

DISTRICT OF COLUMBIA PAIN-CAPABLE UNBORN CHILD
PROTECTION ACT

JULY 31, 2012.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3803]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3803) to amend title 18, United States Code, to protect pain-capable unborn children in the District of Columbia, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

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 development, 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.

(14) The District Council of the District of Columbia, operating under authority delegated by Congress, repealed the entire District law limiting abortions, effective April 29, 2004, so that in the District of Columbia, abortion is now legal, for any reason, until the moment of birth.

(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 determined 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.

“(C) Notwithstanding the definitions of ‘abortion’ and ‘attempt an abortion’ in this section, 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, 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, occasioned 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 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 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.

“(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 pregnant 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 result of natural causes in utero, accidental trauma, 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 ‘attempt’, 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”.

Purpose and Summary

In the District of Columbia, abortion is now legal, for any reason, until the moment of birth.¹ H.R. 3803 relies in part on the Constitution’s District Clause to prohibit abortions after the point at which unborn children can feel pain.

Background and Need for the Legislation

Currently, it is legal to perform an abortion for any reason,² either before or after viability, in the District of Columbia, the national capital.³ Yet, since the Supreme Court’s 1973 decision in *Roe*

¹ The District Council of the District of Columbia, operating under authority delegated by Congress, repealed the entire District law limiting abortions. District of Columbia Act 15–255, 50 D.C. Reg. 10996 (2003); District of Columbia Law 15–154, 51 D.C. Reg. 5691 (2004).

² The Federal Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531, applies, but this law restricts only the method of abortion in which the living baby is mostly delivered before being killed; it does not restrict reasons for which abortions may be performed, either before or after viability.

³ As *The Washington Post* reported, “The District has the fewest restrictions on late-term abortions in the region . . . Maryland and Virginia prohibit abortions after a fetus is considered viable . . .” Ben Pershing, “House panel approves ban on D.C. abortions after 20 weeks,” *The Washington Post* (July 18, 2012) at B5. The Associated Press also reported that “In a May 17 story about a bill that would ban abortion in the District of Columbia after 20 weeks of pregnancy, The Associated Press, relying on information provided by district officials, erroneously reported that abortion of a viable fetus is legal in the district only to protect the life or health

v. *Wade*,⁴ medical knowledge regarding the development of unborn babies and their capacities at various stages of growth has advanced dramatically.⁵

And a *New York Times* magazine article has also explored research on unborn pain, noting the research of Kanwaljeet Anand, an Oxford- and Harvard-trained neonatal pediatrician:

Twenty-five years ago, when Kanwaljeet Anand was a medical resident in a neonatal intensive care unit, his tiny patients, many of them preterm infants, were often wheeled out of the ward and into an operating room. He soon learned what to expect on their return. The babies came back in terrible shape: their skin was gray, their breathing shallow, their pulses weak. Anand spent hours stabilizing their vital signs, increasing their oxygen supply and administering insulin to balance their blood sugar.

“What’s going on in there to make these babies so stressed?” Anand wondered. Breaking with hospital practice, he wrangled permission to follow his patients into the O.R. “That’s when I discovered that the babies were not getting anesthesia,” he recalled recently. Infants undergoing major surgery were receiving only a paralytic to keep them still. Anand’s encounter with this practice occurred at John Radcliffe Hospital in Oxford, England, but it was common almost everywhere. Doctors were convinced that newborns’ nervous systems were too immature to sense pain, and that the dangers of anesthesia exceeded any potential benefits.

Anand resolved to find out if this was true. In a series of clinical trials, he demonstrated that operations performed under minimal or no anesthesia produced a “massive stress response” in newborn babies, releasing a flood of fight-or-flight hormones like adrenaline and cortisol. Potent anesthesia, he found, could significantly reduce this reaction . . .

But Anand was not through with making observations. As NICU technology improved, the preterm infants he cared for grew younger and younger—with gestational ages of 24 weeks, 23, 22—and he noticed that even the most premature babies grimaced when pricked by a needle . . . [n]ew evidence, however, has persuaded him that fetuses can feel pain by 20 weeks gestation (that is, halfway through a full-term pregnancy)⁶ and possibly earlier.

of the mother. Abortions for any reason are legal in the district.” Associated Press, “Correction: Fetal Pain Story” (May 23, 2012).

⁴410 U.S. 113 (1973).

⁵Some of the extensive evidence that unborn children have the capacity to experience pain, at least by 20 weeks and possibly earlier, is summarized here (the document is arranged according to the numbered Findings in the bill and presents citations to medical journal articles that support each Finding): http://www.nrlc.org/abortion/Fetal_Pain/Fetal-Pain-The-Evidence.pdf

⁶There are two different systems of dating during pregnancy. H.R. 3803 uses the post-fertilization age (fetal age) system, which is favored by fetal development specialists as the most accurate. See *infra*, n. 23. Post-fertilization age (fetal age) refers to the actual time that an unborn human has developed. However, by convention, obstetrician-gynecologists and abortion providers date “pregnancy” from the first day of the last menstrual period (LMP), which occurs

If the notion that newborns are incapable of feeling pain was once widespread among doctors, a comparable assumption about fetuses was even more entrenched. Nicholas Fisk is a fetal-medicine specialist and director of the University of Queensland Center for Clinical Research in Australia. For years, he says, “I would be doing a procedure to a fetus, and the mother would ask me, ‘Does my baby feel pain?’ The traditional, knee-jerk reaction was, ‘No, of course not.’ ” But research in Fisk’s laboratory (then at Imperial College in London) was making him uneasy about that answer. It showed that fetuses as young as 18 weeks react to an invasive procedure with a spike in stress hormones and a shunting of blood flow toward the brain—a strategy, also seen in infants and adults, to protect a vital organ from threat. Then Fisk carried out a study that closely resembled Anand’s pioneering research, using fetuses rather than newborns as his subjects. He selected 45 fetuses that required a potentially painful blood transfusion, giving one-third of them an injection of the potent painkiller fentanyl. As with Anand’s experiments, the results were striking: in fetuses that received the analgesic, the production of stress hormones was halved, and the pattern of blood flow remained normal.

Fisk says he believes that his findings provide suggestive evidence of fetal pain—perhaps the best evidence we’ll get. Pain, he notes, is a subjective phenomenon; in adults and older children, doctors measure it by asking patients to describe what they feel. (“On a scale of 0 to 10, how would you rate your current level of pain?”) To be certain that his fetal patients feel pain, Fisk says, “I would need one of them to come up to me at the age of 6 or 7 and say, ‘Excuse me, Doctor, that bloody hurt, what you did to me!’ ” In the absence of such first-person testimony, he concludes, it’s “better to err on the safe side” and assume that the fetus can feel pain starting around 20 to 24 weeks . . .

On April 4, 2004, Sunny Anand took the stand in a courtroom in Lincoln, Neb., to testify as an expert witness in the case of *Carhart v. Ashcroft*. This was one of three Federal trials held to determine the constitutionality of the ban on a procedure called intact dilation and extraction by doctors and partial-birth abortion by anti-abortion groups. Anand was asked whether a fetus would feel pain during such a procedure. “If the fetus is beyond 20 weeks of gestation, I would assume that there will be pain caused to the

about 2 weeks before fertilization. LMP dates are also often referred to as “weeks gestation” or “weeks of pregnancy.” The “20 weeks or greater” post-fertilization age of H.R. 3803 is equivalent to 22 weeks LMP. All three professors of medicine who testified at the May 17, 2012, hearing before the Subcommittee on the Constitution testified that both systems are equally valid and are regularly employed in different fields of medicine. They also testified that any medical professional could read H.R. 3803 and clearly understand the point at which the limitations contained in the bill would apply. See House Subcommittee on the Constitution, Hearing on H.R. 3803, the District of Columbia Pain-Capable Unborn Child Protection Act (May 17, 2012) (proceedings materials available at http://judiciary.house.gov/hearings/Hearings%202012/hear_05172012_2.html).

fetus,” he said. “And I believe it will be severe and excruciating pain.”⁷

Congress has the power to acknowledge these developments by enacting H.R. 3803 under its authority over the District of Columbia, and prohibiting abortions there after the point at which scientific evidence shows the unborn can feel pain, with limited exceptions.

Seven states⁸ have already made such a determination, starting in 2010, by enacting the Pain-Capable Unborn Child Protection Act, and those seven state legislatures have adopted factual findings regarding the medical evidence that unborn children experience pain at least by 20 weeks after fertilization (about the start of the sixth month), and they therefore prohibit abortion after that point, with narrowly drawn exceptions. Those states are Nebraska, Kansas, Idaho, Oklahoma, Alabama, Georgia, and Louisiana. Indiana has also enacted a law that is somewhat similar. In addition, Arizona recently enacted a law generally prohibiting abortion after 18 weeks LMP (20 weeks fetal age), with certain exceptions, which contains a legislative finding on fetal pain capacity.

In *Gonzales v. Carhart*,⁹ the Supreme Court made clear that there is a “legitimate interest of the Government in protecting the life of the fetus that may become a child.”¹⁰ Babies have been born at 20 weeks and survived, and that such unborn children can feel pain as well amply justifies H.R. 3803. Further, the Federal Partial-Birth Abortion Ban Act was upheld although it made no distinction based on viability. As the Supreme Court stated, “The [Partial-Birth Abortion Ban] Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”¹¹

H.R. 3803 also provides doctors “of ordinary intelligence a reasonable opportunity to know what is prohibited” and sets forth “relatively clear guidelines as to prohibited conduct” and provides “objective criteria” to evaluate whether a doctor has performed a prohibited procedure.¹² The Supreme Court has also made clear that “The government may use its voice and its regulatory authority to show its profound respect for the life within the woman,”¹³ and

⁷ Annie Murphy Paul, “The First Ache,” *The New York Times Magazine* (February 10, 2008). Dr. Anand also testified to the following in his Expert Report submitted in the Federal litigation surrounding the Partial-Birth Abortion Ban Act: “It is my opinion that the human fetus possesses the ability to experience pain from 20 weeks of gestation, if not earlier, and the pain perceived by a fetus is possibly more intense than that perceived by term newborns or older children.” The complete Expert Report can be found here: http://www.nrlc.org/abortion/Fetal_Pain/AnandPainReport.pdf

⁸ Those states are Nebraska, Kansas, Idaho, Oklahoma, Alabama, Georgia, and Louisiana. Indiana has also enacted a law that is somewhat similar. In addition, Arizona recently enacted a law generally prohibiting abortion after 18 weeks LMP (20 weeks fetal age), with certain exceptions, which contains a legislative finding on fetal pain capacity.

⁹ 550 U.S. 124 (2007).

¹⁰ *Id.* at 146.

¹¹ *Id.* at 147. The Partial-Birth Abortion Ban Act applies both before and after viability and contains an exception for life-endangerment cases but no broader “health” exception. The *Gonzales v. Carhart* opinion has led constitutional scholars on both sides of the abortion issue to conclude that the decision has opened the door to give elected lawmakers broader authority to protect the unborn. See Randy Beck, “Gonzales, Casey, and the Viability Rule,” 103 Nw. U. L. Rev. 249 (2009); Khiara M. Bridges, “Capturing the Judiciary: Carhart and the Undue Burden Standard,” 67 Wash. & Lee L. Rev. 915 (2010).

¹² *Id.* at 149.

¹³ *Id.* at 157.

that Congress may show such respect for the unborn through “specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.”¹⁴ The Court has stated that it “confirms the State’s interest in promoting respect for human life at all stages in the pregnancy.”¹⁵ The Court has also made clear that “The Court has given state and Federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty,”¹⁶ and in any case the medical evidence that unborn children can feel pain at 20 weeks post-fertilization is widely accepted, as described in the Findings section of the bill.

Justice Kennedy has described the wide latitude the government has to protect unborn life this way:

We held [in the *Casey* decision] it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion. 505 U.S. at 877. *Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate. It is only with this principle in mind that [the government’s] interests can be given proper weight States also have an interest in forbidding medical procedures which, in the State’s reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus . . . A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.¹⁷

The Federal statute upheld in *Carhart* prohibits the abortion method in which the living premature infant is mostly delivered before being killed. The most common method used in the late second trimester is the “D&E,” a dismemberment abortion. It involves using a long steel tool to grasp and tear off, by brute force, the arms and legs of the developing human, after which the skull is crushed. Dr. Anthony Levatino testified at the May 17, 2012, hearing before the House Subcommittee on the Constitution. At one time, Dr. Levatino, an obstetrician-gynecologist, performed many D&Es.¹⁸

¹⁴*Id.* at 158.

¹⁵*Id.* at 163.

¹⁶*Id.* at 163.

¹⁷*Stenberg v. Carhart*, 350 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting). While Justice Kennedy was in the minority in *Stenberg*, which struck down Nebraska’s Partial-Birth Abortion Ban Act, 7 years later, with a differently composed Court, he wrote for the majority in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the decision upholding the Federal Partial-Birth Abortion Ban Act.

¹⁸Dr. Levatino described the horrific nature of the D&E procedure as follows:

Imagine, if you can, that you are a pro-choice obstetrician/gynecologist like I once was. Your patient today is 24 weeks pregnant (LMP). At 24 weeks from last menstrual period, her uterus is two finger-breadths above the umbilicus. If you could see her baby, which is quite easy on an ultrasound, she would be as long as your hand plus a half, from the top of her head to the bottom of her rump, not counting the legs. Your patient has been feeling her baby kick for the last month or more, but now she is asleep on an operating room table and you are there to help her with her problem pregnancy. The first task is to remove the laminaria that had earlier been placed in the cervix, the opening to the uterus, to dilate it sufficiently to allow the procedure you are about to perform. With that accomplished, direct your attention to the surgical instruments

Further, there can be no doubt as to Congress' authority to legislate in the District of Columbia. Congress has exclusive authority over the District of Columbia under the District Clause, which provides that the Congress shall "exercise exclusive Legislation in all Cases whatsoever"¹⁹ over the District established as the seat of government of the United States, now known as the District of Columbia. The District of Columbia Home Rule Act cannot trump a constitutional power of Congress, and indeed the Home Rule Act explicitly provides that "Notwithstanding any other provision of this Act [the Home Rule Act], the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council."²⁰

Certainly the ability to feel pain is a characteristic that has caused human beings to empathize with one another. As elaborated in the *New York Times* magazine article previously cited:

The capacity to feel pain has often been put forth as proof of a common humanity. Think of Shylock's monologue in "The Merchant of Venice": Are not Jews "hurt with the same weapons" as Christians, he demands. "If you prick us, do we not bleed?" Likewise, a presumed insensitivity to pain has been used to exclude some from humanity's privi-

arranged on a small table to your right. The first instrument you reach for is a 14-French suction catheter. It is clear plastic and about nine inches long. It has a bore through the center approximately $\frac{3}{4}$ of an inch in diameter. Picture yourself introducing this catheter through the cervix and instructing the circulating nurse to turn on the suction machine, which is connected through clear plastic tubing to the catheter. What you will see is a pale yellow fluid that looks a lot like urine coming through the catheter into a glass bottle on the suction machine. This is the amniotic fluid that surrounded the baby to protect her.

With suction complete, look for your Sopher clamp. This instrument is about thirteen inches long and made of stainless steel. At the business end are located jaws about 2 inches long and about $\frac{1}{2}$ an inch wide with rows of sharp ridges or teeth. This instrument is for grasping and crushing tissue. When it gets hold of something, it does not let go. A second trimester D&E abortion is a blind procedure. The baby can be in any orientation or position inside the uterus. Picture yourself reaching in with the Sopher clamp and grasping anything you can. At 24 weeks gestation, the uterus is thin and soft so be careful not to perforate or puncture the walls. Once you have grasped something inside, squeeze on the clamp to set the jaws and pull hard—really hard. You feel something let go and out pops a fully formed leg about six inches long. Reach in again and grasp whatever you can. Set the jaw and pull really hard once again and out pops an arm about the same length. Reach in again and again with that clamp and tear out the spine, intestines, heart and lungs.

The toughest part of a D&E abortion is extracting the baby's head. The head of a baby that age is about the size of a large plum and is now free floating inside the uterine cavity. You can be pretty sure you have hold of it if the Sopher clamp is spread about as far as your fingers will allow. You know you have it right when you crush down on the clamp and see white gelatinous material coming through the cervix. That was the baby's brains. You can then extract the skull pieces. Many times a little face may come out and stare back at you . . .

If you refuse to believe that this procedure inflicts severe pain on that unborn child, please think again.

Written Testimony of Dr. Anthony Levatino, available at <http://judiciary.house.gov/hearings/Hearings%202012/Levatino%2005172012.pdf>. A video of Dr. Levatino's oral testimony (including a medical illustration from the respected Nucleus Medical Media firm that provides images for medical education nationwide) that accurately depicts a D&E dismemberment abortion at 23 weeks) is available here: <http://judiciary.edgeboss.net/wmedia/judiciary/constitution/const05172012.wvx>. Dr. Levatino's separate oral testimony is available here: <http://www.youtube.com/watch?v=t-MhKiaD7c&feature=youtu.be>. The Nucleus Medical Media graphic can be found separately here: <http://www.nrlc.org/abortion/pba/DEabortiongraphic.html>.

¹⁹ Art. I, Sec. 8, cl. 17.

²⁰ D.C. Code, Home Rule Title VI, § 601 (entitled "Reservation of Congressional Authority").

leges and protections. Many 19th-century doctors believed blacks were indifferent to pain and performed surgery on them without even that era's rudimentary anesthesia. Over time, the charmed circle of those considered alive to pain, and therefore fully human, has widened to include members of other religions and races, the poor, the criminal, the mentally ill—and, thanks to the work of Sunny Anand and others, the very young.²¹

It is time for Congress to enact H.R. 3083 and prohibit the painful killing of innocent human beings.²²

Hearings

The Committee's Subcommittee on the Constitution held 1 day of hearings on H.R. 3803 on May 17, 2012. Testimony was received from: Colleen Malloy, M.D., Attending Physician, Neonatology, Children's Memorial Hospital, Assistant Professor of Pediatrics, Northwestern University Feinberg School of Medicine; Anthony Levatino, M.D., practicing ob-gyn in New Mexico, graduate of Albany Medical College of Union University; Byron Calhoun, M.D., diplomate of the American Board of Obstetrics and Gynecology and board certified in general Obstetrics/Gynecology and the sub-specialty of Maternal-Fetal Medicine, Professor and Vice-Chair in the Department of Obstetrics and Gynecology at West Virginia University-Charleston; and Christy Zink, Assistant Professor of Writing, The George Washington University, with additional material submitted by various interested organizations.

Committee Consideration

On July 18, 2012, the Committee met in open session and ordered the bill H.R. 3803 favorably reported with an amendment, by a rollcall vote of 18 to 14, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3803.

²¹ Annie Murphy Paul, "The First Ache," *The New York Times* (February 10, 2008). At the House Judiciary Committee markup of H.R. 2299, the Child Interstate Abortion Notification Act, the Ranking Member of the Constitution Subcommittee, Rep. Jerold Nadler (D-NY), said:

I make a distinction. I do not believe that a fertilized egg is a human being. I do not believe a blastula of a couple hundred cells which has no feelings, no brain, no nervous system, no anything, is a human being . . . On the other hand, an 8-month-old fetus or 9-month-old fetus, in my opinion, is a human being. When that change occurs, I do not know. It occurs at some point . . . And certainly the state has more right to regulate and protect [that human being] as the pregnancy becomes longer and the fetus more and more like a human being as a pregnancy proceeds to term, and that is the basis for the design of our law.

Markup transcript, House Judiciary Committee Markup of H.R. 2299, the Child Interstate Abortion Notification Act (March 27, 2012) at 168–69.

²² In 2005, the Journal of the American Medical Association (JAMA) published "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence," which opponents of H.R. 3803 still cite as "proof" that unborn humans do not experience pain until after 29 weeks LMP, even though that paper has been thoroughly discredited. Shortly after the JAMA piece was released, the National Right to Life Committee issued a rebuttal, including important information about the backgrounds and associations of the authors. That rebuttal can be found here: http://www.nrlc.org/abortion/Fetal_Pain/NRLCRebuttalJAMA.html

1. An amendment offered by Mr. Quigley that would have added an additional exception from the bill for the case of a woman with cancer who needs a life saving treatment incompatible with continuing the pregnancy. Defeated by a vote of 8 to 16.

ROLLCALL NO. 1

| | Ayes | Nays | Present |
|--|------|------|---------|
| Mr. Smith, Chairman | | X | |
| Mr. Sensenbrenner, Jr. | | | |
| Mr. Coble | | X | |
| Mr. Gallegly | | | |
| Mr. Goodlatte | | X | |
| Mr. Lungren | | | |
| Mr. Chabot | | X | |
| Mr. Issa | | | |
| Mr. Pence | | | |
| Mr. Forbes | | X | |
| Mr. King | | X | |
| Mr. Franks | | X | |
| Mr. Gohmert | | | |
| Mr. Jordan | | X | |
| Mr. Poe | | X | |
| Mr. Chaffetz | | | |
| Mr. Griffin | | X | |
| Mr. Marino | | X | |
| Mr. Gowdy | | X | |
| Mr. Ross | | X | |
| Ms. Adams | | X | |
| Mr. Quayle | | X | |
| Mr. Amodei | | X | |
| Mr. Conyers, Jr., Ranking Member | X | | |
| Mr. Berman | | | |
| Mr. Nadler | | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | | | |
| Ms. Jackson Lee | | | |
| Ms. Waters | | | |
| Mr. Cohen | | | |
| Mr. Johnson, Jr. | X | | |
| Mr. Pierluisi | X | | |
| Mr. Quigley | X | | |
| Ms. Chu | | | |
| Mr. Deutch | X | | |
| Ms. Sánchez | X | | |
| Mr. Polis | | | |

ROLLCALL NO. 1—Continued

| | Ayes | Nays | Present |
|-------------|------|------|---------|
| Total | 8 | 16 | |

2. An amendment offered by Mr. Deutch that would have struck from the bill civil standing provisions regarding current or former licensed health care providers. Defeated by a vote of 11 to 16.

ROLLCALL NO. 2

| | Ayes | Nays | Present |
|--|------|------|---------|
| Mr. Smith, Chairman | | X | |
| Mr. Sensenbrenner, Jr. | | | |
| Mr. Coble | | X | |
| Mr. Gallegly | | | |
| Mr. Goodlatte | | X | |
| Mr. Lungren | | | |
| Mr. Chabot | | X | |
| Mr. Issa | | | |
| Mr. Pence | | | |
| Mr. Forbes | | X | |
| Mr. King | | X | |
| Mr. Franks | | X | |
| Mr. Gohmert | | | |
| Mr. Jordan | | X | |
| Mr. Poe | | X | |
| Mr. Chaffetz | | | |
| Mr. Griffin | | X | |
| Mr. Marino | | X | |
| Mr. Gowdy | | X | |
| Mr. Ross | | X | |
| Ms. Adams | | X | |
| Mr. Quayle | | X | |
| Mr. Amodei | | X | |
| Mr. Conyers, Jr., Ranking Member | X | | |
| Mr. Berman | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | | | |
| Ms. Waters | | | |
| Mr. Cohen | | | |
| Mr. Johnson, Jr. | X | | |
| Mr. Pierluisi | X | | |
| Mr. Quigley | X | | |

ROLLCALL NO. 2—Continued

| | Ayes | Nays | Present |
|--------------------|-----------|-----------|---------|
| Ms. Chu | X | | |
| Mr. Deutch | X | | |
| Ms. Sánchez | X | | |
| Mr. Polis | | | |
| Total | 11 | 16 | |

3. An amendment offered by Mr. Nadler that would have added to the bill a general “health” exception. Defeated by a vote of 12 to 16.

ROLLCALL NO. 3

| | Ayes | Nays | Present |
|--|------|------|---------|
| Mr. Smith, Chairman | | X | |
| Mr. Sensenbrenner, Jr. | | | |
| Mr. Coble | | X | |
| Mr. Gallegly | | | |
| Mr. Goodlatte | | X | |
| Mr. Lungren | | | |
| Mr. Chabot | | X | |
| Mr. Issa | | | |
| Mr. Pence | | X | |
| Mr. Forbes | | X | |
| Mr. King | | X | |
| Mr. Franks | | X | |
| Mr. Gohmert | | | |
| Mr. Jordan | | X | |
| Mr. Poe | | X | |
| Mr. Chaffetz | | | |
| Mr. Griffin | | X | |
| Mr. Marino | | X | |
| Mr. Gowdy | | | |
| Mr. Ross | | X | |
| Ms. Adams | | X | |
| Mr. Quayle | | X | |
| Mr. Amodei | | X | |
| Mr. Conyers, Jr., Ranking Member | X | | |
| Mr. Berman | | | |
| Mr. Nadler | X | | |
| Mr. Scott | X | | |
| Mr. Watt | X | | |
| Ms. Lofgren | X | | |
| Ms. Jackson Lee | | | |

ROLLCALL NO. 3—Continued

| | Ayes | Nays | Present |
|-----------------------|-----------|-----------|---------|
| Ms. Waters | | | |
| Mr. Cohen | X | | |
| Mr. Johnson, Jr. | X | | |
| Mr. Pierluisi | X | | |
| Mr. Quigley | X | | |
| Ms. Chu | X | | |
| Mr. Deutch | X | | |
| Ms. Sánchez | X | | |
| Mr. Polis | | | |
| Total | 12 | 16 | |

4. The bill was ordered favorably reported by a rollcall vote of 18 to 14.

ROLLCALL NO. 4

| | Ayes | Nays | Present |
|--|------|------|---------|
| Mr. Smith, Chairman | X | | |
| Mr. Sensenbrenner, Jr. | | | |
| Mr. Coble | X | | |
| Mr. Gallegly | | | |
| Mr. Goodlatte | X | | |
| Mr. Lungren | X | | |
| Mr. Chabot | X | | |
| Mr. Issa | | | |
| Mr. Pence | X | | |
| Mr. Forbes | X | | |
| Mr. King | X | | |
| Mr. Franks | X | | |
| Mr. Gohmert | X | | |
| Mr. Jordan | X | | |
| Mr. Poe | X | | |
| Mr. Chaffetz | | | |
| Mr. Griffin | X | | |
| Mr. Marino | X | | |
| Mr. Gowdy | | | |
| Mr. Ross | X | | |
| Ms. Adams | X | | |
| Mr. Quayle | X | | |
| Mr. Amodei | X | | |
| Mr. Conyers, Jr., Ranking Member | | X | |
| Mr. Berman | | X | |
| Mr. Nadler | | X | |

ROLLCALL NO. 4—Continued

| | Ayes | Nays | Present |
|-----------------------|------|------|---------|
| Mr. Scott | | X | |
| Mr. Watt | | X | |
| Ms. Lofgren | | X | |
| Ms. Jackson Lee | | | |
| Ms. Waters | | X | |
| Mr. Cohen | | X | |
| Mr. Johnson, Jr. | | X | |
| Mr. Pierluisi | | X | |
| Mr. Quigley | | X | |
| Ms. Chu | | X | |
| Mr. Deutch | | X | |
| Ms. Sánchez | | X | |
| Mr. Polis | | | |
| Total | 18 | 14 | |

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 3803, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 27, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3803, the “District of Columbia Pain-Capable Unborn Child Protection Act.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3803—District of Columbia Pain-Capable Unborn Child Protection Act.

As ordered reported by the House Committee on the Judiciary
on July 18, 2012.

CBO estimates that implementing H.R. 3803 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

H.R. 3803 would make it illegal to perform abortions in the District of Columbia after 20 weeks of pregnancy, with an exception only for saving the life of the pregnant woman. Because the legislation would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute. We expect that H.R. 3803 would apply to a relatively small number of offenders, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 3803 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the relatively small number of cases likely to be affected.

H.R. 3803 would impose intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill would preempt the authority of the District of Columbia to regulate abortions in a manner that is not compatible with requirements in the bill. It also would require the District of Columbia Department of Health to collect data from physicians and issue annual reports on abortions performed in the District. The District would incur costs to upgrade its data collection system and to issue regulations and reports. Based on information from government and industry representatives, CBO estimates that the cost incurred by the District to comply with the mandates would not exceed the annual thresholds established in UMRA (\$73 million in 2012, adjusted annually for inflation).

H.R. 3803 would impose private-sector mandates as defined in UMRA by banning certain abortions in the District of Columbia

and by instituting new reporting requirements for all abortions performed in that jurisdiction. The costs of those mandates would be the net income forgone by physicians and clinics and the incremental cost of the reporting requirements. Information from the Centers for Disease Control and Prevention and other industry experts indicate that only a relatively small number of abortions are performed within the District. Therefore, CBO estimates that the direct cost of the mandates would fall below the annual threshold established in UMRA for private-sector mandates (\$146 million in 2012, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs), Melissa Merrill (for the impact on State, local and tribal governments), and Marin Randall (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 3803 would prohibit the killing through abortion of unborn children who are capable of feeling pain in the District of Columbia.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3803 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 provides that this Act may be cited as the “District of Columbia Pain-Capable Unborn Child Protection Act.”

Sec. 2. Legislative findings. Section 2 sets out the bill’s legislative findings, including the finding that “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” and that “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. Section 3 established a new Section 1532 in Title 18, which provides in subsection (a) that 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).

Subsection (b) provides in subparagraph (1) that 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. Subsection (b) also provides that except as provided in subparagraph (2)(B), the abortion shall not be performed or attempted, if the probable post-fertilization age of the unborn child is 20 weeks or greater.²³ Subparagraph (2)(B) provides that subparagraph (2)(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.

Subsection (b) also provides that 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.²⁴

Subsection (c) provides that whoever violates subsection (a) shall be fined under this title or imprisoned for not more than 2 years, or both.

²³ Often in the medical literature, the measurement of fetal age used is “LMP,” which denotes measuring fetal age since the pregnant woman’s “last menstrual period.” H.R. 3803 uses the fetal age standard (20 weeks fetal age, measured from fertilization) instead, but for clarity’s sake a 20 week fetal age measured from fertilization is essentially the same as an LMP-measured fetal age of 22 weeks.

There are various valid means of determining the age of an unborn child, but the most accurate is the post-fertilization age determination. See *The Developing Human: Clinically Oriented Embryology* (4th ed. 1988) at 82, by Dr. Keith L. Moore (discussing distinction between LMP and “fertilization age,” and arguing the LMP method is error prone in part because “it depends on the mother’s memory of an event that occurred several weeks before she realized she was pregnant” and that “The day fertilization occurs is the most accurate reference point for estimating age . . .”). As methods of establishing fertilization age (through ultrasound and other techniques) have become more refined, the determination of post-fertilization age has also become more accurate.

In any case, a state legislature, or Congress, can use whichever system it wants when drafting laws, as long as the law clearly defines what standard is being employed. H.R. 3803 clearly defines “post-fertilization age” and “probable post-fertilization age of the unborn child.” The bill further clearly informs the physician that he or she must perform “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.” This is language similar to that which appears in many medical malpractice statutes.

²⁴ Such a requirement is allowed under the Supreme Court’s decision in *Gonzales v. Carhart*, in which Justice Kennedy stated: “The . . . premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*’s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” 550 U.S. at 158.

Subsection (d) provides that 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 4²⁵ based on such a violation.

Subsection (e) provides that 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.

Subsection (e) also provides that 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.

Subsection (e) further provides that appropriate relief in a civil action under this subsection includes—(A) objectively verifiable money damages for all injuries, psychological and physical, occasioned by the violation of this section; (B) statutory damages equal to three times the cost of the abortion; and (C) punitive damages.

Subsection (e) also provides that 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.

Subsection (e) provides the following definitions. 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.

Subsection (e) provides that 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, that 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, and that, except as otherwise provided, 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.

Subsection (f) provides that, 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.

Subsection (f) provides that the court shall issue appropriate orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or

²⁵The reference to “section 2, 3, or 4” is to sections 2 (Principals), 3 (Accessory after the fact), and 4 (Misprison of felony) of Title 18 of the U.S. Code. The Partial-Birth Abortion Ban Act contains a similar provision.

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.

Subsection (f) also provides that 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, and that 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.

Subsection (g) provides that 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.

The report shall include the following: (A) 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) 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.

The report shall also include the age or approximate age of the pregnant woman, and 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).

Subsection (g) also provides that 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, that such report shall contain a unique Medical Record Number, to enable matching the report to the woman's medical records, and that 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).

Subsection (g) also provides that 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.

Subsection (g) further provides that 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, and that 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. Subsection (g) provides that 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.

Subsection (g) further provides that 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, and that 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.

Subsection (h) sets out the following definitions used in the Act.

(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 pregnant 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 result of natural causes in utero, accidental trauma, 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 “attempt,” 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.”

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

PART I—CRIMES

| | | |
|-------|---|------|
| Chap. | | Sec. |
| 1. | General provisions | 1 |
| | * * * * * | |
| 74. | [Partial-birth abortions] <i>Abortions</i> | 1531 |
| | * * * * * | |

CHAPTER 74—[PARTIAL-BIRTH] ABORTIONS

| | |
|-------|---|
| Sec. | |
| 1531. | Partial-birth abortions prohibited. |
| 1532. | <i>District of Columbia pain-capable unborn child protection.</i> |
| | * * * * * |

§ 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 determined 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.*

(C) *Notwithstanding the definitions of “abortion” and “attempt an abortion” in this section, 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, 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, occasioned 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 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 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.*

(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 pregnant 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 result of natural causes in utero, accidental trauma, 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 “attempt”, 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 chem-

ical 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.

* * * * *

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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

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July 30, 2012

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Issa,

Thank you for your letter dated July 26 regarding H.R. 3803, the "District of Columbia Pain-Capable Unborn Child Protection Act," which was ordered reported favorably by the Committee on the Judiciary on July 18, 2012.

I am most appreciative of your decision to forego consideration of H.R. 3803 so that it may move expeditiously to the House floor. I acknowledge that although you are waiving formal consideration of the bill, the Committee on Oversight and Government Reform is in no way waiving its jurisdiction over the subject matter contained in the bill. In addition, if a conference is necessary on this legislation, I will support any request that your committee be represented therein.

Finally, I shall be pleased to include your letter and this reply letter memorializing our mutual understanding in the Judiciary Committee's report on H.R. 3803 and in the *Congressional Record* during floor consideration thereof.

Sincerely,



Lamar Smith
Chairman

cc: The Honorable John Boehner
The Honorable John Conyers, Jr.
The Honorable Elijah Cummings
Mr. Thomas J. Wickham, Jr., Parliamentarian

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LAWRENCE J. GRADY
STAFF DIRECTOR

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On July 18, 2012, the Committee on the Judiciary ordered H.R. 3803, the "District of Columbia Pain-Capable Unborn Child Protection Act," reported to the House. Thank you for consulting with the Committee on Oversight and Government Reform with regard to H.R. 3803 on those matters within the committee's jurisdiction. I am writing to confirm our mutual understanding with respect to the consideration of H.R. 3803.

In the interest of expediting the House's consideration of H.R. 3803, I will forego consideration of the bill. However, I do so only with the understanding that this procedural route will not be construed to prejudice the Committee on Oversight and Government Reform's jurisdictional interest and prerogatives on this bill or any other similar legislation and will not be considered as precedent for consideration of matters of jurisdictional interest to my Committee in the future.

I respectfully request your support for the appointment of outside conferees from the Committee on Oversight and Government Reform should this bill or a similar bill be considered in a conference with the Senate. I also request that you include our exchange of letters on this matter in the Committee Report on H.R. 3803 and in the Congressional Record during consideration of this bill on the House floor. Thank you for your attention to these matters.

Sincerely,


Darrell Issa
Chairman

cc: The Honorable John A. Boehner, Speaker

The Honorable John Conyers, Jr., Ranking Minority Member
Committee on the Judiciary

The Honorable Elijah E. Cummings, Ranking Minority Member
Committee on Oversight and Government Reform

Mr. Tom Wickham, Parliamentarian

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House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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July 26, 2012.

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Dissenting Views

INTRODUCTION

H.R. 3803, the “District of Columbia Pain-Capable Unborn Child Protection Act,” is a facially unconstitutional restriction on a woman’s right to make the decision whether or not to end a pregnancy. This draconian measure not only bans pre-viability abortions, but fails to provide the constitutionally required exception to the prohibition to protect a woman’s health and includes only a limited exception to protect her life. This unconstitutional legislation applies solely to the District of Columbia whose residents are taxpaying citizens of the United States and serve in our Armed Forces, yet are denied equal representation in Congress. H.R. 3803 reflects yet again the contempt that the Majority has for these Americans whose only fault is to be citizens of our Nation’s capital city.

Not surprisingly, this legislation is opposed by the Nation’s leading civil rights organizations, including Physicians for Reproductive Choice and Health,¹ the Center for Reproductive Rights,² NARAL Pro-Choice America,³ the National Abortion Federation,⁴ the American Civil Liberties Union,⁵ and Catholics for Choice.⁶

For these reasons, and those described below, we respectfully dissent, and we urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 3803, the “District of Columbia Pain-Capable Unborn Child Protection Act,” would ban abortions in the District of Columbia (The District) beginning at 20 weeks following conception. The bill’s sponsors contend that a fetus is capable of feeling pain at 20 weeks post-fertilization, and that there is 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.”⁷

While the bill has a narrow exception to protect the life of the woman, it specifically excludes from that exception psychological threats to a woman’s life, such as possible suicide.⁸ H.R. 3803 fails

¹*District of Columbia Pain-Capable Unborn Child Protection Act: Hearing on H.R. 3803 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Willie Parker, MD, MPH, Msc, Board Member, Physicians for Reproductive Choice and Health) [hereinafter H.R. 3803 Hearing].

²*Id.* (testimony of the Center for Reproductive Rights).

³*Id.* (testimony of Nancy Keenan, President, NARAL Pro-Choice America).

⁴*Id.* (testimony of Cassing Hammond, M.D., Current member and immediate Past Chair, Board of Directors, National Abortion Federation).

⁵*Id.* (testimony of Laura W. Murphy, Director, ACLU Washington Legislative Office and Vania Leveille, Senior Legislative Counsel, ACLU Washington Legislative Office).

⁶Letter to Rep. Trent Franks (R-AZ) & Rep. Jerrold Nadler (D-NY) from Jon O’Brien, President, Catholics for Choice (May 17, 2012) (on file with Comm. on the Judiciary, Democratic staff).

⁷H.R. 3803 §2(13).

⁸Although the specific language referring to suicidal conditions was deleted pursuant to an amendment offered by Rep. Franks and that was accepted by the Committee, the amendment did not, in fact, change this aspect of the bill. As Rep. Franks said in his explanation of the amendment, “This amendment would strike the words ‘or any claim or diagnosis that the woman will engage in conduct which she intends to result in her death.’ This amendment would simply clarify and simplify the bill as *the stricken words are already a subset of the prefatory language referring to psychological or emotional conditions. That is, we remove the duplicative language that could confuse or complicate the interpretation of the bill.*” Unofficial Tr. of Markup of H.R. 3803, the “District of Columbia Pain-Capable Unborn Child Protection Act,” by the H. Comm. on the Judiciary, 112th Cong. 79–80 (July 18, 2012) (statement of Rep. Franks) (empha-

to include any health exception whatsoever, nor does it have an exception for cases involving rape or incest.

The bill also imposes criminal penalties, including a fine or imprisonment of up to 2 years, or both. In addition, H.R. 3803 creates a cause of action against the individual performing the abortion. Eligible plaintiffs include the woman, the birth father, a present or former health care provider of the woman, and the woman's parents if she is an unemancipated minor.

Representative Trent Franks (R-AZ) introduced H.R. 3803 on January 25, 2012. Currently, the bill has 222 co-sponsors.⁹ On May 17, 2012, the Subcommittee on the Constitution held a hearing on the bill at which the following witnesses testified for the Majority: Anthony Levatino, M.D., Colleen Malloy, M.D., and Byron Calhoun, M.D. The Minority witness was Christy Zink, a District resident whose health would have been jeopardized had H.R. 3803 been in effect. As on previous occasions, the Majority refused District Delegate Eleanor Holmes Norton's request to testify on legislation affecting her district.¹⁰

A detailed summary of the bill's principal substantive provisions follows. Section 2 of the bill sets forth a series of "findings" that allege a fetus can feel pain at 20 weeks. Although section 2 presents these assertions as established scientific fact, they lack any factual basis. These findings also state, in direct contradiction to *Roe v. Wade* and its progeny, that there is "a compelling government interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain."¹¹

Section 3 of the bill adds a new section 1532 to title 18, United States Code that would criminalize abortions performed in the District at 20 weeks following fertilization or later, except in very limited circumstances. In addition, it provides a private cause of action. All further references in this analysis are to new section 1532.

Specifically, section 1532 makes it unlawful for any person to attempt to, or perform, an abortion within the District if the probable post-fertilization age is determined to be 20 weeks or greater. Prior to performing such an abortion, the physician must first determine the "probable post-fertilization age" of the fetus, or reasonably rely on the determination of another physician pursuant to new section 1532(b).

Section 1532(b)(2)(B) allows an abortion to be performed only if it is necessary to "save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury," but would not be permitted for "psychological or emotional conditions." Section 1532(b)(2)(C) further requires that such an abortion be done in a manner that "provides the best opportunity for the unborn child to survive," unless death or "substantial or irreversible physical impairment of a major bodily function" is imminent.

sis added) [hereinafter Markup Transcript], available at http://judiciary.house.gov/hearings/Markups%202012/mark_07182012.html.

⁹ Senator Mike Lee (R-UT) introduced a companion measure, S. 2103, which currently has 29 cosponsors.

¹⁰ See *No Taxpayer Funding for Abortion Act: Hearing on H.R. 3 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. 15–20 (2011).

¹¹ H.R. 3803 § 2(13).

With respect to criminal penalties, section 1532(c) provides that an individual who violates this measure is subject to a fine or imprisonment not to exceed 2 years, or both. Under 1532(d), a woman who undergoes an abortion in violation of this law may not be prosecuted.

With respect to civil remedies, section 1532(e) provides that a civil action may be brought against a person who violates this measure by the woman on whom the abortion was performed, the birth father, or the woman's parents, if she is an unemancipated minor. An individual may not bring an action if the pregnancy resulted from that person's criminal conduct or the plaintiff consented to the abortion.

A plaintiff may obtain money damages for all injuries, both psychological and physical; statutory damages equal to three times the cost of the abortion; and punitive damages. A prevailing plaintiff would also be entitled to reasonable attorney's fees. A prevailing defendant would only be entitled to attorney's fees if the court finds the plaintiff's suit was "frivolous and brought in bad faith."

Section 1532(e) also authorizes injunctive relief "to prevent an abortion provider from performing or attempting further abortions in violation of this section." In addition to the woman, her spouse, parent, sibling, or guardian, an action may also be brought by the United States Attorney for the District.

In addition, the bill would allow a current or former licensed health care provider of the woman to bring an action seeking such an injunction. This would appear to authorize *any* licensed health care professional who provided *any* services at *any* time in the woman's life to bring an action enjoining the woman's doctor from performing any such abortions at *any* time in the future, regardless of how long the practitioner had treated the woman, or how long it had been since the practitioner had seen her. This group of potential plaintiffs could include an adult woman's pediatrician, summer camp nurse, or physician who had molested or committed malpractice on her at some point in the past.

Representative Ted Deutsch (D-FL) offered an amendment that would have removed "a current or former licensed health care provider" from the list of eligible plaintiffs. That amendment was rejected. In addition to being a grotesque invasion of individual and family privacy, we doubt that such an individual could establish standing under Art. III of the Constitution.

Section 1532(f) requires a court to issue orders as are necessary to protect the anonymity of any woman who has undergone an abortion or attempted abortion if she does not give written consent to such disclosure. The court may issue orders to the "parties, witnesses, and counsel" and the records must be sealed to protect the anonymity of the woman.

Any physician who performs or attempts an abortion at 20 weeks or later in the District must report the procedure to the relevant health agency, in accordance with the agency's regulations under section 1532(g). The report must include the post-fertilization age, method of abortion, the age of the woman, and compliance with requirements for exception (facts physician relied upon and the basis for any determinations in the performance of the abortion). The report must not include the name or address of the woman whose pregnancy was terminated, or any other information identifying the

woman. The report is to contain a “unique Medical Record Number” to match the report to the woman’s medical records. The reports are not available for public inspection, and will only be available to the United States Attorney for the District or the U.S. Attorney’s delegate for a criminal or civil investigation of conduct that may violate the Act, or pursuant to a court order. An annual public report is to be issued no later than June 30 of each year after enactment, providing statistics for the previous calendar year from all of the reports made to the health agency.

Any physician who fails to submit a report 30 days after the report is due is subject to a \$1,000 late fee for each additional 30-day period or portion of a 30-day period the report is overdue. A health agency may bring a civil action against any physician who fails to file this report more than 180 days after the reporting deadline pursuant to section 1532(g)(5)(B). In addition, intentional or reckless failure by any physician to comply with any reporting requirements under this measure, other than late filing of a report, qualifies as grounds for any disciplinary sanction which the Health Professional Licensing Administration of the District of Columbia deems appropriate, including suspension and revocation of any license granted by the Administration.

No later than 90 days after Act’s enactment, the health agency must prescribe forms and regulations to assist in compliance of the reporting requirements. The reporting requirements for all abortions take effect the first calendar month beginning after the effective date of such forms and regulations pursuant to section 1532(g)(6).

Finally, section 1532(h) of the bill sets forth various definitions of terms used in this measure.

CONCERNS WITH H.R. 3903

I. H.R. 3803 IS FACIALLY UNCONSTITUTIONAL

H.R. 3803 unconstitutionally prohibits nearly all abortions prior to fetal viability, without providing the requisite exception to protect a woman’s health. It only includes an impermissibly narrow exception to protect a woman’s life. By prohibiting nearly all abortions beginning at “the probable post-fertilization age” of 20 weeks, H.R. 3803 runs flagrantly afoul of this clear constitutional rule. While many factors go into determining fetal viability, and it can vary from case-to-case, it is generally acknowledged as not occurring prior to 24 weeks gestation.¹²

The Supreme Court, in *Roe v. Wade*, struck down pre-viability abortion prohibitions.¹³ The Court explained:

With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both

¹²C. Vavasseur *et. al.* Consensus Statements on the Borderlands of Neonatal Viability: From Uncertainty to Grey Areas 100 *Ir. Med. J.* 561 (2007) (reviewing the consensus statements of the British Association of Perinatal Medicine, American Academy of Pediatrics, the Fetus and Newborn Committee Canada, The Dutch Group, The Australian Group, Nuffield Institute of Bioethics, and the Neonatal Section of the Irish Faculty of Pediatrics).

¹³*Roe v. Wade*, 410 U.S. 113 (1973).

logical and biological justification. If the State is interested in protecting fetal life after viability, it may go as far as to proscribe abortion during that period, *except when it is necessary to preserve the life or health of the mother*.¹⁴

In a companion case, the Court clarified the requirement that the state not prohibit an abortion where the woman's life or health is at risk, and that this determination must be left to a doctor in consultation with her patient. The Court further held that health includes both physical and emotional health. It observed:

[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.¹⁵

In the years since *Roe* and *Doe*, the Court has not departed from this rule. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶ the Court set out an “undue burden” test for determining whether abortion restrictions are permissible. As the Court observed:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.¹⁷

Nonetheless, the Court went on to state, “[w]e also reaffirm *Roe*'s holding that ‘subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’”¹⁸

This constitutional requirement to protect a woman's life and health is in direct contradiction with the substantially narrower exception in section 3 of H.R. 3803, which allows an abortion only when “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[.]”

¹⁴ *Id.* at 163–4 (emphasis added).

¹⁵ *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

¹⁶ 505 U.S. 833 (1992).

¹⁷ *Id.* at 874.

¹⁸ *Id.* at 879 (quoting *Roe v. Wade*, 410 U.S. at 164–65).

The sponsor has argued that a health exception, and a more robust life exception, are not required. In the Committee's markup of this bill, Representative Franks stated, "The bill before us today contains essentially the same exact exception that the Partial Birth Abortion Act contained, which was upheld by the Supreme Court. That exception contained a life exception only."¹⁹

Our colleague, however, misreads the Supreme Court's ruling. While the Court did uphold a congressionally-sanctioned prohibition against a particular abortion procedure, and did so in the absence of a health exception,²⁰ the Court's ruling does not support the exclusion of a health exception in this legislation. In *Gonzalez v. Carhart*, the Court stated that the "prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it 'subject[ed] [women] to significant health risks.'"²¹ The Court upheld the challenged statute only by finding (wrongly, we believe) that "the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure."²²

In an effort to bring this legislation into partial compliance with the Constitution, Representative Jerrold Nadler (D-NY) offered an amendment that would have added an exception to the prohibition where an abortion was necessary to protect a woman's life or health. The amendment was rejected.

II. H.R. 3803 THREATENS WOMEN'S HEALTH

Another disturbing aspect of H.R. 3803 is that it fails to make any provision for a crisis pregnancy that would fall short of a physical risk to the woman's survival.

Christy Zink, a District resident, testified before the Subcommittee on the Constitution and movingly described the nightmare she and her family suffered when a much wanted pregnancy went horribly awry.

When I was 21 weeks pregnant, an MRI revealed that our baby was missing the central connecting structure of the two parts of his brain. A specialist diagnosed the baby with agenesis of the corpus callosum. What allows the brain to function as a whole was simply absent. But that wasn't all. Part of the baby's brain had failed to develop. Where the typical human brain presents a lovely, rounded symmetry, our baby had small, globular splotches. In effect, our baby was also missing one side of his brain. . . . Our baby's condition could not have been detected earlier in my pregnancy. . . . The prognosis was unbearable. . . . If this bill had been passed before my pregnancy, I would have had to carry to term and give birth to a baby whom the doctors concurred had no chance of a life and would have experienced near-constant pain. If he

¹⁹Markup Transcript at 90.

²⁰*Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003).

²¹*Id.* at 161 (citing *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S., 320, 328 (2006)).

²²*Id.* at 164.

had survived the pregnancy—which was not certain—he might have never left the hospital.²³

In another case, Danielle Deaver, a Nebraska woman, was 22-weeks pregnant when her water broke. Doctors informed her that her fetus would likely be born with undeveloped lungs and not survive outside the womb. Because all the amniotic fluid had drained, the tiny growing fetus slowly would be crushed by the uterus walls. During her pregnancy, Nebraska enacted a law similar to H.R. 3803. As a result, Ms. Deaver could not obtain an abortion. Thus, despite serious complications and enduring infections, Ms. Deaver had to allow the fetus to be born. On Dec. 8, 2010, Ms. Deaver delivered a one-pound, 10-ounce child who survived only 15 minutes outside the womb.²⁴

In order to ameliorate the cruelty of this legislation, Representative Mike Quigley (D–IL) offered an amendment that, while falling short of the full health exception required by the Constitution, would have permitted an abortion if a woman had cancer and needed life saving treatment incompatible with continuing the pregnancy. This amendment was also rejected.

We find it appalling that any Member would presume to inflict this kind of suffering on a woman and her family. It is cruel as well as unconstitutional.

III. H.R. 3803 IS ANOTHER ASSAULT ON THE SOVEREIGNTY OF THE DISTRICT OF COLUMBIA

This legislation would apply only to the District. It is yet another example of the abuse of Congressional power over the District. As we know, the District is ably represented by its Delegate, Eleanor Holmes Norton (D–DC), but she is denied a vote in the House of Representatives. In addition, the District has no representation in the Senate. Consequently, some Members believe that they may arrogate to themselves the right to make laws for residents of the District that they would never propose for their own constituents, much less for the Nation. As such, H.R. 3803 is simply a raw example of the abuse of power.

In particular, we note that the Majority refused to allow Delegate Eleanor Holmes Norton to be heard on this issue during the hearing held by Constitution Subcommittee on H.R. 3803. As we have stated earlier in these views, this is not the first time the Majority has chosen to treat our colleague in such a disrespectful manner, and we believe that it speak volumes about the mindset behind this legislation.

Reproductive rights in the District have long been a tempting political target. The public funding of abortion services for District residents is a perennial issue debated by Congress during its annual deliberations on District appropriations. The prohibition on the use of District funds for abortions is another example of congressional intrusion into local matters.²⁵

²³ H.R. 3803 Hearing (statement of Christy Zink).

²⁴ Susan Donaldson James, *Danielle Deaver Denied Abortion Even as Uterus Crushed Fetus*, ABCNews, available at <http://abcnews.go.com/Health/20-week-abortion-ban-nebraska-oklahoma-fetus-feel/story?id=13116214#.T7KtOILknfU> (Mar. 14, 2010).

²⁵ Sabrina Tavernise, *Abortion Limit Is Renewed, as is Washington Anger*, N.Y. TIMES, Apr. 10, 2011, available at <http://www.nytimes.com/2011/04/11/us/politics/11district.html>.

The passage of the District of Columbia Appropriations Act of 1980²⁶ marked the first time Congress imposed some limitation or prohibition on the use of Federal and city funds for abortion services for District residents. Thereafter, the District of Columbia Appropriations Act of Fiscal Year 2010 permitted the city to use its own funds, but not Federal funds, for such services. Laws appropriating funds for the District for fiscal years 2011²⁷ and 2012²⁸ included provisions prohibiting the use of both District *and* Federal funds for abortion services, except in cases of rape, incest, or when the life of the mother was endangered.

H.R. 3803 appears to be based on Congress' plenary power over the District, which is set forth in the Constitution.²⁹ The authority for congressional review and approval of the District's budget is derived from the Constitution and the District of Columbia Home Rule Act.³⁰ As Delegate Norton correctly pointed out in her written testimony submitted for the record, however, "Congress gave up that power over the District of Columbia, except for a small number of enumerated exceptions, with the passage of the Home Rule Act of 1973. The right to reproductive choice was not among those exceptions."³¹

Notwithstanding Congress' power under the Constitution, the Supreme Court held in *Callan v. Wilson* that "[t]here is nothing in the history of the constitution, or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property."³² If this means anything, then it must mean that, notwithstanding its power over the District, Congress is bound by the Constitution to respect women's rights under *Roe v. Wade*, even if those women are citizens of the nation's capital.

IV. THE JUSTIFICATION FOR H.R. 3803 IS BASED ON PSEUDO-SCIENCE

This legislation is part of the Majority's continuing war on science.³³ In an effort to advance their policy objectives, some members of the Majority once again treat marginal views as unchallenged fact, and dismiss broadly accepted, peer-reviewed research out of hand. As former Republican Science Committee Chairman, Sherwood Boehlert, urged his Republican colleagues:

The new Congress should have a policy debate to address facts rather than a debate featuring unsubstantiated attacks on science. We shouldn't stand by while the reputations of scientists are dragged through the mud in order to win a political argument. And no member of any party should look the other way when the basic operating parameters of scientific inquiry—the need to question, ex-

²⁶ Pub. L. No. 96-93 (93 Stat. 719) (1980).

²⁷ Pub. L. No. 112-10 (125 Stat. 38) (2011).

²⁸ Pub. L. No. 112-74 (125 Stat. 773) (2011).

²⁹ The Constitution provides that "Congress shall have the Power. . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17; *see, e.g.*, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

³⁰ Pub. L. No. 93-198, § 446, 87 Stat. 774 (1973).

³¹ H.R. 3803 Hearing (statement of Del. Eleanor Holmes Norton).

³² 127 U.S. 540, 550 (1888).

³³ John Horgan, *Political Science*, N.Y. TIMES, Dec. 18, 2005, available at <http://www.nytimes.com/2005/12/18/books/review/18horgan.html?pagewanted=all> (last visited: July 27, 2012).

press doubt, replicate research and encourage curiosity—are exploited for the sake of political expediency. My fellow Republicans should understand that wholesale, ideologically based or special-interest-driven rejection of science is bad policy. And that in the long run, it's also bad politics.³⁴

The authors of the bill take the position that a fetus can feel pain at 20 weeks. This is not a settled issue in the scientific community. In fact, this view is quite controversial and has been rejected by the mainstream profession. One expert cited by the Majority, Dr. Kanwaljeet Anand, testified on this issue in 2005 that he thought “the evidence for and against fetal pain is very uncertain at the present time.”³⁵

Similarly, a survey of available research published in the *Journal of the American Medical Association* in 2005 concluded that “[e]vidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester.”³⁶ In addition, a detailed survey by the Royal Academy of Obstetricians and Gynaecologists concluded:

In reviewing the neuroanatomical and physiological evidence in the fetus, it was apparent that connections from the periphery to the cortex are not intact before 24 weeks of gestation and, as most neuroscientists believe that the cortex is necessary for pain perception, it can be concluded that the fetus cannot experience pain in any sense prior to this gestation. After 24 weeks there is continuing development and elaboration of intracortical networks such that noxious stimuli in newborn preterm infants produce cortical responses. Such connections to the cortex are necessary for pain experience but not sufficient, as experience of external stimuli requires consciousness. Furthermore, there is increasing evidence that the fetus never experiences a state of true wakefulness in utero and is kept, by the presence of its chemical environment, in a continuous sleep-like unconsciousness or sedation. This state can suppress higher cortical activation in the presence of intrusive external stimuli. This observation highlights the important differences between fetal and neonatal life and the difficulties of extrapolating from observations made in newborn preterm infants to the fetus.³⁷

CONCLUSION

While our Nation is struggling to regain economic stability in the aftermath of financial distress not experienced since the Great Depression of the 1930s, the Majority focuses its resources to continue its “War Against Women” as evidenced by H.R. 3803. This legislation, creatively entitled the “District of Columbia Pain-Capable Un-

³⁴ Sherwood Boehlert, Op-Ed., *Can the Party of Reagan Accept the Science of Climate Change?*, WASH. POST, Nov. 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111805451.html> (Last visited: July 27, 2012).

³⁵ *Pain of the Unborn: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005).

³⁶ Susan Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. Am. Medical Ass'n 947 (Aug. 21, 31, 2005).

³⁷ Royal College of Obstetricians and Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice*, at viii (Mar. 2010).

born Child Protection Act,” is yet another dangerous and unconstitutional attempt to undermine women’s basic reproductive rights, and endanger their health with appeals to ideology rather than to sound science.

Every pregnancy is unique and different. Unfortunately, sometimes women face difficult and emotionally devastating decisions in the course of their pregnancies that require them to consider abortion as a health option. Yet, some members of Congress have absolutely no qualms about meddling in what, for these women and their families, is a private and often difficult decision. The Majority seeks to use the Federal courts to coerce them into making decisions that may be bad for their health, bad for their families, and deny them the best care our medical system can provide.

This legislation will threaten women’s lives and their health by substituting the political preferences of politicians for the very difficult decisions women must face when confronted with these situations. That is morally intolerable, and constitutionally impermissible.

For these reasons, and those stated above, we respectfully dissent, and urge our colleagues to oppose this dangerous and ill-considered legislation.

JOHN CONYERS, JR.
 HOWARD L. BERMAN.
 JERROLD NADLER.
 ROBERT C. “BOBBY” SCOTT.
 MELVIN L. WATT.
 ZOE LOFGREN.
 SHEILA JACKSON LEE.
 MAXINE WATERS.
 STEVE COHEN.
 HENRY C. “HANK” JOHNSON, JR.
 MIKE QUIGLEY.
 JUDY CHU.
 TED DEUTCH.
 LINDA T. SÁNCHEZ.

