



10-2022

Proposition 1: Constitution Right To Reproductive Freedom

Brenna Hatcher

University of the Pacific, McGeorge School of Law, b_hatcher@u.pacific.edu

Yuri Khadka

University of the Pacific, McGeorge School of Law, y_khadka@u.pacific.edu

Alek Kocher

University of the Pacific, McGeorge School of Law, a_kocher@u.pacific.edu

Follow this and additional works at: <https://scholarlycommons.pacific.edu/california-initiative-review>



Part of the [Legislation Commons](#)

Recommended Citation

Hatcher, Brenna; Khadka, Yuri; and Kocher, Alek (2022) "Proposition 1: Constitution Right To Reproductive Freedom," *California Initiative Review (CIR)*: Vol. 2022, Article 9.

Available at: <https://scholarlycommons.pacific.edu/california-initiative-review/vol2022/iss1/9>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in California Initiative Review (CIR) by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Proposition 1: Constitution Right To Reproductive Freedom

Initiative Constitutional Amendment

Copyright © 2022 by the University of the Pacific, McGeorge School of Law

By

Brenna Hatcher

*J.D., University of Pacific, McGeorge School of Law, to be Conferred May 2023
B.A., Political Science: Public Law, University of California, San Diego, 2018*

&

Yuri Khadka

*J.D., University of Pacific, McGeorge School of Law, to be Conferred May 2024
B.A., Sociology, University of California, Davis 2018*

&

Alek Kocher

*J.D., University of Pacific, McGeorge School of Law, to be Conferred May 2024
B.S., Political Science: Public Administration, Northwest Missouri State University, 2021*

I. EXECUTIVE SUMMARY

Proposition 1 is a constitutional amendment proposed by the California Assembly, and California Senate, and supported by Governor Newsom. This proposition would amend the California Constitution to prohibit the state from “denying or interfering” with an individual’s reproductive freedom.¹ Reproductive freedom is defined as an individual’s decision to choose or refuse to have an abortion or to take contraceptives.²

Currently, states across the country are implementing a range of laws either prohibiting or protecting reproductive freedom.³ This is because of the Supreme Court’s recent ruling that the federal constitution does not provide a right to abortion, and there is no federal legislation codifying a federal right to reproductive freedom.⁴ In the aftermath of this decision, individual states are deciding on how to regulate reproductive freedom. According to a UC Berkeley Institute of Governmental Studies poll, 71% of all registered voters support California amending its constitution to protect abortion rights.⁵ At the present, California law gives individuals the right to choose or refuse contraceptives. An individual has access to abortion care if the fetus is not viable, or if the individual’s health is at risk due to the pregnancy.⁶

A “YES” vote on this measure means: The California Constitution would be changed to expressly include existing rights to reproductive freedom—such as the right to choose whether or not to have an abortion and use contraceptives.

A “NO” vote on this measure means: The California Constitution would not be changed to expressly include existing rights to reproductive freedom. These rights, however, would continue to exist under other state laws.

II. THE LAW

A. Evolution of an Individual’s Access to Contraceptives and Abortions based on Federal Law

Prior to the overruling of *Roe v. Wade* by the Supreme Court, an individual had a federal fundamental right to choose an abortion and to choose or refuse contraceptives.⁷ Both abortion and contraceptives fall under the same legal protection because they are considered fundamental rights. This precedent started with an individual’s right to privacy then expanded to an

¹ *Prop 1*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_1_Right_to_Reproductive_Freedom_Amendment_\(2022\)](https://ballotpedia.org/California_Proposition_1_Right_to_Reproductive_Freedom_Amendment_(2022)), (last visited Oct 17, 2022).

² Melody Gutierrez, *Proposal To Put Abortion Protections in California Constitution Appears Headed For Victory*, LOS ANGELES TIMES, <https://www.latimes.com/california/story/2022-08-24/abortion-california-voters-2022-california-election-poll>, (Aug 24, 2022).

³ *Id.*

⁴ *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct.2228 (2022).

⁵ Melody Gutierrez, *supra* note 2.

⁶ Health & Safety Code § 123466; Assembly Committee on Judiciary, *Assembly Floor Analysis*, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SCA10, (Jun 23, 2022).

⁷ *Roe v. Wade*, 410 U.S. 113 (1971); *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).

individual's right to contraceptives then progressed to include the right to abortion.⁸ Eventually, federal case law evolved to the viability test: a state may not outlaw abortion before the fetus is viable.⁹ A fetus is considered viable if the fetus is likely to survive outside the uterus.¹⁰

Recently, the Supreme Court overturned fifty years of precedent recognizing an individual's right to abortion and specifically ruled that the state has the right to regulate abortion.¹¹ However, California's state reproductive health law is based on the old federal standard and the development of reproductive freedom.¹²

B. Federal Case law leading to the decision in Dobbs

1. *Griswold v. Connecticut (1965)*¹³

Even though abortion was not the initial issue discussed, the history of reproductive freedom starts with a federal case establishing the right to privacy and outlawing a state ban on contraceptives. In *Griswold v. Connecticut*, the Court established the right to privacy in intimate relations and held that a married person has a right to privacy regarding decisions about childbearing.¹⁴ The Supreme Court concluded that state bans criminalizing contraceptive use were unconstitutional.¹⁵

2. *Griswold extended the right to choose to use contraceptives to unmarried individuals in 1972*

The right to privacy regarding an individual using contraceptives was extended to include unmarried individuals in a later US Supreme Court case in 1972, *Eisenstadt v. Baird*.¹⁶

3. *Roe applied Griswold's Right to Privacy to State Abortion Laws to Create the Viability Test*

A pregnant single woman challenged the constitutionality of Texas's criminal abortion laws, which outlawed abortions except when the mother's life was threatened.¹⁷ In *Roe v. Wade*, the Supreme Court held that criminal laws banning abortion were an infringement of a constitutional right to privacy.¹⁸ The Court adopted the viability test which allowed a state to

⁸ *Roe v. Wade*, *supra* note 7.

⁹ *Planned Parenthood v. Casey*, *supra* note 7 at p. 873.

¹⁰ *Id.*

¹¹ *Dobbs v. Jackson Women's Health Organization*, *supra* note 4.

¹² Allison MacBeth, et. al, *Fix the fatal flaw in SCA 10*, SCOCA BLOG, <http://scocablog.com/fix-the-fatal-flaw-in-sca-10/> (last visited Oct 17, 2022).

¹³ *Griswold v. Connecticut*, 381 U.S. 479 (1973)

¹⁴ *Id.* at 484-485 (1973) (finding the different amendments in the U.S. Constitution creates different zones of privacy).

¹⁵ *Id.*

¹⁶ *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

¹⁷ *Roe v. Wade*, *supra* note 7 at p. 113-114.

¹⁸ *Roe v. Wade*, *supra* note 7.

restrict abortion if the fetus was viable, and the women's health was not at risk from the pregnancy.¹⁹

4. *Supreme Court created a new abortion test called the Undue Burden Test*

After *Roe*, different states created new regulations on abortions, however, there was confusion on what restrictions were constitutional or not. In 1992, the Court preserved *Roe*'s constitutional protection for abortion, however, the Court created the Undue Burden test which gave states more discretion on how to regulate abortion.²⁰ In *Planned Parenthood v. Casey*, the Court looked at whether the state's regulation placed an undue burden on the mother and balanced that burden against the interests of the potential life of the fetus.²¹ *Casey* held that a state cannot ban pre-viability abortions because that restriction would place an undue burden on the mother without a compelling state interest.²²

C. The Supreme Court held that the U.S. Constitution does not recognize the federal right to abortion.

After *Casey*, states created "trigger bans" anticipating the eventual Supreme Court overruling of *Roe* and *Casey*.²³ In the recent Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*, the Court held that the U.S. Constitution does not confer a right to an abortion because the U.S. Constitution does not mention abortion.²⁴ The federal protection for abortion was only found in caselaw, so this ruling took away the federal protection for abortion. Moreover, this gave power to each state government to decide whether they want to protect or prohibit abortion in their state.

D. Current California Law

Currently, California law allows abortions to be performed if (a) the fetus is not viable; or (b) the fetus is viable, but the pregnancy risks the health of the person who is pregnant. A fetus is considered viable if the fetus is likely to survive outside the uterus.²⁵ This test was the prior federal test to determine whether the government is allowed to regulate abortion.²⁶

There are California cases that hold that the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion based on the federal law found in *Roe*.²⁷ The California State Legislature codified this ruling in the Reproductive

¹⁹ *Roe v. Wade*, *supra* note 7 at p. 163-164.

²⁰ *Planned Parenthood of Southwestern Pennsylvania v. Casey*, *supra* note 7 at p. 873.

²¹ *Id.* at 837.

²² *Id.* at 872.

²³ *Wilder's Response to Dobbs v. Jackson*, WILDER, <https://www.wilder.org/articles/wilders-response-dobbs-v-jackson>, (Jun 30, 2022) (explaining how trigger bans are pieces of legislation enacted to prohibit or limit abortion).

²⁴ *Dobbs v. Jackson Women's Health Organization*, *supra* note 4.

²⁵ Health & Safety Code § 123466.

²⁶ *Planned Parenthood of Southwestern Pennsylvania v. Casey*, *supra* note 7 at p. 833.

²⁷ *People v. Belous*, 71 Cal. 2d 954 (1969); *See* Assembly Committee on Judiciary, *supra* note 6.

Privacy Act.²⁸ This act allows abortion procedures to be performed until the fetus is viable.²⁹ After the fetus becomes viable, abortion is allowed if the procedure is necessary to protect the mother.³⁰ A fetus is considered viable if it is likely to survive without extraordinary medical measures.³¹

E. California's Political Leaders Rushing to Protection Abortion

In June 2022, Governor Gavin Newsom signed Assembly Bill 1666 to shield patients threatened by abortion bans in other states.³² The healthcare clinics would be funded by the proposed Reproductive Health Package.³³ Under the public policy of California, this bill prohibits the application of another state's law authorizing a civil action against a person or entity that attempts or intends to engage in abortion-related actions, against those seeking an abortion from those states.³⁴

F. Other States' responses to *Dobbs v. Jackson Women's Health Organization*

Overturing *Roe v. Wade* produced polarizing responses throughout the country. Currently, there are sixteen states where access to abortion is protected under state law.³⁵ Some states have outlawed abortion altogether.³⁶ Some states have not criminalized abortion, but they have heavily regulated access to abortion.³⁷ Some abortion bans are blocked by their state courts.³⁸

Kansas was the first state post-Dobbs to consider abortion rights on the ballot.³⁹ Kansas introduced a proposed state constitutional amendment that would have made clear there was no

²⁸ Health & Safety. Code §123462(c).

²⁹ Health & Safety Code § 123466 (d).

³⁰ Health & Safety. Code §123466.

³¹ Health & Safety. Code §123464(d).

³² Chris Nichols, *Governor Newsom Signs Bill to Shield Patients Threatened by Abortion Bans in Other States*, CAP RADIO, <https://www.capradio.org/articles/2022/06/24/watch-live-california-governor-gavin-newsom-on-states-action-to-protect-abortion-rights/>, (Jun 24, 2022).

³³ *Id.*

³⁴ *AB 1666*, FAST DEMOCRACY, <https://fastdemocracy.com/bill-search/ca/20212022/bills/CAB00023843/>, (Jun 24, 2022).

³⁵ Laurie Sobel, et. al, *16 States and DC have State Laws Protecting the Right to Abortion if Roe is Overturned*, KKF NEWS, <https://www.kff.org/womens-health-policy/slide/16-states-and-dc-have-state-laws-protecting-the-right-to-abortion-if-roe-v-wade-is-overturned/>, (Jun 17, 2022) (California, Oregon, Washington, Hawaii, Nevada, Colorado, Illinois, New York, New Jersey, Maryland, Washington DC, Delaware, Connecticut, Massachusetts, Rhode Island, Vermont, and Maine).

³⁶ Oriana Gonzalez, Jacob Knutson, *Where Abortion Has Been Banned Now That Roe v. Wade Is Overturned*, <https://www.axios.com/2022/06/25/abortion-illegal-7-states-more-bans-coming>, (Sept 22, 2022) (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Dylan Lysen et al, *Voters in Kansas decide to keep abortion legal in the state, rejecting an amendment*, NPR, <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>, (Aug 3, 2022).

right to an abortion in the state of Kansas.⁴⁰ The proposition was rejected by 59% of the voters.⁴¹ Post-*Dobbs*, fourteen US states implemented abortion restrictions or prohibitions.⁴² Oregon and Washington state announced their joint commitment with California to protect and expand abortion access by funding the proposed Reproductive Health Package.⁴³

G. Path to the Ballot

After the draft opinion of *Dobbs* was published by Politico, Governor Newsom, Senate pro Tempore Toni G. Atkins, and Assembly Speaker Anthony Rendon released a statement saying they intended to pass a state constitutional amendment to protect abortion rights.⁴⁴ The California Constitution requires a 2/3rd vote from both houses for a proposed constitutional amendment to be placed on the ballot.⁴⁵

On June 8, 2022, Proposition 1 was introduced as the Senate Constitutional Amendment 10. On June 20, 2022, the amendment passed in the California Senate with 29-8 votes.⁴⁶ On June 27, 2022, it passed in the state Assembly with 58-16 votes.⁴⁷ Afterward, Senate Constitutional Amendment 10, was placed on the ballot for California voters as Proposition 1.

III. PROPOSED LAW

Proposition 1 would amend the California Constitution to add Section 1.1 to Article 1 stating:

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 and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.⁴⁸

⁴⁰ Dylan Lysen et al, *supra* note 39.

⁴¹ *Id.*

⁴² *Tracking the States Where Abortion is Now Banned*, NEW YORK TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>, (last visited Oct 17, 2022)

⁴³ *State Facts About Abortion: Oregon*, GUTTMACHER, <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-oregon>, (Jun 2022).

⁴⁴ *Senate Leader Atkins, Legislators Introduce Constitutional Amendment to Enshrine Right to Abortion, Contraception*, SENATE PRESIDENT PRO TEMPORE SENATOR TONI G. ATKINS, <https://sd39.senate.ca.gov/news/20220608-senate-leader-atkins-legislators-introduce-constitutional-amendment-enshrine-right>, (Jun 8, 2022).

⁴⁵ Cal. Const., art. XVIII, § 1 (“The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.”).

⁴⁶ Prop 1, *supra* note 1.

⁴⁷ *Id.*

⁴⁸ Senate Constitutional Amendment 10.

If this amendment is approved, both the right to abortion and the right to choose or refuse contraceptives would be a California state constitutional right. If adopted, individuals who are denied contraceptives in California could make a case that their constitutional rights were violated. The goal of the proposition would be to make sure that the Legislature cannot change access to contraception or abortion.

IV. DRAFTING ISSUES

According to California Legislative Analyst, the Legislature's intention in drafting Proposition 1 is to enshrine the individual's right to reproductive freedom.⁴⁹ The language of the amendment includes "the state cannot deny or interfere with an individual's right to reproductive freedom." However, the amendment does not define what government regulation would constitute denying or interfering with someone's reproductive freedom.⁵⁰ The word "deny" implies that anything prohibiting an individual from getting an abortion would be denial.⁵¹ However, this interpretation conflicts with current California law when California follows the viability test.⁵²

Under California's Reproductive Act, an individual is restricted from accessing an abortion if the fetus is viable, and the pregnancy does not put the health or life of the person who is pregnant at risk.⁵³ Under case law, a fetus is considered viable if the fetus is likely to survive outside the uterus.⁵⁴ This is a problem because the protections and definitions for abortion were originally under federal law, and California was codifying those tests.⁵⁵ Now that the federal law is overturned, this amendment can leave open to the interpretation of the California courts to determine what would be considered "interference" or denial. Since Proposition 1 does not offer the California standard for abortion in the Constitution, the court could interpret an interference through the viability test or through the undue burden test, or some other test that is yet to be defined.⁵⁶ The use of either existing test could lead to a different outcome depending on how loosely or strictly a court defined "interference." Moreover, this amendment does not provide a specific test for the California courts to determine what would be considered a denial of an individual's reproductive freedom.

V. CONSTITUTIONAL ISSUES

According to the United States Constitution, federal law is supreme to any state law.⁵⁷ This means if a state law conflicts with valid federal law, then the federal law is the governing

⁴⁹ Assembly Committee on Judiciary, *supra* note 6.

⁵⁰ Senate Constitutional Amendment 10.

⁵¹ Allison Macbeth et. al, *supra* note 12.

⁵² *People v. Belous*, *supra* note 27; *See* Assembly Committee on Judiciary, *supra* note 6.

⁵³ Health & Safety Code § 123466.

⁵⁴ *Id.*

⁵⁵ Allison Macbeth et. al, *supra* note 12.

⁵⁶ *Id.*

⁵⁷ Article VI, cl 2.

law.⁵⁸ Therefore, prior to the *Dobbs*' ruling, a state could not outlaw abortion rights because it would violate *Roe*'s right to abortion. However, *Dobbs* turned the right to abortion to the states. Although Supreme Court has left the power to regulate abortion to the states, there is no clear answer whether the Supreme Court will apply preemption if abortion conflicts with other areas of law. A regulation on reproductive health can intersect with multiple areas like insurance, religion, health care, and administrative law.⁵⁹ Moreover, this leads to constitutional issues with Proposition 1 because California's right to abortion may intersect with other areas of law that may or may not apply preemption.

A. Supreme Court's finding that federal law requiring employer's to provide insurance for contraception violates the employer's religious freedom

In *Burwell v. Hobby Lobby*, the Supreme Court ruled that employers offering employees federal insurance are not required to provide contraception coverage because such a plan violated the employer's religious beliefs.⁶⁰ The employers objected to four of the contraceptive options under the insurance plan because the types of covered contraception work by preventing the implantation of an egg.⁶¹ In *Hobby Lobby*, the employer's religious belief was that life starts at conception so birth control preventing conception violated this belief.⁶² Although this was a case about individuals accessing contraceptive care through private employers, *Hobby Lobby*, was analyzed under the free exercise of religion clause because the individuals bringing the suit were exercising their freedom of religion. The right to contraceptives was not discussed because the employee could still access contraceptive care that prevented fertilizing of the egg. Moreover, *Hobby Lobby*, demonstrated how a federal law trying to provide contraceptive care to individuals was able to be frustrated by the constitutional right to freedom of religion.

Hobby Lobby's ruling may create tension in California where the state law provides insurance for this type of care.⁶³ This holding may impact the effectiveness of Proposition 1 because it shows how the right to contraceptive care may be impacted by the federal right to exercise religion.

B. Preemption can be expressed explicitly, or implicitly so the courts' interpretation can appear ambiguous when abortion intersects with other areas of law.

Although Congress has the authority to pass legislation that has preemptive power in many circumstances, it must explicitly act to govern an area if it wishes to disallow state regulations. Frequently, state and federal laws on similar topics operate in parallel.⁶⁴ For

⁵⁸ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 372-373 (finding "a fundamental principle of the Constitution is that Congress has the power to preempt state law").

⁵⁹ David S. Cohen, et. al., *The New Abortion Battleground*, 123 *Columbia Law Review* (2022), https://scholarship.law.pitt.edu/fac_articles/517 (draft version) (last visited Oct 17, 2022).

⁶⁰ *Burwell v. Hobby Lobby*, 573 U.S. 682, 690, 702-703 (2014) (finding employers means any closely held corporation and defendants, Hobby Lobby and Conestoga Wood Specialties met this burden).

⁶¹ *Id.* at 690, 720 (finding employers showed a sincere religious belief).

⁶² *Id.* at 701.

⁶³ Health & Safety Code § 1367.251.

⁶⁴ David S. Cohen, et.al, *supra* note 59 at p. 27.

example, “Congress has expressed preemptive purpose when it created legislation that governed medical devices but never did so for pharmaceuticals”.⁶⁵ This means that there is “very little case law directly evaluating whether a state may ban an FDA-approved drug mainly because states rarely attempt it.”⁶⁶ However, states are attempting to regulate the use of birth control.⁶⁷ The ambiguity of whether preemption applies creates uncertainty about what happens if a state outlaws birth control.⁶⁸ This issue intersects with Proposition 1 because Proposition 1 gives the right to contraceptive use to California citizens. If a California citizen temporarily lives out of state in a state that criminalizes the use of contraceptives, then the California citizen can challenge that their right is violated. This creates a constitutional issue for Proposition 1 because the court now has the power to interpret the application of Proposition 1. Moreover, this uncertainty can lead to more court challenges about the correct analysis of Proposition 1.⁶⁹

C. Potential Conflicts with the Other States Reproductive Health Laws

Different states that have opposing laws may come into conflict with each other. This conflict becomes a constitutional issue because the federal court has the jurisdiction to hear disputes between states and between citizens of different states.⁷⁰ Different states trying to impose their local abortion and contraceptive policies will create interjurisdictional issues for the federal court to rule on.⁷¹ For example, the California state legislature passed AB 1666 which provides a state fund to help pay for out-of-state residents’ abortions who come to California to have the procedure performed.⁷² An out-of-state resident whose home state outlaws abortion would make their home state law in direct conflict with AB 1666. The conflict resulting from the difference in laws is uncertain.

Contraceptives face a similar interjurisdictional issue because some companies provide nationwide contraceptive services. There are now online contraceptive providers who exclusively provide contraceptives through mailing services. This poses a problem when those companies are mailing products in a state that bans the use of contraceptives. If a California resident temporarily lives in a state⁷³ that outlawed the use of contraceptives, then would their right to contraceptives from Proposition 1 prevail, or would they be breaking the law in the state that they reside in? There is no clarity on whose authority will prevail.⁷⁴ Although these issues are not directly related to Proposition 1, they flow naturally from the creation of an express right to contraception and abortion and will continue to be discussed as reproductive freedom continues to be regulated by individual states.

⁶⁵ David S. Cohen, et.al, *supra* note 59 at p. 43-44.

⁶⁶ *Id.* at 50.

⁶⁷ Michael Ollove, *Some States Already Are Targeting Birth Control*, PEW TRUSTS, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control>, (May 19, 2022).

⁶⁸ David S. Cohen, et. al, *supra* note 59 at p. 28; *See* Alison Macbeth, et. al, *supra* note 12.

⁶⁹ *Id.*

⁷⁰ U.S. Const., Article 4, § 2.

⁷¹ David S. Cohen, et. al, *supra* note 59 at p. 44-45, 49, 50; *See* Alison Macbeth, et. al, *supra* note 12 (finding there will be challenges to the constitutionality of Proposition 1).

⁷² Chris Nichols, *supra* note 32.

⁷³ For example, a college or graduate student who is living out of state may not change their residency or domicile, so they are a California resident while living out of state.

⁷⁴ David S. Cohen, et. al, *supra* note 59 at p. 44-45, 49, 50 (2022).

VI. PUBLIC POLICY ISSUES

The individual's access to abortion and contraception is a highly charged political issue because there are individuals who are morally or religiously opposed to either medical procedure.⁷⁵ This has led to a drastic polarization between the two major political parties in the United States: Democrats and Republicans.⁷⁶ Democrats generally believe in the right to abortion and to choose contraceptives while the Republican Party is adamantly opposed to any right.⁷⁷

After the *Dobbs* ruling, the majority of the states governed by Republicans have outlawed, or heavily restricted abortions. Meanwhile, state governments that are majority Democrats are standing to protect the right to abortion.

A. Proponent Public Policy Argument

1. *Supporters of Proposition 1*

California's state legislature and Governor are the authors of Proposition 1.⁷⁸ The purpose of Proposition 1 is to enshrine reproductive freedom in the California Constitution.⁷⁹ The state government's concern arises from the outcome in *Dobbs*. The legislative intent is to ensure that if the political climate changed in California, individuals would still have protections regarding reproductive health.⁸⁰ The Legislature wants to ensure an individual's right to access to abortion and contraceptives. California alongside Oregon and Washington's state governments entered a commitment to stand united and protect abortion.⁸¹

Proponents of Proposition 1 argue that this amendment follows current California reproductive health law and policies because California has statutes and case law that protect the right to contraceptives and abortion. They advocate that the amendment does not change current

⁷⁵ Michael Lipka, *Abortion views within Parties: A Closer look at the Republicans who favor legal abortion, and the Democrats who oppose it*, PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2022/06/17/a-closer-look-at-republicans-who-favor-legal-abortion-and-democrats-who-oppose-it/>, (Jun 17, 2022).

⁷⁶ Craig Palosky, *Abortion Access Rises as a Voting Issue and Motivator, Especially Among Democrats and Reproductive-Age Women, But Inflation Continues to Dominate as Americans Worry About Bills*, KFF <https://www.kff.org/womens-health-policy/press-release/abortion-access-rises-as-a-voting-issue-and-motivator-especially-among-democrats-and-reproductive-age-women-but-inflation-continues-to-dominate-as-americans-worry-about-bills/>, (Aug 2, 2022).

⁷⁷ Elaine Kamarack, Celia Shapiro, *Will Abortion Affect the Midterm Vote for Candidates? Lessons from the Ban Gay Marriage Ballot Initiatives*, BROOKINGS, <https://www.brookings.edu/blog/fixgov/2022/09/15/will-abortion-affect-the-midterm-vote-for-candidates-lessons-from-the-ban-gay-marriage-ballot-initiatives/>, (last visited Oct 17, 2022).

⁷⁸ *Prop 1*, *supra* note 1.

⁷⁹ Assembly Committee on Judiciary, *supra* note 6.

⁸⁰ Assembly Committee on Judiciary, *supra* note 6.

⁸¹ *Prop 1*, *supra* note 1.

California law because the California constitution explicitly states the right to privacy, and state law provides the right to reproductive privacy. The proposed amendment would guarantee additional shield by amending the constitution and making reproductive rights constitutional.

2. *General Arguments for the Right to Reproductive Rights*

Proponents of Proposition 1 are concerned about protecting an individual's reproductive freedom. Advocates of reproductive rights argue that women should have bodily autonomy when it comes to reproduction.⁸² The decisions about bearing a child should come from the individual raising the child. Abortion is a medical procedure that needs regulation on how it is operated so individuals are in safe sanitary conditions. When abortion is outlawed, pregnant people will still seek abortions, but will be forced to seek unsafe abortions.⁸³ The World Health Organization estimates over 25 million unsafe abortions take place each year.⁸⁴ If a state criminalizes abortions, then pregnant individuals seeking access to abortion will have to look for an alternative option that is potentially dangerous.⁸⁵ Unsafe abortions would lead to an increase in death and serious injury in these procedures when unsafe abortions are preventable.⁸⁶ Supporters of abortion rights argue that an abortion ban is not stopping abortions from occurring, but it is halting safe abortions.

B. Opponent's Public Policy Argument

1. *Pro-Life Arguments for why they are opposed to the Amendment*

Although most Californians are Democrats and support reproductive freedom, there are some Republican counties in California. While Republicans' and Democrats' views on the legality of abortion have long differed, the 46-percentage point partisan gap today is considered larger than it was in the recent past.⁸⁷ This divide is based on philosophical, religious, or cultural views on life beginning at conception, thus abortion as a practice is morally wrong.⁸⁸ The main religious groups that support these views are the Christian evangelicals and the Catholic church members.⁸⁹

⁸² *Key Facts on Abortion*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/>, (last visited Oct. 17, 2022).

⁸³ *Id.*

⁸⁴ *Key Facts about Abortion*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/fact-sheets/detail/abortion>, (Nov 25, 2021).

⁸⁵ Amnesty International, *supra* note 82.

⁸⁶ *Id.*

⁸⁷ Carrie Blazina, *Key Facts About The Abortion Debate In America*, PEW RESEARCH CENTER, <https://www.pewresearch.org/fact-tank/2022/07/15/key-facts-about-the-abortion-debate-in-america/>, (Jul 15, 2022).

⁸⁸ Alexei Koseff, *Hope and Prayer: California Churches Battle Abortion Ballot Measure*, CAL MATTERS, <https://calmatters.org/politics/election-2022/2022/10/california-ballot-measure-abortion-churches/> (Oct. 3, 2022) (citing to Father Michael Mahoney of Our Lady of Angels Paris encouraging families to take home "No Prop 1" signs for their yards because "Life is precious from the very moment of conception [...] This is against everything that we believe in as Catholics").

⁸⁹ *Deep Religious Divisions in Religion*, PEW RESEARCH CENTER, https://www.pewresearch.org/fact-tank/2022/07/15/key-facts-about-the-abortion-debate-in-america/ft_2022-07-14_abortionkeyfacts_05a/ (last visited Oct 17, 2022).

Due to their moral view, some Christian and Catholic advocates argue against any law supporting reproductive health.⁹⁰ This view stops any debate about the benefits of allowing access to abortions because if a person thinks God is against reproductive freedom, then the individual is not willing to debate the benefits of abortion and contraceptive care.⁹¹

2. *Pro-Choice Arguments for why they will vote on Proposition 1*

Although Proposition 1 has major support from pro-choice voters, some pro-choice voters have concerns about the drafting choices made by the authors.⁹² Some opponents of Proposition 1 argue that a new constitutional amendment opens the court's door to challenges from anti-choice individuals who want to see abortion restricted in court.⁹³ They fear that the appointments to the federal bench made during the Trump administration have left the federal judiciary with many anti-choice jurists.⁹⁴ There is concern that anti-choice litigation would be pursued in federal court to challenge Proposition 1.

Another objection is the potential for California's budget to become overburdened as out-of-state residents come to California seeking abortions.⁹⁵ Post *Dobbs*, the number of women for whom the nearest abortion provider is now in California has increased by 3,000%, from about 46,000 to 1.4 million.⁹⁶ Moreover, "pro-choice" opponents of Proposition 1 would like to see clearer wording in the Proposition before they vote "yes" on the measure.

VII. CAMPAIGN FINANCE

According to Politico, proponents of Proposition 1 have spent \$1.3 million in support of the measure.⁹⁷ Meanwhile, opponents of Proposition 1 have spent \$0 against it.

VIII. FISCAL CONSIDERATION

The Legislative Analyst's office lists no major fiscal impacts because abortion is already legal in California. However, there is criticism of this view because this analysis does not

⁹⁰ Alexei Koseff, *supra* note 88.

⁹¹ Susan E. Wills, Esq., *Ten Legal Reasons to Reject Roe*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/ten-legal-reasons-to-reject-roe>, (last visited Oct. 17, 2022).

⁹² Alison Macbeth, et. al, *supra* note 12.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Lauren Hepler, *California Thinks It Can Be An Abortion Sanctuary In A Post-Roe Nation. These Battlegrounds Tell A Different Story*, SAN FRANCISCO CHRONICLE, <https://www.sfchronicle.com/california/article/california-abortion-sanctuary-roe-wade-17249378.php>, (Aug 14, 2022).

⁹⁶ April Dembosky, *California Lawmakers Ramp Up Efforts To Become A Sanctuary State For Abortion Rights*, NPR, <https://www.npr.org/sections/health-shots/2022/06/02/1102317414/california-lawmakers-ramp-up-efforts-to-become-a-sanctuary-state-for-abortion-ri>, (Jun 2, 2022).

⁹⁷ Alexander Nieves, et. al, *California Ballot Tracker: Interest Groups Prepare For Expensive 2022 Fights*, POLITICO, <https://www.politico.com/interactives/2022/california-ballot-measures-propositions-guide-2022/>, (Sept 10, 2022).

consider how this amendment may affect California's budget being spent on litigation and increases in insurance.⁹⁸

IX. CONCLUSION

Proposition 1's objective is to enshrine an individual's reproductive freedom as a fundamental right. Reproductive freedom is defined as an individual's right to choose or refuse contraceptives, and to choose to have an abortion.⁹⁹ The measure amends California's Constitution to ban the state from denying or interfering with an individual's right to reproductive freedom. The amendment does not refer to any of California's statutory or case laws regarding abortion or the right to choose or refuse contraceptives.¹⁰⁰

Proponents argue this amendment will protect reproductive rights in California since there is no longer a federal right to abortion. Proponents argue that this will not impact California fiscally since California case law already recognizes the right to abortion and contraceptives. Since this is a heavily contested issue, there is fear that California law could change so this amendment is necessary to protect reproductive rights.¹⁰¹ Opponents of Proposition 1 fall into two camps. The first camp is opposed to any pro-reproductive rights amendment because the position is against their religion.¹⁰² The second camp wants Proposition 1 to be amended because the wording of the proposition is vague, and it does not reference any California law protecting reproductive rights.¹⁰³

A "YES" vote for Proposition 1 means that the state cannot deny or interfere with an individual's reproductive freedom. Reproductive freedom means that an individual has the choice to use or refuse contraceptives and the right to abortion. This would enshrine reproductive freedom as a fundamental right.

A "NO" vote for Proposition 1 means that the California Constitution would not be changed to include reproductive freedom as a fundamental right. This means that an individual's right to choose or refuse contraceptives or the right to abortion will not be included in California's Constitution. An individual's right to choose or refuse contraceptives or the right to abortion will remain under existing California statutes.

⁹⁸ Alison Macbeth, et. al, *supra* note 12.

⁹⁹ Senate Constitutional Amendment 10.

¹⁰⁰ Melody Gutierrez, *supra* note 2.

¹⁰¹ Assembly Committee on Judiciary, *supra* note 6.

¹⁰² Susan E. Wills, *supra* note 91.

¹⁰³ Alison Macbeth, et. al, *supra* note 12.