

# Ballot Proposal 3 of 2022



## “REPRODUCTIVE FREEDOM FOR ALL” PETITION

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<http://www.house.mi.gov/hfa>

**Proposal 22-3**  
**November 8, 2022 General Election**  
**Placed on the ballot by initiative petition**  
**Complete to 10-26-22**

Analysis available at  
<http://www.legislature.mi.gov>

### SUMMARY:

Proposal 22-3 would amend the state constitution to provide that every individual has a right to reproductive freedom, including the right to make and carry out pregnancy-related decisions such as those concerning prenatal care, childbirth, postpartum care, contraception, sterilization, abortion, miscarriage management, and infertility care. The state could not discriminate in enforcing that right, and it could only deny or infringe that right if advancing, in the least restrictive way, a compelling state interest in the health of an individual seeking care. The state could regulate abortion after the fetus is viable, but it could not under any circumstances prohibit an abortion that is medically indicated to protect the life, physical health, or mental health of the pregnant individual. Finally, the state could not prosecute or penalize an individual based on the actual, potential, alleged, or perceived outcomes of the individual’s pregnancy and could not prosecute or penalize a person for assisting a pregnant individual (with their voluntary consent) to exercise the right to reproductive freedom described above.

The following is the official language as it appears on the November 2022 ballot:

<p>Proposal 22-3</p> <p><b>A proposal to amend the state constitution to establish new individual right to reproductive freedom, including right to make all decisions about pregnancy and abortion; allow state to regulate abortion in some cases; and forbid prosecution of individuals exercising established right</b></p> <p>This proposed constitutional amendment would:</p> <ul style="list-style-type: none"><li>• Establish new individual right to reproductive freedom, including right to make and carry out all decisions about pregnancy, such as prenatal care, childbirth, postpartum care, contraception, sterilization, abortion, miscarriage management, and infertility;</li><li>• Allow state to regulate abortion after fetal viability, but not prohibit if medically needed to protect a patient’s life or physical or mental health;</li><li>• Forbid state discrimination in enforcement of this right; prohibit prosecution of an individual, or a person helping a pregnant individual, for exercising rights established by this amendment;</li><li>• Invalidate state laws conflicting with this amendment.</li></ul> <p>Should this proposal be adopted?</p> <p style="text-align: right;">[ ] YES [ ] NO</p>
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The full text of the proposal as it appeared on the circulated petition can be found here:  
[https://www.michigan.gov/sos/-/media/Project/Websites/sos/24delrio/Reproductive\\_Freedom\\_for\\_All\\_747778\\_7.pdf](https://www.michigan.gov/sos/-/media/Project/Websites/sos/24delrio/Reproductive_Freedom_for_All_747778_7.pdf)

The text of the amendment is also provided as an appendix to this summary.

The proposal would add section 28 to Article I of the state constitution. The new section would provide that every individual has a fundamental right to reproductive freedom, which entails the right to make and carry out decisions about all matters relating to pregnancy, which would include at least prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. An individual's right to reproductive freedom could not be denied, burdened, or infringed upon unless that action was justified by a *compelling state interest* achieved by the least restrictive means.

The proposal says that, for the purpose of the above provisions, a *state interest* is *compelling* only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.

However, despite the above provisions, the proposal would allow the state to regulate the provision of abortion care after *fetal viability*—but in no case could the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

*Fetal viability* would mean the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

The proposal would prohibit the state from discriminating in the protection or enforcement of the fundamental right to reproductive freedom described above.

The state also could not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including at least miscarriage, stillbirth, or abortion.

In addition, the state could not penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.

The proposal states that the provisions described above would be self-executing. (That is, they would not need any legislation to implement them or any other action to become effective.)

Finally, the proposal states that if any provisions described above are held to be invalid by a court, the provisions not held to be invalid would still remain in effect.

## **BACKGROUND:**

### **Michigan law prohibiting abortion**

On June 24, 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court ruled that the United States Constitution does not confer the right to abortion. The decision overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), which had held that

the Fourteenth Amendment to the Constitution protected an individual's due process privacy right to have an abortion prior to fetal viability.<sup>1</sup>

Section 14 of the Michigan Penal Code prohibits performing an abortion at any point in a pregnancy, except as necessary to protect the life of the pregnant individual. ("Performing an abortion" includes administering, and presumably self-administering, a medicine, drug, or substance to cause a miscarriage.) This prohibition, first enacted in 1846, was retained when the state's criminal statutes were consolidated in 1931 and has not been amended since. Violation is a felony punishable by imprisonment for up to four years or a fine of up to \$5,000, or both. If the pregnant individual dies as a result of the abortion, it is considered manslaughter, which is punishable by imprisonment for up to 15 years or a fine of up to \$7,500, or both.<sup>2</sup>

In 1973, the Michigan Supreme Court considered the question of whether *Roe* had made the above prohibition generally inapplicable. It concluded that the prohibition could still apply to the extent that it did not conflict with *Roe*'s protection of the right to abortion performed prior to fetal viability by the pregnant individual's attending physician in the exercise of the physician's medical judgment.<sup>3</sup> A 2001 decision of the Michigan Court of Appeals further held that the state's general abortion prohibition was not implicitly repealed by several subsequent laws regulating, rather than prohibiting, abortions.<sup>4</sup>

In other words, the 1931 abortion prohibition has never been amended or repealed and is still on the books, but it was limited in its application (i.e., its enforcement) to account for the U.S. Supreme Court decisions in *Roe* and *Casey*. With that court's overturning of those decisions in *Dobbs*, Michigan law reverted to its general prohibition against performing an abortion except as necessary to protect the life of the pregnant individual. However, orders issued in two separate Michigan court cases have blocked the prohibition from being enforced.

In April 2022, before the Supreme Court had published its decision in *Dobbs*, Planned Parenthood of Michigan sued the state attorney general in the Court of Claims to prevent enforcement of the 1931 abortion prohibition. On May 17, the judge in that case issued a temporary injunction blocking enforcement of the law pending resolution of the lawsuit. The injunction provided that other laws regulating abortion in Michigan would remain in full effect.

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<sup>1</sup> There have been several Supreme Court decisions related to abortion, but *Roe* and *Casey* (and now *Dobbs*) are the primary ones. *Roe* generally held that the government could not impose restrictions on abortion in the first trimester; could regulate abortion after that in ways reasonably related to the health of the pregnant individual; and after fetal viability could regulate or prohibit abortion except when necessary to preserve the life or health of the pregnant individual. Under *Roe*, infringements of the right to abortion were subject to a strict scrutiny standard when reviewed by the courts. Under that standard, any law affecting a fundamental right must further a compelling government interest and be narrowly written to do so. Nineteen years later, in its *Casey* decision, the court got rid of *Roe*'s trimester model in favor of one based on fetal viability. In addition, under *Casey*, restrictions and regulations were to be judged not by strict scrutiny, but by whether they imposed an "undue burden" (substantial obstacle) on an individual seeking an abortion before fetal viability.

<sup>2</sup> In addition, section 323 of the Penal Code provides that a person who performs an abortion on "any woman pregnant with a quick child" is guilty of manslaughter (including if it causes the death of the pregnant individual). This law also was enacted in 1846 and retained when the state's criminal laws were codified in 1931. At the time this law was enacted, a "quick child" was understood to be a fetus that could be felt moving. In *Larkin v. Wayne Prosecutor* (1973), the Michigan Supreme Court reconsidered this provision and ruled that "quick child" meant a viable fetus.

<sup>3</sup> *People v. Bricker* (1973), decided the same day as *Larkin*.

<sup>4</sup> *People v. Higuera*.

Also in April and in anticipation of *Dobbs*, the governor filed a suit in Oakland County Circuit Court against the prosecutors of the 13 Michigan counties where there are abortion providers (which includes Oakland County). The suit asked the court to prevent the prosecutors from enforcing the 1931 law; to declare the 1931 abortion prohibition to be invalid under the due process and equal protection clauses of the Michigan Constitution; and to declare that the due process clause of the Michigan Constitution protects the right to abortion. At the same time, the governor filed an executive message with the Michigan Supreme Court, asking it to direct the Oakland County Circuit Court to certify the constitutional questions presented in the lawsuit for the Supreme Court's immediate consideration.<sup>5</sup>

On August 1, 2022, a little over a month after the *Dobbs* decision had been handed down, the Michigan Court of Appeals ruled that the temporary injunction issued by the Court of Claims did not apply to county prosecutors. On the same day, however, before any county prosecutor could take an action to enforce the 1931 abortion prohibition, the judge in the Oakland County case granted the governor's emergency motion for a temporary restraining order prohibiting county prosecutors from doing so.

Two and a half weeks later, on August 19, the Oakland County circuit judge issued a preliminary injunction to block county prosecutors from enforcing the 1931 law. An in-person pretrial conference date was set for November 21, 2022. The question of the Michigan Supreme Court's involvement in the case, as described above, is pending.

On September 7, the judge in the Court of Claims case issued an opinion declaring the 1931 abortion prohibition invalid under provisions of the Michigan Constitution and an order permanently barring the attorney general and those under the attorney general's supervision and control from enforcing it. A case challenging this opinion and order is now in the Michigan Supreme Court.

### **Initiative to amend the constitution**

Before it can be placed on the ballot, an initiative petition proposing an amendment to the state constitution must have the valid signatures of a number of registered voters at least equal to 10% of the votes cast for all candidates in the most recent gubernatorial election. In the 2018 gubernatorial race, 4,250,585 votes were cast, which means that a constitutional amendment initiative now requires 425,059 signatures. Those signatures must be collected within 180 days, submitted to the secretary of state at least 120 days before the election, and verified as valid by the Board of State Canvassers.

A group called Reproductive Freedom for All was formed in January 2022 for the purpose of supporting a statewide ballot initiative to amend the state constitution to create a right to reproductive freedom as described above. In March, the Board of State Canvassers approved the group's initiative petition (see link above), and in July the group submitted 753,759 signatures to the Bureau of Elections. After an audit of randomly selected signatures, the

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<sup>5</sup> Michigan Court Rule 7.308(A)(1)(a) provides in part: "Whenever a trial court or tribunal from which an appeal may be taken to the Court of Appeals or to the Supreme Court has pending before it an action or proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination according to executive message of the governor addressed to the Supreme Court, the Court may authorize the court or tribunal to certify the question to the Court with a statement of the facts sufficient to make clear the application of the question."

Bureau of Elections estimated that the petitions had 596,379 valid signatures and recommended that the Board of State Canvassers place the initiative on the November 2022 ballot.

However, a group called Citizens to Support MI Women and Children submitted a challenge to the petition, arguing that a lack of spacing between words had made nonsense of several phrases. The Board of State Canvassers deadlocked on this question at its August 31 meeting, and the proposal was not approved for the ballot.<sup>6</sup>

Reproductive Freedom for All filed a lawsuit with the Michigan Supreme Court challenging this result, and on September 8 the court ruled that the spacing issue did not affect the meaning of the amendment's full text and that the Board of State Canvassers had a clear legal duty to certify the petition.<sup>7</sup> On September 9, the board unanimously certified that the initiative had received enough valid signatures and must be placed on the ballot as Proposal 22-3.

### **FISCAL IMPACT:**

Ballot Proposal 22-3 would have no direct fiscal impact on the state or local units of government. As described above, the 1931 Michigan statute prohibiting abortion except as necessary to protect the pregnant individual's life is not currently enforced. The statute also would not be enforced if voters were to approve the proposed constitutional amendment.

Additionally, Ballot Proposal 22-3 does not appear to expressly require the state to assist in paying for decisions relating to pregnancy. At present, the state Medicaid program reimburses medical providers for services provided for Medicaid-eligible individuals for prenatal care; child birth; postnatal care; sterilizations for individuals that are at least 21 years of age, not legally declared to be mentally incompetent, and not institutionalized in a corrective, penal, or mental rehabilitation facility; and abortions that are medically necessary to save the life of the pregnant individual or if that individual's medical history indicates that the pregnancy was the result of rape or incest. The state Medicaid program does not presently cover infertility services.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

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<sup>6</sup> When the Board of State Canvassers approved the petition in March, it did so on the condition that one word be removed. According to Reproductive Freedom for All, when the printer removed this word, the rest of the text was shifted around in a way that significantly reduced the spacing between several words. That is, those spaces were there, but it was hard to tell that on the page as printed.

<sup>7</sup> The Court's full order can be found here: [https://www.courts.michigan.gov/4a5838/siteassets/case-documents/uploads/sct/public/orders/164760\\_28\\_01.pdf](https://www.courts.michigan.gov/4a5838/siteassets/case-documents/uploads/sct/public/orders/164760_28_01.pdf)

## APPENDIX: THE TEXT OF THE AMENDMENT

The full text of the section that the proposal would add to Article I of the state constitution is as follows:

Sec. 28. (1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

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

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

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

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

(4) For the purposes of this section:

A state interest is "compelling" only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making. "Fetal viability" means: the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

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