

SENATE BILL NO. 766 (Substitute of Senate Bill No. 593 by Senator Alario)

BY SENATORS ALARIO, JOHNS, MILLS AND NEVERS AND REPRESENTATIVES ADAMS, ANDERS, ARMES, ARNOLD, BADON, BARRAS, BARROW, BERTHELOT, BILLIOT, STUART BISHOP, BROADWATER, BROWN, BURFORD, HENRY BURNS, TIM BURNS, CARMODY, CHAMPAGNE, CHANEY, CONNICK, CROMER, DANAHAY, DOVE, EDWARDS, FANNIN, GAROFALO, GEYMAN, GISCLAIR, GUILLORY, GUINN, HARRIS, HARRISON, HAVARD, HAZEL, HENRY, HENSGENS, HILL, HODGES, HOFFMANN, HOLLIS, HOWARD, HUVAL, JOHNSON, JONES, KLECKLEY, LEBAS, LIGI, LOPINTO, LORUSSO, MACK, MILLER, JAY MORRIS, JIM MORRIS, ORTEGO, PEARSON, PONTI, POPE, PUGH, PYLANT, REYNOLDS, RITCHIE, SCHEXNAYDER, SCHRODER, SEABAUGH, SIMON, ST. GERMAIN, TALBOT, THIBAUT, THOMPSON, WHITNEY, PATRICK WILLIAMS AND WILLMOTT

1 AN ACT

2 To enact R.S. 40:1299.30.1, relative to abortion; to provide for the Pain-Capable Unborn
3 Child Protection Act; to provide for legislative intent; to provide for definitions; to
4 provide for the determination of postfertilization age; to provide for penalties; to
5 provide for an effective date; and to provide for related matters.

6 Be it enacted by the Legislature of Louisiana:

7 Section 1. R.S. 40:1299.30.1 is hereby enacted to read as follows:

8 **§1299.30.1. Pain-Capable Unborn Child Protection Act**

9 **A. This Part may be cited as the "Pain-Capable Unborn Child Protection**
10 **Act".**

11 **B. Legislative intent. (1) The legislature makes the following findings:**

12 **(a) Pain receptors (nociceptors) are present throughout the unborn**
13 **child's entire body and nerves link these receptors to the brain's thalamus and**
14 **subcortical plate by no later than twenty weeks.**

15 **(b) By eight weeks after fertilization, the unborn child reacts to touch.**
16 **After twenty weeks, the unborn child reacts to stimuli that would be recognized**
17 **as painful if applied to an adult human, for example, by recoiling.**

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

20 **(d) Subjection to such painful stimuli is associated with long-term**

1 harmful neurodevelopmental effects, such as altered pain sensitivity and,
2 possibly, emotional, behavioral, and learning disabilities later in life.

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

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

14 (g) Substantial evidence indicates that children born missing the bulk of
15 the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

16 (h) In adults, stimulation or ablation of the cerebral cortex does not alter
17 pain perception, while stimulation or ablation of the thalamus does.

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

22 (j) The position, asserted by some medical experts, that the unborn child
23 remains in a coma-like sleep state that precludes the unborn child's
24 experiencing pain is inconsistent with the documented reaction of unborn
25 children to painful stimuli and with the experience of fetal surgeons who have
26 found it necessary to sedate the unborn child with anesthesia to prevent the
27 unborn child from thrashing about in reaction to invasive surgery.

28 (k) Consequently, there is substantial medical evidence that an unborn
29 child is capable of experiencing pain by twenty weeks after fertilization.

30 (2)(a) It is the purpose of the state to assert a compelling state interest

1 in protecting the lives of unborn children from the stage at which substantial
2 medical evidence indicates that they are capable of feeling pain.

3 (b) Louisiana's compelling state interest in protecting the lives of unborn
4 children from the stage at which substantial medical evidence indicates that
5 they are capable of feeling pain is intended to be separate from and independent
6 of Louisiana's compelling state interest in protecting the lives of unborn
7 children from the stage of viability, and neither state interest is intended to
8 replace the other.

9 (3) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the
10 context of determining the severability of a state statute regulating abortion the
11 United States Supreme Court noted that an explicit statement of legislative
12 intent specifically made applicable to a particular statute is of greater weight
13 than a general savings or severability clause, it is the intent of the state that if
14 any one or more provisions, sections, subsections, sentences, clauses, phrases or
15 words of this Act or the application thereof to any person or circumstance is
16 found to be unconstitutional, the same is hereby declared to be severable and
17 the balance of this Act shall remain effective notwithstanding such
18 unconstitutionality. Moreover, the state declares that it would have passed this
19 Act, and each provision, section, subsection, sentence, clause, phrase or word
20 thereof, irrespective of the fact that any one or more provisions, sections,
21 subsections, sentences, clauses, phrases or words, or any of their applications,
22 were to be declared unconstitutional.

23 C. Definitions. For purposes of this Section, the following terms shall
24 have the following meanings unless the context clearly indicates otherwise:

25 (1) "Abortion" means the use or prescription of any instrument,
26 medicine, drug, or any other substance or device to terminate the pregnancy of
27 a woman known to be pregnant with an intention other than to increase the
28 probability of a live birth, to preserve the life or health of the child after live
29 birth, or to remove a dead unborn child who died as the result of natural causes
30 in utero, accidental trauma, or a criminal assault on the pregnant woman or her

1 unborn child, and which causes the premature termination of the pregnancy.

2 (2) "Attempt to perform or induce an abortion" means an act, or an
3 omission of a statutorily required act, that, under the circumstances as the actor
4 believes them to be, constitutes a substantial step in a course of conduct planned
5 to culminate in the performance or induction of an abortion in this state in
6 violation of this Section.

7 (3) "Department" means Department of Health and Hospitals.

8 (4) "Fertilization" means the fusion of a human spermatozoon with a
9 human ovum.

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

20 (6) "Medically futile" means that, in reasonable medical judgment, the
21 unborn child has a profound and irremediable congenital or chromosomal
22 anomaly that is incompatible with sustaining life after birth.

23 (7) "Physician" means any person licensed to practice medicine and
24 surgery or osteopathic medicine and surgery in the state of Louisiana.

25 (8) "Postfertilization age" means the age of the unborn child as
26 calculated from the fusion of a human spermatozoon with a human ovum.

27 (9) "Probable postfertilization age of the unborn child" means what, in
28 reasonable medical judgment, will with reasonable probability be the
29 postfertilization age of the unborn child at the time the abortion is planned to
30 be performed or induced.

1 (10) "Reasonable medical judgment" means a medical judgment that
2 would be made by a reasonably prudent physician, knowledgeable about the
3 case and the treatment possibilities with respect to the medical conditions
4 involved.

5 (11) "Unborn child" or "fetus" each mean an individual organism of the
6 species homo sapiens from fertilization until live birth.

7 (12) "Woman" means a female human being whether or not she has
8 reached the age of majority.

9 D. Determination of postfertilization age.

10 (1) Except in the case of a medical emergency or when a pregnancy is
11 diagnosed as medically futile, no abortion shall be performed or induced or be
12 attempted to be performed or induced unless the physician performing or
13 inducing it has first made a determination of the probable postfertilization age
14 of the unborn child or relied upon such a determination made by another
15 physician. In making such a determination, the physician shall make such
16 inquiries of the woman and perform or cause to be performed such medical
17 examinations and tests as a reasonably prudent physician, knowledgeable about
18 the case and the medical conditions involved, would consider necessary to
19 perform in making an accurate diagnosis with respect to postfertilization age.

20 (2) Failure by any physician to conform to any requirement of this
21 Section constitutes "unprofessional conduct" pursuant to R.S. 37:1261.

22 E. Abortion of unborn child of twenty or more weeks postfertilization
23 age prohibited.

24 (1) No person shall perform or induce or attempt to perform or induce
25 an abortion upon a woman when it has been determined, by the physician
26 performing or inducing or attempting to perform or induce the abortion or by
27 another physician upon whose determination that physician relies, that the
28 probable postfertilization age of the woman's unborn child is twenty or more
29 weeks, unless the pregnancy is diagnosed as medically futile or, in reasonable
30 medical judgment, she has a condition which so complicates her medical

1 condition as to necessitate the abortion of her pregnancy to avert her death or
2 to avert serious risk of substantial and irreversible physical impairment of a
3 major bodily function, not including psychological or emotional conditions. No
4 such greater risk shall be deemed to exist if it is based on a claim or diagnosis
5 that the woman will engage in conduct which she intends to result in her death
6 or in substantial and irreversible physical impairment of a major bodily
7 function.

8 (2) When an abortion upon a woman whose unborn child has been
9 determined to have a probable postfertilization age of twenty or more weeks is
10 not prohibited by Paragraph (1) of this Subsection, the physician shall
11 terminate the pregnancy in the manner which, in reasonable medical judgment,
12 provides the best opportunity for the unborn child to survive, unless, in
13 reasonable medical judgment, termination of the pregnancy in that manner
14 would pose a greater risk either of the death of the pregnant woman or of the
15 substantial and irreversible physical impairment of a major bodily function, not
16 including psychological or emotional conditions, of the woman than would other
17 available methods. No such greater risk shall be deemed to exist if it is based
18 on a claim or diagnosis that the woman will engage in conduct which she intends
19 to result in her death or in substantial and irreversible physical impairment of
20 a major bodily function.

21 F. Penalties. Any person who intentionally or knowingly fails to comply
22 with the requirements of this Section shall be subject to the penalties as
23 provided for in R.S. 40:1299.35.19.

24 G. Construction.

25 This Section shall not be construed to repeal, by implication or
26 otherwise, R.S. 40:1299.35.2 or any otherwise applicable provision of Louisiana
27 law regulating or restricting abortion. An abortion that complies with this
28 Section, but violates the provisions of R.S. 40:1299.35.2 or any otherwise
29 applicable provision of Louisiana law, shall be deemed unlawful as provided in
30 such provision. An abortion that complies with the provisions of R.S.

1 40:1299.35.2 or any otherwise applicable provision of Louisiana law regulating
2 or restricting abortion, but violates this Section, shall be deemed unlawful as
3 provided in this Section. If some or all of the provisions of this Section are
4 temporarily or permanently restrained or enjoined by judicial order, all other
5 provisions of Louisiana law regulating or restricting abortion shall be enforced
6 as though such restrained or enjoined provisions had not been adopted;
7 provided, however, that whenever such temporary or permanent restraining
8 order or injunction is stayed or dissolved, or otherwise ceases to have effect,
9 such provisions shall have full force and effect.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES

GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____