

1 SENATE BILL NO. 329

2 INTRODUCED BY K. REGIER

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE MONTANA PAIN-CAPABLE UNBORN CHILD
5 PROTECTION ACT; PROHIBITING THE ABORTION OF AN UNBORN CHILD CAPABLE OF FEELING PAIN;
6 PROVIDING EXCEPTIONS; PROVIDING DEFINITIONS; PROVIDING PENALTIES; PROVIDING CIVIL
7 REMEDIES; PROVIDING PRIVACY PROTECTIONS; AND AMENDING SECTIONS 50-20-102 AND 50-20-109,
8 MCA."

9
10 WHEREAS, pain receptors are present throughout an unborn child's entire body no later than 16 weeks
11 after fertilization, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than
12 20 weeks after fertilization; and

13 WHEREAS, by 8 weeks after fertilization, an unborn child reacts to touch. After 20 weeks, an unborn
14 child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling;
15 and

16 WHEREAS, substantial evidence indicates that structures used for pain processing in early development
17 differ from those of adults by using different neural elements available at specific times during development, such
18 as the subcortical plate, to fulfill the role of pain processing; and

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

24 WHEREAS, consequently, there is substantial medical evidence that an unborn child is capable of
25 experiencing pain by 20 weeks after fertilization. The Legislature has the constitutional authority to make this
26 judgment. As the United States Supreme Court has noted in *Gonzales v. Carhart*, 550 U.S. 124, 163-164 (2007),
27 "[the] Court has given state and federal legislatures wide discretion to pass legislation in areas where there is
28 medical and scientific uncertainty. . . . The law need not give abortion doctors unfettered choice in the course of
29 their medical practice, nor should it elevate their status above other physicians in the medical community. . . .
30 Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than

1 it does in other contexts." (Internal citations and quotations omitted.); and

2 WHEREAS, it is the purpose of the state to assert a compelling state interest in protecting the lives of
3 unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling
4 pain; and

5 WHEREAS, in enacting this legislation, the state is not asking the United States Supreme Court to
6 overturn or replace its holding first articulated in *Roe v. Wade* and reaffirmed in *Planned Parenthood v. Casey*
7 that the state interest in unborn human life, which is "legitimate" throughout pregnancy, becomes "compelling"
8 at viability. Rather, the state asserts a separate and independent compelling state interest in unborn human life
9 that exists once the unborn child is capable of feeling pain. This assertion is not in replacement of but is in
10 addition to Montana's compelling state interest in protecting the lives of unborn children from the stage of viability;
11 and

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

17 WHEREAS, the United States Supreme Court decision in *Gonzales v. Carhart* upheld the Partial-Birth
18 Abortion Ban Act and vindicated the dissenting opinion of Justice Kennedy in *Stenberg v. Carhart*, 530 U.S. 914
19 (2000), in which Nebraska's Partial-Birth Abortion Ban Act had been struck down. There, Justice Kennedy stated:
20 "[In *Casey*, we] held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests
21 implicated 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 can be given
23 proper weight. . . . States also have an interest in forbidding medical procedures which, in the State's reasonable
24 determination, might cause the medical profession or society as a whole to become insensitive, even disdainful,
25 to life, including life in the human fetus. . . . A State may take measures to ensure the medical profession and its
26 members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity
27 and value of human life, even life which cannot survive without the assistance of others." *Stenberg*, 530 U.S. at
28 961-962. (Internal citations omitted.).

29

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

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

4
5 **NEW SECTION. Section 2. Definitions.** As used in [sections 1 through 6], the following definitions
6 apply:

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

8 (2) "Knowing" or "knowingly" has the meaning provided in 45-2-101;

9 (3) (a) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates
10 the medical condition of a pregnant woman that it necessitates the immediate abortion of the woman's pregnancy
11 without first determining postfertilization age in order to avert the woman's death or for which the delay necessary
12 to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a
13 major bodily function, not including psychological or emotional conditions.

14 (b) The term does not include a condition that is based on a claim or diagnosis that the woman will
15 engage in conduct that the woman intends to result in the woman's death or in substantial and irreversible
16 physical impairment of a major bodily function.

17 (4) "Postfertilization age" means the age of an unborn child as calculated from the fusion of a human
18 spermatozoon with a human ovum.

19 (5) "Practitioner" means a person licensed by the state of Montana to provide health care and whose
20 scope of practice includes the performance or induction of an abortion.

21 (6) "Probable postfertilization age of an unborn child" means what, in reasonable medical judgment, will
22 with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to
23 be performed or induced.

24 (7) "Purposeful" or "purposely" has the meaning provided in 45-2-101.

25 (8) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably
26 prudent practitioner who is knowledgeable about the case and the treatment possibilities with respect to the
27 medical conditions involved.

28 (9) "Serious health risk to the unborn child's mother" means that in reasonable medical judgment, the
29 mother has a condition that so complicates the mother's medical condition that it necessitates the abortion of the
30 mother's pregnancy to avert the mother's death or to avert serious risk of substantial and irreversible physical

1 impairment of a major bodily function, not including psychological or emotional conditions. No greater risk may
2 be determined to exist if it is based on a claim or diagnosis that the mother will engage in conduct that the mother
3 intends to result in the mother's death or in substantial or irreversible impairment of a major bodily function.

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

6 (11) "Woman" means a female human being.
7

8 **NEW SECTION. Section 3. Protection of unborn child capable of feeling pain from abortion. (1)**

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

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

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

21 (3) When an abortion of an unborn child capable of feeling pain is necessary to prevent a serious health
22 risk to the unborn child's mother, the practitioner shall terminate the pregnancy in the manner that, in reasonable
23 medical judgment, provides the best opportunity for the unborn child to survive unless, in reasonable medical
24 judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the
25 pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including
26 psychological or emotional conditions, of the woman than would other available methods. A greater risk may not
27 be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct that the woman
28 intends to result in the woman's death or in substantial and irreversible physical impairment of a major bodily
29 function.
30

1 **NEW SECTION. Section 4. Criminal penalties.** A person who purposely or knowingly performs,
2 induces, or attempts an abortion in violation of [section 3] is guilty of a felony punishable in accordance with
3 50-20-112.

4
5 **NEW SECTION. Section 5. Civil remedies.** (1) A woman upon whom an abortion has been performed
6 or induced in violation of [section 3] or the father of the unborn child who was the subject of the abortion may
7 maintain an action against the person who performed or induced the abortion in a purposeful or knowing violation
8 of [section 3] for actual and punitive damages. A woman upon whom an abortion has been attempted in violation
9 of [section 3] may maintain an action against the person who attempted the abortion in a purposeful or knowing
10 violation of [section 3] for actual and punitive damages.

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

13 (i) the woman upon whom an abortion was performed, induced, or attempted;

14 (ii) a person who is the spouse, parent, sibling, guardian, or current or former licensed health care
15 provider of the woman upon whom an abortion has been performed, induced, or attempted;

16 (iii) a prosecuting attorney with appropriate jurisdiction; or

17 (iv) the attorney general.

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

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

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

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

27
28 **NEW SECTION. Section 6. Protection of privacy in court proceedings.** In a civil or criminal
29 proceeding brought under [section 4] or [section 5], the court shall determine whether the anonymity of the
30 woman upon whom an abortion has been performed, induced, or attempted must be preserved from public

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

12

13 **Section 7.** Section 50-20-102, MCA, is amended to read:

14 **"50-20-102. Statement of purpose -- findings.** (1) The legislature reaffirms the tradition of the state
 15 of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and
 16 in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of
 17 all human life. It is the policy of the state to preserve and protect the lives of all human beings and to provide
 18 protection for the viable human life and for human life that is capable of feeling pain. The protection afforded to
 19 a person by Montana's constitutional right of privacy is not absolute, but may be infringed upon by a compelling
 20 state interest. The legislature finds that a compelling state interest exists in the protection of viable life and life
 21 that is capable of feeling pain.

22 (2) The legislature finds, with respect to 50-20-401, that:

23 (a) the United States supreme court has determined that states have a legitimate interest in protecting
 24 both a woman's health and the potentiality of human life and that each interest grows and reaches a compelling
 25 point at various stages of a woman's approach to the full term of a pregnancy;

26 (b) the court has also determined that subsequent to viability, the state in promoting its interest in the
 27 potentiality of human life may, if it chooses, regulate and even proscribe abortion except when necessary, in
 28 appropriate medical judgment, for the preservation of the life or health of the woman;

29 (c) the holdings referred to in subsections (2)(a) and (2)(b) apply to unborn persons in order to extend
 30 to unborn persons the inalienable right to defend their lives and liberties;

1 (d) absent clear proof that an abortion is necessary to save the life of the woman, the abortion of a viable
2 person is an infringement of that person's rights; and

3 (e) the state has a duty to protect innocent life and that duty has grown to a compelling point with respect
4 to partial-birth abortion."

5

6 **Section 8.** Section 50-20-109, MCA, is amended to read:

7 **"50-20-109. Control of practice of abortion.** (1) Except as provided in 50-20-401, an abortion may not
8 be performed within the state of Montana:

9 (a) except by a licensed physician or physician assistant;

10 (b) ~~after viability of the fetus, except as provided in subsection (2) on an unborn child capable of feeling~~
11 ~~pain, except as provided in [section 3].~~

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

14 ~~—— (a) the judgment of the physician who is to perform the abortion is first certified in writing by the~~
15 ~~physician, setting forth in detail the facts relied upon in making the judgment; and~~

16 ~~—— (b) two other licensed physicians have first examined the patient and concurred in writing with the~~
17 ~~judgment. The certification and concurrence in this subsection (2)(b) are not required if a licensed physician~~
18 ~~certifies that the abortion is necessary to preserve the life of the mother.~~

19 ~~—— (3) The timing and procedure used in performing an abortion under subsection (1)(b) must be such that~~
20 ~~the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in~~
21 ~~45-2-101. The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health~~
22 ~~of the mother.~~

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

25 ~~(5)(2)~~ The supervision agreement of a physician assistant may provide for performing abortions.

26 ~~(6)(3)~~ Violation of ~~subsections (1) through (3)~~ subsection (1) is a felony."

27

28 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 6] are intended to be codified
29 as an integral part of Title 50, chapter 20, and the provisions of Title 50, chapter 20, apply to [sections 1 through
30 6].

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- END -