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HOUSE BILL NO. 2321

Offered January 22, 2015

A *BILL to amend the Code of Virginia by adding in Chapter 4 of Title 18.2 an article numbered 9.1, consisting of sections numbered 18.2-76.3 through 18.2-76.12, relating to the Pain-Capable Unborn Child Protection Act; penalty.*

Patrons—LaRock, Anderson, Bell, Richard P., Berg, Byron, Cline, Cole, Farrell, Gilbert, Hugo, Kilgore, Landes, Lingamfelter, Marshall, D.W., Marshall, R.G., Massie, Miller, Morefield, Morris, Morrissey, Peace, Pogge, Poindexter, Ramadan, Ransone, Robinson, Rush, Ware, Wilt and Wright; Senators: Black, Carrico, Garrett, Martin and Smith

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 4 of Title 18.2 an article numbered 9.1, consisting of sections numbered 18.2-76.3 through 18.2-76.12, as follows:

Article 9.1.

Pain-Capable Unborn Child Protection Act.

§ 18.2-76.3. Legislative findings.

A. Pain receptors (nociceptors) are present throughout the unborn child's entire body, and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks.

B. By eight weeks after fertilization, the unborn child reacts to touch. After 20 weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.

C. In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

D. Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life.

E. For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared with their level when painful stimuli are applied without such anesthesia.

F. The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominantly rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

G. Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

H. In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

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

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

K. Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by 20 weeks after fertilization.

L. It is the purpose of the Commonwealth to assert 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.

M. The Commonwealth's 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 is intended to be separate from and independent of the Commonwealth's compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the

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56 *other.*

57 *N. Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the*
58 *severability of a state statute regulating abortion the Supreme Court of the United States noted that an*
59 *explicit statement of legislative intent specifically made applicable to a particular statute is of greater*
60 *weight than a general savings or severability clause, it is the intent of the Commonwealth that if any*
61 *one or more provisions, sections, subsections, sentences, clauses, phrases, or words of this article or the*
62 *application thereof to any person or circumstance is found to be unconstitutional, the same is hereby*
63 *declared to be severable and the balance of this article shall remain effective notwithstanding such*
64 *unconstitutionality. Moreover, the Commonwealth declares that it would have passed this article, and*
65 *each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact*
66 *that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words, or any of*
67 *their applications, were to be declared unconstitutional.*

68 **§ 18.2-76.4. Definitions.**

69 *For purposes of this article, unless the context requires a different meaning:*

70 *"Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance*
71 *or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to*
72 *increase the probability of a live birth, to preserve the life or health of the child after live birth, or to*
73 *remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a*
74 *criminal assault on the pregnant woman or her unborn child and which causes the premature*
75 *termination of the pregnancy.*

76 *"Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required*
77 *act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a*
78 *course of conduct planned to culminate in the performance or induction of an abortion in the*
79 *Commonwealth, in violation of this article.*

80 *"Department" means the Department of Health.*

81 *"Fertilization" means the fusion of a human spermatozoon with a human ovum.*

82 *"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the*
83 *medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy*
84 *without first determining postfertilization age to avert her death or for which the delay necessary to*
85 *determine postfertilization age will create serious risk of substantial and irreversible physical*
86 *impairment of a major bodily function, not including psychological or emotional conditions. No*
87 *condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will*
88 *engage in conduct that she intends to result in her death or in substantial and irreversible physical*
89 *impairment of a major bodily function.*

90 *"Physician" means any person licensed to practice medicine or osteopathic medicine in the*
91 *Commonwealth pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1.*

92 *"Postfertilization age" means the age of the unborn child as calculated from the fusion of a human*
93 *spermatozoon with a human ovum.*

94 *"Probable postfertilization age of the unborn child" means what, in reasonable medical judgment,*
95 *will with reasonable probability be the postfertilization age of the unborn child at the time the abortion*
96 *is planned to be performed or induced.*

97 *"Reasonable medical judgment" means a medical judgment that would be made by a reasonably*
98 *prudent physician, knowledgeable about the case and the treatment possibilities with respect to the*
99 *medical conditions involved.*

100 *"Unborn child" or "fetus" means an individual organism of the species Homo sapiens from*
101 *fertilization until live birth.*

102 *"Woman" means a female human being whether or not she has reached the age of majority.*

103 **§ 18.2-76.5. Determination of postfertilization age.**

104 *A. Except in the case of a medical emergency, no abortion shall be performed or induced or be*
105 *attempted to be performed or induced unless the physician performing or inducing it has first made a*
106 *determination of the probable postfertilization age of the unborn child or relied upon such a*
107 *determination made by another physician. In making such a determination, the physician shall make*
108 *such inquiries of the woman and perform or cause to be performed such medical examinations and tests*
109 *as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved,*
110 *would consider necessary to perform in making an accurate diagnosis with respect to postfertilization*
111 *age.*

112 *B. Failure by any physician to conform to any requirement of this section constitutes unprofessional*
113 *conduct.*

114 **§ 18.2-76.6. Abortion of unborn child of 20 or more weeks postfertilization age prohibited.**

115 *A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman*
116 *when it has been determined by the physician performing or inducing or attempting to perform or*
117 *induce the abortion or by another physician upon whose determination that physician relies that the*

probable postfertilization age of the woman's unborn child is 20 or more weeks, unless, in reasonable medical judgment, she has a condition that so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

B. When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of 20 or more weeks is not prohibited by subsection A, the physician shall terminate the pregnancy in the manner that in reasonable medical judgment provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function

§ 18.2-76.7. Reporting.

A. Any physician who performs or induces or attempts to perform or induce an abortion shall report to the Department, on a schedule and in accordance with forms and regulations adopted and promulgated by the Board of Health, that include:

1. Postfertilization age:

a. If a determination of probable postfertilization age was made, whether an ultrasound was employed in making the determination, and the week of probable postfertilization age determined; or

b. If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed.

2. Method of abortion used:

a. Medication abortion, including but not limited to abortion accomplished with mifepristone/misoprostol or methotrexate/misoprostol;

b. Manual vacuum aspiration;

c. Electrical vacuum aspiration;

d. Dilation and evacuation;

e. Combined induction abortion and dilation and evacuation;

f. Induction abortion with prostaglandins;

g. Induction abortion with intra-amniotic instillation, such as, but not limited to, saline or urea;

h. Induction abortion, other;

i. Intact dilation and extraction (partial birth); or

j. Method not listed (specify).

3. Whether an intrafetal injection was used in an attempt to induce fetal demise including, but not limited to, intrafetal potassium chloride or digoxin.

4. Age and race of the patient.

5. If the probable postfertilization age was determined to be 20 or more weeks, the basis of the determination that the pregnant woman had a condition that so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions.

6. If the probable postfertilization age was determined to be 20 or more weeks, whether or not the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods.

B. Reports required by subsection A shall not contain the name or the address of the patient whose pregnancy was terminated, nor shall the report contain any other information identifying the patient, except that each report shall contain a unique medical record identifying number to enable matching the report to the patient's medical records. Such reports shall be maintained in strict confidence by the Department, shall not be available for public inspection, and shall not be made available except to the attorney for the Commonwealth with appropriate jurisdiction pursuant to a criminal investigation, or in the event a civil action is instituted under subsection B of § 18.2-76.9 or pursuant to court order in an action under § 18.2-76.9.

C. By June 30 of each year, the Department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with

179 *this section for each of the items listed in subsection A. Each such report shall also provide the*
180 *statistics for all previous calendar years during which this section was in effect, adjusted to reflect any*
181 *additional information from late or corrected reports. The Department shall take care to ensure that*
182 *none of the information included in the public reports could reasonably lead to the identification of any*
183 *pregnant woman upon whom an abortion was performed, induced, or attempted.*

184 *D. Any physician who fails to submit a report by the end of 30 days following the due date shall be*
185 *subject to a late fee of \$1,000 for each additional 30-day period or portion of a 30-day period the*
186 *report is overdue. Any physician required to report in accordance with this article who has not*
187 *submitted a report, or has submitted only an incomplete report, more than six months following the due*
188 *date, may, in an action brought by the Board of Medicine, be directed by a court of competent*
189 *jurisdiction to submit a complete report within a period stated by court order or be subject to civil*
190 *contempt. Intentional or reckless failure by any physician to conform to any requirement of this section,*
191 *other than late filing of a report, constitutes unprofessional conduct. Intentional or reckless failure by*
192 *any physician to submit a complete report in accordance with a court order constitutes unprofessional*
193 *conduct. Intentional or reckless falsification of any report required under this section is a Class 1*
194 *misdemeanor.*

195 *E. Within 90 days of the effective date of this article, the Board of Health shall adopt and*
196 *promulgate forms and regulations to assist in compliance with this section. Subsection A shall take*
197 *effect so as to require reports regarding all abortions performed or induced on and after the first day of*
198 *the first calendar month following the effective date of such rules.*

199 **§ 18.2-76.8. Criminal penalties.**

200 *Any person who intentionally or recklessly performs or induces or attempts to perform or induce an*
201 *abortion in violation of this article is guilty of a Class 6 felony. No penalty may be assessed against the*
202 *woman upon whom the abortion is performed or induced or attempted to be performed or induced.*

203 **§ 18.2-76.9. Civil remedies.**

204 *A. Any woman upon whom an abortion has been performed or induced in violation of this article, or*
205 *the father of the unborn child who was the subject of such an abortion, may maintain an action against*
206 *the person who performed or induced the abortion in intentional or reckless violation of this article for*
207 *actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of*
208 *this article may maintain an action against the person who attempted to perform or induce the abortion*
209 *in an intentional or reckless violation of this article for actual and punitive damages.*

210 *B. A cause of action for injunctive relief against any person who has intentionally or recklessly*
211 *violated this article may be maintained by the woman upon whom an abortion was performed or*
212 *induced or attempted to be performed or induced in violation of this article; by any person who is the*
213 *spouse, parent, sibling, or guardian of, or a current or former licensed health care provider of, the*
214 *woman upon whom an abortion has been performed or induced or attempted to be performed or*
215 *induced in violation of this article; by a county or city attorney with appropriate jurisdiction or by the*
216 *Attorney General. The injunction shall prevent the abortion provider from performing or inducing or*
217 *attempting to perform or induce further abortions in violation of this article in the Commonwealth.*

218 *C. If judgment is rendered in favor of the plaintiff in an action described in this section, the court*
219 *shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.*

220 *D. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was*
221 *frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in*
222 *favor of the defendant against the plaintiff.*

223 *E. No damages or attorney fees may be assessed against the woman upon whom an abortion was*
224 *performed or induced or attempted to be performed or induced except in accordance with subsection D.*

225 **§ 18.2-76.10. Protection of privacy in court proceedings.**

226 *In every civil or criminal proceeding or action brought under this article, the court shall rule*
227 *whether the anonymity of any woman upon whom an abortion has been performed or induced or*
228 *attempted to be performed or induced shall be preserved from public disclosure if she does not give her*
229 *consent to such disclosure. The court, upon motion by a party or upon its own motion, shall make such*
230 *a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the*
231 *parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals*
232 *from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public*
233 *disclosure. Each such order shall be accompanied by specific written findings explaining why the*
234 *anonymity of the woman should be preserved from public disclosure, why the order is essential to that*
235 *end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive*
236 *alternative exists. In the absence of written consent of the woman upon whom an abortion has been*
237 *performed or induced or attempted to be performed or induced, anyone, other than a public official,*
238 *who brings an action under subsection A or B of § 18.2-76.9 shall do so under a pseudonym. This*
239 *section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant*
240 *or from attorneys for the defendant.*

§ 18.2-76.11. Virginia Pain-Capable Unborn Child Protection Act Litigation Fund established.

There is hereby created in the state treasury a special nonreverting fund to be known as the Virginia Pain-Capable Unborn Child Protection Act Litigation Fund, hereafter referred to as "the Fund." The Fund shall be established on the books of the Comptroller. Appropriations made to the account by the Legislature and any donations, gifts, or grants made to the account shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes of providing funds to pay for any costs and expenses incurred by the Attorney General in relation to actions surrounding defense of this article. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Attorney General.

§ 18.2-76.12. Construction.

This article shall not be construed to repeal, by implication or otherwise, any other provision of Article 9 (§ 18.2-71 et seq.) of Chapter 4 of Title 18.2 or any otherwise applicable provision of law regulating or restricting abortion. An abortion that complies with this article but violates any other provision of Article 9 (§ 18.2-71 et seq.) of Chapter 4 of Title 18.2 or any otherwise applicable provision of law shall be deemed unlawful as provided in such provision. An abortion that complies with the provisions of Article 9 (§ 18.2-71 et seq.) of Chapter 4 of Title 18.2 or any otherwise applicable provision of law regulating or restricting abortion but violates this article shall be deemed unlawful as provided in this article. If some or all of the provisions of this article are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of law regulating or restricting abortion shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order of injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 2 of the Acts of Assembly of 2014, Special Session I, requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.