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H. R. 36

IN THE SENATE OF THE UNITED STATES

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AN ACT

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 AND DECLARATION OF**
2 **CONSTITUTIONAL AUTHORITY FOR ENACT-**
3 **MENT.**

4 Congress finds and declares the following:

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

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

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

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

24 (5) For the purposes of surgery on unborn chil-
25 dren, fetal anesthesia is routinely administered and
26 is associated with a decrease in stress hormones

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

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

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

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

24 (9) Substantial evidence indicates that struc-
25 tures used for pain processing in early development

1 differ from those of adults, using different neural
2 elements available at specific times during develop-
3 ment, such as the subcortical plate, to fulfill the role
4 of pain processing.

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

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

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

23 (13) The compelling governmental interest in
24 protecting the lives of unborn children from the
25 stage at which substantial medical evidence indicates

1 that they are capable of feeling pain is intended to
2 be separate from and independent of the compelling
3 governmental interest in protecting the lives of un-
4 born children from the stage of viability, and neither
5 governmental interest is intended to replace the
6 other.

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

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

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

17 **“SEC. 1532. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

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

22 “(b) REQUIREMENTS FOR ABORTIONS.—

23 “(1) ASSESSMENT OF THE AGE OF THE UN-
24 BORN CHILD.—The physician performing or at-
25 tempting the abortion shall first make a determina-

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

11 “(2) PROHIBITION ON PERFORMANCE OF CER-
12 TAIN ABORTIONS.—

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

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

22 “(i) in reasonable medical judgment,
23 the abortion is necessary to save the life of
24 a pregnant woman whose life is endan-
25 gered by a physical disorder, physical ill-

1 ness, or physical injury, including a life-en-
2 dangering physical condition caused by or
3 arising from the pregnancy itself, but not
4 including psychological or emotional condi-
5 tions;

6 “(ii) the pregnancy is the result of
7 rape against an adult woman, and at least
8 48 hours prior to the abortion—

9 “(I) she has obtained counseling
10 for the rape; or

11 “(II) she has obtained medical
12 treatment for the rape or an injury
13 related to the rape; or

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

18 “(I) a government agency legally
19 authorized to act on reports of child
20 abuse; or

21 “(II) a law enforcement agency.

22 “(C) REQUIREMENT AS TO MANNER OF
23 PROCEDURE PERFORMED.—Notwithstanding
24 the definitions of ‘abortion’ and ‘attempt an
25 abortion’ in this section, a physician termi-

1 nating or attempting to terminate a pregnancy
2 under an exception provided by subparagraph
3 (B) may do so only in the manner which, in
4 reasonable medical judgment, provides the best
5 opportunity for the unborn child to survive.

6 “(D) REQUIREMENT THAT A PHYSICIAN
7 TRAINED IN NEONATAL RESUSCITATION BE
8 PRESENT.—If, in reasonable medical judgment,
9 the pain-capable unborn child has the potential
10 to survive outside the womb, the physician who
11 performs or attempts an abortion under an ex-
12 ception provided by subparagraph (B) shall en-
13 sure a second physician trained in neonatal re-
14 suscitation is present and prepared to provide
15 care to the child consistent with the require-
16 ments of subparagraph (E).

17 “(E) CHILDREN BORN ALIVE AFTER AT-
18 TEMPTED ABORTIONS.—When a physician per-
19 forms or attempts an abortion in accordance
20 with this section, and the child is born alive, as
21 defined in section 8 of title 1 (commonly known
22 as the Born-Alive Infants Protection Act of
23 2002), the following shall apply:

24 “(i) DEGREE OF CARE REQUIRED.—
25 Any health care practitioner present at the

1 time shall humanely exercise the same de-
2 gree of professional skill, care, and dili-
3 gence to preserve the life and health of the
4 child as a reasonably diligent and conscien-
5 tious health care practitioner would render
6 to a child born alive at the same gesta-
7 tional age in the course of a natural birth.

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

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

22 “(F) DOCUMENTATION REQUIREMENTS.—

23 “(i) DOCUMENTATION PERTAINING TO
24 ADULTS.—A physician who performs or at-
25 tempts to perform an abortion under an

1 exception provided by subparagraph (B)(ii)
2 shall, prior to the abortion, place in the pa-
3 tient medical file documentation from a
4 hospital licensed by the State or operated
5 under authority of a Federal agency, a
6 medical clinic licensed by the State or op-
7 erated under authority of a Federal agen-
8 cy, from a personal physician licensed by
9 the State, a counselor licensed by the
10 State, or a victim’s rights advocate pro-
11 vided by a law enforcement agency that the
12 adult woman seeking the abortion obtained
13 medical treatment or counseling for the
14 rape or an injury related to the rape.

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

1 the rape or incest was reported prior to the
2 abortion.

3 “(G) 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 pain-capable unborn
19 child;

20 “(II) a statement that Federal
21 law allows abortion after 20 weeks
22 fetal age only if the mother’s life is
23 endangered by a physical disorder,
24 physical illness, or physical injury,
25 when the pregnancy was the result of

1 rape, or an act of incest against a
2 minor;

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

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

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

24 “(VI) affirmation that each sign-
25 er has filled out the informed consent

1 form to the best of their knowledge
2 and understands the information con-
3 tained in the form.

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

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

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

1 tion required by paragraph (j)(1) of such sec-
2 tion.

3 “(I) ADDITIONAL EXCEPTIONS AND RE-
4 QUIREMENTS.—

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

11 “(I) the death of the pregnant
12 woman; or

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

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

1 “(iii) RULE OF CONSTRUCTION IN
2 CASES OF REPORTS TO LAW ENFORCE-
3 MENT.—The requirements of subparagraph
4 (B)(ii) do not apply if the rape has been
5 reported at any time prior to the abortion
6 to a law enforcement agency or Depart-
7 ment of Defense victim assistance per-
8 sonnel.

9 “(iv) COMPLIANCE WITH CERTAIN
10 STATE LAWS.—

11 “(I) STATE LAWS REGARDING
12 REPORTING OF RAPE AND INCEST.—

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

21 “(II) STATE LAWS REGARDING
22 PARENTAL INVOLVEMENT.—The phy-
23 sician who intends to perform an
24 abortion on a minor under an excep-
25 tion provided by subparagraph (B)

1 shall comply with any applicable State
2 laws requiring parental involvement in
3 a minor’s decision to have an abor-
4 tion.

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

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

13 “(e) CIVIL REMEDIES.—

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

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

1 civil action against any person who committed the
2 violation obtain appropriate relief, unless the preg-
3 nancy resulted from the plaintiff's criminal conduct.

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

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

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

11 “(C) punitive damages.

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

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

22 “(6) AWARDS AGAINST WOMAN.—Except under
23 paragraph (5), in a civil action under this sub-
24 section, no damages, attorney's fee or other mone-

1 tary relief may be assessed against the woman upon
2 whom the abortion was performed or attempted.

3 “(f) DATA COLLECTION.—

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

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

18 “(A) the probable post-fertilization age of
19 the unborn child;

20 “(B) the method used to carry out the
21 abortion;

22 “(C) the location where the abortion was
23 conducted;

1 “(D) the exception under subsection
2 (b)(2)(B) under which the abortion was con-
3 ducted; and

4 “(E) any incident of live birth resulting
5 from the abortion.

6 “(3) EXCLUSIONS FROM DATA SUBMISSIONS.—
7 A summary required under this subsection shall not
8 contain any information identifying the woman
9 whose pregnancy was terminated and shall be sub-
10 mitted consistent with the Health Insurance Port-
11 ability and Accountability Act of 1996 (42 U.S.C.
12 1320d–2 note).

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

1 “(g) DEFINITIONS.—In this section the following
2 definitions apply:

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

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

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

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

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

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

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

24 “(4) FACILITY.—The term ‘facility’ means any
25 medical or counseling group, center or clinic and in-

1 includes the entire legal entity, including any entity
2 that controls, is controlled by, or is under common
3 control with such facility.

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

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

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

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

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

1 “(10) POST-FERTILIZATION AGE.—The term
2 ‘post-fertilization age’ means the age of the unborn
3 child as calculated from the fusion of a human
4 spermatozoon with a human ovum.

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

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

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

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

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

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

5 (c) CHAPTER HEADING AMENDMENTS.—

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

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

Passed the House of Representatives May 13, 2015.

Attest:

KAREN L. HAAS,

Clerk.

Calendar No. 230

114TH CONGRESS
1ST Session

H. R. 36

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