

1                   A bill to be entitled  
2           An act relating to the protection of a pain-capable  
3           unborn child from abortion; amending s. 390.011, F.S.;  
4           revising definitions; creating s. 390.301, F.S.;  
5           providing a short title; providing definitions;  
6           providing legislative findings; prohibiting the  
7           attempted or actual performance or induction of an  
8           abortion in certain circumstances; providing a  
9           parameter for determining the applicability of the  
10          prohibition; requiring a physician to make a specified  
11          determination before performing or inducing or  
12          attempting to perform or induce an abortion; requiring  
13          that the physician performing or inducing an abortion  
14          determine the probable gestational age of the unborn  
15          child; providing an exception; requiring a physician  
16          to use an abortion method that provides the best  
17          opportunity for the unborn child to survive the  
18          abortion in specified circumstances; requiring certain  
19          physicians to report specified information to the  
20          Department of Health containing specified data;  
21          prohibiting a report from including information that  
22          would identify the woman whose pregnancy was  
23          terminated; requiring such report to include a unique  
24          medical record identification number; requiring the  
25          department to publish a summary of data from the

26 physician reports on an annual basis; requiring that  
27 such summary include specified information; requiring  
28 that the department safeguard the information included  
29 in such summary; providing penalties for failure to  
30 timely submit physician reports; providing for  
31 disciplinary action; requiring the department to adopt  
32 rules; providing criminal penalties and civil and  
33 criminal remedies; providing for attorney fees;  
34 requiring a court to rule on the protection of certain  
35 identifying information in certain civil and criminal  
36 proceedings or actions; requiring that certain actions  
37 be brought under a pseudonym; providing construction  
38 and severability; providing an effective date.

39  
40 WHEREAS, pain receptors are present throughout an unborn  
41 child's entire body no later than 16 weeks after probable  
42 gestational age, and nerves link these receptors to the brain's  
43 thalamus and subcortical plate by no later than 20 weeks  
44 probable gestational age, and

45 WHEREAS, an unborn child reacts to touch by 8 weeks  
46 probable gestational age, and

47 WHEREAS, by 20 weeks probable gestational age, an unborn  
48 child reacts to stimuli that would be recognized as painful if  
49 applied to an adult human, by recoiling or exhibiting other  
50 avoidance responses, and

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

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

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

62 WHEREAS, the assertion by some medical experts that an  
63 unborn child is incapable of experiencing pain until later than  
64 20 weeks probable gestational age predominately rests on the  
65 assumption that the ability to experience pain depends on the  
66 cerebral cortex and requires nerve connections between the  
67 thalamus and the cerebral cortex, and

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

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

75 WHEREAS, in adults, stimulation or ablation of the cerebral

76 | cortex does not alter pain perception, while stimulation or  
77 | ablation of the thalamus does, and

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

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

90 |       WHEREAS, the Florida Legislature has the constitutional  
91 | authority to make the judgment that there is substantial medical  
92 | evidence that an unborn child is capable of experiencing pain as  
93 | soon as 20 weeks probable gestational age, and

94 |       WHEREAS, the United States Supreme Court has noted, in  
95 | *Gonzales v. Carhart*, 550 U.S. 124, 162-164 (2007), that "the  
96 | Court has given state and federal legislatures wide discretion  
97 | to pass legislation in areas where there is medical and  
98 | scientific uncertainty," that "the law need not give abortion  
99 | doctors unfettered choice in the course of their medical  
100 | practice, nor should it elevate their status above other

101 physicians in the medical community," and that "medical  
102 uncertainty does not foreclose the exercise of legislative power  
103 in the abortion context any more than it does in other  
104 contexts," and

105 WHEREAS, in *Marshall v. United States*, 414 U.S. 417, 427  
106 (1974) the United States Supreme Court stated that "when  
107 Congress undertakes to act in areas fraught with medical and  
108 scientific uncertainties, legislative options must be especially  
109 broad . . .," and

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

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

126 | viability, and

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

136 |       WHEREAS, the United States Supreme Court decision upholding  
137 | the federal Partial Birth Abortion Act in *Gonzales v. Carhart*,  
138 | 550 U.S. 124 (2007) vindicated the dissenting opinion in the  
139 | earlier decision in *Stenberg v. Carhart*, 530 U.S. 914, 958-959  
140 | (2000) (Kennedy, J., dissenting), which had struck down a  
141 | Nebraska law banning partial-birth abortions, and

142 |       WHEREAS, the dissenting opinion in *Stenberg v. Carhart*  
143 | stated that "we held [in *Casey*] it was inappropriate for the  
144 | Judicial Branch to provide an exhaustive list of state interests  
145 | implicated by abortion," that "*Casey* is premised on the States  
146 | having an important constitutional role in defining their  
147 | interests in the abortion debate," that "it is only with this  
148 | principle in mind that [a state's] interests can be given proper  
149 | weight," that "States also have an interest in forbidding  
150 | medical procedures which, in the State's reasonable

151 determination, might cause the medical profession or society as  
 152 a whole to become insensitive, even disdainful, to life,  
 153 including life in the human fetus," and that "a State may take  
 154 measures to ensure the medical profession and its members are  
 155 viewed as healers, sustained by a compassionate and rigorous  
 156 ethic and cognizant of the dignity and value of human life, even  
 157 life which cannot survive without the assistance of others," and

158       WHEREAS, mindful of *Leavitt v. Jane L.*, 518 U.S. 137  
 159 (1996), in which, in the context of determining the severability  
 160 of a state statute regulating abortion, the United States  
 161 Supreme Court noted that an explicit statement of legislative  
 162 intent specifically made applicable to a particular statute is  
 163 of greater weight than a general savings or severability clause,  
 164 the Legislature intends that if any one or more provisions,  
 165 sections, subsections, sentences, clauses, phrases, or words of  
 166 this act or the application thereof to any person or  
 167 circumstance is found to be unconstitutional, the same is hereby  
 168 declared to be severable, and the balance of the act shall  
 169 remain effective notwithstanding such unconstitutionality, and

170       WHEREAS, the Legislature of the State of Florida declares,  
 171 moreover, that it would have passed this act, and each  
 172 provision, section, subsection, sentence, clause, phrase, or  
 173 word thereof, irrespective of the fact that any one or more  
 174 provisions, sections, subsections, sentences, clauses, phrases,  
 175 or words, or any of their applications, were to be declared

176 | unconstitutional, NOW, THEREFORE,

177 |

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

179 |

180 |       Section 1. Subsection (6) and paragraph (a) of subsection  
181 | (12) of section 390.011, Florida Statutes, are amended to read:

182 |       390.011 Definitions.—As used in this chapter, the term:

183 |       (6) "Gestation" means the development of a human embryo or  
184 | fetus between the beginning of the pregnant woman's last  
185 | menstrual period ~~fertilization~~ and birth.

186 |       (12) "Trimester" means one of the following three distinct  
187 | periods of time in the duration of a pregnancy:

188 |       (a) "First trimester," which is the period of time from  
189 | the beginning of the pregnant woman's last menstrual period  
190 | ~~fertilization~~ through the end of the 11th week of gestation.

191 |       Section 2. Section 390.301, Florida Statutes, is created  
192 | to read:

193 |       390.301 Florida Pain-Capable Unborn Child Protection Act.—

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

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

197 |       (a) "Abortion" means the use or prescription of any  
198 | instrument, medicine, or drug, or any other substance or device,  
199 | to intentionally kill the unborn child of a woman known to be  
200 | pregnant or to intentionally terminate the pregnancy of a woman

201 known to be pregnant with a purpose other than to produce a live  
202 birth and preserve the life and health of the child born alive  
203 or to remove a dead unborn child.

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

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

226 (d) "Probable gestational age of the unborn child" means  
227 the gestational age, in weeks, of the unborn child at the time  
228 the abortion of the unborn child is to be performed or induced  
229 as determined from the beginning of the pregnant woman's last  
230 menstrual period.

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

242 (f) "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) The Legislature finds that there is a compelling state  
247 interest in protecting the lives of unborn children from the  
248 stage at which substantial medical evidence indicates that such  
249 unborn children are capable of feeling pain. Such compelling  
250 interest is separate from and independent of this state's

251 compelling interest in protecting the lives of unborn children  
252 from the stage of viability and neither compelling interest is  
253 intended to replace the other.

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

258 (c) An unborn child shall be deemed capable of feeling  
259 pain if it has been determined by the physician performing or  
260 inducing, or attempting to perform or induce, an abortion of the  
261 unborn child, or by another physician upon whose determination  
262 such physician relies, that the probable gestational age of the  
263 unborn child is 20 or more weeks. For purposes of this  
264 subsection, a dead unborn child is not capable of feeling pain.

265 (d) Except in a medical emergency or in the removal of a  
266 dead unborn child, an abortion may not be performed or induced,  
267 or be attempted to be performed or induced, unless the physician  
268 performing or inducing, or attempting to perform or induce, the  
269 abortion has first made a determination of the probable  
270 gestational age of the unborn child or relied upon such a  
271 determination made by another physician. In making this  
272 determination, the physician shall inquire of the unborn child's  
273 mother and perform or cause to be performed such medical  
274 examinations and tests as a reasonably prudent physician,  
275 knowledgeable about the case and the medical conditions

276 involved, would consider necessary in making an accurate  
277 determination of the probable gestational age of the unborn  
278 child.

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

292 (4) REPORTING.—

293 (a) Beginning January 1, 2022, a physician who performs or  
294 induces, or attempts to perform or induce, an abortion shall  
295 report all of the following to the department on forms, and in  
296 accordance with schedules and other requirements, adopted by  
297 department rule:

298 1. The probable gestational age of the unborn child and  
299 whether an ultrasound was employed in making the determination,  
300 and, if a determination of probable gestational age was not

301 made, the basis of the determination that a medical emergency  
302 existed or a determination that the unborn child was dead;  
303 2. The method of abortion, including, but not limited to,  
304 one or more of the following, by or through which the abortion  
305 was performed or induced:  
306 a. Medication, including, but not limited to, an abortion  
307 induced by mifepristone/misoprostol or methotrexate/misoprostol;  
308 b. Manual vacuum aspiration;  
309 c. Electrical vacuum aspiration;  
310 d. Dilation and evacuation;  
311 e. Induction, combined with dilation and evacuation;  
312 f. Induction with prostaglandins;  
313 g. Induction with intra-amniotic instillation, including,  
314 but not limited to, saline or urea; or  
315 h. Intact dilation and extraction, otherwise known as  
316 partial-birth;  
317 3. Whether an intra-fetal injection, including, but not  
318 limited to, intra-fetal potassium chloride or digoxin, was used  
319 in an attempt to induce the death of the unborn child;  
320 4. The age and race of the unborn child's mother;  
321 5. If the unborn child was deemed capable of experiencing  
322 pain under paragraph (3) (c), the basis of the determination that  
323 the pregnancy was a serious health risk to the unborn child's  
324 mother; and  
325 6. If the unborn child was deemed capable of experiencing

326 pain under paragraph (3)(c), whether the method of abortion used  
327 was the method that, using reasonable medical judgment, provided  
328 the best opportunity for the unborn child to survive and, if  
329 such method was not used, the basis of the determination that  
330 termination of the pregnancy using that method would pose a more  
331 serious health risk to the unborn child's mother than would  
332 other available methods.

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

340 (c) Beginning on June 30, 2022, and each June 30  
341 thereafter, the department shall publish in paper form and on  
342 its website a summary providing statistics for the previous  
343 calendar year compiled from all of the reports required by  
344 paragraph (a) for that year. The summary must provide a  
345 tabulation of data for all of the items required by paragraph  
346 (a) to be reported and include each of the summaries from all  
347 previous calendar years for which reports have been filed,  
348 adjusted to reflect any additional data from late-filed reports  
349 or corrected reports. All reports must include the name of the  
350 physician who performs or induces, or attempts to perform or

351 induce, the abortion and the name of the facility in which the  
352 abortion was performed, induced, or attempted to be performed or  
353 induced. The department shall ensure that the information  
354 included in the summary cannot reasonably lead to the  
355 identification of a pregnant woman upon whom an abortion was  
356 performed, induced, or attempted.

357 (d) The department may assess upon a physician who fails  
358 to submit a report required by this subsection by the end of the  
359 30th day after the due date established by department rule a  
360 late penalty of \$1,000 for each 30-day period or portion thereof  
361 that a report is overdue. If a physician has failed to submit  
362 such a report or has submitted an incomplete report more than 6  
363 months after the due date, the department may bring an action  
364 against the physician requesting a court of competent  
365 jurisdiction to order the physician to submit a complete report  
366 within a specified timeframe or be subject to civil contempt.  
367 The intentional or reckless failure by a physician to comply  
368 with this section, other than the late filing of a report, or  
369 the intentional or reckless failure by a physician to submit a  
370 complete report in accordance with a court order, constitutes  
371 unprofessional conduct and is grounds for disciplinary action  
372 pursuant to s. 458.331 or s. 459.015, as applicable. A physician  
373 who intentionally or recklessly falsifies a report required  
374 under this section commits a misdemeanor of the first degree,  
375 punishable as provided in s. 775.082 or s. 775.083.

376       (5) RULEMAKING.—The department shall adopt rules,  
377 including forms for the reports required by subsection (4), as  
378 necessary to implement this section, by January 1, 2022.

379       (6) CRIMINAL PENALTIES.—A person who intentionally or  
380 recklessly performs or induces, or attempts to perform or  
381 induce, an abortion in violation of this section commits a  
382 felony of the third degree, punishable as provided in s.  
383 775.082, s. 775.083, or s. 775.084. A penalty may not be  
384 assessed against the woman upon whom the abortion is performed  
385 or induced or upon whom an abortion is attempted to be performed  
386 or induced.

387       (7) CIVIL REMEDIES.—

388       (a) A woman upon whom an abortion has been performed or  
389 induced in intentional or reckless violation of this section, or  
390 the father of an unborn child aborted in intentional or reckless  
391 violation of this section, may maintain a civil action for  
392 actual and punitive damages against the person who performed or  
393 induced the abortion. A woman upon whom an abortion has been  
394 attempted in intentional or reckless violation of this section  
395 may maintain a civil action for actual and punitive damages  
396 against the person who attempted to perform or induce the  
397 abortion.

398       (b) An injunction may be obtained against a person who has  
399 intentionally or recklessly violated this section to prevent him  
400 or her from performing or inducing, or attempting to perform or

401 induce, further abortions in violation of this section. A cause  
402 of action for injunctive relief against a person who has  
403 intentionally or recklessly violated this section may be  
404 maintained by one or more of the following:

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

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

413 3. A state attorney with appropriate jurisdiction; or

414 4. The Office of the Attorney General.

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

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

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

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

451 defendant or from attorneys for the defendant.

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

467 Section 3. This act shall take effect July 1, 2021.