

MEMORANDUM

TO: Interested persons
FROM: Christine Castro, Sue Frietsche, and Mashayla Hays,
Women's Law Project
DATE: April 29, 2019
RE: **HB 321, making abortion a felony if sought for
prohibited reasons**

HB 321 would criminalize abortion sought because of a prenatal diagnosis of Down syndrome and/or the sex of the fetus. It is an unconstitutional pre-viability abortion ban that would, if enacted into law, be subject to a legal challenge. Every time a federal court has considered the constitutionality of a pre-viability abortion ban, it has been held unconstitutional under decades-long U.S. Supreme Court precedent. Moreover, HB 321's foreseeable consequences would harm women's health by discouraging honest and open communication between a patient and her health care provider; those women who are turned away as a result of the law will, if they can afford it, be forced to travel out of state for abortion care. For these reasons, we oppose HB 321 and urge the Pennsylvania legislature to reject it.

HB 321 criminalizes abortion based on the reason a person seeks abortion care.

HB 321¹ amends Section 3204 of the Abortion Control Act, 18 Pa. C.S.A. §§ 3201-3220, to criminalize abortion at any stage of pregnancy if the abortion is sought because of:

- (a) a prenatal diagnosis of Down syndrome,
- (b) and/or the sex of the fetus.

¹ HB 321 was introduced on April 15, 2019, by Rep. Kate A. Klunk (R-York). See H.B. 321, Pa. Gen. Assemb., Reg. Sess. (Pa. 2019-20), *available at* <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=H&type=B&bn=0321>. No public hearings were held on this bill. A similar bill passed in the House last legislative session, by a vote of 139-56, but failed to pass the Senate.

Specifically, Section 2 of the bill amends the Abortion Control Act, 18 Pa. C.S.A. § 3204, to criminalize abortion sought because “[t]he [fetus] receives a prenatal diagnosis of Down syndrome.”² HB 321 defines “Down syndrome” as “[a] chromosome disorder associated with an extra chromosome 21, in whole or in part, or an effective trisomy for chromosome 21.”

HB 321 would also expand criminal liability under current law by amending 18 Pa. C.S.A. § 3204 to criminalize abortion “sought because of the sex of the [fetus].” Pennsylvania law has prohibited abortions sought “solely because of the sex of the [fetus]” since 1989 (Nov. 17, 1989, P.L. 592, No. 64).³ Amending 18 Pa. C.S.A. § 3204 to remove the term “solely” would criminalize abortion if the sex of the fetus factors into *any* reason for seeking abortion.

A physician who intentionally, knowingly, or recklessly violates Section 2 would be guilty of a felony of the third degree, punishable by a term of incarceration of up to seven years and up to \$15,000 in fines. In addition, the physician’s license would be subject to suspension or revocation.

Pregnant people need to be informed of all available health care options so that they can decide what course of treatment is best for them. The American College of Obstetricians and Gynecologists (ACOG) recommends that all women be informed of prenatal genetic screening and diagnostic testing options as early in pregnancy as possible.⁴ ACOG distinguishes between prenatal *screening* and prenatal *diagnostic testing*. Prenatal *screening* determines a patient’s risk of having a fetus diagnosed with a genetic anomaly. Prenatal *diagnostic testing* determines whether a specific genetic anomaly is present in the fetus. Access to early screening and testing improves pregnancy and childbirth outcomes and makes it possible for patients to have treatment options in

² The term “the unborn child receives” provided in Section 2 is at best bias and medically inaccurate, and at worst intent to enshrine extreme ideology in law. It is the pregnant patient, in consultation with her health care provider, who undergoes prenatal genetic testing, not the fetus.

³ To our knowledge, no prosecution has ever been brought based on this provision, nor has it ever been the subject of a legal or constitutional challenge.

⁴ American College of Obstetricians and Gynecologists (ACOG), *Ob-Gyns Release Revised Recommendations on Screening and Testing for Genetic Disorders* (March 1, 2016), <https://www.acog.org/About-ACOG/News-Room/News-Releases/2016/Ob-Gyns-Release-Revised-Recommendations-on-Screening-and-Testing-for-Genetic-Disorders>. While ACOG recommends that patients be counseled on screening and testing options, they maintain that the decision to undergo testing should be patient-driven.

the first trimester, including advance preparation for delivery and neonatal care, identifying fetal anomalies with available prenatal treatment, and termination of pregnancy.⁵ Screening tests for fetal anomalies such as Down syndrome are available as early as the first trimester at 10 weeks' gestation.⁶

One in four women will have an abortion by the time she is 45 years old,⁷ and most women cite several reasons for having an abortion, including emotional, family, medical, employment, spiritual, and financial.⁸ Three-quarters of women who have abortions name existing familial responsibilities—including parenting their child or children—as a major factor in their decision to terminate their pregnancy.⁹ Currently, abortion is a legal option for women who have received screening or diagnostic tests indicating that they may be carrying a fetus with a genetic disorder.

Pre-viability abortion bans like HB 321 are unconstitutional.

HB 321 is unconstitutional because it criminalizes abortion before viability and unduly interferes with a woman's decision to seek a pre-viability abortion. For over 45 years, the U.S. Constitution has prohibited states from banning abortion before fetal viability. *See, e.g., Planned Parenthood Southeastern Pa. v. Casey*, 505 U.S. 833, 870, 879 (1992) (“a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (same); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (same); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (same); *Roe v. Wade*, 410 U.S. 113 (1973).

⁵ *Id.*

⁶ ACOG, *Practice Bulletin: Screening for Fetal Aneuploidy* 162, 3 (May 2016), abstract available at <https://www.ncbi.nlm.nih.gov/pubmed/26938573>.

⁷ Rachel K. Jones et al., *Population Group Abortion Rates & Lifetime Incidence of Abortion: United States, 2008-2014* (2017); doi:10.2105/AJPH.2017.304042, available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304042>.

⁸ Guttmacher, *Induced Abortion in the United States* (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>; Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative & Qualitative Perspectives*, *Perspectives on Sexual and Reproductive Health* (2005), 37(3):110-118, doi:10.1363/3711005, available at <https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives>.

⁹ According to Guttmacher Institute, fifty-nine percent of women who have abortions have had at least one previous birth. Guttmacher, *Induced Abortion in the United States* (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states>.

In fact, every time a federal court has considered the constitutionality of a pre-viability abortion ban, it has been held unconstitutional under this unbroken line of Supreme Court precedent. See, e.g., *MKB Mgmt. Corp. v. Stenehjem*, 795, 773 F.3d 768 (8th Cir. 2015) (blocking North Dakota’s 6 week abortion ban), *cert. denied*, 136 S. Ct. 981 (2016); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (finding Idaho’s unconstitutional 20 week abortion ban “directly contrary to the Court’s central holding in *Casey* that a woman has the right to ‘choose to have an abortion before viability’”) (quoting *Casey*, 505 U.S. at 846); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (holding Arkansas’ 12 week abortion ban unconstitutionally prohibits pre-viability abortions) (citing *Casey*, 505 U.S. at 879), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (finding Arizona’s 20 week abortion ban “unconstitutional under a long line of invariant Supreme Court precedents.”), *cert. denied*, 134 S. Ct. 905 (2014); *Bryant v. Woodall*, No. 1:16CV1368, 2019 WL 1326900, at *1, *14 (M.D.N.C. Mar. 25, 2019) (enjoining North Carolina’s 20 week abortion ban, finding that “*Casey*’s clear dictate applies []: a state law cannot impose an outright ban [prior to viability]”); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 540 (S.D. Miss. 2018) (enjoining Mississippi’s 15 week abortion ban), *appeal docketed*, No. 18-60868 (5th Cir. Dec. 17, 2018); *EMW Women's Surgical Ctr. v. Beshear*, 3:19-CV-178-DJH, 2019 WL 1233575, at *1 (W.D. Ky. Mar. 15, 2019) (blocking Kentucky’s 6 week abortion ban, noting that “[t]he Supreme Court has stated in no uncertain terms that ‘a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability’”) (quoting *Casey*, 505 U.S. at 879).

Furthermore, the U.S. Supreme Court has made clear that a woman’s right to terminate her pregnancy prior to viability outweighs any state interest, including promoting childbirth. See *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (reiterating that “[b]efore viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure”) (quoting *Casey*, 505 U.S. at 846 (1992)); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Roe v. Wade*, 410 U.S. 113 (1973).

Obstetrician-gynecologists recognize the threshold of viability to be no earlier than the 24th week of gestation, or roughly the end of the second trimester.¹⁰ Screening tests for fetal anomalies such as Down syndrome are available as early as 10

¹⁰ ACOG, Obstetric Care Consensus, *Perivable Birth* (June 2016) <http://www.acog.org/Resources-And-Publications/Obstetric-Care-Consensus-Series/Perivable-Birth>; Morgan et al., *Obstetrician-gynecologists’ Practices Regarding Preterm Birth at the Limit of Viability* (Feb. 2008), abstract available <https://www.ncbi.nlm.nih.gov/pubmed/18240080>.

weeks' gestation.¹¹ As observed by the U.S. Supreme Court, a woman's decision to terminate her pregnancy involves "intimate views with infinite variations." *See Casey*, 505 U.S. at 853. A woman who learns of a diagnosis of Down syndrome may decide terminating her pregnancy is the right decision for her. HB 321 prohibits women in these cases from seeking an abortion in Pennsylvania before viability and is thus unconstitutional.

Federal courts have blocked enforcement of abortion bans similar to HB 321.

Federal courts in Indiana, Ohio, and Kentucky have recently found state laws similar to HB 321 unconstitutional. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 265 F.Supp.3d 859 (S.D. Ind. 2017) (permanently enjoining enforcement of Indiana law criminalizing abortion sought solely because of certain enumerated reasons including the sex of the fetus or a diagnosis of Down syndrome), *aff'd by Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 888 F.3d 300, 302 (7th Cir. 2018); *Preterm-Cleveland v. Himes*, 294 F.Supp.3d 746, 749 (W.D. Ohio 2018) (granting preliminary injunction against enforcement of Ohio law criminalizing abortion sought on basis of a Down syndrome diagnosis), *appeal docketed*, No. 18-3329 (4th Cir. Apr. 12, 2018); *EMW Women's Surgical Ctr. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, at *2, *5 (W.D. Ky. Mar. 15, 2019) (granting temporary restraining order against Kentucky law criminalizing abortion sought "in whole or in part" because of the sex, race, color, or national origin of the fetus, or because of "[t]he diagnosis, or potential diagnosis, of Down syndrome or any other disability.").

In April 2018, the U.S. Circuit Court of Appeals for the Seventh Circuit, the first federal appeals court to consider bans on abortion due to fetal diagnosis, ruled that the Indiana fetal diagnosis provisions "clearly violate well-established Supreme Court precedent holding that a woman may terminate her pregnancy prior to viability, and that the State may not prohibit a woman from exercising that right for any reason." *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 302 (emphasis added).¹² The Court reasoned:

The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly

¹¹ ACOG, *supra* note 6, at 3.

¹² The challenged Indiana law also banned abortion sought solely because of the fetus's sex, race, color, national origin, or ancestry. *Planned Parenthood of Ind. & Ky.*, 265 F.Supp.3d at 862.

held cannot be imposed by the State. . . . Nothing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman’s decision to terminate her pregnancy prior to viability.

Id. at 306.¹³

These courts recognized that prohibiting women from obtaining abortion before viability based on their reasons for seeking abortion violates binding federal law and women’s constitutionally protected rights. *Planned Parenthood of Ind. & Ky.*, 265 F.Supp.3d at 866 (finding Indiana law “clearly violated” Supreme Court precedent because it banned certain women from choosing abortion and “the woman’s right to choose abortion to terminate a pregnancy pre-viability is categorical”) (citing *Casey*, 505 U.S. at 870, 879); *Preterm-Cleveland*, 294 F.Supp.3d at 749 (“[F]ederal law is crystal clear: ‘a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability’ . . . Ohio’s new law wrongfully does just that: it violates the right to privacy of every woman in Ohio and is unconstitutional on its face.”) (quoting *Casey*, 505 U.S. at 879).¹⁴

Similarly, HB 321 impermissibly dictates what factors a woman may consider in choosing abortion before viability: “the very notion that, pre-viability, a State can examine the basis for a woman’s choice to make this private, personal and difficult decision . . . is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions.” *Preterm-Cleveland*, 294 F.Supp.3d at 755 (quoting *Planned Parenthood of Ind. & Ky.*, 265 F.Supp.3d at 868). This type of government intrusion is unconstitutional because “it is a woman’s right to choose an abortion that is protected, which of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice.” *Planned Parenthood of Ind. & Ky.*, 265 F.Supp.3d at 867.

¹³ We note that the Indiana statute deemed unconstitutional by the 7th Circuit is in at least one important respect much less onerous than HB 321: the Indiana statute provides that a physician violates the statute only if she or he “knowingly and intentionally” provides a prohibited abortion; in Pennsylvania under HB 321, a physician would be criminally liable if she or he “intentionally, knowingly, or recklessly” committed a violation.

¹⁴ As of April 2019, only one state, North Dakota, had a law in effect that bans obtaining abortion because of a fetal diagnosis. Guttmacher, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (Apr. 1 2019), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>. The North Dakota law has not been challenged in court.

Eight states, including Pennsylvania, have laws in effect prohibiting abortion sought because of the sex of the fetus.¹⁵ While these laws have been masqueraded as efforts to protect female fetuses, they perpetuate false stereotypes about immigrant women and stigmatize people who seek abortion, especially women of color. See April Shaw, *How Race-Selective & Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion & Deficiencies in Constitutional Protections for Women of Color*. 40 N.Y.U. REV. L. & SOC. CHANGE 545, 562 (2016) (arguing “selective laws are based on essentialist racial narratives that signal which women deserve greater scrutiny when attempting to access abortion services”). Federal courts have struck down similar laws as unconstitutional pre-viability abortion bans. See, e.g., *Planned Parenthood of Ind. & Ky.*, 265 F.Supp.3d 859, *aff’d by Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 888 F.3d 300 (7th Cir. 2018); Guttmacher, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (Mar. 1 2019).

HB 321’s foreseeable consequences will harm women’s health.

The foreseeable consequences of subjecting doctors to felony charges if they recklessly provide abortion care to women with a fetal diagnosis are that doctors will be inhibited from recommending screening and diagnostic testing; patients will be less likely to communicate their medical history and health concerns to their doctors and genetic counselors, lest it foreclose their options; and women who are turned away as a result of the law will, if they can afford it, be forced to leave the state to get abortion care from providers who are not subject to Pennsylvania’s ban.

Moreover, because doctors could face felony charges if they recklessly provide abortion if the fetus’ sex is a factor in the patient’s decision, doctors would be incentivized to examine every reason why she is seeking abortion. This would cause very real harm when after receiving a diagnosis of a sex-linked fetal anomaly, the patient decides abortion is the best option for her, but her doctor has a strong incentive to refuse to perform the abortion in order to avoid criminal liability.

HB 321 is a radical departure from evidenced-based, patient-centered health care. In fact, ACOG has issued a statement denouncing “reason bans” because they compromise the patient-doctor relationship and endanger women’s health:

¹⁵ Guttmacher, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (Apr. 1 2019), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>.

These “reasons bans” represent gross interference in patient-physician relationship, creating a system in which patients and physicians are forced to withhold information or outright lie in order to ensure access to care. In some cases, this will come at a time when a woman’s health, and even her life, is at stake, and when honest, empathetic health counseling is in order. Moreover, it threatens to hold physicians liable for providing women with the care that they need.¹⁶

None of these consequences advances women’s health.

Because of its adverse impact on women’s health, HB 321 fails under the Supreme Court’s most recent decision on abortion rights. In *Whole Woman’s Health*, the Court reaffirmed and clarified *Casey*’s holding that “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877). The majority opinion clarified that courts reviewing abortion restrictions must “consider the burdens a law imposes on abortion access together with the benefits those laws confer” and “weigh[] the asserted benefits against the burdens.” *Whole Woman’s Health*, 136 S. Ct. at 2309-10. Here, not only does the statute confer no health benefit sufficient to justify its burden on abortion access; it actually will harm women’s health by inhibiting screening and testing, impeding the open, honest flow of information between doctor and patient, and driving patients to seek out-of-state providers. HB 321 “does not ‘burden’ the right of such women to choose a pre-viability abortion, it eradicates the right entirely.” *Preterm-Cleveland*, 294 F.Supp.3d at 754. As such, it is unconstitutional under *Whole Woman’s Health*.

Conclusion

A memo provided by the sponsor of HB 321 suggests its purpose is to protect children with Down syndrome.¹⁷ In fact, HB 321 does nothing to support the needs of children with disabilities or their families. People with disabilities can and do thrive given appropriate support, but our

¹⁶ ACOG, *ACOG Statement on Abortion Reasons Bans* (Mar. 10, 2016), <https://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Abortion-Reason-Bans>.

¹⁷ Memorandum from Rep. Kate A. Klunk and Rep. Mike Turzai on Down Syndrome Prot. Legislation to the Pa. House of Representatives (Feb. 13, 2019), *available at* <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=28359>.

Commonwealth is falling far short in providing necessary health care, educational programming, and employment supports for people with disabilities.

The Pennsylvania legislature should reject HB 321 and instead advance initiatives that support the well-being of people with disabilities and families who are raising a child with a disability, including:

- eliminating the waiting list for emergency services for individuals with disabilities so they have access to the services they need;
- increasing pay for professional caregivers to ensure that people with disabilities have ready access to competent, compassionate care; and
- Opposing funding cuts and restrictive eligibility criteria to Medicaid and other safety net programs.

We should support women as they navigate the process of making personal, sometimes difficult decisions about pregnancy and parenting, not create obstacles predicated on unsound assumptions and rhetoric that demean women who seek abortion.

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