

1 **H. B. 2364**

2  
3 (By Delegates Perry, Reynolds, Skaff, P. Smith,  
4 Sumner and Pino)

5  
6 [Introduced February 13, 2013; referred to the  
7 Committee on Health and Human Resources then the  
8 Judiciary.]

**FISCAL  
NOTE**

9  
10 A BILL to amend the Code of West Virginia, 1931, as amended, by  
11 adding thereto a new article, designated §16-2M-1, §16-2M-2,  
12 §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8,  
13 §16-2M-9 and §16-2M-10, all relating to abortions generally  
14 and protecting unborn children who are capable of experiencing  
15 pain by prohibiting abortion after twenty weeks  
16 post-fertilization except when the mother has a medical  
17 emergency and providing for civil remedies and remedies at  
18 law; stating legislative findings; definitions; creating  
19 felony criminal penalties; and creating a Special Revenue Fund  
20 known as the "West Virginia Pain-Capable Unborn Child  
21 Protection Act Litigation Fund".

22 *Be it enacted by the Legislature of West Virginia:*

23 That the Code of West Virginia, 1931, as amended, be amended  
24 by adding thereto a new article, designated §16-2M-1, §16-2M-2,  
25 §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8,

1 §16-2M-9 and §16-2M-10, all to read as follows:

2 **ARTICLE 2M. THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT.**

3 **§16-2M-1. Legislative findings.**

4 The Legislature makes the following findings:

5 (a) Pain receptors (unborn child's entire body nociceptors)  
6 are present no later than sixteen weeks after fertilization and  
7 nerves link these receptors to the brain's thalamus and subcortical  
8 plate by no later than twenty weeks.

9 (b) By eight weeks after fertilization, the unborn child  
10 reacts to stimuli that would be recognized as painful if applied to  
11 an adult human, for example, by recoiling.

12 (c) In the unborn child, application of painful stimuli is  
13 associated with significant increases in stress hormones known as  
14 the stress response.

15 (d) Subjection to painful stimuli is associated with long-  
16 term harmful neuro developmental effects, such as altered pain  
17 sensitivity and, possibly, emotional, behavioral and learning  
18 disabilities later in life.

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

23 (f) The position, asserted by some medical experts, that the  
24 unborn child is incapable of experiencing pain until a point later

1 in pregnancy than twenty weeks after fertilization predominately  
2 rests on the assumption that the ability to experience pain depends  
3 on the cerebral cortex and requires nerve connections between the  
4 thalamus and the cortex. However, recent medical research and  
5 analysis, especially since 2007, provides strong evidence for the  
6 conclusion that a functioning cortex is not necessary to experience  
7 pain.

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

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

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

19 (j) Consequently, there is substantial medical evidence that  
20 an unborn child is capable of experiencing pain by twenty weeks  
21 after fertilization.

22 (k) It is the purpose of the state to assert a compelling  
23 state interest in protecting the lives of unborn children from the  
24 stage at which substantial medical evidence indicates that they are

1 capable of feeling pain.

2 **§16-2M-2. Definitions.**

3 For purposes of this article, the following words have the  
4 following meanings:

5 (a) "Attempt to perform or induce an abortion" means an act or  
6 an omission of a statutorily required act that, under the  
7 circumstances as the actor believes them to be, constitutes a  
8 substantial step in a course of conduct planned to culminate in the  
9 performance or induction of an abortion in this state in violation  
10 of the provisions of section, five, article nine, chapter sixty-two  
11 of this code.

12 (b) "Fertilization" means the fusion of a human spermatozoon  
13 with a human ovum.

14 (c) "Medical emergency" means a condition that, in reasonable  
15 medical judgment, so complicates the medical condition of a  
16 pregnant woman that it necessitates the immediate abortion of her  
17 pregnancy without first determining post-fertilization age to avert  
18 her death or for which the delay necessary to determine  
19 post-fertilization age will create serious risk of substantial and  
20 irreversible physical impairment of a major bodily function. No  
21 condition may be considered a medical emergency if based on a claim  
22 or diagnosis that the woman will engage in conduct which would  
23 result in her death or in substantial and irreversible physical  
24 impairment of a major bodily function.

1 (d) "Physician" means a person with an unlimited license to  
2 practice medicine or osteopathic medicine under the provisions of  
3 section one, article fourteen, chapter thirty of this code.

4 (e) "Post fertilization age" means the age of the unborn child  
5 as calculated from the fertilization of the human ovum.

6 (f) "Probable post fertilization age of the unborn child"  
7 means, in reasonable medical judgment and with reasonable  
8 probability, the post fertilization age of the unborn child at the  
9 time an abortion is planned to be performed.

10 (g) "Reasonable medical judgment" means a medical judgment  
11 that would be made by a reasonably prudent physician, knowledgeable  
12 about the case and the treatment possibilities with respect to the  
13 medical conditions involved.

14 (h) "Unborn child" or "fetus" each mean an individual organism  
15 of the species homo sapiens from fertilization until live birth.

16 (i) "Woman" means a female human being whether or not she has  
17 reached the age of majority.

18 **§16-2M-3. Determination of post fertilization age.**

19 (a) Except in the case of a medical emergency, no abortion may  
20 be performed or induced or be attempted to be performed or induced  
21 unless the physician performing or inducing it has first made a  
22 determination of the probable post fertilization age of the unborn  
23 child or relied upon such a determination made by another  
24 physician. In making this determination, the physician shall make

1 such inquiries of the woman and perform or cause to be performed  
2 medical examinations and tests as a reasonably prudent physician,  
3 knowledgeable about the case and the medical conditions involved,  
4 would consider necessary to perform in making an accurate diagnosis  
5 with respect to post fertilization age.

6 (b) Failure by any physician to conform to any requirement of  
7 this section constitutes "unprofessional conduct" pursuant to the  
8 provisions of section one, article fourteen, chapter thirty of this  
9 code.

10 **§16-2M-4. Abortion of unborn child of twenty or more weeks post**  
11 **fertilization age prohibited.**

12 (a) No person may perform or induce, or attempt to perform or  
13 induce, an abortion upon a woman when it has been determined, by  
14 the physician performing or inducing or attempting to perform or  
15 induce the abortion or by another physician upon whose  
16 determination that physician relies, that the probable post  
17 fertilization age of the woman's unborn child is twenty or more  
18 weeks unless there is reasonable medical judgment that she has a  
19 condition which so complicates her medical condition as to  
20 necessitate the abortion of her pregnancy to avert her death or to  
21 avert serious risk of substantial and irreversible physical  
22 impairment of a major bodily function, not including psychological  
23 or emotional conditions. No greater risk may be determined to exist  
24 if it is based on a claim or diagnosis that the woman will engage

1 in conduct which she intends to result in her death or in  
2 substantial and irreversible physical impairment of a major bodily  
3 function.

4 (b) When an abortion upon a woman whose unborn child has been  
5 determined to have a probable post fertilization age of twenty or  
6 more weeks is not prohibited by subsection (a) of this section, the  
7 physician shall terminate the pregnancy in the manner which, in  
8 reasonable medical judgment, provides the best opportunity for the  
9 unborn child to survive, unless, in reasonable medical judgment,  
10 termination of the pregnancy in that manner would pose a greater  
11 risk either of the death of the pregnant woman or of the  
12 substantial and irreversible physical impairment of a major bodily  
13 function, not including psychological or emotional conditions, of  
14 the woman than would other available methods. No greater risk may  
15 be determined to exist if it is based on a claim or diagnosis that  
16 the woman will engage in conduct which she intends to result in her  
17 death or in substantial and irreversible physical impairment of a  
18 major bodily function.

19 **§16-2M-5. Reporting.**

20 (a) Any physician who performs or induces or attempts to  
21 perform or induce an abortion shall report to the Division of  
22 Health, on a schedule and in accordance with forms and rules  
23 adopted and promulgated by the Department of Health and Human  
24 Resources, that include:

- 1       (1) Post fertilization age:
- 2       (A) If a determination of probable post fertilization age was  
3 made, whether ultrasound was employed in making the determination,  
4 and the week of probable post fertilization age determined.
- 5       (B) If a determination of probable post fertilization age was  
6 not made, the basis of the determination that a medical emergency  
7 existed.
- 8       (2) Method of abortion:
- 9       (A) Medication abortion such as, but not limited to,  
10 mifepristone/misoprostol or methotrexate/misoprostol;
- 11       (B) Manual vacuum aspiration;
- 12       (C) Electrical vacuum aspiration;
- 13       (D) Dilation and evacuation;
- 14       (E) Combined induction abortion and dilation and evacuation;
- 15       (F) Induction abortion with prostaglandins;
- 16       (G) Induction abortion with intra-amniotic instillation such  
17 as, but not limited to, saline or urea;
- 18       (H) Induction abortion;
- 19       (I) Intact dilation and extraction (partial-birth); or
- 20       (J) Method not listed (specify).
- 21       (3) Whether an intra-fetal injection was used in an attempt to  
22 induce fetal demise such as, but not limited to, intrafetal  
23 potassium chloride or digoxin;
- 24       (4) Age and race of the patient;



1       (5) If the probable post fertilization age was determined to  
2 be twenty or more weeks, the basis of the determination that the  
3 pregnant woman had a condition which so complicated her medical  
4 condition as to necessitate the abortion of her pregnancy to avert  
5 her death or to avert serious risk of substantial and irreversible  
6 physical impairment of a major bodily function, not including  
7 psychological or emotional conditions;

8       (6) If the probable post fertilization age was determined to  
9 be twenty or more weeks, whether the method of abortion used was  
10 one that, in reasonable medical judgment, provided the best  
11 opportunity for the unborn child to survive and, if such a method  
12 was not used, the basis of the determination that termination of  
13 the pregnancy in that manner would pose a greater risk either of  
14 the death of the pregnant woman or of the substantial and  
15 irreversible physical impairment of a major bodily function, not  
16 including psychological or emotional conditions, of the woman than  
17 would other available methods.

18       (b) Reports required by subsection (a) of this section may not  
19 contain the name or the address of the patient whose pregnancy was  
20 terminated nor may the report contain any information identifying  
21 the patient, except that each report shall contain a unique medical  
22 record identifying number to enable matching the report to the  
23 patient's medical records. These reports shall be maintained in  
24 strict confidence by the department, may not be available for

1 public inspection, and may not be made available except:

2 (1) To the Attorney General or a prosecuting attorney with  
3 appropriate jurisdiction pursuant to a criminal investigation;

4 (2) To the Attorney General or a prosecuting attorney pursuant  
5 to a civil investigation of the grounds for an action under  
6 subsection (b), section seven of this article; or

7 (3) Pursuant to court order in an action under section seven  
8 of this article.

9 (c) By June 30 of each year the Department of Health and Human  
10 Resources shall issue a public report providing statistics for the  
11 previous calendar year compiled from all of the reports covering  
12 that year submitted in accordance with this section for each of the  
13 items listed in subsection (a) of this section. Each report shall  
14 provide the statistics for all previous calendar years during which  
15 this section was in effect, adjusted to reflect any additional  
16 information from late or corrected reports. The Department of  
17 Health and Human Resources shall take care to ensure that none of  
18 the information included in the public reports could reasonably  
19 lead to the identification of any pregnant woman upon whom an  
20 abortion was performed, induced or tempted.

21 (d) Any physician who fails to submit a report by the end of  
22 thirty days following the due date is subject to a late fee of  
23 \$1,000 for each additional thirty day period or portion of a thirty  
24 day period the report is overdue. Any physician required to report

1 in accordance with this article who has not submitted a report or  
2 has submitted only an incomplete report more than six months  
3 following the due date, may, in an action brought by the  
4 department, be directed by a court of competent jurisdiction to  
5 submit a complete report within a period stated by court order or  
6 be subject to civil contempt. Intentional or reckless failure by a  
7 physician to conform to any requirement of this section, other than  
8 late filing of a report, constitutes "unprofessional conduct"  
9 pursuant to the provisions of section one, article fourteen,  
10 chapter thirty of this code. Intentional or reckless failure by a  
11 physician to submit a complete report in accordance with a court  
12 order constitutes "unprofessional conduct" pursuant to the  
13 provisions of section one, article fourteen, chapter thirty of this  
14 code. Intentional or reckless falsification of any report required  
15 under this section is a misdemeanor.

16 (e) Within ninety days of the effective date of this article,  
17 the Department of Health and Human Services shall adopt and  
18 promulgate forms and regulations to assist in compliance with this  
19 section. Subsection (a) of this section shall take effect so as to  
20 require reports regarding all abortions performed or induced on and  
21 after the first day of the first calendar month following the  
22 effective date of the rules.

23 **§16-2M-6. Criminal penalties.**

24 Any person who intentionally or recklessly performs or induces

1 or attempts to perform or induce an abortion in violation of this  
2 article is guilty of a felony and, upon conviction thereof, shall  
3 be fined not more than \$5,000 or imprisoned in a state correctional  
4 facility not less than one year, or both fined and imprisoned. No  
5 penalty may be assessed against the woman upon whom the abortion is  
6 performed or induced or attempted to be performed or induced.

7 **\$16-2M-7. Civil remedies.**

8 (a) A woman upon whom an abortion has been performed or  
9 induced in violation of this article, or the father of the unborn  
10 child who was the subject of such an abortion, may maintain an  
11 action against the person who performed or induced the abortion in  
12 intentional or reckless violation of this article for actual and  
13 punitive damages. A woman upon whom an abortion has been attempted  
14 in violation of this article may maintain an action against the  
15 person who attempted to perform or induce the abortion in an  
16 intentional or reckless violation of this article for actual and  
17 punitive damages.

18 (b) A cause of action for injunctive relief against a person  
19 who has intentionally or recklessly violated this article may be  
20 maintained by the woman upon whom an abortion was performed or  
21 induced or attempted to be performed or induced in violation of  
22 this article, by: (1) A person who is the spouse, parent, sibling  
23 or guardian of, or a current or former licensed health care  
24 provider of, the woman upon whom an abortion has been performed or

1 induced or attempted to be performed or induced in violation of  
2 this article; (2) by a prosecuting attorney with appropriate  
3 jurisdiction; or (3) by the Attorney General. The injunction  
4 prevents the abortion provider from performing or inducing or  
5 attempting to perform or induce further abortions in violation of  
6 this article in this state.

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

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

15 (e) No damages or attorney's fee may be assessed against the  
16 woman upon whom an abortion was performed or induced or attempted  
17 to be performed or induced except in accordance with subsection (d)  
18 of this section.

19 **§16-2M-8. Protection of privacy in court proceedings.**

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

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

18 **§16-2M-9. Litigation defense fund.**

19 (a) There is created a Special Revenue Fund known as the "West  
20 Virginia Pain-Capable Unborn Child Protection Act Litigation Fund"  
21 for the purpose of providing funds to pay for any costs and  
22 expenses incurred by the state Attorney General in relation to  
23 actions surrounding defense of this law.

24 (b) The fund shall be maintained by the Office of the Attorney

1 General.

2 (c) The fund shall consist of:

3 (1) Appropriations made to the account by the Legislature;

4 and

5 (2) Donations, gifts or grants made to the account.

6 (d) The fund shall retain the interest income derived from the  
7 moneys credited to the fund.

8 **§16-2M-10. Construction.**

9 This article does not repeal, by implication or otherwise, any  
10 otherwise applicable provision of West Virginia law regulating or  
11 restricting abortion. An abortion that complies with this article  
12 but violates the provisions of or any otherwise applicable  
13 provision of West Virginia law is unlawful as provided in that  
14 provision. An abortion that complies with the provisions of or any  
15 otherwise applicable provision of West Virginia law regulating or  
16 restricting abortion but violates this article is unlawful as  
17 provided in this article. If some or all of the provisions of this  
18 article are temporarily or permanently restrained or enjoined by  
19 judicial order, all other provisions of West Virginia law  
20 regulating or restricting abortion shall be enforced as though the  
21 restrained or enjoined provisions had not been adopted: *Provided,*  
22 That whenever the temporary or permanent restraining order of  
23 injunction is stayed or dissolved or otherwise ceases to have  
24 effect, the provisions shall have full force and effect.

NOTE: The purpose of this bill is to protect unborn children who are capable of experiencing pain by prohibiting abortion after twenty weeks post-fertilization except when the mother has a medical emergency, to provide for civil remedies and remedies at law, and to call for reporting.

This article is new; therefore, it has been completely underscored.