

112TH CONGRESS
2^D SESSION

S. 2103

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

FEBRUARY 13, 2012

Mr. LEE 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”.

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

1 and subcortical plate by no later than 20 weeks after
2 fertilization.

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

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

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

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

22 (6) The position, asserted by some medical ex-
23 perts, that the unborn child is incapable of experi-
24 encing pain until a point later in pregnancy than 20
25 weeks after fertilization predominately rests on the

1 assumption that the ability to experience pain de-
2 pends on the cerebral cortex and requires nerve con-
3 nections between the thalamus and the cortex. How-
4 ever, recent medical research and analysis, especially
5 since 2007, provides strong evidence for the conclu-
6 sion that a functioning cortex is not necessary to ex-
7 perience pain.

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

11 (8) In adult humans and in animals, stimula-
12 tion or ablation of the cerebral cortex does not alter
13 pain perception, while stimulation or ablation of the
14 thalamus does.

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

21 (10) The position, asserted by some commenta-
22 tors, that the unborn child remains in a coma-like
23 sleep state that precludes the unborn child experi-
24 encing pain is inconsistent with the documented re-
25 action of unborn children to painful stimuli and with

1 the experience of fetal surgeons who have found it
2 necessary to sedate the unborn child with anesthesia
3 to prevent the unborn child from engaging in vig-
4 orous movement in reaction to invasive surgery.

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

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

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

23 (14) The District Council of the District of Co-
24 lumbia, operating under authority delegated by Con-

1 gress, repealed all limitations on abortion at any
2 stage of pregnancy, effective April 29, 2004.

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

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

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

17 **“§ 1532. District of Columbia pain-capable unborn**
18 **child protection**

19 “(a) UNLAWFUL CONDUCT.—Notwithstanding any
20 other provision of law, including any legislation of the Dis-
21 trict of Columbia under authority delegated by Congress,
22 it shall be unlawful for any person to perform an abortion
23 within the District of Columbia, or attempt to do so, un-
24 less in conformity with the requirements set forth in sub-
25 section (b).

1 “(b) REQUIREMENTS FOR ABORTIONS.—

2 “(1) The physician performing or attempting
3 the abortion shall first make a determination of the
4 probable post-fertilization age of the unborn child or
5 reasonably rely upon such a determination made by
6 another physician. In making such a determination,
7 the physician shall make such inquiries of the preg-
8 nant woman and perform or cause to be performed
9 such medical examinations and tests as a reasonably
10 prudent physician, knowledgeable about the case and
11 the medical conditions involved, would consider nec-
12 essary to make an accurate determination of post-
13 fertilization age.

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

19 “(B) Subject to subparagraph (C), subpara-
20 graph (A) does not apply if, in reasonable medical
21 judgment, the abortion is necessary to save the life
22 of a pregnant woman whose life is endangered by a
23 physical disorder, physical illness, or physical injury,
24 including a life-endangering physical condition
25 caused by or arising from the pregnancy itself, but

1 not including psychological or emotional conditions
2 or any claim or diagnosis that the woman will en-
3 gage in conduct which she intends to result in her
4 death.

5 “(C) A physician terminating or attempting to
6 terminate a pregnancy under the exception provided
7 by subparagraph (B) may do so only in the manner
8 which, in reasonable medical judgment, provides the
9 best opportunity for the unborn child to survive, un-
10 less, in reasonable medical judgment, termination of
11 the pregnancy in that manner would pose a greater
12 risk of—

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

14 “(ii) the substantial and irreversible phys-
15 ical impairment of a major bodily function, not
16 including psychological or emotional conditions,
17 of the pregnant woman;

18 than would other available methods.

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

22 “(d) BAR TO PROSECUTION.—A woman upon whom
23 an abortion in violation of subsection (a) is performed or
24 attempted may not be prosecuted under, or for a con-

1 spiracy to violate, subsection (a), or for an offense under
2 section 2, 3, or 4 based on such a violation.

3 “(e) CIVIL REMEDIES.—

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

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

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

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

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

3 “(C) punitive damages.

4 “(4) INJUNCTIVE RELIEF.—

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

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

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

15 “(ii) any person who is the spouse,
16 parent, sibling or guardian of, or a current
17 or former licensed health care provider of,
18 that woman; or

19 “(iii) the United States Attorney for
20 the District of Columbia.

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

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

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

12 “(f) PROTECTION OF PRIVACY IN COURT PRO-
13 CEEDINGS.—

14 “(1) IN GENERAL.—Except to the extent the
15 Constitution or other similarly compelling reason re-
16 quires, in every civil or criminal action under this
17 section, the court shall make such orders as are nec-
18 essary to protect the anonymity of any woman upon
19 whom an abortion has been performed or attempted
20 if she does not give her written consent to such dis-
21 closure. Such orders may be made upon motion, but
22 shall be made sua sponte if not otherwise sought by
23 a party.

24 “(2) ORDERS TO PARTIES, WITNESSES, AND
25 COUNSEL.—The court shall issue appropriate orders

1 under paragraph (1) to the parties, witnesses, and
2 counsel and shall direct the sealing of the record and
3 exclusion of individuals from courtrooms or hearing
4 rooms to the extent necessary to safeguard her iden-
5 tity from public disclosure. Each such order shall be
6 accompanied by specific written findings explaining
7 why the anonymity of the woman must be preserved
8 from public disclosure, why the order is essential to
9 that end, how the order is narrowly tailored to serve
10 that interest, and why no reasonable less restrictive
11 alternative exists.

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

18 “(4) LIMITATION.—This subsection shall not be
19 construed to conceal the identity of the plaintiff or
20 of witnesses from the defendant or from attorneys
21 for the defendant.

22 “(g) REPORTING.—

23 “(1) DUTY TO REPORT.—Any physician who
24 performs or attempts an abortion within the District
25 of Columbia shall report that abortion to the rel-

1 evant District of Columbia health agency (herein-
2 after in this section referred to as the ‘health agen-
3 cy’) on a schedule and in accordance with forms and
4 regulations prescribed by the health agency.

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

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

13 “(B) METHOD OF ABORTION.—Which of
14 the following methods or combination of meth-
15 ods was employed:

16 “(i) Dilation, dismemberment, and
17 evacuation of fetal parts also known as ‘di-
18 lation and evacuation’.

19 “(ii) Intra-amniotic instillation of sa-
20 line, urea, or other substance (specify sub-
21 stance) to kill the unborn child, followed by
22 induction of labor.

23 “(iii) Intracardiac or other intra-fetal
24 injection of digoxin, potassium chloride, or
25 other substance (specify substance) in-

1 tended to kill the unborn child, followed by
2 induction of labor.

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

5 “(v) Manual vacuum aspiration with-
6 out other methods.

7 “(vi) Electrical vacuum aspiration
8 without other methods.

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

12 “(viii) if none of the methods de-
13 scribed in the other clauses of this sub-
14 paragraph was employed, whatever method
15 was employed.

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

18 “(D) COMPLIANCE WITH REQUIREMENTS
19 FOR EXCEPTION.—The facts relied upon and
20 the basis for any determinations required to es-
21 tablish compliance with the requirements for
22 the exception provided by subsection (b)(2).

23 “(3) EXCLUSIONS FROM REPORTS.—

24 “(A) A report required under this sub-
25 section shall not contain the name or the ad-

1 dress of the woman whose pregnancy was ter-
2 minated, nor shall the report contain any other
3 information identifying the woman.

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

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

11 “(i) to the United States Attorney for
12 the District of Columbia or that Attorney’s
13 delegate for a criminal investigation or a
14 civil investigation of conduct that may vio-
15 late this section; or

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

18 “(4) PUBLIC REPORT.—Not later than June 30
19 of each year beginning after the date of enactment
20 of this paragraph, the health agency shall issue a
21 public report providing statistics for the previous
22 calendar year compiled from all of the reports made
23 to the health agency under this subsection for that
24 year for each of the items listed in paragraph (2).
25 The report shall also provide the statistics for all

1 previous calendar years during which this section
2 was in effect, adjusted to reflect any additional in-
3 formation from late or corrected reports. The health
4 agency shall take care to ensure that none of the in-
5 formation included in the public reports could rea-
6 sonably lead to the identification of any pregnant
7 woman upon whom an abortion was performed or at-
8 tempted.

9 “(5) FAILURE TO SUBMIT REPORT.—

10 “(A) LATE FEE.—Any physician who fails
11 to submit a report not later than 30 days after
12 the date that report is due shall be subject to
13 a late fee of \$1,000 for each additional 30-day
14 period or portion of a 30-day period the report
15 is overdue.

16 “(B) COURT ORDER TO COMPLY.—A court
17 of competent jurisdiction may, in a civil action
18 commenced by the health agency, direct any
19 physician whose report under this subsection is
20 still not filed as required, or is incomplete, more
21 than 180 days after the date the report was
22 due, to comply with the requirements of this
23 section under penalty of civil contempt.

24 “(C) DISCIPLINARY ACTION.—Intentional
25 or reckless failure by any physician to comply

1 with any requirement of this subsection, other
2 than late filing of a report, constitutes suffi-
3 cient cause for any disciplinary sanction which
4 the Health Professional Licensing Administra-
5 tion of the District of Columbia determines is
6 appropriate, including suspension or revocation
7 of any license granted by the Administration.

8 “(6) FORMS AND REGULATIONS.—Not later
9 than 90 days after the date of the enactment of this
10 section, the health agency shall prescribe forms and
11 regulations to assist in compliance with this sub-
12 section.

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

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

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

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

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

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

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

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

24 “(5) PERFORM.—The term ‘perform’, with re-
25 spect to an abortion, includes induce an abortion

1 through a medical or chemical intervention including
2 writing a prescription for a drug or device intended
3 to result in an abortion.

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

8 “(7) POST-FERTILIZATION AGE.—The term
9 ‘post-fertilization age’ means the age of the unborn
10 child as calculated from the fusion of a human
11 spermatozoon with a human ovum.

12 “(8) PROBABLE POST-FERTILIZATION AGE OF
13 THE UNBORN CHILD.—The term ‘probable post-fer-
14 tilization age of the unborn child’ means what, in
15 reasonable medical judgment, will with reasonable
16 probability be the postfertilization age of the unborn
17 child at the time the abortion is planned to be per-
18 formed or induced.

19 “(9) REASONABLE MEDICAL JUDGMENT.—The
20 term ‘reasonable medical judgment’ means a medical
21 judgment that would be made by a reasonably pru-
22 dent physician, knowledgeable about the case and
23 the treatment possibilities with respect to the med-
24 ical conditions involved.

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

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

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

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

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

18 (c) CHAPTER HEADING AMENDMENTS.—

19 (1) CHAPTER HEADING IN CHAPTER.—The
20 chapter heading for chapter 74 of title 18, United
21 States Code, is amended by striking “**PARTIAL**
22 **BIRTH ABORTIONS**” and inserting “**ABOR-**
23 **TIONS**”.

24 (2) TABLE OF CHAPTERS FOR PART I.—The
25 item relating to chapter 74 in the table of chapters

1 at the beginning of part I of title 18, United States
2 Code, is amended by striking “**PARTIAL BIRTH**
3 **ABORTIONS**” and inserting “**ABORTIONS**”.

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