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HOUSE BILL DRH30267-ML-122B*

Short Title: Pain Capable Unborn Child Protection Act. (Public)

Sponsors: Representatives McElraft, Hurley, Conrad, and Stevens (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT ESTABLISHING THE PAIN CAPABLE UNBORN CHILD PROTECTION ACT.
3 Whereas, pain receptors (nociceptors) are present throughout the unborn child's entire
4 body no later than 16 weeks after fertilization and nerves link these receptors to the brain's
5 thalamus and subcortical plate by no later than 20 weeks; and
6 Whereas, by eight weeks after fertilization, the unborn child reacts to touch. After 20
7 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an
8 adult human, for example, by recoiling; and
9 Whereas, in the unborn child, application of such painful stimuli is associated with
10 significant increases in stress hormones known as the stress response; and
11 Whereas, subjection to such painful stimuli is associated with long-term harmful
12 neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral,
13 and learning disabilities later in life; and
14 Whereas, for the purposes of surgery on unborn children, fetal anesthesia is routinely
15 administered and is associated with a decrease in stress hormones compared to their level when
16 painful stimuli are applied without the anesthesia; and
17 Whereas, the position, asserted by some medical experts, that the unborn child is
18 incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization
19 predominately rests on the assumption that the ability to experience pain depends on the cerebral
20 cortex and requires nerve connections between the thalamus and the cortex. However, recent
21 medical research and analysis, especially since 2007, provides strong evidence for the conclusion
22 that a functioning cortex is not necessary to experience pain; and
23 Whereas, substantial evidence indicates that children born missing the bulk of the
24 cerebral cortex, those with hydranencephaly, nevertheless experience pain; and
25 Whereas, in adults, stimulation or ablation of the cerebral cortex does not alter pain
26 perception, while stimulation or ablation of the thalamus does; and
27 Whereas, substantial evidence indicates that structures used for pain processing in
28 early development differ from those of adults, using different neural elements available at
29 specific times during development, such as the subcortical plate, to fulfill the role of pain
30 processing; and
31 Whereas, the position, asserted by some medical experts, that the unborn child
32 remains in a coma-like sleep state that precludes the unborn child experiencing pain is
33 inconsistent with the documented reaction of unborn children to painful stimuli and with the
34 experience of fetal surgeons who have found it necessary to sedate the unborn child with
35 anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery; and



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

4 Whereas, the United States Supreme Court has noted in *Gonzales v. Carhart*, 550
5 U.S. 124, 162-64 (2007), that "the Court has given state and federal legislatures wide discretion
6 to pass legislation in areas where there is medical and scientific uncertainty," that "the law need
7 not give abortion doctors unfettered choice in the course of their medical practice, nor should it
8 elevate their status above other physicians in the medical community," and that "medical
9 uncertainty does not foreclose the exercise of legislative power in the abortion context any more
10 than it does in other contexts."; and

11 Whereas, in *Marshall v. United States*, 414 U.S. 417, 427 (1974), the United States
12 Supreme Court stated that "when Congress undertakes to act in areas fraught with medical and
13 scientific uncertainties, legislative options must be especially broad."; and

14 Whereas, the State of North Carolina asserts a compelling State interest in protecting
15 the lives of unborn children from the stage at which substantial medical evidence indicates that
16 they are capable of feeling pain; and

17 Whereas, in enacting this legislation, the State of North Carolina is not asking the
18 United States Supreme Court to overturn or revise its holding, first articulated in *Roe v. Wade*
19 and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833,
20 869 (1992), that the State interest in unborn human life, which is "legitimate" throughout
21 pregnancy, becomes "compelling" at the point of fetal viability, but, rather, it asserts a separate
22 and independent State interest in unborn human life which becomes compelling once an unborn
23 child is capable of feeling pain, which is asserted not instead of, but in addition to, the State of
24 North Carolina's compelling State interest in protecting the lives of unborn children beginning at
25 viability; and

26 Whereas, the United States Supreme Court, in *Planned Parenthood of Southeastern*
27 *Pennsylvania v. Casey*, established that the "constitutional liberty of the woman to have some
28 freedom to terminate her pregnancy... is not so unlimited... that from the outset the State cannot
29 show its concern for the life of the unborn, and at a later point in fetal development the State's
30 interest in life has sufficient force so that the right of the woman to terminate the pregnancy can
31 be restricted."; and

32 Whereas, the United States Supreme Court decision upholding the federal Partial
33 Birth Abortion Act in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), vindicated the dissenting
34 opinion in the earlier decision in *Stenberg v. Carhart*, 530 U.S. 914, 958-959 (2000) (Kennedy,
35 J., dissenting), which had struck down a Nebraska law banning partial-birth abortions; and

36 Whereas, the dissenting opinion in *Stenberg v. Carhart* stated that "we held [in *Casey*]
37 it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests
38 implicated by abortion," that "*Casey* is premised on the States having an important constitutional
39 role in defining their interests in the abortion debate," that "it is only with this principle in mind
40 that [a state's] interests can be given proper weight," that "States also have an interest in
41 forbidding medical procedures which, in the State's reasonable determination, might cause the
42 medical profession or society as a whole to become insensitive, even disdainful, to life, including
43 life in the human fetus," and that "a State may take measures to ensure the medical profession
44 and its members are viewed as healers, sustained by a compassionate and rigorous ethic and
45 cognizant of the dignity and value of human life, even life which cannot survive without the
46 assistance of others."; and

47 Whereas, mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which, in the context
48 of determining the severability of a state statute regulating abortion, the United States Supreme
49 Court noted that an explicit statement of legislative intent specifically made applicable to a
50 particular statute is of greater weight than a general savings or severability clause, it is the intent
51 of the State that if any one or more provisions, sections, subsections, sentences, clauses, phrases

1 or words of this Act or the application thereof to any person or circumstance is found to be
2 unconstitutional, the same is hereby declared to be severable and the balance of this Act shall
3 remain effective notwithstanding such unconstitutionality; and

4 Whereas, the General Assembly declares, moreover, that it would have passed this
5 act, and each provision, section, subsection, sentence, clause, phrase, or word thereof,
6 irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses,
7 phrases, or words, or any of their applications, were to be declared unconstitutional; Now,
8 therefore,

9 The General Assembly of North Carolina enacts:

10
11 **PART I. TITLE**

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

14
15 **PART II. PAIN CAPABLE UNBORN CHILD PROTECTION ACT**

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

18 "Article 1L.

19 "Pain Capable Unborn Child Protection Act.

20 **"§ 90-21.130. Definitions.**

21 The following definitions apply in this Article:

- 22 (1) Abortion. – As defined in G.S. 90-21.81.
23 (2) Attempt to perform an abortion. – An act, or an omission of a statutorily
24 required act, that, under the circumstances as the actor believes them to be,
25 constitutes a substantial step in a course of conduct planned to culminate in
26 the performance or induction of an abortion in violation of this Article.
27 (3) Fertilization. – The fusion of a human sperm with a human egg.
28 (4) Medical emergency. – A determination, using reasonable medical judgment,
29 that the pregnant woman's medical condition necessitates the immediate
30 abortion of an unborn child before determining the postfertilization age of the
31 unborn child in order to avert the pregnant woman's death or a serious risk to
32 the pregnant woman of a substantial and irreversible physical impairment of
33 one or more of her major bodily functions, not including psychological or
34 emotional conditions, which may result from the delay necessary to determine
35 the postfertilization age of the unborn child. A condition may not be
36 determined to be a medical emergency if it is based on a claim or diagnosis
37 that the pregnant woman will engage in conduct that she intends to result in
38 her death or in a substantial and irreversible physical impairment of one or
39 more of her major bodily functions.
40 (5) Postfertilization age. – The age of the unborn child as calculated from the time
41 of fusion of the human sperm with the human egg.
42 (6) Probable postfertilization age of the unborn child. – The postfertilization age,
43 in weeks, of the unborn child at the time the abortion of the unborn child is
44 planned to be performed or induced as determined through the use of
45 reasonable medical judgment.
46 (7) Serious health risk to the unborn child's mother. – That the unborn child's
47 mother is at risk of death or a substantial and irreversible physical impairment
48 of one or more of her major bodily functions, not including psychological or
49 emotional conditions, due to her pregnancy as determined through the use of
50 reasonable medical judgment. Such a determination may not be made if it is
51 based on a claim or diagnosis that the unborn child's mother will engage in

1 conduct that she intends to result in her death or in the substantial and
2 irreversible physical impairment of one or more of her major bodily functions.

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

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

7 **"§ 90-21.131. Protection from abortion of an unborn child capable of feeling pain.**

8 (a) Prohibition. – A person may not perform or induce, or attempt to perform or induce,
9 the abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious
10 health risk to the unborn child's mother.

11 (b) Determining Capability to Feel Pain. – An unborn child shall be deemed capable of
12 feeling pain if it has been determined by the physician performing or inducing, or attempting to
13 perform or induce, an abortion of the unborn child, or by another physician upon whose
14 determination such physician relies, that the probable postfertilization age of the unborn child is
15 20 or more weeks. For purposes of this subsection, a dead unborn child is not capable of feeling
16 pain.

17 (c) Determining Postfertilization Age. – Except in a medical emergency or in the removal
18 of a dead unborn child, an abortion may not be performed or induced, or be attempted to be
19 performed or induced, unless the physician performing or inducing, or attempting to perform or
20 induce, the abortion has first made a determination of the probable postfertilization age of the
21 unborn child or relied upon such a determination made by another physician. In making this
22 determination, the physician shall inquire of the unborn child's mother and perform or cause to
23 be performed such medical examinations and tests as a reasonably prudent physician,
24 knowledgeable about the case and the medical conditions involved, would consider necessary in
25 making an accurate determination of the probable postfertilization age of the unborn child.

26 (d) Method of Termination. – When an abortion of an unborn child capable of feeling
27 pain is necessary to prevent a serious health risk to the unborn child's mother, the physician shall
28 terminate the pregnancy through or by the method that, using reasonable medical judgment,
29 provides the best opportunity for the unborn child to survive, unless, using reasonable medical
30 judgment, termination of the pregnancy in that manner would pose a more serious health risk to
31 the unborn child's mother than would other available methods. Such a determination may not be
32 made if the determination is based on a claim or diagnosis that the unborn child's mother will
33 engage in conduct that she intends to result in her death or in the substantial and irreversible
34 physical impairment of one or more of her major bodily functions.

35 **"§ 90-21.132. Reporting.**

36 (a) Requirement. – Beginning January 1, 2020, a physician who performs or induces, or
37 attempts to perform or induce, an abortion shall report all of the following to the Department of
38 Health and Human Services on forms, and in accordance with schedules and other requirements,
39 adopted by Department rule:

40 (1) The probable postfertilization age of the unborn child and whether ultrasound
41 was employed in making the determination, and, if a determination of
42 probable postfertilization age was not made, the basis of the determination
43 that a medical emergency existed or a determination that the unborn child was
44 dead.

45 (2) The method of abortion, including, but not limited to, one or more of the
46 following, by or through which the abortion was performed or induced:

47 a. Medication, including, but not limited to, an abortion induced by
48 mifepristone/misoprostol or methotrexate/misoprostol.

49 b. Manual vacuum aspiration.

50 c. Electrical vacuum aspiration.

51 d. Dilation and evacuation.

- 1 e. Induction, combined with dilation and evacuation.
2 f. Induction with prostaglandins.
3 g. Induction with intra-amniotic instillation, including, but not limited to,
4 saline or urea.
5 h. Intact dilation and extraction, otherwise known as partial-birth.

6 (3) Whether an intra-fetal injection, including, but not limited to, intra-fetal
7 potassium chloride or digoxin, was used in an attempt to induce the death of
8 the unborn child.

9 (4) The age and race of the unborn child's mother.

10 (5) If the unborn child was deemed capable of experiencing pain under
11 G.S. 90-21.131(b), the basis of the determination that the pregnancy was a
12 serious health risk to the unborn child's mother.

13 (6) If the unborn child was deemed capable of experiencing pain under
14 G.S. 90-21.131(b), whether the method of abortion used was the method that,
15 using reasonable medical judgment, provided the best opportunity for the
16 unborn child to survive and, if such method was not used, the basis of the
17 determination that termination of the pregnancy using that method would pose
18 a more serious health risk to the unborn child's mother than would other
19 available methods.

20 (b) Confidentiality. – Except as otherwise required under this subsection, reports required
21 under subsection (a) of this section may not contain the name or the address of the woman whose
22 pregnancy was terminated and may not contain any other information identifying the woman
23 whose pregnancy was terminated. Each report must contain a unique medical record
24 identification number that allows the report to be matched to the medical records of the woman
25 whose pregnancy was terminated.

26 (c) Publication. – Beginning on June 30, 2020, and each June 30 thereafter, the
27 Department of Health and Human Services shall publish in paper form and on its Web site a
28 summary providing statistics for the previous calendar year compiled from all of the reports
29 required by subsection (a) of this section for that year. The summary must provide a tabulation
30 of data for all of the items required by subsection (a) of this section to be reported and include
31 each of the summaries from all previous calendar years for which reports have been filed,
32 adjusted to reflect any additional data from late-filed reports or corrected reports. The Department
33 shall ensure that the information included in the summary cannot reasonably lead to the
34 identification of any pregnant woman upon whom an abortion was performed, induced, or
35 attempted.

36 (d) Failure to Report. – The Department of Health and Human Services may assess upon
37 a physician who fails to submit a report required by subsection (a) of this section by the end of
38 the 30th day following the due date established by Department rule a late penalty of one thousand
39 dollars (\$1,000) for each 30-day period or portion thereof that a report is overdue. If, more than
40 six months following the due date, a physician still has failed to submit such a report or has
41 submitted an incomplete report, the Department may bring an action against the physician
42 requesting a court of competent jurisdiction to order the physician to submit a complete report
43 within a specified time frame or be subject to civil contempt. The intentional or reckless failure
44 by a physician to comply with this section, other than the late filing of a report, or the intentional
45 or reckless failure by a physician to submit a complete report in accordance with a court order,
46 constitutes unprofessional conduct and is grounds for disciplinary action pursuant to applicable
47 law. A physician who intentionally or recklessly falsifies a report required under this section is
48 guilty of a Class 1 misdemeanor.

49 **"§ 90-21.133. Criminal penalties.**

50 (a) In General. – Except as provided in subsection (b) of this section, unless the conduct
51 is covered under some other provision of law providing greater punishment, a person who

1 intentionally or recklessly performs or induces, or attempts to perform or induce, an abortion in
2 violation of G.S. 90-21.131 is guilty of a Class D felony.

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

6 **"§ 90-21.134. Civil remedies; attorneys' fees.**

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

14 (b) Injunction. – An injunction may be obtained against a person who has intentionally
15 or recklessly violated G.S. 90-21.131 to prevent him or her from performing or inducing, or
16 attempting to perform or induce, further abortions in violation of G.S. 90-21.131. A cause of
17 action for injunctive relief against a person who has intentionally or recklessly violated
18 G.S. 90-21.131 may be maintained by one or more of the following:

19 (1) The woman upon whom an abortion was performed or induced, or upon whom
20 an abortion was attempted to be performed or induced, in violation of
21 G.S. 90-21.131.

22 (2) The spouse, parent, sibling, or guardian of, or a current or former licensed
23 health care provider of, the woman upon whom an abortion was performed or
24 induced, or upon whom an abortion was attempted to be performed or
25 induced, in violation of G.S. 90-21.131.

26 (3) A district attorney with jurisdiction.

27 (4) The Attorney General.

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

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

38 **"§ 90-21.135. Protection of privacy in court proceedings.**

39 In each civil or criminal proceeding or action brought under this Article, the court shall rule
40 on whether the anonymity of a woman upon whom an abortion has been performed or induced,
41 or upon whom an abortion has been attempted to be performed or induced, must be preserved
42 from public disclosure if the woman does not give her consent to such disclosure. The court,
43 upon its own motion or the motion of a party, shall make such a ruling and, if it determines that
44 anonymity should be preserved, shall issue an order to preserve the woman's anonymity to the
45 parties, witnesses, and counsel and shall direct the sealing of the record and the exclusion of
46 individuals from courtrooms or hearing rooms to the extent necessary to safeguard the woman's
47 identity from public disclosure. Each such order shall be accompanied by specific written
48 findings explaining why the anonymity of the woman should be preserved, why the order is
49 essential to that end, how the order is narrowly tailored to serve that interest, and why a
50 reasonable, less restrictive alternative does not exist. In the absence of the written consent of the
51 woman upon whom an abortion has been performed or induced or upon whom an abortion has

1 been attempted to be performed or induced, anyone, other than a public official, who brings an
2 action under subsections (a) or (b) of G.S. 90-21.134 shall do so under a pseudonym. This section
3 may not be construed to conceal the identity of the plaintiff or any witness from the defendant or
4 from attorneys for the defendant.

5 **"§ 90-21.136. Litigation Defense Fund.**

6 (a) Creation. – A special fund is created in the Office of the Attorney General, to be
7 known as the North Carolina Pain Capable Unborn Child Protection Act Litigation Defense
8 Fund. The Fund shall be placed in an interest bearing account and any interest or other income
9 derived from the Fund shall be credited to the Fund.

10 (b) Sources of Funding. – The Fund shall consist of any appropriations made to the Fund
11 by the General Assembly and any private donations, gifts, or grants made to the Fund.

12 (c) Uses. – All moneys in the Fund shall be used only to cover any costs or expenses
13 incurred by the Attorney General in relation to actions taken to defend the law set forth in this
14 Article. To the extent the moneys in this Fund are deemed unappropriated, the moneys are hereby
15 appropriated for the purpose set forth in this subsection.

16 **"§ 90-21.137. Construction.**

17 This Article may not be construed to repeal, by implication or otherwise, Article 11 of
18 Chapter 14 of the General Statutes or any other applicable provision of State law regulating or
19 restricting abortion. An abortion that complies with this section but violates Article 11 of Chapter
20 14 of the General Statutes or any other applicable provision of State law shall be deemed
21 unlawful. An abortion that complies with Article 11 of Chapter 14 of the General Statutes or any
22 other State law regulating or restricting abortion but violates this section shall be deemed
23 unlawful. If this Article, or any portion thereof, is temporarily or permanently restrained or
24 enjoined by judicial order, all other State laws regulating or restricting abortion shall be enforced
25 as though the restrained or enjoined provisions had not been adopted; however, if such temporary
26 or permanent restraining order or injunction is stayed or dissolved or otherwise ceases to have
27 effect, such provisions shall have full force and effect."

28 **SECTION 2.(b)** This act becomes effective December 1, 2019, and applies to
29 offenses committed on or after that date.

30
31 **PART III. SEVERABILITY CLAUSE**

32 **SECTION 3.** If any provision of this act or its application is held invalid, the
33 invalidity does not affect other provisions or applications of this act that can be given effect
34 without the invalid provisions or application, and to this end the provisions of this act are
35 severable.

36
37 **PART IV. EFFECTIVE DATE**

38 **SECTION 4.** Except as otherwise provided, this act becomes effective December 1,
39 2019.