

# SENATE, No. 537

## STATE OF NEW JERSEY 218th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2018 SESSION

**Sponsored by:**

**Senator STEVEN V. OROHO**

**District 24 (Morris, Sussex and Warren)**

**Senator JOSEPH PENNACCHIO**

**District 26 (Essex, Morris and Passaic)**

**Co-Sponsored by:**

**Senators Doherty, A.R.Bucco and Singer**

**SYNOPSIS**

"Pain-Capable Unborn Child Protection Act"; bans abortion 20 weeks or more after fertilization.

**CURRENT VERSION OF TEXT**

Introduced Pending Technical Review by Legislative Counsel.



**(Sponsorship Updated As Of: 5/14/2019)**

1 AN ACT concerning abortions, supplementing Title 2C of the New  
2 Jersey Statutes, and designated as the "Pain-Capable Unborn  
3 Child Protection Act."  
4

5 **BE IT ENACTED** by the Senate and General Assembly of the State  
6 of New Jersey:  
7

8 1. As used in this act:

9 "Abortion" means the use or prescription of any instrument,  
10 medicine, drug, or any other substance or device to intentionally kill  
11 the unborn child of a woman known to be pregnant or to  
12 intentionally terminate the pregnancy of a woman known to be  
13 pregnant, with an intention other than: after viability, to produce a  
14 live birth and preserve the life and health of the child born alive; or  
15 to remove a dead unborn child.

16 "Attempt an abortion" means conduct taken by a person that the  
17 person believes will constitute a substantial step in a course of  
18 conduct planned to culminate in performing an abortion.

19 "Counseling" means counseling provided by a counselor licensed  
20 by the State, or a victim's rights advocate provided by a law  
21 enforcement agency.

22 "Facility" means any medical or counseling group, center, or  
23 clinic and includes the entire legal entity, including any entity that  
24 controls, is controlled by, or is under common control with such  
25 facility.

26 "Fertilization" means the fusion of human spermatozoon with a  
27 human ovum.

28 "Medical treatment" means treatment provided at a hospital  
29 licensed by the State or operated under authority of a federal  
30 agency, at a medical clinic licensed by the State or operated under  
31 authority of a federal agency, or from a personal physician licensed  
32 by the State.

33 "Minor" means an individual who has not attained the age of 18  
34 years.

35 "Perform an abortion" means to take an action that includes  
36 inducing an abortion through a medical or chemical intervention,  
37 including writing a prescription for a drug or device intended to  
38 result in an abortion.

39 "Physician" means a person who is licensed to practice medicine  
40 and surgery pursuant to chapter 9 of Title 45 of the Revised  
41 Statutes.

42 "Post-fertilization age" means the age of unborn child as  
43 calculated from the fusion of a human spermatozoon with a human  
44 ovum.

45 "Probable post-fertilization age of the unborn child" means the  
46 time period that will, with reasonable medical judgment and  
47 reasonable probability, be the post-fertilization age of the unborn  
48 child at the time the abortion is planned to be performed or induced.

1 "Reasonable medical judgment" means a professional judgment  
2 made by a reasonably prudent physician in the practice of medicine,  
3 and made with knowledge about the case and the treatment  
4 possibilities with respect to the medical conditions involved.

5 "Unborn child" means an individual organism of species homo  
6 sapiens, beginning at fertilization, until the point of being born  
7 alive.

8 "Woman" means a female person who has or has not reached the  
9 age of majority.

10

11 2. a. (1) Notwithstanding the provisions of any other law to  
12 the contrary, it shall be unlawful for a person to perform an abortion  
13 or attempt to do so, unless the person is a physician, performing or  
14 attempting to perform the abortion pursuant to this act, who has first  
15 made a determination of the probable post-fertilization age of the  
16 unborn child or has reasonably relied upon this determination made  
17 by another physician. In making a determination pursuant to this  
18 section, the physician shall make inquiries of the pregnant woman  
19 and shall perform or cause to be performed any medical  
20 examinations or tests that a reasonably prudent physician,  
21 knowledgeable about the case and the medical conditions involved,  
22 would consider necessary to make an accurate determination of  
23 post-fertilization age.

24 (2) Except as provided in subsection b. of this section, an  
25 abortion shall not be performed or attempted if the probable post-  
26 fertilization age of the unborn child, as determined pursuant to this  
27 subsection, is 20 weeks or greater.

28 b. The provisions of subsection a. of this section shall not  
29 apply if:

30 (1) in reasonable medical judgment, the abortion is necessary to  
31 save the life of a pregnant woman whose life is endangered by a  
32 physical disorder, physical illness, or physical injury, including a  
33 life-endangering physical condition caused by, or arising from, the  
34 pregnancy itself, but not including a psychological or emotional  
35 condition;

36 (2) the pregnancy is the result of rape, if the rape has been  
37 reported at any time prior to the abortion to a law enforcement  
38 agency or to Department of Defense victim assistance personnel,  
39 and at least 48 hours prior to the abortion, the patient has obtained  
40 counseling for the rape, provided that the counseling may not be  
41 provided by a facility that performs abortions unless that facility is  
42 a hospital; or the patient has obtained medical treatment for the rape  
43 or an injury related to the rape. The physician who performs or  
44 attempts to perform an abortion under an exception provided by this  
45 paragraph shall comply with such applicable State laws that are in  
46 effect regarding reporting requirements in cases of rape; or

47 (3) the pregnancy is the result of rape or incest against a minor,  
48 if the rape or incest has been reported at any time prior to the

1 abortion to a law enforcement agency or to the Division of Child  
2 Protection and Permanency in the Department of Children and  
3 Families. The physician who performs or attempts to perform an  
4 abortion under an exception provided by this paragraph shall  
5 comply with such applicable State laws that are in effect regarding  
6 reporting requirements in cases of rape or incest.

7 c. Notwithstanding the requirements for performing or  
8 attempting to perform an abortion pursuant to this act, a physician  
9 terminating or attempting to terminate a pregnancy pursuant to  
10 subsection b. of this section may do so only in a manner which, in  
11 reasonable medical judgment, provides the best opportunity for the  
12 unborn child to survive, unless in reasonable medical judgment  
13 termination of the pregnancy in that manner would pose a greater  
14 risk of:

15 (1) the death of the pregnant woman; or

16 (2) the substantial and irreversible physical impairment of a  
17 major bodily function, not including a psychological or emotional  
18 condition of the pregnant woman.

19 d. A person who performs or attempts to perform an abortion in  
20 violation of subsection a. of this section shall be guilty of a crime of  
21 the third degree.

22 e. A woman upon whom an abortion is performed shall be  
23 immune from civil or criminal liability for a violation of, or a  
24 conspiracy to violate, subsection a. of this section.

25 f. If, in reasonable medical judgment, the pain-capable unborn  
26 child has the potential to survive outside the womb, the physician  
27 who performs or attempts an abortion under an exception provided  
28 by subsection b. of this section shall ensure a second physician  
29 trained in neonatal resuscitation is present and prepared to provide  
30 care to the child consistent with the requirements of subsection g. of  
31 this section.

32 g. When a physician performs or attempts an abortion in  
33 accordance with this section, and the child is born alive, as defined  
34 in the federal "Born-Alive Infants Protection Act of 2002" (Pub. L.  
35 107-207, 1 U.S.C. s.8), the following shall apply:

36 (1) Any health care practitioner present at the time shall  
37 humanely exercise the same degree of professional skill, care, and  
38 diligence to preserve the life and health of the child as a reasonably  
39 diligent and conscientious health care practitioner would render to a  
40 child born alive at the same gestational age in the course of a  
41 natural birth.

42 (2) Following the care required to be rendered under paragraph  
43 (1) of this subsection, the child born alive shall be immediately  
44 transported and admitted to a hospital.

45 (3) A health care practitioner or any employee of a hospital,  
46 physician's office, or abortion clinic who has knowledge of a  
47 failure to comply with the requirements of this paragraph shall

1 immediately report the failure to an appropriate State or federal law  
2 enforcement agency or both.

3 h. A physician who performs or attempts to perform an  
4 abortion under an exception provided by paragraph (2) of  
5 subsection b. of this section shall, prior to the abortion, place in the  
6 patient medical file, documentation from a hospital licensed by the  
7 State or operated under authority of a federal agency, a medical  
8 clinic licensed by the State or operated under authority of a federal  
9 agency, a personal physician licensed by the State, a counselor  
10 licensed by the State, or a victim's rights advocate provided by a  
11 law enforcement agency, which documentation shall show that the  
12 adult woman seeking the abortion obtained medical treatment or  
13 counseling for the rape or an injury related to the rape.

14 i. A physician who performs or attempts to perform an  
15 abortion under an exception provided by paragraph (3) of  
16 subsection b. of this section shall, prior to the abortion, place in the  
17 patient medical file documentation from the Division of Child  
18 Protection and Permanency in the Department of Children and  
19 Families showing that the rape or incest was reported prior to the  
20 abortion; or, as an alternative, documentation from a law  
21 enforcement agency showing that the rape or incest was reported  
22 prior to the abortion.

23 j. The physician who intends to perform or attempt to perform  
24 an abortion under the provisions of subsection b. of this section  
25 shall not perform any part of the abortion procedure without first  
26 obtaining a signed informed consent authorization form in  
27 accordance with this subsection. The informed consent  
28 authorization form shall be signed in person by the woman seeking  
29 the abortion, as well as by the physician who is performing or  
30 attempting to perform the abortion, and a witness. The physician  
31 performing or attempting to perform an abortion shall retain the  
32 signed informed consent form in the patient's medical file, and shall  
33 maintain the form in compliance with all State and federal laws,  
34 including the federal "Health Insurance Portability and  
35 Accountability Act of 1996," Pub.L.104-191, and related  
36 regulations. The informed consent authorization form shall be  
37 presented in person by the physician and shall consist of:

38 (1) a statement by the physician indicating the probable post-  
39 fertilization age of the pain-capable unborn child;

40 (2) a statement that State law allows abortion after 20 weeks  
41 fetal age only if the mother's life is endangered by a physical  
42 disorder, physical illness, or physical injury, when the pregnancy  
43 was the result of rape, or an act of incest against a minor;

44 (3) a statement that the abortion shall be performed by the  
45 method most likely to allow the child to be born alive, unless this  
46 would cause significant risk to the mother;

47 (4) a statement that in any case in which an abortion procedure  
48 results in a child born alive, State law requires that child to be given

1 every form of medical assistance that is provided to children  
2 spontaneously born prematurely, including transportation and  
3 admittance to a hospital;

4 (5) a statement that these requirements are binding upon the  
5 physician and all other medical personnel who are subject to  
6 criminal and civil penalties and that a woman on whom an abortion  
7 has been performed may take civil action if these requirements are  
8 not followed; and

9 (6) affirmation that each signer has filled out the informed  
10 consent form to the best of the signer's knowledge and understands  
11 the information contained in the form.

12 k. A woman upon whom an abortion has been performed or  
13 attempted in violation of any provision of this section may, in a  
14 civil action against any person who committed the violation, obtain  
15 appropriate relief, under the following conditions:

16 (1) A parent of a minor upon whom an abortion has been  
17 performed or attempted under an exception provided for in  
18 paragraphs (2) or (3) of subsection b. of this section, and that was  
19 performed in violation of any provision of this section may, in a  
20 civil action against any person who committed the violation obtain  
21 appropriate relief, unless the pregnancy resulted from the plaintiff's  
22 criminal conduct.

23 (2) Appropriate relief in a civil action under this subsection  
24 includes objectively verifiable money damages for all injuries,  
25 psychological and physical, occasioned by the violation; statutory  
26 damages equal to three times the cost of the abortion; and punitive  
27 damages.

28 (3) The court shall award a reasonable attorney's fee as part of  
29 the costs to a prevailing plaintiff in a civil action under this  
30 subsection.

31 (4) If a defendant in a civil action under this subsection prevails  
32 and the court finds that the plaintiff's suit was frivolous, the court  
33 shall award a reasonable attorney's fee in favor of the defendant  
34 against the plaintiff.

35 (5) Except as provided under paragraph (4) of this subsection, in  
36 a civil action under this subsection, no damages, attorney's fee or  
37 other monetary relief shall be assessed against the woman upon  
38 whom the abortion was performed or attempted.

39 l. Any physician who performs or attempts an abortion  
40 pursuant to subsection b. of this section shall annually submit a  
41 summary of all such abortions to the National Center for Health  
42 Statistics no later than 60 days after the end of the calendar year in  
43 which the abortion was performed or attempted, under the following  
44 conditions:

45 (1) The summary shall include the number of abortions  
46 performed or attempted on an unborn child who had a post-  
47 fertilization age of 20 weeks or more and specify the following for  
48 each abortion:

- 1 (a) the probable post-fertilization age of the unborn child;  
2 (b) the method used to carry out the abortion;  
3 (c) the location where the abortion was conducted;  
4 (d) the exception under subsection b. of this section pursuant to  
5 which the abortion was conducted; and  
6 (e) any incident of live birth resulting from the abortion.  
7 (2) A summary required under this subsection shall not contain  
8 any information identifying the woman whose pregnancy was  
9 terminated and shall be submitted consistent with the federal  
10 "Health Insurance Portability and Accountability Act of 1996,"  
11 Pub.L.104-191, and related regulations.  
12  
13 3. This act shall take effect on the first day of the third month  
14 next following the date of enactment.  
15  
16

17 STATEMENT  
18

19 This bill, designated as the "Pain-Capable Unborn Child  
20 Protection Act," provides that an abortion is not to be performed or  
21 attempted if the probable post-fertilization age of the unborn child  
22 is 20 weeks or greater, with certain exceptions noted below. It is to  
23 be unlawful for a person to perform an abortion or attempt to do so,  
24 unless the person is a physician who has first made a determination  
25 of the probable post-fertilization age of the unborn child or has  
26 reasonably relied upon this determination made by another  
27 physician. In making the determination, a physician is to make  
28 inquiries of the pregnant woman and perform any medical  
29 examinations or tests necessary to accurately determine post-  
30 fertilization age.

31 The bill provides an exception to the above provisions if: (1) the  
32 abortion is necessary to save the life of a pregnant women whose  
33 life is endangered by a physical disorder, illness, or injury,  
34 including a life-endangering physical condition caused by, or  
35 arising from, the pregnancy itself; (2) the pregnancy is the result of  
36 rape, if reported to a law enforcement agency prior to the abortion;  
37 or (3) the pregnancy is the result of rape or incest against a minor, if  
38 reported to a law enforcement agency or to the Division of Child  
39 Protection and Permanency (DCPP) in the Department of Children  
40 and Families prior to the abortion. In terminating or attempting to  
41 terminate a pregnancy under these circumstances, the physician  
42 may do so only in a manner which, in reasonable medical judgment,  
43 provides the best opportunity for the unborn child to survive, unless  
44 the termination of the pregnancy in that manner would pose a  
45 greater risk of death of the pregnant woman or substantial and  
46 irreversible physical impairment of a major bodily function.

47 The bill also: outlines the procedures that a physician who  
48 performs or attempts an abortion must follow, consistent with the

1 federal “Born Alive Infant Protection Act”, if an exception provided  
2 in the bill exists and the pain-capable unborn child survives the  
3 abortion or attempted abortion; outlines the documentation from a  
4 law enforcement agency, Department of Defense victim assistance  
5 personnel, or DCCP, that a physician is required to file proving a  
6 pregnant woman or minor seeking an abortion has been raped or is a  
7 victim of incest; requires the woman seeking the abortion, the  
8 physician performing or attempting to perform the abortion, and a  
9 witness to sign an informed consent authorization form; and  
10 requires any physician who performs or attempts an abortion  
11 pursuant to the bill to annually submit a summary of all such  
12 abortions to the National Center for Health Statistics as provided by  
13 the conditions outlined in the bill.

14 A person who performs or attempts to perform an abortion in  
15 violation of the bill's requirements is to be guilty of a crime of the  
16 third degree (punishable by three to five years imprisonment or a  
17 fine of up to \$15,000, or both); however, a woman upon whom an  
18 abortion is to be performed is to be immune from civil or criminal  
19 liability.

20 A woman or the parent of a minor upon whom an abortion is  
21 performed in violation of the provisions of the the bill may, in a  
22 civil action against any person who committed the violation, obtain  
23 appropriate relief the conditions delineated in the bill.

24 The bill, which is modeled on H.R.36 of the 114th Congress, is  
25 intended to address the concern that an unborn child is capable of  
26 experiencing pain by 20 weeks after fertilization, if not earlier.  
27 Surgeons in the field of maternal and fetal medicine have found it  
28 necessary to sedate an unborn child to prevent the unborn child  
29 from engaging in vigorous movement in reaction to invasive  
30 surgery.

31 It is the purpose of this Legislature to assert a compelling  
32 governmental interest in protecting the lives of unborn children  
33 from the stage at which substantial medical evidence indicates they  
34 are capable of feeling pain.