prevent a substantial permanent impairment of the life or physical health of the pregnant woman." (emphasis added). Section 16-34-2-1.1 requires that certain information be given to a woman at least eighteen hours before an abortion *except in the case of a medical emergency*, which is defined in Indiana Code section 16-18-2-223.5 as a condition that "necessitates the immediate termination of [a woman's] pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function." Section 16-34-2-1.2 requires

that an abortion provider inform a woman facing a medical emergency of the medical indications supporting the provider's judgment that an abortion is necessary to prevent the mother's death *or* "a substantial and irreversible impairment of a major bodily function." Section 16-34-2-3(a) states that all abortions performed after viability shall be performed in a hospital having premature birth intensive care units unless compliance would result in "an increased risk to the life *or health* of the mother." (emphasis added). Subsection (b) requires there to be in attendance a second physician who shall care for a child born alive as a result of an abortion unless "compliance would result in an increased risk to the life *or health* of the mother." (emphasis added). In other statutes, however, it is clear that the legislature intended provisions or exceptions to apply *only* to women whose lives are in danger. Indiana Code section 16-34-2-1(a)(1)(B) states that, "if in the judgment of the physician the abortion is *necessary to preserve the life* of the woman, her consent is not required." (emphasis added). Indiana Code section 16-34-2-1(b) prohibits partial birth abortions unless a physician reasonably believes that it is *necessary to save the woman's life* and no other medical procedure is sufficient.

The fact that certain sections apply when a woman faces risk of death *or* impairment of a major bodily function, such as section 16-34-2-1.1, while other sections apply *only* when she faces risk of death, such as sections 16-34-2-1(b) and 16-34-1-2, indicates that the legislature's choice of language was precise and deliberate, demonstrating that the legislature intended to identify and treat differently these distinct classes of women with respect to the different statutory provisions.

In Part II, the majority imports the language of its new definition from Indiana

Code section 16-18-2-223.5. This provision does not address any term used in the statute restricting eligibility for taxpayer-funded abortions, I.C. § 16-34-1-2, but rather provides an exception to the informed consent requirements of Indiana's general abortion law in cases of "medical emergency," which it defines as a condition that "complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function." I.C. § 16-18-2-223.5. In *A Woman's Choice—East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 109 (Ind.1996), this Court construed this "medical emergency" definition to permit a physician to dispense with the informed consent provisions whenever the doctor concluded that an abortion was medically necessary in the doctor's clinical judgment based on "all relevant factors pertaining to a woman's health." By its importation of this language, the majority improperly scuttles the present restrictions in the Indiana Medicaid program's abortion coverage and appears to imply that Medicaid-eligible women may henceforth receive abortions at taxpayer expense in any case supported by the clinical judgment of a doctor based upon the woman's health factors, irrespective of whether she is at risk of death.

The majority's alarming expansion of the coverage is exacerbated by the fact that it imposes upon Indiana's Medicaid program the requirement to fund not only abortions necessary to prevent substantial and irreversible impairment of a major bodily function, but also abortions necessary to prevent even serious *risk* of the same. Plaintiffs claim in their brief that hypertension (high blood pressure) complicates approximately 8%—10% of pregnancies, and that "[a]lthough in most cases

serious harm to health can be averted, hypertensive pregnant women are at higher *risk* for cerebrovascular accidents (strokes), abruptio placentae (premature separation of the placenta from the uterus), and disseminated intravascular coagulation (a severe bleeding disorder)." Br. of Appellees at 5-6 (emphasis added). Plaintiffs also discuss the risks pregnancy can have on women with diabetes, including retinopathy (eye disease, including blindness) and nephropathy (kidney disease), a fourfold increase in the likelihood of pre-eclampsia or eclampsia and hypertensive diseases, and a tenfold increase in the risk of pregnancy-related death. Other conditions potentially necessitating abortion, according to the plaintiffs, are cancer that requires radiation or chemotherapy, and sickle cell anemia, which can cause "severe crises (especially in bones), infections such as pneumonia[,] . . . increasingly severe anemia, congestive heart failure, and pulmonary complications such as embolus." Br. of Appellees at 7. Plaintiffs admit that "[w]hile these conditions may not always be life threatening, they *can* seriously and permanently compromise a woman's health." Br. of Appellees at 7 (emphasis added). Under Justice Sullivan's expanded definition, these conditions arguably may now warrant coverage under Indiana's Medicaid abortion coverage.

Thus Justice Sullivan's opinion, while purporting in Part I to find the enacted limitations on Medicaid abortion coverage constitutionally valid, nevertheless in Part

II has the effect of granting almost all the relief sought by the plaintiffs in this case. In judicially repealing the express legislative pronouncement that state and local government funds cannot be used to pay for any abortion unless necessary to preserve the mother's life, the majority establishes a potentially ever-expanding set of medical conditions that may be transformed into entitlements for state-funded abortions for which there will be no federal Medicaid reimbursement. This is blatantly contrary to the intentions of both the Indiana General Assembly that enacted Indiana Code section 16-34-1-2 and Governor Evan Bayh who signed the bill into law.

For these reasons I dissent from Part II of Justice Sullivan's opinion. The fact that the Indiana Medicaid program does not pay for abortions in cases of "pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function" does not render the challenged statute and regulations unconstitutional as applied.

BOEHM, Justice, dissenting as to Part I.

For the reasons given below, I respectfully dissent from Part I of the majority opinion. Twelve of the seventeen state courts that have considered the issue in published opinions have concluded that denial of benefits to indigent women for medically necessary abortions is a violation of their state constitution.¹ Under prevailing

1. *Perdue v. Planned Parenthood*, 28 P.3d 904 (Alaska 2001); *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 203 Ariz. 454, 56 P.3d 28 (2002); *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134 (1986); *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996); *Doe v. Wright*, No. 91 Ch. 1958, slip op. (Ill. Cir.Ct. Dec. 2, 1994), leave to file late appeal

denied, No. 78512 (Ill. Feb. 28, 1995); *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Women of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn.1995); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *New Mexico Right to Choose/NARAL v. Johnson*, 126 N.M. 788, 975 P.2d 841 (1998); *Planned Parenthood Ass'n. v. Dep't of Human Res.*, 63 Or.App. 41, 663 P.2d 1247 (1983), aff'd on other grounds, 297 Or. 562,

constitutional doctrine in this state, I would reach the same result.

There is no doubt that a pregnant woman has the right to elect an abortion as set forth in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There is no doubt that the State may elect to have a Medicaid program or not to have one. And there is no doubt that the State may elect to fund medical procedures for the indigent without providing the same benefit to all citizens. Finally, it is plain on the face of the Medicaid statute that by restricting abortion benefits to those necessary to prevent death of the mother or to terminate pregnancies generated by rape or incest, the Indiana Medicaid program seeks to provide different benefits for some abortions than it does for other “medically necessary” procedures.

The plaintiffs here posit their claim as a constitutionally impermissible distinction arising from Medicaid’s refusal to fund medically necessary abortions for certain indigent women while providing benefits for all other indigents in need of medical treatment. The plaintiffs are entitled to frame their own complaint, so this different treatment is the issue presented in this case. Plaintiffs do not base their challenge on a comparison of funding for pregnancies arising from rape or incest or threatening the woman’s life to funding for other abortions. It therefore seems to me that the Indiana constitutional issue presented by this case is simply stated: is it permissible under Article I, Section 23 for the State to provide funding for medically necessary treatment for indigents generally, but to refuse it for medically necessary abortions unless the mother’s life is at

stake or the pregnancy results from rape or incest? I conclude it is not, as to those pregnancies for which the federal constitution guarantees the woman the right to make the election to terminate her pregnancy.

I. Equal Privileges Under the Indiana Constitution

The plaintiff’s constitutional challenge to this legislation is based solely on the Equal Privileges Clause found in Article I, Section 23 of the Indiana Constitution. The test for constitutionality under that clause is established in *Collins v. Day*, 644 N.E.2d 72 (Ind.1994), and is accurately recited by the majority:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.

Id. at 80.

Although the *Collins* formulation is often described as a “two-pronged” test, it really breaks down into three components because the first “prong” establishes two requirements: 1) the classification must be based on “characteristics” that “rationally distinguish the unequally treated class”, and 2) the “disparate treatment” must be “reasonably related” to the characteristics that define the class. I think this means,

687 P.2d 785 (1984); *Women’s Health Ctr. Of West Virginia, Inc. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993). *But see Renee B. v. Fla. Agency for Health Care Admin.*, 790 So.2d 1036 (Fla.2001); *Doe v. Dep’t of Social Servs.*, 439 Mich. 650, 487 N.W.2d 166

(1992); *Rosie J. v. North Carolina Dep’t of Human Res.*, 347 N.C. 247, 491 S.E.2d 535 (1997); *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114 (1985); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002).

in simple terms, that the class must be defined by a characteristic that is not arbitrary or otherwise impermissible and that the difference in legislative treatment must be reasonably related to the difference between the classes. The second “prong” of *Collins* imposes a third test: everyone who is in fact in the class (i.e., everyone who shares the defining characteristic) must be treated alike, and everyone who is not in the class must be treated alike. As we noted in *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind.2000), the “characteristic” that defines the legislative class is not necessarily innate (e.g., race, national origin). It may be a mutable characteristic that the same person may have as of a given time, but lack at others (e.g., people who are over age sixty-two can elect to receive Social Security benefits, but are ineligible before attaining that age; a corporation with seventy-five or fewer shareholders can elect to be taxed more or less as a partnership, but is ineligible with seventy-six shareholders). Or, as in *McIntosh*, the classification may be based on a sequence of events (persons injured by products in use for over ten years have no claim under the Product Liability Act).² And so on.

Here the relevant characteristics defining the class generally entitled to Medicaid benefits are indigence and desire for a medically necessary treatment. In Section 23 terms, the Medicaid statute confers a privilege on those persons. The plaintiffs here are indigent and seek reimbursement

2. In some sense, the claim asserted under the Equal Privileges Clause always defines the class because it sets forth the plaintiff's theory, and therefore presumably defines the class that is claimed to be unequally treated. However, I do not agree with the majority that “this claim defines the class” as that term is used in *McIntosh*. The issue in that case was whether the statute of repose in the Product Liability Act violated Article I, Section 23 by shutting off claims based on products in use

for procedures that are “medically necessary” as that term is used in the Medicaid statute. The State refuses to pay because the requested medical treatment would terminate a pregnancy that is neither life endangering nor the result of rape or incest. Therefore, the defining characteristic of the classification of citizens this legislation draws is those women who are (1) requesting a medically necessary abortion and (2) otherwise eligible for Medicaid benefits but (3) whose pregnancy is neither life endangering nor a result of rape or incest. The result is that this legislation confers a privilege by providing benefits to indigents requiring medically necessary treatment, but withholds that privilege from poor women in need of medically necessary abortions to terminate a pregnancy that is neither life threatening nor originated by rape or incest. The statute thus sets up a scheme for funding abortions that is different from that for funding for all other medical treatment.

II. Equal Protection Under the Federal Constitution

In order to understand the higher standard demanded by the state constitution, it is important to review the basis of the holding that the federal constitution does not prevent the states from imposing this condition on funding for indigent medical care. In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), the United States Supreme Court, in a 5-4

over ten years before the event giving rise to the plaintiff's injury. In saying that the “claim ... defines the class,” *McIntosh* referred to the claim of the plaintiffs in the underlying product liability case, not to the claim of unconstitutionality. In other words, the claim that defined the class was the claim that the plaintiff was injured by a product more than ten years old, not the claim that the statute of repose violated the Indiana Constitution.

decision, established that federal equal protection doctrine did not prohibit the federal government from enacting a federal statute, the Hyde Amendment, that denies federal reimbursement for the procedures at issue here. In reaching that conclusion, the majority relied on prevailing federal equal protection doctrine. The only Equal Protection Clause in the federal constitution is found in the Fourteenth Amendment which imposes limitations on state legislation, but does not apply to federal statutes. Indeed, until 1954, it was accepted dogma that there was no equal protection doctrine applicable to federal legislation. Kenneth L. Karst, *The Fifth Amendment Guarantee of Equal Protection*, 55 N.C. L.Rev. 541, 542 (1971); see, e.g., *Detroit Bank v. United States*, 317 U.S. 329, 337, 63 S.Ct. 297, 87 L.Ed. 304 (1943). The Supreme Court for the first time found equal protection applicable to a federal law in a companion case to *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) addressed segregation in the schools of the District of Columbia. Because the District of Columbia was a federal enclave and not a state, the Fourteenth Amendment did not apply. The Supreme Court unanimously held that the Due Process Clause of the Fifth Amendment required no less than the Equal Protection Clause of the Fourteenth Amendment, finding it “unthinkable” that the federal government could impose distinctions that the Constitution forbids to the states. By the mid 1970’s, it had become accepted that the equal protection doctrine developed under the Fourteenth Amendment with respect to state laws applied equally to federal legislation. See,

e.g., *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).³ It was within this legal framework that *Harris* upheld the federal Hyde Amendment in 1980.

The four-Justice majority in *Harris* first found that the Hyde Amendment did not itself “impinge on a right or liberty protected by the [federal] Constitution.” *Id.* at 322, 100 S.Ct. 2671. This was based on the conclusion, in addressing claims under the federal Due Process Clause, that although there is a federal constitutional right to elect an abortion under *Roe v. Wade*, there is no federal constitutional right to receive funding for an abortion.

Because no federal constitutional right was impinged, and indigent pregnant women were not a suspect class, the majority in *Harris* evaluated the federal equal protection claim under the standard taken from *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961): the classification must be sustained unless it “rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.” *Harris*, 448 U.S. at 322, 100 S.Ct. 2671 (brackets in original). The majority recognized a legitimate governmental interest in protecting human life by “subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions.” *Id.* at 325, 100 S.Ct. 2671. Accordingly, the *Harris* majority held that nothing in the federal equal protection doctrine prevents a state from refusing to fund medically necessary abortions for indigent women. The majority thus relied on the prevailing “rationality” test for federal equal protection: a legislative classification requires only “a rational relationship to any legitimate government-

3. For an account of this journey, which includes a few detours, see generally *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200, 219, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

tal interest.” John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.3, at 644 (6th ed. 2000).

Four Justices dissented in *Harris*, taking the view that the Hyde Amendment and its consequent state implementations imposed an impermissible burden on the exercise of a woman’s constitutionally protected right to choose. For that reason, some of the dissenters did not address the federal equal protection claims raised in that case. Justice Marshall, however, did find both due process and equal protection violations in a scheme that provides government funding for one choice, but not for the other, when the right to make that election is itself constitutionally protected. In addition to placing an impermissible burden on the exercise of a constitutionally protected right in violation of the federal Due Process Clause, Justice Marshall concluded that the classification effected by the statute did not pass the federal equal protection test formulated by the majority. In his view, the asserted governmental interest—protection of human life—was not rational as that term is used in equal protection doctrine because it is, as a matter of federal constitutional law, subordinate to the individual women’s “interest in preserving their lives and health by obtaining medically necessary treatment.” *Harris*, 448 U.S. at 346, 100 S.Ct. 2701.

I agree that the *Harris* majority identified a legitimate governmental interest in promotion of human life. This is a factor supporting the policy found in both the federal Hyde Amendment and the Indiana statute at issue here. The state has a second valid consideration in its concern for public expenditures. The federal government has elected not to participate in funding of medical procedures to terminate these pregnancies. The result is the state bears all of any cost, not merely approximately thirty-eight percent. The parties

cite various studies suggesting that funding abortion would have a financial impact of zero or even a positive effect on total federal and state Medicaid expenses. This conclusion is based on comparisons to the cost of delivering the child and bearing its subsequent health-care costs. Thus, the federal decision to deny benefits may indeed rely solely on social policy, not financial considerations. However on this record I cannot conclude that the State’s claimed financial concerns are a sham. Evaluation of that factor is therefore a matter for the legislature. Given that the federal scheme embodied in the Hyde Amendment treats these pregnancies differently than it does all other medically necessary procedures, plaintiffs have not established that it is fiscally irrational for the state legislature to refuse to underwrite the entire expense rather than the sixty-two percent it bears for all other medical expenses. As the majority points out, the legislature is entitled to substantial deference in drawing lines where judgment is required in balancing competing interests. For both these reasons, I agree that under the rationality test adopted by the *Harris* majority, which requires only some minimal governmental interest in the absence of a suspect class or a directly infringed constitutional right, no federal equal protection violation is to be found. But both the analysis and the result are different under the Indiana Constitution.

III. The Plaintiffs’ Claim Under the Indiana Constitution

The Indiana constitutional provision that the plaintiffs invoke is not equal protection, but rather the Equal Privileges Clause found in Article I, Section 23. It provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” As *Collins* pointed out, Arti-

cle I, Section 23 of the Indiana Constitution is quite different in both its language and its meaning from the federal Equal Protection Clause whose doctrines governed the United States Supreme Court majority in *Harris*. By demanding that legislative privileges be dispensed “equally”, and plainly applying to treatment of Indiana’s own citizens, it also differs significantly from the Privileges and Immunities Clause of the Fourteenth Amendment. The Equal Privileges Clause was found in the Indiana Constitution well before 1868 when the Fourteenth Amendment introduced both the Equal Protection Clause and the Privileges and Immunities Clause into the United States Constitution. Some regarded the Privileges and Immunities Clause, not either the Equal Protection or Due Process Clause, to be the primary guarantor of individual rights against state intrusion. Nowak & Rotunda, *Constitutional Law* § 14.1 at 632. The federal Privileges and Immunities Clause prohibits state laws that “abridge the privileges or immunities of citizens of the United States” but makes no mention of “equal” treatment. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1872), promptly held this provision to apply only to state laws that discriminate in favor of their own citizens and against outsiders. Thus, the federal Privileges and Immunities Clause was rendered a dead letter as a limitation on a state’s ability to restrict rights of its own citizens. That result was based in large part on the view that the Fourteenth Amendment “was not intended to displace the critical role of the states as protectors of their own citizens.” Lawrence H. Tribe, *Constitutional Law* § 14 at 10 (3d ed. 2000). Thus, for over a century,⁴ the Privileges and Immunities

Clause of the Federal Constitution was thought to defer to its counterparts in state constitutions. It is the Indiana Equal Privileges Clause that is in issue here, and for the reasons explained below, I believe it requires more than either the Equal Protection Clause or the Privileges and Immunities Clause of the Fourteenth Amendment. In the course of establishing its standard for constitutional legislative classifications under the Indiana Equal Privileges Clause, *Collins* explicitly rejected the federal equal protection approach of degrees of scrutiny. *Collins*, 644 N.E.2d at 80. Rather, “[t]he protections assured by Section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or immunities, including not only those grants involving suspect classes or impinging upon fundamental rights but other such grants as well.” *Id.* at 80. Thus, all claims of unequal privilege are evaluated under the test described in Part I of this opinion.

The method chosen—denial of funding—undoubtedly meets the requirement that the legislation be related to the goal of promoting human life. But I believe the legislation fails the *Collins* requirement that the classification be reasonably related to the legislative objectives. The plaintiffs point to other measures, such as denying scholarships at universities to women who elect abortions, that they contend might also be justified in the name of deterring abortions, if the State’s Medicaid statutes are upheld. Although these hypothetical examples are not before us today, in general I think they raise the issue whether the disparate treatment is “reasonably related” to the defining character-

4. Only at the end of the twentieth century did the federal Privileges and Immunities Clause emerge from the shadows to which the *Slaughter-House Cases* banished it, and its

future remains at best uncertain. *Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999).

istic, and not whether the class is defined by a permissible characteristic.

Under *Collins*, as Justice Sullivan points out, the reasonableness of the relationship between the classification and the legislative objective turns on a balancing test. The woman's right under the Constitution of the United States to elect an abortion is established by *Roe v. Wade*, irrespective of the origin of the pregnancy or whether her life is threatened by carrying the fetus to term. The U.S. Supreme Court in *Roe* held, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 164-65, 93 S.Ct. 705. Thus, the right to choose is not absolute, but the interest of the State in promoting childbirth is constitutionally subordinate to the woman's right to choose to protect her life and her health. As explained above, under *Harris*, federal equal protection doctrine would permit the State to deny funding even if its interest—promotion of human life—is offset and outweighed by other interests as long as the legislation disadvantages no suspect classification and impinges no fundamental right. But the Indiana Constitution is rife with provisions asserting the primacy of individual rights. The 1851 Constitution, like its 1816 predecessor, begins with a Bill of Rights and only later turns to provisions establishing the branches of government. The Bill of Rights starts with Article 1, Section 1, which borrows from the Declaration of Independence in asserting rights to life, liberty and pursuit of happiness. This emphasis on individual rights reflected the strong populist sentiment prevailing at the 1851 convention, which essentially carried out the agenda set in 1816. See *Price v. State*, 622 N.E.2d 954, 962 n. 11 (Ind.1993). In the same vein, the

Indiana Equal Privileges Clause elevates individual rights by requiring more than some recognized governmental interests before legislation can override the interests of the individual. Thus, under *Collins* a "rational relationship to any legitimate governmental interest" is not enough to carry the day. Under the balancing test of our state constitution, the governmental interests must outweigh those of the private citizen before a statute may deny a privilege granted to others. Under this standard, when faced with the federal constitutional right of a woman to choose to protect her health, the State's interests fail to carry that burden.

This case presents a classic confrontation between individual rights and the will of the majority as reflected in legislation. The law at issue here affects only women who are indigent and desire a medically necessary procedure. The effect of the statute is to impose a financial penalty on a woman's election to exercise her constitutionally guaranteed right to choose. Of course, as a practical matter, this financial obstacle may result in delays that complicate the woman's medical condition, and often may force the result of a choice that is for the woman alone to make. The State thus seeks to impose its choice upon the woman to whom that decision is constitutionally reserved. By so choosing, the State seeks to prioritize the interest it advances over the woman's right to choose. Whether the State seeks to advance its interest by criminalizing abortions, as it no longer can do, or by creating legislation that penalizes the exercise of that right, either is, as a matter of constitutional priorities, an unreasonable balance. As such, this legislation imposes an unreasonable classification and is invalid under *Collins*.

Justice Sullivan concludes that indigent women whose pregnancy risks serious and permanent impairment of a major bodily

function may not be denied Medicaid benefits. Those women are a subset of all indigents in need of medically necessary procedures. Accordingly, I concur in Part II of Justice Sullivan's opinion, though it does not grant all of the relief to which I believe the plaintiffs are entitled.

RUCKER, J., concurs.



Tamara COOK, Appellant
(Defendant below),

v.

Kenneth WHITSELL-SHERMAN,
Appellees (Plaintiff below).

No. 48S04-0211-CV-607.

Supreme Court of Indiana.

Sept. 24, 2003.

Dog owner appealed judgment of the Circuit Court, Madison County, Fredrick R. Spencer, J., holding her liable for injuries suffered by Postal Service employee in dog attack. The Court of Appeals, 771 N.E.2d 1211, reversed and remanded. On transfer, the Supreme Court, Boehm, J., held that: (1) dog bite liability statute applied to owner of a dog even though owner was not in possession of the dog; (2) the dog bite statute renders dog owners strictly liable if their dogs bite a postal delivery worker without provocation; and (3) evidence rule providing for admission of statements of medical charges did not authorize admission of written statements purporting to estimate future medical costs.

Remanded.

Rucker, J., concurred in part and dissented in part with separate opinion.

1. Appeal and Error ⌘846(6)

Practice of accepting verbatim a party's proposed findings of fact weakens appellate court's confidence that the findings are the result of considered judgment by the trial court.

2. Animals ⌘72

Dog bite liability statute applied to owner of a dog that bit Postal Service employee even though owner was not in possession of the dog; in providing that owner included custodians, the statute did not substitute them for the owner if the owner was absent from the scene of the bite. West's A.I.C. 15-5-12-1.

3. Animals ⌘68, 74(3)

The dog bite statute renders dog owners strictly liable if their dogs bite a postal delivery worker or other public servants in the course of their duties without provocation; the statute reflects a policy choice that the dog's owner and keeper should bear the loss rather than the injured public employee by eliminating the presumption of canine harmlessness as far as postal employees are concerned. West's A.I.C. 15-5-12-1.

4. Animals ⌘74(3)

The common law presumes that all dogs, regardless of breed or size, are harmless.

5. Animals ⌘74(3)

Common law presumption that all dogs, regardless of breed or size, are harmless can be overcome by evidence of a known vicious or dangerous propensity of the particular dog.

752, 343 N.E.2d 149, that the regulations "must contain narrow, objective and definite standards, or . . . [be] void for vagueness," would be misplaced. In any event, we hold that the Soft Drink Licenses regulations, which were in effect at the time of the violation by Union Station alleged in Complaint No. 790384, are not so vague as to be unconstitutional on their face.

[12] c. The final question asks whether the regulations, if valid, may be applied to vending machines duly licensed pursuant to the provisions of G.L. c. 94, §§ 308-312. Despite some doubt whether this question is properly before us in the absence of a statement of agreed facts, we believe that the correct answer is in the affirmative. The soft drink licensing statute, G.L. c. 140, §§ 21A-21D, seems to be aimed in part at the identification of the person or entity operating the business in question, and its location. The license required is not issued in gross for its exercise at any unidentified location. By contrast, the vending machine statute, G.L. c. 94, §§ 308-312, relates to licenses issued by the Commissioner of Public Health to an operator of such machines who may then place them at any location of his choice within the Commonwealth. He is required to keep a list of all locations where the machines are operated by him, but the license is not limited to any specified location. One statute is intended to regulate places where soft drinks are sold; the other displays a strong indication of concern for public health problems, and for that reason requires the identification and licensing of operators of vending machines dispensing food or beverage. One statute is administered locally by each municipality, and the other is administered by the Commonwealth's chief public health officer.

The soft drink statute was enacted in 1922, and the vending machine statute in 1963. The soft drink statute was amended in certain respects in 1979 by St.1979, c. 358, without the addition of any exemption for

vending machines licensed under G.L. c. 94, §§ 308-312. We do not find in G.L. c. 94, §§ 308-312, any indication that the Legislature intended by it to preempt the field of vending machines for the Commissioner of Public Health. None of the statutory concerns of the Commissioner of Public Health in regulating vending machines relate to the character of the establishments in which they are situated, or their impact upon the surrounding community. We believe that the legislation indicates the intention that the two licensing schemes continue to coexist. Any doubt on this subject was resolved by the Legislature in enacting St.1979, c. 358, effective July 3, 1979, which redefined the "retail sale" of soft drinks covered by §§ 21A-21D to include specifically soft drinks sold through a vending machine.

The cases are remanded to the Municipal Court of the City of Boston for further proceedings consistent with the opinions expressed herein.

So ordered.



Mary MOE et al.¹

v.

SECRETARY OF ADMINISTRATION
AND FINANCE et al.²

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued Sept. 8, 1980.

Decided Feb. 18, 1981.

Medicaid-eligible pregnant women, who desired medically necessary abortions that

porting to have been executed by them. The record before us includes a motion filed by counsel for those plaintiffs asking that those

1. The names of the plaintiffs as stated in the complaint are Mary Moe, Karen Koe, Paula Poe, and Dr. Phillip Stubblefield. The first three names, which are clearly pseudonyms, appear elsewhere in the pleadings and related documents, and particularly in affidavits pur-

2. See note 2 on page 388.

were not necessary to avoid their death, and physicians who were willing to perform such abortions brought class action seeking to have declared invalid, and to enjoin enforcement of statutory provisions restricting medicaid funding of abortions. The Supreme Judicial Court for Suffolk County, Kaplan, J., certified two plaintiff classes, reserved decision on and reported to full court a number of procedural and jurisdictional issues, as well as central constitutional claims. The Supreme Judicial Court, Quirico, J., held that: (1) court had subject matter jurisdiction over action, which presented actual controversy appropriate for declaration of rights; (2) restriction impermissibly burdened right protected by constitutional guarantee of due process; and (3) restriction would be invalidated insofar as it was constitutionally offensive, but remaining medicaid appropriations, being severable, remained valid.

Remanded.

Hennessey, C. J., dissented and filed an opinion.

1. Constitutional Law ⇔68(1), 70.1(7)

Supreme Judicial Court did not lack subject matter jurisdiction over class action seeking to enjoin enforcement of certain statutory provisions restricting medicaid funding of abortions on theories that granting relief would violate principle of separation of powers and that case involved political question concerning appropriations,

three persons be permitted to proceed without disclosing their true names for reasons related to the possible serious impact on their lives and the lives of family members. The motion has not been acted on. We believe that it is important and necessary that the identity of the persons who seek the benefit of a judgment by this court appear in the records of this proceeding. While we recognize the reasons stated by these persons as sufficient to protect them against the public disclosure of their identity, we deny their motion and order that each of the three plaintiffs in question file an affidavit of identity with the clerk of the Supreme Judicial Court for Suffolk County, and that such affidavit, when filed, be impounded until further order of the court.

since funds had already been appropriated and since relief sought was in power of court to grant. M.G.L.A.Const. Pt. 1, Art. 30.

2. Declaratory Judgment ⇔124

Where plaintiffs alleged that challenge to restriction on funding of abortions under state medicaid program would prevent them from obtaining abortions and affidavits submitted indicated that medicaid providers would not perform significant number of abortions in face of express prohibition on reimbursement, factual controversy appropriate for declaration of rights was presented. M.G.L.A. c. 29, § 20B.

3. States ⇔4.13

Where states were by federal legislation free to fund or not fund abortions to extent they deemed appropriate under medicaid program, Massachusetts' provisions restricting funding of abortions to those cases where abortion was necessary to prevent death of mother did not conflict with governing federal legislation, and thus challenge to state restrictions could not be statutorily resolved by resort to the supremacy clause, under which a conflict between state and federal medicaid eligibility standards would render state legislation invalid. U.S. C.A.Const. Art. 6, cl. 2; Act Dec. 16, 1980, § 109, 94 Stat. 3166.

4. Constitutional Law ⇔82(10)

Existence of private realm of family life which state cannot enter is cardinal precept of state jurisprudence.

2. The defendants originally named in the complaint were each of the persons then holding the following offices or positions with the Commonwealth of Massachusetts: Governor, Secretary of Administration and Finance, Secretary of Human Services, Commissioner of Public Welfare, and Comptroller. By an order entered by the single justice on July 23, 1980, the action was dismissed as to the Governor for the reason that he had been improperly joined as a defendant.

We take note of the fact that the individual defendant described in the complaint as "John D. Pratt [as he] is the Commissioner of Public Welfare" no longer holds that office, and that William Hogan who has been appointed "his successor is automatically substituted as a party" Mass.R.Civ.P. 25(d)(1), 365 Mass. 771 (1974).

5. Constitutional Law ⇔82(10)

Constitution protects the right of individual to be free from unwarranted governmental intrusion into decision whether to bear or beget a child.

6. Social Security and Public Welfare ⇔241.95

When state decides to alleviate some of hardships of poverty by providing medical care, manner in which state dispenses benefits is subject to constitutional limitations; while state retains wide latitude to decide manner in which it will allocate benefits, it may not use criteria which discriminatorily burden exercise of fundamental right.

7. Constitutional Law ⇔82(10)**Social Security and Public Welfare** ⇔241.95

State provisions restricting medicaid funding of abortions to those abortions where attending physician has certified in writing that abortion is necessary to prevent death of mother violated state due process constitutional guarantee to be free from governmental intrusion into fundamental right to decide whether to bear or beget a child by injecting coercive financial incentives favoring childbirth into decision constitutionally guaranteed to be neutral. M.G.L.A. c. 29, § 20B; M.G.L.A.Const. Pt. 1, Arts. 1, 10, 12; Pt. 2 C. 1, Art. 1 et seq.

8. Constitutional Law ⇔82(10)**Social Security and Public Welfare** ⇔241.95

Interests of medicaid-eligible pregnant women in choosing medically necessary abortions far outweigh state interest in preservation of potential life, which can be enforced only by significant invasion of woman's bodily integrity by nine months of enforced pregnancy and resulting attachment the experience creates, and thus state medicaid restriction prohibiting payment for abortions that are not necessary to avert death of mother could not be implemented as legislatively enacted. M.G.L.A. c. 29, § 20B; St.1980, c. 329, § 2, Item 4402-5000.

9. Statutes ⇔64(2)

Where statutory restriction was invalid insofar as it prohibited use of state medicaid funds to reimburse authorized providers for lawful, medically necessary abortion services rendered to qualified medicaid recipients, existing restriction insofar as it was constitutionally offensive would be invalidated, but remainder of medicaid appropriation, being severable, would remain valid in order to avoid scope of intrusion that nullification of medicaid program in its entirety would involve. M.G.L.A. c. 29, § 20B; St.1980, c. 329, § 2, Item 4402-5000.

Nancy Gertner, Boston (John Reinstein, Marjorie Heins, and Katherine Triantafyllou, Boston, with her), for plaintiffs.

Thomas R. Kiley, Asst. Atty. Gen. (Garrick F. Cole, Asst. Atty. Gen., with him), for defendants.

Jeanne Barkin, Boston, for the Preterm, Inc., amicus curiae, submitted a brief.

Robert A. Destro, Cleveland, Ohio, for the Catholic League for Religious and Civil Rights, amicus curiae, submitted a brief.

Carolynn Fischel & Rita J. DiGiovanni, Boston, for various religious professors & others, amici curiae, submitted a brief.

John H. Henn, Boston, Eve W. Paul and Dara Klassel, New York City, for Planned Parenthood Federation of America, Inc. and others, amici curiae, submitted a brief.

Kimberly Homan and Joyce Perkit Zal-kind, Boston, for Boston Women's Health Book Collective, Inc. and others, amici curiae, submitted a brief.

Charles Kindregan, Boston, Dennis J. Horan, Victor G. Rosenblum, John D. Gorbey, Patrick A. Trueman and Thomas J. Marzen, Chicago, Ill., for certain Massachusetts physicians, amici curiae, submitted a brief.

Henry C. Luthin, Newton, for certain members of the General Court, and for Massachusetts Citizens for Life, Inc., amici curiae, submitted briefs.

Terry Jean Seligmann, Margot Botsford, Boston and Susanne C. Howard, Cambridge, for Women's Bar Association of Massachu-

setts and others, amici curiae, submitted a brief.

Before HENNESSEY, C. J., and QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS and ABRAMS, JJ.

QUIRICO, Justice.

In this class action, the plaintiffs seek to have declared invalid and to enjoin the enforcement of certain statutory provisions restricting the funding of abortions under the Massachusetts Medical Assistance Program (Medicaid). The defendants are all officials in the executive branch of the government of the Commonwealth. The challenged enactments include G.L. c. 29, § 20B, inserted by St.1979, c. 268, § 1, and various appropriation measures including St.1979, c. 393, § 2, Item 4402-5000, and St.1980, c. 329, § 2, Item 4402-5000.³ These statutes, which by reason of their original legislative sponsors are commonly referred to as the Doyle-Flynn Amendments, would prohibit the payment of State Medicaid funds for abortions except as necessary to avert the death of the mother. This restric-

3. General Laws c. 29, § 20B, inserted by St. 1979, c. 268, § 1, provides in full as follows: "No account or demand approved by the head of a department, office, commission or institution for which it was contracted, requiring the certification of the comptroller or warrant of the governor shall be paid from an appropriation for an abortion, as defined in section twelve K of chapter one hundred and twelve except for an abortion where the attending physician has certified in writing that the abortion is necessary to prevent the death of the mother."

Similar restrictions were first placed on the Commonwealth's Medicaid appropriations by St.1978, c. 367, § 2, Item 4402-5000, which provided in so far as is here pertinent, "that no funds appropriated under this item shall be expended for the payment of abortions not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law enforcement agency within thirty days after said incident."

The appropriations for fiscal year 1980, St. 1979, c. 393, § 2, Item 4402-5000, eliminated the exception for rape and incest present in the 1978 appropriations; it provided "that no funds appropriated under this item shall be expended

tion, it is claimed, violates two provisions of the Massachusetts Declaration of Rights, namely, the provision for equal protection of the laws, art. 1, as amended by art. 106 (Equal Rights Amendment), and art. 10 as it relates to the right to due process of law.⁴ For reasons which follow, we decide in favor of the plaintiffs.

1. *The background of this action.* The Medicaid program is one of the several joint Federal-State programs of assistance to the indigent included in the Social Security Act, 42 U.S.C. § 301 et seq. (1976 & Supp. III 1979) (Act). By enacting Title XIX of the Act, 42 U.S.C. §§ 1396-1396k (1976 & Supp. III 1979), Congress in 1965 authorized the expenditure of Federal funds to enable each State to furnish medical assistance to certain categories of needy persons. Participation is at the option of each State, and the States are free within broad parameters to determine the scope and extent of the assistance offered. Certain minimum requirements must be met, however, to qualify for Federal aid. A State must furnish five types of services⁵ to the "categorically needy"⁶ A State may also furnish assist-

for the payment of abortions not necessary to prevent the death of the mother." The relevant language of the most recent Appropriations Act, St.1980, c. 329, § 2, Item 4402-5000, is identical.

4. We have historically taken the view that the principles of due process of law in our State Constitution are embodied in arts. 1, 10, and 12 of the Declaration of Rights and in Part II, c. 1, of the Constitution. See, e. g., Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U.L.Rev. 887, 909-910 n.135 (1980).

5. These include (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing services, early periodic screening and diagnosis, and family planning services, and (5) physicians' services. See 42 U.S.C. § 1396a(a)(13)(B) and 42 U.S.C. § 1396d(a)(1)-(5).

6. The "categorically needy" include the aged, blind, or disabled, and recipients of either supplemental security income or aid for dependent children. 42 U.S.C. § 1396a(a)(13)(B).

ance, subject to certain restrictions, to persons who are not categorically needy, but who nonetheless have insufficient income and resources to meet the costs of necessary medical and remedial care and services. See 42 U.S.C. § 1396a(a)(10)(C).⁷ The Federal legislation does not specifically enumerate the services which the States must offer within the mandated categories of care and services. It does, however, require participating States to establish reasonable standards governing the extent of such services consistent with the statutory purposes. See *Beal v. Doe*, 432 U.S. 438, 441, 97 S.Ct. 2366, 2369, 53 L.Ed.2d 464 (1977), citing 42 U.S.C. § 1396a(a)(17). It is settled as a matter of Federal law that Medicaid-participant States remain free to subsidize at their own expense abortions beyond those for which Federal reimbursement is available. See *Harris v. McRae*, 448 U.S. 297, 311 n.16, 100 S.Ct. 2671, 2685 n.16, 65 L.Ed.2d 784 (1980). Thus, the relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program.

Massachusetts joined the national Medical Assistance Program in 1966, by Executive Order of the Governor. The Legislature established the Massachusetts Medical Assistance Program in 1969; the program is codified in G.L. c. 118E, §§ 1-27. The major responsibility for policy making and administration is lodged in the Department of Public Welfare. G.L. c. 118E, §§ 2, 4. The current administrative and billing regulations are contained in 106 Code Mass. Regs. 450.000 et seq., as amended, 185 Mass. Reg. 9 (November 23, 1979).

The Massachusetts program is broad and comprehensive. For eight categories of recipients, the program affords twenty-nine types of services; a more limited range of

services, numbering ten, is available under the State's General Relief Medical Assistance Program. See 106 Code Mass. Regs. 450.105 and 107. These services are all provided subject to the standard of "medical necessity" set forth at 106 Code Mass. Regs. 450.204, as follows: "A provider must furnish or prescribe medical services to the recipient only when, and to the extent, medically necessary, unless otherwise specified in Department regulations. For the purposes of this Chapter 450.000, a service is 'medically necessary' if it is (1) reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the recipient that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and (2) there is no other equally effective course of treatment available or suitable for the recipient requesting the service that is more conservative or substantially less costly. Medical services shall be of a quality that meets professionally recognized standards of health care, and shall be substantiated by records including evidence of such medical necessity and quality. Those records shall be made available to the Department upon request. (See 42 U.S.C. § 1396a(a)(30), and 42 CFR 440.230(C)(2) and 440.260.)"

An understanding of the plaintiffs' objectives in this case requires some knowledge of the history of Medicaid funding for abortion in Massachusetts. Following the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the State issued regulations establishing abortion coverage coextensive with the limits on State regulation set in that decision.⁸

7. An overview of the provisions of Title XIX may be found at 3 Medicare & Medicaid Guide (CCH) par. 14,010, from which our summary is in part derived.

8. The introduction to the 1974 regulations, Massachusetts Public Assistance Policy Manual, c. 7, § 10, part 1 (effective October 1, 1974), stated that "[a] woman always has the freedom of choice regarding abortion, just as she has freedom of choice with regard to any other

medical service." First trimester abortions were required to be performed by a licensed and qualified physician in a licensed clinic or in a hospital. The performance of second trimester abortions was permitted only in hospitals. Funding for third trimester abortions was limited to those necessary to save the life of a woman or "to eliminate substantial risk of grave impairment to her physical or mental

The first Federal restrictions on Medicaid funding for abortions came in 1976. In that year, Congress enacted the so-called "Hyde Amendment," a rider to the Labor-HEW Appropriations Act limiting Federal reimbursement of abortion services to cases in which "the life of the mother would be endangered if the fetus were carried to term." Pub.L.No. 94-439, § 209, 90 Stat. 1434 (1976). Similar restrictions were passed by Congress in 1977, 1978, and 1979.⁹ Notwithstanding the elimination of Federal reimbursement for all but this limited category of abortions, Massachusetts continued until 1978 to fund abortion services under its Medicaid program as before.

On July 10, 1978, the General Court first acted to limit State Medicaid expenditures for abortion. The restriction was in a form similar to the Hyde Amendment; a rider to the State's Medicaid appropriations for fiscal year 1979, St.1978, c. 367, § 2, Item 4402-5000, prohibited State reimbursement for abortions except when necessary to prevent the death of the pregnant woman or in certain cases of rape or incest. Chapter 367 was immediately challenged in an action filed in the United States District Court for the District of Massachusetts. The plaintiffs alleged that the State's failure to provide for "medically necessary" abortions violated Title XIX and the United States Constitution. That court, while agreeing that c. 367, § 2, Item 4402-5000, violated the requirements of Title XIX, declined to order the State to pay for abortions other than those which would qualify for Federal reimbursement under the Hyde Amendment. *Jaffe v. Sharp*, 463 F.Supp. 222 (D.Mass.1978). The plaintiffs appealed, and on August 7, 1978, an order was entered by the United States Court of Appeals for the

First Circuit requiring the Commonwealth to fund all medically necessary abortions pending disposition of the appeal. On January 15, 1979, the First Circuit affirmed the District Court's statutory ruling, holding that the Hyde Amendment had amended Title XIX and that the State was thus not statutorily required to fund abortions beyond those eligible for Federal reimbursement. *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979). The Court of Appeals remanded the case to the District Court for consideration of the plaintiffs' constitutional claims, but continued its order enjoining the enforcement of the funding restriction then in effect, pending a ruling on the plaintiffs' petition for a writ of certiorari. Certiorari was denied on May 14, 1979, sub nom. *Preterm, Inc. v. King*, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979). A petition for rehearing was denied on October 1, 1979. 444 U.S. 888, 100 S.Ct. 187, 62 L.Ed.2d 122 (1979).

Between October 1, 1979, and January 15, 1980, although not bound by any court order, the Commonwealth chose not to implement any funding restriction and paid for all medically necessary abortions. During this interim, the United States District Court for the Eastern District of New York held the restriction placed on Federal reimbursement for abortions by the Hyde Amendment to be unconstitutional and entered an order effective January 15, 1980, enjoining the Secretary of Health, Education and Welfare from discontinuing Federal reimbursement for medically necessary abortions. *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y.1980). Since the First Circuit had already held the Doyle-Flynn Amendment to be in conflict with Title XIX, the order in *McRae* had the apparent effect of

health." Massachusetts Public Assistance Policy Manual, *supra* at 1-2.

9. The 1977 version, covering fiscal year 1978, was slightly broader than the 1976 version in that it included two additional categories, cases of "severe and long-lasting physical health damage" and "rape or incest." Pub.L.No. 95-205, § 101, 91 Stat. 1460 (1977). The 1978 version (for fiscal year 1979) was identical to 1977. Pub.L.No. 95-480, § 210, 92 Stat. 1586 (1978). In 1979, Congress eliminated the "se-

vere and long-lasting health damage" exception. Pub.L.No. 96-123, § 109, 93 Stat. 926 (1979). The latest Federal legislation limits reimbursement for abortion to cases in which continued pregnancy is life-endangering, to cases of ectopic pregnancy, and to certain cases involving rape or incest; participating States are left free, however, to further restrict abortion subsidies in their sole discretion. Pub.L.No. 96-536, § 109, 94 Stat. 3170 (1980).

requiring Medicaid coverage for medically necessary abortions, and the Commonwealth continued to provide such coverage. On June 30, 1980, however, the United States Supreme Court reversed the Federal District Court's decision in *McRae*, holding that Title XIX does not require State Medicaid programs to fund abortion services for which Federal reimbursement is unavailable and upholding the validity of the Hyde Amendment against a variety of constitutional challenges. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

The upshot of this long course of litigation is that before the June 30, 1980 decision in *Harris v. McRae*, *supra*, Massachusetts had never refused to reimburse Medicaid providers who had performed medically necessary abortions. Following that decision, however, the Commonwealth made known its intention to implement the provision of St.1980, c. 329, § 2, Item 4402-5000, restricting State reimbursement for Medicaid abortions to those cases in which the procedure is necessary to prevent the death of the mother. On July 9, 1980, this action was filed in the Supreme Judicial Court for Suffolk County.

We summarize the facts alleged by the plaintiffs in their complaint and in the affidavits which accompanied their motion for a temporary restraining order, filed simultaneously with the complaint. Each of the three pseudonymous plaintiffs representing the class of Medicaid-eligible pregnant women alleges similar facts. Each is pregnant and is eligible for Medicaid assistance. Each has decided after consultation with her physician that she wishes to terminate her pregnancy by abortion. In each case, the consulting physician believes that an abortion is medically indicated, but cannot certify that the procedure is necessary to

prevent death. None of the three could afford to have an abortion without Medicaid assistance.

Dr. Phillip Stubblefield, the fourth named plaintiff, is a physician licensed to practice in Massachusetts; his specialty is obstetrics and gynecology. He is an authorized Medicaid provider whose practice includes performing abortions and supervising the abortion service in a Boston hospital. He brings this action on his own behalf and on behalf of a class consisting of qualified Medicaid providers who are willing to perform abortions which cannot be characterized as necessary to prevent death. He describes the various procedures used to perform abortions, and the considerations, relating primarily to the stage of pregnancy, which determine which procedure is appropriate. He cites statistics tending to demonstrate that the risks to health associated with abortion increase as a pregnancy progresses, and states that postponing an abortion unnecessarily is wholly inconsistent with sound medical practice. Dr. Stubblefield lists a number of medical conditions which, in conjunction with pregnancy, pose a risk to health and which may in their more severe forms be life-threatening.¹⁰ Because the risks associated with these conditions typically increase as a pregnancy becomes more advanced, Dr. Stubblefield suggests that physicians treating Medicaid-eligible pregnant women under the constraints of the challenged restriction face a dilemma: They may be forced to refuse treatment involving abortion early in a woman's pregnancy, only to undertake a more complicated and dangerous operation at some later stage when the situation has become life-threatening. He further cites a number of conditions in which termination of pregnancy is the preferred treatment, although not

10. Dr. Stubblefield cites the following conditions as illustrative: "chronic lung disease (childbirth accelerates the deterioration of the lung function); essential hypertension (pregnancy may increase the likelihood of pre-eclampsia or eclampsia, complications of pregnancy characterized by significant protein loss in the urine and edema, which in turn accelerates the likelihood of vascular disease and the

risk of a cerebral-vascular accident, of brain vessel and kidney damage, and increased incidence of diabetes); diabetes; heart disease (particularly mitral stenosis—the most common cardiac complication associated with pregnancy); and renal (kidney) disease particularly chronic nephritis and pyelo-nephritis; pregnancy can contribute to renal failure."

necessary to avert death.¹¹ In sum, Dr. Stubblefield concludes that a "standard of medical care which considers only the certainty [or] likelihood of a patient's death is alien and antithetical to medicine in general. I know of no area of medical practice in which a physician exercises professional responsibility solely in terms of life and death assessments." Dr. Stubblefield thus alleges that the constraints imposed by these restrictions on the free exercise of a physician's medical judgment violate the equal protection guarantee of the Massachusetts Declaration of Rights.

The defendants answered on July 16, 1980, asserting in the form of affirmative defenses a number of alleged procedural or jurisdictional defects in the action, and denying the plaintiffs' substantive claims. In the interim between the answer and the hearing before the single justice, the defendants moved to require posting of a bond by the plaintiffs should the preliminary order sought by the plaintiffs be granted; they further moved for disclosure of the pseudonymous plaintiffs' names, moved to compel those plaintiffs to submit to physical and mental examinations, and noticed depositions with each of the plaintiffs.

After hearing counsel, the single justice on July 23, 1980, entered an order provisionally certifying two plaintiff classes, dismiss-

11. According to Dr. Stubblefield, abortion is recommended without regard to the patient's wish in cases involving a severe diabetic retinopathy, which may cause blindness in a pregnant woman; certain genital and other cancers; and habituation or addiction to alcohol or other drugs.

12. The plaintiff classes provisionally certified by the single justice were as follows: "(a) Medicaid-eligible pregnant women who desire abortions and whose physicians have determined that abortion is medically necessary, even though not necessary to avert their death; and (b) Physicians who are willing to perform abortions in the circumstances indicated in (a) above." The single justice expressly denied relief as to nontherapeutic abortions and limited his order enjoining enforcement of the funding restrictions to cases involving medically necessary abortions.

We agree with the distinction drawn by the single justice between nontherapeutic and

ing the action against the Governor on the ground that he had been improperly joined, and granting a preliminary injunction against taking any action to enforce the challenged statutes in so far as they would prohibit the funding of medically necessary abortions for Medicaid recipients.¹² The single justice further reserved decision on and reported to the full court a number of procedural and jurisdictional issues, as well as the plaintiffs' central constitutional claims.¹³

Since the entry of the July 23 order, the defendants have amended their answer to include a counterclaim for payments received by Medicaid providers pursuant to that order. The parties have also entered into three stipulations. The plaintiffs have restated their claims; essentially, they seek Medicaid coverage for abortions coextensive with the legal limits in force in the Commonwealth. See G.L. c. 112, §§ 12K-12U. But see note 12 *supra*. The defendants have agreed to continue their previously noticed depositions of the pseudonymous plaintiffs pending our disposition of the case. Finally, in a statement of agreed facts, the parties agree that certain documents submitted in a separate record appendix are genuine, and that "[n]o other service within the scope of the Massachusetts Medical Assistance Program . . . is subject to the restrictions which the Gener-

medically necessary abortions. The Massachusetts Medicaid program establishes a single standard of medical necessity, and funds no service which does not meet that standard. See 106 Code Mass.Reg. 450.204, as amended, 185 Mass.Reg. 9 (November 23, 1979). Because there is no entitlement under the Massachusetts plan to "elective" services which are not also medically necessary, the exclusion of funding for abortions which fall into that category presents no constitutional issue. See *Maher v. Roe*, 432 U.S. 464, 479, 97 S.Ct. 2376, 2385, 53 L.Ed.2d 484 (1977); *Right to Choose v. Byrne*, 165 N.J.Super. 443, 455, 398 A.2d 587 (Ch.Div.1979).

13. The order of July 23 was superseded by a substantially identical order entered by the single justice on August 1, 1980, which continued temporary relief pending argument of this case to the full court.

al Court has imposed upon abortion services.”

II. *Threshold considerations.* We consider at the outset three potential grounds for avoiding the constitutional issues argued by the plaintiffs. The defendants advance two reasons for refusing to adjudicate this case at present. They argue, first, that this court lacks subject matter jurisdiction over this action; and second, that the relief sought by the plaintiffs is barred by the existence of an adequate remedy at law. We reach the third ground, namely a possible conflict between State and Federal standards for Medicaid eligibility, in deference to our obligation to avoid constitutional adjudication if any other ground of decision appears sufficient to dispose of a particular case. We therefore discuss the possibility that this case may be decided on statutory grounds.

[1] A. *Jurisdiction.* The defendants assert that this court lacks subject matter jurisdiction of this case both because granting relief would violate the principle of separation of powers expressed in art. 30 of the Massachusetts Declaration of Rights, and because this case involves a political question. The basis for their position is that the challenged enactments are, in part, appropriations measures, and the power to appropriate funds is committed to the Legislature. See *Opinion of the Justices*, 375 Mass. 827, 833, 376 N.E.2d 1217 (1978); *Baker v. Commonwealth*, 312 Mass. 490, 493, 45 N.E.2d 470 (1942). Accordingly, they argue that fashioning relief in this case will involve a forced appropriation, an intrusion into the legislative sphere purportedly beyond the constitutional power of this court.

There are two answers to the concerns expressed by the defendants. First, the plaintiffs do not seek any forced appropriation of funds. Here, the Legislature has already exercised its unquestioned power to appropriate funds. The appropriation is general in form; the sole restriction pertaining to the coverage of medical services

is the abortion funding provision challenged here. See St.1980, c. 329, § 2, Item 4402-5000. If we were to grant the relief the plaintiffs seek, it is undisputed that the net effect would be to reduce the Commonwealth's Medicaid expenditures, not increase them. See note 20 *infra*.

More fundamentally, we have never embraced the proposition that merely because a legislative action involves an exercise of the appropriations power, it is on that account immunized against judicial review. In *Colo. v. Treasurer & Receiver Gen.*, 378 Mass. —, ———^a, 392 N.E.2d 1195 (1979), we rejected the argument that either the doctrine of separation of powers or the political question doctrine requires that result. “Without in any way attempting to invade the rightful province of the Legislature to conduct its own business, we have the duty, certainly since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 2 L.Ed. 60 (1803), to adjudicate a claim that a law and the actions undertaken pursuant to that law conflict with the requirements of the Constitution. ‘This,’ in the words of Mr. Chief Justice Marshall, ‘is of the very essence of judicial duty.’” *Colo. supra* at ———^b, 392 N.E.2d 1195. Clearly, the relief sought by the plaintiffs is within our power to grant. As to the form that relief should take, we think that question is more appropriately addressed at the end of this opinion.

[2] B. *Adequacy of the remedy provided by G.L. c. 258, §§ 1-13.* The defendants further take the position that because the “ultimate relief” sought here is reimbursement to Medicaid providers for abortion services rendered to recipients, it would be premature to decide this case until such reimbursement is actually withheld. They suggest that the appropriate avenue of relief is for providers who have performed abortions for recipients to sue the State for payment under the provisions of G.L. c. 258, asserting the unconstitutionality of the funding restriction as the basis of their claim.

a. Mass.Adv.Sh. (1979) 1893, 1895-1897.

b. Mass.Adv.Sh. (1979) at 1897.

We think this argument misperceives the interest asserted by the plaintiffs, and takes a correspondingly unrealistic view of the effect of the challenged restrictions. Inescapably at stake in this case is the availability of medically necessary abortion services to the plaintiff class of Medicaid-eligible women. By definition, these women are financially incapable of affording these services themselves. See 42 U.S.C. § 1396. To require them to find a Medicaid provider who will perform an abortion in the face of an express prohibition on reimbursement, and who will then undertake the additional burden of litigating the constitutionality of that prohibition, would be to render whatever right they may have totally illusory.

The plaintiffs clearly allege that the challenged restriction will prevent them from obtaining abortions. Affidavits submitted by Medicaid providers indicate that, in practice, Medicaid providers will not perform any significant number of abortions in the hope that they may ultimately prevail in a lawsuit challenging this restriction. We think these allegations to be entirely sufficient to present an actual controversy appropriate for a declaration of rights. "For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of [a woman's right to choose an abortion] as would ever be necessary." *Singleton v. Wulff*, 428 U.S. 106, 118-119 n.7, 96 S.Ct. 2868, 2876 n.7, 49 L.Ed.2d 826 (1976) (four Justices concurring).

Because the necessary predicates for maintaining this suit are present with respect to the plaintiff class of Medicaid-eligible pregnant women, we need not dwell on the correlative claims of the class represented by Dr. Stubblefield. In part III of this opinion, we address only the constitutional claims of the recipient class of plaintiffs, and do not decide the parallel contentions made by the class composed of Medicaid providers.

[3] C. *Statutory conflict.* The plaintiffs have not advanced any statutory ground for the relief they seek. Nevertheless, because such a ground arguably existed prior to the current fiscal year, we discuss briefly the possibility, now eliminated, of a statutory resolution of this case.

Under the Supremacy Clause, a conflict between State and Federal standards for Medicaid eligibility would render the State legislation invalid, at least to the extent of the inconsistency. See *ABCD, Inc. v. Commissioner of Pub. Welfare*, — Mass. —, — n.14⁶, 391 N.E.2d 1217 (1979); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), cert. denied sub nom. *Preterm, Inc. v. King*, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979). During the fiscal year 1980, the Massachusetts limitation on Medicaid funding for abortions, although never enforced, was more restrictive than the corresponding Federal legislation. The State limited funding to cases in which abortion was required to avert death, while the Federal appropriations included funding for abortion in certain cases of rape or incest. Compare Pub.L.No.96-123, § 109, 93 Stat. 926 (1979), with St.1979, c. 393, § 2, Item 4402-5000. Following *Preterm, Inc. v. Dukakis, supra*, the Federal Courts of Appeals which considered the issue were unanimous in holding that the Federal legislation established a minimum level of abortion funding, and that more restrictive State enactments were invalid. Two of these courts enjoined enforcement of the State statutes in question only in so far as they were more restrictive than the governing Federal law. See *Hodgson v. County Comm'rs, County of Hennepin*, 614 F.2d 601, 615 (8th Cir. 1980); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), cert. denied sub nom. *Zbaraz v. Miller*, 448 U.S. 907, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980) (decision on remand holding Hyde Amendment and Illinois statutory equivalent unconstitutional, 469 F.Supp. 1212 [N.D.Ill.1979], rev'd sub nom. *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980)). See also *Committee to Defend Reproductive Rights v.*

Myers, 93 Cal.App.3d 492, 511-514, 156 Cal. Rptr. 73, 86-87 (1979) (case deleted from official reporter; hearing granted). A fourth court invalidated the more restrictive State law in its entirety. See *Roe v. Casey*, 623 F.2d 829, 837 (3d Cir. 1980). See also *Right to Choose v. Byrne*, 165 N.J. Super. 443, 454, 398 A.2d 587 (Ch.Div.1979).¹⁴

If only the State's fiscal 1980 restriction were before us, the remedial question would be crucial. If we were to invalidate the Massachusetts restriction entirely, the controversy presented might be resolved. However, by Pub.L.No.96-536, § 109, 94 Stat. 3170 (1980), enacted December 16, 1980, the Congress has stated that "States are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." It is thus clear that as to the State's fiscal year 1981 restriction—the only restriction which can now be enforced—no statutory conflict exists with the governing Federal legislation. We thus turn to the constitutional issues presented.

III. *Constitutional claims.* The plaintiffs mount a broad attack on the restriction of Medicaid funding for abortions to cases in which the procedure is necessary to prevent a woman's death. First, they argue that this form of restriction is an impermissible burden on the exercise of a fundamental right secured by the guarantee of due process implicit in art. 10 of our Declaration of Rights. In addition, they argue that the classification established by this legislation cannot survive the equal protection analysis articulated in *Marcoux v. Attorney Gen.*, 375 Mass. 63, 375 N.E.2d 688 (1978), and that this restriction discriminates on the basis of sex in violation of the State Equal Rights Amendment. Finally, the plaintiffs argue that this restriction does not meet even the traditional minimum rationality standard of equal protection.

¹⁴ In *Harris v. McRae*, 448 U.S. 297, 309-312, 100 S.Ct. 2671, 2684-2685, 65 L.Ed.2d 784 [1980], and *Williams v. Zbaraz*, 448 U.S. 358, 367-369 & n.11, 100 S.Ct. 2694, 2700-2701 & n.11, 65 L.Ed.2d 831 [1980], the Court

Because we agree that the challenged restriction impermissibly burdens a right protected by our constitutional guarantee of due process, we do not reach the alternative grounds of invalidity asserted by the plaintiffs. Although the issue involved is difficult and of extraordinary importance, the framework for our analysis is well established. We begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right. Concluding that it does, we examine the justifications offered by the State in support of these enactments.

A. *The protected choice.* Our starting point is necessarily the landmark decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There, the Court held that a woman's decision whether or not to terminate a pregnancy by abortion falls within a constitutionally protected zone of privacy. *Id.* at 153, 93 S.Ct. at 727. Without defining precisely either the scope of the right or its source, the Court made it clear that the right of the individual is not absolute. State regulations are permitted which advance a "compelling state interest" and are "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155, 93 S.Ct. at 727-28. The Court identified two such interests, one in protecting the health of the pregnant woman, and the other in fostering potential human life. *Id.* at 159, 93 S.Ct. at 729-730. "Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'" *Id.* at 162-163, 93 S.Ct. at 730-731. Dividing pregnancy into three stages, the Court weighed the State and individual interests present during each. During the first trimester, the Court held the right of individual choice to be paramount; accordingly, the State may not restrict abortions during this period beyond requiring that they be performed by a li-

left open the question whether the Hyde Amendment, prior to fiscal year 1981, established a statutory minimum for abortion funding.

censed physician. In the second trimester of pregnancy, the State's interest in maternal health was held to be sufficient to permit regulation reasonably related to such health concerns. Only at the point of fetal viability, beginning at approximately the seventh month of pregnancy, does the State's interest in potential life become sufficiently compelling to support an outright prohibition of abortion except as necessary to save the life or health of the pregnant woman. *Id.* at 163-165, 93 S.Ct. at 731-733. In light of these limits on State regulation, the Texas statute under consideration, which imposed criminal sanctions for the performance of any abortion not necessary to save a woman's life, was held to be overbroad and thus invalid under the due process clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 164, 93 S.Ct. at 732.

Although we are not unaware of the criticism leveled at *Roe v. Wade, supra*, we have accepted the formulation of rights that it announced as an integral part of our jurisprudence. We note that it has been repeatedly reaffirmed by the Supreme court in decisions invalidating State laws burdening the abortion decision. See *Bellocchi v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (requirement of parental consultation and consent or court approval prior to permitting unmarried minors to undergo abortion); *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (requirement that physician determine fetal viability prior to performing abortion; imposing criminal and civil sanctions for failure to exercise care to save fetal life); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (requirement of parental or spousal consent prior to abortion; prohibition of saline abortion after first trimester; imposing civil and criminal sanctions for failure to exercise care to save fetal life); *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (limiting those hospitals in which abortions could be performed; requiring prior hospital committee approval and concurrence of three doctors that abortion is necessary).

We have twice been called upon to apply the principles enunciated in *Roe v. Wade, supra*, in cases raising the question of the limits of permissible State intervention in the abortion decision. In *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), we held that a pregnant woman's husband had no right, whether constitutional or at common law, to declaratory and injunctive relief designed to prevent her from securing an abortion. We recognized that the line of cases culminating in *Roe v. Wade, supra*, "all . . . involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens." *Doe, supra*, 365 Mass. at 560, 314 N.E.2d 128. We emphasized the principle of personal autonomy inherent in these cases; "[w]e would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy. . . . Some things must be left to private agreement." *Id.* at 563, 314 N.E.2d 128. In *Framingham Clinic, Inc. v. Selectmen of Southborough*, 373 Mass. 279, 367 N.E.2d 606 (1977), we held invalid a zoning by-law designed to exclude abortion clinics from the town. Again, we emphasized the "negative constitutional principle" underlying *Roe v. Wade, supra*; this principle "forbids the State to interpose material obstacles to the effectuation of a woman's counselled decision to terminate her pregnancy during the first trimester. Indeed, the need for scrupulous observance of this neutral or negative constitutional principle is felt all the more strongly as the State is seem to have no affirmative duty [to aid a woman to secure an abortion]." *Framingham Clinic, Inc., supra*, 373 Mass. at 288, 367 N.E.2d 606, citing *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

[4] The cases dealing specifically with a woman's right to make the abortion decision privately express but one aspect of a far broader constitutional guarantee of privacy. These cognate cases are linked by their recognition that "[t]he existence of a

Cite as, Mass., 417 N.E.2d 387

'private realm of family life which the state cannot enter,' *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), is a cardinal precept of our jurisprudence." *Custody of a Minor*, 377 Mass. 887, —^d, 389 N.E.2d 68 (1979). In the seminal case of *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), in which we considered the limits of the State's power, or obligation, to impose life-prolonging treatment on a terminally ill incompetent in its care, we said that "[t]he constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice." *Id.* at 742, 370 N.E.2d 417. More recently, we noted "something approaching consensus" in support of the principle that "[a] person has a strong interest in being free from nonconsensual invasion of his bodily integrity, and a constitutional right of privacy that may be asserted to prevent unwanted infringements of bodily integrity." *In the Matter of Spring*, — Mass. —, —^e, 405 N.E.2d 115.¹⁵

[5] In sum, we deal in this case with the application of principles to which this court is no stranger, and in an area in which our constitutional guarantee of due process has sometimes impelled us to go further than the United States Supreme Court. See, e. g., *District Attorney for the Suffolk Dist. v.*

d. Mass.Adv.Sh. (1979) 1117, 1122.

e. Mass.Adv.Sh. (1980) 1209, 1214.

15. This consensus is evident from a number of our recent decisions applying privacy principles in diverse areas, including parents' rights to custody of their children, *Department of Pub. Welfare v. J. K. B.*, — Mass. — (1979) (Mass.Adv.Sh. [1979] 2202, 393 N.E.2d 406; *Custody of a Minor*, 377 Mass. 887 (1979) (Mass.Adv.Sh. [1979] 1117), 389 N.E.2d 68; choice with regard to medical treatment, *In the Matter of Spring*, — Mass. — (1980) (Mass.Adv.Sh. [1980] 1209), 405 N.E.2d 115; *Commissioner of Correction v. Myers*, — Mass. — (1979) (Mass.Adv.Sh. [1979] 2523), 399 N.E.2d 452; *Superintendent of Belchertown State*

Watson, — Mass. —, —^f, 411 N.E.2d 1274 (1980) (recognizing the relevance of a fundamental right to life in invalidating death penalty); *Department of Pub. Welfare v. J. K. B.*, — Mass. —^g, 393 N.E.2d 406 (1979) (recognizing indigent parents' right to court appointed counsel in State instituted proceeding to remove child from parents' custody). It is established that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive" (citations omitted). *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). Having defined the right involved, we turn to the question whether it is infringed by the challenged funding restriction.¹⁶

B. *Neutrality of the State regulation.* In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), and its companion case *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980) the Supreme Court of the United States upheld enactments substantially identical to those challenged here against claims that they violated the due process and equal protection components of the Fifth and Fourteenth Amendments to the United States Constitution. In the view of five

School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); sexual conduct, *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974); and drug use, *Marcoux v. Attorney Gen.*, 375 Mass. 63, 375 N.E.2d 688 (1978).

f. Mass.Adv.Sh. (1980) 2231, 2246.

g. Mass.Adv.Sh. (1979) 2202.

16. As noted earlier, *supra* at — (Mass.Adv.Sh. [1981] at —), the presence of the plaintiff class of Medicaid-eligible pregnant women in this action obviates any necessity to examine at length the correlative right asserted by the plaintiff class of Medicaid providers represented by Dr. Stubblefield.

members of the Court, neither the Federal nor the parallel State funding restriction denied any federally protected constitutional right. While granting the importance of a woman's interest in protecting her health in the scheme established by *Roe v. Wade*, *supra*, the Court held that "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in [*Maier v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977)]: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. . . . Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all." *Harris v. McRae*, *supra* at 316, 100 S.Ct. at 2688 (1980)¹⁷. The Court went on to reject claims based on the free exercise and establishment clauses of the First Amendment, and on the Fifth Amendment guarantee of equal protection.¹⁸ Concluding that to be upheld the funding restriction need only be rationally related to a legitimate State interest, the Court held that the establishment of financial incentives making childbirth "a more attractive alternative" than abortion for Medicaid recipients has a "direct relationship to the legitimate [governmental] interest in protecting potential life." *Id.* at 324, 100 S.Ct. at 2692 (1980).

17. In *Maier v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), the Court upheld the exclusion of purely elective, nontherapeutic abortions from Medicaid coverage.

18. In *Williams v. Zbaraz*, 448 U.S. 358, 369, 100 S.Ct. 2694, 2701, 65 L.Ed.2d 831 [1980], the Court held *Harris* to be controlling as to the plaintiffs' equivalent Fourteenth Amendment equal protection claim.

We are urged by the defendants to adopt this analysis of the interests here at stake. The plaintiffs, on the other hand, remind us that when asked to interpret the Massachusetts Constitution, this court is "not bound by Federal decisions, which in some respects are less restrictive than our Declaration of Rights." *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 416, 294 N.E.2d 354 (1973). Accord, *District Attorney for the Plymouth Dist. v. New England Tel. & Tel. Co.*, — Mass. —, — n.1^h, 399 N.E.2d 866 (1980). (Liacos, J., dissenting). See Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U.L.Rev. 887 (1980); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 Suffolk U.L.Rev. 1123 (1978); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977). We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution as interpreted by *Harris v. McRae*, *supra*.

As we have demonstrated, the limitation on State action which is imposed by the fundamental right of privacy declared in *Roe v. Wade*, *supra*, is one of neutrality. We do not understand the plaintiffs here to assert either an absolute right to have abortions or an equivalent right to have their abortions subsidized by the State.¹⁹ Their claim is more limited. They point out that in establishing the State Medicaid program, the Legislature has undertaken a broad commitment to subsidize medically necessary services for the needy. Family planning and pregnancy-related services, like all other services covered by the program, are offered subject only to a showing of medi-

h. Mass.Adv.Sh. (1980) 197, 208 n.1.

19. We emphasize again that this case, as narrowed by the order of the single justice, involves only the exclusion of lawful, medically necessary abortions from Medicaid coverage. See note 12 *supra*.

Cite as, Mass., 417 N.E.2d 387

cal necessity. Only subsidies for abortions are conditioned on a showing that the procedure is necessary to prevent death. It is this unique treatment which the plaintiffs claim is unconstitutional; their claim is thus limited to an assertion of "the right to have abortions nondiscriminatorily funded." *Singleton v. Wulff*, 428 U.S. 106, 118-119 n. 7, 96 S.Ct. 2868, 2876 n. 7, 49 L.Ed.2d 26 (1976) (four Justices concurring).

[6] It is elementary that "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Maher v. Roe*, 432 U.S. 464, 469-470, 97 S.Ct. 2376, 2380-81, 53 L.Ed.2d 484 (1977). While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right. *Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth*, 375 Mass. 85, 93, 375 N.E.2d 1175 (1978). *Opinion of the Justices*, 375 Mass. 795, 806, 376 N.E.2d 810 (1978), and cases cited.

When the question is whether a selective grant of benefits impinges on a right held to be fundamental, it is unimportant whether the burden imposed is direct or indirect. In *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972), a State college denied recognition to a group of students who wished to form a local chapter of Students for a Democratic Society (SDS), on the basis that the goals and methods of the national SDS organization were antithetical to the educational process and ideals of the college. By this action, the students were denied access to campus bulletin boards and the student newspaper, and were prohibited from using campus facilities for their meetings. Notwithstanding the fact that the State had imposed no direct obstacle to the exercise of the students' First Amendment rights, the Court held this action to be unconstitutional. "We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S., [449] at 461, [78 S.Ct. 1163 at 1171, 2 L.Ed.2d 1488] [1958],

that the administration 'has taken no direct action . . . to restrict the rights of [petitioners] to associate freely' But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.' *Bates v. City of Little Rock*, 361 U.S. 516, 523 [80 S.Ct. 412, 416, 4 L.Ed.2d 480] (1960). See also *Sweezy v. New Hampshire*, 354 U.S., [234] at 263, [77 S.Ct. 1203 at 1218, 1 L.Ed.2d 1311] [1957] (Frankfurter, J., concurring in result); *Watkins v. United States*, 354 U.S. 178, 197 [77 S.Ct. 1173, 1184, 1 L.Ed.2d 1273] (1957)." *Healy v. James*, *supra* at 183, 92 S.Ct. at 2347. See *Harris v. McRae*, *supra* at 333-336, 100 S.Ct. at 2704-2705 (1980), and cases cited (Brennan, J., dissenting with whom Marshall and Blackmun, JJ., joined). See also *Right to Choose v. Byrne*, 169 N.J.Super. 543, 551-552, 398 N.E.2d 587 (Ch.Div.1979); The Supreme Court, 1979 Term, 94 Harv.L.Rev. 77, 100 & n.27 (1980).

The principle underlying these cases is not novel in our own jurisprudence. In *Schulte v. Director of the Div. of Employment Security*, 376 Mass. 107, 379 N.E.2d 588 (1978), we remanded for more explicit findings a case in which it appeared that unemployment benefits had been denied because the claimant refused to be available to work on the Jewish Sabbath. In a concurring opinion, two Justices commented that "[i]t goes without saying that any decision by a State agency that, in order to qualify for benefits, a claimant must be available for work on a day which the claimant observes as the Sabbath is invidious and unconstitutional discrimination.

Sherbert v. Verner, 374 U.S. 398 [83 S.Ct. 1790, 10 L.Ed.2d 965] (1963).” *Schulte, supra* at — — —¹, 379 N.E.2d 588 (Abrams, J., concurring, with whom Liacos, J., joined). Similarly, in *Opinions of the Justices*, 372 Mass. 874, 363 N.E.2d 652 (1977), we decided that a statute requiring teachers to lead their classes in a salute to the flag and pledge of allegiance would be unconstitutional even severed of a provision for penalizing a teacher who failed to obey the statute’s command. “Even if we were to determine that it would be unconstitutional to visit any adverse consequences on a teacher for his failure to comply with [this law], the very existence of the statutory mandate might inhibit a teacher from exercising whatever constitutional right he may have to refrain from leading his class in the recitation of the pledge of allegiance. Indirect discouragement of the exercise of First Amendment rights has been condemned.” *Id.* at 877, 363 N.E.2d 652. See *Broderick v. Police Comm’r of Boston*, 368 Mass. 33, 37, 330 N.E.2d 199 (1975), cert. denied sub nom. *Broderick v. DiGrazia*, 423 U.S. 1048, 96 S.Ct. 773, 46 L.Ed.2d 636 (1976); *Opinion of the Justices*, 332 Mass. 763, 767, 126 N.E.2d 100 (1955).

[7] We think the instant case stands on the same footing as those cited. Our prior decisions demonstrate that our Declaration of Rights affords the privacy rights asserted here no less protection than those guaranteed by the First or Fifth Amendments to the Federal Constitution. In our view, “articulating the purpose [of the challenged restriction] as ‘encouraging normal childbirth’ does not camouflage the simple fact that the purpose, more starkly expressed, is discouraging abortion.” Perry, *The Abortion Funding Cases: A Comment on the Supreme Court’s Role in American Government*, 66 Geo.L.J. 1191, 1196 (1978). As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It

may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to “achieve with carrots what [it] is forbidden to achieve with sticks.” L. Tribe, *American Constitutional Law*, § 15–10 at 933 n.77 (1978). We are therefore in agreement with the views expressed by Justice Brennan, writing in dissent to *Harris v. McRae, supra* at 333, 100 S.Ct. at 2703–2704 (1980): “In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*.”

[8] C. *Interest balancing*. Our inquiry does not end with the conclusion that this funding restriction burdens the plaintiffs’ fundamental right of choice. It remains to examine the interests asserted by the State to justify this measure. As we noted in *Framingham Clinic, Inc. v. Selectmen of Southborough*, 373 Mass. 279, 284, 367 N.E.2d 606 (1977), “[i]t is not easy to find a precise answer to the question what burden a State must sustain in order to establish the validity of a regulation impinging on the constitutional right during [the early period of a pregnancy]” The Federal cases suggest that, in this context, “[c]ompelling’ is . . . the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.” *Carey v. Population Servs. Int’l*,

i. Mass.Adv.Sh. (1978) at 2204–2205.

Cite as, Mass., 417 N.E.2d 387

431 U.S. 678, 686, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977). We have at times expressed the relevant test in similar language. See *Massachusetts Pub. Interest Research Group v. Secretary of the Commonwealth*, 375 Mass. 85, 93, 375 N.E.2d 1175 (1978); *Opinion of the Justices*, 375 Mass. 795, 806, 376 N.E.2d 810 (1978). At the same time, we have recognized to some extent the limitations inherent in such a rigid formulation. See *Marcoux v. Attorney Gen.*, 375 Mass. 63, 65 n. 4, 357 N.E.2d 688 (1978) (“The cases at times speak of legislation which need only undergo a test of ‘reasonable relation’ and legislation that must survive ‘strict scrutiny,’ but we conceive that these soubriquets are a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability determined at every point by the competing values involved”). Our recent cases in this area exemplify a more flexible approach to the weighing of interests that must take place. See *In the Matter of Spring*, *supra* at ———^j, 405 N.E.2d 115; *Commissioner of Correction v. Myers*, *supra* at ———^k, 399 N.E.2d 452; *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 740–741, 370 N.E.2d 417 (1977).

The basic judicial authority defining the interests involved when a State seeks to regulate the performance of abortions is, of course, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). While the balance of interests struck in that case is not controlling here, it is nevertheless instructive to look to that case for guidance. The Supreme Court defined two State interests that are implicated by the abortion procedure: the first, “in preserving and protecting the health of the pregnant woman”; and a second, distinct interest, “in protect-

ing the potentiality of human life.” *Roe v. Wade*, *supra* at 162, 93 S.Ct. at 731. It seems obvious—and the defendants do not argue to the contrary—that the instant enactments in no way further the State interest in maternal health. Thus, under *Wade*, the only State interest at stake in this case is the interest in preserving potential life.²⁰ In *Roe v. Wade*, *supra* at 162–165, 93 S.Ct. at 731–733, the Court held that interest to be present throughout a woman’s pregnancy, but to be “compelling” only from the point of fetal viability onward, or during approximately the last three months of pregnancy.

This formulation, if accepted, would prove fatal to the challenged restriction. Rather than mechanically accepting this result, however, we prefer to test these enactments by the balancing principles which we have developed in our own recent decisions.

Perhaps the clearest exposition of those principles in a case presenting an analogous, although not identical, issue is found in *Commissioner of Correction v. Myers*, *supra*. The Commissioner sought declaratory and injunctive relief to establish that he could compel a prisoner in the State prison to undergo medically necessary hemodialysis. We began our analysis of this issue by reference to *Superintendent of Belchertown State School v. Saikewicz*, *supra*, our leading case on the law involving involuntary life-saving medical treatment. In *Saikewicz*, we recognized an interest of constitutional dimension in an individual’s freedom from nonconsensual invasions of bodily integrity; and further, that such an interest, or right, may be asserted to prevent infringements of bodily integrity in circumstances defined by a proper balancing of

j. Mass.Adv.Sh. (1980) at 1214.

k. Mass.Adv.Sh. (1979) at 2528–2529.

20. The defendants make no argument that these restrictions are calculated to conserve funds. This is not surprising; other courts which have considered the question have found that, on a program-wide basis, the cost of providing the medical services necessary to support women through to childbirth, even offset by available Federal reimbursement, exceeds

the cost of providing abortion services to eligible women who want them. See *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126–127 n. 4 (1st Cir.), cert. denied sub nom. *Preterm, Inc. v. King*, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979); *Right to Choose v. Byrne*, 165 N.J.Super. 443, 449, 398 A.2d 587 (Ch.Div. 1979). See also *Harris v. McRae*, *supra*, 448 U.S. at 355 n. 9, 100 S.Ct. at 2715 n. 9, 65 L.Ed.2d 784 [1980] (Stevens, J., dissenting).

State and individual interests. *Id.* at 738–745, 370 N.E.2d 417. See *Myers, supra* at ———¹, 399 N.E.2d 452. Both *Saikewicz* and *Myers* identify four countervailing State interests present in cases involving involuntary medical treatment: “(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.” *Myers, supra* at ———^m, 399 N.E.2d 452. The interest primarily implicated in *Myers* was in preserving life, since hemodialysis treatment permitted the defendant to live an otherwise normal life. Against that strong interest, we balanced the individual’s interest in being free of the hemodialysis treatments, an invasion of his bodily integrity we thought to be significant, although not great. Viewed in isolation, we thought these two interests to yield “a very close balance of interests.” *Id.* at ———ⁿ, 399 N.E.2d 452. The decisive factor thus became the State’s interest in the orderly administration of its prisons, particularly since the defendant, by refusing treatment, sought to extort concessions regarding his placement in the prison system. *Id.* at ———^o, 399 N.E.2d 452. Adding to this balance the State’s interest in maintaining the ethical integrity of the medical profession, we concluded that the weight of the State interests was sufficient to allow the Commissioner to use any reasonably necessary measures to save the prisoner’s life. *Id.* at ———^p, 399 N.E.2d 452.

Here, as in *Myers*, the State interest primarily involved is in the preservation of life, albeit potential life.²¹ Against this interest, we must balance the interest of the pregnant woman in choosing a medically necessary abortion. We think that there

l. Mass.Adv.Sh.(1979) at 2528–2529.

m. Mass.Adv.Sh.(1979) at 2529.

n. Mass.Adv.Sh.(1979) at 2531.

o. Mass.Adv.Sh. (1979) at 2532.

p. Mass.Adv.Sh. (1979) at 2533.

21. At least prior to viability, we are constrained by *Roe v. Wade*, 410 U.S. 113, 156–159, 93 S.Ct. 705, 728–730, 35 L.Ed.2d 147 (1973), from

can be no question that the magnitude of this invasion far exceeds that of the compelled medical treatments challenged in *Myers*; the nine months of enforced pregnancy inherent in effectuating these regulations are only a prelude to the ultimate burden the State seeks to impose. See *Tribe, supra* at 924 (“If a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one wants to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child—not simply to provide an ovum but to carry the child to term—the invasion is incalculably greater. Quite apart from the physical experience of pregnancy itself, an experience which of course has no analogue for the male there is the attachment the experience creates, partly physiological and partly psychological, between mother and child. Thus it is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.” Where the balance of these interests in *Myers* was close, we think the balance in this case to be decisively in favor of the individual right involved.²² We therefore conclude that this restriction cannot be implemented as legislatively enacted.

[9] IV. *Remedy.* We have concluded that the challenged restriction is invalid in so far as it prohibits the use of State Medicaid funds to reimburse authorized providers for lawful, medically necessary abortion services rendered to qualified Medicaid recipients. We now address the question of fashioning an appropriate remedy. The

imputing to the State any interest in protecting the fetus as a “third party.”

22. Although we do not regard it as decisive, we note that placing physicians in the position of choosing between their livelihood and the preservation of the health of a patient for whom abortion is a medical necessity cannot be thought to foster the ethical integrity of the profession.

Cite as, Mass., 417 N.E.2d 387

question posed is whether simply to invalidate the existing restriction in so far as it is constitutionally offensive, or whether it is necessary to nullify the Medicaid appropriation for the current fiscal year in its entirety.

The parties agree that this question is governed by the rule stated in *Opinion of the Justices*, 330 Mass. 713, 726, 113 N.E.2d 452 (1953): "When a court is compelled to pass upon the constitutionality of a statute and is obliged to declare part of it unconstitutional, the court, as far as possible, will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the Legislature could not have intended that the part otherwise valid should take effect without the invalid part." See *DelDuca v. Town Administrator of Methuen*, 368 Mass. 1, 13-14, 329 N.E.2d 748 (1975).

The defendants argue that this is indeed a case in which the Legislature could not, or at least would not, have intended the Medicaid program to continue had they been aware of the invalidity of the abortion funding restriction.²³ They point, in support of this position, to the long record of legislative opposition to Medicaid funded abortions and to the deep division in public opinion still existing with regard to abortion. They accordingly suggest that we must now invalidate the current Medicaid appropriation in its entirety.

We cannot agree. We do not doubt that there exists in the Legislature a deep-seated resistance to public funding for abortion. Equally clear, however, is the Legislature's strong commitment over a period of fifteen years to a State Medicaid program. The Medicaid appropriation has become the largest single item in the State's budget. The program goes far beyond federally mandated requirements, both in terms of standards of eligibility and in terms of the scope of the services offered. It is obviously a program on which a large number of

our State's needy people rely to meet their most urgent needs. Moreover, this is not a case in which a decision to sever the funding restriction will result in an increased financial burden to the State. Cf. *ABCD, Inc. v. Commissioner of Pub. Welfare*, — Mass. —, — — —^q, 391 N.E.2d 1217 (1979); *Rosado v. Wyman*, 397 U.S. 397, 420-422, 90 S.Ct. 1207, 1221-1223, 25 L.Ed.2d 442 (1970). On the contrary, as we have previously explained, severing the offending restriction in this instance will create a financial benefit to the program as a whole.

The principle embodied in the rule governing this remedial question is straightforward: we must seek to minimize the scope of any necessary intrusion into the legislative sphere. We think a nullification of the Medicaid program in its entirety would represent a far greater intrusion into that sphere than a remedy excising only the offending restriction. We therefore remand this case to the county court with instructions that the single justice enter a judgment (1) declaring that the plaintiff class of Medicaid-eligible pregnant women is entitled to nondiscriminatory funding of lawful, medically necessary abortion services, and (2) enjoining the enforcement of G.L. c. 29, § 20B, and St. 1980, c. 329, § 2, Item 4402-5000, in so far as these statutory provisions would prevent reimbursement to Medicaid providers for services in performing lawful, medically necessary abortions on Medicaid-eligible pregnant women.

So ordered.

HENNESSEY, Chief Justice (dissenting).

I dissent. I do not subscribe to the opinion of the majority of the court that the legislation violates the guarantee of due process implicit in art. 10 of the Massachusetts Declaration of Rights. Nor do I believe that the legislation contravenes either the equal protection provision or the Equal

²³ In Part II (A) of this opinion we have disposed of the argument that "extension" of the benefit would violate art. 30 of the Declaration of Rights of the Constitution of the Commonwealth.

^q Mass. Adv. Sh. (1979) 1566, 1579-1581.

Rights Amendment of our State Constitution.

The constitutional arguments of the plaintiffs are rooted in *Wade*, which held that the liberty protected by the United States Constitution includes the freedom of a woman to decide whether to terminate a pregnancy. At the same time, the United States Supreme Court also affirmed in *Wade* that a State has legitimate interests in protecting the health of the mother, and protecting potential human life. These State interests become more substantial as the woman approaches term until, at viability, usually in the third trimester, the State interest justifies a criminal prohibition against abortion.

The plaintiffs here correctly do not contend that they have a right to public funding of abortions. See *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). They also rightly concede the State's privilege to choose to fund no medical expenses of indigent persons, including expenses associated with pregnancy. They simply contend that the State may not provide for the payment of medically necessary expenses of childbirth, but simultaneously refuse to fund the medically necessary expenses of therapeutic abortion.

The United States Supreme Court, faced with the precise issue presented here, held that there was no impediment in the United States Constitution to congressional funding of childbirth but not of certain abortions. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). The majority's opinion here, on the contrary, con-

cludes that the legislative action impermissibly burdens a right protected by the guarantee of due process in our Massachusetts Declaration of Rights.

The majority opinion states that it accepts the formulation of rights announced in *Wade*. In my view, it nevertheless then proceeds to modify and extend the *Wade* principles. It relies upon a series of precedents which stem from *Wade*, but all of these cases concern obstacles which intrude on the woman's freedom of choice.¹ This court has defined, I think correctly, the constitutional principle of *Wade* as forbidding the State to "interpose material obstacles to the effectuation of "the woman's decision to terminate her pregnancy during the first trimester. *Framingham Clinic, Inc. v. Selectmen of Southborough*, 373 Mass. 279, 288, 367 N.E.2d 606 (1977). The majority rely upon that definition in this case, concluding that the decisions of indigent women may well be affected by the disparity in funding, and those decisions will likely favor birth over abortion. It is clear to me that the majority thus equate a financial inducement toward childbirth with an obstacle to a woman's freedom to choose abortion. The logic fails. It may be an appropriate argument to address to the Legislature, but it is not a valid premise for a conclusion of unconstitutionality. It is also a major departure from *Wade* and the opinions which have followed that case.

I do not dispute that this court is free in appropriate circumstances to decide that the Massachusetts guarantee of due process is more extensive than its Federal counterpart.² Nevertheless, there are the best of

1. The majority cite the following: "*Bellotti v. Baird*, 443 U.S. 622, [99 S.Ct. 3035, 61 L.Ed.2d 797] (1979) (requirement of parental consultation and consent or court approval prior to permitting unmarried minors to undergo abortion); *Colautti v. Franklin*, 439 U.S. 379, [99 S.Ct. 675, 58 L.Ed.2d 596] (1979) (requirement that physician determine fetal viability prior to performing abortion; imposing criminal and civil sanctions for failure to exercise care to save fetal life); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, [96 S.Ct. 2831, 49 L.Ed.2d 788] (1976) (requirement of parental or spousal consent prior to abortion; prohibition of saline abortion after first trimester; impos-

ing civil and criminal sanctions for failure to exercise care to save fetal life); *Doe v. Bolton*, 410 U.S. 179 [93 S.Ct. 739, 35 L.Ed.2d 201] (1973) (limiting those hospitals in which abortions could be performed; requiring prior hospital committee approval and concurrence of three doctors that abortion is necessary)."

2. I suggest that the majority inappropriately rely upon *District Attorney for the Suffolk Dist. v. Watson*, — Mass. — (1980) (Mass. Adv. Sh. [1980] 2231, 411 N.E.2d 1274), as support for its result here. This court in *Watson* did not rely upon our State Constitution's guarantee of due process, but its prohibition of cruel or unusual punishment. In finding the death pen-

reasons in policy and logic why the court should not do so in this case. One of the principles of *Wade* which the majority profess to accept is the recognition of the State's interest in the protection of potential life. I think that one effective way in which the State can advance this interest, aside from exercising its limited power to regulate and prohibit abortion,³ is to provide disparate funding which favors birth over abortion. The majority have now denied that privilege to the State, although the State has not by its legislation erected "obstacles" (in any sense which will find support in *Wade*, *Maier*, *McRae* or Webster's Dictionary) to a woman's freedom to choose. Since the State has no constitutional duty to provide medical expenses for abortion or any other medical need, the ease with which an abortion may be obtained remains unchanged by the Legislature's decision to pay for the necessary medical expenses of childbirth. The conclusion of the majority that the State must be "neutral" ignores, and largely nullifies, the State's long recognized interest in protecting potential life. The majority's extension of due process is particularly inappropriate in light of the principle that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maier v. Roe*, 432 U.S. 464, 476, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977).

The majority, having decided this case on a due process approach, recognized that there was no necessity to examine the plaintiffs' assertions that the legislation violates the provision in our State Constitution for equal protection of the laws, and the related provision in the Equal Rights Amendment. I conclude that these argu-

ally statute unconstitutional, the court relied on among other things, what it considered to be an indisputable conclusion that the criminal justice system inevitably imposes the death penalty arbitrarily and discriminatorily. *Id.* at ——— (Mass.Adv.Sh. [1980] at 2247-2254, 411 N.E.2d 1274). I perceive no similarly persuasive constitutional reasoning to support the majority's decision in this case.

ments, like those addressed to due process, fail. The legislation was not predicated on a suspect classification. The principal incidence of the disparate treatment inherent in the legislation falls upon the indigent. Poverty is not a suspect classification. *McRae*, *supra* at 322, 100 S.Ct. at 2691 (1980); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). It remains then, in order to establish constitutionality, to establish only that the legislation is rationally related to a legitimate governmental objective. There clearly is a rational relationship of the legislation to the State's legitimate interest in protecting potential life of the fetus. The equal protection argument of the plaintiffs fails.

The plaintiffs also are not assisted by the Equal Rights Amendment to the Massachusetts Constitution, which is intended to eliminate gender-based discrimination. This court has not yet fully addressed the question of what, if any, proof of discriminatory intent is required to make out a prima facie showing of discrimination under the Equal Rights Amendment. Cf. *School Comm. of Braintree v. Massachusetts Comm'n Against Discrimination*, 377 Mass. 424, ———^a, 386 N.E.2d 1251 (1980), and cases cited (involving claims of employment discrimination under G.L. c. 151B, § 4). I find it unnecessary to resolve this question here, because I do not believe this case involves a gender based classification cognizable under the Equal Rights Amendment. Inescapably, the motive for the challenged legislation lies in opposition to abortion and is based on the State's valid interest in preserving life. The legislation is directed at abortion as a medical procedure, not at women as a class.

3. I trust and assume that one of the principles of *Wade* which the court accepts is that which permits a limited intrusion by the State into the pregnant woman's freedom of choice, particularly by the processes of the criminal law and particularly in the third trimester.

a. Mass.Adv.Sh. (1979) 543, 549-550.

It is clear that the matter in which this court now intrudes is a matter for the Legislature. "It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in [the disparate treatment by the Legislature of childbirth and abortion] is a wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so." *McRae, supra* at 326, 100 S.Ct. at 2693 (1980).

I would direct the single justice to enter a judgment declaring that the challenged legislation is constitutional in all respects under the Constitution of Massachusetts.



COMMONWEALTH et al.¹

v.

SCHOOL COMMITTEE OF
SPRINGFIELD et al.²

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued Oct. 7, 1980.

Decided Feb. 18, 1981.

Commonwealth filed a complaint in the Supreme Judicial Court for Suffolk County seeking declaratory and injunctive relief against school committee to require the school committee, in accordance with statute, to enter into agreements with private schools and institutions to provide special education program for children whose spe-

1. The Commonwealth brought this action through the Attorney General, see G.L. c. 12, § 3, on its own behalf and as *parens patriae* for the citizens of Springfield. Additional plaintiffs are the Board of Education of the Commonwealth, and Gregory R. Anrig, as he is the Commissioner of the Department of Education.

cial needs could not be met by the programs available in public schools. The case was reserved and reported by Wilkins, J. The Supreme Judicial Court, Quirico, J., held that disbursement of public funds to educate school-age children in state-approved private schools and institutions, when no public school programs were available to meet such children's special educational needs, as allowed by statute, did not violate constitutional amendment prohibiting use of public money for the purpose of founding, maintaining or aiding private schools.

Remanded.

1. Schools ⇌3

Disbursement of public funds to educate school age children in state-approved private schools or institutions, when no public school programs were available to meet such children's special educational needs, as allowed by statute, did not violate state constitutional amendment prohibiting the use of public money for the purpose of founding, maintaining or aiding private schools, as the disbursement of public funds pursuant to such statute was not made for the constitutionally prohibited purpose. M.G.L.A. c. 71B, § 1; M.G.L.A.Const. Amend. Art. 46, § 2.

2. Constitutional Law ⇌48(4)

Unless the specific constitutional provision requires a heightened standard of scrutiny, one attacking the statute upon a constitutional ground bears the heavy burden of proving the absence of any conceivable basis upon which the statute may be supported.

3. Schools ⇌3

Criteria considered in determining whether statute allowing disbursement of

2. Members of the school committee who are named as defendants are Patricia Correia, Francis Coughlin, Wilbur Hogan, Daniel Lynch, Mary Lynch, and Maureen Wark. Additional defendants are Theodore E. Dimauro, mayor of Springfield and presiding officer (ex officio) of the school committee, and James Fenlason, administrator of special education for the Springfield school district.

maintain proper trust account books and records, failure to cooperate with the investigation and that respondent had committed illegal sexual harassment against an employee of his law practice; and

WHEREAS, the respondent has admitted, with two minor exceptions, the allegations and has joined with the Director in a stipulation wherein they jointly recommend that respondent be indefinitely suspended for a minimum of 5 years, that the reinstatement hearing provided for in Rule 18, Rules on Lawyers Professional Responsibility, is not waived and that he is required to pay \$750 in costs and disbursements, and that he may only petition for reinstatement to permanent retired status; and

WHEREAS, this court has independently reviewed the record and agrees that the recommended discipline will serve the purpose of protecting the public,

IT IS HEREBY ORDERED that respondent Ralph E. Sheffey is indefinitely suspended, for a minimum of 5 years, and that any reinstatement will be conditioned on a hearing pursuant to Rule 18, compliance with Rule 26, and upon his petitioning only for permanent retired status.

The Director is awarded costs and disbursements in the amount of \$750.

BY THE COURT:

/s/ Mary Jeanne Coyne
Mary Jeanne Coyne
Associate Justice

PAGE, Justice (dissenting).

I respectfully dissent. Respondent's conduct, as admitted in the stipulation, warrants respondent being disbarred.

The WOMEN OF the STATE OF MINNESOTA, as represented by Jane DOE, et al., Respondents,

v.

Maria R. GOMEZ, in her official capacity as the Commissioner of Human Services, Appellant,

Hennepin County Board, Ramsey County Board, St. Louis County Board, Respondents.

No. CX-94-1442.

Supreme Court of Minnesota.

Dec. 15, 1995.

Women, physicians, financial aid organization, and providers of abortion and counseling services sought declaratory and injunctive relief against state and counties, challenging constitutionality of statutory provisions restricting use of public medical assistance and general assistance funds for therapeutic abortion services. The District Court, Hennepin County, William S. Posten, J., struck down provisions as unconstitutional and granted permanent injunctive relief. State filed notice of appeal and petitioned for accelerated review. The Supreme Court, Keith, C.J., held that medical assistance and general assistance statutes that permitted use of public funds for childbirth-related medical services, but prohibited similar use of public funds for medical services related to therapeutic abortions, impermissibly infringed on a woman's fundamental right of privacy under the Minnesota Constitution.

Affirmed.

Coyne, J., filed dissenting opinion.



1. Constitutional Law ¶82(10)

Encompassed by federal constitutional right of privacy is every woman's fundamental right to decide to terminate her pregnancy free from unwarranted government intrusion.

2. Constitutional Law ⇌82(10)

Federal constitutional right of privacy protects against unduly burdensome interference with procreative decision-making, and only compelling interest can justify state regulation impinging upon that right.

3. Constitutional Law ⇌82(7)

Constitutional right of privacy protects only fundamental rights, and therefore law must impermissibly infringe upon fundamental right before it will be declared unconstitutional as violative of right of privacy.

4. Constitutional Law ⇌82(7)

“Fundamental rights” protected by constitutional right of privacy are those which have their origin in express terms of the Constitution or which are necessarily to be implied from those terms.

See publication Words and Phrases for other judicial constructions and definitions.

5. Abortion and Birth Control ⇌.5**Constitutional Law** ⇌82(10)

Right of privacy under Minnesota Constitution protects a woman's right to choose to have an abortion. M.S.A. Const. Art. 1, §§ 2, 7, 10.

6. Constitutional Law ⇌82(10)**Social Security and Public Welfare** ⇌241.95

Medical assistance and general assistance program statutes that permit use of public funds for childbirth-related medical services but prohibit similar use of public funds for medical services related to therapeutic abortions violate constitutional right of privacy under Minnesota Constitution. M.S.A. Const. Art. 1, §§ 2, 7, 10; M.S.A. §§ 256B.011, 256B.02, 256B.0625, subd. 16, 256B.40, 261.28, 393.07, subd. 11.

7. Constitutional Law ⇌82(1)

The Minnesota Constitution may be interpreted to offer greater protection of individual rights than the United States Supreme Court has afforded under the Federal Constitution.

8. Constitutional Law ⇌18

It is significant undertaking for any state court to hold that a state Constitution offers broader protection than similar federal provisions, and it is certainly not sufficient to reject a United States Supreme Court opinion on comparable federal clause merely because one prefers the opposite result.

9. Abortion and Birth Control ⇌.5**Constitutional Law** ⇌82(10)

Right of privacy under Minnesota Constitution protects not simply right to an abortion, but rather protects the woman's decision to abort, and any legislation infringing on decision-making process violates this fundamental right. M.S.A. Const. Art. 1, §§ 2, 7, 10.

10. Social Security and Public Welfare**⇌241.95**

Medical assistance and general assistance program statutes that permit use of public funds for childbirth-related medical services but prohibit similar use of public funds for medical services related to therapeutic abortions implicate fundamental right of privacy and, thus, are subject to strict scrutiny. M.S.A. Const. Art. 1, §§ 2, 7, 10; M.S.A. §§ 256B.011, 256B.02, 256B.0625, subd. 16, 256B.40, 261.28, 393.07, subd. 11.

Syllabus by the Court

Statutes that permit the use of public funds for childbirth-related medical services but prohibit similar use of public funds for medical services related to therapeutic abortions impermissibly infringe on a woman's fundamental right of privacy under Article I, Sections 2, 7 and 10 of the Minnesota Constitution.

Hubert H. Humphrey, III, Atty. Gen., Patricia A. Sonnenberg, Asst. Atty. Gen., St. Paul, for appellant.

Simon Heller, Janet Benshoof, New York City, Linda Ojala, Minneapolis, for respondents Jane Doe, Jane Hodgson, M.D., Pro-Choice Resources, Women's Health Center of Duluth, Midwest Health Center for Women, and Meadowbrook Women's Clinic.

Michael O. Freeman, Hennepin Co. Atty., Martin Munic, Asst. Hennepin Co. Atty., Minneapolis, for respondent Hennepin Co. Bd.

C. David Dietz, Asst. Ramsey Co. Atty., St. Paul, for respondent Ramsey Co. Bd.

Clay Odden, Duluth, for respondent St. Louis Co. Bd.

Creighton R. Magid, Stacey M. Fuller, Dorsey & Whitney, Minneapolis, for amicus Minnesota Civ. Liberties Union.

Barry W. McKee, Stillwater, for amicus Pro-Life Action Ministries, Inc.

Eric J. Magnuson, David F. Fitzgerald, Gregory M. Weyandt, Minneapolis, for amicus Minnesota Lawyers for Life, Inc.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

In this appeal, we are called upon to assess the validity under the Minnesota Constitution of statutes that restrict the use of public funds for abortion-related medical services to three limited circumstances while permitting the use of such funds for comprehensive childbirth-related medical services. Plaintiffs contend that this selective funding scheme violates a woman's right to privacy and equal protection of the law because it denies medical benefits to otherwise qualified women solely because they seek to exercise their constitutional right to procreative choice in a manner which the State does not approve.

In light of the emotional and political overtones of the abortion issue in this country, we must emphasize that this case presents a very narrow legal issue. This opinion is not based upon the morality or immorality of abortion, or the ethical considerations involved in a woman's individual decision whether or not to bear a child. In this case, the Minnesota legislature has adopted certain restrictions which impact poor women who, for medical reasons or because of rape

or incest, choose to have an abortion. A similar constitutional challenge would certainly arise if the Minnesota legislature funded abortions for qualified women to limit the population of the poor, but refused to provide medical care for poor women who choose childbirth. Thus, the constitutional issues in this case concern the protection of *either* choice from discriminatory governmental treatment.

Both parties agree that women have a fundamental right to obtain an abortion before fetal viability under the Minnesota and United States Constitutions. However, plaintiffs assert that the statutory scheme at issue in this case infringes upon this fundamental right to privacy, and therefore must be subjected to strict scrutiny by this court. See *Skeen v. State*, 505 N.W.2d 299, 312 (Minn.1993) (statutes which impinge upon a fundamental right are subject to strict scrutiny by the judiciary). Because we agree with plaintiffs and because the State has not convinced us that the statutes in question are necessary to promote a compelling governmental interest, we hold that the challenged provisions are unconstitutional. Our decision is only based upon this court's determination that a pregnant woman, who is eligible for medical assistance and is considering an abortion for therapeutic reasons, cannot be coerced into choosing childbirth over abortion by a legislated funding policy. In reaching our decision, we have interpreted the Minnesota Constitution to afford broader protection than the United States Constitution of a woman's fundamental right to reach a private decision on whether to obtain an abortion, and thus reject the United States Supreme Court's opinion on this issue in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). We conclude that the challenged provisions impermissibly infringe upon a woman's fundamental right of privacy under Article I, Sections 2, 7 and 10 of the Minnesota Constitution. Accordingly, we affirm the district court, and therefore find it unnecessary to address the equal protection arguments raised by the plaintiffs.¹

1. The dissent makes much of the plaintiffs' equal protection claims, arguing that the funding re-

strictions at issue in this case are rationally related to several important governmental interests,

I.

On March 8, 1993, plaintiffs filed suit in Hennepin County District Court seeking declaratory and injunctive relief against the State of Minnesota Commissioner of Human Services (the "State"), the Commissioners of Hennepin County, the Commissioners of Ramsey County, and the Commissioners of St. Louis County.² Plaintiffs alleged constitutional violations arising out of statutory provisions that restrict the use of public medical assistance and general assistance funds for therapeutic abortion services. Plaintiffs sought an injunction against the enforcement of the challenged provisions and a declaration

such as discouraging the fabrication of rape and incest claims and encouraging early reports to law enforcement authorities. Even if the dissent's and the State's explanations of the equal protection issue were correct, however, the statutory scheme would still be an unconstitutional interference with a woman's right to privacy, leading us to the same result.

2. "Plaintiffs" refers to all plaintiffs below, including those added by amended complaint on April 13, 1993, now situated as respondents on appeal.

The plaintiff identified as Jane Doe is an African-American mother of two who resided in Hennepin County and was eligible for medical assistance ("MA") at the time of the complaint. The complaint asserts she sought an abortion for a pregnancy resulting from rape, but was unable to obtain MA coverage because she did not report the rape within 48 hours to law enforcement authorities. On March 15, 1993, she obtained an abortion with financial assistance from Pro-Choice Resources.

Plaintiff Jane Hodgson, M.D. is a physician specializing in obstetrics and gynecology and is a resident of St. Paul. She is a member of the Board of Directors of plaintiff Women's Health Center of Duluth and performs abortions at that facility.

Plaintiff Pro-Choice Resources ("PCR") is a non-profit organization that provides loans and grants to assist low-income women in obtaining abortions. PCR is funded solely by private donations and is the only fund of its type in Minnesota. Since 1977, when the challenged provisions eliminated state funding for abortions in Minnesota, PCR has given financial assistance to between four and five thousand women for reduced cost abortions or for alternatives to abortion. PCR receives roughly 2,500 requests for assistance per year and assists approximately 700 women per year. The fund distributes roughly \$10,000 per month in loans and grants.

Plaintiff Women's Health Center of Duluth, PA ("WHC") is a private, non-profit corporation that

that the provisions violated the Minnesota Constitution.

Both the State and Ramsey County moved to dismiss. Shortly thereafter, plaintiffs moved for class certification. In its order filed July 15, 1993, the district court denied the motions to dismiss and granted certification. The court certified:

the class of all women eligible for Minnesota's Medical Assistance, General Assistance Medical Care, or County Poor Relief programs, who seek abortions for health reasons during the pendency of this litigation or have obtained abortions for health

provides approximately 90-100 abortions per month at its Duluth clinic. WHC provides abortions through the 15th week of pregnancy measured from the last menstrual period ("lmp") and refers women beyond 15 weeks lmp to providers in the Twin Cities. WHC's fee ranges from \$330.00 for an abortion from 7 to 11 weeks lmp to \$530.00 for an abortion at 15 weeks lmp.

Plaintiff Midwest Health Center for Women ("MHCW") is a private, non-profit corporation that provides abortion services and other reproductive health care for women through its Minneapolis clinic. Roughly 28% of MHCW's patients are MA recipients, and MHCW provides approximately 200 abortions per month for pregnancies up to 15 weeks lmp. Women on MA pay \$200 for an abortion at 7 to 12 weeks lmp and \$240 at 12 to 14 weeks lmp.

Plaintiff Meadowbrook Women's Clinic ("MWC") provides abortions and counselling services for women with pregnancies up to 21.6 weeks lmp. Women beyond 21.6 weeks lmp are referred to St. Paul Ramsey Fertility Control Clinic and women beyond 23 weeks lmp are referred to a provider in Kansas. Approximately 10% of MWC's patients are MA-eligible. MWC's abortion fees begin at \$315 for a woman less than 12 weeks lmp and increase as the pregnancy progresses. At 21 to 21.6 weeks lmp, the fee is \$1,200.00. These fees are reduced for women on MA by \$110 for first trimester abortions and by \$185 for second trimester abortions.

The defendants at the lower court were the Commissioner of Human Services of the State of Minnesota and the Hennepin, Ramsey and St. Louis County Boards of Commissioners. The Commissioner of Human Services and her successors in office were sued in their official capacity of being charged with administering Minnesota's medical assistance statutes and regulations. Minn.Stat. §§ 256B.04, subd. 1, 256D.04 (1992). The county boards were sued in their official capacities of being charged under Minnesota Statutes § 393.07(2) with administering "all forms of public welfare" within each board's respective county.

reasons within the one year period prior to the filing of this action.³

Following discovery, the State and the plaintiffs made cross-motions for summary judgment. In its order dated June 16, 1994, the district court denied the State's motion for summary judgment and granted the plaintiffs' motion for summary judgment in its entirety. The court struck Minnesota Statutes section 256B.0625, subdivision 16 as unconstitutional under the equal protection and privacy guarantees of Article I, Sections 2, 7, and 10 of the Minnesota Constitution and permanently enjoined the defendants from enforcing the challenged statutes and regulations.⁴

On June 23, 1994, the State filed a motion for a stay of enforcement of the judgment and for a suspension of the injunction issued by the district court. In its July 5, 1994 order, the district court denied the State's motion for a stay and reserved the issues of reimbursement to class members and of costs and reasonable disbursements until all appeals have been exhausted.

The State filed a notice of appeal to the Minnesota Court of Appeals on July 6, 1994 and filed a petition for accelerated review in this court on the same day. By an order dated July 29, 1994, this court granted the State's petition for accelerated review. In this appeal, we are asked to resolve the issues of whether the challenged provisions violate the equal protection guarantees or impermissibly infringe on a woman's fundamental right of privacy under the Minnesota Constitution.

3. Plaintiffs submitted affidavits of two women seeking to be added as plaintiffs in the class action, and also submitted seven other affidavits of women denied MA coverage for their abortions. The trial court identified all nine women as plaintiff class members and described their statements in its June 16, 1994 findings of facts. One additional affidavit was submitted by "Ann Doe" in opposition to defendants' motion for a stay pending appeal. It is unclear whether she is an additional plaintiff class member.
4. Specifically, the court enjoined defendants from enforcing Minnesota Statutes sections 256B.0625, subdivision 16, 256B.40, 393.07, subdivision 11, 261.28, and Minnesota Rule 9505.0220(q) and 9505.0235, subpart 2.

Before addressing the issues presented, however, it is important to note the statutory scheme and caselaw implicated in this appeal and the facts presented to the trial court prior to its decision.

A. The Statutory Scheme and Related Caselaw

Created in 1965 under Title XIX of the Social Security Act, Medicaid is a joint federal-state entitlement program that provides medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care. 42 U.S.C. §§ 1396a-1396v (1988 & Supp. IV 1992); see *Atkins v. Rivera*, 477 U.S. 154, 156, 106 S.Ct. 2456, 2458, 91 L.Ed.2d 131 (1986). States are not required to participate in the Medicaid program, but once a state elects to participate, it must comply with the requirements of Title XIX. *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 2680, 65 L.Ed.2d 784 (1980). Federal law sets out mandatory and optional categories of services funded under Medicaid. 42 U.S.C. §§ 1396a, 1396d(a) (1988 & Supp. IV 1992). The mandatory categories require a participating state to provide financial assistance to the "categorically needy"⁵ with respect to five general areas of medical treatment.⁶ See 42 U.S.C. § 1396a(a)(10)(A) (1988 & Supp. IV 1992); *McRae*, 448 U.S. at 301, 100 S.Ct. at 2680; *Atkins*, 477 U.S. at 157, 106 S.Ct. at 2458-59. The optional categories permit a participating state to provide additional medical benefits to the "medically needy."⁷ See 42 U.S.C. §§ 1396a(a)(10)(C)

5. The "categorically needy" are persons eligible for cash assistance under either Supplemental Security Income for the Aged, Blind, and Disabled (SSI) or Aid to Families with Dependent Children (AFDC). See *Atkins*, 477 U.S. at 157, 106 S.Ct. at 2458.
6. These five areas include: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services; and (5) services of physicians. 42 U.S.C. § 1396d(a)(1-5)(1988 & Supp. V 1993).
7. "Medically needy" refers to persons who meet the nonfinancial eligibility requirements under

and 1396d(a) (1988 & Supp. IV 1992). Although the program does not identify specific types of medical treatment required under the program, the state's plan must establish "reasonable standards * * * consistent with the objectives of [Title XIX]" to determine what treatment is covered. 42 U.S.C. § 1396a(a)(17) (Supp. V 1993). Thus, Title XIX gives states "substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.'" *Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 721, 83 L.Ed.2d 661 (1985) (citing 42 U.S.C. § 1396a(a)(19)).

The United States Supreme Court has, in several cases, addressed the issue of coverage for abortion services in light of Title XIX and the United States Constitution. In *Beal v. Doe*, the Court considered whether Title XIX requires participating states to fund the cost of nontherapeutic abortions. 432 U.S. 438, 440, 97 S.Ct. 2366, 2368, 53 L.Ed.2d 464 (1977). The Court held that a state's refusal to extend Medicaid coverage to nontherapeutic abortions does not conflict with Title XIX, although the state is free to provide such coverage if it so desires. *Beal*, 432 U.S. at 447, 97 S.Ct. at 2372. In the companion case, *Maher v. Roe*, the Court also held that neither the Equal Protection Clause nor the privacy right under the federal constitution requires a participating state that provides coverage for childbirth expenses also to provide coverage for nontherapeutic abortions. 432 U.S. 464, 471, 474, 97 S.Ct. 2376, 2381, 2382-83, 53 L.Ed.2d 484 (1977).

Further, Congress has since September 1976 restricted the use of federal funds for both therapeutic and nontherapeutic abor-

AFDC or SSI, but whose income or resources exceed the eligibility cut-offs for those programs. See *Atkins*, 477 U.S. at 157, 106 S.Ct. at 2458.

8. In 1993, the Hyde Amendment was revised to expand the categories of abortions eligible for federal funds under Medicaid. Under this new law, the federal government also must provide abortions to Medicaid-eligible women who are the victims of rape or incest. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub.L. No. 103-112, 107 Stat. 1082 (1993).

tions by amendment to the annual appropriations bill. See *McRae*, 448 U.S. at 302, 100 S.Ct. at 2680. This amendment is commonly referred to as the "Hyde Amendment," and at the time the complaint was filed in this case, it restricted the use of federal funds to reimburse only those abortions necessary to save a woman's life. Dept. of Health and Human Serv. Appropriations Act of 1991, Pub.L. No. 102-170, § 203, 105 Stat. 1107 (1991).⁸

In 1980, the Supreme Court addressed whether Title XIX requires states to provide services for which federal funding has been withheld under the Hyde Amendment. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). The Court held that Congress' withdrawal of federal funding for abortions except under limited circumstances does not obligate participating states under Title XIX to continue to pay for that service as a condition of receiving federal financial support for other services. *Id.* at 309, 100 S.Ct. at 2684. At the same time, the Court considered the validity of the Hyde Amendment under the U.S. Constitution and found no violation of women's Fifth Amendment Due Process right to decide to terminate a pregnancy, no violation of the Establishment Clause of the First Amendment, and no violation of the equal protection component of the Due Process Clause of the Fifth Amendment. See *McRae*, 448 U.S. 297, 100 S.Ct. 2671. Thus, after *McRae*, states are free to fund medically necessary abortions at their own expense, but the Hyde Amendment prohibits federal reimbursement. *Id.* at 311 n. 16, 100 S.Ct. at 2685 n. 16.

Minnesota participates in the Medicaid program through its medical assistance program ("MA"), codified at Minnesota Statutes

The United States Court of Appeals for the Tenth Circuit recently has held that Colorado's voluntary participation in the federal Medicaid program requires that state to "do so on the terms established by Congress." *Hern v. Beye*, 57 F.3d 906, 913 (10th Cir.1995), cert. denied, *Weil v. Hern*, No. 95-701, — U.S. —, 116 S.Ct. 569, 133 L.Ed.2d 494 (U.S. Dec. 4, 1995). Therefore, Colorado's abortion funding restrictions under its medical assistance program can no longer limit funding to situations where the mother's life is in danger, but must provide funds for victims of rape or incest as well.

chapter 256B. The MA program is designed to assist persons whose income and resources are insufficient to meet the costs of necessary medical care. Minn.Stat. § 256B.01 (1994). Minnesota also operates the General Assistance Medical Care program ("GAMC"), which provides medical care to those who do not qualify for MA but who are unable to pay for necessary care. Minn.Stat. §§ 256D.01, subd. 1a, 256D.02, subd. 4a, 256D.03, subd. 3 (1992); Minn.R. 9505.1030 (1993). Further, under the County Relief of Poor Act, counties may spend their own funds to provide assistance beyond that furnished by the state. Minn.Stat. §§ 261.001–28 (1992).

Minnesota's development of abortion funding restrictions paralleled the federal development. Eleven days after the U.S. Supreme Court's decision in *Roe v. Wade*, establishing a right of privacy under the U.S. Constitution encompassing a woman's decision to terminate her pregnancy, 410 U.S. 113, 153, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973), this court held that Minnesota's statute criminalizing abortion was unconstitutional. See *State v. Hodgson*, 295 Minn. 294, 204 N.W.2d 199 (1973); *State v. Hultgren*, 295 Minn. 299, 204 N.W.2d 197 (1973). Within a month of these decisions, the Minnesota Commissioner of Public Welfare issued a policy bulletin announcing that MA would reimburse for the cost of abortions, whether therapeutic or not, if performed by a licensed provider. See *McKee v. Likins*, 261 N.W.2d 566, 575 (Minn.1977). This court later invalidated the bulletin as a violation of the rulemaking provisions of the Administrative Procedure Act. *Id.* at 577–78. See also *Mower County Welfare Bd. v. State Dep't of Pub. Welfare*, 261 N.W.2d 578 (Minn.1977). Subsequently, in 1978, the Minnesota legislature enacted section 256B.011 declaring:

Between normal childbirth and abortion it is the policy of the state of Minnesota that normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens.

1978 Minn. Laws ch. 508, § 1 (now Minn. Stat. § 256B.011). At the same time, the

legislature enacted several provisions restricting MA/GAMC coverage for abortions. See 1978 Minn. Laws ch. 508, §§ 1–6. These provisions represent the origins of the statutory scheme now challenged by the plaintiffs and have remained largely unchanged since first enacted. See Minn.Stat. §§ 256B.011, 256B.02, 256B.0625, subd. 16, 256B.40, 261.28, and 393.07, subd. 11 (1994).

In general terms, the challenged provisions limit the availability of public funds for abortion services. Under Minnesota Statutes section 256B.057, subd. 1 (1994), pregnant women are eligible for MA "if countable family income is equal to or less than 275 percent of the federal poverty guideline for the same family size." No asset limitation applies to pregnant women. MA covers a wide range of pregnancy-related services including family planning services, history and physical exams, pregnancy tests, blood tests, ultrasound tests, pap smears and laboratory exams to detect fetal abnormalities. Minn.R. 9505.0280, subp. 1, 9505.0235, subp. 1 (1993). MA also covers medically-necessary prenatal care services including ongoing monitoring, nutrition counseling and education. Minn.R. 9505.0353, subp. 1 (1993). The challenged provisions impose limitations, however, on when MA/GAMC funds can be used to pay for abortions. Under Minnesota Statutes section 256B.0625, subd. 16, MA funds can be used only if one of the following conditions is met:

(a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of *two physicians* indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law;

(b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to re-

port the criminal sexual conduct, in which case the report shall be made within 48 hours after the victim becomes physically able to report the criminal sexual conduct; or

(c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

(1994) (emphasis added).⁹ The same conditions apply to the GAMC program. Minn. Stat. § 256D.03, subd. 4(h) (1994). Except in these limited circumstances, payment for abortion services with public funds is expressly prohibited. Minn.Stat. § 256B.40 (1994); see also Minn.R. 9505.0220(Q); Minn.R. 9505.0235, subp. 2 (1993). The laws also prohibit the use of public funds under county poor relief programs or by social service agencies to pay for abortions that are not eligible for MA payment. Minn.Stat. § 261.28; § 256B.40; § 393.07, subd. 11 (1994).

B. Facts Presented to the Trial Court

Prior to the trial court's ruling on cross-motions for summary judgment, the parties submitted affidavits and other discovery to the court detailing the following information.

9. The criminal sexual conduct provisions referenced in (b) state:

A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

* * *

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(e) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish sexual penetration; or

* * *

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

1. Statistics

In fiscal year 1991-92, 125,941 women between the ages of 15 and 44 years received MA in Minnesota. Although the number of women receiving GAMC in any particular fiscal year is unknown, on April 1, 1993, 22,291 women were receiving GAMC. 16,178 abortions were performed in Minnesota in 1991, and it was estimated that a similar number would be performed in 1993. The number of times abortion procedures were reimbursed by MA in 1977, prior to the enactment of the challenged provisions, was 1,942. By comparison, in 1993, MA reimbursed for abortion procedures in only two cases.

2. Categories of Women Particularly Affected by the Funding Ban

Plaintiffs submitted affidavits highlighting categories of women particularly affected by the MA/GAMC funding ban on abortions.

a. When abortion is sought for health reasons

MA/GAMC will cover an abortion when two physicians certify that the abortion is necessary to prevent the death of the moth-

(ii) an accomplice is armed with a dangerous weapon or article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit * * *.

Minn.Stat. § 609.342, subd. 1 (1992). Although the rape exception under section 256B.0625, subdivision 16 applies to criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i) and (f), the corresponding Minnesota Rule 9505.0235, subpart 2 states that the provision applies to criminal sexual conduct under section 609.342, paragraphs (c) to (f). The additional section cited by the Rule but not included in the statute is section 609.342, paragraph (e)(ii): sexual penetration when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless."

Further, the criminal incest statute provides:

Whoever has sexual intercourse with another nearer of kin to the actor than first cousin, computed by rules of the civil law, whether of the half or the whole blood, with knowledge of the relationship, is guilty of incest and may be sentenced to imprisonment for not more than ten years.

Minn.Stat. § 609.365 (1994).

er. Minn.Stat. § 256B.0625, subd. 16 (1994). Plaintiffs suggest, however, that for MA/GAMC-eligible women who typically suffer from pre-existing health conditions such as stress or malnutrition, abortion may be necessary to preserve the health of the mother even though it is not clear to the physician that the mother would die without the abortion. Plaintiffs further cite several medical conditions aggravated or caused by pregnancy, including premature ruptured membrane, preeclampsia, hypertension and poorly controlled diabetes, as examples of conditions that might require an immediate abortion, even though they would fall outside the statutory exception for an abortion that is “necessary to prevent the woman’s death.” If an abortion is not performed in these situations, the woman is exposed to increased health risks such as shock, the need for a blood transfusion, infection, pain and discomfort.

Further, some woman have pre-existing medical conditions that are aggravated by or untreatable during the pregnancy. Examples of conditions that may be aggravated by pregnancy include congenital heart disease, serum hepatitis, rheumatoid arthritis, ovarian cysts, toxemia, iron deficiency, hypertension, and diabetes. Diseases such as cervical cancer that require radiation or chemotherapy treatment are untreatable during pregnancy, as are other conditions requiring medication that may affect the development of the fetus. Abortion may also be sought in cases in which pregnancy aggravates a pre-existing mental illness or psychiatric disability. In such cases, pregnancy increases the risk of breakdown, particularly when the woman must cease taking psychotropic medications due to the pregnancy.

b. When abortion is sought for rape or incest outside the statutory limits

Under the challenged provisions, MA/GAMC reimburses for abortion when the pregnancy results from rape that was reported to law enforcement authorities within 48 hours of the incident or within 48 hours after the victim becomes physically able to report the incident. Minn.Stat. § 256B.0625, subd. 16 (1994). Further, MA/GAMC reimburses when the pregnancy results from incest that was reported to law enforcement authorities

prior to undergoing an abortion. *Id.* In light of these limitations, plaintiffs submitted affidavits indicating that a significant number of women seeking abortions due to rape or incest do not meet these requirements.

First, the State concedes that both rape and incest are under-reported in Minnesota and that many women who are victims of rape and incest do not report the incident to law enforcement authorities within the statutory reporting requirements. The State agrees, in cases of rape, women are often too traumatized or too ashamed to report the rape within the 48-hour statutory period. Although such women may reveal the incident to a friend or victim advocate, they are not likely to report to law enforcement officials as required by the provision. Pro-Choice Resources submitted information to the trial court indicating that it typically assists four to five women per quarter who are pregnant as a result of rape and who did not report the incident to law enforcement authorities within the statutory period. In the third quarter of 1993, PCR assisted eight women in this situation. Similarly, not all incest victims are psychologically able or willing to report an abusing relative to law enforcement officials within the nine-month period of pregnancy. One study cited by plaintiffs found that only 2% of all child incest cases were ever reported to police. PCR indicated it typically assists one woman per quarter who is pregnant as a result of incest and whose abortion is not covered by MA because she did not report the incident to law enforcement.

Second, a number of pregnancies resulting from rape or incest do not fit within the specific categories of offenses designated in the statute. For example, because the statutory exception for rape is limited to those involving actual or threat of physical violence, it excludes “statutory rape” based on the age of the victim and the perpetrator, and it excludes rape in which the perpetrator is in a position of authority over the victim and uses this authority to cause the victim to submit. *See* Minn.Stat. § 609.342(a)–(b) (1992). MA/GAMC also excludes rape when the victim is mentally impaired, mentally incapacitated, or physically helpless. *See*

Minn.Stat. § 609.342(e)(ii). Moreover, the exception for incest victims is limited to blood relatives, and pregnancy resulting from incest by a steprelative is not covered. Minn.Stat. § 609.365 (1994). One study cited by plaintiffs, however, indicates that steprelatives are proportionally more likely to sexually abuse their female relatives than blood relatives.

3. Implications of the Funding Restrictions on Women's Health

The State concedes that one study has found that Medicaid-eligible women who are denied funding delay abortion while they seek alternative funds. Plaintiffs' affidavits suggest that such women may delay for several weeks to obtain funding from other sources. Women commonly cancel and reschedule appointments for the procedure a number of times while they seek funding. Plaintiffs' affidavits further demonstrate that delay in the performance of an abortion increases the health risks women face in connection with the procedure. Therefore, the restrictions imposed on poor women who seek therapeutic abortions may actually subvert the purpose of the MA/GAMC program, which is to alleviate the hardships faced by those who cannot afford medical treatment. The mortality risk of abortion increases with gestational age, and one study suggests that the mortality risk of abortion increases 50% with each week after the eighth week of pregnancy. See Cates and Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* 158, 172 (J. Hodgson ed., 1981). The State agrees that, if abortions were reimbursable under MA/GAMC, some women would receive earlier abortions. The State also admits that delay in the performance of abortion may cause some in-

10. Specifically, in *Jarvis v. Levine*, we indicated that the right of privacy under the Minnesota Constitution is rooted in Article I, Sections 1, 2 and 10. 418 N.W.2d 139 (Minn.1988). Article I, Section 1 provides: "Government is instituted for the security, benefit and protection of the people * * *." Article I, Section 2 provides: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. * * *"

crease in the health risk to the pregnant woman and can impose pain, discomfort, or increased risks for women with medical complications. However, the State disputes the degree to which the health risks are increased due to delay.

II.

The first issue to be decided by this court is whether the challenged statutory provisions impermissibly infringe on a woman's right of privacy in violation of Article I, Sections 2, 7 and 10 of the Minnesota Constitution.

[1, 2] The right of privacy was first recognized at the federal level. In *Griswold v. Connecticut*, the U.S. Supreme Court recognized a "zone of privacy created by several fundamental constitutional guarantees" protected by the federal constitution. 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). Encompassed by this right of privacy under the constitution is every woman's fundamental right to decide to terminate her pregnancy free from unwarranted government intrusion. *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 727, 35 L.Ed.2d 147 (1973). This right protects against unduly burdensome interference with procreative decision-making, and only a compelling interest can justify state regulation impinging upon that right. *Maher v. Roe*, 432 U.S. 464, 473-74, 97 S.Ct. 2376, 2382-83, 53 L.Ed.2d 484 (1977); *Roe v. Wade*, 410 U.S. at 155-56, 93 S.Ct. at 728.

In 1987, this court recognized a similar right of privacy guaranteed under and protected by the Minnesota Bill of Rights.¹⁰ *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987); see M.S.A., Const. Art. 1, §§ 1-17. This court has never directly addressed, however, whether the right of privacy under the

Article I, Section 10 provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *"

We also find Article I, Section 7 applicable: "No person shall be held to answer for a criminal offense without due process of law * * * nor be deprived of life, liberty or property without due process of law."

Minnesota Constitution encompasses a woman's decision to terminate her pregnancy.

[3,4] In evaluating this issue, we first note that the right of privacy protects only fundamental rights, and therefore "a law must impermissibly infringe upon a fundamental right before it will be declared unconstitutional as violative of the right of privacy." *Gray*, 413 N.W.2d at 111. Fundamental rights are those "which have their origin in the express terms of the Constitution or which are necessarily to be implied from those terms." *Id.* (citing Black's Law Dictionary 607 (Rev. 5th ed. 1979)).

[5] In the present case, plaintiffs allege that the fundamental right implicated in this case is the right of a pregnant woman to decide whether to terminate her pregnancy. The State has conceded this point and has adopted the view that "the state constitution protects a woman's right to choose to have an abortion." We agree.

In *Jarvis v. Levine*, we held that the "right [of privacy] begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent." 418 N.W.2d 139, 148 (Minn.1988). We therefore found that the right to be free from intrusive medical treatment is a fundamental right encompassed by the right of privacy under the Minnesota Constitution. *Id.* at 150. In making that decision, we acknowledged that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 149 (quoting *Minnesota Bd. of Health v. City of Brainerd*, 308 Minn. 24, 241 N.W.2d 624 (1976), *appeal dismissed*, 429 U.S. 803, 97 S.Ct. 35, 50 L.Ed.2d 63 (1976)).

We find this characterization equally persuasive in the context of the present case. The right of procreation without state interference has long been recognized as "one of the basic civil rights of man * * * fundamental to the very existence and survival of the race." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110,

1113, 86 L.Ed. 1655 (1942). We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities. We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy.

III.

[6] Having made this determination, we next consider whether the challenged statutes impermissibly infringe on this right of privacy.

As noted previously, the U.S. Supreme Court has evaluated this issue in light of the federal constitution. In the companion cases of *Beal v. Doe* and *Maher v. Roe*, the Court held that the government may refuse to pay for nontherapeutic abortions without conflicting with Title XIX and without impinging on the fundamental right of privacy recognized in *Roe v. Wade*. *Beal v. Doe*, 432 U.S. 438, 447, 97 S.Ct. 2366, 2372, 53 L.Ed.2d 464 (1977); *Maher v. Roe*, 432 U.S. 464, 474, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977). The Court noted that even though the state's interest in encouraging childbirth is not compelling until after viability, it is nevertheless "a significant state interest existing throughout the course of the woman's pregnancy." *Beal*, 432 U.S. at 446, 97 S.Ct. at 2371. The state can therefore make "a value judgment favoring childbirth over abortion, and * * * implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474, 97 S.Ct. at 2382.

Two years later, in *Harris v. McRae*, the Supreme Court reviewed the Hyde Amendment restricting federal funding of abortion to determine whether it violated any substantive rights secured by the Constitution. 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). In its analysis of whether the funding ban constituted an impermissible infringement, the Court noted:

The financial constraints that restrict an indigent woman's ability to enjoy the full

range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. *Id.* at 316–17, 100 S.Ct. at 2688. The Court thus viewed the woman's indigency and not the statute as creating the infringement on the woman's decision to terminate her pregnancy, and it held that the government may refuse to pay for abortions without impinging on the constitutionally protected freedom of choice recognized in *Roe v. Wade*. *Id.* at 317, 100 S.Ct. at 2688.

In the case before us, the State and the dissent assert that this court should adopt the *McRae* Court's distinction between government action that creates an obstacle to abortion and government action that simply fails to remove a preexisting barrier, and should find no infringement. Inherent in this argument is the assertion of the State and the dissent that the Minnesota Constitution does not require the state to fund the exercise of every fundamental right. The State relies upon the *McRae* Court's statement that "[a]lthough the liberty protected by the Due Process Clause affords protection

11. One such example is the assertion that the denial of public funds for abortions is analogous to the denial of public funds for religious education, comparing the constitutional right of freedom of conscience to the constitutional right of privacy. Under the Minnesota Constitution, this analogy fails on its face. On the one hand, Article XIII, Section 1 of the Minnesota Constitution mandates funding of public education. On the other, Article XIII, Section 2 provides that "[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." In contrast, there are no constitutional provisions that either mandate or prohibit funding of medical costs. The dissent's analogy fails because in concluding that just as it is constitutional for the legislature to fund public education but not reli-

against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S. at 317–18, 100 S.Ct. at 2688. In support of this argument, the dissent cites several examples of how the state does not fund all choices, even when a particular choice is constitutionally protected.¹¹ These analogies, however, misconstrue plaintiffs' claim. Rather than asserting that the Minnesota Constitution requires the state to fund abortions under MA/GAMC, plaintiffs instead argue that the state may not fund childbirth-related health services without funding abortion-related health services because this interferes with a woman's decision-making process. The relevant inquiry, then, is whether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons solely because they make constitutionally protected health care decisions with which the state disagrees.

Plaintiffs urge us to construe the Minnesota Constitution more broadly than the *McRae* Court construed the U.S. Constitution and to find that the "ban on medical assistance funding for abortion services 'interferes' with a woman's choice to have an abortion by adding state created financial considerations to the woman's decision making process." Other state courts have addressed this issue, and a substantial majority of these courts have departed from *McRae*.¹²

gious education pursuant to the Minnesota Constitution, it is also constitutional for the legislature to choose to fund childbirth-related medical costs but not abortion-related medical costs pursuant to its legislative authority, the dissent equates the government's constitutional power with the legislature's authority to enact statutes. In fact, the legislature is subject to constitutional limitations which prohibit it from impermissibly burdening fundamental rights. See *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn.1983).

12. See *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *Moe v. Secretary of Admin. and Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134 (1986); *Planned Parenthood Ass'n, Inc. v. Department of Human Resources of the State of*

In evaluating the opposing arguments, we find the U.S. Supreme Court's decision in *McRae* unpersuasive. As Justice Brennan noted in his dissent to *McRae*, "[the Court has] heretofore never hesitated to invalidate any scheme granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice." 448 U.S. at 334, 100 S.Ct. at 2704 (Brennan, J., dissenting). For example, in *Sherbert v. Verner*, the Court reviewed a South Carolina statute that required recipients of unemployment insurance to accept suitable employment when offered, even if the refusal was grounded in religious convictions. 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The *Sherbert* Court held that the state could not terminate the benefits of a Seventh-Day Adventist who refused a job that would require her to work on Saturdays. The Court reasoned:

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege * * *. [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Id. at 404-406, 83 S.Ct. at 1794-1795. In light of this precedent, we are unpersuaded by the *McRae* majority in that it failed to recognize that the infringement created by a statutory funding ban on abortion is indistinguishable from the infringement the Court found in earlier cases.

Instead, we find exceptionally persuasive Justice Brennan's dissent in *McRae*:

A poor woman in the early stages of pregnancy confronts two alternatives: she may elect either to carry the fetus to term or to have an abortion. In the abstract, of course, this choice is hers alone, and the Court rightly observes that the Hyde

Or., 63 Or.App. 41, 663 P.2d 1247 (1983), *aff'd on other grounds*, 297 Or. 562, 687 P.2d 785 (1984); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658 (1993); *Doe v. Wright*, No. 91-CH-1958 (Ill.Cir. Ct. Dec. 2, 1994); *New Mexico Right to Choose v. Danfelser*, No. SF-95-867(C) (N.M.Dist.Ct. filed July 3, 1995); *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont.Dist.Ct. May 22, 1995). In

Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." * * * But the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women would have chosen to have an abortion if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure.

The fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions. Implicit in the Court's reasoning is the notion that as long as the Government is not obligated to provide its citizens with certain benefits or privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights.

McRae, 448 U.S. at 333-34, 100 S.Ct. at 2704 (Brennan, J., dissenting).

[7] Accordingly, to the extent that *McRae* stands for the proposition that a leg-

contrast, three state courts have found no state constitutional violation for state funding of childbirth-related medical costs but not abortion-related medical costs. See *Hope v. Perales*, 83 N.Y.2d 563, 611 N.Y.S.2d 811, 634 N.E.2d 183 (1994); *Doe v. Department of Social Serv.*, 439 Mich. 650, 487 N.W.2d 166 (1992); *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114 (1985).

islative funding ban on abortion does not infringe on a woman's right to choose abortion, we depart from *McRae*. This court has long recognized that we may interpret the Minnesota Constitution to offer greater protection of individual rights than the U.S. Supreme Court has afforded under the federal constitution. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn.1993); *State v. Fuller*, 374 N.W.2d 722, 726 (Minn.1985). In *Fuller*, we stated:

Indeed, as the highest court of this state, we are 'independently responsible for safeguarding the rights of [our] citizens.' * * * State courts are, and should be, the first line of defense for individual liberties within the federalist system. This, of course, does not mean that we will or should cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution. Indeed, a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force.

374 N.W.2d at 726-27 (footnote omitted). In some cases, we have in fact interpreted the Minnesota Constitution to provide more protection than that accorded under the federal constitution or have applied a more stringent constitutional standard of review.¹³ We find that this is one of those limited circumstances in which we will interpret our constitution to provide more protection than that afforded under the federal constitution.

[8] We do not do so lightly. It is a significant undertaking for any state court to hold that a state constitution offers broader protection than similar federal provisions, and it is certainly not sufficient "to reject a [U.S.] Supreme Court opinion on the comparable federal clause merely because one pre-

fers the opposite result." Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U.Balt.L.Rev. 379, 392 (1980). Although there are several possible rationales for interpreting our constitution differently from the federal constitution, we are persuaded today particularly by circumstances attendant to this case, but unique to Minnesota, our precedents, and the inadequacy we find in the federal status quo.

Minnesota possesses a long tradition of affording persons on the periphery of society a greater measure of government protection and support than may be available elsewhere. This tradition is evident in legislative actions on behalf of the poor, the ill, the developmentally disabled and other persons largely without influence in society.

This court too, has acted to establish that tradition during other times when the nation was divided on an important issue. Previously, when this nation was split on the question of slavery, this court relied on the Minnesota Constitution to strike legislation denying citizens of secessionist states access to Minnesota courts. These secessionists were politically unpopular in unionist Minnesota. Nonetheless, this court held that government must protect the rights of each of its citizens, regardless of the fact that the larger community may hold them in low esteem. *Davis v. Pierce*, 7 Minn. 1, 6 (1862); accord *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 224-26, 14 N.W.2d 400, 405 (Minn.1944). We believe that this tradition compels us to deviate from the federal course on the question of denying funding to indigent women seeking therapeutic abortions.

We are also persuaded of the correctness of our decision by our prior decisions to expand the protective reach of the Minnesota Constitution beyond that of the U.S. Constitution and by our decision in *Jarvis*. In

13. See, e.g., *Ascher v. Commissioner of Pub. Safety*, 519 N.W.2d 183 (Minn.1994) (warrantless searches at sobriety checkpoints); *Matter of Welfare of E.D.J.*, 502 N.W.2d 779 (Minn.1993) (seizure); *Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828 (Minn.1991) (right to counsel at the chemical testing stage of a DWI proceeding); *State v. Russell*, 477 N.W.2d 886 (Minn.1991) (adopting stricter equal protection rational basis

standard than federal courts); *State v. Hershberger*, 462 N.W.2d 393 (Minn.1990) (religious liberties); *Jarvis v. Levine*, 418 N.W.2d 139 (Minn.1988) (bodily integrity); *Skeen v. State*, 505 N.W.2d 299 (Minn.1993) (fundamental right of education); *State v. Hamm*, 423 N.W.2d 379 (Minn.1988) (right to 12-member jury) (subsequently overruled by constitutional amendment).

Jarvis, we determined that our obligation to independently safeguard the rights of our citizens required us to decide that case exclusively under the Minnesota Constitution and our state's statutes. 418 N.W.2d at 147. In a situation involving such intimate and personal decisions as the present case, we cannot agree with the federal courts. *McRae* has the practical effect of not protecting a woman's fundamental right to choose to have an abortion and allowing funding decisions to accomplish its nullification of that right. As a result, we believe that our decision today chooses the "better law" to protect this privacy right for Minnesota's indigent women. Minnesota has an interest in assuring those within its borders that their disputes will be resolved in accordance with this state's own concepts of justice. See *Milkovich v. Saari*, 295 Minn. 155, 166-67, 203 N.W.2d 408, 415 (1973).

[9, 10] It is critical to note that the right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right. In the present case, the infringement is the state's offer of money to women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions. Faced with these two options, financially independent women might not feel particularly compelled to choose either childbirth or abortion based on the monetary incentive alone. Indigent women, on the other hand, are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban.¹⁴ We simply cannot say that an indigent woman's decision whether to terminate

14. In fact, our state's own commitment to health care issues highlights the recognition that without monetary assistance, some people are forced to accept the alternative: foregoing necessary medical care. See Minn.Stat. § 62J.015 (MinnesotaCare Act policy statement); Minn.Stat. § 256B.01 (Medical Assistance Act policy statement). These policy statements provide:

The legislature finds that the staggering growth in health care costs is having a devastating effect on the health and cost of living of

her pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term. We conclude, therefore, that these statutes constitute an infringement on the fundamental right of privacy.

Because the challenged provisions infringe on the fundamental right of privacy, we must subject them to strict scrutiny. *Skeen v. State*, 505 N.W.2d 299, 312 (Minn.1993). The State's interest in participating in Medicaid and in providing MA/GAMC is to provide assistance to those whose income and resources are insufficient to meet the costs of necessary medical care. See Minn.Stat. §§ 256B.01 and 256D.01 (1994). Within this broader purpose, the legislature has specifically stated its policy in regard to the funding provisions:

Between normal childbirth and abortion it is the policy of the state of Minnesota that normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens.

Minn.Stat. § 256B.011 (1994). Based on this policy, the State indicates that its interest is the preservation of potential human life and the encouragement and support of childbirth. However, a woman's right of privacy encompasses her decision whether to choose health care services necessary to terminate or to continue a pregnancy without interference from the state, "at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability." *State v. Merrill*, 450 N.W.2d 318, 322 (Minn.1990), *cert. denied*, 496 U.S. 931, 110 S.Ct. 2633, 110 L.Ed.2d 653 (1990) (citing *Roe*, 410 U.S. at 163, 93 S.Ct. at 732). Un-

Minnesota residents. The legislature further finds that the number of uninsured and underinsured residents is growing each year * * *. Minn.Stat. § 62J.015 (1994).

Medical assistance for needy persons whose resources are not adequate to meet the cost of such care is hereby declared to be a matter of state concern. To provide such care, a state-wide program of medical assistance, with free choice of vendor, is hereby established. Minn.Stat. § 256B.01 (1994).

der *Roe v. Wade*, then, the state's interest in potential life does not become compelling prior to viability. 410 U.S. at 162-65, 93 S.Ct. at 731-33. Because the challenged provisions apply at all stages of pregnancy, including prior to viability, they do not withstand strict scrutiny, and thus must be invalidated.

We emphasize that our decision is limited to the class of plaintiffs certified by the district court and the narrow statutory provisions at issue in this case. Specifically, we hold that the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons. The statutory scheme, as it exists, takes the decision from the hands of such women in a manner that, in light of the protections afforded by our own constitution, we simply cannot condone. Contrary to the dissent's allegations, this court's decision will not permit any woman eligible for medical assistance to obtain an abortion "on demand." Rather, under our interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.

Affirmed.

STRINGER, J., took no part in the consideration or decision of this case.

COYNE, Justice (dissenting).

I respectfully dissent. As the commissioner of human services cogently remarked in her brief, abortion is not merely a highly volatile issue, it is "one of the most politically divisive legal issues of our time." Since the early 1970s, I have observed that "abortion," though often posited as the subject of discussion, is seldom discussed. Perhaps because the subject plumbs deeply held philosophical and moral beliefs, speakers oftentimes are prone to abandon reasoned discourse for exhortation either "for" or "against" abortion. Because I believe that the majority's decision today will not only assure the continued divisiveness of the issue but will, indeed, escalate the acrimony attendant upon it, I shall attempt to address the constitutional issues in a reasoned and principled manner without

the inflammatory rhetoric that so often attends the subject.

The initial judicial exploration of the right of privacy with respect to the decision to terminate a pregnancy by abortion is, of course, found in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There the plaintiff challenged Texas statutes which made it a crime to "procure an abortion" or to attempt one, except for "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." *Id.* at 117-18 n. 1, 93 S.Ct. at 709 n. 1. After reviewing a line of decisions in which the Court had recognized a right of privacy, which is not explicitly mentioned in the Constitution but whose roots had, at various times, been found in the First Amendment, the Fourth, Fifth or Ninth Amendments, in the penumbras of the Bill of Rights, or in the concept of liberty guaranteed by the Fourteenth Amendment, the Court pointed out that this right of personal privacy has some extension to activities relating to marriage, procreation, contraception, family relationships and to child rearing and education. The Supreme Court set out its holding in these words:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State [of Texas] would impose upon the pregnant woman by denying this choice altogether is apparent.

Roe v. Wade, 410 U.S. at 153, 93 S.Ct. at 727.

After rejecting the argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses," *id.*, the Court went on to recognize that the State, too, has valid interests which are strong enough to support some regulation in areas protected by the right of privacy:

Cite as 542 N.W.2d 17 (Minn. 1995)

[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. * * * The privacy right involved, therefore, cannot be said to be absolute. * * *

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

Id. at 154, 93 S.Ct. at 727.

The right of privacy which the Supreme Court recognized in *Roe v. Wade* was a woman's right to address the question whether or not to terminate her pregnancy unfettered by state law criminalizing abortion and to free her decision from the possible burden of complicity in a crime. The decision in *Roe* goes no further. Moreover, the right of privacy of which the Supreme Court speaks in *Roe* is not absolute; the abortion decision, like any other constitutionally protected choice, must be balanced against state interests, which the Supreme Court regarded as important enough to justify some regulation. Although the right of personal privacy is broad enough to include the abortion decision, that right is "subject to some limitations" and "at some point the state interests as to protection of health, medical standards, and pre-natal life, become dominant." *Id.* at 155, 93 S.Ct. at 728.

Misapprehending the *Roe* analysis and its context, the majority suggests that it is the identical right which is at issue here and compels the decision reached by the majority. It is not, however, the same right. At least, it seems to me, despite the majority's insistence that there is a single right at issue here, that there is a very significant difference between a right to decide to terminate a pregnancy by abortion without fear of criminal complicity and a right to compel the state to pay for the abortion.

A careful review of *Roe* reveals not only that a pregnant woman's right of privacy is not absolute but also that the Court adopted a posture of neutrality about the morality or immorality of abortion which is the essential point of the decision in *Roe*:

Texas urges that * * * life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159, 93 S.Ct. at 730.

By declining to decide when life begins, the Court acknowledged that the respect to which an unborn life is entitled is a controversial issue which the Constitution reposes in the conscience of each pregnant woman with respect to the unborn or potential life she is carrying.

If, as the Supreme Court held, the right to choose to terminate a pregnancy by abortion arises out of a right of privacy, the government must keep its nose out of the woman's privacy and keep its hands off. But while the government must not interfere with the rights of the woman who chooses abortion, the posture of neutrality adopted in *Roe* requires the government to recognize also that opposition to abortion is based on a conscientious conviction which is deserving of equal respect.

In the present case the majority promptly abandons all vestige of neutrality. First, the majority frankly extols abortion as a positive good and the cure for all the ills from which a pregnant woman could possibly suffer. Cloaking its discourse in the garb of medical necessity and pregnancy by rape and incest, the majority concludes that the right to decide without fear of criminal complicity to have an abortion is the right to require the state to provide abortion at taxpayer expense.

Treating these two discrete "rights" as one, the majority disclaims any necessity to address the plaintiffs' equal protection arguments. Having side-stepped the issue, the majority scoffs at any discussion of the equal protection arguments, but because I do not believe that the right of privacy confers on a

pregnant woman the right to demand that the state pay for whatever option she chooses, it is necessary to address those arguments in this dissent.

Initially, the plaintiffs attack the statute on the ground that any distinction between an abortion necessary to prevent the death of the mother or the abortion of a pregnancy resulting from reported rape or incest (all of which are funded by Medicaid) and an abortion chosen for any other reason (which is not state funded) is arbitrary and irrational. Suffice it to say that the policy expressed at Minn.Stat. § 256B.01 (1994)—

Medical assistance for needy persons whose resources are not adequate to meet the cost of such care is hereby declared to be a matter of state concern. To provide such care, a statewide program of medical assistance, with free choice of vendor, is hereby established.

—does not mean that the state must as a matter of constitutional right fund whatever medical procedures which a needy person might elect to undergo or even all medical procedures designed to benefit the mental or physical health of all needy persons.¹ If such a constitutional right existed, the existing statutory exclusions of certain licensed chemical dependency programs, of most care provided in institutions for mental diseases, of certain organ transplants, or of cosmetic surgery or most fixed dental bridgework would be vulnerable to the same constitutional challenge. Furthermore, except for those persons fortunate enough to be insured pursuant to a policy of medical insurance which affords coverage for organ transplants, most Minnesotans in need of an organ transplant would be “needy persons whose resources are not adequate to meet the cost of such care.” That the need for an organ transplant is almost always a matter of life or death goes without saying.

Next, the plaintiffs challenge the statutory provisions on the ground that they discriminate against women on the basis of gender by funding most—though not all—medically

necessary reproductive and other health care for men while denying funding for some abortions. Apart from the fact that any procreative choice with respect to medical intervention affecting the male reproductive system must be made prior to engaging in intercourse—a choice equally available to women—the physiological differences between men and women would seem ample justification for statutory differentiation. See *State v. Witt*, 310 Minn. 211, 219, 245 N.W.2d 612, 618 (1976).

Finally, the plaintiffs attack the notification requirements with respect to claims that the pregnancy resulted from either rape or incest. When, however, a government is prepared to fund an abortion with respect to a pregnancy resulting from rape or incest, it is surely entitled to take steps designed to establish that the claimant is a victim of rape or incest and to reduce fabrication of the claim. Certainly, a claim of rape reasonably promptly made is more likely to be true than a claim first voiced after the decision to abort has been made. That such claims are sometimes fabricated has recently been confirmed by media reports that Ms. Roe of *Roe v. Wade* fame has confessed that her allegations that her pregnancy was the result of gang rape were false.

The statute only requires that incest be reported prior to the performance of the abortion. Although the reporting requirement seems more likely intended to establish eligibility for funding, it seems possible that it is also intended to enable the state to extract reimbursement for pregnancy-related expenses from a financially responsible father. That the woman is indigent does not necessarily mean that the relative who fathered the child is also indigent.

The plaintiffs also declare that there is no rational basis for distinguishing between forcible rape and statutory rape or between incest by blood relatives and “incest by steprelatives.” There are, it seems to me, obvious distinctions among these types of conduct, which may have influenced the de-

1. It is interesting to note that Medicaid affords needy persons a “free choice of vendor,” an option that is denied many persons whose medical insurance is purchased by their employer as

partial compensation for the employees’ labor or is purchased directly by the insured. See Minn. Stat. § 256B.01 (1994).

cision to withhold the funding of abortions in cases of pregnancies resulting from what is often called statutory rape or from what the plaintiffs call "incest by steprelatives." Society no doubt has good reason to consider sexual intercourse between steprelatives unacceptable, but it is not because the conduct is incestuous. Since ancient times sexual intercourse between persons within a specified degree of kinship—that is, persons descended from a common ancestor and, therefore, closely related by blood—has been forbidden, and it is that conduct which is today defined as incest. *See* Minn.Stat. § 609.365 (1994). Stepparents are, however, not related by blood to their stepchildren. Neither are stepsiblings related by blood. Hence, sexual intercourse between steprelatives is not incestuous although it may generally be abusive and often amount to rape.

Because the reporting requirement with respect to incest seems to be nothing more than a suitable method of providing evidence of eligibility for an MA funded abortion, there can be no serious question that it passes constitutional muster no matter how it is scrutinized.

The reporting requirement and definition of rape for purposes of establishing eligibility for MA funding pursuant to Minn.Stat. § 256B.0625 pose a rather different question. Despite my opinion that there is a rational basis for the statutory limitations on funding for abortion in cases of pregnancy resulting from rape and my reluctance to second-guess the legislature's judgment, I am uneasy about the limitation of state funding with respect to some pregnancies resulting from conduct proscribed as criminal sexual conduct by Minn.Stat. ch. 609 and by a reporting requirement unrelated to the criminality of the conduct.

The majority, as well as the plaintiffs, conveniently ignore the fact that when the Minnesota Legislature enacted the provisions which declare that medical assistance covers abortion services if one of three conditions is met, the statute was obviously intended to track the Hyde Amendment as it was then in effect. It seems to me apparent that the Minnesota statute was intended to make available to the state whatever funds Con-

gress reserved for Medicaid. Nevertheless, in view of the United States Supreme Court's recent rejection of Colorado's appeal from a decision of the United States Court of Appeals for the Tenth Circuit holding that participation in the federal Medicaid program required Colorado to pay for abortions sought by financially eligible women whose pregnancy resulted from rape or incest, *Hern v. Beye*, 57 F.3d 906 (10th Cir.1995), *cert. denied*, *Weil v. Hern*, — U.S. —, 116 S.Ct. 569, 133 L.Ed.2d 494 (1995), the legislature may well consider it appropriate to assure Minnesota's continued eligibility for federal Medicaid funds by conforming Minn.Stat. § 256.0625, subd. 16 (1994), to the terms of the 1994 Hyde Amendment contained in Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub.L. No. 103-112, 107 Stat. 1082 (1993).

Declaring the statutory limitations on abortion funding to be arbitrary and irrational, the plaintiffs urge this court to arrogate unto itself the political function accorded the legislature by Articles III and IV of the Minnesota Constitution. Acceding to the plaintiffs demands, the majority spurns this court's own advice to the legislature that this important political issue—the funding of abortions—should "be decided by the legislature where everyone can have his say." *McKee v. Likins*, 261 N.W.2d 566, 578 (Minn. 1977). Similarly, on at least three occasions the United States Supreme Court has stated in this same context that it is not for the Supreme Court or any other to strike down statutes "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Harris v. McRae*, 448 U.S. 297, 326, 100 S.Ct. 2671, 2693, 65 L.Ed.2d 784 (1980); *Maher v. Roe*, 432 U.S. 464, 479, 97 S.Ct. 2376, 2385, 53 L.Ed.2d 484 (1977) (both quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955)).

[Rather], when an issue involves policy choices so sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.

Maher, 432 U.S. at 479, 97 S.Ct. at 2385. See also *Harris v. McRae*, 448 U.S. at 326, 100 S.Ct. at 2693, and *Beal v. Doe*, 432 U.S. 438, 447-48 n. 15, 97 S.Ct. 2366, 2372 n. 15, 53 L.Ed.2d 464 (1977).

At bottom the majority's quarrel is with a political reality: selective funding. Although the magnitude of the national debt may be thought to suggest otherwise, the government cannot fund everything—a proposition with which I presume every member of this court as well as every citizen of this state would agree. Government must be selective. When, however, selective funding has some influence on the exercise of constitutional rights, flamboyant oratory sometimes influences the politics of legislative selection with respect to spending decisions. But until today constitutional rights have been regarded as limitations on government's power to interfere with private rights, not entitlements to governmental financial aid.² For example, the freedom to engage in interstate travel and to choose in what state one wishes to reside is recognized as a fundamental constitutional right, but even when a homeless Minnesotan whose frostbitten fingers and toes, ears and nose prompt a desire to travel to a warmer clime, to date it has not been suggested that the availability of Minnesota's general assistance while the State declines to fund the purchase of a bus, train, or airplane ticket or to fill the gasoline tank of the frozen indigent's automobile has impermissibly "coerced" the choice to remain in Minnesota. The right of free speech does not compel the government to purchase a newspaper or publishing house for any citizen who wishes to be a publisher. Nor does a funding obligation arise out of the fact that the government itself creates and disseminates certain publications, thereby making private publication of like material economically unsound. At least until today, the publication of printed material by the government has not been considered an impediment to free speech.

The majority asserts that the plaintiffs do not claim that the state must fund all choices

2. Only in the context of criminal prosecutions has there been recognition of entitlement to government aid—access to lawyers and other resources needed for defense—or when the government is already in charge of the person requiring

but only make an equal protection argument—"that the state may not fund child-birth-related health services without funding abortion-related health services because this interferes with a woman's decision-making process." The majority goes on to state the "relevant inquiry" in these words:

[W]hether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons solely because they make constitutionally protected health care decisions with which the state disagrees.

Ante, at 28. Although I can think of several less intemperate ways of stating the issue, I shall content myself with responding, "Yes, for the reasons set out below, it is constitutionally permissible for the state to fund one alternative and not the other."

The closest analogue to the right of privacy with respect to reproduction and the issue concerning government funding of abortions is, I believe, found in the right to the free exercise of religion expressed in both the United States Constitution and the Minnesota Constitution and the issue concerning government funding of religiously affiliated schools. The constitutional issue is the same, it seems to me, in both cases: when does the government's refusal to fund a constitutionally protected choice impermissibly "burden" the exercise of that right? The majority rather cavalierly disposes of the analogy in a footnote, distinguishing the constitutional right of freedom of conscience from the constitutional right of privacy by reference to the utter absence of any constitutional provision either mandating or prohibiting the funding of medical costs. That melding of two discrete rights demonstrates once again the majority's failure to distinguish between the right of privacy at issue in *Roe* and the right to compel the state to pay for an abortion. The right of privacy recognized in *Roe v. Wade*, *supra*, that is, the qualified right of a woman to decide whether or not to termi-

assistance. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

nate her pregnancy, is not at issue here. That question has been decided by the United States Supreme Court, and we are all bound by that decision. The issue is whether the right to decide whether to terminate a pregnancy includes the right to compel the government to pay for the abortion—the medical procedure necessary to carry out that decision. I see precious little difference from a constitutional perspective between that issue and the question whether the right to decide, as a matter of conscience, to send one's children to a private, religiously affiliated school carries with it the right to demand governmental support of the parochial school. In both cases the *right* of the individual to *decide* is protected by the Constitution, and in both cases the government funds one alternative but not the other. By the Hyde Amendment to the Medicaid Act Congress has prohibited the expenditure of federal monies for most abortions. A series of decisions of the United States Supreme Court—most notably *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)—prohibit the use of federal funds for schools which have a religious affiliation.

As support for its position that a constitutionally protected choice overrides all other constitutional rights, the majority relies on Justice Brennan's remark in his dissent in *Harris v. McRae*, "that [the Court has] heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice." 448 U.S. at 334, 100 S.Ct. at 2704 (Brennan, J., dissenting). Justice Brennan seems to have forgotten, however, his own eloquent concurrence 8 years earlier in the decision in *Lemon*, 403 U.S. at 642, 91 S.Ct. at 2126, prohibiting the expenditure of government funds for private schools affiliated with a religion.³

3. Justice Brennan is, of course, not alone in his inconsistent positions with respect to these two issues. It appears to me that within the last 25 years only Justice Powell has consistently upheld funding restrictions with respect to both private religiously affiliated schools and abortion. Compare, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973); *Aguilar v. Felton*, 473 U.S. 402, 105

The penultimate paragraph of the *Lemon* opinion concludes with these words:

The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

403 U.S. at 625, 91 S.Ct. at 2117.

Despite its recognition of the enormous contribution of church-related elementary and secondary schools and its acknowledgment that taxpayers "have been spared vast sums" by the maintenance of privately supported church-related schools, the Court drew the line in favor of the establishment clause. *Id.* But in neither *Lemon* nor the later decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788, 93 S.Ct. 2955, 2973, 37 L.Ed.2d 948 (1973), where the tension between the establishment clause and the freedom of choice clause of the United States Constitution is expressly recognized, did the Court make any attempt to explain why the establishment clause was accorded precedence. Most earlier cases had treated the free exercise principle as dominant. E.g., *Sherbert v. Verner*, 374 U.S. 398, 409, 83 S.Ct. 1790, 1797, 10 L.Ed.2d 965 (1963).

The right to freely exercise one's religion by choosing to send one's children to a privately funded school that has a religious affiliation was judicially recognized 70 years ago in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). In *Pierce* the Court invalidated an Oregon criminal law requiring a parent or guardian of a child to send the child to a public school. The Court thought it "entirely plain" that this direct prohibition against sending the child to a private school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children un-

S.Ct. 3232, 87 L.Ed.2d 290 (1985); and *Grand Rapids School District v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), with *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977); and *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

der their control." *Id.* at 534-35, 45 S.Ct. at 573.

Subsequent to the decision in *Lemon*, in *Norwood v. Harrison*, 413 U.S. 455, 462, 93 S.Ct. 2804, 2809, 37 L.Ed.2d 723 (1973), the Court expressly rejected the argument that *Pierce* stands for the proposition that private or parochial schools have a right "to share with public schools in state largesse."

It is one thing, [the Court remarked], to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

Id.

To put it another way, a state may not deprive a parent or guardian of the right to choose, in the free exercise of religion, to send his or her child or ward to a religious school by compelling the child's attendance at a public school, but the state may, nevertheless, fund the public schools and at the same time deny any funding of religious schools without violating the equal protection clause of the United States Constitution.

Dismissing the religious school analogy by asserting that there can be no analogy because the Minnesota Constitution expressly mandates funding public education and prohibits funding any school affiliated with a religion while the Constitution says nothing at all about either a right of privacy or the funding of medical costs, the majority totally ignores both constitutional history and the constitutional issue—the free exercise of religion—by the simple expedient of sweeping the express constitutional right to freedom of conscience and the express constitutional prohibition against interference with the rights of conscience under the rug of a footnote. *Ante*, at 28 n.11. But that issue is present in the religious school context in the same way that the right of privacy is present in the abortion context. If an impoverished parent is prevented from sending her children to a school affiliated with a religion by

the absence of government funding for that school, there can be no doubt that her rights of conscience have been interfered with in the same way and to the same extent as the privacy right of the impoverished woman who cannot afford an abortion. It may be true that the parent is free to follow the dictates of her conscience in other respects, but although the majority speaks as if abortion were the only procreative choice available to a woman, that is quite obviously not the case. The right of privacy with respect to procreation is considerably broader, and although the choices are clearly narrowed once the woman is pregnant, before she became pregnant there were a number of funded choices available under MA, including contraceptives and education with respect to family planning.

The United States Supreme Court has, of course, decided in both the religious school context and the abortion context that freedom of choice must yield to the government's right to fund one alternative and not the other. Consequently, the plaintiffs assert their claim under the Minnesota Constitution, contending that the statutes create an unconstitutional classification based on wealth by "coercing low-income women to choose childbirth" while "allowing women with financial resources the opportunity to make reproductive choices free of government interference." As we recently observed in *Skeen v. State*, 505 N.W.2d 299, 314 (Minn.1993),⁴ "the Minnesota Constitution does not require strict economic equality under the equal protection clause." Whether posed under the United States Constitution or that of Minnesota, the claim must, I believe, fail.

Article I, Section 16 of the Minnesota Constitution provides for freedom of conscience:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to main-

mental right' to any particular funding scheme," *id.* at 315, in *Skeen* the court applied the rational basis test to determine the constitutionality of legislation affecting the fundamental right to a publicly funded education.

4. Inasmuch as the majority twice cites *Skeen v. State*, 505 N.W.2d 299 (Minn.1993), as authority for subjecting the challenged statutes to "strict scrutiny," it is rather interesting to note that because "it cannot be said that there is a 'funda-

tain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted * * *.

The language of the Minnesota Constitution differs sufficiently from that of the First Amendment of the United States Constitution that this court has held that it affords broader protection with respect to freedom of exercise of religion than does the United States Constitution. *State v. Hershberger*, 462 N.W.2d 393 (Minn.1990). That this court has never had occasion to decide whether this broader protection of the right of conscience requires an answer different from that in *Lemon* and its progeny with respect to the funding of schools with a religious affiliation is hardly surprising in view of the presence of Article XIII, Section 2 of the Minnesota Constitution:

In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.

Inasmuch as this Minnesota constitutional provision comports with the decision in *Lemon, supra*, there can be no question that it does not offend the equal protection clause of the United States Constitution. Furthermore, and more particularly with respect to the plaintiffs' claim here, the constitutional mandate that the state must establish and fund public schools but that it must not provide *any* state funds for the support of religiously affiliated schools makes it abundantly clear that selective government funding of one alternative and not of the other does *not*, pursuant to the Minnesota Constitution, impermissibly interfere with freedom of choice with respect to the two alternatives, only one of which is paid for by the government.

That the drafters of the Minnesota Constitution were cognizant of the necessity for selective funding is apparent when the Minnesota Constitution is placed in historical context. By the middle of the 19th century the basic principles of American education had been formulated and to some extent established. Opposition to free public education came from people of property who

objected to their being taxed to support schools to which they would not consider sending their own children. Court decisions adverse to the right of local authorities to impose taxes almost wrecked one state's system in the 1850s. At least one state used its educational fund to subsidize private schools. Most of the impetus for secondary schools came from various religious denominations, and during the 1850s there was spirited public discourse regarding the public funding of education and the perceived evils of the application of public funds for the maintenance of schools affiliated with a religion. Quite obviously the drafters saw no conflict between the prohibition against interference with the rights of conscience and the public funding of public education but not of education in a religiously affiliated school. The inclusion of both Section 1 and Section 2 of Article XIII resolved the difference of opinion, and the freedom to establish with private funds a school affiliated with a religion of one's choice was adequate vindication of freedom of conscience.

Although the freedom of conscience explicitly assured by Article I, Section 16 has resided in the Minnesota Constitution since 1857 without significant change, the right of privacy is not expressly provided anywhere in either the Minnesota Constitution or the United States Constitution. Just as it took almost 200 years for recognition of a right of privacy under the United States Constitution, more than 100 years went by before a right of privacy was found under the state constitution, and then its source was not identified with any specificity; it has only been said to repose somewhere in Article I, Sections 1, 2, 7, and 10. That the rather recently recognized right of privacy is implicit rather than explicit does not, I think, reduce its importance. That the right of privacy is implicit does not relieve it of the necessity to meet the same objective standard with respect to selective funding as those rights which have been expressly assured since 1857. It appears that the drafters of the Minnesota Constitution recognized that if there was to be a constitutional right to an education funded by the public, it was necessary to expressly impose the duty to estab-

lish a system of public schools and authorize its funding by taxation. Having authorized the public funding of an educational system, the legislature could have left it for the courts to determine whether public support of religious schools collided with another constitutional right, such as freedom of religion. But at least one state then supported religious schools, and the decision of the United States Supreme Court in *Lemon* was about a century in the future. Therefore, the careful Minnesota lawyer-drafters thought it necessary to expressly preclude the use of public funds to support religious schools. Since the right of privacy is conspicuously absent from the language of the Minnesota Constitution, there was no reason to provide or prohibit public funding, but the absence of any provision cannot be converted into a constitutional mandate for public funding.

Parents who send their children to a school with a religious affiliation do so as a matter of conscience, knowing full well that they must not only pay as tuition a proportionate part of the cost of operating the religious school but that they must also bear the tax burden of maintaining the public school system which their children do not attend. Accordingly, the parent who exercises the freedom of conscience to choose to send his or her children to a religious school must pay twice, and in that sense is penalized for following his or her conscience. The pregnant woman who chooses abortion, even though she may be required to seek funds elsewhere than from the government, receives through MA all the same prenatal care, including any testing preparatory to the abortion, that is available to a woman who gives birth to her child. Once the abortion is performed, any woman otherwise eligible for MA will receive government funded medical care for complications resulting from the abortion. There can be, I think, no justification for holding that the implicit right of privacy is entitled "strict scrutiny" protection with respect to charges of either unequal protection or "interference" while denying such protection for the explicit right of freedom of conscience. They must be accorded at least equal rank.

The majority relies on a quoted portion of Justice Brennan's dissent in *Harris v. McRae*. That argument has been transposed by Professor Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv.L.Rev. 989, 990 (1991), into an argument that it is unconstitutional for the government to refuse to fund religious schools when it funds secular schools:

A poor woman [with school-age children] confronts two alternatives: she may elect either to [send them to secular schools] or to [send them to religious schools]. In the abstract, of course, this choice is hers alone, and the Court rightly observes that [*Lemon*] "places no governmental obstacle in the path of a woman who chooses to [send her children to religious school]." But the reality of the situation is that [*Lemon*] has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with [secular education] and none of the expenses incurred in [religious education], the Government literally makes an offer that the indigent woman cannot afford to refuse. * * * [M]any poverty-stricken women will choose to [send their children to secular schools] simply because the Government provides funds for [this], even though these same women would have chosen [religious schools] if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither * * *.

Id. (citing *Harris v. McRae*, 448 U.S. at 333-34, 100 S.Ct. at 2704 (Brennan, J., dissenting)). Justice Brennan would not, I am sure, agree that the government's refusal to fund the religious school unconstitutionally impacts the poor mother's exercise of freedom of religion, but he has never explained why.

Having found the dissenting position in *Harris v. McRae* so persuasive, the majority concludes that the Minnesota statutory provisions for funding childbirth while funding only some abortions infringe upon a woman's right to decide whether to procure an abortion. Because the plaintiffs' pro-choice equal protection argument is surely destined for

failure in the face of the United States Supreme Court's decision in *Harris v. McRae*, *supra*, and in the face of Article I, Section 16 and Article XIII, Section 2 of the Minnesota Constitution, the majority casts its argument as one of coercion: funding childbirth but only some and not all abortions "coerces" a choice in violation of an absolute right to abortion at government expense. It is mere sophistry to declare as does the majority that the decision to fund childbirth but not abortion is violative of a woman's right of privacy (because it "coerces" a choice) is not grounded on equal protection principles. Whether stated or unstated, the rationale depends on the proposition that funding childbirth but not abortion constitutes an arbitrary classification.

It seems to me that in characterizing the statutory limitations on abortion funding as "coercing" choice, the majority has adopted a position which is not only at odds with Minnesota constitutional law but driven more by enthusiasm for the underlying right of privacy recognized in *Roe v. Wade*, *supra*, than by a principled understanding of the actual holding of *Roe* and of the relationship between a constitutional right and government funding.⁵

I am not without sympathy for a woman who is pregnant with an unwanted child, and I deplore the inclusion in both the opinion and the dissents in *Harris v. McRae* of value judgments about abortion which are both unnecessary to the arguments and undesirable because they seem to me to depart from the privacy rationale of *Roe*. I also disapprove of the policy statement found at Minn. Stat. § 256B.011 (1994). In order to be eligible for federal funds pursuant to 42 U.S.C. § 1396 (1988 & Supp. IV 1992) each state must have in force a plan for medical assistance approved by the Secretary. Among the myriad mandated provisions of the state plan is the requirement that the plan provide medical assistance to pregnant women qualified pursuant to 42 U.S.C. § 1396d(n) (1988

& Supp. IV 1992). Such medical assistance must include prenatal care and delivery services. Subchapter XIX of Article 42 of the United States Code makes no mention of abortion-related services except, of course, for the often cited Hyde Amendment, which prohibits the use of federal funds for any abortion unless such a procedure is necessary to save the life of the mother or the pregnancy is the result of an act of rape or incest. Inasmuch as Minnesota is required to provide prenatal care and delivery services to pregnant women, there would seem to be no reason for prefacing the state plan with a policy statement which is likely to offend many citizens. Moreover, because the government must often fund the care of an unhealthy or birth-injured child and because it has long been understood that prenatal care and proper medical supervision of childbirth are essential to the health and well-being of a newborn child, there are many reasons for the government to provide funding for such services without any necessity to distinguish between childbirth and abortion. It cannot be denied that the position taken by most people with respect to the termination of a pregnancy by abortion is a matter of conscientious conviction. No matter how wrong-headed one regards the position of the opposition, both positions are deserving of respect.

Nonetheless, as Professor McConnell puts it,

When a matter has been constitutionally declared "private" precisely because of intractable public dissension, there is all the more reason to refrain from public subvention. Taxation is coercion, and to require taxpayers to support religions they do not accept is understood to violate their religious conscience. In the words of the Virginia Act for Establishing Religious Freedom, passed in 1785, "to compel a man to furnish contributions of money for

5. The extent of this enthusiasm is reflected in the majority's comparison of the issue raised in *Jarvis v. Levine*, 418 N.W.2d 139, 148 (Minn.1988), with the issue raised here. The statement in *Jarvis* about "the integrity of one's own body" and "the right not to have it altered or invaded

without consent" referred to Jarvis' involuntary treatment by the forcible administration of major tranquilizers and neuroleptic medications, a situation which has no relationship to the question whether government must fund the right of privacy.

the propagation of opinions which he disbelieves, is sinful and tyrannical.”

McConnell, *supra*, at 1008.

Even if it is no more “sinful and tyrannical” to tax those who consider abortion to be immoral than it is to tax those who consider war immoral, at the very least, respect for the consciences of those who believe abortion is immoral should count as a legitimate basis for Congress and state legislatures to decide not to devote coerced tax dollars to that use. If, as I believe, the decision whether or not the government should fund abortion is properly a matter for decision by the legislature, the legislature has exercised its authority in what appears to me to be a rational manner. Even though the members of the court may disagree with some or all of the legislature’s political decisions with respect to funding abortions, this court should not arrogate unto itself the legislative function. The repeated references in the majority opinion to health care services and therapeutic abortions suggest an expectation that only abortions necessitated by significant health considerations will be state-funded, an implication articulated in the statement of the holding:

[W]e [*i.e.*, the majority] hold that the State cannot refuse to provide abortions to MA/GAMC eligible women when the procedure is necessary for therapeutic reasons.

Ante, at 32. For two reasons, however, I consider any such expectation doomed to failure. First, there is the practical problem posed by the court’s inability to set any standard for determining when an abortion is “necessary for therapeutic reasons.” If a woman has decided that she does not want the child and that she does not want to carry it to term, it seems to me more than likely that she will find a physician who will agree that the stress of continuing an unwanted pregnancy justifies an abortion.

It is possible, of course, that the legislature could alleviate that problem by adopting some standards, but the legislature can do nothing except propose a constitutional amendment to address the second reason, for the court has created an impediment to any

limitation on state-funded abortions. The majority has based its decision on a constitutional right which it has defined as a “right of privacy under the Minnesota Constitution [which] encompasses a woman’s right to decide to terminate her pregnancy.” *Ante*, at 27. The majority then affirms an injunction precluding enforcement of statutes and rules⁶ on the ground that the statutory provisions which provide for funding childbirth but deny funding for abortion “coerce” a decision in violation of a woman’s constitutional right to decide to terminate her pregnancy. Having determined that state-funding of medical services, including delivery of the child, to pregnant women and of some, but not all, abortions “coerces” a pregnant woman’s decision whether to give birth or terminate her pregnancy and infringes her constitutional right to decide to terminate her pregnancy, as a matter of constitutional law the court is in no better position than the legislature to deny state-funding because the court does not approve of the reason for the decision to terminate the pregnancy. That the limitations the court imposes are less restrictive than those set by the legislature does not alter the fact that if financial considerations can be said to “coerce” a decision in violation of a constitutional right to decide, *any* restriction of state-funding is “coercive” and, therefore, violative of the fundamental right of privacy.

I would reverse the decision of the district court and direct the entry of judgment in favor of the Commissioner of Human Services.



6. The injunction enjoins enforcement of Minnesota Statutes sections 256B.0625, subdivision 16, 256B.40, 393.07, subdivision 11, 261.28, and

Minnesota Rules 99505.022(q) and 9505.0235, subpart 2.



Cited

As of: July 2, 2024 8:59 PM Z

Jeannette R. v. Ellery

First Judicial District Court of Montana, Lewis and Clark County

May 22, 1995, Decided

Cause No. BDV-94-811

Reporter

1995 Mont. Dist. LEXIS 795 *

JEANNETTE R., on behalf of herself and all others similarly situated: SUSAN WICKLUND, M.D., JAMES H. ARMSTRONG, M.D., on behalf of themselves and their Medicaid-eligible patients, Plaintiffs, - v - NANCY ELLERY, as Administrator of Medicaid Services Division of the Montana Department of Social and Rehabilitation Services, in her individual and official capacities; PETER BLOUKE, as Director of the Montana Department of Social and Rehabilitation Services, in his individual and official capacities, and their successors, Defendants.

Core Terms

abortion, funding, Medicaid, right to privacy, regulation, pregnancy, medically necessary, woman, medical services, summary judgment, Hyde Amendment, eligible, violates, constitutionally protected, childbirth, incest, rape, physician's services, fundamental rights, abortion services, state interest, infringes, benefits, indigent, genuine issue of material fact, equal protection, women's rights, provisions, privacy, courts

Judges: [*1] Honorable Judge Sherlock, DISTRICT COURT JUDGE.

Opinion by: Honorable Judge Sherlock

Opinion

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross-motions for summary judgment. The motions consider the validity of ARM 46.12.2002 (1)(e). That section provides as follows:

- (1)(e) Physician services for abortion procedures must meet the following requirements in order to receive medicaid payment:
 - (i) The physician has found, and certified in writing,

that on the basis of his/her professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient and must be on or attached to the medicaid claim; or (ii) The pregnancy is the result of an act of rape or incest and the certifications required by subsection (f) are attached to the claim form.

(f) Medicaid will reimburse for abortions in cases of pregnancy resulting from an act of rape or incest only if:

- (i) the recipient certifies in writing that the pregnancy resulted from an act of rape or incest; and
- (ii) the physician certifies in writing either that;

(A) the recipient has stated to the physician that she [*2] reported the rape or incest to a law enforcement or protective services agency having jurisdiction over the matter, or if the recipient is a child enrolled in a school, to a school counselor; or (B) in the physician's professional opinion, the recipient was and is unable for physical or psychological reasons to report the act of rape or incest.

Before proceeding further, it would be helpful to define what this case is and is not about.

At the outset, to dispel certain misconceptions that have appeared in this case, we must clarify the precise, narrow legal issue before this court.

First, this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical consideration involved in a woman's individual decision whether or not to bear a child. Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar

constitutional issues would arise if the Legislature-- as a population control measure, for example-- funded Medical abortions but refused to provide [*3] comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.

Second, contrary to the suggestion of the defendants and the dissent, the question presented is not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so; plaintiffs do not contend that the state would be required fund to fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child. Rather, we face the much narrower question of whether the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support.

Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 780-781 (1981). (Emphasis [*4] added) (Hereinafter "funding ban.")

Stated differently, the issue in this case is if the state of Montana provides necessary medical services to indigent women who carry their pregnancies to /// term, may it deny it necessary medical services for a low income woman to exercise her right to an abortion?

Further, this case has nothing to do with indigent women who may seek an elective abortion. Rather, it deals with the state's right to restrict funding to necessary medical services for indigent women. Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.

FACTUAL AND PROCEDURAL BACKGROUND

The state of Montana participates in a joint federal- state medical care program called Medicaid, which provides certain medical services to low income people. Under

Title XIX of the Social Security Act, *42 U.S.C. Section 1396, et seq.*, the federal government will pay a certain percentage of the cost of medical services provided by states that choose to participate in the Medicaid program. Although a state's participation in the program [*5] is optional, once a state chooses to participate, it must comply with the requirements of Title XIX. Montana's Medicaid program is administered by the Department of Social and Rehabilitation Services (the Department).

Since 1976, Congress has limited the extent to which Title XIX federal funds will reimburse the cost of abortions under Medicaid through what is commonly known as the Hyde Amendment. The current Hyde Amendment allows funding for abortions only in situations where the life of the mother is at risk or where the pregnancy is the result of rape or incest. A state that participates in the Medicaid program is not required to pay for abortions for which federal reimbursement is unavailable under the Hyde Amendment.

Plaintiffs filed a complaint in this Court on May 26, 1994, requesting declaratory and injunctive relief. Plaintiffs alleged that ARM 46.12.2002 (1)(e), Montana's administrative regulation regarding payment for abortion procedures under Medicaid, violates state and federal law and the Montana Constitution. At the time the complaint was filed, Montana's administrative regulation provided payment only for abortions where the mother's life was at risk.

This Court [*6] held a hearing on Plaintiffs' request for a preliminary injunction on May 31, 1994. Plaintiffs Susan Wicklund and James Armstrong testified and both parties presented oral arguments. On June 1, 1994, the Court issued an order stating that the regulation was inconsistent with the federal Hyde Amendment and ordered the Department to begin providing abortion services for victims of rape and incest as well as services in situations where the mother's life is at risk. This Court held that, although states generally do not need to provide services beyond that which is required by Title XIX, a state cannot be more restrictive in funding than Title XIX and the Hyde Amendment. Thus, the Court determined that the Montana regulation was in violation of both state and federal law and could not be enforced as written.

Since the Court's order of June 1, 1994, the Department has instituted rulemaking proceedings to amend this regulation to conform to the Hyde Amendment.

In the June 1, 1994, preliminary order, this Court left

unanswered the question of whether state law and the Montana Constitution require the state to fund all medically necessary abortions, rather than just those provided for [*7] in the Hyde Amendment. Both Plaintiffs and Defendants have moved for summary judgment on this further issue and that is the matter currently before the Court. The motions have been briefed by both parties and Plaintiffs also rely on the testimony from the preliminary injunction hearing and various affidavits.

Montana's Medicaid statute states that the program is "established for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." *Section 53-6-101 (1), MCA*. Thus, not only must a patient be financially eligible for the program, but the desired services must be determined to be "medically necessary."

The statute provides that the program shall include certain services, for example, inpatient and outpatient hospital services, physicians' services, physician assistants' services, and federally qualified health center services. *Section 53-6-101 (2), MCA*. The statute also includes certain optional services which the "program may, as provided by department rule, also include" *Section 53-6-101 (3), MCA*.

ARM 46.12.2002 (e) states that [*8] "[p]hysician services for abortion procedures must meet the following requirements" (emphasis added) Thus, by regulation, the Department has included abortion services within those types of services that the statute mandates be provided.

Plaintiffs base their contention that the state must provide Medicaid services for all medically necessary abortions on several theories. First, Plaintiffs argue that because *Section 53-6-101(2)(e), MCA*, mandates payment for physician's services and the Department's regulation states that abortion procedures are included as physician services, then the Department is violating the statute by not providing for all medically necessary abortions.

Second, Plaintiffs assert that the limitation on abortion services violates several provisions of the Montana Constitution including the right to privacy, the right to equal protection, and the right to equal protection in the administration of welfare benefits. Plaintiffs argue that the Medicaid limitation on abortion infringes on a woman's private choice of whether to carry a pregnancy to term or to have an abortion, which choice is a fundamental right. Because the [*9] state provides full

coverage and services to women who choose to carry a pregnancy to term, but only provides abortion services in certain limited circumstances, Plaintiffs argue that the state is improperly influencing the constitutionally protected choice of whether or not to carry a pregnancy to term. Also, assert Plaintiffs, by offering a financial incentive to choose pregnancy over abortion, the state is violating the requirement that the government must remain neutral in its administration of welfare benefits.

In support of their position, Plaintiffs have filed a number of affidavits from doctors who provide abortion services and/or counselling, and also affidavits from Plaintiff Jeanette R. and other Medicaid eligible women who need or have needed abortions but could not receive Medicaid assistance to obtain them.

Affidavits provided by Plaintiffs from various doctors reveal that carrying a pregnancy to term can cause many physical and emotional complications such as diabetes, heart disease, hypertension, placenta previa, and abruptio placentae. A pregnancy can also aggravate preexisting physical and psychological conditions. Additionally, the medical costs associated with [*10] prenatal care and childbirth generally exceed the cost of an abortion procedure. The affidavits state that an abortion procedure is one of the safest surgical procedures, safer than carrying a pregnancy to term or even receiving a shot of penicillin, although the risks increase each week after the eighth week of pregnancy.

Because of the low number of abortion providers in Montana, many women must travel 100 miles or more to obtain services. Many women also must delay the procedure while they attempt to gather the necessary money. The cost of an abortion usually increases after a woman has passed the first trimester of a pregnancy and the medical risks also increase. Thus, a woman who must delay while trying to get the money and transportation for an abortion often finds that she must find additional funds because she has entered her second trimester and the procedure costs more. Also, many women who would have chosen abortion end up carrying the pregnancy to full term because they simply cannot obtain the necessary money.

Defendants set forth several arguments as to why the state does not have to fund all medically necessary abortions. First, the Defendants assert that the state [*11] is only required to provide abortion services to the extent that the federal government has agreed to assist with federal funding under the Hyde Amendment.

Second, Defendants argue that the limited funding of

abortion does not violate the Montana constitutional right to privacy because the constitutional protection of a woman's right to choose abortion does not translate into a constitutional obligation for a state to subsidize abortions.

Third, limitations on abortion funding do not violate the equal protection provisions of the Montana Constitution under Article II, Section 4 or Article XII, Section 3 because, according to Defendants, these provisions still allow the legislature some discretion in determining what services to provide and there is a reasonable basis for the state to promote childbirth and the health of an unborn child.

Finally, Defendants argue that the funding limitation does not violate a woman's right to safety and happiness as stated in [Article II, Section 3 of the Montana Constitution](#), because that provision does not guarantee that the state will provide "safety, health and happiness," but rather affords individuals the right to "seek" their own safety [*12] and happiness. There is no substantive right, contend Defendants, that the public treasury will provide for all the necessities of life for a person. Also, Defendants assert that the Medicaid abortion funding provisions do not discriminate against Medicaid eligible women on the basis of sex because this situation does not involve a distinction or preferential treatment for one sex over another. Rather, the distinction is between abortion and childbirth, involving varying benefits to one class of women as opposed to another class of women, based on a voluntary choice made a woman.

Both parties agree that this matter is ripe for summary judgment.

SUMMARY JUDGMENT STANDARD

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M. R. Civ. P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. [Wagner v. Glasgow Livestock Sale Co.](#), 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); [Clarks Fork National Bank v. Papp](#), 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); [*13] [Bonawitz v. Bourke](#), 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. See Rule 56(c), M. R. Civ. P.; [Cate v. Hargrave](#), 209 Mont. 265, 269, 680 P.2d 952, 954 (1984). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. [Kober v. Stewart](#), 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. [Denny Driscoll Boys Home v. State](#), 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." [Reaves v. Reinbold](#), 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as [*14] to the propriety of a motion for summary judgment, it should be denied. [Rogers v. Swingley](#), 206 Mont. 306, 670 P.2d 1386 (1983); [Cheyenne Western Bank v. Young](#), 179 Mont. 492, 587 P.2d 401 (1978); [Kober at 122, 417 P.2d at 479](#).

WHETHER THE ABORTION FUNDING RULE VIOLATES THE ENABLING STATUE

Plaintiffs argue that the abortion funding limitation in the administrative rule is invalid because it is inconsistent with the state Medicaid statute that requires funding of all medically necessary physician services. Plaintiffs contend that the Department has no rulemaking authority to eliminate or restrict medically necessary abortions from the program.

The Montana legislature has stated the purpose of the Montana Medicaid program as that "of providing necessary medical services to eligible persons who have need for medical assistance." *Section 53-6-101 (1), MCA*. The legislature further stated that the program is to be administered by the Department of Social and Rehabilitation Services under Title 53, chapter 6, MCA, and in accordance with Title XIX of the federal Social Security Act. *Section 53-6-101 (1), MCA* [*15] .

The statute authorizing services under the Medicaid program outlines a number of services that shall be included in the program, one of which is physicians' services. *Section 53-6-101(2), MCA*. The statute also outlines optional medical services that the program may provide for by departmental rule. *Section 53-6-101(3), MCA*.

It is clear that the Department considers abortion procedures to be in the category of physicians' services because the abortion funding limitation is included in a rule entitled "PHYSICIAN SERVICES, REQUIREMENTS" and states, in part, that "[p]hysician services for abortion procedures must meet the following requirements" ARM 42.12.2002 . (Emphasis added) Thus, abortion procedures are in the series of medical services that are specifically included in the Medicaid program rather than included through the rulemaking process of the Department.

The enabling statute also states that the Department must determine the amount, scope, and duration of provided services "in accordance with Title XIX" *Section 53-6-101 (7), MCA*. The Department, apparently, has interpreted [*16] this provision to mean that Medicaid services in Montana are to be limited to only those services specifically funded under Title XIX and thus has limited abortion funding to only those instances allowed under the federal Hyde Amendment. The Court disagrees with this interpretation.

The stated purpose of the Medicaid program is to provide all medically necessary services to those people who are eligible and need the services. The statute further states that physicians' services are specifically included in the program. The statute does not give the Department the authority to limit or eliminate those services enumerated under *Section 53-6-101 (2), MCA*, unless there are insufficient funds to provide medical assistance for all eligible people. See *Section 53-6-101 (9), MCA*.

Although the Department is instructed to administer the program "in accordance with Title XIX," this is not authority to limit funding of these required services. Rather, the Court believes that this directive is intended to tell the Department to make sure that the program provides at least those services included in Title XIX and to provide them in the [*17] manner directed by Title XIX. It does not tell the Department to limit those services to only those within Title XIX.

The problem here is that the funding ban operates as a sort of administrative Hyde amendment. The legislature can pass its own Hyde amendment if it wishes. However, it exceeds the power of the Department for it to limit the services provided by the legislature.

The Court concludes that because the public policy behind Montana's Medicaid program is to provide to all eligible persons the ability to receive medically necessary services, which includes physician services

for abortion procedures, the Department has exceeded its rulemaking authority by limiting the reasons for a woman to be allowed to receive an abortion beyond the general standard of "medically necessary."

Usually, if this Court could resolve a matter on statutory grounds, it would not resort to constitutional analysis. However, this Court feels that this issue is of such importance that these constitutional matters must be decided by the courts of the state of Montana at one time and not over a period of time. To do otherwise would only encourage a ping pong effect where this regulation might be changed [*18] by the legislature or by an administrative agency and come back to this Court or some other court for further review. This process could take years and would not be in the public interest.

RIGHT TO PRIVACY

Montana's constitutional right to privacy is stated as follows: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Constitution of the State of Montana, Art II, Section 10.

Throughout this order, the Court will be citing cases from numerous jurisdictions. Many of those cases talk about a right to privacy. However, none of those jurisdictions have such an explicit right to privacy as is contained in Montana's Constitution. Montana's right to privacy has been described by the Montana Supreme Court as the strongest right to privacy in the United States, exceeding even that provided by the federal constitution. See *State v. Burns, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992)*. Montana's clearly articulated right to privacy distinguishes this case from almost any other case cited to this Court by either party.

Further, Montana's courts need not follow rulings [*19] of the United States Supreme Court if our own Constitution provides for more expansive rights than contained in that document. *State v. Sierra, 214 Mont. 472, 476, 692 P.2d 1273, 1276 (1985)*.

The first question that we must answer is whether or not the right to privacy even applies in this case. In *Roe v. Wade, 410 U.S. 113 (1973)*, the United States Supreme Court held that a woman's decision whether or not to terminate a pregnancy by abortion falls within a constitutionally protected zone of privacy. *Id. at 153*.

It certainly cannot be disputed that the right of privacy covers a variety of individual choices and issues.

Certainly it could not be disputed that the decision whether or not to beget or bear a child is an extremely private decision. This involves the most intimate and private of human activities and relationships.

"If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [Committee to Defend Reprod. Rights v. Myers](#), 625 P.2d 779, 792 (Cal. 1981), [*20] quoting [Eisenstadt v. Baird](#), 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972).

This Court concludes that the right to privacy encompasses a woman's choice of whether or not to end her pregnancy. The question still remains, however, whether the challenged restriction infringes that right.

In [Harris v. McRae](#), 448 U.S. 297 (1980), the United States Supreme Court upheld enactments not unlike those challenged here. In that case, the United States Supreme Court held that the government could not place obstacles in the path of a woman's exercise of freedom of choice. However, it need not remove obstacles not of its own creation, such as a woman's indigency. *Id.* at 316. This view has been followed by two state courts. See [Doe v. Department of Social Services](#), 487 N.W.2d 166 (Mich. 1992) and [Fischer v. Department of Public Welfare](#), 502 A.2d 114 (Pa. 1985).

This Court feels that the Montana Constitution affords a greater degree of protection to the right of privacy than does the federal constitution as interpreted by [Harris v. McRae](#). Indeed, the [McRae](#) decision has been criticized by some of America's leading [*21] constitutional scholars. See [Abortion Funding Conundrum](#), Lawrence Tribe, 99 *Harv. L. Rev.* 330, 338 (1985).

Also, the majority of state courts that have reviewed similar issues have generally held that although a state need not subsidize any of the costs associated with child bearing or with health care generally, once a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality. See [Moe v. Secretary of Administration and Finance](#), 417 N.E.2d 387, 402 (Mass. 1981); [Committee to Defend Reproductive Rights v. Myers](#), 625 P.2d 779 (Cal. 1981); [Women's Health Center of West Virginia v. Panepinto](#), 446 S.E.2d 658 (W. Va. 1993); [Planned Parenthood Association v. Department of Human Resources](#) 663 P.2d 1247 (Or. App. 1983); [Right to](#)

[Choose v. Byrne](#) 450 A.2d 925 (N.J. 1982); and [Doe v. Maher](#), 515 A.2d 134 (Conn. Super. Ct. 1986).

Although many times the articulated purpose of a regulation such as the one we are facing here is that of encouraging normal child birth, most courts have realized that [*22] regulations such as this, although they do encourage normal child birth, also have the purpose of discouraging abortion. This Court refers to the Massachusetts court:

As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks." L. Tribe, *American Constitutional Law*, Section 15-10 at 933 n.77 (1978). We are therefore in agreement with the views expressed by Justice Brennan, writing in dissent to [Harris v. McRae](#), *supra* at 333, 100 S. Ct. at 2703-2704 (1980): "In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government [*23] will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in [Roe v. Wade](#)."

[Moe v. Secretary of Administration at 402.](#)

Having decided that this issue is protected by the right of privacy and having further determined that the right of privacy is violated by this regulation, the Court must weigh the state's interest in the regulation. As noted in our Constitution, the right of privacy cannot be infringed without the showing of a compelling state interest. In this case, the state was unable to present the Court with a compelling state interest. At one point, the state even contended that the interest being served here was the

state's need to represent the anti-abortion views of a portion of its population. No court could ever accept such a view. To do so would allow the state to justify almost any action imaginable on the basis that some of its citizens felt it was [*24] appropriate.

It is obvious that the regulation does nothing to further the state's interest in maternal health. The only state interest involved here is the interest in preserving potential life. That interest is certainly a legitimate one, but the United States Supreme Court has held though that interest may be present throughout a woman's pregnancy, it is not really compelling until fetal viability exists, or the last three months of pregnancy. See *Moe at 403*. Since this regulation does not limit itself to those situations where the interest of the fetus is compelling, the regulation violates Montana's right to privacy. The mother's interest in necessary medical care for her own health must outweigh the state's interest in encouraging potential life, at least until the last three months of the pregnancy.

Here it is important to note that the right we are talking about is not an assurance of governmental funding of abortion. Rather, we are talking about the right to privacy, which is the right to be left alone. That right protects the individual from undue governmental interference. See *Right to Choose v. Byrne at 935 n.5* and *Moe v. Secretary of Administration and Finance at 398*. [*25] In other words, although the state is under no obligation to fund an individual's choice to a right of privacy, once it has entered an area that is covered by the zone of privacy, the state must be neutral.

"[O]nce government enters the zone of privacy surrounding a pregnant woman's right to choose, it must act impartially. In that constitutionally protected zone, the state may be an umpire, but not a contestant." *Byrne at 935 n.5*.

In the first two trimesters of a pregnancy, the state's interest in the potential life of the fetus is not compelling. See *Myers at 795*.

Other justifications put forth by the state similarly suffer from the same problem. The state argues that the regulation in question recognizes the high cost of birth to indigent women and is an attempt to lessen that burden. Further, the state argues that its regulation focuses on the health needs of fetuses and newborn children. While this may be true, and both purposes are certainly laudable, in so doing, the state has interfered with a woman's right of privacy and her right to protect

her own health.

By this regulation, the state improperly subordinates the woman's right to choice and to health to the lesser [*26] state interest in a nonviable fetus. Since the state is apparently bound and determined to enter this area, it must do so with neutrality; this the state has not done. Therefore, this Court concludes that the regulation in question violates [Article II, Section 10 of the Montana Constitution](#).

EQUAL PROTECTION

Plaintiffs contend that the funding restriction mentioned above also violates Montana's guarantee of equal protection contained in [Article II, Section 4 of the Montana Constitution](#) which provides as follows:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. (Emphasis added)

Under Montana law, if a classification is based upon a suspect class or infringes upon a fundamental right, the government has the burden of proving that the rule is justified by a compelling state interest. See *Matter of Wood, 236 Mont. 118, 123-124, 768 P.2d 1370, 1374 (1989)*. [*27] Here, the regulation does infringe upon a fundamental right. That fundamental right is the right to privacy. Further, a woman has a fundamental right to control her body and her destiny. She also has a fundamental right as to whether or not to choose if she is to have an abortion. See *Byrne at 934*.

In this case, some women are excluded from benefits to which they are otherwise entitled solely because they seek to exercise a constitutional right. Women are asked to make this sacrifice to their health, even though a doctor has certified that an abortion procedure may be medically necessary, solely in order to further the state's interest in potential human life. The denial of equal protection is clear. The state has taken the class of indigent pregnant Medicaid eligible women and divided them. One class, who needs medically necessary treatment (an abortion) are not entitled to help from the state. However, another class (those women for whom child birth is a medically necessary treatment) are entitled to state financial help.

There is no question but that the state's interest in potential human life is legitimate. However, to say that it always outweighs the mother's interest in [*28] her own health is not acceptable. The funding restriction imposed by the state of Montana gives the state's interest priority at the expense of the mother's health.

End of Document

For similar holdings that similar abortion funding restrictions violate equal protection provisions, see *Byrne and Maher*.

As noted earlier, the state has not been able to advance a compelling interest for its regulation. Thus, the regulation does violate Montana's constitutional guarantee of equal protection of the law.

MISCELLANEOUS

Since the Court has ruled on two constitutional and one statutory ground that the regulation is illegal and unconstitutional, there is no reason for this Court to address Plaintiffs' other contentions.

This Court also needs to emphasize that it has not made any use of the various supplemental filings that Plaintiff's attorney has provided. Plaintiffs' attorney has provided this Court with supplemental evidence after the close of the hearing and this Court has not considered those items.

Finally, this Court again must emphasize that this decision does not conclude that the state of Montana must fund elective, nontherapeutic abortions. All this decision says is that when the state [*29] of Montana begins conferring benefits in a constitutionally protected area, it must do so in an even handed and neutral manner. It is clear that the state need not fund nontherapeutic elective abortions. Neither need it fund medically necessary abortions under the Medicare Act if it did not fund child birth services. However, this is an area the state of Montana has chosen to enter and in doing so there are certain constitutional restrictions that must be obeyed.

Based on the above, IT IS HEREBY ORDERED that ARM 46.12.2002 (1)(e) is declared to be invalid as being violative of Montana's right to privacy, Montana's guarantee of the right to equal protection of the laws, and in violation of the statutory authority of the Department.

DATED this _____ day of May, 1995.

DISTRICT COURT JUDGE

91 N.J. 287

RIGHT TO CHOOSE: E. M., P. B., A. C., D. T., E. R., on Behalf of E., A Minor, and D. C. on Behalf of K., A Minor, all on Behalf of Themselves and all Others Similarly Situated; Edward S. Milner, Jr., M. D.; New Jersey Welfare Rights Organization, and New Jersey Religious Coalition for Abortion Rights, Plaintiffs-Respondents and Cross-Appellants,

v.

Brendan T. BYRNE, Governor, State of New Jersey; John J. Degnan, Attorney General, State of New Jersey; Ann Klein, Commissioner, Department of Human Services, State of New Jersey; G. Thomas Riti, Director, Division of Human Services, State of New Jersey; Thomas M. Russo, Acting Director, Division of Medical Assistance and Health Services, Department of Human Services, State of New Jersey, and Joanne E. Finley, Commissioner, Department of Health, State of New Jersey, Defendants-Appellants and Cross-Respondents,

and

John T. Scully, M. D., F.A.C.S., as Guardian on Behalf of Those Conceived but Unborn Herein and on Behalf of Others Similarly Situated; Dominic A. Introcaso, M. D., F.A.C.O.G.; Anthony P. Despirito, M. D., F.A.A.P.; The New Jersey Right to Life Committee; the Student Ad Hoc Committee Against the War in Vietnam, and New Jersey Concerned Taxpayers, an Association, Interveners-Respondents.

Supreme Court of New Jersey.

Argued May 3, 1982.

Decided Aug. 18, 1982.

Action was brought challenging New Jersey statute prohibiting medicaid funding for abortions except where medically indicated to be necessary to preserve mother's life. The Superior Court, Chancery Division, 169 N.J.Super. 543, 405 A.2d 427, 173 N.J.Super. 66, 413 A.2d 366, entered judg-

ment and awarded attorney fees, and review was sought. After granting certification, the Supreme Court, Pollock, J., held that: (1) women's right to choose to protect her health by terminating pregnancy outweighed state's asserted interest in protecting potential life at expense of women's health, and thus statute restricting medicaid funding to abortions necessary to save life of mother violated New Jersey Constitution; (2) appropriate construction of such statute was that it limited funding to abortions medically necessary to preserve life or health of woman, and determination of "medical necessity" was proper province of physicians, who could be guided, to extent consistent with competent medical treatment, by regulations of Department of Human Services; (3) the statute did not contravene New Jersey Constitution's prohibition on establishment of religion; (4) the statute did not infringe on free exercise of religion; and (5) plaintiffs who succeeded on claim that the statute violated New Jersey constitution were not entitled to award of attorney fees under federal statute governing awards of attorney fees in civil rights action where plaintiffs did not prevail on claim that the statute violated federal law.

Affirmed as modified.

Pashman, J., concurred in part and dissented in part and filed opinion.

O'Hern, J., dissented and filed opinion.

See also, 165 N.J.Super. 443, 398 A.2d 587.

1. Constitutional Law ⇌ 18

Where provisions of Federal and State Constitutions differ, or where previously established body of state law leads to different result, then New Jersey Supreme Court must determine whether more expansive grant of rights is mandated by New Jersey Constitution.

2. Constitutional Law ⇌ 213.1(1)

For equal protection purposes, neither poverty nor pregnancy gives rise to membership in suspect class. N.J.S.A.Const.Art. 1, par. 1; U.S.C.A.Const.Amend. 14.

3. Abortion and Birth Control ⇌.50**Social Security and Public Welfare**
⇌24.95

There is no fundamental right to funding for abortion; however, right to choose whether to have abortion is fundamental right of all pregnant women, including those entitled to medicaid reimbursement for necessary medical treatment. N.J.S.A. Const.Art. 1, par. 1; U.S.C.A.Const.Amend. 14; N.J.S.A. 30:4D-6.1.

4. Abortion and Birth Control ⇌.50

Protection of potential life is legitimate state interest, but at no point in pregnancy may it outweigh superior interest in life and health of mother. N.J.S.A.Const.Art. 1, par. 1; U.S.C.A.Const.Amend. 14.

5. Constitutional Law ⇌82(6)**Social Security and Public Welfare**
⇌241.95

Woman's right to choose to protect her health by terminating pregnancy outweighed state's asserted interest in protecting potential life at expense of woman's health, and thus statute restricting medicaid funding to abortions necessary to save life of mother violated New Jersey Constitution. N.J.S.A.Const.Art. 1, par. 1; N.J.S.A. 30:4D 6.1.

6. Constitutional Law ⇌48(1)

Appraisal of constitutional defect in statute begins with assumption that Legislature intended to act in constitutional manner.

7. Constitutional Law ⇌48(1)

It is duty of Supreme Court to save statute if it is reasonably susceptible to constitutional interpretation; in appropriate cases, therefore, the Court may engage in "judicial surgery" to excise constitutional defect or to engraft needed meaning.

8. Social Security and Public Welfare
⇌241.95

Appropriate construction of statute governing use of medicaid funding for abortions was that it limited funding to abortions medically necessary to preserve life or health of woman, and determination of "medical necessity" was proper province

of physicians, who could be guided, to extent consistent with competent medical treatment, by regulations of Department of Human Services. N.J.S.A. 30:4D-6.1.

9. Constitutional Law ⇌84

To determine whether statute violates New Jersey Constitution's prohibition against establishment of religion, Supreme Court has generally followed federal standard, and such standard requires determination: whether statute has secular legislative purpose; whether its primary effect neither advances nor inhibits religion; and whether it fosters excessive governmental entanglement with religion. N.J.S.A.Const. Art. 1, pars. 3, 4.

10. Constitutional Law ⇌84**Social Security and Public Welfare**
⇌241.95

Statute governing use of medicaid funds to pay for abortions did not contravene New Jersey Constitution's prohibition on establishment of religion. N.J.S.A. Const.Art. 1, pars. 3, 4.

11. Constitutional Law ⇌84**Social Security and Public Welfare**
⇌241.95

Statute governing use of medicaid funds to pay for abortions did not infringe on free exercise of religion. N.J.S.A.Const. Art. 1, par. 3.

12. Civil Rights ⇌13.17

Plaintiffs who succeeded on claim that New Jersey statute restricting medicaid funding of abortions violated New Jersey Constitution were not entitled to award of attorney fees under federal statute governing awards of attorney fees in civil rights action where plaintiffs did not prevail on claim that the statute violated federal law. 42 U.S.C.A. § 1988.

13. Civil Rights ⇌13.17

Even parties who obtain preliminary or interlocutory relief are not "prevailing parties" within meaning of federal statute governing awards of attorney fees in civil rights action unless they prevail ultimately on merits of at least some of their federal claims. 42 U.S.C.A. § 1988.

Michael R. Cole, Asst. Atty. Gen., for defendants-appellants and cross-respondents (Irwin I. Kimmelman, Atty. Gen., attorney; Stephen Skillman, former Asst. Atty. Gen., and Michael R. Cole, Asst. Atty. Gen., of counsel; Andrea M. Silkowitz, Deputy Atty. Gen., on the briefs).

Nadine Taub and Louis Raveson, Newark, for plaintiffs-respondents and cross-appellants (Nadine Taub and Louis Raveson, attorneys and on brief; Joan Vermeulen and Claudia Davidson, Newark, on the briefs).

Stephen J. Foley, Asbury Park, for intervenors-respondents (Campbell, Foley, Lee, Murphy & Cernigliaro, Asbury Park, attorneys).

Pamela Kaufelt, Somerville, submitted a brief on behalf of amici curiae Planned Parenthood Federation of America, Inc.; Ass'n of Planned Parenthood Physicians, Inc.; Conference of New Jersey Planned Parenthood Affiliates, Inc. and Certain Physicians and Family Planning Nurse Practitioners (Pamela Kaufelt, Somerville, attorney; Eve W. Paul, Trenton; and Dara Klassel, New York City, members of the New York bar, of counsel).

Randall W. Westreich, Basking Ridge, submitted a brief on behalf of amici curiae New Jersey Coalition for Battered Women, New Jersey Committee for Abortion Rights and Against Sterilization Abuse (CARASA); Women's Equity Action League (WEAL) and Women's Resource and Survival Center.

Nancy Goldhill, Newark, submitted a brief on behalf of amici curiae National Ass'n of Social Workers, Inc., New Jersey Chapter; National Ass'n of Social Workers; National Conference of Black Lawyers; Women's Affirmative Action Committee of the New Jersey State Industrial Union Council AFL-CIO; Hispanic Political Action Committee of New Jersey; Peoples Independent Coalition; Northern New Jersey Chapter of the Coalition of Labor Union Women and New Jersey Chapter of the National Lawyers Guild.

Morton Stavis, Hoboken, submitted a brief on behalf of amici curiae American Humanist Ass'n; Interreligious Foundation for Community Organization; Union of American Hebrew Congregations; Unitarian Universalist Ass'n; Unitarian Universalist Women's Federation and Women's Div., Gen. Bd. of Global Ministries of the United Methodist Church (Morton Stavis, Hoboken, attorney; Rhonda Copelon, New York City, a member of the New York bar, of counsel).

Gloria B. Cherry, Hackensack, on behalf of amicus curiae League of Women Voters of New Jersey joined in the brief submitted on behalf of amici curiae National Ass'n of Social Workers, et al.

The opinion of the Court was delivered by

POLLOCK, J.

This appeal presents the question of the validity under the New Jersey Constitution of a statute that prohibits Medicaid funding for abortions "except where it is medically indicated to be necessary to preserve the woman's life." *N.J.S.A. 30:4D-6.1* (1981). Medicaid pays for the costs of all childbirths and abortions to save the life of the mother but, because of the statutory prohibition, does not pay for those therapeutic abortions needed to protect the health of the mother or for elective, nontherapeutic abortions.

Originally plaintiffs claimed that the denial of Medicaid funds violated rights assured by the due process and equal protection clauses of the New Jersey and United States Constitutions. The Chancery Division found the statute violated a fundamental right to health under both Constitutions. Consequently, that court declared the statute invalid and awarded attorneys' fees to plaintiffs as the prevailing party in a federal civil rights claim. After an appeal had been taken to the Appellate Division, we granted direct certification. 88 *N.J.* 472, 443 *A.2d* 692 (1981).

Following the Chancery Division decision, however, the United States Supreme Court in *Harris v. McRae*, 448 *U.S.* 297, 100 *S.Ct.* 2671, 65 *L.Ed.2d* 784 (1980), determined that the federal Constitution does not invest pregnant women with the right to Medicaid

funds for abortions. Although we are bound to honor that determination of plaintiffs' federal constitutional rights, we conclude that under the New Jersey Constitution the State may not restrict funds to those abortions to preserve a woman's life, but not her health. We conclude further that the New Jersey Constitution does not require the funding of elective, nontherapeutic abortions. Without determining whether a constitutional right to health exists in New Jersey, we find that the statute violates the right of pregnant women to equal protection of the law under Art. I, par. 1 of the New Jersey Constitution. Accordingly, we modify and affirm the declaration of the invalidity of *N.J.S.A. 30:4D-6.1*, 169 *N.J.Super.* 543, 405 A.2d 427. Although plaintiffs have succeeded in their state constitutional claim, they have not prevailed on the federal constitutional claims, and we reverse the award of attorneys' fees, 173 *N.J.Super.* 66, 413 A.2d 366.

I

In recent years abortion has generated an intense public debate, which is reflected in constantly changing federal and state legislative and administrative responses. With the decision of the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the issue assumed a new dimension.¹ In that case, the Court ruled that during the first trimester of a pregnancy the state has no role in the abortion decision, which "must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164, 93 S.Ct. at 732. In the second trimester, the state may "regulate the abortion proce-

dures in ways that are reasonably related to maternal health." *Id.* During the third trimester, the state may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65, 93 S.Ct. at 732.

After *Roe v. Wade*, indigent women received funding for abortions under Medicaid, a joint federal-state program of medical care for the needy. In the three years between the *Roe v. Wade* decision and the enactment of *N.J.S.A. 30:4D-6.1* in 1975, New Jersey did not restrict state Medicaid funding for abortions. See Statement to S-528 (1975); *Right to Choose v. Byrne*, 165 *N.J.Super.* 443, 446, 398 A.2d 587 (Ch.Div. 1979) (*Right to Choose I*). In *N.J.S.A. 30:4D-6.1*, however, the New Jersey Legislature restricted state Medicaid funds to abortions needed to preserve the life, but not the health, of the mother. Subsequently, in September, 1976, Congress adopted the first version of the "Hyde Amendment," which, in terms similar to the present version², provided that federal Medicaid funds should not be used to pay for abortions except where the life of the mother would be endangered. *Pub.L.No. 94-439*, § 209, 90 *Stat.* 1434. The 1977 version of the Hyde Amendment, *Pub.L.No. 95-205*, 91 *Stat.* 1460, however, extended the permissible use of Medicaid funds to situations in which the mother was the victim of rape or incest, or where two physicians determined "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." Although that version of the Hyde Amendment permitted funding for

1. The controversy concerning the proper role of the government with respect to abortions will continue after this opinion. The United States Supreme Court has granted *certiorari* to hear cases involving whether the government may require hospitalization for abortions, parental consent for abortions on minors, signature on an informed consent form, a 24-hour hiatus between informed consent and the performance of the abortion, and taking of tissue sample to be submitted for pathology report. *Simpoulos v. Virginia*, — U.S. —, 102 S.Ct. 2265, 73 L.Ed.2d 1281 (1982); *City of Akron v.*

Akron Center for Reproductive Health, — U.S. —, 102 S.Ct. 2266, 73 L.Ed.2d 1282; *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, — U.S. —, 102 S.Ct. 2267, 73 L.Ed.2d 1282. We need not address these issues in this case.

2. The current version of the Hyde Amendment provides further that "the several states are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate." *Pub.L.No.97-12*, 95 *Stat.* 96.

abortions to prevent serious injury, *N.J.S.A.* 30:4D-6.1 restricts funding to abortions to preserve the life of the mother. Thus, the state statute is more restrictive than the 1977 Hyde Amendment.

In that context, plaintiffs filed their original complaint in June, 1978 challenging the statute on a variety of grounds. Plaintiffs alleged the funding restriction violated the federal Medicaid Act as well as provisions of the federal and state Constitutions, including those that guarantee equal protection of the laws. They also asserted that the statute constituted the establishment of religion and impinged upon their free exercise of religion. The action has led to three opinions by the Chancery Division, as well as a final judgment on March 28, 1979 and a supplemental final judgment on March 19, 1980. *Right to Choose I*, 165 *N.J.Super.* 443, 398 A.2d 587; *Right to Choose v. Byrne*, 169 *N.J.Super.* 543, 405 A.2d 427 (1979) (*Right to Choose II*); *Right to Choose v. Byrne*, 173 *N.J.Super.* 66, 413 A.2d 366 (1979) (*Right to Choose III*).

In its first opinion, the Chancery Division described the parties:

Plaintiffs are four women who were pregnant when their complaint or amended complaint was filed, two mothers on behalf of minor daughters who were then pregnant, a medical doctor, two nonprofit associations formed to protect abortion and welfare rights, and a religious association for abortion rights.

In accordance with *R.R.* 4:32-1, 2, this court certified the individual plaintiffs as representatives of two classes: Medicaid-eligible women who are seeking funding for elective nontherapeutic abortions and for abortions which are medically necessary for the protection of their health, although their pregnancies are not life-threatening.

* * * * *

Defendants are state officials with responsibility for the administration of the State Medicaid statute. Defendant intervenors are three medical doctors, a nonprofit corporation formed to oppose abortion, a nonprofit association of students

opposing the war in Vietnam and a nonprofit taxpayers association.

[*Right to Choose I*, 165 *N.J.Super.* at 448-49, 398 A.2d 587].

In assaying the consequences of *N.J.S.A.* 30:4D-6.1 and its validity under the federal Medicaid Act, the court concluded that the conflict between the statute and the Medicaid Act, even when construed in light of the 1977 version of the Hyde Amendment, constituted a breach of New Jersey's obligation to provide its share of Medicaid funding for necessary medical services. *Right to Choose I*, 165 *N.J.Super.* at 454, 398 A.2d 587. Therefore, the Chancery Division enjoined defendants from enforcing *N.J.S.A.* 30:4D-6.1 and ordered the issuance of guidelines for funding medically necessary abortions.

The court found further that plaintiffs "were foreclosed from arguing as a matter of federal constitutional law that the withholding of Medicaid funding for elective nontherapeutic abortions is a denial of equal protection of the law . . ." *Right to Choose I*, 165 *N.J.Super.* at 455-56, 398 A.2d 587. It reached that conclusion by relying on *Maher v. Roe*, 432 *U.S.* 464, 97 *S.Ct.* 2376, 53 *L.Ed.2d* 484 (1977), which upheld the validity of a Connecticut statute prohibiting the use of Medicaid funds for nontherapeutic abortions.

Also in *Right to Choose I*, the Chancery Division rejected plaintiffs' claims that *N.J.S.A.* 30:4D-6.1 establishes as a state policy the views of the Roman Catholic Church that life begins at conception, 165 *N.J.Super.* at 459, 398 A.2d 587; that the Roman Catholic Church became excessively entangled in the legislative process, *id.* at 460, 398 A.2d 587; and that the statute interfered with the free exercise of religion. *Id.* at 462-63, 398 A.2d 587.

In response to the court order in *Right to Choose I*, the Department of Human Services proposed guidelines incorporating the terms of the 1977 Hyde Amendment. That amendment permitted funding for abortions "where the life of the mother would be endangered . . . for the victims of rape

or incest . . . or . . . [in] those instances where severe and long-lasting physical damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.'” *Right to Choose II*, 169 *N.J.Super.* at 546, 405 A.2d 427, quoting *Pub.L.No. 95-480*, 92 *Stat.* 1586.

In sustaining plaintiffs’ equal protection challenge in *Right to Choose II*, the Chancery Division found that the regulations discriminated “against Medicaid eligible women with a medical necessity for an abortion without warrant of a compelling state interest, in violation of equal protection of the law.” 169 *N.J.Super.* at 552, 405 A.2d 427. Underlying that holding was the court’s conclusion that:

[E]njoyment of one’s health is a fundamental liberty which is shielded by the Fourteenth Amendment to the Federal Constitution and by Article 1, paragraph 1, of the State Constitution against unreasonable and discriminatory restriction. Medicaid funding is in furtherance of that fundamental liberty.

The effect of the proposed guidelines would be to withhold funding for one medically necessary procedure and one only, an abortion to protect a woman’s health, although such funding was previously available.

[*Id.* at 551, 405 A.2d 427].

That conclusion also underlay the declaration in the supplemental final judgment that *N.J.S.A. 30:4D-6.1* violated the equal protection clause of the Fourteenth Amendment of the United States Constitution and *Art. I, par. 1* of the New Jersey Constitution. Having declared the statute unconstitutional, the court enjoined defendants to fund all Medicaid abortions except elective, nontherapeutic abortions and those to prevent insignificant impairments to health. 169 *N.J.Super.* at 552, 405 A.2d 427.

Thereafter the Department issued new regulations, effective May 1, 1980, declaring

3. The State does not justify the enactment of the challenged statute as a fiscal measure. Indeed, the Chancery Division found that “[m]edicaid funding for childbirths without complica-

that “Medicaid will pay for all medically necessary abortions.” *N.J.A.C. 10:53-1-14(a)*. Furthermore, in determining whether an abortion is medically necessary, a physician may consider: “(1) Physical, emotional, and psychological factors; (2) Family reasons; (3) Age.” *Id.* at (b).

The injunction and new regulations have had a significant effect on the availability of abortions. In *Right to Choose I*, the court found that, while the statute was in effect, births to Medicaid eligible women increased by 30% but the number of Medicaid funded abortions declined from a monthly average exceeding 900 to fewer than 25. 165 *N.J.Super.* at 457, 398 A.2d 587. We were informed at oral argument that during fiscal year 1981, while the injunction and regulations have been in effect, the federal and state governments funded 6,118 abortions: 2,374 were jointly funded and 3,744 were solely state funded.³

In its final opinion, the Chancery Division granted plaintiffs’ claim for attorneys’ fees under 42 *U.S.C.A. § 1988*, which permits the court, in its discretion, to award attorneys’ fees to the prevailing party in any action to enforce certain federal civil rights. Although the attorneys’ affidavits failed to segregate time spent on the prevailing issues, the Chancery Division awarded counsel fees to two of the organizations representing plaintiffs: Essex-Newark Legal Services was awarded \$13,500 and Rutgers Women’s Rights Litigation Clinic was awarded \$6,375. *Right to Choose III*, 173 *N.J.Super.* at 74, 413 A.2d 366.

Shortly after the decision in *Right to Choose III*, however, the United States Supreme Court sustained a more restrictive version of the Hyde Amendment, a version that prohibited the use of Medicaid funds for abortions except where the life of the mother was endangered. *Harris v. McRae*, 448 *U.S.* 297, 325 n.27, 100 *S.Ct.* 2671, 2692 n.27, 65 *L.Ed.2d* 784 (1980). In effect, *McRae* overruled the declaration of the

tions is \$236, but for abortions without complications only \$79.” *Right to Choose II*, 169 *N.J.Super.* at 549, 405 A.2d 427.

Cite as, N.J., 450 A.2d 925

Chancery Division in *Right to Choose II* that funding Medicaid abortions to protect the life, but not the health, of the mother violated the equal protection clause of the federal Constitution.⁴ *McRae, supra*, 448 U.S. at 322–27, 100 S.Ct. at 2691–2694.

A further effect of *McRae* was to affirm the Chancery Division's decision that the denial of Medicaid funds for abortion did not violate the federal constitutional provision against the establishment of religion. Because plaintiffs in *McRae* lacked standing, the United States Supreme Court declined to reach the claim that the Hyde Amendment violated the free exercise of their religion. *Id.* at 320, 100 S.Ct. at 2689–2690. Thus, *McRae* effectively remitted plaintiffs to the contention that the statute violated those provisions of the New Jersey Constitution concerning religion and equal protection. *N.J.Const.* (1947), Art. 1, pars. 1, 3 & 4.

Before evaluating plaintiffs' claim under the New Jersey Constitution, it is advisable that we set the limits of this opinion by stating what it excludes. It is not a referendum on the morality of abortion. We do not presume to answer the profound questions about the moral, medical, and societal implications of abortion. Nor do we undertake to determine when life begins or at what point a fetus is a person. Our mission is to decide the extent to which the New Jersey Constitution permits a statutory restriction on funding for abortions.

II

Fundamental to our decision is the role of a state court of last resort in our federalist system. Inherent in that role is the interplay between, on the one hand, the individual states, their Constitutions, and courts; and, on the other hand, the federal government, its Constitution, and the Supreme Court. Understanding of the relationship between the United States Supreme Court

and a state Supreme Court as interpreters of constitutional rights begins with the recollection that the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution. See *People v. Brisendine*, 13 Cal.3d 528, 550, 531 P.2d 1099, 1113, 119 Cal.Rptr. 325, 329 (1975).

Over the past two centuries, however, the United States Constitution has emerged as the primary source of fundamental rights. Note, "Developments in the Law—The Interpretation of State Constitutional Rights," 95 *Harv.L.Rev.* at 1326, 1328 (1982) ("State Constitutional Rights"). Nevertheless, in recent years, distinguished jurists and scholars have encouraged state courts, in appropriate cases, to look more closely to their own Constitutions as fonts of individual rights. Although the federal Constitution may remain as the basic charter, state Constitutions may serve as a supplemental source of fundamental liberties. See generally Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harv.L.Rev.* 489 (1977).

From that perspective, state Constitutions are separate sources of individual freedoms, *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980), and restrictions on the exercise of power by the Legislature. *State v. Saunders*, 75 N.J. 200, 225–26, 381 A.2d 333 (1977) (Schreiber, J., concurring). By contrast, the United States Constitution is a grant of enumerated powers to the federal government. *Id.* See *Gangemi v. Berry*, 25 N.J. 1, 134 A.2d 1 (1957). See generally "State Constitutional Rights," *supra*, 95 *Harv.L.Rev.* at 1326–28. Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights. Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.

4. On the same date that it rendered the *McRae* decision, the Court applied the rationale of that case to sustain an Illinois statute that, like N.J.S.A. 30:4D 6.1, prohibited Medicaid funds for all abortions except those to preserve the life of the mother. *Williams v. Zbaraz*, 448

U.S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980). The majority and dissenting opinions in *Zbaraz* relied on the opinions in *McRae*. *Id.* at 369. Therefore, we shall refer to the federal equal protection analysis contained in *McRae*.

Indeed, the United States Supreme Court itself has long proclaimed that state Constitutions may provide more expansive protection of individual liberties than the United States Constitution. See, e.g., *Oregon v. Kennedy*, — U.S. —, —, 102 S.Ct. 2083, 2092, 72 L.Ed.2d 416, 428 (1982) (Brennan, J., concurring); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040–41, 64 L.Ed.2d 741 (1980); *id.* at 91–92, 100 S.Ct. at 2040 (Marshall, J., concurring); *Oregon v. Haas*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967).

In addition, this Court has recognized that our state Constitution may provide greater protection than the federal Constitution. See, e.g., *State v. Alston*, 88 N.J. 211, 227–28, 440 A.2d 1311 (1981) (standing to challenge searches and seizures); *In re Grady*, 85 N.J. 235, 249, 426 A.2d 467 (1981) (the right to sterilization); *State v. Schmid*, 84 N.J. 535, 559, 423 A.2d 615 (1980) (free speech protected in some instances against private interference); *State v. Baker*, 81 N.J. 99, 112–13, 405 A.2d 368 (1979) (the right of unrelated persons to live as a single unit); *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 (1975) (consent to search); *Southern Burlington Cty. NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 174–75, 336 A.2d 713 (1975) (exclusionary zoning); *Robinson v. Cahill*, 62 N.J. 473, 482, 509, 303 A.2d 273 cert. denied sub. nom. *Dickey v. Robinson*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973) (fundamental right to thorough and efficient public education).

[1] Nonetheless, we proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution. See *State v. Hunt*, 91 N.J. 338, 344–345, 450 A.2d 952, 955 (1982); *id.* at 362–363, 450 A.2d at 964 (Handler, J., concurring). Our caution emanates, in part, from our recognition of the general advisability in a federal system of uniform interpretation of identical constitutional provisions. Where provisions of the federal and

state Constitutions differ, however, or where a previously established body of state law leads to a different result, then we must determine whether a more expansive grant of rights is mandated by our state Constitution. See generally, “State Constitutional Rights,” *supra*, 95 Harv.L. Rev. at 1361.

III

Against this background, we consider the implications of the decision of the United States Supreme Court in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). In *McRae*, the five-member majority found that the version of the Hyde Amendment that prohibited Medicaid funds for abortions except when necessary to save the life of the mother bore a rational relationship to government’s “legitimate interest in protecting the potential life of the fetus.” 448 U.S. at 324, 100 S.Ct. at 2692.

The majority opinion precipitated vigorous dissents from four members of the Court, who attacked that opinion at several points. Of particular relevance is the dissenters’ contention that, by denying Medicaid funds for medically necessary abortions, the Hyde Amendment was not supported by a sufficiently compelling state interest to justify its restriction on the exercise of the fundamental right to choose an abortion. In his dissent, Justice Stevens stated that the Court’s earlier decision in *Roe v. Wade* prevented the State from “exclud[ing] a woman from medical benefits to which she would otherwise be entitled solely to further an interest in potential life when a physician, ‘in appropriate medical judgment,’ certifies that an abortion is necessary ‘for the preservation of the life or health of the mother.’” 448 U.S. at 352, 100 S.Ct. at 2713 (citations omitted). He found a denial of equal protection to a class consisting of poor pregnant women who, under Medicaid, had a right to necessary medical treatment. Those women “are confronted with a choice between two serious harms: serious health damage to themselves on the one hand and abortion on the other.” *Id.* at 350, 100 S.Ct. at 2712. He

found further that the denial of funds for medically necessary abortions was "tantamount to severe punishment." *Id.* at 354, 100 S.Ct. at 2714. Consequently, protection of potential life could not be used as a reason to deny indigent women necessary medical care.

Justice Brennan, with whom Justices Marshall and Blackmun joined, concurred with Justice Stevens:

I agree entirely with my Brother Stevens that the State's interest in protecting the potential life of the fetus cannot justify the exclusion of financially and medically needy women from the benefits to which they would otherwise be entitled solely because the treatment that a doctor has concluded is medically necessary involves an abortion.

[448 U.S. at 329, 100 S.Ct. at 2702].

The majority in *McRae* concluded that the prohibition on the use of Medicaid funds for abortion to protect the health of the mother did not violate the equal protection clause of the United States Constitution. Under the supremacy clause, *U.S. Const., Art. VI, cl. 2*, that interpretation precludes our reaching a different result as a matter of federal law. We remain obligated, however, to evaluate *N.J.S.A. 30:4D-6.1* in light of the Constitution of New Jersey.

In more expansive language than that of the United States Constitution, *Art. I, par. 1* of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." The state Bill of Rights, which includes that provision, has been described as expressing "the social, political, and economic ideals of the present day in a broader way than ever before in American constitutional history." Milmed, "The New Jersey Constitution of 1947" in *N.J.S.A. Const., Art. I-III* 91 at 110 (1971). By declaring the right to life, liberty and the pursuit of safety and happiness, *Art. I, par. 1* protects the right of privacy, a right that

was implicit in the 1844 Constitution. Heckel, "The Bill of Rights," in *II Constitutional Convention of 1947*, 1336 at 1339 (1951).

The right of privacy has been found to extend to a variety of areas, including sexual conduct between consenting adults, *State v. Saunders*, 75 N.J. 200, 224-29, 381 A.2d 333 (1977) (Schreiber, J., concurring); the right to sterilization, *In re Grady*, *supra*, 85 N.J. at 249, 426 A.2d 467; and even the right to terminate life itself. *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647 *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). These cases establish that "under some circumstances, an individual's personal right to control her own body and life overrides the State's general interest in preserving life." *In re Grady*, *supra*, 85 N.J. at 249, 426 A.2d 467.

In recent years, moreover, a body of law has developed in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion. Even before *Roe v. Wade*, this Court intimated that a woman who had contracted rubella during her pregnancy had a right to choose whether to give birth to a defective child or undergo an abortion. See *Gleitman v. Cosgrove*, 49 N.J. 22, 62-63, 227 A.2d 689 (1967) (Weintraub, C. J., dissenting in part). That intimation became a reality in *Berman v. Allen*, 80 N.J. 421, 432, 404 A.2d 8 (1979), in which the Court held that a woman had a cause of action for deprivation of the right to decide whether to bear a child with Down's Syndrome. We reaffirmed that right last year in *Schroeder v. Perkel*, 87 N.J. 53, 66, 432 A.2d 834 (1981), holding that a mother, after giving birth to a child with cystic fibrosis, had a right to choose whether to conceive a second child who might suffer from the same genetic defect. See *Comras v. Lewin*, 183 N.J.Super. 42, 443 A.2d 229 (App.Div. 1982) (negligent deprivation of right to choose to abort). See also *Doe v. Bridgeton Hospital Ass'n, Inc.*, 71 N.J. 478, 366 A.2d 641 (1976) (private non-profit hospital may not use moral concepts to limit common-law

right of access to quasi-public hospital facilities for elective abortions).

Although we decline to proceed as far as the Chancery Division in declaring that the New Jersey Constitution guarantees a fundamental right to health, *Right to Choose II*, *supra*, 169 *N.J.Super.* at 551, 405 A.2d 427, we recognize that New Jersey accords a high priority to the preservation of health. More than 70 years ago, Chancellor Pitney recognized that

[a]mong the most [important] of personal rights, without which man could not live in a state of society, is the right of personal security, including 'the preservation of a man's health from such practices as may prejudice or annoy it,' a right recognized, needless to say, in almost the first words of our written Constitution.

[*Tomlinson v. Armour & Co.*, 75 *N.J.L.* 748, 757, 70 A. 314 (E. & A. 1908) (citations omitted)].

With these long-standing principles of state law in mind, we assess whether the restriction of Medicaid reimbursement to abortions to protect the life of the mother is compatible with the state guarantee of equal protection of the laws. In New Jersey, equal protection of the laws is assured not only by the Fourteenth Amendment to the United States Constitution, but also by Art. I, par. 1 of the state Constitution. *Levine v. Dep't of Insts. & Agencies*, 84 *N.J.* 234, 257, 418 A.2d 229 (1980); *Jersey Shore Medical Center v. Estate of Baum*, 84 *N.J.* 137, 148, 417 A.2d 1003 (1980). In construing the constitutional guarantees of equal protection, this Court has frequently applied a similar standard of review, whether the guarantee arose from the state or federal Constitution. *Levine v. Dep't of Insts. & Agencies*, *supra*, 84 *N.J.* at 257, 418 A.2d 229.

Conventional equal protection analysis employs "two tiers" of judicial review. Briefly stated, if a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny; the state must establish that a compelling state interest supports the classification and that no less restrictive alternative is available.

With other rights and classes, however, the legislative classification need be only rationally related to a legitimate state interest. *United States Chamber of Commerce v. State*, 89 *N.J.* 131, 157-58, 445 A.2d 353 (1982).

[2, 3] Neither poverty nor pregnancy gives rise to membership in a suspect class. See *Maher v. Roe*, 432 U.S. 464, 470, 97 S.Ct. 2376, 2380, 53 L.Ed.2d 484 (1977); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28-29, 93 S.Ct. 1278, 1293-94, 36 L.Ed.2d 16 (1973); *Taxpayers Ass'n v. Weymouth Tp.*, 80 *N.J.* 6, 38 n.15, 364 A.2d 1016 (1976), appeal dismissed, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977). Nor is there a fundamental right to funding for an abortion. *Harris v. McRae*, *supra*, 448 U.S. at 316, 100 S.Ct. at 2687-88; *Maher v. Roe*, 432 U.S. at 469, 97 S.Ct. at 2380. The right to choose whether to have an abortion, however, is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. As to that group of women, the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary. Under *N.J.S.A.* 30:4D-6.1, those needing abortions receive funds only when their lives are at stake. By granting funds when life is at risk, but withholding them when health is endangered, the statute denies equal protection to those women entitled to necessary medical services under Medicaid.

Thus, the statute impinges upon the fundamental right of a woman to control her body and destiny. That right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child. This intensely personal decision is one that should be made by a woman in consultation with trusted advisers, such as her doctor, but without undue government interference. In this case, however, the State admittedly seeks to influence the decision between abortion and childbirth. Indeed, it concedes that, for a woman who cannot afford either medical procedure, the statute skews the decision in

favor of childbirth at the expense of the mother's health.

[4] To justify the discrimination, the State asserts as its compelling interest the protection of potential life. Although that is a legitimate state interest, at no point in a pregnancy may it outweigh the superior interest in the life and health of the mother. *Roe v. Wade, supra*, 410 U.S. at 163–65, 93 S.Ct. at 731–33. Yet the funding restriction gives priority to potential life at the expense of maternal health. From a different perspective, the statute deprives indigent women “of a governmental benefit for which they are otherwise eligible, solely because they have attempted to exercise a constitutional right.” *Harris v. McRae, supra*, 448 U.S. at 346, 100 S.Ct. at 2710 (Marshall, J., dissenting).

5. In his separate opinion, Justice Pashman concludes that a woman has a right under the New Jersey Constitution to funding for an elective or nontherapeutic abortion. He correctly notes that we find no such right to funding. Justice O'Hern, in his dissenting opinion, reaches a conclusion diametrically opposed to that of Justice Pashman. That is, Justice O'Hern concludes that the State has no obligation to fund any abortions, therapeutic or nontherapeutic.

Both opinions misperceive the constitutional right. Justice Pashman errs in construing the right as imposing a correlative duty on government to fund all abortions. The flaw in his analysis is in failing to recognize that the right of the individual is freedom from undue government interference, not an assurance of government funding. Justice O'Hern, on the other hand, errs by failing to recognize that once government enters the zone of privacy surrounding a pregnant woman's right to choose, it must act impartially. In that constitutionally protected zone, the State may be an umpire, but not a contestant.

6. This distinction between life and health is not rationally related to any legitimate state interest. Thus, the statute would fail even the minimum rationality test. Although the State has a legitimate interest in protecting potential life, that interest ceases to be legitimate when the result is to deprive a woman of her right to choose to protect her life and health.

The State, however, may draw a rational distinction between medically necessary abortions and nontherapeutic abortions that do not implicate the health of the mother. With respect to nontherapeutic abortions, the State may pursue its interest in protecting potential life, without impairing the life or health of the

Concededly, the Legislature need not fund any of the costs of medically necessary procedures pertaining to pregnancy; conversely, it could include in its Medicaid plan medically necessary abortions for which federal reimbursement is not available. *Id.* at 311 n.16, 100 S.Ct. at 2685 n.16. Once it undertakes to fund medically necessary care attendant upon pregnancy, however, government must proceed in a neutral manner.⁵ Given the high priority accorded in this State to the rights of privacy and health, it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions. Nor is it neutral to provide one woman with the means to protect her life at the expense of a fetus and to force another woman to sacrifice her health to protect a potential life.⁶

mother. That conclusion is consistent with the essential purpose of Medicaid, which is to provide necessary medical care for the indigent. *N.J.S.A. 30:4D 5; N.J.A.C. 10:49 1.4.*

Moreover, the distinction between life and health may be difficult for even the most discerning physician. In this case, uncontroverted medical evidence established that pregnancy increases the health risks for many women with preexisting diseases such as sickle cell anemia, diabetes, hypertension, as well as heart, kidney, or lung disease. Furthermore, some of these diseases may be health-threatening early in a pregnancy, but life-threatening as the pregnancy approaches full term. Additionally, some medical conditions that endanger a woman's health arise for the first time during pregnancy, while others may go undetected until pregnancy. When an abortion is medically necessary is a decision best made by the patient in consultation with her physician without the complication of deciding if that procedure is required to protect her life, but not her health.

For many indigent women, the denial of Medicaid funds, as a practical matter, forecloses the option of obtaining a medically necessary abortion. More affluent women need not avail themselves of public funds for necessary medical procedures. Through private resources or third-party payors, they can protect their health without recourse to Medicaid. Only those least able to bear the financial burden will be forced into childbirth at the expense of their health.

If the purpose of the statute is to protect potential life by depriving indigent women of their right to protect their health, the statute, in that sense, is rational. But it is that ruthless

By controlling funds for schools, prisons, highways, housing, welfare, and other public needs, the legislative and executive branches fulfill the definition of our constitutional rights. Those two branches properly enjoy wide latitude in making fiscal decisions, but the State may not use its treasury to persuade a poor woman to sacrifice her health by remaining pregnant. Statutes such as *N.J.S.A. 30:4D-6.1* "can be understood only as an attempt to achieve with carrots what government is forbidden to achieve with sticks." L. Tribe, *American Constitutional Law*, § 15-10 at 933 n.77 (1978). The statute affects the right of poor pregnant women to choose between alternative necessary medical services. No compelling state interest justifies that discrimination, and the statute denies equal protection to those exercising their constitutional right to choose a medically necessary abortion.

Although we have employed the conventional two-tiered equal protection analysis, the conflicting individual and governmental interests do not easily fit into a rigid analytical structure. See *Matthews v. Atlantic City*, 84 N.J. 153, 165, 417 A.2d 1011 (1980).

Nearly ten years ago, Chief Justice Weintraub wrote:

Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it. Ultimately, a court must weigh the nature of the restraint or the

rationality that our Constitution will not condone.

7. Members of the United States Supreme Court, who recognize that the two-tiered analysis is not always appropriate, have resorted to a middle-tier or intermediate level of scrutiny. *Matthews v. Atlantic City*, *supra*, 84 N.J. at 165, 417 A.2d 1011, and cases cited therein. Under this intermediate standard, the judicial role is to determine whether the legislative classification substantially relates to an important governmental interest. See generally *United States Chamber of Commerce v. State*, 89 N.J. 131, 157-59, 445 A.2d 353 (1982). In a recent equal protection decision, the United States Supreme Court employed a balancing approach in determining that a state statute

denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

[*Robinson v. Cahill*, 62 N.J. 473, 491-92, 303 A.2d 273, cert. denied sub. nom *Dickey v. Robinson*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973)].

Shortly thereafter the Court rejected a rigid equal protection test based either on mere rationality or strict scrutiny. *Collingswood v. Ringgold*, 66 N.J. 350, 370, 331 A.2d 262 (1975), appeal dismissed, 426 U.S. 901, 96 S.Ct. 2220, 48 L.Ed.2d 826 (1976). The following year, the Court employed a balancing test in analyzing equal protection claims under the state Constitution. Writing for a unanimous Court, Justice Pashman stated: "[W]here an important personal right is affected by governmental action, the Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution."⁷ *Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp.*, *supra*, 80 N.J. at 43, 364 A.2d 1016.

[5] This balancing test is particularly appropriate when, as here, the statutory classification indirectly infringes on a fundamental right. See *United States Chamber of Commerce v. State*, *supra*, 89 N.J. at 158, 445 A.2d 353; *Matthews v. Atlantic City*, *supra*, 84 N.J. at 167, 417 A.2d 1011.

that prohibited the children of illegal aliens from attending public schools violated the equal protection clause. A majority of the Justices stated that, although illegal aliens are not a suspect class and education is not a fundamental right, the statute must be supported by a governmental interest more important than the children's interest in an education. See *Plyler v. Doe*, — U.S. —, —, 102 S.Ct. 2382, 2400-01, 72 L.Ed.2d 786, 806 (1982); *id.* — U.S. at —, 102 S.Ct. at 2402, 72 L.Ed.2d at 808 (Marshall, J., concurring); *id.* — U.S. at —, 102 S.Ct. at 2402-05, 72 L.Ed.2d at 808-12 (Blackmun, J., concurring); *id.* — U.S. at —, 102 S.Ct. at 2405-07, 72 L.Ed.2d at 812-14 (Powell, J., concurring).

In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable.⁸ Elective, nontherapeutic abortions, however, do not involve the life or health of the mother, and the State may pursue its interest in potential life by excluding those abortions from the Medicaid program.

Our holding is not that the State is under a constitutional obligation to fund all abortions. Rather, we hold that the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent. A woman's right to choose to protect her health by terminating her pregnancy outweighs the State's asserted interest in protecting a potential life at the expense of her health. Therefore, we hold that the restriction of funding to abortions necessary to save the life of the mother violates the New Jersey Constitution. It remains to determine the effect of that violation.

IV

[6, 7] Appraisal of a constitutional defect begins with the assumption that the Legislature intended to act in a constitutional manner. *State v. Profaci*, 56 N.J. 346, 349-50, 266 A.2d 579 (1970) (limiting statute proscribing loud and profane language in public only to words likely to incite breach of peace or offend listener). With that assumption in mind, we must determine whether the Legislature would want the statute to survive with appropriate modifications rather than succumb to constitutional infirmities. *Jordan v. Horsemen's Benevolent and Protective Ass'n*, 90 N.J. 422, 431-32, 448 A.2d 462 (1982). Stat-

8. Weighing these same considerations under their own state Constitutions, the Supreme Courts in California and Massachusetts have invalidated restrictions on Medicaid funding for abortions. *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981); *Moe v. Secretary of Admin. & Finance*, — Mass. —, 417 N.E.2d 387 (1981). The Massachusetts court relied on a substantive due process analysis, and the

ed otherwise, we must ascertain whether the Legislature would have declined to adopt the statute or would have adopted it with the constitutional interpretation. *United States Chamber of Commerce v. State*, supra, 89 N.J. at 152, 445 A.2d 353. That decision depends on the purpose, subject, and effect of the statute. See *Schmoll v. Creecy*, 54 N.J. 194, 202, 254 A.2d 525 (1969) (interpreting intestacy law and wrongful death act definition of "children" to include illegitimate children). It is our duty to save a statute if it is reasonably susceptible to a constitutional interpretation. *State v. Profaci*, supra, 56 N.J. at 350, 266 A.2d 579. In appropriate cases, therefore, a court may engage in "judicial surgery" to excise a constitutional defect or engraft a needed meaning. See *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 N.J. 57, 75, 411 A.2d 168 (1980) (limiting election financing reporting act to avoid overbreadth problem); *Collingswood v. Ringgold*, supra, 66 N.J. at 357, 331 A.2d 262 (limiting an ordinance requiring prior registration of canvassers and solicitors to door-to-door activity on private property); *State v. DeSantis*, 65 N.J. 462, 473, 323 A.2d 489 (1974) (adding notice and warning requirement to obscenity statute); *Camarco v. City of Orange*, 61 N.J. 463, 466, 295 A.2d 353 (1972) (limiting broad anti-loitering ordinance to interferences with others in public places or threats of immediate breach of peace); *State v. Profaci*, supra; *State v. Zito*, 54 N.J. 206, 218, 254 A.2d 769 (1969) (interpreting statute proscribing failure to give good account of one's self so as to prevent arrest without opportunity to explain apparently inculpatory circumstances); *Schmoll v. Creecy*, supra.

California court based its decision on an express state constitutional guarantee of privacy. Both courts recognized equal protection implications of their decisions. Whether expressed in terms of due process or equal protection, these decisions recognize that the state, by denying Medicaid funds, may not interfere with an indigent woman's right to choose a medical-necessary abortion.

[8] Before the enactment of *N.J.S.A.* 30:4D-6.1, the Legislature provided funds for all abortions, even those not required to protect the life or health of the mother. One purpose of the statute was to eliminate the use of public funds for abortion "on demand." See Statement to S-528 (1975). From this legislative history and the words of the statute, we have no doubt that the Legislature would not want to return to funding elective, nontherapeutic abortions. It is equally clear that the Legislature would want to fund abortions to preserve the life of the mother. Given the high priority accorded to protecting an individual's interest in health and privacy, we believe that the Legislature would prefer that the statute not succumb to its constitutional infirmity but that it survive with coverage extended to medically necessary abortions. From that perspective, we hold that the appropriate construction of *N.J.S.A.* 30:4D-6.1 is that it limits Medicaid funds to those abortions medically necessary to preserve the life or health of the woman. The determination of "medical necessity" is the proper province of physicians, who may be guided, to the extent consistent with competent medical treatment, by the regulations of the Department of Human Services. See *N.J.A.C.* 10:53-1.14(b).

We do not hold directly that the statute was intended to encompass abortions to terminate pregnancies where the mother was the victim of rape or incest. Nonetheless, under those regulations, physicians might well conclude that such abortions are medically necessary.

V

Additionally, plaintiffs claim that *N.J.S.A.* 30:4D-6.1 violates the constitutional provisions guaranteeing freedom of religion, *N.J.Const.* (1947), Art. 1, par. 3, and proscribing establishment of one religious sect in preference to another. *Id.*, par. 4. *Harris v. McRae*, *supra*, determined the parallel federal constitutional claims by rejecting the establishment claim and declining, because no plaintiff had standing, to pass on the free exercise issue. 448 *U.S.* at 319-21, 100 *S.Ct.* at 2689-90.

Our rules of standing are more liberal than the federal rules, however, and any slight additional interest is sufficient to afford standing to private individuals to raise issues of great public interest. *Jordan v. Horsemen's Benevolent and Protective Ass'n*, 90 *N.J.* 422, 432, 448 A.2d 462 (1982); *Salorio v. Glaser*, 82 *N.J.* 482, 491, 414 A.2d 943 (1980). Here, the explicit allegation of a conviction that, under some circumstances, abortion is a religious duty is a sufficient additional interest to warrant consideration of the merits. Therefore, we will address both the establishment and free exercise issues under our Constitution.

[9, 10] Previously, this Court has concluded that the state Constitution, insofar as its prohibition on the establishment of religion is concerned, is less pervasive than the United States Constitution. *Clayton v. Kervick*, 56 *N.J.* 523, 528, 267 A.2d 503 (1970), *vacated on other grounds*, 403 *U.S.* 945, 91 *S.Ct.* 2274, 29 *L.Ed.2d* 854 (1971). Nonetheless, to determine whether a statute violates this prohibition, we have generally followed the federal standard. That standard requires a determination: (1) whether the statute has a secular legislative purpose; (2) whether its primary effect neither advances nor inhibits religion; and (3) whether it fosters excessive governmental entanglement with religion. *Smith v. Ricci*, 89 *N.J.* 514, 523, 446 A.2d 501 (1982). See *Committee for Pub. Educ. & Rel. Liberty v. Regan*, 444 *U.S.* 646, 653, 100 *S.Ct.* 840, 846, 63 *L.Ed.2d* 94 (1980). Applying that test to this case, we conclude that the statute does not contravene the constitutional prohibition. First, the statute is related to a secular purpose, the protection of potential human life and the encouragement of childbirth. See *McRae*, 448 *U.S.* at 313, 100 *S.Ct.* at 2686; *Roe v. Wade*, *supra*, 410 *U.S.* at 162-63, 93 *S.Ct.* at 731-32. Second, the principal effect is not to advance religion. Merely because a statute is consistent with one or more religions does not mean that its principal effect is religious. *McRae*, *supra*, 448 *U.S.* at 319-20, 100 *S.Ct.* at 2689-90; *Two Guys from Harrison, Inc. v. Furman*, 32 *N.J.* 199, 215, 160 A.2d 265 (1960).

Plaintiffs allege further that the Roman Catholic Church lobbied intensively for the passage of the statute and, therefore, that religion became so entangled in the legislative process that the statute is invalid. The claim, in essence, is that direct or indirect pressure by a religious organization on the legislative process is, without more, a violation of the state Constitution. We disagree.

The facts do not support the broad allegations of excessive influence by a single religious group. Not every anti-abortion lobbyist represented the Roman Catholic Church; not every Catholic legislator voted to restrict abortion funding. In fact, some Catholic legislators voted against the statute.

Even if we were to accept plaintiffs' factual allegations and the questionable view that the state constitutional provision directly proscribes "entanglement," see *Marsa v. Wernik*, 86 N.J. 232, 239 n.2, 430 A.2d 888 (1981), we perceive no basis for limiting the right of any citizen or group of citizens to seek to persuade elected representatives that a particular viewpoint should be enacted into law. Limiting access to the Legislature on the basis of religion might well violate other fundamental constitutional guarantees, most notably Art. I, par. 6 ("Every person may freely speak, write and publish his sentiments on all subjects"), and Art. I, par. 18 ("The people have the right freely . . . to make known their opinions to their representatives"). An organization, even one with a particular religious orientation, has the right to lobby for the passage of legislation. On the record before us, we conclude that neither the Roman Catholic Church nor any other religious organization became so entangled in the legislative process that the statute constitutes the establishment of religion in violation of the Constitution.

[11] Plaintiffs contend finally that, because some women in some circumstances believe an abortion represents an expression of divine will, the statute infringes on the free exercise of religion. To the extent the statute prevents those women from obtaining an abortion, plaintiffs argue, it inter-

feres with the free exercise of their religious beliefs. Again, we disagree.

The argument misconstrues the guarantee of the free exercise of religion. Art. I, par. 3. True, government may not interfere with the free exercise of religion—e.g., by barring clergy from serving as delegates to a state constitutional convention, *McDaniel v. Paty*, 435 U.S. 618, 629, 98 S.Ct. 1322, 1329, 55 L.Ed.2d 593 (1978); by requiring compulsory school attendance to age 16 in violation of religious tenets, *Wisconsin v. Yoder*, 406 U.S. 205, 218–19, 92 S.Ct. 1526, 1534–35, 32 L.Ed.2d 15 (1972); or by conditioning eligibility for unemployment benefits on willingness to work on the Sabbath. *Sherbert v. Verner*, 374 U.S. 398, 403–06, 83 S.Ct. 1790, 1793–95, 10 L.Ed.2d 965 (1963). It is equally true, however, that the State need not facilitate free exercise. *State v. Fass*, 62 N.J.Super. 265, 162 A.2d 608 (Cty.Ct.1960), *aff'd*, 36 N.J. 102, 175 A.2d 193 (1961), *appeal dismissed and cert. denied*, 370 U.S. 47, 82 S.Ct. 1167, 8 L.Ed.2d 398 (1962). The constitutional right to the free exercise of religion is not a promise that following one's faith will be free from cost. All the Constitution assures is that government will not interfere with the exercise of religious freedom.

It may be, as plaintiffs contend, that for some an abortion represents the fulfillment of a religious duty. That duty, however, cannot serve as the basis for requiring public funding, for to compel facilitation of the exercise of that religious duty may well violate the prohibition against the establishment of religion. See *State v. Fass*, *supra*, 62 N.J.Super. at 268, 162 A.2d 608. We conclude that the statute does not violate either the prohibition against the establishment of or the guarantee of free exercise of religion.

VI

[12] After the Chancery Division held that N.J.S.A. 30:4D–6.1 violated both the federal and state Constitutions, plaintiffs moved for reasonable attorneys' fees. The court granted the motion and awarded plaintiffs counsel fees totaling \$19,875.

Right to Choose III, 173 *N.J.Super.* at 74, 413 A.2d 366.

The general rule pertaining to counsel fees is that "sound judicial administration will best be advanced" if litigants bear their own counsel fees except in those situations designated by R. 4:42. See *Gerhardt v. Continental Ins. Co.*, 48 *N.J.* 291, 301, 225 A.2d 328 (1966). One exception is in cases "where counsel fees are permitted by statute." R. 4:42-9(a)(8). Relying on that exception, plaintiffs claim they are entitled to fees as a "prevailing party" in an action to enforce federal civil rights under 42 U.S.C.A. § 1988 (section 1988). Thus, the question becomes whether plaintiffs are entitled to reasonable attorneys' fees as "the prevailing party" under the federal statute.

After the decision in *Right to Choose III*, the United States Supreme Court determined that the federal Constitution was not violated by the Hyde Amendment, which restricted Medicaid reimbursement to those abortions necessary for the protection of the life of the mother. *Harris v. McRae*, *supra*. As previously indicated, we are bound by that determination of federal law. Consequently, plaintiffs have not prevailed on the merits of their federal claims. Thus, no basis exists as a matter of federal law for the award of counsel fees under section 1988.

Plaintiffs argue, however, that they are the prevailing party because they have prevailed on their state law claim, which arises from the same facts as the federal claims. Stated otherwise, plaintiffs contend that, because they have prevailed on a pendent state claim, they are entitled to counsel fees under section 1988. The flaw in that contention is that section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all. *Kimbrough v. Arkansas Activs. Ass'n*, 574 F.2d 423, 426 (8th Cir. 1978). No counsel fees may be allowed where the federal claims have been decided adversely to "the prevailing party." *Luria Bros. & Co. v. Allen*, 672 F.2d 347, 357-58 (3d Cir. 1982); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980).

[13] Even parties who obtain preliminary or interlocutory relief are not prevailing parties within section 1988 unless they prevail ultimately on the merits of at least some of their federal claims. *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 1989-90, 64 L.Ed.2d 670 (1980); *Bradley v. Richmond School Bd.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) (discussing 20 U.S.C.A. § 1617); 6 *Moore's Federal Practice* ¶ 54.70[4] at 1309 (2d ed. 1982). While a fee award need not await the resolution of the entire controversy, *Bradley v. Richmond School Bd.*, *supra*, 416 U.S. at 722-24, 94 S.Ct. at 2021-22, it is clear that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." *Hanrahan v. Hampton*, *supra*, 446 U.S. at 758, 100 S.Ct. at 1989. Compare *id.* (denying fees to plaintiff who won reversal of directed verdict) and *Powe v. City of Chicago*, 664 F.2d 639, 652 (7th Cir. 1981) (denying fee to plaintiff who won reversal of dismissal for failure to state a claim) with *Maher v. Gagne*, 448 U.S. 122, 129-30, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980) (fee permitted when relief obtained by settlement and consent order), and *Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353-54 (5th Cir. 1979) (granting fee to students who obtained temporary restraining order to permit demonstration and consent decree to change rules for future demonstrations).

Under the statute, a preliminary injunction reflects a judgment not on the merits of the claim, but merely a likelihood that the plaintiff will prevail. Plaintiffs who challenge the constitutionality of a statute and obtain interim relief must await a plenary hearing for a determination of their rights to counsel fees. See *Planned Parenthood of Minn. v. Citizens for Community Action*, 558 F.2d 861, 870-71 (8th Cir. 1977). Because success on the merits is considered to be a condition precedent to an award of counsel fees, federal courts generally reject applications for counsel fees based on obtaining a preliminary injunction. *E.g.*,

Cite as, N.J., 450 A.2d 925

Smith v. University of No. Carolina, 632 F. 2d 316, 346-53 (4th Cir. 1980) (fees denied to professor who won preliminary injunction continuing employment but ultimately lost on merits); *Parks v. Grayton Park Assoc.*, 531 F.Supp. 77, 79-80 (E.D.Mich.1982) (fees denied to plaintiffs who won temporary and preliminary injunctions but lost on merits of discrimination claim). *Contra*, *Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981) (misquoting *Hanrahan*). Our recent decision in *Westfield Centre Serv. v. Cities Serv. Oil Co.*, 86 N.J. 453, 432 A.2d 48 (1981), in which we approved a counsel fee for an attorney who obtained a preliminary injunction, is distinguishable because it involved an award of counsel fees predicated not on section 1988, but on the state Franchise Practices Act, N.J.S.A. 56:10-1 to 10-15. Furthermore, after the issuance of a preliminary injunction under that Act, the ultimate claim for injunctive relief became moot. Thus, *Westfield* is similar to those federal cases in which the Court never reached the merits of the claim for relief.

Although plaintiffs here succeeded in obtaining a preliminary injunction, permanent relief was ultimately sustained only on the basis of the state, not the federal, Constitution. In brief, plaintiffs did not prevail on the merits of any of their federal claims and, therefore, are not entitled to counsel fees under 42 U.S.C.A. § 1988.

VII

We hold that N.J.S.A. 30:4D-6.1 violates equal protection of the laws under the New Jersey Constitution by limiting funds to abortions medically necessary to preserve the mother's life. We construe that statute to require Medicaid funding of all abortions that are medically necessary to preserve the mother's life or health. Plaintiffs' claim for attorneys' fees is denied.

1. Unlike the majority, I would affirm Judge Furman's ruling that the right to health is fundamental under the State Constitution. See *ante* at 934. I cannot conclude that the interest in health is accorded merely a "high priority" by our Constitution; it is a fundamental individual right. Indeed, there is no significant difference between the right to health and the

PASHMAN, J., concurring in part and dissenting in part.

I concur in the opinion of the Court insofar as it holds that the State Constitution forbids the State from jeopardizing the health and liberty of poor women by failing to fund medically necessary abortions. However, I fail to understand why this Court limits its holding to therapeutic abortions. Its reasoning is equally applicable to elective, or non-therapeutic, abortions. Because I accept the Court's reasoning, I believe that the State Constitution requires the State to fund all abortions, including elective abortions, for women who could not otherwise afford them. On that issue I dissent.

I

The right to choose whether or not to bear a child is partly grounded on the constitutional right to health.¹ *Ante* at 933-934. There is no question that the statute at issue here severely endangers the health of many people in this state. It has the purpose and effect of discouraging abortions, even when pregnancy may result in serious and lasting damage to the mother's health. The majority correctly concludes that the countervailing state interest in potential life cannot justify this immediate infliction of harm on our citizens.

Nonetheless, the majority inexplicably holds that only therapeutic abortions necessary to preserve the mother's health are "medically necessary" and therefore within the scope of the legislative funding of medical services for the poor. It therefore concludes that the Legislature may constitutionally deny funding for elective abortions that are not required for "health" reasons. *Ante* at 938.

right to life itself. May the state actively impair the health of its citizens in the absence of a state interest of overwhelming importance? To ask the question is to answer it. The state may not do anything that jeopardizes the health of our citizens unless its actions are necessary to achieve a compelling state interest.

I disagree. There is no medically valid distinction between therapeutic abortions and so-called elective abortions. When a woman is forced to bear a child against her will, a wide variety of physical and psychological injuries can result. I know of no definition of health which does not take these into account. Further, the pregnancy itself is a medical condition which impairs women in a wide variety of ways; moreover, childbirth always carries a risk to a woman's health or even life. There is no basis for concluding that any abortion performed after consultation with a physician is not medically necessary. This Court has specifically held that there is no medically valid distinction between therapeutic and elective abortions. See *Doe v. Bridgeton Hospital Ass'n, Inc.*, 71 N.J. 478, 489, 366 A.2d 741 (1976). I see no reason to depart from that position.

The constitutional right to an abortion does not encompass merely the freedom to choose an abortion to protect the mother's health; it includes the freedom to obtain medical help to terminate the pregnancy for any reason. It is now well settled that elective abortions are included in this constitutional guarantee. As Justice Blackmun explained in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the constitution protects the freedom of women to choose abortions for a variety of reasons.

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation. [*Id.* at 153, 93 S.Ct. at 727, 35 L.Ed.2d at 177]

This Court has also acknowledged the constitutional right to choose an elective abortion. Justice Schreiber wrote in *Doe v. Bridgeton Hospital Ass'n, Inc.*, 71 N.J. at 490, 366 A.2d 741;

To interpret this act to empower a non-sectarian non-profit hospital to refuse to permit its facilities to be used for *elective abortions* would clearly constitute state action. . . . The *federal constitutional right* to an abortion during the first trimester is now well-settled. . . . For the state to frustrate that right by its action would be violative of the constitutional guarantee. [citations omitted; emphasis added]

Given that the constitution protects the freedom of individuals to choose elective abortions, I am genuinely perplexed by the majority's conclusion that such abortions are not "medically necessary" services. Pregnant women who do not want to carry the fetus to term will undoubtedly be surprised to learn that an abortion is not a medically necessary procedure. Moreover, this Court has previously held that there is no medically valid distinction that justifies statutory discrimination between elective and therapeutic abortions. In *Doe v. Bridgeton Hospital* we said that:

Neither the trial court nor the defendants have suggested that the regulations [allowing therapeutic abortions and] prohibiting elective abortions were adopted to further any medical standards. Medically there is no valid distinction which justifies permission to utilize hospital facilities and equipment for therapeutic, but not elective abortions. [71 N.J. at 489, 366 A.2d 741]

There is likewise no medically valid distinction that justifies funding therapeutic but not elective abortions. See *Beal v. Doe*, 432 U.S. 438, 453-54, 97 S.Ct. 2366, 2375-76, 53 L.Ed.2d 464, 477 (1977) (Brennan, J., dissenting) ("there is certainly no affirmative policy justification of the State that aids the Court's construction of necessary medical services as not including medical services rendered in performing elective

abortions"). In either case, abortion is a medically necessary procedure; it is the only possible medical procedure for treating the woman's condition of pregnancy in the manner she chooses. Justice Brennan has explained:

Pregnancy is unquestionably a condition requiring medical services. . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. Abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy. . . . [*Beal v. Doe*, 432 U.S. at 449, 97 S.Ct. at 2373, 53 L.Ed.2d at 475 (Brennan, J., dissenting) (citations omitted)]

A pregnant woman cannot go on living the same kind of life she had before she became pregnant; she is forced to make a medical decision between two alternative procedures. The failure to choose one of them means that she will inevitably have to undergo the other. It is therefore a mistake to assume that an abortion that is not required for the mother's health is not a medically necessary procedure. Childbirth is not the necessary medical response to pregnancy. It is only one of two alternatives. Abortion is the *only* medical option for a pregnant woman who does not want to give birth.

We must also keep in mind that poor women who are denied funds for abortions may feel compelled to undergo the substantial risk of a self-induced abortion or a cheap illegal abortion by an unqualified person. *Harris v. McRae*, 448 U.S. 297, 346, 100 S.Ct. 2701, 2710, 65 L.Ed.2d 784, 823 (1980) (Marshall, J., dissenting). Justice Marshall has warned that "[i]f funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life." *Beal v. Doe*, 432 U.S. at 458, 97 S.Ct. at 2396, 53 L.Ed.2d at 480 (Marshall, J., dissenting). This reason alone compels the conclusion

that elective abortions are medically necessary services.

I would hold that elective abortions are medically necessary services. The constitutional right to an abortion includes the freedom to choose the desired medical response to pregnancy free from unwarranted government interference. Since the Legislature has provided for medical services for the poor, elective abortions are as much entitled to funding as therapeutic abortions.

II

Even if one could accept the idea that elective abortions are not medically necessary procedures, one must still conclude that the legislative funding of childbirth but not abortion coerces individuals to give up their liberty to exercise a fundamental constitutional right. The majority acknowledges that the constitutional right of privacy includes the liberty to choose between childbirth and abortion. *Ante* at 933, 934. It tacitly acknowledges, as it must, that this right includes the freedom to terminate a pregnancy for reasons unrelated to the mother's health. For example, the majority notes that individuals have the freedom to choose whether to bear a child who will suffer from a genetic defect. *Ante* at 933. Moreover, the majority admits that by granting funds for childbirth while denying them for abortions, the state impermissibly interferes with that free choice. The majority explains:

In recent years, moreover, a body of law has developed in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion. . . . Thus, the statute impinges upon the fundamental right of a woman to control her body and destiny. That right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child. This intensely personal decision is one that should be made by a woman in consultation with trusted advisers, such as her doctor, but without undue government interference. In this case, however, the

State admittedly seeks to influence the decision between abortion and childbirth. Indeed, it concedes that, for a woman who cannot afford either medical procedure, the statute skews the decision in favor of childbirth at the expense of the mother's health. . . . Statutes such as *N.J. S.A. 30:4D-6.1* "can be understood only as an attempt to achieve with carrots what the government is forbidden to achieve with sticks." L. Tribe, *American Constitutional Law*, § 15-10 at 933 n.77 (1978). [Ante at 933, 934, 936]

If this is so, and I believe it is, then there is no reason whatsoever to limit the government's obligation to funding abortions necessary to protect the mother's health. The argument that the state has chosen to fund only medical services necessary to preserve health is beside the point. The state may not use discriminatory funding to induce poor women to choose childbirth over abortion. As Justice Brennan observed, "[t]his disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have. . . ." *Maher v. Roe*, 432 U.S. 464, 483, 97 S.Ct. 2376, 2387, 53 L.Ed.2d 484, 500 (1977) (Brennan, J., dissenting). Indeed, that is its sole purpose. This is impermissible not merely because it endangers the health of our citizens, but because it interferes with the freedom to choose. The majority's conclusion that the state must fund only therapeutic abortions contradicts its own assertions that this statute impermissibly interferes with the protected decision-making process.

The majority refuses to face squarely the fact that the constitutional right to an abortion is broader than the right to protect one's health. The majority consistently presents the issue as if the only individual interest involved is the right of individuals to protect their health. See, e.g., ante at 935 ("The funding restriction gives priority to potential life at the expense of maternal health"). Yet it is clear that this is not the only individual interest involved. *Roe*

v. *Wade* established a right to an abortion for any reason. 410 U.S. at 153, 93 S.Ct. at 726. Once this is clearly acknowledged, it is evident that discriminatory funding of childbirth but not abortion unconstitutionally coerces poor individuals to give up their freedom to terminate the pregnancy.

III

I would go still further. The freedom to choose whether or not to bear a child is of such fundamental importance that I believe our Constitution affirmatively requires funding for abortions for women² who choose them and cannot otherwise afford them. The freedom to act is meaningless if it is not coupled with the ability to effectively enjoy that freedom. This Court has previously recognized that

a woman possesses a constitutional right to decide whether her fetus should be aborted. . . . Public policy now supports . . . the proposition that she not be impermissibly denied a meaningful opportunity to make that decision. [*Berman v. Allan*, 80 N.J. 421, 431-32, 404 A.2d 8 (1979)]

No "meaningful opportunity" to choose can exist for poor women in the absence of funding. "[F]or women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether." *Harris v. McRae*, 448 U.S. at 338, 100 S.Ct. at 2706, 65 L.Ed.2d at 818 (1980) (Marshall, J., dissenting).

I agree with the majority that, by funding childbirth but not abortion, the state has interfered with the freedom to choose between them by actively making one alternative more attractive than the other. Yet even if the Legislature chose to fund neither childbirth nor abortion, the impermissible coercion would remain. Poor women who cannot afford abortions simply cannot obtain them in the absence of funding. Such women would be compelled to carry the fetus to term even if the state did not fund childbirth. This is because, as a prac-

2. I believe our Constitution also affirmatively requires funding for childbirth to permit effective enjoyment of the fundamental right of procreative choice.

2. I believe our Constitution also affirmatively requires funding for childbirth to permit effective

tical matter, most physicians will not perform abortions unless they are going to be paid. Yet when a woman goes into labor, a hospital does not bar its doors and force her to deliver on the front steps. To this extent, it is irrelevant that the Legislature has chosen to fund childbirth; the failure to fund abortion for the poor in any case is tantamount to an absolute prohibition.

For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an "interdiction" of it as would ever be necessary. [*Singleton v. Wulff*, 428 U.S. 106, 118-19 n.7, 96 S.Ct. 2868, 2876 n.7, 49 L.Ed.2d 826, 836 n.7 (1976)]

The individual interest protected by the constitutional freedom to choose an abortion is of great magnitude. It includes the liberty to control one's body and to determine the "direction of [one's] life." *Beal v. Doe*, 432 U.S. at 458-59, 97 S.Ct. at 2397, 53 L.Ed.2d at 480 (Marshall, J., dissenting). The inability to exercise this fundamental freedom can have grievous consequences. As Justice Marshall noted:

The governmental benefits at issue here, while perhaps not representing large amounts of money for any individual, are nevertheless of absolutely vital importance in the lives of the recipients. The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the

lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost. [*Id.*]

Because the freedom to choose an abortion is so fundamental to one's personhood, it is a liberty that our Constitution affords the highest protection. And it is undisputed that the poor, as well as the rich, are entitled to this constitutional freedom. Yet it is ludicrous to assert that in the absence of funding, poor women who cannot afford abortions have the same freedom to choose between abortion and childbirth as do women who can afford either option. We must not allow the appearance of equal freedom to obscure the reality of its denial. "The strong do what they can," wrote Thucydides, "and the weak suffer what they must." The poor must sometimes act out of necessity rather than free choice. As Anatole France remarked, "the law, in its majestic equality, forbids the rich and poor alike from sleeping under bridges, begging in the streets and stealing bread." Freedom in poverty exists only for saints.

In certain cases, courts have required states to fund the exercise of fundamental constitutional rights and liberties. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the Supreme Court invalidated the requirement of the payment of court fees and costs that restricted the ability of indigents to get a divorce. The Court reasoned that "the right to due process reflects a fundamental value in our American constitutional system." *Id.* at 374, 91 S.Ct. at 784, 28 L.Ed.2d at 117. The denial of access to the courts effectively denied poor persons the meaningful "opportunity" to obtain a divorce. *Id.* at 380-81, 91 S.Ct. at 787-88, 28 L.Ed.2d at 120-21. The Court held that a state could not prevent citizens from exercising a fundamental right merely because it resulted in costs to the state. *Id.* See also *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956) (holding that indigents must be provided with a free copy of

trial transcripts and appellate counsel); *In the Matter of the Guardianship of Felicia Dotson*, 72 N.J. 112, 367 A.2d 1160 (1976) (free transcript on appeal from a proceeding involuntarily terminating parental rights).

These few cases notwithstanding, it would be disingenuous to deny that this argument is essentially new. While courts have aggressively sought to protect individuals from undue governmental interference in their legal liberties, courts have traditionally shied away from enforcing the right of citizens to effectively enjoy these liberties. The main exception to this practice is the area of procedural due process in which courts have required states to fund constitutional rights to ensure that they can be effectively enjoyed by rich and poor alike.³

The argument generally advanced to deny the constitutional right to effective enjoyment of fundamental liberties is that government is not responsible for poverty. See, e.g., *Harris v. McRae*, 448 U.S. at 316, 100 S.Ct. at 2687-88, 65 L.Ed.2d at 804 ("although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category"). This distinction must surely not impress the poor person who is told that she has a right but is offered no realistic means to enjoy it. A theoretical right is of no use to a real person. As Justice Blackmun wrote in dissent in *Beal v. Doe*:

The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on

3. But see *Schneider v. Irvington*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), in which the Court held that a town could not constitutionally prohibit citizens from exercising their freedom of speech merely because their distribution of handbills in a public area would result in costs to the town in cleaning up. "Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." *Id.* at 162, 60 S.Ct. at 151, 84 L.Ed. at 165. In effect, the Court held that the municipality had an affirmative constitutional obligation to fund the exercise of

the ground that existence and realization are separate and distinct. For the individual woman concerned, indigent and financially helpless . . . the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake." [432 U.S. at 462, 97 S.Ct. at 2398, 53 L.Ed.2d at 483]

Further, it is simply not true that the actions of the state have played no role in creating the poverty in which one-seventh of our citizens are now mired. The state defines and enforces property rights, creates the economic climate in which private enterprise operates, and in myriads of ways effects the economy of the state and the wealth or poverty of its citizens.⁴

The failure to fund abortions for women who cannot afford them effectively deprives them of the freedom to choose. Yet the poor are as much entitled to this constitutional liberty as the rich. To effectively vindicate that right, we have no choice but to hold that the Constitution requires funding.

IV

The majority notes its disagreement with my conclusion that the New Jersey Constitution affirmatively obligates the state to give poor persons a meaningful opportunity to exercise their freedom to choose whether or not to bear a child. *Ante* at 935 n.5. However, the majority opinion fails

the right of free speech under these circumstances.

4. The interrelationship between law and the distribution of income and wealth is a staple of legal literature. E.g., Kennedy and Michelman, "Are Property and Contract Efficient?" 8 *Hofstra L.Rev.* 711 (1980); Cohen, "The Basis of Contract," 46 *Harv.L.Rev.* 553 (1933); Cohen, "Property and Sovereignty," 13 *Cornell L.Q.* 8 (1927); Hale, "Property and Distribution in a Supposedly Non-Coercive State," 38 *Pol. Sci.Q.* 470 (1923); Hale, "Bargaining, Duress, and Economic Liberty," 43 *Colum.L.Rev.* 603 (1943).

entirely to address my other two arguments: first, that elective abortions are in fact medically necessary services, and second, that discriminatory funding of childbirth but not abortion coerces poor women into waiving their constitutional right to terminate the pregnancy.

As to the first argument, I can only repeat the obvious. For a pregnant woman who does not wish to carry the fetus to term, an abortion is a medically necessary service. To hold the opposite is to fly in the face of current medical knowledge and practice, and to suggest that although medicine has developed two alternative responses for pregnant women who are rich, government can manage only one option for those who are poor.

As to the second argument, I can only reemphasize that the constitutional right to an abortion includes the freedom to choose an abortion for any reason. The majority correctly recognizes that the interest in potential life *never* outweighs the individual interest in the health of the mother. *Ante* at 935. However, it fails to note that in the first six months of the pregnancy, the individual interest in freedom to terminate the pregnancy *for any reason* outweighs the state interest in potential life. *Roe v. Wade*, 410 U.S. at 160, 163, 93 S.Ct. at 730, 731, 35 L.Ed.2d at 181, 182–83. It is therefore misleading to compare the state interest in potential life to the individual interest in health; this states the countervailing individual interest too narrowly.

If the individual interest protected by the constitution includes the freedom to choose an elective abortion, then state funding of childbirth but not abortion impermissibly coerces poor women to give up that choice. Three dissenters in *Beal v. Doe* argued precisely that. See 432 U.S. at 454, 97 S.Ct. at 2376, 53 L.Ed.2d at 477–78 (Brennan, J., dissenting) (“The Court’s construction can only result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous”); *Id.* at 456, 97 S.Ct. at 2395, 53 L.Ed.

2d at 479 (Marshall, J., dissenting) (“The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives”); *Id.* at 462, 97 S.Ct. at 2398, 53 L.Ed.2d at 483 (Blackmun, J., dissenting).

Moreover, in *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866 (1981), the California Supreme Court similarly held that “the asserted state interest in protecting fetal life cannot constitutionally claim priority over the woman’s fundamental right to procreative choice.” 625 P.2d at 781, 172 Cal.Rptr. at 868. “[T]he state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.” *Id.* at 793, 172 Cal.Rptr. at 880. This California case is instructive because the court held that the state had the constitutional obligation to fund elective abortions even though Justice Tobriner rejected the contention that the California Constitution affirmatively required the state to fund the exercise of constitutional rights. *Id.* at 798–99 n.31, 172 Cal.Rptr. at 885–86 n.31. Justice Tobriner argued that although the state need not fund medical services in the first instance, once it does, it cannot “withhold funds from some eligible persons because they exercise a constitutional right,” *id.*, a right that concededly includes the freedom to choose an elective abortion. *Id.* at 793, 172 Cal.Rptr. at 880.

V

I fully agree with the majority that New Jersey citizens have two independent and complementary sources of fundamental rights and liberties: the federal constitution and the state constitution. However, I disagree with the majority on the extent of that independence. The majority believes it is qualified; I believe it is complete. See *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (Pashman, J., concurring).

Constitutions limit the power of governments to interfere unduly with the liberty

and security of individuals. They also, in certain cases, require government to act affirmatively to enable citizens to effectively enjoy fundamental freedoms. The federal constitution, as interpreted by the United States Supreme Court, defines the rights enjoyed by all citizens of the United States. In that sense, no state constitution could validly permit a state government to act in ways prohibited by the federal constitution. However, the federal constitution has never been interpreted to limit the power of the citizens of the states to adopt state constitutions that define individual freedoms more broadly than the federal constitution.

The majority correctly notes that both this Court and the United States Supreme Court have held that state constitutions may provide greater protection for individual liberties than does the federal constitution. *Ante* at 931-32. State constitutions do this either by limiting the power of state government more than it is limited by the federal constitution, or by mandating that the state act in ways not required by the federal constitution to enable citizens effectively to exercise fundamental liberties.

Nonetheless, the majority is reluctant to interpret the state constitution's protection of individual liberties more broadly than the federal constitution. It concludes that state constitutions should be interpreted to provide greater protection for individual liberties only where the text differs from the federal counterpart or there exists a "previously established body of state law [that] leads to a different result." *Ante* at 932. In other cases, the majority concludes that the interest in "uniform interpretation of identical constitutional provisions," *ante* at 932, should lead a state supreme court to interpret its state constitution in whatever way the federal constitution has been interpreted by the United States Supreme Court.

I disagree. The benefit of uniform federal constitutional rights is not that all citizens in the country are protected to precisely the same degree: it is that there is a certain minimum of liberty and security

that may not be infringed by any state government whether or not it possesses its own constitutional protections. Beyond that minimum, states are free to adopt constitutional charters that protect the citizens of that state even further from oppression by state government.

The definition of state constitutional rights is bound up with federal constitutional rights only to the extent that no state constitution could validly allow state action that would contravene individual liberties guaranteed by the federal constitution. However, the federal constitution *in no way* limits state constitutions from going further. Because this is so, there should be no presumption that the guarantees of the state constitution are identical to those given the federal constitution by the United States Supreme Court. While the interpretation of federal constitutional rights is instructive and helpful in defining state constitutional rights, it is no more than that. The state constitution is completely independent of the federal constitution in this sense.

There may of course be powerful policy reasons for interpreting certain specific state constitutional guarantees to be identical to their federal counterparts. However, there is no basis in constitutional law for *presuming* that the state constitution parallels the federal constitution. The state constitution must be interpreted separately from the federal constitution *unless* there are good reasons of policy to establish a uniform interpretation.

I therefore reject the majority's assertion that state constitutions should be interpreted to provide greater protection for liberty than the federal constitution only where there exists a previously established body of state law to that effect. Why should this matter? That previous body of state law was created by interpretation of the state constitution itself by our state courts. The United States Supreme Court, by defining liberties in a more limited manner, cannot prevent future decisions by state supreme courts that interpret state constitutions to go further. If this were true, the Supreme

Cite as, N.J., 450 A.2d 925

Court would effectively be the final arbiter, not only of federal constitutional law, but of much state constitutional law. Yet both the Supreme Court and this Court have consistently rejected this position.

I would hold that the New Jersey Constitution provides our state citizens with a fully *independent* source of protection of fundamental rights and liberties. This means that we should not presume the United States Supreme Court interpretations of the federal constitution dispose of the state constitutional issue. Our state constitution must be interpreted on its own merits, and the liberties it protects are in no way limited by the extent to which they are protected by the federal constitution.

I agree that policy reasons may justify a uniform interpretation of the state and federal constitutions. See *State v. Hunt*, 91 N.J. at 338, 450 A.2d 952, 959-960 (Pashman, J., concurring). Nonetheless, this Court remains the final arbiter of the meaning of the state constitution. We cannot relieve ourselves of that obligation by deferring to the decisions of another court. There is simply no court to which we can defer. The citizens of New Jersey have adopted a constitution that ensures their liberties independent of the federal law. The New Jersey Constitution is not an empty gesture. It is the bedrock of liberty in this State. We must uphold it.

O'HERN, J., dissenting.

"To declare a statute unconstitutional is a judicial power to be delicately exercised." *Harvey v. Essex County Board of Freeholders*, 30 N.J. 381, 388, 153 A.2d 10 (1959). A legislative act should not be declared void unless its repugnancy to the Constitution is clear beyond a reasonable doubt. *Gangemi v. Berry*, 25 N.J. 1, 10, 134 A.2d 1 (1957). I cannot dispel that reasonable doubt and dissent.

I.

The United States Supreme Court, faced with the precise issue presented here, held that there was no impediment in the United States Constitution to a similar legislative

pattern. *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2701, 65 L.Ed.2d 784 (1980). That alone should give cause for doubt. This Court concedes that supremacy to interpret the federal Constitution but bases its decision on the equal protection guarantee in the state Constitution. Heretofore we have generally said that the "burden of mounting a successful challenge on equal protection grounds under the state Constitution [under stated circumstances] . . . is no different from that which prevails under the federal Constitution." *McKenney v. Byrne*, 82 N.J. 304, 317, 412 A.2d 1041 (1980). We now depart from that principle.

Of course, New Jersey is not bound in interpreting its constitutional guarantees to federal interpretations of comparable provisions. *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982); *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980). Those cases have dealt with specific rights textually guaranteed by the New Jersey Constitution. Here we deal not with a textually guaranteed right, but with a principle of legal analysis.

A concept of equal protection is implicit in Art. I, par. 1 of the New Jersey Constitution, which guarantees the natural and inalienable rights of enjoying life and liberty, of acquiring and possessing property, and of pursuing and obtaining happiness. *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79, 389 A.2d 465 (1978). Elaborate analytical structures have been created to guide courts in the application of this seemingly simple concept, giving rise to the observation that we have constructed a "veil of tiers." *Matthews v. Atlantic City*, 84 N.J. 153, 175, 417 A.2d 1011 (1980) (Clifford, J., dissenting). Some commentators have argued that these confusions of equality arise from the concept's concealing the real nature of the substantive rights it incorporates by reference. Westen, "The Empty Idea of Equality," 95 *Harv.L.Rev.* 537, 579 (1982). That is precisely the point that Justice White made in his concurrence in *Harris v. McRae*. He wrote of the dissent there:

The argument has a certain internal logic, but it is not legally sound. The constitutional right recognized in *Roe v. Wade* was the right to choose to undergo an abortion without coercive interference by the government. As the Court points out, *Roe v. Wade* did not purport to adjudicate a right to have abortions funded by the government, but only to be free from unreasonable official interference with private choice. [448 U.S. at 327, 100 S.Ct. at 2693, 65 L.Ed.2d at 811].

The right at stake here is the right to be let alone in an area involving "the most intimate of human activities and relationships." See *State v. Saunders*, 75 N.J. 200, 212, 381 A.2d 333 (1980). It is the antithesis of that right to involve other segments of society in that moral choice.

A more fundamental premise should lead the Court to adhere to the United States Supreme Court's view on this deeply divisive issue. When the issue at stake touches upon the national identity, we would be wise to yield to the judgment of the Supreme Court. "[I]n enforcing the federal Constitution . . . the Court is the voice of the more encompassing national community." Gibbons, "Constitutional Adjudication," 56 N.Y.U.L.Rev. 260, 275 (1981). The right that this Court supports has been shaped and defined under the federal Constitution. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). National disunity about an issue so similar in each community cannot be productive in the long view. Though having a surface appeal, the doctrine of independent state grounds would here cause "closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts," a concern that strongly motivated Justice Stewart, the writer of *Harris v. McRae*. Sandalow, "Potter Stewart," 95 Harv.L.Rev. 6, 10 (1981).

II.

On the merits I disagree with the Court's Equal Protection analysis. "Absent infringement of a fundamental right or discrimination against a suspect class, equal

protection is not denied if the legislative classification is reasonable and bears a rational relationship to a legitimate governmental objective." *Rubin v. Glaser*, 83 N.J. 299, 309, 416 A.2d 382 (1980). The majority concedes that we do not deal here with a suspect class. "[P]urposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, at 274, 99 S.Ct. 2282 at 2293, 60 L.Ed.2d 870 (1979), quoting *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976). There is no evidence of discriminatory purpose here. The landmark cases in Equal Protection have always focused upon disparate treatment of the individual. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (separate education based on color); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (one-year residency requirement for receipt of welfare benefits); *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974) (county medical benefits limited to one-year residents); *Plyler v. Doe*, — U.S. —, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (education denied to aliens).

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 S.Ct. 560, 562, 64 L.Ed. 989] (1920). But so too, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." [*Plyler v. Doe*, — U.S. —, —, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)].

The subject of the legislation is not the person of the recipient but the nature of the claimed medical service. There is no disguised attempt to single out a class. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

As to infringement of a fundamental right, the essence of the right—to be left alone, has not been infringed. That the Legislature has chosen to subsidize free public education has never been held to infringe upon the constitutional right of parents to send their child to a school of their choice, *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or to require government to subsidize the individual's election to attend the chosen school. To translate the limitation on governmental power to interfere in this matter of personal choice into an affirmative funding obligation is an unprecedented result. *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977).

The Court's final task is to deal with the question of whether the classification is reasonable and bears a rational relationship to a legitimate governmental objective. In the last analysis, the question comes down to whether it is irrational to distinguish between life and health.

I cannot say that such a classification is irrational. To be unable to distinguish these two is to misunderstand one of the central mysteries of existence. Justice Proctor, citing Theocritus, once reminded us that "[f]or the living there is hope, but for the dead there is none." *Gleitman v. Cosgrove*, 49 N.J. 22, 30, 227 A.2d 689 (1967).¹ Few would seriously doubt the difference.

No particular viewpoint is represented in that conclusion. The members of the Supreme Court who recognized this distinction were not ideologues. Three of those in the *Harris v. McRae* majority had held in *Roe v. Wade* that the liberty protected by the Fourteenth Amendment included a freedom of personal choice in certain matters of family life including the freedom of a woman to decide whether to terminate a pregnancy. But they recognized as legitimate a governmental classification of benefits that recognized an interest in life.

We cannot resolve the imponderable mysteries that divide theologian, scholar and judge. We need only recognize that there

is a rational classification here to be made by lawmakers.

III.

I hold no brief for the view that poor women, especially the minority women making up most of the Medicaid rolls, should not have the same effective moral choice as other women in our society. There is an essential unfairness in such an economic system. But they should have the same choice as well to send their children to private preparatory schools or to own suburban homes that would aid them and their families in breaking through the barriers of neglect. Yet,

[in *Robinson v. Cahill*] the Court was justifiably hesitant to ground its holding upon the equal protection clause. As noted in deciding that case, "the equal protection clause may be unmanageable if it is called upon to supply categorical answers to the vast area of human needs, choosing those which must be met and a single basis upon which the State must act. 62 N.J. at 492 [303 A.2d 273]." [*Abrahams v. Civ. Serv. Comm.*, 65 N.J. 61, 79, 319 A.2d 483 (1974)].

Dealing with the root of the problem is the obvious answer. In the meantime, judges will continue to struggle with such constitutional clauses when relied upon as a source of access to governmental benefits expenditures.

For affirmance as modified—Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER and POLLOCK—5.

Concurring in part; dissenting in part—Justice PASHMAN—1.

Dissenting—Justice O'HERN—1.



1. The cause of action disallowed in *Gleitman* was later allowed in part. *Berman v. Allan*, 80

N.J. 421, 404 A.2d 8 (1979). The point remains the same.

126 N.M. 788

1999-NMSC-005

NEW MEXICO RIGHT TO CHOOSE/NARAL, Abortion and Reproductive Health Services, Planned Parenthood of the Rio Grande, Curtis Boyd, M.D., Lucia Cies, M.D., Bruce Ferguson, M.D., and Lewis Koplik, M.D., Plaintiffs-Appellees and Cross-Appellants,

v.

William JOHNSON, Secretary of the New Mexico Human Services Department, Defendant-Appellant and Cross-Appellee,

and

Eugene E. Klecan and Donald Schaurete, Defendants-in-Intervention and Appellants and Cross-Appellees.

No. 23,239.

Supreme Court of New Mexico.

Nov. 25, 1998.

Abortion providers and others brought action to prevent enforcement of revised rule restricting state funding of abortions for Medicaid-eligible women. Two litigants were allowed to intervene as of right. The District Court issued order permanently enjoining Human Services Department from enforcing rule. Department's Secretary appealed. On certification from the Court of Appeals, Steve Herrera, D.J., the Supreme Court, Minzner, J., held that: (1) abortion providers and others had standing to bring lawsuit; (2) litigants' interests as taxpayers and representatives of potential life of the unborn did not entitle them to intervene as matter of right; (3) sovereign immunity did not bar action; (4) rule violated New Mexico's Equal Rights Amendment; and (5) District Court had authority to order state to pay for medically necessary abortions for Medicaid-eligible women.

Affirmed in part and reversed in part.

1. Constitutional Law ⇔42.1(1), 42.3(1)

Providers of abortions to Medicaid-eligible women, nonprofit organization that provided counseling on pregnancy options and

loaned funds for abortions and nonprofit advocacy organization with members who were Medicaid-eligible women had standing to bring lawsuit challenging constitutionality of rule restricting state funding of abortions for Medicaid-eligible women, as they had sufficient direct interest and sufficiently close relationship with the women, and privacy concerns and time constraints imposed significant hindrance on ability of the women to protect their own interest.

2. Action ⇔13

Associations ⇔20(1)

To obtain standing for judicial review, litigants generally must allege that they are directly injured as a result of the action they seek to challenge in court; however, this requirement is met even when the extent of the alleged injury is slight or the allegation is made by an organization on behalf of its members.

3. Action ⇔13

The exercise of the Supreme Court's discretion to confer standing should be guided by prudential considerations, particularly when litigants seek to assert claims on behalf of third parties.

4. Parties ⇔40(2)

A person claiming a right of intervention is required to demonstrate an interest in the action that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than to an existing party to the suit. NMRA, Rule 1-024, subd. A(2).

5. Parties ⇔38

While Supreme Court may confer standing to decide an issue of great public importance, this power to confer standing does not equate with rights of indiscriminate intervention; the bounds of the intervention rule are to be observed. NMRA, Rule 1-024.

6. Parties ⇔40(2)

Litigants' interest as taxpayers was not sufficiently direct to entitle them to intervene as matter of right in action brought by abortion providers and nonprofit organizations to challenge constitutionality of rule restricting state funding of abortions for

Medicaid-eligible women; litigants did not allege that expenditure of state funds for medically necessary abortions would change their tax liability or that any of their tax payments were earmarked for purpose of paying for abortions. NMRA, Rule 1-024, subd. A(2).

7. Parties ⇨40(2)

Litigants' interest as representatives of potential life of the unborn did not entitle them to intervene as matter of right in action brought by abortion providers and nonprofit organizations to challenge constitutionality of rule restricting state funding of abortions for Medicaid-eligible women, as such interest was adequately protected in the case by Human Services Department; litigants and Department shared same ultimate objective of upholding constitutionality of the rule. NMRA, Rule 1-024, subd. A(2).

8. Parties ⇨44

Where the state is named as a party to an action and the interest the proposed intervenor seeks to protect is represented by a governmental entity, a presumption of adequate representation exists. NMRA, Rule 1-024, subd. A(2).

9. Parties ⇨44

To overcome presumption that governmental entity that is a named party adequately represents interest of proposed intervenors, the proposed intervenors must demonstrate that the representation is inadequate by showing, for example, an adversity of interest, collusion, or nonfeasance on the part of the governmental entity. NMRA, Rule 1-024, subd. A(2).

10. States ⇨191.9(2)

Sovereign immunity did not bar abortion providers and others from bringing declaratory judgment suit against Human Services Department to challenge constitutionality of rule restricting state funding of abortions for Medicaid-eligible women. NMSA 1978, § 44-6-13.

11. Appeal and Error ⇨1135

Defendant's contention that genuine issues of material fact remained did not provide basis for reversing district court's order granting summary judgment in favor of

plaintiffs, where defendant had filed its own motion for summary judgment and stipulated that case was ripe for determination by summary judgment, parties filed lengthy set of stipulated facts, and defendant made no showing that disputed facts not covered by the stipulation were material. NMRA, Rule 1-056, subd. C.

12. Judgment ⇨181(2)

Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. NMRA, Rule 1-056, subd. C.

13. Constitutional Law ⇨224(2)

Social Security and Public Welfare ⇨241.95

New Mexico's Equal Rights Amendment established basis for affording Medicaid-eligible women greater protection against gender discrimination than they received under federal law, for purposes of determining constitutionality of rule restricting state funding of abortions for Medicaid-eligible women. Const. Art. 2, § 18.

14. Constitutional Law ⇨18

Under Supreme Court's "interstitial approach" to state constitutional interpretation, the Court may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government or distinctive state characteristics.

15. Constitutional Law ⇨224(1)

New Mexico's Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it. Const. Art. 2, § 18.

16. Constitutional Law ⇨224(1)

New Mexico's Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications; this inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the state's burden to rebut this presumption. Const. Art. 2, § 18.

17. Constitutional Law ⇔224(2)

Rule restricting state funding of abortions for Medicaid-eligible women warranted heightened judicial scrutiny under New Mexico's Equal Rights Amendment, though rule employed classification based on physical characteristic unique to female sex, namely the ability to become pregnant and bear children. Const. Art. 2, § 18.

18. Constitutional Law ⇔224(1)

The presumption that gender-based classifications violate New Mexico's Equal Rights Amendment is not irrebuttable, and court's heightened scrutiny need not be fatal in fact. Const. Art. 2, § 18.

19. Constitutional Law ⇔224(1)

To determine whether men and women are similarly situated with respect to a classification, for purposes of determining whether classification violates New Mexico's Equal Rights Amendment, court must look beyond the classification to the purpose of the law. Const. Art. 2, § 18.

20. Constitutional Law ⇔224(1)

To determine whether a classification based on a physical characteristic unique to one sex results in the denial of "equality of rights under law" within the meaning of New Mexico's Equal Rights Amendment, court must ascertain whether the classification operates to the disadvantage of persons so classified. Const. Art. 2, § 18.

21. Constitutional Law ⇔224(1)

Classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment of the New Mexico Constitution; State Constitution requires the state to provide a compelling justification for using such classifications to the disadvantage of the persons they classify. Const. Art. 2, § 18.

22. Constitutional Law ⇔224(2)**Social Security and Public Welfare** ⇔241.95

Rule prohibiting state funding of medically necessary abortions for Medicaid-eligible women, except when necessary to save life of mother, to end ectopic pregnancy or

when pregnancy resulted from rape or incest violated New Mexico's Equal Rights Amendment; rule was presumptively unconstitutional in that it employed gender-based classification that operated to disadvantage of women, and state's interests in reducing costs of providing medical assistance and in potential life of the unborn did not provide compelling justification for rule, in that rule was not the least restrictive means to advance those interests. Const. Art. 2, § 18.

23. Civil Rights ⇔450

District court had authority, after determining that rule restricting state funding of abortions for Medicaid-eligible women violated New Mexico's Equal Rights Amendment, to remedy the constitutional violation by ordering state to pay for medically necessary abortions for Medicaid-eligible women. Const. Art. 2, § 18; NMSA 1978, § 27-2-12.

24. Social Security and Public Welfare ⇔241.95

Public Assistance Act does not prohibit state funding of medically necessary abortions for Medicaid-eligible women, even if federal reimbursement is unavailable. NMSA 1978, § 27-2-12.

25. Constitutional Law ⇔67

It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.

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Eugene E. Klecan, Albuquerque, for Appellants and Cross-Appellees Eugene E. Klecan and Donald Schauferte.

Freedman, Boyd, Daniels, Peifer, Holland-er, Guttman & Goldberg, J. Michele Guttman, Albuquerque, Louise Melling, Cather-

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OPINION

MINZNER, J.

{1} This case concerns the authority of the Secretary of the New Mexico Human Services Department to restrict funding for medically necessary abortions under the State's Medicaid program. The Secretary appeals the district court's order permanently enjoining the Department from enforcing a rule that prohibits the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to save the life of the mother, to end an ectopic pregnancy, or

when the pregnancy resulted from rape or incest. Under the district court's order, the Department must allow the use of state funds to pay for abortions for Medicaid-eligible women when they are medically necessary. Under the court's order, an abortion is "medically necessary" when a pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual.

{2} The Court of Appeals certified the appeal to this Court because it presented a significant question of law under the New Mexico Constitution. Based on the independent grounds provided by the Equal Rights Amendment to Article II, Section 18 of our state constitution, we affirm the district court's order. New Mexico's Equal Rights Amendment requires a searching judicial inquiry to determine whether the Department's rule prohibiting state funding for certain medically necessary abortions denies Medicaid-eligible women equality of rights under law. We conclude from this inquiry that the Department's rule violates New Mexico's Equal Rights Amendment because it results in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance. The district court did not exceed its authority in providing a remedy for this constitutional violation by enjoining the Department from enforcing its rule and requiring the Department to apply the standard of medical necessity in a nondiscriminatory manner in this case.

{3} As an alternative basis for affirming the district court's order, Plaintiffs argue that a woman's right to reproductive choice is among the inherent rights guaranteed by Article II, Section 4 of the New Mexico Constitution, and that the Department's rule unlawfully infringes upon this right because it favors childbirth over abortion. It is unnecessary for us to reach the broader questions raised by this argument, however, because we decide this appeal based upon the Department's violation of the Equal Rights

Amendment to Article II, Section 18 of our state constitution. Thus, our discussion is limited to the protection afforded by New Mexico's Equal Rights Amendment in the situation where the Department has elected to provide medical assistance to needy persons in this state.

I.

{4} We begin with a review of the factual and legal developments that led to this appeal. For many years, both federal and state law have provided funding for persons to obtain medical assistance when they meet certain criteria based on financial and medical need. At the federal level, Title XIX of the Social Security Amendments of 1965, 42 U.S.C. §§ 1396 to 1396v (1994 & Supp. II 1996), establishes a program, commonly known as "Medicaid," for the purpose of providing federal financial assistance to states that choose to participate. Under the program, the federal government pays a percentage of the total cost that a participating state incurs in providing certain categories of medical care and services to needy persons. See 42 U.S.C. § 1396b(a), 1396d(b)(1). While a state's medical assistance plan must contain a number of required elements in order to qualify for federal funding, see *Hern v. Beye*, 57 F.3d 906, 910 (10th Cir.1995), "Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable," *Harris v. McRae*, 448 U.S. 297, 309, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

{5} Except in cases of rape or incest, or when necessary to save the life of the mother, abortions are among the medical services for which federal funding is unavailable under a provision of federal law known as "the Hyde Amendment." See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations

1. We note that the Hyde Amendment is not "permanent legislation" but rather part of a statute appropriating funds for certain departments of the federal government for one fiscal year. See *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 477, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996) (per curiam). However, all versions of the Hyde Amendment subsequent to the district court's order have retained essentially the same restrictions. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, § 508, 110 Stat. 1321, 1321-243 (1996); Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104-208, § 508, 110 Stat. 3009, 3009-269 (1996); Balanced Budget Act of 1997, Pub.L. No. 105-33, § 2105(c)(1), (7), 111 Stat. 251, 561, 562-63 (1997). The question of the temporal scope of the district court's order is not before us.

Act of 1995, Pub.L. No. 103-333, § 509, 108 Stat. 2539, 2573 (1994).¹ However, "[a] participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." *Harris*, 448 U.S. at 311 n. 16, 100 S.Ct. 2671.

{6} Section 27-2-12 of New Mexico's Public Assistance Act, NMSA 1978, § 27-2-12 (1993), authorizes the Medical Assistance Division of the Human Services Department to issue regulations regarding the provision of medical assistance to persons eligible for public assistance programs under the federal Social Security Act. Pursuant to Section 27-2-12, the Department issued a rule, known as "Rule 766," that restricted the availability of abortions under the State's medical assistance plan. In response to concerns about its constitutionality, the Department revised Rule 766 in 1994 to expand the availability of abortions under the State's medical assistance plan. The revised rule allowed the use of state funds to provide abortions for Medicaid-eligible women when they are medically necessary. See *Pregnancy Termination Procedures*, N.M. Human Servs. Dep't, Med. Assistance Div. Reg. 766, 5 N.M.Reg. 1632 (Dec. 15, 1994, prior to 1995 amendment). The 1994 rule defined an abortion as "medically necessary" when a pregnancy "aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual." *Id.* Under the 1994 rule, abortions for Medicaid recipients that met this definition of "medically necessary" but did not fit into the exceptions of the Hyde Amendment were paid for exclusively with state funds.

{7} After a new Secretary was appointed, the Department made another revision of

sions and Appropriations Act of 1996, Pub.L. No. 104-134, § 508, 110 Stat. 1321, 1321-243 (1996); Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104-208, § 508, 110 Stat. 3009, 3009-269 (1996); Balanced Budget Act of 1997, Pub.L. No. 105-33, § 2105(c)(1), (7), 111 Stat. 251, 561, 562-63 (1997). The question of the temporal scope of the district court's order is not before us.

Rule 766 that was scheduled to take effect in May 1995. The 1995 rule restricted state funding of abortions under the Department's medical assistance program to those certified by a physician as necessary to save the life of the mother or to end an ectopic pregnancy, or when the pregnancy resulted from rape or incest. *See* Pregnancy Termination Procedures, N.M. Human Serv. Dep't, Med. Assistance Div. Reg., 6 N.M.Reg. 684 (Apr. 29, 1995) (codified at 8 NMAC 4.MAD.766 (May 1, 1995)).² On April 21, 1995, however, Plaintiffs brought suit in the district court to prevent the 1995 revision of Rule 766 from taking effect.

{8} Plaintiffs' complaint alleged that Rule 766 violates the rights of Medicaid-eligible women under Article II, Sections 4 and 18 of the New Mexico Constitution. The Department denied these allegations. Eugene E. Klecan filed a motion, in which Donald Schaurete later joined, to intervene as of right as a taxpayer and representative of the potential life of the unborn. The district court granted the motion to intervene. The Attorney General declined to represent the Department and was later allowed to present arguments as an amicus curiae.

{9} On May 1, 1995, the district court granted a preliminary injunction to keep the 1995 revision of Rule 766 from taking effect. Both Plaintiffs and the Department subsequently filed motions for summary judgment and entered stipulations of fact. On July 3, 1995, the district court issued a memorandum opinion concluding that the 1995 revision of Rule 766 violates Article II, Section 18 of the New Mexico Constitution. On this basis, the district court granted Plaintiffs' motion for summary judgment and made the injunction permanent. The Department appealed this ruling. Klecan and Schaurete also appealed. Plaintiffs cross-appealed the orders allowing Klecan and Schaurete to intervene.³ On October 13, 1995, the Court of Appeals certified the appeals to this Court.

2. For ease of reference, all subsequent citations to the New Mexico Human Services Department Rules are to the New Mexico Administrative Code as amended through May 1, 1995, unless otherwise noted.

II.

{10} The parties raise several threshold questions that we must answer before turning to the merits of the district court's ruling. First, the Department challenges Plaintiffs' standing to assert a claim on behalf of pregnant women who seek medically necessary abortions under the State's medical assistance program. Second, Plaintiffs challenge the district court rulings that allowed Klecan and Schaurete to intervene as of right in this case. Third, Klecan and Schaurete assert that Plaintiffs' claims must be dismissed because the doctrine of sovereign immunity bars them from bringing suit against the Department. Finally, the Department asserts that the district court's order granting Plaintiff's motion for summary judgment was improper because there are disputed issues of material fact.

A.

[1] {11} Plaintiffs Curtis Boyd, M.D., Lucia Cies, M.D., Bruce Ferguson, M.D., and Lewis H. Koplik, M.D., are individual physicians who provide reproductive health care services, including abortions, to Medicaid-eligible women. Plaintiff Abortion and Reproductive Health Services is a non-profit organization that also provides such services. Plaintiff Planned Parenthood of the Rio Grande is a non-profit organization that provides counseling and referral on pregnancy options, including abortion, and loans funds for abortions to Medicaid-eligible women. Plaintiff New Mexico Right to Choose/NARAL is a non-profit advocacy organization with members who are Medicaid-eligible women. The Department contends that Plaintiffs do not have standing to bring this lawsuit because none of them are Medicaid-eligible women who seek a medically necessary abortion and were denied it due to Rule 766.

[2] {12} In order to obtain standing for judicial review in New Mexico, litigants gen-

3. Plaintiffs also cross-appealed the district court's refusal to award attorney fees. However, this Court granted a stay of the cross-appeal regarding Plaintiffs' attorney fees pending the disposition of the other issues. We do not address the issue of attorney fees in this opinion.

erally must allege that they are directly injured as a result of the action they seek to challenge in court. See *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 472, 535 P.2d 1320, 1323 (1975); *Ramirez v. City of Santa Fe*, 115 N.M. 417, 420, 852 P.2d 690, 693 (Ct.App.1993); cf. *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 16, 124 N.M. 640, 954 P.2d 72 (noting prerequisites of "actual controversy" in declaratory judgment actions). Following the trend in federal standing law articulated in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), and *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973), however, this requirement is met even when the extent of the alleged injury is slight, see *Ramirez*, 115 N.M. at 420, 852 P.2d at 693, or the allegation is made by an organization on behalf of its members, see *National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct.App. 1994). Moreover, New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution. See *John Does I Through III v. Roman Catholic Church of the Archdiocese of Santa Fe, Inc.*, 1996-NMCA-094, ¶¶ 25-26, 122 N.M. 307, 924 P.2d 273; cf. *State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995) (concluding that it is within this Court's discretion to confer standing "on the basis of the importance of the public issues involved." (quoting *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974))).

[3] {13} Nevertheless, the exercise of this Court's discretion to confer standing should be guided by prudential considerations, particularly when litigants seek to assert claims on behalf of third parties. Cf. *John Does I Through III*, 1996-NMCA-094, ¶ 25, 122 N.M. 307, 924 P.2d 273 ("The requirements for standing derive from constitutional provisions, enacted statutes and rules, and prudential considerations."). Under federal standing law, courts consider the following three criteria in determining the right of litigants to bring actions on behalf of third parties:

The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (citations omitted); see also *Singleton v. Wulff*, 428 U.S. 106, 112-16, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (plurality opinion); *Craig v. Boren*, 429 U.S. 190, 192-97, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). These three criteria, as applied by the plurality in *Singleton*, 428 U.S. at 112-18, 96 S.Ct. 2868, warrant our consideration in this case.

{14} Insofar as they are providers of abortion services to Medicaid-eligible women, Plaintiffs have both a direct financial interest in obtaining state funding to reimburse them for the cost of these services, see *id.* at 112-13, 96 S.Ct. 2868, and a close relation to the Medicaid-eligible women whose rights they seek to assert in court, see *id.* at 117, 96 S.Ct. 2868. Insofar as Plaintiff New Mexico Right to Choose/NARAL seeks to assert the rights of its members who are Medicaid-eligible women, this organization also has a sufficiently direct interest and a sufficiently close relationship. Cf. *National Trust for Historic Preservation*, 117 N.M. at 594, 874 P.2d at 802 (organization may assert claim on behalf of its members). Further, we agree with the plurality in *Singleton*, 428 U.S. at 117-18, 96 S.Ct. 2868, that privacy concerns and time constraints impose a significant hindrance on the ability of Medicaid-eligible women to protect their own interest in obtaining medically necessary abortions. For all of these reasons, we determine that Plaintiffs have standing to challenge the constitutionality of Rule 766 in this case.

B.

{15} In the district court, Klecan and Schaurete moved to intervene as of right under Rule 1-024(A) NMRA 1998. They did not assert a statutory right to intervene under Rule 1-024(A)(1), nor did they seek permissive intervention under Rule 1-024(B).

Thus, we must determine whether the district court applied the correct legal standard in granting the motion to intervene under Rule 1-024(A)(2). *Cf. State v. Elinski*, 1997-NMCA-117, ¶ 8, 124 N.M. 261, 948 P.2d 1209 (providing for de novo review of a discretionary decision that is premised on misapprehension of the law).

{16} Under Rule 1-024(A)(2), anyone who makes a timely application shall be permitted to intervene

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Plaintiffs contend that Klecan and Schaurete's asserted interest as taxpayers and protectors of the potential life of the unborn is not sufficient to meet this standard. We agree with Plaintiffs that Klecan and Schaurete fail to meet the requirements of Rule 1-024(A)(2).

{4, 5} {17} Rule 1-024(A)(2) requires a person claiming a right of intervention to demonstrate an interest in the action "that is significant, direct rather than contingent, and based on a right belonging to the proposed intervenor rather than [to] an existing party to the suit." *Cordova v. State ex rel. Human Servs. Dep't (In re Marcia L.)*, 109 N.M. 420, 421, 785 P.2d 1039, 1040 (Ct.App.1989). In this respect, the requirements for intervention as of right seem to accord with the general requirements for standing. *Cf.* Rule 1-082 NMRA 1998 (rules of civil procedure shall not be construed to extend court's jurisdiction); *In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040 (noting that Rule 1-024(A) "is almost identical to [Fed.R.Civ.P.] 24(a)"); 6 James Wm. Moore et al., *Moore's Federal Practice* § 24.03[2][d], at 24-37 (3d ed.1998) (advocating the view that a party who lacks standing cannot intervene under Fed. R.Civ.P. 24(a)). However, while we may confer standing to decide an issue of great public importance, *see State ex rel. Clark*, 120 N.M. at 569, 904 P.2d at 18, this power to confer

standing "does not equate with rights of indiscriminate intervention.' The bounds of [Rule 1-024] are to be observed." *Dominiguez v. Rogers*, 100 N.M. 605, 608, 673 P.2d 1338, 1341 (Ct.App.1983) (quoting *Peterson v. United States*, 41 F.R.D. 131, 135 (D.Minn. 1966) (mem.)).

{6} {18} In this case, Klecan and Schaurete assert that their interests as taxpayers will be harmed by the expenditure of state funds for medically necessary abortions. However, they have not alleged that such an expenditure will change their tax liability in any way, or that any of their tax payments are earmarked for the purpose of paying for abortions. Thus, we conclude that Klecan and Schaurete's interest as taxpayers is not sufficiently direct to meet the requirements of Rule 1-024(A)(2). *See In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040; *cf. Eastham v. Public Employees' Retirement Ass'n Bd.*, 89 N.M. 399, 405, 553 P.2d 679, 685 (1976) (concluding that taxpayers lack standing when they fail to demonstrate that they "will be affected by the acts sought to be enjoined in any other manner than any other taxpayer of the state'" (quoting *Asplund v. Hannett*, 31 N.M. 641, 645, 249 P. 1074, 1075 (1926))). As such, Klecan and Schaurete's asserted interest as taxpayers does not entitle them to intervene as a matter of right in this case.

{7, 8} {19} With regard to Klecan and Schaurete's alleged interest as representatives of the potential life of the unborn, we conclude that interest is adequately protected by the Department in this case. "Where the State . . . is named as a party to an action and the interest the applicant seeks to protect is represented by a governmental entity, a presumption of adequate representation exists." *Chino Mines Co. v. Del Curto*, 114 N.M. 521, 524, 842 P.2d 738, 741 (Ct.App. 1992); *see also Planned Parenthood League of Mass., Inc. v. Attorney General*, 424 Mass. 586, 677 N.E.2d 101, 109 (Mass.1997); 6 Moore et al., *supra*, § 24.03[4][a][iv][A], at 24-46.1 to 24-46.2; *cf. In re Marcia L.*, 109 N.M. at 421, 785 P.2d at 1040 (intervention under Rule 1-024(A) must be "based on a right belonging to the proposed intervenor rather than [to] an existing party to the

suit”). Thus, to the extent that the interest in the potential life of the unborn requires legal representation in this case, the Department is presumed to represent that interest adequately.

[9] {20} To overcome this presumption, the proposed intervenors must demonstrate that the representation is inadequate by showing, for example, an adversity of interest, collusion, or nonfeasance on the part of the Department. *See Chino Mines Co.*, 114 N.M. at 524, 842 P.2d at 741; 6 Moore et al., *supra*, § 24.03[4][a][ii], at 24–45. In this case, Klecan, Schaurete, and the Department share the same ultimate objective—upholding the constitutionality of Rule 766. While the record indicates that there may have been some difference of opinion about the tactics used to accomplish this objective, such differences are insufficient to establish an adversity of interest. *See Planned Parenthood League*, 677 N.E.2d at 109; 6 Moore et al., *supra*, § 24.03[4][a][iii], at 24–45. Further, the fact that the Attorney General chose to support the Plaintiffs’ position as an amicus curiae does not show collusion or nonfeasance on the part of the Department. The record shows that the Department was provided with independent and adequate representation notwithstanding the Attorney General’s position in this case.

{21} For these reasons, the proposed intervenor’s “assertion of an interest in the protection of ‘unborn’ children is also insufficient to justify intervention as of right.” *Keith v. Daley*, 764 F.2d 1265, 1271 (7th Cir.1985); *cf. Dominguez*, 100 N.M. at 608, 673 P.2d at 1341 (rejecting a father’s application to intervene as of right in an action for wrongful death of his daughter where the father’s interest was represented by a duly appointed personal representative and the father failed to show that representation was inadequate). We conclude that the district court’s decision to grant the motion to intervene as of right requires reversal “because it was premised on a misapprehension of the law.” *Elinski*, 1997–NMCA–117, ¶ 8, 124 N.M. 261, 948 P.2d 1209.

{22} Because we reverse on this issue, we need not reach the question of whether Klecan and Schaurete were denied due pro-

cess after the district court erroneously granted their motion to intervene. In light of the public importance of the other constitutional issues presented in this case, however, we consider Klecan and Schaurete’s other arguments as if they were presented by an amicus curiae. *Cf.* 6 Moore et al., *supra*, § 24.03[2][b], at 24–29 (“[A]pplicants concerned only about the legal principles that apply to an action may appear as amici curiae, but they are not entitled to intervene as of right.”).

C.

[10] {23} Klecan and Schaurete assert that Plaintiffs’ complaint must be dismissed because the Department is not subject to suit in this matter. Section 44–6–13 of the Declaratory Judgment Act, NMSA 1978, § 44–6–13 (1975), however, plainly states that “the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights . . . of the parties call for a construction of the constitution of the state of New Mexico.” Further, we have heard other claims against the Department that challenge the constitutionality of its public assistance programs, *see, e.g., Howell v. Heim*, 118 N.M. 500, 882 P.2d 541 (1994); *cf. Katz v. New Mexico Dept of Human Servs., Income Support Div.*, 95 N.M. 530, 624 P.2d 39 (1981) (appeal of administrative ruling), and in this case, the Department admitted the jurisdictional allegations in Plaintiffs’ complaint. Therefore, sovereign immunity does not shield the Department from appearing in court as a defendant in this case.

D.

[11, 12] {24} “Summary judgment is proper if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992); *see also* Rule 1–056(C) NMRA 1998. On appeal, the Department contends that the district court erred in entering summary judgment in Plaintiff’s favor because there are genuine issues of material fact. In the district court, however, the Department filed its own motion for summary judgment,

and also stipulated that “the[] parties agree that based upon this record, this case is ripe for determination by summary judgment.” In addition, the parties filed a lengthy set of stipulated facts. While some disputed facts not covered by these stipulations may remain, they do not preclude summary judgment without a showing that they are material. *See Tapia v. Springer Transfer Co.*, 106 N.M. 461, 463, 744 P.2d 1264, 1266 (Ct.App. 1987). The Department made no such showing here. *Cf. Spectron Dev. Lab. v. American Hollow Boring Co.*, 1997–NMCA–025, ¶ 32, 123 N.M. 170, 936 P.2d 852 (concluding that normal rules of preservation of error apply to appeals from summary judgments). Therefore, this issue does not provide a basis for reversal of the district court’s order, and none of the threshold issues raised by the parties preclude this Court from ruling on the constitutionality of Rule 766.

III.

{25} We next address the merits of Plaintiffs’ constitutional claims. Plaintiffs concede that the United States Constitution does not require the State to provide funding to Medicaid-eligible women for medically necessary abortions that fall outside the restrictions of the Hyde Amendment. *See Harris*, 448 U.S. at 316, 100 S.Ct. 2671. Plaintiffs’ arguments in the district court and on appeal are directed to the issue of whether the New Mexico Constitution affords greater protection than federal law. This issue was preserved below. *See State v. Gomez*, 1997–NMSC–006, ¶¶ 22, 23, 122 N.M. 777, 932 P.2d 1 (requirements for preserving state constitutional issue when parallel provision of federal constitution is involved); *cf. State v. Sarracino*, 1998–NMSC–022, ¶ 11, 125 N.M. 511, 964 P.2d 72 (discussing preservation when there is no federal constitutional scheme from which to depart).

{26} At least twelve other state courts have published opinions addressing the question of whether state law requires funding for abortions for indigent women in situations where federal reimbursement is unavailable. In six of these states, the courts have determined that such funding is required under their state constitutions. *See*

Committee to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779, 798–99 (1981); *Doe v. Maher*, 40 Conn.Supp. 394, 515 A.2d 134, 162 (Super.Ct.1986); *Moe v. Secretary of Admin. and Fin.*, 382 Mass. 629, 417 N.E.2d 387, 404 (1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 32 (Minn.1995); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925, 941 (1982); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W.Va. 436, 446 S.E.2d 658, 667 (1993). One court found that a state agency exceeded its statutory authority in restricting state funding for abortions. *See Planned Parenthood Ass’n, Inc. v. Department of Human Resources*, 297 Or. 562, 687 P.2d 785, 792–93 (1984). Another court expressed disapproval of an agency rule restricting state funding for abortions in an opinion holding that a trial court abused its discretion in denying an award of attorney fees to plaintiffs who prevailed in their challenge to such restrictions. *See Roe v. Harris*, 128 Idaho 569, 917 P.2d 403, 407 (1996). In four of the twelve states that have published opinions on the issue, however, the courts have not found provisions in their state constitutions that require state funding for abortions in situations where federal reimbursement is unavailable. *See Doe v. Department of Social Servs.*, 439 Mich. 650, 487 N.W.2d 166, 179–80 (1992); *Hope v. Perales*, 83 N.Y.2d 563, 611 N.Y.S.2d 811, 634 N.E.2d 183, 188 (1994); *Rosie J. v. North Carolina Dept of Human Resources*, 347 N.C. 247, 491 S.E.2d 535, 538 (1997); *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114, 126 (1985). Only two of the published opinions addressing the issue have analyzed whether state funding for abortions is required by a state’s equal rights amendment, with conflicting results. *Compare Doe*, 515 A.2d at 162 (concluding that funding restrictions violate Connecticut’s equal rights amendment), *with Fischer*, 502 A.2d at 126 (concluding that funding restrictions do not violate Pennsylvania’s equal rights amendment).

{27} Our analysis focuses on the protection afforded by the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution in the situation where the Department has elected to provide medical assistance to needy persons. We first

examine whether this provision of our state constitution establishes a basis for affording Medicaid-eligible women greater protection against gender discrimination than they receive under federal law. We conclude that it does. Next, we address the Department's claim that Rule 766 does not warrant heightened judicial scrutiny because it is based on a physical characteristic unique to one sex, namely the ability to become pregnant and bear children. We conclude that this unique physical characteristic does not exempt Rule 766 from a searching judicial inquiry under New Mexico's Equal Rights Amendment. We then examine whether Rule 766 operates to the disadvantage of women in the context of the State's Medicaid program, and we determine that Rule 766 is presumptively unconstitutional because it results in a program that does not apply the same standard of medical necessity to both men and women. Finally, we examine whether there is a compelling justification for treating men and women differently with respect to their eligibility for medical assistance in this instance. Because such a compelling justification is lacking in this case, we conclude that Rule 766 violates the New Mexico Constitution.

A.

[13, 14] {28} Neither the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this Court from affording greater protection of the rights of Medicaid-eligible women under our state constitution in this instance. See *Gomez*, 1997-NMSC-006, ¶ 17, 122 N.M. 777, 932 P.2d 1; *Harris*, 448 U.S. at 311 n. 16, 100 S.Ct. 2671. Under this Court's "interstitial approach" to state constitutional interpretation, we "may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." *Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1; see also *State v. Gutierrez*, 116 N.M. 431, 440, 863 P.2d 1052, 1061 (1993) (describing this Court's "willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees"). In this case, we find distinctive state characteristics that

render the federal equal-protection analysis inapposite with respect to Plaintiffs' claim of gender discrimination.

{29} Article II, Section 18 of the New Mexico Constitution guarantees that "[e]quality of rights under law shall not be denied on account of the sex of any person." This guarantee became part of our state constitution in 1973, after the people of New Mexico passed the Equal Rights Amendment by an overwhelming margin. See Richard H. Folmar, *Piecemeal Amendment of the New Mexico Constitution: 1911 to 1990*, at 28 tbl. I, 34 tbl. IV (13th rev., New Mexico Legis. Council Serv., 1991). There is no counterpart to New Mexico's Equal Rights Amendment in the United States Constitution. Indeed, the absence of such an amendment to the United States Constitution appears to have been a significant factor in the development of federal law applying the Equal Protection Clause to gender discrimination claims. See *Frontiero v. Richardson*, 411 U.S. 677, 692, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (Powell, J., concurring in the judgment) (pending ratification process for federal equal rights amendment provides "reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny"); *People v. Ellis*, 57 Ill.2d 127, 311 N.E.2d 98, 101 (1974) (noting relationship between *Frontiero* and equal rights amendment). This lack of a federal counterpart to New Mexico's Equal Rights Amendment renders the federal equal protection analysis inapposite in this case.

{30} Prior to 1973, Article II, Section 18 of the New Mexico Constitution contained only the following sentence: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." The Equal Rights Amendment added a new sentence to this provision of our state constitution: "Equality of rights under law shall not be denied on account of the sex of any person." We construe the intent of this amendment as providing something beyond that already afforded by the general language of the Equal Protection Clause. See *Doe*, 515 A.2d at 160-61 ("To equate our [equal rights amendment] with the equal pro-

tection clause of the federal constitution would negate its meaning given that our state adopted an [equal rights amendment] while the federal government failed to do so.”); *Ellis*, 311 N.E.2d at 101 (“[W]e find inescapable the conclusion that [our equal rights amendment] was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights[.]”); *Darrin v. Gould*, 85 Wash.2d 859, 540 P.2d 882, 889 (1975) (en banc) (“Any other view would mean the people intended to accomplish no change in the existing constitutional law governing sex discrimination” when they enacted an equal rights amendment); cf. *Hannett v. Jones*, 104 N.M. 392, 395, 722 P.2d 643, 646 (1986) (“[C]onstitutions must be construed so that no part is rendered surplusage or superfluous[.]”).

{31} We do not base our analysis on a mere textual difference between the federal and state constitutions. Cf. *Gomez*, 1997–NMSC–006, ¶ 17, 122 N.M. 777, 932 P.2d 1 (indicating that textual differences are not necessary prerequisites to affording broader protection under the New Mexico Constitution (citing *State ex rel. Serna v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976))). Rather, we view New Mexico’s Equal Rights Amendment as the culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality in this state. A review of the history of these amendments informs our analysis.

{32} From its inception, our state constitution has recognized that “[a]ll persons are born equally free.” N.M. Const. art. II, § 4. The provisions in our state constitution prohibiting discrimination on account of sex, however, have developed in a piecemeal fashion. At the time the New Mexico Constitution was drafted in 1910, the rights of women to vote and participate in public life were a topic of debate and compromise. See Reuben W. Heflin, *New Mexico Constitutional Convention*, 21 N.M.Hist.Rev. 60, 67 (1946); Edward D. Tittmann, *New Mexico Constitutional Convention: Recollections*, 27 N.M.Hist.Rev. 177, 182 (1952). While Congress only extended the right to vote and hold public office to “every free white male inhabitant” when it established the Territory

of New Mexico in 1850, see Organic Act Establishing the Territory of New Mexico, ch. 49, § 6, 9 Stat. 446, 449 (1850) (compiled in NMSA 1978, vol. 1, Territorial Laws and Treaties), in 1914 this Court noted that the territorial government had appointed women to hold various public offices, see *State v. Chaves de Armijo*, 18 N.M. 646, 663–64, 140 P. 1123, 1129 (1914). In addition, “[t]he Supreme Court of the Territory, in 1908, admitted a woman to practice law in the Territory, and [circa 1889] a woman was admitted to the bar at Las Vegas.” *Id.* at 663, 140 P. at 1129.

{33} The original state constitution that became law in 1912, however, only gave women the right to vote in school elections and to hold the office of county school superintendent, school director, board of education member, notary public, and “such other appointive offices as may be provided by law.” N.M. Const. art. XX, § 11; *id.* art. VII, § 2 (prior to 1921 amendment). In 1913, the Legislature provided that “women may hold any appointive office in the State of New Mexico.” 1913 N.M.Laws, ch. 60. Following the passage of the Nineteenth Amendment to the United States Constitution, which gave women the unconditional right to vote in federal and state elections, Article VII, Section 2 of the New Mexico Constitution was amended in 1921 to state that “[t]he right to hold public office in New Mexico shall not be denied or abridged on account of sex, and wherever the masculine gender is used in this constitution, in defining the qualifications for specific offices, it shall be construed to include the feminine gender.” See Folmar, *supra*, at 22 tbl. I.

{34} Despite these developments, many of the State’s early laws continued to reflect the common-law view “that women were incapable mentally of exercising judgment and discretion and were classed with children, lunatics, idiots, and aliens insofar as their political rights were concerned.” *Chaves de Armijo*, 18 N.M. at 659, 140 P. at 1127; see also Anne K. Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N.M.L.Rev. 11, 56 (1973) (noting

early community property laws that “reflect[ed] the attitudes of an era when married women were expected to rear children, care for home and husband, and do nothing else”). For example, the State’s early marriage laws provided that “[t]he husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.” NMSA 1953, § 57-2-2 (1907) (repealed 1973); *see also* NMSA 1953, § 57-4-3 (1927) (repealed 1973) (granting husbands the exclusive right to manage and control personal property shared by their wives under the state’s community property laws).

{35} Many of these early laws were repealed or amended in direct response to the passage of the Equal Rights Amendment in 1972. *See, e.g.*, 1973 N.M.Laws, ch. 58, § 1 (revising the definition of “unlawful discriminatory practice” under the New Mexico Human Rights Act, NMSA 1978, § 28-1-7 (1995), to expand prohibitions on sex discrimination); Anne K. Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L.Rev. 1 (1974) (reviewing changes in community property law occasioned by passage of the Equal Rights Amendment); Folmar, *supra*, at 28 tbl. I (noting that Article VIII, Section 5 of the New Mexico Constitution was amended in 1973 to remove gender-based restrictions on veterans’ property tax exemptions); Lisa Dawgert Waggoner, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, 22 N.M.L.Rev. 551, 561 (1992) (describing changes to the definition of criminal sexual offenses in response to the Equal Rights Amendment). New Mexico courts also have relied upon the Equal Rights Amendment and the statutory changes that followed in its wake. *See, e.g.*, *State v. Gonzales*, 111 N.M. 590, 599, 808 P.2d 40, 49 (Ct.App.1991) (Equal Rights Amendment makes it “clear beyond cavil that discrimination on the basis of gender in the use of peremptory challenges [to strike jurors in a criminal case] is prohibited in New Mexico”); *Behrmann v. Phototron Corp.*, 110 N.M. 323, 328, 795 P.2d 1015, 1020 (1990) (affirming a jury verdict in favor of an employee who claimed that termination of her employment because of her

pregnancy was an unlawful discriminatory practice under Section 28-1-7).

[15, 16] {36} Based on our review of the text and history of our state constitution, we conclude that New Mexico’s Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious consequences of the gender-based discrimination that prevailed under the common law and civil law traditions that preceded it. As such, the Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications. This inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the State’s burden to rebut this presumption.

{37} Although we recognize that federal courts currently apply an intermediate level of scrutiny to gender-based classifications, *see United States v. Virginia*, 518 U.S. 515, 532-34, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), our rationale for conducting a searching judicial inquiry regarding such classifications under the New Mexico Constitution may accord with the criteria for invoking more stringent judicial scrutiny under federal law, *see United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (noting that heightened scrutiny may be appropriate “when legislation appears on its face to be within a specific prohibition of the Constitution”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (“history of purposeful unequal treatment” is one of “traditional indicia” of suspect classification requiring strict scrutiny under federal law); *Marrujo v. New Mexico State Highway Transp. Dep’t*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) (noting circumstances in which strict scrutiny applies); *cf. Opinion of the Justices to the House of Representatives*, 374 Mass. 836, 371 N.E.2d 426, 428 (1977) (“To use a standard . . . which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.”). Thus, as we explain below, our analysis is not inextricably tied to the standard of review employed by the federal courts. *Cf. Gutierrez*, 116 N.M. at 435-36,

863 P.2d at 1056–57 (in interpreting state constitutional guarantees, New Mexico courts may seek guidance from decisions of federal courts without being bound by those decisions).

B.

[17, 18] {38} The Department asserts that heightened scrutiny is not warranted in this case because Rule 766 employs a classification based on a “physical condition” with respect to which men and women are not similarly situated. *See Geduldig v. Aiello*, 417 U.S. 484, 496–97 n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974); *Fischer*, 502 A.2d at 125–26. We agree that not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination. A flat prohibition of such classifications may lead to “absurd results.” *See generally* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 893–94 (1971); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 Univ.Cin.L.Rev. 1, 37 (1975). For this reason, the presumption that gender-based classifications violate New Mexico’s Equal Rights Amendment is not irrebuttable, and our heightened scrutiny need not be “fatal in fact.” *Cf. Virginia*, 518 U.S. at 533 n. 6, 116 S.Ct. 2264 (observing that “strict scrutiny of [classifications based on race or national origin] is not inevitably ‘fatal in fact’”).

{39} It would be error, however, to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex. In this context, “‘similarly situated’ cannot mean simply ‘similar in the possession of the classifying trait.’ All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test.” Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal.L.Rev. 341, 345 (1949). It is equally erroneous to rely on the notion that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some “natural” grouping. *See id.* at 346. We find this error

present in an analysis which reasons that laws affecting only the members of one sex may be justified by “certain immutable facts of life which no amount of legislation may change.” *Fischer*, 502 A.2d at 125.

[19, 20] {40} To determine whether men and women are similarly situated with respect to a classification, “we must look beyond the classification to the purpose of the law.” Tussman & tenBroek, *supra*, at 346. Further, to determine whether a classification based on a physical characteristic unique to one sex results in the denial of “equality of rights under law” within the meaning of New Mexico’s Equal Rights Amendment, we must ascertain whether the classification “operates to the disadvantage of persons so classified.” Ginsburg, *supra*, at 37–38; *see also* Brown et al., *supra*, at 894 (noting danger that rule based on unique physical characteristic “could be used to justify laws that in overall effect seriously discriminate against one sex”); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum.L.Rev. 1, 33 (1992) (“The question at hand is whether government has the power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.”); Laurence H. Tribe, *American Constitutional Law* § 16–29, at 1584 (2d ed. 1988) (“[T]he fundamental problem is [the] willingness to transmute woman’s ‘real’ biological difference to woman’s disadvantage.”).

{41} In making these determinations, we cannot ignore the fact that “[s]ince time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them.” *Doe*, 515 A.2d at 159. Further, history teaches that lawmakers often have attempted to justify gender-based discrimination on the grounds that it is “benign” or “protective” of women. *See generally* Ginsburg, *supra*, at 2–7; *cf. Frontiero*, 411 U.S. at 684, 93 S.Ct. 1764 (plurality opinion) (discussing “attitude of ‘romantic paternalism’”). For example, as a basis for imposing restrictions on women’s ability to work and participate in public life, courts have accepted at face value a desire of lawmakers to protect women from “ugliness and

depravity,” *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), “a legislative solicitude for the moral and physical well-being of women,” *Goesaert v. Cleary*, 335 U.S. 464, 468, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (Rutledge, J., dissenting), *overruling recognized by Payne v. Tennessee*, 501 U.S. 808, 828 n. 1, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), including the need to protect a woman’s “physical structure and a proper discharge of her maternal functions,” *Muller v. Oregon*, 208 U.S. 412, 422, 28 S.Ct. 324, 52 L.Ed. 551 (1908), and the rationale that “woman is still regarded as the center of home and family life,” *Hoyt v. Florida*, 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), *overruling recognized by Payne*, 501 U.S. at 829 n. 1, 111 S.Ct. 2597.

{42} We also note that some physical characteristics, such as the ability to become pregnant, may have profound health consequences. For example, there is undisputed evidence in the record that carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus. The evidence presented in this case concerning the health consequences of pregnancy accords with the expert medical testimony presented in other cases. *See, e.g., Doe*, 515 A.2d at 142; *Moe*, 417 N.E.2d at 393 n. 10.

{21} {43} In light of these factors, we conclude that classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the Equal Rights Amendment to Article II, Section 18

4. We recognize that the Second Circuit disagrees with this interpretation to the extent it implies that a participating state is required to provide certain kinds of durable medical equipment to every Medicaid-eligible individual who has a rare condition or unusual need. *See DeSario v. Thomas*, 139 F.3d 80, 96 (2d Cir.1998). The

of the New Mexico Constitution. New Mexico’s state constitution requires the State to provide a compelling justification for using such classifications to the disadvantage of the persons they classify.

C.

{22} {44} Looking “beyond the classification to the purpose of the law,” Tussman & tenBroek, *supra*, at 346, it is apparent that men and women who meet the Department’s general criteria regarding financial and medical need are similarly situated with respect to their eligibility for medical assistance in this case. The basic objective of Title XIX of the federal Social Security Act is to provide qualified individuals with necessary medical care. *See* 42 U.S.C. § 1396; *Hern*, 57 F.3d at 910–11. Likewise, “[t]he mission of the New Mexico Medical Assistance Division is to maximize the health status of Medicaid-eligible individuals by furnishing payment for quality health services at levels comparable to private health plans.” 8 NMAC 4.MAD.002.

{45} While Title XIX gives the State some flexibility to determine the extent of coverage for the required categories of medical services, several federal courts, including the Tenth Circuit, have “interpreted Title XIX and its accompanying regulations as imposing a general obligation on [participating] states to fund those mandatory coverage services that are medically necessary.” *Hern*, 57 F.3d at 911.⁴ Apart from the restrictions on federal funding imposed by the Hyde Amendment, “[a]bortion falls under several of these ‘mandatory coverage’ categories.” *Id.* at 910. Further, the mandatory coverage services available under state law generally rely on the standard of medical necessity. *See* 8 NMAC 4.MAD.601 (providing for services “which are medically necessary for the diagnosis and/or treatment of

present case, however, does not involve benefits of the kind requested by the *DeSario* plaintiffs, and the defendant in *DeSario* is a state that has been ordered to provide medically necessary abortions to comply with its state constitution. *See Doe*, 515 A.2d at 162.

illnesses, injuries, or conditions of recipients”).

{46} Except in the cases of rape or incest, or when necessary to save the life of the mother, Rule 766 denies state funding for abortions even when they are medically necessary. Under the Department’s regulations, there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department’s regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy. For example, the Department does not explicitly condition reimbursement for any covered health service for income-eligible men on a physician’s certification that the care is necessary to save the life of the patient.

{47} Thus, Rule 766 undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women. See *Geduldig*, 417 U.S. at 501, 94 S.Ct. 2485 (Brennan, J., dissenting); Sunstein, *supra*, at 32–33. “Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination.” *Doe*, 515 A.2d at 159. We determine that Rule 766 employs a gender-based classification that operates to the disadvantage of women and is therefore presumptively unconstitutional. In order to survive the heightened scrutiny that we apply to such classifications, the State must meet its burden of showing that Rule 766 is supported by a compelling justification.

D.

{48} The Department asserts that the restriction on medically necessary abortions imposed by Rule 766 serves the State’s interests in two ways. First, the Department claims that Rule 766 is a legitimate cost-saving measure. In this regard, we acknowledge that courts very rarely require the government to fund its citizens’ exercise of their constitutional rights. See *Harris*, 448 U.S. at 316–18, 100 S.Ct. 2671 (federal govern-

ment is not required to fund a woman’s exercise of her constitutional right to abortion); *Howell*, 118 N.M. at 506, 882 P.2d at 547 (concluding that there is no fundamental right to receive public assistance). But that is not to say that when the Department elects to provide medically necessary services to indigent persons, it can do so in a way that discriminates against some recipients on account of their gender.

{49} The Department fails to offer a sufficiently compelling justification for such discrimination in this case. To be sure, Rule 766 may prevent the State from incurring the cost of funding medically necessary abortions not covered by the Hyde Amendment. But the Department’s assertion “that it saves money when it declines to pay the cost of a [Medicaid-eligible woman’s medically necessary] abortion is simply contrary to undisputed facts.” *Maher v. Roe*, 432 U.S. 464, 490, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (Brennan, J., dissenting) (citation omitted).

{50} Pregnant women who qualify for medical assistance from the Department are, by definition, unable to pay for their own medical expenses. Such women have only a limited period of time to obtain a safe, relatively inexpensive abortion after discovering that they are pregnant. The expense of obtaining an abortion increases two to six times in the second trimester. Further, it is not unreasonable to infer that the conditions which make an abortion medically necessary also may have a disabling effect on a pregnant woman’s earning capacity. For these reasons, we cannot assume that Medicaid-eligible women are likely to obtain medically necessary abortions with private funds when they are denied state funding under Rule 766.

{51} Indeed, such a result would be incompatible with the second interest asserted by the Department—protecting the potential life of the unborn. If Rule 766 only succeeded in shifting the burden of paying for abortion services to the private sector, then it would lose its effect of preserving potential life. Thus, in order to account for the second interest asserted by the Department, we must assume that the Department stands

ready to accept an increase in the cost of other forms of medical assistance to which Medicaid-eligible pregnant women are entitled when they are denied medically necessary abortions.

{52} Under this scenario, for every woman who is denied state funding for a medically necessary abortion, we must assume the Department will be obligated to contribute a significant portion of the funds used to pay for medical expenses associated with bringing a pregnancy to term.⁵ These expenses may include the cost of providing midwife services, *see* 8 NMAC 4.MAD.718.1, case management services for pregnant women and their infants, *see* 8 NMAC 4.MAD.772 (May 15, 1996), coverage for newborn infants, *see* 8 NMAC 4.NBN.400, and other pregnancy-related services, *see* 8 NMAC 4.PSO.400; 8 NMAC 4.PWN.400. In addition, the Department in some cases may have to cover medical treatment necessary to control the aggravation of pre-existing conditions that, according to Plaintiffs' allegations, would render an abortion medically necessary. *See* 42 C.F.R. § 440.210(a)(2) (1997) (mandatory coverage for "other conditions that might complicate the pregnancy"). It is undisputed that the State's expenses associated with bringing a pregnancy to term generally are much greater than its expenses associated with providing a medically necessary abortion.⁶ For these reasons, we cannot conclude that Rule 766 serves as the least restrictive means of reducing the State's costs of providing medical assistance.

{53} We next consider whether, apart from its financial impact, Rule 766 serves as the least restrictive means of advancing the State's interest in the potential life of the

unborn. Under federal law, the State's interest in the potential life of the unborn is never compelling enough to outweigh the interest in the life and health of the mother. *See Roe v. Wade*, 410 U.S. 113, 164–65, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833, 879, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion); *Doe*, 515 A.2d at 157. Assuming, however, that at some late stage of a woman's pregnancy the State's interest becomes sufficiently compelling to support the denial of public funding, Rule 766 is not the least restrictive means of advancing this interest because it prohibits state funding for most medically necessary abortions at all stages of a woman's pregnancy and without regard to her health except in life-threatening situations. Further, according to the parties' stipulated facts, Rule 766 also may deny coverage for an abortion even when it is determined that the fetus will not be viable because it suffers from a fatal physical or mental impairment.

{54} For these reasons, we conclude that Rule 766 is not the least restrictive means to advance the State's interest in the potential life of the unborn at a point when that interest may become compelling. Further, because the State fails to provide a compelling justification for treating men and women differently with respect to their medical needs in this instance, we conclude that Rule 766 violates the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution.

IV.

[23, 24] {55} We next address the Department's claim that the district court lacks

5. Under Title XIX, the federal government generally reimburses between 50 and 83 percent of a participating state's expenses for providing medical assistance. *See* 42 U.S.C. § 1396d(b)(1). For certain services, however, this percentage may be higher. *See, e.g., id.* § 1396b(a)(5) (federal government provides 90% reimbursement for sums attributable to family planning services and supplies).

6. According to the parties' stipulations, an abortion in the early stages of pregnancy costs between \$275 and \$350. From January to November 1994, the Department paid for 45 abortions at a cost of \$11,009.25. From December 1994 to May 1995, the Department paid for 161 abor-

tions at a cost of \$25,785.60. In contrast, the Department paid \$23,528,032.61 in hospital costs to provide labor and delivery services to 14,222 women from January to December 1994, for an average cost of \$1,654.34 per woman. This figure does not include the amount paid for other pregnancy-related services. Thus, even if the federal government reimbursed the Department for 90% of the costs of bringing a pregnancy to term, the related costs incurred by the State would remain comparable to, if not higher than, the amount the State expended per pregnancy for medically necessary abortions during the same time frame.

the authority to remedy this constitutional violation by ordering the State to pay for medically necessary abortions for Medicaid-eligible women. According to the Department, the district court's order is inconsistent with the requirements of Section 27-2-12 of the Public Assistance Act and the provisions in the New Mexico Constitution regarding the separation of powers.

{56} Section 27-2-12 provides that:

Consistent with the federal act and subject to the appropriation and availability of federal and state funds, the medical assistance division of the human services department may by regulation provide medical assistance, including the services of licensed doctors of oriental medicine and licensed chiropractors, to persons eligible for public assistance programs under the federal act.

The Department claims this language means that it cannot provide any medical assistance for which federal reimbursement is unavailable. Thus, according to the Department, the district court violated the Public Assistance Act and exceeded its constitutional powers by enacting law and appropriating state funds for such medical assistance in the case of medically necessary abortions that fall outside the restrictions in the Hyde Amendment. *See* N.M. Const. art. III, § 1 (providing for separation of powers); *id.* art. IV, § 1 (vesting legislative power in the Senate and the House of Representatives); *id.* art. IV, § 30 (limiting payments from the treasury to appropriations by the Legislature).

{57} We do not agree with the Department's proposed construction of Section 27-2-12 of the Public Assistance Act. Section 27-2-12 does not expressly prohibit funding medically necessary abortions for Medicaid-eligible women, nor does it explicitly state that funding for this particular medical procedure is contingent on federal reimbursement. Indeed, the Legislature has considered and rejected such language. *See* S.52, 42d Leg., 1st Sess. (N.M.1995); H.R.76, 42d Leg., 1st Sess. (N.M.1995). Unlike the specific restriction on the availability of federal funds for abortions imposed by Congress in the Hyde Amendment, New Mexico's Public

Assistance Act only contains general language delegating rulemaking authority to the Department and setting limits on that authority with respect to the State's medical assistance program. Thus, we cannot say the funding restrictions in Rule 766 are compelled by the plain meaning of Section 27-2-12. *See State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994) (noting circumstances under which the plain-meaning rule does not apply).

{58} In this case, the Department's power to adjust the distribution of state funds under the medical assistance provisions of the Public Assistance Act in order to comply with the Bill of Rights guaranteed by the New Mexico Constitution "arise[s] from the statutory language by fair and necessary implication." *Howell*, 118 N.M. at 504, 882 P.2d at 545. The basic purpose of Section 27-2-12 is to ensure that, if New Mexico is going to participate in the federal Medicaid program, the State's plan must provide for the categories of medical assistance and the level of state funding that are required to remain eligible for federal financial assistance under Title XIX of the Social Security Act. *Cf.* 42 U.S.C. § 1396a(a)(10) (requiring state plan to provide categories of medical assistance listed under 42 U.S.C. §§ 1396d(a)(1) to (5), (17), (21)); *id.* § 1396a(a)(2) (requiring state plan to provide for financial participation by the State); *id.* § 1396c (providing for discontinuation of federal payments if state plan does not comply with these federal requirements). But this linkage to "[f]ederal law cannot enlarge state executive power beyond that conferred by the state constitution." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 42, 125 N.M. 343, 961 P.2d 768. Where, as here, state funds within the Department's control are used in a manner that does not conflict with federal law in order to fulfill the fundamental guarantees of our state constitution, we cannot say that Section 27-2-12 has been violated. *Cf. Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352, 358 (1992) (refusing to construe state medical assistance statute as prohibiting use of state funds to pay for abortions that did not qualify for federal matching funds); *Dodge v. Department of*

Soc. Servs., 657 P.2d 969, 975–76 (Colo.Ct. App.1982) (same).

{25} {59} Our conclusion that the district court's order does not violate Section 27–2–12 also disposes of the Department's claim that the district court violated the provisions in our state constitution requiring separation of powers. In requiring the Department to disburse state funds appropriated by the Legislature in a manner consistent with the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution, the district court did not usurp the Legislature's power to enact new laws or appropriate funds. See *Moe*, 417 N.E.2d at 395; *Dodge*, 657 P.2d at 973–75; *Georgia by Dep't of Med. Assistance v. Heckler*, 768 F.2d 1293, 1296 (11th Cir.1985). "It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution." *State ex rel. Clark*, 120 N.M. at 570, 904 P.2d at 19 (quoting *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957)). The district court did not exceed its power in performing that function here.

{60} The Department's final contention is that a permanent injunction is not warranted because Plaintiffs have not established that they will suffer irreparable injury if Rule 766 is implemented or that granting an injunction is not adverse to the public interest. See *National Trust for Historic Preservation*, 117 N.M. at 595, 874 P.2d at 803 (listing requirements for preliminary injunction). These assertions, however, rely on the Department's arguments regarding standing and separation of powers, which we have

rejected earlier in this opinion. Therefore, we conclude that the district court did not err in permanently enjoining the Department from enforcing Rule 766. Cf. *Doe*, 515 A.2d at 162 (finding that enforcement of abortion regulation would cause irreparable injury and granting injunctive relief).

V.

{61} Based on the independent grounds provided by the Equal Rights Amendment to Article II, Section 18 of the New Mexico Constitution, we affirm the district court's orders granting Plaintiffs' motion for summary judgment, permanently enjoining the Department from enforcing its May 1995 revision of Rule 766, and awarding costs to Plaintiffs. We reverse the district court's orders granting Klecan and Schaurete's motion to intervene for failure to comply with the requirements of Rule 1–024(A)(2). Because we have previously granted a stay of Plaintiffs' cross-appeal with respect to the issue of attorney fees, we defer ruling on that issue or the award of costs on appeal until further order of this Court.

{62} **IT IS SO ORDERED.**

FRANCHINI, C.J., BACA, MCKINNON, III, JJ., and ARMIJO, Judge, New Mexico Court of Appeals, sitting by designation, concur.



PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1247

Cite as 663 P.2d 1247 (Or.App. 1983)

to these litigants. We know of no previous case involving section 13(c) agreements litigated by any Oregon transit district or transit union. The likelihood of recurrence between these parties or involving other parties is not so great as to justify a decision by this court on the merits of the dispute.

[3] We accordingly remand this case to the circuit court with directions to dismiss the case as moot.²



63 Or.App. 41
PLANNED PARENTHOOD ASSOCIATION, INC., et al., Petitioners,

v.

DEPARTMENT OF HUMAN RESOURCES OF the STATE OF OREGON, Respondent.

CA A20856.

Court of Appeals of Oregon.

Argued and Submitted Dec. 23, 1981.

Decided May 11, 1983.

Reconsideration Denied July 15, 1983.

Judicial review was sought for determination of validity of rule of the Department of Human Resources. The Court of Appeals, Buttler, P.J., held that rule limiting state medical assistance for abortions, to

2. This is the proper disposition of a case which becomes moot on appeal. See *Board of Regents of the University of Texas System v. New Left Education Project*, 414 U.S. 807, 94 S.Ct. 118, 38 L.Ed.2d 43 (1973), *vacating and re-*

the extent that it denied funding for medically necessary abortions, was invalid under the privileges and immunities clause of the Oregon Constitution, despite claimed state fiscal interest supporting the rule and state's interest in protecting potential human life before viability of the fetus.

Rule held invalid.

1. Abortion and Birth Control ⇐.50
Constitutional Law ⇐225.1

Federally protected right of woman to choose abortion rather than childbirth is a "negative" right which prohibits state from obstructing her exercise of that freedom of choice within decisional limits but does not require affirmative action by the state to remove obstructions that it did not create, and under the equal protection clause, choice of normal childbirth may be favored over choice of abortion. U.S.C.A. Const. Amends. 1, 5, 14.

2. Constitutional Law ⇐18

State Supreme Court may interpret State Constitution independently of the Federal Constitution's counterparts.

3. Courts ⇐489(1)

Decision of the United States Supreme Court under the equal protection clause of the Federal Constitution that states were not required to pay for indigent woman's exercise of constitutionally protected right to terminate pregnancy did not foreclose Oregon's Supreme Court from examining challenged rule of the State Department of Human Resources limiting state medical assistance for abortions under the privileges and immunities clause of the Oregon Constitution. U.S.C.A. Const. Amends. 5, 14; Const. Art. 1, § 20.

4. Constitutional Law ⇐208(3)

Before there may be a problem requiring analysis under the privileges and immu-

manding, 472 F.2d 218 (1973); *United States v. Munsingwear*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 3533, at 292-94 (1975).

nities clause, there must be a class among which some members are denied a privilege available to other members on equal terms. Const. Art. 1, § 20.

5. Constitutional Law ⇌ 208(3)

Women denied equal right to state medical assistance for abortions, though their physicians had determined that it was medically necessary to terminate pregnancy for the sake of their health, constituted a class which presented a claim cognizable under the privileges and immunities clause of the State Constitution, despite contention that the classification created by the rule limiting assistance for abortions did not exist apart from the rule so that there would be no cognizable equal privilege problem, but rule could not be regarded as also classifying according to wealth for purposes of equal privilege analysis, since the distinction between poor and rich was created by the financial eligibility criteria for the medical assistance program, not by the rule in question. Const. Art. 1, § 20.

6. Constitutional Law ⇌ 208(1)

A balancing test is properly employed in analyzing a constitutional claim under the privileges and immunities clause of the State Constitution where important interests are at stake, and in that balancing the detriment to affected members of the class is weighed against the state's ostensible justification for the disparate treatment. Const. Art. 1, § 20.

7. Constitutional Law ⇌ 208(3)

Under the privileges and immunities clause of the Oregon Constitution, state did not show a state fiscal interest adequate to support denial of funding for medically necessary abortions pursuant to rule, in light of undisputed contention that terminating pregnancy was less expensive than childbirth medical expenses covered by the medical assistance program. Const. Art. 1, § 20.

8. Constitutional Law ⇌ 208(3)

State's interest in protecting potential human life before viability of fetus, by

means of rule limiting state medical assistance for abortions, was of a limited nature and not sufficient to outweigh woman's interest in her health, and thus rule, to extent that it denied funding for medically necessary abortions, was invalid under privileges and immunities clause of the Oregon Constitution, in light of the broad and inconsistent nature of the rule. Const. Art. 1, § 20.

9. Constitutional Law ⇌ 208(1)

In analysis under the privileges and immunities clause of the Oregon Constitution, weighing of the interests at stake controls and rule cannot be upheld on ground that state is entitled to effect an acceptable compromise on a delicate social issue, taking into account prevalent social mores. Const. Art. 1, § 20.

10. Social Security and Public Welfare ⇌ 241

In original proceeding challenging rule limiting state medical assistance for abortions, in which there was no record before the court explaining what medical assistance program covered and what it did not, issue of denial of equal privileges to woman on theory that the program provided coverage for all medically necessary services for men but that the challenged rule limited such services for women was not properly before the court, and the same was true of contention that challenged rule impermissibly burdened exercise of those whose religious or conscientious convictions counsel consideration of abortion.

Ruth Gundle, Oregon Legal Services Corp., Portland, and Steven S. Walters, American Civil Liberties Union, Portland, argued the cause for petitioners. With them on the briefs were Donna Meyer, Nancy Helget, Albany, Ira Zarov, Andrew R. Gardner, Mary Klepser, Pamela L. Jacklin and Susan P. Graber, Portland.

William F. Gary, Sol. Gen., Salem, argued the cause for respondent. With him on the

PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1249

Cite as 663 P.2d 1247 (Or.App. 1983)

brief were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Deputy Sol. Gen., and Virginia L. Linder, Asst. Atty. Gen., Salem.

Before BUTTLER, P.J., and WARDEN and WARREN, JJ.

BUTTLER, Presiding Judge.

Petitioners, individuals and public interest organizations,¹ bring this proceeding pursuant to ORS 183.400² to invalidate an administrative rule promulgated by the Department of Human Resources, Adult and Family Services Division (AFSD), that provides state medical assistance for certain "elective" abortions.

The administrative rule, OAR 461-14-052, provides:³

"(1) Payment will not be made for elective abortions performed except under the following conditions:

"(a) Cases in which a physician, on the basis of his or her professional judgment, has certified in writing that the abortion is necessary because the life of the woman would be endangered if the fetus were carried to term.

"(b) Cases other than in subsection (a) of this section:

"(A) Payment may be made for one (1) elective abortion (in addition to an abor-

tion in subsection (a) of this section) if the woman is 18 years of age or older and was receiving maintenance assistance from Oregon at the time determined by a physician that conception occurred. Payment may not be made under this paragraph if payment for an abortion has been made under paragraph (B) of this subsection.

"(B) Payment may be made for two (2) elective abortions (in addition to an abortion listed in subsection (1)(a) of this rule) if the woman is 17 years of age or younger at the time determined by a physician that conception occurred and is otherwise eligible for medical assistance in Oregon.

"(2) Payment will not be made for elective abortions unless prior authorized by the Division.

"(3) Payment for elective abortions will be limited to abortions performed in a physician's office, clinic or outpatient surgery setting unless the physician specifically requests and justifies the need for hospitalization."

Under the statutes governing the medical assistance program, the state is required to provide medical funding, ORS 414.032, to the "categorically needy," defined in ORS 414.025(2),⁴ within the limits of available funds, and to the "medically needy,"

"(c) Copies of all documents necessary to demonstrate compliance with applicable rule-making procedures.

"(4) The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures.

" * * * "

1. Respondents have made no challenge to petitioners' standing to bring this proceeding.

2. ORS 183.400 provides, in relevant part:

"(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

" * * * "

"(3) Judicial review of a rule shall be limited to an examination of:

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule; and

3. The original petition challenged a version of the rule that allowed medical assistance for abortions in cases of rape and incest. That provision was deleted in July, 1981.

4. ORS 414.025(2) provided:

"(2) 'Categorically needy' means a person who is a resident of this state and who:

"(a) Is receiving a category of aid.

"(b) Would be eligible for, but is not receiving a category of aid.

defined in ORS 414.025(7),⁵ within the limits of expressly appropriated and available funds. ORS 414.032.⁶

Because this case is an original proceeding in this court for direct review of the validity of the administrative rule in question, we are limited to an examination of that rule. ORS 183.400(3). We do not have

the benefit of a record, other than the documentation demonstrating compliance with the applicable rulemaking procedures, which is not challenged here. Neither do we have the benefit of the agency's interpretation of the rule in the context of the agency's other rules, of which the challenged one is a part. OAR 461-14-001 to

"(c) Is in a medical facility and, if he left such facility, would be eligible for a category of aid.

"(d) Is under the age of 21 years and would be a dependent child under the program for aid to dependent children except for age and regular attendance in school or in a course of vocational or technical training.

"(e) Is a caretaker relative named in paragraph (c) of subsection (1) of ORS 418.035 who has in his care a dependent child who would be a dependent child under the program for aid to dependent children except for age and regular attendance in school or in a course of vocational or technical training; or is the spouse of such caretaker relative and fulfills the requirements of subsection (2) of ORS 418.035.

"(f) Is under the age of 21 years, is in a foster family home or licensed child-caring agency or institution under a purchase of care agreement and is one for whom a public agency of this state is assuming financial responsibility, in whole or in part.

"(g) Is a spouse of an individual receiving a category of aid and who is living with the recipient of a category of aid, whose needs and income are taken into account in determining the cash needs of the recipient of a category of aid, and who is determined by the Adult and Family Services Division to be essential to the well-being of the recipient of a category of aid.

"(h) Is a caretaker relative named in paragraph (c) of subsection (1) of ORS 418.035 who has in his care a dependent child receiving aid to dependent children, or a child who would be eligible to receive aid to dependent children except for duration of residence requirement; or is the spouse of such caretaker relative and fulfills the requirements of subsection (2) of ORS 418.035.

"(i) Is under the age of 21 years, is in a youth care center and is one for whom a public agency of this state is assuming financial responsibility, in whole or in part.

"(j) Is under the age of 21 years and is in an intermediate care facility which includes institutions for the mentally retarded; or is under the age of 22 years and is in a psychiatric hospital.

"(k) Is under the age of 21 years and is in an independent living situation with all or part of the maintenance cost paid by Children's Services Division.

"(L) Is a member of a family which received aid to dependent children in at least three of the six months immediately preceding the month in which such family became ineligible for such assistance because of increased hours of or increased income from employment. As long as the member of the family is employed, such families will continue to be eligible for medical assistance for a period of four calendar months beginning with the month in which such family became ineligible for assistance because of increased hours of employment or increased earnings.

"(m) Was receiving Title XIX benefits in the month of December 1973, and for that reason met all conditions of eligibility including financial eligibility for aid to the disabled or blind by criteria for blindness or disability and financial criteria established by the State of Oregon in effect on or before December 1973, had been determined to meet, and for subsequent months met all eligibility requirements.

"(n) Is essential spouse of individuals described in paragraph (m) of this subsection.

"(o) Is an adopted person under 21 years of age for whom a public agency is assuming financial responsibility in whole or in part.

5. ORS 414.025(7) provided:

"(7) 'Medically needy' means a person who is a resident of this state and who does not have income and resources sufficient to provide himself and his dependents with essential maintenance and medical needs as are necessary to afford a reasonable sustenance compatible with decency and health, and who, except for financial need requirement, would be eligible for a category of aid."

6. ORS 414.032 provides:

"(1) Within the limits of funds available therefor, medical assistance shall be made available to persons who are categorically needy.

"(2) Within the limits of funds expressly appropriated and available for medical assistance to the medically needy, medical assistance shall be available to persons who are medically needy."

PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1251

Cite as 663 P.2d 1247 (Or.App. 1983)

461-14-060. Petitioners challenge the constitutionality of the rule on three grounds: (1) it violates an indigent woman's right of privacy under the Oregon Constitution; (2) it violates the Equal Privileges and Immunities Clause of the Oregon Constitution; and (3) it violates the religious freedom guarantees of the Oregon Constitution.

Before considering petitioners' contentions, we must understand the significance and meaning of the rule in the context in which it was adopted, attempting to apply definitions that preexisted the challenged rule. All abortions, including those necessary to save the life of the mother, are treated as "elective" under the rule. "Elective" services are defined as "those which are not considered emergency measures, and which can usually be scheduled later or postponed indefinitely without having immediate serious adverse effect on the client's mental or physical health." OAR 461-14-005(9).⁷ Elective services must have prior administrative approval, which requires substantiation that the service is "medically indicated" and will significantly improve the mental or physical health of the recipient or otherwise reduce health-care costs.⁸

There is no definition of the phrase "medically indicated," and we are not certain what it means in the context of abortions, as compared to other elective surgical procedures. For example, if a patient is told by his physician that he has gallstones

7. OAR 461-14-005(9) provided at the relevant time:

"'Elective' as used in the context of the Division's policy, 'Elective' means those services for which reimbursement must be prior authorized by the Division. This term applies to those services so identified in the fee schedule(s) and also to other services, although unlisted, which are described by the criteria listed below. 'Elective' is defined as those services which are not considered emergency measures, and which can usually be scheduled later or postponed indefinitely without having immediate serious adverse effect on the client's mental or physical health."

and that, although there is no immediate need to remove his gallbladder, he should plan on having the surgery performed at his convenience, we assume that the surgery is elective and that it is "medically indicated." That is, there is a medical reason for the procedure and, if providing that surgical procedure meets one of the other requirements of OAR 461-14-005(10) (see n. 8, *supra*), it will be funded as an elective procedure. In the case of a pregnant woman who is eligible for an abortion under the challenged rule, it is not clear what a physician must determine before he may express the opinion that an abortion is "medically indicated." Of course, he must conclude that the woman is pregnant; however, if the pregnancy is normal in all respects and the mother's health is not endangered, is an abortion "medically indicated" solely because the woman desires to terminate her pregnancy, as she has the right to do? Or must the physician conclude that an abortion is necessary for the physical or mental health of the woman?

Although it is not clear, given the fact that "elective" abortions include those that are necessary because the life of the woman would be endangered if the fetus were carried to term, we conclude that the word "elective" is used in the challenged rule primarily to require authorization prior to performing any surgical procedure that involves an abortion, except in the case of a bona fide medical emergency. OAR 461-

8. OAR 461-14-005(10) provided at the relevant time:

"(10) Approval of reimbursement for 'Elective' services is contingent upon the request presented including sufficient clinical and other pertinent data to substantiate that provision of the service is medically indicated and will:

"(a) Significantly improve the mental or physical health; or

"(b) Significantly improve the client's ability for self care; or

"(c) Significantly improve the client's capability for employment; or

"(d) Significantly reduce the need for long-term, higher cost care."

14-045(3).⁹ We assume that the medical emergency exception applies only to those abortions for which funding is otherwise authorized. All other abortions for which funding is authorized under the rule are "elective" in the generally understood sense, e.g., they are "medically indicated" if a physician determines that the woman is pregnant and desires an abortion. It would follow as a matter of course that one or more of the four additional conditions of OAR 461-14-005(10) would be met.¹⁰

The rule, then, provides funding for one or two abortions, depending on the woman's age, for any reason, but for no other surgical procedure involving an abortion, no matter how damaging to the woman's health the failure to provide medical assistance may be, unless the life of the woman would be endangered by failure to provide the assistance. Petitioners' challenge is to the failure to fund any surgical procedure that a physician has determined to be medically necessary, but not life-threatening, if it involves an abortion and the woman's entitlement to the one or two elective abor-

tions has been expended. The parties appear to assume that "medically necessary" means something more than "medically indicated," but less than life-threatening, as applied to abortions. However, because neither the petitioners nor the agency have defined "medically necessary," we will, for the purposes of this opinion, provide our own working definition, recognizing that it is the agency's function to adopt one. We consider an abortion to be medically necessary, generally, when that surgical procedure is required, in a physician's opinion, because specified medical problems may be caused or aggravated by the pregnancy endangering the health of the woman.¹¹

Petitioners recognize that under the United States Supreme Court's decision in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 100 S.Ct. 2701, 65 L.Ed.2d 784 (1980), they are foreclosed from claiming that the rule violates the United States Constitution. However, they contend that the Oregon Constitution should be construed to grant a right of privacy, including the right of women to make procreational choices unfet-

9. OAR 461-14-045(3) provided at the relevant time:

"(3) Procedures identified in the guide as 'Elective,' which are provided in a bonafide medical emergency will be reimbursed without prior authorization. The invoice must be accompanied by validating clinical information, as in 'By Report' (BR). (See Rules 461-13-010, 461-13-041, and 461-14-005(9)."

10. The meaning of the phrase "medically indicated" in OAR 461-14-005(10), *supra*, n. 8), is confusing, at best, unless it is intended to mean that a physical condition exists and will continue to exist or get worse without surgical intervention. The rule appears to say that once that determination has been made, the procedure will be authorized if it is *also* determined that the procedure will "significantly improve the mental or physical health" of the person. In other words, improvement in the health of the person is separate from the procedure's being "medically indicated."

As applied to abortions, the physical condition of pregnancy will continue without intervention, and one of the other determinations, not involving health, necessary to authorize the procedure would seem to follow as a matter of course. That is, termination of pregnancy will either:

"(b) Significantly improve the client's ability for self care; or

"(c) Significantly improve the client's capability for employment; or

"(d) Significantly reduce the need for long-term, higher cost care."

11. There are many examples of such medical problems in reported cases. In *Doe, et al v. Maher, et al* (Conn Super Ct, Jud Dist of New Haven, No. 19 68 74 (October 9, 1981)), the court ordered the funding of an abortion under the state's Hyde Amendment rule, because it was medically necessary, although not life-threatening. The plaintiff's doctor stated that it was necessary to perform a cortization (a cutting of the cervix) in order to determine whether plaintiff had cervical cancer, because the endocervical curettage showed dysplasia (pre-cancerous cells). If an abortion were not performed, there was a risk of hemorrhaging. Other complications could result from continuation of the pregnancy: plaintiff was on methadone, and unless the pregnancy was terminated, there was a risk of cardiac arrest, shock, respiratory and circulatory depression and gastrointestinal problems. See n. 20, *infra*.

PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1253

Cite as 663 P.2d 1247 (Or.App. 1983)

tered by state interference, and that the challenged rule violates the Privileges and Immunities Clause of the Oregon Constitution, Article I, section 20. Before proceeding to petitioners' contentions under the Oregon Constitution, a review of the evolution of the right of privacy under the United States Constitution and the extent to which it protects a woman's right to make procreational choices may be helpful.

In *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court held that a statute prohibiting the use of contraceptives violated the Fourteenth Amendment, because it infringed on an area of protected freedom identified as a penumbral right of privacy, implicitly recognized in its previous decisions that "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484, 85 S.Ct. at 1681. Under the Fourteenth Amendment, the Court concluded that several fundamental constitutional guarantees created a zone of privacy which encompassed "notions of privacy surrounding the marriage relationship." The fundamental federal "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542, 549 (1969), was again recognized in the procreational context in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), which struck down a state law banning the distribution of contraceptives to unmarried persons as denying equal protection under the Fourteenth Amendment.

The following term, the Court decided that the federal right of privacy included the right of a woman to decide whether to terminate her pregnancy by abortion. In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Court stated that the right of privacy was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state ac-

tion" and held that the right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153, 93 S.Ct. at 726. However, the Court concluded that the right of procreational choice is not absolute. It reasoned that because a pregnant woman carries an embryo and, later, a fetus, the situation is inherently different from the privacy interests it had recognized previously, e.g., marital intimacy, private possession of obscene material, marriage, procreation or education. The Court concluded that "it is reasonable and appropriate for a state to decide that at some point in time another interest, that of the health of the mother or that of potential life, becomes significantly involved." 410 U.S. at 154, 93 S.Ct. at 727. Those interests, the Court said, are separate and distinct, yet increasingly substantial, as a woman approaches term.

In summary, the Court held that a criminal statute that did not take into account the following considerations violated the Due Process Clause of the Fourteenth Amendment:

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman and her attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except when it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother." 410 U.S. at 164-65, 93 S.Ct. at 732.

After *Roe v. Wade*, the United States Supreme Court reiterated its conclusion

that the Due Process Clause of the Fourteenth Amendment is the constitutional source of the federal right of personal privacy and the included right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, 431 U.S. 678, 684–85, 97 S.Ct. 2010, 2015–2016, 52 L.Ed.2d 675, 684 (1977). A series of cases followed in which the Court was asked to decide whether the states were required to pay for an indigent woman's exercise of her constitutionally protected right to terminate her pregnancy.

In *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977), the United States Supreme Court held, as a matter of statutory construction, that Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (1970 Ed. and Supp. V), did not require states to fund the cost of non-therapeutic abortions when the states were funding medically necessary abortions for financially needy persons as part of their medical programs. A regulation implementing that policy choice was found to be rationally related to, and in furtherance of, a "strong and legitimate interest in encouraging normal childbirth." 432 U.S. at 446, 97 S.Ct. at 2371.

Subsequently, the question was presented in *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977), whether the Equal Protection Clause of the Federal Constitution required a state participating in the Medicaid program under Title XIX to pay for non-therapeutic abortions for needy persons if the state funded childbirth services for them. The Court held that a state was not required to do so when it had implemented a policy to encourage childbirth by paying for an indigent's childbirth expenses. It reasoned that indigency alone was not a suspect class for purposes of equal protection analysis and that a regulation funding childbirth services to the exclusion of non-therapeutic abortion services did not impinge on the protected privacy interest recognized in *Roe v. Wade*, *supra*. The Court said:

"The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe*." *Maher v. Roe*, *supra*, 432 U.S. at 474, 97 S.Ct. at 2382. (Footnote omitted.)

Because there was no suspect classification or impingement of a fundamental right, the state was not required to demonstrate a compelling interest in its policy of favoring normal childbirth. It was enough that the distinction drawn between childbirth and non-therapeutic abortions by the regulation be rationally related to, and in furtherance of, a legitimate state interest in encouraging normal childbirth—a constitutionally permissible purpose.

Maher was followed by *Harris v. McRae*, *supra*, which raised issues closely analogous to those presented here. In *Harris*, Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. § 1396 *et seq.*, which excludes federal funding for certain medically necessary abortions in nonlife-threatening situations, were challenged on statutory and constitutional grounds. After concluding that Title XIX does not require states participating in the Medicaid program to pay for those medically necessary

abortions for which federal reimbursement was unavailable under the so-called Hyde Amendment, the Court held that the statute did not contravene the First and Fifth Amendments. With regard to the Fifth Amendment challenge to the federal legislation, the Court concluded that the Hyde Amendment did not impinge on the due process liberty recognized in *Wade*. Reiterating what it said in *Maier v. Roe, supra*, the Court found that the Hyde Amendment

“ * * * places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. * * * ” *Harris v. McRae, supra*, 448 U.S. at 315, 100 S.Ct. at 2687.

The Court found no constitutionally significant distinction between the restrictions on funding for medically necessary abortions involved in *Harris* and the restrictions on funding for non-therapeutic abortions involved in *Maier*:

“ * * * [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maier*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically

necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.” *Harris v. McRae, supra*, 448 U.S. at 316-17, 100 S.Ct. at 2687-2688. (Footnotes omitted.)

[1] It is apparent from the foregoing summary that the federally protected right of a woman to choose abortion rather than childbirth is a “negative” right: it prohibits a state from obstructing her exercise of that freedom of choice within the limits of *Roe v. Wade, supra*, but does not require affirmative action by the state to remove obstructions that it did not create. It is also clear that under the Equal Protection Clause one choice may be favored over the other, because there is a rational basis for preferring normal childbirth over abortion, a constitutionally permissible purpose.

We had thought that it was clear under *Roe v. Wade, supra*, that a woman's interest in protecting her health was an important aspect of her protected right to choose the termination of her pregnancy, and that even after fetal viability a state may not prohibit abortions “necessary to preserve the life or health of the mother.” 410 U.S. at 164, 93 S.Ct. at 732. Given that premise, it is difficult to understand the rational basis for denying one medically necessary surgical procedure to a pregnant woman solely because it involves an abortion while, at the same time, funding all other medically necessary services relating to pregnancy. Be that as it may, *McRae* holds that there is a rational basis for doing so and therefore there is no denial of rights of due process or equal protection under the Fourteenth Amendment.

[2] To avoid the result reached in *McRae*, petitioners contend that we should

construe the Oregon Constitution to provide a right of privacy that includes a woman's right to choose not to carry her pregnancy to term.¹² They rely on the natural rights declaration of Article I, section 1, and on Article I, sections 3, 9 and 33,¹³ collectively, as providing the substantial equivalent of the right of privacy found in the Fourteenth Amendment. In doing so, they also rely on the United States Supreme Court cases developing that right, but stop short of the cases explaining its limitations.

12. After *Harris v. McRae*, *supra*, was decided, some states found a right of privacy in their state constitutions and invalidated state rules analogous to the one challenged here. See *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *Moe v. Secretary of Administration*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to choose, et al v. Byrne, etc., et al.*, 91 N.J. 287, 450 A.2d 925 (1982); *cf. Doe, et al v. Maher, et al.*, n. 11, *supra*. For an analysis of *Harris* and a discussion of abortion-funding cases generally, see Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 Col.L.Rev. 721 (1981).

13. Article I, sections 1, 3, 9 and 33 provide:

"Section 1. We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.

" * * *

"Section 3. No law shall in any case whatever control the free exercise, and enjoyment of religious (sic) opinions, or interfere with the rights of conscience.

" * * *

"Section 9. No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

" * * *

"33. This enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people."

Professor (now Justice) Linde commented on section 1:

" * * * Section 1, which the draftsman began with 'we declare' means just that; it is a

They argue correctly that we may interpret Oregon's Constitution independently of the federal Constitution's counterparts. If we do that here, unless we conclude that the state constitution provides articulable greater rights, we have not advanced the solution to the problem, and petitioners have not articulated the extent to which the Oregon right is greater.¹⁴

[3] However, we deem it unnecessary for the purposes of this proceeding to trace

declaration of the ideological premises of the 'social compact', which might possibly be drawn upon in giving historic meaning to other provisions of the constitution, but which does not furnish an independent source for judicial invalidation of legislative authority." Linde, *Without Due Process*, 49 Or.L.Rev. 125, at 144 (1970). (Emphasis supplied.)

14. They do not contend that the right to choose termination of a pregnancy is a basic constitutional right that requires the state to provide an abortion to the indigent as it is required to provide counsel in criminal cases. Neither do they contend that the state must fund all abortions if it funds medical expenses for childbirth.

Notwithstanding those concessions, some of the propositions petitioners assert would necessarily lead to one or the other of those conclusions. For example, petitioners contend that "the state may not condition receipt of benefits upon the waiver of a fundamental right * * *." If we understand the contention correctly, it falls within the accepted principle that unconstitutional conditions may not be imposed on the granting of a right. See *American Communications Ass'n v. Douds*, 339 U.S. 382, 417, 70 S.Ct. 674, 94 L.Ed. 925 (1950) (separate opinion of Frankfurter, J.). Petitioners contend that the rule requires an indigent pregnant woman to carry her pregnancy to term, which she has a right not to do, in order to receive pregnancy-related medical benefits. However, by definition, a woman who chooses to terminate her pregnancy is not seeking childbirth benefits, and at no time does the state say to a pregnant woman that it will provide childbirth benefits only if she waives her right to choose; those benefits simply follow as a matter of course if the pregnancy is not terminated.

It is true that the effect of the rule is to provide unwanted childbirth expenses for women who are not entitled to a funded abortion under its terms and are unable to obtain an abortion from other sources. In that sense, the rule undoubtedly would have an effect on the woman's choice. On the other hand, if the state provided no funding for either childbirth

PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1257

Cite as 663 P.2d 1247 (Or.App. 1983)

an independent right of procreational choice under the Oregon Constitution. We recognize that right, which includes the decision to terminate pregnancy, as an important right protected under the due process guarantee of the Fourteenth Amendment under *Roe v. Wade, supra*. We also recognize that *Harris v. McRae, supra*, decided under the Equal Protection Clause of the federal Constitution, does not foreclose our examining the challenged rule under Article I, section 20, of the Oregon Constitution,¹⁵ which is textually different from its Federal analogue,¹⁶ and has been applied differently by the Oregon Supreme Court:

“ * * * ‘The provisions of the state Constitution are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights * * *.’” *State ex rel. Reed v. Schwab*, 287 Or. 411, 417, 600 P.2d 387 (1979), cert. den. 444 U.S. 1088, 100 S.Ct. 1051, 62 L.Ed.2d 776, reh. den. 445 U.S. 955, 100

or abortion, the probable effect would be to encourage early abortions, because, as petitioners contend, they are less expensive and might be affordable. If petitioners' waiver contention is correct, then it must follow that the state is mandated by its constitution to fund all abortions, nontherapeutic as well as medically necessary, if it funds childbirth. As indicated, they disclaim that proposition.

15. Or. Const. Art. I, § 20 provides:

“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”

16. See *State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Or. 277, 282, 613 P.2d 23 (1980); *Tharalson v. State Dept. of Rev.*, 281 Or. 9, 15 n. 10, 573 P.2d 298 (1978); see also Linde, “Without Due Process,” *supra*, n. 13; Linde, “First Things First: Rediscovering the State Bill of Rights,” 9 U.Balt.L.Rev. 379, 392 (1980).

17. The state relies on the following language from *State v. Clark, supra*:

“The terms ‘class’ and ‘classification’ are invoked sometimes to mean whatever distinction is created by the challenged law itself and sometimes to refer to a law’s limita-

S.Ct. 1609, 63 L.Ed.2d 792 (1980); *State v. Savage*, 96 Or. 53, 59, 184 P. 567 (1919), 189 P. 427 (1920).

The scope of the two provisions has generally been held to be the same. *City of Klamath Falls v. Winters*, 289 Or. 757, 769 n. 10, 619 P.2d 217 (1980); *Cooper v. OSAA*, 52 Or.App. 425, 432, 629 P.2d 386, rev. den. 291 Or. 504, 634 P.2d 1347 (1981); see also *School Dist. No. 12 v. Wasco County*, 270 Or. 622, 628, 529 P.2d 386 (1975) (semantic and conceptual differences between the two provisions can be resolved in favor of common underlying principles).

[4, 5] Before there may be a problem requiring an analysis under the Equal Privileges and Immunities Clause, there must be a class among which some members are denied a privilege available to other members on equal terms. The state, relying on *State v. Clark*, 291 Or. 231, 630 P.2d 810, cert. den. 454 U.S. 1084, 102 S.Ct. 640, 70 L.Ed.2d 619 (1981), contends that the classification created by the rule here does not exist apart from the rule,¹⁷ and hence there is no equal privilege problem cognizable

rate treatment of persons or groups by virtue of characteristics which they have apart from the law in question. Familiar examples of the latter kind of ‘class’ are personal characteristics such as sex, ethnic background, legitimacy, past or present residency or military service. On the other hand, every law itself can be said to ‘classify’ what it covers from what it excludes. For instance, the rule of this court that limits the time for filing a petition for review (Rule 10.05) ‘classifies’ persons by offering the ‘privilege’ of review to those who file within 30 days and denying it to those who file later. Similarly, a law that licenses opticians and optometrists to perform different functions, see *Williamson v. Lee Optical*, 348 US 483, 75 S Ct 461, 99 L Ed 563 (1955), does not grant or deny privileges to classes of persons whose characteristics are those of ‘opticians’ and ‘optometrists’; rather, the law creates these classes by the licensing scheme itself. Attacks on such laws as ‘class legislation’ therefore tend to be circular and, as the above quotations from early decisions show, have generally been rejected whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms. See also *Jarvill v. City of Eugene*, 289 Or 157, 184–185, 613 P2d 1 (1980) (sustaining limita-

under Article I, section 20. In *Clark*, the Supreme Court held that neither the group of defendants who do not receive preliminary hearings because they are charged by indictment, nor the group of defendants who receive preliminary hearings because they are charged by information, constitutes a "class" for equal protection purposes, because "these defendants do not exist as categories or as classes with distinguishing characteristics before and apart from a prosecutor's decision how to charge one, or some, or all defendants." 291 Or. at 243, 630 P.2d 810. Here, the group of women qualifying for assistance who seek medically necessary services relating to pregnancy does constitute a class apart from purely administrative action. The members of the class who are denied an equal right to those services are those whose physicians have determined that it is medically necessary to terminate pregnancy for the sake of their health. *Clark* is inapposite.¹⁸ Accordingly, we conclude that there is a class and that petitioners have presented a claim cognizable under the Privileges and Immunities Clause of the Oregon Constitution.¹⁹

[6] In contrast to the analysis under the federal Equal Protection Clause, a balancing test is properly employed in analyzing a constitutional claim presented under Article

tions on privilege to use public parking facilities)." 291 Or. at 240-41, 630 P.2d 810.

18. The state does not argue that this case can be decided under the principle expressed in *Jarvill v. City of Eugene*, 289 Or. 157, 613 P.2d 1, cert. den. 449 U.S. 1013, 101 S.Ct. 572, 66 L.Ed.2d 472 (1980), that no privileges and immunities problem exists where the "disfavored" ones have not chosen to place themselves upon the same terms as the favored group. In *Jarvill*, the Supreme Court stated that persons residing or working in a special downtown development district who were subject to parking restrictions nevertheless enjoyed the privilege of free parking "upon the same terms as all members of the general public: when they * * * [were] not working or residing in the [d]istrict." We do not believe the *Jarvill* analysis is applicable, either. Here, there is one class: indigent pregnant women who desire medically necessary services relating to pregnancy; some of them are granted those services and others are not.

I, section 20, where, as here, important interests are at stake. In that balancing, the detriment to affected members of the class is weighed against the state's ostensible justification for the disparate treatment. *Olsen v. State ex rel. Johnson*, 276 Or. 9, 20, 554 P.2d 139 (1976); *Cooper v. OSAA*, supra, 52 Or.App. at 425, 629 P.2d 386. As we explained in *Cooper*, 52 Or.App. at 433, 629 P.2d 386:

"Notwithstanding the fact that we have concluded that the impact of the two provisions [*i.e.*, fourteenth amendment Equal Protection Clause and Article I, section 20] is the same in this instance, the Oregon Supreme Court, in analyzing Article I, § 20 claims, has eschewed the federal approach of categorizing an interest as 'fundamental' or 'nonfundamental' and has instead employed a 'balancing test' wherein the court weighs the detriment caused to plaintiff by a particular classification against the state's ostensible justification for the classification. *Olson [sic] v. State ex rel Johnson*, supra. Therefore, although the protection afforded plaintiffs is said to be the same under the Oregon and Federal constitutions, the analytical approach is somewhat different."

In *Olsen*, potential disparity in the quality of educational opportunity was found to be

19. Petitioners also contend that the rule classifies according to wealth. That claim is flawed in that the distinction between poor and rich is created by the financial eligibility criteria for the medical assistance program, not by the rule in question, which applies only to those financially eligible for the medical assistance program. There is a sense in which the challenged rule distinguishes according to wealth: the decision by pregnant women to terminate pregnancy is not affected for women who may be able to afford the procedure. It does not necessarily follow, however, that someone who is not eligible for medical assistance can afford all necessary medical services; that is, the eligibility criteria may in fact establish a line not between the rich and the poor but between the less poor and the poor.

PLANNED PARENTHOOD ASS'N v. DEPT. OF HUMAN RES. Or. 1259

Cite as 663 P.2d 1247 (Or.App. 1983)

outweighed by the state's interest in promoting local fiscal control of education. In *Cooper*, the disadvantage of a one-year period of ineligibility for OSAA athletics for students transferring to or from private schools was found to be outweighed by the state's "compelling" interest in preventing athletic recruiting among competing schools.

Here, indigent women are denied medical assistance their physicians have determined to be necessary to their physical health, because the prescribed assistance involves an abortion, whereas other indigent pregnant women who seek medically necessary assistance relating to pregnancy that does not involve an abortion are granted assistance. The state concedes that the medical assistance program provides funding for all medically necessary services relating to pregnancy and childbirth (within funding limitations), including those necessary to overcome complications attendant on childbirth, so long as they do not involve termination of the pregnancy; therefore, the rule denies benefits for pregnancy-related medically necessary services that involve abortion solely on that ground. The effect of the rule's denial of benefits on the health of the latter group must be weighed against the state's asserted fiscal interest in limiting funding for abortions and in its interest in protecting potential life.

It is apparent, as petitioners contend and the state does not deny, that the challenged rule has an adverse effect on the health of pregnant women who seek medically necessary abortions to avoid additional risk to the mother's health. The rule thus has an adverse effect on the health of some of

those eligible for medical assistance, despite the fact that health is the principal interest to be served under the program. See ORS 414.025(7), *supra*, n. 5; ORS 414.032, *supra*, n. 6. Although there is no record as such in this proceeding, other cases in which a record has been made evidence examples of serious physical harm.²⁰ Moreover, the fact that the challenged rule provides for abortions at the point that continuation of the pregnancy becomes life-threatening presupposes that there will be cases, short of life-threatening situations, in which the health of the pregnant woman will suffer if denied medical assistance involving an abortion. Those situations appear to be covered by the medical emergency rule authorizing an elective service without prior authorization if funding for the abortion is otherwise authorized by the challenged rule.

[7] We turn to the state's justifications for the rule. It contends that it has a fiscal purpose in restricting the use of state, as opposed to federal, funds for abortion services. Because the effect of the Hyde Amendment is to limit federal funding for abortions, the state argues, and because the state's medical assistance program was designed to qualify for federal revenue sharing, funding of abortions beyond those permitted under the Hyde Amendment necessarily must come out of the state's general fund. Although that is true, petitioners contend that the state has no legitimate, purely fiscal interest in denying medically necessary abortions, because terminating pregnancy is less expensive than childbirth medical expenses and because the long-term expense of bringing a child into a welfare family will be greater. Although the state

20. Justice Stevens in his dissenting opinion in *Harris v. McRae*, *supra*, noted:

"5. The record is replete with examples of serious physical harm. See, e.g., Judge Dooling's opinion in *McRae v. Califano*, 491 F Supp 630, 670 [1980]:

"Women, particularly young women, suffering from diabetes are likely to experience high risks of health damage to themselves and their fetuses; the woman may become blind through the worsening during pregnan-

cy of a diabetic retinopathy; in the case, particularly, of the juvenile diabetic, Dr. Eliot testified there is evidence that a series of pregnancies advances the diabetes faster; given an aggravated diabetic condition, other risks increased through pregnancy are kidney problems, and vascular problems of the extremities.'" 448 U.S. at 353, 100 S.Ct. at 2714, 65 L.Ed.2d at 827.

See n. 11, *supra*.

points out that there is no record to support that contention here, it does not actually dispute the point. We do not believe that the state has shown a state fiscal interest adequate to support the denial of funding for medically necessary abortions.

The state also contends that, in the allocation of funds, it has a substantial interest in providing medical services to protect potential human life and to assure healthy childbirth. We have no doubt that the state does have that interest, but we question whether the challenged rule provides an appropriate balancing of that interest against the mother's health. *Roe v. Wade*, *supra*, 410 U.S. at 162-65, 93 S.Ct. at 731-732, recognized the state's interest in protecting potential life as a compelling one only in the third trimester at the point of viability of the fetus. As explained in *Harris v. McRae*, *supra*, 448 U.S. at 313, 100 S.Ct. at 2686, the Court in *Wade* stated that in the second trimester the interest in protecting the health of the mother was sufficiently substantial to justify regulation reasonably related to that concern. In the first trimester, the state's interest in protecting potential human life was found not to be sufficiently substantial to justify any intrusion on the woman's right to terminate her pregnancy. Thus, *Wade* established that the state's interest in protecting potential human life during the first two trimesters is no greater than the mother's interest in protecting her health. The state is not free, as a matter of federal constitutional law, to challenge that proposition.

[8] The challenged rule not only does not make any distinction as to the stage of pregnancy at which a medically necessary abortion is requested, it also does not undertake to protect all potential life, because it authorizes funding for one or two elective abortions, depending on the age of the mother. As such, the rule is too broad and inconsistent to persuade us that it supports the interest in protecting potential life as against the woman's interest in her health. We conclude that the state's interest in

protecting potential human life before viability of the fetus, by means of the challenged rule, is of a limited nature and is not sufficient to outweigh the woman's interest in her health.

[9] The state argues that, in fashioning a rule, it is entitled to take into account prevalent social mores. In other words, the state claims it is entitled to effect an acceptable compromise on a delicate social issue. Although we accept that proposition, generally, the extent to which such considerations may be accorded weight in the constitutional balancing process under Article I, section 20, is at least questionable. In the context of the challenged rule, the compromise is between not funding medically necessary procedures for pregnant women that involve abortions, and funding all medically necessary services for pregnant women that do not involve abortions. We do not believe that is a compromise that can be made under Article I, section 20, because the weighing of the interests at stake controls.

[10] Included among petitioners' equal privileges arguments is the contention that the medical assistance program provides coverage for all "medically necessary" services for men, but, because the challenged rule limits some "medically necessary" services for women, the program denies equal privileges to women. The entire medical assistance program, however, is not before us in this proceeding; the only issue before us is the validity of one challenged rule. In this original proceeding, we do not have a record explaining what the medical assistance program covers and what it does not or its application in practice. It may well be that, if the medical assistance program is a comprehensive one providing all medically necessary services for men but not for women if those services involve an abortion, the program denies equal privileges to women because they are women. See *Hewitt v. SAIF*, 294 Or. 33, 653 P.2d 970 (1982). To consider those questions we would need

STATE v. LUTHER

Or. 1261

Cite as 663 P.2d 1261 (Or.App. 1983)

more of a record than we have here. They are not properly before us in this proceeding, and we do not decide them.

Petitioners' final contention is that the challenged rule "impermissibly burdens the free exercise of those whose religious or conscientious convictions counsel consideration of abortion." The limited record before us does not permit our consideration of that contention.

We hold only that the challenged rule, to the extent that it denies funding for medically necessary abortions, is invalid under Article I, section 20 of the Oregon Constitution.

Rule held invalid.

tively revoke his initial consent for police officers to search room, and thus, evidence obtained in search was admissible; (2) trial court did not err in failing to allow defendant to introduce evidence regarding what state witness said or did while under hypnosis; (3) error, if any, in denying motions to prohibit testimony of witness who had been hypnotized could not be said to be prejudicial; (4) contention that trial court erred in denying discovery of state witness' testimony before first grand jury would not be considered on appeal; and (5) trial court did not err in refusing to give requested instructions on testimony contrary to physical facts and on self-defense.

Affirmed.

Warden, J., dissented and filed opinion in which Van Hoomissen, J., joined.



63 Or.App. 86

STATE of Oregon, Respondent,

v.

Orville John LUTHER, Appellant.

No. C79-04-31252; CA 17011.

Court of Appeals of Oregon,
In Banc.

Argued and Submitted June 17, 1981.

Resubmitted In Banc Jan. 10, 1983.

Decided May 11, 1983.

Reconsideration Denied July 7, 1983.

Defendant was convicted in the Circuit Court, Multnomah County, J.J. Murchison, J., of second-degree manslaughter, and he appealed. The Court of Appeals, Buttler, J., held that: (1) defendant did not effec-

1. Searches and Seizures ⇌ 7(27)

Absent express revocation of initial consent to search, i.e., absent objection to subsequent, closely related entry and search after initial consensual entry and search, inference that initial consent continued is permitted.

2. Searches and Seizures ⇌ 7(27)

Defendant's closing door to room which he had initially given police consent to search did not act as a revocation of initial consent, where defendant tried to open door himself in response to police officer's request to enter, told police officer that his mother had key, and made no objection to police obtaining key or opening door. U.S. C.A. Const.Amend. 4.

3. Criminal Law ⇌ 1170(1)

Where defense counsel did not ask state witness who had been hypnotized, either before jury or as offer of proof, whether she knew what had happened while she was under hypnosis, trial court's error, if any, in not allowing defense counsel to introduce evidence regarding what witness said or did while under hypnosis could not

whether or not Mr. Morris may sustain a cause of action pursuant to the principles set forth in this opinion. The certified questions having been answered, this case is dismissed from the docket of this Court.⁷

Certified questions answered.



191 W.Va. 436

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, INC., Women's Health Services, Inc., and West Virginia Free, on Behalf of Themselves and All Medicaid-Eligible Women in West Virginia, Plaintiffs Below, Appellants,

and

The West Virginia Chapter of the National Organization for Women, Intervening Plaintiff, Appellee,

v.

Ruth Ann PANEPINTO, PH.D., Secretary, West Virginia Department of Health and Human Resources; and Nancy J. Tolliver, Commissioner, Bureau of Administration and Finance, Department of Health and Human Services, Defendants Below, Appellants,

and

Karen A. Cross, Rebecca A. Romero, Charlotte S. Snead, Dianne Fowler, Rev. Wayne Swisher, Jay Gould, Dr. Ric Day, Linda Day, Phyllis Martin, Kim Hale, Karen Austin, Leonard Anderson, Keith Wagner, Donna Boley, Odell Huffman,

7. Although not an issue raised by the certified questions, there is one additional issue raised by Consolidation Coal Company. The issue is whether the recognition of a cause of action for the breach of the fiduciary relationship between a physician and patient should apply retroactively. However, since the trial court did not address this issue in the certified questions, we choose not to address it in detail in this case. We note, however, that generally, the opinions of

Barbara Warner, Ben Vest, Steve Harrison, Dick Henderson, Danny Ellis, Larry Hendricks, John Pino, Larry Border, Tom Louisos, Jay Nesbitt, Farrell Johnson, Ron Walters, Kenneth Adkins and Randy Schoonover, Taxpayers and Citizens of the State of West Virginia, and West Virginians for Life, Inc., A West Virginia Corporation, Intervening Defendants Below, Appellees.

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, INC., Women's Health Services, Inc., and West Virginia Free, on Behalf of Themselves and All Medicaid-Eligible Women In West Virginia, Plaintiffs Below, Appellees,

and

The West Virginia Chapter of the National Organization for Women, Intervening Plaintiff, Appellant,

v.

Ruth Ann PANEPINTO, PH.D., Secretary, West Virginia Department of Health and Human Resources; and Nancy J. Tolliver, Commissioner, Bureau of Administration and Finance, Department of Health and Human Services, Defendants Below, Appellees,

and

Karen A. Cross, Rebecca A. Romero, Charlotte S. Snead, Dianne Fowler, Rev. Wayne Swisher, Jay Gould, Dr. Ric Day, Linda Day, Phyllis Martin, Kim Hale, Karen Austin, Leonard Anderson, Keith Wagner, Donna Boley, Odell Huffman, Barbara Warner, Ben Vest, Steve Harrison, Dick Henderson, Danny Ellis, Larry Hendricks, John Pino, Larry Border, Tom Louisos, Jay Nesbitt, Farrell John-

this Court relating to retroactivity issues when new law is set always accord the parties in the case that sets the new law the benefit of that law. See generally syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) and *LaRue v. LaRue*, 172 W.Va. 158, 304 S.E.2d 312 (1983), superseded by statute on other grounds, *Butcher v. Butcher*, 178 W.Va. 33, 357 S.E.2d 226 (1987).

Cite as 446 S.E.2d 658 (W.Va. 1993)

son, Ron Walters, Kenneth Adkins and Randy Schoonover, Taxpayers and Citizens of the State of West Virginia, and West Virginians for Life, Inc., A West Virginia Corporation, Intervening Defendants Below, Appellees.

WOMEN'S HEALTH CENTER OF WEST VIRGINIA, INC., Women's Health Services, Inc., and West Virginia Free, on Behalf of Themselves and All Medicaid-Eligible Women in West Virginia, Plaintiffs Below, Appellees,

and

The West Virginia Chapter of the National Organization for Women, Intervening Plaintiff, Appellee,

v.

Ruth Ann PANEPINTO, PH.D., Secretary, West Virginia Department of Health and Human Resources; and Nancy J. Tolliver, Commissioner, Bureau of Administration and Finance, Department of Health and Human Services, Defendants Below, Appellees,

and

Karen A. Cross, Rebecca A. Romero, Charlotte S. Snead, Dianne Fowler, Rev. Wayne Swisher, Jay Gould, Dr. Ric Day, Linda Day, Phyllis Martin, Kim Hale, Karen Austin, Leonard Anderson, Keith Wagner, Donna Boley, Odell Huffman, Barbara Warner, Ben Vest, Steve Harrison, Dick Henderson, Danny Ellis, Larry Hendricks, John Pino, Larry Border, Tom Louisos, Jay Nesbitt, Farrell Johnson, Ron Walters, Kenneth Adkins and Randy Schoonover, Taxpayers and Citizens of the State of West Virginia, and West Virginians for Life, Inc., A West Virginia Corporation, Intervening Defendants Below, Appellants.

Nos. 21924 to 21926.

Supreme Court of Appeals of West Virginia.

Submitted Nov. 30, 1993.

Decided Dec. 17, 1993.

Dissenting Opinion of Justice McHugh July 21, 1994.

Action was brought challenging constitutionality of statute which bans the use of

state Medicaid funds for abortions except in limited circumstances. Constitutionality of the statute was upheld by the Circuit Court, Kanawha County, John Hey, J., and plaintiffs appealed. The Supreme Court of Appeals, Workman, C.J., held that: (1) given West Virginia's enhanced constitutional protections, the statute constitutes undue government interference with exercise of federally protected right to terminate pregnancy, and (2) statute is severable from remainder of Medicaid tax reform bill.

Reversed and remanded.

McHugh, J., filed dissenting opinion in which Brotherton, C.J., joined.

1. Constitutional Law ⇌18, 251

State Constitution may, in certain instances, require higher standards of protection than afforded by the Federal Constitution and, in particular, the West Virginia due process clause is more protective of individual rights than its federal counterpart. U.S.C.A. Const.Amends. 5, 14; Const. Art. 3, § 10.

2. Constitutional Law ⇌18

Provision of enhanced guarantees for "the enjoyment of life and liberty * * * and safety" by State Constitution both permits and requires Supreme Court of Appeals to interpret those guarantees independent from federal precedent. Const. Art. 3, § 1.

3. Constitutional Law ⇌18

Federally created right of privacy, protecting woman's choice with regard to pregnancy termination, is required to be enforced in nondiscriminatory manner under State Constitution, even though no prior decision of Supreme Court of Appeals expressly determines existence of analogous right. Const. Art. 3, § 1.

4. Constitutional Law ⇌234.6

While state is not obligated to pay for exercise of constitutional rights, once government chooses to dispense funds, it must do so in nondiscriminatory fashion and cannot withdraw benefits for no reason other than that woman chooses to avail herself of feder-

ally granted constitutional right. Const. Art. 3, § 3.

5. Constitutional Law ⇌242.3(1)

When state government seeks to act "for the common benefit, protection and security of the people" under the State Constitution in providing medical care for the poor, it has obligation to do so in neutral manner so as not to infringe on constitutional rights of citizens. Const. Art. 3, § 3.

6. Constitutional Law ⇌82(10)

Social Security and Public Welfare ⇌241.60, 241.95

Given West Virginia's enhanced constitutional protections, provision of state statute which bans the use of state Medicaid funds for abortions except in limited circumstances constitutes undue government interference with exercise of federally protected right to terminate pregnancy. Code, 9-2-11; Const. Art. 3, §§ 1, 3, 10.

7. Constitutional Law ⇌48(1)

Where there is adequate procedural remedy which will prevent statute from being unconstitutionally applied, court will, under doctrine of least intrusive remedy, adopt such procedure to avoid declaring statute unconstitutional.

8. Statutes ⇌64(2)

Unconstitutional section of Medicaid tax reform bill, banning use of state Medicaid funds for abortions except for limited circumstances, is severable. Code, 9-2-11.

Syllabus by the Court

1. "The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syllabus Point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)." Syl. Pt. 1, *State v. Bonham*, 173 W.Va. 416, 317 S.E.2d 501 (1984).

2. Under the rationale announced by this Court in *United Mine Workers v. Par-*

1. West Virginia Code § 9-2-11 imposes the following limitations on the use of medicaid funds:
(a) No funds from the medicaid program accounts may be used to pay for the perfor-

sons, 172 W.Va. 386, 305 S.E.2d 343 (1983), we hold that when state government seeks to act "for the common benefit, protection and security of the people" in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens.

3. Given West Virginia's enhanced constitutional protections, we conclude that the provisions of West Virginia Code § 9-2-11 (1993) constitute undue government interference in violation of the state's obligation to act neutrally with regard to the exercise of the federally protected right to terminate a pregnancy.

4. "Where there is an adequate procedural remedy which prevents a statute from being unconstitutionally applied, the Court will, under the doctrine of least obtrusive remedy, adopt such procedure to avoid declaring a statute unconstitutional." Syl. Pt. 6, *Waite v. Civil Serv. Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1978).

Roger Forman, Forman & Crane, Charleston, Kathryn Kolbert, Eve C. Gartner, The Center for Reproductive Law & Policy, New York, New York City, for Women's Health Center.

John M. Hedges, Charleston, Barbara Fleischauer, Morgantown, for NOW.

Thomas M. Woodward, Deborah L. McHenry, Deputy Attys. Gen., Charleston, for Health & Human Resources.

John Andrew Smith, Stephen A. Weber, Geoffrey A. Haddad, Kay, Casto, Chaney, Love & Wise, Charleston, for Cross, et al.

WORKMAN, Chief Justice:

Appellants challenge the August 25, 1993, order of the Circuit Court of Kanawha County upholding the constitutionality of West Virginia § 9-2-11 (Supp.1993),¹ which bans

mance of an abortion by surgical or chemical means unless:

the use of state medicaid² funds for abortions except in limited circumstances. Those individuals and organizations, to whom we collectively refer as Appellants,³ claim that to deny those abortions which are determined to be "medically necessary,"⁴ violates the West Virginia Constitution. After extensive consideration of the submitted record, numerous briefs, and the arguments of counsel, we conclude that West Virginia Code § 9-2-11 constitutes a discriminatory funding scheme which violates an indigent woman's constitutional rights.

Senate Bill 2, in essence a medicaid tax reform bill, was introduced and passed by the Legislature during a second special session in May 1993. Also contained within the provisions of Senate Bill 2 was the text of West Virginia Code § 9-2-11.⁵ A change in federal law prohibiting West Virginia from

relying on the fund-raising sources previously used to raise its share of medicaid funds necessitated the drafting of Senate Bill 2. During the regular legislative session, there was no public discussion of adding any abortion-restrictive riders to the medicaid tax reform bill. This language, the text of West Virginia Code § 9-2-11, was added during the final hours of the second extraordinary legislative session. Although Governor Caperton signed the bill into law on June 4, 1993, he publicly stated his reservations concerning the constitutionality of the abortion-funding restrictions included in Senate Bill 2.⁶

On July 9, 1993, the Women's Health Center of West Virginia, Inc., Women's Health Services, Inc., and West Virginia Free, on behalf of themselves and all medicaid-eligible women in West Virginia filed a complaint in

(1) On the basis of the physician's best clinical judgment, there is:

(i) A medical emergency that so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a delay will create grave peril of irreversible loss of major bodily function or an equivalent injury to the mother: Provided, That an independent physician concurs with the physician's clinical judgment; or

(ii) Clear clinical medical evidence that the fetus has severe congenital defects or terminal disease or is not expected to be delivered; or

(2) The individual is a victim of incest or the individual is a victim of rape when the rape is reported to a law-enforcement agency.

(b) The Legislature intends that the state's medicaid program not provide coverage for abortion on demand and that abortion services be provided only as expressly provided for in this section.

2. Medicaid is a joint federal-state entitlement program that provides funding for various medical services to the poor. See 42 U.S.C.A. § 1396b (West 1992 & Supp.1993).

3. The Appellants include the following groups and individuals: Women's Health Center of West Virginia, Inc., Women's Health Services, Inc., West Virginia Free, on behalf of themselves and all medicaid-eligible women in West Virginia, the West Virginia Chapter of N.O.W., Ruth Ann Panepinto, Secretary, West Virginia Department of Health and Human Services, and Nancy J. Tolliv-

er, Commissioner, Bureau of Administration and Finance, Department of Health and Human Resources.

4. Under federal law and regulations, all medical services must be "medically necessary." See 42 U.S.C.A. §§ 1396, 1396a(a)(10)(A), 1396d(a) (West 1992 & Supp.1993). For determining whether a submitted medical expense qualifies as medically necessary, the West Virginia Department of Health and Human Services has adopted Policy No. MA-85-4, which provides that the Department: "makes reimbursement for pregnancy termination when it is determined to be medically advisable by the attending physician in light of physical, emotional, psychological, familial, or age factors (or a combination thereof) relevant to the well-being of the patient."

5. During oral argument, counsel for N.O.W. advised the Court that the same language of West Virginia Code § 9-2-11, which passed when tacked on to the medicaid tax reform bill, had previously been submitted as a separate bill on twenty-three separate occasions and failed each time.

6. In fact, the Governor instituted a civil action in the Circuit Court of Kanawhy County on June 7, 1993, against the Secretary of the West Virginia Department of Health and Human Services for the purpose of having the abortion-restrictive language contained in Senate Bill 2 declared unconstitutional. This action was dismissed pursuant to defendant's Rule 12(b)(6) motion for

the Circuit Court of Kanawha County, seeking to have that portion of Senate Bill 2, which became West Virginia Code § 9-2-11, declared unconstitutional. Following a trial on this matter on August 11 and 12, the circuit court entered its ruling on August 25, 1993, declaring the challenged portion of Senate Bill 2 constitutional. The circuit court ordered Secretary Panepinto and Commissioner Tolliver to immediately implement the subject provisions of Senate Bill 2 and West Virginia Code § 9-2-11, and denied Appellants' motion for a stay pending appeal absent the posting of a \$350,000 bond, which they were unable to post. On September 7, 1993, Appellees filed a motion with this Court requesting a stay pending appeal, which was granted on that same date.⁷

In preface to the discussion to follow, we borrow the opening comments of another tribunal faced with similar issues:

At the outset, to dispel certain misconceptions that have appeared in this case, we must clarify the precise, narrow legal issue before this court. First, this case does *not* turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child. Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature—as a population control measure, for example—fund-

lack of justiciable controversy and because the Governor had waived his right to bring the action, having signed and not vetoed the legislation. See W.Va.R.Civ.P. 12(b)(6).

7. The Appellants similarly filed a motion seeking a stay pending appeal with this Court. Having already granted the stay motion filed by Appellees, we denied Appellants' stay motion as moot.

8. The Hyde Amendment, the federal counterpart to West Virginia Code § 9-2-11, which was in effect at the time of the *Harris* decision provided:

[N]one of the funds provided by this joint resolution [Medicaid funding] shall be used to perform abortions except where the life of the

ed [medicaid] . . . abortions but refused to provide comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.

Committee to Defend Reprod. Rights v. Myers, 29 Cal.3d 252, 256, 625 P.2d 779, 780, 172 Cal.Rptr. 866, 867 (1981) (emphasis supplied).

Contrary to Appellees' representation, the question before this Court is not whether the state is obligated to subsidize the exercise of a woman's right to have an abortion. Rather, the issue presented is whether, once the state undertakes funding of medical care for the poor, which includes funding for childbirth, can the state deny funding for medically necessary abortion services? More specifically, does the limitation of funds to certain legislatively-specified reproductive services violate the constitutional protections afforded the indigent female citizens of this state?

We begin our analysis by addressing Appellees' contention that the decision of the United States Supreme Court in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), which upheld the funding restrictions imposed by the Hyde Amendment,⁸ should control the outcome of this case. At issue in *Harris*, was whether the denial of public funding via the Medicaid program for certain medically necessary abortions violated the liberty or equal protec-

tion of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Harris, 448 U.S. at 302, 100 S.Ct. at 2680 (quoting from the version of the Hyde amendment in effect for fiscal year 1980, Pub.L. No. 96-123, § 109, 93 Stat. 926). The current Hyde Amendment reads:

None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term. Pub.L. No. 102-170, § 203, 105 Stat. 1126 (1992).

tion guarantees of the Due Process Clause of the Fifth Amendment or either of the religion clauses of the First Amendment. 448 U.S. at 301, 100 S.Ct. at 2680. Recognizing that a woman's decision whether to terminate her pregnancy falls within the liberty protection of the Due Process Clause, the Court in *Harris* ruled that:

it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason was explained in *Maher [v. Roe]*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977): although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. . . . [T]he fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in [*Roe v. Wade*] [410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)].

Id. at 316-317, 100 S.Ct. at 2688. The Court also rejected claims based on equal protection and religion. *Id.* at 319-326, 100 S.Ct. at 2689-2693. Appellees suggest that we adopt the reasoning used in *Harris* and conclude that notwithstanding a woman's fundamental right to have an abortion, the state is not required to provide funding to enable the exercise of that right.

Conversely, Appellants maintain that this Court is not bound by the *Harris* decision under the rationale that because the West Virginia Constitution provides more expansive protections to its citizens than the federal constitution, this state's constitutional protections prevail. See *Doe v. Maher*, 40 Conn. Supp. 394, 419, 515 A.2d 134, 147 (1986) ("federal decisional law is not a lid on the protections guaranteed under our state con-

stitution"). As support for this proposition, Appellants cite decisions in seven states which have relied on the greater protections of their respective state constitutions to find abortion-restrictive language in entitlement programs unconstitutional. See *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779, 172 Cal.Rptr. 866; *Maher*, 40 Conn.Supp. 394, 515 A.2d 134; *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Hope v. Perales*, 189 A.D.2d 287, 595 N.Y.S.2d 948 (1993); *Planned Parenthood Ass'n, Inc. v. Department of Human Resources*, 63 Or.App. 41, 663 P.2d 1247 (1983), *aff'd*, 297 Or. 562, 687 P.2d 785 (1984); *Doe v. Celani*, No. S81-84CnC, (Vt.Super.Ct. May 26, 1986).

[1] Those protections unique to our state constitution as contrasted to the federal constitution are found in sections one, three, and ten of article III. Section one of article III reads:

All men are, by nature, *equally free and independent*, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and *safety*.

W.Va. Const. art. III, § 1 (emphasis supplied). Nowhere in the United States Constitution are the terms "equally free and independent" or "safety" or comparable rights guaranteed. Similarly, section three of article III provides that: "Government is instituted for the *common benefit*, protection and *security* of the people, nation or community." W.Va. Const. art. III, § 3 (emphasis supplied). The federal constitution is devoid of any language stating that the federal government is instituted for the "common benefit" and "security" of its citizens. Although our due process clause does not significantly differ in terms of its language from the Fifth and Fourteenth Amendments to the federal

constitution,⁹ this Court has determined repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart. See *State v. Bonham*, 173 W.Va. 416, 317 S.E.2d 501 (1984).

In *Bonham*, this Court noted that, "the United States Supreme Court has . . . recognized that a state supreme court may set its own constitutional protections at a higher level than that accorded by the federal constitution." 173 W.Va. at 418, 317 S.E.2d at 503 (citing, inter alia, *Connecticut v. Johnson*, 460 U.S. 73, 81 n. 9, 103 S.Ct. 969, 974 n. 9, 74 L.Ed.2d 823 n. 9 (1983)). Based on the principle that "[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution[,] Syllabus Point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)," we ruled in *Bonham*, that this state's due process clause affords a criminal defendant greater protections than the federal counterpart. 173 W.Va. at 418-19, 317 S.E.2d at 503-04 and Syl. Pt. 1 (holding that imposition of more severe sentence following trial de novo does violate defendant's due process rights); see also *West Virginia Citizens Action Group v. Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984) (state constitution compels striking limitation on soliciting after sunset even if federal constitution does not); *Woodruff v. Board of Trustees of Cabell Huntington Hospital*, 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984) (Article III, § 1 "more stringent in its limitation on waiver [of fundamental rights] than is the federal constitution"); *Pushinsky v. West Virginia Board of Law Examiners*, 164 W.Va. 736, 266 S.E.2d 444 (1980) (recognizing that state constitution imposes more stringent limitations on power of state to inquire into lawful associations and speech than those imposed by federal constitution); *Pauley v. Kelly*, 162 W.Va. 672, 707, 255 S.E.2d 859, 878 (1979) (ruling that education is a "fundamental constitutional right"); see generally Justice Thomas B. Miller, *The New Federalism in West Virginia*, 90 W.Va.L.Rev. 51 (1987-88).

9. The due process clause provides: "No person shall be deprived of life, liberty, or property,

[2] The provision of enhanced guarantees for "the enjoyment of life and liberty . . . and safety" by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent. W.Va. Const. art. III, § 1. Accordingly, we are not bound by federal precedent in interpreting issues of constitutional law arising from these enhanced guarantees. See *Bonham*, 173 W.Va. at 418, 317 S.E.2d at 503. Furthermore, because we are permitted to elevate our constitutional protections, we are similarly free to reject federal precedent such as *Harris*. See 448 U.S. 297, 100 S.Ct. 2671. We do just that today.

[3] Under *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the constitutional basis for granting a woman choice with regard to pregnancy termination is grounded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Id.* at 153, 93 S.Ct. at 727. In the most recent United States Supreme Court decision on the issue, the Court reiterated the central premise of *Roe*—that women may, for some time period, make independent decisions to obtain abortions based on the right to privacy. *Planned Parenthood v. Casey*, — U.S. —, — — —, 112 S.Ct. 2791, 2811-12, 120 L.Ed.2d 674 (1992). Appellees claim, however, that West Virginia has not recognized a parallel fundamental right to privacy under our state constitution similar to that recognized in *Roe*. See 410 U.S. at 152-53, 93 S.Ct. at 726. Because there is a federally-created right of privacy that we are required to enforce in a non-discriminatory manner, it is inconsequential that no prior decision of this Court expressly determines the existence of an analogous right.

Appellants note that if an indigent woman who is receiving Aid to Families with Dependent Children (AFDC) benefits, receives a gift or donation, earns additional income, or borrows funds to pay for an abortion, that money is required to be reported to the Department of Human Resources ("DHS") and may render the woman ineligible to receive continued benefits. As attested to by

without due process of law. . . ." W.Va. Const. art. III, § 10.

John A. Boles, Jr., the Director of the Office of Income Maintenance within the DHS, even a gift, donation, loan, or extra income in the amount of \$333 "would, in most cases, disqualify the recipient for several months."¹⁰ Thus, indigent women who are forced to secure funds to pay for an abortion are, in effect, penalized for the exercise of a constitutional right. Moreover, the penalty is realized not only by the women, but also by their families through the loss of funds which would have been received if not for the exercise of a constitutional right.

Furthermore, Appellants point out that the provisions of West Virginia Code § 9-2-11 necessarily impinge on the health and safety of poor women. To illustrate how the denial of funding for medically necessary abortions impacts negatively on the safety of indigent women, Appellants identify those types of health concerns that may warrant an abortion which are not covered by West Virginia Code § 9-2-11. Specific examples of medical conditions which may necessitate performing an abortion are hypertension which places pregnant women at higher risk for strokes, premature placenta separation, and a severe bleeding disorder. Other medical conditions which may place the mother's health in jeopardy if she continues the pregnancy include gestational diabetes, epilepsy, and phlebitis. In certain instances, as in the case of phlebitis, the drugs used to prevent blood clotting in the lungs are dangerous to the fetus and cannot be administered if the woman is pregnant. In the case of malignant breast tumors, pregnancy may actually accelerate the growth of the tumors. According to the submitted record, many of these problems occur with greater frequency among low-income women.¹¹

Given that the term safety, by definition, conveys protection from harm, it stands to reason that the denial of funding for abortions that are determined to be medically necessary both can and most likely will affect the health and safety of indigent women in this state. To deny this conclusion requires

10. "In order to qualify for AFDC, income and assets are compared to maximum limits which include \$1,000 in assets (excluding their home furnishings and \$1,500 in equity value in a motor vehicle), and an income less than 26 percent of

that we similarly deny the reality of being poor. The question then becomes whether this arguable impingement on safety resulting from the provisions of West Virginia Code § 9-2-11 rises to the level of impermissible state action.

The United States Supreme Court explained in *Maher*,

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. *But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.*

432 U.S. at 469-70, 97 S.Ct. at 2380 (emphasis supplied and footnote omitted). The Court ruled in *Maher* that Connecticut regulations which excluded funding for nontherapeutic abortions did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 479-80, 97 S.Ct. at 2385-86. The oft-quoted reasoning of the Court in *Maher* was that:

The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Id. at 474, 97 S.Ct. at 2382-83. Perhaps just as frequently-quoted is Justice Brennan's response to this reasoning:

the Federal Poverty Level." Affidavit of John A. Boles, Jr.

11. See affidavit of Ward W. Maxson, M.D.

As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure.

Maher, 432 U.S. at 483, 97 S.Ct. at 2387 (Brennan, J., dissenting). As noted above, the potential denial of AFDC benefits upon borrowing, earning, or receiving funds to pay for an abortion is yet another illustration of how indigent women are coerced by the State to have children which they might otherwise choose not to bear.

[4] Appellees strenuously argue that the state is not obligated to pay for the exercise of constitutional rights. While this proposition is true as stated, it is equally true that once a government chooses to dispense funds, it must do so in a nondiscriminatory fashion, and it certainly cannot withdraw benefits for no reason *other* than that a woman chooses to avail herself of a federally-granted constitutional right. See *Maher*, 432 U.S. at 469-70, 97 S.Ct. at 2380; *accord Moe*, 382 Mass. at 654, 417 N.E.2d at 402; *Byrne*, 91 N.J. at 306-07, 450 A.2d at 935. As noted in *Moe*,

the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what [it] is forbidden to achieve with sticks.'

382 Mass. at 654, 417 N.E.2d at 402 (quoting Lawrence Tribe, *American Constitutional Law*, § 15-10 at 933 n. 77 (1978)).

The concept invoked by selective governmental funding is the issue of government neutrality. We have previously determined that the common benefit clause of article III, section 3 of the West Virginia Constitution imposes an "obligation upon state government . . . to preserve its neutrality when it provides a vehicle" for the exercise of constitutional rights. *United Mine Workers v. Parsons*, 172 W.Va. 386, 398, 305 S.E.2d 343, 354 (1983). We characterized article III, section 3 as an "equal protection clause" that serves the goal of "fundamental fairness." *Id.* Under this rationale, we ruled that while there was no constitutional mandate to sell air time to anyone, once West Virginia University sold broadcast time to the coal industry for the presentation of "a politically controversial issue of public concern," the University was required to sell equal air time to the coal miners' union to permit contrasting viewpoints. *Id.* Furthermore, we noted in *Parsons*, that the obligation of the government to act for the "common benefit, protection, and security" of its citizens is "as applicable in the [arena of free speech] . . . as it is in any other context." *Id.*

In reliance on *Parsons*, Appellants argue that strict neutrality is mandated whenever state government operates to assist constitutionally-protected decisions. In resolving this same issue of neutrality, the Massachusetts Supreme Court looked to the views Justice Brennan expressed in his dissent to *Harris*:

'In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due pro-

cess liberty right recognized in *Roe v. Wade*.'

Moe, 417 N.E.2d at 402 (quoting *Harris*, 448 U.S. at 333, 100 S.Ct. at 2703-04, Brennan, J. dissenting).

[5] Appellants urge this Court to accept the reasoning articulated by Justice Brennan and others that by denying funding for medically necessary abortions while funding childbirth, the state impermissibly pressures women towards a state-approved reproductive choice. The effect of such restrictions is inherently coercive where a woman is too poor to afford appropriate medical care:

[F]rom a realistic perspective, we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her constitutional rights. On the contrary, the state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.

Myers, 29 Cal.3d at 276, 625 P.2d at 793, 172 Cal.Rptr. at 880. Appellants suggest and we agree that for an indigent woman, the state's offer of subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her federally-protected choice. Under the rationale announced by this Court in *Parsons*, we hold that when state government seeks to act "for the common benefit, protection and security of the people" in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens. See 172 W.Va. at 398, 305 S.E.2d at 354.

[6] While Appellees prefer to characterize this case as one involving guarantees of state funding to carry out a protected right, what is really at issue here is "the right of the individual . . . [to be] free[] from undue government interference, not an assurance of government funding." *Byrne*, 91 N.J. at 307, 450 A.2d at 935 n. 5. Given West Virginia's enhanced constitutional protections, we cannot but conclude that the provisions of West Virginia Code § 9-2-11 constitute undue government interference with the exercise of

the federally-protected right to terminate a pregnancy. As we have discussed above, were it not for this state's undertaking to provide medically necessary care to the poor through entitlement programming such as Medicaid, it would not be operating in violation of its obligation to act neutrally for the common benefit of its citizens by enacting legislation such as West Virginia Code § 9-2-11, the effect of which is forced compliance with legislated reproductive policy.

[7, 8] Having concluded that the provisions of West Virginia are unconstitutional, all that remains is to fashion a remedy. In syllabus point six of *Waite v. Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1978) we held that: "[w]here there is an adequate procedural remedy which prevents a statute from being unconstitutionally applied, the Court will, under the doctrine of least obtrusive remedy, adopt such procedure to avoid declaring a statute unconstitutional." Accord, *State ex rel. Harris v. Calendine*, 160 W.Va. 172, 177, 233 S.E.2d 318, 323 (1977); Syl. Pt. 4, *State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 228 S.E.2d 278 (1976). Accordingly, we conclude that that portion of Senate Bill 2 which is West Virginia Code § 9-2-11 is severable from the remainder of Senate Bill 2 under the general severability clause applicable to all statutes, West Virginia Code § 2-2-10(cc) (1990), because there is no provision in any section of chapter nine of the Code which prohibits severability and because the remaining parts of Senate Bill 2 are complete and capable of standing alone.

Based on the foregoing, we hereby reverse and remand the decision of the Circuit Court of Kanawha County for entry of an order reflecting the rulings herein.

Reversed and remanded.

McHUGH, Justice, dissenting:

I dissent from the majority opinion because I believe that a state is not required to provide funding to enable a woman to exercise her right to have an abortion. Like the majority, I agree that the question before the Court "does not turn on the morality or immorality of abortion, and most decidedly

does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child." *Committee to Defend Reprod. Rights v. Myers*, 29 Cal.3d 252, 625 P.2d 779, 780, 172 Cal.Rptr. 866, 867 (1981). However, unlike the majority, I conclude that *W.Va.Code*, 9-2-11 [1993] does not violate the *West Virginia Constitution*.

The Supreme Court of Michigan was faced with the same issue in *Doe v. Dept. of Social Services*, 439 Mich. 650, 487 N.W.2d 166 (1992) and concluded that the Michigan Medicaid statute which funded childbirth, but not abortion unless the abortion was medically necessary to save the mother's life, does not violate the equal protection clause in the Michigan Constitution.¹ I find the analysis of the Supreme Court of Michigan to be persuasive. Therefore, I will follow the Supreme Court of Michigan's analysis in my dissent.

As the majority points out and as the Supreme Court of Michigan notes, the Supreme Court of the United States has analyzed this very issue in a series of cases. In *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) the Supreme Court of the United States upheld a Connecticut statute which limited state funding for abortions to medically necessary abortions performed during the first trimester of pregnancy. In reaching its conclusion the Supreme Court of the United States acknowledged that *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) gave a woman the right under the federal constitution to choose an abortion. However, in *Maher* the Supreme Court of the United States clarified the *Roe* decision:

Roe did not declare an unqualified 'constitutional right to an abortion,' . . . Rather, the right protects the woman from unduly burdensome interference with her freedom

to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Maher, 432 U.S. at 473-74, 97 S.Ct. at 2382, 53 L.Ed.2d at 494. The Court in *Maher* explained that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Id.* at 475, 97 S.Ct. at 2383, 53 L.Ed.2d at 495 (footnote omitted).

In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980), the Supreme Court of the United States held that the Hyde Amendment, which placed federal restrictions on Medicaid funds for abortions except in a limited number of circumstances, did not violate the establishment clause in the First Amendment nor the equal protection clause of the Fifth Amendment of the *United States Constitution*. In reaching its conclusion the Supreme Court of the United States noted that

although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would

1. The Supreme Court of Michigan noted that the relevant language found in § 109a of the Social Welfare Act provides:

'Notwithstanding any other provision of this act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance, general assistance, or categorical assistance or through any other type of

public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.'

M.C.L. § 400.109a; M.S.A. § 16.490(19a).
Doe, 487 N.W.2d at 169.

have had if Congress had chosen to subsidize no health care costs at all.

Id. at 316-17, 100 S.Ct. at 2688, 65 L.Ed.2d at 804 (citing *Maier, supra*).

The Supreme Court of Michigan in *Doe, supra*, discussed the Supreme Court of the United States' equal protection analysis found in *Harris, supra*, and *Maier, supra*, in detail. *Doe* points out that with this issue there are two levels at which an equal protection analysis can take place.² Ordinarily, the legislation must be rationally related to a legitimate governmental purpose. However, if the legislation creates a classification which is based on suspect factors or prevents the exercise of a fundamental right, then the legislation must be analyzed with strict scrutiny. This analysis, although ignored by the majority, is not foreign to this Court. *E.g., Gibson v. W.Va. Dept. of Highways*, 185 W.Va. 214, 406 S.E.2d 440 (1991); *Means v. Sidiropolis*, 184 W.Va. 514, 401 S.E.2d 447 (1990); *Courtney v. State Dept. of Health*, 182 W.Va. 465, 470, 388 S.E.2d 491, 496 (1989); and *Israel v. West Virginia Secondary Schools Activities Commission*, 182 W.Va. 454, 388 S.E.2d 480 (1989).

The Supreme Court of the United States determined that strict scrutiny did not apply to the issue. In *Maier*, the Supreme Court of the United States pointed out that "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Maier*, 432 U.S. at 471, 97 S.Ct. at 2381, 53 L.Ed.2d at 492-93 (citations omitted). Furthermore, the Supreme Court of Michigan pointed out that "[t]he United States Supreme Court has held in other cases that a legislature's election not to fund the exercise of a fundamental right

2. In *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 691, 408 S.E.2d 634, 641 (1991) this Court pointed out that there are three types of equal protection analyses:

First, when a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive 'strict scrutiny,' that is, the legislative classification must be necessary to obtain a compelling state interest. . . . Second, a so-called intermediate level of protection is accorded certain legislative classifications, such as those which are gender-based, and the classifications must serve an important governmental objective and must be substantially re-

lated to the achievement of that objective. . . . [H]owever, this 'middle-tier' equal protection analysis is 'substantially equivalent' to the 'strict scrutiny' test stated immediately above. . . .

Third, all other legislative classifications . . . are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose. (citations omitted). Although there are technically three levels of equal protection analyses in West Virginia, in the case before us only two need to be considered.

does not impinge upon that right[.]” *Doe*, 487 N.W.2d at 172 (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) and footnote omitted). Therefore, the Supreme Court of the United States found that the failure to fund abortions did not interfere with an indigent woman's fundamental right to choose an abortion. See *Maier, supra*.

Since strict scrutiny is not applicable, then the legislation needs only to be rationally related to a legitimate governmental interest. As *Doe, supra*, points out, even the *Roe* decision acknowledges that the state does have an “important and legitimate interest . . . in protecting the potentiality of human life.” *Id.*, 487 N.W.2d at 173, citing *Roe v. Wade*, 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182. In fact, the Supreme Court of the United States

has emphasized that no burden is imposed upon the government to remain neutral regarding abortion: “[The right recognized in *Roe*] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” *Maier*, 432 U.S. at 474, 97 S.Ct. at 2382.

Id. Therefore, the Supreme Court of the United States concluded that the legislation which refused to fund abortions except in limited circumstances was rationally related to a legitimate governmental interest. See *Maier, supra*, and *Harris, supra*.

In *Doe, supra*, the court below had found that the Michigan Constitution provided greater protection under its equal protection clause than its federal counterpart. The Su-

lated to the achievement of that objective. . . . [H]owever, this 'middle-tier' equal protection analysis is 'substantially equivalent' to the 'strict scrutiny' test stated immediately above. . . .

Third, all other legislative classifications . . . are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose. (citations omitted). Although there are technically three levels of equal protection analyses in West Virginia, in the case before us only two need to be considered.

preme Court of Michigan disagreed and held that the equal protection clause in the state constitution provided the same protection as its federal counterpart and applied the same analysis the United States Supreme Court had to the issue. Like the Supreme Court of Michigan I find that the more sound approach to this issue is to follow the analysis provided by the Supreme Court of the United States.

However, unlike *Doe*, the majority, in the case before us, found that the *West Virginia Constitution* provides greater protection than the *United States Constitution*. The rationale of the majority is that "the common benefit clause of article III, section 3 of the West Virginia Constitution imposes an 'obligation upon state government . . . to preserve its neutrality when it provides a vehicle' for the exercise of constitutional rights." *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W.Va. 436, 444, 446 S.E.2d 658, 666 (1993) (citing *United Workers v. Parsons*, 172 W.Va. 386, 398, 305 S.E.2d 343, 354 (1983)). Based on the above premise, the majority went on to hold that once the government provides medical care to an indigent woman it must do so in a neutral manner, and that funding childbirth but not abortion in some circumstances was not neutral.

Although not clear, it appears that the majority applied a strict scrutiny analysis. The majority made a two-fold finding. The first is that *W.Va.Code*, 9-2-11 [1993], impinges upon a woman's fundamental right to an abortion since as a practical matter an indigent woman would not have the freedom to choose an abortion. Within this analysis, the majority found that if the government does not equally fund two competing fundamental rights, then it is infringing upon one of those fundamental rights. The second is that *W.Va.Code*, 9-2-11 [1993], infringes upon a woman's fundamental right to safety found in article III, section 1 of the *West Virginia Constitution*.

I recognize that this Court has previously held that the *West Virginia Constitution*, in rare circumstances, affords a higher degree of protection than the *United States Consti-*

tution does. However, the case before us does not present a need for such protection. In fact, the majority's adoption of the "neutrality in funding" principle could have a profound adverse impact on the indigent or others who seek government assistance. The frightening effect of the majority's reasoning will be to chill government aid since it would be virtually impossible financially to fund all competing fundamental rights equally.

For instance, in syllabus point 3, in relevant part, of *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979) this Court held that an education is a "fundamental, constitutional right in this State." Does this mean that the state government must fund private schools since it funds public schools? If the majority holds to its position, the answer is yes. The majority's reliance on the neutrality in funding principle could logically authorize private religious and non-religious schools to seek and obtain equal funding for the exercise of their fundamental right to education. *Norwood v. Harrison*, 413 U.S. 455, 462, 93 S.Ct. 2804, 2809, 37 L.Ed.2d 723, 729 (1973) points out the difficulties of the majority's position: "It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid." (quoted in *Doe*, 487 N.W.2d at 172).

More importantly, the government has always enacted laws which encourage one right as opposed to a competing right. For instance, many state governments have enacted legislation which benefits marriage. See *Doe, supra* (Levin, J., concurring). However, a person has just as much of a right to choose to be single; yet, governments do not accord the same benefits to the single person as they do to the married couple.

The majority's concept of government neutrality in the case before us would make most government aid or lack thereof unconstitutional:

It will always be possible to argue that an entitlement created by the state promotes one bundle of fundamental rights at the expense of another. A requirement of neutrality would mean that the govern-

ment could create no entitlement without also creating an equal and opposite entitlement. Under such a scheme of government, the role of the judiciary would be to police neutrality in legislation, steadfastly striking down any legislation that expressed an idea, contained a thought, or took a position on the issues that matter most. Only legislation consisting of dull gray matter would survive.

Doe, 487 N.W.2d at 185 (Levin, J., concurring).³ Obviously, this is not what the constitutional framers had in mind when they drafted the state constitution.

Additionally, the safety argument of the majority, based on article III, section 1 of the *West Virginia Constitution*, is without merit. *W.Va.Code*, 9-2-11 [1993], in relevant part, specifically states that funds will be provided for an abortion if a physician determines in his best clinical judgment that there is

(i) A medical emergency that so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a delay will create grave peril of irreversible loss of major bodily function or an equivalent injury to the mother: Provided, That an independent physician concurs with the physician's clinical judgment; or

(ii) Clear clinical medical evidence that the fetus has severe congenital defects or terminal disease or is not expected to be delivered; or

(2) The individual is a victim of incest or the individual is a victim of rape when the rape is reported to a law-enforcement agency.

It is apparent that the legislature did consider the woman's psychological and physiological safety when drafting *W.Va.Code*, 9-2-11 [1993].

Moreover, we have stated that "[a] fact once determined by the legislature, and made the basis of a legislative act, is not thereafter open to judicial investigation." Syl. pt. 4, *State ex rel. W.Va. Housing and*

3. The United States Supreme Court has noted that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or prop-

Development Fund v. Copenhagen, 153 W.Va. 636, 171 S.E.2d 545 (1969). In chapter 16 of the *West Virginia Code*, which is entitled "Parental Notification of Abortions Performed on Unemancipated Minors," the legislature found that "the medical, emotional and psychological consequences of abortion are serious and of indeterminate duration, particularly when the patient is immature[.]" *W.Va.Code*, 16-2F-1 [1984], in relevant part. Even though the above legislative finding of fact concerns minors, it is equally applicable to the issue before this Court. Therefore, this Court may not ignore the legislature's determination that abortions may pose a threat to a woman's safety.

Abortion is an emotionally charged issue. Therefore, as long as the government does not interfere with a woman's right to choose an abortion, the decisions regarding the funding for abortions should be left to the legislature. As we have previously stated, "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). See also syl. pt. 1, *Consumer Advocate Division of the Public Service Commission v. Public Service Commission*, 182 W.Va. 152, 386 S.E.2d 650 (1989).

Additionally, this Court has consistently recognized that whenever possible statutes should be found to be constitutional:

"In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legis-

erty interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 259 (1989).

lative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Point 1 Syllabus, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740 [143 S.E.2d 351].

Syl. pt. 3, *State ex rel. W.Va. Housing Development Fund, supra*. Whether or not the government should fund abortions and/or childbirth for the indigent woman is a matter of legislative policy. The legislature is the proper forum for debating whether *W.Va. Code*, 9-2-11 [1993] is unwise, not the judiciary. As we recently stated, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Tony P. Sellitti Construction Co. v. Caryl*, 185 W.Va. 584, 593, 408 S.E.2d 336, 345 (1991), *cert. den.*, — U.S. —, 112 S.Ct. 969, 117 L.Ed.2d 135 (1992) (*citing City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976)).

W.Va. Code, 9-2-11 [1993] does not trample on a constitutional right. It does not prevent a woman from exercising her fundamental right to choose an abortion. The majority has chosen to cast aside well-established legal principles to reach its conclusion. The holding will have limited precedential value because the majority will not be able to adhere to the result of the neutrality in funding issue when it comes up in other contexts. Accordingly, based on the above discussion, I respectfully dissent. I am authorized to state that Chief Justice Brotherton joins me in this dissent.



191 W.Va. 450

Albert Coerte VOORHEES,
Plaintiff-Appellee,

v.

GUYAN MACHINERY COMPANY, a
West Virginia corporation and Robert
Shell, Jr., Defendants-Appellants.

No. 21693.

Supreme Court of Appeals of
West Virginia.

Submitted Jan. 19, 1994.

Decided March 24, 1994.

Former employee brought action against former employer and its chairman of the board alleging tortious interference with former employee's relationship which his new employer based on former employer's threatening to enforce restrictive noncompetition agreement. The Circuit Court, Logan County, Eric H. O'Briant, J., entered judgment for former employee. Former employer appealed. The Supreme Court of Appeals, Neely, J., held that: (1) former employer's threatening to enforce noncompetition agreement constituted tortious interference with former employee's relationship with new employer; (2) award of punitive damages was appropriate; and (3) former employee was not required to mitigate damages by accepting reemployment with former employer.

Affirmed.

Workman, J., filed a dissenting opinion.

1. Master and Servant ⇐341

Former employer's action in threatening former employee's new employer that former employer would enforce former employee's noncompetition agreement constituted tortious interference with former employee's new business relationship with new employer; only product manufactured by new employer was urethane screens while urethane screens represented less than one half of 1% of former employer's total sales and, thus, any competition between former and new employer was so insignificant as to render absurd former employer's claim that it was



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The Florida Legislature
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Dear Ms. Baker,

A ballot initiative to amend Florida’s constitution to “limit government interference with abortion” has gathered enough signatures to require the Fiscal Impact Estimating Conference (FIEC) to estimate its effects on state and local revenues and expenditures.¹

To assist the FIEC in preparing a financial impact statement, we submit the following analysis of the proposed amendment. The statement reflects the views of its authors and should not be considered an official position of The Heritage Foundation.

Our note focuses on demographic estimates because the least is known about how shifting abortion limits affect the prevalence of abortion and directly related economic decisions. We hope that the demographic estimates can inform existing methods from the Office of Economic and Demographic Research to infer the associated fiscal impacts.

The Supreme Court of the State of Florida has recently upheld the constitutionality of the state’s 15-week ban, and the decision automatically triggered the implementation of the Heartbeat Protection Act (S.B. 300) which bans abortion after 6 weeks gestation. The proposed amendment would repeal any law that restricts abortion prior to viability, a policy context which we will refer to in this letter as a ‘viability standard.’

We estimated the demographic and economic changes under a viability standard compared to two different policy scenarios: a 15-week gestational limit on abortion and a 6-week gestational limit. Results in this updated analysis will only report findings for the impact of the proposed amendment relative to the 6-week abortion ban.

¹ Florida Division of Elections. Amendment to Limit Government Interference with Abortion, 23-07. <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=83927&seqnum=1>. Accessed November 8, 2023.

If the proposed amendment were to be adopted, the number of abortions would increase by nearly 735,000 by the year 2060. The resultant higher incidence in abortions and reduced fertility would lead to a decline in the population by 2060 of nearly 790,000 people.

Some have argued that increased access to abortion allows more women to participate in the labor force. To test these assumptions, we constructed a multi-state panel model of the total labor force participation rate. Our model shows that reductions in the total fertility rate are associated with reductions in the labor force participation rate and that these effects outweigh the slight positive effect the abortion rate has on labor force participation.

Over time, the proposed amendment would result in a decline in the population among working age adults. As a result, the size of the labor force would decline. Our modeling and projections predict that the labor force would decline by nearly 320,000 workers by 2060.

We predict that this contraction in the labor force would cause statewide personal disposable income to decline relative to the status quo. By 2060, personal disposable income is forecasted in the mean to decline by 10% if the proposed amendment is adopted.

The decline in personal disposable income in turn would impact sales and use tax revenue for the state of Florida. If the proposed amendment is adopted, our models and calculations predict a \$8.13 billion loss in sales and use tax revenue between 2025 and 2060.

The remainder of this note presents the methodology behind these estimates and the details of the results. Model coefficient tables and tables of projected abortion number under each policy scenario are provided in Appendix A. Descriptions of the source data are provided in Appendix B. Model fit diagnostics are provided in Appendix C.

Methodology

Florida law currently prohibits abortion after 6 weeks gestation.

If adopted, the proposed constitutional amendment (titled “Amendment to Limit Government Interference with Abortion”, Serial No. 23-07) would repeal all restrictions on abortion prior to “viability” except parental notification laws. There is no scientific, medical, or legal consensus on what gestational age viability occurs. Rather, viability is an arbitrary and poorly defined construct that loosely falls within the range of 20-28 weeks gestational age.²

Given this background, three policy scenarios were considered:

1. a 15-week abortion limit with a mandatory waiting period prior to obtaining an abortion (the legal environment that was in effect prior to the recent enactment of the 6-week ban);
2. a 6-week abortion limit with a mandatory waiting period (the currently enforceable legal environment); and
3. a legal standard where abortion is legal until ‘viability’ and no mandatory waiting period (the legal environment that would result if the proposed amendment were adopted).

² American College of Obstetricians and Gynecologists. Perivable Birth, Obstetric Care Consensus, Number 6, October 2017. <https://www.acog.org/clinical/clinical-guidance/obstetric-care-consensus/articles/2017/10/perivable-birth>. Accessed November 8, 2023.

Under each scenario, we estimate

1. The effect of the proposed amendment on the abortion rate,
2. Cohort-component population projections with alternative abortion rates, and
3. Labor force projections with alternative fertility rates.
4. Statewide personal disposable income.
5. Projected sales and use tax revenue that would result from changes to personal disposable income.

The next subsections walk through each component of the estimate. The results are presented all together in the Results section following.

Effect of the Proposed Amendment on the Abortion Rate

We follow two different procedures to estimate changes in the abortion rate should the amendment pass. The first relies on state-level historical data to estimate the difference in abortion between a 15-week limit and a viability limit. However, 6-week limits have only recently come into force in a limited number of states, so a long enough history is not available to compute reliable estimates. Our second procedure extrapolates from a recent study of Texas' 6-week abortion limit to compute a similar projection for Florida. We additionally test the robustness of the Texas study using our own data and modeling for the state of Georgia which similarly enacted a 6-week abortion ban limit in 2022.

Difference in Abortion Rates Between a 15-week Limit and a Viability Limit

We fit a model to a panel of historical data on abortion rates by state of residence from the years 2003-2020. Only states for which we had complete time series for all variables were included in the model. States that do not report data on abortion to the CDC were excluded from the model: California, New Hampshire, and Maryland. Data for Louisiana, Maine, Rhode Island, South Dakota, and Wyoming were also excluded from the model due to poor quality data for one or more years within our observation window.

The abortion rate by state of residence is defined as

$$R_j = \frac{A_j}{P_{j,f_{15-49}}} * 1000 \quad (1)$$

where R_j is the abortion rate by state of residence in state j , A_j is the number of abortions obtained by residents of state j , and $P_{j,f_{15-49}}$ is the population of female residents of state j who are between 15 and 49 years of age.

We fit a generalized linear mixed model (GLMM) with autoregressive random effects by state to model the abortion rate by state of residence. This type of model provides at least four advantages that are relevant for this panel data set. First, GLMM can model the response as either a Gaussian or non-Gaussian random variable and can be fit with a variety of link functions. In certain contexts, this flexibility allows the model to fit better when the response variables do not follow a normal distribution.

Second, GLMMs can also be used to control for first-order autoregressive correlation by specifying the correlation structure within panels. Panel data, including the data we use here, is often serially correlated within panels.³ Controlling for serial correlation increases the accuracy of the standard errors.

Third, inferences can also be made for individual panels from GLMMs, unlike marginal models such as generalized estimating equations (GEE) models. This allows us to make inferences to any specific state or to a non-observed state so long as it is drawn from the same distribution. With marginal models, we are instead confined to inferences on the population average of the observed states in the model.

Fourth, GLMMs also provide keen advantages over traditional panel fixed-effects and first-differences models in certain contexts. Panel fixed-effects models attempt to deal with serial correlation by differencing the panel-specific mean from the panels. Any residual serial correlation is typically dealt with using robust standard errors. However, the use of robust standard errors leads to loss of power and confidence intervals that may be wider than they ought to be. GLMMs with autoregressive random effects, rather, can model the serial correlation explicitly and make the use of robust standard errors unnecessary if the order of the serial correlation in the original model is approximately AR(1).

Panel first-differences models attempt to deal with serial correlation through first-differences of both the response and each of the explanatory variables. However, interpretation of these models must be made on the differences rather than in levels. In most cases this makes the model less intuitive and thus less useful. GLMMs with autoregressive random effects, to the contrary, handle the serial correlation and can be interpreted in levels.

In our model, state-specific effects were modeled as random effects and each random effect was modeled as having an AR(1) correlation structure. The response variable was modeled as a Gaussian random variable with an identity link function. Since the distribution of the response was skewed, we modeled the response as the log-transformed abortion rate. Explanatory variables included in the model were

- the enforceable state gestational limit,
- an indicator for whether the state had a mandatory waiting period prior to having an abortion,
- the estimated number of abortion providers per women aged 15-49,
- the total fertility rate,
- the annual average labor force participation rate,
- the annual average unemployment rate,
- the percentage of persons living in poverty,
- the percentage of women over 21 years of age with a four-year college education,
- the percentage of women 15-34 years of age who are in school, college, graduate education, and
- the percentage of women 15-49 years of age who are married.

Gestational limit was an indicator variable for whether a state had a 20- or 22-week limit on abortion, with the reference group being gestational limits on abortion at 24 weeks, viability, third trimester, or no gestational limits on abortion. Since there was no data available to quantify the effect of a 15-week

³ Some panel models like OLS fixed effects models are unable to model the correlation structure of the errors, but merely account for serial correlation through first-differencing transformations or robust standard errors.

abortion limit on the abortion rate by state of residence, we assumed that the effect of a 20 or 22-week limit from our model would be the same as that of a 15-week limit.⁴

The coefficient for the gestational limit from our model represents the level change in the abortion rate after controlling for the explanatory covariates and the AR(1)-adjusted state-specific random effects. It is the key coefficient of interest to describe the difference in abortion rates between a 15-week limit and a viability limit.

Difference in Abortion Rates Between a 6-week Limit and a Viability Limit

State limits on abortion at 6 weeks' gestation or sooner have only been in place in recent years, which limits the usefulness of historical data to derive estimates of how much such limits reduce abortion. Therefore, we assumed the impact of a 6-week limit on the abortion rate for Florida residents would be similar to the change in the abortion rate that occurred in the state of Texas when a 6-week abortion limit was adopted in that state in September 2021.

White et al. (2022) estimated the impact of Texas' 6-week abortion limit by comparing the monthly number of abortions for Texas residents in the six-month period following the implementation of the law (Sept. 2021 – Feb. 2022) to a six-month control period 12 months prior, when the law was not in effect (Sept. 2020 – Feb. 2021).⁵

Our estimation procedure proceeds similarly. We assumed the total number of abortions for the six-month period following the implementation of the law was equivalent to the number reported by White et al. (2022).

The study, however, only collected data on out-of-state abortions obtained by Texas state residents after the implementation of the 6-week abortion limit. The study did not have any data on out-of-state abortions obtained by Texas residents prior to the implementation of the 6-week abortion limit. To remedy this gap in the data, we collected monthly data on abortion procedures performed in the state of Texas for Texas residents between September 2020 and February 2021 from Texas Health and Human Services Commission (HHSC), Office of Data Analytics and Performance.⁶

HHSC reports only yearly totals for the number of abortions obtained out-of-state by Texas residents, so we made an adjustment to calculate for out-of-state abortions. The number of out-of-state abortions obtained by Texas state residents in 2020 was assumed to proportionally follow the monthly distribution of abortions performed in the state of Texas for Texas residents. For January and February 2021, the number of out-of-state abortions was assumed to be the same as the number of out-of-state abortions obtained in 2020, corrected by a multiplicative factor

⁴ Only about 4 percent of abortions are performed at 16 weeks gestation or later so the difference in the effect of a 15-week limit and a 20-week limit is likely small. In any event, our estimate of the effect of a 15-week limit is an underestimate and is therefore conservative.

⁵ White K, Sierra G, Lerma K, Beasley A, Hoffer LG, Tocce K, Goyal V, Ogburn T, Potter JE, Dickman SL. Association of Texas' 2021 limit on abortion in early pregnancy with the number of facility-based abortions in Texas and surrounding states. *JAMA*. 2022 Nov 22;328(20):2048-55.

⁶ Office of Data Analytics and Performance, HHSC. ITOP Statistics. Selected Characteristics of Induced Terminations of Pregnancy for 2020-2022. <https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics>.

$$1 - \left(\frac{R_{2020_{Jan-Feb}} - R_{2021_{Jan-Feb}}}{R_{2020_{Jan-Feb}}} \right) \quad (2)$$

where $R_{2020_{Jan-Feb}}$ and $R_{2021_{Jan-Feb}}$ are the number of abortions performed in the state of Texas for Texas residents in January and February of 2020 and 2021 respectively. Monthly estimates for out-of-state abortions for Texas residents were added to monthly totals for abortions occurring in Texas for Texas residents to obtain total estimated number of abortions for Texas residents by month.

From these data, we calculated half-year abortion rates by state of residence using U.S. Census Bureau population estimates by state, age, and sex.⁷ The impact of the 6-week abortion limit on the abortion rate was estimated as

$$\rho_{6 \text{ week ban}} = \frac{R_{before_{Sep-Feb}} - R_{after_{Sep-Feb}}}{R_{before_{Sep-Feb}}} \quad (3)$$

where $\rho_{6 \text{ week ban}}$ is the proportion decline in the abortion rate that results from the implementation of a six-week abortion limit relative to a 22-week abortion limit, and $R_{before_{Sep-Feb}}$ and $R_{after_{Sep-Feb}}$ are the half-year abortion rates for Texas residents in the six-month control period before the implantation of the law and in the six-month period after the implementation of the law, respectively.

Cohort-Component Population Projections

We then used modeled changes to the abortion rate under each policy scenario as inputs in a cohort-component population projection of the state of Florida to 2060. The projection accounts for population changes by accounting for the number of births, deaths, and net migrations in each year.

Population Projection in the Baseline

Our cohort-component projection used the U.S. Census Bureau population estimates for the state of Florida by sex and single-year age as of July 1, 2022 as the base population.⁸ For subsequent years, the population at age a , sex s , and year t were calculated as

$$P_{a,s,t} = P_{a-1,s,t-1} - D_{a,s,t-1:t} + M_{a_{10},s,t-1:t} \quad (4)$$

where $P_{a-1,s,t-1}$ is the population of the same single-age cohort from the previous year, $D_{a,s,t-1:t}$ is the number of deaths from time $t - 1$ to t among the single-year cohort that is age a in year t , and

⁷ While CDC typically assigns females 15-44 years of age as the denominator for calculating abortion rates, we instead assigned females 15-49 years of age as the denominator because fertility rates for women over 44 years of age have been trending upwards for many years now and are gradually coming to represent a larger share of total fertility than in prior years. Fetal abnormalities are also more likely to occur for older pregnant women and abortion is significantly more likely for infants with fetal abnormalities. Switching the population of females 15-49 years of age for the population of females 15-44 years age in the denominator for estimating the abortion rate makes this metric more sensitive to changing fertility trends.

⁸ U.S. Census Bureau. State Population by Characteristics: 2020-2022. Age, Sex, Race, and Hispanic Origin - 5 race groups (5 race alone or in combination groups) by Age, Sex, and Hispanic Origin: April 1, 2020 to July 1, 2022 (SC-EST2022-ALLDATA5).

$M_{a_{10},s,t-1:t}$ is the estimated number of net migrants between time $t - 1$ and t for the single-year cohort that is age a and falls into the ten-year age group a_{10} in year t .⁹

The population at age 0, sex s , and time t in the baseline projection is the sum of new births and newborn migrants. The age-0 population was calculated as

$$P_{0,s,t} = B_{s,t-1;t} * \left(\frac{L_0^{s,t}}{l_0} \right) + \frac{M_{0,s,t-1:t}}{2} \quad (5)$$

where $B_{s,t-1;t}$ is the projected number of births for sex s from time $t - 1$ to time t , where $L_0^{s,t}$ is the number of person-years lived by the single-age cohort at age 0 for sex s , and at year t , where l_0 is the radix of the life table, and where $M_{0,s,t-1:t}$ is the projected number of migrants at age 0 and sex s between time $t - 1$ and t .

Projections for Fertility

The number of births by sex in the baseline projections was estimated as

$$B_{s,t-1;t} = \sum_{a_5=\{\text{under 15}\}}^{\{\text{over 49}\}} \frac{SRB_s}{2} * \left[\left(\frac{ASFR_{a_5,t-1} * P_{a_5,f,t-1}}{1000} \right) + \left(\frac{ASFR_{a_5,t} * P_{a_5,f,t}}{1000} \right) + \left(\frac{ASFR_{a_5,t} * M_{a_5,f,t-1:t}}{1000} \right) \right] \quad (6)$$

where $ASFR_{a_5,t}$ is the five-year age group age-specific fertility rate (ASFR) at time t , $P_{a_5,f,t}$ is the population of females that are within the five-year age group corresponding to the ASFR at time t , $M_{a_5,f,t-1:t}$ is the number of net migrant women that are within the same five-year age groups, and SRB_s is the sex ratio at birth.¹⁰

Projected age-specific fertility rates were derived by fitting ARIMA models to historical five-year ASFRs from 1995 to 2021. The number and order of ARIMA coefficients was selected according to the model that minimized the small-sample corrected Akaike information criterion (AICc) in a stepwise regression under the constraints that the AR and MA coefficients are 5 or less each, the order of integration was limited to one and the total number of ARIMA coefficients are 5 or less. The data for each series was log-transformed prior to model fitting to prevent forecasts for ASFR trends with a long history of decline from becoming negative.

Projections for Mortality

We projected mortality using life tables. Our projections for mortality closely followed the U.S. Census Bureau's methodology for the 2017 National Population Projections.¹¹

⁹ The age granularity of net migration estimates is for every 10 years or age. Net migration for single-year cohorts was estimated by assuming that all single-year age groups within their 10-year bins had equal levels of net migration.

¹⁰ The sex ratio at birth is assumed to be 1.05 males for every female birth.

¹¹ U.S. Census Bureau. Methodology Assumptions, and Inputs for the 2017 National Population Projections: Projections for the United States: 2017 to 2060. U.S. Census Bureau, 2018.

We took the log of the difference between the life expectancy at birth by sex in the state of Florida in 2018 and 2019 and linearly extrapolated the log difference to the year 2100. Back transformation of the log differences to the original scale of the data yielded a projected life expectancy at birth of 81 for males and 93 for females. Using these projected life expectancies, we selected the Coale-Demeny West model life table with the equivalent life expectancy at birth for males and females.¹²

Coale-Demeny West model life tables as provided by the United Nations Population Division are right censored at age 130 while U.S. Census Bureau life tables are right censored at 100 years of age. The right censoring age for U.N. model life tables were adjusted to age 100 by taking the sum of all deaths (d_x) and the sum of all person-years lived (L_x) from age 100 to 130 to estimate ${}_{\infty}d_x$ and ${}_{\infty}L_x$ respectively. From these, ${}_{\infty}m_x$ was calculated as

$${}_{\infty}m_x = \frac{{}_{\infty}d_x}{{}_{\infty}L_x} \quad (7).$$

We then linearly interpolated the log of the probability of dying to next age (q_x) and the log of the death rate (m_x) from 2019 to 2100 and retained the interpolations from 2022 to 2060.

From q_x , life tables were constructed for males and females from 2022 to 2060. The average number of years lived (a_x) was assumed to be 0.5 for all ages over 0 when calculating L_x , following the National Center for Health Statistics (NCHS), Division of Vital Statistics methodology for constructing life tables.¹³ For age 0, person-years lived was estimated using the approximation for a_x from Preston (2001) when the death rate at age 0 (m_0) is less than 0.107.¹⁴

The age at right censoring for life tables was also adjusted to age 115. Survivorship ratios were linearly interpolated from age 99 to age 115, with the survivorship at and beyond 115 being equivalent to 0. L_x was then back calculated from the interpolated survivorship ratios.

Total person-years after age x (T_x) were subsequently computed from L_x for all x .

Because U.S. Census Bureau population estimates by single-year age and sex are right censored at 85 years of age, life table probabilities of dying to next age (q_x) could not be used to estimate mortality for persons 85 years of age or older. Instead, we used the ratio of total person-years lived after age x and $x - 1$ to estimate mortality for this cohort. The population from age x to 115 then was projected as

$$\sum_{x=i}^{115} P_{x,s,t} = \sum_{x=i}^{115} P_{x-1,s,t-1} * \left(\frac{T_x}{T_{x-1}} \right) \quad (8)$$

where $\sum_{x=i}^{115} P_{x,s,t}$ is the population of persons of sex s in year t , and from age x to 115 (our projections assume all remaining individuals at age 115 die that year), $\sum_{x=i}^{115} P_{x-1,s,t-1}$ is the population of persons aged $x - 1$ to 115 in the previous year, and T_x and T_{x-1} are total person-years lived after age x and $x - 1$, respectively.

¹² United Nations Population Division. Model Life Tables. Complete Life Tables (1 year increment). <https://www.un.org/development/desa/pd/data/model-life-tables>.

¹³ Arias E, Xu JQ, Tejada-Vera B, Murphy SL, Bastian B. U.S. state life tables, 2020. National Vital Statistics Reports; vol 71 no 2. Hyattsville, MD: National Center for Health Statistics. 2022.

¹⁴ Preston S, Heuveline P, Guillot M. Demography: Measuring and Modeling Population Processes: 1st Edition. Blackwell Publishing; 2001.

For each iteration of our projection calculations, each single-year age cohort was aged by 1 year. The group of persons 85 years of age or over was also aged by 1 year in each iteration such that in 2022, the group consisted of all persons 85 years or over, and in 2023 the remaining survivors from this group consisted of all persons 86 years of age or over and so on until the cohort died out.

Projections for Migration

Number of immigrants to the state of Florida were projected from the forecasts of ARIMA models fit to immigration rates by 10-year age groups and by sex from 5 U.S. regions of origin (Northeast, Midwest, South, West), and 8 non-U.S. regions of origin (Europe/North America/Oceania, East and South Asia, Northern Africa and Middle East, Mexico, Central America, Caribbean and South America, and Sub-Saharan Africa). Following U.S. Census Bureau practice, we classified immigrants from Puerto Rico as non-U.S. immigrants. The order of ARIMA coefficients for each model was selected by stepwise regression using AICc as the selection criteria and under the constraints that AR and MA coefficients could not exceed 5 (both each and in sum total) and integration could not be performed more than once. The immigration rate was defined as

$$IR_{r,a_{10},s} = \frac{I_{r,a_{10},s}}{P_{r,a_{10},s}} \quad (9)$$

where $I_{r,a_{10},s}$ is the number of immigrants for each 10-year group and sex from region r , and $P_{r,a_{10},s}$ is the mid-year population estimate of the region of origin from which the group immigrated from. The number of immigrants was estimated from ACS 1-year estimates from 2005 to 2022, with linearly interpolated values for the year 2020 (the year of the COVID-19 pandemic) to prevent ARIMA long-term forecasts from being biased by anomalous trends in the training dataset. The populations for non-domestic regions of origin were taken from United Nations Population Division population estimates.

From each of these ARIMA time series models, we forecasted the immigration rate to the year 2060. Projected immigration counts were subsequently back-calculated from the forecasted immigration rates and existent population projection data for the regions of origin by sex and age group. For non-U.S. regions, population projections for the regions of origin were taken from the U.N. Population Division 2022 revision medium variant population projections.¹⁵ For U.S. regions, population projections for the regions of origin were estimated using 2020, 2030, and 2040 population projections by state and sex from the University of Virginia Demographics Research Group.¹⁶ Intervening years to 2060 were approximated by linear interpolation.

Due to the constraints of the data, immigration estimates from the ACS were right censored at 99 years of age. In our immigration rate models, we binned each single-year age cohort into corresponding 10-year age groups for all ages under 70, but for persons over 69 years of age, we binned together all immigrants aged 70-99 by sex and region of origin.

¹⁵ United Nations, Department of Economic and Social Affairs, Population Division (2022). World Population Prospects 2022, Online Edition.

¹⁶ Weldon Cooper Center for Public Service, Demographics Research Group. National Population Projections, University of Virginia: Charlottesville, Virginia; 2023. [cited 2023 Oct 25]. Available from: <https://demographics.coopercenter.org/national-population-projections/>.

To account for emigration, the number of persons leaving Florida in each year between 2011-2022 (not including 2020) was estimated as a residual between ACS 1-year immigration estimates and U.S. Census Bureau net migration estimates for the state of Florida. Emigration estimates were calculated each for domestic emigrants and foreign emigrants. We then calculated the mean of the ratios of emigrants to immigrants for domestic and foreign migrants and for each year from 2011-2022 (not including 2020)

$$\bar{\psi}_q = \frac{1}{11} \sum_{t=2011}^{2022} \frac{\hat{E}_{q,t}}{I_{q,t}} * \log(w_t) \quad (10)$$

where $\hat{E}_{q,t}$ is the estimated number of emigrants in year t , where q is the either foreign or domestic, $I_{q,t}$ is the number of immigrants, and w_t is an indicator variable that is equal to 1 if $t = 2020$ and 0 otherwise. We made the assumption that $\bar{\psi}_q$ would remain constant to 2060.

The projected number of domestic and foreign net migrants was subsequently estimated as

$$M_{q,a_{10},s,t} = I_{r,a_{10},s,t} - (\bar{\psi}_q * I_{r,a_{10},s,t}) \quad (11)$$

where $I_{r,a_{10},s,t}$ is the projected number of immigrants in year t from region of origin r in decadal age group a_{10} and sex s . Since data on net migration by age and sex were not available, emigration was assumed to be constant within foreign and domestic populations across age and sex. The total number of net migrants was the sum of the projected number of domestic and foreign net migrants

$$M_{a_{10},s,t} = \sum_{q=1}^2 M_{q,a_{10},s,t} \quad (12).$$

Projections of net migration counts for each 10-year age group were converted into single-year age group projections. For single-year age groups less than 70 years of age, we made the assumption that the number of net migrants for each single-year age group were one-tenth of the forecasted number of net migrants for their corresponding 10-year age group. For single-year age groups 70 years of age or over, the number of migrants was estimated from a constrained optimization of a Stineman interpolation.¹⁷ We assumed the number of immigrants at age 70 was 1/12th of the total number of net migrants among persons aged 70 and over. By age 80, the number of net migrants was assumed to be 1/30th of the total number of migrants for persons aged 70 and over. The number of net migrants 115 years of age and over was selected based on the value which produced a Stineman interpolation which minimized the absolute differences between the number of forecasted migrants 70 years of age and older and the sum of the single-year age group Stineman interpolated values.

Population Projections in Alternate Policy Scenarios

Projections for Number of Abortions

The baseline projection is the projection of the resident population under the former 15-week abortion limit with a mandatory waiting period. Separate population projections were computed under two alternate policy scenarios relative to the baseline: 1) a 6-week abortion limit with a mandatory waiting period, and 2) a viability standard with no mandatory waiting period. The latter represents the legal

¹⁷ Stineman RW. A consistently well-behaved method of interpolation. *Creative Computing*. 1980 Jul;6(7):54-7.

environment that would result if the proposed amendment were adopted. Under each policy scenario, life table projections, projected mortality rates, age-specific fertility rates, and net migration remain the same as in the baseline projections. Each alternate policy scenario differs only in an additive change each year in the number of births as a result of a difference in the modeled change in the abortion rate.

Projections for abortion under each policy scenario were estimated as level changes to the projected abortion rate in the baseline. We projected the abortion rate in the baseline by fitting an ARIMA time series model to historical abortion rate estimates by state of residence for the state of Florida.

Since the state of Florida has only reported data on number of abortions by state of residence since 2017, abortion rates by state of residence for years prior to 2017 had to be estimated from existent data on abortions by state of residence and from Florida's reporting of abortions by state of occurrence. Complete data for number of abortions for Florida residents exists for the years 2017-2020. We took the data for these years and calculated the ratio of abortions by state of residence to abortion by state of occurrence

$$resident\ ratio_t = \frac{A_{R,FL,t}}{A_{O,FL,t}} \quad (13)$$

where $A_{R,FL,t}$ is the number of abortions by state of residence in the state of Florida in year t , and $A_{O,FL,t}$ is the number of abortions by state of occurrence in Florida. We made the assumption that the resident ratio for 1995-2016 were the mean of the resident ratios for 2017-2020. We then multiplied this constant by the number of abortions by state of occurrence to obtain estimates for the number of abortions by state of residence in Florida

$$\hat{A}_{R,FL,t} = A_{O,FL,t} * \frac{1}{4} \sum_{t=2017}^{2020} \frac{A_{R,FL,t}}{A_{O,FL,t}} \quad (14).$$

For the years 2021 and 2022, we obtained publicly available data on the number of abortions occurring within the state of Florida obtained by Florida residents from the Florida Agency for Health Care Administration.¹⁸ To predict the number of abortions obtained by Florida residents out-of-state in 2021 and 2022, we fit an ARIMA time series model to historic data on number of abortions obtained by Florida residents in states other than Florida from 2010-2020 as reported by the CDC.¹⁹ Model diagnostics for the time series model are shown in Figure C1. We then forecasted this model forward 2 years to predict the number of abortions obtained out-of-state in 2021 and 2022. These forecasts were then added to the reported number of abortions for Florida residents within the state of Florida. Abortion rates by state of residence were subsequently calculated from these estimates of the number of abortions.

These historic estimates for the abortion rate for Florida residents were then used to make projections for the abortion rate to the year 2060. Abortion rate estimates for the year 1995-2022 were fit to an ARIMA (1, 1, 0) time series model. The order of ARIMA coefficients for this model were selected in the same manner as the models for the ASFR, selecting the order of coefficients via stepwise regression that minimized the AICc. We then forecasted this model to 2060 to produce baseline projections for the

¹⁸ Florida Agency for Health Care Administration, Bureau of Central Services. Abortion Data - Induced Terminations of Pregnancy Reports: By County. 2021-2022. Available at <https://ahca.myflorida.com/health-care-policy-and-oversight/bureau-of-central-services/frequently-requested-data>.

¹⁹ Centers for Disease Control and Prevention. (2022). Abortions Distributed by Area of Residence and Area of Clinical Service. Available at: https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

Florida abortion rate by state of residence. Model diagnostics for the time series model are shown in Figure C2.

To obtain the forecasted changes in the abortion rate between a 6-week abortion limit and the baseline projections, we calculated

$$\Delta R_{six\ week\ ban,t} = -1 * R_{forecast,t} * \rho_{6\ week\ ban} \quad (15)$$

where $R_{forecast,t}$ are the point forecasts of the abortion rate in the baseline projections in year t and $\rho_{6\ week\ ban}$ is defined in equation (3).

To obtain the forecasted changes in the abortion rate between a viability limit and the baseline projections, we calculated

$$\Delta R_{viability,t} = R_{forecast,t} * (\rho_{viability} - 1) \quad (16)$$

where $\rho_{viability}$ is the multiplicative change in the mean of the abortion rate in response to a change in the legal environment from a 20-22 week abortion limit with mandatory waiting periods to a viability standard with no mandatory waiting periods. $\rho_{viability}$ is calculated from the coefficients from the model shown in Table 2.

To project the number of abortions each year, the modeled change in abortion incidence in each policy scenario $\Delta R_{p,t}$ was multiplied by the projected number of women of reproductive age 15-49 years of age divided by 1,000. This was then multiplied by the probability of miscarriage at various gestational ages. Then for each policy scenario, we subtracted the estimated number of abortions from the projection for the number of births for that year such that

$$B_{p,s,t-1;t} = B_{baseline,s,t-1;t} - \sum_i^I \Delta R_{p,t} * \left(\frac{P_{p,a_{15-49},f,t}}{1000} \right) * \bar{G}_i * \mathcal{M}_i \quad (17)$$

where $B_{p,s,t-1;t}$ is the number of births in policy scenario p , $B_{baseline,s,t-1;t}$ is the number of births in the baseline projection, $\Delta R_{p,t}$ is the modeled change in the abortion rate in policy scenario p as compared to the baseline projected abortion rate in year t . $P_{p,a_{15-49},f,t}$ is the projected population of females, 15-49 years of age at year t under policy scenario p from our cohort component projection. \mathcal{M}_i is the probability of miscarriage (i.e., pregnancy loss up until 20 weeks gestation) from the start of the interval i to the end of interval i according to a model published by Sarah Tyler.²⁰ \bar{G}_i is the three-year national average (2018-2020) of the percentage of abortions that occur within the gestational age interval i as provided by the CDC Abortion Surveillance reports which is binned into abortions occurring at ≤ 6 weeks gestation, 7-9 weeks, 10-13 weeks, 14-15 weeks, 16-17 weeks, 18-20 weeks, and 21 weeks or over.²¹

When estimating the effect of the 6-week abortion limit, the starting value for i was 7-9 weeks gestational age as it was assumed that the policy would have no effect on the number of abortions obtained at 6

²⁰ Tyler, Sarah. Miscarriage Probability Chart. Available from: <https://datayze.com/miscarriage-chart>.

²¹ The distribution of abortions by gestational age for the state of Florida is consistently very far off from the distribution for all other states. We concluded that the gestational distribution data for Florida was not reliable, so data for the state of Florida was excluded from our calculations of three-year averages for the percentage of abortions that occur by gestational age.

weeks gestation or earlier. In this policy scenario \bar{G}_1 at 6-weeks gestation or earlier was set to 0 and each of the other \bar{G}_i were weighted such that $\sum_{i=2}^I \bar{G}_i = 1$.

Projection of the Labor Force

From our cohort component population projections, we made projections for the size of the labor force to 2060. In our baseline labor force projections, we assumed that the labor force participation rate by age and sex would remain constant through 2060 at levels equivalent to the national average annual labor force participation rates by age and sex for the years 2011-2022, as reported by the Bureau of Labor Statistics.²²

For the other two policy scenarios, we adjusted the labor force participation rate by a modeled change in labor force participation in response to a change in fertility and the abortion rate. We built a multi-state panel Gaussian GLMM with AR(1) adjusted random effects by state to model the labor force participation rate from the year 2000 to 2020. Explanatory variables in the model were

- the total fertility rate,
- the abortion rate by state of residence,
- the annual average unemployment rate,
- the percentage of state population living in urban areas,
- the percentage of women over 21 years of age with a four-year college education,
- the percentage of females 15-34 years of age having attended school, college, or post-graduate education in the last 2-3 months, and
- the percentage of females 15-49 years of age who are married.

The coefficient for the total fertility rate from this model was multiplied by the change in the fertility rate relative to the baseline fertility rate under each policy scenario. This provided a constant additive adjustment to the labor force participation rate by age and sex for each year in our labor force projections. The coefficient for the abortion rate was also multiplied by the change in the abortion rate relative to the baseline in each policy scenario to provide an additional additive adjustment to the labor force participation rate. The labor force participation rate for policy scenario p in year t for age group a and sex s was projected as

$$\lambda_{p,a,s,t} = \bar{\Lambda}_{a,s} + (\delta^A * \Delta R_{p,t}) + (\delta^{TFR} * (TFR_{p,t} - TFR_{baseline,t})) \quad (18)$$

where $\bar{\Lambda}_{a,s}$ is the national average age- and sex-specific labor force participation rate from 2011-2022, and δ^A is the modeled change in the labor force participation rate in response to a one unit change in the abortion rate by state of residence, $\Delta R_{p,t}$ is the change in the abortion rate relative to the baseline in policy scenario p and year t , δ^{TFR} is the coefficient from our model estimating the change in labor force participation in response to a one unit change in the total fertility rate, $TFR_{baseline,t}$ is the total fertility rate for year t in our baseline population projections, and $TFR_{p,t}$ is the total fertility rate for policy scenario p in year t .

The size of the labor force size for year t , L_t , was then projected as

²² Bureau of Labor Statistics, Local Area Unemployment Statistics: Labor force participation rate (annual). 1995-2022.

$$L_t = \sum_{s=1}^2 \sum_{a=\{16-17 \text{ yrs. old}\}}^{\{55 \text{ yrs. and over}\}} (\lambda_{p,a,s,t} * P_{p,a,s,t})/100 \quad (19)$$

where $P_{p,a,s,t}$ is the population under policy scenario p for age a , sex s , and time t .

Because labor participation rates by age and sex specifically for the state of Florida could not be found, baseline projections for labor force size were adjusted by a correction factor

$$C = 1 - \frac{(\lambda_{2022} - \Lambda_{2022})}{\Lambda_{2022}} \quad (20)$$

where λ_{2022} is the initial baseline projected labor force size for 2022 and Λ_{2022} is the known labor force size for the state of Florida as reported by Bureau of Labor Statistics. Initial projections for labor force size in all three policy scenarios were multiplied by correction factor C .

Projection of Disposable Personal Income

We modeled annual total disposable personal income for the state of Florida using an ordinary least squares model with ARIMA adjusted errors to control for serial correlation. Explanatory variables included in the model were

- the annual civilian labor force size,
- an indicator variable for the COVID-19 pandemic (i.e., the years 2020-2021),
- the proportion of the population 65 years of age or older, and
- the unemployment rate.

Whereas the models mentioned above were fit to multi-state panel data, all variables for this model used data specific to the state of Florida. Disposable personal income was log transformed. The civilian labor force size was scaled by $1e6$ to facilitate model fitting.

The order of ARIMA coefficients for the model was selected by hand. The model was selected based on the order of ARIMA coefficients that minimized the AICc, had low root mean square error, and displayed a stationary series with no evidence of serial correlation from a Ljung-Box test. The order of ARIMA coefficients selected was (0, 1, 0). The fit diagnostics for the selected model are shown in Figure C6.

Projections for disposable personal income are based on forecasted explanatory variables to 2060 under each policy scenario. The size of civilian labor force was forecasted using our projections for labor force size under each policy scenario as described in the previous section. The proportion of the population over 64 years of age were forecasted using our cohort component population projections under each policy scenario. The indicator for the COVID-19 pandemic was set to 0 for all projection years as it was assumed that no similar event would occur before 2060.

The unemployment rate was forecasted using CBO projections for the unemployment rate to 2053 and the Bureau of Labor Statistics data on state-level unemployment rates for the state of Florida. The time series for the unemployment rate was extended to 2060 by forecasting an ARIMA time series model fit to the CBO forecasts from 2023-2053, which in essence was a linear extrapolation of unemployment rates to 2060. The unemployment rate in Florida was then projected under the assumption that the Florida

unemployment rate deviates from the national unemployment rate proportionally by the mean difference of the between the two unemployment rates from 1995 to 2022.

Projection of Sales and Use Tax Revenue

Total taxable sales subject to Florida state sales and use tax was modeled as an OLS with ARIMA adjusted errors to correct for serial correlation. We modeled the log of total annual taxable sales in the state of Florida for the years 1996-2022. The explanatory variables were

- the log of the total statewide disposable personal income,
- an indicator variable for the COVID-19 pandemic,
- the total number of annual out-of-state visitors to the state of Florida,
- the percentage of Florida residents who live in urban areas,
- the unemployment rate,
- the personal consumption expenditures price index, and
- the year.

Only data from the state of Florida was used in this model. The order of ARIMA coefficients for the model was selected by hand. The model was selected based on the order of ARIMA coefficients that minimized the AICc, had low root mean square error, and displayed an appropriate stationary series with lessened evidence of serial correlation from a Ljung-Box test. The order of ARIMA coefficients selected was (0, 0, 1). The fit diagnostics for the selected model are shown in Figure C7.

Predictors in the model were forecasted to the year 2060. Disposable personal income was projected from our models of disposable personal income under each policy scenario as described in the previous section. The COVID-19 pandemic indicator was projected in the same manner as in our disposable personal income model.

The number of visitors to the state of Florida was predicted as a linear function of the year. An OLS model was fit to the historic number of visitors to Florida in the millions. Only two predictors were used: a linear trend for the year and an indicator variable for the COVID-19 pandemic. The projections for number of visitors to 2060 were the predictions from this model.

The personal consumption expenditures (PCE) price index was forecasted using the Congressional Budget Office's forecasts for the annual change in the PCE price index to 2032.²³ For years beyond 2032, we made the assumption that the PCE price index would increase linearly by 2% annually, which is the end point estimate of the CBO's forecasts.

The forecasted covariates were subsequently used to make projections for total annual taxable sales to the year 2060 in each of the three policy scenarios. Projections for total annual taxable sales were then used to project total sales and use tax revenue for the state of Florida to 2060. Total taxable sales were broken down into three categories: 1) lease or rental of commercial real property, 2) utilities, electric, gas, water, sewer, and 3) all other taxable sales.

We derived univariate time series of the proportion share of total taxable sales for (1) and (2) from historic taxable sales data publicly available from the Florida Department of Revenue, Office of Tax

²³ Congressional Budget Office. The Budget and Economic Outlook: 2023 to 2033. <https://www.cbo.gov/publication/58946>.

Research from the years 1994-2023 (2023 only available up until August 2023). Univariate time series models were fit to the historic proportion share of (1) and (2) of total taxable sales. The proportional share of commercial real property to total taxable sales was forecasted to remain constant at 0.073. The proportional share of utilities and electricity to total taxable sales grew steadily from 0.019 in 2024 to 0.021 in 2060.

In our projections for total taxable sales, the proportion of total taxable sales were allocated to 1) lease or rental of commercial real property or 2) utilities, electric, gas, water, and sewer according to their projected proportional share of total taxable sales. To project total sales and use tax revenue for the state of Florida, we made the assumption that sales tax rates will remain at their current levels until the year 2060. Projected commercial real property sales were multiplied by 5.5%, projected utilities and electricity by 6.95% and all other projected taxable sales were multiplied by 6%. The sum of these three provided our annual projections for sales and use tax revenue for the state of Florida if the proposed amendment were to be adopted.

Results

Abortion Rate

We estimate that the abortion rate among Florida residents would increase by 23.6 percent if the proposed amendment were to be adopted compared to a 6-week abortion limit.

Compared to a 15-week abortion limit, the abortion rate is estimated to increase by 2.6 percent which can be derived from exponentiating the coefficient for the gestational limit indicator variable from the abortion rate model in Table 1.

Compared to the 15-week ban, the abortion rate among Florida residents could decline by 21.0 percent as a result of the state moving to a 6-week abortion limit. This is estimated from the six-month in-state and out-of-state abortion counts for Texas residents after the state's implementation of a six-week abortion limit in 2021 as reported in White et al. (2022)²⁴ and by the Texas Health and Human Services Commission.²⁵

Comparison to Georgia's LIFE Act

As a robustness check, monthly abortion data was also obtained from the Georgia Department of Public Health to assess the impact of the Living Infants Fairness and Equality (LIFE) Act. The LIFE Act is a Georgia law which banned abortion from the moment fetal cardiac activity can be detected which can occur as early as 6-weeks gestation and is often considered a *de facto* 6-week abortion limit. The law was implemented starting in August 2022 after the U.S. Supreme Court overturned the central holding of *Roe v. Wade* (1973) in its decision in *Dobbs v. Jackson Women's Health Organization* (2022). Prior to the implementation of the LIFE Act, Georgia had a 22-week limit on abortion.

²⁴ White K, Sierra G, Lerma K, Beasley A, Hofler LG, Tocce K, Goyal V, Ogburn T, Potter JE, Dickman SL. Association of Texas' 2021 limit on abortion in early pregnancy with the number of facility-based abortions in Texas and surrounding states. *JAMA*. 2022 Nov 22;328(20):2048-55.

²⁵ Office of Data Analytics and Performance, HHSC. 2020 ITOP Statistics. 2020 Selected Characteristics of Induced Terminations of Pregnancy. <https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics>.

To assess the impact of the LIFE Act on the abortion rate in Georgia we performed an interrupted time series analysis on the approximate monthly abortion rates. The Georgia Department of Public Health provided to us data on the monthly number of abortions for Georgia residents obtained either within the state of Georgia or out of state from January 1994 to December 2022. These data were converted into approximate abortion rates with the mid-year population estimate for females 15-49 years of age serving as the denominator for all datapoints within the corresponding year²⁶. The interrupted time series was modeled as an ordinary least squares model with SARIMA adjusted standard errors. The order of SARIMA coefficients was selected for the model was (3, 0, 4) (0, 1, 1) with a recurring period of 12 months. The fit diagnostics for this model are shown in Figure C3.

The regression coefficients from this model are shown in Table 2. In Georgia, the abortion rate fell by 0.27 as a level change after the implementation of the six-week abortion limit. The linear trend after the implementation of the law is not significant. The number of abortions in the month immediately preceding the intervention was 3,024. A 0.27 drop in the abortion rate is approximately a 24 percent decline in the abortion rate, which is consistent with what White et al. (2022) found in Texas.

Change in Abortion by State of Residence

The results from our multi-state panel model of the abortion rate by state of residence are shown in Table 1. We used a Gaussian GLMM with AR(1) adjusted random effects by state to assess the impact that the proposed amendment would have on the abortion rate among Florida residents. Fit diagnostics for this model are shown in Figure C4. The standard deviation for the random effects was 0.40.

Since the response variable is log-transformed, the coefficients in Table 1 should be exponentiated before interpreting. The exponentiated coefficients should be interpreted as multiplicative changes to the mean of the abortion rate.

Our model of the abortion rate in Table 1 shows that the abortion rate by state of residence is predicted to increase by 2.4 percent on average when the legal gestational limit on abortion changes from a 20-22 week limit to a viability or greater limit. If the proposed amendment is adopted, the mandatory waiting period currently in effect would be eliminated. Thus, the effect that the proposed amendment would have on the abortion rate is the joint effect of both the gestational limit and the mandatory waiting period. Our model predicts that the proposed amendment would increase the abortion rate among Florida residents on average by 2.6 percent compared to the currently enforceable abortion law.

The coefficient for the gestational limit was very nearly significant at the 90% confidence level. The joint effect of both the gestational limit and the mandatory waiting period were also very nearly significant at the 90% confidence level. While $\alpha = 0.05$ is the often resorted to as the default significance level in most disciplines, the level of α does depend on the field of study. In fields of study where measurement precision is high and the researcher is able to conduct controlled experiments on the observational units, a lower significance level α is typically merited. On the other hand, in fields such as social science and economics, where the researcher is often not at liberty to conduct controlled experiments on observational units and where heterogeneity between observations and confounding amongst covariates are widely present, a higher significance level is often merited. Our model of the abortion rate falls into the latter field of study, so greater flexibility must be granted when interpreting results.

²⁶ Although not as precise as true abortion rate estimates, the approximate abortion rates serve our purposes adequately as the intervention point is at mid-year when changes in population would be slight. The seasonal error adjustments from the model also help account for year-to-year changes in the data that could result from using a constant denominator for datapoints within years.

Population Dynamics

The effect size estimates for the change in the abortion rate in each policy scenario were used to derive cohort component population projections under each scenario. Table 3 shows the additional number of abortions that would result if the proposed amendment were passed. The first column shows the number of abortions that would occur under the proposed amendment compared to a 6-week abortion limit. The numbers listed in the first column are $\Delta A_{six\ month\ ban,t}$, the change in the projected number of abortions among residents of the state of Florida in year t where

$$\Delta A_{six\ month\ ban,t} = A_{viability\ standard,t} - A_{six\ month\ ban,t} \quad (21)$$

and $A_{viability\ standard,t}$ is the projected number of abortions among Florida residents that would occur under the proposed amendment in year t and $A_{six\ month\ ban,t}$ is the projected number of abortions in year t that would occur under a 6-week abortion limit. Similarly, the second column of Table 3 is the additional number of projected abortions that would occur if the proposed amendment were passed compared to the current legal environment in Florida

$$\Delta A_{baseline,t} = A_{viability\ standard,t} - A_{baseline,t} \quad (22)$$

where $A_{baseline,t}$ is the projected number of abortions that would occur under the current law in year t . Our projections predict that the proposed amendment would increase the number of abortions by nearly 735,000 by the year 2060 if compared to a 6-week abortion limit and by nearly 80,000 if compared to a 15-week abortion limit.

The proposed amendment would also reduce the resident population of Florida by nearly 790,000 people relative to a 6-week abortion limit by 2060, and by nearly 85,000 people relative to the current law. The effects that the proposed amendment would have on population trends under each policy scenario are shown in Figure A1.

Labor Force Participation Rate

A key question in estimating the fiscal impact of this amendment is whether additional availability of abortion leads to an increase or decrease in labor force participation. The net effect is a combination of two effects. On one hand, new parents may drop out of the labor force to stay home and care for children. On the other hand, the need to provide for a child may induce parents to enter the labor force and earn additional income.

The fixed effects coefficients from our model of the labor force participation rate are shown in Table 4. We modeled the labor force participation rate using a Gaussian GLMM with AR(1) adjusted random effects by state. The response variable for this model was not transformed so coefficients from Table 4 can be interpreted as one would read an OLS regression table. Fit diagnostics for this model are shown in Figure C5. The standard deviation for the random effects was 3.96.

Our estimates imply a one unit increase in the total fertility rate is associated with a 3.1-point increase in the labor force participation rate. This estimate is consistent with the case that more parents enter the labor force to provide for children than exit the labor force to care for children. The effect is also highly significant ($p < 0.001$).

The model also shows that for every 1 unit increase in the abortion rate by state of residence, the labor force participation rate increases by 0.03. This estimate is consistent with the argument that the

availability of abortion allows more women to remain in the labor force but the effect is slight. In fact, the effect is not even significant at the 90% confidence level. Even so, we included the point estimate of the coefficient in our projections of the labor force in order to report a conservative estimate of the total effect.

Our model shows that under the proposed amendment the labor force participation rate is predicted to drop by 0.25 on average compared to what the labor force participation rate would be if the 6-week abortion ban remained in place.

Size of the Labor Force

Considering all modeled effects, the total fertility rate is projected to be about 0.11 lower under the proposed amendment than under a 6-week abortion limit and about 0.01 lower compared to a 15-week abortion limit. Reduced fertility rates would have downstream effects on the size of the labor force years down the road.

Figure A2 shows the change in the labor force size that would result under each policy scenario. Compared to a policy environment with a 15-week abortion limit, the adoption of the proposed amendment could lead to a decline in the labor force by nearly 35,000 laborers. Compared to a 6-week abortion limit, the labor force in Florida could decline by nearly 320,000 laborers by 2060.

The projected decline in the labor force under each policy scenario is driven primarily by population shrinkage rather than workers dropping out of the labor force due to restricted access to abortion. Indeed, our model shows that the proposed amendment would produce a net loss in the labor force participation rate compared to a 6-week abortion limit. Compared to both a 15-week ban and a 6-week ban, the size of labor force is projected to shrink under the proposed amendment.

Impact of the Proposed Amendment on Disposable Personal Income

The results from the model of disposable personal income are shown in Table 5. The model fit was an OLS with ARIMA (0, 1, 0) adjusted errors. The unemployment rate, the size of the civilian labor force, and the indicator for the COVID-19 pandemic were significant at the 90% confidence level.

Residual diagnostics in Figure C6 show an approximately stationary series. P values from the Ljung-Box test are all well above 0.05 at all lags indicating that the series is consistent with the hypothesis that the series does not display serial correlation. The ACF plot also does not suggest the presence of serial correlation at any lag. The model fits the data quite well as the Q-Q plot of standardized residuals shows.

Impact of the Proposed Amendment on Sales and Use Tax Revenue for the State of Florida

The proposed amendment would cause the resident population of Florida to fall significantly. This would cause the labor force to contract and total state disposable personal income to decrease. This in turn would lead to a reduction in sales and use tax revenue for the state of Florida.

Table 6 shows the regression coefficients from our model of the log of taxable sales in Florida for the years 1996-2022. The model fit is an OLS with ARIMA (0, 0, 1) adjusted errors. The personal consumption expenditures price index, the unemployment rate, the COVID-19 indicator, and the

percentage of residents living in urban areas were all significant at the 90% confidence level. The coefficient for the number of visitors to the state of Florida was not significant, an indication that after accounting for the other covariates, the amount of sales and use tax revenue the state receives from out-of-state visitors has a relatively weak and statistically nonsignificant effect relative to the revenue generated by in-state residents.

Table 7 shows the projected loss in state revenue from sales and use tax to the state of Florida. Between 2025 and 2060, the state is projected to lose approximately \$8.13 billion (nominal USD) in sales and use tax revenue if the proposed amendment is adopted. Losses in sales and use tax revenue are predicted to increase as the labor force shrinks and, as a result, total statewide disposable personal income decreases.

Conclusion

We hope that you will find this information useful in the process of determining the proposed amendment's fiscal impact for Florida's budget.

If you have any questions about our estimates or would like to follow up, we may be reached at the contact information below.

Respectfully,

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Appendix A – Tables and Figures

Table 1. Abortion Rate by State of Residence: Gaussian GLMM with AR(1) Adjusted Random Effects

	(1)		
	Estimate	S.E.	p
(Intercept)	0.126	0.299	0.673
Gestational limit, 20-22 weeks	-0.025	0.015	0.108
Mandatory waiting period	-0.001	0.024	0.973
Abortion providers per capita	3.065**	1.066	0.004
Total fertility rate	0.332***	0.051	<0.001
Labor force participation rate	0.016***	0.004	<0.001
Unemployment rate	0.003+	0.002	0.068
Percent living in poverty	0.000	0.001	0.798
Four-year college education, female 22+	-0.001	0.003	0.818
In school, female 15-34 years (%)	0.003*	0.001	0.038
Married, female 15-49 years (%)	0.005**	0.002	0.004
SD(R.E.)	0.401		
N	684		
conditional R2	0.983		
marginal R2	0.983		
RMSE	0.008		
AIC	1318.2		

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Table 2. Effect of Six-Week Abortion Limit on Monthly Abortion Rate in Georgia: OLS with SARIMA-adjusted errors (3, 0, 4) (0, 1, 1) [12]

	Estimate	SE	T	p
6-week abortion limit	-0.267	0.091	-2.948	0.003
time	0.000	0.003	-0.044	0.965
time after intervention	0.011	0.026	0.425	0.671

Table 3: Projected Number of Additional Abortions for Florida Residents that Would Occur if the Proposed Amendment Were Adopted

Year	Compared to a 6-Week Limit	Compared to Baseline
2025	18,577	2,037
2026	18,794	2,061
2027	18,999	2,083
2028	19,211	2,106
2029	19,425	2,130
2030	19,623	2,152
2031	19,821	2,173
2032	20,001	2,193
2033	20,177	2,212
2034	20,349	2,232
2035	20,502	2,248
2036	20,642	2,263
2037	20,793	2,280
2038	20,904	2,292
2039	21,000	2,302
2040	20,969	2,297
2041	20,934	2,289
2042	20,913	2,284
2043	20,905	2,281
2044	20,897	2,277
2045	20,893	2,273
2046	20,891	2,270
2047	20,880	2,266
2048	20,857	2,260
2049	20,820	2,253
2050	20,761	2,243
2051	20,690	2,232
2052	20,653	2,224
2053	20,638	2,220
2054	20,614	2,214
2055	20,578	2,206
2056	20,530	2,199
2057	20,470	2,189
2058	20,409	2,178
2059	20,363	2,170
2060	20,323	2,163
Total	733,806	79,752

Table 4. Labor Force Participation Rate: Gaussian GLMM with AR(1) Adjusted Random Effects

	(1)		
	Estimate	S.E.	p
(Intercept)	55.169***	2.835	<0.001
Total fertility rate	3.128***	0.415	<0.001
Abortion rate (by residence)	0.028	0.018	0.129
Unemployment rate	-0.120***	0.016	<0.001
Urbanization	0.050	0.035	0.157
Four-year college education, female 22+	-0.105***	0.021	<0.001
In school, female 15-34 years (%)	0.022*	0.010	0.024
Married, female 15-49 years (%)	0.061***	0.013	<0.001
SD(R.E.)	3.955		
N	967		
conditional R2	1.000		
marginal R2	1.000		
RMSE	0.000		
AIC	1978.3		
+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001			

**Table 5. Disposable Personal Income (in millions USD):
OLS with (0, 1, 0) ARIMA Errors**

	(1)	
	Estimate	S.E.
Civilian labor force (millions)	1.392	0.038
COVID-19	1.118	0.021
Proportion of population 65 years or over	2.184	3.182
Unemployment rate	1.001	0.003
N	27	
RMSE	14361956221.87	
AIC	-120.3	
+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001		

Table 6. Taxable Sales (Log-Transformed): OLS with (0, 0, 1) ARIMA Errors

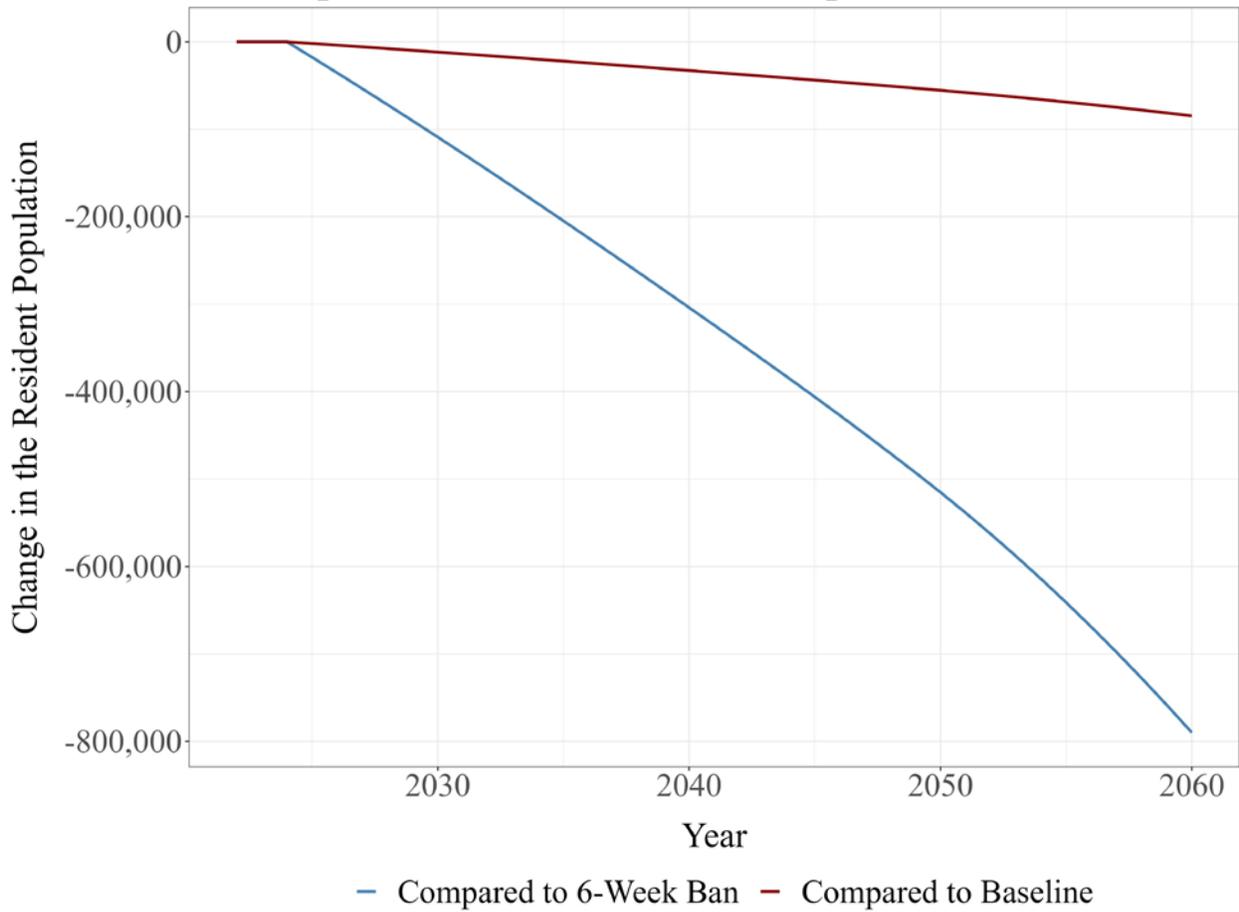
	(1)	
	Estimate	S.E.
MA(1)	0.735	0.151
(Intercept)	27.641	14.851
log(Disposable personal income)	0.023	0.251
COVID-19	0.099	0.035
Number of visitors (millions)	-0.001	0.001
Unemployment rate (residual)	-0.045	0.005
Urbanization (%)	0.062	0.024
Personal consumption expenditures price index	0.021	0.005
Year	-0.004	0.009
N	27	
RMSE	0.02	
AIC	-115.5	

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Table 7: Sales and Use Tax Revenue Loss to the State of Florida

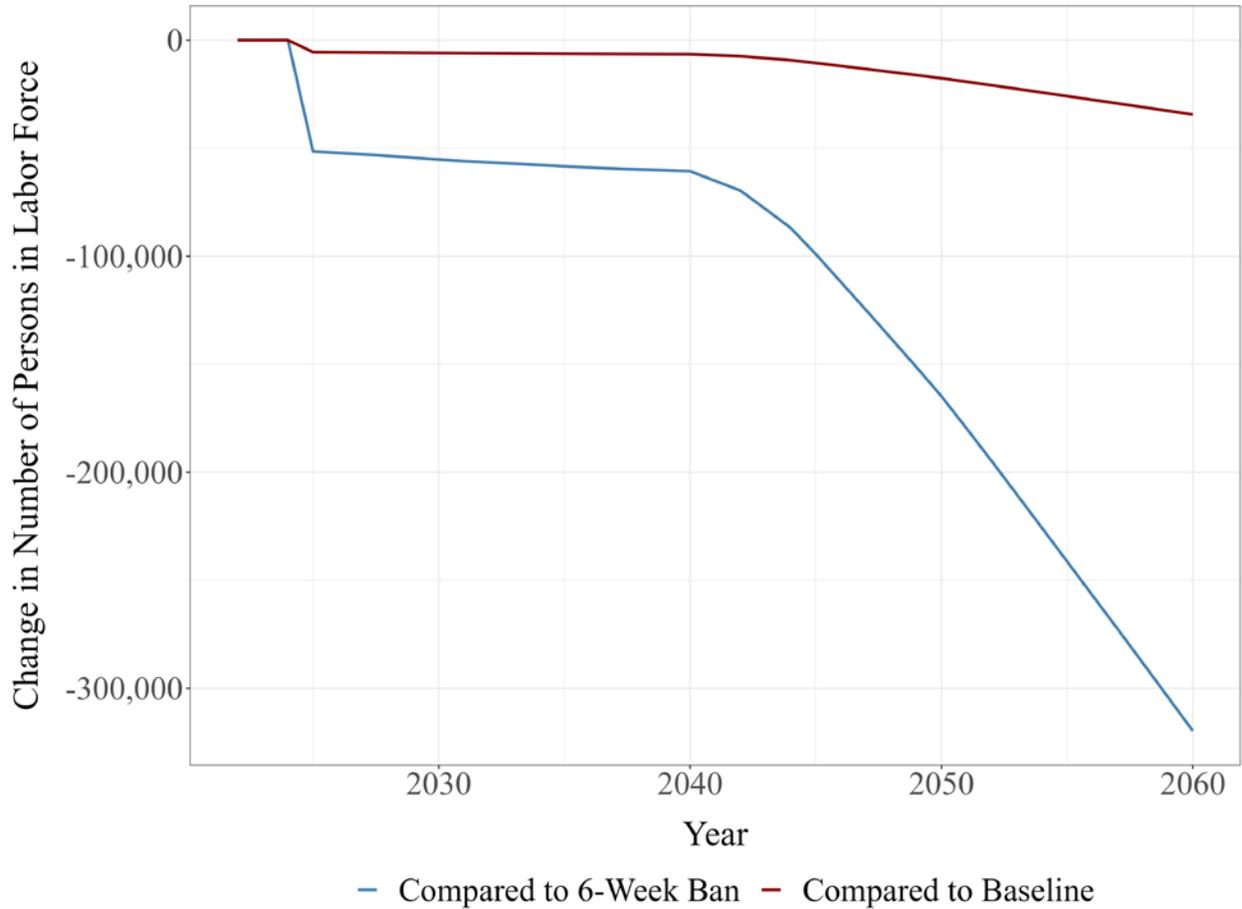
Year	Proposed Amendment vs. 6-Week Ban (in millions US\$)
2025	16.44
2026	17.67
2027	18.81
2028	20.04
2029	21.35
2030	22.77
2031	24.31
2032	25.92
2033	27.65
2034	29.56
2035	31.63
2036	33.86
2037	36.28
2038	38.81
2039	41.55
2040	44.60
2041	51.11
2042	58.34
2043	70.06
2044	83.41
2045	101.92
2046	123.79
2047	148.55
2048	176.93
2049	209.13
2050	246.27
2051	290.74
2052	341.80
2053	400.71
2054	468.27
2055	545.74
2056	634.67
2057	736.66
2058	854.40
2059	990.21
2060	1,146.87
Total	8,130.84

Figure A1: Change in the Resident Population in Florida if the Proposed Amendment Were Adopted



The blue line shows the additional number of persons who would reside in the state of Florida if a six-week limit were adopted compared to the number of persons who would be residing in the state if the proposed amendment were passed. The red line shows the number of additional persons who would reside in the state of Florida if the state's current law on abortion would remain in effect compared to scenario where the proposed amendment is adopted.

Figure A2: Labor Force Shrinkage in Florida that Would Result if the Proposed Amendment Were Adopted



The blue line shows the additional number of persons who would reside in the state of Florida if a six-week limit were adopted compared to the number of persons who would be residing in the state if the proposed amendment were passed. The red line shows the number of additional persons who would reside in the state of Florida if the state's current law on abortion would remain in effect compared to scenario where the proposed amendment is adopted.

Appendix B – Data Sources

Data for the resident population by state, age, and sex were obtained from the U.S. Census Bureau, “State Population by Characteristics, 2020-2022,”²⁷ “State Population by Characteristics, 2010-2020,”²⁸ and “State Intercensal Tables, 2000-2010”²⁹ U.S. Census Bureau data for resident population by state, age, and sex for the years 1990-1999 were obtained from a dataset compiled by the National Bureau of Economic Research (NBER).³⁰ Data for the number of births and age-specific fertility rates (ASFR) by state, year, and mother age group 9 were obtained from publicly available data from the National Vital Statistics System.³¹

Data for the number of abortions by state of residence was obtained from the Centers for Disease Control and Prevention (CDC) Abortion Surveillance reports from 1998-2016.³² For the years 2017-2020, the CDC did not report the number of abortions by state of residence in their annual Abortion Surveillance report. This data was instead extracted from a dataset made publicly available by the CDC, which cross-tabulates the number of abortions by state of occurrence and the number of abortions by state of residence for reporting states.³³ For Georgia, the number of abortions by state of residence were instead obtained from the Georgia Online Analytical Statistical Information System (OASIS) because CDC data for that state was found to be less reliable.³⁴ In the state of Florida, data on the maternal residence of women having an abortion in the state of Florida have only been collected and reported to the CDC since 2017. To obtain estimates for the number of abortions for Florida residents, we made the assumption that the number of abortions for Florida residents obtained within Florida prior to 2017 were proportional to the number of abortions that occurred in the state of Florida. For the years 2017-2020, we found the average ratio of number of abortions for Florida residents and the total reported number of abortions occurring within the state of Florida. We then multiplied this ratio by historic data on the number of abortions by state of occurrence in the state of Florida from 1995-2016 to approximate the number of abortions by state of residence for these years.

Abortion rates by state of residence were calculated from numbers of abortions by state of residence and the estimated resident population of females 15-49 years of age.

²⁷ U.S. Census Bureau. (2023). State Population by Characteristics, 2020-2022. ‘Annual State Resident Population Estimates for 5 Race Groups (5 Race Alone or in Combination Groups) by Age, Sex, and Hispanic Origin: April 1, 2020 to July 1, 2022 (SC-EST2022-ALLDATA5)’.

²⁸ U.S. Census Bureau. (2021). State Population by Characteristics, 2010-2020. ‘Annual State Resident Population Estimates for 5 Race Groups (5 Race Alone or in Combination Groups) by Age, Sex, and Hispanic Origin: April 1, 2010 to July 1, 2020 (SC-EST2020-ALLDATA5)’.

²⁹ U.S. Census Bureau. (2021). State Intercensal Tables, 2000-2010.

³⁰ Feenberg D. National Bureau of Economic Research. (2006). US Census Intercensal Population Estimates. Available at: <https://data.nber.org/data/census-intercensal-population/>.

³¹ Centers for Disease Control and Prevention, National Center for Health Statistics. (2023). National Vital Statistics System, Natality on CDC WONDER Online Database.

³² Centers for Disease Control and Prevention. Abortion Surveillance — United States, [1998-2020]. MMWR Surveill Summ. Available at: https://www.cdc.gov/reproductivehealth/data_stats/index.htm.

³³ Centers for Disease Control and Prevention. (2022). Abortions Distributed by Area of Residence and Area of Clinical Service. Available at: https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

³⁴ Georgia Department of Public Health, Office of Health Indicators for Planning. (2023). Online Analytical Statistical Information System (OASIS): Induced Terminations of Pregnancy (ITOP) Web Query. Available at: <https://oasis.state.ga.us/oasis/webquery/qryITOP.aspx>.

For calculating the effect of a 6-week abortion limit on the abortion rate, data for abortions by state of residence were obtained from White et al. (2022)³⁵ and by the Texas Health and Human Services Commission.³⁶ For our interrupted times series model for the state of Georgia, monthly abortion counts for Georgia residents from January 1994 to December 2022 were obtained from the Georgia Department of Public Health, Office of Health Indicators for Planning (OHIP) by request.

Data on the number of abortion providers by state were obtained for the years 1992, 1996, 2000, 2005, 2008, 2011, 2014, 2017, and 2020 from Jones et al. (2022),³⁷ Jones and Jerman (2017),³⁸ Jones et al (2014),³⁹ Jones and Kooistra (2011),⁴⁰ and Jones et al. (2008).⁴¹

Data on the distribution for the gestational age at which abortion occurs was obtained from the CDC Abortion Surveillance reports.

Time series for gestational limits on abortion by state going back to 2006 were obtained from the Guttmacher Institute's tracking of abortion laws as reported in their periodic publication, *An Overview of Abortion Laws*.⁴² Gestational limits for each year were assigned to each year based on the legal status in effect as reported in *An Overview of Abortion Laws*. The edition used was typically from October, November, or December, but varied from year to year based on whatever edition was available.

Data for mandatory waiting periods by state was compiled by Melanie Israel at The Heritage Foundation.

Data on the percentage of females 15-49 years of age who are married as well as data on the percentage of females 15-34 years of age in school, and data on the percentage of females over 21 years of age with a four-year college education were all obtained from 2000-2021 American Community Survey (ACS) 1-year survey estimates microdata and the microdata from the 1990 5% state survey, both datasets acquired through IPUMS USA.⁴³

Data on the percentage of residents living in urban areas by state was acquired from the U.S. Census Bureau "State-level Urban and Rural Information for the 2020 Census and 2010 Census,"⁴⁴ and for the

³⁵ White K, Sierra G, Lerma K, Beasley A, Hofler LG, Tocce K, Goyal V, Ogburn T, Potter JE, Dickman SL. Association of Texas' 2021 limit on abortion in early pregnancy with the number of facility-based abortions in Texas and surrounding states. *JAMA*. 2022 Nov 22;328(20):2048-55.

³⁶ Office of Data Analytics and Performance, HHSC. 2020 ITOP Statistics. 2020 Selected Characteristics of Induced Terminations of Pregnancy. <https://www.hhs.texas.gov/about/records-statistics/data-statistics/itop-statistics>.

³⁷ Jones RK, Kirstein M, Philbin J. Abortion incidence and service availability in the United States, 2020. *Perspectives on sexual and reproductive health*. 2022 Dec;54(4):128-41.

³⁸ Jones RK, Jerman J. Abortion incidence and service availability in the United States, 2014. *Perspectives on sexual and reproductive health*. 2017 Mar;49(1):17-27.

³⁹ Jones RK, Jerman J. Abortion incidence and service availability in the United States, 2011. *Perspectives on sexual and reproductive health*. 2014 Mar;46(1):3-14.

⁴⁰ Jones RK, Kooistra K. Abortion incidence and access to services in the United States, 2008. *Perspectives on sexual and reproductive health*. 2011 Mar;43(1):41-50.

⁴¹ Jones RK, Zolna MR, Henshaw SK, Finer LB. Abortion in the United States: incidence and access to services, 2005. *Perspectives on sexual and reproductive health*. 2008 Mar;40(1):6-16.

⁴² Guttmacher Institute. *An Overview of Abortion Laws*; [2006-2023] Available at <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

⁴³ Steven Ruggles, Sarah Flood, Matthew Sobek, Danika Brockman, Grace Cooper, Stephanie Richards, and Megan Schouweiler. IPUMS USA: Version 13.0 [dataset]. Minneapolis, MN: IPUMS, 2023. <https://doi.org/10.18128/D010.V13.0>

⁴⁴ U.S. Census Bureau. (2023). State-level 2020 and 2010 Census Urban and Rural Information for the U.S., Puerto Rico, and Island Areas sorted by state FIPS code. Available at <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural.html>.

years 1990 and 2000 from the Iowa Community Indicators Program at Iowa State University.⁴⁵ Data on the percentage of persons living in poverty by state was acquired from the U.S. Census Bureau.⁴⁶

Data on the annual average unemployment rate by state (not seasonally adjusted) and the annual average labor force participation rate (not seasonally adjusted) were obtained from the Bureau of Labor Statistics, “Local Area Unemployment Statistics.”⁴⁷ Historic data for the size of the civilian labor force in the state of Florida was obtained from the Federal Reserve Economic Data (FRED) online database which is maintained by the Federal Reserve Bank of St. Louis.⁴⁸

Historical life tables for the state of Florida by sex were obtained from the National Center for Health Statistics, National Vital Statistics System. Coale-Demeny West model life tables were obtained through public datasets hosted by the United Nations Population Division.⁴⁹ 5-year population estimates and projections by sex for non-U.S. regions was obtained from the United Nations Population Division *World Population Prospects 2022*.⁵⁰ The medium variant was used for population projections. Data for U.S. population projections by age, sex, and state were obtained from University of Virginia Demographics Research Group.⁵¹

We used ACS 1-year estimates from 2011-2022 to estimate the number of immigrants moving to the state of Florida as obtained through the U.S. Census Bureau’s Public Use Microdata Sample (PUMS). We also used data on net migration by state from the U.S. Census Bureau to estimate the number of emigrants leaving the state of Florida.^{52,53}

Data for taxable sales in the state of Florida for the years 1994-2023 were obtained from publicly available data from the Florida Department of Revenue, Office of Tax Research.⁵⁴ Data on disposable personal income by state came from the Bureau of Economic Analysis.⁵⁵ Data for the number of visitors

⁴⁵ Iowa State University, Iowa Community Indicators Program. (2023) Urban Percentage of the Population for States, Historical. Available at <https://www.icip.iastate.edu/tables/population/urban-pct-states>.

⁴⁶ U.S. Census Bureau. (2023). Historical Poverty Tables: People and Families - 1959 to 2022: Table 19. Number of Poor and Poverty Rate by State. Available at <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html>.

⁴⁷ Bureau of Labor Statistics. Local Area Unemployment Statistics.

⁴⁸ Federal Reserve Bank of St. Louis. (2023). Federal Reserve Economic Data. Civilian Labor Force in Florida (LAUST12000000000006A). Available at <https://fred.stlouisfed.org/series/LAUST12000000000006A>.

⁴⁹ United Nations, Department of Economic and Social Affairs, Population Division. Model Life Tables. Complete life tables (1 year increment). Available at <https://www.un.org/development/desa/pd/data/model-life-tables>.

⁵⁰ United Nations, Department of Economic and Social Affairs, Population Division (2022). *World Population Prospects 2022*, Online Edition.

⁵¹ Weldon Cooper Center for Public Service, Demographics Research Group. National Population Projections, University of Virginia: Charlottesville, Virginia; 2023. [cited 2023 Oct 25]. Available from: <https://demographics.coopercenter.org/national-population-projections/>.

⁵² U.S. Census Bureau. State Population by Characteristics, 2020-2022 (NST-EST2022-ALLDATA).

⁵³ U.S. Census Bureau. State Population by Characteristics, 2010-2020 (NST-EST2020-ALLDATA).

⁵⁴ Florida Department of Revenue, Office of Tax Research. (2023). Taxable Sales: Form 10. Available at <https://floridarevenue.com/DataPortal/Pages/TaxResearch.aspx>.

⁵⁵ Bureau of Economic Analysis. (2023). SAINC51 State annual disposable personal income summary: disposable personal income, population, and per capita disposable personal income.

to the state of Florida were obtained from multiple sources including publicly available data from Visit Florida,⁵⁶ the 2017 Florida Visitor Study,⁵⁷ and other sources.^{58,59}

⁵⁶ Visit Florida. (2023). Florida Visitor Estimates. Available at <https://www.visitflorida.org/resources/research/>.

⁵⁷ Visit Florida. 2017 Florida Visitor Study. Tallahassee: Visit Florida; 2019.

⁵⁸ Florida Tax Watch. The Benefits and Costs of Tourism to Florida. Tallahassee: Florida Tax Watch; 2000.

⁵⁹ Florida Tax Watch. The Impact of Tourism on Florida's Economy: Telling a More Complete Story. Tallahassee: Florida Tax Watch; 2006.

Appendix C – Model Fit Diagnostics

Figure C1. Model Fit Diagnostics for ARIMA (0, 0, 1) Time Series Model of the Number of Abortions Obtained by Florida Residents Out-Of-State: 2010-2020

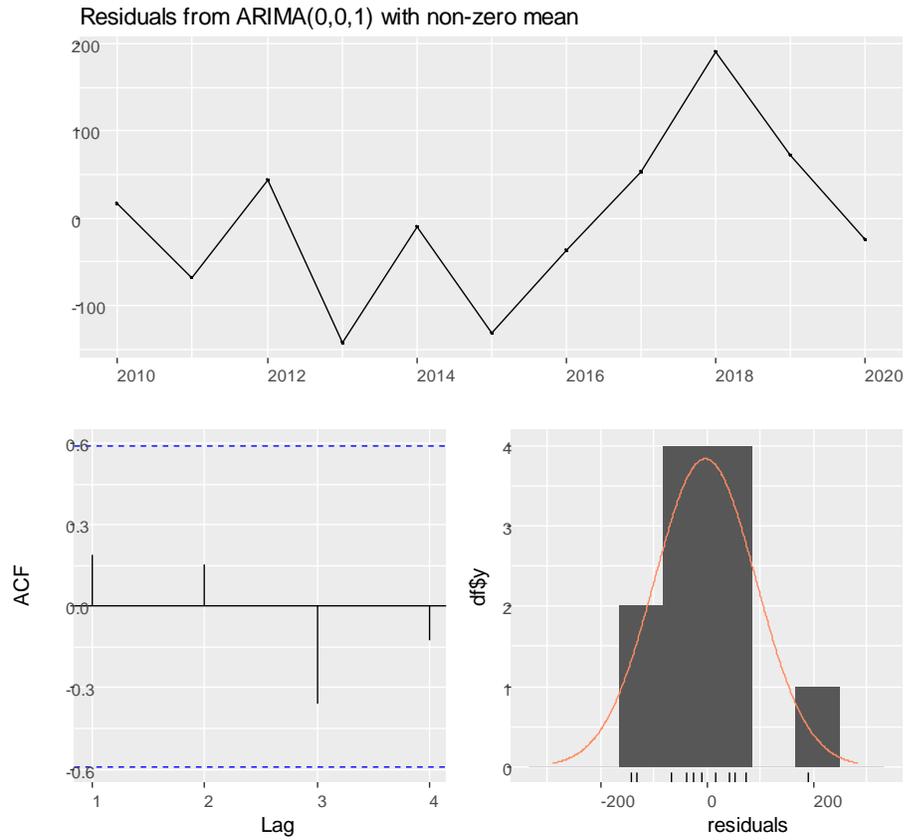


Figure C2. Model Fit Diagnostics for ARIMA (1, 1, 0) Time Series Model of the Abortion Rate for Florida State Residents: 1997-2022

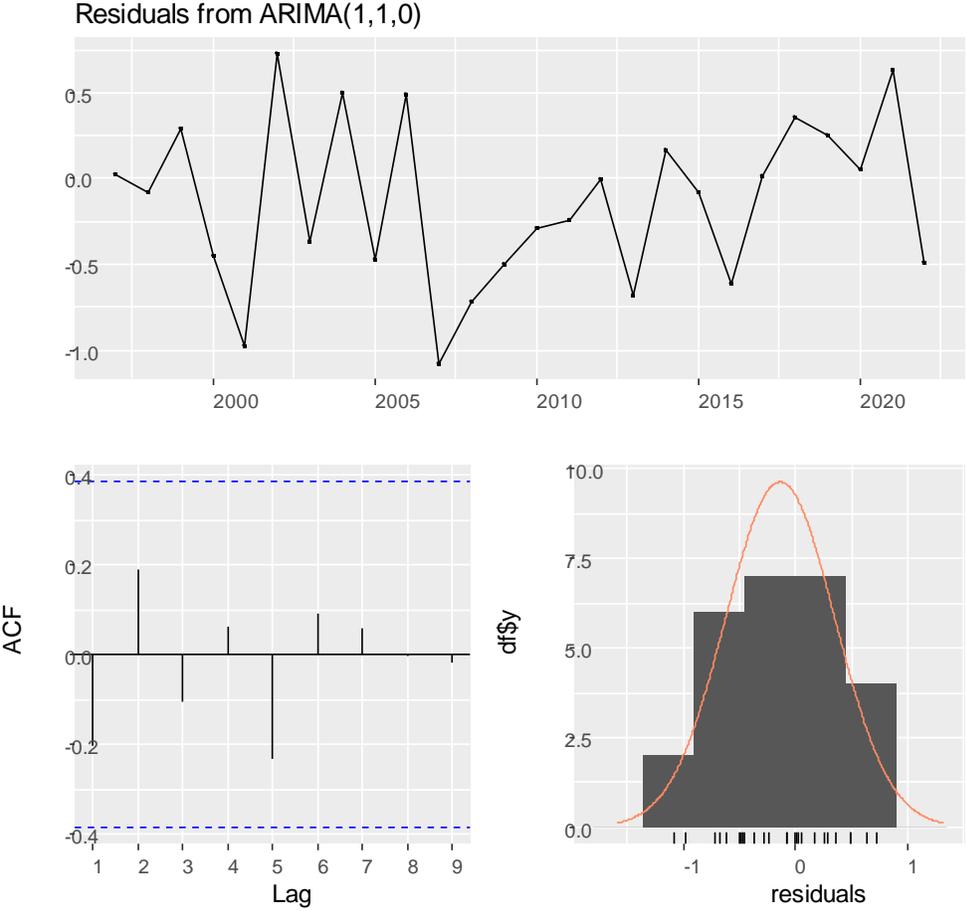


Figure C3. Model Fit Diagnostics for OLS Model on Georgia LIFE Act with SARIMA-adjusted errors (3, 0, 4) (0, 1, 1) [12]

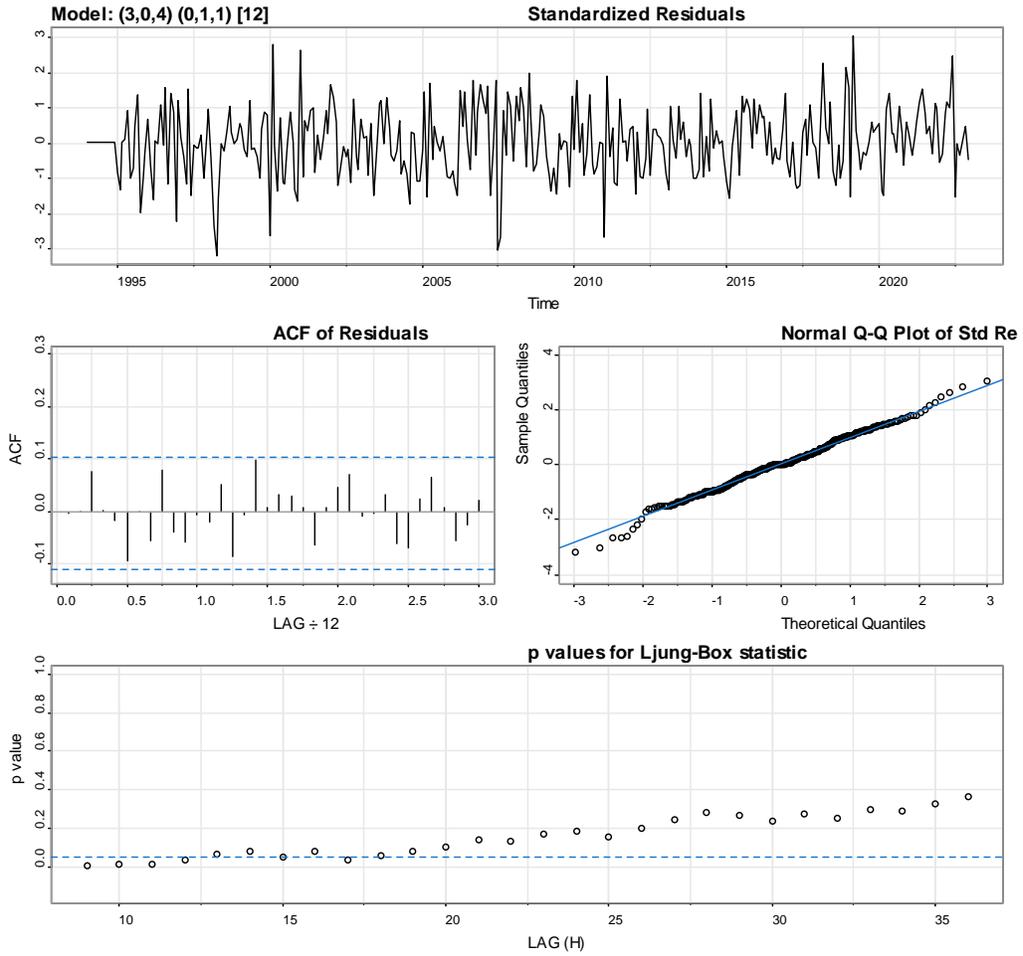


Figure C4. Model Fit Diagnostics for Gaussian GLMM with AR(1) Adjusted Random Effects by State: Abortion Rate by State of Residence (log-transformed)

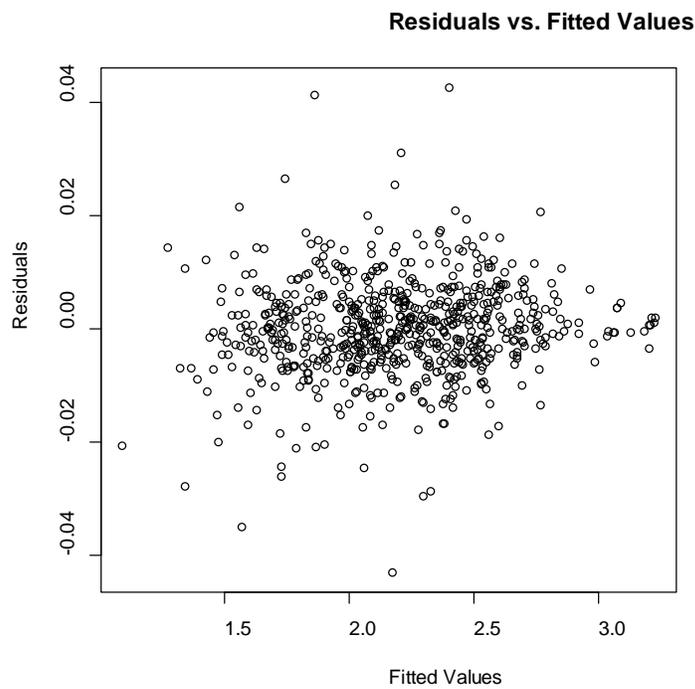
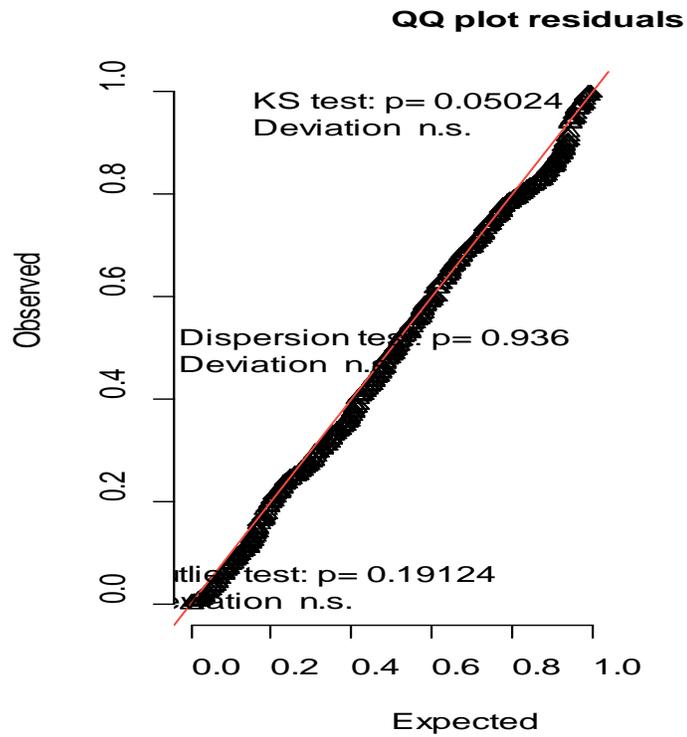


Figure C5. Model Fit Diagnostics for Gaussian GLMM with AR(1) Adjusted Random Effects by State: Labor Force Participation Rate

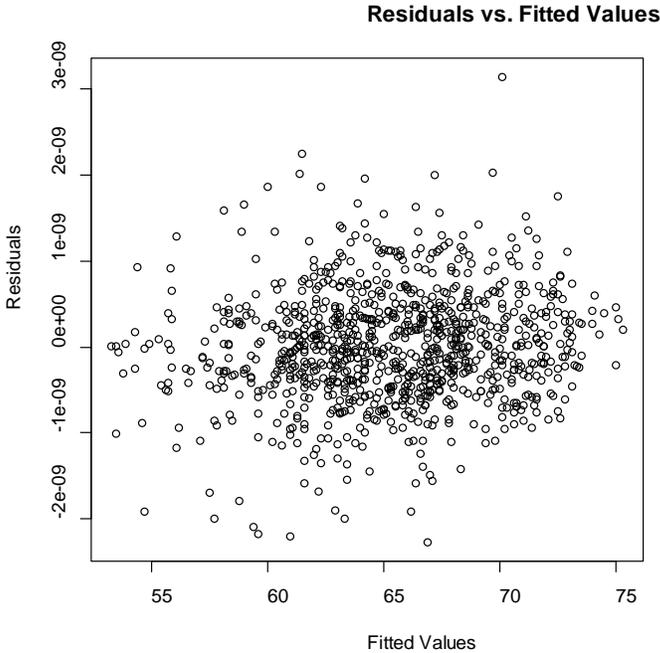
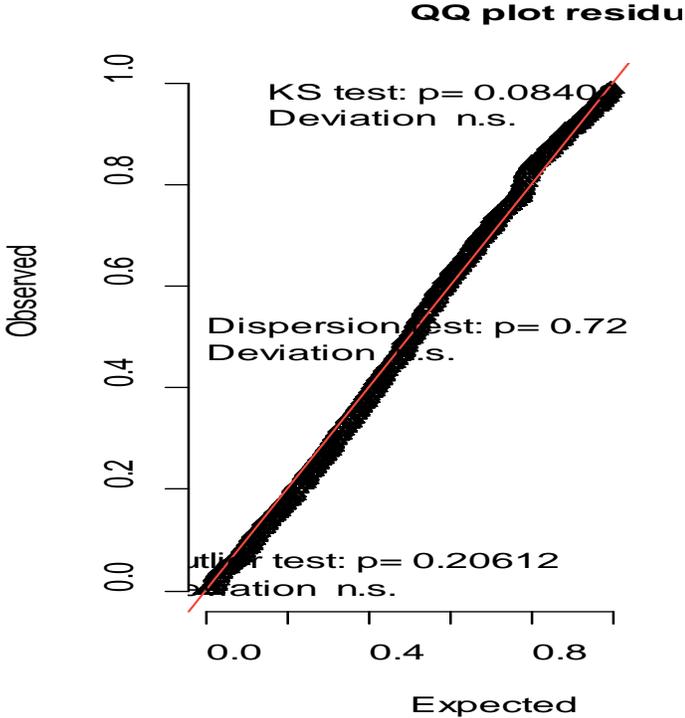


Figure C6. Model Residual Diagnostics for OLS with (0, 1, 0) ARIMA Adjusted Errors: Disposable Personal Income (Log-transformed)

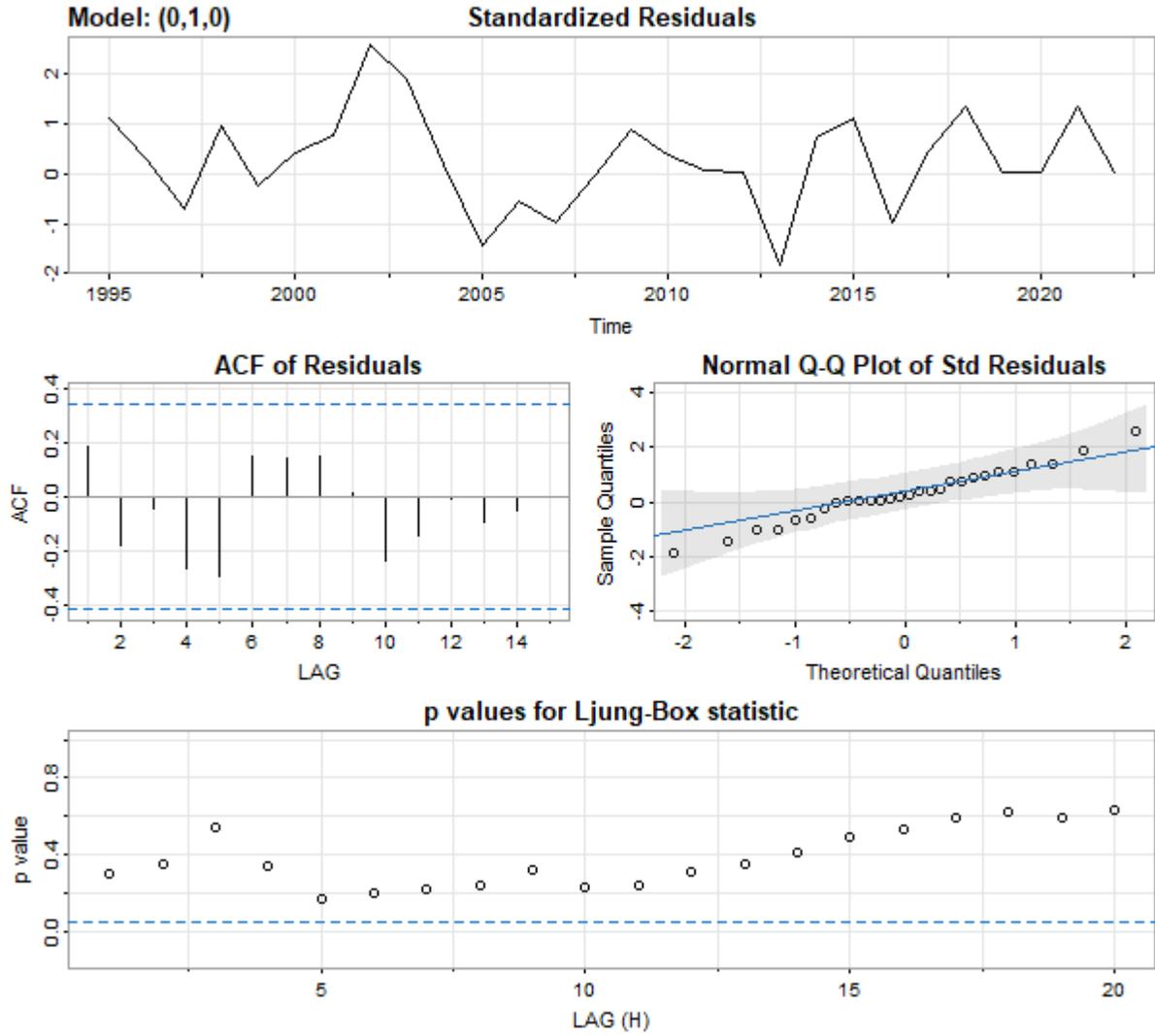
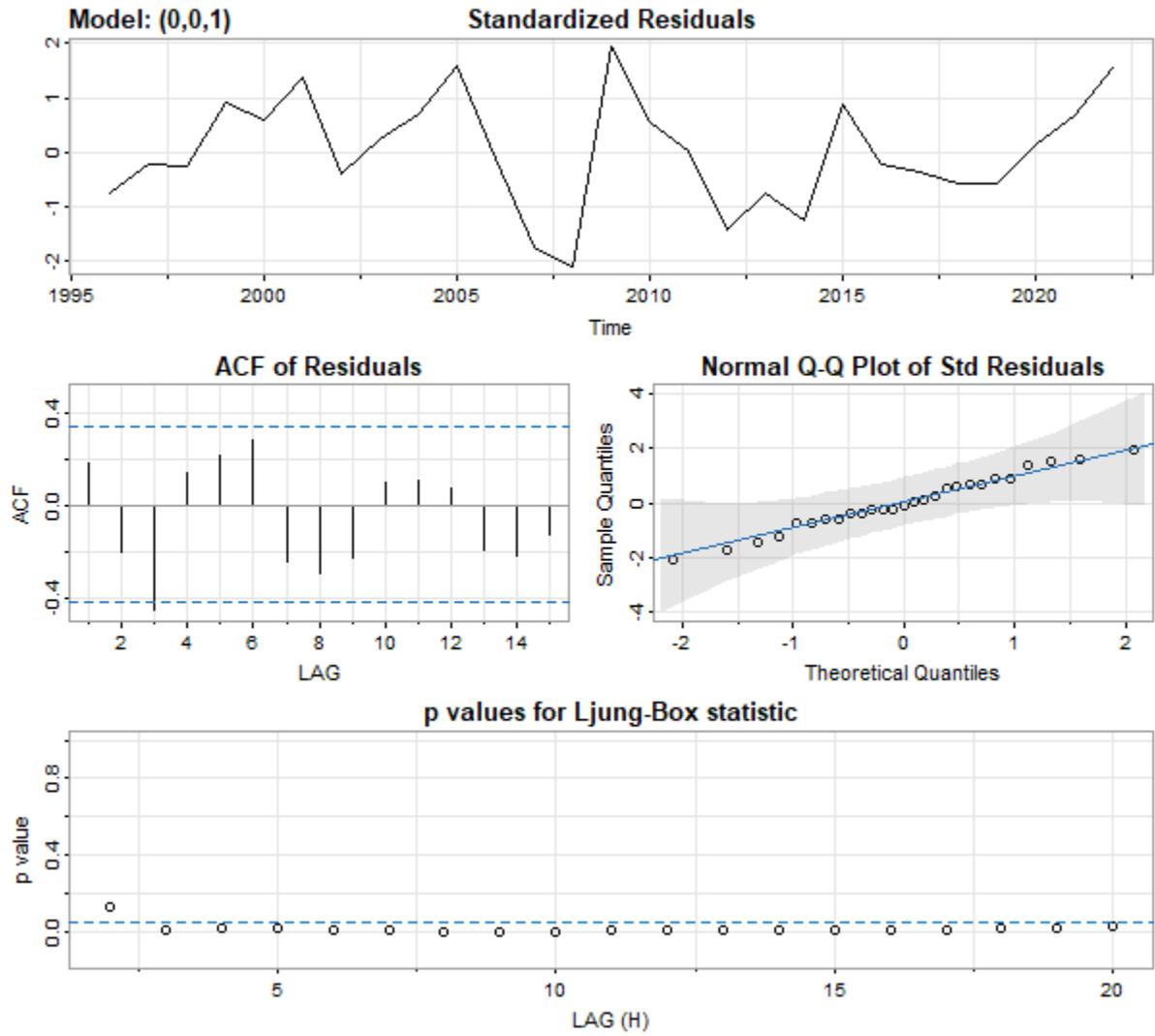


Figure C7. Model Residual Diagnostics for OLS with (0, 0, 1) ARIMA Adjusted Errors: Taxable Sales (Log-transformed)



Tab 9

**Materials from Interested
Parties**

Fiscal Impact Statement for Amendment 4

By Michael J. New Ph.D.

Introduction

I have been asked to consult on a financial impact statement for Amendment 4 which will be on the Florida ballot in November. Amendment 4 would place abortion rights into Florida's constitution. As an academic researcher, I have studied the impact of abortion policy. I have a both Ph.D. in Political Science and a M.S. in Statistics from Stanford University. I was also a post-doctoral researcher at the Harvard-MIT Data Center. I have written four academic journal articles on the impact of various abortion regulations. Two of these articles appeared in *State Politics and Policy Quarterly* which is the top state politics academic journal in the country. I have also been hired by four state attorneys general to provide expert analyses of pro-life laws that were facing legal challenges.

It is my professional opinion that Amendment 4 would have a negative financial impact on Florida. It would result in increases in certain government expenditures. It would result in long term reductions in tax revenue and hurt Florida's bond rating. Overall, it would also place significant burdens on Florida taxpayers in the present and in the future. There are two reasons for this.

First, there is a strong possibility that should Amendment 4 pass, it would require Florida's Medicaid program to pay for elective abortions. Multiple state courts in states with far weaker constitutional protections for abortion than what Amendment 4 proposes have required their state Medicaid program to pay for elective abortions. Additionally, there is a substantial body of academic research which shows that Medicaid funding of elective abortions results in statistically significant increases the abortion rate. There is also a body of evidence that shows that in states where Medicaid covers elective abortions, Medicaid pays for a significant fraction of the abortions that take place – burdening taxpayers.

Second, should Amendment 4 pass, it would certainly strike down many of Florida's pro-life laws including Florida's pro-life Heartbeat Act which currently protects preborn children after 6 weeks gestation and other pro-life laws. There is a strong body of research which shows that incidence of abortion is sensitive to its legal status. Specifically, there is also methodologically rigorous research from Texas which demonstrates that Texas Heartbeat Act both reduced abortions and increased the number of children being born in Texas. As such, the repeal of the Florida Heartbeat Act would increase abortions, reduce births, and lower Florida's fertility rate. A body of research shows that fertility rate

declines, causes long term reductions in tax revenue and hurt bond ratings, placing additional burdens on taxpayers.

Part 1: Amendment 4 and Medicaid Funding of Abortion

Currently 17 state Medicaid programs cover elective abortions.¹ In only three states has a sitting Governor signed legislation requiring the state Medicaid program to cover elective abortions. These states are Illinois², Maine³, and Rhode Island.⁴ In four other states (HI, MD, NY, WA) state health departments instituted a policy of covering abortions through Medicaid that was never reversed by administrative or legislative action. However, in 10 states (AK, CA, CT, MA, MN, MT, NJ, NM, OR, and VT) judicial rulings either mandated that the state Medicaid program cover elective abortions or struck down legislative or administrative restrictions on funding for abortions through Medicaid. A summary is below.

Alaska: State of Alaska and the Commissioner for the Department of Health and Social Services v. Planned Parenthood of the Great Northwest was decided in 2019. The State Supreme Court mandated state funding for all abortions for Medicaid eligible women.

California: Prior to 1978 legal abortions for eligible women were paid for by Medi-Cal (California's Medicaid program) During the late 1970 and 1980s the California state legislature passed abortion funding restrictions in various budgets, but these rules were ruled invalid under the state constitution

Connecticut: A 1986 court ruling found a regulation of Medicaid abortion funding was in violation of the Connecticut Constitution. Since that time the state has continued to pay for therapeutic (elective) abortions

Massachusetts: On February 18, 1981, the Supreme Judicial Court ruled that restrictions on Medicaid funding of abortions were unconstitutional under the Commonwealth's Constitution.

Minnesota: A state court ruled on June 16, 1994 the state must fund all "medically necessary" abortions for low income women on state constitutional grounds.

Montana: In 1995 in *Jeannette R. v Ellery*, a Montana District court found that Montana was required to provide Medicaid coverage of abortions when they were medically necessary.⁵

¹ <https://www.gutmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> (Accessed June 26, 2024)

² https://www.washingtonpost.com/national/illinois-governor-signs-bill-expanding-public-funding-for-abortion/2017/09/28/97da6ad6-9a87-11e7-87fc-c3f7ee4035c9_story.html (Accessed June 26, 2024)

³ <https://www.wmtw.com/article/maine-legislators-voting-on-two-year-state-budget/43472483> (Accessed June 26, 2024)

⁴ <https://apnews.com/article/rhode-island-abortion-8dd0e7b32931bd8bf67834c6c448eec4> (Accessed June 26, 2024)

⁵ <https://montanafreepress.org/2023/04/28/montana-abortion-clinics-sue-over-new-medicaid-coverage-rule/> (Accessed in June 27, 2024)

New Mexico, On December 1, 1998, the New Mexico Supreme Court ruled that limits on Medicaid funded abortions to situations involving rape, incest, and life of the mother were unconstitutional⁶ New Mexico has continued to fund medically necessary abortions through Medicaid since December 1, 1994.

New Jersey: In 1982 in *Right to Choose vs. Byrne*, the State Supreme Court found a “restrictive policy” regarding Medicaid coverage of abortions in violation of equal protection guarantees under the state constitution. The Department of Human Services was required to pay for all “medically necessary” abortions.

Oregon: In the years after *Roe v. Wade*, Medicaid funding of abortion required the consultation of a second physician, but there were no limitations on reasons. An administrative rule was later adopted restricting payments. However, in 1983 in *Planned Parenthood Association v. Department of Human Resources* it was ruled invalid under the state constitution.

Vermont On September 28, 1985 a state court required funding of “Medically necessary” abortions. This policy has been followed since then.

Summary: In none of these 10 states did a state constitution explicitly mention abortion or guarantee abortion access. In most cases, courts struck down limits on Medicaid funding for abortion on either privacy grounds or equal rights grounds. If Amendment 4 passes, the Florida constitution would have much stronger and much more explicit language mandating abortion access than the constitutions of any of these 10 other states. As such, it is my professional opinion that the passage of Amendment 4 would certainly jeopardize Florida’s current limits on Medicaid funding for elective abortions. It might require Florida taxpayers to pay for elective abortions through their state Medicaid program.

How Medicaid Coverage of Elective Abortion Would Impact Abortion Rates in Florida

A substantial body of research from economics, public health, and political science journals shows that Medicaid coverage of elective abortions, increases abortion rate. In fact, a 2009 Guttmacher Institute literature review of research on Medicaid funding for abortion identified 22 methodologically diverse studies on this topic. Of these 22 studies, 19 found that Medicaid coverage of abortion resulted in statistically significant increases in abortion rates.

I did a comprehensive analysis of this literature for a Charlotte Lozier Institute policy paper measuring the impact of the Hyde Amendment on the incidence of abortion in the United States. I excluded studies that were weak methodologically and that had results were statistical outliers. I was left with 7 methodologically sound studies that appeared in reputable academic journals. Averaging the results, I found that Medicaid coverage of elective abortions increases the abortion rate by 1.52 abortions per

⁶ Oswald, Mark. 1998. “High Court Rules against State on Abortions for the Poor.” Santa Fe New Mexican, December 1, A-1.

every thousand women of childbearing age.⁷ This information will be used to analyze how Medicaid coverage of abortion would impact the number of abortions in Florida and Florida's abortion rate.

The most recent Guttmacher Institute data on state abortion rates comes from 2020, They found that Florida's abortion rate was 19.7 per thousand women of childbearing age.⁸ The most recent Centers for Disease Control (CDC) data on state abortion rates is from 2021. They found that Florida's abortion rate was 20.3 per thousand women of childbearing age.⁹ Both the CDC and Guttmacher provide similar estimates of Florida's abortion rate. However, for the purposes of this analysis, I am going to use Guttmacher's data since their data is generally thought to be more accurate than CDC data.

As such, if Florida's Medicaid program is required to cover elective abortions, I would estimate that Florida's abortion rate would be 21.22 per thousand women of childbearing age.¹⁰ This would result in approximately 6,137 more abortions being performed in Florida.¹¹

This is a fairly conservative projection of Florida's abortion rate. This is because estimates published by the Guttmacher Institute and the Society of Family Planning both indicate that the overall incidence of abortion has increased since 2020. Overall, based on population data from the Centers for Disease Control,¹² I would expect approximately 85,685 abortions to be performed in Florida every year.

The most recent comprehensive data on abortions paid for by state Medicaid programs is from the Guttmacher Institute. In a 2017 publication they published data from Fiscal 2015.¹³ As Table 1 indicates, in states where Medicaid covers elective abortion, the state Medicaid program consistently pays for a significant fraction of the abortions that are performed within the state. The percentages of total abortions paid for by Medicaid range from 19.6 percent in Connecticut to 96.1 percent in Vermont. On average, in states where Medicaid covers elective abortions, Medicaid pays for approximately 42.5 percent of all abortions. As such, I would estimate if Florida's Medicaid program was required to cover elective abortions, Florida taxpayers would be paying for 36,416 abortions every year. Guttmacher data

⁷ https://lozierinstitute.org/wp-content/uploads/2016/09/OP_hyde_9.28.3.pdf (Accessed June 26, 2024)

⁸ <https://data.guttmacher.org/states/table?state=FL&topics=65&dataset=data> (Accessed June 26, 2024)

⁹ https://www.cdc.gov/mmwr/volumes/72/ss/ss7209a1.htm#T1_down (Accessed June 26, 2024)

¹⁰ I added 19.7 (Guttmacher Institute's estimate for Florida's abortion rate) to 1.52 (estimated abortion rate increase if Florida's Medicaid program was required to cover elective abortions).

¹¹ The most recent population data from the Centers for Disease Control (CDC) is from 2022. They found that there were 4,037,951 women of childbearing age living in Florida. Source: CDC Wonder. My calculations are as follows: $(4,037,951) * (1.52/1000) = 6,137$

¹² My calculations are as follows: $4,037,951(21.22/1,000) = 85,685$

¹³ https://www.guttmacher.org/sites/default/files/report_pdf/public-funding-family-planning-abortion-services-fy-1980-2015.pdf (Accessed July 2, 2024)

from 2015 shows that each publicly funded abortion cost approximately \$454.37. As such, Medicaid coverage of elective abortions would cost Florida taxpayers approximately \$16,546,337 (Table 2)

I want to be clear that this figure of over \$16 million is a conservative estimate. There are a couple reasons for this, First, it is very likely that the cost of a publicly funded abortion has increased since 2015. Also, in states whose Medicaid programs cover elective abortions, Medicaid is usually paying for an increasing fraction of all abortions performed in the states. Overall, I am confident that if Florida’s Medicaid program is required to cover elective abortions, it would cost Florida taxpayers tens of millions of dollars.

Table 1: Fraction of Taxpayer Funded Abortion in States Where Medicaid Covers Elective Abortions in 2015

	Paid for by State Medicaid	Total Abortions	Percentage
Alaska	588	1,334	44.1%
California	88,466	149,025	59.4%
Connecticut	1,948	9,938	19.6%
Hawaii	1,345	2,026	66.4%
Maryland	6,866	29,165	23.5%
Massachusetts	3,750	18,570	20.2%
Minnesota	4,027	9,861	40.8%
Montana	461	1,611	28.6%
New Jersey	10,277	22,991	44.7%
New Mexico	1,329	4,699	28.3%
New York	22,493	93,096	24.2%
Oregon	3,737	8,610	43.4%
Vermont	1,216	1,265	96.1%
Washington	10,328	17,098	60.4%
Total	156,831	369,289	42.5%

Notes:

2015 Data on Abortions Paid for by State Medicaid obtained from “Public Funding for Family Planning and Abortion Services, FY 1980-2015” published in April 2017 by the Guttmacher Institute

2015 Total Abortion data for HI, NY, WA, AK, CT, MA, MN, MT, NJ, NM, OR and VT obtained from “Abortion Surveillance – United States, 2015” published by the Centers for Disease Control (CDC).

2015 Total Abortion data for CA and MD calculated by averaging Guttmacher Institute abortion data for 2014 and 2016

Table 2: Estimating Annual Cost to Taxpayers of Medicaid Coverage of Elective Abortions

Estimated Number of Abortions in Florida	85,685
Estimated Fraction of Abortions Paid for by Medicaid	42.5%
Estimated Number of Abortions Paid for by Florida’s Medicaid Program	36,416
Estimated Cost Per Abortion	\$454.37
Total Estimated Annual Cost to Florida Taxpayers	\$16,546,337

Part 2: Amendment 4 and Florida’s Fertility Rate

Florida currently has a number of abortion restrictions in effect. These include a waiting period, an informed consent law, a parental involvement law, a 15 week ban on abortion and a Heartbeat Act which effectively prevents abortions from taking place after 6 weeks gestation. All of these laws would be jeopardized if Amendment 4 passes in November. The nullification of these laws would increase the number of abortions, reduce the number of children born, and lower Florida’s fertility rate.

There is a good body of research that shows that the incidence of abortion is sensitive to its legal status. There are studies that show broad abortion bans impact the incidence of abortion. There are also studies which show that various incremental pro-life laws including parental involvement laws and informed consent laws reduce the incidence of abortion.

However, for the purposes of this analysis, I am going to focus on how the repeal of Florida’s Heartbeat Act would impact abortions, births, and Florida’s fertility rate. That is because the Heartbeat Act which largely prevents abortions from being performed after 6 weeks gestation has the largest impact of any abortion restriction currently in effect in Florida. Furthermore, its impact on births and fertility is significant and easiest to quantify.

The Florida Heartbeat Act was signed by Governor Ron DeSantis on April 13, 2023.¹⁴ An April 1 2024 ruling by the Florida State Supreme Court allowed the law to take effect.¹⁵ The law took effect on May 1, 2024¹⁶ and is currently in effect.

Currently we do not have data on how the Florida Heartbeat Act is impacting the incidence of abortion in Florida. However, the experience of Texas is instructive. That is because Texas recently had a similar law in place. The Texas Heartbeat Act took effect on September 1, 2021. Like the Florida Heartbeat Act,

¹⁴ <https://www.cbsnews.com/news/florida-six-week-abortion-ban-signed-into-law-ron-desantis/>

¹⁵ <https://rollcall.com/2024/04/01/florida-supreme-court-upends-abortion-landscape-in-the-south/>

¹⁶ <https://www.politico.com/news/2024/05/01/florida-six-week-abortion-ban-00155305>

the Texas Heartbeat largely prevented abortions from being performed after six weeks gestation.¹⁷ The Texas Heartbeat Act was in effect until the summer of 2022, when it was superseded by a stronger abortion restriction that was made possible by the Supreme Court's *Dobbs* decision.¹⁸ Data from Texas demonstrates how the Heartbeat Act affected abortions, births, and the fertility rate.

The Texas Heartbeat Act resulted in a very sharp reduction in the number of abortions performed in Texas. In the 5 months before the Texas Heartbeat Act took effect, an average of 5,194 abortions were performed in Texas every month. In the 5 months after the Texas Heartbeat Act took effect an average of 2433.8 abortions were performed every month. As such, the Texas Heartbeat Act reduced the number of abortions performed in Texas by over 51 percent.¹⁹

However, analyzing the number of in-state abortions is not the best way to gage the impact of the Texas Heartbeat Act on the overall incidence of abortion in Texas. That is because some Texas women could obtain abortions in other states or obtain chemical abortion pills through the mail. As such, an analysis of Texas birth data is the best way to measure the impact of the Texas Heartbeat Act.

There separate studies analyzing Texas birth data have all found that the Texas Heartbeat Act resulted in more children being born in Texas. My analysis of the Texas Heartbeat Act which I presented at the 2023 meetings of the Midwest Political Science Association found that in the 5 months between March 2022 and July 2022, 5,046 more babies were born in Texas. A research letter published in the *Journal of the American Medical Association* found The Texas Heartbeat Act resulted in 9,799 additional births in the 9 months between April 2022 and December 2022.²⁰ A study that was released by the University of Houston in January 2024 found that the Texas fertility rate increased by 2.0 percent in 2022, in part because of the Heartbeat Act.²¹

Overall, it appears the Texas Heartbeat Act resulted in approximately more 1060.4 births every month (Table 3). This means that Texas Heartbeat Act resulted in approximately 12,725 more births annually. Since there were approximately 6,294,194 women of childbearing age in Texas in 2022, that means

¹⁷ <https://www.cnn.com/2021/09/01/politics/texas-abortion-supreme-court-sb8-roe-wade/index.html> (Accessed July 2, 2024)

¹⁸ <https://www.sll.texas.gov/spotlight/2022/07/texas-abortion-trigger-law-effective-august-25th-2022/> (Accessed July 2, 2024)

¹⁹ New, Michael, "Using Birth Data From Texas To Analyze the Impact of the Texas Heartbeat Law." Presented at the annual meeting of the Midwest Political Science Association, April 15, 2023, Chicago, IL.

²⁰ <https://jamanetwork.com/journals/jama/article-abstract/2806878> (Accessed July 2, 2024)

²¹ <https://www.uh.edu/class/ws/irwgs/docs/2024/56999-ws-abortion-ban-report-v5.pdf> (Accessed July 2, 2024)

Heartbeat Act would have increased the Texas fertility rate by approximately 2.02 births for every thousand women of childbearing age.

Table 3: Studies Analyzing The Impact of the Texas Heartbeat Act on Texas Births

Study	Additional Births	Time Frame	Additional Births per Month
Midwest Political Science Association	5,046	5 months	1009.2
<i>Journal of the American Medical Association</i>	9,799	9 months	1088.8
Weighted Average	14,845	14 months	1060.4

Analyzing the Repeal of Florida’s Heartbeat Act on Fertility and Births

According to Census Bureau estimates, in 2022 there were 4,037,951 women of childbearing age and 224,433 live births in Florida. If Florida’s fertility rate were to fall by 2.02 per every thousand women of childbearing age, there would be approximately 8,506 fewer births every year. If Florida’s fertility rate were to fall by 2 percent (University of Houston study), it would fall from to 55.58 to 54.47, resulting in approximately 4,485 fewer births every year. As such, the repeal of the Heartbeat Act would result in I anywhere from 4,485 to 8,506 fewer children being born in Florida.

I want to make it clear that this is a conservative estimate. The situation that Texas faced in 2021 and 2022 is different than the situation that Florida faces in 2024. In 2022, abortion was still legal in multiple states that bordered Texas. Texas women who sought abortions after 6 weeks gestation could obtain abortions nearby states. Cities relatively near the Texas border that had abortion facilities included Oklahoma City, OK, Shreveport, LA, Santa Teresa, NM and Albuquerque, NM. Anecdotally, many Texas women obtained abortions in nearby states.

However, none of the states the border Florida have a more permissive abortion policy than Florida. Alabama has effectively banned all abortions.²² Georgia has a Heartbeat Act in effect that is similar to Florida’s.²³ As such, it is my professional opinion that the Florida Heartbeat Act would have a larger impact on births and fertility than the Texas Heartbeat Act.

²² <https://abcnews.go.com/US/state-state-breakdown-abortion-laws-2-years-after/story?id=111312220> (Accessed July 2, 2024)

²³ <https://abcnews.go.com/US/state-state-breakdown-abortion-laws-2-years-after/story?id=111312220> (Accessed July, 2 2024)

How Fertility Reductions Will Impact Florida's Fiscal Health

There is a body of research which shows that fertility reductions will result in declines in major revenue streams. Ratings agencies take state demographic trends into account when establishing credit ratings. They have cited slow population growth as a reason for ratings downgrades. In fact, in 2017 Fitch Ratings downgraded Connecticut's credit rating in part because of slow population growth.²⁴ A summary of research showing how fertility reductions would impact various revenues streams is below.

Income Taxes

A paper published by the Federal Reserve Bank of Kansas City in late 2013 estimated that projected demographic changes from 2011 to 2030, which both reflect fertility declines and aging populations would collectively reduce per capita state income tax revenue by 2.4 percent nationally.²⁵ An economic and fiscal outlook for Colorado which was published in March 2022, projected that low birth rates would begin to affect the state's labor force in five to six years.²⁶ Granted Florida does not have a state income tax, but these analyses show how decreasing fertility results in funding reductions from important revenue streams over the long term.

Sales Taxes

There is less research which analyzes the impact of fertility rate declines on sales tax revenue. However, the 2013 Federal Reserve Bank of Kansas City paper acknowledges that fertility reductions will reduce sales tax revenues as well.²⁷ A 2022 analysis published by Pew Charitable Trust states that "sales tax reductions as a consequence of reduced fertility still pose a long-term risk in states that rely heavily on sales taxes." They state that greatest effects of low fertility will be felt decades into the future, when today's children reach an age that they'll be spending more.²⁸

²⁴ <https://www.fitchratings.com/research/us-public-finance/fitch-downgrades-state-of-connecticut-rating-to-a-outlook-stable-12-05-2017>

²⁵ <https://www.kansascityfed.org/documents/933/2013-The%20Impact%20of%20an%20Aging%20U.S.%20Population%20on%20State%20Tax%20Revenues.pdf> (Accessed July 2, 2024)

²⁶ <https://drive.google.com/file/d/1oHD5MwhlmciWoCUV6cX5o5v5huy7G9YN/view> (Accessed July 2, 2024)

²⁷ <https://www.kansascityfed.org/documents/933/2013-The%20Impact%20of%20an%20Aging%20U.S.%20Population%20on%20State%20Tax%20Revenues.pdf> (Accessed July 2, 2024)

²⁸ <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets> (Accessed July 2, 2024)

Property Taxes

Trends in fertility will also influence property taxes, an important revenue source for many school districts and local governments. The Vermont Legislature’s Tax Structure Commission expects lower fertility to result in a trend toward smaller households. They project that this will lower the assessed values of larger homes, and reducing property tax revenue.²⁹

Federal Funds

In addition to leading to a possible decline in tax revenue, fertility rate reductions could reduce states’ federal funding. Several federal programs—including Children’s Health Insurance Program, and Head Start—allocate money to states according to formulas that incorporate population counts.³⁰ A reduction in Florida’s fertility rate would reduce the amount of federal funds that Florida receives for these programs.

Part 2: Summary

The passage of Amendment 4 would result in the repeal of the Florida’s Heartbeat bill. This would result in more abortions, fewer births, and a reduction in Florida’s fertility rate. A body of research and analysis shows that reductions in fertility reduce funding from a number of revenue streams. This includes, income taxes, sales taxes, property taxes, and federal funds. There is also evidence that reductions in Florida’s fertility rate could hurt Florida’s credit rating. Overall, long term reductions in revenue and a lower credit rating would be detrimental for Florida taxpayers. It would also worsen Florida’s fiscal outlook and hurt Florida’s economy.

Conclusion

It is my professional opinion that Amendment 4 would have a negative financial impact on Florida. Based on the experiences of other states, there is a strong chance it would require Florida’s Medicaid program to cover elective abortions. This would easily cost taxpayers tens of millions of dollars annually. It would also certainly increase abortions, reduce births, and lower Florida’s fertility rate. There is a body of research which shows that declining fertility will results in long term reductions in tax revenue. Lower fertility may also reduce the amount of federal funding that Florida receives from the Federal

²⁹ Brighton, Trenholm, and Kleppner, “Final Report of the Vermont Tax Structure Commission.”

³⁰ <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/12/the-long-term-decline-in-fertility-and-what-it-means-for-state-budgets> (Accessed July 2, 2024)

Government. Overall, the passage of Amendment 4 would lead to more state expenditures, long term reductions in revenue, and potentially lower credit ratings. This will increase the burdens on Florida taxpayers and worsen the economic condition of the Sunshine State.

Tab 10

**Communication from State
Agencies**

From: [Baker, Amy](#)
To: [Khan, Azhar](#); [Greszler, Rachel](#); [Spencer, Chris](#)
Cc: [Mock, Scott](#)
Subject: FW: Question Regarding Amendment 4 FIEC Consideration
Date: Monday, July 8, 2024 4:47:34 PM
Attachments:

See the email below—this is the Attorney’s General’s response to Chris that he discussed today.

From: Spencer, Chris
Sent: Monday, July 8, 2024 4:36 PM
To: Baker, Amy
Subject: Fwd: Question Regarding Amendment 4 FIEC Consideration

Amy -

Below is my correspondence with the Attorney General’s Office as discussed today in the Conference. Can you please share with the principals?

Thank you,

Chris Spencer

Begin forwarded message:

From: Daniel Bell
Date: July 8, 2024 at 1:18:14 AM EDT
To: "Spencer, Chris"
Subject: Re: Question Regarding Amendment 4 FIEC Consideration

Dear Mr. Spencer:

I understand you to be asking first, whether there is uncertainty if the abortion initiative would require the State to subsidize certain abortions and, if so, whether that uncertainty may lawfully be included in the Conference’s financial impact statement. The answer to both questions is “yes.”

While we would make strong arguments in opposition, it is inevitable that there will be litigation about whether the amendment requires the State to subsidize abortions. Until earlier this year, the Florida Supreme Court held that the Florida Constitution’s “Privacy Clause guaranteed the right to receive an abortion through the end of the second trimester.” *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 71 (Fla. 2024) (overruling *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)). Under that prior regime, plaintiffs sued the State for allegedly

“interfer[ing] with a woman’s right to privacy by affirmatively creating a wide-ranging health care program for the poor that denies funds for medically necessary abortions while funding virtually all other medically necessary care.” Appellants’ Brief, *Renee B. v. AHCA*, 2000 WL 33998418, at *17 (Fla. June 1, 2000). The Florida Supreme Court rejected that argument, *Renee B. v. AHCA*, 790 So. 2d 1036 (Fla. 2001), but it did not have before it the amendment text at issue here, which would invalidate any “law” that would “prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health.” There can be little doubt that challengers will contend that the new language protects a broader range of abortion rights than the Supreme Court previously recognized in connection with the Privacy Clause. Such litigation is especially likely because many other states are under court orders requiring their Medicaid programs to include medically necessary abortions, and several are under court orders requiring that they subsidize even elective abortions. Likewise, before the U.S. Supreme Court overruled *Roe v. Wade*, a federal district court enjoined a Florida law that made abortion providers ineligible for state funds. See *Planned Parenthood of Sw. & Central Fla. v. Philip*, No. 4:16-cv-321-RH-CAS, Dkt. #20 (N.D. Fla. June 30, 2016) (Hinkle, J.).

We would of course defend Florida’s Medicaid program against any similar litigation, but the question ultimately would have to be resolved by the courts. *Renee B.* concerned a different provision of the Florida Constitution and would not control the outcome of a new lawsuit premised on the proposed amendment. The question would not be whether the Supreme Court should recede from *Renee B.*, but whether the amendment itself abrogates *Renee B.* There will be uncertainty about that question until the Florida courts authoritatively resolve it.

As to your second question, when the Florida Supreme Court reviewed financial impact statements (until *Minimum Wage*), the Court on many occasions approved financial impact statements that discussed similar uncertainties. If the ultimate conclusion of the Conference is that the financial impact of the proposed amendment is indeterminate, the Conference is well within its authority to inform the public of any uncertainties that render its conclusion indeterminate, including the likelihood of litigation. See, e.g., *Advisory Opinion to the Att’y Gen. Re: Voter Control of Gambling*, 215 So. 3d 1209, 1218 (Fla. 2017) (approving financial impact statement that noted the “unknown [retroactive] effect” of the amendment); *Advisory Opinion to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 24 So. 3d 1198, 1199 (Fla. 2009) (“The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment’s absence.”); *Advisory Opinion to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 24 So. 3d 1198, 1201 (Fla. 2009) (“[W]e [have] held that two financial impact statements

complied with Florida law where the statements explained that the probable impact of two proposed amendments was dependent on future action by the Legislature and, therefore, could not be determined.”); *Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 485 (Fla. 2007) (approving statement noting that, “[i]f the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected”); *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 809–10 (Fla. 2014) (approving a statement explaining that the FIEC “could not determine the change in revenue because it could not predict the extent to which medical marijuana would be exempt from taxation”).



Daniel William Bell
Chief Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol | Tallahassee, FL 32399

From: Spencer, Chris
Sent: Sunday, July 7, 2024 5:54 PM
To: Daniel Bell
Subject: Question Regarding Amendment 4 FIEC Consideration

Dear Dan,

Following representations made to the Financial Impact Estimating Conference (FIEC) regarding the effects of the passage of Amendment 4, and discussion amongst the principals regarding whether the Amendment may require Florida taxpayer or Medicaid monies to subsidize abortions, I write to see whether the Florida Attorney General’s Office has a position on the following two, related questions:

(1) If Amendment 4 is adopted, is it likely that litigants will challenge Florida’s current limitations on taxpayer funded abortion services and should Florida prepare for a realistic scenario where a judicial determination requires Florida to use taxpayer or Medicaid monies to subsidize abortions?

(2) If yes, is it appropriate and allowable for the FIEC to reference this realistic scenario, which would have a significant impact on state budget, in the FIEC analysis and Fiscal Impact Statement?

Thank you for your assistance on this matter.

Sincerely,

Chris Spencer

From: [Baker, Amy](#)
To: [Khan, Azhar](#); [Greszler, Rachel](#)
Cc: [Spencer, Chris](#); [Mock, Scott](#)
Subject: Fwd: Question Regarding Amendment 4 FIEC Consideration
Date: Monday, July 15, 2024 6:00:08 AM
Attachments:

Please see below...

Begin forwarded message:

From: "Spencer, Chris"
Date: July 14, 2024 at 10:46:09 PM EDT
To: "Baker, Amy"
Subject: FW: Question Regarding Amendment 4 FIEC Consideration

Amy – Below is correspondence from the Attorney General’s Office regarding additional questions I presented to them following last week’s conference meeting. My apologies for getting this over late, but I wanted to make sure the principals get this before we meet tomorrow.

Best,

Chris Spencer

From: Daniel Bell
Date: Saturday, July 13, 2024 at 5:35 PM
To: Spencer, Chris
Subject: Re: Question Regarding Amendment 4 FIEC Consideration

Dear Mr. Spencer,

You first asked “Are there any differences between Michigan’s 2022 constitutional amendment and Florida’s Amendment 4 that should affect how the Conference views the likelihood of future litigation challenging Florida’s Medicaid restrictions and the possibility that a Florida court could invalidate those restrictions?”

The two amendments are materially the same in this respect. Since 2022, the Michigan Constitution has included “the right to make and effectuate decisions about all matters relating to . . . abortion care.” Art. I, § 28(1), Mich. Const. That right “shall not be denied, burdened, nor infringed” *Id.* In Florida, Amendment 4 would similarly provide that “[n]o law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health.”

Like the Michigan provision, Amendment 4 would generally establish a right to abortion pre-viability. Although Amendment 4 does not explicitly use the word “right,” it contains rights-creating language mirroring the linguistic structure of the First Amendment, which establishes the rights to freedom of speech, association, and religion. See 1st Am., U.S. Const. (“*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (emphasis added)). The First Amendment has been the basis for extensive litigation about the validity of limitations on government expenditures under the unconstitutional conditions doctrine—that is, the principle that “the Government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom[s] . . . even if he has no entitlement to that benefit.’” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (citing *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 59 (2006)). Amendment 4’s use of the same rights-creating language as the First Amendment would invite similar claims. Thus, should Amendment 4 pass, the litigation in Michigan is likely to serve as a template for litigation in Florida. If anything, plaintiffs in Florida may well argue that Amendment 4 protects a broader range of abortion rights than Michigan’s provision because Amendment 4 expressly bars laws that “delay” abortion.

You next asked: “You previously explained that if Amendment 4 is adopted here in Florida, litigation challenging Florida’s existing Medicaid abortion funding restrictions is “inevitable,” that *Renee B.* “would not control the outcome of a new lawsuit premised on the proposed amendment,” and that “the question ultimately would have to be resolved by the courts.” Assuming the Conference agrees with the AG’s office that a Florida court could—when facing a challenge to our current Medicaid abortion funding restrictions—rule those restrictions unconstitutional under Amendment 4, is it appropriate to reference the budgetary effects of that possible conclusion in the FIEC’s report, summary, and Fiscal Impact Statement?”

Because your question is premised on what “a Florida court *could*” conclude, I understand you to be asking about a financial impact statement that ultimately concludes that the overall financial impact of the amendment is indeterminate. If that is the Conference’s conclusion, then yes, it is plainly lawful for the financial impact statement to discuss the budgetary effects the Conference believes would flow from the resolution of any contingency that renders the Conference’s conclusion indeterminate. The Supreme Court has approved many such financial impact statements. See, e.g., *Advisory Opinion to Att’y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 24 So. 3d 1198, 1199 (Fla. 2009) (“The fiscal impact cannot be determined precisely. State

government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."); *Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 485 (Fla. 2007) ("If the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected. If the legislature fails to exempt one or more services that are currently non-taxed, state and local revenues will increase."); *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 809–10 (Fla. 2014) ("While sales tax may apply to purchases, changes in revenue cannot reasonably be determined since the extent to which medical marijuana will be exempt from taxation is unclear without legislative or state administrative action.").



Daniel William Bell
Chief Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol | Tallahassee, FL 32399

From: Spencer, Chris
Sent: Friday, July 12, 2024 1:09 PM
To: Daniel Bell
Subject: Re: Question Regarding Amendment 4 FIEC Consideration

Thank you for that response, Dan. I have a couple follow up questions that arose during the Conference's July 8 meeting, and I would once again request the Attorney General's Office's position. The Conference received submissions about a recently filed case against the State of Michigan challenging that state's Medicaid restrictions on abortion funding. Michigan courts previously rejected challenges to the state's Medicaid abortion funding restrictions. But now, challengers are seeking to declare those restrictions unconstitutional following Michigan voters' 2022 adoption of a ballot amendment relating to abortion. A copy of that complaint can be viewed [here](#).

(1) Are there any differences between Michigan's 2022 constitutional amendment and Florida's Amendment 4 that should affect how the Conference views the likelihood of future litigation challenging Florida's Medicaid restrictions and the possibility that a Florida court could invalidate those restrictions?

(2) You previously explained that if Amendment 4 is adopted here in Florida, litigation challenging Florida’s existing Medicaid abortion funding restrictions is “inevitable,” that *Renee B.* “would not control the outcome of a new lawsuit premised on the proposed amendment,” and that “the question ultimately would have to be resolved by the courts.” Assuming the Conference agrees with the AG’s office that a Florida court could—when facing a challenge to our current Medicaid abortion funding restrictions—rule those restrictions unconstitutional under Amendment 4, is it appropriate to reference the budgetary effects of that possible conclusion in the FIEC’s report, summary, and Fiscal Impact Statement?

Thank you for your assistance.

Chris Spencer

From: Daniel Bell
Date: Monday, July 8, 2024 at 1:18 AM
To: Spencer, Chris
Subject: Re: Question Regarding Amendment 4 FIEC Consideration

Dear Mr. Spencer:

I understand you to be asking first, whether there is uncertainty if the abortion initiative would require the State to subsidize certain abortions and, if so, whether that uncertainty may lawfully be included in the Conference’s financial impact statement. The answer to both questions is “yes.”

While we would make strong arguments in opposition, it is inevitable that there will be litigation about whether the amendment requires the State to subsidize abortions. Until earlier this year, the Florida Supreme Court held that the Florida Constitution’s “Privacy Clause guaranteed the right to receive an abortion through the end of the second trimester.” *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 71 (Fla. 2024) (overruling *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)). Under that prior regime, plaintiffs sued the State for allegedly “interfer[ing] with a woman’s right to privacy by affirmatively creating a wide-ranging health care program for the poor that denies funds for medically necessary abortions while funding virtually all other medically necessary care.” Appellants’ Brief, *Renee B. v. AHCA*, 2000 WL 33998418, at *17 (Fla. June 1, 2000). The Florida Supreme Court rejected that argument, *Renee B. v. AHCA*, 790 So. 2d 1036 (Fla. 2001), but it did not have before it the amendment text at issue here, which would invalidate any “law” that would “prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health.” There can be little doubt that

challengers will contend that the new language protects a broader range of abortion rights than the Supreme Court previously recognized in connection with the Privacy Clause. Such litigation is especially likely because many other states are under court orders requiring their Medicaid programs to include medically necessary abortions, and several are under court orders requiring that they subsidize even elective abortions. Likewise, before the U.S. Supreme Court overruled *Roe v. Wade*, a federal district court enjoined a Florida law that made abortion providers ineligible for state funds. See *Planned Parenthood of Sw. & Central Fla. v. Philip*, No. 4:16-cv-321-RH-CAS, Dkt. #20 (N.D. Fla. June 30, 2016) (Hinkle, J.).

We would of course defend Florida's Medicaid program against any similar litigation, but the question ultimately would have to be resolved by the courts. *Renee B.* concerned a different provision of the Florida Constitution and would not control the outcome of a new lawsuit premised on the proposed amendment. The question would not be whether the Supreme Court should recede from *Rene B.*, but whether the amendment itself abrogates *Rene B.* There will be uncertainty about that question until the Florida courts authoritatively resolve it.

As to your second question, when the Florida Supreme Court reviewed financial impact statements (until *Minimum Wage*), the Court on many occasions approved financial impact statements that discussed similar uncertainties. If the ultimate conclusion of the Conference is that the financial impact of the proposed amendment is indeterminate, the Conference is well within its authority to inform the public of any uncertainties that render its conclusion indeterminate, including the likelihood of litigation. See, e.g., *Advisory Opinion to the Att'y Gen. Re: Voter Control of Gambling*, 215 So. 3d 1209, 1218 (Fla. 2017) (approving financial impact statement that noted the "unknown [retroactive] effect" of the amendment); *Advisory Opinion to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 24 So. 3d 1198, 1199 (Fla. 2009) ("The fiscal impact cannot be determined precisely. State government and state courts may incur additional costs if litigation increases beyond the number or complexity of cases which would have occurred in the amendment's absence."); *Advisory Opinion to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 24 So. 3d 1198, 1201 (Fla. 2009) ("[W]e [have] held that two financial impact statements complied with Florida law where the statements explained that the probable impact of two proposed amendments was dependent on future action by the Legislature and, therefore, could not be determined."); *Advisory Opinion to the Attorney General re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose*, 953 So. 2d 471, 485 (Fla. 2007) (approving statement noting that, "[i]f the legislature exempts all services that are currently non-taxed, state and local government revenues will not be affected"); *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132

So. 3d 786, 809–10 (Fla. 2014) (approving a statement explaining that the FIEC “could not determine the change in revenue because it could not predict the extent to which medical marijuana would be exempt from taxation”).



Daniel William Bell
Chief Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol | Tallahassee, FL 32399

From: Spencer, Chris
Sent: Sunday, July 7, 2024 5:54 PM
To: Daniel Bell
Subject: Question Regarding Amendment 4 FIEC Consideration

Dear Dan,

Following representations made to the Financial Impact Estimating Conference (FIEC) regarding the effects of the passage of Amendment 4, and discussion amongst the principals regarding whether the Amendment may require Florida taxpayer or Medicaid monies to subsidize abortions, I write to see whether the Florida Attorney General’s Office has a position on the following two, related questions:

- (1) If Amendment 4 is adopted, is it likely that litigants will challenge Florida’s current limitations on taxpayer funded abortion services and should Florida prepare for a realistic scenario where a judicial determination requires Florida to use taxpayer or Medicaid monies to subsidize abortions?
- (2) If yes, is it appropriate and allowable for the FIEC to reference this realistic scenario, which would have a significant impact on state budget, in the FIEC analysis and Fiscal Impact Statement?

Thank you for your assistance on this matter.

Sincerely,

Chris Spencer

Tab 11

Impact

FLORIDA FINANCIAL IMPACT ESTIMATING CONFERENCE
Amendment to Limit Government Interference with Abortion
Serial Number 23-07
July 15, 2024

FINANCIAL IMPACT STATEMENT

The proposed amendment would result in significantly more abortions and fewer live births per year in Florida. The increase in abortions could be even greater if the amendment invalidates laws requiring parental consent before minors undergo abortions and those ensuring only licensed physicians perform abortions. There is also uncertainty about whether the amendment will require the state to subsidize abortions with public funds. Litigation to resolve those and other uncertainties will result in additional costs to the state government and state courts that will negatively impact the state budget. An increase in abortions may negatively affect the growth of state and local revenues over time. Because the fiscal impact of increased abortions on state and local revenues and costs cannot be estimated with precision, the total impact of the proposed amendment is indeterminate.

SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT

Florida law currently prevents most abortions after a fetal heartbeat is detected. The proposed amendment states that “no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider.” If the proposed amendment is adopted, there would be significantly more abortions in Florida each year. Additional statutes and regulations could likely be challenged as unconstitutional, including, but not limited to:

- **The Parental Consent for Abortion Act**, Fla.Stat. 390.01114, which requires physicians to obtain written consent from a parent before performing an abortion on a minor;
- **The Physician requirement**, Fla.Stat. 390.0111(2), which allows only licensed physicians to perform abortions; and
- **Restrictions on taxpayer funding for abortions**, Fla.Stat. 390.0111(15), which restricts the use of public funds to subsidize abortions, with exceptions for rape, incest, and medical necessity.

It is probable that the state government and courts will face additional litigation costs that go beyond that which would occur in the amendment’s absence. Because specific litigation costs are dependent on a multitude of case-specific factors that manifest when particular cases are filed and tried, the precise amount of this increase in litigation expenses cannot be determined at this time.

Further, it is probable that there will be litigation challenging the constitutionality of Florida’s funding restrictions. Should those statutes be found unconstitutional under the proposed amendment, the state would incur higher costs subsidizing more abortions than those that qualify for public funding under current law. There are likely to be cost savings to the Health and Human Services budget as a result of the passage of the amendment, however potential costs, savings, and any offsets depend on the outcome of litigation that is likely to be complex.

While the amendment would result in an aggregate statewide cost savings from a reduction in the provision of educational services due to fewer live births, the effects of the proposed amendment could exacerbate financial constraints for individual school districts already experiencing a decline in student enrollment.

The majority of the Conference agrees that there would be a loss to state and local tax collections beginning immediately and extending over time. In some of the counties that are already experiencing

financial constraints, the impact to local tax collections may be exacerbated. The timing and magnitude of those impacts cannot be estimated with precision. The impact is therefore indeterminate.

Because the fiscal impact of increased abortions on state and local revenues and costs cannot be estimated with precision, the total impact of the proposed amendment is indeterminate.

SUBSTANTIVE ANALYSIS

A. Proposed Amendment

Ballot Title:

Amendment to Limit Government Interference with Abortion

Ballot Summary:

No law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider. This amendment does not change the Legislature’s constitutional authority to require notification to a parent or guardian before a minor has an abortion.

Article and Section Being Created or Amended:

Creates – Article 1, New Section

Full Text of the Proposed Amendment:

New Section, Amendment to Limit Government Interference with Abortion

Limiting government interference with abortion.— Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient’s health, as determined by the patient’s healthcare provider.

B. Effective Date

Article XI, Section 5(e), Florida Constitution, states: “Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.”

The effective date would be January 7, 2025.

C. Formal Communications to and from the Sponsor, Proponents, and Opponents

The FIEC for the proposed amendment met in two sessions: the Fall of 2023 and the Summer of 2024. The Sponsor, Floridians Protecting Freedom, Inc., designated five representatives to speak on its behalf at meetings held by the Financial Impact Estimating Conference (FIEC): Pamela Burch Fort, Margaret Good, Kara Gross, Sara Latshaw, and Michelle Morton.

D. Input Received from the Sponsor, Proponents, Opponents, and Interested Parties

The FIEC allows any proponent, opponent, or interested party to present or provide the conference with materials to consider. Over its two series of meetings, the FIEC received input from designated representatives from the Sponsor, both in writing and orally. Follow-up information was also submitted by the Sponsor.

In addition, representatives from an opponent, Susan B. Anthony Pro-Life America, presented to the FIEC and submitted written comments. Further, materials were received from a proponent of the amendment, the Institute for Women's Policy Research, and one opponent of the amendment, The Heritage Foundation.

The FIEC requested and received input and/or materials for staff analysis from the following state agencies: the Agency for Health Care Administration (AHCA), the Department of Children and Families, the Department of Corrections, and the Department of Management Services. A representative from AHCA's Division of Health Care Policy & Oversight also submitted materials and presented to the FIEC on two occasions.

Representatives for both the Florida League of Cities and the Florida Association of Counties were contacted prior to the first series of meetings, but no response was received from either organization.

Documentation of all written comments and materials received by the FIEC can be found in the EDR Notebooks (Book 1 and Book 2) on the website at: <http://edr.state.fl.us/Content/constitutional-amendments/2024Ballot/LimitGovernmentInterferencewithAbortionAdditionalInformation.cfm>

In addition, the public meetings were recorded and archived by The Florida Channel. These recordings may be viewed at: <https://thefloridachannel.org>.

E. Background (Summary of Current Law)

In 2023, the Legislature passed SB 300 (ch. 2023-21, L.O.F., also known as the Heartbeat Protection Act) prohibiting abortions if the gestational age of the fetus is more than 6 weeks. The bill retains the medical and fatal fetal abnormality exceptions that previously existed and adds exceptions for rape, incest, or human trafficking if the gestational age of the fetus is less than 15 weeks and the pregnant woman provides specified documentation. The provisions of SB 300 took effect on May 1, 2024, thirty days after the Florida Supreme Court ruling on HB 5 (ch. 2022-69, L.O.F.) which permitted a 15-week ban.¹

Below is a map showing the status of abortion bans in the United States as of May 23, 2024. This map was extracted from the KFF website-and can be found at <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/#state>².

As the map displays, Florida was one of five states that had an abortion ban with a gestational limit between 6 and 12 weeks LMP (last menstrual period).

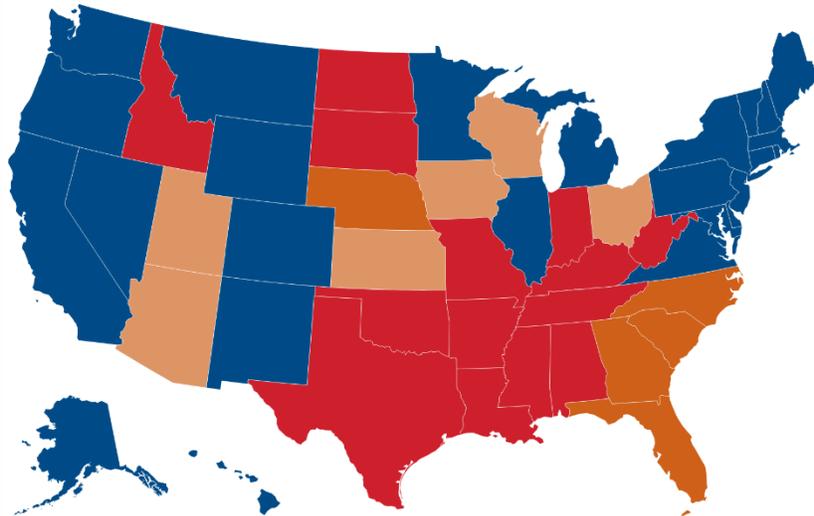
¹ The Florida Supreme Court ruled on *Planned Parenthood of Southwest and Central Florida v. State of Florida* on April 1, 2024.

² Formally known as the Kaiser Family Foundation.

Status of Abortion Bans in the United States as of May 23, 2024

Hover over state for more details

- Abortion Banned (14 states)
- Gestational limit between 6 and 12 weeks LMP (5 states)
- Gestational limit between 15 and 22 weeks LMP (6 states)
- Abortion legal beyond 22 weeks LMP (25 states & DC)



Note: LMP = Last Menstrual Period. For more information on state policies, please see our briefs on state actions to protect abortion, states without laws protecting or restricting abortion, our brief on the *Dobbs* case, our KFF State Health Facts page on abortion policies, our brief on legal challenges to state abortion bans, and our brief on abortion ban exceptions. In 4 states (IA, OH, WI, and WY), laws banning or limit abortion earlier in pregnancy are currently blocked by courts. Source: KFF analysis of state policies and court decisions, as of May 23, 2024.

KFF

F. Discussion of Impact of Proposed Amendment

Potential Conflicts with Current Statutes

The proposed constitutional amendment could conflict with many provisions in Chapter 390, F.S., and administrative rules, which are directly related to abortion procedures and the State's regulatory functions.

Potential Impact of the Amendment

At the time this analysis was prepared in July 2024, the Heartbeat Protection Act, a 6-week prohibition with exceptions, was in effect. Relative to this act, the proposed constitutional amendment has the potential to affect the state's budget, including both costs and revenues.

The major programs and revenues are described in the remainder of this document. To calculate the proposed constitutional amendment's financial impacts, current law is used as the baseline for measurement, which represents the status quo or pre-change condition. The difference estimated to result from the proposed change (positive or negative) is then determined by measuring the post-change condition against the baseline. An increased cost would be expected to increase—or a savings would be expected to decrease—the state's budget in the future, while an increase in tax or fee collections would be expected to increase the state's revenue and the opposite would be expected to decrease it in the future.

The table below shows the number of reported abortions in Florida by known week of gestation during different calendar years. The 2020 and 2021 calendar years are published data from the Centers for Disease Control and Prevention (CDC), while 2022 and 2023 use unpublished data from the Agency for Health Care

Administration (AHCA). The weeks of gestation starting July 1, 2022 use a revised state definition that is calculated from the first day of the pregnant woman’s last menstrual period. Prior to this, the calculation was based on the clinician’s estimate.

Weeks of Gestation	CY 2020		CY 2021		CY 2022 <i>(definitional change as of July 1, 2022)</i>		CY 2023	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
≤6	55,834	74.6	58,136	72.8	46,011	55.7	33,453	39.8
7–9	11,686	15.6	13,436	16.8	24,015	29.1	34,854	41.5
10–13	4,768	6.4	5,321	6.7	9,384	11.4	12,577	15.0
14–15	1,005	1.3	1,140	1.4	1,859	2.3	3,013	3.6
16–17	652	0.9	734	0.9	527	0.6	46	0.1
18–20	704	0.9	764	1.0	572	0.7	71	0.1
≥21	219	0.3	286	0.4	213	0.3	38	0.0
Total abortions reported by known gestational age	74,868		79,817		82,581		84,052	

2023 data received from AHCA on June 27, 2024. Percentages may not add to 100.0 due to rounding.

The number of abortions by weeks of gestation are skewed towards fewer weeks of gestation. Data related to the Heartbeat Protection Act, a 6-week prohibition with exceptions, are not yet available. However, for the purpose of this analysis, the conference concludes that the passage of the constitutional amendment will result in more abortions and fewer live births in Florida relative to a baseline reflecting the current law.

In 2023, there were 84,052 abortions in Florida. Of these, 33,453 occurred during the first six weeks of gestation. Florida’s Heartbeat Protection Act bans abortions after 6 weeks of gestation, with exceptions for various reasons. The table below provides an example of projected abortions that would not be allowed under the Heartbeat Protection Act based on 2023 data. These estimates do not include any behavioral changes or increased use of out-of-state abortions, telehealth, or contraceptive methods.

Projected Abortions Not Allowed Under the Heartbeat Protection Act with Exceptions in Florida

	CY 2023
Total Abortions	84,052
Abortions allowed under the Heartbeat Protection Act with exceptions	35,274
≤6 weeks of gestation	33,453
Abortion Performed due to Physical Health of Mother that is not Life Endangering ¹	1,334
Abortion Performed due to a Life Endangering Physical Condition ¹	251
Abortion Performed due to Incest ²	8
Abortion Performed due to Rape ²	85
Abortion Performed due to Victim of Human Trafficking ²	2
Abortion Performed due to Fatal Fetal Abnormality ³	141
Projected Abortions Not Allowed Under the Heartbeat Protection Act	48,778

¹ Includes all abortions under this exception regardless of timing

² Includes only abortions that occurred during the 1st trimester

³ Includes only abortions that occurred prior to the 3rd trimester

Sources:

1) 2023 AHCA data by weeks of gestation, received June 27, 2024

2) Agency for Health Care Administration, Reported Induced Terminations of Pregnancy (ITOP) by Reason, by Trimester, 2023, <https://ahca.myflorida.com/content/download/22078/file/TrimesterByReason.pdf>

State and Local Costs:

A. Criminal Justice System

Under current law, there are four felonies related to abortion that exist under Chapter 390, F.S. Section 390.0111, F.S., includes a Level 1, 3rd degree felony for “any person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements of” how pregnancies should be terminated, including when it is permitted to terminate a pregnancy after the gestational age of 6 weeks, and when a partial-birth abortion or experimentation on a fetus is permitted. A Level 4, 2nd degree felony is also included for “any person who performs, or actively participates in, a termination of pregnancy in violation of this section which results in the death of the woman.” Additionally, it includes a Level 1, 3rd degree felony for a person who violates the requirements that an infant “born alive during or immediately after an attempted abortion” be treated like “any other child born alive in the course of natural birth.” Section 390.01114, F.S., includes a Level 1, 3rd degree felony for “a physician who intentionally or recklessly performs or induces, or attempts to perform or induce, a termination of a pregnancy of a minor without obtaining the required consent” from a parent or legal guardian. Section 390.011, F.S. specifically defines the term “physician” and Section 390.0111, F.S. states that “only a physician may perform or induce a termination of pregnancy.” The proposed amendment states that a patient’s healthcare provider can make such determinations, rather than strictly physicians. However, healthcare provider is defined under Section 381.026, F.S., for the purposes of that section, as “a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, a podiatric physician licensed under chapter 461, or an advanced practice registered nurse registered under s. 464.0123, F.S.” Further, healthcare providers are limited by the scope of what they are licensed to practice. For example, Section 461.003, F.S. defines the practice of podiatric medicine as “the diagnosis or medical, surgical, palliative, and mechanical treatment of ailments of the human foot and leg.”

Given the data available from the Florida Department of Corrections, there have been no commitments to prison for any of the felonies described above—either before or after the enactment of the 2023 legislative change to 6 weeks (ch. 2023-21, L.O.F.), which went into effect on May 1, 2024.³ It should be noted that the 6-week language just went into effect this year, and given the time it would take from arrest to adjudication, it is highly unlikely that any current offenders would have moved through the entire criminal justice system at this point.

Conclusion: The Conference could not agree to the direction of the budgetary impact, however, the Conference agreed the impact to the Criminal Justice System is not expected to be significant under any reasonable scenario.

B. Education Services

With the School Readiness program offering financial assistance for care and early education, education services begin as early as birth. Although primarily funded by the federal Child Care and Development Fund Block Grant, the School Readiness program is partially supported by state and local funds. Children in eligible low-income households can participate in this program’s range of services from birth through the age of 12.

Florida resident births also directly influence the state’s future preschool and school age populations. The initial effects of policies that impact birth rates may be seen in the school system beginning three

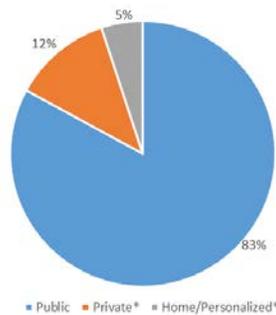
³ The data series from the Florida Department of Corrections begins in 1979.

to four years following the change. The first educational setting that could experience differences would be Florida’s Exceptional Student Education programs, including state and locally-funded public schools and the state-funded Family Empowerment Scholarship Program for Students with Unique Abilities. In 2023-24, these two programs for three and four year olds with additional needs for learning support served roughly 16 percent of this age group. The next state-funded program preschoolers can participate in is Florida’s universal Voluntary Prekindergarten Program (VPK), which serves 64.8 percent of four year olds.

The full effect of policies that influence birth rates and their interactions with Florida’s schools would begin five to six years following the policy change, once students reach the age of compulsory education. Florida’s school choice landscape would result in the effects of the policies being felt across public, private, and home education settings beginning in Kindergarten. Once students are eligible for Kindergarten, impacts are cumulative – stretching across 13 grades from Kindergarten to 12th grade. After 18 years of policy change, all 15 years of education across three settings (public, private, and home), two key scholarship programs (Family Empowerment Scholarship and Florida Tax Credit Scholarship programs) and five major funding programs (Florida Education Finance Program, VPK within the General Appropriations Act, Florida Tax Credit Scholarship Program, Motor Vehicle Sales Tax Credit Scholarship Program, and Commercial Rental Sales Tax Credit Scholarship Program) would feel the full effect of policies influencing birth rates.

In FY 2023-24, the school year base student allocation for VPK was \$2,941, which increases to \$3,029 in FY 2024-25 (3.0%). As of June 2024, the FY 2023-24 statewide funds per unweighted PreK-12 FTE was \$8,716, with average scholarship amounts ranging from \$7,800 for a private school scholarship to \$10,900 for a unique abilities scholarship. Looking ahead to FY 2024-25, the average cost per unweighted PreK-12 FTE is initially estimated to be \$8,959, a 3.6% increase relative to FY 2023-24’s initial estimate (\$8,648). This increase is similar to the average annual increase of 3.2% over the preceding 5 years of change in initial estimates. Further, costs across the public school setting and scholarship programs depend on the grade, level of needs, and residence of each student.

FY 2023-24 Enrollment Distribution



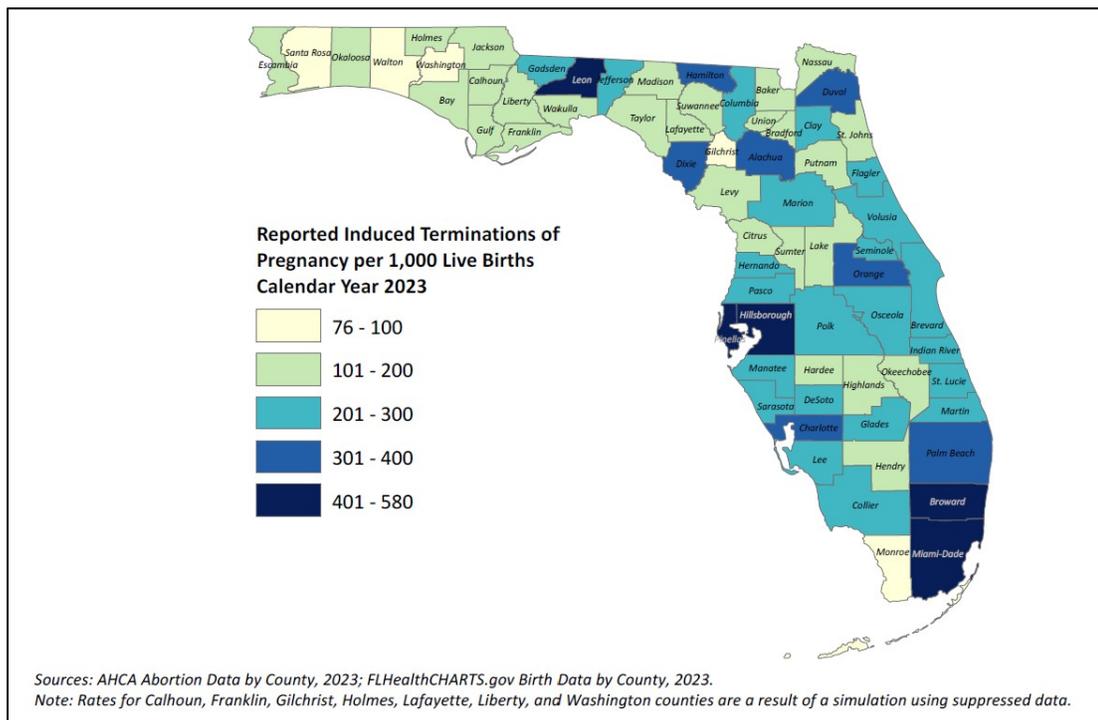
*Non-public education settings include FES and FTC scholarship students

FY 2022-23 through FY 2028-29 Unweighted FTE and Scholarship Forecast							
	FY 2022-23 Final 1/12/2024	FY 2023-24 3rd Calc 1/23/2024	FY 2024-25 Forecast 2/21/2024	FY 2025-26 Forecast 2/21/2024	FY 2026-27 Forecast 2/21/2024	FY 2027-28 Forecast 2/21/2024	FY 2028-29 Forecast 2/21/2024
Total PreK-12 FEFP FTE (Excl. Scholarships)	2,823,723	2,835,236	2,854,409	2,863,759	2,864,675	2,880,547	2,901,502
Family Empowerment Scholarship (FES)	155,183	216,857	315,892	360,113	394,804	429,985	465,772
FES-Education Opportunity (EO)	87,402	134,801	216,960	240,967	255,094	269,423	283,645
FES-Unique Ability (UA)	67,781	82,056	98,932	119,146	139,710	160,562	182,127
Florida Tax Credit Scholarship (FTC)	94,518	147,041	114,587	106,751	105,647	104,501	103,331

Florida’s education system allocates funds to school districts for K-12 operations based on student count through the Florida Education Finance Program (FEFP), which consists of both state and local funds. Local funds are generated from property tax revenue and are comprised of the .748 discretionary millage levy and the required local effort (RLE) levy. The RLE is the amount of funds a district generates from levying the state certified local effort millage rate on the district’s ad valorem property.

School districts are also authorized to levy up to an additional 1.5 mills against the taxable value for school purposes, including charter schools, new construction, maintenance and renovation of existing facilities, school buses, and equipment, among other allowable uses.

The amendment will result in fewer live births relative to the current law. The impact on individual districts will be unequally distributed.



All things being equal, a declining student population would result in less funding allocated to school districts to maintain operations. School districts could increase the discretionary millage levies, however most districts are currently levying the maximum millage. There are multiple actions state and local governments could take to address a declining student enrollment.

Conclusion: While the proposed amendment would result in an aggregate statewide cost savings from a reduction in the provision of educational services due to fewer live births, the effects of the proposed amendment could exacerbate financial constraints for individual school districts already experiencing a decline in student enrollment.

C. Health and Human Services

Florida offers a wide range of social services to support residents with medical, food, and cash assistance that are partially dependent on Florida’s population and birth rate. While there are programs that are purely federally funded, many programs use a mix of state and federal funding. An example of the latter is the Medicaid program that provides medical assistance to individuals and families to cover or assist in the cost of services that are medically necessary. Another example is the Temporary Cash Assistance program that provides financial assistance to pregnant women in their third trimester and families with dependent children to assist in the payment of rent, utilities and other household expenses. As many of these programs serve children as well as new or expecting mothers, any change in Florida resident births affects the number of people potentially eligible for these various social services for both the birthed and the birthing.

For children in Florida needing medical assistance, the state offers Medicaid and Kidcare (Title XXI Children’s Health Program—CHIP). Children from birth until their first birthday are eligible for Medicaid if the household income is below 200 percent of the Federal Poverty Level (FPL). After their first birthday, the household income threshold drops to 133 percent of the FPL. Those children remain Medicaid eligible up until their nineteenth birthday (there are special programs for 19 and 20 years old based on a fixed income dollar amount). If household income is above 133 percent but below 300 percent of the FPL, children are eligible for Medikids Title XXI. If household income is above 300 percent, children are eligible for Medikids Full Pay. Eligibility for both Medikids programs covers children until their fifth birthday. From ages 5 to 18 years old, under the same FPL thresholds, children are eligible for Florida Healthy Kids Title XXI or Full Pay. Children in income eligible households with special healthcare needs that require extensive preventive and ongoing care are eligible for the Children’s Medical Services (CMS) health plan.

Florida Medicaid and CHIP Income Requirements (Children)	
Medicaid	
Children Under Age 1	200% FPL
Children ages 1 through 18	133% FPL
Parents, Caretakers, Children ages 19-20	Fixed dollar amount
Children’s Health Insurance Program (CHIP)	
Medikids (Ages 1-4)	
Title XXI	133% up to 300%
Full Pay	300%
Florida Healthy Kids (Ages 5-18)	
Title XXI	133% up to 300%
Full Pay	300%
CMS	133% up to 300%

The federal government uses state per capita personal income to calculate each state’s federal reimbursement rate for Medicaid and other grants. This is the Federal Medical Assistance Percentage (FMAP) and is the share of state Medicaid benefit costs paid by the federal government. The FMAP is based on a three-year average of state per capita personal income compared to the national average. The state’s share is 100% minus the FMAP. The Children’s Health Insurance Program (CHIP) uses an enhanced FMAP, which is higher than the Medicaid FMAP. The enhanced FMAPs are calculated by reducing each state’s Medicaid share by 30% and are capped at 85%. Between January 2020 and March 2023, there was a temporary FMAP adjustment during the Public Health Emergency (PHE). Starting on April 2023, this adjustment was phased out and ultimately ended in December 2023. The table shows the base FMAP excluding the addition of temporary PHE adjustments.

Federal Fiscal		
Year	FMAP	EFMAP
FY 15-16	60.46%	72.32%
FY 16-17	60.99%	72.69%
FY 17-18	61.62%	73.13%
FY 18-19	61.10%	72.77%
FY 19-20	61.47%	73.03%
FY 20-21	61.96%	73.37%
FY 21-22	61.03%	72.72%
FY 22-23	60.05%	72.04%
FY 23-24	57.96%	70.57%
FY 24-25	57.17%	70.02%

With coverage beginning as early as birth, the effects of any changes to the birth rate can be cumulative and varying. Medicaid covers almost one-half of the births (43.9 percent CY 2022) in the state. They maintain that coverage until their first birthday is reached and their eligibility is reassessed. Many remain on Medicaid, move to a CHIP program, or are able to find health insurance elsewhere. As of May 2024, 48.6 percent (2,149,107) of the 4.4 million Medicaid enrollees were under the age of 18 with ages from 0 to five years making up approximately 34 percent of the total under 18. CHIP covers a further 243,944 children under the age of 18 with Medikids covering 20,748, Healthy Kids covering 209,671 and CMS covering 13,525. It should also be noted that the PHE significantly affected enrollment leading into this period. The tables below show current enrollment as of May 2024 and December 2019, the month before the PHE retroactively went into effect (the PHE began in March 2020 but continuous enrollment was retroactive to January 1, 2020).

Florida Medicaid Enrollment by Age Group and Date				
	5/31/2024		12/31/2019	
Group	Enrolled	% of Total	Enrolled	% of Total
<i>Ages 0-5</i>	<i>721,308</i>	<i>16.3%</i>	<i>769,120</i>	<i>19.9%</i>
<i>Ages 6 -10</i>	<i>570,910</i>	<i>12.9%</i>	<i>543,814</i>	<i>14.1%</i>
<i>Ages 11-18</i>	<i>856,889</i>	<i>19.4%</i>	<i>770,549</i>	<i>19.9%</i>
Total 0-18	2,149,107	48.6%	2,083,483	53.9%
Medicaid	4,423,280	100.0%	3,868,723	100.0%

Florida Children's Health Insurance Program (CHIP) Enrollment by Age Group and Date					
	MK XXI	MK Full Pay	HK XXI	HK Full Pay	CMS
<i>5/31/2024</i>					
Ages 1-5	16,660	4,088	-	-	1,207
Ages 6 -10	-	-	42,232	9,176	4,010
Ages 11-18	-	-	90,625	14,746	6,308
<i>12/31/2019</i>					
Ages 1-5	31,830	8,847	-	-	1,196
Ages 6 -10	-	-	63,334	6,939	4,102
Ages 11-18	-	-	129,784	9,614	8,227

While children under the age of 18 make up almost one-half of the Medicaid enrollees, they account for approximately a quarter of the total Medicaid expenditure. In SFY 2022-23, children were 47.2 percent of enrollees and 27.0 percent of expenditures. The 2024 Rate Year (October 2023 – September 2024) statewide average MMA capitation rate for a child between the age of one month and eleven months without a serious mental illness was \$325.19 per month (\$3,902.28 per year). For a similar child between a year and 13 years old, that rate was \$159.62 per month (\$1,915.44 per year). There are circumstances where the expenditure on a child is higher than these statewide averages. Children on the CMS plan typically have higher per person per month expenditures, but they account for a small portion of the total children on Medicaid.

As mentioned above, Medicaid covers a significant number of the births in Florida (see table below). There is also pre- and postnatal public assistance for the mothers. Medical assistance for pregnant women is available through various Medicaid programs. A pregnant woman who is eligible for regular Medicaid (income below 185 percent FPL) for at least one month, including a retroactive month, is eligible to receive Medicaid throughout her pregnancy and until the end of the 12th month after the birth (postpartum period). The family planning waiver program covers family planning services to eligible women, ages 14 through 55. Services are provided up to 24 months. Eligibility is limited to women with family incomes at or below 191 percent of the FPL who have lost or are losing Florida Medicaid State Plan eligibility and are not otherwise eligible for Medicaid, Children's Health Insurance Program, or health insurance coverage that provides family planning services.

Recipients losing SOBRA (pregnancy Medicaid) eligibility have passive enrollment during the first 12 months of losing Medicaid. Non-SOBRA women have to actively apply for the first year of benefits at their local county health departments. All women enrolled in the family planning waiver have active re-determination of eligibility through their local county health departments after 12 months of family planning waiver eligibility. In order to receive the second year of benefits, recipients must reapply at their local county health departments.

As of May 2024, there were 427,463 individuals receiving Medicaid or the Family Planning waiver to assist with the pregnancies. Of the total, 143,606 receive Pregnant Women Medicaid and 283,857 utilize the Family Planning Waiver.

Florida Births Covered by Medicaid, Percent of Total births			
CY	Medicaid	Total	Rate
2017	109,225	223,579	48.85%
2018	106,695	221,508	48.17%
2019	102,636	220,010	46.65%
2020	98,018	209,645	46.75%
2021	98,297	216,189	45.47%
2022	97,966	222,976	43.90%

Pregnant Women and Family Planning Enrollment by Program and Date				
	SOBRA PREGNANT WOMEN UP TO 100% FPL	SOBRA PREGNANT WOMEN OVER 100% OF FPL UP TO 185% OF FPL	Family Planning Waiver	Total
5/31/2024	110,142	33,464	283,857	427,463
% of Total	25.77%	7.83%	66.41%	100.00%
12/31/2019	67,810	19,124	69,250	156,184
% of Total	43.42%	12.24%	44.34%	100.00%

The Temporary Assistance for Needy Families – Temporary Cash Assistance (TCA) program provides cash assistance to families with children under the age of 18 or under age 19 if full time secondary school students (high school). The program helps families become self-supporting while allowing children to remain in their own homes. Pregnant women may also receive TCA, either in the third trimester of pregnancy if unable to work, or in the 9th month of pregnancy. Eligibility for the TCA program is similar to Medicaid eligibility with a few other technical requirements. Gross income must be less than 185 percent of the FPL and countable income cannot be higher than the payment standard for the family size. Individuals get a \$90 deduction from their gross earned income. Some people must participate in work activities unless they meet an exemption. Regional Workforce Boards provide work activities and services needed to get or keep a job. Individuals who receive TCA are eligible for Medicaid. Individuals who are eligible for TCA, but choose not to receive it, may still be eligible for Medicaid. Florida law creates four categories of families who may be eligible for TCA. While many of the basic eligibility requirements apply to all of these categories, there are some distinctions between the categories in terms of requirements and restrictions:

- **Child-Only Families:** These families include situations where the child is living with a relative or situations where a custodial parent is not eligible to be included in the eligibility group.
- **Relative Caregiver Program:** A specialized program for child-only families where the child has been adjudicated dependent due to abuse or neglect and has been placed with a grandparent or other relative by the court. These relatives are eligible for a payment that is higher than the typical child-only payment, but less than the payment for licensed foster care.

- Single-Family Parents with Children: Parents with children can receive cash assistance for the parent and the children.
- Two-Parent Families with Children: Are eligible on the same basis as single-parent families except the work requirement for two-parent families includes a higher number of hours of participation per week (35 hours or 55 hours if childcare is subsidized) than required for single-parent families (30 hours).

In FY 2022-23, these four programs assisted 67,224 individuals (in FY 2019-20 that number was 61,260). Both the Child-Only Families and Relative Caregiver programs have experienced steady declines in terms of cases and persons served. The other two programs have seen increases over the last few fiscal years that are mostly driven by increased activity among non-citizens seeking assistance.

Temporary Cash Assistance by Program and Date		
Programs	FY 2022-23	FY 2019-20
Child Only Cases	13,840	19,191
Relative Caregiver	9,495	16,461
Single-Family Parents with Children	21,613	22,884
Unemployed Two-Parent Families with Children Parent	22,276	2,723
Total	67,224	61,260

Looking at the age groups served by the TCA programs, ages six and over represent the majority of those receiving assistance (approximately 70 percent). Children from birth to 5 years old make up a smaller proportion of TCA recipients, but are usually also receiving other forms of public assistance as well. While these individuals are treated separately from Medicaid, they are included in the total caseload counts reported each month.

Temporary Cash Assistance by Age and Date				
	9/30/2023		12/31/2019	
	Eligible	%total	Eligible	%total
Age 0 to 5	12,795	29%	16,014	32%
Age 6 to 12	18,755	42%	21,137	42%
Age 13 to 17	13,209	30%	12,989	26%
Total	44,759	100%	50,140	100%

Finally, the foster care system in Florida serves children from birth until their 18th birthday. There are specialty programs to extend foster care services to those older than eighteen, but the majority of those receiving these services are seventeen or younger. In 2023, 21,031 children (aged 0-17) received foster care services. These services are federally funded through Title IV of the Social Security Act with matching state funds (similar to Medicaid and CHIP). Title IV-E provides federal funding to help provide foster care, independent living services, adoption assistance, and guardianship assistance. Like all states that receive Title IV-E funds for foster care, independent living services, adoption assistance, and guardianship assistance, Florida must follow a Title IV-E State Plan.

Consolidated Appropriations Act, Pub. L. No. 117-103, §506-507, 136 Stat. 49, 336 (2022), the Hyde Amendment, prohibits any federal “funds appropriated in [the] Act” to be “expended for any abortion.” In practice, this functions to prevent federal Medicaid coverage of abortions except in certain situations (i.e. if the pregnancy is the result of an act of rape or incest; or generally, if the pregnancy is jeopardizing the health of the mother). The Hyde Amendment specifically indicates that it does not preempt state funding of abortions.

Florida law has similar prohibitions to the Hyde amendment. Section 390.0111(15), Florida Statutes, contains a prohibition on expending funds for the benefit of, payment of funds to, or contracting with organizations that provide abortion services, which include managed care plans. Under this statute, public funds may cover abortions resulting from rape and incest and when “medically necessary to preserve the life of the pregnant woman or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman, other than a psychological condition.” Section 627.6696, Florida Statutes, applies similar restrictions for public funds expended for state health exchanges and for Health Maintenance Organizations.

Counsel for the Florida Attorney General has advised that if the proposed amendment is adopted, it is inevitable that there will be litigation about whether the amendment renders Florida’s funding restrictions unconstitutional because the restrictions “prohibit, penalize, delay, or restrict abortion...” In answering that open question which will inevitably arise, a court could find that these funding restrictions are unconstitutional. This scenario has borne out in 15 other states where courts have concluded that those state’s abortion funding restrictions are unconstitutional or unconstitutionally narrow.

Michigan’s example is instructive. Its Medicaid restrictions were upheld in a 1992 court decision but are now being relitigated under the pro-abortion amendment adopted by Michigan voters in 2022. The complaint, filed on June 27, 2024, cites other states where Medicaid restrictions have been struck down and argues that the new right to an abortion in Michigan is even clearer than it was in those cases: “[Other states] have relied on general equal rights amendments—which do not address reproductive care as directly as the Michigan Constitution—in finding that government health care programs that single out abortion from coverage are unconstitutional.”⁴ Plaintiffs who—like the proposed amendment’s proponents—may argue that “the coverage ban burdens and infringes on the constitutional rights of Medicaid eligible patients by denying them coverage for abortion care and delaying their care.”⁵ It is important to note that a court could conclude that the proposed amendment, as written, intends to provide broader abortion protections than Michigan’s 2022 amendment. Michigan’s “right to reproductive freedom” still contemplates allowable government regulation that prohibits, penalizes, delays, or restricts abortion.⁶ The proposed amendment, meanwhile, prohibits any government action that prohibits, penalizes, delays, or restricts abortion.

The Florida Supreme Court in 2001 concluded that the state need not subsidize abortions, however that ruling was issued at a time when the Court believed an implicit right to elective abortion existed within the State Constitution’s right to privacy. See *Renee B. v. Florida Agency for Health Care Administration*, 790 So. 2d 1036 (Fla. 2001). The Florida Supreme Court adopted the trial court’s reasoning that “[t]he plaintiffs’ argument, in effect, says to the government: leave me alone, stay out of my private affairs, and let me chose [sic] what it is I want to do concerning reproduction, except that I want you to finance my choice. This the constitution does not require.” *Id.* at 1040. But the proposed amendment would dramatically alter the legal landscape. Rather than an abortion right deriving from privacy guarantees, the proposed amendment would constitutionally prohibit any government action that prohibits, penalizes, delays, or restricts abortion. The question would not be whether the Supreme Court should recede from *Renee B.*, but whether the amendment itself abrogates *Renee B.* Put simply, it would likely

⁴ See Complaint, *Young Women’s Christian Ass’n of Kalamazoo, Mich. v. State*, No. 24-000093-MM at ¶181, (Mich. Ct. Cl.) (filed June 27, 2024) available at https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf.

⁵ *Id.* at p. 10.

⁶ *Id.* at ¶ 4.

be much easier for future plaintiffs to argue that Florida’s Medicaid restrictions “penalize,” “delay,” or “restrict” abortion than it was for the *Renee B.* plaintiffs to argue that Florida’s Medicaid restrictions constituted “government intrusion into private affairs.” In sum, *Renee B.* would not foreclose a Florida court from ruling that Florida’s existing funding restrictions are unconstitutional under the proposed amendment.⁷ Regardless of the outcome, state government and state courts will incur increased litigation costs related to the proposed amendment, if adopted.

If a court ruled that the state is required to cover the cost of more abortions, the state would incur higher costs in the health and human services system. Further, a comprehensive review of the financial impacts of public abortion subsidies submitted to the Conference indicates that the rate of abortions increases under regimes where public subsidy exists, thereby potentially compounding that cost.

Conclusion: The majority of the Conference agreed to the inclusion of the outcome of future Medicaid litigation in the section on Health and Human Services as presented herein. The majority conclusion is shown below.

The health and human services programs in Florida serve children as well as new or expecting mothers. Any changes to resident births affect the number of people potentially eligible for these services. While there could be cost savings to health and human services including a reduction of federal financial assistance due to fewer live births, the magnitude of any savings is dependent on highly variable interactions between birth outcomes and economic factors affecting personal or family income. The state does not currently have an obligation to pay for most abortions, and the proposed amendment does not expressly create a new obligation for the state to pay for elective abortions. However, if the proposed amendment is adopted, it is probable that there will be litigation challenging the constitutionality of Florida’s funding restrictions. Should those statutes be found unconstitutional under the proposed amendment, the state would incur higher costs subsidizing more abortions than those that qualify for public funding under current law. There are likely cost savings to the Health and Human Services budget as a result of the passage of the amendment, however potential costs, savings, and any offsets depend on the outcome of litigation that is likely to be complex.

D. Cost of Litigation

According to the State of Florida’s Long-Range Financial Outlook: “Numerous lawsuits against the state exist at any point in time. Some have the capacity to disrupt specific programs and services and to force changes and adjustments to the Outlook. These lawsuits relate to a broad cross-section of the state’s activities including, but not limited to, education funding, environmental matters, Medicaid, agricultural programs, and state revenue sources.” The Outlook is constitutionally required and highlights litigation against the State as a significant risk to the forecast.

The Department of Legal Affairs’ most recent Long-Range Program Plan provides expenditures associated with various departmental functions. Perhaps most on point are those costs associated with the Civil Litigation Division. According to the department’s plan, this division discharges the Attorney General’s responsibilities under section 16.01, Florida Statutes, by providing statewide representation on behalf of the state, its agencies, officers, employees, and agents, at the trial and appellate level. These actions can involve constitutional challenges to statutes, civil rights, employment discrimination,

⁷ The proposed amendment additionally prohibits laws that penalize, delay, or restrict post-viability abortions when necessary to protect the “patient’s health.” “Patient’s health” is not defined but necessarily covers a broader range of conditions than those set forth in Fla. Stat. § 390.0111(15), which specifically defines medical necessity and excludes psychological conditions. It is highly probable that this, too, would give rise to litigation challenging that statute as unconstitutionally narrow under the proposed amendment. Florida courts would have to resolve this uncertainty and could conclude that Florida must subsidize a broader category of abortions than it does under current law.

torts, contract disputes, eminent domain, forfeiture, prisoner litigation, declaratory judgments, charitable trusts, and class action suits. Clients include state officers and agencies from all three branches of state government. Civil litigation defense of state agencies in FY 2022-23 generated expenditures in excess of \$10.74 million. Another \$2.85 million was associated with administrative law cases and \$2.74 million was associated with the Solicitor General's complex litigation work. These figures do not include internal costs incurred by the participating agencies which can also be significant.

The cost of litigation does not address the specific outcomes associated with the individual cases. Each Florida Annual Comprehensive Financial Report contains a note about significant loss contingencies associated with legal proceedings. The 2023 report notes two cases, each of which had projected losses between \$30 million and \$35 million.

According to the Brennan Center for Justice, as of January 11, 2024, a total of 40 cases had been filed challenging abortion bans in 23 states, of which 22 were pending at either the trial or appellate levels. On the current website for the Center for Reproductive Rights, the following statement is provided, "The Center for Reproductive Rights is litigating dozens of cases in state, national and regional courts against harmful laws that restrict access to abortion and other reproductive rights."⁸

A financial impact statement (FIS) may account for likely increased litigation costs that will result from passage of a proposed amendment. See *Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries*, 24 So. 3d 1198, 1199-1202 (Fla. 2009).

If adopted, the proposed amendment will generate litigation. Some of the existing statutes and regulations that could likely be challenged include, but are not limited to, the following:

- **Parental consent:** statute requires physician to obtain written consent from a parent or legal guardian before performing or inducing the termination of a pregnancy of a minor.⁹
- **Physician requirement:** statute prohibits abortions from being performed at any time except by a physician as defined in section 390.011, Florida Statutes.¹⁰
- **Medicaid reimbursement:** AHCA rules withhold Medicaid reimbursement for abortions (with exceptions for rape, and incest, and medical necessity).¹¹
- **Licensing & sanitation:** statute and AHCA rules restrict where abortions may be performed, impose sanitization standards for those facilities, and mandate annual agency inspections.¹²
- **Admitting privileges:** statute requires physicians who perform abortions to have admitting privileges at a hospital within reasonable proximity to the abortion clinic and requires abortion clinics to have a written patient transfer agreement with a hospital within reasonable proximity to the clinic.¹³
- **Medical screening:** statute and AHCA rules require physician to obtain the pregnant woman's medical history, perform a physical examination, and conduct appropriate laboratory tests.¹⁴
- **Waiting period:** statute requires a physician to inform a pregnant woman at least 24 hours before the abortion about the risks and nature of the procedure.¹⁵

⁸ <https://reproductiverights.org/our-work/case-highlights/>. Accessed July 12, 2024.

⁹ § 390.01114, Fla. Stat.

¹⁰ § 390.0111(2), Fla. Stat.

¹¹ Fla. Admin. Code R. 59G-1.045(6) (incorporating by reference the State of Florida Abortion Certification Form, AHCA MedServ Form 011, June 2016, <http://www.flrules.org/Gateway/reference.asp?No=Ref-07013>).

¹² § 390.012(3), Fla. Stat.

¹³ § 390.012(2), Fla. Stat.

¹⁴ § 390.012(3)(d), Fla. Stat.

¹⁵ § 390.0111(3)(a)1., Fla. Stat.

- **In-person counseling:** statute requires disclosure of risks and nature of the abortion procedure to be disclosed orally, while the physician and pregnant woman are physically present in the same room.¹⁶
- **Informed consent materials:** statute requires pregnant woman to be provided printed materials prepared by the Department of Health describing various stages of fetal development, listing entities that offer alternatives to terminating the pregnancy, and detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.¹⁷
- **Ultrasound requirements:** statute requires physicians performing abortions to perform an ultrasound to determine the probable gestational age of the fetus and to offer the pregnant woman an opportunity to view the images.¹⁸
- **Regulation of abortion procedure:** statute and AHCA rules require appropriate use of general and local anesthesia, appropriate precautions such as the establishment of intravenous access, and appropriate monitoring of vital signs throughout the abortion procedure.¹⁹
- **Regulation of abortion method:** statute prohibits physicians from performing a “partial-birth abortion” by partially vaginally delivering a living fetus before killing the fetus and completing the delivery and creates a civil action on the part of the father.²⁰
- **Disposal of fetal remains:** statute and AHCA rules require fetal remains to be disposed of in a sanitary manner.²¹
- **Regulation of recovery and follow-up care:** statute and AHCA rules require abortion clinics to provide for monitorization by medical professionals capable of providing basic cardiopulmonary resuscitation, instructions regarding access to medical care for complications, and a postabortion medical visit that includes a medical examination and a review of the results of laboratory tests and a urine pregnancy test.²²
- **Failed abortions:** statute entitles an infant born alive during or immediately after an attempted abortion to the same rights, powers, and privileges as are granted by the laws of this state to any other child born alive in the course of natural birth.²³
- **Refusal to participate:** statute immunizes hospitals and other persons from liability for refusing to participate in abortions.²⁴
- **ACA plan coverage:** statute prohibits healthcare plans purchased with state or federal funds through an Affordable Care Act exchange to cover abortions (with exceptions for danger of death, rape, and incest).²⁵
- **Recordkeeping & reporting:** AHCA rules impose monthly reporting requirements on abortion clinics.²⁶

Before the Florida Supreme Court ruled that the state constitution protected no right to abortion in 2024, the state was compelled to defend against many challenges to these precise types of abortion laws and regulations in state and federal courts.²⁷ The state’s defense of those lawsuits was costly and

¹⁶ § 390.0111(3)(a)1.a., Fla. Stat.

¹⁷ § 390.0111(3)(a)2., Fla. Stat.

¹⁸ § 390.0111(3)(a)1.b., Fla. Stat.

¹⁹ § 390.012(3)(e), Fla. Stat.

²⁰ § 390.0111(5), Fla. Stat.; § 390.011(10), Fla. Stat.

²¹ § 390.0111(7), Fla. Stat.

²² § 390.012(3)(f-g), Fla. Stat.

²³ § 390.0111(12), Fla. Stat.

²⁴ § 390.0111(8), Fla. Stat.

²⁵ § 627.6699(16), Fla. Stat.

²⁶ Fla. Admin. Code R. 59AER24-2.

²⁷ **Physician requirement:** see § 408.07(25), Fla. Stat. (defining “healthcare provider”); see also, e.g., *Whole Woman’s Health All. v. Hill*, 493 F. Supp. 3d 694, 715 (S.D. Ind. 2020) (reviewing Indiana statute providing that only a physician is authorized to perform a

often protracted.²⁸ If, therefore, the proposed amendment is adopted, state government and state courts will incur increased litigation costs. Multiple submissions to the Conference confirm that litigation on these issues is far from speculative.²⁹ And experience in other states confirms the high probability that Florida will face additional litigation costs if the proposed amendment is adopted.³⁰

Conclusion: If the proposed amendment is adopted, it is probable that the state government and courts will face additional litigation costs that go beyond that which would occur in the amendment's absence. Because, however, specific litigation costs are dependent on a multitude of case-specific factors that manifest when particular cases are filed and tried, the precise amount of this increase in litigation expenses cannot be determined at this time.

first trimester abortion); *Wright v. State*, 351 So. 2d 708 (Fla. 1977) (reviewing Florida statute making it a crime for non-physicians to perform abortions). **Heartbeat Protection Act:** see, e.g., *Roe*, 410 U.S. 113 (subjecting state abortion bans to strict scrutiny before viability); *Casey*, 505 U.S. 833 (similar); *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (reviewing Missouri statute defining “viability”). **Parental consent:** see, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (reviewing Massachusetts statute requiring parental consent before an abortion could be performed on an unmarried woman under the age of 18); *In Re T.W.*, 551 So. 2d 1186 (1989). **Licensing & sanitation:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana statute prohibiting the performance of abortions outside licensed abortions clinics, ambulatory surgical centers, or hospitals); *State, Agency for Healthcare Admin. v. Planned Parenthood of Sw. & Cent. Fla., Inc.*, 207 So. 3d 1032 (Fla. 1st DCA 2017). **Admitting privileges:** see, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (reviewing Texas law requiring admitting privileges and surgical center requirements for abortion facilities); *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299 (2020) (reviewing similar Louisiana law); *EMW Women’s Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (reviewing similar Kentucky law); *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana law requiring abortionists to have admitting privileges). **Medical screening:** see, e.g., *Hopkins v. Jegley*, 508 F. Supp. 3d 361 (E.D. Ark. 2020) (reviewing Arkansas statute imposing criminal and civil penalties on physicians who failed to make reasonable efforts to obtain pregnant woman’s medical records relating to her entire pregnancy history before performing an abortion). **Waiting period:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute requiring a 24-hour waiting period); *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Noem*, 584 F. Supp. 3d 759 (D.S.D. 2022) (reviewing South Dakota statute requiring third appointment and waiting period before providing two-medication regimen to induce abortion); *Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006) (reviewing an Ohio statute requiring a 24-hour waiting period); *State v. Gainesville Woman Care, LLC*, 278 So. 3d 216 (Fla. Dist. Ct. App. 1st Dist. 2019), *State v. Presidential Women’s Ctr.*, 937 So. 2d 114 (Fla. 2006) (reviewing Florida’s informed consent requirements). **In-person counseling:** see, e.g., *Hill*, 493 F. Supp. 3d at 715 (reviewing Indiana’s “telemedicine ban” prohibiting healthcare providers from using telemedicine to prescribe “an abortion inducing drug”). **Informed consent materials:** see, e.g., *Casey*, 505 U.S. at 881 (reviewing Pennsylvania statute that prohibited an abortion being performed unless the woman certified in writing that she had been informed of the availability of materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion). **Ultrasound requirements:** see, e.g., *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (reviewing Missouri statute specifying that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is “viable” by performing “such medical examinations and tests as are necessary to make a finding of [the fetus’] gestational age, weight, and lung maturity”). **Regulation of abortion method:** see, e.g., *Danforth*, 428 U.S. at 69 (reviewing Missouri statute prohibiting, after the first 12 weeks of pregnancy, the abortion procedure of saline amniocentesis); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (reviewing Nebraska statute criminalizing the performance of partial birth abortions); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (similar). **Disposal of fetal remains:** see, e.g., *Jegley*, 508 F. Supp. 3d 361 (reviewing Arkansas statute requiring physicians to ensure disposal of embryonic and fetal tissue in accordance with Arkansas Final Disposition Rights Act). **Refusal to participate:** see Harris Meyer, *Malpractice lawsuits over denied abortion care may be on the horizon*, KFF Health News (June 23, 2023), <https://www.cbsnews.com/news/abortion-laws-medical-malpractice-lawsuits-after-dobbs-ruling/>. **Medicaid reimbursement:** see the Health and Human Services section of this report, *supra*. **Recordkeeping & reporting:** see, e.g., *Casey*, 505 U.S. at 881; *Danforth*, 428 U.S. at 69.

²⁸ According to the Center for Reproductive Rights, states defending abortion regulations spent \$10 million in attorney’s fees alone from 2015-2019. Texas faced the highest costs, with \$2,297,860 in attorney’s fees. Dan Keating, *Abortion restrictions are costing states millions of dollars — in fees for the other side*, Washington Post (Sept. 23, 2019), <https://www.washingtonpost.com/national/2019/09/23/abortion-restrictions-are-costing-states-millions-dollars-fees-other-side/>.

²⁹ See e.g., Email from Deputy Solicitor General Daniel Bell sent to Chris Spencer, Governor’s Principal submitted July 8, 2024; “Comment on Amendment to Limit government Interference with Abortion (23-07) by Protect Women Florida submitted July 1, 2024; “Fiscal Impact Statement for Amendment 4” by Michael J. New, PHD., submitted to the FIEC July 2024 Conference on July 7, 2024.

³⁰ See Complaint, Young Women’s Christian Ass’n of Kalamazoo, Mich. v. State of Mich. and Dep’t of Health and Hum. Services, No. 24-000093-MM (Mich. Ct. Cl.) (filed June 27, 2024); “Comment on Amendment to Limit government Interference with Abortion (23-07) by Protect Women Florida submitted July 1, 2024.

State and Local Revenues:

The tax structure of an economy depends on its tax base and tax rate, which shape how the effective tax rate varies across persons and circumstances. Florida's overall tax structure is established both constitutionally and statutorily. Since the amendment's effect on the economy is not colored by the specific constraints brought about by the state and local tax codes, those results may differ materially from the discrete revenue impacts. An analysis of that type is no longer a part of the charge given to the Financial Impact Estimating Conference (FIEC).

Generally, the greatest impact on taxes associated with a new life would be expected when the child enters the workforce. Most analyses conducted by the Legislature's Office of Economic and Demographic Research (EDR) and the State's formal estimating conference process do not reach this far into the future. According to s. 216.134(1), Florida Statutes, "The official information developed by each consensus estimating conference shall include forecasts for a period of at least 10 years, unless the principals of the conference unanimously agree otherwise." Nevertheless, the FIEC is not bound by this section of the statutes. It is, however, obligated to follow standard economic principles and widely accepted protocols. There are special techniques to evaluate taxes that are generated and received in a distant future. The majority of the Conference agreed that there are revenue impacts to the state and local governments beginning immediately and extending over time.

Conclusion: The majority of the Conference agrees that there would be a loss to state and local tax collections beginning immediately and extending over time. In some of the counties that are already experiencing financial constraints, the impact to local tax collections may be exacerbated. The timing and magnitude of those impacts cannot be estimated with precision. The impact is therefore indeterminate.