

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

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 2005”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

1 (1) At least 20 weeks after fertilization, an un-
2 born 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 past fertilization who undergo prenatal surgery.

12 (4) There is substantial evidence that the abor-
13 tion methods most commonly used 20 weeks after
14 fertilization cause substantial pain to an unborn
15 child, whether by dismemberment, poisoning, pene-
16 trating or crushing the skull, or other methods. Ex-
17 amples of abortion methods used 20 weeks after fer-
18 tilization include, but are not limited to the fol-
19 lowing:

20 (A) The Dilation and Evacuation (D&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 at random with a long-
25 toothed clamp. The fetal body parts are then

1 torn off of the body and pulled out of the vag-
2 inal canal. The remaining body parts are
3 grasped and pulled out until only the head re-
4 mains. The head is then grasped and crushed
5 in order to remove it from the vaginal canal.

6 (B) Partial-Birth Abortion is an abortion
7 in which the abortion practitioner delivers an
8 unborn 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.

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

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

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

1 stock, which include, but are not limited to the fol-
2 lowing:

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

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

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

1 and handling in connection with such
2 slaughtering.”.

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

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

17 “(ii) that the principal investigator
18 considers alternatives to any procedure
19 likely to produce pain to or distress in an
20 experimental animal;

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

23 “(I) that a doctor of veterinary
24 medicine is consulted in the planning
25 of such procedures;

1 “(II) for the use of tranquilizers,
2 analgesics, and anesthetics;

3 “(III) for pre-surgical and post-
4 surgical care by laboratory workers, in
5 accordance with established veterinary
6 medical and nursing procedures;

7 “(IV) against the use of para-
8 lytics without anesthesia; and

9 “(V) that the withholding of
10 tranquilizers, anesthesia, analgesia, or
11 euthanasia when scientifically nec-
12 essary shall continue for only the nec-
13 essary period of time;”.

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

1 care committees which must conduct reviews at
 2 least semi-annually and report to the Director
 3 of such Institutes at least annually. If the Di-
 4 rector determines that an entity has not been
 5 following the guidelines, the Director must give
 6 the entity an opportunity to take corrective ac-
 7 tion, and, if the entity does not, the Director
 8 must suspend or revoke the grant or contract
 9 involved.

10 **SEC. 3. AMENDMENT TO THE PUBLIC HEALTH SERVICE**
 11 **ACT.**

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

14 **“TITLE XXIX—UNBORN CHILD**
 15 **PAIN AWARENESS**

16 **“SEC. 2901. DEFINITIONS.**

17 “In this title:

18 “(1) ABORTION.—The term ‘abortion’ means
 19 the intentional use or prescription of any instru-
 20 ment, medicine, drug, or any other substance or de-
 21 vice to terminate the pregnancy of a woman known
 22 to be pregnant with an intention other than to in-
 23 crease the probability of a live birth, to preserve the
 24 life or health of the child after live birth, or to re-
 25 move a dead fetus.

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

5 “(3) PAIN-CAPABLE UNBORN CHILD.—

6 “(A) IN GENERAL.—The term ‘pain-capable
7 unborn child’ means an unborn child who
8 has reached a probable stage of development of
9 20 weeks after fertilization.

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

16 “(4) PROBABLE AGE OF DEVELOPMENT.—The
17 term ‘probable age of development’ means the dura-
18 tion of development after fertilization of the unborn
19 child at the time an abortion is performed, as deter-
20 mined in the good faith judgment of the abortion
21 provider on the basis of examination of the unborn
22 child using ultrasound or other imaging technology,
23 in addition to information obtained by interviewing
24 the pregnant woman.

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

4 “(6) WOMAN.—The term ‘woman’ means a fe-
5 male human being who is capable of becoming preg-
6 nant, whether or not she has reached the age of ma-
7 jority.

8 **“SEC. 2902. REQUIREMENT OF INFORMED CONSENT.**

9 “(a) REQUIREMENT OF COMPLIANCE BY PRO-
10 VIDERS.—An abortion provider performing any abortion
11 of a pain-capable unborn child, that is in or affecting
12 interstate commerce, shall comply with the requirements
13 of this title.

14 “(b) PROVISION OF CONSENT.—

15 “(1) IN GENERAL.—Before any part of an abor-
16 tion involving a pain-capable unborn child begins,
17 the abortion provider or his or her agent shall pro-
18 vide the pregnant woman involved, by telephone or
19 in person, with the information described in para-
20 graph (2).

21 “(2) REQUIRED INFORMATION.—

22 “(A) ORAL STATEMENT.—

23 “(i) IN GENERAL.—An abortion pro-
24 vider or the provider’s agent to whom
25 paragraph (1) applies shall make the fol-

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

6 ‘You are considering having an abortion of
7 an unborn child who will have developed,
8 at the time of the abortion, approximately
9 _____ weeks after fertilization. The Con-
10 gress of the United States has determined
11 that at this stage of development, an un-
12 born child has the physical structures nec-
13 essary to experience pain. There is sub-
14 stantial evidence that by this point, unborn
15 children draw away from surgical instru-
16 ments in a manner which in an infant or
17 an adult would be interpreted as a re-
18 sponse to pain. Congress finds that there
19 is substantial evidence that the process of
20 being killed in an abortion will cause the
21 unborn child pain, even though you receive
22 a pain-reducing drug or drugs. Under the
23 Federal Unborn Child Pain Awareness Act
24 of 2005, you have the option of choosing to
25 have anesthesia or other pain-reducing

1 drug or drugs administered directly to the
2 pain-capable unborn child if you so desire.
3 The purpose of administering such drug or
4 drugs would be to reduce or eliminate the
5 capacity of the unborn child to experience
6 pain during the abortion procedure. In
7 some cases, there may be some additional
8 risk to you associated with administering
9 such a drug.’.

10 “(ii) DESCRIPTION OF RISKS.—After
11 making the statement required under
12 clause (i), the abortion provider may pro-
13 vide the woman involved with his or her
14 best medical judgment on the risks of ad-
15 ministering such anesthesia or analgesic, if
16 any, and the costs associated therewith.

17 “(iii) ADMINISTRATION OF ANES-
18 THESIA.—If the abortion provider is not
19 qualified or willing to administer the anes-
20 thesia or other pain-reducing drug in re-
21 sponse to the request of a pregnant woman
22 after making the statement required under
23 clause (i), the provider shall—

1 “(I) arrange for a qualified spe-
2 cialist to administer such anesthesia
3 or drug; or

4 “(II) advise the pregnant
5 woman—

6 “(aa) where she may obtain
7 such anesthesia or other pain-re-
8 ducing drugs for the unborn child
9 in the course of an abortion; or

10 “(bb) that the abortion pro-
11 vider is unable to perform the
12 abortion if the woman elects to
13 receive anesthesia or other pain-
14 reducing drugs for her unborn
15 child.

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

1 the woman's signature on the decision
2 form, and otherwise complies with the af-
3 firmative requirements of the law.

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

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

19 “(c) UNBORN CHILD PAIN AWARENESS BRO-
20 CHURE.—

21 “(1) DEVELOPMENT.—Not later than 90 days
22 after the date of enactment of this title, the Sec-
23 retary shall develop an Unborn Child Pain Aware-
24 ness Brochure. Such Brochure shall be written in
25 English and Spanish and shall contain the same in-

1 formation as required under the statement under
2 subsection (b)(2)(A)(i), including greater detail on
3 her option of having a pain-reducing drug or drugs
4 administered to the unborn child to reduce the expe-
5 rience of pain by the unborn child during the abor-
6 tion. Such information shall be written in an objec-
7 tive and nonjudgmental manner and be printed in a
8 typeface large enough to be clearly legible. The Bro-
9 chure shall be made available by the Secretary at no
10 cost to any abortion provider.

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

21 “(3) PRESENTATION OF BROCHURE.—An abor-
22 tion provider or his or her agent shall offer to pro-
23 vide a pregnant woman with the Brochure developed
24 under paragraph (1) before any part of an abortion
25 of a pain-capable child begins—

1 “(A) through an in-person visit by the
2 pregnant woman;

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

5 “(C) through a request to have such Bro-
6 chure mailed, by certified mail, to the woman at
7 least 72 hours before any part of the abortion
8 begins.

9 “(4) WAIVER.—After the abortion provider or
10 his or her agent offers to provide a pregnant woman
11 the Brochure, the pregnant woman may waive re-
12 ceipt of the Brochure under this subsection by sign-
13 ing the waiver form contained in the Unborn Child
14 Pain Awareness Decision Form.

15 “(5) UNBORN CHILD PAIN AWARENESS DECI-
16 SION FORM.—Not later than 30 days after the date
17 of enactment of this title, the Secretary shall develop
18 an Unborn Child Pain Awareness Decision Form.
19 To be valid, such Form shall—

20 “(A) with respect to the pregnant
21 woman—

22 “(i) contain a statement that affirms
23 that the woman has received or been of-
24 fered all of the information required in
25 subsection (b);

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

4 “(iii) be signed by a pregnant woman
5 prior to the performance of an abortion in-
6 volving a pain-capable unborn child; and

7 “(B) with respect to the abortion pro-
8 vider—

9 “(i) contain a statement that the pro-
10 vider has provided the woman with all of
11 the information required under subsection
12 (b);

13 “(ii) if applicable, contain a certifi-
14 cation by the provider that an exception
15 described in section 2903 applies and the
16 detailed reasons for such certification; and

17 “(iii) be signed by the provider prior
18 to the performance of the abortion proce-
19 dure.

20 “(6) MAINTENANCE OF RECORDS.—The Sec-
21 retary shall promulgate regulations relating to the
22 period of time during which copies of Forms under
23 paragraph (5) shall be maintained by abortion pro-
24 viders.

1 **“SEC. 2903. EXCEPTION FOR MEDICAL EMERGENCIES.**

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

5 “(b) MEDICAL EMERGENCY DEFINED.—

6 “(1) IN GENERAL.—In subsection (a), the term
7 ‘medical emergency’ means a condition which, in the
8 reasonable medical judgment of the abortion pro-
9 vider, so complicates the medical condition of the
10 pregnant woman that a delay in commencing an
11 abortion procedure would impose a serious risk of
12 causing grave and irreversible physical health dam-
13 age entailing substantial impairment of a major bod-
14 ily function.

15 “(2) REASONABLE MEDICAL JUDGMENT.—In
16 paragraph (1), the term ‘reasonable medical judg-
17 ment’ means a medical judgment that would be
18 made by a reasonably prudent physician, knowledge-
19 able about the case and the treatment possibilities
20 with respect to the medical conditions involved.

21 “(c) CERTIFICATION.—

22 “(1) IN GENERAL.—Upon a determination by
23 an abortion provider under subsection (a) that a
24 medical emergency exists with respect to a pregnant
25 woman, such provider shall certify the specific med-
26 ical conditions that constitute the emergency.

1 “(2) FALSE STATEMENTS.—An abortion pro-
2 vider who willfully falsifies a certification under
3 paragraph (1) shall be subject to all the penalties
4 provided for under section 2904 for failure to com-
5 ply with this title.

6 **“SEC. 2904. PENALTIES FOR FAILURE TO COMPLY.**

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

11 “(b) COMMENCEMENT OF ACTION.—The Attorney
12 General, the Deputy Attorney General, the Associate At-
13 torney General, or any Assistant Attorney General or
14 United States Attorney who has been specifically des-
15 ignated by the Attorney General may commence a civil ac-
16 tion under this section.

17 “(c) CERTIFICATION REQUIREMENTS.—At the time
18 of the commencement of an action under this section, the
19 Attorney General, the Deputy Attorney General, the Asso-
20 ciate Attorney General, or any Assistant Attorney General
21 or United States Attorney who has been specifically des-
22 ignated by the Attorney General to commence a civil ac-
23 tion under this section, shall certify to the court involved
24 that, at least 30 calendar days prior to the filing of such
25 action, the Attorney General, the Deputy Attorney Gen-

1 eral, the Associate Attorney General, or any Assistant At-
2 torney General or United States Attorney involved—

3 “(1) has provided notice of the alleged violation
4 of this section, in writing, to the Governor or Chief
5 Executive Officer and Attorney General or Chief
6 Legal Officer of the State or political subdivision in-
7 volved, as well as to the State medical licensing
8 board or other appropriate State agency; and

9 “(2) believes that such an action by the United
10 States is in the public interest and necessary to se-
11 cure substantial justice.

12 “(d) FIRST OFFENSE.—Upon a finding by a court
13 that a respondent in an action commenced under this sec-
14 tion has knowingly violated a provision of this title, the
15 court shall notify the appropriate State medical licensing
16 authority in order to effect the suspension of the respon-
17 dent’s medical license in accordance with the regulations
18 and procedures promulgated under section 2905, or shall
19 assess a civil penalty against the respondent in an amount
20 not to exceed \$100,000, or both.

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

1 notify the appropriate State medical licensing authority in
2 order to effect the revocation of the respondent's medical
3 license in accordance with the regulations and procedures
4 promulgated under section 2905, or shall assess a civil
5 penalty against the respondent in an amount not to exceed
6 \$250,000, or both.

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

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

19 **“SEC. 2905. REGULATIONS.**

20 “A State, and the medical licensing authority of the
21 State, shall promulgate regulations and procedures for the
22 revocation or suspension of the medical license of an abor-
23 tion provider upon a finding by a court under section 2904
24 that the provider has violated a provision of this title. A
25 State that fails to implement such procedures shall be sub-

1 ject to loss of funding under title XIX of the Social Secu-
2 rity Act (42 U.S.C. 1396 et seq.).

3 **“SEC. 2906. PREEMPTION.**

4 “Nothing in this title shall be construed to preempt
5 any provision of State law to the extent that such State
6 law establishes, implements, or continues in effect greater
7 protections for unborn children from pain than the protec-
8 tions provided for under this title.”.

○