

1 State of Arkansas  
2 88th General Assembly  
3 Regular Session, 2011  
4

# A Bill

HOUSE BILL 1887

5 By: Representatives Mayberry, Benedict, Dale, Eubanks, Hammer, Hobbs, Hopper, Mauch, Sanders,  
6 Stubblefield, Westerman, Woods  
7 By: Senator Rapert  
8

## For An Act To Be Entitled

9  
10 AN ACT TO CREATE THE PAIN-CAPABLE UNBORN CHILD  
11 PROTECTION ACT; TO PROHIBIT THE ABORTION OF AN UNBORN  
12 CHILD OF TWENTY OR MORE WEEKS POST-FERTILIZATION AGE;  
13 TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES.  
14

## Subtitle

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16  
17 AN ACT TO CREATE THE PAIN-CAPABLE UNBORN  
18 CHILD PROTECTION ACT AND TO DECLARE AN  
19 EMERGENCY.  
20

21  
22 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
23

24 SECTION 1. Arkansas Code Title 20, Chapter 16 is amended to add an  
25 additional subchapter to read as follows:

26 Subchapter 13. Pain-Capable Unborn Child Protection Act  
27

28 20-16-1301. Title.

29 This subchapter shall be known and may be cited as the "Pain-Capable  
30 Unborn Child Protection Act".  
31

32 20-16-1302. Definitions.

33 As used in this subchapter:

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

36 (A) To terminate the pregnancy of a woman known to be



1 pregnant with an intention other than to:

2 (i) Increase the probability of a live birth;

3 (ii) Preserve the life or health of the child after  
4 live birth; or

5 (iii) Remove a dead unborn child who died as the  
6 result of natural causes in utero, accidental trauma, or a criminal assault  
7 on the pregnant woman or her unborn child; and

8 (B) Which causes the premature termination of the  
9 pregnancy;

10 (2) "Attempt to perform or induce an abortion" means an act or  
11 an omission of a statutorily required act, that under the circumstances as  
12 the actor believes them to be, constitutes a substantial step in a course of  
13 conduct planned to culminate in the performance or induction of an abortion  
14 in this state in violation of this subchapter;

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

17 (4)(A) "Medical emergency" means a condition that, in reasonable  
18 medical judgment, so complicates the medical condition of the pregnant woman  
19 that it necessitates the immediate abortion of her pregnancy;

20 (i) Without first determining post-fertilization age  
21 to avert the death of the pregnant woman; or

22 (ii) For which the delay necessary to determine  
23 post-fertilization age will create serious risk of substantial and  
24 irreversible physical impairment of a major bodily function, not including  
25 psychological or emotional conditions.

26 (B) "Medical emergency" does not include a condition based  
27 on a claim or diagnosis that a pregnant woman will engage in conduct which  
28 would result in her death or in substantial and irreversible physical  
29 impairment of a major bodily function;

30 (5) "Physician" means any person licensed to practice medicine  
31 and surgery or osteopathic medicine and surgery in this state;

32 (6) "Post-fertilization age" means the age of the unborn child  
33 as calculated from the fertilization of the human ovum;

34 (7) "Probable post-fertilization age of the unborn child" means  
35 what, in reasonable medical judgment, will, with reasonable probability, be  
36 the post-fertilization age of the unborn child at the time the abortion is

1 planned to be performed or induced;

2 (8) "Reasonable medical judgment" means a medical judgment that  
3 would be made by a reasonably prudent physician knowledgeable about the case  
4 and the treatment possibilities with respect to the medical conditions  
5 involved;

6 (9) "Unborn child" means an individual organism of the species  
7 homo sapiens from fertilization until live birth; and

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

10  
11 20-16-1303. Legislative findings.

12 The General Assembly finds that:

13 (1) Pain receptors known as nociceptors are present throughout  
14 the unborn child's entire body by no later than sixteen (16) weeks after  
15 fertilization, and nerves link these receptors to the brain's thalamus and  
16 subcortical plate by no later than twenty (20) weeks;

17 (2) By eight (8) weeks after fertilization, the unborn child  
18 reacts to stimuli that would be recognized as painful if applied to an adult  
19 human, for example, by recoiling;

20 (3) In the unborn child, application of such painful stimuli is  
21 associated with significant increases in stress hormones known as the stress  
22 response;

23 (4) Subjection to such painful stimuli is associated with long-  
24 term harmful neurodevelopmental effects, such as altered pain sensitivity  
25 and, possibly, emotional, behavioral, and learning disabilities later in  
26 life;

27 (5) For the purposes of surgery on unborn children, fetal  
28 anesthesia is routinely administered and is associated with a decrease in  
29 stress hormones compared to those levels when painful stimuli are applied  
30 without such anesthesia;

31 (6)(A) The position, asserted by some medical experts, that the  
32 unborn child is incapable of experiencing pain until a point later in  
33 pregnancy than twenty (20) weeks after fertilization predominately rests on  
34 the assumption that the ability to experience pain depends on the cerebral  
35 cortex and requires nerve connections between the thalamus and the cortex.

36 (B) However, recent medical research and analysis,

1 especially since 2007, provide strong evidence for the conclusion that a  
2 functioning cortex is not necessary to experience pain;

3 (7) Substantial evidence indicates that children born missing  
4 the bulk of the cerebral cortex, those with hydranencephaly, nevertheless  
5 experience pain;

6 (8) In adults, stimulation or ablation of the cerebral cortex  
7 does not alter pain perception, while stimulation or ablation of the thalamus  
8 does;

9 (9) Substantial evidence indicates that structures used for pain  
10 processing in early development differ from those of adults and use different  
11 neural elements available at specific times during development, such as the  
12 subcortical plate, to fulfill the role of pain processing;

13 (10) Consequently, there is substantial medical evidence that an  
14 unborn child is capable of experiencing pain by twenty (20) weeks after  
15 fertilization;

16 (11) It is the purpose of the state to assert a compelling state  
17 interest in protecting the lives of unborn children from the stage at which  
18 substantial medical evidence indicates that they are capable of feeling pain;  
19 and

20 (12) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in  
21 which in the context of determining the severability of a state statute  
22 regulating abortion, the United States Supreme Court noted that an explicit  
23 statement of legislative intent specifically made applicable to a particular  
24 statute is of greater weight than a general savings or severability clause,  
25 it is the intent of the state that § 1-2-117 be specifically applied to this  
26 subchapter, and moreover the General Assembly declares that it would have  
27 passed this subchapter, and each section, subsection, subdivision, sentence,  
28 clause, phrase, or word in this subchapter, irrespective of the fact that any  
29 one (1) or more sections, subsections, subdivisions, sentences, clauses,  
30 phrases, or words, or any of their applications, were to be declared  
31 unconstitutional.

32  
33 20-16-1304. Determination of post-fertilization age.

34 (a)(1) Except in the case of a medical emergency, an abortion shall  
35 not be performed or induced or be attempted to be performed or induced unless  
36 the physician performing or inducing the abortion has first made a

1 determination of the probable post-fertilization age of the unborn child or  
2 relied upon such a determination made by another physician.

3 (2) In making such a determination under subdivision (a)(1) of  
4 this section, the physician shall make such inquiries of the woman and  
5 perform or cause to be performed such medical examinations and tests as a  
6 reasonably prudent physician, knowledgeable about the case and the medical  
7 conditions involved, would consider necessary to accurately diagnose the  
8 probable post-fertilization age of the unborn child.

9 (b) Any physician who purposely, knowingly, or recklessly fails to  
10 conform to any requirement of this section engages in unprofessional conduct  
11 under § 17-95-409(a)(2)(D).

12  
13 20-16-1305. Abortion of unborn child of twenty (20) or more weeks  
14 post-fertilization age prohibited.

15 (a)(1) A person shall not perform or induce or attempt to perform or  
16 induce an abortion upon a woman when it has been determined by the physician  
17 performing or inducing or attempting to perform or induce the abortion or by  
18 another physician upon whose determination that physician relies that the  
19 probable post-fertilization age of the unborn child of the woman is twenty  
20 (20) or more weeks.

21 (2)(A) However, subdivision (a)(1) of this section does not  
22 apply if, in reasonable medical judgment, the pregnant woman has a condition  
23 which so complicates her medical condition as to necessitate the abortion of  
24 her pregnancy to avert her death or to avert serious risk of substantial and  
25 irreversible physical impairment of a major bodily function of the pregnant  
26 woman, not including psychological or emotional conditions.

27 (B) A condition creating an exemption under subdivision  
28 (a)(2)(A) of this section shall not be deemed to exist if the condition is  
29 based on a claim or diagnosis that the woman will engage in conduct that  
30 would result in her death or in substantial and irreversible physical  
31 impairment of a major bodily function.

32 (b)(1) When an abortion upon a woman whose unborn child has been  
33 determined under subdivision (a)(1) of this section to have a probable post-  
34 fertilization age of twenty (20) or more weeks is not prohibited by this  
35 section, the physician shall terminate the pregnancy in the manner which, in  
36 reasonable medical judgment, provides the best opportunity for the unborn

1 child to survive.

2 (2)(A) However, subdivision (b)(1) of this section does not  
3 apply if, in reasonable medical judgment, termination of the pregnancy in  
4 that manner would pose a greater risk either of the death of the pregnant  
5 woman or of the substantial and irreversible physical impairment of a major  
6 bodily function of the woman, not including psychological or emotional  
7 conditions, than would other available methods.

8 (B) A risk creating an exemption under subdivision  
9 (b)(2)(A) of this section shall not be deemed to exist if it is based on a  
10 claim or diagnosis that the woman will engage in conduct that would result in  
11 her death or in substantial and irreversible physical impairment of a major  
12 bodily function.

13  
14 20-16-1306. Reporting.

15 (a)(1) A physician who performs or induces or attempts to perform or  
16 induce an abortion shall report to the Department of Health on a schedule and  
17 in accordance with rules adopted by the department.

18 (2) The report required under subdivision (a)(1) of this section  
19 shall include without limitation:

20 (A) Whether a determination of probable post-fertilization  
21 age was made, the probable post-fertilization age of the unborn child  
22 determined, and the method and basis of the determination;

23 (B) If a determination of probable post-fertilization age  
24 of the unborn child was not made, the basis of the determination that a  
25 medical emergency existed;

26 (C) If the probable post-fertilization age of the unborn  
27 child was determined to be twenty (20) or more weeks, the basis of the  
28 determination that the pregnant woman had a condition which so complicated  
29 her medical condition as to necessitate the immediate abortion of her  
30 pregnancy to avert her death or to avert serious risk of substantial and  
31 irreversible physical impairment of a major bodily function of the pregnant  
32 woman, not including psychological or emotional conditions;

33 (D) The method used for the abortion; and

34 (E) If an abortion was performed when the probable post-  
35 fertilization age of the unborn child was determined to be twenty (20) or  
36 more weeks;

1                   (i) Whether the method used was one that in  
2 reasonable medical judgment provided the best opportunity for the unborn  
3 child to survive; or

4                   (ii) If such a method under subdivision (a)(2)(E)(i)  
5 of this section was not used, the basis of the determination that termination  
6 of the pregnancy in that manner would pose a greater risk either of the death  
7 of the pregnant woman or of the substantial and irreversible physical  
8 impairment of a major bodily function of the woman not including  
9 psychological or emotional conditions than would other available methods.

10           (b)(1) By June 30 of each year the department shall issue a public  
11 report providing statistics for the previous calendar year compiled from all  
12 of the reports covering that year submitted under this section for each of  
13 the items listed in subsection (a) of this section.

14                   (2) Each report also shall provide the statistics for all  
15 previous calendar years during which this section was in effect, adjusted to  
16 reflect any additional information from late or corrected reports.

17                   (3) The department shall take care to ensure that none of the  
18 information included in the public reports could reasonably lead to the  
19 identification of any pregnant woman upon whom an abortion was performed or  
20 induced or attempted to be performed or induced.

21           (c)(1) A physician who fails to submit a report by the end of thirty  
22 (30) days after the date the report is due shall be subject to a late fee of  
23 five hundred dollars (\$500) for each additional thirty-day period or portion  
24 of a thirty-day period the report is overdue.

25                   (2) A physician required to report in accordance with this  
26 subchapter who has not submitted a report or has submitted only an incomplete  
27 report more than one (1) year following the date the report is due , in an  
28 action brought in the manner in which actions are brought by the department,  
29 may be directed by a court of competent jurisdiction to submit a complete  
30 report within a period stated by court order or be subject to civil contempt.

31           (d)(1) Failure by a physician to conform to any requirement of this  
32 section, other than late filing of a report, constitutes unprofessional  
33 conduct under § 17-95-409.

34                   (2) Failure by a physician to submit a complete report in  
35 accordance with a court order constitutes unprofessional conduct under § 17-  
36 95-409.

1           (3) Purposeful, knowing, or reckless falsification of any report  
2 required under this section is a Class C misdemeanor.

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

9  
10           20-16-1307. Criminal penalties.

11           (a) A person who purposely, knowingly, or recklessly performs or  
12 induces or attempts to perform or induce an abortion in violation of this  
13 subchapter is guilty of a Class D felony.

14           (b) A penalty may not be assessed against the woman upon whom the  
15 abortion is performed or induced or attempted to be performed or induced.

16  
17           20-16-1308. Civil remedies.

18           (a)(1) A woman upon whom an abortion has been performed in violation  
19 of this subchapter or the father of the unborn child who was the subject of  
20 an abortion in violation of this subchapter may bring an action against the  
21 person who purposely, knowingly, or recklessly performed or induced the  
22 abortion in violation of this subchapter for actual and punitive damages.

23           (2) A woman upon whom an abortion has been attempted in  
24 violation of this subchapter may bring an action against the person who  
25 attempted purposely, knowingly, or recklessly to perform or induce the  
26 abortion in violation of this subchapter for actual and punitive damages.

27           (b)(1) A cause of action for injunctive relief against a person who  
28 has purposely, knowingly, or recklessly violated this subchapter may be  
29 maintained by:

30                   (A) The woman upon whom an abortion was performed or  
31 induced or attempted to be performed or induced in violation of this  
32 subchapter;

33                   (B) A person who is the spouse, parent, sibling, or  
34 guardian of or a current or former licensed health care provider of the woman  
35 upon whom an abortion has been performed or induced or attempted to be  
36 performed or induced in violation of this subchapter;



1                   (C) A prosecuting attorney with appropriate jurisdiction;  
2 or

3                   (D) The Attorney General.

4                   (2) The injunction shall prevent the abortion provider from  
5 performing or inducing and from attempting to perform or induce further  
6 abortions in violation of this subchapter.

7                   (c) If judgment is rendered in favor of the plaintiff in an action  
8 described in this section, the court shall also render judgment for a  
9 reasonable attorney's fee in favor of the plaintiff against the defendant.

10                  (d) If judgment is rendered in favor of the defendant and the court  
11 finds that the plaintiff's suit was frivolous and brought in bad faith, the  
12 court shall render judgment for a reasonable attorney's fee in favor of the  
13 defendant against the plaintiff.

14                  (e) Damages or attorney's fee shall not be assessed against the woman  
15 upon whom an abortion was performed or induced or attempted to be performed  
16 or induced except under subsection (d) of this section.

17  
18                  20-16-1309. Protection of privacy in court proceedings.

19                  (a) In every civil or criminal proceeding or action brought under this  
20 subchapter, the court shall rule whether the anonymity of a woman upon whom  
21 an abortion has been performed or induced or attempted to be performed or  
22 induced shall be preserved from public disclosure if she does not give her  
23 consent to the disclosure.

24                  (b) The court, upon motion or sua sponte, shall make a ruling under  
25 subsection (a) of this section and, upon determining that the woman's  
26 anonymity should be preserved, shall issue orders to the parties, witnesses,  
27 and counsel and shall direct the sealing of the record and exclusion of  
28 individuals from courtrooms or hearing rooms to the extent necessary to  
29 safeguard the woman's identity from public disclosure.

30                  (c) Each order under subsection (b) of this section shall be  
31 accompanied by specific written findings explaining:

32                   (1) Why the anonymity of the woman should be preserved from  
33 public disclosure;

34                   (2) Why the order is essential to that end;

35                   (3) How the order is narrowly tailored to serve that interest;

36 and

1           (4) Why no reasonable less restrictive alternative could be  
2 fashioned.

3           (d) In the absence of written consent of the woman upon whom an  
4 abortion has been performed or induced or attempted to be performed or  
5 induced, anyone other than a public official who brings an action under § 20-  
6 16-1308 shall do so under a pseudonym.

7           (e) This section is not intended to conceal the identity of the  
8 plaintiff or of witnesses from the defendant or from attorneys for the  
9 defendant.

10  
11           20-16-1310. Construction.

12           (a) Since it is the intent of the state to assert two (2) separate and  
13 independent compelling state interests, those in (1) protecting the lives of  
14 viable unborn children and (2) protecting the lives of unborn children from  
15 the stage at which substantial medical evidence indicates that they are  
16 capable of feeling pain, this subchapter does not repeal by implication or  
17 otherwise § 20-16-705.

18           (b) This subchapter does not repeal by implication or otherwise any  
19 other provision of this chapter.

20  
21           SECTION 2. EMERGENCY CLAUSE. It is found and determined by the  
22 General Assembly of the State of Arkansas that abortions of pain-capable  
23 unborn children may be legally performed today in Arkansas; that the  
24 suffering described in this act should be prohibited at the earliest possible  
25 moment; and that this act is immediately necessary because this act will  
26 ensure that no abortion of a pain-capable child will be performed in Arkansas  
27 after this act becomes effective. Therefore, an emergency is declared to  
28 exist and this act being immediately necessary for the preservation of the  
29 public peace, health, and safety shall become effective on:

30           (1) The date of its approval by the Governor;

31           (2) If the bill is neither approved nor vetoed by the Governor,  
32 the expiration of the period of time during which the Governor may veto the  
33 bill; or

34           (3) If the bill is vetoed by the Governor and the veto is  
35 overridden, the date the last house overrides the veto.