

# STATE OF NEW YORK

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6064

2019-2020 Regular Sessions

## IN ASSEMBLY

February 26, 2019

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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:

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

3 § 2. The legislature makes the following findings:

4 (1) Pain receptors are present throughout the unborn child's entire  
5 body and nerves link these receptors to the brain's thalamus and subcor-  
6 tical plate by no later than twenty weeks after fertilization.

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

10 (3) In the unborn child, application of such painful stimuli is asso-  
11 ciated with significant increases in stress hormones known as the stress  
12 response.

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

17 (5) For the purposes of surgery on unborn children, fetal anesthesia  
18 is routinely administered and is associated with a decrease in stress  
19 hormones compared to their level when painful stimuli are applied with-  
20 out the anesthesia.

21 (6) The position, asserted by some medical experts, that the unborn  
22 child is incapable of experiencing pain until a point later in pregnancy  
23 than twenty weeks after fertilization predominantly rests on the assump-  
24 tion that the ability to experience pain depends on the cerebral cortex  
25 and requires nerve connections between the thalamus and the cortex.

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

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1 However, recent medical research and analysis, especially since 2007,  
2 provides strong evidence for the conclusion that a functioning cortex is  
3 not necessary to experience pain.

4 (7) Substantial evidence indicates that children born missing the bulk  
5 of the cerebral cortex, those with hydranencephaly, nevertheless experi-  
6 ence pain.

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

10 (9) Substantial evidence indicates that structures used for pain proc-  
11 essing in early development differ from those of adults, using different  
12 neural elements available at specific times during development, such as  
13 the subcortical plate, to fulfill the role of pain processing.

14 (10) The position, asserted by some commentators, that the unborn  
15 child remains in a coma-like sleep state that precludes the unborn child  
16 experiencing pain is inconsistent with the documented reaction of unborn  
17 children to painful stimuli and with the experience of fetal surgeons  
18 who had found it necessary to sedate the unborn child with anesthesia to  
19 prevent the unborn child from engaging in vigorous movement in reaction  
20 to invasive surgery.

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

36 (12) It is the purpose of the State to assert a compelling state  
37 interest in protecting the lives of unborn children from the stage at  
38 which substantial medical evidence indicates that they are capable of  
39 feeling pain.

40 (13) In enacting this legislation the state is not asking the Supreme  
41 Court to overturn or replace its holding, first articulated in *Roe v.*  
42 *Wade* and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania*  
43 *v. Casey*, that the state interest in unborn human life, which is "legit-  
44 imate" throughout pregnancy, becomes "compelling" at viability. Rather,  
45 it asserts a separate and independent compelling state interest in  
46 unborn human life that exists once the unborn child is capable of feel-  
47 ing pain, which is asserted not in replacement of, but in addition to  
48 the state's compelling state interest in protecting the lives of unborn  
49 children from the stage of viability.

50 (14) The United States Supreme Court has established that the "consti-  
51 tutional liberty of the woman to have some freedom to terminate her  
52 pregnancy...is not so unlimited...that from the outset the State cannot  
53 show its concern for the life of the unborn, and at a later point in  
54 fetal development the State's interest in life has sufficient force so  
55 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:

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

3 (ii) to remove a dead unborn child.

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

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

10 4. "Medical emergency" means a condition that, in reasonable medical  
11 judgment, so complicates the medical condition of the pregnant woman  
12 that it necessitates an immediate abortion of her pregnancy without  
13 first determining post-fertilization age to avert her death or for which  
14 the delay necessary to determine post-fertilization age will create  
15 serious risk of substantial and irreversible physical impairment of a  
16 major bodily function, not including psychological or emotional condi-  
17 tions. A condition may not be deemed a medical emergency if based on a  
18 claim or diagnosis that the woman will engage in conduct that she  
19 intends to result in her death or in substantial and irreversible phys-  
20 ical impairment of a major bodily function.

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

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

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

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

34 9. "Serious health risk to the unborn child's mother" means that in  
35 reasonable medical judgment she has a condition that so complicates her  
36 medical condition that it necessitates the abortion of her pregnancy to  
37 avert her death or to avert serious risk of substantial and irreversible  
38 physical impairment of a major bodily function, not including psycholog-  
39 ical or emotional conditions. No greater risk may be determined to exist  
40 if it is based on a claim or diagnosis that the woman will engage in  
41 conduct which she intends to result in her death or in substantial and  
42 irreversible physical impairment of a major bodily function.

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

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

48 § 4164-b. Protection of unborn child capable of feeling pain from  
49 abortion. 1. No person shall perform or induce, or attempt to perform  
50 or induce, an abortion of an unborn child capable of feeling pain unless  
51 necessary to prevent serious health risk to the unborn child's mother.

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

1     3. Except in the case of a medical emergency, no abortion may be  
2 performed or induced or be attempted to be performed or induced unless  
3 the physician performing or inducing it has first made a determination  
4 of the probable post-fertilization age of the unborn child or relied  
5 upon such a determination made by another physician. In making this  
6 determination, the physician shall make such inquiries of the woman and  
7 perform or cause to be performed such medical examinations and tests as  
8 a reasonably prudent physician, knowledgeable about the case and the  
9 medical conditions involved, would consider necessary to perform in  
10 making an accurate diagnosis with respect to post-fertilization age.

11     4. When an abortion of an unborn child capable of feeling pain is  
12 necessary to prevent serious health risk to the unborn child's mother,  
13 the physician shall terminate the pregnancy in the manner which, in  
14 reasonable medical judgment, provides the best opportunity for the  
15 unborn child to survive, unless, in reasonable medical judgment, termi-  
16 nation of the pregnancy in that manner would pose a greater risk either  
17 of the death of the pregnant woman or the substantial and irreversible  
18 physical impairment of a major bodily function, not including psycholog-  
19 ical or emotional conditions, of the woman than would other available  
20 methods. No greater risk may be determined to exist if it is based on a  
21 claim or diagnosis that the woman will engage in conduct which she  
22 intends to result in her death or in substantial and irreversible phys-  
23 ical impairment of a major bodily function.

24     § 4164-c. Reporting. 1. Any physician who performs or induces or  
25 attempts to perform or induce an abortion shall report to the depart-  
26 ment, on a schedule and in accordance with forms and regulations adopted  
27 and promulgated by the department, that include:

28     (a) Post-fertilization age:

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

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

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

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

37     (ii) Manual vacuum aspiration;

38     (iii) Electrical vacuum aspiration;

39     (iv) Dilation and evacuation;

40     (v) Combined induction abortion and dilation and evacuation;

41     (vi) Induction abortion with prostaglandins;

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

44     (viii) Induction abortion, other; or

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

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

49     (d) Age and race of the patient;

50     (e) If the unborn child was deemed capable of experiencing pain under  
51 section forty-one hundred sixty-four-b of this title, the basis of the  
52 determination that the pregnant woman had a condition which so compli-  
53 cated her medical condition as to necessitate the abortion of her preg-  
54 nancy to avert her death or to avert serious risk of substantial and  
55 irreversible physical impairment of a major bodily function, not includ-  
56 ing psychological or emotional conditions;

1 (f) If the unborn child was deemed capable of experiencing pain under  
2 section forty-one hundred sixty-four-b of this title, whether or not the  
3 method of abortion used was one that, in reasonable medical judgment,  
4 provided the best opportunity for the unborn child to survive and, if  
5 such a method was not used, the basis of the determination that termi-  
6 nation of the pregnancy in that manner would pose a greater risk either  
7 of the death of the pregnant woman or of the substantial and irrevers-  
8 ible physical impairment of a major bodily function, not including  
9 psychological or emotional conditions, of the woman than would other  
10 available methods.

11 2. Reports required by subdivision one of this section may not contain  
12 the name or the address of the patient whose pregnancy was terminated,  
13 nor may the report contain any other information identifying the  
14 patient, except that each report shall contain a unique medical record  
15 identifying number, to enable matching the report to the patient's  
16 medical records. These reports shall be maintained in strict confidence  
17 by the department, shall not be available for public inspection, and  
18 shall not be made available except:

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

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

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

26 3. By June thirtieth of each year the department shall issue a public  
27 report providing statistics for the previous calendar year compiled from  
28 all of the reports covering that year submitted in accordance with this  
29 section for each of the items listed in subdivision one of this section.  
30 Each report shall also provide the statistics for all previous calendar  
31 years during which this section was in effect, adjusted to reflect any  
32 additional information from late or corrected reports. The department  
33 shall take care to ensure that none of the information included in the  
34 public reports could reasonably lead to the identification of any preg-  
35 nant woman upon whom an abortion was performed, induced, or attempted.

36 4. Any physician who fails to submit a report by the end of thirty  
37 days following the due date established by regulation shall be subject  
38 to a late fee of one thousand dollars (\$1,000) for each additional thir-  
39 ty-day period or portion of a thirty-day period the report is overdue.  
40 Any physician required to report in accordance with this act who has not  
41 submitted a report, or has submitted only an incomplete report, more  
42 than six months following the due date, may, in an action brought by the  
43 department, be directed by a court of competent jurisdiction to submit a  
44 complete report within a period stated by court order or be subject to  
45 civil contempt. Intentional or reckless failure by any physician to  
46 conform to any requirement of this section constitutes professional  
47 misconduct pursuant to title two-A of article two of this chapter.

48 § 4164-d. Criminal penalties. Any person who intentionally or reck-  
49 lessly performs or induces or attempts to perform or induce an abortion  
50 in violation of this title shall be guilty of a felony. No penalty may  
51 be assessed against the woman upon whom the abortion is performed or  
52 induced or attempted to be performed or induced.

53 § 4164-e. Civil remedies. 1. Any woman upon whom an abortion has been  
54 performed or induced in violation of this title, or the father of the  
55 unborn child who was the subject of such an abortion, may maintain an  
56 action against the person who performed or induced the abortion in

1 intentional or reckless violation of this title for actual and punitive  
2 damages. Any woman upon whom an abortion has been attempted in violation  
3 of this title may maintain an action against the person who attempted to  
4 perform or induce the abortion in an intentional or reckless violation  
5 of this title for actual and punitive damages.

6 2. A cause of action for injunctive relief against any person who has  
7 intentionally or recklessly violated this title may be maintained (i) by  
8 the woman upon whom an adoption was performed or induced or attempted to  
9 be performed or induced in violation of this title; (ii) by any person  
10 who is the spouse, parent, sibling or guardian of, or a current or  
11 former licensed health care provider of, the woman upon whom an abortion  
12 has been performed or induced or attempted to be performed or induced in  
13 violation of this title; (iii) by a prosecuting attorney with appropri-  
14 ate jurisdiction; or (iv) by the attorney general. The injunction shall  
15 prevent the abortion provider from performing or inducing or attempting  
16 to perform or induce further abortions in violation of this title in  
17 this state.

18 3. If judgment is rendered in favor of the plaintiff in an action  
19 described in this section, the court shall also render judgment for a  
20 reasonable attorney's fee in favor of the plaintiff against the defend-  
21 ant.

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

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

29 § 4164-f. Protection of privacy in court proceedings. In every civil  
30 or criminal proceeding or action brought under this title, the court  
31 shall rule whether the anonymity of any woman upon whom an abortion has  
32 been performed or induced or attempted to be performed or induced shall  
33 be preserved from public disclosure if she does not give her consent to  
34 such disclosure. The court shall make such a ruling and, upon determin-  
35 ing that her anonymity should be preserved, shall issue orders to the  
36 parties, witnesses, and counsel and shall direct the sealing of the  
37 record and exclusion of individuals from courtrooms or hearing rooms to  
38 the extent necessary to safeguard her identity from public disclosure.  
39 Each such order shall be accompanied by specific written findings  
40 explaining why the anonymity of the woman should be preserved from  
41 public disclosure, why the order is essential to that end, how the order  
42 is narrowly tailored to serve that interest, and why no reasonable less  
43 restrictive alternative exists. In the absence of written consent of the  
44 woman upon whom an abortion has been performed or induced or attempted  
45 to be performed or induced, anyone, other than a public official, who  
46 brings an action under section forty-one hundred sixty-four-e of this  
47 title shall do so under a pseudonym. This section may not be construed  
48 to conceal the identity of the plaintiff or of witnesses from the  
49 defendant or from attorney for the defendant.

50 § 4164-g. Litigation defense fund. 1. There is hereby established in  
51 the joint custody of the state comptroller and the department a special  
52 fund known as the Pain-Capable Unborn Child Protection Act Litigation  
53 Fund for the purpose of providing funds to pay for any costs and  
54 expenses incurred by the state attorney general in relation to actions  
55 surrounding defense of this law.

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

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

6     § 4165-h. Construction. This act shall not be construed to repeal, by  
7 implication or otherwise, any otherwise applicable provision of law  
8 regulating or restricting abortion. An abortion that complies with this  
9 title but violates the provisions of any otherwise applicable provision  
10 of law shall be deemed unlawful as provided in such provision. An  
11 abortion that complies with the provisions of any otherwise applicable  
12 provision of law regulating or restricting abortion but violates this  
13 title shall be deemed unlawful as provided in this title. If some or all  
14 of the provisions of this title are ever temporarily or permanently  
15 restrained or enjoined by judicial order, all other provisions of law  
16 regulating or restricting abortion shall be enforced as though such  
17 restrained or enjoined provisions had not been adopted; provided, howev-  
18 er, that whenever such temporary or permanent restraining order of  
19 injunction is stayed or dissolved, or otherwise ceases to have effect,  
20 such provisions shall have full force and effect.

21     § 4. This act shall take effect immediately.