**Testimony of B. Jessie Hill**
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**Judge Ben C. Green Professor of Law**
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**to the House Health Committee**
**Opposing House Bill 214**
**Tuesday, October 10, 2017**

I am writing to oppose HB 214. I am the Associate Dean for Academic Affairs and Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law. I have been teaching, publishing scholarship, and litigating in the field of constitutional law, with a particular focus on reproductive rights, for fifteen years. I write now to share with the Committee my constitutional analysis of the bill currently under consideration, which criminalizes performing an abortion when one reason for seeking the abortion is a diagnosis or test result indicating the possibility Down syndrome. I am submitting this testimony on my own behalf and not on behalf of Case Western Reserve University.

HB 214 is clearly unconstitutional, first, for the reason that it is a total ban on certain previability abortions. In *Planned Parenthood v. Casey*, the U.S. Supreme Court stated that states may regulate abortion in ways that do not unduly burden the woman's right to terminate her pregnancy. The "ultimate decision" must be her own, however, and the state cannot prevent "*any* woman" from making that choice before the fetus is viable. 505 U.S. 833, 879 (1992). Additionally, the Court explained that the state, whether promoting "the interest in potential life or some other valid state interest," may act to inform the woman's choice, but not to hinder it. *Id.* at 877. In the only other published case considering a similar ban—Indiana's—the federal court struck down the state law that prohibited abortions chosen for, among other reasons, fetal anomaly, noting that to uphold the law would require it to abandon the clear holdings of *Roe v. Wade* and *Planned Parenthood v. Casey*. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana Department of Health*, 2017 WL 4224750, at *8 (Sept. 22, 2017). Indeed, the court explained: "[N]othing in *Roe*, *Casey*, or any other subsequent Supreme Court decisions suggests that a woman's right to choose an abortion prior to viability can be restricted if exercised for a particular reason determined by the State. The right to a pre-viability abortion is categorical." *Id.* In fact, no court has upheld a law that entirely bans previability abortions, whether for all women or some subcategory of women. *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir.

2015). Such a law flies directly in the face of the very right to privacy and decisionmaking autonomy recognized by *Roe v. Wade*.

In addition to its clear unconstitutionality under binding and unquestioned U.S. Supreme Court precedent, H.B. 214 additionally suffers from the defect of vagueness. H.B. 214 criminalizes performing an abortion if the physician knows that the woman is seeking the abortion, in whole or in part, because of a test or diagnosis indicating Down syndrome, or "any other reason to believe that an unborn child has Down syndrome." It is unclear to what this might refer. For example, if a woman becomes pregnant at an advanced age and is concerned about the risk of Down syndrome, would a doctor risk prosecution for terminating the pregnancy? A reasonable physician is not given sufficient notice by this provision of the sort of conduct that might subject him or her to criminal penalties.

Finally, it is unclear what legitimate interest the state intends to advance through this prohibition. This law cannot be intended to protect the health of the woman, since it would appear to have the exact opposite effect. Since it requires the physician have knowledge of the patient's motives for criminal liability to attach, this ban will presumably encourage women to withhold information from their physicians about their reasons for seeking an abortion and about their medical histories. It will thereby drive a wedge in the physician-patient relationship and undermine the goal of open and informed communication within that relationship. And to the extent the law intends to serve the purposes of preserving fetal life, dignity, or nondiscrimination, the Supreme Court has already made it clear that these goals cannot be advanced by means of taking authority for the ultimate decision regarding pregnancy away from the woman. *Casey*, 505 U.S. at 879. Moreover, it is not clear why only fetuses with Down syndrome, and not other anomalies, are entitled to this special protection.

For all of these reasons, I believe that HB 214 is unconstitutional, and I oppose this legislation.

Respectfully submitted,

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