

Women's Right to Know Act (2019) by Americans United for Life

In 2019, Americans United for Life, hereafter AUL, published a model legislation called the Women's Right to Know Act in their annual publication *Defending Life*. The goal of the model legislation, which AUL annually updates, is to help state governments enact enhanced informed consent laws for abortion. The Women's Right to Know Act requires physicians to provide specific information to women before they may consent to having an abortion. It also suggests that individual US state governments should develop informational materials about abortion and pregnancy that healthcare providers must give to women before they receive an abortion. As of 2021, twenty-eight states have enacted informed consent laws for abortion that resemble the Women's Right to Know Act. In a larger effort to dismantle legal access to abortion, the AUL's Women's Right to Know Act encourages individual states to restrict access to abortion to protect what the organization calls the unborn child.

AUL, which is a non-profit, pro-life policy organization, authored the Women's Right to Know Act, hereafter the Act, model legislation. The members of AUL describe the organization as the legal architect of the pro-life movement, which opposes access to legal abortion, or the medical termination of pregnancy. In 1971, a group of pro-life activists founded AUL, which was two years before the US Supreme Court case *Roe v. Wade* (1973) ruled that pregnant women have a constitutional right to accessible and safe abortion. In opposition to *Roe v. Wade*, AUL's goal is to protect and defend what they refer to as human life from conception to natural death through legislative and educational efforts. AUL advocates for increased restrictions on abortion, as well as legal protection for embryos and fetuses, restrictions on embryo research, and increased regulation of assisted reproductive technology.

In the US Supreme Court case *Planned Parenthood v. Casey* (1992), hereafter *Casey*, the court ruled that states may dictate specific requirements for physicians in regard to the informed consent process. Informed consent is standard practice before every medical procedure. It usually involves physicians telling patients about the medical procedure, its expected outcome, and its potential risks and benefits. In *Casey*, the US Supreme Court ruled that states have an interest in protecting the health of both the pregnant women and the fetus, and thus states can pass informed consent laws that advance both of those interests. *Casey* also established the undue burden standard, meaning laws should not create significant difficulties for women to access legal abortion. Because of that standard, the court ruled that it is constitutional to give women truthful, non-misleading information about the risks of abortion and childbirth to ensure that her consent is thoughtful and informed. However, that standard says nothing about if informed consent laws for abortion are allowed to influence women's decision to have an abortion or not. That means that under the ruling of *Casey*, states can legally attempt to persuade women against having an abortion. Thus, *Casey* helped to establish the standards that the Act follows.

The Act is part of AUL's annual publication, *Defending Life*, which serves as a guide to assist state legislators in passing pro-life laws, such as informed consent laws for abortion. *Defending Life* contains several pieces of pro-life model legislation. In 2013, AUL launched several pieces of such model legislation, including the Act, as part of a larger project called the Women's Protection Project that they continue to update. Charmaine Yoest, then president and chief executive officer of AUL, stated that the purpose of the Women's Protection Project model legislation is to protect women from negative health effects of abortion, which she argues that abortion rights advocates consistently downplay. However, several studies have shown that abortion is among the safest medical

procedures. For example, in 2018, The National Academies of Sciences, Engineering, and Medicine reported that serious complications due to abortion are rare. According to Daniel Grossman, physician and director of Advancing New Standards in Reproductive Health, the information that state health departments provide in their informational materials are often misleading.

The Act is a piece of model legislation that state governments can use to create informed consent laws for abortion that include their specific requirements for physicians to follow. The model legislation is meant to provide women with information about the fetus, the medical and psychological risks of abortion, and the abortion procedure at least twenty-four hours before they have an abortion. The AUL organized the 2019 version of the model legislation into twelve sections that include blank spaces for state governments to fill in details that are relevant to their individual states. The first section states that the title of the model legislation is the Women's Right to Know Act. In the second section, "Legislative Findings and Purposes," AUL discuss the purposes of the model legislation, which is to ensure that pregnant women receive what AUL states is necessary information to make an informed decision on whether to receive an abortion or not. Next, "Definitions," defines key terms that AUL uses throughout the Act. The fourth section, "Informed Consent Requirement," details the requirements that abortion providers must meet to obtain informed and voluntary consent. Similarly, in "Publication of Materials," AUL details the requirements that state health departments must meet to develop informed consent materials, such as informational booklets or pamphlets. The remaining seven sections of the Act briefly describe what physicians should do in cases of medical emergency, criminal penalties for violating the Act, and provisions for the enforcement of the Act.

In "Legislative Findings and Purposes," AUL lists eight findings that state governments may reference to underscore the importance of their individual legislations. The first finding states that it is essential that pregnant women who consider abortion receive accurate information about the procedure, as well as alternatives to protect their mental and physical health. The second finding states that a woman can only make a knowledgeable decision if the physician provides her with enough information to make an informed choice between abortion and childbirth. In the third finding, the Act references Casey, which ruled that informed consent laws for abortion should include information about the consequences of abortion for the pregnant woman. Next, the Act states that because women often do not have prior relationships with their physicians, there are few opportunities for women to receive meaningful counseling about their decisions. In the fifth and sixth findings, the Act quotes the court cases *Planned Parenthood v. Danforth* (1976) and *H. L. v. Matheson* (1981), which state that the decision to have an abortion is a stressful one that may have serious medical, emotional, and psychological consequences. The last two findings describe AUL's belief that physicians who perform abortions offer limited counseling opportunities and are available to, in AUL's words, sell or promote abortion services to patients, rather than help women make decisions between having an abortion and childbirth.

Continuing in that section, based on those legislative findings, AUL then details four primary purposes of the Act. The first purpose is to ensure that every woman receives what the organization refers to as complete information to give their informed consent. The second purpose is to protect, in AUL's words, the unborn child. In the third statement of purpose, AUL quotes Casey to say that the law is necessary to reduce the risk of women who regret their decision to have an abortion. That is because, according to AUL, an uninformed abortion may have negative psychological consequences for women. The final purpose of the Act is to compel states to adopt the definition of a medical emergency that the US Supreme Court accepted in Casey, which the Act defines in the next section.

In "Definitions," AUL defines several key terms that it uses throughout the rest of the Act. AUL defines abortion as intentionally terminating the pregnancy of a woman with the knowledge that the process will cause the death of, what the Act calls, the unborn child. However, the Act does not include abortion due to medical emergencies in their definition of the procedure. The Act also defines the term complication to mean any negative physical or psychological condition that arises after a woman receives an abortion. According to the Act, those complications include heavy bleeding, failure to terminate the pregnancy or to remove all the fetal tissue, cardiac arrest, shock, and coma. However, the Act does not include the likelihoods of those complications. The Act

also includes preterm birth in subsequent pregnancies as a complication, as well as psychological complications such as depression, anxiety, and sleeping disorders that may occur after a woman receives an abortion. The Act states that states' health departments may further include other complications that they deem necessary.

The Act provides the definitions of several other terms in "Definitions," including gestational age, medical emergency, unborn child, and viability, among others. The gestational age of the fetus is the amount of time after a pregnant woman's last menstrual period. Unborn child, according to AUL, is the offspring of human beings from conception until birth. AUL often uses that term to describe the embryo or fetus throughout the Act. Viability, according to AUL, is the point in fetal development when, based on the judgment of the physician, a fetus may survive outside the womb with or without medical or technological assistance. Many states severely restrict or do not allow abortion past the point of viability. AUL defines a medical emergency as a condition that, according to the physician's judgment, severely impacts the pregnant woman's health, so an abortion is necessary. A medical emergency can also be a situation in which a woman's pregnancy may cause her substantial and irreversible bodily harm. As AUL states in the previous section of the Act, "Legislative Findings and Purposes," the Act aims for states to adopt that definition of medical emergency. That means that if a physician performs an abortion outside of the circumstances of a medical emergency without obtaining the woman's voluntary and informed consent, then the physician would be violating the law.

In the next section of the Act, "Informed Consent Requirement," AUL describes information that a physician must provide to the pregnant woman, orally and in-person, at least twenty-four hours before the abortion. The twenty-four hour waiting period between counseling and the abortion procedure constitutes a reflection period for the woman to consider the information provided, according to AUL. Critics of that waiting period requirement argue that it further restricts access to abortion, because it requires two separate trips to the healthcare facility, which is not feasible for women who live a long distance away from their nearest abortion provider.

The physician must provide the woman with medically accurate information that, in the words of the Act, a reasonable patient would consider relevant to the decision of whether to have an abortion. That information, according to the Act, includes a description of the abortion procedure, the immediate and long-term risks of the procedure, and alternatives to abortion. Similarly, according to the AUL, the physician must also detail the medical risks associated with carrying the pregnancy to term. For example, two risks that the Acts describes are danger to subsequent pregnancies and increased risk of breast cancer. However, in 2007, a study that examined over 11,000 pregnancies in women who had previously received a first-trimester abortion found no evidence that abortion increased the risk of adverse outcomes in future pregnancies. Further, the American Cancer Society and the American College of Obstetricians and Gynecologists have stated that there is little evidence that suggests abortion increases the risk of breast cancer.

Continuing with that section, AUL further details the requirements under which a pregnant woman's consent to abortion is voluntary and informed. During the informed consent process, AUL states that the physician must tell the pregnant woman that the father is liable for child support, even if he offered to pay for the abortion. However, the physician may omit information about the father's responsibility in cases of rape or incest. Also, AUL mentions that pregnant women have the right to withdraw her consent to abortion without affecting her right to future care or losing her healthcare benefits. Finally, the physician must provide written materials, that the individual state governments develop according to AUL's guidelines which the organization later describes.

"Informed Consent Requirement" contains two optional subsections, one about fetal pain and one about chemical abortion reversal, which legislators may choose to add to their laws depending on the states' preferences. The first subsection, called "Information on Fetal Pain," requires physicians to tell women that by twenty weeks of fetal development, the fetus can feel pain. The physician must also provide that maternal anesthesia does not prevent the fetus from feeling pain, but fetal anesthesia is available to minimize the fetus's pain. According to the Act, the physician would also have to identify the steps of the abortion at which the fetus would feel pain. However, it is unlikely that a fetus is able to feel pain prior to twenty-four weeks, according to the Royal College of Obstetricians and Gynecologists. The second subsection, called "Information on Chemical Abortion

Reversal,” requires physicians to inform women who elect to have what the Act refers to as a drug-induced abortion that it may be possible to reverse the effects of the drug, if she changes her mind about the abortion. However, the Act states that the physician must complete the reversal quickly. However, according to the Guttmacher Institute, which is an organization that researches and promotes reproductive health rights, there is neither medical evidence to support that claim nor data on whether proposed reversal treatments are safe or effective.

The fifth section of the Act, “Publication of Materials,” describes the several guidelines that state health departments should follow to produce written informational materials. State health departments may publish those informational materials on an accessible website, which physicians must make available to women before they can consent to abortion. For example, those informational materials must include a list of public and private agencies that are available to assist women through pregnancy, childbirth, and childcare, including adoption agencies. They further state that if a minor’s parents refuse to financially support her unless she has an abortion, then the minor can become emancipated, meaning she is legally allowed to make decisions without parent or guardian approval. Emancipation would allow that minor to receive public assistance benefits that could help her with healthcare and childcare. However, she could not use those public assistance benefits to obtain an abortion. Also, the informational materials must make it clear that the father has a legal obligation to provide child support.

Continuing in that section, the AUL describes that the informational materials must also describe the complete development of the embryo and fetus, as well as detail each type of abortion procedure. Color photographs of the embryo and fetus at each two-week stage should accompany information about fetal development. That information should include descriptions of heart and brain functions, features such as external limbs and internal organs, and the possibility of survival outside of the womb. The materials must also include descriptions of all the different abortion procedures and their risks, as well as the risks of carrying a pregnancy to term. The Act provides twenty-five examples of possible complications during and after the abortion procedure, including physical and psychological risks of abortion. However, the Act does not provide any examples of the risks of carrying a pregnancy to term. The Act also requires the state to produce an informational DVD that includes a video, showing an ultrasound of the fetus’s heartbeat biweekly until the eighth week of pregnancy and then each month after that until the physician judges the fetus to be viable. The Act states that the materials have to be objective, nonjudgmental, and scientifically accurate in providing information about fetal development, abortion procedures, and abortion risks.

The remaining seven sections of the Act briefly describe what physicians should do in cases of medical emergency, criminal penalties for violating the Act, and provisions for the enforcement of the Act. The sixth section, “Medical Emergencies,” describes the requirements for consent in cases when abortion is necessary due to a medical emergency. The seventh and eighth sections describe the penalties for violating the Act, and the remaining sections describe how state governments should enforce the Act.

The 2019 edition of *Defending Life* contains statements from then Vice President of the United States Mike Pence, then governor of Oklahoma Mary Fallin, and governor of Arkansas Asa Hutchinson that praise AUL and its efforts. In his statement, Pence describes his pride that Indiana, the state in which he was formerly governor, is one of the most pro-life states in the US. Pence further praises the work that AUL does to, in his words, protect life and protect the unborn, who are the among the most vulnerable members of society. Fallin, in her statement, praises the efforts of AUL to, in her words, provide lawmakers with the tools to craft strong pro-life legislation. Hutchinson states that in Arkansas, the state in which he is governor as of 2021, the state used AUL’s resources to enact and strengthen, in his words, protections for the unborn and their mothers.

In opposition, abortion rights advocates have criticized informed consent laws for abortion as coercive, manipulative, and misleading and for infringing on women’s right to an abortion. For example, the American Civil Liberties Union, which is an organization that defends individuals’ constitutional rights and also supports reproductive rights, has stated its opposition to laws that link abortion to breast cancer, calling it a scare tactic meant to convince women not to have an abortion and to restrict their reproductive choices. According to lawyer Amanda McMurray Roe, other abortion rights advocates have criticized laws based on the Act for intervening in the doctor-patient relation-

ship to impose state ideology on women seeking abortion. Despite that opposition, AUL continues to advocate for informed consent legislation for abortion.

As of 2021, twenty-eight states have informed consent laws for abortion that resemble AUL's model legislation. Four other states have informed consent laws for abortion, but the states did not specifically model their laws after the Act and follow standard informed consent principles. All twenty-eight states require that physicians provide the state health department develop written informational materials to women under the Woman's Right to Know Act. For the remaining states that do not have legislation that model the Act, AUL recommends that they adopt the Act or a version of it.

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