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S. 886

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

IN THE SENATE OF THE UNITED STATES

MAY 7, 2013

Mr. LEE (for himself, Mr. BARRASSO, Mr. BLUNT, Mr. BOOZMAN, Mr. BURR, Mr. ENZI, Mr. CHAMBLISS, Mr. COATS, Mr. COCHRAN, Mr. COBURN, Mr. CORNYN, Mr. CRAPO, Mr. CRUZ, Mrs. FISCHER, Mr. GRAHAM, Mr. GRASSLEY, Mr. HATCH, Mr. INHOFE, Mr. JOHANNES, Mr. JOHNSON of Wisconsin, Mr. MCCONNELL, Mr. MORAN, Mr. PAUL, Mr. PORTMAN, Mr. RISCH, Mr. ROBERTS, Mr. RUBIO, Mr. SCOTT, Mr. SESSIONS, Mr. TOOMEY, Mr. VITTER, Mr. WICKER, and Ms. AYOTTE) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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”.

1 **SEC. 2. LEGISLATIVE FINDINGS.**

2 Congress finds and declares the following:

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

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

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

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

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

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

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

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

19 (9) Substantial evidence indicates that struc-
20 tures used for pain processing in early development
21 differ from those of adults, using different neural
22 elements available at specific times during develop-
23 ment, such as the subcortical plate, to fulfill the role
24 of pain processing.

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

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

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

19 (13) The compelling governmental interest in
20 protecting the lives of unborn children from the
21 stage at which substantial medical evidence indicates
22 that they are capable of feeling pain is intended to
23 be separate from and independent of the compelling
24 governmental interest in protecting the lives of un-
25 born children from the stage of viability, and neither

1 governmental interest is intended to replace the
2 other.

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

9 (15) Article I, section 8 of the Constitution of
10 the United States of America provides that the Con-
11 gress shall “exercise exclusive Legislation in all
12 Cases whatsoever” over the District established as
13 the Seat of Government of the United States, now
14 known as the District of Columbia. The constitu-
15 tional responsibility for the protection of pain-capable
16 unborn children within the Federal District re-
17 sides with the Congress.

18 **SEC. 3. DISTRICT OF COLUMBIA PAIN-CAPABLE UNBORN**

19 **CHILD PROTECTION.**

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

1 **“§ 1532. District of Columbia pain-capable unborn**
2 **child protection**

3 “(a) UNLAWFUL CONDUCT.—Notwithstanding any
4 other provision of law, including any legislation of the Dis-
5 trict of Columbia under authority delegated by Congress,
6 it shall be unlawful for any person to perform an abortion
7 within the District of Columbia, or attempt to do so, un-
8 less in conformity with the requirements set forth in sub-
9 section (b).

10 “(b) REQUIREMENTS FOR ABORTIONS.—

11 “(1) The physician performing or attempting
12 the abortion shall first make a determination of the
13 probable post-fertilization age of the unborn child or
14 reasonably rely upon such a determination made by
15 another physician. In making such a determination,
16 the physician shall make such inquiries of the preg-
17 nant woman and perform or cause to be performed
18 such medical examinations and tests as a reasonably
19 prudent physician, knowledgeable about the case and
20 the medical conditions involved, would consider nec-
21 essary to make an accurate determination of post-
22 fertilization age.

23 “(2)(A) Except as provided in subparagraph
24 (B), the abortion shall not be performed or at-
25 tempted, if the probable post-fertilization age, as de-

1 terminated under paragraph (1), of the unborn child
2 is 20 weeks or greater.

3 “(B) Subject to subparagraph (C), subpara-
4 graph (A) does not apply if, in reasonable medical
5 judgment, the abortion is necessary to save the life
6 of a pregnant woman whose life is endangered by a
7 physical disorder, physical illness, or physical injury,
8 including a life-endangering physical condition
9 caused by or arising from the pregnancy itself, but
10 not including psychological or emotional conditions.

11 “(C) Notwithstanding the definitions of ‘abor-
12 tion’ and ‘attempt an abortion’ in this section, a
13 physician terminating or attempting to terminate a
14 pregnancy under the exception provided by subpara-
15 graph (B) may do so only in the manner which, in
16 reasonable medical judgment, provides the best op-
17 portunity for the unborn child to survive, unless, in
18 reasonable medical judgment, termination of the
19 pregnancy in that manner would pose a greater risk
20 of—

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

22 “(ii) the substantial and irreversible phys-
23 ical impairment of a major bodily function, not
24 including psychological or emotional conditions,
25 of the pregnant woman;

1 than would other available methods.

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

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

10 “(e) CIVIL REMEDIES.—

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

17 “(2) CIVIL ACTION BY RELATIVES.—The father
18 of an unborn child who is the subject of an abortion
19 performed or attempted in violation of subsection
20 (a), or a maternal grandparent of the unborn child
21 if the pregnant woman is an unemancipated minor,
22 may in a civil action against any person who en-
23 gaged in the violation, obtain appropriate relief, un-
24 less the pregnancy resulted from the plaintiff’s

1 criminal conduct or the plaintiff consented to the
2 abortion.

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 of this section;

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

10 “(C) punitive damages.

11 “(4) INJUNCTIVE RELIEF.—

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

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

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

22 “(ii) any person who is the spouse,
23 parent, sibling or guardian of, or a current
24 or former licensed health care provider of,
25 that woman; or

1 “(iii) the United States Attorney for
2 the District of Columbia.

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

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

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

18 “(f) PROTECTION OF PRIVACY IN COURT PRO-
19 CEEDINGS.—

20 “(1) IN GENERAL.—Except to the extent the
21 Constitution or other similarly compelling reason re-
22 quires, in every civil or criminal action under this
23 section, the court shall make such orders as are nec-
24 essary to protect the anonymity of any woman upon
25 whom an abortion has been performed or attempted

1 if she does not give her written consent to such dis-
2 closure. Such orders may be made upon motion, but
3 shall be made sua sponte if not otherwise sought by
4 a party.

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

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

24 “(4) LIMITATION.—This subsection shall not be
25 construed to conceal the identity of the plaintiff or

1 of witnesses from the defendant or from attorneys
2 for the defendant.

3 “(g) REPORTING.—

4 “(1) DUTY TO REPORT.—Any physician who
5 performs or attempts an abortion within the District
6 of Columbia shall report that abortion to the rel-
7 evant District of Columbia health agency (herein-
8 after in this section referred to as the ‘health agen-
9 cy’) on a schedule and in accordance with forms and
10 regulations prescribed by the health agency.

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

13 “(A) POST-FERTILIZATION AGE.—For the
14 determination of probable post-fertilization age
15 of the unborn child, whether ultrasound was
16 employed in making the determination, and the
17 week of probable post-fertilization age that was
18 determined.

19 “(B) METHOD OF ABORTION.—Which of
20 the following methods or combination of meth-
21 ods was employed:

22 “(i) Dilation, dismemberment, and
23 evacuation of fetal parts also known as ‘di-
24 lation and evacuation’.

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

5 “(iii) Intracardiac or other intra-fetal
6 injection of digoxin, potassium chloride, or
7 other substance (specify substance) in-
8 tended to kill the unborn child, followed by
9 induction of labor.

10 “(iv) Partial-birth abortion, as defined
11 in section 1531.

12 “(v) Manual vacuum aspiration with-
13 out other methods.

14 “(vi) Electrical vacuum aspiration
15 without other methods.

16 “(vii) Abortion induced by use of
17 mifepristone in combination with
18 misoprostol.

19 “(viii) If none of the methods de-
20 scribed in the other clauses of this sub-
21 paragraph was employed, whatever method
22 was employed.

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

1 “(D) COMPLIANCE WITH REQUIREMENTS
2 FOR EXCEPTION.—The facts relied upon and
3 the basis for any determinations required to es-
4 tablish compliance with the requirements for
5 the exception provided by subsection (b)(2).

6 “(3) EXCLUSIONS FROM REPORTS.—

7 “(A) A report required under this sub-
8 section shall not contain the name or the ad-
9 dress of the woman whose pregnancy was ter-
10 minated, nor shall the report contain any other
11 information identifying the woman.

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

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

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

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

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

17 “(5) FAILURE TO SUBMIT REPORT.—

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

24 “(B) COURT ORDER TO COMPLY.—A court
25 of competent jurisdiction may, in a civil action

1 commenced by the health agency, direct any
2 physician whose report under this subsection is
3 still not filed as required, or is incomplete, more
4 than 180 days after the date the report was
5 due, to comply with the requirements of this
6 section under penalty of civil contempt.

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

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

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

1 “(h) DEFINITIONS.—In this section the following
2 definitions apply:

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

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

8 “(B) to intentionally prematurely termi-
9 nate the pregnancy of a woman known to be
10 pregnant, with an intention other than to in-
11 crease the probability of a live birth or of pre-
12 serving the life or health of the child after live
13 birth, or to remove a dead unborn child.

14 “(2) ATTEMPT AN ABORTION.—The term ‘at-
15 tempt’, with respect to an abortion, means conduct
16 that, under the circumstances as the actor believes
17 them to be, constitutes a substantial step in a course
18 of conduct planned to culminate in performing an
19 abortion in the District of Columbia.

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

23 “(4) HEALTH AGENCY.—The term ‘health
24 agency’ means the Department of Health of the Dis-

1 trict of Columbia or any successor agency respon-
2 sible for the regulation of medical practice.

3 “(5) PERFORM.—The term ‘perform’, with re-
4 spect to an abortion, includes inducing an abortion
5 through a medical or chemical intervention including
6 writing a prescription for a drug or device intended
7 to result in an abortion.

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

12 “(7) POST-FERTILIZATION AGE.—The term
13 ‘post-fertilization age’ means the age of the unborn
14 child as calculated from the fusion of a human
15 spermatozoon with a human ovum.

16 “(8) PROBABLE POST-FERTILIZATION AGE OF
17 THE UNBORN CHILD.—The term ‘probable post-fer-
18 tilization age of the unborn child’ means what, in
19 reasonable medical judgment, will with reasonable
20 probability be the post-fertilization age of the un-
21 born child at the time the abortion is planned to be
22 performed or induced.

23 “(9) REASONABLE MEDICAL JUDGMENT.—The
24 term ‘reasonable medical judgment’ means a medical
25 judgment that would be made by a reasonably pru-

1 dent physician, knowledgeable about the case and
2 the treatment possibilities with respect to the med-
3 ical conditions involved.

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

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

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

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

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

21 (c) CHAPTER HEADING AMENDMENTS.—

22 (1) CHAPTER HEADING IN CHAPTER.—The
23 chapter heading for chapter 74 of title 18, United
24 States Code, is amended by striking “Partial-Birth
25 Abortions” and inserting “Abortions”.

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

○