

MEMORANDUM

TO: Interested persons
FROM: Sue Frietsche and Christine Castro, Women's Law Project
DATE: December 5, 2017
RE: **SB 3, Criminalizing Abortion**

SB 3 was introduced on February 2, 2017, by Senator Michele Brooks (R-Warren) and passed in the Senate on February 8, 2017.¹ The bill amends the Abortion Control Act, 18 Pa. C.S.A. §§ 3201-3220, to ban abortion by any method after 19 weeks' gestation. It would also criminalize "dismemberment" abortions at any stage of pregnancy, which would likely ban dilation and evacuation (D&E) abortion procedures.

SB 3 criminalizes abortion after 19 weeks' gestation.

Section 2 of the bill amends 18 Pa. C.S.A. § 3211 by changing the point in gestation at which abortion becomes a crime from the current 24 weeks to 20 weeks.² In 2015, there were 652 abortions performed in Pennsylvania at 18-20 weeks' gestation (some portion of which would be illegal under SB 3). There were 380 abortions performed at 21-23 weeks' gestation (all of which would be illegal under SB 3 absent extraordinary circumstances).³ If SB 3 were to take effect, performing an abortion past the 19th week of pregnancy would be a felony.

This provision is unconstitutional for at least two reasons: it criminalizes abortion before viability, and its health exception is so narrow that women could not get an abortion even if their pregnancy was causing them to suffer health damage.

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<http://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170&cosponId=21603>.

² Pregnancies are measured from the first day of the last menstrual period, *see* 18 Pa. C.S.A. § 3203 (defining "gestational age"), and not from the midpoint of the menstrual cycle two weeks later when most pregnancies actually begin. SB 3 would therefore criminalize abortion after the woman has completed her 17th week of pregnancy, in the middle of the second trimester.

³ *See* Pennsylvania Dep't of Health, 2015 Abortion Statistics, at 2, *available at* http://www.statistics.health.pa.gov/HealthStatistics/VitalStatistics/Documents/Pennsylvania_Annual_Abortion_Report_2015.pdf.

Pre-viability abortion bans like SB 3 are blatantly unconstitutional.

For 44 years, the U.S. Constitution has prohibited states from banning abortion before fetal viability. *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016); *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 *Planned Parenthood Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992)); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Roe v. Wade*, 410 U.S. 113 (1973).

SB 3 is unconstitutional because it bans abortion prior to the point when pregnancies become viable. “Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Casey*, 505 U.S. at 879.

Furthermore, the U.S. Supreme Court has made clear that states are prohibited from drawing a line at a particular gestational period to establish fetal viability. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976). The Supreme Court has repeatedly held that viability is a matter best left to the doctor’s medical judgment. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 396 (1979) (reaffirming that “the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician”) (quoting *Danforth*, 428 U.S. at 64); *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989); *Roe*, 410 U.S. at 160.

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.⁴ Every pregnancy is different, and there are a variety of contributing factors in determining whether a fetus is viable.⁵ The gestational limit in SB 3 presumes that every pregnancy is viable at least a month before most pregnancies are and is thus unconstitutional.

Every time a pre-viability ban has been challenged in court, it has been blocked from going into effect under Supreme Court precedent. *See, e.g., McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (finding Idaho’s 20 week abortion ban unconstitutional and “directly contrary to the Court’s central holding in *Casey* that a woman has the right to ‘choose to have an abortion before viability and to obtain it without undue interference from the State’”) (quoting *Casey*, 505 U.S. at 846); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (“Because [Arizona’s 20 week abortion ban] deprives the women to whom it applies of the ultimate decision to terminate their pregnancies

⁴ American College of Obstetricians and Gynecologists, *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>.

⁵ A study in the *New England Journal of Medicine* noted that all infants in the study born before 22 weeks of gestation died within 12 hours after birth. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, *New England J. Med.* 2015; 372:1801-1811 (collecting data of rates of survival and survival without impairment among births between 22 to 24 weeks of pregnancy), abstract available at http://www.nejm.org/doi/full/10.1056/NEJMoa1410689?query=featured_home&. Despite characterization to the contrary in the popular press, *see* McCullough, *Progress in Saving Premies on the Edge of Viability*, Philly.com (updated Feb. 16, 2017), it “remains true in the present day that delivery before 23 weeks of gestation typically results in neonatal death (5–6% survival), and among rare survivors, significant morbidity is universal (98–100%).” ACOG, *Obstetric Care Consensus: Perivable Birth, No. 4* (June 2016), available at <http://www.acog.org/Resources-And-Publications/Obstetric-Care-Consensus-Series/Perivable-Birth>.

prior to fetal viability, it is unconstitutional under a long line of invariant Supreme Court precedents.”), *cert. denied*, 134 S. Ct. 905 (2014).

Abortion bans like SB 3 that criminalize abortions that women need to avoid health damage are unconstitutional.

SB 3 has a narrow health exception: it would not be illegal for a physician to perform an abortion after 19 weeks if the physician “reasonably believes that it is necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman.”⁶ SB 3, Section 2(b)(1). This exception was drawn from the existing gestational limit in the Abortion Control Act. *See* 18 Pa. C.S. § 3211(b). A physician providing a post-19-week abortion under this exception must comply with a ponderous second-physician consultation requirement that has the potential to delay urgent medical attention.⁷

SB 3’s narrow exception is not a true health exception: it would require women to sustain damage to their health, even serious damage, that is “irreversible” but not “substantial,” that is “substantial” but not “irreversible,” and that is both “substantial and irreversible” but that does not impair a “major” bodily function.

There is no exception for rape, incest, or fetal anomaly.

SB 3 is unconstitutional because its health exception is too narrow and would make it illegal for doctors to give women medical care they need to save them from damage to their health. Even after viability, the Supreme Court has maintained that “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 woman. *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164-65) (emphasis added).

Several federal circuit courts of appeals have struck down pre-viability abortion bans containing exceptions similar to those contained in SB 3, and the Supreme Court has declined to review those rulings. *See, e.g., MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015) (“Because there is no genuine dispute that H.B. 1456 generally prohibits abortion before viability . . . and because we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions, we must affirm the district court’s grant of summary judgment to the plaintiffs.”), *cert.*

⁶ This exception does not apply to suicide or other self-harm.

⁷ The physician would have to:

1. certify that the procedure is necessary to prevent death or substantial and irreversible impairment of a major bodily function;
2. subject the woman to a second “personal” medical examination by a different doctor;
3. ensure that the second doctor has also certified that the procedure is necessary to prevent death or substantial and irreversible impairment of a major bodily function;
4. perform the procedure in a hospital;
5. use an abortion method that provides the “best opportunity for the unborn child to survive.” There is an exception for cases in which this method would pose a “significantly greater risk” of death or substantial and irreversible impairment of major bodily function than another method—again, an exception that is too narrow to be constitutional. Doctors would no longer be free to use the safest method, even when the patient would face a somewhat greater risk of death.
6. arrange for a second physician to be present throughout the procedure to attend to the removed fetus.

denied, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (“Whether or not ‘exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.’ By banning abortions after 12 weeks’ gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point before viability.” (quoting *Casey*, 505 U.S. at 879)), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1227 (9th Cir. 2013) (“By permitting abortions from twenty weeks to viability only at the decision of a medical professional as to an immediate medical necessity, Section 7 prohibits women from electing to terminate their pregnancies prior to fetal viability.”) (citing *Casey*, 505 U.S. at 846), *cert. denied*, 134 S. Ct. 905 (2014).

SB 3 criminalizes D&E abortion at any stage of pregnancy.

Section 3 of the bill adds a new section to the Abortion Control Act at § 3211.1, “Dismemberment abortion ban.”⁸ This new provision makes it a felony to perform this vaguely described abortion procedure, likely to include D&E abortions, at any time during pregnancy. In 2015, there were 1,588 D&E abortions performed in Pennsylvania.

The D&E abortion procedure is the safest and most commonly used midterm abortion method.⁹ It is sometimes used in the first trimester. It is the same procedure that is used to complete a miscarriage. The alternative procedure SB 3 seemingly leaves open—induction abortion—is not a comparable alternative to D&E abortion and does not provide a safety benefit to women seeking abortion.

In *Stenberg*, the U.S. Supreme Court struck down Nebraska’s abortion procedure ban because it was so vague that it might also ban D&E abortions:

[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman’s right to make an abortion decision. We must consequently find the statute unconstitutional.

530 U.S. at 945-46. Banning the safest and most commonly used pre-viability abortion procedure is unconstitutional because women’s health is important.¹⁰ The Supreme Court recognized that the D&E method is safer than other methods in the mid-second trimester:

⁸ “Dismemberment abortion” is not a medical term and is defined in Section 1 of the bill in non-medical language. The definition states that the term does not include “an abortion which is exclusively performed through suction curettage.” The term “suction curettage” is not defined in the bill or underlying statute and is too vague for doctors performing early, conventional vacuum aspiration procedures to know whether their conduct is encompassed within it.

⁹ The D&E procedure is the “predominant” method used for abortion after 13 weeks. *See* American College of Obstetricians and Gynecologists (ACOG), ACOG Statement Regarding Abortion Procedure Bans (Oct. 9, 2015), <http://www.acog.org/About-ACOG/News-Room/Statements/2015/ACOG-Statement-Regarding-Abortion-Procedure-Bans> (“ACOG Statement”). According to ACOG, D&E abortion is “evidence-based and medically preferred because it results in the fewest complications for women compared to alternative procedures.” *Id.*

¹⁰ Again, the extremely narrow health exception does not make this abortion ban constitutional. As in Section 4 of the bill, Section 5 utilizes the same high threshold showing that the procedure is “necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman”; there is no exception for rape, incest, or fetal anomaly; and even where the exception applies, women must undergo a medically

Nonetheless studies show that the risks of mortality and complication that accompany the D&E procedure between the 12th and 20th weeks of gestation are significantly lower than those accompanying induced labor procedures (the next safest midsecond trimester procedures).

Id. at 926. In the Supreme Court's words: "[T]his Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.* at 931.

The Supreme Court's holding in *Stenberg* that a categorical ban on D&E abortion is unconstitutional was not overruled by its decision in *Gonzales*. In *Gonzales*, the Supreme Court upheld a federal ban on only intact D&E abortion, in part, because the ban had not swept too broadly to include standard D&E abortion. 550 U.S. at 150-51. Even the government submitted that the intact D&E abortion ban could not withstand constitutional muster if it applied to standard D&E abortion, the most common and safest method of second trimester abortion. *Id.* at 147.

SB 3 also fails under the Supreme Court's most recent decision on abortion rights, *Whole Woman's Health*, because it has no benefit sufficient to justify its burden on abortion access. In *Whole Woman's Health*, the Supreme Court reiterated 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 Supreme Court also clarified that review of abortion restrictions requires courts to "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.

An abortion restriction is unconstitutional if its "purpose or effect" is to "impose a substantial obstacle" in the path of a woman seeking a pre-viability abortion. *Casey*, 505 U.S. at 877. A memo provided by the sponsor of SB 3 suggests its purpose is to protect the health and safety of women who seek abortion, promote integrity in the medical profession, and advance respect for human life.¹¹ SB 3 would jeopardize, not protect, the health and safety of women who seek abortion. As such, it is unconstitutional under *Whole Woman's Health*.

SB 3 is also unconstitutionally vague. The bill defines "dismemberment abortion" to not include "abortion which is exclusively performed through suction curettage." This term is not defined, and doctors would be left questioning whether their conduct is felonious. *See Colautti*, 439 U.S. at 390 ("a criminal statute that 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' or is so

unnecessary physical examination and gestational sizing by a second physician along with the rest of the procedural hurdles of Section 4.

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<http://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20170&cosponId=21603>.

indefinite that ‘it encourages arbitrary and erratic arrests and convictions’ is void for vagueness”) (internal citations omitted).

Every time a D&E ban has been challenged in court, it has been blocked or enjoined from going into effect.¹²

Conclusion

In the words of ACOG, “these restrictions represent legislative interference at its worst: doctors will be forced, by ill-advised, unscientifically motivated policy, to provide lesser care to patients.” *See* ACOG Statement, *supra* n.9. SB 3 is unconstitutional because it criminalizes abortion prior to viability and bans a safe and commonly used second-trimester abortion method. Should this bill become law, it will be subject to a legal challenge. The Pennsylvania legislature should reject SB 3 and instead pursue initiatives in the Pennsylvania Agenda for Women’s Health, www.pa4womenshealth.org, which support women in having healthy pregnancies by toughening laws addressing discrimination and violence against pregnant women and nursing mothers.

¹² As of December 2017, only eight states have enacted laws that essentially ban D&E abortion; in five of those states, the ban has either been struck down as unconstitutional or enjoined from enforcement awaiting disposition of litigation. *See Whole Woman’s Health v. Paxton*, No. A-17-CV-690-LY, 2017 WL5641585, at *6 (W.D. Tex. Nov. 22, 2017)(concluding that “based on existing [Supreme Court] precedent alone, the [ban] must fail,” and, finding persuasive the legal reasoning drawn in court decisions in Arkansas, Kansas, and Oklahoma granting temporary injunction that enjoined similar D&E bans from taking effect); *See also West Ala. Women’s Ctr. v. Miller*, No. 2:15-cv-497-MHT, 2017 WL4843230 (M.D. Ala. Oct. 26, 2017)(holding that Alabama law banning D&E abortion placed a “substantial obstacle to women seeking pre-viability abortions” and, therefore, is unconstitutional). In Louisiana, the state has agreed to delay enforcement of the ban while a federal lawsuit challenging it is pending. In two states, Mississippi and West Virginia, D&E bans are in effect but they have not yet been challenged in court. *See* Guttmacher Institute, *Bans on Specific Abortion Methods Used After the First Trimester* (Dec. 1, 2017), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>.