

JAMES BOPP, JR.  
jboppjr@aol.com

COURTNEY TURNER MILBANK  
cmilbank@bopplaw.com

JOSEPH D. MAUGHON  
jmaughon@bopplaw.com

**THE BOPP LAW FIRM, PC**  
ATTORNEYS AT LAW

THE NATIONAL BUILDING  
1 South Sixth Street  
TERRE HAUTE, INDIANA 47807-3510  
Telephone 812/232-2434 Facsimile 812/235-3685  
www.bopplaw.com

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To: National Right to Life Committee and Whom It May Concern

From: James Bopp, Jr., NRLC General Counsel, Courtney Turner Milbank, Joseph D. Maughon

Date: Independence Day, July 4, 2022

Re: NRLC Post-*Roe* Model Abortion Law Version 2

**INTRODUCTION**

Since *Roe v. Wade* has been overturned, most States will act to protect unborn life by limiting and prohibiting abortion. This memorandum proposes a model abortion law for a post-*Roe* Nation that builds on the substantial experience the right-to-life movement has had in protecting unborn lives through pro-life legislation.<sup>1</sup>

There are two major parts to legislation to protect unborn life. First is the substantive part: which abortions will be prohibited by the law and which abortions will be permitted and under what conditions. We recommend prohibiting abortion except to prevent the death of the pregnant woman, which has been the accepted policy choice by the pro-life movement since 1973 and for many years before.

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<sup>1</sup> The National Right to Life Committee would like to express its appreciation to the pro-life lawyers and organizations that offered suggestions on previous drafts. Their input was invaluable, but NRLC has the sole responsibility for the final product.

The second part is an effective enforcement regime. Traditionally, abortion laws relied on criminal enforcement to make pro-life laws effective in protecting unborn life. However, current realities require a much more robust enforcement regime than just reliance on criminal penalties.

In the current environment, criminal penalties have three substantial drawbacks. First, radical Democrat prosecutors have been elected in several counties in almost every State, who regularly refuse to enforce laws that do not meet their social-justice agenda. These include a wide variety of laws, such as immigration laws, drug laws, sex-crime laws, minor criminal offenses and offenses against property.<sup>2</sup> In addition, they will not enforce laws against favored groups such as (recently) Antifa and BLM members who have committed serious and violent acts such as arson and assault on police officers.<sup>3</sup> Abortion-rights advocates are conspiring on how abortion-on-demand can be protected in States that will adopt pro-life laws.<sup>4</sup> A key part of that strategy is for radical Democrat prosecutors to refuse to enforce pro-life laws post-*Roe*.<sup>5</sup> And the reality is that most abortion clinics have already moved to large urban centers and college towns where these radical Democrat prosecutors are likely to be elected. If we rely only on criminal penalties, these counties will be sanctuaries for abortion-on-demand. As a result, to effectively enforce pro-life laws, a wide variety

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<sup>2</sup> <https://www.usnews.com/news/politics/articles/2021-10-19/district-attorneys-refuse-to-prosecute-some-gop-led-laws>.

<sup>3</sup> <https://www.the-sun.com/news/3123181/hundreds-blm-rioters-looters-vandals-charges-dropped/>; <https://www.ksdk.com/article/news/local/st-louis-riots-missouri-attorney-general-says-circuit-attorney-not-prosecuting-criminals/63-3cf5934f-623d-4f71-ac9f-05c2c2882b78>.

<sup>4</sup> <https://slate.com/news-and-politics/2022/05/red-state-abortion-access-post-roe.html>.

<sup>5</sup> After *Roe v Wade* was overturned, 90 Prosecuting Attorneys from 31 States declared that they would never prosecute individuals performing abortions. <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf>.

of enforcement measures will need to be adopted to supplement criminal enforcement, including licensing penalties, civil remedies, and criminal enforcement by State officials.

Second, as we realized in our Nation's efforts to combat organized crime, prosecuting individual members of an organized criminal enterprise has limited effectiveness. The whole criminal enterprise needs to be dealt with to effectively prevent criminal activity, so RICO-style laws were adopted to provide effective remedies against the whole criminal enterprise.<sup>6</sup> Unfortunately, much of the abortion industry is likely to reemerge and perform unlawful abortions, sheltered by radical Democrat prosecutors and other local Democrat officials.<sup>7</sup> This unlawful abortion industry will be well-funded and well-organized, operating as an unlawful abortion enterprise that will need to be stopped to prevent unlawful abortions from occurring.<sup>8</sup>

Finally, the abortion industry can be expected to exploit existing State laws on telehealth and the proximity of States with less protective laws to circumvent pro-life laws in a particular State. Laws preventing telehealth laws from being exploited for unlawful abortions and new laws to prevent trafficking of minors for unlawful abortions will be needed.

Our specific recommendations follow, including a Model Abortion Law (*infra* p. 9).

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<sup>6</sup> <https://www.justia.com/criminal/docs/rico/>.

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<https://www.bloomberg.com/news/articles/2022-06-24/from-washington-d-c-to-seattle-cities-establish-abortion-sanctuaries>

<sup>8</sup> We are not referring to pro-abortion advocacy groups, whose advocacy for abortion rights is protected by the First Amendment. We are referring to entities that will be performing unlawful abortions.

## PROPOSED MODEL ABORTION LAW

### **I. Substantive Part: Abortions, Except to Prevent the Death of the Pregnant Woman; Conspiring to Cause, Aiding or Abetting Unlawful Abortions; Trafficking in Abortion Inducing Drugs; and Unlawful Abortion Trafficking of a Minor Prohibited**

We recommend prohibitions on (A) performing an abortion except to prevent the death of the pregnant woman, (B) conspiring to cause, or aiding or abetting, unlawful abortions, (C) trafficking in abortion inducing drugs, and (D) unlawful abortion trafficking of a minor, all enforced by criminal penalties.

#### **A. Abortions Prohibited, Except to Prevent the Death of the Pregnant Woman**

We recommend that a person who causes an abortion—subject to an affirmative defense by a physician that the abortion was necessary to prevent the death of the pregnant woman, with safeguards—should be subject to a Level 2 Felony,<sup>9</sup> if the unborn child dies as a result thereof, or a Level 3 Felony, if the unborn child survives.<sup>10</sup> The law should explicitly state that such criminal

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<sup>9</sup> Herein, including the draft statutory language, “Level 2 Felony” and “Level 3 Felony” (for example) refer, respectively, to the second and third most severe felony levels in a given criminal-law framework.

<sup>10</sup> It may be necessary in certain states to have additional exceptions, such as for a woman pregnant as a result of rape or incest. In that event, the following language is suggested:

Amended Section 11(a)(1)(C):

(C) an attending physician determines:

(i) based on reasonable medical judgment, that the abortion was necessary to prevent the death of the pregnant woman. No abortion shall be deemed permitted under this Section if performed on the basis of a claim or a diagnosis that the woman will engage in conduct that would result in her death; or

(ii) that the pregnancy results from rape under [state criminal rape statute] or incest under [state criminal incest statute] when documentation is presented to the attending

penalties shall not apply to a pregnant woman seeking or procuring an abortion.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 3.

## **B. Prohibition on Conspiring to Cause, or Aiding or Abetting, Unlawful Abortions**

To ensure that all parties participating in an unlawful abortion are subject to enforcement, we recommend that the above criminal penalties for performing an unlawful abortion should be extended to anyone, except for the pregnant woman, who (a) conspires to cause an unlawful abortion or (b) aids or abets<sup>10</sup> an unlawful abortion.

Aiding or abetting an unlawful abortion should include, but not be limited to: (1) giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an unlawful abortion; (3) hosting or maintaining a website, or providing internet service, regarding how to obtain an unlawful abortion; (4) offering or providing unlawful “abortion doula” services; and (5) providing referrals to an unlawful abortion provider. The penalties for such conspiracy, and for such aiding or abetting, would be subject to the affirmative defense for a physician to perform a life-saving abortion.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 4.

## **C. Prohibition on Trafficking in Abortion Inducing Drugs**

We recommend that the selling or distributing of abortion inducing drugs, when a person knows,

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physician that demonstrates that the crime has been reported to law enforcement. The physician shall file the documentation that a crime has been reported to law enforcement in the pregnant woman's medical record and in the report filed with the [state agency receiving abortion reports].

<sup>10</sup> While this memo, including the draft statutory language, refers to “conspiring” or “aiding or abetting” a crime, we recognize that different States employ different language to refer to this conduct. The language of the prohibition should match the relevant State’s statutes describing such acts.

or has reason to believe, that the person to whom the person sells or distributes an abortifacient intends to use it to cause an abortion, be prohibited.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 5.

#### **D. Prohibition on Unlawful Abortion Trafficking of a Minor**

Finally, we recommend that a person who recruits, harbors, or transports a pregnant minor with the intent to deprive the pregnant minor's parent of knowledge of, and to procure, an unlawful abortion commits unlawful abortion trafficking of a minor, a Level 3 Felony.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 6.

#### **E. Attorney General Criminal Enforcement Authority**

To ensure that prosecutions for unlawful abortions occur throughout the State, we recommend that, in addition to the prosecutorial authority granted to local Prosecuting Attorneys to enforce the State's criminal code, the Attorney General be granted the authority to prosecute any criminal violations of the abortion law either concurrently with Prosecuting Attorneys or under certain circumstances.

For draft statutory language of this provision, *see* Model Abortion Law, Section 7.

### **II. Medical Licensing Board Enforcement**

In addition to the criminal penalties provided above, we recommend requiring the State's medical licensing board to revoke the license of a physician to practice medicine in the State if the Board determines that the physician has violated any provision of the act and to suspend the license of a physician if the Board determines that the physician has failed to make any of the required certifications or reports.

For draft statutory language of this provision, *see* Model Abortion Law, Section 8.

### **III. Civil Actions for Violating the Abortion Law**

In addition to criminal penalties and medical license revocation, civil remedies will be critical to ensure that unborn lives are protected from unlawful abortions.

#### **A. Civil Remedies to Enforce the Abortion Law**

To further ensure meaningful enforcement against the performance of unlawful abortions, we recommend establishing civil remedies to be brought by appropriate state or local officials and by persons related to the pregnant woman. This would permit a civil action against a person or entity that violates any provision of the abortion law for injunctive relief sufficient to prevent future violations; for compensatory damages if the plaintiff has suffered actual injury or harm from the defendant's conduct; for punitive damages, payable to the not-for-profit organization of the plaintiff's choice that provides services to pregnant women; and for costs and reasonable attorney fees.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 9.

#### **B. Wrongful Death of an Unborn Child**

We recommend that a civil action for Wrongful Death of an unborn child be available to the woman upon whom an unlawful abortion has been performed, the father of the unborn child, and the parents of a minor, permitting recovery of compensatory and punitive damages, and court costs and reasonable attorney fees.

For draft statutory language of this provision, *see* Model Abortion Law, Section 10.

### **IV. Criminal Penalties for and Civil Remedies Against the Unlawful Abortion Industry**

In order to further stem unlawful abortion, we further recommend that States disincentivize the receipt of proceeds from unlawful abortions. Therefore, we recommend both criminal penalties and

civil remedies against a person who receives proceeds from a pattern (two or more instances) of violating the provisions of the abortion law and uses such proceeds to establish or to operate an entity to perform unlawful abortions. Such knowing or intentional conduct should be subject to a Level 5 Felony, as well as civil enforcement actions.

For draft statutory language of these provisions, *see* Model Abortion Law, Section 11.

## **V. Physician Reporting Requirements**

We recommend that reports be required for an abortion to the appropriate state agency by the attending physician, including requiring the physician to certify the facts on the basis of which the physician made the determination that the abortion was necessary to prevent the death of the pregnant woman. Failure to do so should constitute a Class A misdemeanor.<sup>11</sup>

For draft statutory language of these provisions, *see* Model Abortion Law, Section 14.

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<sup>11</sup> Herein, including the draft statutory language, “Class A misdemeanor” refers to the most severe misdemeanor level in a given criminal-law framework.

## **NRLC Model Abortion Law**

### **Section 1. Policy**

It is the policy of this state to protect unborn children from individuals and organizations that would cause, [conspire to], or [aid or abet in] the unjust killing of unborn children, unless a termination of a pregnancy is necessary to prevent the death of the pregnant woman, and to protect pregnant women from unlawful abortions, to the maximum extent permissible under federal law.

### **Section 2. Definitions**

As used in this [act]:

(1) “Abortion” means the use or prescription of any instrument or device or of an abortion inducing drug:

- (A) to intentionally kill, or attempt to kill, the unborn child of a woman known to be pregnant; or
- (B) to intentionally terminate, or attempt to terminate, the pregnancy of a woman known to be pregnant, with an intention other than:
  - (i) to produce a live birth and preserve the life and health of the child if born alive; or
  - (ii) to remove a dead unborn child or an ectopic pregnancy.

(1) “Abortion inducing drug” means

Alternative One

“mifepristone, misoprostol or any other chemical or drug dispensed with the intent of causing an abortion.”

Alternative Two

“a medicine, drug, or substance prescribed or dispensed with the intent of terminating a clinically diagnosable pregnancy with the knowledge that the termination will, with reasonable likelihood, cause the death of the fetus. The term includes the off-label use of a drug known to have abortion inducing properties if the drug is prescribed with the intent of causing an abortion.”

(3) “Action” means any criminal, civil, or administrative proceeding brought under this [act].

(4) “Civil action” means an action under Section 9, 10, 11(c).

(5) “Entity” means an estate, for-profit or nonprofit organization, or other legal organization, including a public corporation, a government, and a governmental subdivision, agency, or instrumentality.

(6) “Fertilization” means the time when the penetration of a male human sperm into a zona pellucida occurs.

(7) “Medical emergency” means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. A condition is not a medical emergency if it is based on a claim, diagnosis, or determination that the woman may engage in conduct which she intends to result in her death or in the substantial and irreversible physical impairment of a major bodily function.

(8) “Person” means an individual or entity.

(9) “Physician” means an individual who holds the degree of doctor of medicine or doctor of osteopathy or its equivalent and who holds a valid unlimited license to practice medicine

or osteopathic medicine in this state.

(10) “Pregnant” or “pregnancy” means the female reproductive condition of having a living unborn child within her uterus.

(11) “Pregnant minor” means a pregnant woman who is less than eighteen (18) years of age.

(12) “Reasonable medical judgment” means a medical judgment, based upon the facts known to the physician at the time, that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(13) “Unborn child” means a living individual organism of the species homo sapiens throughout all stages of the unborn child’s development within a pregnant woman’s uterus from fertilization until birth.

(14) “Unlawful abortion” means an abortion unless it is permitted under Section 3.

(15) “Unlawful abortion activity” means a violation, an attempted violation, or a threatened violation of:

- (A) Section 3 (unlawful abortion);
- (B) Section 4 [conspires to cause an unlawful abortion];
- (C) Section 4 [aids or abets an unlawful abortion];
- (D) Section 5 (trafficking in an abortion inducing drug); or
- (E) Section 6 (unlawful abortion trafficking of a minor).

(16) “Woman” means a living, born, and biologically female individual organism of the species homo sapiens.

### **Section 3. Prohibition on Causing an Unlawful Abortion**

(a) A person who knowingly or intentionally causes an abortion, unless the abortion is permitted under subsection (c), that results in the death of the unborn child, commits unlawful abortion, a [Level 2 Felony]. If the unborn child is born alive, the person commits a [Level 3 Felony].

(b) Medical treatment provided to a pregnant woman by a physician that results in the accidental death of or unintentional injury to or death of the unborn child is not a violation of this Section.

(c) It is an affirmative defense to any violation of this section if a person proves, by a preponderance of the evidence, each of the following:

(1) the abortion was performed by a physician with admitting privileges at a hospital located in the county where the abortion is caused or in a contiguous county;

(2) the physician obtained in person the informed consent of the pregnant woman, and, if the pregnant woman is a minor, the consent of a parent or guardian of the pregnant minor, unless a medical emergency prevents the physician from obtaining consent of a parent or guardian of the pregnant minor; however, the consent is not valid if the pregnant woman is coerced into having an abortion;

(3) the physician determined, based on reasonable medical judgment, that the abortion was necessary to prevent the death of the pregnant woman. An abortion is not permitted under this paragraph if performed on the basis of a claim or a diagnosis that the pregnant woman will engage in conduct that would result in her death;

(4) the physician, based on reasonable medical judgment, performed the abortion

in the manner that provided the best opportunity for the unborn child to survive, unless the physician determined that termination of the pregnancy in that manner poses a greater risk of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function

(5) the abortion was performed in a hospital or other health care facility, that has appropriate neonatal services for premature infants; and

(6) the physician who performed the abortion had arranged for the attendance, in the same room in which the abortion was to be performed, of another physician who was to take control of, provide immediate medical care for, and take all steps reasonably necessary to preserve the life and health of the unborn child immediately upon the child's expulsion or extraction from the pregnant woman.

(d) A physician who performs an abortion that is permitted under subsection (c) need not comply with:

(1) subsection (c)(5) and (6), if the gestational age of the unborn child at the time the abortion was performed was less than twenty (20) weeks;

(2) subsection (c)(5), if a medical emergency prevents compliance with subsection (c)(5); or

(3) subsection (c)(6), if a medical emergency prevents compliance with subsection (c)(6).

(e) If the physician did not get the consent of a parent or guardian of a pregnant minor before an abortion because of a medical emergency, the physician shall notify a parent or the guardian of the pregnant minor within twenty-four (24) hours of the abortion and shall so certify in

the pregnant minor's medical record..

(f) A physician who performs an abortion that is permitted under subsection (c) shall inform the pregnant woman and shall certify in writing in the pregnant woman's medical record the facts on the basis of which the physician made the determinations required by subsection (c)(3) and (4), and, if applicable, the facts on the basis of which the physician made the determinations required by subsections (c)(5) and (6) and (d). A physician who fails to make a certification required by this subsection commits a [Class A misdemeanor].

(g) A person who knowingly or intentionally coerces a pregnant woman to have an abortion commits a [Level 6 Felony].

(h) A pregnant woman who sought or obtained an unlawful abortion shall not be subject to any criminal penalty or civil liability under any law of this state.

(i) A person shall not be subject to a violation of any other law if the conduct that would violate any other law would constitute causing an unlawful abortion under this section.

(j) Any unborn child born alive shall be treated as a person under the law, and a birth certificate shall be issued certifying the child's birth even though the child may subsequently die, in which event a death certificate shall be issued.

#### **Section 4. [Conspiring] to Cause and [Aiding or Abetting] an Unlawful Abortion Prohibited**

(a) It is unlawful for a person to [conspire] to cause an unlawful abortion or to [aid or abet] an unlawful abortion.

(b) Under [state statute covering conspiracy, generally], a person who knowingly or intentionally [conspires] to cause an unlawful abortion violates Section 3 and is subject to the

penalties under Section 3.

(c) Under [state statute prohibiting aiding or abetting a crime, generally], a person who knowingly or intentionally [aids or abets] an unlawful abortion violates Section 3 and is subject to the penalties under Section 3. The prohibition in this subsection includes, but is not limited to:

(1) Knowingly or intentionally giving information to a pregnant woman who is a resident of this state, or someone seeking the information on her behalf, by telephone, the internet, or any other medium of communication, regarding self-administered abortions or the means to obtain a unlawful abortion, with the intent that the information will be used, or is reasonably likely to be used, for a self-administered abortion or an unlawful abortion.

(2) Knowingly or intentionally hosting or maintaining an Internet web site, providing access to an Internet web site, or providing an Internet service, directed to a pregnant woman who is a resident of this state, that provides information on how to obtain an unlawful abortion, with the intent that the information will be used, or is reasonably likely to be used, for an unlawful abortion in this state.

(3) Knowingly or intentionally offering or providing abortion doula services, with the intent that the services will be used, or is reasonably likely to be used, for an unlawful abortion.

(4) Knowingly or intentionally providing a referral to an unlawful abortion provider, with the intent that the referral will result, or is reasonably likely to result, in an unlawful abortion.

(5) Knowingly or intentionally providing a referral to an unlawful abortion provider and receiving monetary remuneration or other compensation from an unlawful abortion

provider for the referral.

**Section 5. Trafficking in Abortion Inducing Drugs Prohibited**

(a) This section does not apply to a pharmacist or a manufacturer or distributor of drugs or surgical supplies who lawfully manufactures, possesses, offers, sells, or distributes, in the usual course of that person's business or profession, any drug, medicine, instrument, or thing intended for any lawful medical purpose.

(b) A person who knows or has reason to know that another person intends to use the abortion inducing drug to cause an unlawful abortion and who knowingly or intentionally:

(1) delivers an abortion inducing drug to that person; or

(2) possesses an abortion inducing drug with the intent to deliver the abortion inducing drug to that person; or

(3) offers or advertises an abortion inducing drug for sale or delivery to that person;

commits trafficking in an abortion inducing drug, a [Level 3] felony.

**Section 6. Prohibition on Unlawful Abortion Trafficking of Minor**

(a) An adult who, with the intent to:

(1) conceal an unlawful abortion from the parents or guardian of a minor; and

(2) procure an unlawful abortion or obtain an abortion inducing drug for the pregnant minor to use for an unlawful abortion;

recruits, harbors, or transports a pregnant minor within this state, commits unlawful abortion trafficking of a minor, a [Level 3] felony.

(b) It is a defense to a prosecution under this section that a parent or guardian of the

pregnant minor consented to trafficking of the minor.

(c) It is not a defense to a prosecution under this section that the abortion provider or the abortion inducing drug provider is located in another state.

**Section 7. Authority of [Attorney General] to Prosecute Criminal Violation**

Alternative One

[The [Attorney General] has the concurrent authority with a [Prosecuting Attorney] to prosecute a person for a criminal violation of this [act].]

Alternative Two

[The [Attorney General] has the authority, at the [Attorney General's] sole discretion, to prosecute a person for a criminal violation of this [act], if the [Prosecuting Attorney] authorized to prosecute criminal violation of this [act] refuses to prosecute violations of any of the provisions of this [act] by any person without regard to the facts or circumstances.]

Alternative Three

[The [Attorney General] has the concurrent authority with a [Prosecuting Attorney] to prosecute a person for a criminal violation of this [act] in any county where there is a city of the [First or Second class] or an [institution of higher learning] with more than [10,000] students.]

**Section 8. [State Medical Licensing Board] Authority to Revoke or Suspend Medical License for Violation of this [act].**

(a) The [State Medical Licensing Board] shall revoke the license of a physician to practice medicine in this state if the [Board] determines by a preponderance of the evidence (or by a certified copy of the physician's conviction) that the physician committed a violation of this [act], and shall suspend for at least six months the license of a physician to practice medicine in this state

if the [Board] determines by a preponderance of the evidence (or by a certified copy of the physician's conviction) that the physician has failed to make any of the certifications required by Section 3(f) or a report required by Section 14.

(b) It is not a defense in any proceeding to revoke or suspend a physician's license under this Section that the physician was not prosecuted for committing a criminal offense under this [act] or, if prosecuted, was acquitted.

**Section 9. Civil Action for Equitable Relief and Damages**

(a) Except as provided in subsection (b), the:

- (1) attorney general;
- (2) the prosecuting attorney exercising jurisdiction in the county where the unlawful abortion was provided;
- (3) father of the unborn child;
- (4) maternal and paternal grandparent of the unborn child; and
- (5) parent or guardian of a pregnant minor;

may bring an action against a person for engaging in unlawful abortion activity.

(b) The person who impregnated the pregnant woman may not bring an action under this [act] if the pregnancy was the result of the person's criminal act.

(c) If the party who brings an action under this section prevails, the party is entitled to:

- (1) injunctive relief to remedy an unlawful abortion activity;
- (2) compensatory damages, including damages for loss of relationship, custody and companionship of the child and emotional distress from an unlawful abortion activity;
- (3) punitive damages, payable to a nonprofit organization that provides services

to the pregnant woman, to be selected by the prevailing party; and

(4) court costs and reasonable attorney's fees.

(d) A woman who obtained the unlawful abortion shall not be named as a defendant in an action under this section.

#### **Section 10. Civil Action for Wrongful Death of an Unborn Child**

(a) A woman who obtained an unlawful abortion may bring an action for wrongful death of her unborn child against the person who caused the unlawful abortion by engaging in unlawful abortion activity, if the unlawful abortion activity was a proximate cause of the death of her unborn child.

(b) The:

(1) father of the unborn child, if the woman described in subsection (a) or her estate does not bring an action within one (1) year;

(2) parent or guardian of a pregnant minor who obtained an unlawful abortion, if the woman described in subsection (a) or her estate does not bring an action within one (1) year; and

(3) estate of the pregnant woman;

may bring an action for wrongful death of the unborn child against the person who engaged in unlawful abortion activity if the unlawful abortion activity was the proximate cause of the unborn child's death.

(c) An action for wrongful death of an unborn child is subject to the same defenses and requirements of proof, except any requirement of a live birth, as would apply to an action for wrongful death of a child who had been born alive in this state.

(d) In an action for wrongful death of an unborn child, the person who brings the action may recover:

(1) compensatory damages if the person suffered injury or harm from the person's unlawful abortion activity, including, but not limited to, loss of relationship, custody and companionship of the child and emotional distress;

(2) punitive damages, payable to a not-for-profit organization of the choice of the person bringing the action, that provides services to pregnant women; and

(3) court costs and reasonable attorney fees.

**Section 11. Criminal Penalties and Civil Remedies Against Persons Associated with Entities Engaging in Unlawful Abortion Activity.**

(a) As used in this Section:

(1) "Pattern of unlawful abortion activity" means that an individual, an entity, or an entity acting through its agents or others that the entity acted in concert with, engaged in at least two (2) incidents of unlawful abortion activity that occurred after [the effective date of this [act]].

(2) "Whistle blower" means an employee who brings wrongdoing by an employer or by other employees to the attention of a person authorized to bring an action for a violation of this [act].

(b) A person who:

(1) knowingly or intentionally receives any proceeds directly or indirectly derived from a pattern of unlawful abortion activity;

(2) knowingly or intentionally uses or invests any proceeds directly or indirectly

derived from a pattern of unlawful abortion activity to acquire an interest in property of, or to establish or to operate, an entity engaged in a pattern of unlawful abortion activity;

(3) through a pattern of unlawful abortion activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of an entity, or the property of an entity, engaged in a pattern of unlawful abortion activity;

(4) is employed by or associated with an entity known by the person to engage in a pattern of unlawful abortion activity; or

(5) knowingly or intentionally conducts or otherwise participates in the activities of an entity engaged in a pattern of unlawful abortion activity;

commits unlawful abortion business activity, a [Level 5 Felony].

(c) The [Attorney General] or a [Prosecuting Attorney] may bring an action to prevent, restrain, or remedy a violation of Section 11(b) by seeking appropriate orders, including, but not limited to:

(1) ordering a person to be divested of any proceeds directly or indirectly derived from a pattern of unlawful abortion business activity and of an interest, direct or indirect, in any entity engaged in a pattern of unlawful abortion business activity;

(2) imposing reasonable restrictions on the future activities or investments of a person, including, but not limited to, prohibiting a person from engaging in unlawful abortion business activity; and

(3) ordering the dissolution or reorganization of an entity engaged in a pattern of unlawful abortion business activity, making provision for the rights of innocent persons.

(d) A person may not take any action to impede a whistle blower from communicating

with a [Prosecuting Attorney], the [Attorney General], or any other person authorized to bring an action for a violation of this [act], about a possible violation of this [act], including by:

- (1) enforcing, or threatening to enforce, a confidentiality agreement or a predispute arbitration agreement with respect to such communications; or
- (2) discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against a whistle blower in the terms and conditions of employment.

A person who knowingly or intentionally violates this subsection commits whistle blower tampering, a [Level 5 Felony].

**Section 12. Limitations on Actions Under this [act]**

(a) In a civil action, a court may not award compensatory or punitive damages if a person demonstrates that the person paid, or has been ordered to pay, compensatory or punitive damages, respectively, in a previous civil action for that particular violation of this [act].

(b) Notwithstanding any other law, a damage award may not be:

(1) paid for, or reimbursed, by an insurance policy, except to the extent that the person against whom the damage award is assessed has insufficient personal assets to pay the total damage award; and

(2) subject to any limitations provided in [state law limiting medical malpractice awards].

(c) Notwithstanding any other law, a civil action may not be brought by a person who, through an act of rape, sexual assault, incest or criminal conduct, impregnated the pregnant woman seeking an unlawful abortion.

(d) Notwithstanding any other law, the following are not defenses to an action brought under this [act]:

(1) that the pregnant woman or, if the pregnant woman is minor, a parent or guardian, consented to an unlawful abortion.

(2) ignorance or mistake of law;

(3) a person's belief that any provision of this [act] is or was unconstitutional;

(4) a person's reliance on a state or federal court decision that is not binding on the court in which the action has been brought;

(5) non-mutual issue preclusion or non-mutual claim preclusion;

(6) contributory or comparative negligence;

(7) assumption of risk; or

(8) a claim that an action under the [act] will violate a constitutional right of a third party.

(f) Notwithstanding any other law, a court may:

(1) not award attorney fees or costs to a person subject to an action under this [act], unless the action is frivolous, without foundation, or brought in bad faith or for the sole reason for delay;

(2) not award attorney fees or costs to a person who prevails in challenging the constitutionality of this [act] under state law, unless the defense of this [act] is frivolous, without foundation, or brought in bad faith or for the sole reason for delay; and

(3) award attorney fees or costs to a person who prevails in defending the

constitutionality of this [act] under state law, even though the challenge to the constitutionality of this [act] was not frivolous, without foundation, or brought in bad faith or for the sole reason for delay.

(g) This [act] may not be construed to impose liability on speech or conduct protected by the First Amendment of the United States Constitution or by [this state's constitution provision on free speech].

(h) Notwithstanding any other law, a person may bring an action not later than six years after the date the action accrues.

### **Section 13. Miscellaneous Provision**

(a) [Telehealth] under [state statute authorizing telehealth] may not be used to cause an abortion, or to prescribe, sell, or distribute an abortion inducing drug unless the abortion is permitted under, and complies with the requirements of, Section 3. A person who violates this subsection commits a [Level 3 Felony].

(b) Notwithstanding any other law, the courts of this state have personal jurisdiction over a person in an action to the maximum extent permitted by the Fourteenth Amendment to the United States Constitution.

(c) In any action brought to challenge the constitutionality of this [act] under state law or the constitutionality or legality of this [act] under federal law:

(1) the [Legislature or Legislative Council] may appoint one or more of its members, in his or her official capacity, to intervene as a matter of right on behalf of the [Legislature} to defend the constitutionality or legality of this [act];

(2) the [Attorney General] has the sole authority to defend any state or local

public officials or governmental body that are the subject of such suit; and

(3) the [Attorney General] [and Legislature or Legislative Council] may retain private attorneys for the defense of such suits and the payment for the attorney fees and costs of such retained private attorneys shall be paid out of [the state fund for claims].

**Section 14. Reporting Requirements to [state board of health]**

(a) Every physician who performs an abortion shall report the abortion on a form prepared by the [applicable state agency]. For each abortion performed, the report shall include, among other things as determined by the [applicable state agency], the following:

- (1) the full name and address of the physician;
- (2) the date and location, including the facility name and city or town, of the abortion;
- (3) the pregnant woman's:
  - (A) county and state of residence;
  - (B) marital status;
  - (C) age; and
  - (D) obstetrical history, including dates of other abortions;
- (4) a certification that the physician obtained in person the informed consent of the pregnant woman, and, if the pregnant woman is a minor, the consent of a parent or guardian of the pregnant minor;
- (5) the following information concerning the abortion:
  - (A) the gestational age of the unborn child (in weeks) and the method used

for the determination;

(B) the gender of the fetus, if detectable;

(C) the medical indication by diagnosis code for the unborn child and the pregnant woman;

(D) the method of the abortion;

(E) the results of pathological examinations if performed;

(F) whether the unborn child was delivered alive, and if so, how long the unborn child lived outside the pregnant woman; and

(G) whether the pregnant woman survived the abortion, and if so, for how long;

(6) a certification of the facts on the basis of which the physician made a determination that:

(A) the informed consent of the pregnant woman had been obtained, and, if the pregnant woman is a minor, the consent of a parent or guardian of the pregnant minor, to the abortion and that the consent of the pregnant woman was not coerced;;

(B) a parent or the guardian of the pregnant minor upon whom an abortion had been performed were notified within twenty-four (24) hours of the abortion;

(C) the abortion was necessary to prevent the death of the pregnant woman;

(D) the abortion was performed in the manner which provided the best opportunity for the unborn child to survive, unless the physician determined

that termination of the pregnancy in that manner poses a greater risk of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman than would other available methods;

(E) the abortion was performed in a hospital or other health care facility, that has appropriate neonatal services for premature infants;

(F) the physician had arranged for the attendance, in the same room in which the abortion was to be performed, of another physician, including the name of the second physician, who was to take control of, provide immediate medical care for, and take all steps reasonably necessary to preserve the life and health of the unborn child immediately upon the child's expulsion or extraction from the pregnant woman; and

(G) a medical emergency prevents compliance with subsections 3(c)(2), (5) or (6).

(b) The physician shall complete the form provided for in subsection (a) and shall transmit the completed form to the [applicable state agency], in the manner specified on the form, no later than thirty (30) days after the date of each abortion. However, if pregnant woman is a minor, the physician shall transmit the form to the [applicable state agency] and separately to the [state child protection agency] not later than (3) days after the abortion is performed.

(c) The dates supplied on a form under this Section may not be redacted for any reason before the form is transmitted as provided in this Section.

(d) Each failure to complete or timely transmit a form, as required under this Section, for each abortion is a [Class B misdemeanor].

(e) Not later than June 30 of each year, the [applicable state agency] shall compile a public report providing the following:

(1) statistics for the previous calendar year from the information submitted under this Section; and

(2) statistics for previous calendar years compiled by the [applicable state agency] under this subsection, with updated information for the calendar year that was submitted to the [applicable state agency] after the compilation of the statistics.

The state department shall ensure that no identifying information of a pregnant woman is contained in the report.

(f) The [applicable state agency] shall:

(1) summarize aggregate data from all data submitted under this Section; and

(2) submit the data, before July 1 of each year, to the United States Centers for Disease Control and Prevention for its inclusion in the annual Vital Statistics Report.

#### **Section 15. Severability**

This [act] is severable under [state statute concerning severability].

#### **Section 16. Effective Date**

This [act] takes effect [date].

#### **NOTE TO LEGISLATIVE DRAFTERS**

Text that appears in brackets in the text of the Act [like this] indicates that the draft should

include text that is appropriate for the state. For example, “this [act]” should be changed to “this chapter”, “this article”, “this title”, according to usage in the state. Similarly, “[Level 3 Felony]” should be changed to “Class 3 Felony” or “Level C Felony,” as appropriate.