

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2022

A N A C T

RELATING TO HEALTH AND SAFETY -- RHODE ISLAND PAIN-CAPABLE UNBORN
CHILD PROTECTION ACT

Introduced By: Senator Jessica de la Cruz

Date Introduced: March 10, 2022

Referred To: Senate Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1. Title 23 of the General Laws entitled "HEALTH AND SAFETY" is hereby
2 amended by adding thereto the following chapter:

3 CHAPTER 97

4 RHODE ISLAND PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

5 **23-97-1. Short title.**

6 This chapter shall be known and may be cited as the "Rhode Island Pain-Capable Unborn
7 Child Protection Act".

8 **23-97-2. Legislative findings.**

9 The general assembly makes the following findings:

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

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

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

18 (4) Subjection to such painful stimuli is associated with long-term harmful

1 neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral
2 and learning disabilities later in life.

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

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

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

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

16 (9) Substantial evidence indicates that structures used for pain processing in early
17 development differ from those of adults, using different neural elements available at specific times
18 during development, such as the subcortical plate, to fulfill the role of pain processing.

19 (10) The position, asserted by some medical experts, that the unborn child remains in a
20 coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the
21 documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons
22 who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child
23 from thrashing about in reaction to invasive surgery.

24 (11) Consequently, there is substantial medical evidence that an unborn child is capable of
25 experiencing pain by twenty (20) weeks after fertilization. The general assembly has the
26 constitutional authority to make this judgment. As the United States Supreme Court has noted in
27 Gonzales v. Carhart, 550 U.S. 124, 162-64 (2007), "[t]he Court has given state and federal
28 legislatures wide discretion to pass legislation in areas where there is medical and scientific
29 uncertainty."; see Marshall v. United States, 414 U.S. 417, 427 (1974) (When Congress undertakes
30 to act in areas fraught with medical and scientific uncertainties, legislative options must be
31 especially broad.). The law need not give abortion doctors unfettered choice in the course of their
32 medical practice, nor should it elevate their status above other physicians in the medical
33 community. Medical uncertainty does not foreclose the exercise of legislative power in the abortion
34 context any more than it does in other contexts.

1 (12) It is the purpose of the state to assert a compelling state interest in protecting the lives
2 of unborn children from the stage at which substantial medical evidence indicates that they are
3 capable of feeling pain.

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

11 (14) The United States Supreme Court has established that the "constitutional liberty of the
12 woman to have some freedom to terminate her pregnancy ... is not so unlimited . . . that from the
13 outset the State cannot show its concern for the life of the unborn, and at a later point in fetal
14 development the state's interest in life has sufficient force so that the right of the woman to terminate
15 the pregnancy can be restricted." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505
16 U.S. 833, 869 (1992).

17 (15) The Supreme Court decision upholding the Partial-Birth Abortion Ban Act, Gonzales
18 v. Carhart, 550 U.S. 124 (2007) vindicated the dissenting opinion in the earlier decision that had
19 struck down Nebraska's Partial-Birth Abortion Ban Act. That opinion stated, "[In Casey] We held
20 it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated
21 by abortion." Casey is premised on the states having an important constitutional role in defining
22 their interests in the abortion debate. It is only with this principle in mind that [a state's] interests
23 can be given proper weight. States also have an interest in forbidding medical procedures which,
24 in the state's reasonable determination, might cause the medical profession or society as a whole to
25 become insensitive, even disdainful, to life, including life in the human fetus. A state may take
26 measures to ensure the medical profession and its members are viewed as healers, sustained by a
27 compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life
28 which cannot survive without the assistance of others." Stenberg v. Carhart, 350 U.S. 914, 958-59
29 (2000)(Kennedy, J., dissenting).

30 (16) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of
31 determining the severability of a state statute regulating abortion, the United States Supreme Court
32 noted that an explicit statement of legislative intent specifically made applicable to a particular
33 statute is of greater weight than a general savings or severability clause, it is the intent of the state
34 that if any one or more provisions, sections, subsections, sentences, clauses, phrases or words of

this chapter 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 chapter, 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.

23-97-3. Definitions.

For purposes of this chapter:

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

(i) Intentionally kill the unborn child of a woman known to be pregnant; or

(ii) Intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than:

(A) After viability to produce a live birth and preserve the life and health of the child born alive; or

(B) To remove a dead unborn child.

(2) "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor 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 this chapter.

(3) "Department" means the department of health.

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

(5) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman 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 any person licensed to practice medicine and surgery, or osteopathic medicine and surgery in this state.

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

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

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

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

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

16 (12) "Woman" means a female human being, whether or not she has reached the age of
17 majority.

18 **23-97-4. Protection of unborn child capable of feeling pain from abortion.**

19 (a) No person may perform or induce, or attempt to perform or induce, an abortion of an
20 unborn child capable of feeling pain, unless necessary to prevent serious health risk to the unborn
21 child's mother.

22 (b) An unborn child shall be deemed capable of feeling pain when it has been determined,
23 by the physician performing or inducing, or attempting to perform or induce the abortion, or by
24 another physician upon whose determination that physician relies, that the probable post
25 fertilization age of the woman's unborn child is twenty (20) or more weeks.

26 (c) Except in the case of a medical emergency, no abortion may be performed or induced,
27 or be attempted to be performed or induced, unless the physician performing or inducing it has first
28 made a determination of the probable post fertilization age of the unborn child or relied upon such
29 a determination made by another physician. In making this determination, the physician shall make
30 such inquiries of the woman and perform or cause to be performed such medical examinations and
31 tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions
32 involved, would consider necessary to perform in making an accurate diagnosis with respect to post
33 fertilization age.

34 (d) When an abortion of an unborn child capable of feeling pain is necessary to prevent

1 serious health risk to the unborn child's mother, the physician shall terminate the pregnancy in the
2 manner which, in reasonable medical judgment, provides the best opportunity for the unborn child
3 to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner
4 would pose a greater risk either of the death of the pregnant woman or of the substantial and
5 irreversible physical impairment of a major bodily function, not including psychological or
6 emotional conditions, of the woman than would other available methods. No greater risk may be
7 determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct
8 which she intends to result in her death or in substantial and irreversible physical impairment of a
9 major bodily function.

10 **23-97-5. Reporting.**

11 (a) Any physician who performs or induces, or attempts to perform or induce, an abortion
12 shall report to the department, on a schedule and in accordance with forms and regulations adopted
13 and promulgated by the department, that include:

14 (1) Post-fertilization age:

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

17 (ii) If a determination of probable post-fertilization age was not made, the basis of the
18 determination that a medical emergency existed.

19 (2) Method of abortion, which of the following was employed:

20 (i) Medication abortion (such as, but not limited to, mifepristone/misoprostol or
21 methotrexate/misoprostol);

22 (ii) Manual vacuum aspiration;

23 (iii) Electrical vacuum aspiration;

24 (iv) Dilation and evacuation;

25 (v) Combined induction abortion and dilation and evacuation;

26 (vi) Induction abortion with prostaglandins;

27 (vii) Induction abortion with intra-amniotic instillation (such as, but not limited to, saline
28 or urea);

29 (viii) Induction abortion, other means;

30 (ix) Intact dilation and extraction (partial-birth); or

31 (x) Method not listed (specify).

32 (3) Whether an intra-fetal injection was used in an attempt to induce fetal demise (such as,
33 but not limited to, intra-fetal potassium chloride or digoxin).

34 (4) Age and race of the patient.

1 (5) If the unborn child was deemed capable of experiencing pain under § 23-97-4(b), the
2 basis of the determination that the pregnant woman had a condition which so complicated her
3 medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert
4 serious risk of substantial and irreversible physical impairment of a major bodily function, not
5 including psychological or emotional conditions.

6 (6) If the unborn child was deemed capable of experiencing pain under § 23-97-4(b),
7 whether or not the method of abortion used was one that, in reasonable medical judgment, provided
8 the best opportunity for the unborn child to survive and, if such a method was not used, the basis
9 of the determination that termination of the pregnancy in that manner would pose a greater risk
10 either of the death of the pregnant woman or of the substantial and irreversible physical impairment
11 of a major bodily function, not including psychological or emotional conditions, of the woman than
12 would other available methods.

13 (b) Reports required by subsection (a) of this section shall not contain the name or the
14 address of the patient whose pregnancy was terminated, nor shall the report contain any other
15 information identifying the patient, except that each report shall contain a unique medical record
16 identifying number, to enable matching the report to the patient's medical records. These reports
17 shall be maintained in strict confidence by the department, shall not be available for public
18 inspection, and shall not be made available except:

19 (1) To the office of attorney general pursuant to a criminal investigation;

20 (2) To the office of attorney general pursuant to a civil investigation of the grounds for an
21 action under § 23-97-7; or

22 (3) Pursuant to court order in an action under § 23-97-7.

23 (c) By June 30 of each year the department shall issue a public report providing statistics
24 for the previous calendar year compiled from all of the reports covering that year submitted in
25 accordance with this section for each of the items listed in subsection (a) of this section. Each report
26 shall also provide the statistics for all previous calendar years during which this section was in
27 effect, adjusted to reflect any additional information from late or corrected reports. The department
28 shall take care to ensure that none of the information included in the public reports could reasonably
29 lead to the identification of any pregnant woman upon whom an abortion was performed, induced,
30 or attempted.

31 (d) Any physician who fails to submit a report by the end of thirty (30) days following the
32 due date established by regulation shall be subject to a late fee of one thousand dollars (\$1,000) for
33 each additional thirty (30) day period or portion of a thirty (30) day period the report is overdue.
34 Any physician required to report in accordance with this act who has not submitted a report, or has

1 submitted only an incomplete report, more than six (6) months following the due date, may, in an
2 action brought by the department, be directed by a court of competent jurisdiction to submit a
3 complete report within a period stated by court order or be subject to civil contempt. Intentional or
4 reckless failure by any physician to conform to any requirement of this section, other than late filing
5 of a report, constitutes "unprofessional conduct". Intentional or reckless failure by any physician to
6 submit a complete report in accordance with a court order constitutes "unprofessional conduct".
7 Intentional or reckless falsification of any report required under this section shall be punishable as
8 a misdemeanor.

9 (e) Within ninety (90) days of the effective date of this chapter, the department shall adopt
10 and promulgate forms and regulations to assist in compliance with this section. Subsection (a) of
11 this section shall take effect so as to require reports regarding all abortions performed or induced
12 on and after the first day of the first calendar month following the effective date of the rules.

13 **23-97-6. Penalties.**

14 Any person who intentionally or recklessly performs or induces, or attempts to perform or
15 induce an abortion in violation of this chapter shall be guilty of a felony. No penalty may be
16 assessed against the woman upon whom the abortion is performed or induced, or attempted to be
17 performed or induced.

18 **23-97-7. Civil remedies.**

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

27 (b) A cause of action for injunctive relief against any person who has intentionally or
28 recklessly violated this chapter may be maintained:

29 (1) By the woman upon whom an abortion was performed or induced, or attempted to be
30 performed or induced in violation of this chapter;

31 (2) If the woman had not attained the age of eighteen (18) years at the time of the abortion,
32 or has died as a result of the abortion, the parent or guardian of the pregnant woman;

33 (3) By a prosecuting attorney with appropriate jurisdiction; or

34 (4) By the office of attorney general.

1 The injunction shall prevent the abortion provider from performing or inducing, or
2 attempting to perform or induce further abortions in violation of this chapter. A cause of action
3 may not be maintained by a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

4 (c) If judgment is rendered in favor of the plaintiff in an action described in this section,
5 the court shall render judgment for a reasonable attorneys' fee in favor of the plaintiff against the
6 defendant.

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

10 (e) No damages or attorneys' fee may be assessed against the woman upon whom an
11 abortion was performed or induced, or attempted to be performed or induced, except in accordance
12 with subsection (d) of this section.

13 **23-97-8. Protection of privacy in court proceedings.**

14 In every civil or criminal proceeding, or any action brought under this chapter, the court
15 shall rule whether the anonymity of any woman upon whom an abortion has been performed or
16 induced, or attempted to be performed or induced shall be preserved from public disclosure if she
17 does not give her consent to the disclosure. The court, upon motion, or sua sponte, shall make a
18 ruling and, upon determining that her anonymity should be preserved, shall issue orders to the
19 parties, witnesses, and counsel, and shall direct the sealing of the record and exclusion of
20 individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity
21 from public disclosure. Each order shall be accompanied by specific written findings explaining
22 why the anonymity of the woman should be preserved from public disclosure, why the order is
23 essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable
24 less restrictive alternative exists. In the absence of written consent of the woman upon whom an
25 abortion has been performed or induced, or attempted to be performed or induced, anyone, other
26 than a public official, who brings an action under §§ 23-97-7(a) or 23-97-7(b), shall do so under a
27 pseudonym. This section shall not be construed to conceal the identity of the plaintiff or of
28 witnesses from the defendant or from attorneys for the defendant.

29 **23-97-9. Litigation defense fund.**

30 (a) There is created a restricted revenue account to be known as the "Rhode Island Pain-
31 Capable Unborn Child Protection Litigation Fund". The fund shall be maintained by the general
32 treasurer for the purpose of providing funds to pay for any costs and expenses incurred by
33 individuals relating to actions surrounding the defense of this law.

34 (b) The fund shall consist of:

- 1 (1) Appropriations made to the account by the general assembly; and
2 (2) Any donations, gifts, or grants received by the account.
3 (c) The fund shall retain the interest income derived from the monies credited to the fund.

4 **23-97-10. Construction.**

- 5 (a) This chapter shall not be construed to repeal, by implication or otherwise, any
6 applicable law, rule or regulation, regulating or restricting abortion.
7 (b) If any provisions or provisions of this chapter, or the application of this chapter to any
8 person or circumstance is held invalid by a court of competent authority, that invalidity does not
9 affect other provisions or applications of this chapter which can be given effect without that invalid
10 provision or provisions or application of the provision or provisions, and to this end the provisions
11 of this chapter are declared to be separable and severable.

12 SECTION 2. This act shall take effect on January 1, 2023.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

A N A C T

RELATING TO HEALTH AND SAFETY -- RHODE ISLAND PAIN-CAPABLE UNBORN
CHILD PROTECTION ACT

1 This act would create the Rhode Island Pain-Capable Unborn Child Protection Act,
2 prohibiting the performance or induction of an abortion of an unborn child capable of feeling pain,
3 unless necessary to prevent serious health risk to the unborn child's mother.

4 This act would take effect on January 1, 2023.

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