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H. R. 3803

[Report No. 112-]

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

IN THE HOUSE OF REPRESENTATIVES

JANUARY 23, 2012

Mr. FRANKS of Arizona (for himself, Mr. AKIN, Mr. GOHMERT, Mr. FLEMING, Mr. WALBERG, Mr. HUELSKAMP, Mr. PITTS, Mr. LAMBORN, Mr. SMITH of Texas, Mr. KINGSTON, Mr. SMITH of New Jersey, Mr. SOUTHERLAND, Mrs. SCHMIDT, Mr. ADERHOLT, Mr. HARRIS, Mr. BUCSHON, Mr. PENCE, Mr. HULTGREN, Mr. BOUSTANY, Mr. ROGERS of Alabama, Mr. MANZULLO, Mr. ROSS of Florida, Mrs. HARTZLER, Mr. FORTENBERRY, Mr. HERGER, Mr. CANSECO, Mr. LANKFORD, Mrs. LUMMIS, Mr. AUSTIN SCOTT of Georgia, Mr. ROE of Tennessee, Mr. NUNNELEE, Mr. MARCHANT, Mr. HUIZENGA of Michigan, Mr. MURPHY of Pennsylvania, Mr. JONES, Mr. LANDRY, Mr. BACHUS, Mr. ROGERS of Kentucky, Mrs. ROBY, Mr. MCKINLEY, Mr. LIPINSKI, Mr. KELLY, Mr. GOWDY, Mr. JORDAN, Mrs. BACHMANN, Mrs. ELLMERS, Mr. AMASH, Mr. ISSA, Mr. SCHWEIKERT, and Mr. SCALISE) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

JULY --, 2012

Reported from the Committee on the Judiciary with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on January 23, 2012]

A BILL

To amend title 18, United States Code, to protect pain-capable unborn children in the District of Columbia, 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 “District of Columbia*
5 *Pain-Capable Unborn Child Protection Act”.*

6 **SEC. 2. LEGISLATIVE FINDINGS.**

7 *Congress finds and declares the following:*

8 (1) *Pain receptors (nociceptors) are present*
9 *throughout the unborn child’s entire body and nerves*
10 *link these receptors to the brain’s thalamus and sub-*
11 *cortical plate by no later than 20 weeks after fertiliza-*
12 *tion.*

13 (2) *By 8 weeks after fertilization, the unborn*
14 *child reacts to touch. After 20 weeks, the unborn child*
15 *reacts to stimuli that would be recognized as painful*
16 *if applied to an adult human, for example, by recoil-*
17 *ing.*

18 (3) *In the unborn child, application of such*
19 *painful stimuli is associated with significant in-*
20 *creases in stress hormones known as the stress re-*
21 *sponse.*

22 (4) *Subjection to such painful stimuli is associ-*
23 *ated with long-term harmful neurodevelopmental ef-*
24 *fects, such as altered pain sensitivity and, possibly,*

1 *emotional, behavioral, and learning disabilities later*
2 *in life.*

3 (5) *For the purposes of surgery on unborn chil-*
4 *dren, fetal anesthesia is routinely administered and is*
5 *associated with a decrease in stress hormones com-*
6 *pared to their level when painful stimuli are applied*
7 *without such anesthesia.*

8 (6) *The position, asserted by some medical ex-*
9 *erts, that the unborn child is incapable of experi-*
10 *encing pain until a point later in pregnancy than 20*
11 *weeks after fertilization predominately rests on the as-*
12 *sumption that the ability to experience pain depends*
13 *on the cerebral cortex and requires nerve connections*
14 *between the thalamus and the cortex. However, recent*
15 *medical research and analysis, especially since 2007,*
16 *provides strong evidence for the conclusion that a*
17 *functioning cortex is not necessary to experience pain.*

18 (7) *Substantial evidence indicates that children*
19 *born missing the bulk of the cerebral cortex, those*
20 *with hydranencephaly, nevertheless experience pain.*

21 (8) *In adult humans and in animals, stimula-*
22 *tion or ablation of the cerebral cortex does not alter*
23 *pain perception, while stimulation or ablation of the*
24 *thalamus does.*

1 (9) *Substantial evidence indicates that structures*
2 *used for pain processing in early development differ*
3 *from those of adults, using different neural elements*
4 *available at specific times during development, such*
5 *as the subcortical plate, to fulfill the role of pain*
6 *processing.*

7 (10) *The position, asserted by some commenta-*
8 *tors, that the unborn child remains in a coma-like*
9 *sleep state that precludes the unborn child experi-*
10 *encing pain is inconsistent with the documented reac-*
11 *tion of unborn children to painful stimuli and with*
12 *the experience of fetal surgeons who have found it nec-*
13 *essary to sedate the unborn child with anesthesia to*
14 *prevent the unborn child from engaging in vigorous*
15 *movement in reaction to invasive surgery.*

16 (11) *Consequently, there is substantial medical*
17 *evidence that an unborn child is capable of experi-*
18 *encing pain at least by 20 weeks after fertilization, if*
19 *not earlier.*

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

1 (13) *The compelling governmental interest in*
2 *protecting the lives of unborn children from the stage*
3 *at which substantial medical evidence indicates that*
4 *they are capable of feeling pain is intended to be sep-*
5 *arate from and independent of the compelling govern-*
6 *mental interest in protecting the lives of unborn chil-*
7 *dren from the stage of viability, and neither govern-*
8 *mental interest is intended to replace the other.*

9 (14) *The District Council of the District of Co-*
10 *lumbia, operating under authority delegated by Con-*
11 *gress, repealed the entire District law limiting abor-*
12 *tions, effective April 29, 2004, so that in the District*
13 *of Columbia, abortion is now legal, for any reason,*
14 *until the moment of birth.*

15 (15) *Article I, section 8 of the Constitution of the*
16 *United States of America provides that the Congress*
17 *shall “exercise exclusive Legislation in all Cases what-*
18 *soever” over the District established as the seat of gov-*
19 *ernment of the United States, now known as the Dis-*
20 *trict of Columbia. The constitutional responsibility*
21 *for the protection of pain-capable unborn children*
22 *within the Federal District resides with the Congress.*

1 **SEC. 3. DISTRICT OF COLUMBIA PAIN-CAPABLE UNBORN**
2 **CHILD PROTECTION.**

3 (a) *IN GENERAL.*—Chapter 74 of title 18, United
4 States Code, is amended by inserting after section 1531 the
5 following:

6 **“§1532. District of Columbia pain-capable unborn**
7 **child protection**

8 “(a) *UNLAWFUL CONDUCT.*—Notwithstanding any
9 other provision of law, including any legislation of the Dis-
10 trict of Columbia under authority delegated by Congress,
11 it shall be unlawful for any person to perform an abortion
12 within the District of Columbia, or attempt to do so, unless
13 in conformity with the requirements set forth in subsection
14 (b).

15 “(b) *REQUIREMENTS FOR ABORTIONS.*—

16 “(1) *The physician performing or attempting the*
17 *abortion shall first make a determination of the prob-*
18 *able post-fertilization age of the unborn child or rea-*
19 *sonably rely upon such a determination made by an-*
20 *other physician. In making such a determination, the*
21 *physician shall make such inquiries of the pregnant*
22 *woman and perform or cause to be performed such*
23 *medical examinations and tests as a reasonably pru-*
24 *dent physician, knowledgeable about the case and the*
25 *medical conditions involved, would consider necessary*

1 *to make an accurate determination of post-fertiliza-*
2 *tion age.*

3 *“(2)(A) Except as provided in subparagraph*
4 *(B), the abortion shall not be performed or attempted,*
5 *if the probable post-fertilization age, as determined*
6 *under paragraph (1), of the unborn child is 20 weeks*
7 *or greater.*

8 *“(B) Subject to subparagraph (C), subparagraph*
9 *(A) does not apply if, in reasonable medical judg-*
10 *ment, the abortion is necessary to save the life of a*
11 *pregnant woman whose life is endangered by a phys-*
12 *ical disorder, physical illness, or physical injury, in-*
13 *cluding a life-endangering physical condition caused*
14 *by or arising from the pregnancy itself, but not in-*
15 *cluding psychological or emotional conditions.*

16 *“(C) Notwithstanding the definitions of ‘abor-*
17 *tion’ and ‘attempt an abortion’ in this section, a phy-*
18 *sician terminating or attempting to terminate a preg-*
19 *nancy under the exception provided by subparagraph*
20 *(B) may do so only in the manner which, in reason-*
21 *able medical judgment, provides the best opportunity*
22 *for the unborn child to survive, unless, in reasonable*
23 *medical judgment, termination of the pregnancy in*
24 *that manner would pose a greater risk of—*

25 *“(i) the death of the pregnant woman; or*

1 “(ii) *the substantial and irreversible phys-*
2 *ical impairment of a major bodily function, not*
3 *including psychological or emotional conditions,*
4 *of the pregnant woman;*
5 *than would other available methods.*

6 “(c) *CRIMINAL PENALTY.—Whoever violates subsection*
7 *(a) shall be fined under this title or imprisoned for not more*
8 *than 2 years, or both.*

9 “(d) *BAR TO PROSECUTION.—A woman upon whom*
10 *an abortion in violation of subsection (a) is performed or*
11 *attempted may not be prosecuted under, or for a conspiracy*
12 *to violate, subsection (a), or for an offense under section*
13 *2, 3, or 4 based on such a violation.*

14 “(e) *CIVIL REMEDIES.—*

15 “(1) *CIVIL ACTION BY WOMAN ON WHOM THE*
16 *ABORTION IS PERFORMED.—A woman upon whom an*
17 *abortion has been performed or attempted in violation*
18 *of subsection (a), may in a civil action against any*
19 *person who engaged in the violation obtain appro-*
20 *priate relief.*

21 “(2) *CIVIL ACTION BY RELATIVES.—The father of*
22 *an unborn child who is the subject of an abortion per-*
23 *formed or attempted in violation of subsection (a), or*
24 *a maternal grandparent of the unborn child if the*
25 *pregnant woman is an unemancipated minor, may in*

1 *a civil action against any person who engaged in the*
2 *violation, obtain appropriate relief, unless the preg-*
3 *nancy resulted from the plaintiff's criminal conduct*
4 *or the plaintiff consented to the abortion.*

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

7 *“(A) objectively verifiable money damages*
8 *for all injuries, psychological and physical, occa-*
9 *sioned by the violation of this section;*

10 *“(B) statutory damages equal to three times*
11 *the cost of the abortion; and*

12 *“(C) punitive damages.*

13 *“(4) INJUNCTIVE RELIEF.—*

14 *“(A) IN GENERAL.—A qualified plaintiff*
15 *may in a civil action obtain injunctive relief to*
16 *prevent an abortion provider from performing or*
17 *attempting further abortions in violation of this*
18 *section.*

19 *“(B) DEFINITION.—In this paragraph the*
20 *term ‘qualified plaintiff’ means—*

21 *“(i) a woman upon whom an abortion*
22 *is performed or attempted in violation of*
23 *this section;*

24 *“(ii) any person who is the spouse,*
25 *parent, sibling or guardian of, or a current*

1 or former licensed health care provider of,
2 that woman; or

3 “(iii) the United States Attorney for
4 the District of Columbia.

5 “(5) *ATTORNEYS FEES FOR PLAINTIFF.*—The
6 court shall award a reasonable attorney’s fee as part
7 of the costs to a prevailing plaintiff in a civil action
8 under this subsection.

9 “(6) *ATTORNEYS FEES FOR DEFENDANT.*—If a
10 defendant in a civil action under this section prevails
11 and the court finds that the plaintiff’s suit was frivo-
12 lous and brought in bad faith, the court shall also
13 render judgment for a reasonable attorney’s fee in
14 favor of the defendant against the plaintiff.

15 “(7) *AWARDS AGAINST WOMAN.*—Except under
16 paragraph (6), in a civil action under this subsection,
17 no damages, attorney’s fee or other monetary relief
18 may be assessed against the woman upon whom the
19 abortion was performed or attempted.

20 “(f) *PROTECTION OF PRIVACY IN COURT PRO-*
21 *CEEDINGS.*—

22 “(1) *IN GENERAL.*—Except to the extent the Con-
23 stitution or other similarly compelling reason re-
24 quires, in every civil or criminal action under this
25 section, the court shall make such orders as are nec-

1 *essary to protect the anonymity of any woman upon*
2 *whom an abortion has been performed or attempted*
3 *if she does not give her written consent to such disclo-*
4 *sure. Such orders may be made upon motion, but*
5 *shall be made sua sponte if not otherwise sought by*
6 *a party.*

7 *“(2) ORDERS TO PARTIES, WITNESSES, AND*
8 *COUNSEL.—The court shall issue appropriate orders*
9 *under paragraph (1) to the parties, witnesses, and*
10 *counsel and shall direct the sealing of the record and*
11 *exclusion of individuals from courtrooms or hearing*
12 *rooms to the extent necessary to safeguard her iden-*
13 *tity from public disclosure. Each such order shall be*
14 *accompanied by specific written findings explaining*
15 *why the anonymity of the woman must be preserved*
16 *from public disclosure, why the order is essential to*
17 *that end, how the order is narrowly tailored to serve*
18 *that interest, and why no reasonable less restrictive*
19 *alternative exists.*

20 *“(3) PSEUDONYM REQUIRED.—In the absence of*
21 *written consent of the woman upon whom an abortion*
22 *has been performed or attempted, any party, other*
23 *than a public official, who brings an action under*
24 *paragraphs (1), (2), or (4) of subsection (e) shall do*
25 *so under a pseudonym.*

1 “(4) *LIMITATION.*—*This subsection shall not be*
2 *construed to conceal the identity of the plaintiff or of*
3 *witnesses from the defendant or from attorneys for the*
4 *defendant.*

5 “(g) *REPORTING.*—

6 “(1) *DUTY TO REPORT.*—*Any physician who*
7 *performs or attempts an abortion within the District*
8 *of Columbia shall report that abortion to the relevant*
9 *District of Columbia health agency (hereinafter in*
10 *this section referred to as the ‘health agency’) on a*
11 *schedule and in accordance with forms and regula-*
12 *tions prescribed by the health agency.*

13 “(2) *CONTENTS OF REPORT.*—*The report shall*
14 *include the following:*

15 “(A) *POST-FERTILIZATION AGE.*—*For the*
16 *determination of probable postfertilization age of*
17 *the unborn child, whether ultrasound was em-*
18 *ployed in making the determination, and the*
19 *week of probable post-fertilization age that was*
20 *determined.*

21 “(B) *METHOD OF ABORTION.*—*Which of the*
22 *following methods or combination of methods*
23 *was employed:*

1 “(i) *Dilation, dismemberment, and*
2 *evacuation of fetal parts also known as ‘di-*
3 *lation and evacuation’.*

4 “(ii) *Intra-amniotic instillation of sa-*
5 *line, urea, or other substance (specify sub-*
6 *stance) to kill the unborn child, followed by*
7 *induction of labor.*

8 “(iii) *Intracardiac or other intra-fetal*
9 *injection of digoxin, potassium chloride, or*
10 *other substance (specify substance) intended*
11 *to kill the unborn child, followed by induc-*
12 *tion of labor.*

13 “(iv) *Partial-birth abortion, as defined*
14 *in section 1531.*

15 “(v) *Manual vacuum aspiration with-*
16 *out other methods.*

17 “(vi) *Electrical vacuum aspiration*
18 *without other methods.*

19 “(vii) *Abortion induced by use of*
20 *mifepristone in combination with*
21 *misoprostol.*

22 “(viii) *If none of the methods described*
23 *in the other clauses of this subparagraph*
24 *was employed, whatever method was em-*
25 *ployed.*

1 “(C) *AGE OF WOMAN.*—*The age or approxi-*
2 *mate age of the pregnant woman.*

3 “(D) *COMPLIANCE WITH REQUIREMENTS*
4 *FOR EXCEPTION.*—*The facts relied upon and the*
5 *basis for any determinations required to estab-*
6 *lish compliance with the requirements for the ex-*
7 *ception provided by subsection (b)(2).*

8 “(3) *EXCLUSIONS FROM REPORTS.*—

9 “(A) *A report required under this subsection*
10 *shall not contain the name or the address of the*
11 *woman whose pregnancy was terminated, nor*
12 *shall the report contain any other information*
13 *identifying the woman.*

14 “(B) *Such report shall contain a unique*
15 *Medical Record Number, to enable matching the*
16 *report to the woman’s medical records.*

17 “(C) *Such reports shall be maintained in*
18 *strict confidence by the health agency, shall not*
19 *be available for public inspection, and shall not*
20 *be made available except—*

21 *“(i) to the United States Attorney for*
22 *the District of Columbia or that Attorney’s*
23 *delegate for a criminal investigation or a*
24 *civil investigation of conduct that may vio-*
25 *late this section; or*

1 “(ii) pursuant to court order in an ac-
2 tion under subsection (e).

3 “(4) *PUBLIC REPORT.*—Not later than June 30
4 of each year beginning after the date of enactment of
5 this paragraph, the health agency shall issue a public
6 report providing statistics for the previous calendar
7 year compiled from all of the reports made to the
8 health agency under this subsection for that year for
9 each of the items listed in paragraph (2). The report
10 shall also provide the statistics for all previous cal-
11 endar years during which this section was in effect,
12 adjusted to reflect any additional information from
13 late or corrected reports. The health agency shall take
14 care to ensure that none of the information included
15 in the public reports could reasonably lead to the
16 identification of any pregnant woman upon whom an
17 abortion was performed or attempted.

18 “(5) *FAILURE TO SUBMIT REPORT.*—

19 “(A) *LATE FEE.*—Any physician who fails
20 to submit a report not later than 30 days after
21 the date that report is due shall be subject to a
22 late fee of \$1,000 for each additional 30-day pe-
23 riod or portion of a 30-day period the report is
24 overdue.

1 “(B) *COURT ORDER TO COMPLY.*—A court
2 of competent jurisdiction may, in a civil action
3 commenced by the health agency, direct any phy-
4 sician whose report under this subsection is still
5 not filed as required, or is incomplete, more than
6 180 days after the date the report was due, to
7 comply with the requirements of this section
8 under penalty of civil contempt.

9 “(C) *DISCIPLINARY ACTION.*—Intentional or
10 reckless failure by any physician to comply with
11 any requirement of this subsection, other than
12 late filing of a report, constitutes sufficient cause
13 for any disciplinary sanction which the Health
14 Professional Licensing Administration of the
15 District of Columbia determines is appropriate,
16 including suspension or revocation of any license
17 granted by the Administration.

18 “(6) *FORMS AND REGULATIONS.*—Not later than
19 90 days after the date of the enactment of this section,
20 the health agency shall prescribe forms and regula-
21 tions to assist in compliance with this subsection.

22 “(7) *EFFECTIVE DATE OF REQUIREMENT.*—
23 Paragraph (1) of this subsection takes effect with re-
24 spect to all abortions performed on and after the first

1 *day of the first calendar month beginning after the ef-*
2 *fective date of such forms and regulations.*

3 *“(h) DEFINITIONS.—In this section the following defi-*
4 *nitions apply:*

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

8 *“(A) to intentionally kill the unborn child*
9 *of a woman known to be pregnant; or*

10 *“(B) to otherwise intentionally terminate*
11 *the pregnancy of a woman known to be pregnant*
12 *with an intention other than to increase the*
13 *probability of a live birth, to preserve the life or*
14 *health of the child after live birth, or to remove*
15 *a dead unborn child who died as the result of*
16 *natural causes in utero, accidental trauma, or a*
17 *criminal assault on the pregnant woman or her*
18 *unborn child, and which causes the premature*
19 *termination of the pregnancy.*

20 *“(2) ATTEMPT AN ABORTION.—The term ‘at-*
21 *tempt’, with respect to an abortion, means conduct*
22 *that, under the circumstances as the actor believes*
23 *them to be, constitutes a substantial step in a course*
24 *of conduct planned to culminate in performing an*
25 *abortion in the District of Columbia.*

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

4 “(4) *HEALTH AGENCY.*—*The term ‘health agen-*
5 *cy’ means the Department of Health of the District of*
6 *Columbia or any successor agency responsible for the*
7 *regulation of medical practice.*

8 “(5) *PERFORM.*—*The term ‘perform’, with re-*
9 *spect to an abortion, includes induce an abortion*
10 *through a medical or chemical intervention including*
11 *writing a prescription for a drug or device intended*
12 *to result in an abortion.*

13 “(6) *PHYSICIAN.*—*The term ‘physician’ means a*
14 *person licensed to practice medicine and surgery or*
15 *osteopathic medicine and surgery, or otherwise li-*
16 *icensed to legally perform an abortion.*

17 “(7) *POST-FERTILIZATION AGE.*—*The term ‘post-*
18 *fertilization age’ means the age of the unborn child as*
19 *calculated from the fusion of a human spermatozoon*
20 *with a human ovum.*

21 “(8) *PROBABLE POST-FERTILIZATION AGE OF*
22 *THE UNBORN CHILD.*—*The term ‘probable post-fer-*
23 *tilization age of the unborn child’ means what, in*
24 *reasonable medical judgment, will with reasonable*
25 *probability be the postfertilization age of the unborn*

1 *child at the time the abortion is planned to be per-*
2 *formed or induced.*

3 “(9) *REASONABLE MEDICAL JUDGMENT.*—*The*
4 *term ‘reasonable medical judgment’ means a medical*
5 *judgment that would be made by a reasonably pru-*
6 *dent physician, knowledgeable about the case and the*
7 *treatment possibilities with respect to the medical*
8 *conditions involved.*

9 “(10) *UNBORN CHILD.*—*The term ‘unborn child’*
10 *means an individual organism of the species homo*
11 *sapiens, beginning at fertilization, until the point of*
12 *being born alive as defined in section 8(b) of title 1.*

13 “(11) *UNEMANCIPATED MINOR.*—*The term*
14 *‘unemancipated minor’ means a minor who is subject*
15 *to the control, authority, and supervision of a parent*
16 *or guardian, as determined under the law of the State*
17 *in which the minor resides.*

18 “(12) *WOMAN.*—*The term ‘woman’ means a fe-*
19 *male human being whether or not she has reached the*
20 *age of majority.”*

21 (b) *CLERICAL AMENDMENT.*—*The table of sections at*
22 *the beginning of chapter 74 of title 18, United States Code,*
23 *is amended by adding at the end the following new item:*

“1532. District of Columbia pain-capable unborn child protection.”

24 (c) *CHAPTER HEADING AMENDMENTS.*—

1 (1) *CHAPTER HEADING IN CHAPTER.*—*The chap-*
2 *ter heading for chapter 74 of title 18, United States*
3 *Code, is amended by striking “**PARTIAL-BIRTH***
4 ***ABORTIONS**” and inserting “**ABORTIONS**”.*

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