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S. 138

To prohibit discrimination against the unborn on the basis of sex or gender, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 24 (legislative day, JANUARY 3), 2013

Mr. VITTER (for himself, Mr. COATS, Mr. BOOZMAN, Mr. RISCH, Mr. ENZI, Mr. COBURN, Mr. CHAMBLISS, and Mr. JOHANNS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To prohibit discrimination against the unborn on the basis of sex or gender, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Prenatal Non-discrimination Act (PRENDA) of 2013".

SEC. 2. FINDINGS AND CONSTITUTIONAL AUTHORITY.

(a) FINDINGS.—The Congress makes the following findings:

(1) Women are a vital part of American society and culture and possess the same fundamental human rights and civil rights as men.

(2) United States law prohibits the dissimilar treatment of males and females who are similarly situated and prohibits sex discrimination in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics.

(3) Sex is an immutable characteristic ascertainable at the earliest stages of human development through existing medical technology and procedures commonly in use, including maternal-fetal bloodstream DNA sampling, amniocentesis, chorionic villus sampling or ''CVS'', and obstetric ultrasound. In addition to medically assisted sex determination, a growing sex determination niche industry has developed and is marketing low-cost commercial products, widely advertised and available, that aid in the sex determination of an unborn child without the aid of medical professionals. Experts have demonstrated that the sex-selection industry is on the rise and predict that it will continue to be a growing trend in the United States. Sex determination is always a

necessary step to the procurement of a sex-selection abortion.

(4) A ''sex-selection abortion'' is an abortion undertaken for purposes of eliminating an unborn child based on the sex or gender of the child. Sex-selection abortion is barbaric, and described by scholars and civil rights advocates as an act of sex-based or gender-based violence, predicated on sex discrimination. Sex-selection abortions are typically late-term abortions performed in the 2nd or 3rd trimester of pregnancy, after the unborn child has developed sufficiently to feel pain. Substantial medical evidence proves that an unborn child can experience pain at 20 weeks after conception, and perhaps substantially earlier. By definition, sex-selection abortions do not implicate the health of the mother of the unborn, but instead are elective procedures motivated by sex or gender bias.

(5) The targeted victims of sex-selection abortions performed in the United States and worldwide are overwhelmingly female. The selective abortion of females is female infanticide, the intentional killing of unborn females, due to the preference for male offspring or ''son preference''. Son preference is reinforced by the low value associated, by some seg-

ments of the world community, with female offspring. Those segments tend to regard female offspring as financial burdens to a family over their lifetime due to their perceived inability to earn or provide financially for the family unit as can a male. In addition, due to social and legal convention, female offspring are less likely to carry on the family name. ''Son preference'' is one of the most evident manifestations of sex or gender discrimination in any society, undermining female equality, and fueling the elimination of females' right to exist in instances of sex-selection abortion.

(6) Sex-selection abortions are not expressly prohibited by United States law or the laws of 47 States. Sex-selection abortions are performed in the United States. In a March 2008 report published in the Proceedings of the National Academy of Sciences, Columbia University economists Douglas Almond and Lena Edlund examined the sex ratio of United States-born children and found ''evidence of sex selection, most likely at the prenatal stage''. The data revealed obvious ''son preference'' in the form of unnatural sex-ratio imbalances within certain segments of the United States population, primarily those segments tracing their ethnic or cultural ori-

gins to countries where sex-selection abortion is prevalent. The evidence strongly suggests that some Americans are exercising sex-selection abortion practices within the United States consistent with discriminatory practices common to their country of origin, or the country to which they trace their ancestry. While sex-selection abortions are more common outside the United States, the evidence reveals that female feticide is also occurring in the United States.

(7) The American public supports a prohibition of sex-selection abortion. In a March 2006 Zogby International poll, 86 percent of Americans agreed that sex-selection abortion should be illegal, yet only 3 States proscribe sex-selection abortion.

(8) Despite the failure of the United States to proscribe sex-selection abortion, the United States Congress has expressed repeatedly, through Congressional resolution, strong condemnation of policies promoting sex-selection abortion in the ''Communist Government of China''. Likewise, at the 2007 United Nation's Annual Meeting of the Commission on the Status of Women, 51st Session, the United States delegation spearheaded a resolution calling on countries to condemn sex-selective abor-

tion, a policy directly contradictory to the permissiveness of current United States law, which places no restriction on the practice of sex-selection abortion. The United Nations Commission on the Status of Women has urged governments of all nations ''to take necessary measures to prevent . . . prenatal sex selection''.

(9) A 1990 report by Harvard University economist Amartya Sen, estimated that more than 100 million women were ''demographically missing'' from the world as early as 1990 due to sexist practices, including sex-selection abortion. Many experts believe sex-selection abortion is the primary cause. Current estimates of women missing from the world range in the hundreds of millions.

(10) Countries with longstanding experience with sex-selection abortion—such as the Republic of India, the United Kingdom, and the People's Republic of China—have enacted restrictions on sex-selection, and have steadily continued to strengthen prohibitions and penalties. The United States, by contrast, has no law in place to restrict sex-selection abortion, establishing the United States as affording less protection from sex-based feticide than the Republic of India or the People's Republic of China,

whose recent practices of sex-selection abortion were vehemently and repeatedly condemned by United States congressional resolutions and by the United States Ambassador to the Commission on the Status of Women. Public statements from within the medical community reveal that citizens of other countries come to the United States for sex-selection procedures that would be criminal in their country of origin. Because the United States permits abortion on the basis of sex, the United States may effectively function as a ''safe haven'' for those who seek to have American physicians do what would otherwise be criminal in their home countries—a sex-selection abortion, most likely late-term.

(11) The American medical community opposes sex-selection. The American Congress of Obstetricians and Gynecologists, commonly known as ''ACOG'', stated in its 2007 Ethics Committee Opinion, Number 360, that sex-selection is inappropriate because it ''ultimately supports sexist practices''. The American Society of Reproductive Medicine (commonly known as ''ASRM'') 2004 Ethics Committee Opinion on sex-selection notes that central to the controversy of sex-selection is the potential for ''inherent gender discrimination'', . . . the ''risk of

psychological harm to sex-selected offspring (i.e., by placing on them expectations that are too high)'', . . . and ''reinforcement of gender bias in society as a whole''. Embryo sex-selection, ASRM notes, remains ''vulnerable to the judgment that no matter what its basis, [the method] identifies gender as a reason to value one person over another, and it supports socially constructed stereotypes of what gender means''. In doing so, it not only ''reinforces possibilities of unfair discrimination, but may trivialize human reproduction by making it depend on the selection of nonessential features of offspring''. The ASRM ethics opinion continues, ''ongoing problems with the status of women in the United States make it necessary to take account of concerns for the impact of sex-selection on goals of gender equality''. The American Association of Pro-Life Obstetricians and Gynecologists, an organization with hundreds of members—many of whom are former abortionists—makes the following declaration: ''Sex selection abortions are more graphic examples of the damage that abortion inflicts on women. In addition to increasing premature labor in subsequent pregnancies, increasing suicide and major depression, and increasing the risk of breast cancer in teens who abort their first

pregnancy and delay childbearing, sex selection abortions are often targeted at fetuses simply because the fetus is female. As physicians who care for both the mother and her unborn child, the American Association of Pro-Life Obstetricians and Gynecologists vigorously opposes aborting fetuses because of their gender.''. The President's Council on Bioethics published a Working Paper stating the council's belief that society's respect for reproductive freedom does not prohibit the regulation or prohibition of ''sex control'', defined as the use of various medical technologies to choose the sex of one's child. The publication expresses concern that ''sex control might lead to . . . dehumanization and a new eugenics''.

(12) Sex-selection abortion results in an unnatural sex-ratio imbalance. An unnatural sex-ratio imbalance is undesirable, due to the inability of the numerically predominant sex to find mates. Experts worldwide document that a significant sex-ratio imbalance in which males numerically predominate can be a cause of increased violence and militancy within a society. Likewise, an unnatural sex-ratio imbalance gives rise to the commoditization of humans in the form of human trafficking, and a consequent increase in kidnapping and other violent crime.

(13) Sex-selection abortions have the effect of diminishing the representation of women in the American population, and therefore, the American electorate.

(14) Sex-selection abortion reinforces sex discrimination and has no place in a civilized society.

(15) The history of the United States includes examples of sex discrimination. The people of the United States ultimately responded in the strongest possible legal terms by enacting a constitutional amendment correcting elements of such discrimination. Women, once subjected to sex discrimination that denied them the right to vote, now have suffrage guaranteed by the 19th amendment. The elimination of discriminatory practices has been and is among the highest priorities and greatest achievements of American history.

(16) Implicitly approving the discriminatory practice of sex-selection abortion by choosing not to prohibit them will reinforce these inherently discriminatory practices, and evidence a failure to protect a segment of certain unborn Americans because those unborn are of a sex that is disfavored. Sex-selection abortions trivialize the value of the unborn on the basis of sex, reinforcing sex discrimination, and

coarsening society to the humanity of all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit sex-selection abortion.

(b) CONSTITUTIONAL AUTHORITY.—In accordance with the above findings, Congress enacts the following pursuant to Congress' power under—

(1) the Commerce Clause;

(2) section 5 of the 14th amendment, including the power to enforce the prohibition on Government action denying equal protection of the laws; and

(3) section 8 of article I to make all laws necessary and proper for the carrying into execution of powers vested by the Constitution in the Government of the United States.

SEC. 3. DISCRIMINATION AGAINST THE UNBORN ON THE BASIS OF SEX.

(a) IN GENERAL.—Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"§ 250. Discrimination against the unborn on the basis of sex

''(a) IN GENERAL.—Whoever knowingly—

"(1) performs an abortion knowing that such abortion is sought based on the sex or gender of the child;

"(2) uses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection abortion;

"(3) solicits or accepts funds for the performance of a sex-selection abortion; or

"(4) transports a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion;

or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) CIVIL REMEDIES.—

"(1) CIVIL ACTION BY WOMAN ON WHOM ABORTION IS PERFORMED.—A woman upon whom an abortion has been performed pursuant to a violation of subsection (a)(2) may in a civil action against any person who engaged in a violation of subsection (a) 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, unless 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, including loss of companionship and support, occasioned by the violation of this section; and

"(B) 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 or parent of a woman upon whom an abortion is performed in violation of this section; or

"(iii) the Attorney General.

"(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.

"(c) LOSS OF FEDERAL FUNDING.—A violation of subsection (a) shall be deemed for the purposes of title VI of the Civil Rights Act of 1964 to be discrimination prohibited by section 601 of that Act.

"(d) REPORTING REQUIREMENT.—A physician, physician's assistant, nurse, counselor, or other medical or mental health professional shall report known or suspected violations of any of this section to appropriate law enforcement authorities. Whoever violates this requirement shall be fined under this title or imprisoned not more than 1 year, or both.

"(e) EXPEDITED CONSIDERATION.—It shall be the duty of the United States district courts, United States courts of appeal, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this section.

"(f) EXCEPTION.—A woman upon whom a sex-selection abortion is performed may not be prosecuted or held civilly liable for any violation of this section, or for a conspiracy to violate this section.

"(g) 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 necessary 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 this section 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.

"(h) DEFINITIONS.—

"(1) The term 'abortion' means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child, unless the act is done with the intent to—

"(A) save the life or preserve the health of the unborn child;

"(B) remove a dead unborn child caused by spontaneous abortion; or

"(C) remove an ectopic pregnancy.

"(2) The term 'sex-selection abortion' is an abortion undertaken for purposes of eliminating an unborn child based on the sex or gender of the child.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 13 of title 18, United States Code, is amended by adding after the item relating to section 249 the following new item:

"250. Discrimination against the unborn on the basis of sex.".

SEC. 4. SEVERABILITY.

If any portion of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the portions or applications of this Act which can be given effect without the invalid portion or application.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to require that a healthcare provider has an affirmative duty to inquire as to the motivation for the abortion, absent the healthcare provider having knowledge or information that the abortion is being sought based on the sex or gender of the child.

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