

By: Senator(s) McDaniel, Yancey, Watson,
Jackson (15th)

To: Judiciary, Division A

SENATE BILL NO. 2840

1 AN ACT TO CREATE THE PAIN-CAPABLE UNBORN CHILD PROTECTION
2 ACT; TO DEFINE TERMS; TO PROHIBIT ABORTIONS UNDER CERTAIN
3 CONDITIONS; TO ENACT PENALTIES; TO AMEND SECTION 73-25-29,
4 MISSISSIPPI CODE OF 1972, TO REVISE THE GROUNDS FOR UNPROFESSIONAL
5 CONDUCT BY A PHYSICIAN TO INCLUDE VIOLATIONS OF THE PAIN-CAPABLE
6 UNBORN CHILD PROTECTION ACT; AND FOR RELATED PURPOSES.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

8 **SECTION 1.** (1) This section may be known and cited as the
9 "Pain-Capable Unborn Child Protection Act."

10 (2) For purposes of the Pain-Capable Unborn Child Protection
11 Act:

12 (a) "Abortion" means the use or prescription of any
13 instrument, medicine, drug, or other substance or device to
14 terminate the pregnancy of a woman known to be pregnant with an
15 intention other than to increase the probability of a live birth,
16 to preserve the life or health of the child after live birth, or
17 to remove a dead unborn child who died as the result of natural
18 causes in utero, accidental trauma, or a criminal assault on the
19 pregnant woman or her unborn child, and which causes the premature
20 termination of the pregnancy.

21 (b) "Attempt to perform or induce an abortion" means an
22 act, or an omission of a statutorily required act, that, under the
23 circumstances as the actor believes them to be, constitutes a
24 substantial step in a course of conduct planned to culminate in
25 the performance or induction of an abortion in this state in
26 violation of the Pain-Capable Unborn Child Protection Act.

27 (c) "Fertilization" means the fusion of a human
28 spermatozoon with a human ovum.



29 (d) "Medical emergency" means a condition which, in
30 reasonable medical judgment, so complicates the medical condition
31 of the pregnant woman as to necessitate the immediate abortion of
32 her pregnancy to avert her death or for which a delay will create
33 a serious risk of substantial and irreversible physical impairment
34 of a major bodily function. No condition shall be deemed a
35 medical emergency if based on a claim or diagnosis that the woman
36 will engage in conduct which would result in her death or in
37 substantial and irreversible physical impairment of a major bodily
38 function.

39 (e) "Post-fertilization age" means the age of the
40 unborn child as calculated from the fertilization of the human
41 ovum.

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

46 (g) "Physician" means any person licensed to practice
47 medicine and surgery or osteopathic medicine under the Uniform
48 Credentialing Act.

49 (h) "Probable post-fertilization age of the unborn
50 child" means what, in reasonable medical judgment, will with
51 reasonable probability be the post-fertilization age of the unborn
52 child at the time the abortion is planned to be performed.

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

56 (j) "Woman" means a female human being whether or not
57 she has reached the age of majority.

58 (3) The Legislature makes the following findings:

59 (a) At least by twenty (20) weeks after fertilization
60 there is substantial evidence that an unborn child has the
61 physical structures necessary to experience pain;



62 (b) There is substantial evidence that, by twenty (20)
63 weeks after fertilization, unborn children seek to evade certain
64 stimuli in a manner which in an infant or an adult would be
65 interpreted as a response to pain;

66 (c) Anesthesia is routinely administered to unborn
67 children who have developed twenty (20) weeks or more past
68 fertilization who undergo prenatal surgery;

69 (d) Even before twenty (20) weeks after fertilization,
70 unborn children have been observed to exhibit hormonal stress
71 responses to painful stimuli. Such responses were reduced when
72 pain medication was administered directly to the unborn children;
73 and

74 (e) It is the purpose of the State of Mississippi to
75 assert a compelling state interest in protecting the lives of
76 unborn children from the stage at which substantial medical
77 evidence indicates that they are capable of feeling pain.

78 (4) (a) Except in the case of a medical emergency which
79 prevents compliance with this section, no abortion shall be
80 performed or induced or be attempted to be performed or induced
81 unless the physician performing or inducing it has first made a
82 determination of the probable post-fertilization age of the unborn
83 child or relied upon such a determination made by another
84 physician. In making such a determination, a physician shall make
85 inquiries of the woman and perform or cause to be performed
86 medical examinations and tests as a reasonably prudent physician,
87 knowledgeable about the case and the medical conditions involved,
88 would consider necessary to perform in making an accurate
89 diagnosis with respect to post-fertilization age.

90 (b) Failure by any physician to conform to any
91 requirement of this section constitutes unprofessional conduct
92 under Section 73-25-29.

93 (5) No person shall perform or induce or attempt to perform
94 or induce an abortion upon a woman when it has been determined, by



95 the physician performing or inducing the abortion or by another
96 physician upon whose determination that physician relies, that the
97 probable post-fertilization age of the woman's unborn child is
98 twenty (20) or more weeks unless, in reasonable medical judgment:
99 (a) she has a condition which so complicates her medical condition
100 as to necessitate the abortion of her pregnancy to avert her death
101 or to avert serious risk of substantial and irreversible physical
102 impairment of a major bodily function; or (b) it is necessary to
103 preserve the life of an unborn child. No such condition shall be
104 deemed to exist if it is based on a claim or diagnosis that the
105 woman will engage in conduct which would result in her death or in
106 substantial and irreversible physical impairment of a major bodily
107 function. In such a case, the physician shall terminate the
108 pregnancy in the manner which, in reasonable medical judgment,
109 provides the best opportunity for the unborn child to survive,
110 unless, in reasonable medical judgment, termination of the
111 pregnancy in that manner would pose a greater risk either of the
112 death of the pregnant woman or of the substantial and irreversible
113 physical impairment of a major bodily function of the woman than
114 would another available method. No such greater risk shall be
115 deemed to exist if it is based on a claim or diagnosis that the
116 woman will engage in conduct which would result in her death or in
117 substantial and irreversible physical impairment of a major bodily
118 function.

119 (6) (a) Any physician who performs or induces or attempts
120 to perform or induce an abortion shall report to the Department of
121 Health, on a schedule and in accordance with forms and rules and
122 regulations adopted and promulgated by the department:

123 (i) If a determination of probable
124 post-fertilization age was made, the probable post-fertilization
125 age determined, and the method and basis of the determination;



126 (ii) If a determination of probable
127 post-fertilization age was not made, the basis of the
128 determination that a medical emergency existed;

129 (iii) If the probable post-fertilization age was
130 determined to be twenty (20) or more weeks, the basis of the
131 determination that the pregnant woman had a condition which so
132 complicated her medical condition as to necessitate the abortion
133 of her pregnancy to avert her death or to avert serious risk of
134 substantial and irreversible physical impairment of a major bodily
135 function, or the basis of the determination that it was necessary
136 to preserve the life of an unborn child; and

137 (iv) The method used for the abortion and, in the
138 case of an abortion performed when the probable post-fertilization
139 age was determined to be twenty (20) or more weeks, whether the
140 method of abortion used was one that, in reasonable medical
141 judgment, provided the best opportunity for the unborn child to
142 survive or, if such a method was not used, the basis of the
143 determination that termination of the pregnancy in that manner
144 would pose a greater risk either of the death of the pregnant
145 woman or of the substantial and irreversible physical impairment
146 of a major bodily function of the woman than would other available
147 methods.

148 (b) By June 30 of each year, the department shall issue
149 a public report providing statistics for the previous calendar
150 year compiled from all of the reports covering that year submitted
151 in accordance with this section for each of the items listed in
152 subsection (1) of this section. Each report shall also provide
153 the statistics for all previous calendar years during which this
154 section was in effect, adjusted to reflect any additional
155 information from late or corrected reports. The department shall
156 take care to ensure that none of the information included in the
157 public reports could reasonably lead to the identification of any
158 pregnant woman upon whom an abortion was performed.



159 (c) Any physician who fails to submit a report by the
160 end of thirty (30) days following the due date shall be subject to
161 a late fee of Five Hundred Dollars (\$500.00) for each additional
162 thirty-day period or portion of a thirty-day period the report is
163 overdue. Any physician required to report in accordance with the
164 Pain-Capable Unborn Child Protection Act who has not submitted a
165 report, or has submitted only an incomplete report, more than one
166 (1) year following the due date, may, in an action brought in the
167 manner in which actions are brought to enforce Section 73-25-29 be
168 directed by a court of competent jurisdiction to submit a complete
169 report within a time period stated by court order or be subject to
170 civil contempt. Failure by any physician to conform to any
171 requirement of this section, other than late filing of a report,
172 constitutes unprofessional conduct under Section 73-25-29.
173 Failure by any physician to submit a complete report in accordance
174 with a court order constitutes unprofessional conduct under
175 Section 73-25-29. Intentional or reckless falsification of any
176 report required under this section is a misdemeanor.

177 (d) The department shall adopt and promulgate rules and
178 regulations to assist in compliance with this section not later
179 than December 1, 2011.

180 (7) Any person who intentionally or recklessly performs or
181 attempts to perform an abortion in violation of subsection (5) of
182 this section is guilty of a felony punishable, upon conviction, by
183 a fine not to exceed Five Thousand Dollars (\$5,000.00) and
184 imprisonment not to exceed ten (10) years, or both. No penalty
185 shall be assessed against the woman upon whom the abortion is
186 performed or attempted to be performed.

187 (8) (a) Any woman upon whom an abortion has been performed
188 in violation of the Pain-Capable Unborn Child Protection Act or
189 the father of the unborn child who was the subject of such an
190 abortion may maintain an action against the person who performed
191 the abortion as an intentional or a reckless violation of the



192 Pain-Capable Unborn Child Protection Act for actual damages. Any
193 woman upon whom an abortion has been attempted in violation of the
194 Pain-Capable Unborn Child Protection Act may maintain an action
195 against the person who attempted to perform the abortion in an
196 intentional or a reckless violation of the Pain-Capable Unborn
197 Child Protection Act for actual damages.

198 (b) A cause of action for injunctive relief against any
199 person who has intentionally violated the Pain-Capable Unborn
200 Child Protection Act may be maintained by the woman upon whom an
201 abortion was performed or attempted to be performed in violation
202 of the Pain-Capable Unborn Child Protection Act, by any person who
203 is the spouse, parent, sibling, or guardian of, or a current or
204 former licensed health care provider of, the woman upon whom an
205 abortion has been performed or attempted to be performed in
206 violation of the Pain-Capable Unborn Child Protection Act, by a
207 district attorney with appropriate jurisdiction, or by the
208 Attorney General. The injunction shall prevent the abortion
209 provider from performing further abortions in violation of the
210 Pain-Capable Unborn Child Protection Act in this state.

211 (c) If judgment is rendered in favor of the plaintiff
212 in an action described in this section, the court shall also
213 render judgment for reasonable attorney's fees in favor of the
214 plaintiff against the defendant.

215 (d) If judgment is rendered in favor of the defendant
216 and the court finds that the plaintiff's suit was frivolous and
217 brought in bad faith, the court shall also render judgment for
218 reasonable attorney's fees in favor of the defendant against the
219 plaintiff.

220 (e) No damages or attorney's fees may be assessed
221 against the woman upon whom an abortion was performed or attempted
222 to be performed except as provided in paragraph (d) of this
223 subsection (8).



224 (9) In every civil or criminal proceeding or action brought
225 under the Pain-Capable Unborn Child Protection Act, the court
226 shall rule whether the anonymity of any woman upon whom an
227 abortion has been performed or attempted shall be preserved from
228 public disclosure if she does not give her consent to disclosure.
229 The court, upon motion or sua sponte, shall make such a ruling
230 and, upon determining that her anonymity should be preserved,
231 shall issue orders to the parties, witnesses, and counsel and
232 shall direct the sealing of the record and exclusion of
233 individuals from courtrooms or hearing rooms to the extent
234 necessary to safeguard her identity from public disclosure. Each
235 such order shall be accompanied by specific written findings
236 explaining why the anonymity of the woman should be preserved from
237 public disclosure, why the order is essential to that end, how the
238 order is narrowly tailored to serve that interest, and why no
239 reasonable less restrictive alternative exists. In the absence of
240 written consent of the woman upon whom an abortion has been
241 performed or attempted, anyone, other than a public official, who
242 brings an action under subsection (8) of this section shall do so
243 under a pseudonym. This section shall not be construed to conceal
244 the identity of the plaintiff or of witnesses from the defendant
245 or from attorneys for the defendant.

246 **SECTION 2.** Section 73-25-29, Mississippi Code of 1972, is
247 amended as follows:

248 73-25-29. (1) The grounds for the nonissuance, suspension,
249 revocation or restriction of a license or the denial of
250 reinstatement or renewal of a license are:

251 (a) Habitual personal use of narcotic drugs, or any
252 other drug having addiction-forming or addiction-sustaining
253 liability.

254 (b) Habitual use of intoxicating liquors, or any
255 beverage, to an extent which affects professional competency.



256 (c) Administering, dispensing or prescribing any
257 narcotic drug, or any other drug having addiction-forming or
258 addiction-sustaining liability otherwise than in the course of
259 legitimate professional practice.

260 (d) Conviction of violation of any federal or state law
261 regulating the possession, distribution or use of any narcotic
262 drug or any drug considered a controlled substance under state or
263 federal law, a certified copy of the conviction order or judgment
264 rendered by the trial court being prima facie evidence thereof,
265 notwithstanding the pendency of any appeal.

266 (e) Procuring, or attempting to procure, or aiding
267 in, an abortion that is not medically indicated.

268 (f) Conviction of a felony or misdemeanor involving
269 moral turpitude, a certified copy of the conviction order or
270 judgment rendered by the trial court being prima facie evidence
271 thereof, notwithstanding the pendency of any appeal.

272 (g) Obtaining or attempting to obtain a license by
273 fraud or deception.

274 (h) Unprofessional conduct, which includes, but is not
275 limited to:

276 (i) Practicing medicine under a false or assumed
277 name or impersonating another practitioner, living or dead.

278 (ii) Knowingly performing any act which in any way
279 assists an unlicensed person to practice medicine.

280 (iii) Making or willfully causing to be made any
281 flamboyant claims concerning the licensee's professional
282 excellence.

283 (iv) Being guilty of any dishonorable or unethical
284 conduct likely to deceive, defraud or harm the public.

285 (v) Obtaining a fee as personal compensation or
286 gain from a person on fraudulent representation of a disease or
287 injury condition generally considered incurable by competent
288 medical authority in the light of current scientific knowledge and



289 practice can be cured or offering, undertaking, attempting or
290 agreeing to cure or treat the same by a secret method, which he
291 refuses to divulge to the board upon request.

292 (vi) Use of any false, fraudulent or forged
293 statement or document, or the use of any fraudulent, deceitful,
294 dishonest or immoral practice in connection with any of the
295 licensing requirements, including the signing in his professional
296 capacity any certificate that is known to be false at the time he
297 makes or signs such certificate.

298 (vii) Failing to identify a physician's school of
299 practice in all professional uses of his name by use of his earned
300 degree or a description of his school of practice.

301 (viii) 1. Performance by a physician of an
302 abortion as defined in Section 1(1) of Senate Bill No. 2930, 2011
303 Regular Session, under circumstances when the physician will not
304 be available for a period of at least forty-eight (48) hours for
305 postoperative care unless the postoperative care is delegated to
306 and accepted by another physician;

307 2. Performance of an abortion upon a
308 minor without having satisfied the notice requirements of Section
309 41-41-53;

310 3. The intentional and knowing
311 performance of a partial-birth abortion as defined in subsection
312 (9) of Section 41-41-73, unless the procedure is necessary to save
313 the life of the mother whose life is endangered by a physical
314 disorder, physical illness or physical injury, including a
315 life-endangering physical condition caused by or arising from the
316 pregnancy itself; and

317 4. Performance by a physician of an
318 abortion in violation of the Pain-Capable Unborn Child Protection
319 Act.

320 (i) The refusal of a licensing authority of another
321 state or jurisdiction to issue or renew a license, permit or



322 certificate to practice medicine in that jurisdiction or the
323 revocation, suspension or other restriction imposed on a license,
324 permit or certificate issued by such licensing authority which
325 prevents or restricts practice in that jurisdiction, a certified
326 copy of the disciplinary order or action taken by the other state
327 or jurisdiction being prima facie evidence thereof,
328 notwithstanding the pendency of any appeal.

329 (j) Surrender of a license or authorization to practice
330 medicine in another state or jurisdiction or surrender of
331 membership on any medical staff or in any medical or professional
332 association or society while under disciplinary investigation by
333 any of those authorities or bodies for acts or conduct similar to
334 acts or conduct which would constitute grounds for action as
335 defined in this section.

336 (k) Final sanctions imposed by the United States
337 Department of Health and Human Services, Office of Inspector
338 General or any successor federal agency or office, based upon a
339 finding of incompetency, gross misconduct or failure to meet
340 professionally recognized standards of health care; a certified
341 copy of the notice of final sanction being prima facie evidence
342 thereof. As used in this paragraph, the term "final sanction"
343 means the written notice to a physician from the United States
344 Department of Health and Human Services, Officer of Inspector
345 General or any successor federal agency or office, which
346 implements the exclusion.

347 (l) Failure to furnish the board, its investigators or
348 representatives information legally requested by the board.

349 (m) Violation of any provision(s) of the Medical
350 Practice Act or the rules and regulations of the board or of any
351 order, stipulation or agreement with the board.

352 (2) In addition to the grounds specified in subsection (1)
353 of this section, the board shall be authorized to suspend the
354 license of any licensee for being out of compliance with an order



355 for support, as defined in Section 93-11-153. The procedure for
356 suspension of a license for being out of compliance with an order
357 for support, and the procedure for the reissuance or reinstatement
358 of a license suspended for that purpose, and the payment of any
359 fees for the reissuance or reinstatement of a license suspended
360 for that purpose, shall be governed by Section 93-11-157 or
361 93-11-163, as the case may be. If there is any conflict between
362 any provision of Section 93-11-157 or 93-11-163 and any provision
363 of this chapter, the provisions of Section 93-11-157 or 93-11-163,
364 as the case may be, shall control.

365 **SECTION 3.** This act shall take effect and be in force from
366 and after July 1, 2011.

