

116TH CONGRESS
2D SESSION

H. R. 8939

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

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 10, 2020

Ms. GABBARD 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.

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 “Late Term Abortion
5 Ban 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) ASSESSMENT OF THE AGE OF THE UN-
22 BORN CHILD.—The physician performing or at-
23 tempting the abortion shall first make a determina-
24 tion of the probable post-fertilization age of the un-
25 born child or reasonably rely upon such a determina-

1 tion made by another physician. In making such a
2 determination, the physician shall make such inquir-
3 ies of the pregnant woman and perform or cause to
4 be performed such medical examinations and tests
5 as a reasonably prudent physician, knowledgeable
6 about the case and the medical conditions involved,
7 would consider necessary to make an accurate deter-
8 mination of post-fertilization age.

9 “(2) PROHIBITION ON PERFORMANCE OF CER-
10 TAIN ABORTIONS.—

11 “(A) GENERALLY FOR UNBORN CHILDREN
12 20 WEEKS OR OLDER.—Except as provided in
13 subparagraph (B), the abortion shall not be
14 performed or attempted, if the probable post-
15 fertilization age, as determined under para-
16 graph (1), of the unborn child is 20 weeks or
17 greater.

18 “(B) EXCEPTIONS.—Subparagraph (A)
19 does not apply if—

20 “(i) in reasonable medical judgment,
21 the abortion is necessary to prevent the
22 loss of life or severe injury (the substantial
23 and irreversible physical impairment of a
24 major bodily function, not including psy-
25 chological or emotional conditions) of a

1 pregnant woman endangered by a physical
2 disorder, physical illness, or physical in-
3 jury, including a life-endangering physical
4 condition caused by or arising from the
5 pregnancy itself, but not including psycho-
6 logical or emotional conditions;

7 “(ii) the pregnancy is the result of
8 rape against an adult woman; or

9 “(iii) the pregnancy is a result of rape
10 against a minor or incest against a minor.

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

20 “(D) REQUIREMENT THAT A PHYSICIAN
21 TRAINED IN NEONATAL RESUSCITATION BE
22 PRESENT.—If, in reasonable medical judgment,
23 the unborn child has the potential to survive
24 outside the womb, the physician who performs
25 or attempts an abortion under an exception

1 provided by subparagraph (B) shall ensure a
2 second physician trained in neonatal resuscita-
3 tion is present and prepared to provide care to
4 the child consistent with the requirements of
5 subparagraph (E).

6 “(E) CHILDREN BORN ALIVE AFTER AT-
7 TEMPTED ABORTIONS.—When a physician per-
8 forms or attempts an abortion in accordance
9 with this section, and the child is born alive, the
10 following shall apply:

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

20 “(ii) MANDATORY REPORTING OF VIO-
21 LATIONS.—A health care practitioner or
22 employee of a hospital, a physician’s office,
23 or an abortion clinic who has knowledge of
24 a failure to comply with the requirements
25 of this subparagraph must immediately re-

1 port the failure to an appropriate State or
2 Federal law enforcement agency or both.

3 “(F) INFORMED CONSENT.—

4 “(i) CONSENT FORM REQUIRED.—The
5 physician who intends to perform or at-
6 tempt to perform an abortion under the
7 provisions of subparagraph (B) may not
8 perform any part of the abortion procedure
9 without first obtaining a signed Informed
10 Consent Authorization form in accordance
11 with this subparagraph.

12 “(ii) CONTENT OF CONSENT FORM.—
13 The Informed Consent Authorization form
14 shall be presented in person by the physi-
15 cian and shall consist of—

16 “(I) a statement by the physician
17 indicating the probable post-fertiliza-
18 tion age of the unborn child;

19 “(II) a statement that Federal
20 law allows abortion after 20 weeks
21 fetal age only if the mother faces se-
22 vere injury (the substantial and irre-
23 versible physical impairment of a
24 major bodily function, not including
25 psychological or emotional conditions)

1 or her life is endangered by a physical
2 disorder, physical illness, or physical
3 injury, when the pregnancy was the
4 result of rape, or an act of incest
5 against a minor;

6 “(III) a statement that the abor-
7 tion must be performed by the method
8 most likely to allow the child to be
9 born alive unless this would cause sig-
10 nificant risk to the mother;

11 “(IV) a statement that in any
12 case in which an abortion procedure
13 results in a child born alive, Federal
14 law requires that child to be given
15 every form of medical assistance that
16 is provided to children spontaneously
17 born prematurely, including transpor-
18 tation and admittance to a hospital;

19 “(V) a statement that these re-
20 quirements are binding upon the phy-
21 sician and all other medical personnel
22 who are subject to criminal and civil
23 penalties and that a woman on whom
24 an abortion has been performed may

1 take civil action if these requirements
2 are not followed; and

3 “(VI) affirmation that each sign-
4 er has filled out the informed consent
5 form to the best of their knowledge
6 and understands the information con-
7 tained in the form.

8 “(iii) SIGNATORIES REQUIRED.—The
9 Informed Consent Authorization form shall
10 be signed in person by the woman seeking
11 the abortion, the physician performing or
12 attempting to perform the abortion, and a
13 witness.

14 “(iv) RETENTION OF CONSENT
15 FORM.—The physician performing or at-
16 tempting to perform an abortion must re-
17 tain the signed informed consent form in
18 the patient’s medical file.

19 “(G) REQUIREMENT FOR DATA RETEN-
20 TION.—Paragraph (j)(2) of section 164.530 of
21 title 45, Code of Federal Regulations, shall
22 apply to documentation required to be placed in
23 a patient’s medical file pursuant to subpara-
24 graph (F) of subsection (b)(2) and a consent
25 form required to be retained in a patient’s med-

1 ical file pursuant to subparagraph (G) of such
2 subsection in the same manner and to the same
3 extent as such paragraph applies to documenta-
4 tion required by paragraph (j)(1) of such sec-
5 tion.

6 “(H) ADDITIONAL EXCEPTIONS AND RE-
7 QUIREMENTS.—

8 “(i) IN CASES OF RISK OF DEATH OR
9 SEVERE INJURY TO THE MOTHER.—Sub-
10 paragraphs (C), (D), and (G) shall not
11 apply if, in reasonable medical judgment,
12 compliance with such paragraphs would
13 pose a greater risk of—

14 “(I) the death of the pregnant
15 woman; or

16 “(II) the substantial and irre-
17 versible physical impairment of a
18 major bodily function, not including
19 psychological or emotional conditions,
20 of the pregnant woman.

21 “(ii) COMPLIANCE WITH CERTAIN
22 STATE LAWS.—

23 “(I) STATE LAWS REGARDING
24 REPORTING OF RAPE AND INCEST.—

25 The physician who performs or at-

1 attempts to perform an abortion under
2 an exception provided by subpara-
3 graph (B) shall comply with such ap-
4 plicable State laws that are in effect
5 as the State’s Attorney General may
6 designate, regarding reporting re-
7 quirements in cases of rape or incest.

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

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

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

25 “(e) CIVIL REMEDIES.—

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

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

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

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

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

23 “(C) punitive damages.

24 “(4) ATTORNEYS FEES FOR PLAINTIFF.—The
25 court shall award a reasonable attorney’s fee as part

1 of the costs to a prevailing plaintiff in a civil action
2 under this subsection.

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

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

14 “(f) DEFINITIONS.—In this section the following defi-
15 nitions apply:

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

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

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

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

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

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

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

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

19 “(5) FERTILIZATION.—The term ‘fertilization’
20 means the fusion of human spermatozoon with a
21 human ovum.

22 “(6) MEDICAL TREATMENT.—The term ‘med-
23 ical treatment’ means treatment provided at a hos-
24 pital licensed by the State or operated under author-
25 ity of a Federal agency, at a medical clinic licensed

1 by the State or operated under authority of a Fed-
2 eral agency, or from a personal physician licensed by
3 the State.

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

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

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

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

19 “(11) PROBABLE POST-FERTILIZATION AGE OF
20 THE UNBORN CHILD.—The term ‘probable post-fer-
21 tilization age of the unborn child’ means what, in
22 reasonable medical judgment, will with reasonable
23 probability be the post-fertilization age of the un-
24 born child at the time the abortion is planned to be
25 performed or induced.

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

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

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

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

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

19 (c) CHAPTER HEADING AMENDMENTS.—

20 (1) CHAPTER HEADING IN CHAPTER.—The
21 chapter heading for chapter 74 of title 18, United
22 States Code, is amended by striking “Partial-Birth
23 Abortions” and inserting “Abortions”.

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

1 at the beginning of part I of title 18, United States
2 Code, is amended by striking “Partial-Birth Abor-
3 tions” and inserting “Abortions”.

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