



## MEMORANDUM

To: All Oklahoma Law Enforcement Agencies  
From: Oklahoma Attorney General<sup>1</sup>  
Date: August 31, 2022  
Re: Guidance for Oklahoma law enforcement following *Dobbs v. Jackson Women's Health Org.*

On June 24, 2022, the U.S. Supreme Court overruled *Roe v. Wade*, holding that the U.S. Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion.” *Dobbs v. Jackson Women's Health Org.* 142 S. Ct. 2228, 2284 (2022). In light of this decision, and following the effective date of Oklahoma’s newest abortion law (63 O.S. § 1-731.4), the Oklahoma Office of the Attorney General offers the following guidance to district attorneys and law enforcement regarding Oklahoma’s prohibition of abortion.

**First**, Oklahoma district attorneys and law enforcement agencies should pursue criminal prosecution of any person who intentionally performs, attempts to perform, or assists with the performance of elective or on-demand abortion in Oklahoma, surgical or chemical.

- Section 861 of Title 21 is Oklahoma’s long-standing criminal prohibition, and it has been enforceable since the Attorney General’s Certification Letter on June 24, 2022.
- A similar law, Section 1-731.4 of Title 63, took effect on August 27, 2022.<sup>2</sup> In short, law enforcement should focus on ensuring that abortion-on-demand has ended in Oklahoma. And information available at present indicates that it has indeed ended.

**Second**, contrary to disinformation spread by those with a political agenda, there are clear instances where prosecutions should *not* be initiated:

- Oklahoma laws prohibiting abortion do not allow for the prosecution or punishment of any mother for seeking or obtaining an abortion.
- Nor do Oklahoma abortion prohibitions apply to unintentional miscarriages and miscarriage management (such as the removal of a dead child), ectopic pregnancies and treatments, in vitro fertilization (IVF) and other fertility treatments, or uses or prescription of contraception, including Plan B.

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<sup>1</sup> This is a guidance memorandum, not an official legal opinion from the Attorney General.

<sup>2</sup> It is the Attorney General’s view that both these laws are in effect, although Section 1-731.4 would generally be the better vehicle for prosecution, given its recency and stronger penalties. Depending on the circumstances of the crime, Oklahoma’s homicide laws may also be available. *See, e.g.*, 21 O.S. § 691; 63 O.S. § 1-732(F).



**Third**, an abortion is only authorized under Oklahoma criminal law when it is necessary to save the life of the mother in an emergency. 63 O.S. § 1-731.4(B)(1).

- This exception should be interpreted to ensure that it is not used by bad faith actors or clinics as a cover for abortion-on-demand.
- At the same time, when a situation involving the life exception arises, district attorneys should use careful discretion in deciding to prosecute when no pattern or trend exists, and where evidence of criminal intent is unclear.
- Medical doctors, in particular, should be given substantial leeway to treat pregnant women experiencing life-threatening or emergency physical conditions, using their reasoned medical judgment, so long as they are not unnecessarily terminating the life of the unborn child or abusing their position intentionally to facilitate elective abortions.
- Should a situation involving the life exception arise, district attorneys and law enforcement are encouraged to consult with the Attorney General's Office before initiating prosecution.

**Fourth**, Oklahoma's criminal abortion prohibitions do not contain independent exceptions for when the unborn child is conceived by rape, sexual assault, or incest.

- As previously explained, an abortion in such circumstance is only authorized under Oklahoma law if the abortion is necessary to save the life of the mother.
- In an instance of rape or sexual assault that led to abortion or an attempted abortion, however, law enforcement should focus first and foremost on identifying and prosecuting the rapist.

**Fifth**, Oklahoma law prohibits aiding and abetting the commission of an unlawful abortion, which may include advising a pregnant woman to obtain an unlawful abortion. *See* 21 O.S. §§ 171-172, 861.

- In enforcing this, district attorneys and law enforcement should take great care to avoid infringing on constitutional speech rights. The Oklahoma Supreme Court has held that speech that encourages "imminent lawless action" is not constitutionally protected, whereas "mere advocacy" is protected. *Edmondson v. Pearce*, 2004 OK 23, ¶ 61.
- Therefore, district attorneys and law enforcement should entirely refrain from investigating or prosecuting persons engaging in general advocacy in favor of abortion.
- District attorneys and law enforcement may consider pursuing a case, however, where a person has advised or encouraged a woman to obtain an unlawful abortion in some imminent way, especially if the third party has taken an overt or tangible action toward that goal. But, again, should such a situation arise, district attorneys and law



enforcement are encouraged to consult with the Attorney General's Office before initiating prosecution.

Also notable is that Oklahoma's two recent civil abortion statutes are not enforceable by law enforcement. *See* 63 O.S. §§ 1-745.38 (SB 1503); 63 O.S. §§ 1-745.54 (HB 4327).

The Attorney General's office recognizes that Oklahoma law enforcement is dedicated to protecting Oklahoma citizens and has already been implementing some of these changes. Law enforcement officials and agencies with questions should contact Chief Agent Brett Macy (brett.macy@oag.ok.gov), and district attorneys should contact Solicitor General Zach West (zach.west@oag.ok.gov).