

IN THE SENATE

SENATE BILL NO. 1148

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO ABORTION; AMENDING TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 5, TITLE 18, TO PROVIDE A SHORT TITLE, TO DEFINE TERMS, TO PROVIDE LEGISLATIVE FINDINGS, TO PROVIDE FOR DETERMINATION OF POSTFERTILIZATION AGE, TO PROHIBIT THE ABORTION OF AN UNBORN CHILD OF TWENTY OR MORE WEEKS POSTFERTILIZATION AGE, TO PROVIDE REPORTING REQUIREMENTS, TO PROVIDE CRIMINAL PENALTIES, TO PROVIDE CIVIL REMEDIES, TO PROVIDE FOR PROTECTION OF PRIVACY IN COURT PROCEEDINGS, TO CREATE THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT LITIGATION FUND IN THE STATE TREASURY; PROVIDING SEVERABILITY AND CONSTRUCTION; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Title 18, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 5, Title 18, Idaho Code, and to read as follows:

CHAPTER 5

PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

18-501. SHORT TITLE. This act shall be known and may be cited as the "Pain-Capable Unborn Child Protection Act."

18-502. DEFINITIONS. For purposes of this chapter:

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

(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 the provisions of this chapter;

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum;

(4) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a ma-

1 jor bodily function, not including psychological or emotional conditions.
 2 No condition shall be deemed a medical emergency if based on a claim or diag-
 3 nosis that the woman will engage in conduct that she intends to result in her
 4 death or in substantial and irreversible physical impairment of a major bod-
 5 ily function;

6 (5) "Physician" means any person licensed to practice medicine and
 7 surgery or osteopathic medicine under chapter 18, title 54, Idaho Code;

8 (6) "Postfertilization age" means the age of the unborn child as calcu-
 9 lated from the fertilization of the human ovum;

10 (7) "Probable postfertilization age of the unborn child" means what, in
 11 reasonable medical judgment, will with reasonable probability be the post-
 12 fertilization age of the unborn child at the time the abortion is planned to
 13 be performed;

14 (8) "Reasonable medical judgment" means a medical judgment that would
 15 be made by a reasonably prudent physician, knowledgeable about the case
 16 and the treatment possibilities with respect to the medical conditions in-
 17 volved;

18 (9) "Unborn child" or "fetus" means an individual organism of the
 19 species homo sapiens from fertilization until live birth; and

20 (10) "Woman" means a female human being whether or not she has reached
 21 the age of majority.

22 18-503. LEGISLATIVE FINDINGS. The legislature makes the following
 23 findings:

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

28 (2) By eight (8) weeks after fertilization, the unborn child reacts to
 29 stimuli that would be recognized as painful if applied to an adult human, for
 30 example by recoiling.

31 (3) In the unborn child, application of such painful stimuli is asso-
 32 ciated with significant increases in stress hormones known as the stress re-
 33 sponse.

34 (4) Subjection to such painful stimuli is associated with long-term
 35 harmful neurodevelopmental effects, such as altered pain sensitivity and,
 36 possibly, emotional, behavioral and learning disabilities later in life.

37 (5) For the purposes of surgery on unborn children, fetal anesthesia is
 38 routinely administered and is associated with a decrease in stress hormones
 39 compared to their level when painful stimuli are applied without such anes-
 40 thesia.

41 (6) The position, asserted by some medical experts, that the unborn
 42 child is incapable of experiencing pain until a point later in pregnancy
 43 than twenty (20) weeks after fertilization predominately rests on the as-
 44 sumption that the ability to experience pain depends on the cerebral cortex
 45 and requires nerve connections between the thalamus and the cortex. How-
 46 ever, recent medical research and analysis, especially since 2007, provides
 47 strong evidence for the conclusion that a functioning cortex is not neces-
 48 sary to experience pain.

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

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

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

10 (10) Consequently, there is substantial medical evidence that an un-
11 born child is capable of experiencing pain by twenty (20) weeks after fertil-
12 ization.

13 (11) It is the purpose of the state of Idaho to assert a compelling state
14 interest in protecting the lives of unborn children from the stage at which
15 substantial medical evidence indicates that they are capable of feeling
16 pain.

17 (12) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which, in
18 the context of determining the severability of a state statute regulating
19 abortion, the United States supreme court noted that an explicit statement
20 of legislative intent is of greater weight than inclusion of a severabil-
21 ity clause standing alone, the legislature declares that it would have
22 passed this act, and each provision, section, subsection, sentence, clause,
23 phrases, phrase or word thereof, irrespective of the fact that any one (1)
24 or more provisions, sections, subsections, sentences, clauses or words of
25 this act or the application thereof to any person or circumstance, were to be
26 declared unconstitutional.

27 18-504. DETERMINATION OF POSTFERTILIZATION AGE. (1) Except in the
28 case of a medical emergency, no abortion shall be performed or induced or
29 be attempted to be performed or induced unless the physician performing or
30 inducing it has first made a determination of the probable postfertilization
31 age of the unborn child or relied upon such a determination made by another
32 physician. In making such a determination, a physician shall make such in-
33 quiries of the woman and perform or cause to be performed such medical exami-
34 nations and tests as a reasonably prudent physician, knowledgeable about the
35 case and the medical conditions involved, would consider necessary to per-
36 form in making an accurate diagnosis with respect to postfertilization age.

37 (2) Intentional or reckless failure by any physician to conform to any
38 requirement of this section makes the physician subject to medical disci-
39 pline pursuant to section 54-1814(6), Idaho Code.

40 18-505. ABORTION OF UNBORN CHILD OF TWENTY OR MORE WEEKS POSTFERTIL-
41 IZATION AGE PROHIBITED. No person shall perform or induce or attempt to per-
42 form or induce an abortion upon a woman when it has been determined, by the
43 physician performing or inducing the abortion or by another physician upon
44 whose determination that physician relies, that the probable postfertiliza-
45 tion age of the woman's unborn child is twenty (20) or more weeks unless, in
46 reasonable medical judgment: (1) she has a condition that so complicates her
47 medical condition as to necessitate the abortion of her pregnancy to avert
48 her death or to avert serious risk of substantial and irreversible physical

1 impairment of a major bodily function, not including psychological or emo-
2 tional conditions; or (2) it is necessary to preserve the life of an unborn
3 child. No such condition shall be deemed to exist if it is based on a claim or
4 diagnosis that the woman will engage in conduct that she intends to result in
5 her death or in substantial and irreversible physical impairment of a major
6 bodily function.

7 18-506. REPORTING. (1) Any physician who performs or induces or at-
8 tempts to perform or induce an abortion shall report to the department of
9 health and welfare, on a schedule and in accordance with forms and rules
10 adopted and promulgated by the department:

11 (a) If a determination of probable postfertilization age was made, the
12 probable postfertilization age determined and the method and basis of
13 the determination;

14 (b) If a determination of probable postfertilization age was not made,
15 the basis of the determination that a medical emergency existed;

16 (c) If the probable postfertilization age was determined to be twenty
17 (20) or more weeks, the basis of the determination that the pregnant
18 woman had a condition that so complicated her medical condition as
19 to necessitate the abortion of her pregnancy to avert her death or to
20 avert serious risk of substantial and irreversible physical impairment
21 of a major bodily function, not including psychological or emotional
22 conditions, or the basis of the determination that it was necessary to
23 preserve the life of an unborn child; and

24 (d) The method used for the abortion.

25 (2) By June 30 of each year, the department shall issue a public re-
26 port providing statistics for the previous calendar year compiled from all
27 of the reports covering that year submitted in accordance with this section
28 for each of the items listed in subsection (1) of this section. Each such re-
29 port shall also provide the statistics for all previous calendar years dur-
30 ing which this section was in effect, adjusted to reflect any additional in-
31 formation from late or corrected reports. The department shall take care to
32 ensure that none of the information included in the public reports could rea-
33 sonably lead to the identification of any pregnant woman upon whom an abor-
34 tion was performed.

35 (3) Any physician who fails to submit a report by the end of thirty (30)
36 days following the due date shall be subject to a late fee of five hundred
37 dollars (\$500) for each additional thirty (30) day period or portion of a
38 thirty (30) day period the report is overdue. Any physician required to
39 report in accordance with this chapter who has not submitted a report, or
40 has submitted only an incomplete report, more than one (1) year following
41 the due date, may, in an action brought by the department, be directed by a
42 court of competent jurisdiction to submit a complete report within a time
43 period stated by court order or be subject to civil contempt. Intentional
44 or reckless failure by any physician to conform to any requirement of this
45 section, other than late filing of a report, makes the physician subject to
46 medical discipline under section 54-1814(6), Idaho Code. Intentional or
47 reckless failure by any physician to submit a complete report in accordance
48 with a court order renders the physician subject to civil contempt and makes
49 the physician subject to medical discipline pursuant to section 54-1814(6),

1 Idaho Code. Intentional or reckless falsification of any report required
2 under this section is a misdemeanor.

3 (4) Within ninety (90) days after the effective date of this act, the
4 department shall adopt and promulgate rules to assist in compliance with
5 this section. Subsection (1) of this section shall take effect so as to re-
6 quire reports regarding all abortions performed or induced on and after the
7 first day of the first calendar month following the effective date of such
8 rules.

9 18-507. CRIMINAL PENALTIES. Any person who intentionally or reck-
10 lessly performs or attempts to perform an abortion in violation of the
11 provisions of section 18-505, Idaho Code, is guilty of a felony. No penalty
12 shall be assessed against the woman upon whom the abortion is performed or
13 attempted to be performed.

14 18-508. CIVIL REMEDIES. (1) Any woman upon whom an abortion has been
15 performed in violation of the pain-capable unborn child protection act or
16 the father of the unborn child who was the subject of such an abortion may
17 maintain an action against the person who performed the abortion in an inten-
18 tional or a reckless violation of the provisions of this chapter for actual
19 damages. Any woman upon whom an abortion has been attempted in violation of
20 the provisions of this chapter may maintain an action against the person who
21 attempted to perform the abortion in an intentional or a reckless violation
22 of the provisions of this chapter for actual damages.

23 (2) A cause of action for injunctive relief against any person who has
24 intentionally or recklessly violated the provisions of this chapter may be
25 maintained by the woman upon whom an abortion was performed or attempted to
26 be performed in violation of the provisions of this chapter, by any person
27 who is the spouse, parent, sibling, or guardian of, or a current or former
28 licensed health care provider of, the woman upon whom an abortion has been
29 performed or attempted to be performed in violation of the provisions of this
30 chapter, by a prosecuting attorney with appropriate jurisdiction, or by the
31 attorney general. The injunction shall prevent the abortion provider from
32 performing or attempting to perform further abortions in violation of the
33 provisions of this chapter in this state.

34 (3) If judgment is rendered in favor of the plaintiff in an action de-
35 scribed in this section, the court shall also render judgment for reasonable
36 attorney's fees in favor of the plaintiff against the defendant.

37 (4) If judgment is rendered in favor of the defendant and the court
38 finds that the plaintiff's suit was frivolous and brought in bad faith, the
39 court shall also render judgment for reasonable attorney's fees in favor of
40 the defendant against the plaintiff.

41 (5) No damages or attorney's fees may be assessed against the woman upon
42 whom an abortion was performed or attempted to be performed except as pro-
43 vided in subsection (4) of this section.

44 18-509. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. In every civil or
45 criminal proceeding or action brought under the pain-capable unborn child
46 protection act, the court shall rule whether the anonymity of any woman upon
47 whom an abortion has been performed or attempted shall be preserved from

1 public disclosure if she does not give her consent to such disclosure. The
2 court, upon motion or sua sponte, shall make such a ruling and, upon deter-
3 mining that her anonymity should be preserved, shall issue orders to the
4 parties, witnesses, and counsel and shall direct the sealing of the record
5 and exclusion of individuals from courtrooms or hearing rooms to the extent
6 necessary to safeguard her identity from public disclosure. Each such or-
7 der shall be accompanied by specific written findings explaining why the
8 anonymity of the woman should be preserved from public disclosure, why the
9 order is essential to that end, how the order is narrowly tailored to serve
10 that interest and why no reasonable less restrictive alternative exists. In
11 the absence of written consent of the woman upon whom an abortion has been
12 performed or attempted, anyone, other than a public official, who brings an
13 action under the provisions of section 18-508, Idaho Code, shall do so under
14 a pseudonym. This section shall not be construed to conceal the identity of
15 the plaintiff or of witnesses from the defendant or from attorneys for the
16 defendant.

17 18-510. LITIGATION DEFENSE FUND. There is hereby created in the state
18 treasury the pain-capable unborn child protection act litigation fund for
19 the purpose of providing funds to pay for any costs and expenses incurred
20 by the state attorney general in relation to actions surrounding defense of
21 this chapter. This fund may include appropriations, donations, gifts or
22 grants made to the fund. Interest earned on the investment of idle moneys in
23 the fund shall be returned to the fund. Moneys in the fund may be expended
24 pursuant to appropriation.

25 SECTION 2. SEVERABILITY AND CONSTRUCTION. The provisions of this act
26 are hereby declared to be severable and if any provision of this act or the
27 application of such provision to any person or circumstance is declared
28 invalid for any reason, such declaration shall not affect the validity
29 of the remaining portions of this act. Notwithstanding section 18-608,
30 Idaho Code, an abortion that complies with that section but violates the
31 provisions of chapter 5, title 18, Idaho Code, or an otherwise applicable
32 provision of chapter 6, title 18, Idaho Code, or other controlling rule of
33 Idaho law shall be deemed unlawful as provided in such section, provision
34 or rule. An abortion that complies with the provisions of chapter 5, title
35 18, Idaho Code, but violates the provisions of section 18-608, Idaho Code,
36 or an otherwise applicable provision of chapter 6, title 18, Idaho Code, or
37 other controlling rule of Idaho law shall be deemed unlawful as provided in
38 such section, provision or rule. If some or all of the provisions of chapter
39 5, title 18, Idaho Code, are ever temporarily or permanently restrained or
40 enjoined by judicial order, chapter 5, title 18, Idaho Code, chapter 6, title
41 18, Idaho Code, and other controlling rules of Idaho law shall be enforced as
42 though such restrained or enjoined provisions had not been adopted, provided
43 however, that whenever such temporary or permanent restraining order or
44 injunction is stayed or dissolved, or otherwise ceases to have effect, such
45 provisions shall have full force and effect.

46 SECTION 3. An emergency existing therefor, which emergency is hereby
47 declared to exist, this act shall be in full force and effect on and after its
48 passage and approval.