
WOMEN'S HEALTH DEFENSE ACT (LATE-TERM ABORTION BAN)

Model Legislation & Policy Guide
For the 2011 Legislative Year



Changing Law to Protect Human Life, State by State

INTRODUCTION

Progress toward overturning *Roe v. Wade* will depend, in large part, on raising public awareness of the negative impact of abortion on women through targeted legislation.

James Hunter's analysis of the 1991 Gallup Poll on "Abortion and Moral Beliefs" in his book, *Before the Shooting Begins*, shows that the American public sees abortion as two sides of a coin: the impact (from abortion or restricting it) on the unborn and the impact (from abortion or restricting it) on women. Hunter's analysis also shows that the public often adheres to a series of myths about abortion (particularly, its purported benefit to women) and about *Roe* (the impact of overturning it). Unfortunately, some still see legal abortion as a "necessary evil," bad for the unborn child but good for women (keeping them out of the "back alley" by providing safe abortions).

For this reason, legislative and educational efforts that only emphasize the impact on the unborn are insufficient because they fail to account for this paradigm. The public is concerned about both the impact on women and the impact on the unborn from abortion or from prohibitions and restrictions on abortion.

The U.S. Supreme Court, along with some Americans, assumes that legal abortion is, on balance, good for women. For example, Justice Blackmun in the Court's opinion in *Roe* relied on the assumption that "abortion is safer than childbirth." The data the Court relied upon was thin and flawed, and no attention was given to the long-term risks of abortion. Critically, the American public is still not fully aware of the true risks.

Recognizing the medical risk to women of later-term abortions, specifically abortions performed at or after 20 weeks gestation, and the impact of such abortions on the unborn (namely, the pain felt by an unborn child during a later-term abortion), AUL has drafted the "Women's Health Defense Act," which prohibits abortions at or after 20 weeks gestation except in the case of a narrowly-defined "medical emergency."

States considering this Act are advised to contact AUL for more information and drafting assistance. Please contact AUL's Legislative Coordinator at (202) 741-4907 or Legislation@AUL.org.

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WOMEN’S HEALTH DEFENSE ACT

HOUSE/SENATE BILL No. _____
By Representatives/Senators _____

Section 1. Title.

This Act may be known and cited as the “Women’s Health Defense Act” [or, alternatively, the “Women’s Late-Term Pregnancy Health Act.”]

Section 2. Legislative Findings and Purposes.

- (a) The [Legislature] of the State of [Insert name of State] finds that:
- (1) Abortion can cause serious physical and psychological (both short- and long-term) complications for women, including but not limited to: uterine perforation, uterine scarring, cervical perforation or other injury, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm delivery in subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions to anesthesia and other drugs, psychological or emotional complications such as depression, anxiety, sleeping disorders, and death.
 - (2) Abortion has a higher medical risk when the procedure is performed later in pregnancy. Compared to an abortion at eight (8) weeks’ gestation or earlier, the relative risk increases exponentially at higher gestations. L. Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, OBSTETRICS & GYNECOLOGY 103(4):729–737 (2004).
 - (3) In fact, the incidence of major complications is highest after 20 weeks of gestation. J. Pregler & A. DeCherney, WOMEN’S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002).
 - (4) According to the Alan Guttmacher Institute, the risk of death associated with abortion increases with the length of pregnancy, from one death for every one million abortions at or before eight (8) weeks gestation to one per 29,000

abortions at sixteen (16) to twenty (20) weeks and one per 11,000 abortions at twenty-one (21) or more weeks (citing L. Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, OBSTETRICS & GYNECOLOGY 103(4):729–737 (2004)).

- (5) After the first trimester, the risk of hemorrhage from an abortion, in particular, is greater, and the resultant complications may require a hysterectomy, other reparative surgery, or a blood transfusion.
 - (6) The State of [Insert name of State] has a legitimate concern for the public’s health and safety. *Williamson v. Lee Optical*, 348 U.S. 483, 486 (1985).
 - (7) The State of [Insert name of State] “has legitimate interests from the outset of pregnancy in protecting the health of women.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992). More specifically, the State of [Insert name of State] “has a legitimate concern with the health of women who undergo abortions.” *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428-29 (1983).
 - (8) Finally, there is substantial and well-documented medical evidence that an unborn child by at least 20 weeks gestation has the capacity to feel pain during an abortion. K. Anand, *Pain and its effects in the human neonate and fetus*, NEW ENGLAND JOURNAL OF MEDICINE, 317:1321-29 (1987).
- (b) For these reasons, the [Legislature]’s purposes in promulgating this Act are to:
- (1) Based on the documented risks to women’s health, prohibit abortions at or after 20 weeks gestation except in cases of a medical emergency.
 - (2) Prohibit abortions at or after 20 weeks gestation, in part, because of the pain felt by an unborn child.
 - (3) Define “medical emergency” to encompass “significant health risks,” namely only those circumstances in which a pregnant woman’s life or a major, physical bodily function is threatened. *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007).

Section 3. Definitions.

For purposes of this Act only:

(a) “**Abortion**” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:

- (1) Save the life or preserve the health of an unborn child;
- (2) Remove a dead unborn child caused by spontaneous abortion; or
- (3) Remove an ectopic pregnancy.

(b) “**Attempt to perform**” means an act or omission of a statutorily-required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion.

(c) “**Conception**” means the fusion of a human spermatozoon with a human ovum.

(d) “**Gestational age**” means the time that has elapsed since the first day of the woman's last menstrual period.

(e) “**Major bodily function**” includes but is not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(f) “**Medical facility**” means any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person.

(g) “**Physician**” means any person licensed to practice medicine in this State. The term includes medical doctors and doctors of osteopathy.

(h) “**Pregnant**” or “**pregnancy**” means that female reproductive condition of having an unborn child in the [woman's] uterus.

- (i) “**Probable gestational age**” means what, in reasonable medical judgment, will with reasonable probability be the gestational age of the unborn child at the time the abortion is considered, performed, or attempted.
- (j) “**Reasonable medical judgment**” means that medical judgment that would be made by a reasonably prudent physician [*in the community*], knowledgeable about the case and the treatment possibilities with respect to the medical condition(s) involved.
- (k) “**Unborn child**” means the offspring of human beings from conception until birth.

Section 4. Prohibition.

- (a) Except in the case of a medical emergency as specifically defined in Subsection 4(c) of this Act, no abortion shall be performed, induced, or attempted unless the physician [*or the referring physician*] has first made a determination of the probable gestational age of the unborn child. In making such a determination, the physician [*or referring physician*] shall make such inquiries of the pregnant woman and perform or cause to be performed all such medical examinations, imaging studies, and tests as a reasonably prudent physician [*in the community*], knowledgeable about the medical facts and conditions of both the woman and the unborn child involved, would consider necessary to perform and consider in making an accurate diagnosis with respect to gestational age.
- (b) Except in a medical emergency as specifically defined in Subsection 4(c) of this Act, no physician or person shall knowingly perform, induce, or attempt to perform an abortion upon a pregnant woman when the probable gestational age of her unborn child has been determined to be at least twenty (20) weeks.
- (c) **Medical Emergency Exception:** For the purposes of this Act, “**medical emergency**” means necessary to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function (as specifically defined in Section 3(e) of this Act) of the pregnant woman.

Section 5. Reporting.

- (a) Any physician who performs an abortion pursuant to Section 4(c) of this Act shall report, in writing, to the medical facility in which the abortion is performed the reason(s) for the determination that a medical emergency existed. The physician’s written report shall be included in a written report from the medical facility to the [*Insert appropriate State department,*

department head, or regulatory body]. If the abortion is not performed in a medical facility, the physician shall report, in writing, the reason(s) for the determination that a medical emergency existed to the [*Insert appropriate State department, department head, or regulatory body*] as part of the written report made by the physician to the [*Insert appropriate State department, department head, or regulatory body*]. The physician and the medical facility shall retain a copies of the written reports required under this Section for not less than five (5) years.

(b) Failure to report under this Section does not subject physician to criminal or civil penalties under Sections 6 and 7 of this Act.

(c) Subsection 4(b) does not preclude sanctions, disciplinary action, or any other appropriate action by the [*Insert appropriate citation or reference to State Medical Board or other appropriate agency*].

Section 6. Criminal Penalties.

(a) Any person who intentionally or knowingly violates this Act is guilty of a [*Insert appropriate penalty/offense classification*].

(b) Any physician who intentionally or knowingly performs or induces an abortion in violation of this Act and thereby kills an unborn child shall be fined not less than ten thousand (\$10,000) nor more than one-hundred thousand dollars (\$100,000) under this Act, or be imprisoned [*at hard labor*] not less than one (1) year nor more than ten (10) years, or both.

Section 7. Civil Penalties.

(a) The father of the unborn child, if married to the mother at the time she receives an abortion in violation of this Act, and, if the mother has not attained the age of eighteen (18) years at the time of the abortion, the maternal grandparents of the unborn child may in a civil action obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(b) Such relief shall include

(1) Money damages for all injuries, psychological and physical, occasioned by the violation of this Act; and

(2) Statutory damages equal to [*Insert number*] times the cost of the abortion performed in violation of this Act.

Section 8. Review by State Medical Board [of *Medical Licensure and Supervision*].

(a) A physician-defendant accused of an offense under this Act may seek a hearing before the State Medical Board [*or other appropriate State agency*] as to whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself; and/or as to whether the continuation of the pregnancy would have created a serious risk of substantial and irreversible impairment of a major bodily function (as specifically defined in Section 3(e) of this Act) of the pregnant woman.

(b) The findings on this issue are admissible on this issue at the civil and criminal trials of the physician-defendant. Upon a motion of the physician-defendant, the court shall delay the beginning of the trial(s) for not more than thirty (30) days to permit such a hearing to take place.

Section 9. Penalties for Medical Facilities.

(a) A medical facility licensed pursuant to [*Insert reference(s) to appropriate statute(s) or regulation(s)*] in which an abortion is performed or induced in violation of this Act shall be subject to immediate revocation of its license by the [*Insert name of appropriate department or agency*].

(b) A medical facility licensed pursuant to [*Insert references to appropriate statute(s) or regulation(s)*] in which an abortion is performed or induced in violation of this Act shall lose all state funding for [*Insert number*] years and will be required to reimburse the State for funds from the calendar [*fiscal*] year in which the abortion in violation of this Act was performed.

Section 10. Prosecutorial Exclusion.

A woman upon whom an abortion in violation of this Act is performed or induced may not be prosecuted under this Act for a conspiracy to violate Section 4 of this Act.

Section 11. Construction.

(a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.

(b) It is not the intention of this Act to make lawful an abortion that is currently unlawful.

Section 12. Severability.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

Section 13. Right of Intervention.

The [*Legislature*], by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this Act in his or her official capacity, to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

Section 14. Effective Date.

This Act shall take effect on [*Insert date*].

More detailed information about the dangers inherent in abortion and the need justification for state laws restricting and regulating abortion can be found in AUL's annual publication *Defending Life 2010: A State by State Legal Guide to Abortion, Bioethics, and the End of Life*.

Defending Life 2010 is available online at AUL.org or for purchase at Amazon.com.

For further information regarding this or other AUL policy guides, please contact:

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