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**Overview of Legislation and
Litigation Involving Protections
Against Down Syndrome
Discrimination Abortion**

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Introduction

Five states have enacted legislation to prohibit the eugenic practice of Down syndrome discrimination abortion. Courts have enjoined the law in three of the states. Several additional states have introduced similar legislation.

States that Prohibit Down Syndrome Discrimination Abortion

Five states have enacted legislation to prohibit the eugenic practice of Down syndrome discrimination abortion. They are Indiana, Ohio, North Dakota, Louisiana, and Kentucky.

Indiana

- Year legislation enacted – 2016
- Enacting legislation – 2016 Ind. ALS 213, 2016 Ind. Acts 213, 2016 Ind. PL 213, 2016 Ind. HEA 1337
- Codified at Burns Ind. Code Ann. § 16-34-4
- Key provisions
 - In Chapter 4, Codified at Burns Ind. Code Ann. § 16-34-4, the legislation defines “any other disability” as including all physical or mental disabilities, disfigurements, and specifying several disabilities including Down syndrome.¹
 - The statute also defines “Down syndrome,”² and “potential diagnosis”³ in separate sections.
 - The Down syndrome prohibition provision of § 16-34-4 is divided into two sections: one set at previability or 20 weeks postconception, and one set after viability or 20 weeks postconception.⁴
 - The statute also carries a provision protecting an unborn child that “has been diagnosed with any other disability or has a potential diagnosis of any other disability.”⁵
 - Violation of those sections of the Indiana code carries disciplinary sanctions, “civil liability for wrongful death,” and a provision exempting the “pregnant woman upon whom an abortion is performed in violation of this chapter.”⁶
 - The abortion must be sought “solely” because of the prenatal diagnosis to be prohibited under Indiana law.⁷

¹ 2016 Ind. HEA 1337, Ch. 4, Sec. 1; Ind. Code Ann. § 16-34-4-1.

² 2016 Ind. HEA 1337, Ch. 4, Sec. 2; Ind. Code Ann. § 16-34-4-1 (defining “Down syndrome” as “a chromosomal disorder associated with an extra chromosome 21 or an effective trisomy for chromosome 21.”).

³ 2016 Ind. HEA 1337, Ch. 4, Sec. 3; Ind. Code Ann. § 16-34-4-3 (defining “potential diagnosis” as “the presence of some risk factors that indicate that a health problem may occur.”).

⁴ 2016 Ind. HEA 1337, Ch. 4, Sec. 6; Ind. Code Ann. § 16-34-4-6.

⁵ 2016 Ind. HEA 1337, Ch. 4, Sec. 7; Ind. Code Ann. § 16-34-4-7.

⁶ 2016 Ind. HEA 1337, Ch. 4, Sec. 9; Ind. Code Ann. § 16-34-4-9.

⁷ 2016 Ind. HEA 1337, Ch. 4, Sec. 6; Ind. Code Ann. § 16-34-4-6.

- Litigation – yes
 - This statute has been enjoined by the United States District Court for the Southern District of Indiana.⁸
 - The injunction has been upheld by the 7th Circuit Court of Appeals.⁹
 - The state has sought review by the U.S. Supreme Court.¹⁰ That petition is pending.
- Status – This statute is currently not in effect.

Ohio

- Year legislation enacted – 2017
- Enacting legislation – 2017 Ohio HB 214
- Codified at Ohio Rev. Code Ann. § 2919.10
- Text of key provisions
 - Ohio’s statute has text prohibiting abortions “in whole or in part” due to “(1) A test result indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; (3) Any other reason to believe that an unborn child has Down syndrome.”¹¹
 - Violation of the statute carries penalties that include loss of medical license¹² and potential civil liability.¹³
- Litigation – yes
 - Ohio’s law was enjoined by the United States District Court for the Southern District of Ohio.¹⁴
 - Ohio has appealed that injunction to the U.S. Court of Appeals for the Sixth Circuit. That appeal is pending.
- Status – This statute is not currently in effect.

North Dakota

- Year legislation enacted – 2017
- Enacting legislation – 2013 N.D. HB 1305
- Codified at N.D. Cent. Code § 14-02.1-04.1
- Text of key provisions

⁸ *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017).

⁹ *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 888 F.3d 300 (7th Cir. 2018).

¹⁰ *Petition for Writ of Certiorari, Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 2018 U.S. App. LEXIS 17676 (7th Cir. Jun. 25, 2018), *petition for cert. filed*, (U.S. Oct. 12, 2018) (No. 17-3163).

¹¹ Ohio Rev. Code Ann. § 2919.10 (B); 2017 Ohio HB 214, Sec. 2919.10 (B).

¹² Ohio Rev. Code Ann. § 2919.10 (D); 2017 Ohio HB 214, Sec. 2919.10 (D).

¹³ Ohio Rev. Code Ann. § 2919.10 (E); 2017 Ohio HB 214, Sec. 2919.10 (E).

¹⁴ *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018).

- North Dakota prohibits the attempted or actual abortion if the mother “is seeking the abortion solely...[b]ecause the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.”¹⁵
- The penalty for violation is a “class A misdemeanor.”¹⁶
- Status – This statute is currently in effect.

Louisiana

- Year legislation enacted – 2016
- Enacting legislation – 2016 La. ALS 563, 2016 La. ACT 563, 2016 La. HB 1019
- Codified at La. Rev. Stat. Ann. § 40:1061.1.2
- Text of key provisions
 - Unlike the Ohio and Indiana statutes, Louisiana’s statute only applies starting at 20 weeks postconception.¹⁷
 - The language does not mention Down syndrome specifically in the prohibition section,¹⁸ but Down syndrome is included in the definition of “genetic abnormality.”¹⁹
 - Under the statute, abortions after? 20 weeks are prohibited if sought “solely because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.”²⁰
- Litigation – yes
 - Louisiana’s statute was challenged in federal court, but the court avoided ruling on the Down syndrome provision on the grounds that plaintiffs lacked standing to challenge it.²¹
- Status – This statute is currently in effect.

Kentucky

- Year legislation enacted – 2019
- Enacting legislation – 2019 Bill Text KY H.B. 5.
- Codified at Ky. Rev. Stat. Ann. § 311.710
- Text of key provisions
 - This statute prohibits abortions on the basis of gender, race, and “diagnosis, or potential diagnosis, of Down syndrome or any other disability.”²²

¹⁵ N.D. Cent. Code § 14-02.1-04.1 (1); 2013 N.D. HB 1305 Sec. 2 (1).

¹⁶ N.D. Cent. Code § 14-02.1-04.1 (2); 2013 N.D. HB 1305 Sec. 2 (2).

¹⁷ La. Rev. Stat. Ann. § 40:1061.1.2 (B).

¹⁸ *Id.*

¹⁹ La. Rev. Stat. Ann. § 40:1061.1.2. (A) (2).

²⁰ La. Rev. Stat. Ann. § 40:1061.1.2 (B).

²¹ La. Rev. Stat. § 40:1061.1(E)(1); *June Med. Servs. LLC v. Gee*, 280 F. Supp. 3d 849, 864 (M.D. La. 2017).

²² 2019 Bill Text KY H.B. 5, Section 1 (2). (Citing to the bill text because the statute is not yet in the updated Kentucky code.)

- The prohibitory language does mention Down syndrome specifically and adds “any other disability”.²³
- Litigation – yes
 - The ACLU filed a challenge to this statute before the governor had a chance to sign it.²⁴ The United States District Court for the Western District of Kentucky granted a temporary restraining order for Senate Bill 9, which was challenged by the ACLU in the same motion.²⁵ There have not been any decisions on House Bill 5.
- Status – This statute is currently in effect.

Litigation Involving Down Syndrome Protection Legislation

The Down syndrome laws of Indiana, Ohio, and Louisiana have been challenged in court. The North Dakota law has not been challenged in court.

Indiana

District Court. In *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859, (S.D. Ind. 2017), the Court held that “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, if she at some point earlier decided she wants a child as a general matter, is inconsistent with the notion of a right rooted in privacy concerns and a liberty right to make independent decisions.”²⁶

Circuit Court. In *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, 888 F.3d 300 (7th Cir. 2018), a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit upheld the district court ruling. The circuit court upheld the injunction, while stating that “PPINK and the State agree that the rate of women seeking an abortion due to the diagnosis or potential diagnosis of a genetic disability will likely increase as these tests become more widespread.”²⁷ The circuit court rejected the state’s argument that the viability standard protects “a woman’s ‘binary choice’ of whether or not to have a child prior to viability,” not the ability to decide whether to abort a specific child.²⁸

²³ *Id.*

²⁴ Bruce Schreiner, Kentucky Gov signs abortion bill already facing a lawsuit, ASSOCIATED PRESS (Mar. 20, 2019) <https://local12.com/news/local/kentucky-gov-signs-abortion-bill-already-facing-a-lawsuit>.

²⁵ *EMW Women’s Medical Center v. Beshear*, No. 3:19-cv-178-DJH (W. D. Ky. Mar. 15, 2019) (available at https://www.aclu-ky.org/sites/default/files/field_documents/sb9_restraining_order_granted.pdf); Plaintiffs Motion for a Temporary Restraining Order And/Or Preliminary Injunction, *EMW Women’s Medical Center v. Beshear*, No. 3:19-cv-178-DJH (W. D. Ky. Mar. 15, 2019) (available at https://www.aclu-ky.org/sites/default/files/field_documents/hb5_sb9_tro_filed.pdf).

²⁶ *PPINK*, 265 F. Supp. 3d at 868.

²⁷ *PPINK*, 888 F.3d at 303.

²⁸ *Id.* at 306.

The state requested en banc review of a separate issue in this case and the Seventh Circuit denied that request. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, No. 17-3163, 2018 U.S. App. LEXIS 17676 (7th Cir. Jun. 25, 2018).

Judge Frank A. Easterbrook wrote an opinion dissenting from the denial en banc that was joined by Judges Diane S. Sykes, Amy Coney Barrett, and Michael B. Brennan. Easterbrook stated that “[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered.”²⁹ Judge Easterbrook and the other dissenting judges insisted that “[w]e ought not impute to the Justices decisions they have not made about problems they have not faced.”³⁰

Supreme Court. Following the denial of en banc review, the state of Indiana sought review by the Supreme Court of the United States.³¹ That petition for certiorari is currently pending before the Supreme Court.

Ohio

The Ohio Down syndrome law was enjoined by a federal district court. The state has appealed to the U.S. Court of Appeals for the Sixth Circuit.

District Court. In Ohio’s Southern District, United States District Judge Timothy S. Black held in *Pre-Term Cleveland v. Lance Himes*, 294 F. Supp. 3d 746 (S.D. Oh. 2018) that Ohio Rev. Code Ann. § 2919.10 “violates the right to privacy of every woman in Ohio and is unconstitutional on its face.”³² Judge Black held that the federal viability standard “is the law of the land.”³³ Quoting the holding in *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), Judge Black argued that “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.”³⁴ Judge Black stated that the State’s interests in “preventing discrimination and protecting the Down syndrome community” “simply rephrase the State’s interest in potential life, which the Supreme Court has already held does not become compelling under the law until viability.”³⁵

Circuit Court. Following the holding above, the state filed an appeal before the Sixth Circuit Court of Appeals. In its reply brief, the state asserted that the “state interests supporting the Antidiscrimination Law” are not irrelevant and asserted that “*Casey* did not

²⁹ *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, No. 17-3163, 2018 U.S. App. LEXIS 17676, at *12 (7th Cir. June 25, 2018).

³⁰ *Id.*

³¹ See Petition for Writ of Certiorari at 12-13, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of the Ind. State Dep’t of Health*, (No. 18-483) (Sup. Ct. filed Oct. 12, 2018), https://www.supremecourt.gov/DocketPDF/18/18-483/66684/20181012122049316_Petition%20for%20Writ%20of%20Certiorari.pdf.

³² *Pre-Term Cleveland v. Lance Himes*, 294 F. Supp. 3d 746, 749 (S.D. Oh. 2018).

³³ *Id.*

³⁴ *Id.* at 754.

³⁵ *Id.* at 755.

change *Roe*'s abortion right into an absolute."³⁶ The state argued that "*Casey* affirmed that *Roe* involved balancing."³⁷ This case is currently awaiting decision.

North Dakota

To date, there has been no litigation on the North Dakota statute.

Louisiana

Unlike the Court in Ohio and the Courts in Indiana, the Court in *June Med. Servs. LLC v. Rebekah Gee*, 280 F. Supp 3d 849 (M. D. La. Nov. 16, 2017) opted not to address the issue of viability or eugenic abortion, instead arguing that another Louisiana statute not challenged in the litigation prohibited the same gestational age from being aborted regardless of the woman's reason for doing so.³⁸ As a result, the Court determined that the plaintiffs did not have standing, and so avoided the issue entirely.³⁹

Kentucky

Prior to final passage or codification, the Kentucky statute was already facing a court challenge in the United States District Court for the Western District of Kentucky.⁴⁰ That Court granted a temporary restraining order for a separately enacted statute challenged under the same court filing; however, no rulings have been issued on the Down syndrome portion of Kentucky's enacted legislation.⁴¹

³⁶ Reply Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel, and Bruce r. Saferin 3-4, *Pre-Term Cleveland v. Himes*, No. 18-3329 (6th Cir. filed Sep. 19, 2018).

³⁷ *Id.* at 4.

³⁸ *June Med. Servs. LLC v. Rebekah Gee*, 280 F. Supp 3d 849, 864 (M. D. La. Nov. 16, 2017).

³⁹ *Id.*

⁴⁰ Bruce Schreiner, Kentucky Gov signs abortion bill already facing a lawsuit, ASSOCIATED PRESS (Mar. 20, 2019) <https://local12.com/news/local/kentucky-gov-signs-abortion-bill-already-facing-a-lawsuit>.

⁴¹ *EMW Women's Medical Center v. Beshear*, No. 3:19-cv-178-DJH (W. D. Ky. Mar. 15, 2019) (available at https://www.aclu-ky.org/sites/default/files/field_documents/sb9_restraining_order_granted.pdf); Plaintiffs Motion for a Temporary Restraining Order And/Or Preliminary Injunction, *EMW Women's Medical Center v. Beshear*, No. 3:19-cv-178-DJH (W. D. Ky. Mar. 15, 2019) (available at https://www.aclu-ky.org/sites/default/files/field_documents/hb5_sb9_tro_filed.pdf).

States that Have Introduced but not yet Enacted Down Syndrome Protection Legislation

Several other states have introduced similar bills, including Arkansas⁴², Illinois⁴³, Oklahoma⁴⁴, Pennsylvania⁴⁵, and Utah.⁴⁶

Arkansas

Arkansas introduced SB 2 on Jan. 11, 2019, which is up for passage out of the Senate on Mar. 20, 2019.⁴⁷ The bill would prohibit abortions if sought solely “on the basis of (1) a test result...(2) a prenatal diagnosis...” or “any other reason to believe that an unborn child has Down Syndrome.”⁴⁸ It also requires that a physician inquire as to any test results or diagnosis before an abortion may be performed and requires that, upon an answer in the affirmative, the physician must make her aware of the law and check her medical records to see if she has had a previous abortion for the same reason.⁴⁹ The bill would subsequently require that the doctor take 14 days to obtain and review the woman’s medical records.⁵⁰

Illinois

Illinois has introduced HB 2281, which has been referred to committee but as of March 2019, it has not seen any progress.⁵¹ The bill would prohibit abortions performed “if the person knows that the pregnant woman is seeking an abortion solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome” or any other disability⁵²

Mississippi

In the state of Mississippi another bill was introduced, the Unborn Children with Down Syndrome Abortion Ban Act., 2018 Bill Text MS S.B. 2616, with language very similar to that of the Illinois statute.⁵³ Unlike a number of the other bills and statutes, the violation of this provision comes with a fine or potential jail time.⁵⁴ This bill has also failed.⁵⁵

⁴² 2019 Bill Text AK S.B. 2.

⁴³ 2019 Bill Text IL H.B. 2281.

⁴⁴ Prenatal Nondiscrimination Act of 2018, 2017 Bill Text OK S.B. 1430 (failed to pass).

⁴⁵ 2017 Bill Text PA S.B. 1050

⁴⁶ Down Syndrome Discrimination by Abortion Prohibition Act, 2019 Bill Text UT H.B. 0166.

⁴⁷ 2019 Bill Tracking AK S.B. 2.

⁴⁸ 2019 Bill Text AK S.B. 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 2019 Bill Tracking IL H.B. 2281.

⁵² 2019 Bill Text IL H.B. 2281.

⁵³ Unborn Children with Down Syndrome Abortion Ban Act., 2018 Bill Text MS S.B. 2616.

⁵⁴ *Id.*

⁵⁵ 2018 Bill Tracking MS S.B. 2616.

Oklahoma

Oklahoma's legislation has a separate section providing that "[i]f this section is held invalid as applied to the period of pregnancy prior to viability, then it shall remain applicable to the period of pregnancy subsequent to viability."⁵⁶ The statute also has separate sections for Down syndrome and for all other genetic abnormalities, each of which has a viability divider provision.⁵⁷ This bill has also failed to be enacted.⁵⁸

Pennsylvania

The Pennsylvania bill, PA H.B. 2050, provides that an abortion is not "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."⁵⁹ This bill was "removed from table" on Oct. 2, 2018.⁶⁰

Utah

Utah's bill requires that following a prenatal diagnosis of Down syndrome, the pregnant woman must be provided with a website created and maintained by the Utah State Department of Health detailing "contact information for state and national Down syndrome organizations" during the informed consent portion of her abortion appointment.⁶¹ The legislation further prohibits abortions "if the pregnant mother's sole reason for the abortion is that the unborn child has or may have Down syndrome" and contains an exception for post-viability children conceived in rape or incest or if the pregnancy compromises the health of the mother.⁶² This bill has passed the Utah House of Representatives and Senate and an enrolled bill has been prepared.⁶³

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⁵⁶ Prenatal Nondiscrimination Act of 2018, 2017 Bill Text OK S.B. 1430.

⁵⁷ *Id.*

⁵⁸ 2017 Bill Tracking OK S.B. 1430.

⁵⁹ 2017 Bill Text PA H.B. 2050.

⁶⁰ 2017 Bill Tracking PA H.B. 2050.

⁶¹ 2019 Bill Text UT H.B. 0166.

⁶² *Id.*

⁶³ 2019 Bill Tracking UT H.B. 0166.