

1 **Senate Bill No. 388**

2 (By Senators Prezioso, Blair, Walters, Carmichael and Cole)

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4 [Introduced January 21, 2014; referred to the Committee on the
5 Judiciary; and then to the Committee on Finance.]

6 _____
7 **FISCAL
NOTE**

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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, §16-2M-10 and §16-2M-11, all relating to creating
14 the West Virginia Pain-Capable Unborn Child Protection Act;
15 asserting a compelling state interest in protecting the lives
16 of unborn children from the stage at which substantial medical
17 evidence indicates that they are capable of feeling pain;
18 short title; legislative findings; definitions; determination
19 of post-fertilization age; prohibiting abortion of unborn
20 child of twenty or more weeks post-fertilization age;
21 requiring reports from physicians who perform or attempt to
22 perform abortions; criminal penalties; civil remedies;
23 protection of privacy in court proceedings; creating a

1 litigation defense fund; and stating how article is to be
2 construed.

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

4 That the Code of West Virginia, 1931, as amended, be amended
5 by adding thereto a new article, designated §16-2M-1, §16-2M-2,
6 §16-2M-3, §16-2M-4, §16-2M-5, §16-2m-6, §16-2M-7, §16-2M-8,
7 §16-2M-9, §16-2M-10 and §16-2M-11, all to read as follows:

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

9 **§16-2M-1. Short title.**

10 This article may be cited as the "West Virginia Pain-Capable
11 Unborn Child Protection Act".

12 **§16-2M-2. Legislative findings.**

13 The Legislature makes the following findings:

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

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

22 (c) In the unborn child, application of such painful stimuli
23 is associated with significant increases in stress hormones known

1 as the stress response.

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

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

10 (f) The position, asserted by some medical experts, that the
11 unborn child is incapable of experiencing pain until a point later
12 in pregnancy than twenty weeks after fertilization predominately
13 rests on the assumption that the ability to experience pain depends
14 on the cerebral cortex and requires nerve connections between the
15 thalamus and the cortex. However, recent medical research and
16 analysis, especially since 2007, provide strong evidence for the
17 conclusion that a functioning cortex is not necessary to experience
18 pain.

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

22 (h) In adults, stimulation or ablation of the cerebral cortex
23 does not alter pain perception, while stimulation or ablation of

1 the thalamus does.

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

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

14 (k) Consequently, there is substantial medical evidence that
15 an unborn child is capable of experiencing pain by twenty weeks
16 after fertilization.

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

21 (m) West Virginia's compelling state interest in protecting
22 the lives of unborn children from the stage at which substantial
23 medical evidence indicates that they are capable of feeling pain is

1 intended to be separate from and independent of West Virginia's
2 compelling state interest in protecting the lives of unborn
3 children from the stage of viability, and neither state interest is
4 intended to replace the other.

5 (n) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in
6 which in the context of determining the severability of a state
7 statute regulating abortion the United States Supreme Court noted
8 that an explicit statement of legislative intent specifically made
9 applicable to a particular statute is of greater weight than a
10 general savings or severability clause, it is the intent of the
11 state that if any one or more provisions, sections, subsections,
12 sentences, clauses, phrases or words of this article or the
13 application thereof to any person or circumstance is found to be
14 unconstitutional, the same is hereby declared to be severable and
15 the balance of this article shall remain effective notwithstanding
16 such unconstitutionality. Moreover, the state declares that it
17 would have passed this article and each provision, section,
18 subsection, sentence, clause, phrase or word thereof, irrespective
19 of the fact that any one or more provisions, sections, subsections,
20 sentences, clauses, phrases or words or any of their applications,
21 were to be declared unconstitutional.

22 **§16-2M-3. Definitions.**

23 For purposes of this article:

1 (a) "Abortion" means the use or prescription of any
2 instrument, medicine, drug or any other substance or device to
3 terminate the pregnancy of a woman known to be pregnant with an
4 intention other than to increase the probability of a live birth,
5 to preserve the life or health of the child after live birth or to
6 remove a dead unborn child who died as the result of natural causes
7 in utero, accidental trauma or a criminal assault on the pregnant
8 woman or her unborn child and which causes the premature
9 termination of the pregnancy.

10 (b) "Attempt to perform or induce an abortion" means an act,
11 or an omission of a statutorily required act that, under the
12 circumstances as the actor believes them to be, constitutes a
13 substantial step in a course of conduct planned to culminate in the
14 performance or induction of an abortion in this state in violation
15 of this article.

16 (c) "Department" means the Department of Health and Human
17 Resources.

18 (d) "Fertilization" means the fusion of a human spermatozoon
19 with a human ovum.

20 (e) "Medical emergency" means a condition that, in reasonable
21 medical judgment, so complicates the medical condition of the
22 pregnant woman that it necessitates the immediate abortion of her
23 pregnancy without first determining post-fertilization age to avert

1 her death or for which the delay necessary to determine
2 post-fertilization age will create serious risk of substantial and
3 irreversible physical impairment of a major bodily function, not
4 including psychological or emotional conditions. No condition may
5 be considered a medical emergency if based on a claim or diagnosis
6 that the woman will engage in conduct which she intends to result
7 in her death or in substantial and irreversible physical impairment
8 of a major bodily function.

9 (f) "Physician" means any person licensed to practice medicine
10 and surgery or osteopathic medicine and surgery in this state.

11 (g) "Post-fertilization age" means the age of the unborn child
12 as calculated from the fusion of a human spermatozoon with a human
13 ovum.

14 (h) "Probable post-fertilization age of the unborn child" means
15 what, in reasonable medical judgment, will with reasonable
16 probability be the post-fertilization age of the unborn child at
17 the time the abortion is planned to be performed or induced.

18 (i) "Reasonable medical judgment" means a medical judgment that
19 would be made by a reasonably prudent physician, knowledgeable
20 about the case and the treatment possibilities with respect to the
21 medical conditions involved.

22 (j) "Unborn child" or "fetus" each mean an individual organism
23 of the species homo sapiens from fertilization until live birth.

1 (k) "Woman" means a female human being whether or not she has
2 reached the age of majority.

3 **§16-2M-4. Determination of post-fertilization age.**

4 (a) Except in the case of a medical emergency, an abortion may
5 not be performed or induced or be attempted to be performed or
6 induced unless the physician performing or inducing it has first
7 made a determination of the probable post-fertilization age of the
8 unborn child or relied upon such a determination made by another
9 physician. In making such a determination, the physician shall make
10 such inquiries of the woman and perform or cause to be performed
11 such medical examinations and tests as a reasonably prudent
12 physician, knowledgeable about the case and the medical conditions
13 involved, would consider necessary to perform in making an accurate
14 diagnosis with respect to post-fertilization age.

15 (b) Failure by any physician to conform to any requirement of
16 this section constitutes "unprofessional conduct" pursuant to
17 section fourteen(7), article, chapter thirty of this code.

18 **§16-2M-5. Abortion of unborn child of twenty or more weeks post-**
19 **fertilization age prohibited.**

20 (a) No person may perform or induce or attempt to perform or
21 induce an abortion upon a woman when it has been determined, by the
22 physician performing or inducing or attempting to perform or induce
23 the abortion or by another physician upon whose determination that

1 physician relies, that the probable post-fertilization age of the
2 woman's unborn child is twenty or more weeks, unless, in reasonable
3 medical judgment, she has a condition which so complicates her
4 medical condition as to necessitate the abortion of her pregnancy
5 to avert her death or to avert serious risk of substantial and
6 irreversible physical impairment of a major bodily function, not
7 including psychological or emotional conditions. No such greater
8 risk may be considered to exist if it is based on a claim or
9 diagnosis that the woman will engage in conduct which she intends
10 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 woman whose unborn child has been
13 determined to have a probable post-fertilization age of twenty or
14 more weeks is not prohibited by subsection (a) of this section, the
15 physician shall terminate the pregnancy in the manner which, in
16 reasonable medical judgment, provides the best opportunity for the
17 unborn child to survive, unless, in reasonable medical judgment,
18 termination of the pregnancy in that manner would pose a greater
19 risk either of the death of the pregnant woman or of the
20 substantial and irreversible physical impairment of a major bodily
21 function, not including psychological or emotional conditions, of
22 the woman than would other available methods. No such greater risk
23 may be considered to exist if it is based on a claim or diagnosis

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

4 **§16-2m-6. Reporting.**

5 (a) Any physician who performs or induces or attempts to
6 perform or induce an abortion shall report to the department, on a
7 schedule and in accordance with forms and regulations adopted and
8 promulgated by the department, that include:

9 (1) Post-fertilization age:

10 (i) If a determination of probable post-fertilization age was
11 made, whether ultrasound was employed in making the determination,
12 and the week of probable post-fertilization age determined.

13 (ii) If a determination of probable post-fertilization age was
14 not made, the basis of the determination that a medical emergency
15 existed.

16 (2) Method of abortion: which of the following was employed:

17 (i) Medication abortion (such as, but not limited to,
18 mifepristone/misoprostol or methotrexate/misoprostol);

19 (ii) Manual vacuum aspiration;

20 (iii) Electrical vacuum aspiration;

21 (iv) Dilation and evacuation;

22 (v) Combined induction abortion and dilation and evacuation

23 (vi) Induction abortion with prostaglandins;

1 (vii) Induction abortion with intra-amniotic instillation
2 (such as, but not limited to, saline or urea);

3 (viii) Induction abortion, other;

4 (ix) Intact dilation and extraction (partial-birth); or

5 (x) Method not listed (specify).

6 (3) Whether an intra-fetal injection was used in an attempt to
7 induce fetal demise (such as, but not limited to, intrafetal
8 potassium chloride or digoxin).

9 (4) Age and race of the patient.

10 (5) If the probable post-fertilization age was determined to
11 be twenty or more weeks, the basis of the determination that the
12 pregnant woman had a condition which so complicated her medical
13 condition as to necessitate the abortion of her pregnancy to avert
14 her death or to avert serious risk of substantial and irreversible
15 physical impairment of a major bodily function, not including
16 psychological or emotional conditions.

17 (6) If the probable post-fertilization age was determined to
18 be twenty or more weeks, whether or not the method of abortion used
19 was one that, in reasonable medical judgment, provided the best
20 opportunity for the unborn child to survive and, if such a method
21 was not used, the basis of the determination that termination of
22 the pregnancy in that manner would pose a greater risk either of
23 the death of the pregnant woman or of the substantial and

1 irreversible physical impairment of a major bodily function, not
2 including psychological or emotional conditions, of the woman than
3 would other available methods.

4 (b) Reports required by subsection (a) of this section may not
5 contain the name or the address of the patient whose pregnancy was
6 terminated, nor may the report contain any other information
7 identifying the patient, except that each report shall contain a
8 unique medical record identifying number, to enable matching the
9 report to the patient's medical records. These reports shall be
10 maintained in strict confidence by the department, may not be
11 available for public inspection and may not be made available
12 except:

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

15 (2) To the Attorney General or a prosecuting attorney pursuant
16 to a civil investigation of the grounds for an action under
17 subsection (b) of section eight of this article; or

18 (3) Pursuant to court order in an action under section eight
19 of this article.

20 (c) By June 30 of each year the department shall issue a
21 public report providing statistics for the previous calendar year
22 compiled from all of the reports covering that year submitted in
23 accordance with this section for each of the items listed in

1 subdivision (1) of this section. Each such report shall also
2 provide the statistics for all previous calendar years during which
3 this section was in effect, adjusted to reflect any additional
4 information from late or corrected reports. The department shall
5 take care to ensure that none of the information included in the
6 public reports could reasonably lead to the identification of any
7 pregnant woman upon whom an abortion was performed, induced or
8 attempted.

9 (d) Any physician who fails to submit a report by the end of
10 thirty days following the due date is subject to a late fee of
11 \$1,000 for each additional thirty-day period or portion of a
12 thirty-day period the report is overdue. Any physician required to
13 report in accordance with this article who has not submitted a
14 report, or has submitted only an incomplete report, more than six
15 months following the due date may, in an action brought by the
16 department, be directed by a court of competent jurisdiction to
17 submit a complete report within a period stated by court order or
18 be subject to civil contempt. Intentional or reckless failure by
19 any physician to conform to any requirement of this section, other
20 than late filing of a report, constitutes "unprofessional conduct"
21 pursuant to section fourteen, article seven, chapter thirty of this
22 code. Intentional or reckless failure by any physician to submit
23 a complete report in accordance with a court order constitutes

1 "unprofessional conduct" pursuant to section fourteen, article
2 seven, chapter thirty of this code. Intentional or reckless
3 falsification of any report required under this section is a
4 misdemeanor as provided in article three, chapter thirty of this
5 code.

6 (e) Within ninety days of the effective date of this article,
7 the Department of Health and Human Services shall adopt and
8 promulgate forms and rules to assist in compliance with this
9 section. Subsection (a) of this section shall take effect so as to
10 require reports regarding all abortions performed or induced on and
11 after the first day of the first calendar month following the
12 effective date of the rules.

13 **§16-2M-7. Criminal penalties.**

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

21 **§16-2M-8. Civil remedies.**

22 (a) Any woman upon whom an abortion has been performed or
23 induced in violation of this article, or the father of the unborn

1 child who was the subject of such an abortion, may maintain an
2 action against the person who performed or induced the abortion in
3 intentional or reckless violation of this article for actual and
4 punitive damages. Any woman upon whom an abortion has been
5 attempted in violation of this article may maintain an action
6 against the person who attempted to perform or induce the abortion
7 in an intentional or reckless violation of this article for actual
8 and punitive damages.

9 (b) A cause of action for injunctive relief against any person
10 who has intentionally or recklessly violated this article may be
11 maintained by the woman upon whom an abortion was performed or
12 induced or attempted to be performed or induced in violation of this
13 article: (1) By any person who is the spouse, parent, sibling or
14 guardian of, or a current or former licensed health care provider
15 of, the woman upon whom an abortion has been performed or induced
16 or attempted to be performed or induced in violation of this
17 article; or (2) by a county prosecuting attorney with appropriate
18 jurisdiction; or (3) by the Attorney General. The injunction shall
19 prevent the abortion provider from performing or inducing or
20 attempting to perform or induce further abortions in violation of
21 this article in this state.

22 (c) If judgment is rendered in favor of the plaintiff in an
23 action described in this section, the court shall also render

1 judgment for a reasonable attorney's fee in favor of the plaintiff
2 against the defendant.

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

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

11 **§16-2M-9. Protection of privacy in court proceedings.**

12 In every civil or criminal proceeding or action brought under
13 this article, the court shall rule whether the anonymity of any
14 woman upon whom an abortion has been performed or induced or
15 attempted to be performed or induced shall be preserved from public
16 disclosure if she does not give her consent to the disclosure. The
17 court, upon motion or sua sponte, shall make a ruling and, upon
18 determining that her anonymity should be preserved, shall issue
19 orders to the parties, witnesses and counsel and shall direct the
20 sealing of the record and exclusion of individuals from courtrooms
21 or hearing rooms to the extent necessary to safeguard her identity
22 from public disclosure. Each such order shall be accompanied by
23 specific written findings explaining why the anonymity of the woman

1 should be preserved from public disclosure, why the order is
2 essential to that end, how the order is narrowly tailored to serve
3 that interest and why no reasonable less restrictive alternative
4 exists. In the absence of written consent of the woman upon whom
5 an abortion has been performed or induced or attempted to be
6 performed or induced, anyone, other than a public official, who
7 brings an action under subsection (a) or (b) of section eight of
8 this article shall do so under a pseudonym. This section may not
9 be construed to conceal the identity of the plaintiff or of
10 witnesses from the defendant or from attorneys for the defendant.

11 **§16-2M-10. Litigation Defense Fund.**

12 (a) There is created a special revenue fund known as the West
13 Virginia Pain-Capable Unborn Child Protection Act Litigation Fund
14 for the purpose of providing funds to pay for any costs and expenses
15 incurred by the State Attorney General in relation to actions
16 surrounding defense of this law.

17 (b) The fund shall be maintained by the Department of Health
18 and Human Resources.

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

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

1 **§16-2M-11. How article construed.**

2 This article may not be construed to repeal, by implication or
3 otherwise or any otherwise applicable provision of law regulating
4 or restricting abortion. An abortion that complies with this
5 article but violates the provisions of any otherwise applicable
6 provision of law is unlawful as provided in that provision. An
7 abortion that complies with the provisions of any otherwise
8 applicable provision of law regulating or restricting abortion but
9 violates this article is unlawful as provided in this article. If
10 some or all of the provisions of this article are ever temporarily
11 or permanently restrained or enjoined by judicial order, all other
12 provisions of law regulating or restricting abortion shall be
13 enforced as though the restrained or enjoined provisions had not
14 been adopted: *Provided*, That whenever the temporary or permanent
15 restraining order of injunction is stayed or dissolved, or otherwise
16 ceases to have effect, those provisions have full force and effect.

NOTE: The purpose of this bill is to create the "West Virginia Pain-Capable Unborn Child Protection Act" that asserts a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain. The bill prohibits abortion of unborn child of twenty or more weeks post-fertilization age.

This article is new; therefore, strike-throughs and underscoring have been omitted.