ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 4, 2021

RE: OPPOSITION TO HOUSE BILL 1500 P.N. 1536 (KLUNK)

Bill summary: House Bill 1500 copies legislative efforts in several other states that target specific pregnancy conditions and populations of women.[1] This bill amends the Pennsylvania crimes code[2] to prohibit terminating a pregnancy based — in part — on a prenatal diagnosis of Down syndrome. Any violation of this provision would constitute a third-degree felony[3] and the outright revocation of a physician's medical license.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 1500.

HB 1500 eliminates exceptions for rape, incest, and medical emergencies.

Unlike its predecessor, HB 321 (2019), HB 1500 provides no exceptions for pregnancies resulting from rape or incest and most critically, it includes no provision that would allow a pregnancy to be terminated even if it threatened the life of the woman. Even the most severe and extreme abortion bans in other states acknowledge that the life of the woman counts as life. This is a cruel and unconscionable omission.

HB 1500 expands the definition of the sex-based ban, then extends it to the Down syndrome ban.

When this bill was first introduced in 2017 as HB 2050, it defined the ban as follows (emphasis added):

(2) No abortion shall be deemed necessary **if sought exclusively** for either or both of the following reasons:
(i) The sex of the unborn child.
(ii) A prenatal diagnosis of, or belief that the unborn child has, Down syndrome.

HB 1500 changes the definition for both bans by removing the word "solely" (emphasis added):

(2) An abortion shall not be deemed a necessary abortion if any of the following apply:
(i) The abortion is sought [~~solely~~] because of the sex of the unborn child [~~shall be deemed a necessary abortion~~].
(ii) The abortion is sought because the unborn child receives a prenatal diagnosis of Down syndrome.

This expanded definition is further underscored in a new physician verification requirement under § 3214, not included in either HB 2050 (2017) or HB 321 (2019) (emphasis added):

(7.1) Written acknowledgment by the physician who performed the abortion that the woman is not seeking the abortion, **in whole or in part**, because of any of the following:
(i) The sex of the unborn child.
(ii) A test result indicating Down syndrome in the unborn child.
(iii) A prenatal diagnosis of Down syndrome in the unborn child.
(iv) An indication that the unborn child has Down syndrome.

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[1] "Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly." *Guttmacher Institute*, 20 Mar. 2018.
[2] 18 Pa.C.S § 3203 and 18 Pa.C.S § 3204(c)
[3] 18 Pa.C.S § 3204(d)

Women's reasons for seeking an abortion are varied, layered, complex, and highly individual. Expanding both these definitions to include factors that may have included, but were not determinative of, the final decision casts a dangerously broad net far beyond the scope of any reason-based ban. It would effectively prohibit abortions even if there were other factors that contributed to the decision in addition to the sex or diagnosis of the fetus.

Federal courts have ruled similar bans unconstitutional.

Because genetic testing during pregnancy can occur as early as ten weeks of gestation,[4] attempts to restrict abortion based on a Down syndrome diagnosis impose an undue burden on the well-established, constitutional right to abortion, in particular the right to terminate a pregnancy before fetal viability.[5] Attempts to implement similar bans have been successfully challenged on constitutional grounds, often at considerable expense to the state.[6] Indiana became the first state to have its law blocked by federal courts in 2016 and subsequently permanently enjoined. And just this year, the Eighth Circuit Court of Appeals ruled against a similar ban Arkansas enacted in 2019. The Court held that it directly conflicts with Supreme Court precedent that requires that each patient, not politicans, main control of the ultimate decision of whether to have an abortion.[7]

HB 1500 undermines a woman's relationship with her doctor by threatening providers with felony charges.

Women need and deserve clear information and expert medical advice when making decisions about their pregnancies. But the ability for a woman to have an open, honest conversation about her health is significantly undermined if her decision may result in criminal felony charges for her doctor. As states began to replicate these bans, the American Congress of Obstetricians and Gynecologists (ACOG) publicly opposed them, expressing concern about the damaging effects on the doctor-patient relationship:

"Restricting abortions on the basis of a woman's reason for needing one is not medically appropriate and endangers the health of women. These 'reason bans' represent gross interference in the 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."[8]

And the new reporting requirement also suggests that the doctor has to inquire into the reason for the abortion or at least require the patient to affirm that sex or a fetal diagnosis was not a contributing reason for the termination. This may result in women deciding not to seek prenatal testing at all — for privacy reasons or fear of the criminal consequences for her provider. Worse, doctors may discourage prenatal testing for the same reasons.

HB 1500 offers nothing to improve the lives of people with disabilities.

Individuals with disabilities can and do live full, meaningful lives, but they often face unique obstacles. Instead of addressing those obstacles, HB 1500 interferes with women's legally protected medical decisions. This bill does nothing to address the serious concerns of those with disabilities in our community – it does nothing to educate a woman and her family about having a child with a disability and does nothing to ensure that people living with disabilities have access to education, healthcare, employment opportunities, or other vital services they may need, including nothing to help the 5,000+ people currently on the waitlist for persons with intellectual disabilities who are in need of emergency services.[9]

For these reasons, we urge you to oppose House Bill 1500.

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[4] Understanding a Diagnosis of Down Syndrome, National Down Syndrome Society.

[5] The right to terminate a pregnancy is grounded in the right to privacy rooted in "the Fourteenth Amendment's concept of personal liberty." *Roe*, 410 9 U.S. at 153; see *Casey*, 505 U.S. at 846 ("[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we [the United States Supreme Court] cannot renounce." *Casey,* 505 U.S. at 871. "A State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879; *Stenberg*, 530 U.S. at 920; *Gonzales*, 550 U.S. at 146.

[6] Stafford, Dave. "State Pays ACLU over $1.4M under Pence." *The Indiana Lawyer*, 20 Apr. 2016.

[7] *Little Rock Family Planning Services v. Rutledge*, No. 19-2690 (8th Cir. 2021).

[8] The American College of Obstetricians and Gynecologists. (2016, March 10). Press release, ACOG Statement on Abortion Reason Bans.

[9] The PA Waiting List Campaign.