SPONSOR: Sen. Richardson & Rep. Dukes
Sens. Bonini, Hocker, Lawson, Pettyjohn, Simpson; Reps. Briggs King, Collins, Gray, Kenton, Postles, D. Short, Wilson, Yearick

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL NO. 205

AN ACT TO AMEND TITLE 24 OF THE DELAWARE CODE RELATING TO UNBORN CHILDREN.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 17 of Title 24 of the Delaware Code by deleting Subchapter IX thereof in its entirety and by making deletions as shown by strikethrough and insertions as shown by underline as follows:

Subchapter IX. The Pain-Capable Unborn Child Protection Act

§ 1790. Legislative Findings

The General Assembly makes the following findings:

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

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

(3) In the unborn child, application of painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to painful stimuli is associated with long-term harmful neuro developmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) 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 is applied without the anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty 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.

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

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

(9) 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.

(10) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization. The Legislature has the constitutional authority to make this judgment. As the United States Supreme Court has noted in *Gonzales v. Carhart*, 550 U.S. 124, 162-64 (2007), "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty….See *Marshall v. United States*, 414 U.S. 417, 427 (1974) ('When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.')….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…. Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."

(11) It is the purpose of the state to assert 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.

(12) 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.

(13) In enacting this legislation Delaware is not asking the Supreme Court to overturn or replace its holding, first articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that the state interest in unborn human life, which is "legitimate" throughout pregnancy, becomes "compelling" at viability. Rather, it asserts a separate and independent compelling state interest in unborn human life that exists once the unborn child is capable of feeling pain, which is asserted not in replacement of, but in addition to Delaware's compelling state interest in protecting the lives of unborn children from the stage of viability.

(14) The United States Supreme Court has 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." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

(15) The Supreme Court decision upholding the Partial-Birth Abortion Ban Act, *Gonzales v. Carhart*, 550 U.S. 124 (2007), vindicated the dissenting opinion in the earlier decision that had struck down Nebraska's Partial-Birth Abortion Ban Act. That opinion stated, "[In *Casey*] We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion….*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that [a state's] interests can be given proper weight.…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….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." *Stenberg v. Carhart*, 350 U.S. 914, 958-59 (2000) (Kennedy, J. dissenting).

(16) 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. Moreover, the State declares 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.

§ 1791 Definitions.

For the purposes of this subchapter:

(1) "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device;

"(a) to intentionally kill the unborn child of a women known to be pregnant; or

"(b) to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than-

"(i) after viability to produce a live birth and preserve the life and health of the child born alive; or

"(ii) to remove a dead unborn child."

(2) "Attempt to perform or induce and abortion" means an act or an omission of a statutorily required act that, under the circumstances as the person 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 this state in violation of the applicable provisions of this code.

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

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

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

(6) "Physician" means a person with an unrestricted license to practice allopathic medicine pursuant to article three of chapter thirty of this code or osteopathic medicine pursuant to article fourteen, chapter thirty of this code.

(7) "Probable post-fertilization age of the fetus" means what, in reasonable medical judgment and will, with reasonable probability, be the post-fertilization age of the fetus at the time an abortion is planned to be performed or induced.

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

(9) "Post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(10) "Serious health risk to the unborn child's mother" means that in reasonable medical judgment she has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No greater risk may be determined to exist if it is based on a claim or diagnosis that

the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(11) "Department" means the Delaware Department of Health and Social Services.

§ 1792. Determination of post-fertilization age.

Except in the case of a medical emergency, no abortion may be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable post-fertilization age of the fetus or relied upon such a determination made by another physician. In making this determination, the physician shall make inquiries of the patient and perform or cause to be performed medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to post-fertilization age.

§ 1793. Abortion of fetus of pain-capable post-fertilization age prohibited.

(a) No person may perform or induce, or attempt to perform or induce, an abortion of an unborn child capable of feeling pain unless necessary to prevent serious health risk to the unborn child's mother. No person may perform or induce, or attempt to perform or induce, an abortion when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post-fertilization age of the fetus has reached the pain-capable post-fertilization age of twenty or more weeks, unless in reasonable medical judgment there exists a condition of the pregnant woman that, in reasonable medical judgment, so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition may be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a patient whose fetus has been determined to have a probable post-fertilization age that has reached the pain-capable post-fertilization age is not prohibited by subsection (a) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the fetus to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the patient or of the substantial and irreversible physical impairment of a major bodily function of the patient than would other available methods. No greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

§ 1794. Reporting.

(a) Any physician who performs or induces or attempts to perform or induce an abortion shall report to the Department.

The reporting shall be on a schedule and on forms set forth by the Secretary of the Department annually, no later than December 31. The reports shall include the following information:

(1) Probable post-fertilization age:

(a) If a determination of probable post-fertilization age was made, whether ultrasound was employed in making the determination, and the week of probable post-fertilization age determined.

(b) If a determination of probable post-fertilization age was not made, the bases of the determination that a medical emergency existed.

(2) Method of abortion.

(3) If the probable post-fertilization age was determined to have reached the pain-capable post-fertilization age of twenty weeks or greater, the basis of the determination that the patient had a condition which so complicated the medical condition of the patient that it necessitated the abortion of her pregnancy in order to avert her death or avert a serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; and

(4) If the probable post-fertilization age was determined to have reached the pain-capable post-fertilization age of twenty weeks or greater, whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the fetus to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the patient or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions of the patient than would other available methods.

(b) Reports required by subsection (a) of this section may not contain the name or the address of the patient whose pregnancy was terminated, nor may the report contain any information identifying the patient. These reports shall be maintained in strict confidence by the Department, may not be available for public inspection, and may not be made available except pursuant to court order.

(c) Beginning June 30, 2019, and annually after that, the Department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each report shall provide the statistics for all previous calendar years from the effective date of this section, adjusted to reflect any additional information from late or corrected reports.

The Department shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any patient upon whom an abortion was performed or induced or attempted to be performed or induced.

§1895. Penalties.

(a) Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of this Act shall be guilty of a class D felony. Any physician or other licensed medical practitioner who intentionally or recklessly performs or induces an abortion in violation of this subchapter is considered to have acted outside the scope of practice permitted by law or otherwise in breach of the standard of care owed to patients and is subject to discipline from the applicable licensure board for that conduct, including, but not limited to, loss of professional license to practice.

(b) Any person, not subject to subsection (a) of this section, who intentionally or recklessly performs or induces an abortion in violation of this Subchapter is considered to have engaged in the unauthorized practice of medicine in violation of this Chapter.

(c) In addition to the penalties set forth in subsections (a) and (b) of this section, a patient may seek any remedy otherwise available to such patient by applicable law.

(d) No penalty may be assessed against any patient upon whom an abortion is performed or induced or attempted to be performed or induced.

(e) Any woman upon whom an abortion has been performed or induced in violation of this Act, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in intentional or reckless violation of this Act for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of this Act may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this Act for actual and punitive damages. No damages may be awarded a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

(f) A cause of action for injunctive relief against any person who has intentionally or recklessly violated this Act may be maintained (i) by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of this Act; (ii) if the woman had not attained the age of eighteen (18) years at the time of the abortion or has died as a result of the abortion, the parent or guardian of the pregnant woman; (iii) by a prosecuting attorney with appropriate jurisdiction; or (iv) by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of this Act in this State. A cause of action may not be maintained by a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

(g) If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney's fee in favor of the plaintiff against the defendant.

(h) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney's fee in favor of the defendant against the plaintiff.

(i) 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 (h) of this section.

Section 2. Severability.

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 or temporarily or permanently restrained or enjoined by judicial order, or both, the same is declared to be severable and the balance of this Act shall remain effective notwithstanding such judicial decision, including for all other applications of each of the provisions, sections, subsections, sentences, clauses, phrases or words of this Act: Provided, that whenever any judicial decision is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

SYNOPSIS

The Act protects the life of the unborn child at a time when the potential for the child to survive outside the womb increases, especially with the advancement of medical procedures. Also, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization. The Delaware Legislature has the constitutional authority to make this judgment as shown in U.S. Supreme Court decisions as detailed in this Act.

In enacting this legislation Delaware is not asking the Supreme Court to overturn or replace the holding in Roe v. Wade. Rather, it asserts a separate and independent compelling state interest in unborn human life that exists once the unborn child is capable of experiencing pain.

Author: Senator Richardson