

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1797
OFFERED BY MR. FRANKS OF ARIZONA**

Strike all after the enacting clause and insert the following:

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 AND DECLARATION OF
5 CONSTITUTIONAL AUTHORITY FOR ENACT-
6 MENT.**

7 Congress finds and declares the following:

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

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

1 (3) In the unborn child, application of such
2 painful stimuli is associated with significant in-
3 creases in stress hormones known as the stress re-
4 sponse.

5 (4) Subjection to such painful stimuli is associ-
6 ated with long-term harmful neurodevelopmental ef-
7 fects, such as altered pain sensitivity and, possibly,
8 emotional, behavioral, and learning disabilities later
9 in life.

10 (5) For the purposes of surgery on unborn chil-
11 dren, fetal anesthesia is routinely administered and
12 is associated with a decrease in stress hormones
13 compared to their level when painful stimuli are ap-
14 plied without such anesthesia. In the United States,
15 surgery of this type is being performed by 20 weeks
16 after fertilization and earlier in specialized units af-
17 filiated with children's hospitals.

18 (6) The position, asserted by some physicians,
19 that the unborn child is incapable of experiencing
20 pain until a point later in pregnancy than 20 weeks
21 after fertilization predominately rests on the as-
22 sumption that the ability to experience pain depends
23 on the cerebral cortex and requires nerve connec-
24 tions between the thalamus and the cortex. However,
25 recent medical research and analysis, especially since

1 2007, provides strong evidence for the conclusion
2 that a functioning cortex is not necessary to experi-
3 ence pain.

4 (7) Substantial evidence indicates that children
5 born missing the bulk of the cerebral cortex, those
6 with hydranencephaly, nevertheless experience pain.

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

11 (9) Substantial evidence indicates that struc-
12 tures used for pain processing in early development
13 differ from those of adults, using different neural
14 elements available at specific times during develop-
15 ment, such as the subcortical plate, to fulfill the role
16 of pain processing.

17 (10) The position, asserted by some commenta-
18 tors, that the unborn child remains in a coma-like
19 sleep state that precludes the unborn child experi-
20 encing pain is inconsistent with the documented re-
21 action of unborn children to painful stimuli and with
22 the experience of fetal surgeons who have found it
23 necessary to sedate the unborn child with anesthesia
24 to prevent the unborn child from engaging in vig-
25 orous movement in reaction to invasive surgery.

1 (11) Consequently, there is substantial medical
2 evidence that an unborn child is capable of experi-
3 encing pain at least by 20 weeks after fertilization,
4 if not earlier.

5 (12) It is the purpose of the Congress to assert
6 a compelling governmental interest in protecting the
7 lives of unborn children from the stage at which sub-
8 stantial medical evidence indicates that they are ca-
9 pable of feeling pain.

10 (13) The compelling governmental interest in
11 protecting the lives of unborn children from the
12 stage at which substantial medical evidence indicates
13 that they are capable of feeling pain is intended to
14 be separate from and independent of the compelling
15 governmental interest in protecting the lives of un-
16 born children from the stage of viability, and neither
17 governmental interest is intended to replace the
18 other.

19 (14) Congress has authority to extend protec-
20 tion to pain-capable unborn children under the Su-
21 preme Court's Commerce Clause precedents and
22 under the Constitution's grants of powers to Con-
23 gress under the Equal Protection, Due Process, and
24 Enforcement Clauses of the Fourteenth Amendment.

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

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

5 **“§ 1532. Pain-capable unborn child protection**

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

10 “(b) REQUIREMENTS FOR ABORTIONS.—

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

23 “(2)(A) Except as provided in subparagraph
24 (B), the abortion shall not be performed or at-
25 tempted, if the probable post-fertilization age, as de-

1 terminated under paragraph (1), of the unborn child
2 is 20 weeks or greater.

3 “(B) Subject to subparagraph (C), subpara-
4 graph (A) does not apply if, in reasonable medical
5 judgment, the abortion is necessary to save the life
6 of a pregnant woman whose life is endangered by a
7 physical disorder, physical illness, or physical injury,
8 including a life-endangering physical condition
9 caused by or arising from the pregnancy itself, but
10 not including psychological or emotional conditions.

11 “(C) Notwithstanding the definitions of ‘abor-
12 tion’ and ‘attempt an abortion’ in this section, a
13 physician terminating or attempting to terminate a
14 pregnancy under the exception provided by subpara-
15 graph (B) may do so only in the manner which, in
16 reasonable medical judgment, provides the best op-
17 portunity for the unborn child to survive, unless, in
18 reasonable medical judgment, termination of the
19 pregnancy in that manner would pose a greater risk
20 of—

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

22 “(ii) the substantial and irreversible phys-
23 ical impairment of a major bodily function, not
24 including psychological or emotional conditions,
25 of the pregnant woman;

1 than would other available methods.

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

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

10 “(e) DEFINITIONS.—In this section the following
11 definitions apply:

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

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

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

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

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

24 “(2) ATTEMPT AN ABORTION.—The term ‘at-
25 tempt’, with respect to an abortion, means conduct

1 that, under the circumstances as the actor believes
2 them to be, constitutes a substantial step in a course
3 of conduct planned to culminate in performing an
4 abortion.

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

8 “(4) PERFORM.—The term ‘perform’, with re-
9 spect to an abortion, includes induce an abortion
10 through a medical or chemical intervention including
11 writing a prescription for a drug or device intended
12 to result in an abortion.

13 “(5) PHYSICIAN.—The term ‘physician’ means
14 a person licensed to practice medicine and surgery
15 or osteopathic medicine and surgery, or otherwise le-
16 gally authorized to perform an abortion.

17 “(6) POST-FERTILIZATION AGE.—The term
18 ‘post-fertilization age’ means the age of the unborn
19 child as calculated from the fusion of a human
20 spermatozoon with a human ovum.

21 “(7) PROBABLE POST-FERTILIZATION AGE OF
22 THE UNBORN CHILD.—The term ‘probable post-fer-
23 tilization age of the unborn child’ means what, in
24 reasonable medical judgment, will with reasonable
25 probability be the postfertilization age of the unborn

1 child at the time the abortion is planned to be per-
2 formed or induced.

3 “(8) REASONABLE MEDICAL JUDGMENT.—The
4 term ‘reasonable medical judgment’ means a medical
5 judgment that would be made by a reasonably pru-
6 dent physician, knowledgeable about the case and
7 the treatment possibilities with respect to the med-
8 ical conditions involved.

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

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

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

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

20 (c) CHAPTER HEADING AMENDMENTS.—

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

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

Amend the title so as to read: “A bill to amend title
18, United States Code, to protect pain-capable unborn
children, and for other purposes.”.

