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HOUSE BILL 179

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

INTRODUCED BY

Dennis J. Roch

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

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

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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. DETERMINATION OF GESTATIONAL AGE.--

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

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

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

11 SECTION 4. ABORTION OF UNBORN CHILD OF TWENTY OR MORE  
12 WEEKS GESTATIONAL AGE PROHIBITED.--

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

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1 would result in her death or in substantial and irreversible  
2 physical impairment of a major bodily function.

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

17 SECTION 5. REPORTING.--

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

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

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1 determination;

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

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

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

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

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

25 B. By June 30 of each year the department of health

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

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

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

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

11 **SECTION 6. CRIMINAL PENALTIES.--**Any person who  
12 intentionally or recklessly performs or induces or attempts to  
13 perform or induce an abortion in violation of this act shall be  
14 guilty of a third degree felony. No penalty may be assessed  
15 against the woman upon whom the abortion is performed or  
16 induced or attempted to be performed or induced.

17 **SECTION 7. CIVIL REMEDIES.--**

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

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

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

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

24 D. If judgment is rendered in favor of the  
25 defendant and the court finds that the plaintiff's suit was

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1 frivolous and brought in bad faith, the court shall also render  
2 judgment for a reasonable attorney fee in favor of the  
3 defendant against the plaintiff.

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

8 **SECTION 8. LITIGATION DEFENSE FUND.--**

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

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

16 C. The litigation fund shall consist of:

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

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

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

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

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1           SECTION 9. PROTECTION OF PRIVACY IN COURT PROCEEDINGS.--

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

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1 for the defendant.

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