No. 18-3329
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRETERM-CLEVELAND, ET AL.,	:	
	:	United States District Court for the
Plaintiffs-Appellees,	:	Southern District of Ohio
	:	Western Division
	:	
v.	:	
	:	District Court Case No. 1:18-cv-00109
LANCE HIMES, ET AL.,	:	
	:	
Defendants-Appellants.	:	
	:	

BRIEF IN OPPOSITION TO REHEARING EN BANC FOR PLAINTIFFS-APPELLEES PRETERM-CLEVELAND, PLANNED PARENTHOOD SOUTHWEST OHIO REGION, WOMEN'S MED GROUP PROFESSIONAL CORPORATION, ROSLYN KADE, M.D., AND PLANNED PARENTHOOD OF GREATER OHIO

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Defendants-Appellants ("Appellants" or "the State") ask this Court to rehear en banc a case in which a panel of this Court affirmed a preliminary injunction against Ohio H.B. 214 ("H.B. 214") by applying straightforward, longstanding Sixth Circuit and U.S. Supreme Court precedent. In fact, no court—including the Supreme Court—has ever upheld a law like H.B. 214, which bans pre-viability abortions based on the patient's reason for seeking the abortion.

En banc rehearing is an "extraordinary procedure." 6th Cir. I.O.P. 35(a). Thus, a party seeking this extraordinary form of review must demonstrate either (1) that the panel's decision conflicts with U.S. Supreme Court or Sixth Circuit precedent, or (2) that the case involves "one or more questions of exceptional importance," such as a decision that creates a circuit split. Fed. R. App. P. 35(b)(1). Neither requirement is met here. If anything, Appellants seek en banc rehearing in order to *create* a circuit split on this issue. That is not the purpose of en banc review.

There is no dispute over the correct precedent to apply in this case: The panel majority, the dissent, *and* the parties all agree that *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992), is controlling.[1] Nor does the State's

[1] Notably, Appellants appear to have abandoned their previous argument that neither *Roe* nor *Casey* control and, instead, the law should be subject to strict scrutiny review. *Compare* Br. of Def't-Appellants at 42, R.20, PAGEID#55, *with* Pet. at 1, R.66, PAGEID#5.

inapposite attempt to invoke the specter of eugenics turn this case into one of exceptional importance. The State and dissent simply disagree with the controlling precedent itself. Such disagreement—whether with the underlying precedent or with the application of that correct precedent to the facts of this case—does not create a conflict or question of exceptional importance that merits en banc review.[2] *See* 6th Cir. I.O.P. 35.

ARGUMENT

I. THE PANEL DECISION DOES NOT CONFLICT WITH—BUT WAS DICTATED BY—SUPREME COURT PRECEDENT AND THEREFORE DOES NOT WARRANT EN BANC REVIEW.

For forty-six years, the Supreme Court has not wavered from the central holding of *Roe v. Wade* that a State may not ban abortion before viability for any reason. *Casey*, 505 U.S. at 846; *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007). The federal courts, including this Court, have uniformly adhered to this principle. *See Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997) (holding that *Casey* "mandates that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability"); *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 888

[2] Moreover, en banc rehearing is not ordinarily appropriate for preliminary rulings. *See Krakoff v. United States*, 431 F.2d 847, 848 (6th Cir. 1970); *see also* 6th Cir. I.O.P. 35(g) (stating that only "[p]etitions seeking rehearing en banc from an order that disposes of the case on the merits or on jurisdictional grounds" are eligible for en banc rehearing).

F.3d 300, 307 (7th Cir. 2018) ("*PPINK*") (holding unconstitutional a state law banning abortion, *inter alia*, for reasons of fetal anomaly), *cert denied sub nom. Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 636 (W.D. Mo. 2019) (same), *modified sub nom*. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 2:19-CV-4155-HFS, 2019 WL 4740511 (W.D. Mo. Sept. 27, 2019), *appeal docketed*, No. 19-3134 (8th Cir. Oct. 3, 2019); *Little Rock Family Planning Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1272 (E.D. Ark. 2019) (same), *appeal docketed*, No. 19-2690 (8th Cir. Aug. 9, 2019); *see also* Br. of Appellee, R.28, PAGEID#31 (citing cases). Thus, in affirming the preliminary injunction below, the panel applied nearly five decades of binding and unanimous precedent. Panel Op. 5-6. For the panel to have defied this precedent to reach any other conclusion would itself have been an extraordinary, precedent-setting error. *See, e.g.*, *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329 (11th Cir. 2018), *cert. denied sub nom. Harris v. W. Alabama Women's Ctr.*, 139 S. Ct. 2606 (2019) ("In our judicial system, there is only one Supreme Court, and we are not it. As one of the 'inferior Courts,' we follow its decisions."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 770 (8th Cir. 2015) (striking pre-viability abortion ban "[b]ecause United States Supreme Court precedent does not permit us to reach a contrary result").

A. A Ban on Pre-viability Abortion Is Unconstitutional Under *Casey*, and the Act Is Undoubtedly Such a Ban.

Appellants' emphasis on the panel's holding that pre-viability abortion bans are categorically unconstitutional is simply a distraction. The panel did not recognize an "absolute" right to abortion, in the sense that the right cannot be restricted. Rather, as the panel correctly recognized, the *Casey* Court already balanced the state's legitimate interests against the woman's autonomy right and made it clear that no abortion ban that applies pre-viability can pass constitutional muster. Op. at 6-7. However, whether framed as a categorically unconstitutional abortion ban or a substantial obstacle under the undue burden standard (which the district court applied in the alternative, Dist. Ct. Order at 12, R.28, PAGEID#589), the result is the same. *See Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion *or* the imposition of a substantial obstacle to the woman's effective right to elect the procedure." (emphasis added)). H.B. 214 is a ban. As such, regardless of the terminology that the panel used, it would always prevent one hundred percent of the women affected by it from accessing abortion; this is the nature of a ban. *See, e.g.*, *Cincinnati Women's Services v. Taft*, 468 F.3d 361, 373 (6th Cir. 2006) (noting that a law is clearly unconstitutional if "all women upon whom the restriction actually operated . . . would effectively be barred from exercising their constitutional right to obtain an abortion.").

Appellants' only response is to argue that H.B. 214—a criminal abortion ban—imposes no burden because it does not require a physician to inquire or "speculate" as to the patient's motivations for the abortion, and because women can simply deceive their doctors in order to obtain now-criminalized abortions. Pet. 13-14, R.66, PAGEID#17-18. This argument is absurd. First, the undisputed evidence shows not only that patients voluntarily disclose the reasons for their abortion (including this reason), but also that patients' medical records often reveal when testing indicates or diagnoses Down syndrome. *See, e.g.* Lappen Decl., ¶ 36, R.3-1, PAGEID#45-46. Second, Appellants' contention that the law merely requires doctors who unintentionally learn of their patients' illegal motives to refer them elsewhere for an abortion is in obvious tension with the state's claimed interest in preventing discriminatory abortions.[3] Moreover, if anything, forcing women to conceal facts from their doctors, while encouraging physicians to be accessories to that concealment, undermines the state's claimed interest in the ethics and integrity of the medical profession far more than it protects them.

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[3] Appellants' own evidence indicates that the law is designed as a ban on abortion due to an indication of Down syndrome, not a mandatory-referral requirement for physicians. *See, e.g.*, Defts' Exh. H, R.25-1, PAGEID#189 (Sponsor Testimony of Rep. Sarah LaTourette) ("[H.B. 214] is priority legislation for Ohio Right to Life and aims to prohibit abortions from taking place based on a potential Down syndrome diagnosis."); Defts' Exh. II, R.25-3, PAGEID#497 (Sponsor Testimony of Frank La Rose) ("This legislation would prohibit an abortion from being performed if the reason for terminating the pregnancy is because of a pre-natal diagnosis of Down syndrome.").

Finally, even if the argument were not both absurd and belied by the record in this case, Appellants' dissatisfaction with *how* the panel applied concededly correct precedent to the facts of the case does not constitute sufficient grounds for en banc review. *See* 6th Cir. I.O.P. 35(a).

B. Appellants' Attempts to Fabricate a Conflict with Supreme Court Precedent Fail.

Lacking any basis for their claim that a pre-viability abortion *prohibition* is constitutional under existing precedent, in an attempt to create a conflict with Supreme Court precedent, Appellants rely on case law upholding *regulations* of abortion that have been found not to create an undue burden. Pet. at 11-16, R.66, PAGEID#15-20. This case law is inapposite.

First, the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), affirmed that a state may *not* prohibit any woman from obtaining an abortion prior to viability, in upholding a federal ban on an uncommon abortion procedure precisely because the dominant procedure remained available *to every woman seeking a pre-viability abortion*. 550 U.S. at 164-65; *see also Northland Family Planning v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007). The same plainly is not true of H.B. 214, which prohibits an entire category of women from obtaining abortions pre-viability. *See, e.g.*, *Voinovich*, 130 F.3 at 201 (prohibiting most common second-trimester abortion method "has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

Second, while certain procedural requirements may be imposed upon a minor seeking an abortion that could not be imposed on an adult, *see Casey*, 505 U.S. at 898-99 (striking down spousal notice requirement for abortion while upholding a parental consent requirement), the Supreme Court has clearly held that it would be categorically unconstitutional to give absolute veto power to the state or to the parents over a minor's abortion decision. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). Here, by contrast, the State claims just such a veto power over the abortion decision of *every* Ohioan who seeks an abortion based wholly or in part on a Down syndrome diagnosis. Appellants' attempt to invoke parental-consent laws in support of their argument therefore fails as well.

Third, Appellants misleadingly point to what they deem "leading opinions on the other side of the debate" to imply a conflict where none exists. Pet. at 15, R.66, PAGEID#19. Yet, the Seventh Circuit is the only other appellate court to have considered the constitutionality of a ban on abortion based on the woman's reasons, and that court reached the same conclusion as the panel here. *PPINK*, 888 F.3d at 307, *cert. denied sub nom. Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. at 1781. It should go without saying that any disagreement between the panel decision and (1) Judge Easterbrook's *dissent in the denial of en banc review* of the Seventh Circuit decision or (2) Justice Thomas's *concurrence in the denial of*

certiorari in the same case (which was joined by no other Justice),[4] is no conflict at all, let alone one sufficient for en banc review. If anything, Appellants seek to manufacture a circuit split where none exists. This is an inappropriate use of the en banc process. *See Mitchell v. JCG Industries, Inc.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing en banc) (observing that en banc review was inappropriate, in part because "a reversal of the panel decision would create a circuit split with the only other appellate decision to deal with the same issue").

II. APPELLANTS' INVOCATION OF EUGENICS IS A RED HERRING AND DOES NOT CREATE AN ISSUE OF EXCEPTIONAL IMPORTANCE.

In arguing "the real reason for *en banc* review is the 'exceptional importance' of the question whether States can pass anti-eugenics laws" Pet. at 2, R.66, PAGEID#6, Appellants further misrepresent the record before this Court. Appellants do not point to any evidence, nor could they, showing that women in Ohio are engaged in a campaign to eradicate people with Down syndrome, that they are choosing abortion for invidiously discriminatory reasons, or that they are being coerced by physicians into terminating wanted pregnancies after a Down

[4] The Supreme Court did not summarily reverse the lower court on that issue, despite the Appellants' misleading statement to that effect. Pet. at 15, R.66, PAGEID#19.

syndrome diagnosis. Rather, the undisputed evidence shows that women in Ohio seek abortions—including in cases where they have received a Down syndrome diagnosis—for a number of complex, interrelated reasons relating to their health, family, and other life circumstances. *See, e.g.*, Lappen Dec. ¶ 12, R.3-1, PAGEID#39-40. The undisputed evidence also shows that Ohio patients receive sensitive, comprehensive, and non-directive counseling in cases of a prenatal Down syndrome diagnosis, Lappen Dec. ¶¶ 34-35, 46 R.3-1, PAGEID#44-45, 48—even beyond what is already required by statute, Ohio Rev. Code § 3701.69(B) (requiring health care providers to supply patients with a state-created information sheet after a prenatal or postnatal diagnosis of Down syndrome).[5] To compare these personal medical decisions to a government-sponsored eugenics campaign is not only unfounded, but also demonstrates a profound lack of respect for the morality and decision-making ability of the women and families the State of Ohio supposedly represents. In fact, the undisputed evidence before the district court shows that Ohioans with Down syndrome are struggling due to a lack of government support. Chestnut Decl., R.27-2, PageID#570-73; Thrower Decl., R. 27-3, PageID#574-577; *see also* Br. of Amici Curiae Mothers, in Support of Pls.-

[5] Ohio's reference to a study of pamphlets from Canadian prenatal screening centers is baffling given that Ohio law already requires the distribution of a *state-published* pamphlet to any patient who receives a Down syndrome diagnosis. Pet. 6, R.66, PAGEID#10.

Appellees at 8-10, R.33, PAGEID#12-14. In response, Appellants can only point to alleged eugenic beliefs and practices in Western Europe, Canada, and "elite academic circles." Pet. 5, R.66, PAGEID#9. Thus, even if the panel's treatment of the facts were relevant to the question of *en banc* review, Appellants' contentions are plainly insufficient to warrant such review here.

CONCLUSION

For the foregoing reasons, Appellants' petition for rehearing en banc should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, I filed a copy of the foregoing 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/ *B. Jessie Hill*