



AN ACT ADOPTING THE MONTANA PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; PROHIBITING THE ABORTION OF AN UNBORN CHILD CAPABLE OF FEELING PAIN; PROVIDING EXCEPTIONS; PROVIDING DEFINITIONS; AND AMENDING SECTION 50-20-109, MCA.

WHEREAS, pain receptors are present throughout an unborn child's entire body no later than 16 weeks after fertilization, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks gestational age; and

WHEREAS, by 8 weeks after fertilization, an unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling; and

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

WHEREAS, subjection to painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life; and

WHEREAS, for the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without anesthesia; and

WHEREAS, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks gestational age; and

WHEREAS, the state asserts a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain; and

WHEREAS, an abortion occurring later in pregnancy may increase the risk to the woman of the occurrence of infection, sepsis, heavy bleeding, or a ruptured or perforated uterus.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Short title. [Sections 1 through 6] may be cited as the "Montana Pain-Capable Unborn Child Protection Act".

Section 2. Definitions. As used in [sections 1 through 6], the following definitions apply:

- (1) "Fertilization" means the fusion of a human spermatozoon with a human ovum.
- (2) "Gestational age" means the age of an unborn child, calculated from the first day of the woman's last menstrual period.
- (3) "Knowing" or "knowingly" has the meaning provided in 45-2-101.
- (4) (a) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of a pregnant woman that it necessitates the immediate abortion of the woman's pregnancy without first determining gestational age in order to avert the woman's death or for which the delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.
(b) The term does not include a condition that is based on a claim or diagnosis that the woman will engage in conduct that the woman intends to result in the woman's death or in substantial and irreversible physical impairment of a major bodily function.
- (5) "Medical practitioner" means a person authorized under 50-20-109 to perform an abortion.
- (6) "Probable gestational age of an unborn child" means what, in reasonable medical judgment, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed or attempted.
- (7) "Purposeful" or "purposely" has the meaning provided in 45-2-101.
- (8) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent medical practitioner who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.
- (9) "Serious health risk to the unborn child's mother" means that, in reasonable medical judgment, the

mother has a condition that so complicates the mother's medical condition that it necessitates the abortion of the mother's pregnancy to avert the mother's 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 mother will engage in conduct that the mother intends to result in the mother's death or in substantial and irreversible impairment of a major bodily function.

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

Section 3. Protection of unborn child capable of feeling pain from abortion. (1) (a) A person may not perform or attempt to perform an abortion of an unborn child capable of feeling pain unless it is necessary to prevent a serious health risk to the unborn child's mother.

(b) For the purposes of this subsection (1), an unborn child is capable of feeling pain when it has been determined by the medical practitioner performing or attempting the abortion or by another medical practitioner on whose determination the medical practitioner relies that the probable gestational age of the unborn child is 20 or more weeks.

(2) Except in the case of a medical emergency, an abortion may not be performed or attempted unless the medical practitioner has first made a determination of the probable gestational age of the unborn child or relied on a determination made by another medical practitioner. In making this determination, the medical practitioner shall make inquiries of the woman and perform or cause to be performed medical examinations and tests that a reasonably prudent practitioner who is knowledgeable about the case and the medical conditions involved would consider necessary to perform in making an accurate diagnosis with respect to gestational age.

(3) When an abortion of an unborn child capable of feeling pain is necessary to prevent a serious health risk to the unborn child's mother, the medical practitioner shall terminate the pregnancy in the manner that, in reasonable medical judgment, provides the best opportunity for the unborn child 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 pregnant woman or of the substantial and irreversible physical impairment of a major bodily

function, not including psychological or emotional conditions, of the woman 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 that the woman intends to result in the woman's death or in substantial and irreversible physical impairment of a major bodily function.

Section 4. Criminal penalties. A person who purposely or knowingly performs or attempts to perform an abortion in violation of [section 3] is guilty of a felony punishable in accordance with 50-20-112.

Section 5. Civil remedies. (1) A woman on whom an abortion has been performed or attempted in violation of [section 3] or the father of the unborn child who was the subject of the abortion may maintain an action against the person who performed or attempted the abortion in a purposeful or knowing violation of [section 3] for actual and punitive damages.

(2) (a) A cause of action for injunctive relief against a person who has purposely or knowingly violated [section 3] may be maintained by:

- (i) the woman on whom an abortion was performed or attempted or, if the woman is a minor, the woman's parent or guardian;
- (ii) a person who is the spouse of the woman on whom an abortion has been performed or attempted;
- (iii) a prosecuting attorney with appropriate jurisdiction; or
- (iv) the attorney general.

(b) The injunction must prevent the person from performing or attempting additional abortions in violation of [section 3] in this state.

(3) If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall order the defendant to pay reasonable attorney fees to the plaintiff.

(4) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's lawsuit was frivolous and brought in bad faith, the court shall order the plaintiff to pay reasonable attorney fees to the defendant.

(5) Damages or attorney fees may not be assessed against the woman on whom an abortion was performed or attempted except in accordance with subsection (4).

Section 6. Protection of privacy in court proceedings. In a civil or criminal proceeding brought under [section 4] or [section 5], the court shall determine whether the anonymity of the woman on whom an abortion has been performed or attempted must be preserved from public disclosure if the woman does not consent to the disclosure. The court, on motion or sua sponte, shall make a determination and, on determining that the woman's anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard the woman's identity from public disclosure. The order must be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable, less restrictive alternative exists. In the absence of written consent of the woman on whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under [section 5(1) or (2)] shall do so under a pseudonym. This section may not be construed to conceal from the defendant or from attorneys for the defendant the identity of the plaintiff or of witnesses.

Section 7. Section 50-20-109, MCA, is amended to read:

"50-20-109. Control of practice of abortion. (1) Except as provided in 50-20-401, an abortion may not be performed within the state of Montana:

- (a) except by a licensed physician or physician assistant;
- (b) after viability of the fetus, except as provided in subsection (2) on an unborn child capable of feeling pain, except as provided in [section 3].

~~(2) An abortion under subsection (1)(b) may be performed only to preserve the life or health of the mother and only if:~~

- ~~(a) the judgment of the physician who is to perform the abortion is first certified in writing by the physician, setting forth in detail the facts relied upon in making the judgment; and~~
- ~~(b) two other licensed physicians have first examined the patient and concurred in writing with the judgment. The certification and concurrence in this subsection (2)(b) are not required if a licensed physician certifies that the abortion is necessary to preserve the life of the mother.~~

~~(3) The timing and procedure used in performing an abortion under subsection (1)(b) must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 45-2-101. The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.~~

~~(4) For purposes of this section, "health" means the prevention of a risk of substantial and irreversible impairment of a major bodily function.~~

~~(5)(2) The supervision agreement of a physician assistant may provide for performing abortions.~~

~~(6)(3) Violation of subsections (1) through (3) subsection (1) is a felony."~~

Section 8. Codification instruction. [Sections 1 through 6] are intended to be codified as a new part in Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections 1 through 6].

- END -

I hereby certify that the within bill,
HB 136, originated in the House.

Chief Clerk of the House

Speaker of the House

Signed this _____ day
of _____, 2021.

President of the Senate

Signed this _____ day
of _____, 2021.

HOUSE BILL NO. 136

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SMITH

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