

Memorandum

Re: To rebut the false claims that “Arkansas Unborn Child Protection from Dismemberment Abortion Act” (Act 45) subjects a woman to criminal or civil penalties and that Act 45 prevents a woman from obtaining a lawful abortion.

Date: February 5, 2017

From: Jennifer Popik, J.D. Legislative Director and Counsel to Department of State Legislation

1. This law explicitly provides that a woman seeking or obtaining an abortion will NOT face criminal or civil penalties, or punishment of any sort.
2. The civil remedies contained in Act 45 give standing to certain close family members ONLY in action against the physician, and ONLY against the one proscribed abortion method (one that dismembers a living child), not against other methods.

Background:

On January 26, 2017, HB 1032, now Act 45, became law in Arkansas. Act 45 prevents one particularly gruesome type of abortion, an abortion which dismembers a living unborn child. Alternatives to dismemberment abortion include, but are not limited to, labor-induction abortion, inducing fetal demise with digoxin injections, and inducing fetal demise by cutting the umbilical cord (also known as transection).

1. **This law explicitly provides that a woman seeking or obtaining an abortion will NOT face criminal or civil penalties, or punishment of any sort.**

The only persons who can incur liability, either criminal or civil are those who “purposely perform or attempt to perform a dismemberment abortion.” Violation of the law is made a felony, but the woman upon whom an abortion is performed or attempted is specifically excluded. The engrossed version, page 4 in lines 1-3, states “The following individuals are excluded from liability under this subchapter: (1) A woman who receives or attempts to receive a dismemberment abortion”. The woman seeking an abortion is not subject to liability, as is the case with each and every piece of legislation that National Right to Life develops or assists states with.

2. **The civil remedies contained in Act 45 give standing to certain close family members ONLY in action against the physician, and ONLY against the one proscribed abortion method (one that dismembers a living child), not against other methods.**

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Act 45 outlaws one particularly gruesome method of abortion. In making dismemberment abortions that kill a living unborn child a felony, the state has made this one type of abortion illegal. The civil remedies in Act 45 may only be sought against the person performing the abortion. Women upon whom an abortion illegal under this act is performed or attempted and their near relatives are empowered to seek an injunction to prevent the abortionist from further violating or attempting to violate the act, or to obtain civil damages for purposeful violations; however, no damages may be awarded to any person whose “criminal conduct” (such as rape or incest) was responsible for the pregnancy itself (page 4, lines 3-4).

The legislature, by including civil remedies, is merely attempting to ensure the law is truly enforced. Civil remedies are a common form of relief that is applied to people violating the law, and in this case that is exclusively the abortion provider who is about to or has broken the law.

Under a civil remedies approach, private individuals are given "standing"--the ability to sue the abortionist. There are two types of civil remedies: injunctions and civil damages. An injunction has a number of advantages. It allows action to prevent the dismembering of a living unborn child before it happens. It permits a case to be brought promptly before a judge who can directly order the would-be assister not to violate the law. That person then knows that if he or she violates the court order, the judge will order fines for contempt of court.

For most physicians, this is likely to be a far more realistic deterrent than the potential for criminal prosecution, as doctors' fear of malpractice liability demonstrates, monetary sanctions are extremely effective. They can be enforced through the garnishment of income and the seizure of assets. Civil damages are monies awarded after the fact, as in traditional malpractice cases.

Insurers are likely to exercise strong pressure on doctors to avoid actions that could subject them to such suits.

It is critical to keep in mind that all of these civil remedies only apply to *illegal abortion*. The notion that a woman's husband or any other person with standing might be able to somehow stop the woman from obtaining a legally permitted form of abortion is simply untrue. An abortion provider who is providing illegal dismemberment abortions is the only subject of scrutiny. The law is clear that the woman is always free to obtain a legal type of abortion at anytime, for whatever reason. Line 11 (d) of Act 45 states, “This subchapter does not prohibit an abortion by any other method for any reason, including rape or incest.” *Emphasis added.*