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PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

JUNE 14, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 1797]

[Including Committee Cost Estimate]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1797) to amend title 18, United States Code, to protect pain-capable unborn children in the District of Columbia, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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29–006

The Amendments

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Pain-Capable Unborn Child Protection Act".

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

Congress finds and declares the following:

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

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

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

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

(5) 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. In the United States, surgery of this type is being performed by 20 weeks after fertilization and earlier in specialized units affiliated with children's hospitals.

(6) The position, asserted by some physicians, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization 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, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

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

(8) 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.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) The position, asserted by some commentators, that the unborn child remains in a coma-like sleep state that precludes the unborn child 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 the unborn child with anesthesia to prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery.

(11) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain at least by 20 weeks after fertilization, if not earlier.

(12) It is the purpose of the Congress to assert a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

(13) The compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the compelling governmental interest in protecting the lives of unborn children from the stage of viability, and neither governmental interest is intended to replace the other.

(14) Congress has authority to extend protection to pain-capable unborn children under the Supreme Court's Commerce Clause precedents and under the Constitution's grants of powers to Congress under the Equal Protection, Due Process, and Enforcement Clauses of the Fourteenth Amendment.

SEC. 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.

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

"§ 1532. Pain-capable unborn child protection

"(a) UNLAWFUL CONDUCT.—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) REQUIREMENTS FOR ABORTIONS.—

"(1) The physician performing or attempting the abortion shall first make a determination of the probable post-fertilization 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 post-fertilization age.

"(2)(A) Except as provided in subparagraph (B), the abortion shall not be performed or attempted, if the probable post-fertilization age, as determined under paragraph (1), of the unborn child is 20 weeks or greater.

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

"(C) Notwithstanding the definitions of 'abortion' and 'attempt an abortion' in this section, a physician terminating or attempting to terminate a pregnancy under the 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, unless, in reasonable medical judgment, termination of the pregnancy in that manner 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;

than would other available methods.

"(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) 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 AN ABORTION.—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) FERTILIZATION.—The term 'fertilization' means the fusion of human spermatozoon with a human ovum.

"(4) PERFORM.—The term 'perform', with respect to an abortion, includes induce an abortion through a medical or chemical intervention including writing a prescription for a drug or device intended to result in an abortion.

"(5) 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.

"(6) POST-FERTILIZATION AGE.—The term 'post-fertilization age' means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

"(7) PROBABLE POST-FERTILIZATION AGE OF THE UNBORN CHILD.—The term 'probable post-fertilization age of the unborn child' means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

"(8) REASONABLE MEDICAL JUDGMENT.—The term 'reasonable medical judgment' means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

"(9) 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.

"(10) 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. 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 by striking "Partial-Birth Abortions" and inserting "Abortions".

Amend the title to read:

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

Purpose and Summary

H.R. 1797, the "Pain-Capable Unborn Child Protection Act" was introduced by the House Constitution Subcommittee Chairman Trent Franks on April 26, 2013. The bill would generally prohibit abortions of unborn children capable of feeling pain after 20 weeks post-fertilization, with limited exceptions.

Background and Need for the Legislation

Since the Supreme Court's infamous 1973 decision in *Roe v. Wade*,[1] medical knowledge regarding the development of unborn babies and their capacities at various stages of growth has advanced dramatically.[2] A *New York Times* article recently explored research on the capacity of unborn children to feel pain, noting the research of Kanwaljeet Anand, an Oxford- and Harvard-trained neonatal pediatrician:

> Twenty-five years ago, when Kanwaljeet Anand was a medical resident in a neonatal intensive care unit, his tiny patients, many of them preterm infants, were often wheeled out of the ward and into an operating room. He soon learned what to expect on their return. The babies came back in terrible shape: their skin was gray, their breathing shallow, their pulses weak. Anand spent hours stabilizing their vital signs, increasing their oxygen supply and administering insulin to balance their blood sugar.
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> "What's going on in there to make these babies so stressed?" Anand wondered. Breaking with hospital practice, he wrangled permission to follow his patients into the O.R. "That's when I discovered that the babies were not getting anesthesia," he recalled recently. Infants under-

[1] 410 U.S. 113 (1973).

[2] Some of the extensive evidence that unborn children have the capacity to experience pain, at least by 20 weeks and possibly earlier is summarized here: http://www.nrlc.org/abortion/Fetal__Pain/Fetal-Pain-The-Evidence.pdf.

going major surgery were receiving only a paralytic to keep them still. Anand's encounter with this practice occurred at John Radcliffe Hospital in Oxford, England, but it was common almost everywhere. Doctors were convinced that newborns' nervous systems were too immature to sense pain, and that the dangers of anesthesia exceeded any potential benefits.

Anand resolved to find out if this was true. In a series of clinical trials, he demonstrated that operations performed under minimal or no anesthesia produced a "massive stress response" in newborn babies, releasing a flood of fight-or-flight hormones like adrenaline and cortisol. Potent anesthesia, he found, could significantly reduce this reaction . . .

But Anand was not through with making observations. As NICU technology improved, the preterm infants he cared for grew younger and younger—with gestational ages of 24 weeks, 23, 22—and he noticed that even the most premature babies grimaced when pricked by a needle . . . [n]ew evidence, however, has persuaded him that fetuses can feel pain by 20 weeks gestation (that is, halfway through a full-term pregnancy) and possibly earlier . . .

If the notion that newborns are incapable of feeling pain was once widespread among doctors, a comparable assumption about fetuses was even more entrenched. Nicholas Fisk is a fetal-medicine specialist and director of the University of Queensland Center for Clinical Research in Australia. For years, he says, "I would be doing a procedure to a fetus, and the mother would ask me, 'Does my baby feel pain?' The traditional, knee-jerk reaction was, 'No, of course not.'" But research in Fisk's laboratory (then at Imperial College in London) was making him uneasy about that answer. It showed that fetuses as young as 18 weeks react to an invasive procedure with a spike in stress hormones and a shunting of blood flow toward the brain—a strategy, also seen in infants and adults, to protect a vital organ from threat. Then Fisk carried out a study that closely resembled Anand's pioneering research, using fetuses rather than newborns as his subjects. He selected 45 fetuses that required a potentially painful blood transfusion, giving one-third of them an injection of the potent painkiller fentanyl. As with Anand's experiments, the results were striking: in fetuses that received the analgesic, the production of stress hormones was halved, and the pattern of blood flow remained normal.

Fisk says he believes that his findings provide suggestive evidence of fetal pain—perhaps the best evidence we'll get. Pain, he notes, is a subjective phenomenon; in adults and older children, doctors measure it by asking patients to describe what they feel. ("On a scale of 0 to 10, how would you rate your current level of pain?") To be certain that his fetal patients feel pain, Fisk says, "I would need one of them to come up to me at the age of 6 or 7 and say, 'Excuse me, Doctor, that bloody hurt, what you did to

> me!'" In the absence of such first-person testimony, he concludes, it's "better to err on the safe side" and assume that the fetus can feel pain starting around 20 to 24 weeks . . .
>
> On April 4, 2004, Sunny Anand took the stand in a courtroom in Lincoln, Neb., to testify as an expert witness in the case of *Carhart v. Ashcroft*. This was one of three Federal trials held to determine the constitutionality of the ban on a procedure called intact dilation and extraction by doctors and partial-birth abortion by anti-abortion groups. Anand was asked whether a fetus would feel pain during such a procedure. "If the fetus is beyond 20 weeks of gestation, I would assume that there will be pain caused to the fetus," he said. "And I believe it will be severe and excruciating pain."[3]

Congress has the power to acknowledge these developments by enacting H.R. 1797 and prohibiting abortions after the point at which scientific evidence shows the unborn child can feel pain, with limited exceptions. Nine states[4] have already made such a determination by enacting the Pain-Capable Unborn Child Protection Act, and those nine state legislatures have adopted factual findings regarding the medical evidence that unborn children experience pain at least by 20 weeks after fertilization (about the start of the sixth month), and they therefore prohibit abortion after that point, with narrowly drawn exceptions.

In *Gonzales v. Carhart,*[5] the Supreme Court made clear that there is a "legitimate interest of the Government in protecting the life of the fetus that may become a child."[6] Babies have been born at 20 weeks and survived, and that such unborn children can feel pain as well amply justifies H.R. 1797. Further, the Federal Partial-Birth Abortion Ban Act was upheld although it made no distinction based on viability. As the Supreme Court stated, "The [Partial-Birth Abortion Ban] Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[7]

H.R. 1797 also provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited" and sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure.[8] The Supreme Court has also made clear that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman,"[9] and that Congress may show such respect for the unborn through "specific

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[3] Annie Murphy Paul, "The First Ache," *The New York Times* (February 10, 2008).

[4] Nebraska: R.R.S. Neb. § 28–3,109 (2010); Kansas: K.S.A § 65–6722; Idaho: Idaho Code Ann. §§ 18–501–10 (2011) *McCormack v. Hiedeman*, Case No. 4:11–cv–00433–BLW (March 6, 2013) law enjoined, to be appealed; Oklahoma: Okla. Stat. Ann. §§ 1–745.1–11 (2011); Alabama: Ala. Code § 26–23B–2; Georgia: O.C.G.A. §§ 16–12–140, 16–12–141, O.C.G.A. §§ 31–9B–1 to 31–9B–3 (2012) (preliminary injunction issued *Lathrop, et al. v. Deal, et al.* No. CV224423) (Sup. Ct. of Fulton Cnty., Ga., Dec. 21, 2012); Louisiana: La. R.S. 40:1299.30.1 (2012); Arkansas: 2013, Arkansas Code Title 20, Chapter 16, Subchapter 13—Pain-Capable Unborn Child Protection Act. Governor's veto overridden by the General Assembly, effective immediately; North Dakota: 2013 Bill Text ND S.B. 2368 signed by the Governor April 17, 2013.

[5] 550 U.S. 124 (2007).

[6] *Id.* at 146.

[7] *Id.* at 147.

[8] *Id.* at 149.

[9] *Id.* at 157.

regulation because it implicates additional ethical and moral concerns that justify a special prohibition."[10] The Court has stated that it "confirms the State's interest in promoting respect for human life at all stages in the pregnancy."[11] The Court has also made clear that "[t]he Court has given state and Federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,"[12] and in any case the medical evidence that unborn children can feel pain at 20 weeks is widely accepted, as described in the Findings section of the bill.

Justice Kennedy, often a crucial swing vote on the Court, has described the wide latitude the government has to protect unborn life this way:

> We held [in the *Casey* decision] it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. *Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that [the government's] interests can be given proper weight . . . States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.[13]

The Federal statute upheld in *Carhart* prohibits the abortion method in which the living premature infant is mostly delivered before being killed. The most common method used in the late second trimester is the "D&E," a dismemberment abortion. It involves using a long steel tool to grasp and tear off, by brute force, the arms and legs of the developing human, after which the skull is crushed. Dr. Anthony Levatino testified at the May 17, 2012, hearing before the House Subcommittee on the Constitution. At one time, Dr. Levatino, an obstetrician-gynecologist, performed many D&Es.[14]

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[10] *Id.* at 158.
[11] *Id.* at 163.
[12] *Id.* at 163.
[13] *Stenberg v. Carhart,* 350 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting). While Justice Kennedy was in the minority in *Stenberg,* which struck down Nebraska's Partial Birth Abortion Ban Act, 7 years later, with a differently composed Court, he wrote for the majority in *Gonzales v. Carhart,* 550 U.S. 124 (2007), the decision upholding the Federal Partial Birth Abortion Ban Act.
[14] Dr. Levatino described the horrific nature of the D&E procedure as follows:

> Imagine, if you can, that you are a pro-choice obstetrician/gynecologist like I once was. Your patient today is 24 weeks pregnant (LMP). At 24 weeks from last menstrual period, her uterus is two finger-breadths above the umbilicus. If you could see her baby, which is quite easy on an ultrasound, she would be as long as your hand plus a half, from the top of her head to the bottom of her rump, not counting the legs. Your patient has been feeling her baby kick for the last month or more, but now she is asleep on an operating room table and you are there to help her with her problem pregnancy.
>
> The first task is to remove the laminaria that had earlier been placed in the cervix, the opening to the uterus, to dilate it sufficiently to allow the procedure you are about to perform. With that accomplished, direct your attention to the surgical instruments arranged on a small table to your right. The first instrument you reach for is a 14-French suction catheter. It is clear plastic and about nine inches long. It has a bore

Continued

Certainly the ability to feel pain is a characteristic that has caused human beings to empathize with one another. As elaborated in the *New York Times* article previously cited:

> The capacity to feel pain has often been put forth as proof of a common humanity. Think of Shylock's monologue in "The Merchant of Venice": Are not Jews "hurt with the same weapons" as Christians, he demands. "If you prick us, do we not bleed?" Likewise, a presumed insensitivity to pain has been used to exclude some from humanity's privileges and protections. Many 19th-century doctors believed blacks were indifferent to pain and performed surgery on them without even that era's rudimentary anesthesia. Over time, the charmed circle of those considered alive to pain, and therefore fully human, has widened to include members of other religions and races, the poor, the criminal, the mentally ill—and, thanks to the work of Sunny Anand and others, the very young.[15]

It is time for Congress to enact H.R. 1797 and prohibit the painful killing of innocent human beings.[16]

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through the center approximately ¾ of an inch in diameter. Picture yourself introducing this catheter through the cervix and instructing the circulating nurse to turn on the suction machine, which is connected through clear plastic tubing to the catheter. What you will see is a pale yellow fluid the looks a lot like urine coming through the catheter into a glass bottle on the suction machine. This is the amniotic fluid that surrounded the baby to protect her.

With suction complete, look for your Sopher clamp. This instrument is about thirteen inches long and made of stainless steel. At the business end are located jaws about 2 inches long and about ½ an inch wide with rows of sharp ridges or teeth. This instrument is for grasping and crushing tissue. When it gets hold of something, it does not let go. A second trimester D&E abortion is a blind procedure. The baby can be in any orientation or position inside the uterus. Picture yourself reaching in with the Sopher clamp and grasping anything you can. At 24 weeks gestation, the uterus is thin and soft so be careful not to perforate or puncture the walls. Once you have grasped something inside, squeeze on the clamp to set the jaws and pull hard—really hard. You feel something let go and out pops a fully formed leg about six inches long. Reach in again and grasp whatever you can. Set the jaw and pull really hard once again and out pops an arm about the same length. Reach in again and again with that clamp and tear out the spine, intestines, heart and lungs.

The toughest part of a D&E abortion is extracting the baby's head. The head of a baby that age is about the size of a large plum and is now free floating inside the uterine cavity. You can be pretty sure you have hold of it if the Sopher clamp is spread about as far as your fingers will allow. You know you have it right when you crush down on the clamp and see white gelatinous material coming through the cervix. That was the baby's brains. You can then extract the skull pieces. Many times a little face may come out and stare back at you . . .

If you refuse to believe that this procedure inflicts severe pain on that unborn child, please think again.

Written Testimony of Dr. Anthony Levatino, available at http://judiciary.house.gov/hearings/Hearings%202012/Levatino%2005172012.pdf. A video of Dr. Levatino's oral testimony (including a medical illustration from the respected Nucleus Medical Media firm that provides images for medical education nationwide) that accurately depicts a D&E dismemberment abortion at 23 weeks) is available here: http://judiciary.edgeboss.net/wmedia/judiciary/constitution/const05172012.wvx. Dr. Levatino's separate oral testimony is available here: http://www.youtube.com/watch?v=t—MhKiaD7c&feature=youtu.be. The Nucleus Medical Media graphic can be found separately here: http://www.nrlc.org/abortion/pba/DEabortiongraphic.html. Dr. Levatino provided substantially the same testimony before the House Subcommittee on the Constitution and Civil Justice on May 23, 2013.

[15] Annie Murphy Paul, "The First Ache," *The New York Times* (February 10, 2008).

[16] In 2005, the Journal of the American Medical Association (JAMA) published "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence," which opponents of H.R. 1797 may still cite as "proof" that unborn humans do not experience pain until after 29 weeks LMP, even though that paper has been thoroughly discredited. Shortly after the JAMA piece was released, the National Right to Life Committee issued a rebuttal, including important information about the backgrounds and associations of the authors. That rebuttal can be found here: http://www.nrlc.org/abortion/Fetal__Pain/NRLCrebuttalJAMA.html. In particular, note that the lead author of the article, Susan J. Lee, was previously employed as a lawyer by NARAL, the pro-abortion political advocacy organization. *See* Marie McCullough, "Fetal-pain study omits an

New polling from The Polling Company demonstrates strong support for the D.C. Pain-Capable Unborn Child Protection Act.[17] The Polling Company found that 64% would support a law such as the Pain-Capable Unborn Child Protection Act prohibiting abortion after 20 weeks. Only 30% opposed it. Supporters included 47% of those who identified themselves as "pro-choice" in the poll.

That poll was conducted before the high-profile Pennsylvania trial of late-term abortionist Dr. Kermit Gosnell, who was convicted of three counts of murdering late-term babies following botched abortions.[18] The Grand Jury Report in the case of abortionist Kermit Gosnell begins as follows:

> This case is about a doctor who killed babies and endangered women. What we mean is that he regularly and illegally delivered live, viable, babies in the third trimester of pregnancy—and then murdered these newborns by severing their spinal cords with scissors . . . We ourselves cover a spectrum of personal beliefs about the morality of abortion. For us as a criminal grand jury, however, the case is not about that controversy; it is about disregard of the law and disdain for the lives and health of mothers and infants. We find common ground in exposing what happened here . . . It was a baby charnel house . . . Gosnell had a simple solution for the unwanted babies he delivered: he killed them. He didn't call it that. He called it "ensuring fetal demise." The way he ensured fetal demise was by sticking scissors into the back of the baby's neck and cutting the spinal cord. He called that "snipping." Over the years, there were hundreds of "snippings."[19]

The facts that came out during the trial were so horrific that the urban legend investigative website Snopes.com was compelled to publish a page confirming that the story is real, and not merely an urban legend.[20]

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abortion-rights link," Knight Ridder (August 24, 2005), available at http://www.nrlc.org/abortion/Fetal_Pain/Proabortionlinktostudy.html. One of Lee's four co-authors, Dr. Eleanor A. Drey, was the director of the largest abortion clinic in San Francisco. See Bob Egelko, "Abortion law hits poor hardest, S.F. expert says," *San Francisco Chronicle* (March 31, 2004). According to Dr. Drey, the abortion facility that she runs performs about 600 abortions a year between the 20th and 23rd weeks of pregnancy (that is, in the fifth and sixth months). *Id.* Drey is a prominent critic of the Partial-Birth Abortion Ban Act, and a self-described activist. (In a laudatory profile in the newsletter of Physicians for Reproductive Choice, September 2004, it was noted that "much of Dr. Drey's research centers on repeat and second-trimester procedures . . . ," and quotes Drey as saying, "I am very lucky because I get to train residents and medical students, and I really do feel that it's a type of activism." *See* http://www.christianliferesources.com/article/nrlc-memo-critiquing-jama-paper-on-fetal-pain-1119. One reporter, Knight Ridder's Marie McCullough, did contact JAMA editor-in-chief Catherine D. DeAngelis regarding the ties of Lee and Drey. McCullough reported that DeAngelis "said she was unaware of this, and acknowledged it might create an appearance of bias that could hurt the journal's credibility. 'This is the first I've heard about it,' she said. 'We ask them to reveal any conflict of interest. I would have published the disclosure if it had been made.'" *See* Marie McCullough, "Fetal-pain study omits an abortion-rights link," Knight Ridder (August 24, 2005), available at http://www.nrlc.org/abortion/Fetal_Pain/Proabortionlinktostudy.html.

[17] *See* National Right to Life, "New Polling Shows Strong Support for Prohibiting Abortion on Pain-Capable Unborn Children" (April 22, 2013), available at http://www.nrlc.org/press_releases_new/Release042213.html.

[18] See Brady Dennis, "Abortion doctor Kermit Gosnell convicted of murder in deaths of three infants," *The Washington Post* (May 13, 2013).

[19] Report of the Grand Jury, at 1–5, available at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.

[20] *See* http://www.snopes.com/politics/crime/gosnell.asp ("Dr. Kermit Gosnell trial).

Ann Ponterio, chief of the homicide unit in the Philadelphia District Attorney's office, said this in describing the report of the grand jury: "There was one baby that when it was born, one of the workers was playing with it for several minutes before the worker did exactly what Dr. Gosnell did. Snip the back of the neck. And when we use the word snip, it is a scissors taking the bony part of a vertebrae and cutting it. *This is a very very painful thing.*"[21] The Gosnell grand jury report itself contains references to a neonatal expert who reported that the cutting of the spinal cords of babies intended to be late-term aborted would cause them a "tremendous amount of pain."[22]

It is worth remembering that the difference between what Dr. Gosnell did and what other late-term abortionists do is simply a matter of geography. Columnist Timothy Carney asked participants in a conference call hosted by RHRealityCheck (a pro-choice website) "What is the distinction between what he [Gosnell] did, and what a late-term abortionist like, say, LeRoy Carhart does?" Tracy Weitz, associate professor at the University of California, San Francisco, explained, "When a procedure that usually involves the collapsing of the skull is done, it's usually done when the fetus is still *in* the uterus, not when the fetus has been delivered."[23] Consequently, equally horrible techniques on children at the same stage of development are conducted by late term abortionists, but they are simply applied just inside the womb instead of outside the womb.

Hearings

The Committee's Subcommittee on the Constitution and Civil Justice held a a hearing on H.R. 1797 on May 23, 2013. Testimony was received from Maureen L. Condic, Ph.D., professor of neurobiology and anatomy at the University of Utah; Anthony Levatino, M.D., Jill Stanek, a nurse turned speaker; and Christy Zink, Washington, D.C., with additional material submitted by various organizations.

Committee Consideration

On June 4, 2013, the Subcommittee on the Constitution and Civil Justice met in open session and ordered the bill H.R. 1797 favorably reported with an amendment, by a rollcall vote of 6 to 4, a quorum being present. On June 12, 2013, the Committee met in open session and ordered the bill H.R. 1797 favorably reported with an amendment, by a rollcall vote of 20 to 12, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following

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[21] Lauren Enriquez, "Recapping the Gosnell Saga: 11 Eye-Opening Testimonies and Quotes" (April 30, 2013), available at http://liveactionnews.org/recapping-the-gosnell-saga-11-eye-opening-testimonies-and-quotes/.

[22] Report of the Grand Jury, at 101; *see also id.* at 101 ("excruciating pain") and 112 ("tremendous pain"), available at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.

[23] Timothy Carney, "Collapsing the skull . . . is usually done when the fetus is still in the uterus." *The Washington Times* (April 16, 2013), available at http://washingtonexaminer.com/the-collapsing-of-the-skull-is-usually-done-when-the-fetus-is-still-in-the-uterus/article/2527316/.

rollcall votes occurred during the Committee's consideration of H.R. 1797.

1. An amendment offered by Mr. Conyers would have created an exception to the bill if the pregnancy was the result of rape or incest. Defeated by a vote of 13 to 17.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Coble (NC)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)			
Mr. DeSantis (FL)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	13	17	

2. An amendment offered by Mr. Nadler, Ms. DelBene, and Mr. Watt would have created an exception to the bill to preserve the life "or health" of the woman. Defeated by a vote of 16 to 20.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Coble (NC)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Amodei (NV)			
Mr. Labrador (ID)			
Ms. Farenthold (TX)		X	
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Mr. Scott (VA)	X		
Mr. Watt (NC)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)	X		
Ms. Bass (CA)	X		
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Garcia (FL)	X		
Mr. Jeffries (NY)	X		
Total	16	20	

3. On reporting the bill as amended, approved 20 to 12.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Coble (NC)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Bachus (AL)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)			
Mr. Jordan (OH)	X		
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Amodei (NV)			
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)	X		
Mr. Holding (NC)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Mr. Smith (MO)			
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Mr. Scott (VA)		X	
Mr. Watt (NC)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)		X	
Ms. Bass (CA)		X	
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Garcia (FL)		X	
Mr. Jeffries (NY)			
Total	20	12	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

resentatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Committee Cost Estimate

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee believes that the cost incurred in carrying out the bill, H.R. 1797, would not be significant for the current fiscal year, and for the next 5 fiscal years, as a relatively small number of Federal prosecutions out of all such prosecutions would be affected. The Committee notes that the Congressional Budget Office's cost estimate for the Partial-Birth Abortion Ban Act of 2003 (H.R. 760 in the 108th Congress), which contained a nationwide ban on a particular abortion procedure with a life exception for the mother, concluded that "CBO estimates that implementing H.R. 760 would not result in any significant cost to the Federal Government. Enacting H.R. 760 could affect direct spending and receipts, but CBO estimates that any such effects would not be significant." CBO also found regarding H.R. 760 that "H.R. 760 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments. H.R. 760 would impose a private-sector mandate as defined by UMRA by prohibiting physicians from performing 'partial-birth abortions,' as defined in the bill, except when necessary to save the life of a mother. The direct costs of the mandate would be measured as the net income forgone by physicians and clinics. Based on information from industry sources and nongovernmental organizations, CBO expects that the direct cost of the mandate would fall below the annual threshold established by UMRA for private-sector mandates ($117 million in 2003, adjusted annually for inflation)."

Duplication of Federal Programs

No provision of H.R. 1797 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1797 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1797 would pro-

hibit abortions, with limited exceptions, after 20 weeks post-fertilization (when unborn children have the capacity to feel pain).

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1797 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 provides that this Act may be cited as the "Pain-Capable Unborn Child Protection Act."

Sec. 2. Legislative Findings and Declaration of Constitutional Authority for Enactment. Section 2 sets out the bill's legislative findings.

Sec. 3. Pain-Capable Unborn Child Protection. Section 3 provides in subsection (a) that 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).

Subsection (b) provides in subparagraph (A) that the physician performing or attempting the abortion shall first make a determination of the probable post-fertilization 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 post-fertilization age. Subsection (b) also provides that except as provided in subparagraph (B), the abortion shall not be performed or attempted, if the probable post-fertilization age of the unborn child is 20 weeks or greater.[24] Subparagraph (B) provides that subparagraph (A) does not apply if, in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder,

[24] Often in the medical literature, the measurement of fetal age used is "LMP," which denotes measuring fetal age since the pregnant woman's "last menstrual period." H.R. 1797 uses the fetal age standard (20 weeks fetal age, measured from fertilization) instead, but for clarity's sake a 20-week fetal age measured from fertilization is essentially the same as an LMP-measured fetal age of 22 weeks.

There are various valid means of determining the age of an unborn child, but the most accurate is the post-fertilization age determination. *See* The Developing Human: Clinically Oriented Embryology (4th ed. 1988) at 82, by Dr. Keith L. Moore (discussing distinction between LMP and "fertilization age," and arguing the LMP method is error prone in part because "it depends on the mother's memory of an event that occurred several weeks before she realized she was pregnant" and that "The day fertilization occurs is the most accurate reference point for estimating age . . ."). As methods of establishing fertilization age (through ultrasound and other techniques) have become more refined, the determination of post-fertilization age has also become more accurate.

In any case, a state legislature, or Congress, can use whichever system it wants when drafting laws, as long as the law clearly defines what standard is being employed. H.R. 1797 clearly defines "post-fertilization age" and "probably post-fertilization age of the unborn child." The bill further clearly informs the physician that he or she must perform "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 post-fertilization age." This is language similar to that which appears in many medical malpractice statutes.

physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, but not including psychological or emotional conditions.[25]

Subsection (b) also provides that a physician terminating or attempting to terminate a pregnancy under the 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, unless, in reasonable medical judgment, termination of the pregnancy in that manner 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, than would other available methods.[26]

Subsection (c) provides that whoever violates subsection (a) shall be fined under this title or imprisoned for not more than 5 years, or both.

Subsection (d) provides that 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[27] based on such a violation.

Subsection (e) sets out the following definitions used in the Act.

(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 AN ABORTION—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 in the District of Columbia.

(3) FERTILIZATION—The term "fertilization" means the fusion of human spermatozoon with a human ovum.

(4) PERFORM—The term "perform," with respect to an abortion, includes induce an abortion through a medical or chemical inter-

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[25] Evidence from medical experts show that modern medicine can successfully treat complications of pregnancy that fall short of the physical conditions specified in H.R. 1797 without resort to abortion, so that the government can constitutionally judge that no broader exception is needed to prevent significant risks to the mother's health. Justice Kennedy reiterated in *Gonzales v. Carhart* that legislation protecting the unborn need not allow individual physicians a veto power over its provisions, stating that "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." 550 U.S. at 163–64. Further, in *Gonzales v. Carhart,* the United States Supreme Court upheld the constitutionality of the Partial-Birth Abortion Ban against a challenge based on the absence of a health exception. This ruling was based, in part, on evidence that no broader exception was necessary.

[26] Such an exception is allowed under the Supreme Court's decision in *Gonzales v. Carhart,* in which Justice Kennedy stated: "The . . . premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." 550 U.S. at 158.

[27] The reference to "section 2, 3, or 4" is to sections 2 (Principals), 3 (Accessory after the fact), and 4 (Misprison of felony) of Title 18 of the U.S. Code. The Partial-Birth Abortion Ban Act contains a similar provision.

vention including writing a prescription for a drug or device intended to result in an abortion.

(5) PHYSICIAN—The term "physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise licensed to legally perform an abortion.

(6) POST–FERTILIZATION AGE—The term "post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(7) PROBABLE POST–FERTILIZATION AGE OF THE UNBORN CHILD—The term "probable post-fertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

(8) REASONABLE MEDICAL JUDGMENT—The term "reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(9) 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.

(10) WOMAN—The term "woman" means a female human being whether or not she has reached the age of majority."

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

Chapter.	Sec.
1. General Provisions	1
* * * * * * *	
74. [Partial-Birth Abortions] *Abortions*	1531
* * * * * * *	

CHAPTER 74—[PARTIAL-BIRTH ABORTIONS] *ABORTIONS*

Sec.
1531. Partial-birth abortions prohibited.
1532. Pain-capable unborn child protection.

* * * * * * *

§ 1532. Pain-capable unborn child protection

(a) UNLAWFUL CONDUCT.—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) REQUIREMENTS FOR ABORTIONS.—

(1) The physician performing or attempting the abortion shall first make a determination of the probable post-fertilization 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 post-fertilization age.

(2)(A) Except as provided in subparagraph (B), the abortion shall not be performed or attempted, if the probable post-fertilization age, as determined under paragraph (1), of the unborn child is 20 weeks or greater.

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

(C) Notwithstanding the definitions of "abortion" and "attempt an abortion" in this section, a physician terminating or attempting to terminate a pregnancy under the 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, unless, in reasonable medical judgment, termination of the pregnancy in that manner 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;

than would other available methods.

(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) 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 AN ABORTION.—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) FERTILIZATION.—The term "fertilization" means the fusion of human spermatozoon with a human ovum.

(4) PERFORM.—The term "perform", with respect to an abortion, includes induce an abortion through a medical or chemical intervention including writing a prescription for a drug or device intended to result in an abortion.

(5) 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.

(6) POST-FERTILIZATION AGE.—The term "post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(7) PROBABLE POST-FERTILIZATION AGE OF THE UNBORN CHILD.—The term "probable post-fertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

(8) REASONABLE MEDICAL JUDGMENT.—The term "reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(9) 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.

(10) WOMAN.—The term "woman" means a female human being whether or not she has reached the age of majority.

* * * * * * *

Dissenting Views

INTRODUCTION

H.R. 1797, the "Pain-Capable Unborn Child Protection Act," would impose a nationwide ban on abortions performed after 20 weeks, with only very limited exceptions. This patently unconstitutional legislation constitutes a dangerous and far-reaching attack on women's right to choose. It criminalizes pre-viability abortions with only a narrow exception for the life of the woman and fails to include any exceptions for the woman's health or for pregnancies resulting from rape or incest.

Not surprisingly, this pernicious legislation is opposed by the Nation's leading civil rights organizations, religious groups, and medical professionals.[1] As 15 religious organizations noted in a letter to Members of the House of Representatives, the "decision to end a pregnancy is best left to a woman in consultation with her family, her doctor, and her faith."[2]

For these reasons, and those described below, we respectfully dissent, and we urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 1797, the "Pain-Capable Unborn Child Protection Act," would ban abortions beginning at 20 weeks following fertilization. The bill's sponsors contend that a fetus is capable of feeling pain at 20 weeks post-fertilization, and that there is a "compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[3] While the bill has a narrow exception to protect the life of the woman, it specifically excludes from that exception psychological or emotional conditions that could threaten a woman's life, such as possible suicide.[4] It also fails to include any health exception whatsoever, nor does it have an exception for cases involving rape or incest. The bill also imposes a criminal penalty of a fine or imprisonment for up to 5 years, or both.

Section 2 of the bill consists of a series of largely unsubstantiated assertions misleadingly labeled as "findings" purporting to establish that a fetus can feel pain at 20 weeks. These include statements asserted as scientific fact about fetal pain that are neither widely held nor without controversy in the field. And, in direct contradiction to *Roe v. Wade*[5] and its progeny, they incorrectly claim

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[1] Organizations opposed to H.R. 1797 include the following: ACLU Washington Legislative Office, National Partnership for Women & Families; Planned Parenthood Federation of America; Center for Reproductive Rights; Physicians for Reproductive Health; National Abortion Federation; American Congress of Obstetricians and Gynecologists, American Medical Women's Association, American Nurses Association, American Society for Reproductive Medicine, Association of Reproductive Health Professionals, Medical Students for Choice, National Association of Nurse Practitioners in Women's Health, National Family Planning & Reproductive Health Association; Physicians for Reproductive Health; and Planned Parenthood Federation of America. *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing on H.R. 1797 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 113th Cong. (2013).

[2] These organizations are the Anti-Defamation League; Catholics for Choice; Disciples Justice Action Network; Hadassah, The Women's Zionist Organization of America; Jewish Council for Public Affairs; Methodist Federation for Social Action; Metropolitan Community Churches; Muslims for Progressive Values; National Council of Jewish Women; Religious Coalition for Reproductive Choice; Religious Institute; Union of Reform Judaism; Unitarian Universalist Association of Congregations; Unitarian Universalist Women's Federation; United Church of Christ, and Justice and Witness Ministries. Letter from the Anti-Defamation League *et al.* to members of the U.S. House of Representatives (May 23, 2013) (on file with H. Comm. on the Judiciary Democratic staff).

[3] H.R. 1797, 113th Cong. § 2(12) (2013).

[4] In the 112th Congress, Representative Trent Franks (R–AZ) offered an amendment that removed the bill's reference to suicide. Nonetheless, the Committee Report on the bill made clear that suicide was still excluded:

> Although the specific language referring to suicidal conditions was deleted pursuant to an amendment offered by Rep. Franks and that was accepted by the Committee, the amendment did not, in fact, change this aspect of the bill. As Rep. Franks said in his explanation of the amendment, "This amendment would strike the words 'or any claim or diagnosis that the woman will engage in conduct which she intends to result in her death.' This amendment would simply clarify and simplify the bill as the stricken words are already a subset of the prefatory language referring to psychological or emotional conditions. That is, we remove the duplicative language that could confuse or complicate the interpretation of the bill."

H. Rep. No. 112–640, pt I, at n. 8 (2012) (citation omitted).

[5] Roe v. Wade, 410 U.S. 113 (1973).

that there is "a compelling government interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."[6] Section 2 also cites the Commerce Clause of the Constitution, and the Equal Protection, Due Process, and Enforcement Clauses of the Fourteenth Amendment as the constitutional basis of Congress' power to enact this legislation.[7]

Section 3 amends title 18 of the United States Code to add a new section 1532 that criminalizes abortions performed at 20 weeks or later, except in certain limited circumstances.

Criminal Prohibition: New section 1532(b)(2) makes it unlawful for any person to attempt to, or perform, an abortion if the probable post-fertilization age is determined to be 20 weeks or greater. Prior to performing an abortion, the physician must first determine the "probable post-fertilization age" of the fetus, or reasonably rely on the determination of another physician. An abortion after such date may be legally performed only if necessary to "save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury." New section 1532(b)(2)(B), however, excludes "psychological or emotional conditions." New section 1532(b)(2)(C) further requires that such an abortion be done in a manner that "provides the best opportunity for the unborn child to survive," unless termination of the pregnancy in that manner would pose a greater risk of death or "substantial or irreversible physical impairment of a major bodily function."

Criminal Penalties. An individual who violates this prohibition is subject to a fine or imprisonment up to 5 years, or both pursuant to new section 1532(c), although a woman who undergoes such an abortion would not be subject to prosecution.

CONCERNS WITH H.R. 1797

I. H.R. 1797 IMPERILS THE LIFE AND WELL–BEING OF WOMEN

H.R. 1797 criminalizes virtually all abortions after 20 weeks gestation, without making any provision for the difficult and often dangerous circumstances a woman may face. In fact, the legislation would force women to carry a pregnancy to term even in the most horrific circumstances, including where the fetus has severe abnormalities that make its survival unlikely, or where continuing the pregnancy poses a serious threat to the woman's mental or physical health. Even where the pregnancy is a result of rape or incest, the sponsors of this legislation have declared that a woman must adhere to an arbitrary deadline in deciding how best to deal with the results of that horrific crime.

A. H.R. 1797 Ignores the Fact that Pregnancies Can Have Catastrophic Complications

Unfortunately, women and their families can face devastating complications that could require them to make the gut-wrenching decision to end a pregnancy. For example, Christy Zink at the hearing on this bill before the Subcommittee on the Constitution and Civil Justice movingly described the nightmare that she and her family suffered when a much wanted pregnancy went horribly

[6] H.R. 1797, 113th Cong. § 2(12) (2013).
[7] *Id.* at § 2(14).

awry. She testified that, 21 weeks into her pregnancy, a MRI revealed that the fetus was missing the central connecting structure of the two parts of his brain, diagnosed as agenesis of the corpus callosum. Moreover, part of the brain had failed to develop. Ms. Zink stated:

> This condition could not have been detected earlier in my pregnancy. Only the brain scan could have found it. . . . If the baby survived the pregnancy, which was not certain, his condition would require surgeries to remove more of what little brain matter he had, to diminish what would otherwise be a state of near-constant seizures.[8]

In another case, Danielle Deaver, a Nebraska woman, was 22 weeks pregnant when her water broke. Doctors informed her that her fetus would likely be born with undeveloped lungs and not survive outside the womb because all the amniotic fluid had drained. In addition, she was advised that the growing fetus would slowly be crushed by the mother's uterus walls. During Ms. Deaver's pregnancy, Nebraska enacted a law similar to H.R. 1797 and thus the mother could not obtain an abortion. Despite serious complications and enduring infections, Ms. Deaver was forced to allow the fetus to be born. The one-pound, ten-ounce child survived only 15 minutes outside the womb.[9]

B. H.R. 1797 Jeopardizes the Health of the Mother

H.R. 1797 bans abortions necessary to protect a woman's health and fails to recognize that many things could go wrong in a pregnancy. As a result, this measure puts a woman's health potentially at risk in ways that doctors, not Congress, are in the best position to evaluate. H.R. 1797 would essentially force a woman to wait until her condition was nearly terminal so that she could finally act to protect her health. Such governmental intrusion is unconscionable.

The proponents of this measure ignore the facts widely understood by the medical profession. As one nationally-recognized physician observed, there are "many serious health conditions that materialize or worsen later in pregnancy and compromise the health of a pregnant woman. Passing H.R. 1797 will endanger the lives and health of my patients."[10] A partial list of some of the conditions that may threaten the life and health of pregnant women includes:

- Pulmonary hypertension—Abnormally high blood pressure in the arteries of the lungs that can cause heart failure;
- Marfan's syndrome—A genetic disorder affecting the connective tissues that can lead to a ruptured aorta;

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[8] *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing on H.R. 1797 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 113th Cong. (2013) (statement of Christy Zink).

[9] Susan Donaldson James, Danielle Deaver Denied Abortion Even as Uterus Crushed Fetus, ABCNews, *available at* http://abcnews.go.com/Health/20-week-abortion-ban-nebraska-oklahoma-fetus-feel/story?id=13116214#.T7KtOlLknfU (Mar. 14, 2010).

[10] Letter from Nancy L. Stanwood, MD, MPH, Board Chair, Physicians for Reproductive Choice; Associate Professor of Obstetrics and Gynecology, and Section Chief of Family Planning, Yale School of Medicine, to Members of the House Judiciary Committee (June 13, 2013) (on file with H. Comm. on the Judiciary Democratic staff).

- Severe valvular heart disease—Severe narrowing of or obstructions in the heart's valves. This condition can be congenital or acquired;
- Eisenmenger's syndrome—A congenital condition often characterized by a large hole in the heart and high blood pressure in the arteries of the lungs;
- Cyanotic heart defects—A group of defects in which blood pumped to the body contains less oxygen than normal;
- Hormonally sensitive cancers—Includes active breast, ovarian, or endometrial cancer as well as melanoma;
- Kidney disease—Women with severe kidney disease due to conditions such as diabetes or lupus have high rates of kidney failure during pregnancy;
- Preterm premature rupture of membranes with sepsis—This involves the breaking of the membranes containing the fetus and amniotic fluid before 24 weeks;
- Placenta previa—Hemorrhage caused by a condition where the placenta covers the woman's cervix;
- Severe preeclampsia—A condition indicated by high blood pressure and protein in the urine. The only treatment is delivery, regardless of gestational age. This condition can lead to seizures, stroke, or kidney failure;
- HELLP syndrome—A group of symptoms that include the breaking down of red blood cells, low liver function, and low platelet count;
- Ovarian hyperstimulation syndrome (OHSS)—A complication of fertility-enhancing medications characterized by ovarian enlargement, abdominal or gastrointestinal discomfort, and fluid shift within the body. In extreme cases, OHSS can lead to fluid in the lungs, blood clots, or kidney failure.[11]

In response to these serious concerns, Representative Sheila Jackson Lee (D–TX) offered an amendment that would have permitted an abortion if the pregnancy could result in severe, long-lasting damage to a woman's health, including lung disease, heart disease, or diabetes. Even this narrow exception to the bill was unacceptable to the Majority. The amendment was rejected on a voice vote.

C. H.R. 1797 Lacks Any Exception For Victims of Rape or Incest

One of the most despicable aspects of H.R. 1797 is that it would force victims of rape and incest to carry to term the result of such horrific crimes. It is shocking that Congress would abrogate to itself the authority to dictate how a woman, who has been brutally savaged by the crime of rape or incest, must deal with the consequence of such crime. In sum, the bill would allow victims of these crimes to be re-victimized.

To protect victims of rape and incest from the pain of having to be forced to bear their abuser's child, Ranking Member John Conyers, Jr. (D–MI) offered an amendment that would create an ex-

[11] *Id.*

emption in cases involving rape and incest. In opposition, Representative Trent Franks (R–AZ), the bill's sponsor, made the astonishing assertion that "the incidence of rape resulting in pregnancy are [sic] very low." [12]

This assertion is completely at odds with the facts and ignores clearly established science. The statistics speak for themselves. For example, the Rape, Abuse, and Incest National Network reports:

> In 2004–2005, 64,080 women were raped. According to medical reports, the incidence of pregnancy for one-time unprotected sexual intercourse is 5%. By applying the pregnancy rate to 64,080 women, RAINN estimates that there were 3,204 pregnancies as a result of rape during that period.[13]

According to a study published in the American Journal of Obstetrics and Gynecology that examined the national rape-related pregnancy rate, "an estimated 32,101 pregnancies result from rape each year." [14] Among the study's findings was the following:

> [T]he majority [of pregnancies in the sample] occurred among adolescents and resulted from assault by a known, often related perpetrator. Only 11.7% of these victims received immediate medical attention after the assault, and 47.1% received no medical attention related to the rape. A total 32.4% of these victims did not discover they were pregnant until they had already entered the second trimester; 32.2% opted to keep the infant whereas 50% underwent abortion and 5.9% placed the infant for adoption; an additional 11.8% had spontaneous abortion.
>
> * * *
>
> *Rape-related pregnancy occurs with significant frequency.* It is a cause of many unwanted pregnancies and is closely linked with family and domestic violence. As we address the epidemic of unintended pregnancies in the United States, greater attention and effort should be aimed at preventing and identifying unwanted pregnancies that result from sexual victimization.[15]

A forced pregnancy can also exacerbate the health of victims of rape and incest. As the Centers for Disease Control and Prevention reports:

> Sexual violence, stalking, and intimate partner violence are major public health problems in the United States. Many survivors of these forms of violence can experience physical injury, mental health consequences such as depression, anxiety, low self-esteem, and suicide attempts, and other health consequences such as gastrointestinal disorders, substance abuse, sexually transmitted diseases, and gynecological or pregnancy complications. These con-

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[12] Unofficial Tr. of Markup of H.R. 1797, the "Pain-Capable Unborn Child Protection Act," by the H. Comm. on the Judiciary, 113th Cong. at 32 (June 12, 2013).

[13] Available at: http://www.rainn.org/get-information/statistics/sexual-assault-victims.

[14] M.M. Holmes, *et al.,* Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women, 175 AM. J. OBSTET. GYNECOL. 320 (1996).

[15] *Id.*

sequences can lead to hospitalization, disability, or death.[16]

In this regard, the bill's specific provision barring abortion even if the woman is suicidal, is cruel beyond measure.

Even if Representative Frank's assertion has some basis in fact, we fail to see its relevance. For the women who do become pregnant as a result of rape this question presents a difficult, and life-altering choice. How many women are subjected to this terrible situation is irrelevant. What matters is that they should be free to decide how to handle the impact of the assault based on their own needs, their own conscience, and their own faith, in consultation with their health care provider, family, close friends, and clergy. Politicians should never insinuate themselves into these very personal decisions.

We are also concerned that supporters of H.R. 1797 insist that any rape exception require the woman to report the crime within a very limited period of time after the rape. This completely ignores the many reasons why rapes go unreported, including fear of the abuser, fear of the way in which our legal system can still treat rape victims, and shame. It is a condition that is at odds with the reality faced by rape victims, as is the scientifically baseless assertion that pregnancies caused by rape are rare.

We understand that the sponsors' opposition to the constitutionally protected right to choose whether to carry a pregnancy to term is heartfelt and intense. Nonetheless, we believe that denying the well established science and clinical experience demonstrating the harsh reality faced by women and girls who have already been victimized by their rapists, would victimize them a second time by forcing them to carry and give birth to their abuser's child.

II. H.R. 1797 IS UNCONSTITUTIONAL

Without question, H.R. 1797 is unconstitutional because it prohibits nearly all abortions prior to fetal viability, without providing the requisite exception to protect a woman's health. The bill's impermissibly narrow exception to protect a woman's life also fails to address the requirements of constitutionality.

A. The Bill's Pre-Viability Abortion Prohibition Violates the Constitution

Although the bill prohibits nearly all abortions beginning at "the probable post-fertilization age" of 20 weeks, it is generally acknowledged that fetal viability does not occur prior to 24 weeks gestation.[17] As a result, the bill imposes a pre-viability abortion prohibition that the United States Supreme Court has previously ruled to be unconstitutional in *Roe v. Wade.*[18] In that decision, the Court explained:

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[16] National Center for Injury Prevention and Control, Division of Violence Prevention, The National Intimate Partner and Sexual Violence Survey, 2010 Summary Rep. at 1 (2011).

[17] *See, e.g.,* C. Vavasseur *et al.* Consensus Statements on the Borderlands of Neonatal Viability: From Uncertainty to Grey Areas, 100 IR. MED. J. 561 (2007) (reviewing the consensus statements of the British Association of Perinatal Medicine, American Academy of Pediatrics, the Fetus and Newborn Committee Canada, The Dutch Group, The Australian Group, Nuffield Institute of Bioethics, and the Neonatal Section of the Irish Faculty of Pediatrics).

[18] Roe v. Wade, 410 U.S. 113 (1973).

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification. If the State is interested in protecting fetal life after viability, it may go as far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[19]

Likewise, the U.S. Court of Appeals for the Ninth Circuit, in striking down an Arizona statute similar to H.R. 1797, recently observed:

> Since *Roe v. Wade,* the Supreme Court case law concerning the constitutional protection accorded women with respect to the decision whether to undergo an abortion has been unalterably clear regarding one basic point . . . a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable. A prohibition on the exercise of that right is per se unconstitutional."[20]

It should also be noted that the Ninth Circuit found the Arizona law to be unconstitutional even though it had a broader exception to the prohibition than the exception included in H.R. 1797.[21]

Representative Jerrold Nadler, during the Committee's markup of this legislation, sought to remind his Republican colleagues that they "took an oath to 'support and defend the Constitution of the United States against all enemies, foreign and domestic . . . [and] bear true faith and allegiance to the same.'"[22] He continued:

> I would urge my colleagues to reflect on that oath as we consider this legislation. While some may hope that the Supreme Court will ultimately move in a different direction on these questions, the fact remains that, 40 years after Roe v. Wade, even this far more conservative and hostile court has declined every opportunity to do so. The law is clear, and we ought to be true to our oath and endeavor to pass legislation that comports with the clear requirements of the Constitution.[23]

B. The Bill is Unconstitutional Because It Fails To Include a Meaningful Exception for the Woman's Health

Section 3 of H.R. 1797—which allows an abortion only when "in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endan-

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[19] *Id.* at 163–4 (emphasis added).

[20] Isaacson v. Horne, No. 12–16670, 2013 WL 2160171, at *1 (9th Cir. May 21, 2013).

[21] The state statute allows for an otherwise prohibited abortion to be performed in the event of a "medical emergency," which is defined as "a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible impairment of a major bodily function." Ariz. Rev. Stat. § 36–2151(6) (2012).

[22] Unofficial Tr. of the Markup of H.R. 1797 the "Pain-Capable Unborn Child Protection Act," by the H. Comm. on the Judiciary, 113th Cong. (June 12, 2013) (statement of Representative Jerrold Nadler).

[23] *Id.*

gering physical condition caused by or arising from the pregnancy itself, but not including psychological or emotional conditions"—clearly fails to satisfy the constitutional requirement to protect a woman's life and health.

The Supreme Court, in a companion case to *Roe,* held that the state may not prohibit an abortion where the woman's life or health is at risk and that this determination must be left to a doctor in consultation with her patient. The Court explained that health includes *both* physical and emotional health. It observed:

> [T]he medical judgment may be exercised in the light of all factors—*physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient.* All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[24]

In the years since *Roe,* the Court has not departed from this rule. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[25] for example, the Court established an "undue burden" test for determining whether abortion restrictions are permissible. As the Court observed:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[26]

In *Casey,* the Court reaffirmed "*Roe's* holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'*"[27]

While the Supreme Court has, on one occasion since its *Roe* decision, upheld a congressionally-imposed prohibition against a particular abortion procedure, and did so in the absence of a health exception,[28] the Court's ruling does not support the exclusion of a health exception in this legislation. In *Gonzalez v. Carhart,* the Court stated that the "prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'"[29] The Court upheld the challenged statute only by expressing the view (wrongly, we believe) that "the Act does not impose an undue burden is

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[24] Doe v. Bolton, 410 U.S. 179, 192 (1973) (emphasis supplied).
[25] 505 U.S. 833 (1992).
[26] *Id.* at 874.
[27] *Id.* at 879 (quoting Roe v. Wade, 410 U.S. at 164–65) (emphasis supplied).
[28] Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).
[29] *Id.* at 161 (citing Ayotte v. Planned Parenthood of Northern New England, 546 U.S., 320, 328 (2006)).

supported by other considerations. Alternatives are available to the prohibited procedure."[30] It does not, in short, stand for the proposition that a post-viability abortion ban that lacks a health exception is constitutional.

To address this constitutional failing of H.R. 1797, Representatives Jerrold Nadler (D–NY), Suzan DelBene (D–WA), and Melvin Watt (D–NC) offered an amendment that would have explicitly excepted from the bill's ban an abortion that was necessary to protect a woman's life or health. This amendment, however, failed by a vote of 16 to 20.

III. H.R. 1797 LACKS ANY SCIENTIFIC BASIS

This legislation is part of the Majority's continuing war on science,[31] which treats marginal views as unchallenged fact to advance policy objectives and ignores broadly accepted, peer-reviewed research. As former Republican Science Committee Chairman Sherwood Boehlert (R–NY) urged his Republican colleagues:

> The new Congress should have a policy debate to address facts rather than a debate featuring unsubstantiated attacks on science. We shouldn't stand by while the reputations of scientists are dragged through the mud in order to win a political argument. And no member of any party should look the other way when the basic operating parameters of scientific inquiry—the need to question, express doubt, replicate research and encourage curiosity—are exploited for the sake of political expediency. My fellow Republicans should understand that wholesale, ideologically based or special-interest-driven rejection of science is bad policy. And that in the long run, it's also bad politics.[32]

The authors of the bill argue that a fetus can feel pain at 20 weeks. This is not a settled issue in the scientific community. In fact, this view is quite controversial and has been rejected by the mainstream profession. One expert cited by the Majority, Dr. Kanwaljeet Anand, testified on this issue in 2005 that he thought "the evidence for and against fetal pain is very uncertain at the present time."[33] Dr. Anand further observed that "there is consensus in the medical and scientific research community that there is a—there is no possibility of pain perception in the first trimester. There is uncertainty in the second trimester. There is no discussion in the third trimester."[34]

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[30] *Id.* at 164.

[31] *See, e.g.,* John Horgan, *Political Science,* N.Y. TIMES, Dec. 18, 2005, *available at* http://www.nytimes.com/2005/12/18/books/review/18horgan.html?pagewanted=all).

[32] Sherwood Boehlert, Op-Ed., *Can the Party of Reagan Accept the Science of Climate Change?,* THE WASH. POST, Nov. 19, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111805451.html.

[33] *Pain of the Unborn: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 5 (2005).

[34] *Id.* at 40.

Similarly, a survey of available research published in the *Journal of the American Medical Association* in 2005 concluded that "[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester."[35] In addition, a detailed survey by the Royal Academy of Obstetricians and Gynaecologists concluded:

> In reviewing the neuroanatomical and physiological evidence in the fetus, it was apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation. After 24 weeks there is continuing development and elaboration of intracortical networks such that noxious stimuli in newborn preterm infants produce cortical responses. Such connections to the cortex are necessary for pain experience but not sufficient, as experience of external stimuli requires consciousness. Furthermore, there is increasing evidence that the fetus never experiences a state of true wakefulness in utero and is kept, by the presence of its chemical environment, in a continuous sleep-like unconsciousness or sedation. This state can suppress higher cortical activation in the presence of intrusive external stimuli. This observation highlights the important differences between fetal and neonatal life and the difficulties of extrapolating from observations made in newborn preterm infants to the fetus.[36]

CONCLUSION

Congress has a critical role to play in supporting women's health. Rather than focusing on this dangerous legislation, we should be protecting and investing in programs that are needed to ensure that all women, regardless of income or background, can access the affordable care that they need for healthier pregnancies. Instead this legislation, creatively entitled the "Pain-Capable Unborn Child Protection Act," is yet another dangerous and unconstitutional attempt to undermine women's basic reproductive rights, and endanger their health with appeals to ideology rather than to sound science.

Every pregnancy is unique. Unfortunately, sometimes women face difficult and emotionally devastating decisions in the course of their pregnancies that require them to consider abortion as a health option. Yet, some members of Congress have absolutely no qualms about meddling in what, for these women and their families, is a deeply private and very difficult decision. The Majority seeks to use the Criminal Code, and the threat of a 5-year prison term, to coerce these women into making decisions that may be bad for their health and bad for their families, and that would deny them the best care our medical system can provide. That is morally indefensible, and constitutionally impermissible.

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[35] Susan Lee *et al., Fetal Pain: A Systematic Multidisciplinary Review of the Evidence,* 294 J. Amer. Med. Ass'n 947 (Aug. 21 & 31, 2005).

[36] Royal College of Obstetricians and Gynaecologists, Fetal Awareness: Review of Research and Recommendations for Practice, at viii (Mar. 2010).

For these reasons, we must respectfully dissent and urge our colleagues to oppose this dangerous and ill-considered legislation.

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