# STATE OF NEW YORK

8907

# IN ASSEMBLY

January 8, 2018

Introduced by M. of A. LAWRENCE -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to protecting pain-capable unborn children

**The People of the State of New York, represented in Senate and Assembly, do enact as follows:**

Section 1. This act may be cited as the "pain-capable unborn child protection act".

§ 2. The legislature makes the following findings:

(1) Pain receptors 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 twenty weeks after fertilization.

(2) By eight weeks after fertilization, the unborn child reacts to touch. After twenty weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human.

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

(4) 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.

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

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty 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.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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

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

(9) 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.

(10) The position, asserted by some commentators, 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 had found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery.

(11) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization. The Legislature has the constitutional authority to make this judgment. As the United States Supreme Court has noted in Gonzales v. Carhart, 550 U.S. 124, 162-64 (2007). "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty...See Marshall v. United States, 414 U.S. 417, 427 (1974) ('When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad.')...The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community....Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."

(12) It is the purpose of the State 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.

(13) In enacting this legislation the state is not asking the Supreme Court to overturn or replace its holding, first articulated in Roe v. Wade and reaffirmed in Planned Parenthood of Southeastern Pennsylvania v. Casey, that the state interest in unborn human life, which is "legitimate" throughout pregnancy, becomes "compelling" at viability. Rather, it asserts a separate and independent compelling state interest in unborn human life that exists once the unborn child is capable of feeling pain, which is asserted not in replacement of, but in addition to the state's compelling state interest in protecting the lives of unborn children from the stage of viability.

(14) The United States Supreme Court has established that the "constitutional liberty of the woman to have some freedom to terminate her pregnancy...is not so unlimited...that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992).

(15) The Supreme Court decision upholding the Partial-Birth Abortion Ban Act, Gonzales v. Carhart, 550 U.S. 124 (2007) vindicated the

dissenting opinion in the earlier decision that had struck down Nebraska's Partial-Birth Abortion Ban Act. That opinion stated, "{In Casey} We held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion...Casey is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that {a state's} interests can be given proper weight...States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus...A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." Stenberg v. Carhart, 350 U.S. 914, 958-59 (2000)(Kennedy, J., dissenting).

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

§ 3. Article 41 of the public health law is amended by adding a new title 5-B to read as follows:

**TITLE V-B**

**PAIN-CAPABLE UNBORN CHILD PROTECTION**

**Section 4164-a. Definitions.**
**4164-b. Protection of unborn child capable of feeling pain from abortion.**
**4164-c. Reporting.**
**4164-d. Criminal penalties.**
**4164-e. Civil remedies.**
**4164-f. Protection of privacy in court proceedings.**
**4164-g. Litigation defense fund.**
**4164-h. Construction.**

**§ 4164-a. Definitions. As used in this title:**

**1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device:**

**(a) to intentionally kill the unborn child of a woman known to be pregnant; or**

**(b) to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than:**

**(i) after viability to produce a live birth and preserve the life and health of the child born alive; or**

**(ii) to remove a dead unborn child.**

2. "Attempt", with respect to an abortion, means conduct that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in performing an abortion in this state in violation of this title.

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

4. "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates an immediate abortion of her pregnancy without first determining post-fertilization age to avert her death or for which the delay necessary to determine post-fertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. A condition may not 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.

5. "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise legally authorized to perform an abortion.

6. "Post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

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

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

9. "Serious health risk to the unborn child's mother" means that in reasonable medical judgment she has a condition that so complicates her medical condition that it necessitates 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 greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

10. "Unborn child" means an individual organism of the species homo sapiens, beginning at fertilization, until the point of being born alive.

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

§ 4164-b. Protection of unborn child capable of feeling pain from abortion. 1. No person shall perform or induce, or attempt to perform or induce, an abortion of an unborn child capable of feeling pain unless necessary to prevent serious health risk to the unborn child's mother.

2. An unborn child shall be deemed capable of feeling pain when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable post-fertilization age of the woman's unborn child is twenty or more weeks.

3. Except in the case of a medical emergency, no abortion may be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination

of the probable post-fertilization age of the unborn child or relied upon such a determination made by another physician. In making this determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to post-fertilization age.

4. When an abortion of an unborn child capable of feeling pain is necessary to prevent serious health risk to the unborn child's mother, 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 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 greater risk may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

§ 4164-c. Reporting. 1. 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 department, that include:

(a) Post-fertilization age:

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

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

(b) Method of abortion: which of the following was employed:

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

(ii) Manual vacuum aspiration;

(iii) Electrical vacuum aspiration;

(iv) Dilation and evacuation;

(v) Combined induction abortion and dilation and evacuation;

(vi) Induction abortion with prostaglandins;

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

(viii) Induction abortion, other; or

(ix) Intact dilation and extraction (partial-birth)

(c) Whether an intra-fetal injection was used in an attempt to induce fetal demise (such as, but not limited to, intrafetal potassium chloride or digoxin);

(d) Age and race of the patient;

(e) If the unborn child was deemed capable of experiencing pain under section forty-one hundred sixty-four-b of this title, the basis of the determination that the pregnant woman had a condition which 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;

(f) If the unborn child was deemed capable of experiencing pain under section forty-one hundred sixty-four-b of this title, 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.

2. Reports required by subdivision one of this section may not contain the name or the address of the patient whose pregnancy was terminated, nor may 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. These reports shall be maintained in strict confidence by the department, shall not be available for public inspection, and shall not be made available except:

(a) to the attorney general or a district attorney with appropriate jurisdiction pursuant to a criminal investigation;

(b) to the attorney general or a district attorney pursuant to a civil investigation of the grounds for an action under section forty-one hundred sixty-four-e of this title; or

(c) pursuant to court order in an action under section forty-one hundred sixty-four-e of this title.

3. By June thirtieth 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 subdivision one of this section. Each 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.

4. Any physician who fails to submit a report by the end of thirty days following the due date established by regulation shall be subject to a late fee of one thousand dollars ($1,000) for each additional thirty-day period or portion of a thirty-day period the report is overdue. Any physician required to report in accordance with this act 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 department, 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 to conform to any requirement of this section constitutes professional misconduct pursuant to title two-A of article two of this chapter.

§ 4164-d. Criminal penalties. Any person who intentionally or recklessly performs or induces or attempts to perform or induce an abortion in violation of this title shall be guilty of a felony. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

§ 4164-e. Civil remedies. 1. Any woman upon whom an abortion has been performed or induced in violation of this title, 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 title for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of this title may maintain an action against the person who attempted to

perform or induce the abortion in an intentional or reckless violation of this title for actual and punitive damages.

2. A cause of action for injunctive relief against any person who has intentionally or recklessly violated this title may be maintained (i) by the woman upon whom an adoption was performed or induced or attempted to be performed or induced in violation of this title; (ii) 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 title; (iii) by a prosecuting attorney with appropriate jurisdiction; or (iv) 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 title in this state.

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

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

5. No damages or attorney's fee may be assessed against the woman upon whom an abortion was performed or induced or attempted to be performed or induced except in accordance with subdivision four of this section.

§ 4164-f. Protection of privacy in court proceedings. In every civil or criminal proceeding or action brought under this title, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under section forty-one hundred sixty-four-e of this title shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorney for the defendant.

§ 4164-g. Litigation defense fund. 1. There is hereby established in the joint custody of the state comptroller and the department a special fund known as the Pain-Capable Unborn Child Protection Act Litigation Fund for the purpose of providing funds to pay for any costs and expenses incurred by the state attorney general in relation to actions surrounding defense of this law.

2. The fund shall consist of: (a) appropriations made to the account by the legislature; and (b) any donations, gifts, or grants made to the account.

**3. The fund shall retain the interest income derived from the moneys credited to the fund.**

**§ 4165-h. Construction. This act shall not be construed to repeal, by implication or otherwise, any otherwise applicable provision of law regulating or restricting abortion. An abortion that complies with this title but violates the provisions of any otherwise applicable provision of law shall be deemed unlawful as provided in such provision. An abortion that complies with the provisions of any otherwise applicable provision of law regulating or restricting abortion but violates this title shall be deemed unlawful as provided in this title. If some or all of the provisions of this title 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.**

§ 4. This act shall take effect immediately.