By Senator Steube

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A bill to be entitled

An act relating to the termination of pregnancy; creating s. 390.301, F.S.; providing a short title; defining terms; prohibiting the attempted or actual performance or induction of an abortion in certain circumstances; providing a parameter to be used in determining the applicability of the prohibition; requiring a physician to make a specified determination before performing or inducing or attempting to perform or induce an abortion; requiring that, except in the case of a medical emergency, the physician performing or inducing an abortion determine the probable postfertilization age of the unborn child; providing parameters for making the determination; requiring a physician to use an abortion method that provides the best opportunity for the unborn child to survive the abortion in specified circumstances; requiring certain physicians to report specified information to the Department of Health containing specified data each time the physician performs or attempts to perform an abortion; prohibiting the reports from including information that would identify the woman whose pregnancy was terminated; requiring the reports to include a unique medical record identification number; requiring the department to publish a summary of data from the physician reports on an annual basis; providing penalties for failure to timely submit physician reports; providing for disciplinary action; requiring the department to adopt rules; providing criminal penalties and civil and criminal remedies; providing for the awarding of attorney fees; requiring a court

to rule on the need for the protection, in certain civil and criminal proceedings or actions, of the privacy of a woman on whom an abortion is performed or induced or on whom an abortion is attempted to be performed or induced; requiring that certain actions be brought under a pseudonym; creating a special revenue account to pay for certain costs and expenses incurred by the state in defending the act; providing for funding and retention of interest; providing construction; providing an effective date.

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

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

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

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

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

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

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

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

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

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

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

WHEREAS, the assertion of some medical experts that an unborn child remains in a coma-like sleep state that precludes it from experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the

experience of fetal surgeons who have found it necessary to sedate an unborn child with anesthesia to prevent it from thrashing about in reaction to invasive surgery, and

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

WHEREAS, the United States Supreme Court has noted, in *Gonzales v. Carhart*, 550 U.S. 124, 162-164 (2007), that "the Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," that "the law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community," and that "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts," and

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

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

WHEREAS, in enacting this legislation, the State of Florida is not asking the United States Supreme Court to overturn or

revise its holding, first articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992), that the state interest in unborn human life, which is "legitimate" throughout pregnancy, becomes "compelling" at the point of fetal viability, but, rather, it asserts a separate and independent state interest in unborn human life which becomes compelling once an unborn child is capable of feeling pain, which is asserted not instead of, but in addition to, the State of Florida's compelling state interest in protecting the lives of unborn children from the stage of viability, and

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

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

WHEREAS, the dissenting opinion in *Stenberg v. Carhart* stated that "we held [in *Casey*] it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests

implicated by abortion," that "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate," that "it is only with this principle in mind that [a state's] interests can be given proper weight," that "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus," and that "a State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others," and

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

WHEREAS, the Legislature of the State of Florida declares, moreover, that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more

provisions, sections, subsections, sentences, clauses, phrases, or words, or any of their applications, were to be declared unconstitutional, NOW, THEREFORE,

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

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

390.301 Florida Pain-Capable Unborn Child Protection Act.—

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

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

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

(b) "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, which, under the circumstances as perceived by the actor, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of this section.

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

(d) "Medical emergency" means a determination, using reasonable medical judgment, that the pregnant woman's medical

condition necessitates the immediate abortion of her pregnancy before determining the postfertilization age of the unborn child in order to avert the pregnant woman's death or a serious risk to the pregnant woman of a substantial and irreversible physical impairment of one or more of her major bodily functions, not including psychological or emotional conditions, which may result from the delay necessary to determine the postfertilization age of the unborn child. A condition may not be determined to be a medical emergency if it is based on a claim or diagnosis that the pregnant woman will engage in conduct that she intends to result in her death or in a substantial and irreversible physical impairment of one or more of her major bodily functions.

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

(f) "Probable postfertilization age of the unborn child" means the probable postfertilization age, in weeks, of the unborn child at the time the abortion of the unborn child is planned to be performed or induced as determined through the use of reasonable medical judgment.

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

result in her death or in the substantial and irreversible physical impairment of one or more of her major bodily functions.

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

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

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

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

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

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

(c) Except in the case of a medical emergency, an abortion may not be performed or induced, or be attempted to be performed or induced, unless the physician performing or inducing, or attempting to perform or induce, the abortion 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 this determination, the physician shall

inquire of the unborn child's mother 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 in making an accurate determination of the probable postfertilization age of the unborn child.

(d) When an abortion of an unborn child capable of feeling pain is necessary to prevent a serious health risk to the unborn child's mother, the physician shall terminate the pregnancy through or by the method that, using reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, using reasonable medical judgment, termination of the pregnancy in that manner would pose a more serious health risk to the unborn child's mother than would other available methods. Such a determination may not be made if the determination is based on a claim or diagnosis that the unborn child's mother will engage in conduct that she intends to result in her death or in the substantial and irreversible physical impairment of one or more of her major bodily functions.

(4) REPORTING.—

(a) Beginning January 1, 2018, a physician who performs or induces, or attempts to perform or induce, an abortion shall report all of the following to the department on forms, and in accordance with schedules and other requirements, adopted by department rule:

1. The probable postfertilization age of the unborn child and whether ultrasound was employed in making the determination, and, if a determination of probable postfertilization age was not made, the basis of the determination that a medical

emergency existed;

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

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

b. Manual vacuum aspiration;

c. Electrical vacuum aspiration;

d. Dilation and evacuation;

e. Induction, combined with dilation and evacuation;

f. Induction with prostaglandins;

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

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

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

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

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

6. If the unborn child was deemed capable of experiencing pain under paragraph (3)(b), whether the method of abortion used was the method that, using reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such method was not used, the basis of the determination that termination of the pregnancy using that method would pose a more

serious health risk to the unborn child's mother than would other available methods.

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

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

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

bring an action against the physician requesting a court of competent jurisdiction to order the physician to submit a complete report within a specified timeframe or be subject to civil contempt. The intentional or reckless failure by a physician to comply with this section, other than the late filing of a report, or the intentional or reckless failure by a physician to submit a complete report in accordance with a court order, constitutes unprofessional conduct and is grounds for disciplinary action pursuant to s. 458.331 or s. 459.015, as applicable. A physician who intentionally or recklessly falsifies a report required under this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(5) RULEMAKING.—The department shall adopt rules, including forms for the reports required by subsection (4), as necessary to implement this section, by January 1, 2018.

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

(7) CIVIL AND CRIMINAL REMEDIES.—

(a) A woman upon whom an abortion has been performed or induced in intentional or reckless violation of this section, or the father of an unborn child aborted in intentional or reckless violation of this section, may maintain a civil action for

actual and punitive damages against the person who performed or induced the abortion. A woman upon whom an abortion has been attempted in intentional or reckless violation of this section may maintain a civil action for actual and punitive damages against the person who attempted to perform or induce the abortion.

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

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

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

3. A state attorney with jurisdiction; or

4. The Office of the Attorney General.

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

(d) If a judgment is entered in favor of the defendant in an action brought under this section and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the

court shall award reasonable attorney fees to the defendant.

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

(8) PROTECTION OF PRIVACY IN COURT PROCEEDINGS.—In each civil or criminal proceeding or action brought under this section, the court shall rule on whether the anonymity of a woman upon whom an abortion has been performed or induced, or upon whom an abortion has been attempted to be performed or induced, must be preserved from public disclosure if the woman does not give her consent to such disclosure. The court, upon its own motion or the motion of a party, shall make such a ruling and, if it determines that anonymity should be preserved, shall issue an order to preserve the woman's anonymity to the parties, witnesses, and counsel and shall direct the sealing of the record and the exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard the woman's identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved; why the order is essential to that end; how the order is narrowly tailored to serve that interest; and why a reasonable, less restrictive alternative does not exist. In the absence of the written consent of the woman upon whom an abortion has been performed or induced or upon whom an abortion has been attempted to be performed or induced, anyone, other than a public official, who brings an action under paragraph (7)(a) or paragraph (7)(b) shall do so under a pseudonym. This section may not be construed

to conceal the identity of the plaintiff or any witness from the defendant or from attorneys for the defendant.

(9) LITIGATION DEFENSE FUND.—

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

(b) The account shall:

1. Be administered by the Department of Legal Affairs;

2. Consist of any appropriations made to the account by the Legislature and any private donations, gifts, or grants made to the account; and

3. Retain any interest income derived.

(10) CONSTRUCTION.—This section may not be construed to repeal, by implication or otherwise, s. 390.01112 or any other applicable provision of state law regulating or restricting abortion. An abortion that complies with this section but violates s. 390.01112 or any other applicable provision of state law shall be deemed unlawful. An abortion that complies with s. 390.01112 or any other state law regulating or restricting abortion but violates this section shall be deemed unlawful. If this act, or any portion thereof, is temporarily or permanently restrained or enjoined by judicial order, all other state laws regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; however, if such temporary or permanent restraining order or injunction is stayed or dissolved or otherwise ceases to have

effect, such provisions shall have full force and effect.

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