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. GOHMIERT, Mr. FLEMMING, Mr. WALBERG, Mr. HUELSKAMP, Mr. PITTTS, 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. HULTGREEN, Mr. BOUSTANY, Mr. ROGERS of Alabama, Mr. MANZULLO, Mr. ROSS of Florida, Mrs. HARTZLER, Mr. FORTENBERRY, Mr. HERGER, Mr. CANSECO, Mr. LANDFORD, Mrs. LUMMIS, Mr. AUSTIN SCOTT of Georgia, Mr. ROE of Tennessee, Mr. NUNNELEE, Mr. MARTIANT, Mr. HUZENGA 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.

A BILL

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

Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the “District of Columbia Pain-Capable Unborn Child Protection Act”.

SEC. 2. LEGISLATIVE FINDINGS.

Congress finds and declares the following:

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

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

(3) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and
is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than 20 weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

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

(8) In adult humans and in animals, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does.

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

(10) The position, asserted by some commentators, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from engaging in vigorous movement in reaction to invasive surgery.

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

(12) It is the purpose of the Congress to assert a compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

(13) The compelling governmental interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of the compelling
governmental interest in protecting the lives of unborn children from the stage of viability, and neither governmental interest is intended to replace the other.


(15) Article I, section 8 of the Constitution of the United States of America provides that the Congress shall “exercise exclusive Legislation in all Cases whatsoever” over the District established as the seat of government of the United States, now known as the District of Columbia. The constitutional responsibility for the protection of pain-capable unborn children within the Federal District resides with the Congress.

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

(a) In General.—Chapter 74 of title 18, United States Code, is amended by inserting after section 1531 the following:
§ 1532. District of Columbia pain-capable unborn child protection

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

“(b) REQUIREMENTS FOR ABORTIONS.—

“(1) The physician performing or attempting the abortion shall first make a determination of the probable post-fertilization age of the unborn child or reasonably rely upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the pregnant woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to make an accurate determination of post-fertilization age.

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

“(B) Subject to subparagraph (C), subparagraph (A) does not apply if, in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, but not including psychological or emotional conditions or any claim or diagnosis that the woman will engage in conduct which she intends to result in her death.

“(C) A physician terminating or attempting to terminate a pregnancy under the exception provided by subparagraph (B) may do so only in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk of—

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

“(ii) the substantial and irreversible physical impairment of a major bodily function, not
including psychological or emotional conditions, of the pregnant woman;

than would other available methods.

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

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

“(e) CIVIL REMEDIES.—

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

“(2) CIVIL ACTION BY RELATIVES.—The father of an unborn child who is the subject of an abortion performed or attempted in violation of subsection (a), or a maternal grandparent of the unborn child if the pregnant woman is an unemancipated minor, may in a civil action against any person who engaged in the violation, obtain appropriate relief, un-
less the pregnancy resulted from the plaintiff’s
criminal conduct or the plaintiff consented to the
abortion.

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

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

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

“(C) punitive damages.

“(4) INJUNCTIVE RELIEF.—

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

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

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

“(ii) any person who is the spouse,
parent, sibling or guardian of, or a current
or former licensed health care provider of, that woman; or
“(iii) the United States Attorney for the District of Columbia.
“(5) ATTORNEYS FEES FOR PLAINTIFF.—The court shall award a reasonable attorney’s fee as part of the costs to a prevailing plaintiff in a civil action under this subsection.
“(6) ATTORNEYS FEES FOR DEFENDANT.—If a defendant in a civil action under this section prevails and the court finds that the plaintiff’s suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney’s fee in favor of the defendant against the plaintiff.
“(7) AWARDS AGAINST WOMAN.—Except under paragraph (6), in a civil action under this subsection, no damages, attorney’s fee or other monetary relief may be assessed against the woman upon whom the abortion was performed or attempted.
“(f) PROTECTION OF PRIVACY IN COURT PROCEEDINGS.—
“(1) IN GENERAL.—Except to the extent the Constitution or other similarly compelling reason requires, in every civil or criminal action under this section, the court shall make such orders as are nec-
ecessary to protect the anonymity of any woman upon whom an abortion has been performed or attempted if she does not give her written consent to such disclosure. Such orders may be made upon motion, but shall be made sua sponte if not otherwise sought by a party.

“(2) Orders to Parties, Witnesses, and Counsel.—The court shall issue appropriate orders under paragraph (1) to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman must be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists.

“(3) Pseudonym Required.—In the absence of written consent of the woman upon whom an abortion has been performed or attempted, any party, other than a public official, who brings an action under paragraphs (1), (2), or (4) of subsection (e) shall do so under a pseudonym.
“(4) LIMITATION.—This subsection shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

“(g) REPORTING.—

“(1) DUTY TO REPORT.—Any physician who performs or attempts an abortion within the District of Columbia shall report that abortion to the relevant District of Columbia health agency (hereinafter in this section referred to as the ‘health agency’) on a schedule and in accordance with forms and regulations prescribed by the health agency.

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

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

“(B) METHOD OF ABORTION.—Which of the following methods or combination of methods was employed:
“(i) Dilation, dismemberment, and evacuation of fetal parts also known as ‘dilation and evacuation’.

“(ii) Intra-amniotic instillation of saline, urea, or other substance (specify substance) to kill the unborn child, followed by induction of labor.

“(iii) Intracardiac or other intra-fetal injection of digoxin, potassium chloride, or other substance (specify substance) intended to kill the unborn child, followed by induction of labor.

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

“(v) Manual vacuum aspiration without other methods.

“(vi) Electrical vacuum aspiration without other methods.

“(vii) Abortion induced by use of mifepristone in combination with misoprostol; or

“(viii) if none of the methods described in the other clauses of this subparagraph was employed, whatever method was employed.
“(C) AGE OF WOMAN.—The age or approximate age of the pregnant woman.

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

“(3) EXCLUSIONS FROM REPORTS.—

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

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

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

“(i) to the United States Attorney for the District of Columbia or that Attorney’s delegate for a criminal investigation or a civil investigation of conduct that may violate this section; or
“(ii) pursuant to court order in an action under subsection (e).

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

“(5) FAILURE TO SUBMIT REPORT.—

“(A) LATE FEE.—Any physician who fails to submit a report not later than 30 days after the date that report is due shall be subject to a late fee of $1,000 for each additional 30-day period or portion of a 30-day period the report is overdue.
“(B) Court order to comply.—A court of competent jurisdiction may, in a civil action commenced by the health agency, direct any physician whose report under this subsection is still not filed as required, or is incomplete, more than 180 days after the date the report was due, to comply with the requirements of this section under penalty of civil contempt.

“(C) Disciplinary action.—Intentional or reckless failure by any physician to comply with any requirement of this subsection, other than late filing of a report, constitutes sufficient cause for any disciplinary sanction which the Health Professional Licensing Administration of the District of Columbia determines is appropriate, including suspension or revocation of any license granted by the Administration.

“(6) Forms and regulations.—Not later than 90 days after the date of the enactment of this section, the health agency shall prescribe forms and regulations to assist in compliance with this subsection.

“(7) Effective date of requirement.—Paragraph (1) of this subsection takes effect with respect to all abortions performed on and after the
first day of the first calendar month beginning after
the effective date of such forms and regulations.

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

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

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

“(B) to otherwise intentionally terminate
the pregnancy of a woman known to be preg-
nant with an intention other than to increase
the probability of a live birth, to preserve the
life or health of the child after live birth, or to
remove a dead unborn child who died as the re-
sult of natural causes in utero, accidental trau-
ma, or a criminal assault on the pregnant
woman or her unborn child, and which causes
the premature termination of the pregnancy.

“(2) ATTEMPT AN ABORTION.—The term ‘at-
tempt’, with respect to an abortion, means conduct
that, under the circumstances as the actor believes
them to be, constitutes a substantial step in a course
of conduct planned to culminate in performing an
abortion in the District of Columbia.
“(3) **Fertilization.**—The term ‘fertilization’ means the fusion of human spermatozoon with a human ovum.

“(4) **Health Agency.**—The term ‘health agency’ means the Department of Health of the District of Columbia or any successor agency responsible for the regulation of medical practice.

“(5) **Perform.**—The term ‘perform’, with respect to an abortion, includes induce an abortion through a medical or chemical intervention including writing a prescription for a drug or device intended to result in an abortion.

“(6) **Physician.**—The term ‘physician’ means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise licensed to legally perform an abortion.

“(7) **Post-fertilization Age.**—The term ‘post-fertilization age’ means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

“(8) **Probable Post-fertilization Age of the Unborn Child.**—The term ‘probable post-fertilization age of the unborn child’ means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn
child at the time the abortion is planned to be performed or induced.

“(9) Reasonable Medical Judgment.—The term ‘reasonable medical judgment’ means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

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

“(11) Unemancipated Minor.—The term ‘unemancipated minor’ means a minor who is subject to the control, authority, and supervision of a parent or guardian, as determined under the law of the State in which the minor resides.

“(12) Woman.—The term ‘woman’ means a female human being whether or not she has reached the age of majority.”.

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

“1532. District of Columbia pain-capable unborn child protection.”.
(c) Chapter Heading Amendments.—

(1) Chapter heading in chapter.—The chapter heading for chapter 74 of title 18, United States Code, is amended by striking “PARTIAL BIRTH ABORTIONS” and inserting “ABORTIONS”.

(2) Table of chapters for part I.—The item relating to chapter 74 in the table of chapters at the beginning of part I of title 18, United States Code, is amended by striking “PARTIAL BIRTH ABORTIONS” and inserting “ABORTIONS”.

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