A BILL TO BE ENTITLED
AN ACT ESTABLISHING THE PAIN CAPABLE UNBORN CHILD PROTECTION ACT.

Whereas, pain receptors (nociceptors) are present throughout the 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; and

Whereas, by eight weeks after fertilization, the unborn child reacts to touch. After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling; and

Whereas, in the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response; and

Whereas, subjection to such 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 the 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 the anesthesia; and

Whereas, the position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy 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 cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain; and

Whereas, substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with 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 structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing; and

Whereas, the position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child 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 the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery; and
General Assembly Of North Carolina

Whereas, the General Assembly has the constitutional authority to make the judgment that there is substantial medical evidence that an unborn child is capable of experiencing pain as soon as 20 weeks after fertilization; and

Whereas, the United States Supreme Court has noted in Gonzales v. Carhart, 550 U.S. 124, 162-64 (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 North Carolina asserts a compelling State interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain; and

Whereas, in enacting this legislation, the State of North Carolina 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 North Carolina's compelling State interest in protecting the lives of unborn children beginning at 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 Gonzalez 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, it is the intent of the State 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 this Act shall remain effective notwithstanding such unconstitutionality; and

Whereas, the General Assembly 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,

The General Assembly of North Carolina enacts:

PART I. TITLE

SECTION 1. This act shall be known and may be cited as the "Pain Capable Unborn Child Protection Act."

PART II. PAIN CAPABLE UNBORN CHILD PROTECTION ACT

SECTION 2. (a) Chapter 90 of the General Statutes is amended by adding a new Article to read:

"Article 1L.


The following definitions apply in this Article:

(1) Abortion. – As defined in G.S. 90-21.81.

(2) Attempt to perform an abortion. – An act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in violation of this Article.

(3) Fertilization. – The fusion of a human sperm with a human egg.

(4) Medical emergency. – A determination, using reasonable medical judgment, that the pregnant woman's medical condition necessitates the immediate abortion of an unborn child 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.

(5) Postfertilization age. – The age of the unborn child as calculated from the time of fusion of the human sperm with the human egg.

(6) Probable postfertilization age of the unborn child. – The 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.

(7) Serious health risk to the unborn child's mother. – 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.

(8) Unborn child or fetus. – An individual organism of the species homo sapiens from fertilization until live birth.

(9) Unborn child's mother. – A pregnant woman of the species homo sapiens regardless of age.


(a) Prohibition. – 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) Determining Capability to Feel Pain. – 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. For purposes of this subsection, a dead unborn child is not capable of feeling pain.

(c) Determining Postfertilization Age. – Except in a medical emergency or in the removal of a dead unborn child, 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) Method of Termination. – 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.


(a) Requirement. – Beginning January 1, 2020, a physician who performs or induces, or attempts to perform or induce, an abortion shall report all of the following to the Department of Health and Human Services 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 or a determination that the unborn child was dead.

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.
   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.

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 G.S. 90-21.131(b), the basis of the determination that the pregnancy was a serious health risk to the unborn child's mother.

(6) If the unborn child was deemed capable of experiencing pain under G.S. 90-21.131(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) Confidentiality. – Except as otherwise required under this subsection, reports required under subsection (a) of this section 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. 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) Publication. – Beginning on June 30, 2020, and each June 30 thereafter, the Department of Health and Human Services shall publish in paper form and on its Web site a summary providing statistics for the previous calendar year compiled from all of the reports required by subsection (a) of this section for that year. The summary must provide a tabulation of data for all of the items required by subsection (a) of this section 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 reports 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) Failure to Report. – The Department of Health and Human Services may assess upon a physician who fails to submit a report required by subsection (a) of this section by the end of the 30th day following the due date established by Department rule a late penalty of one thousand dollars ($1,000) for each 30-day period or portion thereof that a report is overdue. If, more than six 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 time frame 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 applicable law. A physician who intentionally or recklessly falsifies a report required under this section is guilty of a Class 1 misdemeanor.


(a) In General. – Except as provided in subsection (b) of this section, unless the conduct is covered under some other provision of law providing greater punishment, a person who
intentionally or recklessly performs or induces, or attempts to perform or induce, an abortion in
violation of G.S. 90-21.131 is guilty of a Class D felony.

(b) Exception. – A woman upon whom an abortion is performed or induced, or upon
whom an abortion is attempted to be performed or induced, may not be prosecuted for a violation
of G.S. 90-21.131.

"§ 90-21.134. Civil remedies; attorneys’ fees.

(a) Civil Remedies. – Except as otherwise provided in subsection (d) of this section, a
woman upon whom an abortion has been performed or induced in intentional or reckless violation
of G.S. 90-21.131, or the father of an unborn child aborted in intentional or reckless violation of
G.S. 90-21.131, 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 G.S. 90-21.131 may maintain a civil action for actual and
punitive damages against the person who attempted to perform or induce the abortion.

(b) Injunction. – An injunction may be obtained against a person who has intentionally
or recklessly violated G.S. 90-21.131 to prevent him or her from performing or inducing, or
attempting to perform or induce, further abortions in violation of G.S. 90-21.131. A cause of
action for injunctive relief against a person who has intentionally or recklessly violated
G.S. 90-21.131 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
G.S. 90-21.131.

(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 G.S. 90-21.131.

(3) A district attorney with jurisdiction.

(4) The Attorney General.

(c) Attorneys’ Fees. – Except as otherwise provided in subsection (d) of this section, if
judgment is rendered in favor of the plaintiff in any action authorized under this section, the court
shall also tax as part of the costs reasonable attorneys’ fees in favor of the plaintiff against the
defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff’s
suit was frivolous or brought in bad faith, then the court shall tax as part of the costs reasonable
attorneys’ fees in favor of the defendant against the plaintiff.

(d) Exceptions. – No damages may be awarded to a plaintiff if the pregnancy resulted
from the plaintiff’s criminal conduct. No damages or attorney’s fee may be assessed against the
woman upon whom an abortion was performed or induced, or attempted to be performed or
induced, except in accordance with subsection (c) of this section.


In each civil or criminal proceeding or action brought under this Article, 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 subsections (a) or (b) of G.S. 90-21.134 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.

(a) Creation. – A special fund is created in the Office of the Attorney General, to be
known as the North Carolina Pain Capable Unborn Child Protection Act Litigation Defense
Fund. The Fund shall be placed in an interest bearing account and any interest or other income
derived from the Fund shall be credited to the Fund.
(b) Sources of Funding. – The Fund shall consist of any appropriations made to the Fund
by the General Assembly and any private donations, gifts, or grants made to the Fund.
(c) Uses. – All moneys in the Fund shall be used only to cover any costs or expenses
incurred by the Attorney General in relation to actions taken to defend the law set forth in this
Article. To the extent the moneys in this Fund are deemed unappropriated, the moneys are hereby
appropriated for the purpose set forth in this subsection.

This Article may not be construed to repeal, by implication or otherwise, Article 11 of
Chapter 14 of the General Statutes or any other applicable provision of State law regulating or
restricting abortion. An abortion that complies with this section but violates Article 11 of Chapter
14 of the General Statutes or any other applicable provision of State law shall be deemed
unlawful. An abortion that complies with Article 11 of Chapter 14 of the General Statutes or any
other State law regulating or restricting abortion but violates this section shall be deemed
unlawful. If this Article, 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.(b) This act becomes effective December 1, 2019, and applies to
offenses committed on or after that date.

PART III. SEVERABILITY CLAUSE
SECTION 3. If any provision of this act or its application is held invalid, the
invalidity does not affect other provisions or applications of this act that can be given effect
without the invalid provisions or application, and to this end the provisions of this act are
severable.

PART IV. EFFECTIVE DATE
SECTION 4. Except as otherwise provided, this act becomes effective December 1,
2019.