

114TH CONGRESS  
1ST SESSION

# H. R. 36

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

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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

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## A BILL

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,*

3 **SECTION 1. SHORT TITLE.**

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

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

9 Congress finds and declares the following:

1           (1) Pain receptors (nociceptors) are present  
2 throughout the unborn child's entire body and  
3 nerves link these receptors to the brain's thalamus  
4 and subcortical plate by no later than 20 weeks after  
5 fertilization.

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

11           (3) In the unborn child, application of such  
12 painful stimuli is associated with significant in-  
13 creases in stress hormones known as the stress re-  
14 sponse.

15           (4) Subjection to such painful stimuli is associ-  
16 ated with long-term harmful neurodevelopmental ef-  
17 fects, such as altered pain sensitivity and, possibly,  
18 emotional, behavioral, and learning disabilities later  
19 in life.

20           (5) For the purposes of surgery on unborn chil-  
21 dren, fetal anesthesia is routinely administered and  
22 is associated with a decrease in stress hormones  
23 compared to their level when painful stimuli are ap-  
24 plied without such anesthesia. In the United States,  
25 surgery of this type is being performed by 20 weeks

1 after fertilization and earlier in specialized units af-  
2 filiated with children's hospitals.

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

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

17 (8) In adult humans and in animals, stimula-  
18 tion or ablation of the cerebral cortex does not alter  
19 pain perception, while stimulation or ablation of the  
20 thalamus does.

21 (9) Substantial evidence indicates that struc-  
22 tures used for pain processing in early development  
23 differ from those of adults, using different neural  
24 elements available at specific times during develop-

1       ment, such as the subcortical plate, to fulfill the role  
2       of pain processing.

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

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

16          (12) It is the purpose of the Congress to assert  
17      a compelling governmental interest in protecting the  
18      lives of unborn children from the stage at which sub-  
19      stantial medical evidence indicates that they are ca-  
20      pable of feeling pain.

21          (13) The compelling governmental interest in  
22      protecting the lives of unborn children from the  
23      stage at which substantial medical evidence indicates  
24      that they are capable of feeling pain is intended to  
25      be separate from and independent of the compelling

1 governmental interest in protecting the lives of un-  
2 born children from the stage of viability, and neither  
3 governmental interest is intended to replace the  
4 other.

5 (14) Congress has authority to extend protec-  
6 tion to pain-capable unborn children under the Su-  
7 preme Court’s Commerce Clause precedents and  
8 under the Constitution’s grants of powers to Con-  
9 gress under the Equal Protection, Due Process, and  
10 Enforcement Clauses of the Fourteenth Amendment.

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

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

15 **“§ 1532. Pain-capable unborn child protection**

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

20 “(b) REQUIREMENTS FOR ABORTIONS.—

21 “(1) The physician performing or attempting  
22 the abortion shall first make a determination of the  
23 probable post-fertilization age of the unborn child or  
24 reasonably rely upon such a determination made by  
25 another physician. In making such a determination,

1 the physician shall make such inquiries of the preg-  
2 nant woman and perform or cause to be performed  
3 such medical examinations and tests as a reasonably  
4 prudent physician, knowledgeable about the case and  
5 the medical conditions involved, would consider nec-  
6 essary to make an accurate determination of post-  
7 fertilization age.

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

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

15 “(i) in reasonable medical judgment, the  
16 abortion is necessary to save the life of a preg-  
17 nant woman whose life is endangered by a  
18 physical disorder, physical illness, or physical  
19 injury, including a life-endangering physical  
20 condition caused by or arising from the preg-  
21 nancy itself, but not including psychological or  
22 emotional conditions; or

23 “(ii) the pregnancy is the result of rape, or  
24 the result of incest against a minor, if the rape  
25 has been reported at any time prior to the abor-

1           tion to an appropriate law enforcement agency,  
2           or if the incest against a minor has been re-  
3           ported at any time prior to the abortion to an  
4           appropriate law enforcement agency or to a  
5           government agency legally authorized to act on  
6           reports of child abuse or neglect.

7           “(C) Notwithstanding the definitions of ‘abor-  
8           tion’ and ‘attempt an abortion’ in this section, a  
9           physician terminating or attempting to terminate a  
10          pregnancy under an exception provided by subpara-  
11          graph (B) may do so only in the manner which, in  
12          reasonable medical judgment, provides the best op-  
13          portunity for the unborn child to survive, unless, in  
14          reasonable medical judgment, termination of the  
15          pregnancy in that manner would pose a greater risk  
16          of—

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

18                   “(ii) the substantial and irreversible phys-  
19                   ical impairment of a major bodily function, not  
20                   including psychological or emotional conditions,  
21                   of the pregnant woman;

22          than would other available methods.

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

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

6       “(e) DEFINITIONS.—In this section the following  
7 definitions apply:

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

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

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

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

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

20               “(2) ATTEMPT AN ABORTION.—The term ‘at-  
21 tempt’, with respect to an abortion, means conduct  
22 that, under the circumstances as the actor believes  
23 them to be, constitutes a substantial step in a course  
24 of conduct planned to culminate in performing an  
25 abortion.



1           “(3) FERTILIZATION.—The term ‘fertilization’  
2 means the fusion of human spermatozoon with a  
3 human ovum.

4           “(4) PERFORM.—The term ‘perform’, with re-  
5 spect to an abortion, includes induce an abortion  
6 through a medical or chemical intervention including  
7 writing a prescription for a drug or device intended  
8 to result in an abortion.

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

13           “(6) POST-FERTILIZATION AGE.—The term  
14 ‘post-fertilization age’ means the age of the unborn  
15 child as calculated from the fusion of a human  
16 spermatozoon with a human ovum.

17           “(7) PROBABLE POST-FERTILIZATION AGE OF  
18 THE UNBORN CHILD.—The term ‘probable post-fer-  
19 tilization age of the unborn child’ means what, in  
20 reasonable medical judgment, will with reasonable  
21 probability be the postfertilization age of the unborn  
22 child at the time the abortion is planned to be per-  
23 formed or induced.

24           “(8) REASONABLE MEDICAL JUDGMENT.—The  
25 term ‘reasonable medical judgment’ means a medical

1 judgment that would be made by a reasonably pru-  
 2 dent physician, knowledgeable about the case and  
 3 the treatment possibilities with respect to the med-  
 4 ical conditions involved.

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

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

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

“1532. Pain-capable unborn child protection.”

16 (c) CHAPTER HEADING AMENDMENTS.—

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

22 (2) TABLE OF CHAPTERS FOR PART I.—The  
 23 item relating to chapter 74 in the table of chapters  
 24 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”.

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