

113TH CONGRESS  
1ST SESSION

# H. R. 1797

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

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 2013

Mr. FRANKS of Arizona (for himself, Mr. SMITH of New Jersey, Mr. SCALISE, Mr. GOSAR, Mr. SCHWEIKERT, Mr. SALMON, Mr. JONES, Mr. CONAWAY, Mr. CRAWFORD, Mr. NUNNELEE, Mr. CRAMER, Mr. KING of Iowa, Mr. FLEMING, Mr. GARRETT, Mr. ROE of Tennessee, Mr. CARTER, Mr. NEUGEBAUER, Mrs. ROBY, Mr. COLE, Mr. HUIZENGA of Michigan, Mr. HARPER, Mr. MASSIE, Mr. PEARCE, Mrs. BLACKBURN, Mr. BOUSTANY, Mrs. HARTZLER, Mr. BRIDENSTINE, Mr. KINGSTON, Mr. GUTHRIE, Mr. HOLDING, Mr. GRIFFIN of Arkansas, Mr. ROGERS of Alabama, Mr. ADERHOLT, Mr. AMASH, Mr. BUCHANAN, Mr. DUNCAN of South Carolina, Mr. SIMPSON, Mr. MARINO, Mr. CASSIDY, Mr. BRADY of Texas, Mr. DUNCAN of Tennessee, Mr. GOWDY, Mr. BACHUS, Mr. LATTA, Mrs. BLACK, Mrs. NOEM, Ms. ROS-LEHTINEN, Mr. YOUNG of Indiana, Mr. POMPEO, Mr. STOCKMAN, Mr. WILSON of South Carolina, Mr. ALEXANDER, Mr. HUELSKAMP, Mr. SHUSTER, Mr. STIVERS, Mr. BARR, Mr. GOHMERT, Mr. FINCHER, Mr. MULLIN, Mr. BROUN of Georgia, Mr. LIPINSKI, Mr. BENISHEK, Mr. ROSS, Mr. TIBERI, Mr. WESTMORELAND, Mr. ROTHFUS, Mr. PALAZZO, Mr. LONG, Mr. BONNER, Mr. PITTS, Mr. PRICE of Georgia, Mr. MCKINLEY, Mr. CALVERT, Mr. JORDAN, Mr. WALBERG, Mr. STEWART, Mr. YODER, Mr. HULTGREN, Mr. LANKFORD, Mr. OLSON, Mr. SMITH of Nebraska, Mr. DESANTIS, Mr. MEADOWS, Mr. ROKITA, Mr. HALL, Mr. NUGENT, Mr. MULVANEY, Mr. MILLER of Florida, Mrs. WAGNER, Mr. RODNEY DAVIS of Illinois, Mr. JOHNSON of Ohio, Mr. FORTENBERRY, Mr. SCHOCK, and Mr. POSEY) 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

# 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  
10 nerves link these receptors to the brain’s thalamus  
11 and subcortical plate by no later than 20 weeks after  
12 fertilization.

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

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.

1           (4) Subjection to such painful stimuli is associ-  
2           ated with long-term harmful neurodevelopmental ef-  
3           fects, such as altered pain sensitivity and, possibly,  
4           emotional, behavioral, and learning disabilities later  
5           in life.

6           (5) For the purposes of surgery on unborn chil-  
7           dren, fetal anesthesia is routinely administered and  
8           is associated with a decrease in stress hormones  
9           compared to their level when painful stimuli are ap-  
10          plied without such anesthesia.

11          (6) The position, asserted by some medical ex-  
12          perts, that the unborn child is incapable of experi-  
13          encing pain until a point later in pregnancy than 20  
14          weeks after fertilization predominately rests on the  
15          assumption that the ability to experience pain de-  
16          pends on the cerebral cortex and requires nerve con-  
17          nections between the thalamus and the cortex. How-  
18          ever, recent medical research and analysis, especially  
19          since 2007, provides strong evidence for the conclu-  
20          sion that a functioning cortex is not necessary to ex-  
21          perience pain.

22          (7) Substantial evidence indicates that children  
23          born missing the bulk of the cerebral cortex, those  
24          with hydranencephaly, nevertheless experience pain.

1           (8) In adult humans and in animals, stimula-  
2           tion or ablation of the cerebral cortex does not alter  
3           pain perception, while stimulation or ablation of the  
4           thalamus does.

5           (9) Substantial evidence indicates that struc-  
6           tures used for pain processing in early development  
7           differ from those of adults, using different neural  
8           elements available at specific times during develop-  
9           ment, such as the subcortical plate, to fulfill the role  
10          of pain processing.

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

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

24          (12) It is the purpose of the Congress to assert  
25          a compelling governmental interest in protecting the

1 lives of unborn children from the stage at which sub-  
2 stantial medical evidence indicates that they are ca-  
3 pable of feeling pain.

4 (13) The compelling governmental interest in  
5 protecting the lives of unborn children from the  
6 stage at which substantial medical evidence indicates  
7 that they are capable of feeling pain is intended to  
8 be separate from and independent of the compelling  
9 governmental interest in protecting the lives of un-  
10 born children from the stage of viability, and neither  
11 governmental interest is intended to replace the  
12 other.

13 (14) The District Council of the District of Co-  
14 lumbia, operating under authority delegated by Con-  
15 gress, repealed the entire District law limiting abor-  
16 tions, effective April 29, 2004, so that in the Dis-  
17 trict of Columbia, abortion is now legal, for any rea-  
18 son, until the moment of birth.

19 (15) Article I, section 8 of the Constitution of  
20 the United States of America provides that the Con-  
21 gress shall “exercise exclusive Legislation in all  
22 Cases whatsoever” over the District established as  
23 the seat of government of the United States, now  
24 known as the District of Columbia. The constitu-  
25 tional responsibility for the protection of pain-cap-

1 ble unborn children within the Federal District re-  
2 sides with the Congress.

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

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

8 **“§ 1532. District of Columbia pain-capable unborn**  
9 **child protection**

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

17 “(b) REQUIREMENTS FOR ABORTIONS.—

18 “(1) The physician performing or attempting  
19 the abortion shall first make a determination of the  
20 probable post-fertilization age of the unborn child or  
21 reasonably rely upon such a determination made by  
22 another physician. In making such a determination,  
23 the physician shall make such inquiries of the preg-  
24 nant woman and perform or cause to be performed  
25 such medical examinations and tests as a reasonably

1 prudent physician, knowledgeable about the case and  
2 the medical conditions involved, would consider nec-  
3 essary to make an accurate determination of post-  
4 fertilization age.

5 “(2)(A) Except as provided in subparagraph  
6 (B), the abortion shall not be performed or at-  
7 tempted, if the probable post-fertilization age, as de-  
8 termined under paragraph (1), of the unborn child  
9 is 20 weeks or greater.

10 “(B) Subject to subparagraph (C), subpara-  
11 graph (A) does not apply if, in reasonable medical  
12 judgment, the abortion is necessary to save the life  
13 of a pregnant woman whose life is endangered by a  
14 physical disorder, physical illness, or physical injury,  
15 including a life-endangering physical condition  
16 caused by or arising from the pregnancy itself, but  
17 not including psychological or emotional conditions.

18 “(C) Notwithstanding the definitions of ‘abor-  
19 tion’ and ‘attempt an abortion’ in this section, a  
20 physician terminating or attempting to terminate a  
21 pregnancy under the exception provided by subpara-  
22 graph (B) may do so only in the manner which, in  
23 reasonable medical judgment, provides the best op-  
24 portunity for the unborn child to survive, unless, in  
25 reasonable medical judgment, termination of the

1 pregnancy in that manner would pose a greater risk  
2 of—

3 “(i) the death of the pregnant woman; or

4 “(ii) the substantial and irreversible phys-  
5 ical impairment of a major bodily function, not  
6 including psychological or emotional conditions,  
7 of the pregnant woman;

8 than would other available methods.

9 “(c) CRIMINAL PENALTY.—Whoever violates sub-  
10 section (a) shall be fined under this title or imprisoned  
11 for not more than 2 years, or both.

12 “(d) BAR TO PROSECUTION.—A woman upon whom  
13 an abortion in violation of subsection (a) is performed or  
14 attempted may not be prosecuted under, or for a con-  
15 spiracy to violate, subsection (a), or for an offense under  
16 section 2, 3, or 4 based on such a violation.

17 “(e) CIVIL REMEDIES.—

18 “(1) CIVIL ACTION BY WOMAN ON WHOM THE  
19 ABORTION IS PERFORMED.—A woman upon whom  
20 an abortion has been performed or attempted in vio-  
21 lation of subsection (a), may in a civil action against  
22 any person who engaged in the violation obtain ap-  
23 propriate relief.

24 “(2) CIVIL ACTION BY RELATIVES.—The father  
25 of an unborn child who is the subject of an abortion

1 performed or attempted in violation of subsection  
2 (a), or a maternal grandparent of the unborn child  
3 if the pregnant woman is an unemancipated minor,  
4 may in a civil action against any person who en-  
5 gaged in the violation, obtain appropriate relief, un-  
6 less the pregnancy resulted from the plaintiff's  
7 criminal conduct or the plaintiff consented to the  
8 abortion.

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

11 “(A) objectively verifiable money damages  
12 for all injuries, psychological and physical, occa-  
13 sioned by the violation of this section;

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

16 “(C) punitive damages.

17 “(4) INJUNCTIVE RELIEF.—

18 “(A) IN GENERAL.—A qualified plaintiff  
19 may in a civil action obtain injunctive relief to  
20 prevent an abortion provider from performing  
21 or attempting further abortions in violation of  
22 this section.

23 “(B) DEFINITION.—In this paragraph the  
24 term ‘qualified plaintiff’ means—

1           “(i) a woman upon whom an abortion  
2           is performed or attempted in violation of  
3           this section;

4           “(ii) any person who is the spouse,  
5           parent, sibling or guardian of, or a current  
6           or former licensed health care provider of,  
7           that woman; or

8           “(iii) the United States Attorney for  
9           the District of Columbia.

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

14           “(6) ATTORNEYS FEES FOR DEFENDANT.—If a  
15           defendant in a civil action under this section prevails  
16           and the court finds that the plaintiff’s suit was friv-  
17           olous and brought in bad faith, the court shall also  
18           render judgment for a reasonable attorney’s fee in  
19           favor of the defendant against the plaintiff.

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

1       “(f) PROTECTION OF PRIVACY IN COURT PRO-  
2 CEEDINGS.—

3               “(1) IN GENERAL.—Except to the extent the  
4 Constitution or other similarly compelling reason re-  
5 quires, in every civil or criminal action under this  
6 section, the court shall make such orders as are nec-  
7 essary to protect the anonymity of any woman upon  
8 whom an abortion has been performed or attempted  
9 if she does not give her written consent to such dis-  
10 closure. Such orders may be made upon motion, but  
11 shall be made sua sponte if not otherwise sought by  
12 a party.

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

1           “(3) PSEUDONYM REQUIRED.—In the absence  
2 of written consent of the woman upon whom an  
3 abortion has been performed or attempted, any  
4 party, other than a public official, who brings an ac-  
5 tion under paragraphs (1), (2), or (4) of subsection  
6 (e) shall do so under a pseudonym.

7           “(4) LIMITATION.—This subsection shall not be  
8 construed to conceal the identity of the plaintiff or  
9 of witnesses from the defendant or from attorneys  
10 for the defendant.

11          “(g) REPORTING.—

12           “(1) DUTY TO REPORT.—Any physician who  
13 performs or attempts an abortion within the District  
14 of Columbia shall report that abortion to the rel-  
15 evant District of Columbia health agency (herein-  
16 after in this section referred to as the ‘health agen-  
17 cy’) on a schedule and in accordance with forms and  
18 regulations prescribed by the health agency.

19           “(2) CONTENTS OF REPORT.—The report shall  
20 include the following:

21           “(A) POST-FERTILIZATION AGE.—For the  
22 determination of probable postfertilization age  
23 of the unborn child, whether ultrasound was  
24 employed in making the determination, and the

1 week of probable post-fertilization age that was  
2 determined.

3 “(B) METHOD OF ABORTION.—Which of  
4 the following methods or combination of meth-  
5 ods was employed:

6 “(i) Dilation, dismemberment, and  
7 evacuation of fetal parts also known as ‘di-  
8 lation and evacuation’.

9 “(ii) Intra-amniotic instillation of sa-  
10 line, urea, or other substance (specify sub-  
11 stance) to kill the unborn child, followed by  
12 induction of labor.

13 “(iii) Intracardiac or other intra-fetal  
14 injection of digoxin, potassium chloride, or  
15 other substance (specify substance) in-  
16 tended to kill the unborn child, followed by  
17 induction of labor.

18 “(iv) Partial-birth abortion, as defined  
19 in section 1531.

20 “(v) Manual vacuum aspiration with-  
21 out other methods.

22 “(vi) Electrical vacuum aspiration  
23 without other methods.

1           “(vii) Abortion induced by use of  
2           mifepristone in combination with  
3           misoprostol.

4           “(viii) If none of the methods de-  
5           scribed in the other clauses of this sub-  
6           paragraph was employed, whatever method  
7           was employed.

8           “(C) AGE OF WOMAN.—The age or approx-  
9           imate age of the pregnant woman.

10           “(D) COMPLIANCE WITH REQUIREMENTS  
11           FOR EXCEPTION.—The facts relied upon and  
12           the basis for any determinations required to es-  
13           tablish compliance with the requirements for  
14           the exception provided by subsection (b)(2).

15           “(3) EXCLUSIONS FROM REPORTS.—

16           “(A) A report required under this sub-  
17           section shall not contain the name or the ad-  
18           dress of the woman whose pregnancy was ter-  
19           minated, nor shall the report contain any other  
20           information identifying the woman.

21           “(B) Such report shall contain a unique  
22           Medical Record Number, to enable matching  
23           the report to the woman’s medical records.

24           “(C) Such reports shall be maintained in  
25           strict confidence by the health agency, shall not

1 be available for public inspection, and shall not  
2 be made available except—

3 “(i) to the United States Attorney for  
4 the District of Columbia or that Attorney’s  
5 delegate for a criminal investigation or a  
6 civil investigation of conduct that may vio-  
7 late this section; or

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

10 “(4) PUBLIC REPORT.—Not later than June 30  
11 of each year beginning after the date of enactment  
12 of this paragraph, the health agency shall issue a  
13 public report providing statistics for the previous  
14 calendar year compiled from all of the reports made  
15 to the health agency under this subsection for that  
16 year for each of the items listed in paragraph (2).  
17 The report shall also provide the statistics for all  
18 previous calendar years during which this section  
19 was in effect, adjusted to reflect any additional in-  
20 formation from late or corrected reports. The health  
21 agency shall take care to ensure that none of the in-  
22 formation included in the public reports could rea-  
23 sonably lead to the identification of any pregnant  
24 woman upon whom an abortion was performed or at-  
25 tempted.

1 “(5) FAILURE TO SUBMIT REPORT.—

2 “(A) LATE FEE.—Any physician who fails  
3 to submit a report not later than 30 days after  
4 the date that report is due shall be subject to  
5 a late fee of \$1,000 for each additional 30-day  
6 period or portion of a 30-day period the report  
7 is overdue.

8 “(B) COURT ORDER TO COMPLY.—A court  
9 of competent jurisdiction may, in a civil action  
10 commenced by the health agency, direct any  
11 physician whose report under this subsection is  
12 still not filed as required, or is incomplete, more  
13 than 180 days after the date the report was  
14 due, to comply with the requirements of this  
15 section under penalty of civil contempt.

16 “(C) DISCIPLINARY ACTION.—Intentional  
17 or reckless failure by any physician to comply  
18 with any requirement of this subsection, other  
19 than late filing of a report, constitutes suffi-  
20 cient cause for any disciplinary sanction which  
21 the Health Professional Licensing Administra-  
22 tion of the District of Columbia determines is  
23 appropriate, including suspension or revocation  
24 of any license granted by the Administration.

1           “(6) FORMS AND REGULATIONS.—Not later  
2 than 90 days after the date of the enactment of this  
3 section, the health agency shall prescribe forms and  
4 regulations to assist in compliance with this sub-  
5 section.

6           “(7) EFFECTIVE DATE OF REQUIREMENT.—  
7 Paragraph (1) of this subsection takes effect with  
8 respect to all abortions performed on and after the  
9 first day of the first calendar month beginning after  
10 the effective date of such forms and regulations.

11          “(h) DEFINITIONS.—In this section the following  
12 definitions apply:

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

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

18                   “(B) to intentionally prematurely termi-  
19 nate the pregnancy of a woman known to be  
20 pregnant, with an intention other than to in-  
21 crease the probability of a live birth or of pre-  
22 serving the life or health of the child after live  
23 birth, or to remove a dead unborn child.

24           “(2) ATTEMPT AN ABORTION.—The term ‘at-  
25 tempt’, with respect to an abortion, means conduct

1 that, under the circumstances as the actor believes  
2 them to be, constitutes a substantial step in a course  
3 of conduct planned to culminate in performing an  
4 abortion in the District of Columbia.

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

8 “(4) HEALTH AGENCY.—The term ‘health  
9 agency’ means the Department of Health of the Dis-  
10 trict of Columbia or any successor agency respon-  
11 sible for the regulation of medical practice.

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

17 “(6) PHYSICIAN.—The term ‘physician’ means  
18 a person licensed to practice medicine and surgery  
19 or osteopathic medicine and surgery, or otherwise li-  
20 censed to legally perform an abortion.

21 “(7) POST-FERTILIZATION AGE.—The term  
22 ‘post-fertilization age’ means the age of the unborn  
23 child as calculated from the fusion of a human  
24 spermatozoon with a human ovum.

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

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

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

19           “(11) UNEMANCIPATED MINOR.—The term  
20 ‘unemancipated minor’ means a minor who is sub-  
21 ject to the control, authority, and supervision of a  
22 parent or guardian, as determined under the law of  
23 the State in which the minor resides.

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

4           (b) CLERICAL AMENDMENT.—The table of sections  
5           at the beginning of chapter 74 of title 18, United States  
6           Code, is amended by adding at the end the following new  
7           item:

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

8           (c) CHAPTER HEADING AMENDMENTS.—

9           (1) CHAPTER HEADING IN CHAPTER.—The  
10          chapter heading for chapter 74 of title 18, United  
11          States Code, is amended by striking “**PARTIAL-**  
12          **BIRTH ABORTIONS**” and inserting “**ABOR-**  
13          **TIONS**”.

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

○