

116TH CONGRESS  
2D SESSION

# H. R. 8939

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

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## IN THE HOUSE OF REPRESENTATIVES

DECEMBER 10, 2020

Ms. GABBARD introduced the following bill; which was referred to the Committee on the Judiciary

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## 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”.

○