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S. 356

To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 14, 2013

Mr. JOHANNS (for himself, Mr. INHOFE, Mr. GRASSLEY, Mrs. FISCHER, Mr. BOOZMAN, Mr. ENZI, Mr. THUNE, Mr. RISCH, Mr. VITTER, and Mr. COCHRAN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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A BILL

To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Unborn Child Pain Awareness Act of 2013''.

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) At least by 20 weeks after fertilization, an unborn child has the physical structures necessary to experience pain.

(2) There is substantial evidence that by 20 weeks after fertilization, unborn children draw away from certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain.

(3) Anesthesia is routinely administered to unborn children who have developed 20 weeks or more after fertilization who undergo prenatal surgery.

(4) There is substantial evidence that the abortion methods most commonly used 20 weeks or more after fertilization cause substantial pain to an unborn child, whether by dismemberment, poisoning, penetrating or crushing the skull, or other methods. Examples of abortion methods used 20 weeks or more after fertilization include, but are not limited to the following:

(A) The dilation and evacuation (D and E) method of abortion is commonly performed in the second trimester of pregnancy. In a dilation and evacuation abortion, the unborn child's body parts are grasped with a long-toothed clamp. The fetal body parts are then torn from

the body and pulled out of the vaginal canal. The remaining body parts are grasped and pulled out until only the head remains. The head is then grasped and crushed in order to remove it from the vaginal canal.

(B) Partial-birth abortion is an abortion in which the abortion practitioner delivers an unborn child's body until only the head remains inside the womb, punctures the back of the child's skull with a sharp instrument, and sucks the child's brains out before completing the delivery of the dead infant, and as further defined in section 1531 of title 18, United States Code.

(5) Expert testimony confirms that by 20 weeks after fertilization an unborn child may experience substantial pain even if the woman herself has received local analgesic or general anesthesia.

(6) Medical science is capable of reducing such pain through the administration of anesthesia or other pain-reducing drugs directly to the unborn child.

(7) There is a valid Federal Government interest in preventing or reducing the infliction of pain on sentient creatures. Examples of this are laws governing the use of laboratory animals and requiring

pain-free methods of slaughtering livestock, which include, but are not limited to the following:

(A) Section 2 of the Act commonly known as the Humane Slaughter Act of 1958 (Public Law 85–765; 7 U.S.C. 1902) states, ''No method of slaughter or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane—

''(i) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

''(ii) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the

carotid arteries with a sharp instrument and handling in connection with such slaughtering.''.

(B) Section 13(a)(3) of the Animal Welfare Act (7 U.S.C. 2143(a)(3)) sets the standards and certification process for the humane handling, care, treatment, and transportation of animals. This includes having standards with respect to animals in research facilities that include requirements—

(i) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia;

(ii) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal; and

(iii) in any practice which could cause pain to animals—

(I) that a doctor of veterinary medicine is consulted in the planning of such procedures;

(II) for the use of tranquilizers, analgesics, and anesthetics;

(III) for pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures;

(IV) against the use of paralytics without anesthesia; and

(V) that the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time.

(C) Section 495 of the Public Health Service Act (42 U.S.C. 289d) directs the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health, to establish guidelines for research facilities as to the proper care and treatment of animals, including the appropriate use of tranquilizers, analgesics, and other drugs, except that such guidelines may not prescribe methods

of research. Entities that conduct biomedical and behavioral research with National Institutes of Health funds must establish animal care committees which must conduct reviews at least semiannually and report to the Director of such Institutes at least annually. If the Director determines that an entity has not been following the guidelines, the Director must give the entity an opportunity to take corrective action, and, if the entity does not, the Director must suspend or revoke the grant or contract involved.

(8) There is a valid Federal Government interest in preventing harm to developing human life at all stages. Examples of this include regulations protecting fetal human subjects from risks of ''harm or discomfort'' in federally funded biomedical research, 45 CFR 102(i) and 45 CFR 46.201 et seq.

SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE ACT.

The Public Health Service Act (42 U.S.C. 201 et seq.) is amended by adding at the end the following:

"TITLE XXXIV—UNBORN CHILD PAIN AWARENESS

"SEC. 3401. DEFINITIONS.

''In this title:

''(1) ABORTION.—The term 'abortion' means the intentional use or prescription of any instrument, medicine, drug, or any other substance or device or method to terminate the life of an unborn child, or to terminate the pregnancy of a woman known to be pregnant with an intention other than—

''(A) to produce a live birth and preserve the life and health of the child after live birth; or

''(B) to remove an ectopic pregnancy, or to remove a dead unborn child who died as the result of a spontaneous abortion, accidental trauma or a criminal assault on the pregnant female or her unborn child.

''(2) ABORTION PROVIDER.—The term 'abortion provider' means any person legally qualified to perform an abortion under applicable Federal and State laws.

''(3) PAIN-CAPABLE UNBORN CHILD.—

"(A) IN GENERAL.—The term 'pain-capable unborn child' means an unborn child who has reached a probable stage of development of 20 weeks or more after fertilization.

"(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed as a determination or finding by Congress that pain may not in fact be experienced by an unborn child at stages of development prior to 20 weeks or more after fertilization.

"(4) PROBABLE AGE OF DEVELOPMENT.—The term 'probable age of development' means the duration of development after fertilization of the unborn child at the time an abortion is performed, as determined in the good faith judgment of the abortion provider using generally accepted medical criteria and information obtained by interviewing the pregnant woman.

"(5) UNBORN CHILD.—The term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

"(6) WOMAN.—The term 'woman' means a female human being whether or not she has reached the age of majority.

"(7) UNEMANCIPATED MINOR.—The term 'unemancipated minor' means an individual who is not older than 18 years and who is not emancipated under State law.

"SEC. 3402. REQUIREMENT OF INFORMED CONSENT.

"(a) REQUIREMENT OF COMPLIANCE BY PROVIDERS.—Any abortion provider in or affecting interstate or foreign commerce, who knowingly performs any abortion of a pain-capable unborn child, shall comply with the requirements of this title.

"(b) PROVISION OF CONSENT.—

"(1) IN GENERAL.—Before any part of an abortion involving a pain-capable unborn child begins, the abortion provider or his or her agent shall provide the pregnant woman involved, by telephone or in person, with the information described in paragraph (2). It may not be provided by a tape recording, but must be provided in a fashion that permits the woman to ask questions of and receive answers from the abortion provider or his agent. (In the case of the Unborn Child Pain Awareness Brochure, it may be provided pursuant to subsection (c)(2) or (c)(3)).

"(2) REQUIRED INFORMATION.—

"(A) IN GENERAL.—An abortion provider or the provider's agent to whom paragraph (1) applies shall provide the following information to the pregnant woman (or in the case of a deaf or non-English speaking woman, provide the statement in a manner that she can easily understand):

"(i) AGE OF UNBORN BABY.—The probable age of development of the unborn baby based on the number of weeks since fertilization.

"(ii) UNBORN CHILD PAIN AWARENESS BROCHURE.—An abortion provider to whom paragraph (1) applies must provide the pregnant woman with the Unborn Child Pain Awareness Brochure (referred to in this section as the 'Brochure') to be developed by the Department of Health and Human Services under subsection (c) or with the information described in subsection (c)(2) relating to accessing such Brochure.

"(iii) USE OF PAIN-PREVENTING DRUGS.—Drugs administered to the mother may not prevent the unborn child from

feeling pain, but in some cases, anesthesia or other pain-reducing drug or drugs can be administered directly to the unborn child.

"(iv) DESCRIPTION OF RISKS.—After providing the information required under clauses (i), (ii), and (iii) the abortion provider shall provide the woman involved with his or her best medical judgment on the risks, if any, of administering such anesthesia or analgesic, and the costs associated therewith.

"(v) ADMINISTRATION OF ANESTHESIA.—If the abortion provider is not qualified or willing to administer the anesthesia or other pain-reducing drug to an unborn child in response to a request from a pregnant women, the provider shall—

"(I) arrange for a qualified specialist to administer such anesthesia or drug; or

"(II) advise the pregnant woman—

"(aa) where she may obtain such anesthesia or other pain re-

ducing drugs for the unborn child in the course of an abortion; or

"(bb) that the abortion provider is unable to perform the abortion if the woman requires that she receive anesthesia or other pain-reducing drug for her unborn child.

"(vi) UNBORN CHILD PAIN AWARENESS DECISION FORM.—An abortion provider to which paragraph (1) applies shall provide the pregnant woman with the Unborn Child Pain Awareness Decision Form (provided for under subsection (d)) and obtain the appropriate signature of the woman on such form.

"(vii) RULE OF CONSTRUCTION.—Nothing in this section may be construed to impede an abortion provider or the abortion provider's agent from offering their own evaluation on the capacity of the unborn child to experience pain, the advisability of administering pain-reducing drugs to the unborn child, or any other matter, as long as such provider or agent

provides the required information, obtains the woman's signature on the decision form, and otherwise complies with the affirmative requirements of the law.

"(B) UNBORN CHILD PAIN AWARENESS BROCHURE.—An abortion provider to whom paragraph (1) applies shall provide the pregnant woman with the Unborn Child Pain Awareness Brochure (referred to in this section as the 'Brochure') to be developed by the Department of Health and Human Services under subsection (c) or with the information described in subsection (c)(2) relating to accessing such Brochure.

"(C) UNBORN CHILD PAIN AWARENESS DECISION FORM.—An abortion provider to which paragraph (1) applies shall provide the pregnant woman with the Unborn Child Pain Awareness Decision Form (provided for under subsection (d)) and obtain the appropriate signature of the woman on such form.

"(c) UNBORN CHILD PAIN AWARENESS BROCHURE.—

"(1) DEVELOPMENT.—Not later than 90 days after the date of enactment of this title, the Sec-

retary shall develop an Unborn Child Pain Awareness Brochure. Such Brochure shall—

"(A) be written in English and Spanish;

"(B) contain the following text: 'Your doctor has determined that, in his or her best medial judgment, your unborn child is at least 20 weeks old. There is a significant body of evidence that unborn children at 20 weeks after fertilization have the physical structures necessary to experience pain. There is substantial evidence that at least by this point, unborn children draw away from surgical instruments in a manner which in an infant or an adult would be interpreted as a response to pain. There is substantial evidence that the process of being killed in an abortion will cause the unborn child pain, even though you receive a pain-reducing drug or drugs. Under the Federal Unborn Child Pain Awareness Act of 2013, you have a right to know that there is evidence that the process of being killed in an abortion will cause your unborn child pain. You may request that anesthesia or other pain-reducing drug or drugs are administered directly to the pain-capable unborn child if you so desire. The purpose of ad-

ministering such drug or drugs would be to reduce or eliminate the capacity of the unborn child to experience pain during the abortion procedure. In some cases, there may be some additional risk to you associated with administering such a drug.';

''(C) contain greater detail on her option of having a pain-reducing drug or drugs administered to the unborn child to reduce the experience of pain by the unborn child during the abortion;

''(D) be written in an objective and nonjudgmental manner and be printed in a typeface large enough to be clearly legible; and

''(E) be made available by the Secretary at no cost to any abortion provider.

''(2) INTERNET INFORMATION.—The Brochure under this section shall be available on the Internet website of the Department of Health and Human Services at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on the website shall be a minimum of 200x300 pixels. All letters on the website shall be a minimum of 12 point font. All such information and pictures shall be accessible

with an industry standard browser, requiring no additional plug-ins.

"(3) PRESENTATION OF BROCHURE.—An abortion provider or his or her agent must provide a pregnant woman with the Brochure, developed under paragraph (1), before any part of an abortion of a pain-capable child begins. The brochure may be provided—

"(A) through an in-person visit by the pregnant woman;

"(B) through an e-mail attachment, from the abortion provider or his or her agent; or

"(C) by certified mail, mailed to the woman at least 72 hours before any part of the abortion begins.

"(4) WAIVER.—After the abortion provider or his or her agent offers to provide a pregnant woman the brochure, a pregnant woman may waive receipt of the brochure under this subsection by signing the waiver form contained in the Unborn Child Pain Awareness Decision Form.

"(d) UNBORN CHILD PAIN AWARENESS DECISION FORM.—Not later than 30 days after the date of enactment of this title, the Secretary shall develop an Unborn

1 Child Pain Awareness Decision Form. To be valid, such
2 form shall—
3 "(1) with respect to the pregnant woman—
4 "(A) contain a statement that affirms that
5 the woman has received or been offered all of
6 the information required in subsection (b);
7 "(B) affirm that the woman has read the
8 following statement: 'You are considering hav-
9 ing an abortion of an unborn child who will
10 have developed, at the time of the abortion, ap-
11 proximately ____ weeks after fertilization.
12 There is a significant body of evidence that un-
13 born children at 20 weeks after fertilization
14 have the physical structures necessary to expe-
15 rience pain. There is substantial evidence that
16 at least by this point, unborn children draw
17 away from surgical instruments in a manner
18 which in an infant or an adult would be inter-
19 preted as a response to pain. There is substan-
20 tial evidence that the process of being killed in
21 an abortion will cause the unborn child pain,
22 even though you receive a pain-reducing drug or
23 drugs. Under the Federal Unborn Child Pain
24 Awareness Act of 2013, you have a right to
25 know that there is evidence that the process of

being killed in an abortion will cause your unborn child pain. You may request that anesthesia or other pain-reducing drug or drugs are administered directly to the pain-capable unborn child if you so desire. The purpose of administering such drug or drugs would be to reduce or eliminate the capacity of the unborn child to experience pain during the abortion procedure. In some cases, there may be some additional risk to you associated with administering such a drug.';

''(C) require the woman to explicitly either request or refuse the administration of pain-reducing drugs to the unborn child; and

''(D) be signed by a pregnant woman prior to the performance of an abortion involving a pain-capable unborn child; and

''(2) with respect to the abortion provider—

''(A) contain a statement that the provider has provided the woman with all of the information required under subsection (b);

''(B) if applicable, contain a certification by the provider that an exception described in section 3403 applies and the detailed reasons for such certification; and

"(C) be signed by the provider prior to the performance of the abortion procedure.

"(e) MAINTENANCE OF RECORDS.—The Secretary shall promulgate regulations relating to the period of time during which copies of forms under subsection (d) shall be maintained by abortion providers.

"SEC. 3403. EXCEPTION TO SAVE THE LIFE OF THE MOTHER.

"The provisions of section 3402 shall not apply to an abortion provider in the case that the abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"SEC. 3404. PENALTIES FOR FAILURE TO COMPLY.

"(a) IN GENERAL.—An abortion provider who willfully fails to comply with the provisions of this title shall be subject to civil penalties in accordance with this section in an appropriate Federal court.

"(b) COMMENCEMENT OF ACTION.—The Attorney General of the United States may commence a civil action under this section.

"(c) FIRST OFFENSE.—Upon a finding by a court that a respondent in an action commenced under this section has knowingly violated a provision of this title, the

court shall notify the appropriate State medical licensing authority and shall assess a civil penalty against the respondent in an amount not to exceed $100,000.

"(d) SECOND AND SUBSEQUENT OFFENSES.—Upon a finding by a court that the respondent in an action commenced under this section has knowingly violated a provision of this title and the respondent has been found to have knowingly violated a provision of this title on a prior occasion, the court shall notify the appropriate State medical licensing authority and shall assess a civil penalty against the respondent in an amount not to exceed $250,000.

"(e) PRIVATE RIGHT OF ACTION.—A pregnant woman upon whom an abortion has been performed in violation of this title, or the parent or legal guardian of such a woman if she is an unemancipated minor, may commence a civil action against the abortion provider for any knowing or reckless violation of this title for actual and punitive damages.".

SEC. 4. PREEMPTION.

Nothing in this Act or the amendments made by this Act shall be construed to preempt any provision of State law to the extent that such State law establishes, implements, or continues in effect greater protections for un-

born children from pain than the protections provided under this Act and the amendments made by this Act.

SEC. 5. SEVERABILITY.

The provisions of this Act shall be severable. If any provision of this Act, or any application thereof, is found unconstitutional, that finding shall not affect any provision or application of the Act not so adjudicated.

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