

1                   A bill to be entitled  
2           An act relating to the termination of pregnancy;  
3           creating s. 390.301, F.S.; providing a short title;  
4           defining terms; prohibiting the attempted or actual  
5           performance or induction of an abortion in certain  
6           circumstances; providing a parameter to be used in  
7           determining the applicability of the prohibition;  
8           requiring a physician to make a specified  
9           determination before performing or inducing or  
10          attempting to perform or induce an abortion; requiring  
11          that, except in the case of a medical emergency, the  
12          physician performing or inducing an abortion determine  
13          the probable postfertilization age of the unborn  
14          child; providing parameters for making the  
15          determination; requiring a physician to use an  
16          abortion method that provides the best opportunity for  
17          the unborn child to survive the abortion in specified  
18          circumstances; requiring certain physicians to report  
19          specified information to the Department of Health  
20          containing specified data each time the physician  
21          performs or attempts to perform an abortion;  
22          prohibiting the reports from including information  
23          that would identify the woman whose pregnancy was  
24          terminated; requiring the reports to include a unique  
25          medical record identification number; requiring the

26 department to publish a summary of data from the  
27 physician reports on an annual basis; providing  
28 penalties for failure to timely submit physician  
29 reports; providing for disciplinary action; requiring  
30 the department to adopt rules; providing criminal  
31 penalties and civil and criminal remedies; providing  
32 for the awarding of attorney fees; requiring a court  
33 to rule on the need for the protection, in certain  
34 civil and criminal proceedings or actions, of the  
35 privacy of the identity of a woman on whom an abortion  
36 is performed or induced or on whom an abortion is  
37 attempted to be performed or induced; requiring that  
38 certain actions be brought under a pseudonym; creating  
39 a special revenue account to pay for certain costs and  
40 expenses incurred by the state in defending the act;  
41 providing for funding and retention of interest;  
42 providing construction and severability; providing an  
43 effective date.

44  
45 WHEREAS, pain receptors are present throughout an unborn  
46 child's entire body no later than 16 weeks after fertilization,  
47 and nerves link these receptors to the brain's thalamus and  
48 subcortical plate by no later than 20 weeks after fertilization,  
49 and

50 WHEREAS, an unborn child reacts to touch by 8 weeks after

51 fertilization, and

52 WHEREAS, 20 weeks after fertilization, an unborn child  
53 reacts to stimuli that would be recognized as painful if applied  
54 to an adult human, by recoiling or exhibiting other avoidance  
55 responses, and

56 WHEREAS, the application of painful stimuli to an unborn  
57 child is associated with significant increases in stress  
58 hormones in the unborn child, known as the stress response, and

59 WHEREAS, subjection to painful stimuli is associated with  
60 long-term harmful neurodevelopmental effects, such as altered  
61 pain sensitivity and, possibly, emotional, behavioral, and  
62 learning disabilities later in life, and

63 WHEREAS, for purposes of surgery on unborn children, fetal  
64 anesthesia is routinely administered and is associated with a  
65 decrease in stress hormones compared to their level when painful  
66 stimuli are applied without anesthesia, and

67 WHEREAS, the assertion by some medical experts that an  
68 unborn child is incapable of experiencing pain until later than  
69 20 weeks after fertilization predominately rests on the  
70 assumption that the ability to experience pain depends on the  
71 cerebral cortex and requires nerve connections between the  
72 thalamus and the cerebral cortex, and

73 WHEREAS, recent medical research and analysis, especially  
74 since 2007, provide strong support for the conclusion that a  
75 functioning cerebral cortex is not necessary to experience pain,

76 | and

77 |       WHEREAS, substantial evidence indicates that children born  
78 | missing most of the cerebral cortex, a condition known as  
79 | hydranencephaly, nevertheless experience pain, and

80 |       WHEREAS, in adults, stimulation or ablation of the cerebral  
81 | cortex does not alter pain perception, while stimulation or  
82 | ablation of the thalamus does, and

83 |       WHEREAS, substantial evidence indicates that neural  
84 | elements, such as the subcortical plate, develop at specific  
85 | times during the early development of an unborn child, serve as  
86 | pain-processing structures, and are different from the neural  
87 | elements used for pain processing by adults, and

88 |       WHEREAS, the assertion of some medical experts that an  
89 | unborn child remains in a coma-like sleep state that precludes  
90 | it from experiencing pain is inconsistent with the documented  
91 | reaction of unborn children to painful stimuli and with the  
92 | experience of fetal surgeons who have found it necessary to  
93 | sedate an unborn child with anesthesia to prevent it from  
94 | thrashing about in reaction to invasive surgery, and

95 |       WHEREAS, the Florida Legislature has the constitutional  
96 | authority to make the judgment that there is substantial medical  
97 | evidence that an unborn child is capable of experiencing pain as  
98 | soon as 20 weeks after fertilization, and

99 |       WHEREAS, the United States Supreme Court has noted, in  
100 | *Gonzales v. Carhart*, 550 U.S. 124, 162-164 (2007), that "the

101 Court has given state and federal legislatures wide discretion  
102 to pass legislation in areas where there is medical and  
103 scientific uncertainty," that "the law need not give abortion  
104 doctors unfettered choice in the course of their medical  
105 practice, nor should it elevate their status above other  
106 physicians in the medical community," and that "medical  
107 uncertainty does not foreclose the exercise of legislative power  
108 in the abortion context any more than it does in other  
109 contexts," and

110 WHEREAS, in *Marshall v. United States*, 414 U.S. 417, 427  
111 (1974) the United States Supreme Court stated that "when  
112 Congress undertakes to act in areas fraught with medical and  
113 scientific uncertainties, legislative options must be especially  
114 broad," and

115 WHEREAS, the State of Florida asserts a compelling state  
116 interest in protecting the lives of unborn children beginning at  
117 the stage in their development at which substantial medical  
118 evidence indicates that they are capable of feeling pain, and

119 WHEREAS, in enacting this legislation, the State of Florida  
120 is not asking the United States Supreme Court to overturn or  
121 revise its holding, first articulated in *Roe v. Wade* and  
122 reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v.*  
123 *Casey*, 505 U.S. 833, 869 (1992), that the state interest in  
124 unborn human life, which is "legitimate" throughout pregnancy,  
125 becomes "compelling" at the point of fetal viability, but,

126 rather, it asserts a separate and independent state interest in  
127 unborn human life which becomes compelling once an unborn child  
128 is capable of feeling pain, which is asserted not instead of,  
129 but in addition to, the State of Florida's compelling state  
130 interest in protecting the lives of unborn children beginning at  
131 viability, and

132 WHEREAS, the United States Supreme Court, in *Planned*  
133 *Parenthood of Southeastern Pennsylvania v. Casey*, established  
134 that the "constitutional liberty of the woman to have some  
135 freedom to terminate her pregnancy . . . is not so unlimited . .  
136 . that from the outset the State cannot show its concern for the  
137 life of the unborn, and at a later point in fetal development  
138 the State's interest in life has sufficient force so that the  
139 right of the woman to terminate the pregnancy can be  
140 restricted," and

141 WHEREAS, the United States Supreme Court decision upholding  
142 the federal Partial Birth Abortion Act in *Gonzales v. Carhart*,  
143 550 U.S. 124 (2007) vindicated the dissenting opinion in the  
144 earlier decision in *Stenberg v. Carhart*, 530 U.S. 914, 958-959  
145 (2000) (Kennedy, J., dissenting), which had struck down a  
146 Nebraska law banning partial-birth abortions, and

147 WHEREAS, the dissenting opinion in *Stenberg v. Carhart*  
148 stated that "we held [in *Casey*] it was inappropriate for the  
149 Judicial Branch to provide an exhaustive list of state interests  
150 implicated by abortion," that "*Casey* is premised on the States

151 having an important constitutional role in defining their  
152 interests in the abortion debate," that "it is only with this  
153 principle in mind that [a state's] interests can be given proper  
154 weight," that "States also have an interest in forbidding  
155 medical procedures which, in the State's reasonable  
156 determination, might cause the medical profession or society as  
157 a whole to become insensitive, even disdainful, to life,  
158 including life in the human fetus," and that "a State may take  
159 measures to ensure the medical profession and its members are  
160 viewed as healers, sustained by a compassionate and rigorous  
161 ethic and cognizant of the dignity and value of human life, even  
162 life which cannot survive without the assistance of others," and  
163       WHEREAS, mindful of *Leavitt v. Jane L.*, 518 U.S. 137  
164 (1996), in which, in the context of determining the severability  
165 of a state statute regulating abortion, the United States  
166 Supreme Court noted that an explicit statement of legislative  
167 intent specifically made applicable to a particular statute is  
168 of greater weight than a general savings or severability clause,  
169 the Legislature intends that if any one or more provisions,  
170 sections, subsections, sentences, clauses, phrases, or words of  
171 this act or the application thereof to any person or  
172 circumstance is found to be unconstitutional, the same is hereby  
173 declared to be severable, and the balance of the act shall  
174 remain effective notwithstanding such unconstitutionality, and  
175       WHEREAS, the Legislature of the State of Florida declares,

176 moreover, that it would have passed this act, and each  
 177 provision, section, subsection, sentence, clause, phrase, or  
 178 word thereof, irrespective of the fact that any one or more  
 179 provisions, sections, subsections, sentences, clauses, phrases,  
 180 or words, or any of their applications, were to be declared  
 181 unconstitutional, NOW, THEREFORE,

182

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

184

185 Section 1. Section 390.301, Florida Statutes, is created  
 186 to read:

187 390.301 Florida Pain-Capable Unborn Child Protection Act.-

188 (1) SHORT TITLE.-This act may be cited as the "Florida  
 189 Pain-Capable Unborn Child Protection Act."

190 (2) DEFINITIONS.-As used in this section, the term:

191 (a) "Abortion" means the use or prescription of any  
 192 instrument, medicine, or drug, or any other substance or device,  
 193 to intentionally kill the unborn child of a woman known to be  
 194 pregnant or to intentionally terminate the pregnancy of a woman  
 195 known to be pregnant with a purpose other than to produce a live  
 196 birth and preserve the life and health of the child born alive  
 197 or to remove a dead unborn child.

198 (b) "Attempt to perform or induce an abortion" means an  
 199 act, or an omission of a statutorily required act, which, under  
 200 the circumstances as perceived by the actor, constitutes a

201 substantial step in a course of conduct planned to culminate in  
202 the performance or induction of an abortion in this state in  
203 violation of this section.

204 (c) "Fertilization" means the fusion of a human sperm with  
205 a human egg.

206 (d) "Medical emergency" means a determination, using  
207 reasonable medical judgment, that the pregnant woman's medical  
208 condition necessitates the immediate abortion of an unborn child  
209 before determining the postfertilization age of the unborn child  
210 in order to avert the pregnant woman's death or a serious risk  
211 to the pregnant woman of a substantial and irreversible physical  
212 impairment of one or more of her major bodily functions, not  
213 including psychological or emotional conditions, which may  
214 result from the delay necessary to determine the  
215 postfertilization age of the unborn child. A condition may not  
216 be determined to be a medical emergency if it is based on a  
217 claim or diagnosis that the pregnant woman will engage in  
218 conduct that she intends to result in her death or in a  
219 substantial and irreversible physical impairment of one or more  
220 of her major bodily functions.

221 (e) "Postfertilization age" means the age of the unborn  
222 child as calculated from the time of fusion of the human sperm  
223 with the human egg.

224 (f) "Probable postfertilization age of the unborn child"  
225 means the postfertilization age, in weeks, of the unborn child

226 | at the time the abortion of the unborn child is planned to be  
 227 | performed or induced as determined through the use of reasonable  
 228 | medical judgment.

229 | (g) "Serious health risk to the unborn child's mother"  
 230 | means that the unborn child's mother is at risk of death or a  
 231 | substantial and irreversible physical impairment of one or more  
 232 | of her major bodily functions, not including psychological or  
 233 | emotional conditions, due to her pregnancy as determined through  
 234 | the use of reasonable medical judgment. Such a determination may  
 235 | not be made if it is based on a claim or diagnosis that the  
 236 | unborn child's mother will engage in conduct that she intends to  
 237 | result in her death or in the substantial and irreversible  
 238 | physical impairment of one or more of her major bodily  
 239 | functions.

240 | (h) "Unborn child" or "fetus" means an individual organism  
 241 | of the species *Homo sapiens* from fertilization until live birth.

242 | (i) "Unborn child's mother" means a pregnant woman of the  
 243 | species *Homo sapiens* regardless of age.

244 | (3) PROTECTION FROM ABORTION OF AN UNBORN CHILD CAPABLE OF  
 245 | FEELING PAIN.—

246 | (a) A person may not perform or induce, or attempt to  
 247 | perform or induce, the abortion of an unborn child capable of  
 248 | feeling pain unless it is necessary to prevent a serious health  
 249 | risk to the unborn child's mother.

250 | (b) An unborn child shall be deemed capable of feeling

251 pain if it has been determined by the physician performing or  
252 inducing, or attempting to perform or induce, an abortion of the  
253 unborn child, or by another physician upon whose determination  
254 such physician relies, that the probable postfertilization age  
255 of the unborn child is 20 or more weeks. For purposes of this  
256 subsection, a dead unborn child is not capable of feeling pain.

257 (c) Except in a medical emergency or in the removal of a  
258 dead unborn child, an abortion may not be performed or induced,  
259 or be attempted to be performed or induced, unless the physician  
260 performing or inducing, or attempting to perform or induce, the  
261 abortion has first made a determination of the probable  
262 postfertilization age of the unborn child or relied upon such a  
263 determination made by another physician. In making this  
264 determination, the physician shall inquire of the unborn child's  
265 mother and perform or cause to be performed such medical  
266 examinations and tests as a reasonably prudent physician,  
267 knowledgeable about the case and the medical conditions  
268 involved, would consider necessary in making an accurate  
269 determination of the probable postfertilization age of the  
270 unborn child.

271 (d) When an abortion of an unborn child capable of feeling  
272 pain is necessary to prevent a serious health risk to the unborn  
273 child's mother, the physician shall terminate the pregnancy  
274 through or by the method that, using reasonable medical  
275 judgment, provides the best opportunity for the unborn child to

276 survive, unless, using reasonable medical judgment, termination  
277 of the pregnancy in that manner would pose a more serious health  
278 risk to the unborn child's mother than would other available  
279 methods. Such a determination may not be made if the  
280 determination is based on a claim or diagnosis that the unborn  
281 child's mother will engage in conduct that she intends to result  
282 in her death or in the substantial and irreversible physical  
283 impairment of one or more of her major bodily functions.

284 (4) REPORTING.—

285 (a) Beginning January 1, 2020, a physician who performs or  
286 induces, or attempts to perform or induce, an abortion shall  
287 report all of the following to the department on forms, and in  
288 accordance with schedules and other requirements, adopted by  
289 department rule:

290 1. The probable postfertilization age of the unborn child  
291 and whether ultrasound was employed in making the determination,  
292 and, if a determination of probable postfertilization age was  
293 not made, the basis of the determination that a medical  
294 emergency existed or a determination that the unborn child was  
295 dead;

296 2. The method of abortion, including, but not limited to,  
297 one or more of the following, by or through which the abortion  
298 was performed or induced:

299 a. Medication, including, but not limited to, an abortion  
300 induced by mifepristone/misoprostol or methotrexate/misoprostol;

301 b. Manual vacuum aspiration;

302 c. Electrical vacuum aspiration;

303 d. Dilation and evacuation;

304 e. Induction, combined with dilation and evacuation;

305 f. Induction with prostaglandins;

306 g. Induction with intra-amniotic instillation, including,  
307 but not limited to, saline or urea; or

308 h. Intact dilation and extraction, otherwise known as  
309 partial-birth;

310 3. Whether an intra-fetal injection, including, but not  
311 limited to, intra-fetal potassium chloride or digoxin, was used  
312 in an attempt to induce the death of the unborn child;

313 4. The age and race of the unborn child's mother;

314 5. If the unborn child was deemed capable of experiencing  
315 pain under paragraph (3)(b), the basis of the determination that  
316 the pregnancy was a serious health risk to the unborn child's  
317 mother; and

318 6. If the unborn child was deemed capable of experiencing  
319 pain under paragraph (3)(b), whether the method of abortion used  
320 was the method that, using reasonable medical judgment, provided  
321 the best opportunity for the unborn child to survive and, if  
322 such method was not used, the basis of the determination that  
323 termination of the pregnancy using that method would pose a more  
324 serious health risk to the unborn child's mother than would  
325 other available methods.

326        (b) Reports required by paragraph (a) may not contain the  
327 name or the address of the woman whose pregnancy was terminated  
328 and may not contain any other information identifying the woman  
329 whose pregnancy was terminated; however, each report must  
330 contain a unique medical record identification number that  
331 allows the report to be matched to the medical records of the  
332 woman whose pregnancy was terminated.

333        (c) Beginning on June 30, 2020, and each June 30  
334 thereafter, the department shall publish in paper form and on  
335 its website a summary providing statistics for the previous  
336 calendar year compiled from all of the reports required by  
337 paragraph (a) for that year. The summary must provide a  
338 tabulation of data for all of the items required by paragraph  
339 (a) to be reported and include each of the summaries from all  
340 previous calendar years for which reports have been filed,  
341 adjusted to reflect any additional data from late-filed reports  
342 or corrected reports. The department shall ensure that the  
343 information included in the summary cannot reasonably lead to  
344 the identification of any pregnant woman upon whom an abortion  
345 was performed, induced, or attempted.

346        (d) The department may assess upon a physician who fails  
347 to submit a report required by this subsection by the end of the  
348 30th day following the due date established by department rule a  
349 late penalty of \$1,000 for each 30-day period or portion thereof  
350 that a report is overdue. If, more than 6 months following the

351 due date, a physician still has failed to submit such a report  
352 or has submitted an incomplete report, the department may bring  
353 an action against the physician requesting a court of competent  
354 jurisdiction to order the physician to submit a complete report  
355 within a specified timeframe or be subject to civil contempt.  
356 The intentional or reckless failure by a physician to comply  
357 with this section, other than the late filing of a report, or  
358 the intentional or reckless failure by a physician to submit a  
359 complete report in accordance with a court order, constitutes  
360 unprofessional conduct and is grounds for disciplinary action  
361 pursuant to s. 458.331 or s. 459.015, as applicable. A physician  
362 who intentionally or recklessly falsifies a report required  
363 under this section commits a misdemeanor of the first degree,  
364 punishable as provided in s. 775.082 or s. 775.083.

365 (5) RULEMAKING.—The department shall adopt rules,  
366 including forms for the reports required by subsection (4), as  
367 necessary to implement this section, by January 1, 2020.

368 (6) CRIMINAL PENALTIES.—A person who intentionally or  
369 recklessly performs or induces, or attempts to perform or  
370 induce, an abortion in violation of this section commits a  
371 felony of the third degree, punishable as provided in s.  
372 775.082, s. 775.083, or s. 775.084. A penalty may not be  
373 assessed against the woman upon whom the abortion is performed  
374 or induced or upon whom an abortion is attempted to be performed  
375 or induced.

376 (7) CIVIL REMEDIES.—

377 (a) A woman upon whom an abortion has been performed or  
378 induced in intentional or reckless violation of this section, or  
379 the father of an unborn child aborted in intentional or reckless  
380 violation of this section, may maintain a civil action for  
381 actual and punitive damages against the person who performed or  
382 induced the abortion. A woman upon whom an abortion has been  
383 attempted in intentional or reckless violation of this section  
384 may maintain a civil action for actual and punitive damages  
385 against the person who attempted to perform or induce the  
386 abortion.

387 (b) An injunction may be obtained against a person who has  
388 intentionally or recklessly violated this section to prevent him  
389 or her from performing or inducing, or attempting to perform or  
390 induce, further abortions in violation of this section. A cause  
391 of action for injunctive relief against a person who has  
392 intentionally or recklessly violated this section may be  
393 maintained by one or more of the following:

394 1. The woman upon whom an abortion was performed or  
395 induced, or upon whom an abortion was attempted to be performed  
396 or induced, in violation of this section;

397 2. The spouse, parent, sibling, or guardian of, or a  
398 current or former licensed health care provider of, the woman  
399 upon whom an abortion was performed or induced, or upon whom an  
400 abortion was attempted to be performed or induced, in violation

401 of this section;

402 3. A state attorney with jurisdiction; or

403 4. The Office of the Attorney General.

404 (c) If a judgment is entered in favor of the plaintiff in  
405 an action brought under this section, the court shall award  
406 reasonable attorney fees to the plaintiff.

407 (d) If a judgment is entered in favor of the defendant in  
408 an action brought under this section and the court finds that  
409 the plaintiff's suit was frivolous and brought in bad faith, the  
410 court shall award reasonable attorney fees to the defendant.

411 (e) Damages or attorney fees may not be assessed against a  
412 woman upon whom an abortion was performed or induced, or upon  
413 whom an abortion was attempted to be performed or induced,  
414 except in accordance with paragraph (d).

415 (8) PROTECTION OF PRIVACY IN COURT PROCEEDINGS.—In each  
416 civil or criminal proceeding or action brought under this  
417 section, the court shall rule on whether the anonymity of a  
418 woman upon whom an abortion has been performed or induced, or  
419 upon whom an abortion has been attempted to be performed or  
420 induced, must be preserved from public disclosure if the woman  
421 does not give her consent to such disclosure. The court, upon  
422 its own motion or the motion of a party, shall make such a  
423 ruling and, if it determines that anonymity should be preserved,  
424 shall issue an order to preserve the woman's anonymity to the  
425 parties, witnesses, and counsel and shall direct the sealing of

426 the record and the exclusion of individuals from courtrooms or  
427 hearing rooms to the extent necessary to safeguard the woman's  
428 identity from public disclosure. Each such order shall be  
429 accompanied by specific written findings explaining why the  
430 anonymity of the woman should be preserved; why the order is  
431 essential to that end; how the order is narrowly tailored to  
432 serve that interest; and why a reasonable, less restrictive  
433 alternative does not exist. In the absence of the written  
434 consent of the woman upon whom an abortion has been performed or  
435 induced or upon whom an abortion has been attempted to be  
436 performed or induced, anyone, other than a public official, who  
437 brings an action under paragraph (7) (a) or paragraph (7) (b)  
438 shall do so under a pseudonym. This section may not be construed  
439 to conceal the identity of the plaintiff or any witness from the  
440 defendant or from attorneys for the defendant.

441 (9) LITIGATION DEFENSE FUND.—

442 (a) A special revenue account known as the Florida Pain-  
443 Capable Unborn Child Protection Act Litigation Account is  
444 created in the Operating Trust Fund within the Department of  
445 Legal Affairs for the purpose of providing funds to pay costs  
446 and expenses incurred by the Attorney General in relation to  
447 actions taken to defend this act.

448 (b) The account shall:

- 449 1. Be administered by the Department of Legal Affairs;  
450 2. Consist of any appropriations made to the account by

451 the Legislature and any private donations, gifts, or grants made  
452 to the account; and

453 3. Retain any interest income derived.

454 (10) CONSTRUCTION.—This section may not be construed to  
455 repeal, by implication or otherwise, s. 390.01112 or any other  
456 applicable provision of state law regulating or restricting  
457 abortion. An abortion that complies with this section but  
458 violates s. 390.01112 or any other applicable provision of state  
459 law shall be deemed unlawful. An abortion that complies with s.  
460 390.01112 or any other state law regulating or restricting  
461 abortion but violates this section shall be deemed unlawful. If  
462 this act, or any portion thereof, is temporarily or permanently  
463 restrained or enjoined by judicial order, all other state laws  
464 regulating or restricting abortion shall be enforced as though  
465 the restrained or enjoined provisions had not been adopted;  
466 however, if such temporary or permanent restraining order or  
467 injunction is stayed or dissolved or otherwise ceases to have  
468 effect, such provisions shall have full force and effect.

469 Section 2. This act shall take effect July 1, 2019.