

**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.”.

