

115TH CONGRESS  
1ST SESSION

# H. R. 36

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

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IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 2017

Mr. FRANKS of Arizona introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

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

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 “Pain-Capable Unborn  
5 Child Protection Act”.

6 **SEC. 2. LEGISLATIVE FINDINGS AND DECLARATION OF**  
7 **CONSTITUTIONAL AUTHORITY FOR ENACT-**  
8 **MENT.**

9 Congress finds and declares the following:

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

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

11           (3) In the unborn child, application of such  
12 painful stimuli is associated with significant in-  
13 creases in stress hormones known as the stress re-  
14 sponse.

15           (4) Subjection to such painful stimuli is associ-  
16 ated with long-term harmful neurodevelopmental ef-  
17 fects, such as altered pain sensitivity and, possibly,  
18 emotional, behavioral, and learning disabilities later  
19 in life.

20           (5) For the purposes of surgery on unborn chil-  
21 dren, fetal anesthesia is routinely administered and  
22 is associated with a decrease in stress hormones  
23 compared to their level when painful stimuli are ap-  
24 plied without such anesthesia. In the United States,  
25 surgery of this type is being performed by 20 weeks

1 after fertilization and earlier in specialized units af-  
2 filiated with children's hospitals.

3 (6) The position, asserted by some physicians,  
4 that the unborn child is incapable of experiencing  
5 pain until a point later in pregnancy than 20 weeks  
6 after fertilization predominately rests on the as-  
7 sumption that the ability to experience pain depends  
8 on the cerebral cortex and requires nerve connec-  
9 tions between the thalamus and the cortex. However,  
10 recent medical research and analysis, especially since  
11 2007, provides strong evidence for the conclusion  
12 that a functioning cortex is not necessary to experi-  
13 ence pain.

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

17 (8) In adult humans and in animals, stimula-  
18 tion or ablation of the cerebral cortex does not alter  
19 pain perception, while stimulation or ablation of the  
20 thalamus does.

21 (9) Substantial evidence indicates that struc-  
22 tures used for pain processing in early development  
23 differ from those of adults, using different neural  
24 elements available at specific times during develop-

1       ment, such as the subcortical plate, to fulfill the role  
2       of pain processing.

3           (10) The position, asserted by some commenta-  
4       tors, that the unborn child remains in a coma-like  
5       sleep state that precludes the unborn child experi-  
6       encing pain is inconsistent with the documented re-  
7       action of unborn children to painful stimuli and with  
8       the experience of fetal surgeons who have found it  
9       necessary to sedate the unborn child with anesthesia  
10      to prevent the unborn child from engaging in vig-  
11      orous movement in reaction to invasive surgery.

12          (11) Consequently, there is substantial medical  
13      evidence that an unborn child is capable of experi-  
14      encing pain at least by 20 weeks after fertilization,  
15      if not earlier.

16          (12) It is the purpose of the Congress to assert  
17      a compelling governmental interest in protecting the  
18      lives of unborn children from the stage at which sub-  
19      stantial medical evidence indicates that they are ca-  
20      pable of feeling pain.

21          (13) The compelling governmental interest in  
22      protecting the lives of unborn children from the  
23      stage at which substantial medical evidence indicates  
24      that they are capable of feeling pain is intended to  
25      be separate from and independent of the compelling

1 governmental interest in protecting the lives of un-  
2 born children from the stage of viability, and neither  
3 governmental interest is intended to replace the  
4 other.

5 (14) Congress has authority to extend protec-  
6 tion to pain-capable unborn children under the Su-  
7 preme Court’s Commerce Clause precedents and  
8 under the Constitution’s grants of powers to Con-  
9 gress under the Equal Protection, Due Process, and  
10 Enforcement Clauses of the Fourteenth Amendment.

11 **SEC. 3. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

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

15 **“SEC. 1532. PAIN-CAPABLE UNBORN CHILD PROTECTION.**

16 “(a) UNLAWFUL CONDUCT.—Notwithstanding any  
17 other provision of law, it shall be unlawful for any person  
18 to perform an abortion or attempt to do so, unless in con-  
19 formity with the requirements set forth in subsection (b).

20 “(b) REQUIREMENTS FOR ABORTIONS.—

21 “(1) ASSESSMENT OF THE AGE OF THE UN-  
22 BORN CHILD.—The physician performing or at-  
23 tempting the abortion shall first make a determina-  
24 tion of the probable post-fertilization age of the un-  
25 born child or reasonably rely upon such a determina-

1       tion made by another physician. In making such a  
2       determination, the physician shall make such inquir-  
3       ies of the pregnant woman and perform or cause to  
4       be performed such medical examinations and tests  
5       as a reasonably prudent physician, knowledgeable  
6       about the case and the medical conditions involved,  
7       would consider necessary to make an accurate deter-  
8       mination of post-fertilization age.

9               “(2) PROHIBITION ON PERFORMANCE OF CER-  
10       TAIN ABORTIONS.—

11               “(A) GENERALLY FOR UNBORN CHILDREN  
12       20 WEEKS OR OLDER.—Except as provided in  
13       subparagraph (B), the abortion shall not be  
14       performed or attempted, if the probable post-  
15       fertilization age, as determined under para-  
16       graph (1), of the unborn child is 20 weeks or  
17       greater.

18               “(B) EXCEPTIONS.—Subparagraph (A)  
19       does not apply if—

20               “(i) in reasonable medical judgment,  
21       the abortion is necessary to save the life of  
22       a pregnant woman whose life is endan-  
23       gered by a physical disorder, physical ill-  
24       ness, or physical injury, including a life-en-  
25       dangering physical condition caused by or

1 arising from the pregnancy itself, but not  
2 including psychological or emotional condi-  
3 tions;

4 “(ii) the pregnancy is the result of  
5 rape against an adult woman, and at least  
6 48 hours prior to the abortion—

7 “(I) she has obtained counseling  
8 for the rape; or

9 “(II) she has obtained medical  
10 treatment for the rape or an injury  
11 related to the rape; or

12 “(iii) the pregnancy is a result of rape  
13 against a minor or incest against a minor,  
14 and the rape or incest has been reported at  
15 any time prior to the abortion to either—

16 “(I) a government agency legally  
17 authorized to act on reports of child  
18 abuse; or

19 “(II) a law enforcement agency.

20 “(C) REQUIREMENT AS TO MANNER OF  
21 PROCEDURE PERFORMED.—Notwithstanding  
22 the definitions of ‘abortion’ and ‘attempt an  
23 abortion’ in this section, a physician termi-  
24 nating or attempting to terminate a pregnancy  
25 under an exception provided by subparagraph

1 (B) may do so only in the manner which, in  
2 reasonable medical judgment, provides the best  
3 opportunity for the unborn child to survive.

4 “(D) REQUIREMENT THAT A PHYSICIAN  
5 TRAINED IN NEONATAL RESUSCITATION BE  
6 PRESENT.—If, in reasonable medical judgment,  
7 the pain-capable unborn child has the potential  
8 to survive outside the womb, the physician who  
9 performs or attempts an abortion under an ex-  
10 ception provided by subparagraph (B) shall en-  
11 sure a second physician trained in neonatal re-  
12 suscitation is present and prepared to provide  
13 care to the child consistent with the require-  
14 ments of subparagraph (E).

15 “(E) CHILDREN BORN ALIVE AFTER AT-  
16 TEMPTED ABORTIONS.—When a physician per-  
17 forms or attempts an abortion in accordance  
18 with this section, and the child is born alive, as  
19 defined in section 8 of title 1 (commonly known  
20 as the Born-Alive Infants Protection Act of  
21 2002), the following shall apply:

22 “(i) DEGREE OF CARE REQUIRED.—  
23 Any health care practitioner present at the  
24 time shall humanely exercise the same de-  
25 gree of professional skill, care, and dili-



1           gence to preserve the life and health of the  
2           child as a reasonably diligent and conscien-  
3           tious health care practitioner would render  
4           to a child born alive at the same gesta-  
5           tional age in the course of a natural birth.

6           “(ii) IMMEDIATE ADMISSION TO A  
7           HOSPITAL.—Following the care required to  
8           be rendered under clause (i), the child born  
9           alive shall be immediately transported and  
10          admitted to a hospital.

11          “(iii) MANDATORY REPORTING OF  
12          VIOLATIONS.—A health care practitioner or  
13          any employee of a hospital, a physician’s  
14          office, or an abortion clinic who has knowl-  
15          edge of a failure to comply with the re-  
16          quirements of this subparagraph must im-  
17          mediately report the failure to an appro-  
18          priate State or Federal law enforcement  
19          agency or both.

20          “(F) DOCUMENTATION REQUIREMENTS.—

21          “(i) DOCUMENTATION PERTAINING TO  
22          ADULTS.—A physician who performs or at-  
23          tempts to perform an abortion under an  
24          exception provided by subparagraph (B)(ii)  
25          shall, prior to the abortion, place in the pa-

1           tient medical file documentation from a  
2           hospital licensed by the State or operated  
3           under authority of a Federal agency, a  
4           medical clinic licensed by the State or op-  
5           erated under authority of a Federal agen-  
6           cy, from a personal physician licensed by  
7           the State, a counselor licensed by the  
8           State, or a victim’s rights advocate pro-  
9           vided by a law enforcement agency that the  
10          adult woman seeking the abortion obtained  
11          medical treatment or counseling for the  
12          rape or an injury related to the rape.

13                   “(ii) DOCUMENTATION PERTAINING  
14                   TO MINORS.—A physician who performs or  
15                   attempts to perform an abortion under an  
16                   exception provided by subparagraph  
17                   (B)(iii) shall, prior to the abortion, place in  
18                   the patient medical file documentation  
19                   from a government agency legally author-  
20                   ized to act on reports of child abuse that  
21                   the rape or incest was reported prior to the  
22                   abortion; or, as an alternative, documenta-  
23                   tion from a law enforcement agency that  
24                   the rape or incest was reported prior to the  
25                   abortion.

1 “(G) INFORMED CONSENT.—

2 “(i) CONSENT FORM REQUIRED.—The  
3 physician who intends to perform or at-  
4 tempt to perform an abortion under the  
5 provisions of subparagraph (B) may not  
6 perform any part of the abortion procedure  
7 without first obtaining a signed Informed  
8 Consent Authorization form in accordance  
9 with this subparagraph.

10 “(ii) CONTENT OF CONSENT FORM.—  
11 The Informed Consent Authorization form  
12 shall be presented in person by the physi-  
13 cian and shall consist of—

14 “(I) a statement by the physician  
15 indicating the probable post-fertiliza-  
16 tion age of the pain-capable unborn  
17 child;

18 “(II) a statement that Federal  
19 law allows abortion after 20 weeks  
20 fetal age only if the mother’s life is  
21 endangered by a physical disorder,  
22 physical illness, or physical injury,  
23 when the pregnancy was the result of  
24 rape, or an act of incest against a  
25 minor;

1           “(III) a statement that the abor-  
2           tion must be performed by the method  
3           most likely to allow the child to be  
4           born alive unless this would cause sig-  
5           nificant risk to the mother;

6           “(IV) a statement that in any  
7           case in which an abortion procedure  
8           results in a child born alive, Federal  
9           law requires that child to be given  
10          every form of medical assistance that  
11          is provided to children spontaneously  
12          born prematurely, including transpor-  
13          tation and admittance to a hospital;

14          “(V) a statement that these re-  
15          quirements are binding upon the phy-  
16          sician and all other medical personnel  
17          who are subject to criminal and civil  
18          penalties and that a woman on whom  
19          an abortion has been performed may  
20          take civil action if these requirements  
21          are not followed; and

22          “(VI) affirmation that each sign-  
23          er has filled out the informed consent  
24          form to the best of their knowledge

1                   and understands the information con-  
2                   tained in the form.

3                   “(iii) SIGNATORIES REQUIRED.—The  
4                   Informed Consent Authorization form shall  
5                   be signed in person by the woman seeking  
6                   the abortion, the physician performing or  
7                   attempting to perform the abortion, and a  
8                   witness.

9                   “(iv) RETENTION OF CONSENT  
10                  FORM.—The physician performing or at-  
11                  tempting to perform an abortion must re-  
12                  tain the signed informed consent form in  
13                  the patient’s medical file.

14                  “(H) REQUIREMENT FOR DATA RETEN-  
15                  TION.—Paragraph (j)(2) of section 164.530 of  
16                  title 45, Code of Federal Regulations, shall  
17                  apply to documentation required to be placed in  
18                  a patient’s medical file pursuant to subpara-  
19                  graph (F) of subsection (b)(2) and a consent  
20                  form required to be retained in a patient’s med-  
21                  ical file pursuant to subparagraph (G) of such  
22                  subsection in the same manner and to the same  
23                  extent as such paragraph applies to documenta-  
24                  tion required by paragraph (j)(1) of such sec-  
25                  tion.

1                   “(I) ADDITIONAL EXCEPTIONS AND RE-  
2                   QUIREMENTS.—

3                   “(i) IN CASES OF RISK OF DEATH OR  
4                   MAJOR INJURY TO THE MOTHER.—Sub-  
5                   paragraphs (C), (D), and (G) shall not  
6                   apply if, in reasonable medical judgment,  
7                   compliance with such paragraphs would  
8                   pose a greater risk of—

9                   “(I) the death of the pregnant  
10                  woman; or

11                  “(II) the substantial and irre-  
12                  versible physical impairment of a  
13                  major bodily function, not including  
14                  psychological or emotional conditions,  
15                  of the pregnant woman.

16                  “(ii) EXCLUSION OF CERTAIN FACILI-  
17                  TIES.—Notwithstanding the definitions of  
18                  the terms ‘medical treatment’ and ‘coun-  
19                  seling’ in subsection (g), the counseling or  
20                  medical treatment described in subpara-  
21                  graph (B)(ii) may not be provided by a fa-  
22                  cility that performs abortions (unless that  
23                  facility is a hospital).

24                  “(iii) RULE OF CONSTRUCTION IN  
25                  CASES OF REPORTS TO LAW ENFORCE-

1                   MENT.—The requirements of subparagraph  
2                   (B)(ii) do not apply if the rape has been  
3                   reported at any time prior to the abortion  
4                   to a law enforcement agency or Depart-  
5                   ment of Defense victim assistance per-  
6                   sonnel.

7                   “(iv) COMPLIANCE WITH CERTAIN  
8                   STATE LAWS.—

9                   “(I) STATE LAWS REGARDING  
10                  REPORTING OF RAPE AND INCEST.—

11                 The physician who performs or at-  
12                 tempts to perform an abortion under  
13                 an exception provided by subpara-  
14                 graph (B) shall comply with such ap-  
15                 plicable State laws that are in effect  
16                 as the State’s Attorney General may  
17                 designate, regarding reporting re-  
18                 quirements in cases of rape or incest.

19                 “(II) STATE LAWS REGARDING  
20                 PARENTAL INVOLVEMENT.—The phy-  
21                 sician who intends to perform an  
22                 abortion on a minor under an excep-  
23                 tion provided by subparagraph (B)  
24                 shall comply with any applicable State  
25                 laws requiring parental involvement in

1 a minor’s decision to have an abor-  
2 tion.

3 “(c) CRIMINAL PENALTY.—Whoever violates sub-  
4 section (a) shall be fined under this title or imprisoned  
5 for not more than 5 years, or both.

6 “(d) BAR TO PROSECUTION.—A woman upon whom  
7 an abortion in violation of subsection (a) is performed or  
8 attempted may not be prosecuted under, or for a con-  
9 spiracy to violate, subsection (a), or for an offense under  
10 section 2, 3, or 4 of this title based on such a violation.

11 “(e) CIVIL REMEDIES.—

12 “(1) CIVIL ACTION BY A WOMAN ON WHOM AN  
13 ABORTION IS PERFORMED.—A woman upon whom  
14 an abortion has been performed or attempted in vio-  
15 lation of any provision of this section may, in a civil  
16 action against any person who committed the viola-  
17 tion, obtain appropriate relief.

18 “(2) CIVIL ACTION BY A PARENT OF A MINOR  
19 ON WHOM AN ABORTION IS PERFORMED.—A parent  
20 of a minor upon whom an abortion has been per-  
21 formed or attempted under an exception provided for  
22 in subsection (b)(2)(B), and that was performed in  
23 violation of any provision of this section may, in a  
24 civil action against any person who committed the



1 violation obtain appropriate relief, unless the preg-  
2 nancy resulted from the plaintiff's criminal conduct.

3 “(3) APPROPRIATE RELIEF.—Appropriate relief  
4 in a civil action under this subsection includes—

5 “(A) objectively verifiable money damages  
6 for all injuries, psychological and physical, occa-  
7 sioned by the violation;

8 “(B) statutory damages equal to three  
9 times the cost of the abortion; and

10 “(C) punitive damages.

11 “(4) ATTORNEYS FEES FOR PLAINTIFF.—The  
12 court shall award a reasonable attorney's fee as part  
13 of the costs to a prevailing plaintiff in a civil action  
14 under this subsection.

15 “(5) ATTORNEYS FEES FOR DEFENDANT.—If a  
16 defendant in a civil action under this subsection pre-  
17 vails and the court finds that the plaintiff's suit was  
18 frivolous, the court shall award a reasonable attor-  
19 ney's fee in favor of the defendant against the plain-  
20 tiff.

21 “(6) AWARDS AGAINST WOMAN.—Except under  
22 paragraph (5), in a civil action under this sub-  
23 section, no damages, attorney's fee or other mone-  
24 tary relief may be assessed against the woman upon  
25 whom the abortion was performed or attempted.

1 “(f) DATA COLLECTION.—

2 “(1) DATA SUBMISSIONS.—Any physician who  
3 performs or attempts an abortion described in sub-  
4 section (b)(2)(B) shall annually submit a summary  
5 of all such abortions to the National Center for  
6 Health Statistics (hereinafter referred to as the  
7 ‘Center’) not later than 60 days after the end of the  
8 calendar year in which the abortion was performed  
9 or attempted.

10 “(2) CONTENTS OF SUMMARY.—The summary  
11 shall include the number of abortions performed or  
12 attempted on an unborn child who had a post-fer-  
13 tilization age of 20 weeks or more and specify the  
14 following for each abortion under subsection  
15 (b)(2)(B)—

16 “(A) the probable post-fertilization age of  
17 the unborn child;

18 “(B) the method used to carry out the  
19 abortion;

20 “(C) the location where the abortion was  
21 conducted;

22 “(D) the exception under subsection  
23 (b)(2)(B) under which the abortion was con-  
24 ducted; and

1           “(E) any incident of live birth resulting  
2           from the abortion.

3           “(3) EXCLUSIONS FROM DATA SUBMISSIONS.—

4           A summary required under this subsection shall not  
5           contain any information identifying the woman  
6           whose pregnancy was terminated and shall be sub-  
7           mitted consistent with the Health Insurance Port-  
8           ability and Accountability Act of 1996 (42 U.S.C.  
9           1320d–2 note).

10           “(4) PUBLIC REPORT.—The Center shall annu-  
11           ally issue a public report providing statistics by  
12           State for the previous year compiled from all of the  
13           summaries made to the Center under this sub-  
14           section. The Center shall take care to ensure that  
15           none of the information included in the public re-  
16           ports could reasonably lead to the identification of  
17           any pregnant woman upon whom an abortion was  
18           performed or attempted. The annual report shall be  
19           issued by July 1 of the calendar year following the  
20           year in which the abortions were performed or at-  
21           tempted.

22           “(g) DEFINITIONS.—In this section the following  
23           definitions apply:

1           “(1) ABORTION.—The term ‘abortion’ means  
2 the use or prescription of any instrument, medicine,  
3 drug, or any other substance or device—

4           “(A) to intentionally kill the unborn child  
5 of a woman known to be pregnant; or

6           “(B) to intentionally terminate the preg-  
7 nancy of a woman known to be pregnant, with  
8 an intention other than—

9           “(i) after viability to produce a live  
10 birth and preserve the life and health of  
11 the child born alive; or

12           “(ii) to remove a dead unborn child.

13           “(2) ATTEMPT.—The term ‘attempt’, with re-  
14 spect to an abortion, means conduct that, under the  
15 circumstances as the actor believes them to be, con-  
16 stitutes a substantial step in a course of conduct  
17 planned to culminate in performing an abortion.

18           “(3) COUNSELING.—The term ‘counseling’  
19 means counseling provided by a counselor licensed  
20 by the State, or a victims rights advocate provided  
21 by a law enforcement agency.

22           “(4) FACILITY.—The term ‘facility’ means any  
23 medical or counseling group, center or clinic and in-  
24 cludes the entire legal entity, including any entity

1 that controls, is controlled by, or is under common  
2 control with such facility.

3 “(5) FERTILIZATION.—The term ‘fertilization’  
4 means the fusion of human spermatozoon with a  
5 human ovum.

6 “(6) MEDICAL TREATMENT.—The term ‘med-  
7 ical treatment’ means treatment provided at a hos-  
8 pital licensed by the State or operated under author-  
9 ity of a Federal agency, at a medical clinic licensed  
10 by the State or operated under authority of a Fed-  
11 eral agency, or from a personal physician licensed by  
12 the State.

13 “(7) MINOR.—The term ‘minor’ means an indi-  
14 vidual who has not attained the age of 18 years.

15 “(8) PERFORM.—The term ‘perform’, with re-  
16 spect to an abortion, includes inducing an abortion  
17 through a medical or chemical intervention including  
18 writing a prescription for a drug or device intended  
19 to result in an abortion.

20 “(9) PHYSICIAN.—The term ‘physician’ means  
21 a person licensed to practice medicine and surgery  
22 or osteopathic medicine and surgery, or otherwise le-  
23 gally authorized to perform an abortion.

24 “(10) POST-FERTILIZATION AGE.—The term  
25 ‘post-fertilization age’ means the age of the unborn

1 child as calculated from the fusion of a human  
2 spermatozoon with a human ovum.

3 “(11) PROBABLE POST-FERTILIZATION AGE OF  
4 THE UNBORN CHILD.—The term ‘probable post-fer-  
5 tilization age of the unborn child’ means what, in  
6 reasonable medical judgment, will with reasonable  
7 probability be the post-fertilization age of the un-  
8 born child at the time the abortion is planned to be  
9 performed or induced.

10 “(12) REASONABLE MEDICAL JUDGMENT.—The  
11 term ‘reasonable medical judgment’ means a medical  
12 judgment that would be made by a reasonably pru-  
13 dent physician, knowledgeable about the case and  
14 the treatment possibilities with respect to the med-  
15 ical conditions involved.

16 “(13) UNBORN CHILD.—The term ‘unborn  
17 child’ means an individual organism of the species  
18 homo sapiens, beginning at fertilization, until the  
19 point of being born alive as defined in section 8(b)  
20 of title 1.

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

24 (b) CLERICAL AMENDMENT.—The table of sections  
25 at the beginning of chapter 74 of title 18, United States

1 Code, is amended by adding at the end the following new  
2 item:

“1532. Pain-capable unborn child protection.”.

3 (c) CHAPTER HEADING AMENDMENTS.—

4 (1) CHAPTER HEADING IN CHAPTER.—The  
5 chapter heading for chapter 74 of title 18, United  
6 States Code, is amended by striking “**Partial-**  
7 **Birth Abortions**” and inserting “**Abortions**”.

8 (2) TABLE OF CHAPTERS FOR PART I.—The  
9 item relating to chapter 74 in the table of chapters  
10 at the beginning of part I of title 18, United States  
11 Code, is amended by striking “Partial-Birth Abor-  
12 tions” and inserting “Abortions”.

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