MEMORANDUM

TO: Interested persons
FROM: Christine Castro and Sue Frietsche, Women’s Law Project
DATE: June 12, 2018
RE: HB 2050, making abortion a felony if sought for prohibited reasons

HB 2050\(^1\) 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 exclusively because of:

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

HB 2050 was introduced on February 26, 2018, by Rep. Mike Turzai (R-Allegheny). No public hearings were held on this bill. It was reported out of the Health Committee on April 9, 2018, and passed finally in the House by a vote of 139-56 on April 16, 2018. It was scheduled for a vote in the Senate Judiciary Committee for June 13, 2018.

**HB 2050 criminalizes abortion based on the reason a person seeks abortion care.**

Section 2 of the bill amends the Abortion Control Act, 18 Pa. C.S.A. § 3204, to criminalize abortion sought “exclusively” because of “[a] prenatal diagnosis of, or belief that the [fetus] has, Down syndrome,” and/or because of the sex of the fetus.\(^2\)

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2. Pennsylvania has prohibited abortions sought solely to select the sex of the fetus since 1989 (Nov. 17, 1989, P.L. 592, No. 64). 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. Because this provision is already in law, this memo
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.” A physician who intentionally, knowingly, or recklessly violates this provision 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 people³ 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 counseled about the availability 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 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 Women seek abortion for a variety of deeply personal reasons, including emotional,

³ Women, transgender men, intersex and gender non-binary people can become pregnant. While gendered pronouns are used throughout this memo, the legal issues raised affect many people who may not identify as “women.”

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.

⁵ Id.


family, medical, employment, spiritual, and financial. Three-quarters of women who have abortions cite existing familial responsibilities—including parenting their child or children—as a major factor in their decision to terminate their pregnancy. 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 2050 are unconstitutional.

HB 2050 is unconstitutional because it criminalizes abortion before viability and unduly interferes with a woman’s decision to seek a pre-viability abortion. For 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).

In fact, every time a pre-viability abortion ban has been challenged in court, it has been held unconstitutional under this unbroken line of Supreme Court precedent. 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. denied, 136 S. Ct. 981 (2016); 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’” (quoting Casey, 505 U.S. at 846); 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, 1217 (9th Cir. 2013) (“Because [Arizona’s 20 week abortion ban] deprives the women to whom it applies of the ultimate decision to terminate


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

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 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 2050 directly contravenes federal law by prohibiting 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 2050.**

Federal courts in Indiana and Ohio have recently found state laws similar to HB 2050 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 a diagnosis of Down syndrome), aff’d by Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, No. 17-3163, 2018 WL 1870566, at *1 (7th Cir. Apr. 19, 2018); Preterm-Cleveland v. Himes, No. 1:18-cv-109, 2018 WL1315019, at *1 (W.D. Ohio Mar.14, 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).12


11 ACOG, supra note 4, 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.
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 on April 19, 2018, 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., 2018 WL 1870566, at *1 (emphasis added). 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 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 *4-5.13

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, 2018 WL1315019, at *1 (“[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

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 2050: 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 2050, a physician would be criminally liable if she or he “intentionally, knowingly, or recklessly” committed a violation.

14 As of April 2018, 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 2018), 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.
Similarly, HB 2050 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, 2018 WL1315019, at *6 (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 867.15

**HB 2050’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. In fact, ACOG has issued a statement denouncing “reason bans” because they compromise the patient-doctor relationship and endanger women’s health:

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.

15 Eight states, including Pennsylvania, have passed laws prohibiting abortion sought because of the sex of the fetus. Guttmacher, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (Mar. 15 2018), https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly. While these laws have been presented as efforts to protect female fetuses, they perpetuate false assumptions about immigrant women and stigmatize people who seek abortion, specifically 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; Guttmacher, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly* (Mar. 15 2018).
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. None of these consequences advances women’s health or improves life for people with Down syndrome or their families.

Because of its adverse impact on women’s health, HB 2050 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 2050 “does not ‘burden’ the right of such women to choose a pre-viability abortion, it eradicates the right entirely.” Preterm-Cleveland, 2018 WL1315019, at *5. As such, it is unconstitutional under Whole Woman’s Health.

Conclusion

A memo provided by the sponsor of HB 2050 suggests its purpose is to advance respect for human life and protect children with Down syndrome.¹⁶ In fact, HB 2050 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 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 2050 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 deeply 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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