

1 HB18
2 129567-4
3 By Representative Rich
4 RFD: Health
5 First Read: 01-MAR-11
6 PFD: 02/25/2011

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ENROLLED, An Act,

To prohibit elective abortions at and after 20 weeks of pregnancy; to provide legislative findings regarding medical assertions that an unborn child is capable of feeling pain; to require a physician to determine the postfertilization age of an unborn child before performing or attempting to perform an abortion; to prohibit the abortion of any unborn child with a postfertilization age of 20 weeks or more, with certain exceptions relating to the health of the woman; to require physician reporting of abortions to the Office of Vital Statistics; to amend Section 22-9A-13, Code of Alabama 1975, to require the Office of Vital Statistics to annually gather information and issue a public report regarding induced pregnancy terminations; to provide civil remedies and criminal penalties for violations; to provide for anonymity for women in court proceedings; to provide for construction with other laws; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1 Section 1. This act shall be known and may be cited
2 as the Alabama Pain-Capable Unborn Child Protection Act.

3 Section 2. The Legislature makes all of the
4 following findings:

5 (1) Pain receptors (nociceptors) are present
6 throughout the unborn child's entire body by no later than 16
7 weeks after fertilization and nerves link these receptors to
8 the brain's thalamus and subcortical plate by no later than 20
9 weeks.

10 (2) By eight weeks after fertilization, the unborn
11 child reacts to touch. After 20 weeks, the unborn child reacts
12 to stimuli that would be recognized as painful if applied to
13 an adult human, for example by recoiling.

14 (3) For the purposes of surgery on unborn children,
15 fetal anesthesia is routinely administered and is associated
16 with a decrease in stress hormones compared to their level
17 when painful stimuli is applied without such anesthesia.

18 (4) In the unborn child, application of such painful
19 stimuli is associated with significant increases in stress
20 hormones known as the stress response.

21 (5) Subjection to such painful stimuli is associated
22 with long-term harmful neurodevelopmental effects, such as
23 altered pain sensitivity and, possibly, emotional, behavioral,
24 and learning disabilities later in life.

1 (6) The position, asserted by some medical experts,
2 that the unborn child is incapable of experiencing pain until
3 a point later in pregnancy than 20 weeks after fertilization
4 predominately rests on the assumption that the ability to
5 experience pain depends on the cerebral cortex and requires
6 nerve connections between the thalamus and the cortex.
7 However, recent medical research and analysis, especially
8 since 2007, provides strong evidence for the conclusion that a
9 functioning cortex is not necessary to experience pain.

10 (7) Substantial evidence indicates that children
11 born missing the bulk of the cerebral cortex, those with
12 hydranencephaly, nevertheless experience pain.

13 (8) In adults, stimulation or ablation of the
14 cerebral cortex does not alter pain perception, while
15 stimulation or ablation of the thalamus does.

16 (9) Substantial evidence indicates that structures
17 used for pain processing in early development differ from
18 those of adults, using different neural elements available at
19 specific times during development, such as the subcortical
20 plate, to fulfill the role of pain processing.

21 (10) The position, asserted by some medical experts,
22 that the unborn child remains in a coma-like sleep state that
23 precludes the unborn child experiencing pain is inconsistent
24 with the documented reaction of unborn children to painful
25 stimuli and with the experience of fetal surgeons who have

1 found it necessary to sedate the unborn child with anesthesia
2 to prevent the unborn child from thrashing about in reaction
3 to invasive surgery.

4 (11) Consequently, there is substantial medical
5 evidence that an unborn child is capable of experiencing pain
6 by 20 weeks after fertilization.

7 (12) It is the purpose of this state to assert a
8 compelling state interest in protecting the lives of unborn
9 children from the stage at which substantial medical evidence
10 indicates that they are capable of feeling pain.

11 (13) Alabama's compelling state interest in
12 protecting the lives of unborn children from the stage at
13 which substantial medical evidence indicates that they are
14 capable of feeling pain is intended to be separate from and
15 independent of Alabama's compelling state interest in
16 protecting the lives of unborn children from the stage of
17 viability, and neither state interest is intended to replace
18 the other.

19 (14) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137
20 (1996), in which in the context of determining the
21 severability of a state statute regulating abortion, the
22 United States Supreme Court noted that an explicit statement
23 of legislative intent specifically made applicable to a
24 particular statute is of greater weight than a general savings
25 or severability clause, it is the intent of this state that if

1 any one or more provisions, sections, subsections, sentences,
2 clauses, phrases, or words of this act or the application
3 thereof to any person or circumstance is found to be
4 unconstitutional, the same is hereby declared to be severable
5 and the balance of this act shall remain effective
6 notwithstanding such unconstitutionality. Moreover, this state
7 declares that it would have passed this act, and each
8 provision, section, subsection, sentence, clause, phrase, or
9 word thereof, irrespective of the fact that any one or more
10 provisions, sections, subsections, sentences, clauses,
11 phrases, or words, or any of their applications, were to be
12 declared unconstitutional.

13 Section 3. For purposes of this act, the following
14 terms shall have the following meanings:

15 (1) ABORTION. The use or prescription of any
16 instrument, medicine, drug, or any other substance or device
17 to terminate the pregnancy of a woman known to be pregnant
18 with an intention other than to increase the probability of a
19 live birth, to preserve the life or health of the child after
20 live birth, or to remove a dead unborn child who died as the
21 result of natural causes in utero, accidental trauma, or a
22 criminal assault on the pregnant woman or her unborn child,
23 and which causes the premature termination of the pregnancy.

24 (2) ATTEMPT TO PERFORM OR INDUCE AN ABORTION. An
25 act, or an omission of a statutorily required act, that, under

1 the circumstances as the actor believes them to be,
2 constitutes a substantial step in a course of conduct planned
3 to culminate in the performance or induction of an abortion in
4 this state in violation of this act.

5 (3) FERTILIZATION. The fusion of a human
6 spermatozoon with a human ovum.

7 (4) MEDICAL EMERGENCY. A condition which, in
8 reasonable medical judgment, so complicates the medical
9 condition of the pregnant woman as to necessitate the
10 immediate abortion of her pregnancy without first determining
11 postfertilization age to avert her death or for which the
12 delay necessary to determine postfertilization age will create
13 serious risk of substantial and irreversible physical
14 impairment of a major bodily function, not including
15 psychological or emotional conditions. No condition shall be
16 deemed a medical emergency if based on a claim or diagnosis
17 that the woman will engage in conduct which she intends to
18 result in her death or in substantial and irreversible
19 physical impairment of a major bodily function.

20 (5) POSTFERTILIZATION AGE. The age of the unborn
21 child as calculated from the fertilization of the human ovum.

22 (6) REASONABLE MEDICAL JUDGMENT. A medical judgment
23 that would be made by a reasonable prudent physician,
24 knowledgeable about the case and the treatment possibilities
25 with respect to the medical conditions involved.

1 (7) PHYSICIAN. Any person licensed to practice
2 medicine and surgery or osteopathic medicine and surgery in
3 this state.

4 (8) PROBABLE POSTFERTILIZATION AGE OF THE UNBORN
5 CHILD. What, in reasonable medical judgment, will with
6 reasonable probability be the postfertilization age of the
7 unborn child at the time the abortion is planned to be
8 performed or induced.

9 (9) UNBORN CHILD or FETUS. An individual organism of
10 the species homo sapiens from fertilization until live birth.

11 (10) WOMAN. A female human being whether or not she
12 has reached the age of majority.

13 Section 4. (a) Except in the case of a medical
14 emergency, no abortion shall be performed or induced or be
15 attempted to be performed or induced unless the physician
16 performing or inducing the abortion has first made a
17 determination of the probable postfertilization age of the
18 unborn child or relied upon such a determination made by
19 another physician. In making such a determination, the
20 physician shall make such inquiries of the woman and perform
21 or cause to be performed such medical examinations and tests
22 as a reasonably prudent physician, knowledgeable about the
23 case and the medical conditions involved, would consider
24 necessary to perform in making an accurate diagnosis with
25 respect to postfertilization age.

1 (b) Failure by any physician to conform to any
2 requirement of this section constitutes unprofessional
3 conduct.

4 Section 5. (a) No person shall perform or induce or
5 attempt to perform or induce an abortion upon a woman when it
6 has been determined, by the physician performing or inducing
7 or attempting to perform or induce the abortion or by another
8 physician upon whose determination that physician relies, that
9 the probable postfertilization age of the unborn child of the
10 woman is 20 or more weeks unless, in reasonable medical
11 judgment, the woman has a condition which so complicates her
12 medical condition as to necessitate the abortion of her
13 pregnancy to avert her death or to avert serious risk of
14 substantial and irreversible physical impairment of a major
15 bodily function, not including psychological or emotional
16 conditions. No such condition shall be deemed to exist if it
17 is based on a claim or diagnosis that the woman will engage in
18 conduct which she intends to result in her death or in
19 substantial and irreversible physical impairment of a major
20 bodily function.

21 (b) When an abortion upon a woman whose unborn child
22 has been determined to have a probable postfertilization age
23 of 20 or more weeks is not prohibited by this section, in such
24 a case, the physician shall terminate the pregnancy in the
25 manner which, in reasonable medical judgment, provides the

1 best opportunity for the unborn child to survive, unless, in
2 reasonable medical judgment, termination of the pregnancy in
3 that manner would pose a greater risk either of the death of
4 the pregnant woman or of the substantial and irreversible
5 physical impairment of a major bodily function, not including
6 psychological or emotional conditions of the woman, than would
7 another available method. No such greater risk shall be deemed
8 to exist if it is based on a claim or diagnosis that the woman
9 will engage in conduct which she intends to result in her
10 death or in substantial and irreversible physical impairment
11 of a major bodily function.

12 Section 6. Section 22-9A-13, Code of Alabama 1975,
13 is amended to read as follows:

14 "§22-9A-13.

15 "(a) A report of fetal death shall be filed with the
16 Office of Vital Statistics, or as otherwise directed by the
17 State Registrar, within five days after the occurrence is
18 known if the fetus has advanced to, or beyond, the twentieth
19 week of uterogestation.

20 "(1) When a fetal death occurs in an institution,
21 the person in charge of the institution or his or her
22 designated representative shall prepare and file the report.

23 "(2) When a fetal death occurs outside an
24 institution, the physician in attendance shall prepare and
25 file the report.

1 "(3) When a fetal death occurs without medical
2 attendance, the county medical examiner, the state medical
3 examiner, or the coroner shall determine the cause of fetal
4 death and shall prepare and file the report.

5 "(4) When a fetal death occurs in a moving
6 conveyance and the fetus is first removed from the conveyance
7 in this state or when a dead fetus is found in this state and
8 the place of fetal death is unknown, the fetal death shall be
9 reported in this state. The county where the fetus was first
10 removed from the conveyance or the dead fetus was found shall
11 be considered the county of fetal death.

12 "(b) A report of induced termination of pregnancy
13 for each induced termination of pregnancy which occurs in this
14 state shall be filed with the Office of Vital Statistics, or
15 as otherwise directed by the State Registrar, no later than 10
16 days after the last day of the month during which the
17 procedure was performed.

18 "(1) When the induced termination of pregnancy is
19 performed in an institution, the person in charge of the
20 institution or his or her designated representative shall
21 prepare and file the report.

22 "(2) When the induced termination of pregnancy is
23 performed outside an institution, the physician in attendance
24 shall prepare and file the report.

1 "(3) Beginning January 1 of the year following the
2 effective date of the act adding this amendatory language, the
3 Office of Vital Statistics shall collect the following
4 information for all induced terminations of pregnancies in
5 addition to information already collected; provided, that the
6 definition of induced termination of pregnancy in Section
7 22-9A-1(5) shall be construed to include every abortion as
8 defined in Section 3(1) of the act adding this amendatory
9 language.

10 "a. Postfertilization age:

11 "1. If a determination of probable postfertilization
12 age was made, whether ultrasound was employed in making the
13 determination, and the week of probable postfertilization age
14 determined.

15 "2. If a determination of probable postfertilization
16 age was not made, the basis of the determination that a
17 medical emergency existed.

18 "b. Method of abortion: Which of the following was
19 employed:

20 "1. Medication abortion (such as, but not limited
21 to, mifepristone/misoprostol or methotrexate/misoprostol).

22 "2. Manual vacuum aspiration.

23 "3. Electrical vacuum aspiration.

24 "4. Dilation and evacuation.

1 "5. Combined induction abortion and dilation and
2 evacuation.

3 "6. Induction abortion with prostaglandins.

4 "7. Induction abortion with intra-amniotic
5 instillation (such as, but not limited to, saline or urea).

6 "8. Induction abortion, other.

7 "9. Intact dilation and extraction (partial-birth).

8 "10. Method not listed (specify).

9 "c. Whether an intra-fetal injection was used in an
10 attempt to induce fetal demise (such as, but not limited to,
11 intra-fetal potassium chloride or digoxin).

12 "d. Age and race of the patient.

13 "e. If the probable postfertilization age was
14 determined to be 20 or more weeks, the basis of the
15 determination that the pregnant woman had a condition which so
16 complicated her medical condition as to necessitate the
17 abortion of her pregnancy to avert her death or to avert
18 serious risk of substantial and irreversible physical
19 impairment of a major bodily function, not including
20 psychological or emotional conditions.

21 "f. If the probable postfertilization age was
22 determined to be 20 or more weeks, whether or not the method
23 of abortion used was one that, in reasonable medical judgment,
24 provided the best opportunity for the unborn child to survive
25 and, if such a method was not used, the basis of the

1 determination that termination of the pregnancy in that manner
2 would pose a greater risk either of the death of the pregnant
3 woman or of the substantial and irreversible physical
4 impairment of a major bodily function, not including
5 psychological or emotional conditions, of the woman than would
6 other available methods.

7 ~~"(3)(4)~~ Reports of induced termination of pregnancy
8 shall not contain the name or the address of the patient whose
9 pregnancy was terminated, nor shall the report contain any
10 other information identifying the patient, except that each
11 report shall contain a unique medical record identifying
12 number, to enable matching the report to the patient's medical
13 records.

14 ~~"(4)(5)~~ Individual induced termination of pregnancy
15 reports shall be maintained in strict confidence by the Office
16 of Vital Statistics, shall not be available for public
17 inspection, and shall not be made available in court for any
18 purpose, and shall not be subject to discovery in any civil
19 action except:

20 "a. To the Attorney General or a district attorney
21 with appropriate jurisdiction pursuant to a criminal
22 investigation.

23 "b. To the Attorney General or a district attorney
24 pursuant to a civil investigation of the grounds for an action

1 under subsection (b) of Section 7 8 of the act adding this
2 amendatory language.

3 "c. Pursuant to court order in an action under
4 Section 7 8 of the act adding this amendatory language.

5 "d. Pursuant to investigations under Section
6 22-9A-25.

7 "e. At the request of the board or its attorney
8 pursuant to an investigation of civil or criminal legal action
9 related to licensure or the need for licensure of health
10 facilities or similar investigation or legal action for
11 failure to file reports required by this section.

12 "f. ~~as~~ As provided in subdivision (b) ~~(5)~~ (6) of this
13 section.

14 ~~(5)~~ (6) The Office of Vital Statistics shall
15 ~~periodically make available~~ annually issue a public report
16 ~~providing~~ aggregate data ~~about the induced terminations of~~
17 ~~pregnancy performed in this state, but the~~ for the previous
18 ~~calendar year compiled from all of the reports covering that~~
19 ~~year submitted in accordance with this section for each of the~~
20 ~~items listed in subdivision (b) (3) of this section. Each~~
21 ~~report shall also provide aggregate data for each such item~~
22 ~~for all previous calendar years during which this section was~~
23 ~~in effect, adjusted to reflect any additional information from~~
24 ~~late or corrected reports. The Office of Vital Statistics~~
25 ~~shall take care to ensure that none of the information~~

1 included in the public reports could reasonably lead to the
2 identification of any pregnant woman upon whom an induced
3 termination of pregnancy was performed or attempted and shall
4 not release the names of individual physicians or other staff
5 members employed by institutions performing induced
6 terminations of pregnancy. The Office of Vital Statistics
7 shall not release the number of procedures performed by any
8 particular ~~institution or physician, except at the request of~~
9 ~~the board or its attorney pursuant to an investigation of~~
10 ~~civil or criminal legal action related to licensure or the~~
11 ~~need for licensure of health facilities or similar~~
12 ~~investigation or legal action for failure to file reports~~
13 ~~required by~~ but shall include in each public report the number
14 of induced terminations of pregnancy, by method and week of
15 postfertilization age, reported by each institution.
16 Information that may not be publicly released under this
17 subdivision shall be made available only as provided with
18 regard to individual induced termination of pregnancy reports
19 in subdivision (b)(5) of this section.

20 ~~"(6)(7)~~ The State Registrar may authorize the use of
21 other aggregate statistical data for official government use.

22 "(c) The reports required under this section are
23 statistical reports only and are not to be incorporated into
24 the official records of the Office of Vital Statistics.

25 Certified copies of these records shall not be issued by the

1 Office of Vital Statistics. ~~Except when copies of reports must~~
2 ~~be maintained pursuant to subdivision (b) (5) of this section,~~
3 ~~the~~ The State Registrar shall dispose of retain and safeguard
4 all individual reports received, as soon as practicable after
5 data from the forms is transferred to the database of the
6 Center for Health Statistics, or after the board or its
7 attorney declares there is no further need for the forms
8 pursuant to subdivision (b) (5) of this section. Such disposal
9 shall follow procedures of the State Records Commission making
10 them available only as provided in subdivision (b) (5) of this
11 section.

12 "(d) ~~Subsection (c) shall also apply to all records~~
13 ~~of fetal death and induced termination of pregnancy filed in~~
14 ~~the Office of Vital Statistics prior to adoption of this~~
15 ~~chapter~~ The Office of Vital Statistics, in advance of 2013 and
16 each succeeding calendar year, shall determine whether as a
17 result of changes in abortion practice the list of methods of
18 abortion for reports of induced termination of pregnancy to be
19 used during that calendar year should be modified from those
20 listed in paragraph (b) (3)b. of this section so as to add new
21 methods, modify the description of methods, or delete methods
22 no longer in use, and shall issue a public notice
23 incorporating changes based on that determination.

24 "(e) The Office of Vital Statistics may charge a
25 filing fee for each report of induced termination of pregnancy

1 required by this section calculated to be sufficient, based on
2 the number of reports estimated to be filed, to recoup and
3 cover the costs to the Office of Vital Statistics of
4 fulfilling its duties under subsections (b) to (d), inclusive,
5 of this section."

6 Section 7. Any person who intentionally, knowingly,
7 or recklessly performs or induces or attempts to perform or
8 induce an abortion in violation of this act is guilty of a
9 Class C felony. No penalty shall be assessed against the woman
10 upon whom the abortion is performed or induced or attempted to
11 be performed or induced.

12 Section 8. (a) Any woman upon whom an abortion has
13 been performed or induced in violation of this act, or the
14 father of the unborn child who was the subject of such an
15 abortion, may maintain an action against the person who
16 performed or induced the abortion in intentional, knowing, or
17 reckless violation of this act for actual and punitive
18 damages. Any woman upon whom an abortion has been attempted in
19 violation of this act may maintain an action against the
20 person who attempted to perform the abortion in intentional,
21 knowing, or reckless violation of this act for actual damages.

22 (b) A cause of action for injunctive relief against
23 any person who has intentionally, knowingly, or recklessly
24 violated this act may be maintained by the woman upon whom an
25 abortion was performed or induced or attempted to be performed

1 or induced in violation of this act, by any person who is the
2 spouse, parent, sibling, or guardian of, or a current or
3 former licensed health care provider of, the woman upon whom
4 an abortion has been performed or induced or attempted to be
5 performed or induced in violation of this act, by a district
6 attorney with appropriate jurisdiction, or by the Attorney
7 General. The injunction shall prevent the abortion provider
8 from performing or inducing, or attempting to perform or
9 induce, further abortions in violation of this act in this
10 state.

11 (c) If judgment is rendered in favor of the
12 plaintiff in an action described in this section, the court
13 shall also render judgment for reasonable attorney fees in
14 favor of the plaintiff against the defendant.

15 (d) If judgment is rendered in favor of the
16 defendant and the court finds that the suit by the plaintiff
17 was frivolous and brought in bad faith, the court shall also
18 render judgment for reasonable attorney fees in favor of the
19 defendant against the plaintiff.

20 (e) No damages or attorney fees may be assessed
21 against the woman upon whom an abortion was performed or
22 induced or attempted to be performed or induced except as
23 provided in subsection (d).

24 Section 9. In every civil or criminal proceeding or
25 action brought under this act, the court shall rule whether

1 the anonymity of any woman upon whom an abortion has been
2 performed or induced or attempted to be performed or induced
3 shall be preserved from public disclosure if she does not give
4 her consent to such disclosure. The court, upon motion or sua
5 sponte, shall make such a ruling and, upon determining that
6 her anonymity should be preserved, shall issue orders to the
7 parties, witnesses, and counsel and shall direct the sealing
8 of the record and exclusion of individuals from courtrooms or
9 hearing rooms to the extent necessary to safeguard her
10 identity from public disclosure. Each order shall be
11 accompanied by specific written findings explaining why the
12 anonymity of the woman should be preserved from public
13 disclosure, why the order is essential to that end, how the
14 order is narrowly tailored to serve that interest, and why no
15 reasonable less restrictive alternative exists. In the absence
16 of written consent of the woman upon whom an abortion has been
17 performed or attempted to be performed, anyone, other than a
18 public official, who brings an action under Section 8 shall do
19 so under a pseudonym. This section shall not be construed to
20 conceal the identity of the plaintiff or of witnesses from the
21 defendant or from attorneys for the defendant.

22 Section 10. The provisions of this act are
23 supplemental to and shall be read in pari materia with Chapter
24 22, Title 26, Code of Alabama 1975, relating to the abortion
25 of viable unborn children, and the Alabama Partial-Birth

1 Abortion Ban Act of 1997. This act shall not be construed to
2 repeal, by implication or otherwise, Section 26-22-3, Section
3 26-23-3, Code of Alabama 1975, or any otherwise applicable
4 provision of Alabama's law regulating or restricting abortion.
5 An abortion that complies with this act but violates the
6 provisions of Section 26-22-3, Section 26-23-3, Code of
7 Alabama 1975, or any otherwise applicable provision of
8 Alabama's law shall be deemed unlawful as provided in such
9 provision. An abortion that complies with the provisions of
10 Section 26-22-3, Section 26-23-3, Code of Alabama 1975, or any
11 otherwise applicable provision of Alabama's law regulating or
12 restricting abortion but violates this act shall be deemed
13 unlawful as provided in this act.

14 Section 11. Although this bill would have as its
15 purpose or effect the requirement of a new or increased
16 expenditure of local funds, the bill is excluded from further
17 requirements and application under Amendment 621, now
18 appearing as Section 111.05 of the Official Recompilation of
19 the Constitution of Alabama of 1901, as amended, because the
20 bill defines a new crime or amends the definition of an
21 existing crime.

22 Section 12. This act shall become effective on the
23 first day of the third month following its passage and
24 approval by the Governor, or its otherwise becoming law,
25 except that the amendment made by this act to Section

1 22-9A-13, Code of Alabama 1975, that requires reports of
2 induced termination of pregnancy shall become effective on
3 January 1, 2012.

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Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 07-APR-11.

Greg Pappas
Clerk

Senate	<hr/> 09-JUN-11 <hr/>	Amended and Passed
House	<hr/> 09-JUN-11 <hr/>	Concurred in Sen- ate Amendment