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HOUSE BILL NO. 1274

Offered January 20, 2022

A BILL to amend and reenact § 18.2-73 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 4 of Title 18.2 an article numbered 10, consisting of sections numbered 18.2-76.3 through 18.2-76.10, relating to the Pain-Capable Unborn Child Protection Act; penalty.

Patrons—Freitas, Avoli, Byron, LaRock, March, McNamara, Runion, Scott, P.A., Tata and Williams

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-73 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 4 of Title 18.2 an article numbered 10, consisting of sections numbered 18.2-76.3 through 18.2-76.10, as follows:

§ 18.2-73. When abortion lawful during second trimester of pregnancy.

Notwithstanding any of the provisions of § 18.2-71 and in addition to the provisions of § 18.2-72, it shall be lawful for any physician licensed by the Board of Medicine to practice medicine and surgery, to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the second trimester of pregnancy and prior to the third trimester of pregnancy after the first trimester and up to twenty weeks postfertilization provided such procedure is performed in a hospital licensed by the State Department of Health or operated by the Department of Behavioral Health and Developmental Services.

Article 10.

Pain-Capable Unborn Child Protection Act.

§ 18.2-76.3. Definitions.

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

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

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

"Authorized nurse practitioner" means a nurse practitioner authorized to perform an abortion pursuant to clause (ii) of § 18.2-72.

"Department" means the Department of Health.

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

"Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if 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.

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

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

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

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

"Unborn child" or "fetus" means an individual organism of the species *Homo sapiens* from

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59 fertilization until live birth.

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

61 **§ 18.2-76.4. Determination of postfertilization age.**

62 A. Except in the case of a medical emergency, no abortion shall be performed or induced or be
63 attempted to be performed or induced unless the physician or authorized nurse practitioner performing
64 or inducing it has first made a determination of the probable postfertilization age of the unborn child or
65 relied upon such a determination made by another physician or authorized nurse practitioner. In making
66 such a determination, the physician or authorized nurse practitioner shall make such inquiries of the
67 woman and perform or cause to be performed such medical examinations and tests as a reasonably
68 prudent physician or authorized nurse practitioner, knowledgeable about the case and the medical
69 conditions involved, would consider necessary to perform in making an accurate diagnosis with respect
70 to postfertilization age.

71 B. Failure by any physician or authorized nurse practitioner to conform to any requirement of this
72 section constitutes unprofessional conduct.

73 **§ 18.2-76.5. Abortion of unborn child of 20 or more weeks postfertilization age prohibited.**

74 A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman
75 when it has been determined by the physician or authorized nurse practitioner performing or inducing
76 or attempting to perform or induce the abortion or by another physician or authorized nurse
77 practitioner upon whose determination that physician or authorized nurse practitioner relies that the
78 probable postfertilization age of the woman's unborn child is 20 or more weeks, unless, in reasonable
79 medical judgment, she has a condition that so complicates her medical condition as to necessitate the
80 abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible
81 physical impairment of a major bodily function, not including psychological or emotional conditions. No
82 such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will
83 engage in conduct that she intends to result in her death or in substantial and irreversible physical
84 impairment of a major bodily function.

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

95 **§ 18.2-76.6. Reporting.**

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

99 1. Postfertilization age:

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

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

104 2. Method of abortion used:

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

107 b. Manual vacuum aspiration;

108 c. Electrical vacuum aspiration;

109 d. Dilation and evacuation;

110 e. Combined induction abortion and dilation and evacuation;

111 f. Induction abortion with prostaglandins;

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

113 h. Induction abortion, other;

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

115 j. Method not listed (specify).

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

118 4. Age and race of the patient.

119 5. If the probable postfertilization age was determined to be 20 or more weeks, the basis of the
120 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 § 18.2-76.8 or pursuant to court order in an action under § 18.2-76.8.

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

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

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

§ 18.2-76.7. Criminal penalties.

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

§ 18.2-76.8. Civil remedies.

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

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

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

182 D. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was
183 frivolous and brought in bad faith, the court shall also render judgment for reasonable attorney fees in
184 favor of the defendant against the plaintiff.

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

187 **§ 18.2-76.9. Protection of privacy in court proceedings.**

188 In every civil or criminal proceeding or action brought under this article, the court shall rule
189 whether the anonymity of any woman upon whom an abortion has been performed or induced or
190 attempted to be performed or induced shall be preserved from public disclosure if she does not give her
191 consent to such disclosure. The court, upon motion by a party or upon its own motion, shall make such
192 a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the
193 parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals
194 from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public
195 disclosure. Each such order shall be accompanied by specific written findings explaining why the
196 anonymity of the woman should be preserved from public disclosure, why the order is essential to that
197 end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive
198 alternative exists. In the absence of written consent of the woman upon whom an abortion has been
199 performed or induced or attempted to be performed or induced, anyone, other than a public official,
200 who brings an action under subsection A or B of § 18.2-76.8 shall do so under a pseudonym. This
201 section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant
202 or from attorneys for the defendant.

203 **§ 18.2-76.10. Construction.**

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

215 2. That the provisions of this act may result in a net increase in periods of imprisonment or
216 commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the
217 necessary appropriation cannot be determined for periods of imprisonment in state adult
218 correctional facilities; therefore, Chapter 552 of the Acts of Assembly of 2021, Special Session I,
219 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of
220 \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary
221 appropriation cannot be determined for periods of commitment to the custody of the Department
222 of Juvenile Justice.