H. R. 36

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

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2015

Mr. Franks of Arizona (for himself and Mrs. Blackburn) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. LEGISLATIVE FINDINGS AND DECLARATION OF CONSTITUTIONAL AUTHORITY FOR ENACT-

MENT.

Congress finds and declares the following:
(1) Pain receptors (nociceptors) are present throughout the unborn child’s entire body and nerves link these receptors to the brain’s thalamus and subcortical plate by no later than 20 weeks after fertilization.

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

(3) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

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

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia. In the United States, surgery of this type is being performed by 20 weeks
after fertilization and earlier in specialized units affiliated with children’s hospitals.

(6) The position, asserted by some physicians, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

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

(8) In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

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

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

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

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

(13) The compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the compelling
governmental interest in protecting the lives of unborn children from the stage of viability, and neither governmental interest is intended to replace the other.

(14) Congress has authority to extend protection to pain-capable unborn children under the Supreme Court’s Commerce Clause precedents and under the Constitution’s grants of powers to Congress under the Equal Protection, Due Process, and Enforcement Clauses of the Fourteenth Amendment.

SEC. 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.

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

“§1532. Pain-capable unborn child protection

“(a) UNLAWFUL CONDUCT.—Notwithstanding any other provision of law, it shall be unlawful for any person to perform an abortion or attempt to do so, unless in conformity with the requirements set forth in subsection (b).

“(b) REQUIREMENTS FOR ABORTIONS.—

“(1) The physician performing or attempting the abortion shall first make a determination of the probable post-fertilization age of the unborn child or reasonably rely upon such a determination made by another physician. In making such a determination,
the physician shall make such inquiries of the preg-
nant woman and perform or cause to be performed
such medical examinations and tests as a reasonably
prudent physician, knowledgeable about the case and
the medical conditions involved, would consider nec-
essary to make an accurate determination of post-
fertilization age.

“(2)(A) Except as provided in subparagraph
(B), the abortion shall not be performed or at-
tempted, if the probable post-fertilization age, as de-
determined under paragraph (1), of the unborn child
is 20 weeks or greater.

“(B) Subject to subparagraph (C), subpara-
graph (A) does not apply if—

“(i) in reasonable medical judgment, the
abortion is necessary to save the life of a preg-
nant woman 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 preg-
nancy itself, but not including psychological or
emotional conditions; or

“(ii) the pregnancy is the result of rape, or
the result of incest against a minor, if the rape
has been reported at any time prior to the abor-
tion to an appropriate law enforcement agency, or if the incest against a minor has been reported at any time prior to the abortion to an appropriate law enforcement agency or to a government agency legally authorized to act on reports of child abuse or neglect.

“(C) Notwithstanding the definitions of ‘abortion’ and ‘attempt an abortion’ in this section, a physician terminating or attempting to terminate a pregnancy under an exception provided by subparagraph (B) may do so only in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk of—

“(i) the death of the pregnant woman; or

“(ii) the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman;

than would other available methods.

“(e) CRIMINAL PENALTY.—Whoever violates subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.
“(d) Bar to Prosecution.—A woman upon whom an abortion in violation of subsection (a) is performed or attempted may not be prosecuted under, or for a conspiracy to violate, subsection (a), or for an offense under section 2, 3, or 4 of this title based on such a violation.

“(e) Definitions.—In this section the following definitions apply:

“(1) Abortion.—The term ‘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—

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

“(ii) to remove a dead unborn child.

“(2) Attempt an Abortion.—The term ‘attempt’, with respect to an abortion, means conduct that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in performing an abortion.
“(3) Fertilization.—The term ‘fertilization’ means the fusion of human spermatozoon with a human ovum.

“(4) Perform.—The term ‘perform’, with respect to an abortion, includes induce an abortion through a medical or chemical intervention including writing a prescription for a drug or device intended to result in an abortion.

“(5) Physician.—The term ‘physician’ means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise legally authorized to perform an abortion.

“(6) Post-fertilization age.—The term ‘post-fertilization age’ means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

“(7) Probable post-fertilization age of the unborn child.—The term ‘probable post-fertilization age of the unborn child’ means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

“(8) Reasonable medical judgment.—The term ‘reasonable medical judgment’ means a medical
judgment that would be made by a reasonably pru-
dent physician, knowledgeable about the case and
the treatment possibilities with respect to the med-
ical conditions involved.

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

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

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

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

(e) CHAPTER HEADING AMENDMENTS.—

(1) CHAPTER HEADING IN CHAPTER.—The
chapter heading for chapter 74 of title 18, United
States Code, is amended by striking “PARTIAL-
BIRTH ABORTIONS” and inserting “ABOR-
TIONS”.

(2) TABLE OF CHAPTERS FOR PART I.—The
item relating to chapter 74 in the table of chapters
at the beginning of part I of title 18, United States
Code, is amended by striking “Partial-Birth Abortions” and inserting “Abortions”.