

PRETERM-CLEVELAND, et al., Plaintiffs-Appellees,

v.

Amy Acton, et al., Defendants-Appellants

No. 18-3329.

On Appeal from the U.S. District Court for the Southern District of Ohio,
District Court Case No. 1:18-cv-00109

**AMICI CURIAE BRIEF OF DISABILITY RIGHTS ORGANIZATIONS,
ADVOCATES AND ACADEMICS ON REHEARING *EN BANC***

RUTH COLKER*

Distinguished University Professor

& Heck-Faust Memorial Chair in

Constitutional Law

Moritz College of Law

The Ohio State University

55 West 12th Avenue

Columbus, OH 43215

614-292-0900

colker.2@osu.edu

SAMUEL BAGENSTOS

625 South State Street

Ann Arbor, Michigan 48109

*institutional affiliation for the purpose of
identification only

TABLE OF CONTENTS

STATEMENT OF INTEREST1

INTRODUCTION AND SUMMARY OF ARGUMENT1

ARGUMENT.....2

 I. The Ohio Ban Is Inconsistent with the State’s Pro-Information
 Campaign Following a Down Syndrome Prenatal Diagnosis.....2

 II. The Ohio Ban Does Not Improve the Quality of the Lives of People
 Born With Down Syndrome7

 III. Ohio’s Abortion Ban Conflicts with Core Tenets of the Disability
 Rights Movement.....10

CONCLUSION12

CERTIFICATE OF COMPLIANCE14

TABLE OF AUTHORITIES

Cases

Ball v. Kasich, Case No. 2:16-cv-282 (S.D. Ohio March 2016)8
Board of Trustees v. Garrett, 531 U.S. 356 (2001)9
Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1790-91 (2019) ..5
Doe v. State of Ohio, Case No. 2:91-cv-004649
University of Alabama at Birmingham v. Garrett, 2000 WL 821359 at *4.....9

Statutes

Ohio Rev. Code § 2919.10(C)2
 Ohio Rev. Code § 3701.69..... 2, 3, 4

Other Authorities

David M. Perry, *How Ohio Is Using Down Syndrome to Criminalize Abortion*, Pacific Standard, Oct. 3, 2017, <https://psmag.com/social-justice/gop-using-down-syndrome-as-cynical-wedge>10
 Graaf, Buckley & Skotko, *Estimates of Live Births, Natural Losses, and Elective Terminations with Down syndrome in the US*, AM J MED GENETICS PART A 167A:756-767 (2015)5
 Jaime L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011)*, 32 PRENATAL DIAGNOSIS 142, 147 (2012)6
 James I. Charlton, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3 (1998).....10
 Julian Quinones & Arijeta Lajka, *“What Kind of Society Do You Want to Live in?”: Inside the Country Where Down Syndrome is Disappearing*, CBSN ONASSIGNMENT, August 14, 2017, <https://www.cbsnews.com/news/down-syndrome-iceland/>6
 Mark Leach, *Delaware and Maryland join Massachusetts and Kentucky in enacting laws to provide information with a Down syndrome test result*, <https://www.downsyndrome – prenataltesting.com/delaware-and-maryland-join-massachusetts-and-kentucky-in-enacting-laws-to-provide-information-with-a-down-syndrome-test-result/>3
 Mikyong Shin et al., *Prevalence of Down Syndrome Among Child and Adolescents in 10 Regions of the United States*, 124 PEDIATRICS 1565 (2009)....7

NAT’L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 40 (2012)11
News, Disability Rights Ohio, available at <https://www.disabilityrightsohio.org/news#latest>8
Ohio Department of Health, Down Syndrome Fact Sheet, December 4, 2015, available at <http://www.odh.ohio.gov>4
Rebecca Cokley, The Anti-Abortion Bill You Aren’t Hearing About, Rewire.News (May 20, 2019, 11:10 AM), <https://perma.cc/B4BM-AXSK>11
Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. CT. REV. 37 (2019)11

Rules

Federal Rule of Appellate Procedure 29(a)(4)(D)1

STATEMENT OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D), *amici curiae* (listed in the Appendix hereto) state that they are disability rights organizations, advocates and academics who seek to improve the lives of people with disabilities. *Amici* seek to advise this Court on the impact that this law has on respect for the lives of people with disabilities, including those born with Down syndrome.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Abortion Ban does not improve the quality of the lives of and respect for people born with Down syndrome.

Inconsistent and Disrespectful. The Abortion Ban undermines the effectiveness of Ohio's Down Syndrome Pro-Information statute, which seeks to counter stereotypes by providing pregnant women with accurate, nonstereotypical information about raising a child with Down syndrome. It is contrary to the core value of reproductive autonomy valued by the disability rights movement.

Unhelpful and Disingenuous. Other measures, like ending Ohio's appalling rate of educational segregation for students with disabilities and

ending Ohio's high rate of institutionalization for people with disabilities, can actually help people born with Down syndrome.

ARGUMENT

Ohio Rev. Code § 2919.10(C) ["Abortion Ban"] criminalizes abortion if the physician performing the abortion knows that one reason, in whole or in part, for the woman's decision to terminate her pregnancy is a fetal indication of Down syndrome. While the state defends the Abortion Ban as an effective means of countering coercion of a pregnant woman, it does exactly the opposite. The Abortion Ban precludes the effective implementation of Ohio's Down Syndrome Pro-Information statute, Ohio Rev. Code § 3701.69, which seeks to overcome stereotypes about Down syndrome. The Abortion Ban muzzles pregnant women at the moment when they receive the state's Down syndrome fact sheet and does not improve the lives of those born with Down syndrome.

I. The Ohio Ban Is Inconsistent with the State's Pro-Information Campaign Following a Down Syndrome Prenatal Diagnosis

The Abortion Ban seeks to use an unconstitutional means to prevent a harm that the State has not shown exists. Without citing one study from Ohio, the state argues that parents "report being pressured by counselors to

abort after prenatal Down syndrome diagnoses.” Defendants-Appellants’ Supplemental Brief on Rehearing *En Banc*, at 6 (filed January 13, 2020).

The state cannot cite evidence that Ohio parents face biased counseling, because Ohio has been a leader in the national movement to require fact-based, non-coercive counseling. Advocates have persuaded state legislators around the country to require that health care professionals present pregnant women with accurate information ranging from how to breast feed a child with Down syndrome to the medical resources available to both pregnant women and their children. See Mark Leach, *Delaware and Maryland join Massachusetts and Kentucky in enacting laws to provide information with a Down syndrome test result*, <https://www.downsyndrome—prenataltesting.com/delaware-and-maryland-join-massachusetts-and-kentucky-in-enacting-laws-to-provide-information-with-a-down-syndrome-test-result/> (states forbidding outdated booklets saying “So You’ve Had a Mongoloid: Now What?”)

Ohio enacted a Down Syndrome Pro-Information statute in 2015. See Ohio Rev. Code § 3701.69. This statute requires the Ohio Department of Health to create a Down syndrome information sheet that contains “only information that is current and based on medical evidence.” *Id.* at (A)(2). A

health care professional or facility is required to provide this information sheet to any patient who “receives either a test result indicating Down syndrome or a prenatal or postnatal diagnosis of Down syndrome.” *Id.* at B. The Ohio fact sheet, for example, states that “[r]aising a child with Down syndrome may involve more time and commitment than raising one without ... but also reports that “[r]esearch shows that the majority of adults with Down syndrome report that they are happy with their lives.” *See* Ohio Department of Health, Down Syndrome Fact Sheet, December 4, 2015, available at <http://www.odh.ohio.gov>.

The Down syndrome fact sheet helps facilitate a constructive conversation between a health care provider and a pregnant woman who is trying to decide whether to terminate her pregnancy following a prenatal Down syndrome diagnosis. But the Abortion Ban makes that conversation impossible. Once a pregnant woman discloses to her abortion provider that she has received the Down syndrome fact sheet,¹ the medical professional will have to end the conversation and inform the pregnant woman that the health care facility can no longer perform the abortion procedure. Rather

¹ The health care provider may also receive that information automatically through electronic medical records.

than *informing* her choice, the mechanisms of the Down Syndrome Pro-information statute combined with the Abortion Ban, will *end* her choice. The Abortion Ban tragically silences women by prohibiting the informed consent conversation that the Down syndrome community strongly supported in 2015.

Ohio's Abortion Ban is also fixing a so-called "eugenics" problem that the state cannot show exists in Ohio. In its Supplemental brief, the state cites one news article reporting that few babies are born with Down syndrome in *Iceland*. Defendant's Supplemental Brief at 5. Its support for the statement that "two-thirds of unborn children diagnosed with Down syndrome are aborted" is Justice Thomas's concurrence in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring) rather than any current research studies. *See* Defendant's Supplemental Brief, at 5.

The most recent study on pregnancy termination rates in the United States estimates a 30 % reduction in live births following a prenatal diagnosis of Down syndrome in the United States rather than the much higher figures cited by the state. *See* Graaf, Buckley & Skotko, *Estimates of Live Births, Natural Losses, and Elective Terminations with Down syndrome in the US*, AM J MED GENETICS PART A 167A:756-767 (2015). Further, these authors conclude

that the increased availability of prenatal testing has not led to an increase in abortions.

Studies indicate that pregnancy termination rates from other countries are not applicable to the United States. See Jaime L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011)*, 32 *PRENATAL DIAGNOSIS* 142, 147 (2012). In fact, the only news report cited by Defendants in their supplemental brief recognizes that Down syndrome termination rates are lower in the United States than in France, Denmark or Iceland. See Julian Quinones & Arijeta Lajka, “*What Kind of Society Do You Want to Live in?*”: *Inside the Country Where Down Syndrome is Disappearing*, CBSN ONASSIGNMENT, August 14, 2017, <https://www.cbsnews.com/news/down-syndrome-iceland/> (cited by Defendants’ Supplemental Brief at 5). Further, the only study that examined pregnancy termination rates over time in a particular state in the United States found that termination rates have decreased. See Natoli et al., *supra* at 147 (reporting decline over time from 78.6 % to 33.3 %). Similarly, other researchers have found that the prevalence of children both with Down syndrome has been *increasing* in recent years in the United States, presumably because of a decline in pregnancy termination rates. See Mikyong Shin et al., *Prevalence of Down*

Syndrome Among Child and Adolescents in 10 Regions of the United States, 124 PEDIATRICS 1565 (2009).

Ohio's Abortion Ban is undermining the important work that the Down syndrome community has been doing since 2015 to counter Down syndrome stereotypes with accurate information. Rather than facilitating that important work, the state is silencing pregnant women who have received a prenatal Down syndrome diagnosis. The state should continue to allow the pro-information campaign to be effective rather than use the heavy hammer of the criminal law in a coercive fit of exasperation.

II. The Ohio Ban Does Not Improve the Quality of the Lives of People Born With Down Syndrome

People who genuinely care about the lives of people with Down syndrome are engaged in a wide range of advocacy on the state and federal level. Banning abortions does not improve the quality of those lives.

In Ohio, advocates who value the lives of people with Down syndrome have often had to sue the state of Ohio to attain genuine assistance. For example, two major class actions have been brought in recent years against the state of Ohio to better protect individuals with disabilities, including individuals with Down syndrome. These are only two of the dozens of

lawsuits that have been recently filed against the state of Ohio to protect the rights of people with developmental disabilities, such as Down syndrome. See News, Disability Rights Ohio, available at <https://www.disabilityrightsohio.org/news#latest> (listing successful resolution of cases against the state involving Medicaid waivers, guardianship, parental rights, prisoner rights, access to support dogs, housing access, and voting rights).

After trying to negotiate with the state of Ohio for nearly two years, a coalition of disability rights advocates filed a complaint against the state in March 2016 to help 6,000 Medicaid-eligible Ohioans with developmental disabilities, who currently live in institutional settings, obtain the Medicaid resources to live in community-based settings. See Class Action Complaint, *Ball v. Kasich*, Case No. 2:16-cv-282 (S.D. Ohio March 2016). The class includes people with Down syndrome. *Id.* at 34. A preliminary settlement was reached in January 2020. See <https://www.disabilityrightsohio.org/dd-class-action-lawsuit#media>.

Parents have had to engage in litigation for two decades to attain a November 2019 settlement regarding the education of children with disabilities. This lawsuit challenged Ohio's appallingly high rates of disability-segregated education. See *Doe v. State of Ohio*, Case No. 2:91-cv-

00464. The settlement seeks to facilitate students with Down syndrome being educated in integrated settings. *See* Settlement Agreement, Case 2:91-cv-00464-MHW-CMV Doc. #584-1, filed November 5, 2019.

Despite this decades of litigation against the state of Ohio for its mistreatment of people born with Down syndrome, the state disingenuously argued before the original Sixth Circuit panel that it had a “compelling” interest in preventing discrimination against those born with Down syndrome. Brief of Defendants-Appellants at 33 (filed June 22, 2018). The state has seemingly abandoned that argument in its *En Banc* brief.

The state of Ohio has historically argued *against* treating people with disabilities as a suspect class. In 2001, the state urged the Supreme Court not to accord suspect class treatment to people with disabilities and to merely conclude “that distinctions drawn by the States on the basis of disability are afforded only rational basis review under the Fourteenth Amendment.” Brief of Amici Curiae States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee in Support of Petitioners, *University of Alabama at Birmingham v. Garrett*, 2000 WL 821359 at *4. The state of Ohio’s position prevailed. *See Board of Trustees v. Garrett*, 531 U.S. 356 (2001). Thus, it is

disingenuous for the state to argue that it has historically considered people with Down syndrome as a group that is entitled to heightened protection.

People with Down syndrome are people, not pawns to be used in an anti-abortion political game. See David M. Perry, *How Ohio Is Using Down Syndrome to Criminalize Abortion*, Pacific Standard, Oct. 3, 2017, <https://psmag.com/social-justice/gop-using-down-syndrome-as-cynical-wedge>.

(“The cynical use of my son’s disability as a wedge issues hasn’t made the world any better for him.”)

III. Ohio’s Abortion Ban Conflicts with Core Tenets of the Disability Rights Movement

Far from serving disability rights interests, Ohio’s Abortion Ban conflicts with core tenets of the American disability rights movement. As individuals with disabilities mobilized to protect their rights in the movement that culminated in the adoption of the Americans with Disabilities Act, they strongly opposed paternalism—and, in particular, control over the choices they made with their bodies. See, e.g., James I. Charlton, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 3 (1998). As leading disability rights activist Rebecca Cokley recently wrote, “The right to decide what happens to our bodies is a

fundamental principle in the disability community, and with good reason.” Rebecca Cokley, *The Anti-Abortion Bill You Aren’t Hearing About*, Rewire.News (May 20, 2019, 11:10 AM), <https://perma.cc/B4BM-AXSK>.

Participants in the disability rights movement often especially oppose paternalism in reproductive choices, because reproduction has been a key site of paternalistic control of disabled people. Individuals with disabilities were long subject to involuntary sterilization—a problem that, perhaps shockingly, continues on many occasions today. See NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* 40 (2012). Even when the state permits people with disabilities to have children, family courts and child welfare agencies often discriminate against them in custody and visitation proceedings. See Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAM. CT. REV. 37 (2019). And, as Cokley writes, doctors themselves often seek to exercise paternalistic control: “Many disability advocates talk about developing actual disassociation skills at the doctor’s office because the objectification can be so traumatizing. And when you do exert control over your own body, you are labeled as difficult, as non-compliant.” Cokley, *supra*.

Laws like Ohio's deny women the right to make their own reproductive choices in a way that is disturbingly similar to the laws and practices that have sought to deny disabled people the right to make their own reproductive choices. Although efforts to ensure that women with disabled fetuses have accurate information about disability are appropriate, Ohio's denial of the woman's ultimate choice is paternalistic and oppressive. It thus contravenes basic disability rights principles.

CONCLUSION

For the foregoing reasons, *amici* join Plaintiffs-Appellees in urging this Court to affirm the district court's decision.

Respectfully submitted,

/s/ Ruth Colker

RUTH COLKER
Distinguished University Professor &
Heck-Faust Memorial Chair in Constitutional Law
Moritz College of Law
The Ohio State University*
55 West 12th Avenue
Columbus, OH 43210
614-292-0900
colker.2@osu.edu

SAMUEL BAGENSTOS
625 South State Street
Ann Arbor, Michigan 48109-1215

*institutional affiliation for the purpose of
identification only

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus brief* is less than 12 ½ pages in length and thus complies with the Court's briefing letter.

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Book Antiqua font.

/s/ Ruth Colker

RUTH COLKER

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, this brief was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ruth Colker

RUTH COLKER