

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

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: June 15, 2022

Re: NRLC Post-*Roe* Model Abortion Law

INTRODUCTION

In the event *Roe v. Wade* is 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.¹

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 allowed 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.

The second part is an effective enforcement regime. Traditionally, abortion laws relied on crimi-

¹ 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.

nal 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.² 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.³ Abortion-rights advocates are conspiring on how abortion-on-demand can be protected in States that will adopt pro-life laws.⁴ A key part of that strategy is for radical Democrat prosecutors to refuse to enforce pro-life laws post-*Roe*.⁵ And the reality is that most abortion clinics have already moved to large urban centers and college towns where these radical Democrat prosecu-

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

³ <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>.

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

⁵ As of 2020, at least 68 local Prosecuting Attorneys from 29 States had declared they would never prosecute individuals performing abortions, <https://fairandjustprosecution.org/wp-content/uploads/2020/10/Joint-Statement-from-Elected-Prosecutors-on-Abortion-Laws-10-14-20.pdf>, and the number is growing. <https://www.texastribune.org/2022/04/21/abortion-texas-lizelle-herrera-prosecutors/>; <https://www.wtae.com/article/allegheeny-county-district-attorney-vows-to-protect-abortion-rights/22107988#>; <https://www.cbsnews.com/pittsburgh/news/dazappala-vows-to-protect-abortion-rights/>; https://www.nola.com/news/courts/article_84ec82aec60-11ec-89a0-6ffddf70f03d.html; <https://www.michiganradio.org/criminal-justice-legal-system/2022-05-05/if-roe-goes-some-michigan-county-prosecutors-vow-not-to-prosecute-abortion-cases>.

tors 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 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.⁶ Unfortunately, much of the abortion industry is likely to reemerge and perform illegal abortions, sheltered by radical Democrat prosecutors and other local Democrat officials.⁷ This illegal abortion industry will be well-funded and well-organized, operating as an illegal abortion enterprise that will need to be stopped to prevent illegal abortions from occurring.⁸

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 illegal abortions and new laws to prevent traf-

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

⁷ At least four cities in three states have already declared themselves abortion "sanctuary cities": San Diego, Oakland, Baltimore, and Ithaca, NY. <https://fox5sandiego.com/news/health/city-council-declares-san-diego-safe-city-for-access-to-abortion/>; <https://www.oaklandca.gov/news/2022/city-of-oakland-declares-itself-a-pro-choice-sanctuary-city>; <https://www.wmar2news.com/news/local-news/baltimore-city-council-unanimously-approves-resolution-supporting-abortion-rights>; <https://ithacavoices.com/2022/05/ithaca-looks-to-become-an-abortion-sanctuary/>.

⁸ 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 illegal abortions.

ficking of minors for illegal abortions will be needed.

Our specific recommendations follow, including a Model Abortion Law (*infra* p. 10).

PROPOSED MODEL ABORTION LAW

I. Substantive Part: Abortions, Except to Prevent the Death of the Pregnant Woman; Conspiring to Cause, Aiding or Abetting Illegal Abortions; Trafficking in Abortifacients; and Illegal 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, illegal abortions, (C) trafficking in abortifacients, and (D) illegal 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,⁹ if the unborn child dies as a result thereof, or a Level 3 Felony, if the unborn child survives.¹⁰ The law should explicitly state that such criminal pen

⁹ 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.

¹⁰ 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 physician that demonstrates that the crime has been reported to law enforcement. The physician shall file the

alties 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, 12(a), 12(f).

B. Prohibition on Conspiring to Cause, or Aiding or Abetting, Illegal Abortions

To ensure that all parties participating in an illegal abortion are subject to enforcement, we recommend that the above criminal penalties for performing an illegal abortion should be extended to anyone, except for the pregnant woman, who (a) conspires to cause an illegal abortion or (b) aids or abets¹⁰ an illegal abortion.

Aiding or abetting an illegal 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 illegal abortion; (3) hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion; (4) offering or providing illegal “abortion doula” services; and (5) providing referrals to an illegal 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 Abortifacients

We recommend that manufacture of abortifacients and the selling or distributing of

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].

¹⁰ 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.

abortifacients, when a person knows, 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 Illegal 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 illegal abortion commits illegal 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 illegal 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 illegal abortions.

A. Civil Remedies to Enforce the Abortion Law

To further ensure meaningful enforcement against the performance of illegal 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 illegal 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 Illegal Abortion Industry

In order to further stem illegal abortion, we further recommend that States disincentivize the receipt of proceeds from illegal 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 illegal 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.¹¹

For draft statutory language of these provisions, *see* Model Abortion Law, Section 15.

Model Abortion Law

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

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 illegal abortions, to the maximum extent permissible under federal law.

Section 2. Definitions

As used in this [act]:

(1) “Abortifacient” means mifepristone, misoprostol or any other chemical or drug dispensed with the intent of causing an abortion.

(2) “Abortion” means the use or prescription of any instrument or device or of an abortifacient:

(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.

(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) “Illegal abortion” means an abortion in violation of Section 3 that is not subject to an affirmative defense under Section 12(a).

(8) “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 based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

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

(10) “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.

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

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

age.

(13) “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.

(14) “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.

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

Section 3. Prohibition on Causing an Illegal Abortion

(a) A person who knowingly or intentionally causes an abortion of a pregnant woman that results in the death of the unborn child commits 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.

Section 4. [Conspiring] to Cause and [Aiding or Abetting] an Illegal Abortion Prohibited

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

(b) Under [state statute covering conspiracy, generally], a person who knowingly or in-

tentionally [conspires] to cause an illegal 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 illegal 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, 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 illegal abortion, knowing that the information will be used, or is reasonably likely to be used, for a self-administered abortion or an illegal abortion;

(2) knowingly or intentionally hosting or maintaining an internet website, providing access to an internet website, or providing an internet service, purposefully directed to a pregnant woman who is a resident of this state, that provides information on how to obtain an illegal abortion, knowing that the information will be used, or is reasonably likely to be used, for an illegal abortions;

(3) knowingly or intentionally offering or providing abortion doula services, knowing that the services will be used, or is reasonably likely to be used, for an illegal abortion;

(4) knowingly or intentionally providing a referral to an illegal abortion provider, knowing that the referral will result, or is reasonably likely to result, in an illegal abortion.

and

(5) knowingly or intentionally providing a referral to an illegal abortion provider and receiving monetary remuneration, or other compensation, from an illegal abortion provider for the referral.

Section 5. Trafficking in Abortifacients Prohibited

(a) A person may not:

(1) purposely manufacture an abortifacient; or

(2) possess for sale or distribution, advertise, or hold one's self out as possessing for sale or distribution, offer to sell or distribute, or sell or distribute, an abortifacient when the person knows, or has reason to know, that a person to whom the person sells or distributes an abortifacient intends to use it to cause an abortion.

(b) This Section does not prohibit a pharmacist or a manufacturer or distributor of drugs or surgical supplies from lawfully manufacturing, possessing, offering, selling, or distributing, in the usual course of that person's business or profession, any drug, medicine, instrument, or thing intended for any lawful medical purpose.

(c) A person who knowingly or intentionally violates this Section commits trafficking in abortifacients, a [Level 3 Felony].

Section 6. Prohibition on Illegal Abortion Trafficking of Minor

Regardless of where an illegal abortion occurs, a person who knowingly or intentionally recruits, harbors, or transports a pregnant minor who is a resident of this state, with the intent to deprive the pregnant minor's parent of knowledge of, and to procure, an illegal abortion or to obtain an abortifacient, commits promotion of illegal abortion trafficking of a minor, a [Level 3 Felony].

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 12(d) or a report required by Section 15.

(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) The [Attorney General], a [Prosecuting Attorney], the father of the unborn child, a maternal or paternal grandparent of the unborn child, and a parent or guardian of a pregnant minor may bring an action against a person for violating, for attempting to violate, or for threatening to violate, this [act].

(b) If the person who brings a civil action under this Section prevails in the civil action by proving, by a preponderance of the evidence, that a person has violated, has attempted to violate, or is threatening to violate, this [act], the court shall award:

(1) injunctive relief sufficient to prevent a person from violating, or to remedy a violation of, this [act];

(2) compensatory damages if the person bringing the action has suffered injury or harm from the person's conduct, including, but not limited to, loss of parental care, custody and companionship of the child and emotional distress;

(3) 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

(4) court costs and reasonable attorney fees.

Section 10. Action for Wrongful Death of an Unborn Child

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

(b) 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.

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

(1) compensatory damages if the person bringing the action has suffered injury or harm from the person's conduct, including, but not limited to, loss of parental care, 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.

(d) An action for wrongful death of an unborn child may be brought against the person who caused an illegal abortion, if the illegal abortion was the proximate cause of the death of the unborn child and if an action for wrongful death of an unborn child has not been brought by the pregnant woman, by:

(1) the father of the unborn child;

(2) a parent or guardian of a pregnant minor who obtained an illegal abortion;

and

(3) the estate of the pregnant woman, if the pregnant woman died as a result of an illegal abortion.

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

(a) As used in this Section:

(1) “Illegal abortion activity” means an activity that a person knowingly or intentionally:

(A) causes an illegal abortion in violation of Section 3;

(B) [conspires] to cause an illegal abortion in violation of Section 4;

(C) [aids or abets] an illegal abortion in violation of Section 4;

(D) engages in trafficking in an abortifacient in violation of Section 5; or

(E) engages in illegal abortion trafficking of a minor in violation of Section 6.

(2) “Pattern of illegal 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 illegal abortion activity that occurred after [the effective date of this [act]].

(3) “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 illegal abortion activity;

(2) knowingly or intentionally uses or invests any proceeds directly or indirectly derived from a pattern of illegal abortion activity to acquire an interest in property of, or to establish or to operate, an entity engaged in a pattern of illegal abortion activity;

(3) through a pattern of illegal 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 illegal abortion activity;

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

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

commits illegal 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 illegal abortion business activity and of an interest, direct or indirect, in any entity engaged in a pattern of illegal 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 illegal abortion business activity; and

(3) ordering the dissolution or reorganization of an entity engaged in a pattern of illegal 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. Protections for a Pregnant Woman

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

(1) the abortion was performed by a physician;

(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; 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, not including psychological or emotional conditions, of the pregnant woman than would other available methods. A greater risk under this paragraph does not exist, if based on a claim or diagnosis that the pregnant woman will engage in conduct that would result in her death;

(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.

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

(1) subsection 12(a)(5) and (6), if the post-fertilization age of the unborn child at

the time the abortion was performed was less than twenty (20) weeks;

(2) subsection 12(a)(5), if a medical emergency prevents compliance with subsection 12(a)(5); or

(3) subsection 12(a)(6), if a medical emergency prevents compliance with subsection 12(a)(6).

(c) A physician who performs an abortion that is allowed under Section 12(a) on a pregnant minor 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.

(d) A physician who performs an abortion that is allowed under subsection 12(a) 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 12(a)(3) and (4), and, if applicable, the facts on the basis of which the physician made the determinations required by subsections 12(a)(5) and (6) and (b). A physician who fails to make a certification required by this subsection commits a [Class A misdemeanor].

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

(f) This [act] may not be construed to subject a pregnant woman to a criminal penalty or civil liability for any violation of this [act].

Section 13. 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 dam-

ages, 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 illegal 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 illegal 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 14. Miscellaneous Provision

(a) [Telehealth] under [state statute authorizing telehealth] may not be used to cause an abortion, or to prescribe, sell, or distribute an abortifacient. 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 [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

(2) the [Attorney General] may retain private attorneys for the defense of such suits and the payment for the attorney fees and costs of such retained private attorneys must be paid out of [the state fund for claims].

Section 15. Reporting Requirements to [state board of health]

(a) Every physician who performs an abortion permitted under Section 12(a) 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 post-fertilization 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) if the method of the abortion is by administration of an abortifacient, the precise drugs provided, prescribed, administered, or dispensed, and the means of delivery of the drugs to the pregnant woman;
 - (F) the results of pathological examinations if performed;
 - (G) whether the unborn child was delivered alive, and if so, how long the unborn child lived outside the pregnant woman; and
 - (H) 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 15(a)(6)(E) or (F).

(b) The physician shall complete the form provided for in subsection 15(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 16. Severability

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

Section 17. 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.