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SENATE BILL 222

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

William E. Sharer

AN ACT

RELATING TO ABORTION; ENACTING THE PAIN-CAPABLE UNBORN CHILD PROTECTION ACT; CREATING LIMITATIONS ON ABORTION; CREATING REPORTING REQUIREMENTS; PROVIDING CIVIL REMEDIES; PROVIDING CRIMINAL AND CIVIL PENALTIES; ESTABLISHING A LITIGATION FUND.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the "Pain-Capable Unborn Child Protection Act".

SECTION 2. DEFINITIONS.--For purposes of the Pain-Capable Unborn Child Protection Act:

A. "abortion" means the use or prescription of any instrument, medicine, 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

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1 birth or to remove a dead unborn child who died as the result
2 of natural causes in utero, accidental trauma or a criminal
3 assault on the pregnant woman or her unborn child, and that
4 causes the premature termination of the pregnancy;

5 B. "attempt to perform or induce an abortion" means
6 an act, or an omission of a statutorily required act, that,
7 under the circumstances as the actor believes them to be,
8 constitutes a substantial step in a course of conduct planned
9 to culminate in the performance or induction of an abortion in
10 this state in violation of the Pain-Capable Unborn Child
11 Protection Act;

12 C. "post-fertilization age" means the age of the
13 unborn child as calculated from the fertilization of the human
14 ovum;

15 D. "fertilization" means the fusion of a human
16 spermatozoon with a human ovum;

17 E. "medical emergency" means a condition that, in
18 reasonable medical judgment, so complicates the medical
19 condition of the pregnant woman as to necessitate the immediate
20 abortion of her pregnancy to avert her death or for which a
21 delay will create serious risk of substantial and irreversible
22 physical impairment of a major bodily function. No condition
23 shall be deemed a medical emergency if the emergency is based
24 on a claim or diagnosis that the woman will engage in conduct
25 that would result in her death or in substantial and

1 irreversible physical impairment of a major bodily function;

2 F. "reasonable medical judgment" means a medical
3 judgment that would be made by a reasonably prudent physician
4 who is knowledgeable about the case and the treatment
5 possibilities with respect to the medical conditions involved;

6 G. "physician" means any person licensed to
7 practice medicine and surgery or osteopathic medicine and
8 surgery in this state;

9 H. "probable post-fertilization age of the unborn
10 child" means what, in reasonable medical judgment, will with
11 reasonable probability be the post-fertilization age of the
12 unborn child at the time the abortion is planned to be
13 performed;

14 I. "unborn child" means an individual organism of
15 the species Homo sapiens from fertilization until live birth;
16 and

17 J. "woman" means a female human being whether or
18 not she has reached the age of majority.

19 **SECTION 3. LEGISLATIVE FINDINGS.--**The legislature makes
20 the following findings:

21 A. pain receptors are present throughout the unborn
22 child's entire body by no later than sixteen weeks after
23 fertilization and nerves link these receptors to the brain's
24 thalamus and subcortical plate by no later than twenty weeks;

25 B. by eight weeks after fertilization, the unborn

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1 child reacts to stimuli that would be recognized as painful if
2 applied to an adult human, for example, by recoiling;

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

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

10 E. for the purposes of surgery on unborn children,
11 fetal anesthesia is routinely administered and is associated
12 with a decrease in stress hormones compared to their level when
13 painful stimuli is applied without such anesthesia;

14 F. the position, asserted by some medical experts,
15 that the unborn child is incapable of experiencing pain until a
16 point later in pregnancy than twenty weeks after fertilization
17 predominately rests on the assumption that the ability to
18 experience pain depends on the cerebral cortex and requires
19 nerve connections between the thalamus and the cortex.

20 However, recent medical research and analysis, especially since
21 2007, provides strong evidence for the conclusion that a
22 functioning cortex is not necessary to experience pain;

23 G. substantial evidence indicates that children
24 born missing the bulk of the cerebral cortex, those with
25 hydranencephaly, nevertheless experience pain;

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1 H. in adults, stimulation or ablation of the
2 cerebral cortex does not alter pain perception, while
3 stimulation or ablation of the thalamus does alter pain
4 perception;

5 I. substantial evidence indicates that structures
6 used for pain processing in the early development of an unborn
7 child differ from those of adults, using different neural
8 elements available at specific times during development, such
9 as the subcortical plate, to fulfill the role of pain
10 processing;

11 J. consequently, there is substantial medical
12 evidence that an unborn child is capable of experiencing pain
13 by twenty weeks after fertilization; and

14 K. it is the purpose of the state to assert a
15 compelling state interest in protecting the lives of unborn
16 children from the stage at which substantial medical evidence
17 indicates that they are capable of feeling pain.

18 **SECTION 4. DETERMINATION OF GESTATIONAL AGE.--**

19 A. Except in the case of a medical emergency that
20 prevents compliance with this section, no abortion shall be
21 performed or induced or be attempted to be performed or induced
22 unless the physician performing or inducing it has first made a
23 determination of the probable post-fertilization age of the
24 unborn child or relied upon such a determination made by
25 another physician. In making such a determination, the

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1 physician shall make such inquiries of the woman and perform or
2 cause to be performed such medical examinations and tests as a
3 reasonably prudent physician who is knowledgeable about the
4 case and the medical conditions involved would consider
5 necessary to perform in making an accurate diagnosis with
6 respect to post-fertilization age.

7 B. Failure by any physician to conform to any
8 requirement of this section constitutes "unprofessional
9 conduct".

10 SECTION 5. ABORTION OF UNBORN CHILD OF TWENTY OR MORE
11 WEEKS GESTATIONAL AGE PROHIBITED.--

12 A. No person shall perform or induce or attempt to
13 perform or induce an abortion upon a woman when it has been
14 determined, by the physician performing or inducing or
15 attempting to perform or induce the abortion or by another
16 physician upon whose determination that physician relies, that
17 the probable post-fertilization age of the woman's unborn child
18 is twenty or more weeks, unless, in reasonable medical
19 judgment, she has a condition that so complicates her medical
20 condition as to necessitate the termination of her pregnancy to
21 avert her death or to avert serious risk of substantial and
22 irreversible physical impairment of a major bodily function.
23 No such condition shall be deemed to exist if it is based on a
24 claim or diagnosis that the woman will engage in conduct that
25 would result in her death or in substantial and irreversible

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1 physical impairment of a major bodily function.

2 B. When an abortion upon a woman whose unborn child
3 has been determined to have a probable post-fertilization age
4 of twenty or more weeks is not prohibited by this section, the
5 physician shall terminate the pregnancy in the manner that, in
6 reasonable medical judgment, provides the best opportunity for
7 the unborn child to survive, unless, in reasonable medical
8 judgment, termination of the pregnancy in that manner would
9 pose a greater risk either of the death of the pregnant woman
10 or of the substantial and irreversible physical impairment of a
11 major bodily function of the woman than would other available
12 methods. No such greater risk shall be deemed to exist if it
13 is based on a claim or diagnosis that the woman will engage in
14 conduct that would result in her death or in substantial and
15 irreversible physical impairment of a major bodily function.

16 SECTION 6. REPORTING.--

17 A. Any physician who performs or induces or
18 attempts to perform or induce an abortion shall report to the
19 department of health on a schedule and in accordance with forms
20 and rules adopted and promulgated by the department that
21 include:

22 (1) if a determination of probable
23 post-fertilization age was made, the probable
24 post-fertilization age determined and the method and basis of
25 the determination;

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1 (2) if a determination of probable
2 post-fertilization age was not made, the basis of the
3 determination that a medical emergency existed;

4 (3) if the probable post-fertilization age was
5 determined to be twenty or more weeks, the basis of the
6 determination that the pregnant woman had a condition which so
7 complicated her medical condition as to necessitate the
8 termination of her pregnancy to avert her death or to avert
9 serious risk of substantial and irreversible physical
10 impairment of a major bodily function; and

11 (4) the method used for the abortion and, in
12 the case of an abortion performed when the probable
13 post-fertilization age was determined to be twenty or more
14 weeks:

15 (a) whether the method used was one
16 that, in reasonable medical judgment, provided the best
17 opportunity for the unborn child to survive; or

18 (b) if such a method was not used, the
19 basis of the determination that termination of the pregnancy in
20 that manner would pose a greater risk either of the death of
21 the pregnant woman or of the substantial and irreversible
22 physical impairment of a major bodily function of the woman
23 than would other available methods.

24 B. By June 30 of each year the department of health
25 shall issue a public report providing statistics for the

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1 previous calendar year compiled from all of the reports
2 covering that year submitted in accordance with this section
3 for each of the items listed in Subsection A of this section.
4 Each such report shall also provide the statistics for all
5 previous calendar years during which this section was in
6 effect, adjusted to reflect any additional information from
7 late or corrected reports. The department shall take care to
8 ensure that none of the information included in the public
9 reports could reasonably lead to the identification of any
10 woman upon whom an abortion was performed.

11 C. Any physician who fails to submit a report by
12 the end of thirty days following the due date shall be subject
13 to a late fee of five hundred dollars (\$500) for each
14 additional thirty-day period or portion of a thirty-day period
15 that the report is overdue. Any physician required to report
16 in accordance with the Pain-Capable Unborn Child Protection Act
17 who has not submitted a report or has submitted only an
18 incomplete report more than one year following the due date
19 may, in an action brought in the manner in which actions are
20 brought by the department of health, be directed by a court of
21 competent jurisdiction to submit a complete report within a
22 period stated by court order or be subject to civil contempt.
23 Failure by any physician to conform to any requirement of this
24 section, other than late filing of a report, constitutes
25 "unprofessional conduct" pursuant to the licensing act

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1 governing that physician. Failure by any physician to submit a
2 complete report in accordance with a court order constitutes
3 "unprofessional conduct" pursuant to the licensing act
4 governing that physician. Intentional or reckless
5 falsification of any report required under this section is a
6 petty misdemeanor.

7 D. Within ninety days of the operative date of this
8 act, the department of health shall adopt and promulgate rules
9 to assist in compliance with this section.

10 SECTION 7. CRIMINAL PENALTIES.--Any person who
11 intentionally or recklessly performs or induces or attempts to
12 perform or induce an abortion in violation of this act shall be
13 guilty of a third degree felony. No penalty may be assessed
14 against the woman upon whom the abortion is performed or
15 induced or attempted to be performed or induced.

16 SECTION 8. CIVIL REMEDIES.--

17 A. Any woman upon whom an abortion has been
18 performed in violation of the Pain-Capable Unborn Child
19 Protection Act, or the father of the unborn child who was the
20 subject of such an abortion, may maintain an action against the
21 person who performed or induced the abortion in intentional or
22 reckless violation of the Pain-Capable Unborn Child Protection
23 Act for actual and punitive damages. Any woman upon whom an
24 abortion has been attempted in violation of the Pain-Capable
25 Unborn Child Protection Act may maintain an action against the

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1 person who attempted to perform or induce the abortion in an
2 intentional or reckless violation of the Pain-Capable Unborn
3 Child Protection Act for actual and punitive damages.

4 B. A cause of action for injunctive relief against
5 any person who has intentionally violated the Pain-Capable
6 Unborn Child Protection Act may be maintained by the woman upon
7 whom an abortion was performed or induced or attempted to be
8 performed or induced in violation of the Pain-Capable Unborn
9 Child Protection Act; by any person who is the spouse, parent,
10 sibling or guardian of, or a current or former licensed health
11 care provider of, the woman upon whom an abortion has been
12 performed or induced or attempted to be performed or induced in
13 violation of the Pain-Capable Unborn Child Protection Act; by a
14 district attorney with appropriate jurisdiction; or by the
15 attorney general. The injunction shall prevent the abortion
16 provider from performing or inducing further abortions in
17 violation of the Pain-Capable Unborn Child Protection Act in
18 this state.

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

23 D. If judgment is rendered in favor of the
24 defendant and the court finds that the plaintiff's suit was
25 frivolous and brought in bad faith, the court shall also render

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1 judgment for a reasonable attorney fee in favor of the
2 defendant against the plaintiff.

3 E. No damages or attorney fees may be assessed
4 against the woman upon whom an abortion was performed or
5 attempted to be performed except in accordance with Subsection
6 D of this section.

7 SECTION 9. LITIGATION DEFENSE FUND.--

8 A. There is created a special revenue fund known as
9 the "Pain-Capable Unborn Child Protection Act litigation fund"
10 for the purpose of providing funds to pay for any costs and
11 expenses incurred by the attorney general in relation to
12 actions surrounding defense of this law.

13 B. The fund shall be maintained by the attorney
14 general.

15 C. The litigation fund shall consist of:

16 (1) appropriations made to the account by the
17 legislature; and

18 (2) any donations, gifts or grants made to the
19 account.

20 D. Any expenses advanced by the attorney general in
21 any of the actions under Subsection A of this section shall be
22 credited to the litigation fund.

23 E. The litigation fund shall retain the interest
24 income derived from the money credited to the fund.

25 SECTION 10. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.--

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1 In every civil or criminal proceeding or action brought under
2 the Pain-Capable Unborn Child Protection Act, the court shall
3 rule whether the anonymity of any woman upon whom an abortion
4 has been performed or induced or attempted to be performed or
5 induced shall be preserved from public disclosure if she does
6 not give her consent to such disclosure. The court, upon
7 motion or sua sponte, shall make such a ruling and, upon
8 determining that her anonymity should be preserved, shall issue
9 orders to the parties, witnesses and counsel and shall direct
10 the sealing of the record and exclusion of individuals from
11 courtrooms or hearing rooms to the extent necessary to
12 safeguard her identity from public disclosure. Each such order
13 shall be accompanied by specific written findings explaining
14 why the anonymity of the woman should be preserved from public
15 disclosure, why the order is essential to that end, how the
16 order is narrowly tailored to serve that interest and why no
17 reasonable less restrictive alternative exists. In the absence
18 of written consent of the woman upon whom an abortion has been
19 performed or induced or attempted to be performed or induced,
20 anyone, other than a public official, who brings an action
21 under Subsection A of Section 8 of the Pain-Capable Unborn
22 Child Protection Act shall do so under a pseudonym. This
23 section may not be construed to conceal the identity of the
24 plaintiff or of witnesses from the defendant or from attorneys
25 for the defendant.

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1 SECTION 11. SEVERABILITY.--If any one or more provisions,
2 sections, subsections, sentences, clauses, phrases or words of
3 the Pain-Capable Unborn Child Protection Act or the application
4 thereof to any person or circumstance is found to be
5 unconstitutional, the same is hereby declared to be severable
6 and the balance of the Pain-Capable Unborn Child Protection Act
7 shall remain effective notwithstanding such
8 unconstitutionality. The legislature hereby declares that it
9 would have passed the Pain-Capable Unborn Child Protection Act,
10 and that each provision, section, subsection, sentence, clause,
11 phrase or word thereof, irrespective of the fact that any one
12 or more provisions, sections, subsections, sentences, clauses,
13 phrases or words of the Pain-Capable Unborn Child Protection
14 Act, or the application of the Pain-Capable Unborn Child
15 Protection Act, would be declared unconstitutional.