ABORTION AND REPRODUCTION

UNITED STATES SUPREME COURT PRECEDENT

The United States Constitution places limits on a state’s right to interfere with certain decisions about family and parenthood, including a woman’s decision to terminate her pregnancy. Specifically, the Supreme Court’s decision in Roe v. Wade, 410 U.S. 113 (1973), has three parts: 1) a woman has the right to choose to have an abortion before viability without undue interference from the state; 2) the state has the right to restrict abortions after viability, if the law contains exceptions for pregnancies that endanger the woman’s life or health; and 3) the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus. The Supreme Court has held, however, that the state may place restrictions on a woman’s decision to terminate her pregnancy so long as it does not create an undue burden to the woman’s ability to make the decision. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). “A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” On the other hand, “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” Id. at 877 (O’Connor, Kennedy, Souter, J.J.). Under this framework, states have passed legislation regarding abortion, including restricting late term abortions, requiring parental involvement if the patient is a minor and mandating the disclosure of certain information prior to the procedure.

OVERVIEW OF STATE LAWS

States have enacted laws regarding abortion and fetal rights. Thirty-five states require informed consent before an abortion procedure, which requires the doctor to notify the woman of certain information that may include the impact on a woman’s mental and physical health and information on fetal pain.
Thirty states also require a waiting period of up to 24 hours; however, four of those states’ laws are permanently enjoined by court order and the waiting period is not in effect. Currently, 43 states require either parental consent or notification of a minor’s abortion. However, six of those 43 states’ laws are permanently or temporarily enjoined by court order. Additionally, 11 states have established policy in the situation that Roe v. Wade is ever overturned: four states criminalize abortion except in cases of life endangerment and seven uphold the right to abortion.

Numerous states have also enacted laws regarding human eggs and embryos. As of July 2011, 18 states allow donation of embryos, either for research or adoption purposes. Of those states, 5 also allow patients to choose to store or dispose of unused embryos. Additionally, California prohibits human eggs or embryos from being sold, offered for sale, or otherwise transferred for valuable consideration for medical research or therapies. However, California also established and maintains a registry of donated embryos that would provide researchers with access to embryos for research purposes. Similarly, South Dakota prohibits the sale of embryos for the purpose of research. Ten other states proscribe the sale of embryos for any reason.

Federal law prohibits the use of federal funds for abortions except in cases of life endangerment, rape or incest (P.L. 105-78). State Medicaid programs are required to fund abortions meeting those exceptions as a condition of obtaining federal monies. Thirty-two states mirror the federal law by restricting funding of abortions to those exceptions; six of those states also include funding for abortions in cases of fetal abnormality or when the pregnancy endangers the woman’s health. Either voluntarily or pursuant to court order, 17 other states use public funding for medically necessary abortions for women on Medicaid. South Dakota only provides public funding in cases where the woman’s life is in danger. As of 2006, 11 states also restricted abortion coverage in public employee insurance policies or other cases where public funds are used to insure employees. Finally, since enactment of the Affordable Care Act in March 2010, at least 12 states have enacted legislation to restrict abortion coverage in their health insurance exchanges.

In 2003, Congress proscribed a type of late term abortion by enacting the Partial-Birth Abortion Ban Act (Act). The statute prescribes a fine or imprisonment for up to two years for any physician who “knowingly performs a partial-birth abortion and thereby kills a human fetus.” The law exempts partial-birth abortions that are necessary to save the life of a mother whose life is endangered by a physical disorder, illness or injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The U.S. Supreme Court upheld the federal ban and held that it did not impose an unconstitutional substantial obstacle on women seeking late term, but previability, abortions. Gonzales v. Carhart, 550 U.S. 124 (2007). Twenty-seven states have enacted bans on partial-birth abortion; four of those states’ laws are substantially similar to the federal Act.

Not only has Congress restricted federal funding and a certain type of abortion, it has also enacted three statutes to protect health care provider conscience rights. These laws allow federally funded providers to refuse, due to religious belief or moral conviction, to participate in abortions. At least 44 states have also adopted similar provider conscience statutes, and several allow pharmacies, hospitals and health professionals to refuse to provide abortion medication or contraception.

Finally, the federal government and certain states have enacted laws that recognize fetal rights. In 2004, the President signed the Unborn Victims of Violence Act, which classifies a “child in utero” who is killed during the commission of an offense as a legal victim. At least 38 states have also adopted fetal homicide laws. These laws contain exceptions for abortions.

---

1 A 2011 South Dakota law extending the waiting period to 72 hours is enjoined pending a court case.
ABORTION AND REPRODUCTION

Arizona Senate Research Staff, 1700 W. Washington, Phoenix, AZ 85007

ARIZONA LAWS

Abortion

Although Arizona law does not establish or recognize a right to an abortion or make lawful an abortion that is otherwise illegal, the State of Arizona does regulate abortion through statute. Such regulations include some of those mentioned above. Specifically, Arizona outlines consent and mandatory reporting requirements; grants rights of conscience for health care providers; regulates and licenses the facilities in which abortions are performed; and restricts abortions under certain circumstances. Additionally, the state provides protections for fetuses, embryos and egg providers.

A woman must give informed consent before an abortion is performed. The woman must be informed at least 24 hours before the abortion of the name of the physician who will perform the abortion, the nature of the procedure, the associated medical risks of the abortion and carrying the child to term, alternatives to abortion and the probable gestational age and physical characteristics of the unborn child. In 2012, the Legislature enacted a law instructing the Department of Health Services (DHS) to establish a website, to be updated annually, which provides certain specified materials related to abortion, alternatives to abortion, and agencies and services available to assist a woman through childbirth and while her child is dependent. Further, as part of the informed consent requirements, the woman must be informed that DHS maintains a website which provides a description of the unborn child and a list of agencies offering alternatives to abortion, and that the woman has a right to review the website and a printed copy of the materials will be provided free of charge if she chooses to review them. The law requires this information to be provided “by the physician who is to perform the abortion… orally and in person.”

The physician or another health professional must also inform the woman that medical assistance benefits may be available, the father must support his child, it is unlawful for a person to coerce the woman to undergo an abortion, and the woman is free to withhold or withdraw her consent. This information must be provided individually and in a private room. In addition, at least 24 hours before any part of the abortion is performed or induced and before any anesthesia is administered in preparation for the abortion, the physician or a qualified staff member must conduct an ultrasound and fetal heart tone auscultation on the woman and offer her an opportunity to view the ultrasound image and listen to the heartbeat. The woman must certify in writing before the abortion that this opportunity was provided and whether she chose to view the image and hear the heartbeat. The physician or staff person must also offer to provide a physical picture of the ultrasound image and an explanation of what the image is depicting.

If the woman is seeking an abortion of an unborn child diagnosed with a lethal fetal condition, the physician or other health professional must inform the woman of available perinatal hospice services and offer such services as an alternative to abortion. Additionally, if a woman is seeking an abortion of an unborn child diagnosed with a nonlethal fetal condition, the physician or qualified health professional must also inform the woman that medical assistance benefits may be available, the father must support his child, it is unlawful for a person to coerce the woman to undergo an abortion, and the woman is free to withhold or withdraw her consent. This information must be provided individually and in a private room. In addition, at least 24 hours before any part of the abortion is performed or induced and before any anesthesia is administered in preparation for the abortion, the physician or a qualified staff member must conduct an ultrasound and fetal heart tone auscultation on the woman and offer her an opportunity to view the ultrasound image and listen to the heartbeat. The woman must certify in writing before the abortion that this opportunity was provided and whether she chose to view the image and hear the heartbeat. The physician or staff person must also offer to provide a physical picture of the ultrasound image and an explanation of what the image is depicting.

The injunction enjoined: a) the requirement that the woman be given certain information prior to the abortion procedure orally and in person by the physician who is to perform the procedure, and instead allowed the information to be given by telephone by another qualified staff person; b) the prohibition on nonphysicians performing surgical abortions; c) the ability of pharmacies, hospitals, health professionals and employees to refuse to provide contraception; and d) the requirement that parental consent to a minor’s abortion be notarized. On August 11, 2011, the Arizona Court of Appeals held the statutes affected by the preliminary injunction constitutional and vacated the injunction.

Planned Parenthood Arizona, Inc. v. American Association of Pro-Life Obstetricians and Gynecologists et al. CV 09-0748/10-0274 (2011). These provisions are therefore now in effect.

---

2 On September 30, 2009, the trial court issued a preliminary injunction enjoining enforcement of certain provisions of Laws 2009, Chapter 172 (H.B. 2564) and Laws 2009, Chapter 178 (S.B. 1175), abortion bills that had been challenged. Specifically,
professional must provide the woman information concerning the range of outcomes for individuals living with the diagnosed condition.

If a medical emergency compels an abortion, the physician must inform the woman, before the procedure if possible, of the medical indications that support the judgment that an abortion is necessary to prevent the woman’s death or substantial and irreversible impairment of a major bodily function. A physician who knowingly violates the informed consent requirement commits an act of unprofessional conduct and is subject to license suspension or revocation. The woman and, under certain circumstances, the father or maternal grandparents of the unborn child may file a civil action if the physician fails to obtain informed consent.

Similarly, a person may not perform an abortion on a pregnant un-emancipated minor unless the physician has obtained written and notarized consent from one of the minor’s parents, guardians or conservators, or unless a judge authorizes the physician to perform the abortion (“judicial bypass”). Legislation passed in 2012 requires consent to be obtained on a form prescribed by DHS. However, parental consent is not required if: 1) the pregnant minor attests that the pregnancy resulted from sexual contact with the minor’s parent, stepparent, uncle, grandparent, sibling, adoptive parent, legal guardian, foster parent or an unrelated male living with the mother and child; or 2) the attending physician certifies that the abortion is necessary to avert death or substantial and irreversible impairment of major bodily function. In 2012, the Legislature established that a civil action may be brought against a person who performs an abortion, or a person who causes, aids or assists a pregnant un-emancipated minor to obtain an abortion, without obtaining parental consent or judicial bypass as required.

Additionally, statute prohibits a person from knowingly performing, coercing or financing an abortion that is sought based on the sex or race of the child or the race of the child’s parent, and classifies a violation as a class 3 felony. Before a person performs or induces an abortion, the person must complete and sign an affidavit stating the person is not performing the abortion because of the child’s sex or race and has no knowledge the abortion is being sought for this reason.

A hospital is not required to admit any patient for the purpose of performing an abortion. Additionally, an employee of a hospital, doctor, clinic or other medical facility in which an abortion has been authorized is not required to facilitate or participate in the abortion, if the person states in writing an objection on moral or religious grounds. Likewise, a pharmacy, hospital, health professional or employee who states in writing an objection on moral or religious grounds is not required to facilitate or participate in the provision of: 1) an abortion; 2) abortion medication; 3) emergency contraception; or 4) any medication or device intended to inhibit or prevent pregnancy.

In addition to recognizing people’s right to refuse to participate in abortions, the State of Arizona has also determined who may perform abortions and how abortions may be performed. In 2008, the Board of Nursing voted that it was within a registered nurse practitioner’s (RNP) scope of practice to perform a first-trimester surgical abortion, provided the procedure was within the RNP’s specialty certification, the RNP had met certain education requirements and there was documented evidence of competency in the procedure. The Legislature, however, later enacted a law prohibiting non-physicians from performing surgical abortions.

3 Substantial and irreversible impairment of a major bodily function is not defined under Arizona law. The phrase was used to define medical emergency in the Pennsylvania abortion statute upheld by the U.S. Supreme Court. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). The Court of Appeals stated: “[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman.” The Supreme Court concluded that, as construed by the Court of Appeals, the medical emergency definition is constitutional.
or administering, prescribing or dispensing medication intended to cause or induce abortion. Further, in 2011 the Legislature enacted a law specifying the Board of Nursing does not have authority to decide scope of practice relating to abortion.

Additionally, statute prohibits a health care provider from using telemedicine to provide an abortion. A provider who does so commits an act of unprofessional conduct and is subject to license suspension or revocation.

The Legislature has also established electronic reporting requirements related to abortion. Namely, hospitals and facilities where abortions are performed must submit to DHS information about the facility; the procedure; the unborn child; and the woman, including her age, race, ethnicity, marital status, education, prior pregnancies and abortions, medical conditions and residence. Moreover, health professionals who treat a woman whom he or she believes in good faith needs medical care because of complications from an abortion must submit an electronic report to DHS, including information about the woman, the facility where the abortion was performed, the procedure, complications and medical treatment. DHS must prepare a comprehensive annual report based on those reports and on information provided by the courts on judicial bypass petitions. In complying with these requirements, though, the woman’s name and other identifying information must remain confidential and may only be disclosed to law enforcement on court order.

Arizona statute prohibits public funds and tax monies of the state and political subdivisions from being expended for payment to any person or entity for the performance of any abortion unless the abortion is necessary to save the life of the woman having the abortion. That limitation also applies to federal funds passing through the state treasury or the treasury of a political subdivision. However, in 2002 the Arizona Supreme Court ruled that under the Arizona Constitution, the state could not refuse to pay for medically necessary abortions for indigent women whose health was endangered by pregnancy, where it had already funded abortions for indigent women whose lives were endangered. Simat Corp v. Arizona Health Care Cost Containment System, 203 Ariz. 454 (2002).

In 2010, the prohibition was expanded to restrict public or tax monies from being used to pay for insurance policies that provide abortion-related benefits. Additionally, if a policy is offered through a state health care exchange under the Affordable Care Act (P.L. 111-148), that policy cannot provide abortion coverage unless the coverage is offered as a separate optional rider for which an additional premium is charged. Again, these restrictions do not apply if the abortion is necessary to save the woman’s life or avert substantial and irreversible impairment of a major bodily function. Similarly, public or tax monies, including student tuition or fees paid to a state university or community college, may not be expended or allocated for training to perform abortions, and statute prohibits abortions from being performed at Arizona’s public universities unless the abortion is necessary to save the woman’s life.

Currently, an individual income tax credit is available for voluntary cash contributions to qualifying charitable organizations in the state. To qualify for donations, an organization must provide the Department of Revenue with written certification that it meets specified criteria. Laws 2011, Chapter 55 requires such an organization to affirm that it does not “provide, pay for, promote, provide coverage of or provide referrals for abortions,” or financially support any entity that does so. The U.S. District Court for the District of Arizona enjoined implementation of the law, and Laws 2012, Chapter 271 removes the requirement that organizations declare whether they promote or provide referrals for abortions. Arizona Coalition Against Domestic Violence v. Greene, CV11-1626-PHX-ROS (2011).

__4__ Laws 2012, Chapter 288 prohibits public funds from being distributed to any facility that performs nonfederally qualified abortions; however, in July 2012, the federal district court temporarily enjoined the law pending a court case. Planned Parenthood Arizona, Inc. et al. v. Tom Betchl, Arizona Health Care Cost Containment System Director, et al. CV 12-01533-PHX-NVW (2012).
Abortion and Reproduction

The state also prohibits certain abortions altogether, with specified exceptions. Arizona’s ban on partial-birth abortion mirrors the federal statute that was upheld by the Supreme Court, including the exception to save the mother’s life.

State law prohibits an abortion from being performed if the unborn child’s probable gestational age has been determined to be at least 20 weeks\(^5\). Statute also expressly forbids abortion of a viable fetus unless: 1) the physician states in writing before the procedure that the abortion is necessary to preserve the life or health of the woman, with other specific information; 2) the physician uses the available method of abortion most likely to preserve the life and health of the fetus, unless doing so would present a greater risk to the life or health of the woman than another method; 3) the physician states in writing the available methods considered, the method used and the reasons for choosing that method; 4) there is another physician in attendance besides the one performing the abortion who provides immediate medical care for a living child born as a result of the abortion; and 5) the physician takes all reasonable steps during the abortion, consistent with the procedure and in keeping with good medical practice, to preserve the life and health of the fetus if these steps do not pose an increased risk to the woman. Those requirements do not apply, however, if there is a medical emergency. If an abortion is performed and a fetus is delivered alive, it is the duty of the physician to see that all available means and medical skills are used to promote, preserve and maintain the life of the fetus.

Reproduction

In addition to prohibiting post-viability abortions, the Legislature has enacted other laws regarding reproduction, and specifically for the protection of fetuses and embryos. For example, it is a class 5 felony for a person to knowingly use any human fetus or embryo, living or dead, or any parts, organs or fluids of a fetus or embryo resulting from an induced abortion for medical or scientific experimentation except as is strictly necessary to diagnose a disease or condition in the mother, and only if the abortion was performed because of the disease or condition. In addition, statute prohibits intentionally or knowingly engaging in destructive human embryonic stem cell research, or purchasing human eggs for any purpose other than: 1) treatment of human infertility, or 2) for clinical investigation by a physician or clinic whose primary practice is treatment of human infertility. Additionally, it is a class 1 misdemeanor to create a human-animal hybrid, receive a human-animal hybrid for any purpose, or transfer a human embryo into a nonhuman womb or vice-versa. State law also restricts a person from purchasing, selling, or advertising for the purchase or sale of an in vitro human embryo; however, the law does not prohibit payment to a physician for otherwise lawful services to treat infertility.

Arizona law provides additional protection to fetuses and embryos by applying homicide laws to unborn children. These offenses apply to “an unborn child in the womb at any stage of its development,” but the law exempts from liability the unborn child’s mother, a person performing an abortion with the consent of the pregnant woman, or a person performing medical treatment on the pregnant woman or unborn child. Additionally, statute requires a physician to obtain written and oral informed consent before performing certain medical procedures or prescribing hormones to an egg donor. The physician must provide information to the egg donor, including a description of drugs, procedures, and potential risks and effects.

Finally, in 2012 the Legislature established that a person is not liable for damages in civil

---

\(^5\) Laws 2012, Chapter 250 prohibits, except in a medical emergency, a person from performing, inducing or attempting to perform or induce an abortion on a pregnant woman if the probable gestational age of the unborn child has been determined to be at least 20 weeks; however on August 1, 2012 the United States Court of Appeals for the Ninth Circuit issued an order that enjoined the provisions related to the 20 week gestational age prohibition, pending appeal (Isaacson v. Horne, Order No. 12-16670).
action for wrongful birth or wrongful life based on a claim a child should not or would not have been born, but for the defendant's act or omission. This protection applies whether the child was born healthy or not and does not apply to civil action for an intentional or grossly negligent act or omission.

**ADDITIONAL RESOURCES**


- Abortion Statutes: A.R.S., Title 36, Chapter 20

- Human Eggs Statutes: A.R.S., Title 36, Chapter 14

- Protection of Fetus or Embryo Statutes: A.R.S., Title 36, Chapter 23

- Partial-Birth Abortion Statutes: A.R.S. §§ 13-3603, 13-3603.01

- Sex-Selection and Race-Selection Abortion Statute: A.R.S. § 13-3603.02