

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 2568**

4 (By Delegates Sobonya, Arvon, Kessinger, Rowan, Summers,
5 Border, Blair, Espinosa, Waxman, Moye and Eldridge)
6

7 (Originating in the House Committee on the Judiciary)

8 [January 30, 2015]
9

10 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
11 designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6 and
12 §16-2M-7, all relating to prohibiting certain abortions; stating legislative findings; defining
13 terms; requiring a calculation of gestational age before an abortion is performed or attempted,
14 except in certain cases; prohibiting abortions when the gestational age of the fetus reaches
15 pain capable gestational age; creating certain exceptions to that prohibition; requiring a
16 physician performing an abortion of a fetus that has reached pain capable gestational age to
17 use the process most likely to allow the fetus to survive, with certain exceptions; requiring
18 reporting of all completed abortions and that the reports contain certain information
19 regarding the abortion; requiring an annual public report that provides statistics of the
20 abortions while keeping the identities of the persons involved confidential; deeming
21 violations by physicians and other licensed medical practitioners to be a breach of the
22 standard of care and outside the scope of practice that is permitted by law; allowing for loss
23 of license to practice for violation; constituting violations for nonphysician and nonlicensed

1 medical practitioners as unauthorized practice of medicine and subject to criminal penalties;
2 preserving existing legal remedies for violations; and clarifying that no penalty may be
3 assessed against a patient; and making provisions severable.

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

5 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
6 article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6 and
7 §16-2M-7, all to read as follows:

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

9 **§16-2M-1. Legislative findings.**

10 The Legislature makes the following findings:

11 (1) Pain receptors (unborn child's entire body nociceptors) are present no later than sixteen
12 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate
13 by no later than twenty weeks.

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

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

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

21 (5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered
22 and is associated with a decrease in stress hormones compared to their level when painful stimuli

1 is applied without the anesthesia.

2 (6) The position, asserted by some medical experts, that the unborn child is incapable of
3 experiencing pain until a point later in pregnancy than twenty weeks after fertilization, which point
4 in the pregnancy is generally consistent with twenty-two weeks following the woman's last
5 menstrual cycle, predominately rests on the assumption that the ability to experience pain depends
6 on the cerebral cortex and requires nerve connections between the thalamus and the cortex.
7 However, recent medical research and analysis, especially since 2007, provides strong evidence for
8 the conclusion that a functioning cortex is not necessary to experience pain.

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

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

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

16 (10) Consequently, there is substantial medical evidence that an unborn child is capable of
17 experiencing pain by pain capable gestational age as defined in subsection (7), section two, article
18 two-m of this chapter.

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

22 **§16-2M-2. Definitions.**

1 For purposes of this article:

2 (1) "Abortion" means abortion as that term is defined in section two, article two-f of this
3 chapter.

4 (2) "Attempt to perform or induce an abortion" means an act or an omission of a statutorily
5 required act that, under the circumstances as the person believes them to be, constitutes a substantial
6 step in a course of conduct planned to culminate in the performance or induction of an abortion in
7 this state in violation of the applicable provisions of this code.

8 (3) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

9 (4) "Fetus" means the developing young in the uterus, specifically the unborn offspring in
10 the postembryonic period from nine weeks after fertilization until birth.

11 (5) "Medical emergency" means a condition that, on the basis of a reasonably prudent
12 physician's reasonable medical judgment, so complicates the medical condition of a pregnant female
13 that it necessitates the immediate abortion of her pregnancy without first determining gestational age
14 to avert her death or for which the delay necessary to determine gestational age will create serious
15 risk of substantial and irreversible physical impairment of a major bodily function, not including
16 psychological or emotional conditions. No condition may be deemed a medical emergency if based
17 on a claim or diagnosis that the woman will engage in conduct which she intends to result in her
18 death or in substantial and irreversible physical impairment of a major bodily function.

19 (6) "Nonmedically viable fetus" means a fetus that contains sufficient lethal fetal anomalies
20 so as to render the fetus medically futile or incompatible with life outside the womb in the reasonable
21 medical judgment of a reasonably prudent physician.

22 (7) "Pain capable gestational age" means twenty-two weeks since the first day of the

1 woman's last menstrual period. The pain capable gestational age defined herein is generally
2 consistent with the time that is twenty weeks after fertilization.

3 (8) "Physician" means a person with an unrestricted license to practice allopathic medicine
4 pursuant to article three of chapter thirty of this code or osteopathic medicine pursuant to article
5 fourteen, chapter thirty of this code.

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

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

12 **§16-2M-3. Determination of gestational age.**

13 Except in the case of a medical emergency or a nonmedically viable fetus, no abortion may
14 be performed or induced or be attempted to be performed or induced unless the physician performing
15 or inducing it has first made a determination of the probable gestational age of the fetus or relied
16 upon such a determination made by another physician. In making this determination, the physician
17 shall make inquiries of the patient and perform or cause to be performed medical examinations and
18 tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions
19 involved, would consider necessary to perform in making an accurate diagnosis with respect to
20 gestational age.

21 **§16-2M-4. Abortion of fetus of pain capable gestational age prohibited.**

22 (a) No person may perform or induce, or attempt to perform or induce, an abortion when it

1 has been determined, by the physician performing or inducing or attempting to perform or induce
2 the abortion or by another physician upon whose determination that physician relies, that the
3 probable gestational age of the fetus has reached the pain capable gestational age, unless in the
4 reasonable medical judgment of a reasonably prudent physician there exists a nonmedically viable
5 fetus or the patient has a condition that, on the basis of a reasonably prudent physician's reasonable
6 medical judgment, so complicates her medical condition as to necessitate the abortion of her
7 pregnancy to avert her death or to avert serious risk of substantial and irreversible physical
8 impairment of a major bodily function, not including psychological or emotional conditions. No
9 condition may be deemed a medical emergency if based on a claim or diagnosis that the woman will
10 engage in conduct which she intends to result in her death or in substantial and irreversible physical
11 impairment of a major bodily function.

12 (b) When an abortion upon a patient whose fetus has been determined to have a probable
13 gestational age that has reached the pain capable gestational age is not prohibited by subsection (a)
14 of this section, the physician shall terminate the pregnancy in the manner which, in reasonable
15 medical judgment, provides the best opportunity for the fetus to survive, unless, in reasonable
16 medical judgment, termination of the pregnancy in that manner would pose a greater risk either of
17 the death of the patient or of the substantial and irreversible physical impairment of a major bodily
18 function of the patient than would other available methods.

19 **§16-2M-5. Reporting.**

20 (a) Any physician who performs or induces an abortion shall report to the Bureau for Public
21 Health. The reporting shall be on a schedule and on forms set forth by the Secretary of the
22 Department of Health and Human Resources annually, no later than December 31. The reports shall

1 include the following information:

2 (1) Probable gestational age:

3 (A) If a determination of probable gestational age was made, whether ultrasound was
4 employed in making the determination, and the week of probable gestational age determined.

5 (B) If a determination of probable gestational age was not made, the basis of the
6 determination that a medical emergency existed or that there existed a nonmedically viable fetus.

7 (2) Method of abortion;

8 (3) If the probable gestational age was determined to have reached the pain capable
9 gestational age, the basis of the determination that there existed a nonmedically viable fetus or that
10 the patient had a condition which so complicated the medical condition of the patient that it
11 necessitated the abortion of her pregnancy in order to avert her death or avert a serious risk of
12 substantial and irreversible physical impairment of a major bodily function; and

13 (4) If the probable gestational age was determined to have reached the pain capable
14 gestational age, whether the method of abortion used was one that, in reasonable medical judgment,
15 provided the best opportunity for the fetus to survive and, if such a method was not used, the basis
16 of the determination that termination of the pregnancy in that manner would pose a greater risk either
17 of the death of the patient or of the substantial and irreversible physical impairment of a major bodily
18 function of the patient than would other available methods.

19 (b) Reports required by subsection (a) of this section may not contain the name or the address
20 of the patient whose pregnancy was terminated nor may the report contain any information
21 identifying the patient. These reports shall be maintained in strict confidence by the department, may
22 not be available for public inspection, and may not be made available except pursuant to court order.

1 (c) Beginning June 30, 2016, and annually after that, the Department of Health and Human
2 Resources shall issue a public report providing statistics for the previous calendar year compiled
3 from all of the reports covering that year submitted in accordance with this section for each of the
4 items listed in subsection (a) of this section. Each report shall provide the statistics for all previous
5 calendar years from the effective date of this section, adjusted to reflect any additional information
6 from late or corrected reports. The Department of Health and Human Resources shall take care to
7 ensure that none of the information included in the public reports could reasonably lead to the
8 identification of any patient upon whom an abortion was performed or induced.

9 **§16-2M-6. Penalties.**

10 (a) Any physician or other licensed medical practitioner who intentionally or recklessly
11 performs or induces an abortion in violation of this article is considered to have acted outside the
12 scope of practice permitted by law or otherwise in breach of the standard of care owed to patients,
13 and is subject to discipline from the applicable licensure board for that conduct, including, but not
14 limited to, loss of professional license to practice.

15 (b) Any person, not subject to subsection (a) of this section, who intentionally or recklessly
16 performs or induces an abortion in violation of this article is considered to have engaged in the
17 unauthorized practice of medicine in violation of section thirteen, article three, chapter thirty of this
18 code, and upon conviction, subject to the penalties contained in that section.

19 (c) In addition to the penalties set forth in subsections (a) and (b) of this section, a patient
20 may seek any remedy otherwise available to such patient by applicable law.

21 (d) No penalty may be assessed against any patient upon whom an abortion is performed or
22 induced or attempted to be performed or induced.

1 **§16-2M-7. Severability.**

2 If any one or more provisions, sections, subsections, sentences, clauses, phrases or words of
3 this article or the application thereof to any person or circumstance is found to be unconstitutional
4 or temporarily or permanently restrained or enjoined by judicial order, or both, the same is declared
5 to be severable and the balance of this article shall remain effective notwithstanding such judicial
6 decision, including for all other applications of each of the provisions, sections, subsections,
7 sentences, clauses, phrases or words of this article: *Provided*, That whenever any judicial decision
8 is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and
9 effect.