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MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: November 19, 2019

RE: OPPOSITION TO HOUSE BILL 321 P.N. 1404 (KLUNK)

[House Bill 321](#) 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 on a “prenatal diagnosis of, or belief that the unborn child has, Down syndrome.” Any violation of this provision would constitute a [third-degree felony](#).³

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to vote ‘no’ on House Bill 321 for the following reasons:

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

In 2016, Indiana became the first state to have its law blocked by federal courts. In her [order](#), Southern Indiana District Judge Tanya Walton Pratt noted, “The United States Supreme Court has stated in categorical terms that a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability,” and that limiting the reasons for an abortion was “inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions.”⁷ Indiana’s law has since been permanently enjoined. More recently, another federal district court prevented Ohio’s ban from taking effect in March of 2018. Judge Black was similarly unequivocal in his [order](#), stating that Ohio’s law “prevents certain women from obtaining pre-viability abortions and [the law] is therefore unconstitutional on its face.”⁸

¹ “Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly.” *Guttmacher Institute*, 20 Mar. 2018, www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly.

² 18 Pa.C.S § 3203 and 18 Pa.C.S § 3204(c), <http://www.legis.state.pa.us/WU01/LI/LI/CT/htm/18/18.htm>

³ 18 Pa.C.S § 3204(d)

⁴ “Understanding a Diagnosis of Down Syndrome.” National Down Syndrome Society. Retrieved March 25, 2018, from <https://www.ndss.org/resources/understanding-a-diagnosis-of-down-syndrome>

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 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, www.theindianalawyer.com/articles/40066-more-than-14m-and-counting.

⁷ *Planned Parenthood of Indiana and Kentucky, et al. v. Commissioner, Indiana State Department of Health, et al.* No. 1:2016cv00763 - Document 61 (S.D. Ind. 2016)

⁸ *Preterm-Cleveland et al v. Himes et al.* No. 1:18-cv-109 – Document 28 (S.D. Ohio 2018)

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 321 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.

Advocates have been clear about what state legislators can do, including, but certainly not limited to:

- Eliminate the wait list for persons with intellectual disabilities in need of services through the Pennsylvania Office of Developmental Programs. Of the [5,000](#) people currently in need of *emergency* services, half don't have any services at all and half have minimal services that don't meet their needs.⁹
- Address the Direct Support Professionals (DSP) [crisis](#) by increasing pay for caregivers to adults with disabilities to ensure that people with disabilities have competent, compassionate care.¹⁰

Undermines a woman's relationship with her doctor by threatening providers with criminal 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 deep concern about the damaging effects on the doctor-patient relationship:

“Access to reproductive services, including abortion care, is essential for millions of American women. 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. Moreover, it threatens to hold physicians liable for providing women with the care that they need.”¹¹

Throughout pregnancy, women should have all the resources they need to make the best decisions for themselves with advice from healthcare professionals they trust. This includes access to accurate medical information, the ability to prevent or end a pregnancy, and the services needed to support women who choose to parent, particularly those planning to raise a child with disabilities.

HB 321 is about restricting abortion, not protecting those with disabilities. It wrests from a woman the ability to decide what is right for her and her family and provides no support for children or adults with Down syndrome or for their parents. Choosing whether to become a parent, including a parent to a child with a disability, is an intensely personal and individual decision. And while many women decide that continuing with their pregnancy is the right choice, HB 321 would force all families to make the same decision no matter the circumstances.

For these reasons, we urge you to vote ‘no’ on House Bill 321.

⁹ The PA Waiting List Campaign, retrieved on April 23, 2019 from <http://pawaitinglistcampaign.org>

¹⁰ Torres, Nicholas, et al. *Direct Support Professional Compensation Practices*. The Alliance of Community Service Providers, Pennsylvania Advocacy and Resources for Autism and Intellectual Disability, and Rehabilitation and Community Providers Association, 2017, <https://paroncloud.egnyte.com/dl/mX7r7MAMU3>. Also see Fix the DSP Crisis at <https://www.fixthedspcrisis.com>.

¹¹ The American College of Obstetricians and Gynecologists. (2016, March 10). ACOG Statement on Abortion Reason Bans [Press release]. Retrieved on April 23, 2019 from <https://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Abortion-Reason-Bans>