
Prenatal Nondiscrimination Act

Model Legislation & Policy Guide



*Advancing the Human Right to Life
in Culture, Law, and Policy*

INTRODUCTION

In recent years, the practice of sex-selection abortion has drawn increasing attention worldwide. A sex-selection abortion is an abortion undertaken to eliminate a child of an undesired sex. Importantly, the targeted victims of such abortions are overwhelmingly female. The United Nations Population Fund (UNFPA) reports that since the 1990s, some areas have seen up to 25% more male births than female births.¹

While it is difficult to determine how many girls have been lost to sex selection, the 2020 State of World Population Report indicates that more than 140 million females are missing today due to both sex-selection abortion and female infanticide.² Other research puts that estimate at over 160 million.³

Studies have found evidence of sex-selection being practiced in the United States.⁴ For example, researchers concluded that the most logical explanation for the irregularity in boy-birth percentages in the United States is gender selection. Analysis also revealed that a deviation in favor of sons in Western society to be evidence of sex selection, most likely at the prenatal stage.⁵ Even the efforts of pro-abortion advocates to defeat bans on sex-selection abortions by claiming these abortions are rare acknowledge that sex-selection abortions happen. Given the expense of advanced reproductive technologies such as *in vitro* fertilization (IVF) or sperm sorting, this gender selection is often taking place by abortion sometime after the embryonic stage of development.⁶ Research also demonstrates that 73% of assisted reproductive

¹ *Gender-biased Sex Selection*, United Nations Population Fund (July 27, 2020), <https://www.unfpa.org/gender-biased-sex-selection>.

² Daniel Baker et al., *State of World Population*, United Nations Population Fund (2020), https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf.

³ Audrey R. Chapman, Peter A. Benn, *Noninvasive Prenatal Testing for Early Sex Identification: A Few Benefits and Many Concerns*, 56 PERSPECTIVES IN BIOLOGY AND MEDICINE 530 (2013).

⁴ See Jonathan Coppage, *Here's the "Missing" Evidence for S.D.'s Sex-Selective Abortion Ban* (Apr. 1, 2014), <http://www.theamericanconservative.com/heres-the-missing-evidence-for-sex-selective-abortion-bans-south-dakota/> (citing Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. OF THE U.S.A. 105: 5681 (2008), <http://www.pnas.org/content/105/15/5681.full>); Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 AMER. ECON. J.: APPLIED ECON. 1 (Apr. 2009).

⁵ *Id.*

⁶ *Id.*

technology clinics offer sex selection, which occurs after embryos are created, and results in their destruction—a form of early abortion.⁷

In 2012, the organization Live Action sent investigators into Planned Parenthood clinics around the country and revealed that the abortion giant was willing to perform sex-selection abortions—even late-term sex-selection abortions, when the risks to maternal health are markedly higher. That same year, testifying against a sex-selection abortion ban in Missouri, Planned Parenthood’s lobbyist refused to answer, when asked three times by legislators including when directly asked to give a “yes or no” response, whether Planned Parenthood would refuse to perform a sex-selection abortion if asked by a patient.

Lawmakers in the United States have begun focusing more attention on the problem of sex-selection abortions, with a growing number of states considering prohibitions on sex-selection abortions each year.⁸ This reflects American jurisprudence, which rejects race and sex discrimination as part of a commitment to human dignity. Such discrimination by state actors and agencies violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution and is prohibited in private and public employment by Title VII of the Civil Rights Act of 1964.⁹ A 2012 poll by the Charlotte Lozier Institute found that 77 percent of Americans support prohibitions on sex-selection abortions.

Prenatal testing is becoming increasingly common, and many diagnostic tests are intended to provide parents and healthcare providers with information about an unborn baby's health and development (including the child's sex). Currently, prenatal testing to identify and diagnose potential genetic abnormalities or disorders is commonly used in cases where a pregnant woman:¹⁰

- Is age 35 or older, because she is generally at higher risk for having a child with a chromosomal abnormality;

⁷ Sarah Capelouto, et al., *Sex Selection for Non-Medical Indications: A Survey of Current Pre-Implantation Genetic Screening Practices Among U.S. ART Clinics*, J. ASSIST. REPROD. GENET., 35: 409 (Mar. 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5904054/>. See generally Jaime S. King, *America's Role in Sex Selection*, Center for Law and the Biosciences Blog, (Oct. 9, 2011), <https://law.stanford.edu/2011/10/09/americas-role-in-sex-selection/>.

⁸ Eleven states ban sex-selection abortions: AZ, AR, KS, MS, MO, NC, ND, OK, PA, SD, and TN. KY's law is temporarily enjoined. IL and IN's laws are permanently enjoined. Six states ban abortion due to genetic anomaly: MS, MO, ND, OH, SD, and TN. AZ, AR, KY, and LA's laws are temporarily enjoined. IN's law is permanently enjoined. UT's law will only take effect if a court decision allows such a law to stand.

⁹ Anna Higgins, *Sex-Selection Abortion: The Real War on Women*, Charlotte Lozier Institute (Apr. 13, 2016), https://lozierinstitute.org/sex-selection-abortion-the-real-war-on-women/#_ftn19.

¹⁰ *Who Should Undergo Genetic Testing?*, ASS'N. FOR WOMEN'S HEALTH CARE, <https://www.chicagooobgyn.com/blog/who-should-undergo-genetic-testing> (last visited Sept. 3, 2022).

- Has a family history of an inherited condition such as Duchenne muscular dystrophy;
- Whose ancestry or ethnic background means that she might have a higher chance of an inherited disorder such as sickle cell anemia, thalassemia, or Tay-Sachs disease; or
- Is screened for common genetic disorders such as spina bifida and Down syndrome.

Two diagnostic procedures are common in prenatal testing:¹¹

- Amniocentesis, which involves testing a sample of amniotic fluid from the womb; and,
- Chorionic villus sampling (CVS), which involves taking a tiny tissue sample from outside the sac where the child is growing.

Prenatal testing can be a valuable tool for diagnosing and treating conditions that threaten the health or life of the mother and/or the child. However, in some cases and despite documented error rates for such testing, it is also being used as a precursor for aborting a child of an undesired sex or with potential genetic abnormalities or defects. In Sweden, for example, nearly 100% of babies diagnosed with Down Syndrome are aborted.¹² In Denmark, more than 95% of these children are aborted.¹³ In the United States, 30% are aborted.¹⁴

Clearly, this chilling slide toward eugenics—specifically, eliminating persons with certain hereditary characteristics—must be confronted. Notably, one of the most prominent American supporters of eugenics was Margaret Sanger, the founder of Planned Parenthood.

Further, it is undisputed that abortion's risks to maternal health increases as gestation increases. While DNA tests can now reveal a baby's sex as early as seven weeks into

¹¹ *Diagnosis of Birth Defects*, Centers for Disease Control and Prevention (Oct. 27, 2020), <https://www.cdc.gov/ncbddd/birthdefects/diagnosis.html>.

¹² Patricia Heaton, *Iceland Isn't Eliminating Down Syndrome—They Are Just Killing Everyone Who Has It*, AMERICA (Dec. 4, 2017), <https://www.americamagazine.org/politics-society/2017/12/04/patricia-heaton-iceland-isnt-eliminating-down-syndrome-they-are-just>.

¹³ Sarah Zhang, *The Last Children of Down Syndrome*, THE ATLANTIC (Dec. 2020), <https://www.theatlantic.com/magazine/archive/2020/12/the-last-children-of-down-syndrome/616928/>.

¹⁴ Gert de Graaf & Frank Buckley, *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167 AM. J. MED. GENET. 756–67 (Apr. 2015); see generally *New Study: Abortion After Prenatal Diagnosis of Down Syndrome Reduces Down Syndrome Community by Thirty Percent*, CHARLOTTE LOZIER INSTITUTE (April 21, 2015), https://lozierinstitute.org/new-study-abortion-after-prenatal-diagnosis-of-down-syndrome-reduces-down-syndrome-community-by-thirty-percent/#_edn3.

pregnancy,¹⁵ diagnostic tests for genetic abnormalities are carried out between 15 and 22 weeks' gestation.¹⁶ Because abortions performed solely based on a genetic diagnosis are generally performed later in pregnancy, women undergoing these abortions are unnecessarily exposed to increased health risks. For example, risk of death at 8 weeks' gestation is one death per 1 million abortions; at 16 to 20 weeks, that risk rises to one death per 29,000 abortions; and at 21 weeks' gestation or later, the risk of death is one per every 11,000 abortions.¹⁷ In other words, a woman seeking an abortion at 20 weeks is 35 times more likely to die from the abortion than she was in the first trimester. At 21 weeks or more, she is 91 times more likely to die from an abortion than she was in the first trimester.

Currently, eleven states ban sex-selection abortions at some point in pregnancy and six states prohibit abortions when the fetus may have a genetic anomaly.

In response, AUL offers the Prenatal Nondiscrimination Act, which prohibits abortions done for reasons of sex-selection or genetic abnormalities such as Down syndrome. For more information or drafting assistance, please contact AUL at Legislation@aul.org.

¹⁵ Pam Belluck, *If You Really, Really Wanted a Girl*, THE NEW YORK TIMES (Aug. 20, 2011), <https://www.nytimes.com/2011/08/21/sunday-review/if-you-really-really-wanted-a-girl.html>.

¹⁶ *Prenatal Genetic Screening Tests: What Are the Different Types of Prenatal Genetic Screening Tests?*, Am. Coll. of Obstetricians and Gynecologists (Oct. 2020), <https://www.acog.org/womens-health/faqs/prenatal-genetic-screening-tests>.

¹⁷ Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729 (2004).

PRENATAL NONDISCRIMINATION ACT OF [INSERT YEAR]

HOUSE/SENATE BILL No. _____
By Representatives/Senators _____

Section 1. Title.

This Act may be cited as the “Prenatal Nondiscrimination Act of [*Insert appropriate year*].”

Section 2. Legislative Findings.

The [*Legislature*] of the State of [*Insert name of State*] finds that:

(a) With regard to sex-selection abortion:

- (1) Women are a vital part of our society and culture and possess the same fundamental human rights as men.
- (2) In spite of this, sex-selection abortion, which is abortion done to prevent the birth of a child of an undesired sex, has been documented to exist, outside the U.S. and, increasingly, inside it, and the victims of sex-selection abortion are overwhelmingly female.
- (3) The United States, along with other countries, has petitioned the United Nations General Assembly to declare sex-selection abortion a crime against women.
- (4) Countries such as India, Great Britain, and China have taken steps to end sex-selection abortion. For example, China and India do not allow doctors to reveal the sex of an unborn child.
- (5) The United States prohibits discrimination on the basis of sex in various areas including employment, education, athletics, and health insurance.
- (6) It is undesirable to have a sex imbalance within a society, particularly when there is a shortage of women. Countries with high rates of male-preference have experienced ill effects as a result of an increasing number of young, unmarried men.
- (7) A large population of young, unmarried men can be a cause of increased violence and militancy within a society.

(b) With regard to abortion and Down syndrome:

- (1) Persons with Down syndrome possess the same fundamental human rights as all other human beings.
- (2) In spite of this, various studies have found that a high degree—in excess seventy (70) percent—of unborn children diagnosed with Down syndrome are aborted.
- (3) Recent years have seen an increase in the use of amniocentesis and other prenatal testing to diagnose potential health problems in unborn children.
- (4) Amniocentesis and other prenatal testing often give correct results, but also give many false-positive results.
- (5) Roughly one (1) in every seven hundred (700) to one thousand (1,000) children is born with Down syndrome.
- (6) Down syndrome is not considered a severe disability.
- (7) In various circumstances, the United States prohibits discrimination against persons with Down syndrome.
- (8) In many situations such as education, the United States requires that accommodations be made for the benefit of persons with Down syndrome.
- (9) Persons with Down syndrome contribute significantly to American culture and are a valuable part of our society.
- (10) Many persons with Down syndrome are able to maintain employment, obtain an education, and live with varying degrees of independence.
- (11) As technology advances and as medical treatments and educational methods improve, persons with Down syndrome will increasingly be self-dependent and productive citizens.

(c) With regard to abortion and genetic abnormalities:

- (1) Persons with physical or mental deformities or handicaps possess the same fundamental human rights as all other human beings.

- (2) The United States prohibits discrimination against persons with physical or mental deformities or handicaps in various circumstances including housing and employment.
 - (3) In many situations, the United States requires that accommodations be made for the benefit of persons with physical or mental deformities or handicaps.
 - (4) In spite of this, studies have revealed that a high percentage of unborn children who are diagnosed with genetic abnormalities or a potential for genetic abnormalities are aborted.
 - (5) Recent years have seen an increase in the use of amniocentesis and other prenatal testing to diagnose potential health problems in unborn children.
 - (6) Amniocentesis and other prenatal testing often give correct results, but also give false-positive results.
 - (7) There are approximately four thousand (4,000) known genetic abnormalities.
 - (8) Persons with physical or mental deformities or handicaps contribute significantly to American culture and are a valuable part of our society.
 - (9) Many persons with physical or mental deformities or handicaps are able to support themselves financially, obtain an education, and live independently.
 - (10) As technology advances and as medical treatments and educational methods improve, persons with physical or mental deformities or handicaps will increasingly be self-dependent and productive citizens.
- (d) With regard to maternal health:
- (1) It is undisputed that abortion's risks to maternal health increases as gestation increases.
 - (2) The risk of death at eight (8) weeks' gestation is one death per one (1) million abortions; at sixteen (16) to twenty (20) weeks, that risk rises to one death per twenty-nine thousand (29,000) abortions; and at twenty one (21) weeks' gestation or later, the risk of death is one per every eleven thousand (11,000) abortions.

- (3) This means that a woman seeking an abortion at twenty (20) weeks is thirty five (35) times more likely to die from the abortion than she was in the first trimester. At twenty one (21) weeks or more, she is ninety one (91) times more likely to die from an abortion than she was in the first trimester.
 - (4) Because abortions performed solely based on a child's sex or genetic diagnosis are generally performed later in pregnancy, women undergoing these abortions are unnecessarily exposed to increased health risks including a exponentially higher risk of death.
- (e) Based on the findings in subsections (a) through (d), the purposes of this Act are to:
- (1) Ban abortions performed for reasons of sex-selection or diagnosed or feared genetic abnormalities; and
 - (2) To protect women from the risks inherent in later-term abortions.

Section 3. Definitions.

As used in this Act only:

- (a) “**Abortion**” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion if done with the intent to:
 - (1) Save the life or preserve the health of the unborn child;
 - (2) Remove a dead unborn child caused by spontaneous abortion; or
 - (3) Remove an ectopic pregnancy.
- (b) “**Down syndrome**” refers to a chromosome disorder associated either with an extra chromosome twenty one (21) (in whole or in part) or an effective trisomy for chromosome twenty one (21). Down syndrome is sometimes referred to as “trisomy 21 syndrome.”
- (c) “**Genetic abnormality**” means any defect, disease, or disorder that is inherited genetically. The term genetic abnormality includes, but is not limited to: any physical disability, any mental disability or retardation, any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, Amelia, or any other type of physical or mental abnormality or disease.

(d) “**Incompetent**” means any person who has been adjudged a disabled person and has had a guardian appointed for him/her under the *[Insert state Probate Act or other appropriate state law]*.

(e) “**Minor**” means any person under the age of eighteen (18) who is not and has not been married and has not been legally emancipated.

(f) “**Physician**” means any person licensed to practice medicine in this State. The term includes medical doctors and doctors of osteopathy.

(g) “**Pregnant woman**” means any female, including those who have not reached the age of eighteen (18) *[or minors]*, who is in the reproductive condition of having an unborn child in her uterus.

(h) “**Sex-selection abortion**” means an abortion performed solely on account of the sex of the unborn child.

(i) “**Unborn child**” means the offspring of human beings from conception until birth.

(j) “**Viability**” means the state of fetal development when, in the judgment of the physician based on the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support.

Section 4. Prohibition on Sex-Selection Abortion.

(a) No person may intentionally perform or attempt to perform an abortion with the knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the unborn child.

(b) Nothing in this Section shall be construed to proscribe the performance of an abortion because the unborn child has a genetic abnormality or disorder that is linked to the unborn child’s sex.

[Drafter’s Note: *If a particular state is also seeking to ban abortions performed because of genetic abnormalities, this subsection (b) may need to be removed or modified.*]

(c) If 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.

Section 5. Prohibition on Abortion for Down Syndrome.

- (a) No person may intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely because the unborn child has been diagnosed with either Down syndrome or a potential for Down syndrome.
- (b) If 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.

Section 6. Prohibition on Abortion for a Genetic Abnormality.

- (a) No person may intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.
- (b) If 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.

Section 7. Criminal Penalties.

Any physician or other person who intentionally or knowingly performs or attempts to perform an abortion prohibited by this Act shall be guilty of a *[Insert appropriate offense/penalty classification]*, and shall be fined not less than *[Insert appropriate amount or possible range of fine]* or be imprisoned *[at hard labor]* not less than *[Insert appropriate time period or range]*, or both.

Section 8. Civil Penalties and Professional Sanctions.

- (a) Any physician or person who intentionally or knowingly violates this Act shall be liable for damages and shall, if applicable, have his or her medical license suspended or revoked. He or she may also be enjoined from future acts prohibited by Sections 4, 5 and 6 of this Act.
- (b) **Civil Damages.** A pregnant woman upon whom an abortion has been performed in violation of this Act, the parent or legal guardian of the woman if she is an unemancipated minor as defined in *[Insert citation(s) or other reference(s) to appropriate state statute(s)]*, or the legal guardian *[or conservator]* of the woman if she has been adjudged incompetent under *[Insert citation(s) or other reference(s) to state statute(s) relating to petition and bearing, independent evaluation, etc.]* may commence a civil action for any knowing, intentional, or reckless violation of the Act

and may seek both actual and punitive damages. Such damages shall include, but are not limited to:

- (1) Money damages for all psychological and physical injuries occasioned by the violation(s) of this Act; and
- (2) Statutory damages equal to *[Insert number]* times the cost of the abortion performed in violation of this Act.

(c) ***Action Against a Medical License.*** Any physician who performs an abortion in violation of this Act shall be considered to have engaged in unprofessional conduct for which his or her *[certificate or]* license to provide healthcare services in the State of *[Insert name of State]* shall be suspended or revoked by the *[Insert name of state Medical Board or other appropriate entity]*.

(d) ***Injunctive Relief.*** A cause of action for injunctive relief against any physician or other person who has knowingly violated this Act may be maintained by the woman upon whom the abortion was performed or attempted to be performed in violation of this Act; any person who is the spouse, parent, guardian, *[conservator]*, or a current or former licensed healthcare provider of the woman upon whom an abortion has been performed or attempted to be performed in violation of this Act; by the Office of the Attorney General of *[Insert name of State]*; or by a *[criminal District]* Attorney with appropriate jurisdiction. The injunction shall prevent the physician or person from performing further abortions in violation of this Act.

(e) ***Contempt Proceedings.*** Any physician or other person who knowingly violates the terms of an injunction issued in accordance with this Act shall be subject to *[civil and/or criminal]* contempt and shall be fined not less than *[Insert appropriate amount or possible range of fine]*, or be imprisoned *[at hard labor]* not less than *[Insert appropriate time period or range]*, or both.

[Drafter's Note: *If only civil contempt is selected as the appropriate remedy for failure to comply with a validly issued injunction, then any reference(s) to imprisonment or other criminal penalties should be removed from subparagraph 8(e).]*

Section 9. Exclusion of Liability for Woman Who Undergoes Abortion Prohibited Under this Act.

(a) Any woman upon whom an abortion in violation of this Act is performed or attempted may not be prosecuted under this Act for a conspiracy to violate this Act or otherwise held criminally or civilly liable for any violation.

(b) In any criminal proceeding or action brought under this Act, any woman upon whom an abortion in violation of this Act is performed or attempted is entitled to all rights, protections, and notifications afforded to crime victims under *[Insert citation(s) or other reference(s) to state law(s) or administrative policies associated with the state's Victim-Witness Protection or similar program]*.

(c) In every civil proceeding or action brought under this Act, the anonymity of the woman upon whom an abortion is performed or attempted shall be preserved from public disclosure unless she gives her consent to such disclosure. A court of competent jurisdiction, upon motion or *sua sponte*, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms, to the extent necessary to safeguard her identity from public disclosure. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone who initiates a proceeding or action under Section 8(b) or Section 8(d) of this Act shall do so under a pseudonym.

Section 10. Construction.

(a) Nothing in this Act shall be construed as creating or recognizing a right to abortion.

(b) It is not the intention of this Act to make lawful an abortion that is currently unlawful.

Section 11. Severability.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

Section 12. Right of Intervention

The *[Legislature]*, by joint resolution, may appoint one or more of its members who sponsored or cosponsored this Act in his or her official capacity to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

Section 13. Effective Date.

This Act takes effect on *[Insert date]*.

For further information regarding this or other AUL policy guides, please contact:

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