

Here's what you need to know about Utah's proposed Down syndrome abortion ban

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Legal experts — including a Brigham Young University professor — have labeled the Down syndrome abortion bill before the Utah Legislature as all but certainly unconstitutional. Physicians point out it needs to be clarified and even then would limit their ability to have open conversations with their patients.

And data suggest few Utah women seek an abortion for a Down syndrome diagnosis in the first place.

Nevertheless, HB205 — which would criminalize doctors who perform an abortion if the sole reason was Down syndrome — has so far cleared every hurdle in the Utah Legislature and is awaiting final approval on the Senate floor. The current sessions ends Thursday at midnight. Conservative lawmakers and anti-abortion groups argue some of the bill's practical pitfalls shouldn't matter: This is a message, they say, that aborting a fetus with the genetic disorder is unacceptable.

The bill is "Utah's message to the world that we will not tolerate discrimination," sponsor Rep. Karianne Lisonbee, R-Clearfield, said at a hearing last week. She also frequently says the bill is intended to ward off eugenics.

Here's what you should know about HB205, also known as the Down Syndrome Nondiscrimination Abortion Act.

Why was HB205 introduced, and what does it do?

In a news conference on the first day of the legislative session, Lisonbee said she'd seen a concerning report that nearly 100 percent of Icelandic women whose fetuses test positive for Down syndrome terminate their pregnancies. Other European countries, she noted, have similarly high rates.

Lisonbee said she wanted to prevent a similar trend in Utah, she said. The genetic disorder occurs when a fetus has an extra 21st chromosome, resulting in intellectual disabilities and other physical problems after birth.

Lisonbee's bill would bar Utah doctors from performing abortions based "solely" on a Down syndrome diagnosis. Those carrying out such a procedure would face prosecution for a class A misdemeanor.

The measure also requires a doctor to give the woman information about Down syndrome parent support groups and to refer her to a physician who is a Down syndrome specialist. While opponents portray the bill as an effort to restrict a woman's access to abortion and her right to choose, Lisonbee and others say it would protect a vulnerable group of people and combat a "terrible form of discrimination."

"Looking at history, I have to ask, if we don't take a stand against the selective purging of one portion of our society from the start, will we continue our silence when the next undesirable segment is purged, and the next? Until only the perfect race remains?" Lisonbee asked her colleagues at a Senate hearing.

"I know my conscience will not allow me to do that," the conservative lawmaker said. "I will fight for the diversity of humanity in our society."

If it passes, would it face legal challenges?

In all likelihood, it would — and state taxpayers would be on the hook for legal defense costs. Shortly after HB205's introduction, legislative attorneys posted a rare warning to lawmakers that it faced "high probability of being declared unconstitutional by a court."

"If we pass this bill, we are buying ourselves a lawsuit," Rep. Brian King, D-Salt Lake, echoed at a hearing in late January. King reminded his colleagues that *Roe v. Wade*, the U.S. Supreme Court case that affirmed a woman's right to an abortion under the 14th Amendment, remains "the law of the land."

A BYU law professor, Frederick Mark Gedicks, also recently weighed in with a letter to legislators sent at the request of Planned Parenthood of Utah. Gedicks — who has taught classes covering the Fifth and 14th amendments for more than 30 years — told lawmakers that provisions of HB205 criminalizing Down syndrome abortions would "almost certainly" be found unconstitutional by a court.

He also cited *Roe v. Wade* as well as *Planned Parenthood v. Casey*, a 1992 decision that laid out the "current contours" of a woman's right to choose prior to viability, or the time in pregnancy when a fetus is able to live outside the womb.

Prof. Frederick Mark Gedicks letter to Legislature on HB205 by The Salt Lake Tribune on Scribd

"An abortion regulation is unduly burdensome if its 'purpose or effect' is to place 'a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,'" Gedicks wrote of the *Casey* decision.

While the law professor noted that he personally supports the moral goals of HB205, he said this sympathy "cannot alter the constitutional reality."

Meanwhile, the American Civil Liberties Union of Utah has called HB205 a "calculated and unconstitutional attack designed to burden women, scare doctors, and chip away at *Roe v. Wade*."

Defending a lawsuit in court would likely be costly for Utah. In 2007, the Utah attorney general's office estimated the legal costs for defending a more sweeping abortion ban would run about \$1.3 million — with other estimates coming in millions of dollars higher.

The progressive-leaning Alliance for a Better Utah sent a request last month to Utah Attorney General Sean Reyes for estimated costs to defend the Down syndrome bill in court, but the group said last week it has yet to receive a response.

(Steve Griffin | Tribune file) Four-year-old Ella Warner, left, shares a chip with her three-year-old friend Finn Merkley as Rep. Karianne Lisonbee, R-Clearfield, talks about HB205, which would enact important protections for children who have Down syndrome. Both children, who have Down Syndrome, attended the news conference with their parents Natalie Warner and Justin Merkley. Amber Merkley, Finn's mother, spoke during the event.

(Steve Griffin | Tribune file) Four-year-old Ella Warner, left, shares a chip with her three-year-old friend Finn Merkley as Rep. Karianne Lisonbee, R-Clearfield, talks about HB205, which would enact important protections for children who have Down syndrome. Both children, who have Down Syndrome, attended the news conference with their parents Natalie Warner and Justin Merkley. Amber Merkley, Finn's mother, spoke during the event.

Officials with the Utah chapters of Planned Parenthood and the ACLU have voiced their strong opposition. National counterparts for both organizations have challenged Down syndrome abortion bans in court in other states.

But William Duncan, an attorney and a director at the conservative Sutherland Institute think tank, has argued that HB205 is sufficiently narrow to pass constitutional muster — and urged lawmakers to push ahead.

“The Legislature can’t allow advocacy groups to have a heckler’s veto over what the state law is by saying, ‘Well, if you pass that law, we’ll sue,’” Duncan said at a recent hearing. The Legislature, he said, “knows how to do the right thing, and can do that without worrying how others will respond. And this is the right thing to do.”

Do other states have similar laws?

Four U.S. states have passed abortion bans similar to HB205.

A federal judge blocked Indiana’s version in 2016, and the state is now in the midst of an appeal.

An Ohio bill signed into law last year currently faces a legal challenge filed on behalf of several of the state’s abortion providers, who argue the ban on Down syndrome abortions violates “well-established constitutional limits” outlining a woman’s right to choose.

A lawsuit filed by the lone North Dakota abortion provider over that state’s version of the ban was dropped by the clinic. It said it already did not perform the procedure after 16 weeks, when prenatal tests for Down syndrome and other conditions are administered.

In Louisiana, legislation passed in 2016 banned abortions for genetic abnormalities after 20 weeks and required a bevy of information be given to women who have such a diagnosis before that time.

A lawsuit challenging the informational part of the law is pending. But the 20-week prohibition remains in place, because another state law already bans all abortions after that point.

What is known about Down syndrome babies and abortions in Utah?

Lisonbee has pointed to a study that suggests the U.S. may have an abortion rate due to Down syndrome diagnoses of 67 percent. But the Utah numbers appear to be drastically lower. Exact figures on Down syndrome-related abortions are not available, but an average of 83 Utah babies were born with the genetic disorder each year between 2010 and 2014, according to the most recent Utah Department of Health data.

Out of about 3,000 total Utah abortions in 2015, there were 40 due to any kind of “malformation,” according to a state report.

Chris Hutchison, a OB-GYN in Riverton who is chairman of the Utah chapter of the American College of Obstetricians and Gynecologists, said the majority of those abortions would be for “lethal malformations,” including deadly brain or kidney syndromes.

A “small fraction” of the 40 abortions would be due to a Down syndrome diagnosis, Hutchison said in an interview. And he said there are other genetic disorders that can be identified via testing, and for which a woman may sometimes choose to have an abortion.

But those disorders — including Klinefelter’s syndrome, Turner syndrome and others — are not covered under Lisonbee’s bill.

Have other issues come up about HB205?

Yes. At hearings on Capitol Hill, some medical professionals warned the proposal could have a chilling effect on conversations with patients regarding abortion and similar subjects.

Hutchison, the Riverton-based OB-GYN, complained about the bill’s vague language on information he and other doctors would be required to provide about Down syndrome parent support groups and specialists. He urged the state to develop a website with that information instead, along with a list of pediatricians who specialize in the disorder.

It also remains unclear how such a law would be enforced — or how a doctor would know a woman wants to have an abortion for the “sole” reason of a Down syndrome diagnosis.

Planned Parenthood clinics do not ask why patients are seeking an abortion.

“We’re not the mind police,” Hutchison said. “How do you know what people are choosing?”

Some lawmakers who support HB205 acknowledged those difficulties.

“We can say, ‘How would we know if that’s why a parent is choosing an abortion?’” said Sen. Daniel Thatcher, R-West Valley City. “The fact is we don’t know, we wouldn’t know, there’s no way this [bill] could be realistically enforced.

“So let’s be honest,” he added. “This is a message bill. The question is: Is this a message we want to send? I would say yes.”

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