

1 STATE OF OKLAHOMA

2 1st Session of the 53rd Legislature (2011)

3 COMMITTEE SUBSTITUTE

4 FOR

HOUSE BILL NO. 1888

By: Peterson

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6  
7 COMMITTEE SUBSTITUTE

8 An Act relating to public health and safety; creating  
9 the Pain-Capable Unborn Child Protection Act;  
10 defining terms; making legislative findings;  
11 establishing purpose; prohibiting the performance of  
12 an abortion without certain determination;  
13 prohibiting the performance of an abortion upon  
14 determination of certain age of unborn child;  
15 providing for exceptions; requiring that the manner  
16 in which physicians terminate certain pregnancies  
17 provides the best opportunity for unborn child's  
18 survival; requiring certain report by physician;  
19 including certain information; requiring State  
20 Department of Health to issue certain report; stating  
21 certain penalties for physicians; requiring  
22 Department to promulgate rules; providing penalty;  
23 permitting certain individuals to maintain action  
24 including injunctive relief; providing for attorney  
fees; requiring court to rule regarding anonymity;  
requiring written findings under certain  
circumstance; providing for severability; providing  
for certain interpretation; providing for  
codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

1 SECTION 1. NEW LAW A new section of law to be codified  
2 in the Oklahoma Statutes as Section 1-745.1 of Title 63, unless  
3 there is created a duplication in numbering, reads as follows:

4 This act shall be known and may be cited as the "Pain-Capable  
5 Unborn Child Protection Act".

6 SECTION 2. NEW LAW A new section of law to be codified  
7 in the Oklahoma Statutes as Section 1-745.2 of Title 63, unless  
8 there is created a duplication in numbering, reads as follows:

9 As used in the Pain-Capable Unborn Child Protection Act only:

10 1. "Abortion" means the use or prescription of any instrument,  
11 medicine, drug, or any other substance or device to terminate the  
12 pregnancy of a woman known to be pregnant with an intention other  
13 than to increase the probability of a live birth, to preserve the  
14 life or health of the child after live birth, or to remove a dead  
15 unborn child who died as the result of natural causes in utero,  
16 accidental trauma, or a criminal assault on the pregnant woman or  
17 her unborn child, and which causes the premature termination of the  
18 pregnancy;

19 2. "Attempt to perform or induce an abortion" means an act, or  
20 an omission of a statutorily required act, that, under the  
21 circumstances as the actor believes them to be, constitutes a  
22 substantial step in a course of conduct planned to culminate in the  
23 performance or induction of an abortion in this state in violation  
24 of the Pain-Capable Unborn Child Protection Act;

1           3. "Postfertilization age" means the age of the unborn child as  
2 calculated from the fertilization of the human ovum;

3           4. "Fertilization" means the fusion of a human spermatozoon  
4 with a human ovum;

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

17           6. "Reasonable medical judgment" means a medical judgment that  
18 would be made by a reasonably prudent physician, knowledgeable about  
19 the case and the treatment possibilities with respect to the medical  
20 conditions involved;

21           7. "Physician" means any person licensed to practice medicine  
22 and surgery or osteopathic medicine and surgery in this state;

23           8. "Probable postfertilization age of the unborn child" means  
24 what, in reasonable medical judgment, will with reasonable

1 probability be the postfertilization age of the unborn child at the  
2 time the abortion is planned to be performed or induced;

3 9. "Unborn child" or "fetus" each means an individual organism  
4 of the species homo sapiens from fertilization until live birth; and

5 10. "Woman" means a female human being whether or not she has  
6 reached the age of majority.

7 SECTION 3. NEW LAW A new section of law to be codified  
8 in the Oklahoma Statutes as Section 1-745.3 of Title 63, unless  
9 there is created a duplication in numbering, reads as follows:

10 The Legislature of the State of Oklahoma finds that:

11 1. Pain receptors (nociceptors) are present throughout the  
12 unborn child's entire body by no later than sixteen (16) weeks after  
13 fertilization and nerves link these receptors to the brain's  
14 thalamus and subcortical plate by no later than twenty (20) weeks;

15 2. By eight (8) weeks after fertilization, the unborn child  
16 reacts to stimuli that would be recognized as painful if applied to  
17 an adult human, for example by recoiling;

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

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

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

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

14           7. Substantial evidence indicates that children born missing  
15 the bulk of the cerebral cortex, those with hydranencephaly,  
16 nevertheless experience pain;

17           8. In adults, stimulation or ablation of the cerebral cortex  
18 does not alter pain perception, while stimulation or ablation of the  
19 thalamus does;

20           9. Substantial evidence indicates that structures used for pain  
21 processing in early development differ from those of adults, using  
22 different neural elements available at specific times during  
23 development, such as the subcortical plate, to fulfill the role of  
24 pain processing;

1           10. Consequently, there is substantial medical evidence that an  
2 unborn child is capable of experiencing pain by twenty (20) weeks  
3 after fertilization; and

4           11. It is the purpose of the State of Oklahoma to assert a  
5 compelling state interest in protecting the lives of unborn children  
6 from the stage at which substantial medical evidence indicates that  
7 they are capable of feeling pain.

8           SECTION 4.       NEW LAW       A new section of law to be codified  
9 in the Oklahoma Statutes as Section 1-745.4 of Title 63, unless  
10 there is created a duplication in numbering, reads as follows:

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

22           B. Failure by any physician to conform to any requirement of  
23 this section constitutes "unprofessional conduct".  
24

1           SECTION 5.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 1-745.5 of Title 63, unless  
3 there is created a duplication in numbering, reads as follows:

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

19           B. When an abortion upon a woman whose unborn child has been  
20 determined to have a probable postfertilization age of twenty (20)  
21 or more weeks is not prohibited by this section, the physician shall  
22 terminate the pregnancy in the manner which, in reasonable medical  
23 judgment, provides the best opportunity for the unborn child to  
24 survive, unless, in reasonable medical judgment, termination of the

1 pregnancy in that manner would pose a greater risk either of the  
2 death of the pregnant woman or of the substantial and irreversible  
3 physical impairment of a major bodily function, not including  
4 psychological or emotional conditions, of the woman than would other  
5 available methods. No such greater risk shall be deemed to exist if  
6 it is based on a claim or diagnosis that the woman will engage in  
7 conduct which would result in her death or in substantial and  
8 irreversible physical impairment of a major bodily function.

9 SECTION 6. NEW LAW A new section of law to be codified  
10 in the Oklahoma Statutes as Section 1-745.6 of Title 63, unless  
11 there is created a duplication in numbering, reads as follows:

12 A. Any physician who performs or induces or attempts to perform  
13 or induce an abortion shall report to the State Department of  
14 Health, on a schedule and in accordance with forms and rules and  
15 regulations adopted and promulgated by the State Department of  
16 Health that include:

17 1. If a determination of probable postfertilization age was  
18 made, the probable postfertilization age determined and the method  
19 and basis of the determination;

20 2. If a determination of probable postfertilization age was not  
21 made, the basis of the determination that a medical emergency  
22 existed;

23 3. If the probable postfertilization age was determined to be  
24 twenty (20) or more weeks, the basis of the determination that the

1 pregnant woman had a condition which so complicated her medical  
2 condition as to necessitate the abortion of her pregnancy to avert  
3 her death or to avert serious risk of substantial and irreversible  
4 physical impairment of a major bodily function, not including  
5 psychological or emotional conditions; and

6 4. The method used for the abortion and, in the case of an  
7 abortion performed when the probable postfertilization age was  
8 determined to be twenty (20) or more weeks:

9 a. whether the method used was one that, in reasonable  
10 medical judgment, provided the best opportunity for  
11 the unborn child to survive, or

12 b. if such a method was not used, the basis of the  
13 determination that termination of the pregnancy in  
14 that manner would pose a greater risk either of the  
15 death of the pregnant woman or of the substantial and  
16 irreversible physical impairment of a major bodily  
17 function not including psychological or emotional  
18 conditions of the woman than would other available  
19 methods.

20 B. By June 30 of each year, the State Department of Health  
21 shall issue a public report providing statistics for the previous  
22 calendar year compiled from all of the reports covering that year  
23 submitted in accordance with this section for each of the items  
24 listed in subsection A of this section. Each such report shall also

1 provide the statistics for all previous calendar years during which  
2 this section was in effect, adjusted to reflect any additional  
3 information from late or corrected reports. The State Department of  
4 Health shall take care to ensure that none of the information  
5 included in the public reports could reasonably lead to the  
6 identification of any pregnant woman upon whom an abortion was  
7 performed or attempted.

8 C. Any physician who fails to submit a report by the end of  
9 thirty (30) days following the due date shall be subject to a late  
10 fee of Five Hundred Dollars (\$500.00) for each additional thirty-day  
11 period or portion of a thirty-day period the report is overdue. Any  
12 physician required to report in accordance with this act who has not  
13 submitted a report, or has submitted only an incomplete report, more  
14 than one (1) year following the due date, may, in an action brought  
15 in the manner in which actions are brought by the State Department  
16 of Health, be directed by a court of competent jurisdiction to  
17 submit a complete report within a period stated by court order or be  
18 subject to civil contempt. Failure by any physician to conform to  
19 any requirement of this section, other than late filing of a report,  
20 constitutes "unprofessional conduct" pursuant to Section 509 of  
21 Title 59 of the Oklahoma Statutes. Failure by any physician to  
22 submit a complete report in accordance with a court order  
23 constitutes "unprofessional conduct" pursuant to Section 509 of  
24 Title 59 of the Oklahoma Statutes. Intentional or reckless

1 falsification of any report required under this section is a  
2 misdemeanor.

3 D. By February 1, 2012, the State Department of Health shall  
4 adopt and promulgate rules and regulations to assist in compliance  
5 with this section.

6 SECTION 7. NEW LAW A new section of law to be codified  
7 in the Oklahoma Statutes as Section 1-745.7 of Title 63, unless  
8 there is created a duplication in numbering, reads as follows:

9 Any person who intentionally or recklessly performs or induces  
10 or attempts to perform or induce an abortion in violation of the  
11 Pain-Capable Unborn Child Protection Act shall be guilty of a  
12 felony. No penalty may be assessed against the woman upon whom the  
13 abortion is performed or induced or attempted to be performed or  
14 induced.

15 SECTION 8. NEW LAW A new section of law to be codified  
16 in the Oklahoma Statutes as Section 1-745.8 of Title 63, unless  
17 there is created a duplication in numbering, reads as follows:

18 A. Any woman upon whom an abortion has been performed in  
19 violation of the Pain-Capable Unborn Child Protection Act, or the  
20 father of the unborn child who was the subject of such an abortion,  
21 may maintain an action against the person who performed or induced  
22 the abortion in intentional or reckless violation of the Pain-  
23 Capable Unborn Child Protection Act for actual and punitive damages.  
24 Any woman upon whom an abortion has been attempted in violation of

1 the Pain-Capable Unborn Child Protection Act may maintain an action  
2 against the person who attempted to perform or induce the abortion  
3 in an intentional or reckless violation of the Pain-Capable Unborn  
4 Child Protection Act for actual and punitive damages.

5 B. A cause of action for injunctive relief against any person  
6 who has intentionally violated the Pain-Capable Unborn Child  
7 Protection Act may be maintained by the woman upon whom an abortion  
8 was performed or induced or attempted to be performed or induced in  
9 violation of the Pain-Capable Unborn Child Protection Act; by any  
10 person who is the spouse, parent, sibling or guardian of, or a  
11 current or former licensed health care provider of, the woman upon  
12 whom an abortion has been performed or induced or attempted to be  
13 performed or induced in violation of the Pain-Capable Unborn Child  
14 Protection Act; by a district attorney with appropriate  
15 jurisdiction; or by the Attorney General. The injunction shall  
16 prevent the abortion provider from performing or inducing further  
17 abortions in violation of the Pain-Capable Unborn Child Protection  
18 Act in the State of Oklahoma.

19 C. If judgment is rendered in favor of the plaintiff in an  
20 action described in this section, the court shall also render  
21 judgment for a reasonable attorney fee in favor of the plaintiff  
22 against the defendant.

23 D. If judgment is rendered in favor of the defendant and the  
24 court finds that the plaintiff's suit was frivolous and brought in

1 bad faith, the court shall also render judgment for a reasonable  
2 attorney fee in favor of the defendant against the plaintiff.

3 E. No damages or attorney fee may be assessed against the woman  
4 upon whom an abortion was performed or attempted to be performed  
5 except in accordance with subsection D of this section.

6 SECTION 9. NEW LAW A new section of law to be codified  
7 in the Oklahoma Statutes as Section 1-745.9 of Title 63, unless  
8 there is created a duplication in numbering, reads as follows:

9 In every civil or criminal proceeding or action brought under  
10 the Pain-Capable Unborn Child Protection Act, the court shall rule  
11 whether the anonymity of any woman upon whom an abortion has been  
12 performed or induced or attempted to be performed or induced shall  
13 be preserved from public disclosure if she does not give her consent  
14 to such disclosure. The court, upon motion or sua sponte, shall  
15 make such a ruling and, upon determining that her anonymity should  
16 be preserved, shall issue orders to the parties, witnesses, and  
17 counsel and shall direct the sealing of the record and exclusion of  
18 individuals from courtrooms or hearing rooms to the extent necessary  
19 to safeguard her identity from public disclosure. Each such order  
20 shall be accompanied by specific written findings explaining why the  
21 anonymity of the woman should be preserved from public disclosure,  
22 why the order is essential to that end, how the order is narrowly  
23 tailored to serve that interest, and why no reasonable less  
24 restrictive alternative exists. In the absence of written consent

1 of the woman upon whom an abortion has been performed or induced or  
2 attempted to be performed or induced, anyone, other than a public  
3 official, who brings an action under subsection A of Section 8 of  
4 this act shall do so under a pseudonym. This section may not be  
5 construed to conceal the identity of the plaintiff or of witnesses  
6 from the defendant or from attorneys for the defendant.

7 SECTION 10. NEW LAW A new section of law to be codified  
8 in the Oklahoma Statutes as Section 1-745.10 of Title 63, unless  
9 there is created a duplication in numbering, reads as follows:

10 If any one or more provisions, sections, subsections, sentences,  
11 clauses, phrases or words of the Pain-Capable Unborn Child  
12 Protection Act or the application thereof to any person or  
13 circumstance is found to be unconstitutional, the same is hereby  
14 declared to be severable and the balance of the Pain-Capable Unborn  
15 Child Protection Act shall remain effective notwithstanding such  
16 unconstitutionality. The Legislature hereby declares that it would  
17 have passed the Pain-Capable Unborn Child Protection Act, and each  
18 provision, section, subsection, sentence, clause, phrase, or word  
19 thereof, irrespective of the fact that any one or more provisions,  
20 sections, subsections, sentences, clauses, phrases, or words of the  
21 Pain-Capable Unborn Child Protection Act, or the application of the  
22 Pain-Capable Unborn Child Protection Act, would be declared  
23 unconstitutional.

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1 SECTION 11. NEW LAW A new section of law to be codified  
2 in the Oklahoma Statutes as Section 1-745.11 of Title 63, unless  
3 there is created a duplication in numbering, reads as follows:

4 Nothing in the Pain-Capable Unborn Child Protection Act shall be  
5 construed as creating or recognizing a right to abortion.

6 SECTION 12. This act shall become effective November 1, 2011.

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