



ATTORNEY GENERAL OF MISSOURI
ANDREW BAILEY

November 22, 2024

OPINION LETTER NO. 22-2024

The Honorable Mike Kehoe
Governor Elect of Missouri
State Capitol
201 W. Capitol Avenue, Room 224
Jefferson City, MO 65101

Dear Lieutenant Governor Kehoe:

This opinion letter provides an assessment of the legal effect of Amendment 3 on five statutes. Although the Secretary of State has not yet certified the results of the election, the unofficial results show that Amendment 3 was adopted—just barely—by a margin of 3%. In a contest where the “yes” side was able in effect to rewrite the ballot summary language, received tens of millions of dollars in funding from out of state, and outspent the “no” side 6 to 1, this tight margin suggests the result may be very different if a future constitutional amendment is put up for a vote.

Nonetheless, until and unless voters have an opportunity to vote again in a possible future election, Amendment 3 will render some statutes unenforceable. Your request for an opinion about the effect of Amendment 3 seeks an opinion about five statutes. Missouri statutes entirely prohibit elective abortion—*i.e.*, abortions other than those performed because of a medical emergency. §§ 188.017, -.030, RSMo. Missouri statutes also have overlapping provisions that prohibit elective abortions after 8 weeks (§ 188.056), 14 weeks (§ 188.057), and 18 weeks (§ 188.058). If Amendment 3 is certified and goes into effect, it will generally prohibit the Attorney General, the Governor, locally elected prosecutors, the Department of Health and Senior Services, the Division of Professional Registration, and other officials from enforcing these provisions.

That does not mean, however, that the statutes are *facially* unenforceable. A statute is facially unconstitutional only if “no set of circumstances exists under which the Act would be valid.” *State v. Kerr*, 905 S.W.2d 514, 515 (Mo. banc 1995) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). If Amendment 3 is certified, there will remain some circumstances where these five statutes are enforceable, and the Attorney General will vigorously enforce them in those circumstances.

First, under the express terms of the amendment, the government may still protect innocent life after viability. The statutes thus remain generally enforceable after viability. The Attorney General accordingly will continue to enforce these laws in those circumstances (subject to the life/health of the mother exception stated in the amendment), and other officials have a constitutional duty to do the same.

Second, the Attorney General will continue to enforce these statutes in circumstances where parents do not consent to an adolescent minor obtaining an abortion. Under the U.S. Constitution, parents have a “fundamental right ... to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This includes the “right to refuse unwanted medical treatment.” *Washington v. Glucksberg*, 521 U.S. 702, 725–26 (1997). Amendment 3 cannot displace that federal constitutional right.¹ These five statutes thus remain enforceable against abortion clinics and abortion physicians in circumstances where a parent has not consented to a minor obtaining an abortion.

The Supreme Court (wrongly) curtailed these traditional parental rights under the *Roe v. Wade* framework. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74–75 (1976); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979). But when the Supreme Court reversed the *Roe* line of cases, acknowledging that those decision were “egregiously wrong from the start” and an “abuse of judicial authority,” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022), the Court restored longstanding parental rights. As a result, parents have a fundamental right—protected by the U.S. Constitution—to prohibit abortions on adolescent minors without parental consent. The Attorney General thus will continue to enforce these laws vigorously in circumstances where parents or legal guardians have not consented. Other officials have a duty to do the same.

Third, nothing in Amendment 3 provides a right to pressure others to obtain an abortion. The right of parents to forbid minors from obtaining abortions should not be misunderstood to somehow imply a right to *force* abortion on minors. Parents’ fundamental rights include the “right to *refuse*” a procedure, but courts have never “transmuted” this right to refuse into a right to obtain a procedure. *Glucksberg*, 521 U.S. at 725–26. Nothing in Amendment 3 does either. The Attorney General thus will continue to vigorously enforce all these laws in circumstances where an adolescent minor obtains an abortion due to unlawful pressure from parents.

The same is true for adults coerced into abortion. A recent peer-reviewed study found that 61% of women “reported high levels of pressure” to abort, including

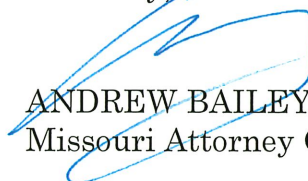
¹ Along similar lines, Amendment 3 cannot displace any state official’s federal authority to enforce federal law. The Attorney General does not interpret Amendment 3 to authorize activities prohibited by federal law and will continue enforcing in any circumstance where activities by an abortion clinic violate federal law.

pressure from abortion clinics.² And there is an unfortunate, sordid history of coerced abortion in Missouri. Two years ago, for example, a sitting Congresswoman from St. Louis sat for a public interview where she revealed that an abortion clinic coerced her into having an abortion.³ Amendment 3 does not give abortion clinics a right to perform abortions on women who have been coerced. It would defy logic to say that an amendment meant to give a woman a right to an abortion (while eliminating the unborn child's rights) could instead be twisted into a tool enabling abusers and oppressors to coerce abortion. The Attorney General will thus continue enforcing these laws in circumstances where women have unlawfully been pressured to abort. Again, other officials have a duty to do likewise.

One final note: should Amendment 3 be construed more narrowly by courts or be amended or repealed in the future to permit greater protection of unborn life, that will automatically restore authority to the Attorney General and other officials to resume broader enforcement. Amendment 3 does not remove these statutes from the books, so there will be no need to reenact them if Amendment 3 is altered in the future. For example, although the Supreme Court declared the Fair Labor Standards Act unconstitutional with respect to state employees in 1976, when the Supreme Court reversed course a decade later, those statutes immediately became enforceable again without further act of Congress. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533–34, 555–57 (1985); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 838, 851–52 (1976).

In sum, this letter responds to a request for an opinion about the effect of Amendment 3 on five statutes. The Attorney General concludes that Amendment 3, if certified, will generally prohibit the Attorney General and other officials from enforcing §§ 188.017, .030, .056, .057, and .058.⁴ The Attorney General thus will cease enforcing these statutes in general circumstances. But Amendment 3 and the U.S. Constitution permit the Attorney General and other officials to continue enforcing these laws after viability (with some exceptions), when there is no parental consent, and when the woman has been unlawfully pressured.

Sincerely,


ANDREW BAILEY
Missouri Attorney General

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² David C. Reardon, Tessa Longbons, *Effects of Pressure to Abort on Women's Emotional Responses and Mental Health*, *Cureus* 15(1) (Jan. 31, 2023), doi:10.7759/cureus.34456.

³ *See Firing Line: Cori Bush* (PBS Oct. 7, 2022), <https://www.pbs.org/video/cori-bush-fzpcjd>.

⁴ The Attorney General has not received a request for an opinion about the effect of Amendment 3 on any other statute, so nothing in this letter should be construed one way or the other with respect to those other statutes.