State of Arkansas
93rd General Assembly
Fiscal Session, 2022 SR 12

By: Senator Rapert

SENATE RESOLUTION

TO AUTHORIZE THE INTRODUCTION OF A NONAPPROPRIATION BILL TO CREATE THE ARKANSAS HUMAN HEARTBEAT AND HUMAN LIFE CIVIL JUSTICE ACT, REGULATE ABORTION IN ARKANSAS, AND SAVE THE LIVES OF UNBORN CHILDREN AND PROTECT THE HEALTH OF WOMEN THROUGH CIVIL LIABILITY FOR VIOLATIONS OF ABORTION LAWS.

Subtitle

TO AUTHORIZE THE INTRODUCTION OF A NONAPPROPRIATION BILL TO CREATE THE ARKANSAS HUMAN HEARTBEAT AND HUMAN LIFE CIVIL JUSTICE ACT TO SAVE THE LIVES OF UNBORN CHILDREN AND PROTECT THE HEALTH OF WOMEN THROUGH CIVIL LIABILITY.

BE IT RESOLVED BY THE SENATE OF THE NINETY-THIRD GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

THAT Senator Rapert is authorized to introduce a bill which as introduced will read substantially as follows:

"Title
AN ACT TO CREATE THE ARKANSAS HUMAN HEARTBEAT AND HUMAN LIFE CIVIL JUSTICE ACT; TO REGULATE ABORTION IN ARKANSAS; TO SAVE THE LIVES OF UNBORN CHILDREN AND PROTECT THE HEALTH OF WOMEN THROUGH CIVIL LIABILITY FOR VIOLATIONS OF ABORTION LAWS; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.

Subtitle
TO CREATE THE ARKANSAS HUMAN HEARTBEAT AND HUMAN LIFE CIVIL JUSTICE ACT; TO SAVE THE LIVES OF UNBORN CHILDREN AND PROTECT THE HEALTH OF WOMEN THROUGH CIVIL LIABILITY; AND TO DECLARE AN EMERGENCY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 20, Chapter 16, is amended to add an additional subchapter to read as follows:
Subchapter 26 — Arkansas Human Heartbeat and Human Life Civil Justice Act

20-16-2601. Title.

This subchapter shall be known and may be cited as the "Arkansas Human Heartbeat and Human Life Civil Justice Act".

20-16-2602. Legislative findings.

(a) The General Assembly finds that:

(1) It is time for the United States Supreme Court to redress and correct the grave injustice against humanity which is being perpetuated by its decisions in Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey;

(2) The United States Supreme Court committed a grave injustice against humanity in the Dred Scott decision by denying personhood to a class of human beings, African Americans;

(3) The United States Supreme Court also committed a grave injustice against humanity by upholding the “separate but equal” doctrine in Plessy v. Ferguson, which withdrew legal protection from a class of human beings who were persons under the United States Constitution, African Americans;

(4) An injustice against humanity occurs when a government withdraws legal protection from a class of human beings, resulting in severe deprivation of their rights, up to and including death;

(5) In Brown v. Board of Education, the United States Supreme Court corrected its own grave injustice against humanity created in Plessy v. Ferguson by overruling and abolishing the fifty-eight-year-old “separate but equal” doctrine, thus giving equal legal rights to African Americans;

(6) Under the doctrine of stare decisis, the three (3) abortion cases mentioned in subdivision (a)(1) of this section meet the test for when a case should be overturned by the United States Supreme Court because of significant changes in facts or laws, including without limitation the following:

(A) The cases have not been accepted by scholars, judges, and the American people, evidenced by the fact that these cases are still the most intensely controversial cases in American history and at the present time;

(B) New scientific advances have demonstrated since 1973 that life begins at the moment of conception and that the child in a woman's womb is a human being;

(C) Scientific evidence and personal testimonies document the massive harm that abortion causes to women;

(D) The laws in all fifty (50) states have now changed through "Safe Haven" laws to eliminate all burdens of child care from women who do not want to care for a child; and

(E) Public attitudes favoring adoption have created a culture of adoption in the United States, with many families waiting long periods of time to adopt newborn infants;

(7) Before the United States Supreme Court decision of Roe v. Wade, Arkansas had already enacted prohibitions on abortions under § 5-61-101 et seq., and authorized the refusal to perform, participate, consent, or submit to an abortion under § 20-16-601;

(8) Arkansas Constitution, Amendment 68, states that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth" and that "no public funds will be used to pay for any abortion, except to save the mother's life";

(9) Arkansas passed the Arkansas Human Heartbeat Protection Act, § 20-16-1301 et seq., in 2013, which shows the will of the Arkansas people to save the lives of unborn children;

(10) Arkansas has continued to pass additional legislation in 2015, 2017, 2019, and 2021 that further shows the will of the Arkansas people to save the lives of unborn children;

(11)(A) Since the decision of Roe v. Wade, approximately sixty-two million five hundred two thousand nine hundred four (62,502,904)

abortions have ended the lives of unborn children.

(B) In 2015, six hundred thirty-eight thousand one hundred sixty-nine (638,169) legal induced abortions were reported to the Centers for Disease Control and Prevention from forty-nine (49) reporting areas in the United States.

(C) The Department of Health reports that two thousand nine hundred sixty-three (2,963) abortions took place in Arkansas during 2019, including abortions performed on out-of-state residents;

(12) Arkansas has a compelling interest from the outset of a woman's pregnancy in protecting the health of the woman and life of an unborn child; and

(13) The State of Arkansas urgently pleads with the United States Supreme Court to do the right thing, as they did in one of the United States Supreme Court's greatest cases, Brown v. Board of Education, which overturned a fifty-eight-year-old precedent of the United States, and reverse, cancel, overturn, and annul Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey.

(b) It is the intent of this subchapter to ensure that abortion in Arkansas is abolished and to establish civil liability for the violation of abortion laws in order to protect the lives of unborn children.

20-16-2603. Definitions.

As used in this subchapter:

(1)(A) "Abortion" means the act of using, prescribing, administering, procuring, or selling of any instrument, medicine, drug, or any other substance, device, or means with the purpose to terminate the pregnancy of a woman, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of an unborn child.

(B) An act under subdivision (1)(A) of this section is not an abortion if the act is performed with the purpose to:

(i) Save the life or preserve the health of the unborn child;

(ii) Remove a dead unborn child caused by spontaneous abortion; or

(iii) Remove an ectopic pregnancy;

(2) "Entity" means a corporation, partnership, limited liability

company, association, joint venture, public corporation, any other legal or commercial entity, fiduciary, or any organized group of persons whether incorporated or not, including without limitation a church or religious organization;

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum;

(4) "Medical emergency" means a condition in which an abortion is necessary to preserve the life of a 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; and

(5) "Unborn child" means an individual organism of the species Homo sapiens from fertilization until live birth.

20-16-2604. Prohibition.

(a) A person or entity shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.

(b) This section does not:

(1) Authorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child;

(2) Permit a civil liability to be assessed against a woman upon whom an abortion is performed in violation of this subchapter; or

(3) Prohibit the sale, use, prescription, or administration of a contraceptive measure, drug, or chemical if the contraceptive measure, drug, or chemical is administered before the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure, drug, or chemical is sold, used, prescribed, or administered in accordance with manufacturer instructions.

(c) It is an affirmative defense under this section if a licensed physician provides medical treatment to a pregnant woman that results in the accidental or unintentional physical injury or death to the unborn child.

20-16-2605. Exemption for preemption and intergovernmental immunity.

The prohibition in § 20-16-2604 shall not apply to an abortion performed at the behest of federal agencies, contractors, or employees that

are carrying out duties under federal law, if the prohibition on the abortion would violate the doctrines of preemption or intergovernmental immunity.

20-16-2606. Limitation on public enforcement.

(a) Notwithstanding any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in § 20-16-2607.

(b) A direct or indirect enforcement of this subchapter may not be taken or threatened by the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person or entity.

(c) A violation of this subchapter may not be used to justify or trigger the enforcement of any other law, except as provided in § 20-16-2607.

20-16-2607. Civil liability.

(a) Any person or entity, other than the state, a political subdivision of the state, or an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person or entity who:

(1) Performs or induces an abortion in violation of this subchapter;

(2) Knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person or entity knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) Intends to engage in the conduct described in subdivision (a)(1) of this section or subdivision (a)(2) of this section.

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) Injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;

(2) Statutory damages in an amount of not less than ten thousand dollars ($10,000) for each abortion that the defendant performed or induced

in violation of this subchapter, and for each abortion performed or induced or aided or abetted in violation of this subchapter;

(3) Nominal and compensatory damages if the plaintiff has suffered harm from the defendant's conduct, including without limitation loss of consortium and emotional distress; and

(4) Costs and attorney's fees.

(c) Notwithstanding subsection (b) of this section, a court may not award relief under this section in response to a violation of subdivision (a)(1) of this section or subdivision (a)(2) of this section if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under subdivision (b)(2) of this section in a previous action for that particular violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(d) Notwithstanding any other law, a person or entity may bring an action under this section not later than the third anniversary after the date the cause of action accrues.

(e) Notwithstanding any other law, the following are not a defense to an action brought under this section:

(1) Ignorance or mistake of law;

(2) A defendant's belief that the requirements or provisions of this subchapter are or were unconstitutional;

(3) A defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision has not been overruled when the defendant violated this subchapter;

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

(5) Nonmutual issue preclusion or nonmutual claim preclusion;

(6) The consent of the unborn child's mother to the abortion; or

(7) Any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by § 20-16-2608.

(f)(1) It is an affirmative defense if:

(A) A person or entity sued under subdivision (a)(2) of this section reasonably believed, after conducting a reasonable

investigation, that the person or entity performing or inducing the abortion had complied or would comply with every requirement and provision of this subchapter; or

(B) A person or entity sued under subdivision (a)(3) of this section reasonably believed, after conducting a reasonable investigation, that the person or entity performing or inducing the abortion would comply with every requirement and provision of this subchapter.

(2) The defendant has the burden of proving an affirmative defense under subdivision (f)(1)(A) of this section or subdivision (f)(1)(B) of this section by a preponderance of the evidence.

(g) This section does not impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth Amendment of the United States Constitution, or by Arkansas Constitution, Article 2, § 6.

(h)(1) Notwithstanding any other law, neither the state, nor any of its political subdivisions, nor any district or county attorney, nor any executive or administrative officer or employee of this state or a political subdivision may act in concert or participation with anyone who brings suit under this section, nor may they intervene in any action brought under this section.

(2) This subsection does not prohibit a person or entity described in subsection (h)(1) of this section from filing an amicus curiae brief in the action if that person or entity does not act in concert or participate with the plaintiff or plaintiffs who sue under this section.

(i) Notwithstanding any other law, including § 16-22-309, a court may not award costs or attorney's fees under the Arkansas Rules of Civil Procedure or any other law to a defendant in an action brought under this section.

(j) Notwithstanding any other law, a civil action under this section may not be brought by a person who impregnated the woman who obtained an abortion through an act of rape, sexual assault, incest, or any other act prohibited under Title 5, Chapter 14.

(k) Notwithstanding any other law, a civil action under this section may not be brought against a person or entity that performed or aided or abetted an abortion at the behest of federal agencies, contractors, or

employees that are carrying out duties under federal law if the prohibition on the abortion would violate the doctrines of preemption or intergovernmental immunity.

(l) Notwithstanding any other law, a civil action under this section may not be brought against a common carrier who transports a pregnant woman to an abortion provider if the common carrier is unaware that the woman intends to abort her unborn child.

20-16-2608. Civil liability — Defenses.

(a) A defendant against whom an action is brought under § 20-16-2607 may assert an affirmative defense to liability under this section if:

(1) The defendant has standing to assert the rights of a woman or a group of women seeking to obtain an abortion under the tests for third-party standing established by the United States Supreme Court; and

(2) The imposition of civil liability on the defendant will result in an undue burden on that abortion-seeking woman or group of abortion-seeking women.

(b) The defendant shall bear the burden of proving the affirmative defense in subsection (a) of this section by a preponderance of the evidence.

(c) The affirmative defense under subsection (a) of this section is not available if the United States Supreme Court overrules Roe v. Wade, 410 U.S. 113 (1973), or Planned Parenthood v. Casey, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under § 20-16-2607 occurred before the United States Supreme Court overruled either of those decisions.

(d)(1) This section or subchapter does not in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under § 20-16-2607.

(2) A court may not award relief under § 20-16-2607 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

(e) This section or subchapter does not in any way limit or preclude a defendant from asserting the unconstitutionality of any provision of Arkansas law as a defense to liability under this subchapter.

20-16-2609. Civil liability — Venue.

(a) Notwithstanding any other law, a civil action brought under § 20-16-2607 shall be brought in:

(1) The county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) The county of residence for any one (1) of the natural person defendants at the time the cause of action accrued;

(3) The county of the principal office in this state of any one (1) of the defendants that is not a natural person; or

(4) The county of residence for the claimant if the claimant is a natural person residing in this state.

(b) If a civil action is brought under § 20-16-2607 in any one (1) of the venues described in subsection (a) of this section, the action shall not be transferred to a different venue without the written consent of all parties.

20-16-2610. Sovereign, governmental, and official immunity preserved — Limits on jurisdiction.

(a) Notwithstanding any other law, the State of Arkansas shall have sovereign immunity, each of its political subdivisions shall have governmental immunity, and each officer and employee of this state or a political subdivision shall have official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this subchapter, on constitutional grounds or otherwise, or that seeks to prevent or enjoin the State of Arkansas, its political subdivisions, or any officer or employee of this state or a political subdivision from enforcing any provision or application of this subchapter, unless that immunity has been abrogated or preempted by federal law in a manner consistent with the United States Constitution.

(b) Notwithstanding any other law, a provision of state law may not be construed to waive or abrogate an immunity described by subsection (a) of this section unless it expressly waives immunity by specific reference to this section.

(c) Notwithstanding any other law, an attorney representing the state, a political subdivision of the state, or any officer or employee of the state or a political subdivision of the state is not authorized or permitted to

waive an immunity described in this section or take any action that would result in a waiver of the immunity described in this section.

(d) Notwithstanding any other law, a court of this state shall not have jurisdiction to consider any action, claim, or counterclaim that seeks declaratory or injunctive relief to prevent the state, a political subdivision of the state, any officer or employee of the state or a political subdivision of the state, or any person or entity from enforcing any provision or application of this subchapter or from filing a civil action under this subchapter.

(e) This section or subchapter shall not be construed to prevent a litigant from asserting the invalidity or unconstitutionality of any provision or application of this subchapter as a defense to any action, claim, or counterclaim brought against the litigant.

20-16-2611. Award of attorney's fees in actions challenging abortion laws.

(a) Notwithstanding any other law, any person, including an entity, attorney, or law firm, that seeks declaratory or injunctive relief to prevent this state, a political subdivision of this state, any governmental entity or public official in this state, or any person or entity in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

(b) For purposes of this section, a party is considered a prevailing party if a state or federal court:

(1) Dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described in subsection (a) of this section, regardless of the reason for the dismissal; or

(2) Enters judgment in the party's favor on any such claim or cause of action.

(c) Regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action, a prevailing party under this section may bring a civil action to recover costs and attorney's fees against

a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described in subsection (a) of this section not later than three (3) years after the date on which, as applicable:

(1) The dismissal or judgment described in subsection (b) of this section becomes final on the conclusion of appellate review; or

(2) The time for seeking appellate review expires.

(d) It is not a defense to an action brought under subsection (c) of this section that:

(1) A prevailing party under this section failed to seek recovery of costs or attorney's fees in the underlying action;

(2) The court in the underlying action declined to recognize or enforce the requirements of this section; or

(3) The court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

20-16-2612. Severability.

(a) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the General Assembly that every provision, section, subsection, sentence, clause, phrase, and word of this subchapter, and every application of the provisions of this subchapter, be severable from each other.

(b)(1) If any application of any provision of this subchapter to any person or entity, group of persons or entities, or circumstances is found by a court to be invalid, preempted, unconstitutional, or to impose an undue burden on any woman or group of women seeking an abortion, then the remaining applications of that provision to all other persons or entities and circumstances shall be severed and preserved, and shall remain in effect.

(2) All constitutionally valid applications of the provisions of this subchapter, and every application of those provisions that can be enforced without imposing an undue burden on women seeking abortions, shall be severed from any applications that a court finds to be invalid, preempted, unconstitutional, or to impose an undue burden on women seeking abortions, and the valid applications shall remain in force, because it is the General

Assembly's intent and priority that the valid applications be allowed to stand alone.

(3) Even if a reviewing court finds that a provision of this subchapter imposes an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the General Assembly had enacted a statute limited to the persons or entities, groups of persons or entities, or circumstances for which the statute's application does not present an undue burden.

(c) The General Assembly further declares that it would have enacted this subchapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this subchapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this subchapter, were to be declared invalid, preempted, unconstitutional, or to impose an undue burden.

(d) If any provision of this subchapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force consistent with the requirements of subsections (a)-(c) of this section.

(e)(1) A court may not decline to enforce the severability requirements of subsections (a)-(d) of this section on the grounds that severance would rewrite the statute or involve the court in legislative or lawmaking activity.

(2) A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute contains the same words as before the court's decision.

(3) A judicial injunction or declaration of unconstitutionality:

(A) Is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Arkansas Constitution or the United States Constitution;

(B) Is not a formal amendment of the language in a statute; and

(C) No more rewrites a statute than a decision by the Governor not to enforce a duly enacted statute in a limited and defined set

of circumstances.

(f)(1) If any state or federal court disregards the severability requirements of subsections (a)-(e) of this section, and declares or finds any provision of this subchapter is facially unconstitutional, when there are discrete applications of that provision that can be enforced against a person or entity, group of persons or entities, or circumstances without violating federal law, the United States Constitution, or the Arkansas Constitution or imposing an undue burden on women seeking abortions, then that provision shall be interpreted as if the General Assembly had enacted a provision limited to the persons or entities, groups of persons or entities, or circumstances for which the provision's application will not violate federal law, the United States Constitution, or the Arkansas Constitution or impose an undue burden on women seeking abortions.

(2) Every court shall adopt this saving construction of that provision until the court ruling that pronounced the provision facially unconstitutional is vacated or overruled.

SECTION 2. DO NOT CODIFY. Construction.

It is the specific intent of this act that the provisions of this act are supplemental to, cumulative to, and in addition to existing laws, civil or criminal, and shall not be construed to amend, repeal, or otherwise affect those existing laws, including without limitation:

(1) The Arkansas Human Life Protection Act, § 5-61-301 et seq.;

(2) The Arkansas Unborn Child Protection Act, § 5-61-401 et seq.;

(3) Section 20-16-603;

(4) Section 20-16-604;

(5) Section 20-16-701 et seq.;

(6) The Unborn Child Pain Awareness and Prevention Act, § 20-16-1101 et seq.;

(7) The Partial-Birth Abortion Ban Act, § 20-16-1201 et seq.;

(8) The Arkansas Human Heartbeat Protection Act, § 20-16-1301 et seq.;

(9) The Pain-Capable Unborn Child Protection Act, § 20-16-1401 et seq.;

(10) The Abortion-Inducing Drugs Safety Act, § 20-16-1501 et

seq.;

(11) The Arkansas Unborn Child Protection from Dismemberment Abortion Act, § 20-16-1801 et seq.;

(12) The Sex Discrimination by Abortion Prohibition Act, § 20-16-1901 et seq.;

(13) The Cherish Act, § 20-16-2001 et seq.; and

(14) The Down Syndrome Discrimination by Abortion Prohibition Act, § 20-16-2101 et seq.

SECTION 3. EMERGENCY CLAUSE. It is found and determined by the General Assembly of the State of Arkansas that legislation in other states has created a situation in which individuals from other states are entering Arkansas seeking abortions, which is burdening the healthcare system in this state; that the General Assembly previously enacted legislation in the spring of 2021 to abolish abortions, which has been enjoined; that abortions have increased in this state causing harm to unborn children and the health and safety of pregnant women; and that this act is immediately necessary to protect the lives of unborn children and the health and safety of pregnant women in this state. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or

(3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."