

Expected Impact of HJ 1/SJ 247 Based on Precedents in Other States

by Susan T. Muskett, J.D.

HJ 1/SJ 247 is a proposed constitutional amendment that would embed a broadly worded “right to reproductive freedom” into the Virginia Constitution.

Over the years, proponents of a constitutional amendment to enshrine abortion into the Virginia Constitution have asserted that it merely enshrines abortion rights within the framework of abortion law pre-Dobbs,¹ and that assertions that it will overturn or block pro-life laws that are constitutionally valid are scare tactics.² This compilation of precedents from other states shows otherwise.

No Law to Restrict Taxpayer Funding of Elective Abortions. Under HJ 1/SJ 247³ the right to abortion “shall not be, directly or indirectly, denied, burdened, or infringed upon,” and “[t]he Commonwealth shall not discriminate in the protection or enforcement of this fundamental right.” This language could be used to overturn Virginia’s restriction on publicly funded abortions.

The Young Women’s Christian Association of Kalamazoo, Michigan v. State of Michigan and Dept. of Health and Human Services, Verified Complaint, Michigan Court of Claims, No. 24-000093-MM⁴ (alleges that Michigan’s statutory prohibition on Medicaid-funded abortions violates the 2022 **Michigan** constitutional amendment because it “burdens and infringes” on the fundamental right to reproductive freedom for Medicaid-eligible women, that it *discriminates* against women seeking abortions compared to women who choose to carry their unborn children to term, and that it “discriminates on the basis of sex, given that it singles out a sex-correlated medical procedure for disfavor.” emphasis added). A decision has not yet been issued. The Michigan constitutional amendment is nearly identical to Virginia’s HJ 1/SJ 247).

No law to Require Parental Consent or Notification prior to a Minor Child’s Abortion. Pursuant to HJ 1/SJ 247, “every individual has the fundamental right to reproductive freedom.” Since the constitutional amendment says “individual” and not “adult,” it applies at any age. Virginia’s constitution supersedes conflicting state statutory law, so Virginia’s parental consent requirement for a minor’s abortion could be eliminated.

In **Missouri**, some abortion-rights groups are publicly complaining about the fact that an initial lawsuit under the newly-enacted constitutional amendment did not include a challenge of the state’s parental consent law.⁵

The National Center for Youth Law (NCYL) interprets the word “individual” in **California’s** 2022 constitutional amendment to include minors. A 2024 NYCL publication⁶ cites the following provision from California’s constitutional amendment as one of the grounds for its assertion that a minor of any age may consent to an abortion: “The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion . . . “

No Law to Ban Eugenic Abortions on Down Syndrome Children. HJ 1/SJ 247’s language “shall not be, directly or indirectly, denied, burdened, or infringed upon” could prevent the enactment of such a law.

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024)⁷ (preliminary injunction issued blocking **Missouri’s** prohibition on abortions based on the race, sex, or Down Syndrome diagnosis of the unborn child as violative of the 2024 **Missouri** constitutional amendment. The lawsuit was brought by Planned Parenthood, ACLU of Missouri, and the national ACLU, on behalf of two Planned Parenthood affiliates.)

On Aug. 19, 2024, *Cleveland.com* ran an article questioning why Ohio’s statutory prohibition on abortions based on a Down syndrome diagnosis is still law in light of the passage of the 2023 **Ohio** constitutional amendment. According to *Cleveland.com*, “[t]he law remains in place because it hasn’t been challenged” and “Jessie Hill, an attorney who represents abortion clinics, said it’s possible that the Down syndrome law could be challenged in the future as violating the new abortion rights amendment.”⁸

No Law to Require an In-Person Visit with a Physician, or to Provide Certain Informational Materials to the Woman to ensure that she is Fully Informed. No 24-Hour Waiting Period. Under HJ 1/SJ 247, the right to abortion “shall not be, directly or indirectly, denied, burdened, or infringed upon.” This could prevent the enactment of these laws.

Northland Family Planning v. Att’y Gen. of Michigan, No. 24-000011-MM (Mich. Ct. Cl. **June 25, 2024**)⁹ (preliminary injunction issued blocking enforcement of Michigan’s 24-hour waiting period, many of the mandatory informed consent requirements, and the physician-only law on the grounds that the laws violate the 2022 **Michigan** constitutional amendment because they “burden and infringe upon” a woman’s decision to obtain an abortion. The lawsuit was filed by the Center for Reproductive Rights on behalf of abortion providers and Medical Students for Choice).

Preterm-Cleveland v. Yost, No. 24 CV 2634 (Court of Common Pleas, Franklin County, Ohio Aug. 23, 2024)¹⁰ (preliminary injunction issued blocking enforcement of Ohio’s statutory requirements for a 24-hour waiting period, in-person visit with a physician, and provision of certain informational materials to a woman prior to an abortion, because the statutes “burden, penalize, prohibit, interfere with, and discriminate against” an individual’s exercise of her reproductive rights as prohibited by the 2023 **Ohio** constitutional amendment. The suit was filed by the American Civil Liberties Union, the ACLU of Ohio, Planned Parenthood Federation of America, and the law firm Covington & Burling LLP, on behalf of abortion providers).

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024)¹¹ (preliminary injunction issued enjoining enforcement of Missouri’s abortion informed consent requirements, waiting period law, and requirement that abortionists have admitting privileges at a nearby hospital, on the grounds that these statutes violate the 2024 **Missouri** constitutional amendment. Missouri’s physician-only law that requires that only physicians perform abortions, law requiring an in-person appointment with a physician, and a law requiring abortion clinics meet facility licensing requirements, were challenged but not preliminarily enjoined. The lawsuit is ongoing.)

No Law to Protect from Abortion an Unborn Child whose Heartbeat can be Detected. No Law to Protect Unborn Children from Abortion Based on Gestational Age. No Pain-Capable Unborn Child Abortion Restriction. HJ 1/SJ 247 could prevent the enactment of such a law.

Preterm v. Yost, No. A2203203 (Court of Common Pleas, Hamilton County, Ohio Oct. 24, 2024)¹² (permanently enjoined Ohio’s heartbeat law from taking effect on the grounds that it violated the 2023 **Ohio** constitutional amendment. The heartbeat law protected from abortion an unborn child whose heartbeat had been detected (about six weeks).

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024)¹³ (preliminary injunction issued enjoining enforcement of Missouri’s total prohibition on abortions; its cascading prohibitions on abortions at eight weeks LMP, fourteen weeks LMP, eighteen weeks LMP, and twenty weeks LMP; and its restriction on abortions at the point that the unborn child feels pain (defined as twenty weeks gestational age or later) on the grounds that they violate the 2024 **Missouri** constitutional amendment).

Abortion-Pill Safety Regulations.

Planned Parenthood Southwest Ohio Region, et al. v. Ohio Dept. of Health, et al., No. A 2101148 (Court of Common Pleas, Hamilton County, Ohio Aug. 29, 2024)¹⁴ (a Hamilton County Common Pleas judge temporarily enjoined Ohio’s statutes preventing Advanced Practice Clinicians [Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants] from providing chemical abortions, as well as a provision requiring physicians to follow FDA labeling. The court found these statutes violate **Ohio’s** 2023 constitutional amendment).

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (*Cir. Ct. of Jackson County, Missouri at Kansas City* Dec. 20, 2024)¹⁵ (preliminarily enjoined Missouri’s chemical abortion telemedicine ban that requires the abortionist to be in the room when the woman takes her first dose of medication. The chemical abortion complication plan requirement was challenged as well, and the court enjoined the regulations implementing the statute. Both provisions were found to violate the 2024 **Missouri** constitutional amendment).

Legitimate Post-Viability Abortion Restrictions.

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (*Cir. Ct. of Jackson County, Missouri at Kansas City* Dec. 20, 2024)¹⁶ (plaintiffs challenged Missouri’s post-viability abortion restriction, asserting that it violates the 2024 **Missouri** constitutional amendment because the statutory law does not allow for post-viability abortions due to the *mental* health of the woman, requires two physicians to agree that the late abortion is necessary under one of the exceptions, requires a second physician be present who shall provide care to a child born alive, and has a broader definition of “viability.”¹⁷ The court did not preliminarily enjoin the criminal penalties attached to the post-viability abortion restriction because the court stated that the plaintiffs had not provided arguments in this regard.)

Criminal Penalties for Violations by Abortion Providers, Interference with Medical Assistance Law, and Pathology Requirement.

Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri, No. 2416-CV31931 (*Cir. Ct. of Jackson County, Missouri at Kansas City* Dec. 20, 2024)¹⁸ (challenged Missouri’s criminal penalties for violations by abortion providers, interference with medical assistance law, and pathology requirement, asserting that these statutes violate the 2024 **Missouri** constitutional amendment. The court preliminarily enjoined many of the criminal penalties, but not all of them, asserting that the plaintiffs had not yet addressed or otherwise met their burden, enjoined the pathology requirement, and did not enjoin the criminal penalties attached to the interference with medical assistance law on the grounds that the plaintiffs had not yet addressed the issue).

Legal Standard: Proponents of HJ 1/SJ 247 can no longer assert that the amendment merely returns things to how they were pre-*Dobbs*. Three separate courts, two in Ohio and one in Michigan, have held that their state’s newly enacted constitutional amendment applies a new standard for reviewing pro-life legislation.

In August 2024, an **Ohio** Franklin County Court of Common Pleas judge wrote that “[t]he plain language of the Amendment clearly sets forth the applicable legal standard . . . Defendants’ argument that the pre-*Dobbs* standard is applicable is unpersuasive. It is well-established that the plain language of an enacted text is the best indicator of intent . . . Arguments that rely on cases decided before the Amendment passed are unpersuasive.”¹⁹

A second judge in **Ohio**, a Hamilton County Common Pleas judge, rejected the State’s assertion that the pre-*Dobbs* legal standard applies, and instead concluded that the Ohio “Amendment’s language

plainly establishes that it offers greater protection of individuals' rights to make their own reproductive choices than those adopted by the U.S. Supreme Court in *Roe* and *Casey*, which make up the pre-*Dobbs* regime the State references. . . Thus, the Amendment explicitly sets an applicable legal standard – one that places a stringent burden on the State. Under the Amendment, patient health is the only state interest that an abortion regulation may constitutionally advance. Therefore, any restrictions on abortion must be narrowly tailored to further protect patient's health *and* such restrictions must be the least restrictive means to advance the patient's health 'in accordance with widely accepted and evidence-based standards.'"²⁰

In **Michigan**, a Court of Claims judge wrote that “[t]he Court disagrees with intervening defendant that, by adopting § 28, the voters of Michigan merely reverted the state of the law back to what it was before the United States Supreme Court reversed *Roe v Wade* . . . and its progeny in *Dobbs v Jackson Women’s Health Org* . . . Michigan voters dramatically changed the Michigan Constitution by adopting § 28 of Article 1 of Michigan’s 1963 Constitution. Section 28 does not recognize the potential for life in a nonviable fetus as a compelling state interest . . . the relevant inquiry to determine whether the challenged laws are constitutional under § 28 starts with determining whether the laws deny, burden, or infringe upon an individual’s freedom to make and effectuate decisions about abortion care.”²¹

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¹ Brittney Melton, “2 Democratic Senators push bill for abortion rights in Virginia,” *wusa9* Jan. 25, 2023 at <https://www.wusa9.com/article/news/local/virginia/democratic-senators-push-bill-abortion-rights-virginia/65-d3badf21-3352-4e24-b8fc-6a7ff5284bde>. Sarah Rankin, “Virginia Democrats defeat bills limiting abortion access,” *Associated Press*, Jan. 26, 2023 at <https://apnews.com/article/abortion-virginia-state-government-42791ab80e24a3c6944819ac820273a6>.

² Drew Wilder, “The next step in Virginia’s abortion rights battle: a constitutional amendment,” *NBC Washington* Nov. 22, 2023 at <https://www.nbcwashington.com/news/local/the-next-step-in-virginias-abortion-rights-battle-a-constitutional-amendment/3477902/>

³ HJ 1, as adopted by the House Privileges and Elections Committee in November 2024 reads: “Section 11-A. Fundamental right to reproductive freedom. That every individual has the fundamental right to reproductive freedom, including the ability to make and carry out decisions relating to one's own prenatal care, childbirth, postpartum care, contraception, abortion care, miscarriage management, and fertility care. An individual's right to reproductive freedom shall not be, directly or indirectly, denied, burdened, or infringed upon unless justified by a compelling state interest achieved by the least restrictive means. Notwithstanding the above, the Commonwealth may regulate the provision of abortion care in the third trimester, provided that in no circumstance shall the Commonwealth prohibit an abortion (i) that in the professional judgment of a physician is medically indicated to protect the life or physical or mental health of the pregnant individual or (ii) when in the professional judgment of a physician the fetus is not viable. The Commonwealth shall not discriminate in the protection or enforcement of this fundamental right. The Commonwealth shall not penalize, prosecute, or otherwise take adverse action against an individual based on such individual's own exercise of this fundamental right or such individual's own actual, potential, perceived, or alleged pregnancy outcomes, including miscarriage, stillbirth, or abortion. The Commonwealth shall not penalize, prosecute, or otherwise take adverse action against any individual for aiding or assisting another individual in exercising such other individual's right to reproductive freedom with such other individual's voluntary consent. For the purposes of this section, a state interest is compelling only if it is for the limited purpose of maintaining or improving the health of an individual seeking care, consistent with accepted clinical standards of care and evidence-based medicine, and does not infringe on that individual's autonomous decision making. This section shall be self-executing. Any provision of this section held invalid shall be severable from the remaining portions of the section.”

⁴ Verified Complaint, *The Young Women’s Christian Association of Kalamazoo, Michigan v. State of Michigan and Dept. of Health and Human Services*, (Michigan Court of Claims, No. 24-000093-MM).at https://www.aclumich.org/sites/default/files/field_documents/2024-06-27_complaint_with_case_number.pdf

⁵ Michele Muntz, “Not all abortion-rights groups are celebrating a lawsuit to restore access in Missouri” (St. Louis Post-Dispatch, Nov. 10, 2024) at https://www.columbiamissourian.com/news/state_news/not-all-abortion-rights-groups-are-celebrating-a-lawsuit-to-restore-access-in-missouri/article_2c8fa51e-9f9f-11ef-89ec-47322ffd86c8.html#:~:text=Abortion%20providers%20have%20moved%20quickly,as%20quickly%20as%20a%20month

⁶ National Center for Youth Law, “California Minor Consent and Confidentiality Laws,” revised Dec. 2023.

⁷ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri* (Cir. Ct. of Jackson County, Missouri at Kansas City, Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

⁸ See Laura Hancock, “Ohio voters enshrined abortion rights. So why is it illegal for doctors to induce an abortion after a fetal Down syndrome test?” (Cleveland.com Aug. 19, 2024).

⁹ *Northland Family Planning v. Att’y Gen. of Michigan*, No. 24-000011-MM (Mich. Ct. Cl, June 25, 2024).

¹⁰ *Preterm-Cleveland v. Yost*, No. 24 CV 2634 (Court of Common Pleas, Franklin County, Ohio Aug. 23, 2024). The decision can be found at the end of a press release here: <https://www.acluohio.org/en/press-releases/ohio-judge-blocks-laws-mandating-24-hour-waiting-period-abortions-violating>

¹¹ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri* (Cir. Ct. of Jackson County, Missouri at Kansas City, Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

¹² *Preterm v. Yost*, No. A2203203 (Court of Common Pleas, Hamilton County, Ohio Oct. 24, 2024) at https://www.acluohio.org/sites/default/files/file_3594.pdf.

¹³ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri* (Cir. Ct. of Jackson County, Missouri at Kansas City, Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

¹⁴ *Planned Parenthood Southwest Ohio Region, et al. v. Ohio Dept. of Health, et al.*, No. A 2101148 (Court of Common Pleas, Hamilton County, Ohio Aug. 29, 2024) at https://www.acluohio.org/sites/default/files/2024.08.29_opinion_and_order_granting_2nd_pi.pdf

¹⁵ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri*, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

¹⁶ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri*, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

¹⁷ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri*, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City, filed Nov. 6, 2024). The petition for a preliminary injunction and/or temporary restraining order can be found at the end of a press release here:

<https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-files-lawsuit-to-restore-abortion-access-on-heels-of-voters-approving-right-to-reproductive-freedom-initiative-2>

¹⁸ *Comprehensive Health of Planned Parenthood Great Plains v. State of Missouri*, No. 2416-CV31931 (Cir. Ct. of Jackson County, Missouri at Kansas City Dec. 20, 2024) at https://www.courts.mo.gov/fv/c/2416-CV31931.COMP%20HEALTH.Prelim%20Injunction%20ORDER_FINAL.pdf?courtCode=16&di=26642271

¹⁹ *Preterm-Cleveland v. Yost*, No. 24 CV 2634 (Court of Common Pleas, Franklin County, Ohio Aug. 23, 2024). The decision can be found at the end of a press release here: <https://www.acluohio.org/en/press-releases/ohio-judge-blocks-laws-mandating-24-hour-waiting-period-abortions-violating>

²⁰ *Planned Parenthood Southwest Ohio Region, et al. v. Ohio Dept. of Health, et al.*, No. A 2101148 (Court of Common Pleas, Hamilton County, Ohio Aug. 29, 2024) at https://www.acluohio.org/sites/default/files/2024.08.29_opinion_and_order_granting_2nd_pi.pdf

²¹ *Northland Family Planning v. Att’y Gen. of Michigan*, No. 24-000011-MM (Mich. Ct. Cl, June 25, 2024) at [https://www.courts.michigan.gov/49ec2c/siteassets/case-documents/opinions-orders/coc-opinions-\(manually-curated\)/2024/24-000011-mm.pdf](https://www.courts.michigan.gov/49ec2c/siteassets/case-documents/opinions-orders/coc-opinions-(manually-curated)/2024/24-000011-mm.pdf)