Memorandum

Date: February 20, 2019

To: Thomas Brejcha
President & Chief Counsel
Thomas More Society

From: Paul Benjamin Linton, Esq.

Re: Analysis of HB 2495, SB 1942 (the "Reproductive Health Act")

Executive Summary

HB 2495 and SB 1942 would enact the "Reproductive Health Act." This Act is the most extreme piece of abortion legislation that has ever been introduced in Illinois, and, arguably, the most extreme one that has been proposed in any state to date, including the one recently enacted in New York State. It is critically important to recognize that *in no sense* can the Reproductive Health Act be viewed as merely an attempt to "codify" the Supreme Court's decision in *Roe v. Wade* (1973), that is, to preserve the present legal status of abortion in the event *Roe* is overruled. On the contrary, the Reproductive Health Act, as its supporters candidly admit, goes *far* beyond repealing Illinois statutes that have been struck down by the federal courts,[1] and would repeal a broad range of *constitutional* statutes that regulate the performance of abortion in Illinois, as well as jeopardize statutes and judicial rules that have nothing whatsoever to do with abortion.

The Act, among other things, would:

- eliminate any restrictions on post-viability abortions and allow abortions for any reason whatsoever throughout all nine months of pregnancy

- eliminate any requirement that the person performing a post-viability abortion use a method of abortion that would enhance the chances of the unborn child surviving the abortion

- eliminate the requirement that a second physician be present to provide immediate medical care for any child born alive as a result of a post-viability abortion

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[1] The Reproductive Health Act would repeal the following statutes that have been declared unconstitutional by federal courts: the Partial-birth Abortion Ban Act, 720 ILCS 513/1 *et seq*., provisions in the Illinois Abortion Law of 1975 prohibiting fetal experimentation, 720 ILCS 510/6(7), and sex-selective abortions, *id*., § 510/6(8), as well as a provision in the Code of Civil Procedure that gave the husband of a woman seeking a post-viability abortion an opportunity to seek an injunction barring her from obtaining an abortion, 735 ILCS 5/11-107.1. Reproductive Health Act, art. 905 (p. 8, lines 6-7, 9-10, 12-13). *A bill intended to repeal only unconstitutional provisions of Illinois law would have been half a page long, not 120 pages.*

- eliminate any restrictions on where abortions may be performed
- allow non-physicians to perform abortions, both surgical and medical
- allow self-abortions
- undermine institutional and individual rights of conscience
- provide a basis to nullify regulations governing the operation of abortion clinics
- allow DCFS to use public funds to pay for abortions
- require health insurance policies to include coverage for all abortions, with no exemptions, even for churches and other religious organizations
- jeopardize enforcement of the Parental Notice of Abortion Act of 1995 (which is the subject of separate bills that would expressly repeal the Act)
- eliminate any requirement to investigate fetal deaths or maternal deaths resulting from abortions or to record fetal deaths resulting from abortions
- impose no restrictions on fetal experimentation
- provide a basis for barring any common law cause of action for prenatal injuries and any statutory action for the wrongful death of an unborn child

Analysis of the Bill

At the outset, it would be useful to contrast the intent of the General Assembly in enacting the Illinois Abortion Law of 1975 with the intent of the Reproductive Health Act. Section 1 of the Illinois Abortion Law of 1975 expressed the intention of the General Assembly "to reasonably regulate abortion in conformance with legal standards set forth in the decisions of the United States Supreme Court of January 22, 1973," referring to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 189 (1973). 720 ILCS 510/1. While some regulatory measures have been struck down (*see* fn. 1), the General Assembly *has* succeeded in building up a body of law regulating abortion that is constitutional and enforceable.

The Reproductive Health Act is not at all concerned with allowing the General Assembly to regulate abortion to the extent allowed by federal law. Rather, it proposes to eliminate virtually all otherwise constitutional regulation of abortion, seeking, in the words of the Governor, to make Illinois the most "abortion-friendly" state in the country. That is exactly what it would do.

Even though the United States Supreme Court no longer refers to abortion as a "fundamental right," § 1-5 of the Act refers to "the fundamental right of an individual who becomes pregnant . . . to have an abortion, and to make autonomous decisions about how to exercise that right." Section 1-5 (p. 1, lines 13-17). *See also* §§ 1-15(a), (b) (p. 4, lines 16-23) (identifying "fundamental reproductive health rights"). The Act is intended "[t]o establish laws and policies that protect individual decision-making in the area of reproductive health [which is defined to include abortion] and that support access to the full scope of quality reproductive health for all in our State." Section 1-5 (p. 1, lines 21-22, through p. 2, lines 1-2). Further, the Act is intended "[t]o permit regulation of reproductive health care, including . . . abortion . . . , only to the extent that such regulation is narrowly tailored to protect a compelling State interest . . . ." *Id*. (p. 2, lines 3-6). For purposes of the Act, regulation of "reproductive health care," including abortion, is appropriate only if it is "consistent with accepted standards of clinical practice, evidence based, and narrowly tailored for the limited purpose of protecting the people seeking such care and in the manner that least restricts a person's autonomous decision-making." *Id*. (lines 7-11).

What is striking about this formulation is that, first, it employs a standard of review that the Supreme Court abandoned when it modified *Roe v. Wade* in *Planned Parenthood v. Casey*, replacing the "strict scrutiny" standard of review (which allows restrictions on abortion only to the extent that they are both "narrowly tailored" and the "least restrictive" means to promoting a "compelling" state interest) with the "undue burden" standard (which allows a broader range of restrictions); and, second, it completely disregards the state's legitimate interest in protecting unborn human life, an interest recognized in *Roe* and confirmed and strengthened in *Casey*.

In reading the Reproductive Health Act, one can feel the disdain, indeed, the *contempt*, the Act has for the unborn child, whose life counts for *nothing*. Nowhere is this contempt expressed more strongly than in § 1-15(c) (p. 4, lines 24-25), where the Act states that "[a] fertilized egg, embryo, or fetus does not have independent rights under the laws of this State." But that contempt runs like a leitmotif throughout the Act, particularly with respect to its deregulation of post-viability abortions**. Under the Act (as described in more detail below), post-viability abortions may be performed for *any* reason, by *any* method, and without *any* obligation on the part of the licensed provider performing the abortion (who is *not* required to be licensed as a physician, under the Act) to use a method that would preserve the life of the unborn child or to take any steps to save the life of a viable child born alive as a result of the abortion.**

Eliminating Any Restrictions on Post-Viability Abortions

Under current Illinois law, an abortion after the unborn child is viable (*i.e*., when "there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support") may not be performed unless, "in the medical judgment of the attending or referring physician, based on the particular facts of the case before him, *it is necessary to preserve the life or health of the mother*." 720 ILCS 510/5(1) (emphasis added). Violation of this

provision is a Class 2 felony. *Id*. When an abortion is authorized under this provision, the physician must certify on a form provided by the Illinois Department of Public Health "the medical indications which, in his medical judgment based on the particular facts of the case before him, warrant performance of the abortion to preserve the life or health of the mother." *Id*. § 510/5(2). Illinois' restriction of post-viability abortions to those necessary to preserve the life or health of the mother fully complies with current federal constitutional requirements, as set forth in *Roe v. Wade* (1973), as modified by *Planned Parenthood v. Casey* (1992).

The Reproductive Health Act would repeal this provision (along with the rest of the Illinois Abortion Law of 1975), art. 905 (p. 8, lines 6-7), *thereby allowing abortions to be performed throughout all nine months of pregnancy for any reason whatsoever*. There would be *no* requirement that post-viability abortions be limited to therapeutic, not elective, reasons. In other words, Illinois would allow abortion on demand.

Eliminating Any Restriction on the Method Used to Perform a Post-Viability Abortion

Under current Illinois law, when a post-viability abortion may be performed pursuant to 720 ILCS 510/5(1), the physician "shall utilize that method of abortion which, of those he knows to be available, is in his medical judgment most likely to preserve the life and health of the fetus." 720 ILCS 510/6(1)(a), 6(4)(a). Violation of these provisions is a Class 3 felony. *Id*. § 510/6(1)(c), 510/6(4)(c). When an abortion is authorized under § 510/5(1), the physician must certify on a form provided by the Illinois Department of Public Health "the available methods considered and the reasons for choosing the method employed." *Id*. § 510/6(1)(b), 510/6(4)(b). Pursuant to § 510/6(5) of the Illinois Abortion Law of 1975, as modified by a federal consent decree, however, nothing in the law requires a physician to use any method of abortion which, in his professional judgment, would create a greater risk to the life or health of the pregnant woman.

The Reproductive Health Act would repeal these provisions, which are part of the Illinois Abortion Law of 1975. Article 905 (p. 8, lines 6-7). As a result, even in circumstances where, in the judgment of the attending provider (*not* necessarily a physician, per the Act), a given method of abortion (*e.g*., induction) would pose no greater risk to the life or health of the mother than another (*e.g*., dismemberment), the person performing the abortion would not be required to use that method which is more likely to preserve the life and health of the unborn child**. *Thus, in performing a post-viability abortion, the provider could intentionally kill the unborn child even though saving the child's life would entail no greater risk to the woman*.**

Eliminating the Second-Physician Requirement for Post-Viability Abortions

Under current Illinois law, whenever a post-viability abortion may be performed pursuant to 720 ILCS 510/5(1), a second physician must be in attendance "who shall take control of and provide immediate medical care for any child born alive as a result of the abortion." *Id*. § 510/6(2)(a). Violation of this provision is a Class 3 felony. *Id*. This requirement does not apply when, "in the medical judgment of the physician performing or inducing the abortion based on the particular facts of the case before him, there exists a medical emergency . . . ." *Id.*

When a second physician is present during the performance of a post-viability abortion and a child is born alive, that physician "shall exercise the same degree of professional skill, care and diligence to preserve the life and health of the child as would be required of a physician providing immediate medical care to a child born alive in the course of a pregnancy termination which was not an abortion. *Id*. § 510/6(2)(b). Violation of this provision is a Class 3 felony. *Id.* The requirement of the presence of a second physician to provide immediate care for any child born alive in the course of a post-viability abortion is constitutional.

The Reproductive Health Act would repeal these provisions. Article 905 (p. 8, lines 6-7). As a result, if a child is born alive in a post-viability abortion, there would be no second physician (or any other licensed provider) present who would be required to provide immediate medical care for him or her. And nothing in the Act would require the person performing the abortion to provide *any* medical care for a viable child born alive as a result of an abortion. *Thus, even though the child's life could be saved by prompt medical care, nothing in the Reproductive Health Act would require the person performing the abortion to provide that care*.

Eliminating Any Restrictions on Where Abortions May be Performed

The Reproductive Health Act would eliminate any restrictions on where abortions, even late-term abortions, may be performed. Section 910-45 (p. 73, lines 14-24, through p. 74, lines 1-10) (deleting 225 ILCS 60/22(A)(1)).

Allowing Non-Physicians to Perform Abortions

Under current Illinois law, only licensed physicians may perform abortions. 720 ILCS 510/3.1. Nurses are not permitted to perform abortions. 225 ILCS 65/65-35(e-5) (cross-referencing § 3.1 of the Illinois Abortion Law of 1975), nor are advanced practice registered nurses. 225 ILCS 65/65-43(c) (last paragraph) (scope of practice of an advanced practice registered nurse "does not include operative surgery"), *id*. § 65/65-43(e) (cross-referencing § 3.1 of the Illinois Abortion Law of 1975). The Supreme Court has repeatedly held that the states may prohibit non-physicians from performing abortions. *Roe v. Wade*, 410 U.S. 113,165 (1973), *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975), *City of Akron v. Akron Center for Reproductive Health*, *Inc*., 462 U.S. 416, 447 (1983) (citing *Roe* and *Menillo*), and *Mazurek v. Armstrong* , 520 U.S. 968 (1997).

The Reproductive Health Act would repeal § 3.1 of the Illinois Abortion Law of 1975 (and the rest of the law), amend the Nurse Practice Act to repeal cross-references to the prohibition of non-physicians from performing abortions set forth in § 3.1, and amend the latter Act to allow advanced practice registered nurses to perform surgical abortions. Articles 905 (p. 8, lines 6-7), 910-50 (p. 96, lines 22-23, p. 100, lines 8-9, and p. 99, lines 23-26). *As a result, non-physicians could lawfully perform abortions, including surgical abortions, to the extent otherwise permitted by the Nurse Practice Act. Allowing non-physicians to perform abortions is not legally required and could jeopardize the health and safety of women seeking abortions.*

Allowing Self-Abortion

The Reproductive Health Act recognizes the "fundamental right" of a pregnant person "to have an abortion, and to make autonomous decisions *about how to exercise that right*." Section 1-15(b) (p. 4, lines 20-23) (emphasis added). This language could be interpreted to authorize *self-abortions*, which the Act clearly does not prohibit. Indeed, Section 1-20(a)(2) of the Act (p. 5, lines 7-13) provides that the State shall not " . . . deprive any individual of the individual's rights for any act . . . during the individual's own pregnancy, *if the predominant basis for such . . . deprivation of rights is the potential, actual, or perceived impact . . . on the pregnant individual's own health*." Emphasis added. *Thus, under the Act, a woman may attempt to abort her own pregnancy, regardless of the potential risks to her own health in doing so.*

Undermining Rights of Conscience

Under current Illinois law, the rights of conscience of both health care institutions and health care professionals enjoy broad legal protection. Section 13 of the Illinois Abortion Law of 1975 provides, in relevant part:

> No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion, and the failure or refusal to do so shall not be the basis for any civil, criminal, administrative or disciplinary action, proceeding, penalty or punishment.

720 ILCS 510/13.

The Abortion Performance Refusal Act provides, in relevant part:

> (a) No physician, nurse or other person who refuses to recommend, perform or assist in the performance of an abortion . . . shall be liable to any person for damages allegedly arising from such refusal.
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> (b) No hospital that refuses to permit the performance of an abortion upon its premises . . . shall be liable to any person for damages allegedly arising from such refusal.
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> (c) Any person, association, partnership or corporation that discriminates against another person in any way, including, but not limited to, hiring, promotion, advancement, transfer, licensing, granting of hospital privileges, or staff appointments, because of that person's refusal to recommend, perform or assist in the performance of an abortion . . . shall be answerable in civil damages equal to 3 times the amount of proved damages, but in no case less than $2,000.

> (d) The license of any hospital, doctor, nurse, or any other medical personnel shall not be revoked or suspended because of a refusal to permit, recommend, perform or assist in the performance of an abortion.

745 ILCS 30/1.

Section 9 of the Sexual Assault Survivors Emergency Treatment Act provides:

> Nothing in this Act shall be construed to require a hospital or an approved pediatric health care facility to provide any services which relate to an abortion.

410 ILCS 70/9.

Finally, the Health Care Right of Conscience Act contains broad protections for health care institutions and heath care providers. 745 ILCS 70/1 *et seq*.

Collectively, these statutes protect the rights of conscience of health care institutions and health care professionals who object to the performance of abortions (and, in the case of the Health Care Right of Conscience Act, any other health services). They may refuse to perform, permit or participate in any abortion, and may not be subjected to any civil, criminal, administrative or disciplinary action proceeding, penalty or punishment for their refusal. No health care professional who refuses to recommend, perform or assist in an abortion, and no hospital that refuses to permit the performance of an abortion upon its premises is liable to anyone for any damages allegedly arising from such refusal. Discrimination against persons who exercise their rights of conscience is unlawful and may result in civil liability, including treble damages. The license of a hospital may not be revoked or suspended because of its refusal to permit the performance of abortions, and the license of any health care professional may not be revoked or suspended because of the professional's refusal to recommend, perform or assist in the performance of an abortion. All of these protections are constitutional.

The Reproductive Health Act would repeal all of the foregoing rights of conscience, except the Health Care Right of Conscience Act. Article 905 (p. 8, lines 3-4) (repealing § 9 of the Sexual Assault Survivors Emergency Treatment Act), (p. 8,, lines 6-7) (repealing the Illinois Abortion Law of 1975), (p. 8, lines 15-16) (repealing the Abortion Performance Refusal Act). And the Health Care Right of Conscience Act might be challenged under Section 1-20(1) (p. 5, lines 3-5). Under that section, the State shall not "deny, restrict, interfere with, or discriminate against an individual's exercise of the fundamental rights set forth [herein]." An argument could be made that, to the extent the Health Care Right of Conscience Act *allows* health care institutions and health care professionals to refuse to permit, provide, perform, assist or otherwise cooperate in providing types of medical care to which they have objections, the state, in effect, is *authorizing* them to "deny," "restrict," "interfere with" or "discriminate against" an individual's exercise of his or her rights under the Reproductive Health Act. Such an argument, if successful, would destroy the protections accorded by the Health Care Right of Conscience Act.

Nullifying Regulations Governing the Operation of Abortion Clinics

The Reproductive Health Act, *by its own terms*, would impose virtually no regulations on abortion clinics, where the overwhelming majority of abortions are performed. Moreover, the Act would make it difficult to sustain such regulations. The Act permits regulation of reproductive health care, including abortion, "*only to the extent that such regulation is narrowly tailored to protect a compelling State interest . . . .*" Section § 1-5(2) (p. 2, lines 3-6) (emphasis added). Only regulation that is "consistent with accepted standards of clinical practice, evidence based, and narrowly tailored for the limited purpose of protecting the health of people seeking care and in the manner that least restricts a person's autonomous decision-making" would satisfy this standard (a standard that is *not* constitutionally required). *Id*. (p. 2, lines 7-11). Under the Act, the State shall not "deny, restrict, interfere with, or discriminate against an individual's exercise of the fundamental rights set forth [therein]." *Id*. § 1-20(a)(1) (p. 5, lines 3-6). Finally, nothing in the Act may be construed to "authorize the State to burden any individual's fundamental rights relating to reproductive health care." *Id.* § 1-30(b) (p. 7, lines 3-5).

Under these principles, it would be difficult for the Department of Public Health to adopt meaningful regulations governing abortion clinics. Such regulations could not be upheld unless (a) they were narrowly tailored to protect a compelling state interest, to wit, protecting the health of women seeking abortions, (b) protected that interest in a manner that least restricted women's autonomous decision-making, and (c) did not burden any woman's fundamental right to obtain an abortion. *It is theoretically possible that the Department of Public Health could develop such regulations. But under the Reproductive Health Act the burden would be on the Department to demonstrate that any new regulations of abortion clinics met this very high standard of review.*

Allowing DCFS to Use Public Funds to Pay for Abortions

Under current Illinois law, the Department of Children & Family Services may not use public funds to pay for abortions. 20 ILCS 505/5(b). There is no federal constitutional requirement that public funds be used to pay for abortions. *Harris v. McRae*, 448 U.S. 297 (1980), *Williams v. Zbaraz*, 448 U.S. 358 (1980). The Reproductive Health Act would repeal this restriction. Section 910-10 (p. 14, lines 11-13).

Requiring Health Insurance Policies to Include Coverage for All Abortions

Under current Illinois insurance law, abortion is not a covered service under the State Employees Group Insurance Act of 1971, nor is such coverage mandated for individual and group health insurance policies governed by the Illinois Insurance Code, for health maintenance organizations governed by the Health Maintenance Organization Act, or for health services plans governed by the Voluntary Health Services Plan Act. *See* 5 ILCS 375/6.11, 215 ILCS 5/356z.4(c), 215 ILCS 125/5-3(a), 215 ILCS 165/10.

The Reproductive Health Act would amend all four acts to mandate insurance coverage for all abortions, regardless of the reason for which the abortion is sought, in any health insurance plan that provides pregnancy related benefits, by adding a new section 356z.4a to the Illinois Insurance Code (which governs policies subject to the Code and is incorporated into the State Employees Group Insurance Act of 1971). Section 910-5 (p. 9, lines 10, 12, p. 10, line 10); § 910-30 (p. 65, lines 11-14, 25, p. 66, lines 1-22); § 910-35 (p. 67, lines 8, 10), § 910-40 (p. 72, lines 12, 15). No health insurance policy subject to this requirement "shall impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on the coverage provided." Section 910-30 (p. 66, lines 8-11).

Requiring all health insurance policies—even those purchased by churches, other religious entities and persons and organizations with moral and/or religious objections to abortion—to cover abortion services violates the rights of all institutions, individuals, employers, employees and insurers who have conscientious objections to abortion.

Jeopardizing Enforcement of the Parental Notice of Abortion Act of 1995

Two other bills have been introduced that would expressly repeal the Parental Notice of Abortion Act of 1995. *See* HB 2467, § 20, SB 1594, § 20, repealing 750 ILCS 70/1 *et seq*. Even if neither of those bills is enacted, language in the Reproductive Health Act *could* be used to nullify the Parental Notice Act. Section 1-20(a)(1) (p. 5, lines 3-5) provides that the State shall not "deny, *restrict*, *interfere with*, *or discriminate* against an individual's exercise of the fundamental rights set forth in this Act . . . " Emphasis added. Those rights include the right of pregnant person "to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right." Section 1-15(b) (p. 4, lines 20-23). And the Act makes no distinction between the rights of minors and those of adults.

An argument could be made that requiring a minor to notify one of her parents (or her legal guardian) of her intention to obtain an abortion "restricts" or "interferes with" the exercise of her "fundamental right" under the Reproductive Health Act to undergo an abortion. If she does not wish to notify one of her parents (or guardian), she must petition the circuit court for an order allowing her to obtain an abortion without notifying either parent (or guardian). Having to notify one of her parents (or guardian) or go through a judicial bypass hearing could be said to "restrict" or "interfere with" her choice to have an abortion. Because the Parental Notice of Abortion Act of 1995 requires a pregnant minor to notify one of her parents (or guardian) only of her intention to obtain an abortion, but not of her intention to give birth, the notice requirement could also be said to "discriminate" against her based upon her choice to undergo an abortion.

Nullification of the Parental Notice Act of 1995 (or its express repeal under either HB 2467 or SB 1594), which has been upheld by both the Seventh Circuit Court of Appeals and the Illinois Supreme Court, would have unfortunate consequences. It would allow pregnant minors of any age to obtain an abortion without the knowledge or guidance of their parents, contrary to the rights of parents to the control, custody and care of their minor children. The parental notice act has had a dramatic impact on the incidence of abortions among Illinois minors. According to

data of the Illinois Department of Public Health, between 2012, when the law was not in effect for any part of the year, and 2017, the last year for which data is currently available, the reported number of abortions performed on Illinois minors declined by more than 55%. During the same time, the reported number of abortions performed on Illinois adult women declined by only 15%. It is apparent, therefore, that the parental notice law has had a significant impact on the incidence of abortions among Illinois minors. At the same time, there have been no reported incidents that the law has resulted in any abuse or neglect of minors whose parents were notified of their intention to obtain an abortion. *There is no reason why the Parental Notice Act of 1995 should be placed in jeopardy by the "fundamental rights" language of the Reproductive Health Act, even assuming that neither of the express repeal bills is enacted.*

Eliminating Requirements to Investigate Fetal Deaths or Maternal Deaths Resulting from Abortion or to Record Fetal Deaths Resulting from Abortion

Under the Counties Code, county coroners are required to investigate "[a] maternal or fetal death due to abortion . . . ." 55 ILCS 5/3-3013(b). And the Vital Records Act requires the reporting of every "fetal death," which means "death prior to the complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy." 410 ILCS 535/1(6) (defining "fetal death"). The Reproductive Health Act repeals § 3-3013(b) of the former Act and amends § 535/1(6) of the latter Act to exclude fetal deaths resulting from abortions, as that term is defined in the Reproductive Health Act. Sections 910-20 (p. 49, line 21), 910-55 (p. 101, lines 17-18).

As a consequence of these changes, the county coroner would no longer be required to conduct even a preliminary investigation into any fetal death resulting from an abortion or any maternal death resulting from an abortion, and fetal deaths resulting from abortion would not be required to be kept and/or reported as vital records. The former change could effectively preclude investigation into whether a child was killed after being born alive (whether or not the child was viable) in an abortion procedure, or whether the death of the mother resulting from an aborting involved either negligence or criminal conduct on the part of the person performing the abortion. The latter change undermines the need for maintaining vital records and also dehumanizes unborn children as being unworthy of having their deaths even reported.

Imposing No Restrictions on Fetal Experimentation

The Reproductive Health Act imposes no restrictions on fetal experimentation.

Jeopardizing Actions for Prenatal Injuries and Wrongful Death

Under current Illinois law, a common law action for prenatal injuries may be brought, regardless of the time during pregnancy when the injuries were sustained. *See Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 1252-53 (Ill. 1977) (express statement in decision recognizing cause of action for pre-conception tort), *Stallman v. Youngquist*, 531 N.E.2d 355 (1988) (following *Renslow*). Similarly, a statutory action for wrongful death may be brought for

the wrongful death—stillbirth or death after live birth–of an unborn child without regard to when the injury causing death was inflicted or when the death occurred. 740 ILCS180/2.2. The Reproductive Health Act does not *expressly* address such causes of action, but language in the bill may call into question whether such actions may be brought.

Section 1-15(c) of the Act (p. 4, lines 24-25) provides, "A fertilized egg, embryo, or fetus does not have independent rights under the laws of this State." Besides denigrating the value of unborn human life, § 1-15(c) would arguably preclude actions for prenatal injuries or the wrongful death of unborn children because such actions necessarily (if implicitly) recognize that an unborn child has a *right not* to be injured or killed by another's negligence or wrongful act (outside the context of abortion). *Section 1-15(c), however, denies that the unborn child has any independent rights under the laws of the State of Illinois, and thus may call into question whether actions for prenatal injuries or wrongful death may be maintained.*

Other Matters

Pathology Testing

Under current Illinois law, "[t]he dead fetus and all tissue removed at the time of the abortion shall be submitted for a gross and microscopic analysis and tissue report to a board eligible or board certified pathologist as a matter of record in all cases." 720 ILCS 510/12. The pathologist's test results must be submitted with the physician's abortion report. *Id*. § 510/10(12).

The purpose of such testing is to ensure that all of the products of conception have been removed from the woman, to detect abnormalities in the tissue that may signify serious, perhaps even fatal, disorders, to evaluate complications that may have arisen during the procedure and their effect on future pregnancies and, along with abortion complication reports, provide a statistical basis for studying those complications. *See Planned Parenthood Ass'n of Kansas City*, *Missouri*, *Inc*., *v. Ashcroft*, 462 U.S. 476, 486-90 (1983) (upholding pathology testing requirement). The Reproductive Health Act would repeal this requirement, art. 905 (p. 8, lines 6-7), thereby needlessly jeopardizing the health and safety of women seeking abortion.

Abortion Reporting

The Illinois Abortion Law of 1975 requires abortion providers to provide detailed reports on the abortions they perform, including, among other things, the type of abortion performed, complications of the procedure, whether the abortion resulted in a live birth and the pathologist's test results required by § 12 of the Act. 720 ILCS 510/10. The Reproductive Health Act would repeal this provision. Article 905 (p. 8, lines 6-7). Although the Act would require a report of each abortion performed to be made to the Department of Public Health, § 1-25(b) (p. 6, lines 7-11), it does not specify what information must be included in the report, but leaves that entirely up to the Department to prescribe. As a result, the Department of Public Health may not require all of the information that the General Assembly has specified must be in such reports. This could affect whether complications of abortion are required to be reported, an important source

of public health data. The possibility that complications resulting from an abortion are *not* reported is aggravated by the repeal of another provision of the Illinois Abortion Law of 1975 that requires any physician who diagnoses a woman as having complications resulting from an abortion to report the diagnosis and a summary of her physical symptoms to the Department of Public Health in accordance with procedures and upon forms mandated by the Department. 720 ILCS 510/10.1. Under the Act, no such reporting is required.

Paying and Receiving Fees for Referring Women for Abortion

Under current Illinois law, it is a Class 4 felony to pay or receive a "referral fee" in connection with the performance of an abortion. 720 ILCS 510/11.1(a). A "referral fee," for purposes of this prohibition, means "the transfer of anything of value between a doctor who performs an abortion or an operator or employee of a clinic at which an abortion is performed and the person who advised the woman receiving the abortion to use the services of that doctor or clinic." *Id.* § 510/11.1(b). This statute was enacted as part of the General Assembly's response to the joint investigation of shoddy abortion providers by the *Chicago Sun-Times* and the Better Government Association in 1979, "The Abortion Profiteers." That expose documented multiple instances in which abortion providers (or their staffs) paid "referral fees" to persons who referred pregnant women to their clinics for abortions. The Reproductive Health Act would repeal this provision (along with the rest of the Illinois Abortion Law of 1975), art. 905 (p. 8, lines 6-7), thereby allowing licensed providers, including physicians, who perform abortions, clinics where abortions are performed and their employees to pay kickbacks to persons who advise women to use the services of those providers and clinics.

Performing "Abortions" on Women Who Are Not Pregnant

Current Illinois law authorizes professional disciplinary action against anyone required to be licensed by the Medical Practice Act who performs "an abortion procedure in a willful and wanton manner on a woman who was not pregnant at the time the abortion procedure was performed." 225 ILCS 60/22(A)(2). This statute, like the one mentioned in the previous paragraph, was enacted in response to the *Sun-Times*/BGA investigation which documented numerous cases of "abortions" being performed on women who were not, in fact, pregnant. The Department "shall automatically revoke the license of [any] physician to practice medicine in Illinois" who is found to have violated this prohibition. *Id.* § 60/36(c). The Reproductive Health Act would eliminate these sanctions. Section 910-45 (p. 74, lines 11-13, p. 90, lines 22-26, through p. 91, lines 1-2). Under the Act, therefore, a physician (or any other licensed provider who would be allowed to perform abortions under the Act) who *willfully and wantonly* performs an abortion procedure on a woman who was *not* pregnant at the time the procedure was performed would *not* be subject to mandatory professional discipline.

Modifying the Fetal Homicide and Battery Statutes

For purposes of the state's fetal homicide and battery statutes, an "unborn child" is defined as "any individual of the human species from fertilization until birth." 720 ILCS 5/9-1.2(b) (intentional homicide of an unborn child), *id*. §§ 5/9-2.1(d) (voluntary manslaughter of an unborn child), 5/9-3.2(c) (involuntary manslaughter and reckless homicide of an unborn child), 5/12-3.1(b) (battery of an unborn child, aggravated battery of an unborn child). Without any medical or scientific justification, the Reproductive Health Act redefines "unborn child" throughout these statutes to mean "any individual of the human species from *the implantation of the embryo* until birth." Section 910-65 (p. 109, lines 8-9, p. 111, lines 7-8, p. 112, lines 11-12, and p. 113, lines 13-14) (emphasis added). Admittedly, it may be extremely difficult to prove by competent evidence that an actor's conduct cause the death of an unborn child after fertilization and before implantation. Nevertheless, the fact remains that human life, *in biological terms*, begins with fertilization, not implantation, as countless medical dictionaries, embryology texts and obstetrics texts attest. The definition of "unborn child" in these statutes (as well as the definition of "pregnancy" in the Act), *see* § 1-10 (p. 3, lines 24-25) should not be changed to promote a political agenda of denying that human life begins with fertilization.

Conclusion

The Reproductive Health Act is an extreme bill that would basically enshrine abortion as a positive good in Illinois law. It would eliminate virtually all common sense regulation of abortion, including regulations that are constitutional, mandate coverage for abortion in health insurance policies – even in those policies provided by churches and religious organizations – provide an argument for the nullification of the Parental Notice of Abortion Act of 1995 and undermine existing legal protections for institutional and individual rights of conscience. The Reproductive Health Act is a radical bill that the people of Illinois and members of the General Assembly should vigorously and aggressively oppose.