

Statement in Support of SJR 13

“A Resolution: Proposing an Amendment to the Constitution of the State of Alaska
Relating to Abortion.”

By

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This statement is **in SUPPORT OF SJR 13: “A Resolution: Proposing an amendment to the Constitution of the State of Alaska relating to abortion.”**

Voters in Alaska and their elected officials should be allowed to speak to the status of abortion within their state. Unconscionably, the Alaska Supreme Court has denied Alaskan citizens and elected officials this right beginning with its ruling in *Valley Hospital Association v. Mat-Su Coalition for Choice*ⁱ in 1997. Action must be taken to reverse this abhorrent usurpation of the rights of Alaska citizens by the Alaska Supreme Court. SJR 13 seeks to do this.

Given the concerning state of abortion in Alaska, Alaskan citizens deserve the right to speak directly to the issue at the ballot box and through their elected officials. SJR 13 allows them to do this. In 2018, 1,283 abortions were preformed in Alaska. While abortions are significantly decreasing across the U.S., Alaska has seen a 2% increase. According to the most recent report from the State of Alaska Department of Health and Social Services, Alaska saw an increase in the number of abortions performed for the first time in six years. Forty-five percent (45%) of these abortions were covered by Medicaid.ⁱⁱ

I. Citizens and Elected officials have a Constitutional Right to Protect Human Life.

As stated with its text, SJR 13 would allow Alaskans to “protect human life,” should they so desire. It is noteworthy that SJR 13 would protect two human lives: the unborn child, and the mother. Protecting human life is a noble and constitutional goal for any state that is for state legislatures and not the state courts to prohibit.

A. State governments may work to protect human life (the life of the unborn child and the mother) from the destruction of abortion.

The United States Supreme Court has explicitly found that state governments are permitted to take measures to protect human life. As the court stated in *Roe v. Wade*, “[T]he State...has legitimate interests in protecting...the potentiality of human

life...”ⁱⁱⁱ. This conclusion was again affirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 at 846 (1992), where the court recognized both a right to protect human life and protect the health of the mother: “the State has legitimate interests from the outset of the pregnancy in protecting the **health of the woman** and the **life of the fetus** that may become a child” (emphasis added).

B. The Alaska Supreme Court should not prevent the Alaska State Legislature and Alaskan citizens from exercising their Constitutionally protected right to preserve the lives and health of Alaskan women.

As noted above in *Casey*, the U.S. Supreme Court allows states to consider the “health of the woman” when considering state abortion policy.

The Alaska State Legislature and Alaskan citizens may very well have a legitimate concern about the health consequences of abortion for women. Numerous studies indicate that abortion often leads to serious medical and psychological consequences, including but not limited to: placenta previa, subsequent preterm birth, depression, anxiety, substance abuse, and even death or suicide.^{iv} In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the U.S. Supreme Court recognized the emotional damage a woman may experience from abortion: “It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns...that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.”

Because abortion results in the destruction of unborn life, and abortion is known to cause physical and mental harm in the lives of women, Alaska voters should be given the opportunity to exercise their constitutional right to protect the lives of both.

C. States have passed similar measures in recent years that have been upheld by Courts.

In 2014, citizens in Tennessee approved a ballot measure to amend the Tennessee State Constitution saying, “Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.” The measure passed 52.6% to 47.4%.^v When a lawsuit was filed against the state, the 6th Circuit U.S. Court of Appeals **upheld the right of Tennessee voters to approve** such a ballot measure, returning the issue to Tennessee citizens from the Tennessee Supreme Court.^{vi}

In 2018, voters in Alabama favored a ballot measure: “Proposing an amendment to the Constitution of Alabama of 1901, as amended; to declare and otherwise affirm that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, most importantly the right to life in all manners and measures appropriate and lawful; and to provide that the constitution of this state does not protect the right to abortion or require the funding of abortion.” The ballot measure passed 59% to 41%.^{vii} There were no legal challenges to this ballot measure.

Also in 2018, West Virginia approved “Amendment 1: No Constitutional Right to Abortion Amendment” that stated: “Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.” West Virginia Amendment 1 was approved by voters 52% to 48%.^{viii} No subsequent legal challenges were filed.

II. The Alaska Supreme Court Should Not Deny Alaskan Citizens Their Constitutional Right to Limit Taxpayer Funding of Abortion

SJR 13 states that, “nothing in this constitution may be construed to...require the State to fund an abortion.” Alaska and its citizens may constitutionally limit funding of abortion.

A. A Significant Number of Abortions Performed in Alaska are Subsidized by Taxpayer Funding in Opposition to the wishes of Taxpayers.

According to the most recent statistical data, forty-five percent (45%) of Alaska abortions were covered by Medicaid.^{ix} However, six (6) in ten (10) Americans oppose taxpayer funding of abortion. ^x

B. The Supreme Court of the United States recognizes the Constitutional Right of States to restrict the use of taxpayer funding for abortions.

In *Harris v. McRae*, the U.S. Supreme Court ruled it constitutional for governments to limit taxpayer funding of abortion: “Congress has established incentives that make childbirth a more attractive alternative than abortion **for persons eligible for Medicaid**. These incentives bear a direct relationship to the **legitimate congressional interest in protecting potential life**.”^{xi}

Likewise in *Rust v. Sullivan*^{xii}, the Court affirmed the right for the federal government to restrict entities receiving Title X funding from counseling clients on or referring clients for abortion.

C. Taxpayer Funding Dramatically Increases the Rate of Abortion.

Alaska expanded its state Medicaid program in 2015 to include coverage of abortion. From 2013 through 2015, Medicaid funded abortions averaged 473 per year. From 2016 through 2018, Medicaid funded abortions averaged 579 per year, an average increase of 117 Medicaid funded abortions per year.^{xiii}

As another example, Dr. James Studnicki and Dr. James W. Fisher conducted a case study, which revealed a dramatic increase in the number of abortions performed by Planned Parenthood over 20 years, during which the organization also had a significant increase in taxpayer funding.

The case study reviewed the abortions provided by organizations affiliated with the Planned Parenthood Federation of American (“PPFA”). According to the study, PPFA holds the largest market-share in America’s abortion industry. PPFA is also a grant recipient of federal Title X funding. According to its most recent Annual Report at the time of the study, PPFA performed 321,384 abortion procedures in a one-year period from October 1, 2015 through September 30, 2016. Compared nationally, PPFA performs more than one-third of all abortions in the United States; approximately 926,200 abortions were performed by all abortion providers in the United States in 2014. Of particular note is that, while the rate of abortion in the United States has steadily declined for the past 30 years, abortions performed by PPFA have increased dramatically. Since 1995, abortions performed by non-PPFA providers decreased by 50.8%, while PPFA **abortions increased by an astonishing 142%.**^{xiv}

Given these concerns, the Alaskan Supreme Court should not deny Alaskan citizens their Constitutional right to determine, for themselves, whether or not to subsidize abortion with their own money.

III. The Alaska Constitution Should Establish Guidance in the Event *Roe v. Wade* and *Doe v. Bolton* are Reversed.

Because of the growing possibility that *Roe* may be substantially limited or even reversed, the fact that the Alaskan Supreme Court has usurped the right of Alaskan citizens on this issue is especially concerning. If this happens, the question of abortion will be returned to the states, where the power to decide the extent to which abortion will be legal rightfully should belong to Alaska’s 737,438 citizens, through their elected official’s representation, and not limited to the five (5) members of the Alaskan Supreme Court, which constitute a mere 0.0007% of Alaska’s population.

A. The extreme abortion policies of *Roe v. Wade* and *Doe v. Bolton* have been reduced through subsequent U.S. Supreme Court Opinions.

The distinct possibility that Alaska should be prepared to legislatively address abortion has been demonstrated by the U.S. Supreme Court's gradual retraction of its decision in *Roe* and *Doe*.

In 1973, the U.S. Supreme Court issued two (2) opinions related to abortion. In *Roe v. Wade*,^{xv} the Court denied states the right to regulate abortion in the first trimester, gave states the right to regulate abortion in the second trimester only to protect the health of the woman, and in the third trimester, the right to regulate or prohibit abortion to protect the life of the fetus, except when necessary to preserve the life or health of the mother. *Doe v. Bolton*,^{xvi} a lesser-known companion case was decided the same day. In *Doe*, the Court expanded the health exception to all trimesters and provided a broad definition of health as being: "'all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient.'"

Since *Roe* and *Doe*, the Court has started to gradually reverse course, granting states more authority to restrict abortion.

In *Planned Parenthood of Southeastern Pa. v. Casey*,^{xvii} the Court failed to overturn *Roe* and *Doe*, but granted states the right to restrict abortion, even in the first trimester, so long as the restrictions did not create an "undue burden" on a woman seeking an abortion. Specifically, the Court upheld parental consent for minors (so long as a judicial bypass is available), waiting periods, and informed consent laws.

In 2007, the Court decided *Gonzales v. Carhart*,^{xviii} allowing the federal prohibition against Partial-Birth Abortion to stand. *Gonzales* reaffirmed the State's interest in preserving life and protecting the health of the mother. Justice Thomas, joined by Justice Scalia issued a concurrence supporting the reversal of *Roe*, stating "I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, 410 U. S. 113 (1973), has no basis in the Constitution."

On March 4, 2020, the Court will hear *June Medical Services LLC v. Russo*.^{xix} This case will give the Court yet another opportunity to further pull back from *Roe*, or overturn *Roe* altogether.

B. The current composition of the U.S. Supreme Court lends itself for further restrictions of *Roe*, or the reversal of *Roe* altogether.

The current composition of the U.S. Supreme Court is presumably favorable to additional restrictions on abortion and potentially to a reversal of our extreme abortion jurisprudence altogether. Three (3) of the nine (9) current Justices have demonstrated that they support restrictions on abortion in prior Supreme Court decisions: Justices Thomas, Alito and Roberts. Thomas has already expressed his

opinion that *Roe* has “no basis in the Constitution.” Conversely, four (4) of the nine (9) current justices have demonstrated support for maintaining or increasing the current extreme abortion policies of *Roe*: Justices Ginsburg, Breyer, Sotomayor, and Kagan. Ginsburg has argued that abortion should be afforded protection under the Constitution’s Equal Protection Clause. Very recently, two (2) Justices have been appointed and confirmed for placement on the Court, Justices Gorsuch and Kavanaugh. Presumably Gorsuch and Kavanaugh favor restrictions on abortion, tilting the balance to five (5) justices in favor of restrictions and four (4) opposed. While decisions are very difficult to predict, the general consensus is that the Supreme Court is in the most favorable position to reverse *Roe* than it has been since its passage.

As noted above, the next abortion case before the Court will be heard on March 4, 2020, with an anticipated decision released before the end of June 2020. Alaska needs be ready to respond.

C. The U.S. Supreme Court is allowed to overturn *Roe* and *Doe*, and return the issue of legalized abortion back to the States.

Reversing its own precedent is not uncommon for the U.S. Supreme Court, often because of updated information technology, and changes in social opinions. In fact, to date the Court has overturned 236 of its own decisions.^{xx} Notable examples include, *Plessy v. Ferguson*^{xxi}, which was overturned by *Brown v. Board of Education*^{xxii}; *Bowers v. Harwick*^{xxiii}, which was overturned by *Lawrence v. Texas*^{xxiv}, and *Baker v. Nelson*^{xxv}, which was overturned by *Obergefell v. Hodges*^{xxvi}.

D. Many states have already taken preparative measures to clarify their position on abortion policy should *Roe* and *Doe* be reversed.

Should *Roe* be reversed, the issue of abortion will return to the states. In recent years, and in light of the points noted above, many states have enacted laws to address the position of their state on abortion should *Roe* be reversed. These are often referred to as “trigger laws.” Twelve (12) states have laws in place that will ban elective abortion within their states should *Roe* be reversed: AL, AZ, AR, KY, LA, MI, MS, MO, ND, OK, WV and WI. Conversely, thirteen (13) states have laws that will allow abortions should *Roe* be reversed. In eleven (11) states the abortion would be legalized during the first trimester without restriction: CA, CT, DE, GA, HI, ME, MD, NV, NM, RI, and WA. Two (2) states would allow abortion throughout pregnancy: VT and OR.^{xxvii}

In light of these reasons, the decision as to which course Alaska will take on abortion should be returned to the citizens of Alaska.

For these reasons, I urge a vote in support of SJR 13: “A Resolution: Proposing an amendment to the Constitution of the State of Alaska relating to abortion.”

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- ⁱ 948 P.2d 963 (Alaska 1997).
- ⁱⁱ State of Alaska, Department of Health and Social Services. "2018 Alaska Induced Termination of Pregnancy Statistics." Feb. 2019. Available at: <http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/itop/2018%20Alaska%20ITOP%20Statistics%20V0.4.2.pdf>. (Accessed 25 Feb. 2020).
- ⁱⁱⁱ *Roe v. Wade*, 410 U.S. 113, at 162
- ^{iv} Americans United for Life. "Known Health Risks of Abortion." Available at: <https://aul.org/wp-content/uploads/2019/01/Summary-of-Known-Health-Risks-of-Abortion.pdf> (Accessed 25 Feb. 2020).
- ^v Ballotpedia. "Tennessee Legislative Powers Regarding Abortion, Amendment 1 (2014)." Available at: [https://ballotpedia.org/Tennessee_Legislative_Powers_Regarding_Abortion_Amendment_1_\(2014\)#cite_note-quotedisclaimer-17](https://ballotpedia.org/Tennessee_Legislative_Powers_Regarding_Abortion_Amendment_1_(2014)#cite_note-quotedisclaimer-17). (Accessed 25 Feb. 2020).
- ^{vi} *George et al v Hargett et al*, 6th U.S. Circuit Court of Appeals, No. 16-5563 (2018).
- ^{vii} Ballotpedia. "Alabama Amendment 2, State Abortion Policy Amendment (2018)." Available at: [https://ballotpedia.org/Alabama_Amendment_2_State_Abortion_Policy_Amendment_\(2018\)#cite_note-quotedisclaimer-9](https://ballotpedia.org/Alabama_Amendment_2_State_Abortion_Policy_Amendment_(2018)#cite_note-quotedisclaimer-9) (Accessed 25 Feb. 2020).
- ^{viii} Ballotpedia. "West Virginia Amendment 1, No Right to Abortion in Constitution Measure (2018)." Available at: [https://ballotpedia.org/West_Virginia_Amendment_1_No_Right_to_Abortion_in_Constitution_Measure_\(2018\)#cite_note-quotedisclaimer-12](https://ballotpedia.org/West_Virginia_Amendment_1_No_Right_to_Abortion_in_Constitution_Measure_(2018)#cite_note-quotedisclaimer-12) (Accessed 25 Feb. 2020). (Accessed 25 Feb. 2020).
- ^{ix} State of Alaska, Department of Health and Social Services. "2018 Alaska Induced Termination of Pregnancy Statistics." Feb. 2019. Available at: <http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/itop/2018%20Alaska%20ITOP%20Statistics%20V0.4.2.pdf>. (Accessed 25 Feb. 2020).
- ^x "Americans' Opinions on Abortion" Marist Poll, Knights of Columbus. January 2018. Web. Available at: <https://www.kofc.org/un/en/resources/communications/abortion-limits-favored.pdf> (accessed 25 Feb. 2020).¹_{SEP}
- ^{xi} *Harris v. McRae*, 448 U.S. 297, at 325 (1980) (emphasis added).
- ^{xii} 500 U.S. 173 (1991)
- ^{xiii} New, MJ. "An Analysis of Medicaid Expansion in Kansas Will Affect Abortion Rates." 19 Feb. 2020. Available at: <https://lozierinstitute.org/an-analysis-of-how-medicaid-expansion-in-kansas-will-affect-abortion-rates/> (Accessed 25 Feb. 2020); and State of Alaska, Department of Health and Social Services. "2018 Alaska Induced Termination of Pregnancy Statistics." Feb. 2019. Available at: <http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/itop/2018%20Alaska%20ITOP%20Statistics%20V0.4.2.pdf>. (Accessed 25 Feb. 2020).
- ^{xiv} Studnicki, J. and Fisher, J.W. (2018) Planned Parenthood: Supply Induced Demand for Abortion in the US. *Open Journal of Preventive Medicine*, 8, 142-145. <https://doi.org/10.4236/ojpm.2018.84014>.
- ^{xv} 410 U.S. 113 (1973)
- ^{xvi} 410 U.S. 179 (1973)
- ^{xvii} 505 U.S. 833 (1992)
- ^{xviii} 550 U.S. 124 (2007)
- ^{xix} U.S. Supreme Court Docket No. 18A774.
- ^{xx} Willingham, AJ. "The Supreme Court has overturned more than 200 of its own decisions. Here's what it could mean for *Roe v. Wade*." CNN. 29 May 2019. Available at: <https://www.cnn.com/2019/05/29/politics/supreme-court-cases-overturned-history-constitution-trnd/index.html> (Accessed 25 Feb. 2020).
- ^{xxi} 163 U.S. 537 (1896). Upholding racial segregation.
- ^{xxii} 347 U.S. 483 (1954). Finding racial segregation in public schools unconstitutional.
- ^{xxiii} 478 U.S. 186 (1986). Upholding the criminalization of homosexual sodomy.
- ^{xxiv} 539 U.S. 558 (2003). Finding prohibitions on homosexual activity to be unconstitutional.

^{xxv} 291 Minn. 310, 191 N.W.2d 185 (1971). Supreme Court of Minnesota upheld prohibition on issuing marriage licenses to same-sex couples. The U.S. Supreme Court rejected a petition to review on appeal.

^{xxvi} 576 U.S. ____ (2015). Finding a Constitutional right of same-sex couples to marry.

^{xxvii} Guttmacher Institute, Public Policy Office. "Abortion Policy in the Absence of Roe." 1 Feb. 2020.

Available at: <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe>.

(Accessed 25 Feb. 2020).