

**Minority Report**  
**Conference Committee to SB1457**  
**abortion; unborn child; genetic abnormality**  
**April 20, 2021**

We oppose SB1457 abortion; unborn child; genetic abnormality as amended in conference committee, because the conference committee amendment fails to remedy the egregious Constitutional issues and practical barriers created by the bill.

The bill is an expansive and intrusive step toward criminalizing, restricting, and regulating women, doctors, universities and public institutions. The amendment makes minor improvements: it exempts in vitro fertilization procedures from the expansive civil and criminal liability of the bill; it adds an additional requirement that a Class 6 felony penalty shall apply if a person performs an abortion knowing that it is sought "solely" because of a genetic abnormality of the child. Additionally, it tightens the language of the exception to the Class 6 felony for abortions sought due to a "severe fetal abnormality," to a "lethal fetal condition." These slight improvements are far from sufficient to address the significant criminal and civil liability that this bill creates.

First and foremost, the Pace amendment does not change the fetal personhood language of Sec. 1., which confers personhood - all rights, privileges and immunities – to an unborn child at any stage of development. This would grant all rights, privileges, and immunities of any other citizen, to a fetus – meaning any harm to the fetus may carry criminal or civil sanctions never before contemplated. Although the bill states the personhood status must be consistent with Supreme Court precedent, it is not hard to see how this provision could be easily interpreted to erase the universe of protections afforded to women under law of the land since *Roe v. Wade* and *Planned Parenthood v. Casey*.

Regardless of potentially undermining a woman's right to an abortion under current Supreme Court precedent, the "personhood" provisions of the bill would open up the potential for prosecutors to charge persons including the pregnant individual whose conduct results in a woman having a miscarriage with murder, manslaughter or child endangerment. In fact, a young African American woman in Alabama, a state with a fetal personhood law, was indicted by a grand jury on manslaughter charges when she lost her fetus at 5-months after being shot and faced up to 20 years in prison. In El Salvador where the law maintains personhood for fetuses and criminalizes abortions, women in poverty who have miscarriages or still births are routinely swept up into the criminal system through no fault of their own. Evidence suggests that poor women of color will be punished more severely than their counterparts, further exasperating the racial and class disparities that already exist in our justice system.

An amendment attached to Sec. 1 of the bill during the Free Conference Committee expressly prohibits a cause of action against a person who performs In Vitro Fertilization (IVF), seemingly in view of the fact that IVF techniques routinely engage in the selective reduction in the number of embryos implanted in a person's womb. Nevertheless, the scope of this exemption from liability is unclear. Does it apply to any nurse, anesthesiologist or technician or office staff that work for an entity that conducts IVF? What about the company that stores embryos in deep

freezers? Would their potential negligence in damaging a test tube containing an embryo or shutting off a freezer, subject them to criminal or civil liability and damages? For these reasons, we sought to introduce an amendment to repeal Sec. 1 from the bill, but the conservative majority adjourned abruptly in order to prevent us from doing so.

Secondly, the bill will criminalize the doctor-patient relationship, providing for the prosecution of a person, not limited to a doctor, who performs an abortion sought due to a genetic abnormality, and any person who solicits or accepts monies to finance an abortion sought due to a genetic abnormality. This would require doctors to interrogate a pregnant person for their motivations in seeking an abortion, and subject them to a felony if they are determined incorrect by a judge or jury. The addition of the word "solely," far from clarifying the doctor's duties in determining why an abortion is sought, only creates more questions: what if a woman provides one reason for an abortion but then later mentions the fetus's genetic abnormality? Which is the physician to believe is the "sole" reason the person now wants an abortion? Additionally, if a woman is wealthy enough to self-finance this abortion out of pocket, she does not face the Class 3 felony prescribed in this section. However, lower middle class and low-income women will be treated more harshly based on their ability to pay for abortions based on genetic abnormalities. The amendment also exempts from a prohibited abortion an abortion performed on a fetus with a "lethal fetal condition," as defined under A.R.S. Section 36-2158. The definition of a lethal fetal condition also raises questions as it turns on the existence of a reasonable medical certainty that the fetus will not live more than 3 months after birth. It is important to understand that the bill language does not defer to the doctor's medical judgment as would be necessary were the language to include the phrase "good faith medical judgment." Instead the ultimate decider of whether a physician is liable (and the full scope of liability for the physician's staff) will be the judge or the jury.

The criminalization of the doctor-patient relationship has far-reaching implications, not only for women and their doctors, but also for assisting medical professionals and staff, who could be charged as accomplices – including nurses, physician's assistant's, and anesthesiologists. Other reproductive healthcare professions such as midwives and doulas could also be criminalized under this law.

Additionally, inclusion of "genetic abnormality" language in abortion restrictions act to expand the connected civil liability under A.R.S. 13-3603.02(D), which allows a husband of the woman or parent of a pregnant minor to bring a civil action on behalf of an unborn child – against a woman who solicits or accepts monies for such an abortion; and against a doctor who performs such an abortion. This creates enormous possible legal exposure for doctors and healthcare institutions, in addition to exposing a minor to civil liability against her own parents. For these reasons, we distributed an amendment removing the language pertaining to genetic abnormality but was prohibited from moving the amendment by the Chair.

The Pace amendment fails to address any of these concerns and makes only minor and insufficient improvements. The Chair of the Conference Committee broke from custom and practice established by the Senate in 2019 by arbitrarily blocking public testimony from Morgan Tucker and Garin and Erica Marschall, Arizonans who have needed an abortion due to genetic abnormality of a fetus, and expert witnesses that include but are not limited to doctors, criminal

defense attorneys, and other impacted stakeholders. In addition, the Senate President prohibited over a dozen members of the public from attending the hearing live, despite the official notice stating the hearing would be open to the public. We believe these witnesses would have provided important information on the issues raised in this report.

Lastly, the addition of a legislative intent clause - an attempt to inoculate the legislation from the inevitable court challenge the sponsor clearly anticipates - fails to remedy any concerns; and relies on dicta, and cherry-picked statistics from reports submitted by parents in those cases. It cites *Box v. Planned Parenthood of Indiana and Kentucky*, a ruling on the disposition of fetal remains in which the Court did not make a substantive ruling on the issue of a sex- and gender-selective abortion restriction; and *PRETERM-CLEVELAND v. McCloud*, in which is not a final ruling on the merits of any abortion restriction but rather a ruling on a lower court's decision on a preliminary injunction. This is far from substantive law.

The amendment fails to address any of these concerns and makes only minor and insufficient improvements. For those reasons, and many more, we oppose SB1457 as amended by the conference committee.

**For reference**

<https://www.washingtonpost.com/nation/2019/06/28/she-miscarried-after-being-shot-prosecutors-are-weighing-manslaughter-case-against-her/>

<https://theconversation.com/el-salvadors-abortion-ban-jails-women-for-miscarriages-and-stillbirths-now-one-womans-family-seeks-international-justice-156484>

<https://rewirenewsgroup.com/article/2019/11/07/personhood-cost-push-fetal-rights/>

  
\_\_\_\_\_  
Senator Kirsten Engel

  
\_\_\_\_\_  
Representative Melody Hernandez