109TH CONGRESS
1ST SESSION

S. 51

To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child.

IN THE SENATE OF THE UNITED STATES

JANUARY 24, 2005

Mr. BROWNBACK (for himself, Mr. ALEXANDER, Mr. ALLEN, Mr. BUNNING, Mrs. DOLE, Mr. ISAKSON, Mr. CHAMBLISS, Mr. BURNS, Mr. COBURN, Mr. COLEMAN, Mr. CORNYN, Mr. CRAPO, Mr. DEMINT, Mr. DEWINE, Mr. ENZI, Mr. GRAHAM, Mr. GRASSLEY, Mr. HAGEL, Mr. HATCH, Mr. INHOFE, Mr. KYL, Mr. ROBERTS, Mr. SANTORUM, Mr. SESSIONS, Mr. SHELBY, Mr. TALENT, Mr. THUNE, Mr. VITTER, Mr. VOINOVICH, Mr. MARTINEZ, Mr. ENSIGN, and Mr. MCCONNELL) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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A BILL

To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Unborn Child Pain Awareness Act of 2005''.

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) At least 20 weeks after fertilization, an unborn child has the physical structures necessary to experience pain.

(2) There is substantial evidence that by 20 weeks after fertilization, unborn children draw away from certain stimuli in a manner which in an infant or an adult would be interpreted as a response to pain.

(3) Anesthesia is routinely administered to unborn children who have developed 20 weeks or more past fertilization who undergo prenatal surgery.

(4) There is substantial evidence that the abortion methods most commonly used 20 weeks after fertilization cause substantial pain to an unborn child, whether by dismemberment, poisoning, penetrating or crushing the skull, or other methods. Examples of abortion methods used 20 weeks after fertilization include, but are not limited to the following:

(A) The Dilation and Evacuation (D&E) method of abortion is commonly performed in the second trimester of pregnancy. In a dilation and evacuation abortion, the unborn child's body parts are grasped at random with a long-toothed clamp. The fetal body parts are then

torn off of the body and pulled out of the vaginal canal. The remaining body parts are grasped and pulled out until only the head remains. The head is then grasped and crushed in order to remove it from the vaginal canal.

(B) Partial-Birth Abortion is an abortion in which the abortion practitioner delivers an unborn child's body until only the head remains inside the womb, punctures the back of the child's skull with a sharp instrument, and sucks the child's brains out before completing the delivery of the dead infant.

(5) Expert testimony confirms that by 20 weeks after fertilization an unborn child may experience substantial pain even if the woman herself has received local analgesic or general anesthesia.

(6) Medical science is capable of reducing such pain through the administration of anesthesia or other pain-reducing drugs directly to the unborn child.

(7) There is a valid Federal Government interest in reducing the number of events in which great pain is inflicted on sentient creatures. Examples of this are laws governing the use of laboratory animals and requiring pain-free methods of slaughtering live-

stock, which include, but are not limited to the following:

(A) Section 2 of the Humane Slaughter Act (7 U.S.C. 1902) states, ''No method of slaughter or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

''(i) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

''(ii) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument

and handling in connection with such slaughtering.''.

(B) Section 13(a)(3) of the Animal Welfare Act (7 U.S.C. 2143(a)(3)) sets the standards and certification process for the humane handling, care, treatment, and transportation of animals. This includes having standards with respect to animals in research facilities that include requirements—

''(i) for animal care, treatment, and practices in experimental procedures to ensure that animal pain and distress are minimized, including adequate veterinary care with the appropriate use of anesthetic, analgesic, tranquilizing drugs, or euthanasia;

''(ii) that the principal investigator considers alternatives to any procedure likely to produce pain to or distress in an experimental animal;

''(iii) in any practice which could cause pain to animals—

''(I) that a doctor of veterinary medicine is consulted in the planning of such procedures;

''(II) for the use of tranquilizers, analgesics, and anesthetics;

''(III) for pre-surgical and post-surgical care by laboratory workers, in accordance with established veterinary medical and nursing procedures;

''(IV) against the use of paralytics without anesthesia; and

''(V) that the withholding of tranquilizers, anesthesia, analgesia, or euthanasia when scientifically necessary shall continue for only the necessary period of time;''.

(C) Section 495 of the Public Health Service Act (42 U.S.C. 289d) directs the Secretary of Health and Human Services, acting through the Director of the National Institutes of Health, to establish guidelines for research facilities as to the proper care and treatment of animals, including the appropriate use of tranquilizers, analgesics, and other drugs, except that such guidelines may not prescribe methods of research. Entities that conduct biomedical and behavioral research with National Institutes of Health funds must establish animal

care committees which must conduct reviews at least semi-annually and report to the Director of such Institutes at least annually. If the Director determines that an entity has not been following the guidelines, the Director must give the entity an opportunity to take corrective action, and, if the entity does not, the Director must suspend or revoke the grant or contract involved.

SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE ACT.

The Public Health Service Act (42 U.S.C. 201 et seq.) is amended by adding at the end the following:

"TITLE XXIX—UNBORN CHILD PAIN AWARENESS

"SEC. 2901. DEFINITIONS.

''In this title:

''(1) ABORTION.—The term 'abortion' means the intentional use or prescription of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

''(2) ABORTION PROVIDER.—The term 'abortion provider' means any person legally qualified to perform an abortion under applicable Federal and State laws.

''(3) PAIN-CAPABLE UNBORN CHILD.—

''(A) IN GENERAL.—The term 'pain-capable unborn child' means an unborn child who has reached a probable stage of development of 20 weeks after fertilization.

''(B) RULE OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed as a determination or finding by Congress that pain may not in fact be experienced by an unborn child at stages of development prior to 20 weeks after fertilization.

''(4) PROBABLE AGE OF DEVELOPMENT.—The term 'probable age of development' means the duration of development after fertilization of the unborn child at the time an abortion is performed, as determined in the good faith judgment of the abortion provider on the basis of examination of the unborn child using ultrasound or other imaging technology, in addition to information obtained by interviewing the pregnant woman.

''(5) UNBORN CHILD.—The term 'unborn child' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

''(6) WOMAN.—The term 'woman' means a female human being who is capable of becoming pregnant, whether or not she has reached the age of majority.

"SEC. 2902. REQUIREMENT OF INFORMED CONSENT.

''(a) REQUIREMENT OF COMPLIANCE BY PROVIDERS.—An abortion provider performing any abortion of a pain-capable unborn child, that is in or affecting interstate commerce, shall comply with the requirements of this title.

''(b) PROVISION OF CONSENT.—

''(1) IN GENERAL.—Before any part of an abortion involving a pain-capable unborn child begins, the abortion provider or his or her agent shall provide the pregnant woman involved, by telephone or in person, with the information described in paragraph (2).

''(2) REQUIRED INFORMATION.—

''(A) ORAL STATEMENT.—

''(i) IN GENERAL.—An abortion provider or the provider's agent to whom paragraph (1) applies shall make the fol-

lowing oral statement to the pregnant woman (or in the case of a deaf or non-English speaking woman, provide the statement in a manner that she can easily understand):

'You are considering having an abortion of an unborn child who will have developed, at the time of the abortion, approximately ____ weeks after fertilization. The Congress of the United States has determined that at this stage of development, an unborn child has the physical structures necessary to experience pain. There is substantial evidence that by this point, unborn children draw away from surgical instruments in a manner which in an infant or an adult would be interpreted as a response to pain. Congress finds that there is substantial evidence that the process of being killed in an abortion will cause the unborn child pain, even though you receive a pain-reducing drug or drugs. Under the Federal Unborn Child Pain Awareness Act of 2005, you have the option of choosing to have anesthesia or other pain-reducing

drug or drugs administered directly to the pain-capable unborn child if you so desire. The purpose of administering such drug or drugs would be to reduce or eliminate the capacity of the unborn child to experience pain during the abortion procedure. In some cases, there may be some additional risk to you associated with administering such a drug.'.

''(ii) DESCRIPTION OF RISKS.—After making the statement required under clause (i), the abortion provider may provide the woman involved with his or her best medical judgment on the risks of administering such anesthesia or analgesic, if any, and the costs associated therewith.

''(iii) ADMINISTRATION OF ANESTHESIA.—If the abortion provider is not qualified or willing to administer the anesthesia or other pain-reducing drug in response to the request of a pregnant woman after making the statement required under clause (i), the provider shall—

"(I) arrange for a qualified specialist to administer such anesthesia or drug; or

"(II) advise the pregnant woman—

"(aa) where she may obtain such anesthesia or other pain-reducing drugs for the unborn child in the course of an abortion; or

"(bb) that the abortion provider is unable to perform the abortion if the woman elects to receive anesthesia or other pain-reducing drugs for her unborn child.

"(iv) RULE OF CONSTRUCTION.—Nothing in this section may be construed to impede an abortion provider or the abortion provider's agent from offering their own evaluation on the capacity of the unborn child to experience pain, the advisability of administering pain-reducing drugs to the unborn child, or any other matter, as long as such provider or agent provides the required information, obtains

the woman's signature on the decision form, and otherwise complies with the affirmative requirements of the law.

"(B) UNBORN CHILD PAIN AWARENESS BROCHURE.—An abortion provider to whom paragraph (1) applies shall provide the pregnant woman with the Unborn Child Pain Awareness Brochure (referred to in this section as the 'Brochure') to be developed by the Department of Health and Human Services under subsection (c).

"(C) UNBORN CHILD PAIN AWARENESS DECISION FORM.—An abortion provider to whom paragraph (1) applies shall provide the pregnant woman with the Unborn Child Pain Awareness Decision Form (provided for under subsection (c)) and obtain the appropriate signature of the woman on such form.

"(c) UNBORN CHILD PAIN AWARENESS BROCHURE.—

"(1) DEVELOPMENT.—Not later than 90 days after the date of enactment of this title, the Secretary shall develop an Unborn Child Pain Awareness Brochure. Such Brochure shall be written in English and Spanish and shall contain the same in-

formation as required under the statement under subsection (b)(2)(A)(i), including greater detail on her option of having a pain-reducing drug or drugs administered to the unborn child to reduce the experience of pain by the unborn child during the abortion. Such information shall be written in an objective and nonjudgmental manner and be printed in a typeface large enough to be clearly legible. The Brochure shall be made available by the Secretary at no cost to any abortion provider.

''(2) INTERNET INFORMATION.—The Brochure under this section shall be available on the Internet website of the Department of Health and Human Services at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on the website shall be a minimum of 200x300 pixels. All letters on the website shall be a minimum of 12 point font. All such information and pictures shall be accessible with an industry standard browser, requiring no additional plug-ins.

''(3) PRESENTATION OF BROCHURE.—An abortion provider or his or her agent shall offer to provide a pregnant woman with the Brochure developed under paragraph (1) before any part of an abortion of a pain-capable child begins—

"(A) through an in-person visit by the pregnant woman;

"(B) through an e-mail attachment, from the abortion provider or his or her agent; or

"(C) through a request to have such Brochure mailed, by certified mail, to the woman at least 72 hours before any part of the abortion begins.

"(4) WAIVER.—After the abortion provider or his or her agent offers to provide a pregnant woman the Brochure, the pregnant woman may waive receipt of the Brochure under this subsection by signing the waiver form contained in the Unborn Child Pain Awareness Decision Form.

"(5) UNBORN CHILD PAIN AWARENESS DECISION FORM.—Not later than 30 days after the date of enactment of this title, the Secretary shall develop an Unborn Child Pain Awareness Decision Form. To be valid, such Form shall—

"(A) with respect to the pregnant woman—

"(i) contain a statement that affirms that the woman has received or been offered all of the information required in subsection (b);

"(ii) require the woman to explicitly either request or refuse the administration of pain-reducing drugs to the unborn child;

"(iii) be signed by a pregnant woman prior to the performance of an abortion involving a pain-capable unborn child; and

"(B) with respect to the abortion provider—

"(i) contain a statement that the provider has provided the woman with all of the information required under subsection (b);

"(ii) if applicable, contain a certification by the provider that an exception described in section 2903 applies and the detailed reasons for such certification; and

"(iii) be signed by the provider prior to the performance of the abortion procedure.

"(6) MAINTENANCE OF RECORDS.—The Secretary shall promulgate regulations relating to the period of time during which copies of Forms under paragraph (5) shall be maintained by abortion providers.

"SEC. 2903. EXCEPTION FOR MEDICAL EMERGENCIES.

"(a) IN GENERAL.—The provisions of section 2902 shall not apply to an abortion provider in the case of a medical emergency.

"(b) MEDICAL EMERGENCY DEFINED.—

"(1) IN GENERAL.—In subsection (a), the term 'medical emergency' means a condition which, in the reasonable medical judgment of the abortion provider, so complicates the medical condition of the pregnant woman that a delay in commencing an abortion procedure would impose a serious risk of causing grave and irreversible physical health damage entailing substantial impairment of a major bodily function.

"(2) REASONABLE MEDICAL JUDGMENT.—In paragraph (1), 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.

"(c) CERTIFICATION.—

"(1) IN GENERAL.—Upon a determination by an abortion provider under subsection (a) that a medical emergency exists with respect to a pregnant woman, such provider shall certify the specific medical conditions that constitute the emergency.

''(2) FALSE STATEMENTS.—An abortion provider who willfully falsifies a certification under paragraph (1) shall be subject to all the penalties provided for under section 2904 for failure to comply with this title.

"SEC. 2904. PENALTIES FOR FAILURE TO COMPLY.

''(a) IN GENERAL.—An abortion provider who willfully fails to comply with the provisions of this title shall be subject to civil penalties in accordance with this section in an appropriate Federal court.

''(b) COMMENCEMENT OF ACTION.—The Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney who has been specifically designated by the Attorney General may commence a civil action under this section.

''(c) CERTIFICATION REQUIREMENTS.—At the time of the commencement of an action under this section, the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General or United States Attorney who has been specifically designated by the Attorney General to commence a civil action under this section, shall certify to the court involved that, at least 30 calendar days prior to the filing of such action, the Attorney General, the Deputy Attorney Gen-

eral, the Associate Attorney General, or any Assistant Attorney General or United States Attorney involved—

''(1) has provided notice of the alleged violation of this section, in writing, to the Governor or Chief Executive Officer and Attorney General or Chief Legal Officer of the State or political subdivision involved, as well as to the State medical licensing board or other appropriate State agency; and

''(2) believes that such an action by the United States is in the public interest and necessary to secure substantial justice.

''(d) FIRST OFFENSE.—Upon a finding by a court that a respondent in an action commenced under this section has knowingly violated a provision of this title, the court shall notify the appropriate State medical licensing authority in order to effect the suspension of the respondent's medical license in accordance with the regulations and procedures promulgated under section 2905, or shall assess a civil penalty against the respondent in an amount not to exceed $100,000, or both.

''(e) SECOND OFFENSE.—Upon a finding by a court that the respondent in an action commenced under this section has knowingly violated a provision of this title and the respondent has been found to have knowingly violated a provision of this title on a prior occasion, the court shall

notify the appropriate State medical licensing authority in order to effect the revocation of the respondent's medical license in accordance with the regulations and procedures promulgated under section 2905, or shall assess a civil penalty against the respondent in an amount not to exceed $250,000, or both.

''(f) HEARING.—With respect to an action under this section, the appropriate State medical licensing authority shall be given notification of and an opportunity to be heard at a hearing to determine the penalty to be imposed under this section.

''(g) PRIVATE RIGHT OF ACTION.—A pregnant woman upon whom an abortion has been performed in violation of this title, or the parent or legal guardian of such a woman if she is an unemancipated minor, may commence a civil action against the abortion provider for any knowing or reckless violation of this title for actual and punitive damages.

''SEC. 2905. REGULATIONS.

''A State, and the medical licensing authority of the State, shall promulgate regulations and procedures for the revocation or suspension of the medical license of an abortion provider upon a finding by a court under section 2904 that the provider has violated a provision of this title. A State that fails to implement such procedures shall be sub-

ject to loss of funding under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.).

"SEC. 2906. PREEMPTION.

"Nothing in this title shall be construed to preempt any provision of State law to the extent that such State law establishes, implements, or continues in effect greater protections for unborn children from pain than the protections provided for under this title.".

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