ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: October 19, 2022

RE: Legal Analysis of the California's "Reproductive Freedom" Ballot Initiative

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California's Proposition 1 "Reproductive Freedom" ballot initiative would amend California's constitution to create a complete license to "reproductive freedom" for any "individual." This not only includes procuring abortions at any stage of pregnancy, including the gruesome partial birth abortion procedure, but it could also allow men to avoid child support payments, force the state to procure women to be surrogate mothers, and allow children to remove healthy reproductive organs without parental knowledge or consent. The proposed amendment uses intentionally vague terms that threaten the public health, safety, and general welfare of Californians.

The amendment would endanger both mothers and their children by prohibiting common-sense limits and regulations on abortion, and it would undermine the state's ability to protect other fundamental rights, like conscience rights of doctors and nurses to not participate in ending a human life, parental rights to raise and educate children, rights of association for hospitals and care centers to hire mission-oriented employees, the free speech right to advocate for life-affirming care, and the fundamental right to life of every human being.

I. "Reproductive freedom" includes more than unregulated abortion.

The proposed amendment makes "reproductive freedom" a constitutional right, but unfortunately fails to define this key term. Confronted with this lack of clarity, courts interpreting this broad term could conclude that "reproductive freedom" means far more than just unfettered, unregulated access to abortion, contraceptives, and sterilization.

A. Courts have failed to adequately define the term "reproductive freedom."

When a law fails to define a term, courts typically defer to the word's ordinary meaning.[1] Here, the proposed amendment merely states that reproductive freedom "includes the[] fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives." Rather than define the term "reproductive freedom," the proposed amendment provides only broad examples of what the term "includes," leaving the door open for activists to expand the outer limits of "reproductive freedom" and for courts to impose ever more expansive meanings.

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[1] *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'") (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010)).

To date, the U.S. Supreme Court has not defined the term "reproductive freedom" but has used the term in cases involving regulations on abortion procedures.[2] California state courts have likewise not defined "reproductive freedom. At the very least, courts use the term "reproductive freedom" to refer to access to abortion, but the proposed amendment's failure to define the term leaves the issue open to interpretation.

B. Academia promotes a broad understanding of "reproductive freedom."

Legal scholarship discussing "reproductive freedom" fails to consistently define the term. While scholarly articles tend to discuss the term in the context of abortion, they also explore other connotations of the term, including access to contraceptives, sterilization, mother and child-related healthcare, and paternal rights.

Some legal articles state broadly that "reproductive freedom" is "the individual's choice to reproduce or not to reproduce"[3] and "the ability to choose whether, when, how, and with whom one will have children."[4] Others have a more expansive view. As one author put it, "to adequately ensure that all women in this country have true reproductive choice, the definition of 'reproductive freedom' must be expanded to include, 'for example, . . . decisions about sterilization and medical treatment; it must include access to fertilization technologies and to prenatal and perinatal care.'"[5]

C. "Reproductive freedom" could include any sexual activity.

At a more general level, "reproductive freedom" could mean any conduct related to sexual activity because of the relationship between sexual activity and reproduction. Forbidding any state interference of any person's sexual activity in California would mean that any law regulating sexual conduct, including statutory rape laws and incest laws, could be subject to strict scrutiny analysis.

California's statutory rape law makes it a crime to engage in sexual acts with a person under 18 years of age.[6] California code also forbids sexual conduct between members of the same family.[7] These laws forbid sexual activity with certain people, *e.g.* children and family members, and therefore they impose a limit on the "reproductive

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[2] *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 916 (1992) (J. Stevens, concurring), overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see also Washington v. Glucksberg*, 521 U.S. 702, 771, n. 11 (1997) (J. Souter, concurring); and *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318 (2022) (J. Breyer, dissenting).

[3] Elizabeth J. Ireland, *Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland*, 38 N.C. J. Int'l L. & Com. Reg. 651, 695 (2013) (quoting Berta E. Hernández, *To Bear or not to Bear: Reproductive Freedom as a Human Right*, 17 Brook. J. Int'l L. 309, 309 (1991)).

[4] Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 14 Women's Rts. L. Rep. 305, 309 (1992) (quoting Kathryn Kolbert, *Developing A Reproductive Rights Agenda*, REPRODUCTIVE LAWS FOR THE 1990S: A BRIEFING HANDBOOK 8 (N. Taub & S. Cohen, eds. 1988)).

[5] Darci Elaine Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA Women's L. J. 401, 406 (1995) (quoting Roberts, *supra* n.5).

[6] Cal. Penal Code § 261.5.

[7] Cal. Penal Code § 285.

freedom" of adults and family members who want to exercise their "reproductive freedom" by engaging in sexual activity with minors or members of their own family.

While it may sound grotesque to contemplate such activities, enshrining "reproductive freedom" as a fundamental right would give criminals who violate statutory rape and incest laws a defense for their heinous acts.

D. "Reproductive freedom" is likely to be interpreted expansively.

Although courts will likely take an expansive view of the meaning of "reproductive freedom," even the narrowest definition would create a broad scope of new rights that will conflict with other fundamental rights.

For instance, it would interfere with the state's protection of the fundamental right to conscience by requiring nurses and doctors to participate in ending human life through abortion. It would interfere with parents' right to raise and educate their children by cutting parents out of any of their children's medical decisions that fall under "reproductive freedom." It would interfere with hospitals' rights of association to hire mission-oriented employees and forbid them from maintaining policies and procedures that require staff to provide life-affirming services to their clients. It would interfere with the Californians' right to free speech in advocating for the life of the unborn. And, of course, it would forbid policies protecting the most fundamental right, without which no other right can be exercised: the right to life.

II. The creation of a right for every "individual" includes not only pregnant adult women, but also minors and men.

The proposed amendment stops the state from interfering with the reproductive freedom of any "individual" but does not define the term "individual." As with the term "reproductive freedom," courts defer to the common definition of "individual" to determine its meaning.[8] In fact, the U.S. Supreme Court has already relied on a dictionary definition of "individual" to determine that it means a "human being, a person."[9] In the context of California's proposed amendment, courts will turn to the ordinary definition of the term "individual" and likely conclude that it refers to any human being or person, male or female, adult or child.

A. Minors could have dangerous access to abortion and sterilization.

The proposed amendment would create an unprecedented right for minors to procure abortions, sterilization, and other medical procedures related to their reproductive capacities, with no ability to the state to provide regulations or rules to protect minors pursuing these procedures.

Minors could also argue that the right to reproductive freedom includes the right to sterilization and the right to undergo sterilizing gender transition surgeries that remove healthy reproductive organs. This could allow girls to demand medically

[8] *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012).
[9] *Id.* at 454 (citing 7 Oxford English Dictionary 880 (2d ed. 1989)).

unnecessary hysterectomies and mastectomies; for boys, it could include penectomies and orchidectomies. For both, the proposed amendment could create a right to access puberty blockers and hormones that affect their sexual development.

Moreover, giving minors a new right to have these procedures would undermine the fundamental right of parents to raise and educate their children. Not only would parents be cut out of their rights and obligations as parents, but children would also be left vulnerable to industries that profit from children who can be persuaded to pursue these procedures—all while prohibiting the state from protecting the health, safety, and wellbeing of Californian minors.

B. The amendment allows men to take advantage of "reproductive freedom."

Just as the amendment would create a right for women to decide whether they become a parent, it would also give that same right to men. Giving men a right to "reproductive freedom" could hurt mothers and their children by undermining state laws that require men to provide child support. For example, a man who never intended to father a child despite engaging in sexual activity could object to his partner's pregnancy, even demanding that she abort the child. If the woman keeps the child and demands child support, the man could appeal to his right to reproductive freedom to avoid paying for such support.[10]

Creating a new right for infertility care as part of "reproductive freedom" could also compel California to ensure that women are made available to act as surrogates for men who want children. For example, same-sex couples that are naturally infertile could argue that their right to infertility care means that the state must facilitate and require surrogacy options for them to acquire children.[11] These are just some of the real-world implications of adding a new class of rights to California's constitution.

III. Creating a "fundamental" right to abortion undermines the state's ability to enforce common-sense health and safety regulations.

The proposed amendment stops government officials from enforcing laws and regulations that interfere in any way with a "fundamental right to choose to have an abortion." In doing so, the amendment would forbid the state from protecting the health and safety of women through common-sense health regulations.

Courts use the strict scrutiny standard of judicial review to decide if burdens on fundamental rights can survive. The U.S. Supreme Court explains that to satisfy strict scrutiny, government action "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."[12] In other words, the government must

[10] *See* also, Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 Ala. L. Rev. 507 (2015).
[11] Earlier this year, a gay couple filed a claim against New York City making this exact argument. *See* Precious Fondren, *Gay Couple Was Denied I.V.F. Benefits. They Say That's Discriminatory*, THE NEW YORK TIMES (Apr. 12, 2022), https://www.nytimes.com/2022/04/12/nyregion/nyc-ivf-same-sex-couple.html.
[12] *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) (internal quotation marks omitted).

be compelled to enforce the law even though doing so violates a fundamental right, and it must have no alternative but to impose a burden on that right.

Unfortunately, many state laws that provided common-sense protections for public health and safety were invalidated because they violated a "right" to abortion. The history of cases reviewing abortion-related laws under strict scrutiny analysis demonstrates that very few regulations on abortion procedures survived challenge under this rigorous test.[13] For that reason, protective and popular laws, including California's requirement that abortions be performed by medical professionals who have a valid medical license, clinic safety regulations, and late-term abortion limitations, are all vulnerable to being struck down by a court applying this standard.[14]

If California adds the proposed amendment to its constitution, activist plaintiffs will seek to compel state courts to use strict scrutiny analysis to invalidate common-sense health and safety laws and regulations that Californians have supported and relied on for years.

IV. Conclusion

California's proposed "Reproductive Freedom" Amendment would undermine the state's compelling interests in protecting and promoting public health, safety, and the general welfare. The amendment's use of the broad and undefined term "reproductive freedom" paves the way for unregulated abortion, commercial surrogacy, and sterilizing gender transition surgeries. The establishment of a broad, right to "reproductive freedom" could even shield criminal sexual activity, hindering the state from enforcing laws criminalizing incest and statutory rape.

The amendment's use of the term "individual" rather than "woman" will provide an untested fundamental right to "reproductive freedom" for men—and a resulting lack of accountability for their sexual actions. And it will provide unprecedented access to abortion and sterilization for minors. The amendment will put healthcare providers who wish to preserve life and "do no harm" at risk of lawsuits for declining to perform procedures, like abortion. It will cast out health care providers who wish to provide life-affirming care and it will forbid aspiring doctors from practicing medicine in California.

[13] *See* Elizabeth R. Kirk, *Impact of the Strict Scrutiny Standard of Judicial Review on Abortion Legislation under the Kansas Supreme Court's Decision in Hodes & Nauser v. Schmidt,* 42 On Point (2020).
[14] California Health and Safety Code 123468(a) and California Business and Professions Code 2253(b)(1).