

113TH CONGRESS
1ST SESSION

S. 1670

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

IN THE SENATE OF THE UNITED STATES

NOVEMBER 7, 2013

Mr. GRAHAM (for himself, Mr. McCONNELL, Mr. CORNYN, Mr. THUNE, Mr. BARRASSO, Mr. BLUNT, Mr. MORAN, Mr. PORTMAN, Mr. SCOTT, Mr. HATCH, Mr. GRASSLEY, Mr. RUBIO, Mr. CRUZ, Mr. ROBERTS, Mr. INHOFE, Mr. VITTER, Mr. HOEVEN, Mr. JOHANNES, Mr. BOOZMAN, Mr. CRAPO, Mr. CHAMBLISS, Mr. MCCAIN, Mr. ENZI, Mr. RISCH, Mr. COATS, Mr. COBURN, Mr. BURR, Mr. JOHNSON of Wisconsin, Mr. COCHRAN, Mr. WICKER, Mr. ISAKSON, Mrs. FISCHER, Mr. SHELBY, Mr. FLAKE, Ms. AYOTTE, Mr. SESSIONS, and Mr. LEE) 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”.

6 **SEC. 2. LEGISLATIVE FINDINGS.**

7 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 **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) The physician performing or attempting
16 the abortion shall first make a determination of the
17 probable post-fertilization age of the unborn child or
18 reasonably rely upon such a determination made by
19 another physician. In making such a determination,
20 the physician shall make such inquiries of the preg-
21 nant woman and perform or cause to be performed
22 such medical examinations and tests as a reasonably
23 prudent physician, knowledgeable about the case and
24 the medical conditions involved, would consider nec-

1 essary to make an accurate determination of post-
2 fertilization age.

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

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

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

18 “(ii) the pregnancy is the result of rape, or
19 the result of incest against a minor, if the rape
20 has been reported at any time prior to the abor-
21 tion to an appropriate law enforcement agency,
22 or if the incest against a minor has been re-
23 ported at any time prior to the abortion to an
24 appropriate law enforcement agency or to a

1 government agency legally authorized to act on
 2 reports of child abuse or neglect.

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

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

14 “(ii) the substantial and irreversible phys-
 15 ical impairment of a major bodily function, not
 16 including psychological or emotional conditions,
 17 of the pregnant woman;

18 than would other available methods.

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

22 “(d) BAR TO PROSECUTION.—A woman upon whom
 23 an abortion in violation of subsection (a) is performed or
 24 attempted may not be prosecuted under, or for a con-

1 spiracy to violate, subsection (a), or for an offense under
 2 section 2, 3, or 4 of this title based on such a violation.

3 “(e) DEFINITIONS.—In this section the following
 4 definitions apply:

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

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

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

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

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

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

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

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

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

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

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

21 “(8) **REASONABLE MEDICAL JUDGMENT.**—The
 22 term ‘reasonable medical judgment’ means a medical
 23 judgment that would be made by a reasonably pru-
 24 dent physician, knowledgeable about the case and

1 the treatment possibilities with respect to the med-
 2 ical conditions involved.

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

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

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

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

14 (c) CHAPTER HEADING AMENDMENTS.—

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

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

