

1 **SENATE FLOOR VERSION**

2 March 29, 2011

3 COMMITTEE SUBSTITUTE
4 FOR ENGROSSED
5 HOUSE BILL NO. 1888

6 By: Peterson, Reynolds, Ritze,
7 Trebilcock, Johnson, Derby,
8 Hall, Billy, Farley, Kern,
9 Nollan, Cooksey, Hamilton,
10 Banz, Tibbs and Brumbaugh
11 of the House

12 and

13 Jolley, Brinkley and
14 Newberry of the Senate

15 An Act relating to public health and safety; creating
16 the Pain-Capable Unborn Child Protection Act;
17 providing short title; defining terms; making
18 legislative findings; establishing purpose;
19 prohibiting the performance of an abortion without
20 certain determination; prohibiting the performance of
21 an abortion upon determination of certain age of
22 unborn child; providing for exceptions; requiring
23 that the manner in which physicians terminate certain
24 pregnancies provides the best opportunity for unborn
child's survival; requiring certain report by
physician; including certain information; requiring
State Department of Health to issue certain report;
stating certain penalties for physicians; requiring
the State Board of Health to promulgate rules;
providing date on which certain provisions shall
become effective; providing penalty; permitting
certain individuals to maintain action 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.

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

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

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

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

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

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

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

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

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

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

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

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

1 8. "Probable postfertilization age of the unborn child" means
2 what, in reasonable medical judgment, will with reasonable
3 probability be the postfertilization age of the unborn child at the
4 time the abortion is planned to be performed or induced;

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

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

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

12 The Legislature of the State of Oklahoma finds that:

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

17 2. By eight (8) weeks after fertilization, the unborn child
18 reacts to touch. After twenty (20) weeks, the unborn child reacts
19 to stimuli that would be recognized as painful if applied to an
20 adult human, for example by recoiling;

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

24

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

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

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

18 7. Substantial evidence indicates that children born missing
19 the bulk of the cerebral cortex, those with hydranencephaly,
20 nevertheless experience pain;

21 8. In adults, stimulation or ablation of the cerebral cortex
22 does not alter pain perception, while stimulation or ablation of the
23 thalamus does;

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1 9. Substantial evidence indicates that structures used for pain
2 processing in early development differ from those of adults, using
3 different neural elements available at specific times during
4 development, such as the subcortical plate, to fulfill the role of
5 pain processing;

6 10. The position, asserted by some, that the unborn child
7 remains in a coma-like sleep state that precludes the unborn child
8 from experiencing pain is inconsistent with the documented reaction
9 of unborn children to painful stimuli and with the experience of
10 fetal surgeons who have found it necessary to sedate the unborn
11 child with anesthesia to prevent the unborn child from thrashing
12 about in reaction to invasive surgery;

13 11. Consequently, there is substantial medical evidence that an
14 unborn child is capable of experiencing pain by twenty (20) weeks
15 after fertilization;

16 12. It is the purpose of the State of Oklahoma to assert a
17 compelling state interest in protecting the lives of unborn children
18 from the stage at which substantial medical evidence indicates that
19 they are capable of feeling pain; and

20 13. Oklahoma's compelling state interest in protecting the
21 lives of unborn children from the stage at which substantial medical
22 evidence indicates that they are capable of feeling pain is intended
23 to be separate from and independent of Oklahoma's compelling state
24 interest in protecting the lives of unborn children from the stage

1 of viability, and neither state interest is intended to replace the
2 other.

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

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

17 B. Knowing or reckless failure by any physician to conform to
18 any requirement of this section constitutes "unprofessional
19 conduct".

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

23 A. No person shall perform or induce or attempt to perform or
24 induce an abortion upon a woman when it has been determined, by the

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

14 B. When an abortion upon a woman whose unborn child has been
15 determined to have a probable postfertilization age of twenty (20)
16 or more weeks is not prohibited by this section, the physician shall
17 terminate the pregnancy in the manner which, in reasonable medical
18 judgment, provides the best opportunity for the unborn child to
19 survive, unless, in reasonable medical judgment, termination of the
20 pregnancy in that manner would pose a greater risk either of the
21 death of the pregnant woman or of the substantial and irreversible
22 physical impairment of a major bodily function, not including
23 psychological or emotional conditions, of the woman than would other
24 available methods. No such greater risk shall be deemed to exist if

1 it is based on a claim or diagnosis that the woman will engage in
2 conduct which she intends to result in her death or in substantial
3 and irreversible physical impairment of a major bodily function.

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

7 A. Any physician who performs or induces or attempts to perform
8 or induce an abortion shall report to the State Department of
9 Health, on a schedule and in accordance with forms and rules and
10 regulations adopted and promulgated by the State Board of Health
11 that include:

12 1. If a determination of probable postfertilization age was
13 made, the probable postfertilization age determined and the method
14 and basis of the determination;

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

18 3. If the probable postfertilization age was determined to be
19 twenty (20) or more weeks, the basis of the determination that the
20 pregnant woman had a condition which so complicated her medical
21 condition as to necessitate the abortion of her pregnancy to avert
22 her death or to avert serious risk of substantial and irreversible
23 physical impairment of a major bodily function, not including
24 psychological or emotional conditions; and

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

4 a. whether the method used was one that, in reasonable
5 medical judgment, provided the best opportunity for
6 the unborn child to survive, or

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

15 B. By June 30 of each year, the State Department of Health
16 shall issue a public report providing statistics for the previous
17 calendar year compiled from all of the reports covering that year
18 submitted in accordance with this section for each of the items
19 listed in subsection A of this section. Each such report shall also
20 provide the statistics for all previous calendar years during which
21 this section was in effect, adjusted to reflect any additional
22 information from late or corrected reports. The State Department of
23 Health shall take care to ensure that none of the information
24 included in the public reports could reasonably lead to the

1 identification of any pregnant woman upon whom an abortion was
2 performed or attempted.

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

23 D. By February 1, 2012, the State Board of Health shall adopt
24 and promulgate rules and regulations to assist in compliance with

1 this section. Subsection A of this section shall take effect so as
2 to require reports regarding all abortions performed or induced on
3 and after the first day of the first calendar month following the
4 effective date of such rules.

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

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

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

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

1 in knowing or reckless violation of the Pain-Capable Unborn Child
2 Protection Act for actual and punitive damages.

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

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

22 D. If judgment is rendered in favor of the defendant and the
23 court finds that the plaintiff's suit was frivolous and brought in
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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 subsections A or B of Section 8
4 of 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 A. If any one or more provisions, sections, subsections,
11 sentences, clauses, phrases or words of the Pain-Capable Unborn
12 Child 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 B. The Pain-Capable Unborn Child Protection Act shall not be
2 construed to repeal, by implication or otherwise, Section 1-732 of
3 Title 63 of the Oklahoma Statutes, or any otherwise applicable
4 provision of Oklahoma's laws regulating or restricting abortion. An
5 abortion that complies with this act but violates the provisions of
6 Section 1-732 of Title 63 of the Oklahoma Statutes, or any otherwise
7 applicable provision of Oklahoma's laws shall be deemed unlawful as
8 provided in such provision. An abortion that complies with the
9 provisions of Section 1-732 of Title 63 of the Oklahoma Statutes, or
10 any otherwise applicable provision of Oklahoma's laws regulating or
11 restricting abortion but violates this act shall be deemed unlawful
12 as provided in this act.

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

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

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

19 COMMITTEE REPORT BY: COMMITTEE ON HEALTH & HUMAN SERVICES, dated
20 3-28-11 - DO PASS, As Amended and Coauthored.

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