

112TH CONGRESS
1ST SESSION

S. 314

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

FEBRUARY 10, 2011

Mr. JOHANNIS (for himself, Mr. BOOZMAN, Mr. BURR, Mr. COCHRAN, Mr. CRAPO, Mr. ENSIGN, Mr. ENZI, Mr. GRAHAM, Mr. GRASSLEY, Mr. HATCH, Mr. INHOFE, Mr. ISAKSON, Mr. KYL, Mr. MORAN, Mr. RISCH, Mr. ROBERTS, Mr. THUNE, Mr. VITTER, and Mr. WICKER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Unborn Child Pain
5 Awareness Act of 2011”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

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

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

9 (3) Anesthesia is routinely administered to un-
10 born children who have developed 20 weeks or more
11 after fertilization who undergo prenatal surgery.

12 (4) There is substantial evidence that the abor-
13 tion methods most commonly used 20 weeks or more
14 after fertilization cause substantial pain to an un-
15 born child, whether by dismemberment, poisoning,
16 penetrating or crushing the skull, or other methods.
17 Examples of abortion methods used 20 weeks or
18 more after fertilization include, but are not limited
19 to the following:

20 (A) The dilation and evacuation (D and E)
21 method of abortion is commonly performed in
22 the second trimester of pregnancy. In a dilation
23 and evacuation abortion, the unborn child's
24 body parts are grasped with a long-toothed
25 clamp. The fetal body parts are then torn from

1 the body and pulled out of the vaginal canal.
2 The remaining body parts are grasped and
3 pulled out until only the head remains. The
4 head is then grasped and crushed in order to
5 remove it from the vaginal canal.

6 (B) Partial-birth abortion is an abortion in
7 which the abortion practitioner delivers an un-
8 born child's body until only the head remains
9 inside the womb, punctures the back of the
10 child's skull with a sharp instrument, and sucks
11 the child's brains out before completing the de-
12 livery of the dead infant, and as further defined
13 in section 1531 of title 18, United States Code.

14 (5) Expert testimony confirms that by 20 weeks
15 after fertilization an unborn child may experience
16 substantial pain even if the woman herself has re-
17 ceived local analgesic or general anesthesia.

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

22 (7) There is a valid Federal Government inter-
23 est in preventing or reducing the infliction of pain
24 on sentient creatures. Examples of this are laws gov-
25 erning the use of laboratory animals and requiring

1 pain-free methods of slaughtering livestock, which
2 include, but are not limited to the following:

3 (A) Section 2 of the Act commonly known
4 as the Humane Slaughter Act of 1958 (Public
5 Law 85–765; 7 U.S.C. 1902) states, “No meth-
6 od of slaughter or handling in connection with
7 slaughtering shall be deemed to comply with the
8 public policy of the United States unless it is
9 humane. Either of the following two methods of
10 slaughtering and handling are hereby found to
11 be humane—

12 “(i) in the case of cattle, calves,
13 horses, mules, sheep, swine, and other live-
14 stock, all animals are rendered insensible
15 to pain by a single blow or gunshot or an
16 electrical, chemical or other means that is
17 rapid and effective, before being shackled,
18 hoisted, thrown, cast, or cut; or

19 “(ii) by slaughtering in accordance
20 with the ritual requirements of the Jewish
21 faith or any other religious faith that pre-
22 scribes a method of slaughter whereby the
23 animal suffers loss of consciousness by
24 anemia of the brain caused by the simulta-
25 neous and instantaneous severance of the

1 carotid arteries with a sharp instrument
2 and handling in connection with such
3 slaughtering.”.

4 (B) Section 13(a)(3) of the Animal Wel-
5 fare Act (7 U.S.C. 2143(a)(3)) sets the stand-
6 ards and certification process for the humane
7 handling, care, treatment, and transportation of
8 animals. This includes having standards with
9 respect to animals in research facilities that in-
10 clude requirements—

11 (i) for animal care, treatment, and
12 practices in experimental procedures to en-
13 sure that animal pain and distress are
14 minimized, including adequate veterinary
15 care with the appropriate use of anesthetic,
16 analgesic, tranquilizing drugs, or eutha-
17 nasia;

18 (ii) that the principal investigator con-
19 siders alternatives to any procedure likely
20 to produce pain to or distress in an experi-
21 mental animal; and

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

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

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

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

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

12 (V) that the withholding of tran-
13 quilizers, anesthesia, analgesia, or eu-
14 thanasia when scientifically necessary
15 shall continue for only the necessary
16 period of time.

17 (C) Section 495 of the Public Health Serv-
18 ice Act (42 U.S.C. 289d) directs the Secretary
19 of Health and Human Services, acting through
20 the Director of the National Institutes of
21 Health, to establish guidelines for research fa-
22 cilities as to the proper care and treatment of
23 animals, including the appropriate use of tran-
24 quilizers, analgesics, and other drugs, except
25 that such guidelines may not prescribe methods

1 of research. Entities that conduct biomedical
2 and behavioral research with National Insti-
3 tutes of Health funds must establish animal
4 care committees which must conduct reviews at
5 least semiannually and report to the Director of
6 such Institutes at least annually. If the Director
7 determines that an entity has not been fol-
8 lowing the guidelines, the Director must give
9 the entity an opportunity to take corrective ac-
10 tion, and, if the entity does not, the Director
11 must suspend or revoke the grant or contract
12 involved.

13 (8) There is a valid Federal Government inter-
14 est in preventing harm to developing human life at
15 all stages. Examples of this include regulations pro-
16 tecting fetal human subjects from risks of “harm or
17 discomfort” in federally funded biomedical research,
18 45 C.F.R. 102(i) and 45 C.F.R. 46.201 et seq.

19 **SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE**
20 **ACT.**

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

1 **“TITLE XXXIV—UNBORN CHILD**
2 **PAIN AWARENESS**

3 **“SEC. 3401. DEFINITIONS.**

4 “In this title:

5 “(1) ABORTION.—The term ‘abortion’ means
6 the intentional use or prescription of any instru-
7 ment, medicine, drug, or any other substance or de-
8 vice or method to terminate the life of an unborn
9 child, or to terminate the pregnancy of a woman
10 known to be pregnant with an intention other
11 than—

12 “(A) to produce a live birth and preserve
13 the life and health of the child after live birth;
14 or

15 “(B) to remove an ectopic pregnancy, or to
16 remove a dead unborn child who died as the re-
17 sult of a spontaneous abortion, accidental trau-
18 ma or a criminal assault on the pregnant fe-
19 male or her unborn child.

20 “(2) ABORTION PROVIDER.—The term ‘abortion
21 provider’ means any person legally qualified to per-
22 form an abortion under applicable Federal and State
23 laws.

24 “(3) PAIN-CAPABLE UNBORN CHILD.—

1 “(A) IN GENERAL.—The term ‘pain-capable
2 unborn child’ means an unborn child who
3 has reached a probable stage of development of
4 20 weeks or more after fertilization.

5 “(B) RULE OF CONSTRUCTION.—Nothing
6 in subparagraph (A) shall be construed as a de-
7 termination or finding by Congress that pain
8 may not in fact be experienced by an unborn
9 child at stages of development prior to 20 weeks
10 or more after fertilization.

11 “(4) PROBABLE AGE OF DEVELOPMENT.—The
12 term ‘probable age of development’ means the dura-
13 tion of development after fertilization of the unborn
14 child at the time an abortion is performed, as deter-
15 mined in the good faith judgment of the abortion
16 provider using generally accepted medical criteria
17 and information obtained by interviewing the preg-
18 nant woman.

19 “(5) UNBORN CHILD.—The term ‘unborn child’
20 means a member of the species *homo sapiens*, at any
21 stage of development, who is carried in the womb.

22 “(6) WOMAN.—The term ‘woman’ means a fe-
23 male human being whether or not she has reached
24 the age of majority.

1 “(7) UNEMANCIPATED MINOR.—The term
2 ‘unemancipated minor’ means an individual who is
3 not older than 18 years and who is not emancipated
4 under State law.

5 **“SEC. 3402. REQUIREMENT OF INFORMED CONSENT.**

6 “(a) REQUIREMENT OF COMPLIANCE BY PRO-
7 VIDERS.—Any abortion provider in or affecting interstate
8 or foreign commerce, who knowingly performs any abor-
9 tion of a pain-capable unborn child, shall comply with the
10 requirements of this title.

11 “(b) PROVISION OF CONSENT.—

12 “(1) IN GENERAL.—Before any part of an abor-
13 tion involving a pain-capable unborn child begins,
14 the abortion provider or his or her agent shall pro-
15 vide the pregnant woman involved, by telephone or
16 in person, with the information described in para-
17 graph (2). It may not be provided by a tape record-
18 ing, but must be provided in a fashion that permits
19 the woman to ask questions of and receive answers
20 from the abortion provider or his agent. (In the case
21 of the Unborn Child Pain Awareness Brochure, it
22 may be provided pursuant to subsection (c)(2) or
23 (c)(3)).

24 “(2) REQUIRED INFORMATION.—

1 “(A) IN GENERAL.—An abortion provider
2 or the provider’s agent to whom paragraph (1)
3 applies shall provide the following information
4 to the pregnant woman (or in the case of a deaf
5 or non-English speaking woman, provide the
6 statement in a manner that she can easily un-
7 derstand):

8 “(i) AGE OF UNBORN BABY.—The
9 probable age of development of the unborn
10 baby based on the number of weeks since
11 fertilization.

12 “(ii) UNBORN CHILD PAIN AWARE-
13 NESS BROCHURE.—An abortion provider to
14 whom paragraph (1) applies must provide
15 the pregnant woman with the Unborn
16 Child Pain Awareness Brochure (referred
17 to in this section as the ‘Brochure’) to be
18 developed by the Department of Health
19 and Human Services under subsection (c)
20 or with the information described in sub-
21 section (c)(2) relating to accessing such
22 Brochure.

23 “(iii) USE OF PAIN-PREVENTING
24 DRUGS.—Drugs administered to the moth-
25 er may not prevent the unborn child from

1 feeling pain, but in some cases, anesthesia
2 or other pain-reducing drug or drugs can
3 be administered directly to the unborn
4 child.

5 “(iv) DESCRIPTION OF RISKS.—After
6 providing the information required under
7 clauses (i), (ii), and (iii) the abortion pro-
8 vider shall provide the woman involved
9 with his or her best medical judgment on
10 the risks, if any, of administering such an-
11 esthesia or analgesic, and the costs associ-
12 ated therewith.

13 “(v) ADMINISTRATION OF ANES-
14 THESIA.—If the abortion provider is not
15 qualified or willing to administer the anes-
16 thesia or other pain-reducing drug to an
17 unborn child in response to a request from
18 a pregnant women, the provider shall—

19 “(I) arrange for a qualified spe-
20 cialist to administer such anesthesia
21 or drug; or

22 “(II) advise the pregnant
23 woman—

24 “(aa) where she may obtain
25 such anesthesia or other pain re-

1 ducing drugs for the unborn child
2 in the course of an abortion; or

3 “(bb) that the abortion pro-
4 vider is unable to perform the
5 abortion if the woman requires
6 that she receive anesthesia or
7 other pain-reducing drug for her
8 unborn child.

9 “(vi) UNBORN CHILD PAIN AWARE-
10 NESS DECISION FORM.—An abortion pro-
11 vider to which paragraph (1) applies shall
12 provide the pregnant woman with the Un-
13 born Child Pain Awareness Decision Form
14 (provided for under subsection (d)) and ob-
15 tain the appropriate signature of the
16 woman on such form.

17 “(vii) RULE OF CONSTRUCTION.—
18 Nothing in this section may be construed
19 to impede an abortion provider or the
20 abortion provider’s agent from offering
21 their own evaluation on the capacity of the
22 unborn child to experience pain, the advis-
23 ability of administering pain-reducing
24 drugs to the unborn child, or any other
25 matter, as long as such provider or agent

1 provides the required information, obtains
 2 the woman’s signature on the decision
 3 form, and otherwise complies with the af-
 4 firmative requirements of the law.

5 “(B) UNBORN CHILD PAIN AWARENESS
 6 BROCHURE.—An abortion provider to whom
 7 paragraph (1) applies shall provide the preg-
 8 nant woman with the Unborn Child Pain
 9 Awareness Brochure (referred to in this section
 10 as the ‘Brochure’) to be developed by the De-
 11 partment of Health and Human Services under
 12 subsection (c) or with the information described
 13 in subsection (c)(2) relating to accessing such
 14 Brochure.

15 “(C) UNBORN CHILD PAIN AWARENESS
 16 DECISION FORM.—An abortion provider to
 17 which paragraph (1) applies shall provide the
 18 pregnant woman with the Unborn Child Pain
 19 Awareness Decision Form (provided for under
 20 subsection (d)) and obtain the appropriate sig-
 21 nature of the woman on such form.

22 “(c) UNBORN CHILD PAIN AWARENESS BRO-
 23 CHURE.—

24 “(1) DEVELOPMENT.—Not later than 90 days
 25 after the date of enactment of this title, the Sec-

1 retary shall develop an Unborn Child Pain Aware-
2 ness Brochure. Such Brochure shall—

3 “(A) be written in English and Spanish;

4 “(B) contain the following text: ‘Your doc-
5 tor has determined that, in his or her best me-
6 dial judgment, your unborn child is at least 20
7 weeks old. There is a significant body of evi-
8 dence that unborn children at 20 weeks after
9 fertilization have the physical structures nec-
10 essary to experience pain. There is substantial
11 evidence that at least by this point, unborn chil-
12 dren draw away from surgical instruments in a
13 manner which in an infant or an adult would be
14 interpreted as a response to pain. There is sub-
15 stantial evidence that the process of being killed
16 in an abortion will cause the unborn child pain,
17 even though you receive a pain-reducing drug or
18 drugs. Under the Federal Unborn Child Pain
19 Awareness Act of 2011, you have a right to
20 know that there is evidence that the process of
21 being killed in an abortion will cause your un-
22 born child pain. You may request that anes-
23 thesia or other pain-reducing drug or drugs are
24 administered directly to the pain-capable un-
25 born child if you so desire. The purpose of ad-

1 ministering such drug or drugs would be to re-
2 duce or eliminate the capacity of the unborn
3 child to experience pain during the abortion
4 procedure. In some cases, there may be some
5 additional risk to you associated with admin-
6 istering such a drug.’;

7 “(C) contain greater detail on her option
8 of having a pain-reducing drug or drugs admin-
9 istered to the unborn child to reduce the experi-
10 ence of pain by the unborn child during the
11 abortion;

12 “(D) be written in an objective and
13 nonjudgmental manner and be printed in a
14 typeface large enough to be clearly legible; and

15 “(E) be made available by the Secretary at
16 no cost to any abortion provider.

17 “(2) INTERNET INFORMATION.—The Brochure
18 under this section shall be available on the Internet
19 website of the Department of Health and Human
20 Services at a minimum resolution of 70 DPI (dots
21 per inch). All pictures appearing on the website shall
22 be a minimum of 200x300 pixels. All letters on the
23 website shall be a minimum of 12 point font. All
24 such information and pictures shall be accessible

1 with an industry standard browser, requiring no ad-
2 ditional plug-ins.

3 “(3) PRESENTATION OF BROCHURE.—An abor-
4 tion provider or his or her agent must provide a
5 pregnant woman with the Brochure, developed under
6 paragraph (1), before any part of an abortion of a
7 pain-capable child begins. The brochure may be pro-
8 vided—

9 “(A) through an in-person visit by the
10 pregnant woman;

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

13 “(C) by certified mail, mailed to the
14 woman at least 72 hours before any part of the
15 abortion begins.

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

22 “(d) UNBORN CHILD PAIN AWARENESS DECISION
23 FORM.—Not later than 30 days after the date of enact-
24 ment of this title, the Secretary shall develop an Unborn

1 Child Pain Awareness Decision Form. To be valid, such
2 form shall—

3 “(1) with respect to the pregnant woman—

4 “(A) contain a statement that affirms that
5 the woman has received or been offered all of
6 the information required in subsection (b);

7 “(B) affirm that the woman has read the
8 following statement: ‘You are considering hav-
9 ing an abortion of an unborn child who will
10 have developed, at the time of the abortion, ap-
11 proximately ____ weeks after fertilization.
12 There is a significant body of evidence that un-
13 born children at 20 weeks after fertilization
14 have the physical structures necessary to expe-
15 rience pain. There is substantial evidence that
16 at least by this point, unborn children draw
17 away from surgical instruments in a manner
18 which in an infant or an adult would be inter-
19 preted as a response to pain. There is substan-
20 tial evidence that the process of being killed in
21 an abortion will cause the unborn child pain,
22 even though you receive a pain-reducing drug or
23 drugs. Under the Federal Unborn Child Pain
24 Awareness Act of 2011, you have a right to
25 know that there is evidence that the process of

1 being killed in an abortion will cause your un-
2 born child pain. You may request that anes-
3 thesia or other pain-reducing drug or drugs are
4 administered directly to the pain-capable un-
5 born child if you so desire. The purpose of ad-
6 ministering such drug or drugs would be to re-
7 duce or eliminate the capacity of the unborn
8 child to experience pain during the abortion
9 procedure. In some cases, there may be some
10 additional risk to you associated with admin-
11 istering such a drug.’;

12 “(C) require the woman to explicitly either
13 request or refuse the administration of pain-re-
14 ducing drugs to the unborn child; and

15 “(D) be signed by a pregnant woman prior
16 to the performance of an abortion involving a
17 pain-capable unborn child; and

18 “(2) with respect to the abortion provider—

19 “(A) contain a statement that the provider
20 has provided the woman with all of the informa-
21 tion required under subsection (b);

22 “(B) if applicable, contain a certification
23 by the provider that an exception described in
24 section 3403 applies and the detailed reasons
25 for such certification; and

1 “(C) be signed by the provider prior to the
2 performance of the abortion procedure.

3 “(e) MAINTENANCE OF RECORDS.—The Secretary
4 shall promulgate regulations relating to the period of time
5 during which copies of forms under subsection (d) shall
6 be maintained by abortion providers.

7 **“SEC. 3403. EXCEPTION TO SAVE THE LIFE OF THE MOTH-**
8 **ER.**

9 “The provisions of section 3402 shall not apply to
10 an abortion provider in the case that the abortion is nec-
11 essary to save the life of a mother whose life is endangered
12 by a physical disorder, physical illness, or physical injury,
13 including a life-endangering physical condition caused by
14 or arising from the pregnancy itself.

15 **“SEC. 3404. PENALTIES FOR FAILURE TO COMPLY.**

16 “(a) IN GENERAL.—An abortion provider who will-
17 fully fails to comply with the provisions of this title shall
18 be subject to civil penalties in accordance with this section
19 in an appropriate Federal court.

20 “(b) COMMENCEMENT OF ACTION.—The Attorney
21 General of the United States may commence a civil action
22 under this section.

23 “(c) FIRST OFFENSE.—Upon a finding by a court
24 that a respondent in an action commenced under this sec-
25 tion has knowingly violated a provision of this title, the

1 court shall notify the appropriate State medical licensing
2 authority and shall assess a civil penalty against the re-
3 spondent in an amount not to exceed \$100,000.

4 “(d) SECOND AND SUBSEQUENT OFFENSES.—Upon
5 a finding by a court that the respondent in an action com-
6 menced under this section has knowingly violated a provi-
7 sion of this title and the respondent has been found to
8 have knowingly violated a provision of this title on a prior
9 occasion, the court shall notify the appropriate State med-
10 ical licensing authority and shall assess a civil penalty
11 against the respondent in an amount not to exceed
12 \$250,000.

13 “(e) PRIVATE RIGHT OF ACTION.—A pregnant
14 woman upon whom an abortion has been performed in vio-
15 lation of this title, or the parent or legal guardian of such
16 a woman if she is an unemancipated minor, may com-
17 mence a civil action against the abortion provider for any
18 knowing or reckless violation of this title for actual and
19 punitive damages.”.

20 **SEC. 4. PREEMPTION.**

21 Nothing in this Act or the amendments made by this
22 Act shall be construed to preempt any provision of State
23 law to the extent that such State law establishes, imple-
24 ments, or continues in effect greater protections for un-

1 born children from pain than the protections provided
2 under this Act and the amendments made by this Act.

3 **SEC. 5. SEVERABILITY.**

4 The provisions of this Act shall be severable. If any
5 provision of this Act, or any application thereof, is found
6 unconstitutional, that finding shall not affect any provi-
7 sion or application of the Act not so adjudicated.

○