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

IN THE SENATE OF THE UNITED STATES

OCTOBER 5, 2017

Mr. GRAHAM (for himself, Mr. LANKFORD, Mr. BLUNT, Mr. HATCH, Mr. MCCAIN, Mr. DAINES, Mr. SCOTT, Mr. GRASSLEY, Mr. INHOFE, Mr. CRUZ, Mr. LEE, Mr. PORTMAN, Mr. MORAN, Mr. SASSE, Mr. BOOZMAN, Mr. PERDUE, Mr. CASSIDY, Mr. TILLIS, Mr. COCHRAN, Mrs. ERNST, Mr. MCCONNELL, Mr. ROUNDS, Mr. ROBERTS, Mr. COTTON, Mr. WICKER, Mr. RISCH, Mr. PAUL, Mr. CORNYN, Mr. BURR, Mr. STRANGE, Mr. BARRASSO, Mrs. FISCHER, Mr. ISAKSON, Mr. THUNE, Mr. JOHNSON, Mr. SHELBY, Mr. FLAKE, Mr. ENZI, Mr. YOUNG, Mr. SULLIVAN, Mr. RUBIO, Mr. KENNEDY, Mr. CORKER, Mr. CRAPO, Mr. HOEVEN, and Mr. TOOMEY) introduced the following bill; which was read twice and 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.

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”.

1 **SEC. 2. LEGISLATIVE FINDINGS.**

2 Congress finds and declares the following:

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

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

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

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

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

1 surgery of this type is being performed by 20 weeks
2 after fertilization and earlier in specialized units af-
3 filiated with children's hospitals.

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

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

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

22 (9) Substantial evidence indicates that struc-
23 tures used for pain processing in early development
24 differ from those of adults, using different neural
25 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 **SEC. 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

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

9 **“§ 1532. Pain-capable unborn child protection**

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

14 “(b) REQUIREMENTS FOR ABORTIONS.—

15 “(1) ASSESSMENT OF THE AGE OF THE UN-
16 BORN CHILD.—The physician performing or at-
17 tempting the abortion shall first make a determina-
18 tion of the probable post-fertilization age of the un-
19 born child or reasonably rely upon such a determina-
20 tion made by another physician. In making such a
21 determination, the physician shall make such inquir-
22 ies of the pregnant woman and perform or cause to
23 be performed such medical examinations and tests
24 as a reasonably prudent physician, knowledgeable
25 about the case and the medical conditions involved,

1 would consider necessary to make an accurate deter-
2 mination of post-fertilization age.

3 “(2) PROHIBITION ON PERFORMANCE OF CER-
4 TAIN ABORTIONS.—

5 “(A) GENERALLY FOR UNBORN CHILDREN
6 20 WEEKS OR OLDER.—Except as provided in
7 subparagraph (B), the abortion shall not be
8 performed or attempted, if the probable post-
9 fertilization age, as determined under para-
10 graph (1), of the unborn child is 20 weeks or
11 greater.

12 “(B) EXCEPTIONS.—Subparagraph (A)
13 does not apply if—

14 “(i) in reasonable medical judgment,
15 the abortion is necessary to save the life of
16 a pregnant woman whose life is endan-
17 gered by a physical disorder, physical ill-
18 ness, or physical injury, including a life-en-
19 dangering physical condition caused by or
20 arising from the pregnancy itself, but not
21 including psychological or emotional condi-
22 tions;

23 “(ii) the pregnancy is the result of
24 rape against an adult woman, and at least
25 48 hours prior to the abortion—

1 “(I) she has obtained counseling
2 for the rape; or

3 “(II) she has obtained medical
4 treatment for the rape or an injury
5 related to the rape; or

6 “(iii) the pregnancy is a result of rape
7 against a minor or incest against a minor,
8 and the rape or incest has been reported at
9 any time prior to the abortion to either—

10 “(I) a government agency legally
11 authorized to act on reports of child
12 abuse; or

13 “(II) a law enforcement agency.

14 “(C) REQUIREMENT AS TO MANNER OF
15 PROCEDURE PERFORMED.—Notwithstanding
16 the definitions of ‘abortion’ and ‘attempt an
17 abortion’ in this section, a physician termi-
18 nating or attempting to terminate a pregnancy
19 under an exception provided by subparagraph
20 (B) may do so only in the manner which, in
21 reasonable medical judgment, provides the best
22 opportunity for the unborn child to survive.

23 “(D) REQUIREMENT THAT A PHYSICIAN
24 TRAINED IN NEONATAL RESUSCITATION BE
25 PRESENT.—If, in reasonable medical judgment,

1 the pain-capable unborn child has the potential
2 to survive outside the womb, the physician who
3 performs or attempts an abortion under an ex-
4 ception provided by subparagraph (B) shall en-
5 sure a second physician trained in neonatal re-
6 suscitation is present and prepared to provide
7 care to the child consistent with the require-
8 ments of subparagraph (E).

9 “(E) CHILDREN BORN ALIVE AFTER AT-
10 TEMPTED ABORTIONS.—When a physician per-
11 forms or attempts an abortion in accordance
12 with this section, and the child is born alive, as
13 defined in section 8 of title 1 (commonly known
14 as the Born-Alive Infants Protection Act of
15 2002), the following shall apply:

16 “(i) DEGREE OF CARE REQUIRED.—
17 Any health care practitioner present at the
18 time shall humanely exercise the same de-
19 gree of professional skill, care, and dili-
20 gence to preserve the life and health of the
21 child as a reasonably diligent and conscien-
22 tious health care practitioner would render
23 to a child born alive at the same gesta-
24 tional age in the course of a natural birth.

1 “(ii) IMMEDIATE ADMISSION TO A
2 HOSPITAL.—Following the care required to
3 be rendered under clause (i), the child born
4 alive shall be immediately transported and
5 admitted to a hospital.

6 “(iii) MANDATORY REPORTING OF
7 VIOLATIONS.—A health care practitioner or
8 any employee of a hospital, a physician’s
9 office, or an abortion clinic who has knowl-
10 edge of a failure to comply with the re-
11 quirements of this subparagraph must im-
12 mediately report the failure to an appro-
13 priate State or Federal law enforcement
14 agency or both.

15 “(F) DOCUMENTATION REQUIREMENTS.—

16 “(i) DOCUMENTATION PERTAINING TO
17 ADULTS.—A physician who performs or at-
18 tempts to perform an abortion under an
19 exception provided by subparagraph (B)(ii)
20 shall, prior to the abortion, place in the pa-
21 tient medical file documentation from a
22 hospital licensed by the State or operated
23 under authority of a Federal agency, a
24 medical clinic licensed by the State or op-
25 erated under authority of a Federal agen-

1 cy, from a personal physician licensed by
2 the State, a counselor licensed by the
3 State, or a victim's rights advocate pro-
4 vided by a law enforcement agency that the
5 adult woman seeking the abortion obtained
6 medical treatment or counseling for the
7 rape or an injury related to the rape.

8 “(ii) DOCUMENTATION PERTAINING
9 TO MINORS.—A physician who performs or
10 attempts to perform an abortion under an
11 exception provided by subparagraph
12 (B)(iii) shall, prior to the abortion, place in
13 the patient medical file documentation
14 from a government agency legally author-
15 ized to act on reports of child abuse that
16 the rape or incest was reported prior to the
17 abortion; or, as an alternative, documenta-
18 tion from a law enforcement agency that
19 the rape or incest was reported prior to the
20 abortion.

21 “(G) INFORMED CONSENT.—

22 “(i) CONSENT FORM REQUIRED.—The
23 physician who intends to perform or at-
24 tempt to perform an abortion under the
25 provisions of subparagraph (B) may not

1 perform any part of the abortion procedure
2 without first obtaining a signed Informed
3 Consent Authorization form in accordance
4 with this subparagraph.

5 “(ii) CONTENT OF CONSENT FORM.—
6 The Informed Consent Authorization form
7 shall be presented in person by the physi-
8 cian and shall consist of—

9 “(I) a statement by the physician
10 indicating the probable post-fertiliza-
11 tion age of the pain-capable unborn
12 child;

13 “(II) a statement that Federal
14 law allows abortion after 20 weeks
15 fetal age only if the mother’s life is
16 endangered by a physical disorder,
17 physical illness, or physical injury,
18 when the pregnancy was the result of
19 rape, or an act of incest against a
20 minor;

21 “(III) a statement that the abor-
22 tion must be performed by the method
23 most likely to allow the child to be
24 born alive unless this would cause sig-
25 nificant risk to the mother;

1 “(IV) a statement that in any
2 case in which an abortion procedure
3 results in a child born alive, Federal
4 law requires that child to be given
5 every form of medical assistance that
6 is provided to children spontaneously
7 born prematurely, including transpor-
8 tation and admittance to a hospital;

9 “(V) a statement that these re-
10 quirements are binding upon the phy-
11 sician and all other medical personnel
12 who are subject to criminal and civil
13 penalties and that a woman on whom
14 an abortion has been performed may
15 take civil action if these requirements
16 are not followed; and

17 “(VI) affirmation that each sign-
18 er has filled out the informed consent
19 form to the best of their knowledge
20 and understands the information con-
21 tained in the form.

22 “(iii) SIGNATORIES REQUIRED.—The
23 Informed Consent Authorization form shall
24 be signed in person by the woman seeking
25 the abortion, the physician performing or

1 attempting to perform the abortion, and a
2 witness.

3 “(iv) RETENTION OF CONSENT
4 FORM.—The physician performing or at-
5 tempting to perform an abortion must re-
6 tain the signed informed consent form in
7 the patient’s medical file.

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

20 “(I) ADDITIONAL EXCEPTIONS AND RE-
21 QUIREMENTS.—

22 “(i) IN CASES OF RISK OF DEATH OR
23 MAJOR INJURY TO THE MOTHER.—Sub-
24 paragraphs (C), (D), and (G) shall not
25 apply if, in reasonable medical judgment,

1 compliance with such paragraphs would
2 pose a greater risk of—

3 “(I) the death of the pregnant
4 woman; or

5 “(II) the substantial and irre-
6 versible physical impairment of a
7 major bodily function, not including
8 psychological or emotional conditions,
9 of the pregnant woman.

10 “(ii) EXCLUSION OF CERTAIN FACILI-
11 TIES.—Notwithstanding the definitions of
12 the terms ‘medical treatment’ and ‘coun-
13 seling’ in subsection (g), the counseling or
14 medical treatment described in subpara-
15 graph (B)(ii) may not be provided by a fa-
16 cility that performs abortions (unless that
17 facility is a hospital).

18 “(iii) RULE OF CONSTRUCTION IN
19 CASES OF REPORTS TO LAW ENFORCE-
20 MENT.—The requirements of subparagraph
21 (B)(ii) do not apply if the rape has been
22 reported at any time prior to the abortion
23 to a law enforcement agency or Depart-
24 ment of Defense victim assistance per-
25 sonnel.

1 “(iv) COMPLIANCE WITH CERTAIN
2 STATE LAWS.—

3 “(I) STATE LAWS REGARDING
4 REPORTING OF RAPE AND INCEST.—
5 The physician who performs or at-
6 tempts to perform an abortion under
7 an exception provided by subpara-
8 graph (B) shall comply with such ap-
9 plicable State laws that are in effect
10 as the State’s Attorney General may
11 designate, regarding reporting re-
12 quirements in cases of rape or incest.

13 “(II) STATE LAWS REGARDING
14 PARENTAL INVOLVEMENT.—The phy-
15 sician who intends to perform an
16 abortion on a minor under an excep-
17 tion provided by subparagraph (B)
18 shall comply with any applicable State
19 laws requiring parental involvement in
20 a minor’s decision to have an abor-
21 tion.

22 “(c) CRIMINAL PENALTY.—Whoever violates sub-
23 section (a) shall be fined under this title or imprisoned
24 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) CIVIL REMEDIES.—

7 “(1) CIVIL ACTION BY A WOMAN ON WHOM AN
8 ABORTION IS PERFORMED.—A woman upon whom
9 an abortion has been performed or attempted in vio-
10 lation of any provision of this section may, in a civil
11 action against any person who committed the viola-
12 tion, obtain appropriate relief.

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

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

1 “(A) objectively verifiable money damages
2 for all injuries, psychological and physical, occa-
3 sioned by the violation;

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

6 “(C) punitive damages.

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

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

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

22 “(f) DATA COLLECTION.—

23 “(1) DATA SUBMISSIONS.—Any physician who
24 performs or attempts an abortion described in sub-
25 section (b)(2)(B) shall annually submit a summary

1 of all such abortions to the National Center for
2 Health Statistics (hereinafter referred to as the
3 ‘Center’) not later than 60 days after the end of the
4 calendar year in which the abortion was performed
5 or attempted.

6 “(2) CONTENTS OF SUMMARY.—The summary
7 shall include the number of abortions performed or
8 attempted on an unborn child who had a post-fer-
9 tilization age of 20 weeks or more and specify the
10 following for each abortion under subsection
11 (b)(2)(B):

12 “(A) the probable post-fertilization age of
13 the unborn child;

14 “(B) the method used to carry out the
15 abortion;

16 “(C) the location where the abortion was
17 conducted;

18 “(D) the exception under subsection
19 (b)(2)(B) under which the abortion was con-
20 ducted; and

21 “(E) any incident of live birth resulting
22 from the abortion.

23 “(3) EXCLUSIONS FROM DATA SUBMISSIONS.—
24 A summary required under this subsection shall not
25 contain any information identifying the woman

1 whose pregnancy was terminated and shall be sub-
2 mitted consistent with the Health Insurance Port-
3 ability and Accountability Act of 1996 (42 U.S.C.
4 1320d-2 note).

5 “(4) PUBLIC REPORT.—The Center shall annu-
6 ally issue a public report providing statistics by
7 State for the previous year compiled from all of the
8 summaries made to the Center under this sub-
9 section. The Center shall take care to ensure that
10 none of the information included in the public re-
11 ports could reasonably lead to the identification of
12 any pregnant woman upon whom an abortion was
13 performed or attempted. The annual report shall be
14 issued by July 1 of the calendar year following the
15 year in which the abortions were performed or at-
16 tempted.

17 “(g) DEFINITIONS.—In this section the following
18 definitions apply:

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

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

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

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

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

8 “(2) ATTEMPT.—The term ‘attempt’, with re-
9 spect to an abortion, means conduct that, under the
10 circumstances as the actor believes them to be, con-
11 stitutes a substantial step in a course of conduct
12 planned to culminate in performing an abortion.

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

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

22 “(5) FERTILIZATION.—The term ‘fertilization’
23 means the fusion of human spermatozoon with a
24 human ovum.

1 “(6) MEDICAL TREATMENT.—The term ‘med-
2 ical treatment’ means treatment provided at a hos-
3 pital licensed by the State or operated under author-
4 ity of a Federal agency, at a medical clinic licensed
5 by the State or operated under authority of a Fed-
6 eral agency, or from a personal physician licensed by
7 the State.

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

10 “(8) PERFORM.—The term ‘perform’, with re-
11 spect to an abortion, includes inducing an abortion
12 through a medical or chemical intervention including
13 writing a prescription for a drug or device intended
14 to result in an abortion.

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

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

23 “(11) PROBABLE POST-FERTILIZATION AGE OF
24 THE UNBORN CHILD.—The term ‘probable post-fer-
25 tilization age of the unborn child’ means what, in

1 reasonable medical judgment, will with reasonable
 2 probability be the post-fertilization age of the un-
 3 born child at the time the abortion is planned to be
 4 performed or induced.

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

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

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

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

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

23 (c) CHAPTER HEADING AMENDMENTS.—

24 (1) CHAPTER HEADING IN CHAPTER.—The
 25 chapter heading for chapter 74 of title 18, United

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

3 (2) TABLE OF CHAPTERS FOR PART I.—The
4 item relating to chapter 74 in the table of chapters
5 at the beginning of part I of title 18, United States
6 Code, is amended to read as follows:

“74. Abortions 1531”.

