Analysis of House Bill 166

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Should legislators be concerned about the constitutionality of the bill?

- The portion of the bill that requires medical professionals refer patients to more information on Down Syndrome is clearly not open to challenge as a violation on the right to abortion.
- The portion of the bill that prevents targeting children with a diagnosis of Down Syndrome will not go into effect unless the courts rule that it is constitutional. Therefore, it cannot be challenged in court.
- There is good reason to believe that this type of law will be found constitutional.
- The Supreme Court has approved abortion restrictions, at any stage during pregnancy, when they advance important government interests.
- In *Gonzalez v. Carhart*, 550 U.S. 124 (2007), Justice Anthony Kennedy writing for the majority said: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." (p. 157) It is important to note that Justice Kennedy was one of the authors of the *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), case that was relied on in the mistaken opinions striking down Indiana's Down Syndrome anti-discrimination law.
- The *Gonzalez* decision said the government had a legitimate interest in regulating abortion for such reasons as (1) promoting respect for life in the medical profession, (2) preventing anything even nearing infanticide, (3) ensuring "so grave a choice is well informed."
- Like the restrictions on partial birth abortion, a law that prevents targeting children who have been diagnosed with Down Syndrome for abortion, advances powerful government interests:
    - Protecting a vulnerable group from being terminated just because they are different.
    - Drawing a firm line against eugenics, the practice of trying to "screen out" certain people from the population because they are considered by some to have "undesirable" traits.
    - "[R]egulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzalez* at 158.
    - Preventing discrimination against those with a condition, who would likely live if not for a misunderstanding about that condition.
- The court decisions striking down a similar law in Indiana did not address any of these interests. It merely said there could be no regulation of abortion before viability under *Casey v. Planned Parenthood* even though one of the authors of the *Casey* opinion approved a law banning partial birth abortion even before viability.
- A dissent in the Indiana court decision pointed out that the Supreme Court has not ruled on "the validity of an anti-eugenics law."
- The Supreme Court's recognition of a "right to abortion" is meant to allow a woman to choose abortion in the event of an unwanted pregnancy. Here, the situation is

different—the child is wanted only until the diagnosis of Down Syndrome is delivered, often without accurate information on what this will mean for the parents and child.
- The bill would not change current law to limit the choices of anyone who has conceived as a result of rape or incest or whose life is endangered by a continuing pregnancy.
- Ultimately, the legislature must determine what is good policy, rather than trying to guess what courts might think or allowing activist groups to exercise a "heckler's veto" by threatening litigation.

Why does the bill only mention those who have a Down Syndrome diagnosis and not others with disabilities?

- As recently disclosed, there is at least one country where individuals with Down Syndrome have been almost completed eliminated through abortion. Julian Quinones & Arijeta Lajka, *"What kind of society do you want to live in?": Inside the country where Down syndrome is disappearing*, CBS NEWS (Aug. 14, 2017), https://www.cbsnews.com/news/down-syndrome-iceland/.
- Currently, more than 85% of children who are diagnosed with Down Syndrome before birth are aborted. Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32 PRENATAL DIAGNOSIS 142 (February 2012).
- Parents have testified that they feel pressure to abort after a Down Syndrome diagnosis.
- Down Syndrome is a condition that can be pretty accurately predicted early in the pregnancy when abortion is more likely (although there are concerns about misdiagnosis).
- Utah law allows for abortion where a child is unlikely to survive birth. Since Down Syndrome is unlikely to involve this scenario, this condition is unlikely to conflict with current law. Including in this bill other conditions which might threaten the viability of an unborn child could potentially create a conflict with current law.
- This bill will encourage appreciation for vulnerable unborn children with a wide range of disabilities even if all of the possibilities are not addressed in a single bill at this time.

The law is a teacher and the laws of Utah should express our conviction that when medical professionals counsel a parent whose child has been diagnosed with Down Syndrome, they should encourage understanding rather than abortion.