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HOUSE BILL NO. 1285

Offered January 20, 2012

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 18.2-76.13, relating to the Pain-Capable Unborn Child Protection Act.*

Patrons—Anderson, Byron, Cline, Crockett-Stark, Dudenhefer, Fariss, Massie, Pogge, Rush and Wilt

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 18.2-76.13, as follows:

*Article 9.1.**Pain-Capable Unborn Child Protection Act.**§ 18.2-76.3. Short title.*

This act may be cited as the "Virginia Pain-Capable Unborn Child Protection Act."

§ 18.2-76.4. 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. Virginia'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 Virginia'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 other.

*N. Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the*

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

69 § 18.2-76.5. Definitions.

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

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

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

81 "Department" means the Department of Health.

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

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

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

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

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

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

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

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

104 § 18.2-76.6. Determination of postfertilization age.

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

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

115 § 18.2-76.7. Abortion of unborn child of 20 or more weeks postfertilization age prohibited.

116 A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman
117 when it has been determined, by the physician performing or inducing or attempting to perform or
118 induce the abortion or by another physician upon whose determination that physician relies, that the
119 probable postfertilization age of the woman's unborn child is 20 or more weeks, unless, in reasonable
120 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, which 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.

§ 18.2-76.8. 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 § 18.2-76.10 or pursuant to court order in an action under § 18.2-76.10.

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 this section for each of the items listed in subsection A. Each such report shall also provide the

182 statistics for all previous calendar years during which this section was in effect, adjusted to reflect any
183 additional information from late or corrected reports. The Department shall take care to ensure that
184 none of the information included in the public reports could reasonably lead to the identification of any
185 pregnant woman upon whom an abortion was performed, induced, or attempted.

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

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

201 § 18.2-76.9. Criminal penalties.

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

205 § 18.2-76.10. Civil remedies.

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

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

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

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

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

227 § 18.2-76.11. Protection of privacy in court proceedings.

228 In every civil or criminal proceeding or action brought under this article, the court shall rule
229 whether the anonymity of any woman upon whom an abortion has been performed or induced or
230 attempted to be performed or induced shall be preserved from public disclosure if she does not give her
231 consent to such disclosure. The court, upon motion by a party or upon its own motion, shall make such
232 a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the
233 parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals
234 from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public
235 disclosure. Each such order shall be accompanied by specific written findings explaining why the
236 anonymity of the woman should be preserved from public disclosure, why the order is essential to that
237 end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive
238 alternative exists. In the absence of written consent of the woman upon whom an abortion has been
239 performed or induced or attempted to be performed or induced, anyone, other than a public official,
240 who brings an action under subsection A or B of § 18.2-76.10 shall do so under a pseudonym. This
241 section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant
242 or from attorneys for the defendant.

243 § 18.2-76.12. 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.

§ 18.2-76.13. 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 Virginia 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 Virginia 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 Virginia 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 Virginia 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 890 of the Acts of Assembly of 2011 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 is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.