CENTER FOR REPRODUCTIVE RIGHTS

April 6, 2018

VIA ELECTRONIC MAIL

Chairwoman Kathy L. Rapp
House Health Committee
Pennsylvania State House of Representatives

Democratic Chair Florindo J. Fabrizio
House Health Committee
Pennsylvania State House of Representatives

Re: House Bill 2050

Dear Chairwoman Rapp, Democratic Chairman Fabrizio and members of the Health Committee:

The Center for Reproductive Rights ("the Center") strongly opposes House Bill 2050 ("HB 2050"),[1] and urges you to reject this measure. This bill is unconstitutional and would prevent women from accessing critical reproductive health care by threatening physicians with civil and criminal penalties, while doing nothing to support the needs of the Down syndrome community.

The Center is a legal advocacy organization that advances reproductive freedom as a fundamental human right that all governments are legally obligated to protect, respect, and fulfill. A key part of our mission is ensuring that women throughout the United States have meaningful access to high-quality, comprehensive reproductive health care services. For nearly 25 years, we have successfully challenged restrictions on abortion throughout the United States. In June 2016, we won the landmark case *Whole Woman's Health v. Hellerstedt*,[2] in which the U.S. Supreme Court reaffirmed the Constitution's robust protections for a woman's decision to have an abortion.

The bill before you is extreme, unconstitutional and harmful. We urge you to carefully consider the implications of HB 2050 and the negative effects it will have on Pennsylvanians. Below, we outline the primary policy and constitutional objections to HB 2050.

[1] Pa. HB 2050 (As Introduced by the House), (last visited Mar. 03, 2018) http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sind=0&body=H&type=B&bn=2050.
[2] 136 S. Ct. 2292, 2324 (2016).

199 Water Street, 22nd Floor
New York, NY 10038
Tel. 917 637 3600 Fax. 917 637 3666
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I. HB 2050 is an Unconstitutional Ban on Pre-Viability Abortion.

HB 2050 is an unconstitutional ban on abortion prior to viability. The Supreme Court has repeatedly held that the Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable.[3] As the Court has emphasized, "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[4] The Supreme Court has never wavered from this position, despite numerous opportunities to do so.[5] Furthermore, courts have consistently struck down laws that prohibit a woman from obtaining an abortion before viability. These include laws banning all abortions,[6] laws banning abortion after 12 weeks,[7] and laws banning abortion after 20 weeks.[8] By banning abortions sought because of a Down syndrome diagnosis at *any time* during pregnancy, HB 2050 violates the fundamental protections of privacy and liberty found in the United States Constitution.

II. HB 2050 Fails to Protect Women's Lives and Health.

Furthermore, HB 2050 harms women's health by interfering in the doctor-patient relationship. The ban may deter a woman from having honest, in-depth conversations for fear of suggesting an intent to terminate due to a Down syndrome diagnosis. The threat of liability created by HB 2050 could also deter physicians from having honest conversations with their patient, for fear that this could lead to a loss of license or a criminal conviction. As with any medical condition, when a woman receives information about a Down syndrome diagnosis or has a "belief"[9] that the condition exists, it is extremely important for her and her doctor to have an open conversation. Honest dialogue between providers and patients is critical for determining what decisions are best for the family's needs and circumstances. By burdening the doctor-patient relationship, this bill creates obstacles to care.

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[3] *E.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833,* 879, 878, and 877 (1992); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

[4] *Casey*, 505 U.S. at 860, 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

[5] *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015), cert. denied, 136 S. Ct. 895 (2016).

[6] *See, e.g., MKB Management Corp.*, 795 F.3d 768 (8th Cir. 2015) (striking down a law that effectively banned all pre-viability abortions by banning abortion where the fetus has a detectable heartbeat); *Guam Soc'y of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992) (finding that a Guam statute prohibiting non-emergency abortions was unconstitutional); *Roe*, 410 U.S. 113 (1973) (holding that laws criminalizing pre-viability abortions are unconstitutional).

[7] *See Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015) (holding that a ban on abortion after 12 weeks of gestation if a heartbeat has been detected is unconstitutional).

[8] *See McCormack v. Herzong*, 788 F.3d 1017 (9th Cir. 2015) (holding that because women have the right to pre-viability abortions, a statute prohibiting abortions at 20 weeks was unconstitutional); *Jane L. v. Banterer*, 102 F.3d 1112 (10th Cir. 1996) (striking down a ban on abortions after 20 weeks gestational age).

[9] Pa. HB 2050 (As Introduced by the House).

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III. HB 2050 is Unconstitutionally Vague.

The Due Process Clause of the United States Constitution requires that laws adequately describe the conduct prohibited so that both those who must conform their conduct to the law, and those charged with enforcing the law, can understand their obligations.[10] Moreover, statutes that threaten to inhibit the exercise of constitutionally protected rights, such as a woman's right to terminate her pregnancy, must meet an exacting standard of clarity.[11]

HB 2050 expands criminal felony liability and civil liability as applied to abortion providers.[12] This bill would subject abortion providers to the potential of loss, or revocation, of their medical license and impose third degree felony charges,[13] if there is a prenatal diagnosis of Down syndrome, or even a "belief" of Down syndrome during an abortion procedure. Creating liability when a physician performs an abortion with a "*belief*" there could be a case of Down syndrome makes this bill unconstitutionally vague.[14] It is difficult to construe what such a "belief" could be and, therefore, it may be impossible for a physician to determine how to comply with the law. This leads to a vague law which is not only difficult to enforce, but equally difficult to comply with.

IV. HB 2050 is about Restricting Abortion, not Protecting those with Down Syndrome.

Parents of children with Down syndrome have pointed out that bills like HB 2050 are not about helping families and children affected by Down syndrome, but are instead using those children to ban abortion altogether. Barry Rosenberg, father of a 3-year-old son with Down syndrome, testified against a similar bill in Ohio stating, "[i]f our legislators truly care about the people with Down syndrome, then I would love to see them take this opportunity to create a more inclusive community for people with such development issues, not use people like my son to politicize an issue."[15]

Instead of playing a divisive political game with the personal decisions of Pennsylvanian families, lawmakers should work to ensure the people of Pennsylvania have access to the services and accommodations they need. If they truly care about people with Down syndrome, they should follow the lead of Down syndrome advocacy organizations and focus their efforts on medical research, health care access, education, economic self-sufficiency, employment, and community integration for people with Down syndrome.[16]

V. Conclusion

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[10] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[11] *Colautti v. Franklin*, 439 U.S. 379, 190-91 (1979).
[12] 18 Pa. Stat. and Cons. Stat. Ann. § 3204 (West).
[13] *Id.*
[14] Pa. HB 2050 (As Introduced by the House) (emphasis added).
[15] S 164 Hearing Before *Committee on Health, Human Services and Medicaid* (last visited Dec.8 2017) (statement of Barry Rosenberg 3rd hearing Sept 12, 2017) http://ohiosenate.gov/committee/health-human-services-and-medicaid#.
[16] *E.g.*, National Down Syndrome Society, *Legislative Agenda* (last visited Mar. 08, 2018) http://www.ndss.org/advocate/ndss-legislative-agenda/.

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In conclusion, HB 2050 is an unconstitutional ban on abortion and will harm women in Pennsylvania and their families. This bill disregards women's fundamental right to determine when and whether to have children, poses a serious risk to women's health, and makes it impossible for a physician to know how to comply with the law. HB 2050 is an extreme and unjustified measure that would jeopardize women's health, while doing nothing to promote the needs of the Down syndrome community. We urge you to reject this measure and work with the legislature to promote meaningful policies that support women's health and the needs of those with Down syndrome.

We urge you to vote no on this bill. Please do not hesitate to contact us if you would like further information.

Sincerely,

Shivana Jorawar *
State Legislative Counsel
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
sjorawar@reprorights.org

*admitted in New York

Nimra Chowdhry*
State Legislative Fellow
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
nchowdhry@reprorights.org

*admitted in Texas