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EDITOR'S PICK

Abortion is on the West Virginia ballot. Here's what you need to know.

By Erin Beck Register-Herald Reporter

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West Virginia voters are deciding whether to give state lawmakers, who've passed several anti-abortion laws in recent years, more authority over women's access to abortion in West Virginia.

Remember, the state has three branches of government – the executive branch, the legislative branch, and the judicial branch.

The West Virginia Legislature passes laws, but courts serve as a check on the Legislature. They make sure it isn't overstepping its authority and look to the West Virginia Constitution for guidance.

During early voting now and on Election Day Nov. 6, voters will decide whether to amend the state constitution so that the judicial branch can no longer find a right to abortion within it.

West Virginia Amendment No. 1 states, "Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion."

It means courts wouldn't be able to use the state's guiding document, the constitution, to serve as that check on abortion rights issues.

Why is this amendment on the ballot? Isn't it about Medicaid?

Some supporters of the amendment say the amendment is on the ballot so that West Virginia taxpayers no longer have to pay for abortions.

In the *Womens' Health Center of West Virginia, Inc. v. Panepinto* decision in 1993, the state Supreme Court found that Medicaid should cover abortion. Justice Margaret Workman, who was recently impeached by the same Legislature that voted to put this amendment on the ballot, wrote in the opinion that denying Medicaid coverage of abortion discriminated against poor women.

Since then, West Virginia Medicaid has paid for abortion. In 2017, women had to make under \$17,000 annually to qualify.

So it's true that the amendment, by changing the West Virginia Constitution to explicitly not include a right to abortion, would mean that the 1993 decision no longer applies, and West Virginia tax dollars wouldn't go to abortions.

But the amendment is not all about Medicaid and taxpayer funding. Lawyers and other people active in abortion access and anti-abortion movements know that changing the guiding document for the state of West Virginia's government, the constitution, does more than change one court case.

First, the amendment's lead sponsor, Senator Patricia Rucker, R- Jefferson, has said that it was incorrect that the amendment was about Medicaid and said that it was about the Legislature's ability to enact abortion restrictions generally, as it had done so for several years.

Second, a plain reading of the amendment and the inclusion of the word "or" indicates that there are two issues contained, the right to abortion ("Nothing in this Constitution secures or protects a right to abortion"), and taxpayer-funded abortion ("or requires the funding of abortion").

Third, this amendment is modeled after a Tennessee amendment, passed in 2014, which had nothing to do with Medicaid-funded abortion, as that state several hours south of here does not and has never had Medicaid-funded abortion.

Several abortion restrictions were implemented there in response in the years following, all having nothing to do with Medicaid, all also demonstrating that the amendment on the ballot here in West Virginia could have effects that have nothing to do with Medicaid.

So why is it on the ballot then?

To really understand why Amendment No. 1 is on the ballot, look first to Tennessee, where anti-abortion activists were also angry about an old state Supreme Court decision and changed their constitution. Then to Texas, where a group of abortion providers sued over state laws restricting abortion and took their case all the way to the Supreme Court.

In 2000, Tennessee's state Supreme Court decision found a right to abortion within the right to privacy in their state Constitution.

In 2014, Tennessee passed their version of Amendment No. 1.

One of the restrictions the amendment made way for in Tennessee was a 48-hour waiting period, requiring two visits.

Jeff Teague, who led Planned Parenthood of Middle and East Tennessee at the time, said in some cases, the waiting period meant surgical instead of pill-induced abortions because pill-induced abortions are only an option up to a certain number of weeks.

He added that the waiting period also required poor women to make two visits, spending more on travel and child care. Two abortion facilities closed.

"In Tennessee the argument was about making the procedure safer for women," he said. "This was about protecting women, when in reality, it was never anything about that. It was about passing as many restrictions and regulations on abortion providers as possible to make it nearly impossible for women to access safe, legal abortion in Tennessee.

"The result was it became much more difficult for women to access abortion," he said. "It became much more expensive for women to access abortion."

Tennessee also required abortion clinics to be regulated as ambulatory surgical care centers (health facilities that offer same-day surgeries).

That requirement was later ended by the United State Supreme Court 2016 decision, *Whole Women's Health v. Hellerstedt*.

"Our doors are staying open," said Francie Hunt, executive director of Tennessee Advocates for Planned Parenthood. "Who they're really hurting are patients."

Tennessee law makes it much more difficult to pass a constitutional amendment — it must be passed by two consecutive legislatures, called general assemblies in Tennessee, and it has to appear on the ballot during the same year as a governor's race, according to Teague. He said they were able to fight the effort back for awhile.

"But of course in 2010 the Republicans took control of the Legislature for the first time since reconstruction," he said, "and immediately set about the process of passing it and so in 2010 they passed it the first time, in 2012 they passed it the second time and in 2014 it appeared on the ballot."

What could happen in the courts or the Legislature?

West Virginia has passed a number of abortion restrictions in recent years and is already down to one abortion facility, in Charleston. And the GOP-led, mainly anti-abortion West Virginia Legislature hasn't publicly stated any specific abortion laws it wants to pass next.

But if they passed something restrictive enough to prompt a lawsuit, courts would no longer be able to look to the state Constitution for guidance.

Jessica Arons, senior advocacy & policy counsel for reproductive freedom at the national ACLU, noted that the amendment would "tell them very clearly that they're not allowed to interpret it in certain ways."

Tennessee's amendment was in response to a lawsuit by the ACLU and Planned Parenthood about several laws their general assembly had passed.

These amendments pass, she said, "so that we can't sue them again."

"So no one can," she said. "So basically a right that West Virginians have today, they wouldn't have tomorrow and they wouldn't be able to go back in court to defend those rights, because they would have been taken away by this ballot measure."

The Whole Women's Health case has prevented some of the most stringent abortion regulations. But Arons noted that the make-up of the Supreme Court recently changed.

In that case, Texas abortion providers sued over laws that regulated them like ambulatory surgical centers, and required their doctors to have admitting privileges at local hospitals.

In *Whole Women's Health*, the Supreme Court had found, in a 5-3 decision, that abortion laws shouldn't place undue burden on women seeking abortions. In the opinion, justices noted that evidence showed women did not receive better, safer care at ambulatory surgical centers.

They also noted that abortion in Texas "was an extremely safe procedure with very low rates of complications and virtually no deaths," that the requirement would cost clinics millions to comply with, and that clinic closures as a result of the requirements disproportionately affected poor women.

"Nationwide, childbirth is 14 times more likely than abortion to result in death, ... but Texas law allows a midwife to oversee childbirth in the patient's own home," stated the opinion, delivered by Justice Stephen Breyer.

Arons called the admitting privileges requirement a "catch-22," because to get admitting privileges, you have to admit patients frequently, and abortion is safe, so the doctors don't frequently admit patients. She also noted that hospitals would let sick patients in, anyway.

"They pass laws that are impossible to comply with, or they put up barriers where it makes it almost impossible for the patient to get to the clinic," she said.

Arons said it's possible the United States Supreme Court may soon choose to overturn *Roe v. Wade*. She said there are 13 cases in federal appeals courts that the Supreme Court could take up and "make some sort of decision about *Roe*."

She thinks it is more likely, though, that justices will "pay lip service to *Roe*" and "let the states regulate abortion out of existence."

"They could either reverse *Whole Women's Health* or they could just not apply it," she said. "They could ignore it. They shouldn't ignore it, but you know, they're the Supreme Court, they can kind of do what they want."

While the newest appointee to the high court, Associate Justice Brett Kavanaugh, has noted *Roe v. Wade* is precedent, Arons pointed out that anti-abortion activists had supported his nomination.

"Really with every nomination of a conservative Supreme Court justice in the last ten or twenty years, they've done this dance, where they – it's with a wink and a nod," she said. "They know what they're doing and the anti-abortion movement knows what they're doing."

They wouldn't have been nominated if the president nominating them didn't feel confident they would vote against Roe when the day came, but they talk about it being settled law, precedent, because that's what it is, but they also know when they get to the Supreme Court that they're no longer bound by that precedent and they get to make new precedent if they want."

Arons sees West Virginia's ballot measure as "one piece of the puzzle" in a national strategy by anti-abortion activists to enact laws that sound reasonable, but when you take a closer look, make it harder to access abortion.

"They make it sound like they're just trying to protect women's health and safety, but the reality is they've been designed to cut off access to care and to shame and harass women for seeking abortion services," she said.

The ending of Medicaid-funded abortion in West Virginia would be the "immediate impact," Arons said, "but the proponents of this measure, again, they're playing the long game."

"They are absolutely laser-focused on banning abortion wherever they can and so they are working at both the state and federal level," she said.

What could happen to me or my loved ones?

Derek Harman didn't want to shame the woman.

So he didn't ask her why she'd tried to induce an abortion herself, when he was working in an emergency room as a medical resident.

"She was so sick," he said. "I wasn't going to say 'why didn't you just go...'"

He stopped mid-sentence.

She'd come to the emergency room with a tender belly. He found it had filled with puss, a sign of infection, and learned she'd perforated her uterus.

She died in surgery.

"That type of thing is still happening and it should remind us what's going to happen, what's going to come back if we don't do something, if we don't keep this safe and legal," he said.

That was within the last 15 years. Harman doesn't know which barrier prevented her from having a doctor provide the abortion.

Now on the board of WV Free, an abortion access and reproductive health advocacy organization, Harman said he knew then he had to do everything he could to keep abortion safe and legal.

Harman noted that during the debate preceding Roe v. Wade in the 1960s and 1970s, doctors were saying "look, women are dying and we could be saving their lives just with a simple procedure."

"Personally, I believe it's only going to take one daughter or granddaughter of a legislator for them to get sick and die for this rule to be overturned," he said.

Harman tries to put all his reproductive-age female patients on birth control. But he also noted that one in four woman have had the procedure.

"People are just trying to live their daily lives and it's hard to kind of understand what the real impact ... would be," Arons added, "but when it comes down to it, it is about taking away decisions from women and their families and about having the government tell women how to live their lives and cutting off access to healthcare that people often don't think they're going to need, but eventually, you know, you might need it."

What do I need to know when I vote?

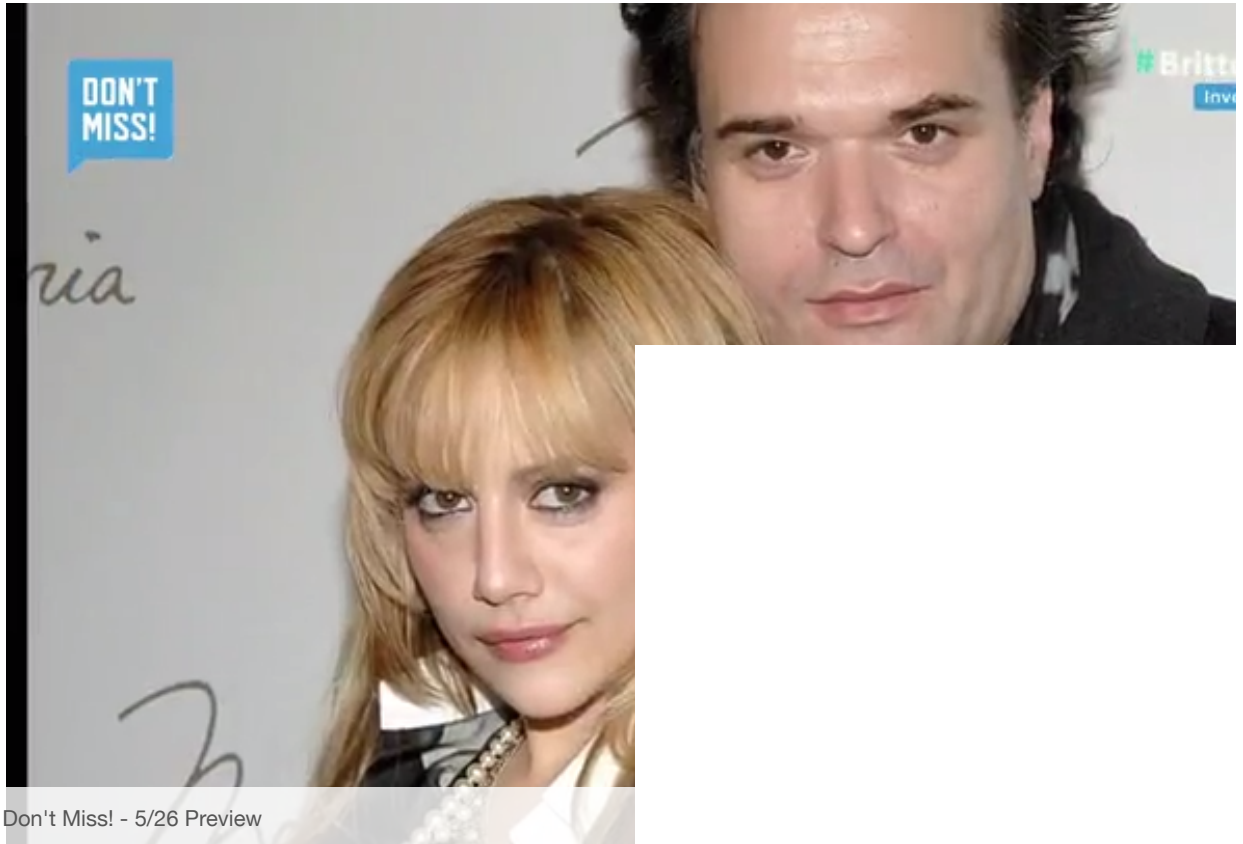
The amendment is only one line: Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion

It's opposed by the state chapters of the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the National Association of Social Workers, the League of Women Voters, the West Virginia Foundation for Rape Information and Services, and the West Virginia Coalition Against Domestic Violence. It's supported by GOP leaders, many lawmakers and West Virginians for Life, which did not respond to requests for comment.

If you want to give state lawmakers more authority over whether you or people you know can access abortion safely in West Virginia, let them possibly ban abortion entirely if things go anti-abortion activists' way at the Supreme Court of the United States, and remove the ability of courts to serve as a check on the Legislature's authority in that area, vote yes.

If you don't, vote no.

Email: ebeck@register-herald.com and follow on Twitter @3littleredbones




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