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Chapter No. 506
14/HR40/R1296SG
CSJ / glj

HOUSE BILL NO. 1400

Originated in House  Clerk

HOUSE BILL NO. 1400

AN ACT TO CREATE NEW SECTIONS 41-41-131 THROUGH 41-41-145, MISSISSIPPI CODE OF 1972, TO PROHIBIT THE PERFORMING OR INDUCING OF AN ABORTION AT OR AFTER 20 WEEKS GESTATIONAL AGE; TO PROHIBIT THE PERFORMING OR INDUCING OF AN ABORTION UNTIL A PHYSICIAN MAKES A DETERMINATION OF THE PROBABLE GESTATIONAL AGE OF THE UNBORN CHILD; TO PROVIDE FOR CERTAIN EXCEPTIONS; TO PROVIDE FOR THE PROTECTION OF PRIVACY IN COURT PROCEEDINGS OF THE IDENTITY OF THE WOMAN ON WHOM AN ABORTION HAS BEEN PERFORMED OR INDUCED; TO AMEND SECTION 73-25-29, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT A PHYSICIAN WHO PERFORMS OR INDUCES AN ABORTION IN VIOLATION OF THIS ACT IS SUBJECT TO DISCIPLINARY ACTION; AND FOR RELATED PURPOSES.

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

SECTION 1. (1) The findings indicate that:

(a) Abortion can cause serious physical and psychological (both short- and long-term) complications for women, including, but not limited to: uterine perforation, uterine scarring, cervical perforation or other injury, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic

disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm birth in subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions to anesthesia and other drugs, psychological or emotional complications such as depression, anxiety, sleeping disorders, and death;

(b) Abortion has a higher medical risk when the procedure is performed later in pregnancy. Compared to an abortion at eight (8) weeks gestation or earlier, the relative risk increases exponentially at higher gestations. *L. Bartlett et al., risk factors for legal induced abortion-related mortality in the United States, Obstetrics & Gynecology 103(4):729 (2004);*

(c) In fact, the incidence of major complications is highest after twenty (20) weeks gestation. *J. Pregler & A. DeCherney, Women's Health; Principles and Clinical Practice 232 (2002);*

(d) According to the Alan Guttmacher Institute, the risk of death associated with abortion increases with the length of pregnancy, from one (1) death for every one million (1,000,000) abortions at or before eight (8) weeks gestation to one (1) per twenty-nine thousand (29,000) abortions at sixteen (16) to twenty (20) weeks and one (1) per eleven thousand (11,000) abortions at twenty-one (21) or more weeks (citing *L. Bartlett et al., risk factors for legal induced abortion-related mortality in the United States, Obstetrics & Gynecology 103(4):729-737 (2004);*

(e) After the first trimester, the risk of hemorrhage from an abortion, in particular, is greater, and the resultant complications may require a hysterectomy, other reparative surgery, or a blood transfusion;

(f) The State of Mississippi has a legitimate concern for the public's health and safety. *Williamson v. Lee Optical*, 348 U.S. 483, 486 (1985);

(g) The State of Mississippi "has legitimate interests from the outset of pregnancy in protecting the health of women." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833.847 (1992). More specifically, the State of Mississippi "has a legitimate concern with the health of women who undergo abortions." *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428-29 (1983);

(h) In addition, substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than twenty (20) weeks gestational age:

(i) Pain receptors (nociceptors) are present throughout the unborn child's entire body and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty (20) weeks.

(ii) By eight (8) weeks after conception, the unborn child reacts to touch. After twenty (20) weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.

(iii) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

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

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

(vi) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty (20) weeks after conception predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

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

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

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

(x) The position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery.

(i) The state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(j) The compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn

children from the stage of viability, and neither state interest is intended to replace the other; and

(k) Restricting elective abortions at or later than twenty (20) weeks gestational age, as provided by Sections 41-41-131 through 41-41-145, does not impose an undue burden or a substantial obstacle on a woman's ability to have an abortion because:

(i) The State of Mississippi has an interest in protecting maternal health from the outset of pregnancy, and women face substantial risks from abortion as gestation increases;

(ii) The woman has adequate time to decide whether to have an abortion in the first twenty (20) weeks gestation; and

(iii) Sections 41-41-131 through 41-41-145 do not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman or abortions that are performed on unborn children with severe fetal abnormalities.

(2) The Legislature intends that every application of Sections 41-41-131 through 41-41-145 to every individual woman shall be severable from each other. In the unexpected event that the application of Sections 41-41-131 through 41-41-145 is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of Sections 41-41-131 through 41-41-145 to those women shall be severed from the remaining applications of Sections 41-41-131 through 41-41-145

that do not impose an undue burden, and those remaining applications shall remain in force and unaffected, consistent with Section 13 of this act.

SECTION 2. The following shall be codified as Section 41-41-131, Mississippi Code of 1972:

41-41-131. Sections 41-41-131 through 41-41-145 may be cited as the Women's Health Protection and Preborn Pain Act.

SECTION 3. The following shall be codified as Section 41-41-133, Mississippi Code of 1972:

41-41-133. As used in Sections 41-41-131 through 41-41-145:

(a) "Abortion" means the use or prescription of any instrument, medicine, drug or any 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 fetus.

(b) "Gestational age" means the time that has elapsed since the first day of the woman's last menstrual period as determined using methods consistent with standard medical practice in the community.

(c) "Severe fetal abnormality" means a life-threatening physical condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb.

(d) "Major bodily function" includes, but is not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions.

SECTION 4. The following shall be codified as Section 41-41-135, Mississippi Code of 1972:

41-41-135. Except as otherwise provided by Section 41-41-141, a physician may not perform, or induce or attempt to perform or induce an abortion without, before the procedure:

(a) Making a determination of the probable gestational age of the unborn child; or

(b) Possessing and relying on a determination of the probable gestational age of the unborn child made by another physician. The physician making such a determination must do so in accordance with reasonable medical judgment.

SECTION 5. The following shall be codified as Section 41-41-137, Mississippi Code of 1972:

41-41-137. Except as otherwise provided by Section 41-41-141, a person may not perform or induce or attempt to perform or induce an abortion on a woman if it has been determined, by the physician performing, inducing, or attempting to perform or induce the abortion or by another physician on whose determination that physician relies, that the probable gestational age of the unborn child is twenty (20) or more weeks.

SECTION 6. The following shall be codified as Section 41-41-139, Mississippi Code of 1972:

41-41-139. (1) This section applies only to an abortion authorized under Section 41-41-141(1) in which:

(a) The probable gestational age of the unborn child is twenty (20) or more weeks; or

(b) The probable gestational age of the unborn child has not been determined but could reasonably be twenty (20) or more weeks.

(2) A physician performing or inducing an abortion under subsection (1) of this section shall terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive.

SECTION 7. The following shall be codified as Section 41-41-141, Mississippi Code of 1972:

41-41-141. (1) The prohibitions and requirements under Sections 41-41-135, 41-41-137 and 41-41-139(2) do not apply if there exists a condition in which an abortion is necessary to preserve the life of the pregnant woman whose life is endangered by a physical disorder, physical illness or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function (as

specifically defined in Section 3(d) of Section 41-41-133) of the pregnant woman.

(2) The prohibitions and requirements under Sections 41-41-135, 41-41-137 and 41-41-139(2) do not apply to an abortion performed or induced on an unborn child who has a severe fetal abnormality if the mother is informed twenty-four (24) hours before the abortion that supportive care, including, but not limited to, counseling and medical care by maternal-fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, clergy, social workers, and specialty nurses focused on alleviating fear and ensuring that the woman and her family experience the life and death of their child in a comfortable and supportive environment, is available should she choose to carry her pregnancy to term.

SECTION 8. The following shall be codified as Section 41-41-143, Mississippi Code of 1972:

41-41-143. (1) Except as otherwise provided by this section, in a civil or criminal proceeding or action involving an act prohibited under Sections 41-41-131 through 41-41-145, the identity of the woman on whom an abortion has been performed or induced or attempted to be performed or induced is not subject to public disclosure if the woman does not give consent to disclosure.

(2) Unless the court makes a ruling under subsection (3) of this section to allow disclosure of the woman's identity, the

court shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to protect the woman's identity from public disclosure.

(3) A court may order the disclosure of information that is confidential under this section if:

(a) A motion is filed with the court requesting release of the information and a hearing on that request; and

(b) Notice of the hearing is served on each interested party.

(4) If the conditions specified in subsection (3) of this section are fulfilled, then after an in camera hearing, for each order issued under subsection (2) of this section that is challenged by a motion under subsection (3) of this section, the court shall either vacate the order or issue specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists.

SECTION 9. The following shall be codified as Section 41-41-145, Mississippi Code of 1972:

41-41-145. (1) Sections 41-41-131 through 41-41-145 shall be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with

federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save Sections 41-41-131 through 41-41-145 from judicial invalidation. Judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the statutory provision from invalidity.

(2) If any court determines that a provision of Sections 41-41-131 through 41-41-145 is unconstitutionally vague, the court shall interpret the provision, as a matter of state law, to avoid the vagueness problem and shall enforce the provision to the maximum possible extent. If a federal court finds any provision of Sections 41-41-131 through 41-41-145 or its application to any person, group of persons, or circumstances to be unconstitutionally vague and declines to impose the saving construction described by this subsection, the Mississippi Supreme Court shall provide an authoritative construction of the objectionable statutory provisions that avoids the constitutional problems while enforcing the statute's restrictions to the maximum possible extent, and shall agree to answer any question certified from a federal appellate court regarding the statute.

(3) State executive or administrative officials may not decline to enforce Sections 41-41-131 through 41-41-145, or adopt a construction of Sections 41-41-131 through 41-41-145 in a way that narrows their applicability, based on the official's own beliefs about what the state or federal constitution requires,

unless the official is enjoined by a state or federal court from enforcing Sections 41-41-131 through 41-41-145.

(4) Sections 41-41-131 through 41-41-145 may not be construed to authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of Sections 41-41-131 through 41-41-145.

SECTION 10. Section 73-25-29, Mississippi Code of 1972, is amended as follows:

73-25-29. The grounds for the nonissuance, suspension, revocation or restriction of a license or the denial of reinstatement or renewal of a license are:

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

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

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

(4) Conviction of violation of any federal or state law regulating the possession, distribution or use of any narcotic drug or any drug considered a controlled substance under state or federal law, a certified copy of the conviction order or judgment

rendered by the trial court being prima facie evidence thereof, notwithstanding the pendency of any appeal.

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

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

(7) Obtaining or attempting to obtain a license by fraud or deception.

(8) Unprofessional conduct, which includes, but is not limited to:

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

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

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

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

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

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

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

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

(9) The refusal of a licensing authority of another state or jurisdiction to issue or renew a license, permit or certificate to practice medicine in that jurisdiction or the revocation, suspension or other restriction imposed on a license, permit or certificate issued by such licensing authority which prevents or restricts practice in that jurisdiction, a certified copy of the disciplinary order or action taken by the other state or jurisdiction being prima facie evidence thereof, notwithstanding the pendency of any appeal.

(10) Surrender of a license or authorization to practice medicine in another state or jurisdiction or surrender of membership on any medical staff or in any medical or professional association or society while under disciplinary investigation by

any of those authorities or bodies for acts or conduct similar to acts or conduct which would constitute grounds for action as defined in this section.

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

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

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

(14) Violation(s) of the provisions of Sections 41-121-1 through 41-121-9 relating to deceptive advertisement by health care practitioners. This paragraph shall stand repealed on July 1, 2016.

(15) Performing or inducing an abortion on a woman in violation of any provision of Sections 41-41-131 through 41-41-145.

In addition to the grounds specified above, the board shall be authorized to suspend the license of any licensee for being out of compliance with an order for support, as defined in Section 93-11-153. The procedure for suspension of a license for being out of compliance with an order for support, and the procedure for the reissuance or reinstatement of a license suspended for that purpose, and the payment of any fees for the reissuance or reinstatement of a license suspended for that purpose, shall be governed by Section 93-11-157 or 93-11-163, as the case may be. If there is any conflict between any provision of Section 93-11-157 or 93-11-163 and any provision of this chapter, the provisions of Section 93-11-157 or 93-11-163, as the case may be, shall control.

SECTION 11. Sections 41-41-131 through 41-41-145 may not be construed to repeal, by implication or otherwise, any other provision of Mississippi law regulating or restricting abortion not specifically addressed by Sections 41-41-131 through 41-41-145. An abortion that complies with Sections 41-41-131 through 41-41-145 but violates any other law is unlawful. An abortion that complies with another state law but violates Sections 41-41-131 through 41-41-145 is unlawful as provided in Sections 41-41-131 through 41-41-145.

SECTION 12. (1) If some or all of the provisions of Sections 41-41-131 through 41-41-145 are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Mississippi law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; however, whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect.

(2) *Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996)*, in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the Legislature that every provision, section, subsection, paragraph, sentence, clause, phrase or word in Sections 41-41-131 through 41-41-145, and every application of the provisions in Sections 41-41-131 through 41-41-145, are severable from each other. If any application of any provision in Sections 41-41-131 through 41-41-145 to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of Sections 41-41-131 through 41-41-145 shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force,

because it is the Legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of Sections 41-41-131 through 41-41-145 to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not represent an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the Legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The Legislature further declares that it would have passed Sections 41-41-131 through 41-41-145, and each provision, section, subsection, sentence, clause, phrase or word, and all constitutional applications of Sections 41-41-131 through 41-41-145, irrespective of the fact that any provision, section, subsection, paragraph, sentence, clause, phrase or word, or applications of Sections 41-41-131 through 41-41-145, were to be declared unconstitutional or to represent an undue burden.

(3) If Sections 41-41-131 through 41-41-145 are found by any court to be invalid or to impose an undue burden as applied to any person, group of persons, or circumstances, the prohibition shall apply to that person or group of persons or circumstances on the earliest date on which Sections 41-41-131 through 41-41-145 can be constitutionally applied.

(4) If any provisions of Sections 41-41-131 through 41-41-145 is found by any court to be unconstitutionally vague,

then the applications of the provision that do not present constitutional vagueness problems shall be severed and remain in force.

SECTION 13. This act shall take effect and be in force from and after July 1, 2014.

PASSED BY THE HOUSE OF REPRESENTATIVES
April 1, 2014


SPEAKER OF THE HOUSE OF REPRESENTATIVES

PASSED BY THE SENATE
April 1, 2014


PRESIDENT OF THE SENATE

APPROVED BY THE GOVERNOR


GOVERNOR

4/23/14

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