

115TH CONGRESS
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H. R. 36

IN THE SENATE OF THE UNITED STATES

OCTOBER 4, 2017

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 18, United States Code, to protect pain-capable unborn children, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Pain-Capable Unborn
3 Child Protection Act”.

4 **SEC. 2. LEGISLATIVE FINDINGS AND DECLARATION OF**
5 **CONSTITUTIONAL AUTHORITY FOR ENACT-**
6 **MENT.**

7 Congress finds and declares the following:

8 (1) Pain receptors (nociceptors) are present
9 throughout the unborn child’s entire body and
10 nerves link these receptors to the brain’s thalamus
11 and subcortical plate by no later than 20 weeks after
12 fertilization.

13 (2) By 8 weeks after fertilization, the unborn
14 child reacts to touch. After 20 weeks, the unborn
15 child reacts to stimuli that would be recognized as
16 painful if applied to an adult human, for example,
17 by recoiling.

18 (3) In the unborn child, application of such
19 painful stimuli is associated with significant in-
20 creases in stress hormones known as the stress re-
21 sponse.

22 (4) Subjection to such painful stimuli is associ-
23 ated with long-term harmful neurodevelopmental ef-
24 fects, such as altered pain sensitivity and, possibly,
25 emotional, behavioral, and learning disabilities later
26 in life.

1 (5) For the purposes of surgery on unborn chil-
2 dren, fetal anesthesia is routinely administered and
3 is associated with a decrease in stress hormones
4 compared to their level when painful stimuli are ap-
5 plied without such anesthesia. In the United States,
6 surgery of this type is being performed by 20 weeks
7 after fertilization and earlier in specialized units af-
8 filiated with children's hospitals.

9 (6) The position, asserted by some physicians,
10 that the unborn child is incapable of experiencing
11 pain until a point later in pregnancy than 20 weeks
12 after fertilization predominately rests on the as-
13 sumption that the ability to experience pain depends
14 on the cerebral cortex and requires nerve connec-
15 tions between the thalamus and the cortex. However,
16 recent medical research and analysis, especially since
17 2007, provides strong evidence for the conclusion
18 that a functioning cortex is not necessary to experi-
19 ence pain.

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

23 (8) In adult humans and in animals, stimula-
24 tion or ablation of the cerebral cortex does not alter

1 pain perception, while stimulation or ablation of the
2 thalamus does.

3 (9) Substantial evidence indicates that struc-
4 tures used for pain processing in early development
5 differ from those of adults, using different neural
6 elements available at specific times during develop-
7 ment, such as the subcortical plate, to fulfill the role
8 of pain processing.

9 (10) The position, asserted by some commenta-
10 tors, that the unborn child remains in a coma-like
11 sleep state that precludes the unborn child experi-
12 encing pain is inconsistent with the documented re-
13 action of unborn children to painful stimuli and with
14 the experience of fetal surgeons who have found it
15 necessary to sedate the unborn child with anesthesia
16 to prevent the unborn child from engaging in vig-
17 orous movement in reaction to invasive surgery.

18 (11) Consequently, there is substantial medical
19 evidence that an unborn child is capable of experi-
20 encing pain at least by 20 weeks after fertilization,
21 if not earlier.

22 (12) It is the purpose of the Congress to assert
23 a compelling governmental interest in protecting the
24 lives of unborn children from the stage at which sub-

1 substantial medical evidence indicates that they are ca-
2 pable of feeling pain.

3 (13) The compelling governmental interest in
4 protecting the lives of unborn children from the
5 stage at which substantial medical evidence indicates
6 that they are capable of feeling pain is intended to
7 be separate from and independent of the compelling
8 governmental interest in protecting the lives of un-
9 born children from the stage of viability, and neither
10 governmental interest is intended to replace the
11 other.

12 (14) Congress has authority to extend protec-
13 tion to pain-capable unborn children under the Su-
14 preme Court’s Commerce Clause precedents and
15 under the Constitution’s grants of powers to Con-
16 gress under the Equal Protection, Due Process, and
17 Enforcement Clauses of the Fourteenth Amendment.

18 **SEC. 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

19 (a) IN GENERAL.—Chapter 74 of title 18, United
20 States Code, is amended by inserting after section 1531
21 the following:

22 **“SEC. 1532. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

23 “(a) UNLAWFUL CONDUCT.—Notwithstanding any
24 other provision of law, it shall be unlawful for any person

1 to perform an abortion or attempt to do so, unless in con-
2 formity with the requirements set forth in subsection (b).

3 “(b) REQUIREMENTS FOR ABORTIONS.—

4 “(1) ASSESSMENT OF THE AGE OF THE UN-
5 BORN CHILD.—The physician performing or at-
6 tempting the abortion shall first make a determina-
7 tion of the probable post-fertilization age of the un-
8 born child or reasonably rely upon such a determina-
9 tion made by another physician. In making such a
10 determination, the physician shall make such inquir-
11 ies of the pregnant woman and perform or cause to
12 be performed such medical examinations and tests
13 as a reasonably prudent physician, knowledgeable
14 about the case and the medical conditions involved,
15 would consider necessary to make an accurate deter-
16 mination of post-fertilization age.

17 “(2) PROHIBITION ON PERFORMANCE OF CER-
18 TAIN ABORTIONS.—

19 “(A) GENERALLY FOR UNBORN CHILDREN
20 20 WEEKS OR OLDER.—Except as provided in
21 subparagraph (B), the abortion shall not be
22 performed or attempted, if the probable post-
23 fertilization age, as determined under para-
24 graph (1), of the unborn child is 20 weeks or
25 greater.

1 “(B) EXCEPTIONS.—Subparagraph (A)
2 does not apply if—

3 “(i) in reasonable medical judgment,
4 the abortion is necessary to save the life of
5 a pregnant woman whose life is endan-
6 gered by a physical disorder, physical ill-
7 ness, or physical injury, including a life-en-
8 dangering physical condition caused by or
9 arising from the pregnancy itself, but not
10 including psychological or emotional condi-
11 tions;

12 “(ii) the pregnancy is the result of
13 rape against an adult woman, and at least
14 48 hours prior to the abortion—

15 “(I) she has obtained counseling
16 for the rape; or

17 “(II) she has obtained medical
18 treatment for the rape or an injury
19 related to the rape; or

20 “(iii) the pregnancy is a result of rape
21 against a minor or incest against a minor,
22 and the rape or incest has been reported at
23 any time prior to the abortion to either—

1 “(I) a government agency legally
2 authorized to act on reports of child
3 abuse; or

4 “(II) a law enforcement agency.

5 “(C) REQUIREMENT AS TO MANNER OF
6 PROCEDURE PERFORMED.—Notwithstanding
7 the definitions of ‘abortion’ and ‘attempt an
8 abortion’ in this section, a physician termi-
9 nating or attempting to terminate a pregnancy
10 under an exception provided by subparagraph
11 (B) may do so only in the manner which, in
12 reasonable medical judgment, provides the best
13 opportunity for the unborn child to survive.

14 “(D) REQUIREMENT THAT A PHYSICIAN
15 TRAINED IN NEONATAL RESUSCITATION BE
16 PRESENT.—If, in reasonable medical judgment,
17 the pain-capable unborn child has the potential
18 to survive outside the womb, the physician who
19 performs or attempts an abortion under an ex-
20 ception provided by subparagraph (B) shall en-
21 sure a second physician trained in neonatal re-
22 suscitation is present and prepared to provide
23 care to the child consistent with the require-
24 ments of subparagraph (E).

1 “(E) CHILDREN BORN ALIVE AFTER AT-
2 TEMPTED ABORTIONS.—When a physician per-
3 forms or attempts an abortion in accordance
4 with this section, and the child is born alive, as
5 defined in section 8 of title 1 (commonly known
6 as the Born-Alive Infants Protection Act of
7 2002), the following shall apply:

8 “(i) DEGREE OF CARE REQUIRED.—
9 Any health care practitioner present at the
10 time shall humanely exercise the same de-
11 gree of professional skill, care, and dili-
12 gence to preserve the life and health of the
13 child as a reasonably diligent and conscien-
14 tious health care practitioner would render
15 to a child born alive at the same gesta-
16 tional age in the course of a natural birth.

17 “(ii) IMMEDIATE ADMISSION TO A
18 HOSPITAL.—Following the care required to
19 be rendered under clause (i), the child born
20 alive shall be immediately transported and
21 admitted to a hospital.

22 “(iii) MANDATORY REPORTING OF
23 VIOLATIONS.—A health care practitioner or
24 any employee of a hospital, a physician’s
25 office, or an abortion clinic who has knowl-

1 edge of a failure to comply with the re-
2 quirements of this subparagraph must im-
3 mediately report the failure to an appro-
4 priate State or Federal law enforcement
5 agency or both.

6 “(F) DOCUMENTATION REQUIREMENTS.—

7 “(i) DOCUMENTATION PERTAINING TO
8 ADULTS.—A physician who performs or at-
9 tempts to perform an abortion under an
10 exception provided by subparagraph (B)(ii)
11 shall, prior to the abortion, place in the pa-
12 tient medical file documentation from a
13 hospital licensed by the State or operated
14 under authority of a Federal agency, a
15 medical clinic licensed by the State or op-
16 erated under authority of a Federal agen-
17 cy, from a personal physician licensed by
18 the State, a counselor licensed by the
19 State, or a victim’s rights advocate pro-
20 vided by a law enforcement agency that the
21 adult woman seeking the abortion obtained
22 medical treatment or counseling for the
23 rape or an injury related to the rape.

24 “(ii) DOCUMENTATION PERTAINING
25 TO MINORS.—A physician who performs or

1 attempts to perform an abortion under an
2 exception provided by subparagraph
3 (B)(iii) shall, prior to the abortion, place in
4 the patient medical file documentation
5 from a government agency legally author-
6 ized to act on reports of child abuse that
7 the rape or incest was reported prior to the
8 abortion; or, as an alternative, documenta-
9 tion from a law enforcement agency that
10 the rape or incest was reported prior to the
11 abortion.

12 “(G) INFORMED CONSENT.—

13 “(i) CONSENT FORM REQUIRED.—The
14 physician who intends to perform or at-
15 tempt to perform an abortion under the
16 provisions of subparagraph (B) may not
17 perform any part of the abortion procedure
18 without first obtaining a signed Informed
19 Consent Authorization form in accordance
20 with this subparagraph.

21 “(ii) CONTENT OF CONSENT FORM.—
22 The Informed Consent Authorization form
23 shall be presented in person by the physi-
24 cian and shall consist of—

1 “(I) a statement by the physician
2 indicating the probable post-fertiliza-
3 tion age of the pain-capable unborn
4 child;

5 “(II) a statement that Federal
6 law allows abortion after 20 weeks
7 fetal age only if the mother’s life is
8 endangered by a physical disorder,
9 physical illness, or physical injury,
10 when the pregnancy was the result of
11 rape, or an act of incest against a
12 minor;

13 “(III) a statement that the abor-
14 tion must be performed by the method
15 most likely to allow the child to be
16 born alive unless this would cause sig-
17 nificant risk to the mother;

18 “(IV) a statement that in any
19 case in which an abortion procedure
20 results in a child born alive, Federal
21 law requires that child to be given
22 every form of medical assistance that
23 is provided to children spontaneously
24 born prematurely, including transpor-
25 tation and admittance to a hospital;

1 “(V) a statement that these re-
2 quirements are binding upon the phy-
3 sician and all other medical personnel
4 who are subject to criminal and civil
5 penalties and that a woman on whom
6 an abortion has been performed may
7 take civil action if these requirements
8 are not followed; and

9 “(VI) affirmation that each sign-
10 er has filled out the informed consent
11 form to the best of their knowledge
12 and understands the information con-
13 tained in the form.

14 “(iii) SIGNATORIES REQUIRED.—The
15 Informed Consent Authorization form shall
16 be signed in person by the woman seeking
17 the abortion, the physician performing or
18 attempting to perform the abortion, and a
19 witness.

20 “(iv) RETENTION OF CONSENT
21 FORM.—The physician performing or at-
22 tempting to perform an abortion must re-
23 tain the signed informed consent form in
24 the patient’s medical file.

1 “(H) REQUIREMENT FOR DATA RETEN-
2 TION.—Paragraph (j)(2) of section 164.530 of
3 title 45, Code of Federal Regulations, shall
4 apply to documentation required to be placed in
5 a patient’s medical file pursuant to subpara-
6 graph (F) of subsection (b)(2) and a consent
7 form required to be retained in a patient’s med-
8 ical file pursuant to subparagraph (G) of such
9 subsection in the same manner and to the same
10 extent as such paragraph applies to documenta-
11 tion required by paragraph (j)(1) of such sec-
12 tion.

13 “(I) ADDITIONAL EXCEPTIONS AND RE-
14 QUIREMENTS.—

15 “(i) IN CASES OF RISK OF DEATH OR
16 MAJOR INJURY TO THE MOTHER.—Sub-
17 paragraphs (C), (D), and (G) shall not
18 apply if, in reasonable medical judgment,
19 compliance with such paragraphs would
20 pose a greater risk of—

21 “(I) the death of the pregnant
22 woman; or

23 “(II) the substantial and irre-
24 versible physical impairment of a
25 major bodily function, not including

1 psychological or emotional conditions,
2 of the pregnant woman.

3 “(ii) EXCLUSION OF CERTAIN FACILI-
4 TIES.—Notwithstanding the definitions of
5 the terms ‘medical treatment’ and ‘coun-
6 seling’ in subsection (g), the counseling or
7 medical treatment described in subpara-
8 graph (B)(ii) may not be provided by a fa-
9 cility that performs abortions (unless that
10 facility is a hospital).

11 “(iii) RULE OF CONSTRUCTION IN
12 CASES OF REPORTS TO LAW ENFORCE-
13 MENT.—The requirements of subparagraph
14 (B)(ii) do not apply if the rape has been
15 reported at any time prior to the abortion
16 to a law enforcement agency or Depart-
17 ment of Defense victim assistance per-
18 sonnel.

19 “(iv) COMPLIANCE WITH CERTAIN
20 STATE LAWS.—

21 “(I) STATE LAWS REGARDING
22 REPORTING OF RAPE AND INCEST.—
23 The physician who performs or at-
24 tempts to perform an abortion under
25 an exception provided by subpara-

1 graph (B) shall comply with such ap-
2 plicable State laws that are in effect
3 as the State’s Attorney General may
4 designate, regarding reporting re-
5 quirements in cases of rape or incest.

6 “(II) STATE LAWS REGARDING
7 PARENTAL INVOLVEMENT.—The phy-
8 sician who intends to perform an
9 abortion on a minor under an excep-
10 tion provided by subparagraph (B)
11 shall comply with any applicable State
12 laws requiring parental involvement in
13 a minor’s decision to have an abor-
14 tion.

15 “(c) CRIMINAL PENALTY.—Whoever violates sub-
16 section (a) shall be fined under this title or imprisoned
17 for not more than 5 years, or both.

18 “(d) BAR TO PROSECUTION.—A woman upon whom
19 an abortion in violation of subsection (a) is performed or
20 attempted may not be prosecuted under, or for a con-
21 spiracy to violate, subsection (a), or for an offense under
22 section 2, 3, or 4 of this title based on such a violation.

23 “(e) CIVIL REMEDIES.—

24 “(1) CIVIL ACTION BY A WOMAN ON WHOM AN
25 ABORTION IS PERFORMED.—A woman upon whom

1 an abortion has been performed or attempted in vio-
2 lation of any provision of this section may, in a civil
3 action against any person who committed the viola-
4 tion, obtain appropriate relief.

5 “(2) CIVIL ACTION BY A PARENT OF A MINOR
6 ON WHOM AN ABORTION IS PERFORMED.—A parent
7 of a minor upon whom an abortion has been per-
8 formed or attempted under an exception provided for
9 in subsection (b)(2)(B), and that was performed in
10 violation of any provision of this section may, in a
11 civil action against any person who committed the
12 violation obtain appropriate relief, unless the preg-
13 nancy resulted from the plaintiff’s criminal conduct.

14 “(3) APPROPRIATE RELIEF.—Appropriate relief
15 in a civil action under this subsection includes—

16 “(A) objectively verifiable money damages
17 for all injuries, psychological and physical, occa-
18 sioned by the violation;

19 “(B) statutory damages equal to three
20 times the cost of the abortion; and

21 “(C) punitive damages.

22 “(4) ATTORNEYS FEES FOR PLAINTIFF.—The
23 court shall award a reasonable attorney’s fee as part
24 of the costs to a prevailing plaintiff in a civil action
25 under this subsection.

1 “(5) ATTORNEYS FEES FOR DEFENDANT.—If a
2 defendant in a civil action under this subsection pre-
3 vails and the court finds that the plaintiff’s suit was
4 frivolous, the court shall award a reasonable attor-
5 ney’s fee in favor of the defendant against the plain-
6 tiff.

7 “(6) AWARDS AGAINST WOMAN.—Except under
8 paragraph (5), in a civil action under this sub-
9 section, no damages, attorney’s fee or other mone-
10 tary relief may be assessed against the woman upon
11 whom the abortion was performed or attempted.

12 “(f) DATA COLLECTION.—

13 “(1) DATA SUBMISSIONS.—Any physician who
14 performs or attempts an abortion described in sub-
15 section (b)(2)(B) shall annually submit a summary
16 of all such abortions to the National Center for
17 Health Statistics (hereinafter referred to as the
18 ‘Center’) not later than 60 days after the end of the
19 calendar year in which the abortion was performed
20 or attempted.

21 “(2) CONTENTS OF SUMMARY.—The summary
22 shall include the number of abortions performed or
23 attempted on an unborn child who had a post-fer-
24 tilization age of 20 weeks or more and specify the

1 following for each abortion under subsection
2 (b)(2)(B)—

3 “(A) the probable post-fertilization age of
4 the unborn child;

5 “(B) the method used to carry out the
6 abortion;

7 “(C) the location where the abortion was
8 conducted;

9 “(D) the exception under subsection
10 (b)(2)(B) under which the abortion was con-
11 ducted; and

12 “(E) any incident of live birth resulting
13 from the abortion.

14 “(3) EXCLUSIONS FROM DATA SUBMISSIONS.—

15 A summary required under this subsection shall not
16 contain any information identifying the woman
17 whose pregnancy was terminated and shall be sub-
18 mitted consistent with the Health Insurance Port-
19 ability and Accountability Act of 1996 (42 U.S.C.
20 1320d–2 note).

21 “(4) PUBLIC REPORT.—The Center shall annu-
22 ally issue a public report providing statistics by
23 State for the previous year compiled from all of the
24 summaries made to the Center under this sub-
25 section. The Center shall take care to ensure that

1 none of the information included in the public re-
2 ports could reasonably lead to the identification of
3 any pregnant woman upon whom an abortion was
4 performed or attempted. The annual report shall be
5 issued by July 1 of the calendar year following the
6 year in which the abortions were performed or at-
7 tempted.

8 “(g) DEFINITIONS.—In this section the following
9 definitions apply:

10 “(1) ABORTION.—The term ‘abortion’ means
11 the use or prescription of any instrument, medicine,
12 drug, or any other substance or device—

13 “(A) to intentionally kill the unborn child
14 of a woman known to be pregnant; or

15 “(B) to intentionally terminate the preg-
16 nancy of a woman known to be pregnant, with
17 an intention other than—

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

21 “(ii) to remove a dead unborn child.

22 “(2) ATTEMPT.—The term ‘attempt’, with re-
23 spect to an abortion, means conduct that, under the
24 circumstances as the actor believes them to be, con-

1 stitutes a substantial step in a course of conduct
2 planned to culminate in performing an abortion.

3 “(3) COUNSELING.—The term ‘counseling’
4 means counseling provided by a counselor licensed
5 by the State, or a victims rights advocate provided
6 by a law enforcement agency.

7 “(4) FACILITY.—The term ‘facility’ means any
8 medical or counseling group, center or clinic and in-
9 cludes the entire legal entity, including any entity
10 that controls, is controlled by, or is under common
11 control with such facility.

12 “(5) FERTILIZATION.—The term ‘fertilization’
13 means the fusion of human spermatozoon with a
14 human ovum.

15 “(6) MEDICAL TREATMENT.—The term ‘med-
16 ical treatment’ means treatment provided at a hos-
17 pital licensed by the State or operated under author-
18 ity of a Federal agency, at a medical clinic licensed
19 by the State or operated under authority of a Fed-
20 eral agency, or from a personal physician licensed by
21 the State.

22 “(7) MINOR.—The term ‘minor’ means an indi-
23 vidual who has not attained the age of 18 years.

24 “(8) PERFORM.—The term ‘perform’, with re-
25 spect to an abortion, includes inducing an abortion

1 through a medical or chemical intervention including
2 writing a prescription for a drug or device intended
3 to result in an abortion.

4 “(9) PHYSICIAN.—The term ‘physician’ means
5 a person licensed to practice medicine and surgery
6 or osteopathic medicine and surgery, or otherwise le-
7 gally authorized to perform an abortion.

8 “(10) POST-FERTILIZATION AGE.—The term
9 ‘post-fertilization age’ means the age of the unborn
10 child as calculated from the fusion of a human
11 spermatozoon with a human ovum.

12 “(11) PROBABLE POST-FERTILIZATION AGE OF
13 THE UNBORN CHILD.—The term ‘probable post-fer-
14 tilization age of the unborn child’ means what, in
15 reasonable medical judgment, will with reasonable
16 probability be the post-fertilization age of the un-
17 born child at the time the abortion is planned to be
18 performed or induced.

19 “(12) REASONABLE MEDICAL JUDGMENT.—The
20 term ‘reasonable medical judgment’ means a medical
21 judgment that would be made by a reasonably pru-
22 dent physician, knowledgeable about the case and
23 the treatment possibilities with respect to the med-
24 ical conditions involved.

1 “(13) UNBORN CHILD.—The term ‘unborn
2 child’ means an individual organism of the species
3 homo sapiens, beginning at fertilization, until the
4 point of being born alive as defined in section 8(b)
5 of title 1.

6 “(14) WOMAN.—The term ‘woman’ means a fe-
7 male human being whether or not she has reached
8 the age of majority.”.

9 (b) CLERICAL AMENDMENT.—The table of sections
10 at the beginning of chapter 74 of title 18, United States
11 Code, is amended by adding at the end the following new
12 item:

“1532. Pain-capable unborn child protection.”.

13 (c) CHAPTER HEADING AMENDMENTS.—

14 (1) CHAPTER HEADING IN CHAPTER.—The
15 chapter heading for chapter 74 of title 18, United
16 States Code, is amended by striking “**Partial-**
17 **Birth Abortions**” and inserting “**Abortions**”.

18 (2) TABLE OF CHAPTERS FOR PART I.—The
19 item relating to chapter 74 in the table of chapters
20 at the beginning of part I of title 18, United States

1 Code, is amended by striking “Partial-Birth Abor-
2 tions” and inserting “Abortions”.

Passed the House of Representatives October 3,
2017.

Attest:

KAREN L. HAAS,

Clerk.