

1 **H. B. 4414**

2
3 (By Delegates Perry, Shaver, Reynolds, Hall,
4 Skaff, Smith, Sumner, Walker, Pino,
5 Frazier and Carmichael)

6 [Introduced February 3, 2012; referred to the
7 Committee on Health and Human Resources then the Judiciary.]

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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 post-
16 fertilization, except when the mother has a medical emergency
17 and providing for civil remedies and remedies at law; stating
18 legislative findings; definitions; creating felony criminal
19 penalties; and creating a Special Revenue Fund known as the
20 "West Virginia Pain-Capable Unborn Child Protection Act
21 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 §16-2M3, §16-2M-4, §16-2M-5, §16-2M-6, §16-2M-7, §16-2M-8, §16-2M-9

1 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 throughout the by no later than sixteen weeks after
7 fertilization and nerves link these receptors to the brain's
8 thalamus and subcortical 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
11 to 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 term
16 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
3 depends on the cerebral cortex and requires nerve connections
4 between the thalamus and the cortex. However, recent medical
5 research and analysis, especially since 2007, provides strong
6 evidence for the conclusion that a functioning cortex is not
7 necessary to experience 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
13 the 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,
6 or 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
18 avert 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
22 claim or diagnosis that the woman will engage in conduct which
23 would result in her death or in substantial and irreversible
24 physical 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 what, in reasonable medical judgment, will with reasonable
8 probability be the post-fertilization age of the unborn child at
9 the 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 such medical examinations and tests as a reasonably prudent
3 physician, knowledgeable about the case and the medical conditions
4 involved, would consider necessary to perform in making an accurate
5 diagnosis 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**
11 **post-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
17 post-fertilization age of the woman's unborn child is twenty or
18 more weeks, unless there is reasonable medical judgment that she
19 has a 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 such greater risk may be determined to
24 exist if it is based on a claim or diagnosis that the woman will

1 engage 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 such greater
15 risk may be determined to exist if it is based on a claim or
16 diagnosis that the woman will engage in conduct which she intends
17 to result in her death or in substantial and irreversible physical
18 impairment of a 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: Which of the following was employed:
- 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, other;
- 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 or not the method of abortion
10 used was one that, in reasonable medical judgment, provided the
11 best opportunity for the unborn child to survive and, if such a
12 method was not used, the basis of the determination that
13 termination of the pregnancy in that manner would pose a greater
14 risk either of the death of the pregnant woman or of the
15 substantial and irreversible physical impairment of a major bodily
16 function, not including psychological or emotional conditions, of
17 the woman than 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 other information
21 identifying the patient, except that each report shall contain a
22 unique medical record identifying number, to enable matching the
23 report to the patient's medical records. These reports shall be
24 maintained in strict confidence by the department, may not be

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

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

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

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

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

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

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

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

24 **§16-2M-6. Criminal penalties.**

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

8 **§16-2M-7. Civil remedies.**

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

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

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

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

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

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

20 **§16-2M-8. Protection of privacy in court proceedings.**

21 In every civil or criminal proceeding or action brought under
22 this article, the court shall rule whether the anonymity of any
23 woman upon whom an abortion has been performed or induced or
24 attempted to be performed or induced shall be preserved from public

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

20 **§16-2M-9. Litigation defense fund.**

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

1 actions surrounding defense of this law.

2 (b) The fund shall be maintained by the Office of the Attorney
3 General.

4 (c) The fund shall consist of: (1) Appropriations made to the
5 account by the Legislature; and (2) any donations, gifts or grants
6 made to the account.

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

9 **§16-2M-10. Construction.**

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

1 ceases to have effect, the provisions shall have full force and
2 effect.

NOTE: The purpose of this bill is to protect unborn children who are capable of experiencing pain by prohibiting abortion after 20 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.