

Calendar No. 294

115TH CONGRESS
2D SESSION

S. 2311

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

IN THE SENATE OF THE UNITED STATES

JANUARY 16, 2018

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. 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, Mr. TOOMEY, and Mr. HELLER) introduced the following bill; which was read the first time

JANUARY 17, 2018

Read the second time and placed on the calendar

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,*

1 **SECTION 1. SHORT TITLE.**

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

4 **SEC. 2. LEGISLATIVE FINDINGS.**

5 Congress finds and declares the following:

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

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

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

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

25 (5) For the purposes of surgery on unborn chil-
26 dren, fetal anesthesia is routinely administered and

1 is associated with a decrease in stress hormones
 2 compared to their level when painful stimuli are ap-
 3 plied without such anesthesia. In the United States,
 4 surgery of this type is being performed by 20 weeks
 5 after fertilization and earlier in specialized units af-
 6 filiated with children's hospitals.

7 (6) The position, asserted by some physicians,
 8 that the unborn child is incapable of experiencing
 9 pain until a point later in pregnancy than 20 weeks
 10 after fertilization predominately rests on the as-
 11 sumption that the ability to experience pain depends
 12 on the cerebral cortex and requires nerve connec-
 13 tions between the thalamus and the cortex. However,
 14 recent medical research and analysis, especially since
 15 2007, provides strong evidence for the conclusion
 16 that a functioning cortex is not necessary to experi-
 17 ence pain.

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

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

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

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

16 (11) Consequently, there is substantial medical
17 evidence that an unborn child is capable of experi-
18 encing pain at least by 20 weeks after fertilization,
19 if not earlier.

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

1 (13) The compelling governmental interest in
 2 protecting the lives of unborn children from the
 3 stage at which substantial medical evidence indicates
 4 that they are capable of feeling pain is intended to
 5 be separate from and independent of the compelling
 6 governmental interest in protecting the lives of un-
 7 born children from the stage of viability, and neither
 8 governmental interest is intended to replace the
 9 other.

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

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

14 **“§ 1532. Pain-capable unborn child protection**

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

19 “(b) REQUIREMENTS FOR ABORTIONS.—

20 “(1) ASSESSMENT OF THE AGE OF THE UN-
 21 BORN CHILD.—The physician performing or at-
 22 tempting the abortion shall first make a determina-
 23 tion of the probable post-fertilization age of the un-
 24 born child or reasonably rely upon such a determina-
 25 tion made by another physician. In making such a

determination, the physician shall make such inquiries of the pregnant 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 necessary to make an accurate determination of post-fertilization age.

“(2) PROHIBITION ON PERFORMANCE OF CERTAIN ABORTIONS.—

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

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

“(i) in reasonable medical judgment, the abortion is necessary to save the life of a pregnant 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 pregnancy itself, but not

1 including psychological or emotional condi-
 2 tions;

3 “(ii) the pregnancy is the result of
 4 rape against an adult woman, and at least
 5 48 hours prior to the abortion—

6 “(I) she has obtained counseling
 7 for the rape; or

8 “(II) she has obtained medical
 9 treatment for the rape or an injury
 10 related to the rape; or

11 “(iii) the pregnancy is a result of rape
 12 against a minor or incest against a minor,
 13 and the rape or incest has been reported at
 14 any time prior to the abortion to either—

15 “(I) a government agency legally
 16 authorized to act on reports of child
 17 abuse; or

18 “(II) a law enforcement agency.

19 “(C) REQUIREMENT AS TO MANNER OF
 20 PROCEDURE PERFORMED.—Notwithstanding
 21 the definitions of ‘abortion’ and ‘attempt an
 22 abortion’ in this section, a physician termi-
 23 nating or attempting to terminate a pregnancy
 24 under an exception provided by subparagraph
 25 (B) may do so only in the manner which, in

reasonable medical judgment, provides the best opportunity for the unborn child to survive.

“(D) REQUIREMENT THAT A PHYSICIAN TRAINED IN NEONATAL RESUSCITATION BE PRESENT.—If, in reasonable medical judgment, the pain-capable unborn child has the potential to survive outside the womb, the physician who performs or attempts an abortion under an exception provided by subparagraph (B) shall ensure a second physician trained in neonatal resuscitation is present and prepared to provide care to the child consistent with the requirements of subparagraph (E).

“(E) CHILDREN BORN ALIVE AFTER ATTEMPTED ABORTIONS.—When a physician performs or attempts an abortion in accordance with this section, and the child is born alive, as defined in section 8 of title 1 (commonly known as the Born-Alive Infants Protection Act of 2002), the following shall apply:

“(i) DEGREE OF CARE REQUIRED.—
Any health care practitioner present at the time shall humanely exercise the same degree of professional skill, care, and diligence to preserve the life and health of the

child as a reasonably diligent and conscientious health care practitioner would render to a child born alive at the same gestational age in the course of a natural birth.

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

“(iii) MANDATORY REPORTING OF VIOLATIONS.—A health care practitioner or any employee of a hospital, a physician’s office, or an abortion clinic who has knowledge of a failure to comply with the requirements of this subparagraph must immediately report the failure to an appropriate State or Federal law enforcement agency or both.

“(F) DOCUMENTATION REQUIREMENTS.—

“(i) DOCUMENTATION PERTAINING TO ADULTS.—A physician who performs or attempts to perform an abortion under an exception provided by subparagraph (B)(ii) shall, prior to the abortion, place in the patient medical file documentation from a

1 hospital licensed by the State or operated
2 under authority of a Federal agency, a
3 medical clinic licensed by the State or op-
4 erated under authority of a Federal agen-
5 cy, from a personal physician licensed by
6 the State, a counselor licensed by the
7 State, or a victim's rights advocate pro-
8 vided by a law enforcement agency that the
9 adult woman seeking the abortion obtained
10 medical treatment or counseling for the
11 rape or an injury related to the rape.

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

25 “(G) INFORMED CONSENT.—

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

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

13 “(I) a statement by the physician
14 indicating the probable post-fertiliza-
15 tion age of the pain-capable unborn
16 child;

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

1 “(III) a statement that the abor-
2 tion must be performed by the method
3 most likely to allow the child to be
4 born alive unless this would cause sig-
5 nificant risk to the mother;

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

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

22 “(VI) affirmation that each sign-
23 er has filled out the informed consent
24 form to the best of their knowledge

1 and understands the information con-
2 tained in the form.

3 “(iii) SIGNATORIES REQUIRED.—The
4 Informed Consent Authorization form shall
5 be signed in person by the woman seeking
6 the abortion, the physician performing or
7 attempting to perform the abortion, and a
8 witness.

9 “(iv) RETENTION OF CONSENT
10 FORM.—The physician performing or at-
11 tempting to perform an abortion must re-
12 tain the signed informed consent form in
13 the patient’s medical file.

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

1 “(I) ADDITIONAL EXCEPTIONS AND RE-
2 QUIREMENTS.—

3 “(i) IN CASES OF RISK OF DEATH OR
4 MAJOR INJURY TO THE MOTHER.—Sub-
5 paragraphs (C), (D), and (G) shall not
6 apply if, in reasonable medical judgment,
7 compliance with such paragraphs would
8 pose a greater risk of—

9 “(I) the death of the pregnant
10 woman; or

11 “(II) the substantial and irre-
12 versible physical impairment of a
13 major bodily function, not including
14 psychological or emotional conditions,
15 of the pregnant woman.

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

24 “(iii) RULE OF CONSTRUCTION IN
25 CASES OF REPORTS TO LAW ENFORCE-

1 MENT.—The requirements of subparagraph
2 (B)(ii) do not apply if the rape has been
3 reported at any time prior to the abortion
4 to a law enforcement agency or Depart-
5 ment of Defense victim assistance per-
6 sonnel.

7 “(iv) COMPLIANCE WITH CERTAIN
8 STATE LAWS.—

9 “(I) STATE LAWS REGARDING
10 REPORTING OF RAPE AND INCEST.—

11 The physician who performs or at-
12 tempts to perform an abortion under
13 an exception provided by subpara-
14 graph (B) shall comply with such ap-
15 plicable State laws that are in effect
16 as the State’s Attorney General may
17 designate, regarding reporting re-
18 quirements in cases of rape or incest.

19 “(II) STATE LAWS REGARDING
20 PARENTAL INVOLVEMENT.—The phy-
21 sician who intends to perform an
22 abortion on a minor under an excep-
23 tion provided by subparagraph (B)
24 shall comply with any applicable State
25 laws requiring parental involvement in

1 a minor's decision to have an abor-
2 tion.

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

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

11 “(e) CIVIL REMEDIES.—

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

18 “(2) CIVIL ACTION BY A PARENT OF A MINOR
19 ON WHOM AN ABORTION IS PERFORMED.—A parent
20 of a minor upon whom an abortion has been per-
21 formed or attempted under an exception provided for
22 in subsection (b)(2)(B), and that was performed in
23 violation of any provision of this section may, in a
24 civil action against any person who committed the

1 violation obtain appropriate relief, unless the preg-
2 nancy resulted from the plaintiff's criminal conduct.

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

5 “(A) objectively verifiable money damages
6 for all injuries, psychological and physical, occa-
7 sioned by the violation;

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

10 “(C) punitive damages.

11 “(4) ATTORNEYS FEES FOR PLAINTIFF.—The
12 court shall award a reasonable attorney's fee as part
13 of the costs to a prevailing plaintiff in a civil action
14 under this subsection.

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

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

1 “(f) DATA COLLECTION.—

2 “(1) DATA SUBMISSIONS.—Any physician who
3 performs or attempts an abortion described in sub-
4 section (b)(2)(B) shall annually submit a summary
5 of all such abortions to the National Center for
6 Health Statistics (hereinafter referred to as the
7 ‘Center’) not later than 60 days after the end of the
8 calendar year in which the abortion was performed
9 or attempted.

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

16 “(A) the probable post-fertilization age of
17 the unborn child;

18 “(B) the method used to carry out the
19 abortion;

20 “(C) the location where the abortion was
21 conducted;

22 “(D) the exception under subsection
23 (b)(2)(B) under which the abortion was con-
24 ducted; and

1 “(E) any incident of live birth resulting
2 from the abortion.

3 “(3) EXCLUSIONS FROM DATA SUBMISSIONS.—
4 A summary required under this subsection shall not
5 contain any information identifying the woman
6 whose pregnancy was terminated and shall be sub-
7 mitted consistent with the Health Insurance Port-
8 ability and Accountability Act of 1996 (42 U.S.C.
9 1320d–2 note).

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

22 “(g) DEFINITIONS.—In this section the following
23 definitions apply:

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

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

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

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

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

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

18 “(3) COUNSELING.—The term ‘counseling’
19 means counseling provided by a counselor licensed
20 by the State, or a victims rights advocate provided
21 by a law enforcement agency.

22 “(4) FACILITY.—The term ‘facility’ means any
23 medical or counseling group, center or clinic and in-
24 cludes the entire legal entity, including any entity

1 that controls, is controlled by, or is under common
2 control with such facility.

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

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

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

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

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

24 “(10) POST-FERTILIZATION AGE.—The term
25 ‘post-fertilization age’ means the age of the unborn

1 child as calculated from the fusion of a human
 2 spermatozoon with a human ovum.

3 “(11) PROBABLE POST-FERTILIZATION AGE OF
 4 THE UNBORN CHILD.—The term ‘probable post-fer-
 5 tilization age of the unborn child’ means what, in
 6 reasonable medical judgment, will with reasonable
 7 probability be the post-fertilization age of the un-
 8 born child at the time the abortion is planned to be
 9 performed or induced.

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

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

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

24 (b) CLERICAL AMENDMENT.—The table of sections
 25 at the beginning of chapter 74 of title 18, United States

1 Code, is amended by adding at the end the following new
 2 item:

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

3 (c) CHAPTER HEADING AMENDMENTS.—

4 (1) CHAPTER HEADING IN CHAPTER.—The
 5 chapter heading for chapter 74 of title 18, United
 6 States Code, is amended by striking “**Partial-**
 7 **Birth Abortions**” and inserting “**Abortions**”

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

“74. Abortions 1531”.

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A BILL

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Read the second time and placed on the calendar