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S. 3290

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

IN THE SENATE OF THE UNITED STATES

JUNE 13, 2012

Mr. VITTER (for himself, Mr. DEMINT, Ms. AYOTTE, Mr. COBURN, Mr. SESSIONS, Mr. LEE, Mr. CORNYN, Mr. RISCH, Mr. JOHNSON of Wisconsin, Mr. CHAMBLISS, Mr. ISAKSON, Mr. JOHANNES, Mr. INHOFE, Mrs. HUTCHISON, Mr. ROBERTS, Mr. COCHRAN, Mr. HOEVEN, Mr. WICKER, Mr. COATS, Mr. ENZI, Mr. GRAHAM, Mr. BOOZMAN, Mr. THUNE, Mr. BARRASSO, Mr. CRAPO, and Mr. MCCONNELL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit discrimination against the unborn on the basis
of sex or gender, 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 “Prenatal Non-
5 discrimination Act (PRENDA) of 2012”.

6 **SEC. 2. FINDINGS AND CONSTITUTIONAL AUTHORITY.**

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

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

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

10 (3) Sex is an immutable characteristic ascer-
11 tainable at the earliest stages of human development
12 through existing medical technology and procedures
13 commonly in use, including maternal-fetal blood-
14 stream DNA sampling, amniocentesis, chorionic
15 villus sampling or “CVS”, and obstetric ultrasound.
16 In addition to medically assisted sex determination,
17 a growing sex determination niche industry has de-
18 veloped and is marketing low-cost commercial prod-
19 ucts, widely advertised and available, that aid in the
20 sex determination of an unborn child without the aid
21 of medical professionals. Experts have demonstrated
22 that the sex-selection industry is on the rise and pre-
23 dict that it will continue to be a growing trend in
24 the United States. Sex determination is always a

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

3 (4) A “sex-selection abortion” is an abortion
4 undertaken for purposes of eliminating an unborn
5 child based on the sex or gender of the child. Sex-
6 selection abortion is barbaric, and described by
7 scholars and civil rights advocates as an act of sex-
8 based or gender-based violence, predicated on sex
9 discrimination. Sex-selection abortions are typically
10 late-term abortions performed in the 2nd or 3rd tri-
11 mester of pregnancy, after the unborn child has de-
12 veloped sufficiently to feel pain. Substantial medical
13 evidence proves that an unborn child can experience
14 pain at 20 weeks after conception, and perhaps sub-
15 stantially earlier. By definition, sex-selection abor-
16 tions do not implicate the health of the mother of
17 the unborn, but instead are elective procedures moti-
18 vated by sex or gender bias.

19 (5) The targeted victims of sex-selection abor-
20 tions performed in the United States and worldwide
21 are overwhelmingly female. The selective abortion of
22 females is female infanticide, the intentional killing
23 of unborn females, due to the preference for male
24 offspring or “son preference”. Son preference is re-
25 inforced by the low value associated, by some seg-

1 ments of the world community, with female off-
2 spring. Those segments tend to regard female off-
3 spring as financial burdens to a family over their
4 lifetime due to their perceived inability to earn or
5 provide financially for the family unit as can a male.
6 In addition, due to social and legal convention, fe-
7 male offspring are less likely to carry on the family
8 name. “Son preference” is one of the most evident
9 manifestations of sex or gender discrimination in
10 any society, undermining female equality, and fuel-
11 ing the elimination of females’ right to exist in in-
12 stances of sex-selection abortion.

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

1 gins to countries where sex-selection abortion is
2 prevalent. The evidence strongly suggests that some
3 Americans are exercising sex-selection abortion prac-
4 tices within the United States consistent with dis-
5 criminatory practices common to their country of or-
6 igin, or the country to which they trace their ances-
7 try. While sex-selection abortions are more common
8 outside the United States, the evidence reveals that
9 female feticide is also occurring in the United
10 States.

11 (7) The American public supports a prohibition
12 of sex-selection abortion. In a March 2006 Zogby
13 International poll, 86 percent of Americans agreed
14 that sex-selection abortion should be illegal, yet only
15 3 States proscribe sex-selection abortion.

16 (8) Despite the failure of the United States to
17 proscribe sex-selection abortion, the United States
18 Congress has expressed repeatedly, through Con-
19 gressional resolution, strong condemnation of poli-
20 cies promoting sex-selection abortion in the “Com-
21 munist Government of China”. Likewise, at the
22 2007 United Nation’s Annual Meeting of the Com-
23 mission on the Status of Women, 51st Session, the
24 United States delegation spearheaded a resolution
25 calling on countries to condemn sex-selective abor-

1 tion, a policy directly contradictory to the permis-
2 siveness of current United States law, which places
3 no restriction on the practice of sex-selection abor-
4 tion. The United Nations Commission on the Status
5 of Women has urged governments of all nations “to
6 take necessary measures to prevent . . . prenatal
7 sex selection”.

8 (9) A 1990 report by Harvard University econ-
9 omist Amartya Sen, estimated that more than 100
10 million women were “demographically missing” from
11 the world as early as 1990 due to sexist practices,
12 including sex-selection abortion. Many experts be-
13 lieve sex-selection abortion is the primary cause.
14 Current estimates of women missing from the world
15 range in the hundreds of millions.

16 (10) Countries with longstanding experience
17 with sex-selection abortion—such as the Republic of
18 India, the United Kingdom, and the People’s Repub-
19 lic of China—have enacted restrictions on sex-selec-
20 tion, and have steadily continued to strengthen pro-
21 hibitions and penalties. The United States, by con-
22 trast, has no law in place to restrict sex-selection
23 abortion, establishing the United States as affording
24 less protection from sex-based feticide than the Re-
25 public of India or the People’s Republic of China,

1 whose recent practices of sex-selection abortion were
2 vehemently and repeatedly condemned by United
3 States congressional resolutions and by the United
4 States Ambassador to the Commission on the Status
5 of Women. Public statements from within the med-
6 ical community reveal that citizens of other countries
7 come to the United States for sex-selection proce-
8 dures that would be criminal in their country of ori-
9 gin. Because the United States permits abortion on
10 the basis of sex, the United States may effectively
11 function as a “safe haven” for those who seek to
12 have American physicians do what would otherwise
13 be criminal in their home countries—a sex-selection
14 abortion, most likely late-term.

15 (11) The American medical community opposes
16 sex-selection. The American Congress of Obstetri-
17 cians and Gynecologists, commonly known as
18 “ACOG”, stated in its 2007 Ethics Committee Opin-
19 ion, Number 360, that sex-selection is inappropriate
20 because it “ultimately supports sexist practices.”
21 The American Society of Reproductive Medicine
22 (commonly known as “ASRM”) 2004 Ethics Com-
23 mittee Opinion on sex-selection notes that central to
24 the controversy of sex-selection is the potential for
25 “inherent gender discrimination”, . . . the “risk of

1 psychological harm to sex-selected offspring (i.e., by
2 placing on them expectations that are too
3 high),” . . . and “reinforcement of gender bias in
4 society as a whole.” Embryo sex-selection, ASRM
5 notes, remains “vulnerable to the judgment that no
6 matter what its basis, [the method] identifies gender
7 as a reason to value one person over another, and
8 it supports socially constructed stereotypes of what
9 gender means.” In doing so, it not only “reinforces
10 possibilities of unfair discrimination, but may
11 trivialize human reproduction by making it depend
12 on the selection of nonessential features of off-
13 spring.” The ASRM ethics opinion continues, “ongo-
14 ing problems with the status of women in the United
15 States make it necessary to take account of concerns
16 for the impact of sex-selection on goals of gender
17 equality.” The American Association of Pro-Life Ob-
18 stetricians and Gynecologists, an organization with
19 hundreds of members—many of whom are former
20 abortionists—makes the following declaration: “Sex
21 selection abortions are more graphic examples of the
22 damage that abortion inflicts on women. In addition
23 to increasing premature labor in subsequent preg-
24 nancies, increasing suicide and major depression,
25 and increasing the risk of breast cancer in teens who

1 abort their first pregnancy and delay childbearing,
2 sex selection abortions are often targeted at fetuses
3 simply because the fetus is female. As physicians
4 who care for both the mother and her unborn child,
5 the American Association of Pro-Life Obstetricians
6 and Gynecologists vigorously opposes aborting
7 fetuses because of their gender.” The President’s
8 Council on Bioethics published a Working Paper
9 stating the council’s belief that society’s respect for
10 reproductive freedom does not prohibit the regula-
11 tion or prohibition of “sex control,” defined as the
12 use of various medical technologies to choose the sex
13 of one’s child. The publication expresses concern
14 that “sex control might lead to . . . dehumanization
15 and a new eugenics.”

16 (12) Sex-selection abortion results in an un-
17 natural sex-ratio imbalance. An unnatural sex-ratio
18 imbalance is undesirable, due to the inability of the
19 numerically predominant sex to find mates. Experts
20 worldwide document that a significant sex-ratio im-
21 balance in which males numerically predominate can
22 be a cause of increased violence and militancy within
23 a society. Likewise, an unnatural sex-ratio imbalance
24 gives rise to the commoditization of humans in the

1 form of human trafficking, and a consequent in-
2 crease in kidnapping and other violent crime.

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

7 (14) Sex-selection abortion reinforces sex dis-
8 crimination and has no place in a civilized society.

9 (15) The history of the United States includes
10 examples of sex discrimination. The people of the
11 United States ultimately responded in the strongest
12 possible legal terms by enacting a constitutional
13 amendment correcting elements of such discrimina-
14 tion. Women, once subjected to sex discrimination
15 that denied them the right to vote, now have suf-
16 frage guaranteed by the 19th amendment. The
17 elimination of discriminatory practices has been and
18 is among the highest priorities and greatest achieve-
19 ments of American history.

20 (16) Implicitly approving the discriminatory
21 practice of sex-selection abortion by choosing not to
22 prohibit them will reinforce these inherently dis-
23 criminatory practices, and evidence a failure to pro-
24 tect a segment of certain unborn Americans because
25 those unborn are of a sex that is disfavored. Sex-se-

1 lection abortions trivialize the value of the unborn on
 2 the basis of sex, reinforcing sex discrimination, and
 3 coarsening society to the humanity of all vulnerable
 4 and innocent human life, making it increasingly dif-
 5 ficult to protect such life. Thus, Congress has a
 6 compelling interest in acting—indeed it must act—
 7 to prohibit sex-selection abortion.

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

11 (1) the Commerce Clause;

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

15 (3) section 8 of article I to make all laws nec-
 16 essary and proper for the carrying into execution of
 17 powers vested by the Constitution in the Govern-
 18 ment of the United States.

19 **SEC. 3. DISCRIMINATION AGAINST THE UNBORN ON THE**
 20 **BASIS OF SEX.**

21 (a) IN GENERAL.—Chapter 13 of title 18, United
 22 States Code, is amended by adding at the end the fol-
 23 lowing:

1 **“§ 250. Discrimination against the unborn on the**
2 **basis of sex**

3 “(a) IN GENERAL.—Whoever knowingly—

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

7 “(2) uses force or the threat of force to inten-
8 tionally injure or intimidate any person for the pur-
9 pose of coercing a sex-selection abortion;

10 “(3) solicits or accepts funds for the perform-
11 ance of a sex-selection abortion; or

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

15 or attempts to do so, shall be fined under this title or im-
16 prisoned not more than 5 years, or both.

17 “(b) CIVIL REMEDIES.—

18 “(1) CIVIL ACTION BY WOMAN ON WHOM ABOR-
19 TION IS PERFORMED.—A woman upon whom an
20 abortion has been performed pursuant to a violation
21 of subsection (a)(2) may in a civil action against any
22 person who engaged in a violation of subsection (a)
23 obtain appropriate relief.

24 “(2) CIVIL ACTION BY RELATIVES.—The father
25 of an unborn child who is the subject of an abortion
26 performed or attempted in violation of subsection

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

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

10 “(A) objectively verifiable money damages
11 for all injuries, psychological and physical, in-
12 cluding loss of companionship and support, oc-
13 casioned by the violation of this section; and

14 “(B) punitive damages.

15 “(4) INJUNCTIVE RELIEF.—

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

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

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

1 “(ii) any person who is the spouse or
2 parent of a woman upon whom an abortion
3 is performed in violation of this section; or

4 “(iii) the Attorney General.

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

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

13 “(d) REPORTING REQUIREMENT.—A physician, phy-
14 sician’s assistant, nurse, counselor, or other medical or
15 mental health professional shall report known or suspected
16 violations of any of this section to appropriate law enforce-
17 ment authorities. Whoever violates this requirement shall
18 be fined under this title or imprisoned not more than 1
19 year, or both.

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

1 “(f) EXCEPTION.—A woman upon whom a sex-selec-
2 tion abortion is performed may not be prosecuted or held
3 civilly liable for any violation of this section, or for a con-
4 spiracy to violate this section.

5 “(g) PROTECTION OF PRIVACY IN COURT PRO-
6 CEEDINGS.—

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

17 “(2) ORDERS TO PARTIES, WITNESSES, AND
18 COUNSEL.—The court shall issue appropriate orders
19 under paragraph (1) to the parties, witnesses, and
20 counsel and shall direct the sealing of the record and
21 exclusion of individuals from courtrooms or hearing
22 rooms to the extent necessary to safeguard her iden-
23 tity from public disclosure. Each such order shall be
24 accompanied by specific written findings explaining
25 why the anonymity of the woman must be preserved

1 from public disclosure, why the order is essential to
2 that end, how the order is narrowly tailored to serve
3 that interest, and why no reasonable less restrictive
4 alternative exists.

5 “(3) PSEUDONYM REQUIRED.—In the absence
6 of written consent of the woman upon whom an
7 abortion has been performed or attempted, any
8 party, other than a public official, who brings an ac-
9 tion under this section shall do so under a pseu-
10 donym.

11 “(4) LIMITATION.—This subsection shall not be
12 construed to conceal the identity of the plaintiff or
13 of witnesses from the defendant or from attorneys
14 for the defendant.

15 “(h) DEFINITIONS.—

16 “(1) The term ‘abortion’ means the act of using
17 or prescribing any instrument, medicine, drug, or
18 any other substance, device, or means with the in-
19 tent to terminate the clinically diagnosable preg-
20 nancy of a woman, with knowledge that the termi-
21 nation by those means will with reasonable likelihood
22 cause the death of the unborn child, unless the act
23 is done with the intent to—

24 “(A) save the life or preserve the health of
25 the unborn child;

1 “(B) remove a dead unborn child caused
2 by spontaneous abortion; or

3 “(C) remove an ectopic pregnancy.

4 “(2) The term ‘sex-selection abortion’ is an
5 abortion undertaken for purposes of eliminating an
6 unborn child based on the sex or gender of the
7 child.”.

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

 “250. Discrimination against the unborn on the basis of sex.”.

12 **SEC. 4. SEVERABILITY.**

13 If any portion of this Act or the application thereof
14 to any person or circumstance is held invalid, such inva-
15 lidity shall not affect the portions or applications of this
16 Act which can be given effect without the invalid portion
17 or application.

18 **SEC. 5. RULE OF CONSTRUCTION.**

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

○