

1 A bill to be entitled
2 An act relating to abortion; providing a short title;
3 providing legislative findings; amending s. 390.011, F.S.;
4 providing definitions; amending s. 390.0111, F.S.;
5 requiring a physician performing or inducing an abortion
6 to first make a determination of the probable
7 postfertilization age of the unborn child; providing an
8 exception; providing for disciplinary action against
9 noncompliant physicians; prohibiting an abortion if the
10 probable postfertilization age of the woman's unborn child
11 is 20 or more weeks; providing exceptions; providing
12 recordkeeping and reporting requirements for physicians;
13 providing for rulemaking; requiring an annual report by
14 the Department of Health; providing financial penalties
15 for late reports; providing for civil actions to require
16 reporting; providing for disciplinary action against
17 noncompliant physicians; providing criminal penalties for
18 intentional or reckless falsification of a report;
19 providing criminal penalties for any person who
20 intentionally or recklessly performs or attempts to
21 perform an abortion in violation of specified provisions;
22 providing that a penalty may not be assessed against a
23 woman involved in such an abortion or attempt; providing
24 for civil actions by certain persons for intentional or
25 reckless violations; providing for actions for injunctive
26 relief by certain persons for intentional violations;
27 providing for award of attorney's fees in certain
28 circumstances; requiring that in every civil or criminal

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proceeding or action brought under the court rule on whether the anonymity of any woman upon whom an abortion was performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure; requiring specified findings if a court determines that the anonymity of the woman should be preserved from public disclosure; conforming cross-references; amending s. 765.113, F.S.; conforming a cross-reference; requiring rulemaking by the Department of Health by a specified date; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Pain-Capable Unborn Child Protection Act."

Section 2. The Legislature finds that:

(1) By 20 weeks after fertilization there is substantial evidence that an unborn child has the physical structures necessary to experience pain.

(2) There is substantial evidence that, by 20 weeks after fertilization, unborn children seek to evade certain stimuli in a manner that in an infant or an adult would be interpreted as a response to pain.

(3) Anesthesia is routinely administered to unborn children who have developed 20 weeks or more past fertilization who undergo prenatal surgery.

(4) Even before 20 weeks after fertilization, unborn children have been observed to exhibit hormonal stress responses

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57 to painful stimuli. Such responses were reduced when pain
58 medication was administered directly to such unborn children.

59 (5) This state has a compelling state interest in
60 protecting the lives of unborn children from the stage at which
61 substantial medical evidence indicates that they are capable of
62 feeling pain.

63 Section 3. Section 390.011, Florida Statutes, is amended
64 to read:

65 390.011 Definitions.—As used in this chapter, the term:

66 (1) "Abortion" means the termination of human pregnancy
67 with an intention other than to produce a live birth or to
68 remove a dead fetus.

69 (2) "Abortion clinic" or "clinic" means any facility in
70 which abortions are performed. The term does not include:

71 (a) A hospital; or

72 (b) A physician's office, provided that the office is not
73 used primarily for the performance of abortions.

74 (3) "Agency" means the Agency for Health Care
75 Administration.

76 (4) "Attempt to perform or induce an abortion" means an
77 act, or an omission of a statutorily required act, that, under
78 the circumstances as the person believes them to be, constitutes
79 a substantial step in a course of conduct planned to culminate
80 in the performance or induction of an abortion.

81 (5)~~(4)~~ "Department" means the Department of Health.

82 (6) "Fertilization" means the fusion of a human
83 spermatozoon with a human ovum.

84 (7)~~(5)~~ "Hospital" means a facility as defined in s.

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395.002(12) and licensed under chapter 395 and part II of chapter 408.

(8) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. A condition is not a medical emergency if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function.

(9)~~(6)~~ "Partial-birth abortion" means a termination of pregnancy in which the physician performing the termination of pregnancy partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

(10)~~(7)~~ "Physician" means a physician licensed under chapter 458 or chapter 459 or a physician practicing medicine or osteopathic medicine in the employment of the United States.

(11) "Postfertilization age" means the age of an unborn child as calculated from the fertilization of the human ovum.

(12) "Probable postfertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time an abortion is planned to be performed.

(13) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities

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with respect to the medical conditions involved.

~~(14)(8)~~ "Third trimester" means the weeks of pregnancy after the 24th week of pregnancy.

(15) "Unborn child" or "fetus" means an individual organism of the species homo sapiens from fertilization until live birth.

Section 4. A new subsection (1) is added to section 390.0111, Florida Statutes, subsections (1) through (11) of that section are renumbered as subsections (2) through (12), respectively, and present subsection (10) and paragraph (b) of present subsection (11) of that section are amended, to read:

390.0111 Termination of pregnancies.—

(1) PAIN-CAPABLE UNBORN CHILD PROTECTION.—

(a)1. Except in the case of a medical emergency that prevents compliance with this subsection, an abortion may not be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, a physician shall make such inquiries of the pregnant woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

2. Failure by any physician to conform to any requirement of this paragraph constitutes grounds for disciplinary action

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under s. 458.331 or s. 459.015.

(b) A person may not perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is 20 or more weeks unless, in reasonable medical judgment:

1. She has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function; or

2. It is necessary to preserve the life of an unborn child.

Such a condition may not be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that would result in her death or in substantial and irreversible physical impairment of a major bodily function. With respect to the exceptions in subsections 1. and 2., the physician shall terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function of the woman than would another available method. Such greater risk may not be deemed to exist if it is

169 based on a claim or diagnosis that the woman will engage in
170 conduct that would result in her death or in substantial and
171 irreversible physical impairment of a major bodily function.

172 (c) Any physician who performs or induces or attempts to
173 perform or induce an abortion shall report to the department, on
174 a schedule and in accordance with forms and rules and
175 regulations adopted by the department, the following:

176 1. If a determination of probable postfertilization age
177 was made, the probable postfertilization age determined and the
178 method and basis of the determination.

179 2. If a determination of probable postfertilization age
180 was not made, the basis of the determination that a medical
181 emergency existed.

182 3. If the probable postfertilization age was determined to
183 be 20 or more weeks, the basis of the determination that the
184 pregnant woman had a condition that so complicated her medical
185 condition as to necessitate the abortion of her pregnancy to
186 avert her death or to avert serious risk of substantial and
187 irreversible physical impairment of a major bodily function, or
188 the basis of the determination that it was necessary to preserve
189 the life of an unborn child.

190 4. The method used for the abortion and, in the case of an
191 abortion performed when the probable postfertilization age was
192 determined to be 20 or more weeks, whether the method of
193 abortion used was one that, in reasonable medical judgment,
194 provided the best opportunity for the unborn child to survive
195 or, if such a method was not used, the basis of the
196 determination that termination of the pregnancy in that manner

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197 would pose a greater risk either of the death of the pregnant
198 woman or of the substantial and irreversible physical impairment
199 of a major bodily function of the woman than would other
200 available methods.

201 (d) By June 30 of each year, the department shall issue a
202 public report providing statistics for the previous calendar
203 year compiled from all of the reports covering that year
204 submitted in accordance with paragraph (c). Each such report
205 shall also provide the statistics for all previous calendar
206 years during which this subsection was in effect, adjusted to
207 reflect any additional information from late or corrected
208 reports. The department shall take care to ensure that none of
209 the information included in the public reports could reasonably
210 lead to the identification of any pregnant woman upon whom an
211 abortion was performed.

212 (e) Any physician who fails to submit a report under
213 paragraph (c) by the end of 30 days after the due date shall be
214 subject to a late fee of \$500 for each additional 30-day period
215 or portion of a 30-day period the report is overdue. Any
216 physician required to report in accordance with this subsection
217 who has not submitted a report, or has submitted only an
218 incomplete report, more than 1 year after the due date, may be
219 directed by a court of competent jurisdiction to submit a
220 complete report within a time period stated by court order or be
221 subject to civil contempt. Failure by any physician to conform
222 to any requirement of this subsection constitutes grounds for
223 disciplinary action under s. 458.331 or s. 459.015. Intentional
224 or reckless falsification of any report required under paragraph

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225 (c) is a misdemeanor of the second degree, punishable as
226 provided in s. 775.082 or s. 775.083.

227 (f) Any person who intentionally or recklessly performs or
228 attempts to perform an abortion in violation of paragraph (b)
229 commits a felony of the third degree, punishable as provided in
230 s. 775.082, s. 775.083, or s. 775.084. A penalty may not be
231 assessed against the woman upon whom the abortion was performed
232 or attempted to be performed.

233 (g)1. Any woman upon whom an abortion was performed in
234 violation of this subsection or the father of the unborn child
235 who was the subject of such an abortion may maintain an action
236 against the person who performed the abortion in an intentional
237 or a reckless violation of this subsection for actual damages.
238 Any woman upon whom an abortion was attempted in violation of
239 this subsection may maintain an action against the person who
240 attempted to perform the abortion in an intentional or a
241 reckless violation of this subsection for actual damages.

242 2. The woman upon whom an abortion was performed or
243 attempted in violation of this subsection has a cause of action
244 for injunctive relief against any person who has intentionally
245 violated this subsection. Such a cause of action may also be
246 maintained by a spouse, parent, sibling, guardian, or current or
247 former licensed health care provider of such a woman or by the
248 Attorney General or a county attorney with appropriate
249 jurisdiction. An injunction granted under this subparagraph
250 shall prevent the violator from performing or attempting more
251 abortions in violation of this subsection in this state.

252 3. If judgment is rendered in favor of the plaintiff in an

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253 action described in this section, the court shall also render
254 judgment for reasonable attorney's fees in favor of the
255 plaintiff against the defendant.

256 4. If judgment is rendered in favor of the defendant and
257 the court finds that the plaintiff's suit was frivolous and
258 brought in bad faith, the court shall also render judgment for
259 reasonable attorney's fees in favor of the defendant against the
260 plaintiff.

261 5. Neither damages nor attorney's fees may be assessed
262 against the woman upon whom an abortion was performed or
263 attempted except as provided in subparagraph 4.

264 (h) In every civil or criminal proceeding or action
265 brought under this subsection, the court shall rule whether the
266 anonymity of any woman upon whom an abortion was performed or
267 attempted shall be preserved from public disclosure if she does
268 not give her consent to such disclosure. The court, upon motion
269 or sua sponte, shall make such a ruling and, upon determining
270 that her anonymity should be preserved, shall issue orders to
271 the parties, witnesses, and counsel and direct the sealing of
272 the record and exclusion of individuals from courtrooms or
273 hearing rooms to the extent necessary to safeguard her identity
274 from public disclosure. Each such order shall be accompanied by
275 specific written findings explaining why the anonymity of the
276 woman should be preserved from public disclosure, why the order
277 is essential to that end, how the order is narrowly tailored to
278 serve that interest, and why no reasonable less restrictive
279 alternative exists. In the absence of written consent of the
280 woman upon whom an abortion was performed or attempted, anyone,

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other than a public official, who brings an action under paragraph (g) shall do so under a pseudonym. This paragraph does not require the concealment of the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

(11)~~(10)~~ PENALTIES FOR VIOLATION.—Except as provided in subsections (1), (4), ~~(3)~~ and (8)~~(7)~~:

(a) Any person who willfully performs, or actively participates in, a termination of pregnancy procedure in violation of the requirements of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) Any person who performs, or actively participates in, a termination of pregnancy procedure in violation of the provisions of this section which results in the death of the woman commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(12)~~(11)~~ CIVIL ACTION PURSUANT TO PARTIAL-BIRTH ABORTION; RELIEF.—

(b) In a civil action under this section, appropriate relief includes:

1. Monetary damages for all injuries, psychological and physical, occasioned by the violation of subsection (6) ~~(5)~~.

2. Damages equal to three times the cost of the partial-birth abortion.

Section 5. Subsection (2) of section 765.113, Florida Statutes, is amended to read:

765.113 Restrictions on providing consent.—Unless the

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principal expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, a surrogate or proxy may not provide consent for:

(2) Withholding or withdrawing life-prolonging procedures from a pregnant patient prior to viability as defined in s. 390.0111(5)~~(4)~~.

Section 6. Notwithstanding any other provision of law, within 90 days after the effective date of this act the Department of Health shall adopt rules to assist in compliance with s. 390.0111(1)(c), (d), and (e), Florida Statutes, as created by this act.

Section 7. This act shall take effect July 1, 2011.