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

IN THE SENATE OF THE UNITED STATES

Mr. GRAHAM introduced the following bill; which was read twice and referred to the Committee on __________

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting Pain-Capable Unborn Children from Late-Term Abortions Act”.

SEC. 2. LEGISLATIVE FINDINGS AND DECLARATION OF CONSTITUTIONAL AUTHORITY FOR ENACTMENT.

Congress finds and declares the following:
(1) Medical and other authorities now know more about human prenatal development than ever before, including that—

(A) an unborn child first moves about in the womb and first reacts to touch at approximately 8 weeks gestation;

(B) the eyes begin to form at 5 weeks gestation and finish forming by 10 weeks gestation;

(C) eye movements can be detected by ultrasound at 12 weeks gestation;

(D) by 8 to 9 weeks gestation, an unborn child has detectable brain waves;

(E) at 9 weeks gestation—

(i) an unborn child’s diaphragm is developing, and he or she may even hiccup; and

(ii) an unborn child is beginning to move about freely in the womb;

(F) by 9 to 11 weeks gestation, teeth as well as external genitalia begin to form;

(G) by 10 weeks gestation—

(i) all of an unborn child’s organ rudiments are formed and in place;
(ii) the digestive system and kidneys start to function; and

(iii) an unborn child will show a preference for either right-handedness or left-handedness; and

(H) at 12 weeks gestation—

(i) an unborn child can open and close his or her fingers, starts to make sucking motions, and senses stimulation from the world outside the womb; and

(ii) fingernails and fingerprints begin to form.

(2) The Supreme Court of the United States has acknowledged that, by at least 12 weeks gestation, an unborn child has taken on “the human form” in all relevant aspects. Gonzales v. Carhart, 550 U.S. 124, 160 (2007).

(3) Pain receptors (also known as “nociceptors”) begin forming at 7 weeks gestational age. Nerves linking these pain receptors to the brain’s thalamus and subcortical plate form between 12 and 20 weeks gestational age. At no later than 16 weeks gestational age, the first contact occurs between the subcortical plate and these forming fibers.
(4) In considering the use of anesthesia for invasive medical procedures performed on the fetus, doctors have concluded, based on the evidence, that from as early as 12 weeks gestational age, and certainly by 15 weeks gestational age, the fetus is extremely sensitive to painful stimuli, making it necessary to apply adequate analgesia and anesthesia to prevent fetal suffering.

(5) Substantial evidence indicates that neural elements, such as the thalamus and subcortical plate, which develop at specific times during the early development of an unborn child, serve as pain-processing structures, and are different from the neural elements used for pain processing by adults. Recent evidence, particularly since 2016, demonstrates that structures responsible for pain show signs of sufficient maturation beginning at 15 weeks of gestation.

(6) In an unborn child, application of painful stimuli is associated with significant increases in stress hormones known as the stress response.

(7) Subjection to painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emo-
tional, behavioral, and learning disabilities later in life.

(8) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia.

(9) The assertion by some medical experts that an unborn child is incapable of experiencing pain until a point in pregnancy later than 24 weeks gestational age predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provide strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(10) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, such as those with hydranencephaly, nevertheless experience pain.

(11) In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter
pain perception, while stimulation or ablation of the thalamus does.

(12) The assertion of some medical experts that an unborn child remains in a coma-like sleep state that precludes an unborn child from experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate an unborn child with anesthesia and provide analgesia to prevent an unborn child from engaging in vigorous movement in reaction to invasive surgery.

(13) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain at least by 15 weeks gestational age, if not earlier.

(14) Abortion carries significant physical and psychological risks to the pregnant woman, and these physical and psychological risks increase with gestational age.

(15) The majority of abortion procedures performed after 15 weeks gestation are dismemberment abortion procedures which involve the use of surgical instruments to crush and tear an unborn child apart
before removing the pieces of the dead child from the womb.

(16) Medical complications from dismemberment abortions include pelvic infection, incomplete abortions (retained tissue), blood clots, heavy bleeding or hemorrhage, laceration, tear, or other injury to the cervix, puncture, laceration, tear, or other injury to the uterus, injury to the bowel or bladder, depression, anxiety, substance abuse, and other emotional or psychological problems. Further, in abortions performed after 15 weeks gestation, there is a higher risk of requiring a hysterectomy, other reparative surgery, or a blood transfusion.

(17) In subparagraphs (J) and (K) of section 2(14) of the Partial-Birth Abortion Ban Act of 2003 (Public Law 108–105; 117 Stat. 1201), Congress found and declared that late-term abortion, such as a dismemberment abortion, “confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child” and “undermines the public’s perception of the appropriate role of a physician”.

(18) “The [Supreme] Court has given state and federal legislatures wide discretion to pass legislation
in areas where there is medical and scientific uncer-
tainty.” Gonzales v. Carhart, 550 U.S. at 163. “The
law need not give abortion doctors unfettered choice
in the course of their medical practice, nor should it
elevate their status above other physicians in the
medical community.” Gonzales v. Carhart, 550 U.S.
at 163. “Medical uncertainty does not foreclose the
exercise of legislative power in the abortion context
any more than it does in other contexts.” Gonzales
v. Carhart, 550 U.S. at 164.

(19) The Supreme Court has held that “[i]t is
time to heed the Constitution and return the issue
of abortion to the people’s elected representatives.”
Dobbs v. Jackson Women’s Health Organization,
142 S. Ct. 2228, 2243 (2022).

(20) The Supreme Court has also held that
“[a] law regulating abortion, like other health and
welfare laws, is entitled to a ‘strong presumption of
validity’. ... It must be sustained if there is a ration-
al basis on which the legislature could have thought
that it would serve legitimate state interests. ...
These legitimate interests include respect for and
preservation of prenatal life at all stages of develop-
ment...; the protection of maternal health and safety;
the elimination of particularly gruesome or barbaric
medical procedures; the preservation of the integrity
of the medical profession; the mitigation of fetal
pain; and the prevention of discrimination on the
basis of race, sex, or disability.” Dobbs v. Jackson
Women’s Health Organization, 142 S. Ct. at 2239.

(21) It is the purpose of Congress to assert a
legitimate governmental interest in protecting the
lives of unborn children from the stage at which sub-
stantial medical evidence indicates that they are ca-
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(22) Congress has authority to extend protec-
tion to pain-capable unborn children under—

(A) the Commerce Clause of section 8 of
article I of the Constitution of the United
States, as interpreted by the Supreme Court;
and

(B) the Equal Protection and Due Process
Clauses of section 1, and the Enforcement
Clause of section 5, of the 14th Amendment to
the Constitution.

SEC. 3. FEDERAL MINIMUM PROTECTIONS FOR PAIN-CAPA-
BLE UNBORN CHILDREN.

(a) In General.—Chapter 74 of title 18, United
States Code, is amended by inserting after section 1531
the following:
“§ 1532. Federal minimum protections for pain-capable unborn children

“(a) UNLAWFUL CONDUCT.—Subject to subsection (g) and notwithstanding any other provision of law, it shall be unlawful for any person to perform an abortion or attempt to do so, unless in conformity with the requirements set forth in subsection (b).

“(b) MINIMUM REQUIREMENTS FOR ABORTIONS.—

“(1) ASSESSMENT OF THE AGE OF THE UNBORN CHILD.—The physician performing or attempting the abortion shall first make a determination of the probable gestational age of the unborn child or reasonably rely upon such a determination 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 gestational age.

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

“(A) GENERALLY FOR UNBORN CHILDREN 15 WEEKS OR OLDER.—Except as provided in subparagraph (B), the abortion shall not be
performed or attempted, if the probable gesta-
tional age, as determined under paragraph (1),
of the unborn child is 15 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 endan-
gered by a physical disorder, physical ill-
ness, or physical injury, including a life-en-
dangering physical condition caused by or
arising from the pregnancy itself, but not
including psychological or emotional condi-
tions;

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

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

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

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

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

“(II) a law enforcement agency.

“(C) Requirement as to manner of procedure performed.—Notwithstanding the definitions of ‘abortion’ and ‘attempt’ in this section, a physician terminating or attempting to terminate a pregnancy under an exception provided by subparagraph (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 hospital licensed by the State or operated under authority of a Federal agency, a medical clinic licensed by the State or operated under authority of a Federal agency, from a personal physician licensed by the State, a counselor licensed by the State, or a victim’s rights advocate provided by a law enforcement agency that the adult woman seeking the abortion obtained medical treatment or counseling for the rape or an injury related to the rape.
“(ii) Documentation pertaining to minors.—A physician who performs or attempts to perform an abortion under an exception provided by subparagraph (B)(iii) shall, prior to the abortion, place in the patient medical file—

“(I) documentation from a government agency legally authorized to act on reports of child abuse that the rape or incest was reported prior to the abortion; or

“(II) as an alternative, documentation from a law enforcement agency that the rape or incest was reported prior to the abortion.

“(G) Informed consent.—

“(i) Consent form required.—The physician who intends to perform or attempt to perform an abortion under the provisions of subparagraph (B) may not perform any part of the abortion procedure without first obtaining a signed Informed Consent Authorization form in accordance with this subparagraph.
“(ii) CONTENT OF CONSENT FORM.—

The Informed Consent Authorization form shall be presented in person by the physician and shall consist of—

“(I) a statement by the physician indicating the probable gestational age of the pain-capable unborn child;

“(II) a statement that Federal law allows abortion after 15 weeks probable gestational age only if—

“(aa) the mother’s life is endangered by a physical disorder, physical illness, or physical injury; or

“(bb) the pregnancy was the result of—

“(AA) rape; or

“(BB) an act of incest against a minor;

“(III) a statement that the pregnancy must be terminated by the method most likely to allow the child to be born alive unless this would cause significant risk to the mother;
“(IV) a statement that in any case in which an abortion procedure results in a child born alive, Federal law requires that child to be given every form of medical assistance that is provided to children spontaneously born prematurely, including transportation and admittance to a hospital;

“(V) a statement that these requirements are binding upon the physician and all other medical personnel who are subject to criminal and civil penalties and that a woman on whom an abortion has been performed may take civil action if these requirements are not followed; and

“(VI) affirmation that each signer has filled out the informed consent form to the best of their knowledge and understands the information contained in the form.

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

“(iv) Retention of consent form.—The physician performing or attempting to perform an abortion must retain the signed informed consent form in the patient’s medical file.

“(H) Requirement for data retention.—Paragraph (j)(2) of section 164.530 of title 45, Code of Federal Regulations, shall apply to documentation required to be placed in a patient’s medical file pursuant to subparagraph (F) of subsection (b)(2) and a consent form required to be retained in a patient’s medical file pursuant to subparagraph (G) of such subsection in the same manner and to the same extent as such paragraph applies to documentation required by paragraph (j)(1) of such section.

“(I) Additional exceptions and requirements.—

“(i) In cases of risk of death or major injury to the mother.—Subparagraphs (C), (D), and (G) shall not apply if, in reasonable medical judgment,
compliance with such paragraphs would pose a greater risk of—

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

“(II) the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the pregnant woman.

“(ii) Exclusion of Certain Facilities.—Notwithstanding the definitions of the terms ‘medical treatment’ and ‘counseling’ in subsection (g), the counseling or medical treatment described in subparagraph (B)(ii) may not be provided by a facility that performs abortions (unless that facility is a hospital).

“(iii) Rule of Construction in Cases of Reports to Law Enforcement.—The requirements of subparagraph (B)(ii) do not apply if the rape has been reported at any time prior to the abortion to a law enforcement agency or Department of Defense victim assistance personnel.
“(c) Criminal Penalty.—Whoever violates subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.

“(d) Bar to Prosecution.—A woman upon whom an abortion in violation of subsection (a) is performed or attempted may not be prosecuted under, or for a conspiracy to violate, subsection (a), or for an offense under section 2, 3, or 4 of this title based on such a violation.

“(e) Civil Remedies.—

“(1) Civil action by a woman on whom an abortion is performed.—A woman upon whom an abortion has been performed or attempted in violation of any provision of this section may, in a civil action against any person who committed the violation, obtain appropriate relief.

“(2) Civil action by a parent of a minor on whom an abortion is performed.—A parent of a minor upon whom an abortion has been performed or attempted under an exception provided for in subsection (b)(2)(B), and that was performed in violation of any provision of this section may, in a civil action against any person who committed the violation obtain appropriate relief, unless the pregnancy resulted from the plaintiff’s criminal conduct.
“(3) APPROPRIATE RELIEF.—Appropriate relief in a civil action under this subsection includes—

“(A) objectively verifiable money damages for all injuries, psychological and physical, occasioned by the violation;

“(B) statutory damages equal to 3 times the cost of the abortion; and

“(C) punitive damages.

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

“(5) ATTORNEYS FEES FOR DEFENDANT.—If a defendant in a civil action under this subsection prevails and the court finds that the plaintiff’s suit was frivolous, the court shall award a reasonable attorney’s fee in favor of the defendant against the plaintiff.

“(6) AWARDS AGAINST WOMAN.—Except as provided in paragraph (5), in a civil action under this subsection, no damages, attorney’s fee or other monetary relief may be assessed against the woman upon whom the abortion was performed or attempted.

“(f) DATA COLLECTION.—
“(1) DATA SUBMISSIONS.—Any physician who performs or attempts an abortion described in subsection (b)(2)(B) shall annually submit a summary of all such abortions to the National Center for Health Statistics (in this subsection referred to as the ‘Center’) not later than 60 days after the end of the calendar year in which the abortion was performed or attempted.

“(2) CONTENTS OF SUMMARY.—The summary shall include the number of abortions performed or attempted on an unborn child who had a gestational age of 15 weeks or more and specify the following for each abortion under subsection (b)(2)(B):

“(A) The probable gestational age of the unborn child.

“(B) The method used to carry out the abortion.

“(C) The location where the abortion was conducted.

“(D) The exception under subsection (b)(2)(B) under which the abortion was conducted.

“(E) Any incident of live birth resulting from the abortion.
“(3) EXCLUSIONS FROM DATA SUBMISSIONS.—

A summary required under this subsection shall not contain any information identifying the woman whose pregnancy was terminated and shall be submitted consistent with the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d–2 note).

“(4) PUBLIC REPORT.—The Center shall annually issue a public report providing statistics by State for the previous year compiled from all of the summaries made to the Center under this subsection. The Center shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed or attempted. The annual report shall be issued by July 1 of the calendar year following the year in which the abortions were performed or attempted.

“(g) RULES OF CONSTRUCTION.—

“(1) GREATER PROTECTION.—Nothing in this section may be construed to preempt or limit any Federal, State, or local law that provides greater protections for an unborn child than those provided in this section.
“(2) Creating or Recognizing Right.—

Nothing in this section shall be construed to—

“(A) create or recognize a right to abortion; or

“(B) make lawful an abortion that is unlawful on the date of enactment of this section.

“(h) Definitions.—In this section the following definitions apply:

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

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

“(B) to intentionally terminate the pregnancy of a woman known to be pregnant, with an intention other than—

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

“(ii) to remove a dead unborn child.

“(2) Attempt.—The term ‘attempt’, with respect to an abortion, means conduct that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in performing an abortion.
“(3) COUNSELING.—The term ‘counseling’ means counseling provided by a counselor licensed by the State, or a victims rights advocate provided by a law enforcement agency.

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

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

“(6) GESTATIONAL AGE.—The term ‘gestational age’, with respect to an unborn child, means the age of the unborn child calculated from the first day of the pregnant woman’s last menstrual period.

“(7) MEDICAL TREATMENT.—The term ‘medical treatment’ means treatment provided at a hospital licensed by the State or operated under authority of a Federal agency, at a medical clinic licensed by the State or operated under authority of a Federal agency, or from a personal physician licensed by the State.

“(8) MINOR.—The term ‘minor’ means an individual who has not attained the age of 18 years.
“(9) PERFORM.—The term ‘perform’, with respect to an abortion, includes inducing an abortion through a medical or chemical intervention, including writing a prescription for a drug or device intended to result in an abortion.

“(10) PHYSICIAN.—The term ‘physician’ means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise legally authorized to perform an abortion.

“(11) PROBABLE GESTATIONAL AGE OF THE UNBORN CHILD.—The term ‘probable gestational age of the unborn child’ means what, in reasonable medical judgment, will with reasonable probability be the gestational age at the time the abortion is performed or induced.

“(12) REASONABLE MEDICAL JUDGMENT.—The term ‘reasonable medical judgment’ means a medical judgment that would be made by a reasonably prudent physician in the field of obstetrics, maternal fetal medicine, or neonatology who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

“(13) STATE.—The term ‘State’ means any of the several States, the District of Columbia, or any territory or possession of the United States.
“(14) UNBORN CHILD.—The term ‘unborn child’ means an individual organism of the species homo sapiens, beginning at fertilization, until the point of being born alive as defined in section 8(b) of title 1.

“(15) WOMAN.—The term ‘woman’ means a female human being whether or not she has reached the age of majority.”.

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

“1532. Federal minimum protections for pain-capable unborn child protection.”.

(c) CHAPTER HEADING AMENDMENTS.—

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

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

“74. Abortion ........................................................................................................... 1531”.

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