

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 of the privacy  
34 of women on whom an abortion is performed or induced  
35 or on whom an abortion is attempted to be performed or  
36 induced in certain civil and criminal proceedings or  
37 actions; requiring that certain actions be brought  
38 under a pseudonym; creating a special revenue account  
39 to pay for certain costs and expenses incurred by the  
40 state in defending the act; providing for funding and  
41 retention of interest; providing construction;  
42 providing an effective date.

43  
44 WHEREAS, pain receptors are present throughout an unborn  
45 child's entire body no later than 16 weeks after fertilization,  
46 and nerves link these receptors to the brain's thalamus and  
47 subcortical plate by no later than 20 weeks after fertilization,  
48 and

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

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

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

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

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

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

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

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

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

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

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

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

98 WHEREAS, the United States Supreme Court has noted, in  
99 *Gonzales v. Carhart*, 550 U.S. 124, 162-64 (2007), that "the  
100 Court has given state and federal legislatures wide discretion

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

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

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

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

126 | unborn human life which becomes compelling once an unborn child  
127 | is capable of feeling pain, which is asserted not instead of,  
128 | but in addition to, the State of Florida's compelling state  
129 | interest in protecting the lives of unborn children from the  
130 | stage of viability, and

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

140 |       WHEREAS, the United States Supreme Court decision upholding  
141 | the federal Partial Birth Abortion Act in *Gonzales v. Carhart*,  
142 | 550 U.S. 124 (2007) vindicated the dissenting opinion in the  
143 | earlier decision in *Stenberg v. Carhart*, 530 U.S. 914, 958-59  
144 | (2000) (Kennedy, J., dissenting), which had struck down a  
145 | Nebraska law banning partial-birth abortions, and

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

151 interests in the abortion debate," . . . that "it is only with  
 152 this principle in mind that [a state's] interests can be given  
 153 proper weight," . . . that "States also have an interest in  
 154 forbidding medical procedures which, in the State's reasonable  
 155 determination, might cause the medical profession or society as  
 156 a whole to become insensitive, even disdainful, to life,  
 157 including life in the human fetus," . . . and that "a State may  
 158 take measures to ensure the medical profession and its members  
 159 are viewed as healers, sustained by a compassionate and rigorous  
 160 ethic and cognizant of the dignity and value of human life, even  
 161 life which cannot survive without the assistance of others," and

162       WHEREAS, mindful of *Leavitt v. Jane L.*, 518 U.S. 137  
 163 (1996), in which, in the context of determining the severability  
 164 of a state statute regulating abortion, the United States  
 165 Supreme Court noted that an explicit statement of legislative  
 166 intent specifically made applicable to a particular statute is  
 167 of greater weight than a general savings or severability clause,  
 168 the Legislature intends that if any one or more provisions,  
 169 sections, subsections, sentences, clauses, phrases, or words of  
 170 this act or the application thereof to any person or  
 171 circumstance is found to be unconstitutional, the same is hereby  
 172 declared to be severable, and the balance of the act shall  
 173 remain effective notwithstanding such unconstitutionality, and

174       WHEREAS, the Legislature of the State of Florida declares,  
 175 moreover, that it would have passed this act, and each

176 provision, section, subsection, sentence, clause, phrase, or  
177 word thereof, irrespective of the fact that any one or more  
178 provisions, sections, subsections, sentences, clauses, phrases,  
179 or words, or any of their applications, were to be declared  
180 unconstitutional, NOW, THEREFORE,

181

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

183

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

186 390.301 Florida Pain-Capable Unborn Child Protection Act.-

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

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

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

197 (b) "Attempt to perform or induce an abortion" means an  
198 act, or an omission of a statutorily required act, which, under  
199 the circumstances as perceived by the actor, constitutes a  
200 substantial step in a course of conduct planned to culminate in



201 the performance or induction of an abortion in this state in  
202 violation of this section.

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

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

220 (e) "Postfertilization age" means the age of the unborn  
221 child as calculated from the fusion of the human spermatozoon  
222 with the human ovum.

223 (f) "Probable postfertilization age of the unborn child"  
224 means a determination, using reasonable medical judgment, of the  
225 probable postfertilization age, in weeks, of the unborn child at

226 the time the abortion of the unborn child is planned to be  
227 performed or induced.

228 (g) "Serious health risk to the unborn child's mother"  
229 means a determination, using reasonable medical judgment, that  
230 the unborn child's mother is at risk of death or a substantial  
231 and irreversible physical impairment of one or more of her major  
232 bodily functions, not including psychological or emotional  
233 conditions, due to her pregnancy. No greater risk may be  
234 determined to exist if it is based on a claim or diagnosis that  
235 the unborn child's mother will engage in conduct that she  
236 intends to result in her death or in the substantial and  
237 irreversible physical impairment of one or more of her major  
238 bodily functions.

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

241 (i) "Unborn child's mother" means a pregnant female of the  
242 species *Homo sapiens* regardless of whether she has reached 18  
243 years of age.

244 (j) "Woman" means a female of the species *Homo sapiens*  
245 regardless of whether she has reached 18 years of age.

246 (3) PROTECTION FROM ABORTION OF AN UNBORN CHILD CAPABLE OF  
247 FEELING PAIN.—

248 (a) A person may not perform or induce, or attempt to  
249 perform or induce, the abortion of an unborn child capable of  
250 feeling pain unless it is necessary to prevent a serious health

251 risk to the unborn child's mother.

252 (b) An unborn child shall be deemed capable of feeling  
253 pain if it has been determined by the physician performing or  
254 inducing or attempting to perform or induce an abortion of the  
255 unborn child, or by another physician upon whose determination  
256 such physician relies, that the probable postfertilization age  
257 of the unborn child is 20 or more weeks.

258 (c) Except in the case of a medical emergency, an abortion  
259 may not be performed or induced, or be attempted to be performed  
260 or induced, unless the physician performing or inducing, or  
261 attempting to perform or induce, the abortion has first made a  
262 determination of the probable postfertilization age of the  
263 unborn child or relied upon such a determination made by another  
264 physician. In making this determination, the physician shall  
265 inquire of the unborn child's mother and perform or cause to be  
266 performed such medical examinations and tests as a reasonably  
267 prudent physician, knowledgeable about the case and the medical  
268 conditions involved, would consider necessary in making an  
269 accurate determination of the probable postfertilization age of  
270 the 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 which, 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. No greater risk may be determined to exist 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, 2018, 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;

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

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

300 b. Manual vacuum aspiration;

301 c. Electrical vacuum aspiration;

302 d. Dilation and evacuation;

303 e. Combined induction, and dilation and evacuation;

304 f. Induction with prostaglandins;

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

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

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

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

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

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

325 (b) Reports required by paragraph (a) may not contain the

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

332 (c) Beginning on June 30, 2018, and each June 30  
333 thereafter, the department shall publish in paper form and on  
334 its website a summary providing statistics for the previous  
335 calendar year compiled from all of the reports required by  
336 paragraph (a) for that year. The summary must provide a  
337 tabulation of data for all of the items required by paragraph  
338 (a) to be reported and include each of the summaries from all  
339 previous calendar years for which reports have been filed,  
340 adjusted to reflect any additional data from late-filed or  
341 corrected reports. The department shall ensure that the  
342 information included in the summary cannot reasonably lead to  
343 the identification of any pregnant woman upon whom an abortion  
344 was performed, induced, or attempted.

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

351 submit such a report or has submitted an incomplete report, the  
352 department may bring an action against the physician requesting  
353 a court of competent jurisdiction to order the physician to  
354 submit a complete report within a specified timeframe or be  
355 subject to civil contempt. The intentional or reckless failure  
356 by a physician to comply with this section, other than the late  
357 filing of a report, or the intentional or reckless failure by a  
358 physician to submit a complete report in accordance with a court  
359 order, constitutes unprofessional conduct and is grounds for  
360 disciplinary action pursuant to s. 458.331 or s. 459.015, as  
361 applicable. A physician who intentionally or recklessly  
362 falsifies a report required under this section commits a  
363 misdemeanor of the first degree, punishable as provided in s.  
364 775.082 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, 2018.

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

375 (7) CIVIL AND CRIMINAL REMEDIES.—

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

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

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

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



401 3. A state attorney with jurisdiction; or

402 4. The Office of the Attorney General.

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

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

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

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

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

440 (9) LITIGATION DEFENSE FUND.—

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

447 (b) The account shall be administered by the Department of  
448 Legal Affairs.

449 (c) The account shall consist of any appropriations made  
450 to the account by the Legislature and any private donations,

451 gifts, or grants made to the account.

452 (d) The account shall retain any interest income derived.

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

468 Section 2. This act shall take effect July 1, 2017.

469