

## NACDL REPORT

# ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS: Missouri Appendix

### *I. Introduction<sup>1</sup>*

In 2019, Missouri was among a number of states to pass legislation that restricts, and as a practical result, virtually eliminates a woman's right to obtain an abortion.<sup>2</sup> Missouri House Bill 126, also known as the "Missouri Stands for the Unborn Act" (the "Act"),<sup>3</sup> contains a slew of restrictions related to abortion, including significant criminal penalties for abortion providers who provided abortion services outside of the very narrow confines of the new law.

A day prior to the scheduled effective date of the Act, the District Court for the Western District of Missouri issued an injunction with respect to the provisions of the Act that carry criminal consequences for abortion providers.<sup>3</sup> Notably, the Court's opinion in *Planned Parenthood v. Parsons* did not address the legality of the criminalization provisions in the Act, but instead focused on the State's fundamental overreach in attempting to restrict abortion access prior to the time of fetal viability. As of the writing of this memorandum, the injunction remains in place.

### *II. Criminal Provisions of the Act*

The Act contains numerous provisions that attempt to further regulate abortion in the State of Missouri. These provisions are enforced through a scheme of civil and criminal penalties, the latter of which are the focus of this memorandum.

*A. Prohibition on Abortions After 8 Weeks of Gestational Age*

In pertinent part, Mo. Ann. Stat. § 188.056 provides:

Abortion prohibited after eight weeks gestational age, exception for medical emergency – violation, penalty – severability clause.

1. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this section.
2. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 1 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.
3. Prosecution under this section shall bar prosecution under section 188.057, 188.058, or 188.375 if prosecution under such sections would violate the provisions of Amendment V to the Constitution of the United States or article I, section 19 of the Constitution of Missouri.
4. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of

competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*See* Mo Stat. Ann. § 188.056 (Abortion prohibited after eight weeks gestational age, exception for medical emergency--violation, penalty--severability clause) (emphasis added).

To be clear, in connection with its effort to bar upon abortions performed or induced after eight (8) weeks of gestational age, the Act creates criminal liability on the part of the abortion provider, unless the *provider* is able to demonstrate that the abortion was performed as a result of a medical emergency. “Medical emergency” is defined in the Act as “a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.” *See* Mo. Ann. Stat. § 188.015.

Accordingly, it is *presumed* that all abortions that take place after eight weeks of gestational age are in violation of the law, and the burden is expressly placed upon the abortion provider to demonstrate medical necessity as part of an *affirmative defense* in

the face of prosecution. As result of this burden shifting, at trial, the State is not be required to introduce evidence that the abortion was not performed as a result of any medical emergency, nor does it have the burden to prove same beyond a reasonable doubt.

In anticipation of legal challenges to its effort to ban abortions performed after eight weeks of pregnancy, the legislature included several fallback provisions in the Act, which would move the gestational age trigger back incrementally. *See* Mo. Ann. Stat. §§ 188.057 (moving gestational age for abortion ban to 14 weeks), 188.058 (moving gestational age for abortion ban to 18 weeks). Each of these provisions contain criminalization language identical to that found in Mo. Ann. Stat. § 188.056 (eight-week ban).

*B. "Late-Term Pain-Capable Unborn Child Protection Act"*

Adding to this enforcement scheme, Mo. Ann. Stat. § 188.375 purports to define "late term" abortions as abortions performed after 20 weeks. Specifically, Mo. Ann. Stat. § 188.375 provides:

188.375. Citation of act—definition—limitation on abortion, when—  
violation, penalty—method or technique to be utilized--severability clause

1. This section shall be known and may be cited as the "Late-Term Pain-Capable Unborn Child Protection Act."

2. As used in this section, the phrase “late-term pain-capable unborn child” shall mean an unborn child at twenty weeks gestational age or later.
3. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman carrying a late-term pain-capable unborn child, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of a late-term pain-capable unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection.
4. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 3 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.
5. Prosecution under subsection 3 of this section shall bar prosecution under section 1 188.056, 188.057, or 188.058 if prosecution under such sections would violate the provisions of Amendment V to the Constitution of the United States or article I, section 19 of the Constitution of Missouri.
6. When in cases of medical emergency a physician performs or induces an abortion upon a woman in her third trimester carrying a late-term pain-capable unborn child, the physician shall utilize the available method or technique of abortion most likely to preserve the life or health of the unborn child. In cases where the method or technique of abortion most likely to preserve the life or health of the unborn child would present a greater risk to the life or health of the woman than another legally permitted and available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs or induces an abortion upon a woman during her third trimester carrying a late-term pain-capable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

7. When in cases of medical emergency a physician performs or induces an abortion upon a woman during her third trimester carrying a late-term pain-capable unborn child, there shall be in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion.
8. Any physician who knowingly violates any of the provisions of subsection 6 or 7 of this section shall be guilty of a class D felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of subsections 6 or 7 of this section shall not be prosecuted for a conspiracy to violate the provisions of those subsections.
9. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*See Mo. Ann. Stat. § 188.375 (Citation of act--definition--limitation on abortion, when--violation, penalty--method or technique to be utilized--severability clause) (emphasis added).*

This provision creates criminal penalties that are consistent with the penalties set forth in connection with Mo. Ann. Stat. §§ 188.056, 188.057, and 188.058, but also creates

additional criminal liability for an abortion provider who fails to comply with certain certification requirements in connection with third-trimester abortions, including utilizing medical techniques that are most likely to allow for the survival of the fetus, providing a certification to that effect, and having a second medical professional present to provide medical treatment to the aborted fetus.

Similar to the provisions with respect to the eight-week ban, criminalization efforts are outwardly focused on medical professionals, while women seeking abortions are excluded from prosecution under this section of the Act.

Notably, a Class B felony is punishable under Missouri law by 5 to 15 years' imprisonment, R.S.Mo. §558.011, while a Class D felony is punishable under Missouri law by a term of imprisonment not to exceed seven years. *Id.*

### ***III. District Court Injunction***

#### *A. The Decision*

One day prior to the effective date of the Act, the District Court for the Western District of Missouri issued an order enjoining the State from implementing the “pre-viability” abortion bans set forth in Mo. Ann. Stat. §§ 188.056, 188.057, 188.058, and § 188.375. *See Planned Parenthood v. Parsons*, 389 F.Supp.3d 631 (WDMO 2019). The Court held that the plaintiffs had a likelihood of success in challenging the State’s attempt to tie “viability” to a certain week of gestation, where such efforts had been roundly rejected in precedent. *Id.* at 637 (quoting *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979))

(“Neither the legislature nor the courts may proclaim one of the elements entering into the assessment of viability — be it weeks of gestation . . . or any other single factor — as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the crucial point.”).

The Court’s injunction with respect to Mo. Ann. Stat. §§ 188.056, 188.057, 188.058, and § 188.375 also put a halt to the criminal penalties associated with those provisions. While the injunction is in place, the majority of abortion-related services offered at the State’s lone, remaining clinic may continue, although they may be circumscribed by other provisions of the Act, which went into effect.<sup>4</sup> According to the Court, “[t]he greatest impact of House Bill 126 would be to prohibit abortions in Missouri after eight weeks LMP [last menstrual period]. This would prohibit more than two thirds of plaintiff RHS’s patients from obtaining abortions and about half the reported abortions in Missouri. The impact of the 20-week rule seems likely to prohibit about 100 abortions performed each year.” *Id.* at 638.

In a subsequent opinion dated September 27, 2019, the Court expanded its August 27, 2019 decision to include an injunction against the “reason” portion of the Act, which would have required medical providers to interrogate their patients regarding the basis upon which the abortion was being sought in order to determine whether the purpose was based upon the fetus’s race, sex, or genetic screening results, and therefore prohibited. *See Reproductive Health Services of Planned Parenthood of the St.*

*Louis Region, Inc., et al v. Michael Parsons, et al*, 408 F.Supp.3d 1049 (WDMO 2019)

(enjoining implementation of Mo. Ann. Stat. § 188.038, which provides that no person shall perform or induce abortion if the person knows that the woman is seeking abortion solely because of prenatal diagnosis, test, or screening indicating Down syndrome or potential Down syndrome, or if abortion is sought solely because of sex or race of fetus.) Violations of this provision would have been subject to civil penalties including potential license revocation and malpractice exposure, but not criminal penalties.

*B. Impact – Criminalization Issues on the Horizon*

While the specific penalties contemplated by the Act have been tabled, in the event that the injunction is lifted, the impact may be far greater than the penalties provided in the text of the law.<sup>5</sup> For instance, the Act refers specifically to abortion providers and women seeking abortions – the former being expressly subject to prosecution, the latter being expressly excepted from it; however, it is unclear whether others, from clinic staff, to friends and family of the abortion seeker, may face accomplice liability in connection with the provision of an illegal abortion service. *See e.g.* MO Rev Stat § 564.016. Moreover, prior to the passage of the Act, Missouri already had criminal penalties in effect relating to the provision of abortion services, including penalties for seemingly regulatory infractions (e.g., § 188.060, records must be maintained for seven years in the facility where the abortion was performed). *See Mo.*

Ann. Stat. § 188.075 (a person who contrary to provisions of §§ 188.010 to 188.085 knowingly performs, induces, or aids in performance or inducing of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor, unless a different penalty is provided for in state law); *see also* MO. Ann. Stat. §558.011 (Class A misdemeanor punishable by up to one year county jail). Similar to the burden-shifting mechanisms proposed in the Act, prior laws purporting to regulate abortions also allowed for an affirmative defense to any violation of the law based upon medical emergency. *See* Mo. Ann. Stat. § 188.075(2). These laws remain in effect with the passage of the Act and were unaffected by the Court's injunction.

Similarly, the State could attempt to bring charges of assault under MO Ann. Stat §§ 565.050-056, *see State v. Kenney*, 973 S.W.2d 536 (Mo. App. 1998) (affirming finding of guilty for assault in first degree involving an unborn child) (overruled on other grounds) or under §§ 565.072-74 (domestic assault) (involving attempt to kill or seriously injure a domestic victim), for parents, for instance, who assist in accommodating abortion services for a minor. Creative efforts to expand prosecution in myriad ways are not hard to imagine. In *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007), the Missouri Court of Appeals dismissed a felony charge of first-degree child endangerment against a pregnant woman for using marijuana and methamphetamine during her pregnancy. MO Ann. Stat. § 568.045 provides that person commits the

offense of endangering the welfare of a child in the first degree if he or she: “(1) Knowingly acts in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years of age; by ‘knowingly act[ing] in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years old[.]’”

The Court held that the statutory definition of a “child” did not appear to include a child in utero.<sup>6</sup> The Court would have undoubtedly reached the opposite result if the Missouri abortion bill and Mo. Ann. Stat. § 188.010 (1) (Intent of the General Assembly) are permitted to go into effect. Section § 188.010 (1) states that it is the intention of the general assembly to “defend the right to life of all humans, born and unborn.”

Likewise, criminal liability can be expected to extend to pregnant women and to the individuals who help them arrange or obtain abortions under Missouri’s murder statutes if *Roe v. Wade* is overturned.<sup>7</sup> In *Bailey v. State*, 191 S.W.3d 52 (Mo. App. 2005) the Court of Appeals rejected the claim that an unborn child could not be a victim of the crime of murder in the first degree, citing the legislature’s statement in Mo. Ann. Stat. § 1.205.2 that life begins at conception. *Id.* at 55. The Court also rejected the defendant’s contention that the unborn child in this case was not viable and that a non-viable fetus should be treated differently than a viable fetus for purposes of the homicide statutes. *Id.*

The overt criminalization efforts set forth in the Act are of significant concern, and the secondary prosecution efforts that may come in the wake of a lifted injunction are

equally disturbing. Although the injunction is in place for now, forces are hard at work to eliminate that hurdle and clear the path for full prosecution.

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<sup>1</sup> This memorandum is submitted in light of two orders for injunctive relief that were issued by the District Court for the Western District of Missouri in August and September of 2019. This overview is tailored accordingly, and does not explore onerous civil and regulatory schemes that restrict abortion access in Missouri, or prior efforts to criminalize abortion services.

<sup>2</sup> The Act enhanced an already restrictive legal framework for abortion providers – so restrictive, in fact, that even prior to the passage of the Act, only one abortion provider, located in St. Louis, remained in the State. See <https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html> (Missouri one of six states with only one abortion clinic as of June 2019).

<sup>3</sup> *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al v. Michael Parsons, et al*, 389 F.Supp.3d 631 (USDC WDMO, Aug. 27, 2019) (“*Planned Parenthood v. Parsons*”).

<sup>4</sup> To be clear, neither the Court’s initial injunction, nor its supplemental opinion and expanding the injunction, prohibit implementation of the numerous other provisions of the Act, such as: 1) requiring both parents of a minor to be notified should the minor seek an abortion, whereas single parent notification was the prior standard; 2) requiring an increase in medical malpractice coverage for physicians providing abortion services; 3) requiring Missourians referred for abortion procedures out of state to comply with the same “informed consent” standards set by Missouri; 4) increasing tax credits for pregnancy resource centers; and 5) implementing a complete ban on abortions should *Roe v. Wade* be overturned.

<sup>5</sup> Prior to the passage of the Act, Missouri already had criminal penalties in effect relating to the provision of abortion services, including penalties for seemingly regulatory infractions (e.g., § 188.060; records must be maintained for seven years in the facility where the abortion was performed). See Mo. Ann. Stat. § 188.075 (person who contrary to provisions of §§ 188.010 to 188.085 knowingly performs, induces, or aids in performance or inducing of any abortion or knowingly fails to perform any action required by sections 188.010 to 188.085 shall be guilty of a class A misdemeanor, unless a different penalty is provided for in state law); see also R.S.Mo. §558.011 (Class A misdemeanor punishable by up to one year county jail). Similar to the burden-shifting mechanisms proposed in the Act, prior laws purporting to regulate abortions also allowed for an affirmative defense to any violation of the law based upon medical emergency. See Mo. Ann. Stat. § 188.075(2). These laws remain in effect with the passage of the Act, and were unaffected by the Court’s injunction.

<sup>6</sup> *Id.* at 664.

<sup>7</sup> MO Ann. Stat. § 565.020 – *First Degree Murder* provides: “A person commits the offense of murder in the first degree if he or she knowingly causes the death of another person after deliberation upon the matter.” MO Ann. Stat. § 565.020 – *Second Degree Murder* provides: “A person who knowingly causes the death of another or causes the death of another in the commission of another felony is guilty of second-degree

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murder.” There is already one anti-abortion statute that makes it a felony for a non-physician to perform an abortion.