Protecting Unborn Children from Discriminatory Abortions

by Chantel Hoyt

Modern medical technology can detect genetic characteristics and diagnose many disabilities in the womb. Unfortunately, these scientific advancements have increased the potential for abortions that are motivated by bias against an unborn child's race, sex, ethnicity, national origin, and/or disability.

Babies who are prenatally diagnosed with a disability may be the most common victims of discriminatory abortions. An international study found that 63 percent of babies prenatally diagnosed with spina bifida and 83 percent of babies prenatally diagnosed with anencephaly are aborted.[1] Another study revealed that an estimated 67 percent of women in the United States who receive a prenatal diagnosis of Down syndrome choose abortion.[2] In Denmark, more than 95 percent of mothers who receive a prenatal Down syndrome diagnosis choose to abort their child, and in 2019, 15 years after screening became universally available, only 18 babies with Down syndrome were born in the whole country.[3]

State legislators across the country are becoming increasingly aware of this problem and are introducing prenatal nondiscrimination acts (PRENDAs) to protect children from discriminatory abortions. In 2019, they were emboldened when Justice Thomas penned a lengthy opinion in *Box v. Planned Parenthood* in which he cited abortion's eugenic roots and its continued eugenic potential.

Much like other pro-life bills, support for PRENDAs has been growing over the past few years. From 2013 to 2020, an average of **10** state-level PRENDAs were introduced each year. In 2021, a record-high **31** were introduced. So far, two have been enacted, in **Arizona** (SB 1457) and **South Dakota** (HB

1110). Fourteen other states have enacted some version of these protections. In fact, the past three years have seen more PRENDAs enacted (seven) than in all the preceding years combined.

These bills typically have four key provisions:

- Prohibit anyone from knowingly aborting the unborn child of a woman who sought the abortion solely on the basis of an inherent characteristic (*e.g.*, sex, race, ethnicity, national origin) or disability of the child.
- Provide a penalty for noncompliance (criminal, civil, and/or professional).
- Indemnify the mother (*i.e.*, absolve the mother of legal liability).
- Create a civil cause of action (*i.e.*, abortion businesses who violate the law can be sued).

In addition, some bills may mandate information be provided to the mother about perinatal palliative care if the unborn child has a life-threatening illness or abnormality. This year, four out of the 31 bills introduced do this (all four are from Texas).

Of the PRENDAs introduced this year, 16 protect unborn children from abortion on the basis of sex, 11 on the basis of race, 22 on the basis of a disability or genetic abnormality diagnosis, six on the basis of ethnicity, and one on the basis of national origin.

So far, Arizona's SB 1457 and South Dakota's HB 1110 have been enacted this year. Arizona's law builds on existing PRENDA law, adding "genetic abnormality" to the list of characteristics protected against discriminatory abortions (in addition to sex and race). This bill weakens the penalty from a class three felony to a class six felony. Existing law in Arizona indemnifies the mother and creates a civil cause of action. South Dakota's bill is strong, prohibiting abortions sought on the basis of a Down syndrome diagnosis and imposing the criminal penalty of a class six felony for noncompliance. Additionally, this bill indemnifies the mother and creates a civil cause of action.

Texas introduced **four** strong PRENDAs (HB 3218, SB 1647, HB 3760, SB 1173) that include each of the key provisions listed above as well as provisions for mothers to learn more about perinatal palliative care. **Seven** states—Pennsylvania (HB 1500), Massachusetts (H 2409), Michigan (HB 4737), Texas (HB 4339), South Dakota (HB 1110), Washington (SB 5416), and Arkansas (SB 468)—also introduced strong bills that include each key provision. Each of these bills prohibits abortions sought

because of one or more of the following characteristics of the unborn child: diagnosis or potential diagnosis of Down syndrome, diagnosis of a disability, genetic abnormality, race, ethnicity, or sex.

Four states—Florida (CS/HB 1221, SB 1664), Texas (HB 1432), South Carolina (HB 3512), and Washington (HB 1008)—introduced moderate bills, missing one or two of the key provisions (a civil cause of action and/or indemnification of the mother). Florida, Washington, and South Carolina's bills prohibit abortions based on a diagnosis of a disability or genetic abnormality of the unborn child (Washington's is specific to Down syndrome). Texas' bill prohibits abortions based on the ethnicity or national origin of the unborn child, and South Carolina's bill additionally prohibits race and sex-selective abortions.

Seven states—North Carolina, Arizona, Arkansas, Illinois, Maryland, West Virginia, and Oregon—introduced relatively weak or limited PRENDAs missing more than two of the key provisions. Some of these bills included other limitations that made them especially weak. North Carolina's bill (H 453) adds to an existing ban on sex-selective abortions by also prohibiting abortions on the basis of the unborn child's race or Down syndrome. This bill contains no other provisions. Arizona's bill (SB 1381) adds to existing PRENDA statutes by adding "disability" as a protected trait for which a child may not be aborted. This bill is weakened by the fact that "disability" is not defined. Arkansas' bill (SB 519) amends a section of law prohibiting sex-selective abortions and requires the physician carrying out the abortion to attempt to obtain the woman's medical records to determine if she has previously undergone an abortion due to the child's sex. This bill does not contain any other provisions. However, to Arkansas' credit, the state already does prohibit sex-selective abortions. Illinois' bills (HB 3047, HB 1893, HB 3043, HB 3053, and HB 3046) prohibit abortions sought solely based on the sex of the unborn child. Besides containing no other PRENDA provisions, these bills include a weakening statement that allows abortions sought because of a genetic disorder linked to the child's sex. This goes against the purpose of PRENDA laws, to protect unborn children from being aborted due to an immutable trait. Maryland and West Virginia's bills (MD HB 846 and WV HB 3024) prohibit abortions based on a diagnosis of Down syndrome but include no other provisions. Oregon's bill (SB 654) prohibits sex-selective abortions but limits this protection to the third trimester. This too goes against the purpose of PRENDA laws since the sex of babies can be determined as early as 14 weeks. In effect, this would prohibit few, if any, discriminatory abortions.

Discriminatory abortions are a grim reality in the United States and around the world, but they are not going unchallenged. Thus far, state legislators have introduced PRENDAs in over **35** states and successfully enacted them in **16**. If the surge of state-level PRENDA bills in 2021 is any indication, these numbers are sure to rise in the coming years. There is cause for optimism that states' laws will one day reflect American's rightful opposition to discriminatory abortions, and eventually to the eugenic roots of abortion itself.

For more information on why PRENDAs are essential, please refer to FRC's issue analysis.[4]

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[1] https://pubmed.ncbi.nlm.nih.gov/23097374/

[2] https://obgyn.onlinelibrary.wiley.com/doi/full/10.1002/pd.2910

[3] https://www.theatlantic.com/magazine/archive/2020/12/the-last-children-of-down-syndrome/616928/

[4] https://frc.org/prenda