

COMMITTEE SUBSTITUTE

FOR

# **H. B. 2568**

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(BY DELEGATES SOBONYA, ARVON, KESSINGER,  
ROWAN, SUMMERS, BORDER, BLAIR, ESPINOSA,  
WAXMAN, MOYE AND ELDRIDGE)

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(Originating in the House Committee on the Judiciary)

[January 30, 2015]

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A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §16-2M-1, §16-2M-2, §16-2M-3, §16-2M-4, §16-2M-5, §16-2M-6 and §16-2M-7, all relating to prohibiting certain abortions; stating legislative findings; defining terms; requiring a calculation of gestational age before an abortion is performed or attempted, except in certain cases; prohibiting abortions when the gestational age of the fetus reaches pain capable gestational age; creating certain exceptions

to that prohibition; requiring a physician performing an abortion of a fetus that has reached pain capable gestational age to use the process most likely to allow the fetus to survive, with certain exceptions; requiring reporting of all completed abortions and that the reports contain certain information regarding the abortion; requiring an annual public report that provides statistics of the abortions while keeping the identities of the persons involved confidential; deeming violations by physicians and other licensed medical practitioners to be a breach of the standard of care and outside the scope of practice that is permitted by law; allowing for loss of license to practice for violation; constituting violations for nonphysician and nonlicensed medical practitioners as unauthorized practice of medicine and subject to criminal penalties; preserving existing legal remedies for violations; and clarifying that no penalty may be assessed against a patient; and making provisions severable.

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

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

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

**§16-2M-1. Legislative findings.**

1        The Legislature makes the following findings:

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

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

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

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

16       (5) For the purposes of surgery on unborn children, fetal  
17       anesthesia is routinely administered and is associated with a

18 decrease in stress hormones compared to their level when painful  
19 stimuli is applied without the anesthesia.

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

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

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

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

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

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

**§16-2M-2. Definitions.**

1 For purposes of this article:

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

4 (2) “Attempt to perform or induce an abortion” means an act  
5 or an omission of a statutorily required act that, under the  
6 circumstances as the person believes them to be, constitutes a

7 substantial step in a course of conduct planned to culminate in  
8 the performance or induction of an abortion in this state in  
9 violation of the applicable provisions of this code.

10 (3) “Fertilization” means the fusion of a human  
11 spermatozoon with a human ovum.

12 (4) “Fetus” means the developing young in the uterus,  
13 specifically the unborn offspring in the postembryonic period  
14 from nine weeks after fertilization until birth.

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

26 result in her death or in substantial and irreversible physical  
27 impairment of a major bodily function.

28 (6) “Nonmedically viable fetus” means a fetus that contains  
29 sufficient lethal fetal anomalies so as to render the fetus  
30 medically futile or incompatible with life outside the womb in  
31 the reasonable medical judgment of a reasonably prudent  
32 physician.

33 (7) “Pain capable gestational age” means twenty-two weeks  
34 since the first day of the woman’s last menstrual period. The  
35 pain capable gestational age defined herein is generally  
36 consistent with the time that is twenty weeks after fertilization.

37 (8) “Physician” means a person with an unrestricted license  
38 to practice allopathic medicine pursuant to article three of  
39 chapter thirty of this code or osteopathic medicine pursuant to  
40 article fourteen, chapter thirty of this code.

41 (9) “Probable gestational age of the fetus” means, in  
42 reasonable medical judgment and with reasonable probability,  
43 the gestational age of the fetus at the time an abortion is planned  
44 to be performed.

45       (10) “Reasonable medical judgment” means a medical  
46 judgment that would be made by a reasonably prudent physician,  
47 knowledgeable about the case and the treatment possibilities  
48 with respect to the medical conditions involved.

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

1       Except in the case of a medical emergency or a  
2 nonmedically viable fetus, no abortion may be performed or  
3 induced or be attempted to be performed or induced unless the  
4 physician performing or inducing it has first made a  
5 determination of the probable gestational age of the fetus or  
6 relied upon such a determination made by another physician. In  
7 making this determination, the physician shall make inquiries of  
8 the patient and perform or cause to be performed medical  
9 examinations and tests as a reasonably prudent physician,  
10 knowledgeable about the case and the medical conditions  
11 involved, would consider necessary to perform in making an  
12 accurate diagnosis with respect to gestational age.

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

1       (a) No person may perform or induce, or attempt to perform  
2 or induce, an abortion when it has been determined, by the



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

19 (b) When an abortion upon a patient whose fetus has been  
20 determined to have a probable gestational age that has reached  
21 the pain capable gestational age is not prohibited by subsection

22 (a) of this section, the physician shall terminate the pregnancy in  
23 the manner which, in reasonable medical judgment, provides the  
24 best opportunity for the fetus to survive, unless, in reasonable  
25 medical judgment, termination of the pregnancy in that manner  
26 would pose a greater risk either of the death of the patient or of  
27 the substantial and irreversible physical impairment of a major  
28 bodily function of the patient than would other available  
29 methods.

**§16-2M-5. Reporting.**

1 (a) Any physician who performs or induces an abortion shall  
2 report to the Bureau for Public Health. The reporting shall be on  
3 a schedule and on forms set forth by the Secretary of the  
4 Department of Health and Human Resources annually, no later  
5 than December 31. The reports shall include the following  
6 information:

7 (1) Probable gestational age:

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

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

14 (2) Method of abortion;

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

23 (4) If the probable gestational age was determined to have  
24 reached the pain capable gestational age, whether the method of  
25 abortion used was one that, in reasonable medical judgment,  
26 provided the best opportunity for the fetus to survive and, if such  
27 a method was not used, the basis of the determination that  
28 termination of the pregnancy in that manner would pose a  
29 greater risk either of the death of the patient or of the substantial

30 and irreversible physical impairment of a major bodily function  
31 of the patient than would other available methods.

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

39 (c) Beginning June 30, 2016, and annually after that, the  
40 Department of Health and Human Resources shall issue a public  
41 report providing statistics for the previous calendar year  
42 compiled from all of the reports covering that year submitted in  
43 accordance with this section for each of the items listed in  
44 subsection (a) of this section. Each report shall provide the  
45 statistics for all previous calendar years from the effective date  
46 of this section, adjusted to reflect any additional information  
47 from late or corrected reports. The Department of Health and  
48 Human Resources shall take care to ensure that none of the  
49 information included in the public reports could reasonably lead

50 to the identification of any patient upon whom an abortion was  
51 performed or induced.

**§16-2M-6. Penalties.**

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

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

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

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

**§16-2M-7. Severability.**

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



