PART A—TEXT OF AMENDMENT CONSIDERED AS ADOPTED

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 36 OFFERED BY MR. FRANKS OF ARIZONA

Strike all that follows 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.

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 **"SEC. 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) ASSESSMENT OF THE AGE OF THE UN-
12 BORN CHILD.—The physician performing or at-
13 tempting the abortion shall first make a determina-
14 tion of the probable post-fertilization age of the un-
15 born child or reasonably rely upon such a determina-
16 tion made by another physician. In making such a
17 determination, the physician shall make such inquir-
18 ies of the pregnant woman and perform or cause to
19 be performed such medical examinations and tests
20 as a reasonably prudent physician, knowledgeable
21 about the case and the medical conditions involved,
22 would consider necessary to make an accurate deter-
23 mination of post-fertilization age.

24 "(2) PROHIBITION ON PERFORMANCE OF CER-
25 TAIN ABORTIONS.—

1 "(A) GENERALLY FOR UNBORN CHILDREN
2 20 WEEKS OR OLDER.—Except as provided in
3 subparagraph (B), the abortion shall not be
4 performed or attempted, if the probable post-
5 fertilization age, as determined under para-
6 graph (1), of the unborn child is 20 weeks or
7 greater.
8 "(B) EXCEPTIONS.—Subparagraph (A)
9 does not apply if—
10 "(i) in reasonable medical judgment,
11 the abortion is necessary to save the life of
12 a pregnant woman whose life is endan-
13 gered by a physical disorder, physical ill-
14 ness, or physical injury, including a life-en-
15 dangering physical condition caused by or
16 arising from the pregnancy itself, but not
17 including psychological or emotional condi-
18 tions;
19 "(ii) the pregnancy is the result of
20 rape against an adult woman, and at least
21 48 hours prior to the abortion—
22 "(I) she has obtained counseling
23 for the rape; or

1 "(II) she has obtained medical
2 treatment for the rape or an injury
3 related to the rape; or
4 "(iii) the pregnancy is a result of rape
5 against a minor or incest against a minor,
6 and the rape or incest has been reported at
7 any time prior to the abortion to either—
8 "(I) a government agency legally
9 authorized to act on reports of child
10 abuse; or
11 "(II) a law enforcement agency.
12 "(C) REQUIREMENT AS TO MANNER OF
13 PROCEDURE PERFORMED.—Notwithstanding
14 the definitions of 'abortion' and 'attempt an
15 abortion' in this section, a physician termi-
16 nating or attempting to terminate a pregnancy
17 under an exception provided by subparagraph
18 (B) may do so only in the manner which, in
19 reasonable medical judgment, provides the best
20 opportunity for the unborn child to survive.
21 "(D) REQUIREMENT THAT A PHYSICIAN
22 TRAINED IN NEONATAL RESUSCITATION BE
23 PRESENT.—If, in reasonable medical judgment,
24 the pain-capable unborn child has the potential
25 to survive outside the womb, the physician who

1 performs or attempts an abortion under an ex-
2 ception provided by subparagraph (B) shall en-
3 sure a second physician trained in neonatal re-
4 suscitation is present and prepared to provide
5 care to the child consistent with the require-
6 ments of subparagraph (E).

7 "(E) CHILDREN BORN ALIVE AFTER AT-
8 TEMPTED ABORTIONS.—When a physician per-
9 forms or attempts an abortion in accordance
10 with this section, and the child is born alive, as
11 defined in section 8 of title 1 (commonly known
12 as the Born-Alive Infants Protection Act of
13 2002), the following shall apply:

14 "(i) DEGREE OF CARE REQUIRED.—
15 Any health care practitioner present at the
16 time shall humanely exercise the same de-
17 gree of professional skill, care, and dili-
18 gence to preserve the life and health of the
19 child as a reasonably diligent and conscien-
20 tious health care practitioner would render
21 to a child born alive at the same gesta-
22 tional age in the course of a natural birth.

23 "(ii) IMMEDIATE ADMISSION TO A
24 HOSPITAL.—Following the care required to
25 be rendered under clause (i), the child born

1 alive shall be immediately transported and
2 admitted to a hospital.
3 "(iii) MANDATORY REPORTING OF
4 VIOLATIONS.—A health care practitioner or
5 any employee of a hospital, a physician's
6 office, or an abortion clinic who has knowl-
7 edge of a failure to comply with the re-
8 quirements of this subparagraph must im-
9 mediately report the failure to an appro-
10 priate State or Federal law enforcement
11 agency or both.
12 "(F) DOCUMENTATION REQUIREMENTS.—
13 "(i) DOCUMENTATION PERTAINING TO
14 ADULTS.—A physician who performs or at-
15 tempts to perform an abortion under an
16 exception provided by subparagraph (B)(ii)
17 shall, prior to the abortion, place in the pa-
18 tient medical file documentation from a
19 hospital licensed by the State or operated
20 under authority of a Federal agency, a
21 medical clinic licensed by the State or op-
22 erated under authority of a Federal agen-
23 cy, from a personal physician licensed by
24 the State, a counselor licensed by the
25 State, or a victim's rights advocate pro-

1 vided by a law enforcement agency that the
2 adult woman seeking the abortion obtained
3 medical treatment or counseling for the
4 rape or an injury related to the rape.
5 "(ii) DOCUMENTATION PERTAINING
6 TO MINORS.—A physician who performs or
7 attempts to perform an abortion under an
8 exception provided by subparagraph
9 (B)(iii) shall, prior to the abortion, place in
10 the patient medical file documentation
11 from a government agency legally author-
12 ized to act on reports of child abuse that
13 the rape or incest was reported prior to the
14 abortion; or, as an alternative, documenta-
15 tion from a law enforcement agency that
16 the rape or incest was reported prior to the
17 abortion.
18 "(G) INFORMED CONSENT.—
19 "(i) CONSENT FORM REQUIRED.—The
20 physician who intends to perform or at-
21 tempt to perform an abortion under the
22 provisions of subparagraph (B) may not
23 perform any part of the abortion procedure
24 without first obtaining a signed Informed

1 Consent Authorization form in accordance
2 with this subparagraph.
3 "(ii) CONTENT OF CONSENT FORM.—
4 The Informed Consent Authorization form
5 shall be presented in person by the physi-
6 cian and shall consist of—
7 "(I) a statement by the physician
8 indicating the probable post-fertiliza-
9 tion age of the pain-capable unborn
10 child;
11 "(II) a statement that Federal
12 law allows abortion after 20 weeks
13 fetal age only if the mother's life is
14 endangered by a physical disorder,
15 physical illness, or physical injury,
16 when the pregnancy was the result of
17 rape, or an act of incest against a
18 minor;
19 "(III) a statement that the abor-
20 tion must be performed by the method
21 most likely to allow the child to be
22 born alive unless this would cause sig-
23 nificant risk to the mother;
24 "(IV) a statement that in any
25 case in which an abortion procedure

1 results in a child born alive, Federal
2 law requires that child to be given
3 every form of medical assistance that
4 is provided to children spontaneously
5 born prematurely, including transpor-
6 tation and admittance to a hospital;
7 "(V) a statement that these re-
8 quirements are binding upon the phy-
9 sician and all other medical personnel
10 who are subject to criminal and civil
11 penalties and that a woman on whom
12 an abortion has been performed may
13 take civil action if these requirements
14 are not followed; and
15 "(VI) affirmation that each sign-
16 er has filled out the informed consent
17 form to the best of their knowledge
18 and understands the information con-
19 tained in the form.
20 "(iii) SIGNATORIES REQUIRED.—The
21 Informed Consent Authorization form shall
22 be signed in person by the woman seeking
23 the abortion, the physician performing or
24 attempting to perform the abortion, and a
25 witness.

1 "(iv) RETENTION OF CONSENT
2 FORM.—The physician performing or at-
3 tempting to perform an abortion must re-
4 tain the signed informed consent form in
5 the patient's medical file.
6 "(H) REQUIREMENT FOR DATA RETEN-
7 TION.—Paragraph (j)(2) of section 164.530 of
8 title 45, Code of Federal Regulations, shall
9 apply to documentation required to be placed in
10 a patient's medical file pursuant to subpara-
11 graph (F) of subsection (b)(2) and a consent
12 form required to be retained in a patient's med-
13 ical file pursuant to subparagraph (G) of such
14 subsection in the same manner and to the same
15 extent as such paragraph applies to documenta-
16 tion required by paragraph (j)(1) of such sec-
17 tion.
18 "(I) ADDITIONAL EXCEPTIONS AND RE-
19 QUIREMENTS.—
20 "(i) IN CASES OF RISK OF DEATH OR
21 MAJOR INJURY TO THE MOTHER.—Sub-
22 paragraphs (C), (D), and (G) shall not
23 apply if, in reasonable medical judgment,
24 compliance with such paragraphs would
25 pose a greater risk of—

1 "(I) the death of the pregnant
2 woman; or
3 "(II) the substantial and irre-
4 versible physical impairment of a
5 major bodily function, not including
6 psychological or emotional conditions,
7 of the pregnant woman.
8 "(ii) EXCLUSION OF CERTAIN FACILI-
9 TIES.—Notwithstanding the definitions of
10 the terms 'medical treatment' and 'coun-
11 seling' in subsection (g), the counseling or
12 medical treatment described in subpara-
13 graph (B)(ii) may not be provided by a fa-
14 cility that performs abortions (unless that
15 facility is a hospital).
16 "(iii) RULE OF CONSTRUCTION IN
17 CASES OF REPORTS TO LAW ENFORCE-
18 MENT.—The requirements of subparagraph
19 (B)(ii) do not apply if the rape has been
20 reported at any time prior to the abortion
21 to a law enforcement agency or Depart-
22 ment of Defense victim assistance per-
23 sonnel.
24 "(iv) COMPLIANCE WITH CERTAIN
25 STATE LAWS.—

1 "(I) STATE LAWS REGARDING
2 REPORTING OF RAPE AND INCEST.—
3 The physician who performs or at-
4 tempts to perform an abortion under
5 an exception provided by subpara-
6 graph (B) shall comply with such ap-
7 plicable State laws that are in effect
8 as the State's Attorney General may
9 designate, regarding reporting re-
10 quirements in cases of rape or incest.
11 "(II) STATE LAWS REGARDING
12 PARENTAL INVOLVEMENT.—The phy-
13 sician who intends to perform an
14 abortion on a minor under an excep-
15 tion provided by subparagraph (B)
16 shall comply with any applicable State
17 laws requiring parental involvement in
18 a minor's decision to have an abor-
19 tion.
20 "(c) CRIMINAL PENALTY.—Whoever violates sub-
21 section (a) shall be fined under this title or imprisoned
22 for not more than 5 years, or both.
23 "(d) BAR TO PROSECUTION.—A woman upon whom
24 an abortion in violation of subsection (a) is performed or
25 attempted may not be prosecuted under, or for a con-

1 spiracy to violate, subsection (a), or for an offense under
2 section 2, 3, or 4 of this title based on such a violation.
3 "(e) CIVIL REMEDIES.—
4 "(1) CIVIL ACTION BY A WOMAN ON WHOM AN
5 ABORTION IS PERFORMED.—A woman upon whom
6 an abortion has been performed or attempted in vio-
7 lation of any provision of this section may, in a civil
8 action against any person who committed the viola-
9 tion, obtain appropriate relief.
10 "(2) CIVIL ACTION BY A PARENT OF A MINOR
11 ON WHOM AN ABORTION IS PERFORMED.—A parent
12 of a minor upon whom an abortion has been per-
13 formed or attempted under an exception provided for
14 in subsection (b)(2)(B), and that was performed in
15 violation of any provision of this section may, in a
16 civil action against any person who committed the
17 violation obtain appropriate relief, unless the preg-
18 nancy resulted from the plaintiff's criminal conduct.
19 "(3) APPROPRIATE RELIEF.—Appropriate relief
20 in a civil action under this subsection includes—
21 "(A) objectively verifiable money damages
22 for all injuries, psychological and physical, occa-
23 sioned by the violation;
24 "(B) statutory damages equal to three
25 times the cost of the abortion; and

1 "(C) punitive damages.

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

6 "(5) ATTORNEYS FEES FOR DEFENDANT.—If a
7 defendant in a civil action under this subsection pre-
8 vails and the court finds that the plaintiff's suit was
9 frivolous, the court shall award a reasonable attor-
10 ney's fee in favor of the defendant against the plain-
11 tiff.

12 "(6) AWARDS AGAINST WOMAN.—Except under
13 paragraph (5), in a civil action under this sub-
14 section, no damages, attorney's fee or other mone-
15 tary relief may be assessed against the woman upon
16 whom the abortion was performed or attempted.

17 "(f) DATA COLLECTION.—

18 "(1) DATA SUBMISSIONS.—Any physician who
19 performs or attempts an abortion described in sub-
20 section (b)(2)(B) shall annually submit a summary
21 of all such abortions to the National Center for
22 Health Statistics (hereinafter referred to as the
23 'Center') not later than 60 days after the end of the
24 calendar year in which the abortion was performed
25 or attempted.

1 "(2) CONTENTS OF SUMMARY.—The summary
2 shall include the number of abortions performed or
3 attempted on an unborn child who had a post-fer-
4 tilization age of 20 weeks or more and specify the
5 following for each abortion under subsection
6 (b)(2)(B):
7 "(A) the probable post-fertilization age of
8 the unborn child;
9 "(B) the method used to carry out the
10 abortion;
11 "(C) the location where the abortion was
12 conducted;
13 "(D) the exception under subsection
14 (b)(2)(B) under which the abortion was con-
15 ducted; and
16 "(E) any incident of live birth resulting
17 from the abortion.
18 "(3) EXCLUSIONS FROM DATA SUBMISSIONS.—
19 A summary required under this subsection shall not
20 contain any information identifying the woman
21 whose pregnancy was terminated and shall be sub-
22 mitted consistent with the Health Insurance Port-
23 ability and Accountability Act of 1996 (42 U.S.C.
24 1320d-2 note).

1 "(4) PUBLIC REPORT.—The Center shall annu-
2 ally issue a public report providing statistics by
3 State for the previous year compiled from all of the
4 summaries made to the Center under this sub-
5 section. The Center shall take care to ensure that
6 none of the information included in the public re-
7 ports could reasonably lead to the identification of
8 any pregnant woman upon whom an abortion was
9 performed or attempted. The annual report shall be
10 issued by July 1 of the calendar year following the
11 year in which the abortions were performed or at-
12 tempted.
13 "(g) DEFINITIONS.—In this section the following
14 definitions apply:
15 "(1) ABORTION.—The term 'abortion' means
16 the use or prescription of any instrument, medicine,
17 drug, or any other substance or device—
18 "(A) to intentionally kill the unborn child
19 of a woman known to be pregnant; or
20 "(B) to intentionally terminate the preg-
21 nancy of a woman known to be pregnant, with
22 an intention other than—
23 "(i) after viability to produce a live
24 birth and preserve the life and health of
25 the child born alive; or

1 "(ii) to remove a dead unborn child.

2 "(2) ATTEMPT.—The term 'attempt', with re-
3 spect to an abortion, means conduct that, under the
4 circumstances as the actor believes them to be, con-
5 stitutes a substantial step in a course of conduct
6 planned to culminate in performing an abortion.

7 "(3) COUNSELING.—The term 'counseling'
8 means counseling provided by a counselor licensed
9 by the State, or a victims rights advocate provided
10 by a law enforcement agency.

11 "(4) FACILITY.—The term 'facility' means any
12 medical or counseling group, center or clinic and in-
13 cludes the entire legal entity, including any entity
14 that controls, is controlled by, or is under common
15 control with such facility.

16 "(5) FERTILIZATION.—The term 'fertilization'
17 means the fusion of human spermatozoon with a
18 human ovum.

19 "(6) MEDICAL TREATMENT.—The term 'med-
20 ical treatment' means treatment provided at a hos-
21 pital licensed by the State or operated under author-
22 ity of a Federal agency, at a medical clinic licensed
23 by the State or operated under authority of a Fed-
24 eral agency, or from a personal physician licensed by
25 the State.

1 "(7) MINOR.—The term 'minor' means an indi-
2 vidual who has not attained the age of 18 years.
3 "(8) PERFORM.—The term 'perform', with re-
4 spect to an abortion, includes inducing an abortion
5 through a medical or chemical intervention including
6 writing a prescription for a drug or device intended
7 to result in an abortion.
8 "(9) PHYSICIAN.—The term 'physician' means
9 a person licensed to practice medicine and surgery
10 or osteopathic medicine and surgery, or otherwise le-
11 gally authorized to perform an abortion.
12 "(10) POST-FERTILIZATION AGE.—The term
13 'post-fertilization age' means the age of the unborn
14 child as calculated from the fusion of a human
15 spermatozoon with a human ovum.
16 "(11) PROBABLE POST-FERTILIZATION AGE OF
17 THE UNBORN CHILD.—The term 'probable post-fer-
18 tilization age of the unborn child' means what, in
19 reasonable medical judgment, will with reasonable
20 probability be the post-fertilization age of the un-
21 born child at the time the abortion is planned to be
22 performed or induced.
23 "(12) REASONABLE MEDICAL JUDGMENT.—The
24 term 'reasonable medical judgment' means a medical
25 judgment that would be made by a reasonably pru-

1 dent physician, knowledgeable about the case and
2 the treatment possibilities with respect to the med-
3 ical conditions involved.
4 "(13) UNBORN CHILD.—The term 'unborn
5 child' means an individual organism of the species
6 homo sapiens, beginning at fertilization, until the
7 point of being born alive as defined in section 8(b)
8 of title 1.
9 "(14) WOMAN.—The term 'woman' means a fe-
10 male human being whether or not she has reached
11 the age of majority.".
12 (b) CLERICAL AMENDMENT.—The table of sections
13 at the beginning of chapter 74 of title 18, United States
14 Code, is amended by adding at the end the following new
15 item:

"1532. Pain-capable unborn child protection.".

16 (c) CHAPTER HEADING AMENDMENTS.—
17 (1) CHAPTER HEADING IN CHAPTER.—The
18 chapter heading for chapter 74 of title 18, United
19 States Code, is amended by striking "**Partial-**
20 **Birth Abortions**" and inserting "**Abortions**"
21 (2) TABLE OF CHAPTERS FOR PART I.—The
22 item relating to chapter 74 in the table of chapters
23 at the beginning of part I of title 18, United States

1 Code, is amended by striking "Partial-Birth Abor-
2 tions" and inserting "Abortions".