

APPEAL NO. 18-3329

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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Preterm-Cleveland, et al.,

Plaintiffs-Appellees,

v.

Lance Himes, et al.,

Defendants-Appellants.

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On Appeal from the United States District Court  
for the Southern District of Ohio, Western Division  
Case No. 1:18-cv-109

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BRIEF OF AMICI CURIAE, MOTHERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND  
AFFIRMANCE

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## INTERESTS OF AMICI CURIAE

Amici are the mothers of children with Down syndrome, who love, cherish and advocate for their children.<sup>1</sup> Each of these women urge this Court to affirm the district court's entry of a preliminary injunction, which enjoined the enforcement of 2017 H.B. No. 214—Ohio Revised Code §§ 2919.10, 2919.101, and 3701.79 (hereinafter "**H.B. 214**").

Ashley Meier Barlow is a licensed attorney and a mother of two sons, the younger of whom—Jack—has Down syndrome. Ashley has engaged in advocacy at the state and federal level on issues relevant to the Down syndrome community. Ashley lives in Fort Thomas, Kentucky, is the incoming board president of the Down Syndrome Association of Greater Cincinnati and advocates for her son and all children with Down syndrome.<sup>2</sup>

Holly Christensen is a mother of five children, one of whom—Lyra—has Down syndrome. An Akronite, Holly is a writer, blogger, teacher and award-winning columnist who authors a regular parenting column for the Akron Beacon Journal. Holly has published about her experience as the parent of a beautiful girl with Down syndrome and spoken out against H.B. 214. *See, e.g.* Holly

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<sup>1</sup> This brief is filed with the consent of all parties. No party or party's counsel has authored this brief either in full or in part; nor have they contributed financially to this brief. No one other than amici curiae and their counsel contributed money to fund the preparation or submission of this brief.

<sup>2</sup> This organization has not taken any position on this legislation or this litigation. Amici speak solely in their personal capacities.

Christensen, *Busting myths on life with Down syndrome*, AKRON BEACON JOURNAL, (May 6, 2017), <https://www.ohio.com/akron/lifestyle/holly-christensen-busting-myths-on-life-with-down-syndrome> (last visited Aug. 22, 2018); Holly Christensen, *The problem with the Down syndrome abortion ban*, AKRON BEACON JOURNAL, (Dec. 28, 2017), available at <https://www.ohio.com/akron/lifestyle/holly-christensen-the-problem-with-the-down-syndrome-abortion-ban> (last visited Aug. 22, 2018).

Kathleen Ferrara is a registered nurse and the mother of one child, Kathryn, who is nine years old and has Down syndrome. Kathleen resides in the Cincinnati area and previously served as the Health Outreach Coordinator at the Down Syndrome Association of Greater Cincinnati. Kathleen has lobbied Ohio on issues relevant to the Down syndrome community, including in support of Ohio's Down Syndrome Information Act, 2014 Sub.H.B. 552. See Chelsea Robertson, *UC student and mom helps pass Ohio's Down Syndrome Information Act*, THE NEWS RECORD, (Mar. 24, 2015), [http://www.newsrecord.org/news/uc-student-and-mom-helps-pass-ohio-s-down-syndrome/article\\_e063d18a-d288-11e4-a4e4-bba3d969c512.html](http://www.newsrecord.org/news/uc-student-and-mom-helps-pass-ohio-s-down-syndrome/article_e063d18a-d288-11e4-a4e4-bba3d969c512.html)(last visited Aug. 22, 2018).

Catherine Green is the mother of Lorelei, who has Down syndrome.

Catherine received a diagnosis of Down syndrome and fetal hydrops<sup>3</sup> when she was pregnant and chose to carry her pregnancy to term. Catherine resides in Akron, Ohio and has worked in the developmental disabilities field for the past 10 years. Catherine advocates for those in the disability community and currently works at a county board of development disabilities where she connects families to resources, both federal and community based.

Jen Franklin Kearns works in the nonprofit sector and has three children. Jen's oldest son, Alex, was diagnosed with Down syndrome at birth and is currently an eighth grader.

Victoria Margroum is a mother of two children, one of whom—R.—has Mosaic Down syndrome. Victoria is a stay-at-home mother, president of the PTO at her children's elementary school and resides in the greater Cincinnati area. R. came to live with Victoria and her husband when R. was five months old. Victoria and her husband officially adopted R. seventeen months later, when R. was twenty-two months old.

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<sup>3</sup> Hydrops fetalis is an ultrasound marker of “fetal complications” and is “defined as an abnormal collection of fluid in at least two different fetal organ spaces.” *Hydrops fetalis/erythroblastosis fetalis*, CHILDREN'S HOSPITAL OF WISCONSIN, <https://www.chw.org/medical-care/fetal-concerns-center/conditions/infant-complications/hydrops-fetalis-erythroblastosis-fetalis> (last visited Aug. 24, 2018). Only approximately 20% of fetuses diagnosed with hydrops survive delivery. *Id.*

Dawn Thornton is a mortgage closer and the mother of Owen, who is five years old and has Down syndrome. Dawn received a diagnosis of Down syndrome and fetal hydrops when she was nineteen weeks pregnant and made the choice to carry her pregnancy to term. Dawn lives in the Columbus, Ohio area, where Owen is about to begin his third year of preschool. (Ashley, Holly, Kathleen, Catherine, Jen, Victoria and Dawn are collectively, the “*Amici*”).

The Amici deeply love and are grateful for their children, who enrich their lives and bring each much joy. Each of them is an advocate for all children with Down syndrome and their families. As such advocates, the Amici urge Ohio lawmakers to pass laws that: (i) educate Ohioans about Down syndrome, including women who receive a fetal Down syndrome diagnosis; (ii) support the medical needs of Ohioans born with Down syndrome; and (iii) destigmatize and provide greater societal support to people with Down syndrome and their families. Instead, the Ohio legislature passed H.B. 214, which invades women’s privacy, legislates the choices women can make over their bodies, criminalizes a medical procedure and, in the end, will only serve to further stigmatize Ohioans with Down syndrome.



## INTRODUCTION

Consistent with the Ohio legislature's continued push to limit abortion rights,<sup>4</sup> the legislature passed H.B. 214 during Ohio's 132<sup>nd</sup> General Assembly. H.B. 214 amended O.R.C. § 3701.79 and enacted O.R.C. §§ 2919.10 and 2919.101. Under O.R.C. § 2919.10(B):

[n]o person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following:

- (1) A test result indicating Down syndrome in an unborn child;
- (2) A prenatal diagnosis of Down syndrome in an unborn child;
- (3) Any other reason to believe that an unborn child has Down syndrome.

The punishment to persons who violate the statute is severe—a fourth degree felony. O.R.C. § 2919.10(C). Additionally, doctors who are found to have violated the law are subject to revocation of their medical license and can be liable for compensatory and exemplary damages in a civil action. O.R.C. § 2919.10(D) and (E).

As the district court properly concluded, H.B. 214 “violates the right to privacy of every woman in Ohio and is unconstitutional on its face.” (R. 28, p. 580). Amici write separately because H.B. 214: (i) politicizes a disability

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<sup>4</sup>Other of Ohio's recent efforts to restrict abortion rights include restrictions included in the 2013-2014 biennial budget, 2013 Am.Sub.H.B. No. 59.

diagnosis, does not meet the stated purposes of ameliorating discrimination against persons with Down syndrome, and, instead, only stigmatizes the diagnosis;

(ii) does not protect the Down syndrome community or provide the much needed educational and financial support the community needs; and (iii) unduly burdens a woman's right to choose. For these reasons, and the reasons set forth herein, the Amici urge this Court to affirm the District Court's order.

## ARGUMENT

### **A. H.B. 214 Does Not Advance Anti-Discrimination Efforts, it Only Politicizes and Conflates Disability Rights with the Highly Politicized Abortion Debate.**

H.B. 214 does not support people with Down syndrome and their families or seek to remedy the discrimination these families face. Instead, H.B. 214 politicizes a specific diagnosis—Down syndrome—and seeks to commandeer the resources, support, and interests of a community in order to advance an anti-abortion agenda.

By politicizing children with Down syndrome, H.B. 214 perpetuates a sense of “otherness” between the disabled community at large and those with Down syndrome. It separates and singles out those in the community who have Down syndrome and signifies that, somehow, this disability diagnosis is “different” than others. The State marks a possible Down syndrome diagnosis as so special that women should not have any choice but to bring a pregnancy to term if there is even a suggestion of fetal Down syndrome diagnosis. The Amici want to know why the

State has chosen to only ban abortions in the case of a possible fetal diagnosis of Down syndrome when there are a myriad of other fetal diagnoses to choose from? Why Down syndrome and not spina bifida or cystic fibrosis? The Amici fear it is because those in the Down syndrome community are readily identifiable, sympathetic, and bring so much joy to their parents. But the Amici's children should not be co-opted to be the sympathetic faces of a political campaign.

By separating the rest of the disability community from those who have Down syndrome, H.B. 214 also hurts parents' efforts at promoting inclusion, diversity and rights to all persons with disabilities. H.B. 214 unfairly singles out one group for disparate treatment under the guise of "protection." The legislation also threatens the ability of people to organize across the political spectrum, with the shared goal of improving the lives of people with Down syndrome and their families.

Moreover, by creating a wedge political issue around Down syndrome, the State conflates two separate topics: disability rights and abortion. Down syndrome and abortion are two unrelated issues, only made related because the government seeks to use people with Down syndrome to criminalize a medical procedure.

**B. H.B. 214 Does Not Protect the Down Syndrome Community**

H.B. 214 does not protect the Down syndrome community because it does not provide the educational, financial or civic support that the Down syndrome community needs.

First, H.B. 214 does not mandate that doctors or the State provide educational or scientific information that the Amici know are important to empowering and allowing women to make informed decisions once they receive a possible fetal Down syndrome diagnosis. The Amici agree that there remains outdated notions concerning Down syndrome, including a lack of timely and thorough information that is provided to potential parents and parents of children born with Down syndrome. Accurate, thorough and updated information concerning Down syndrome, circulated to both the public at large and to potential parents, would certainly help protect the Down syndrome community. But the solution to a lack of well-researched, thorough and accurate information concerning Down syndrome is not the outlawing of abortions when a possible Down syndrome diagnosis is made.

Second, H.B. 214 does not seek to stabilize or support Ohio's current support network for disabled persons. The Amici each currently have to navigate the bureaucracy of Ohio's disability support system in an attempt to provide their children with the best possible care. The support that Ohio currently provides these

families is neither robust nor refined. For example, Holly, who lives in Akron, must travel two hours in order to take advantage of Lyra's vision care because the closest optometrist that accepts both her personal insurance and the insurance provided by the Ohio Department of Health's Bureau of Children with Medical Handicaps ("*BCM<sup>H</sup>*") is located in Columbus.<sup>5</sup> Meanwhile, when Dawn tried to use her Medicaid waiver funds to purchase a \$50 stroller that would fit her son Owen's needs, including his long legs, she was denied because it was not "adaptive"—the comparable "adaptive" stroller was almost \$1,000. And Catherine just barely qualifies for assistance from BCMH due to Ohio's eligibility requirements.

But the idea that the solution to these inadequacies in resources for persons with disabilities is a ban on abortions is absurd. *See* Br. of Def'ts-Appellants at 52 – 53 (noting that if the "state affirms and values the lives of these individuals from conception," "the greater the impetus to refine and improve the support structures which are so crucial to the quality of life of these children and their families.>"). Nothing prevents Ohio from directly creating robust support structures for disabled Ohioans, including Ohioans with Down syndrome, and their families. Instead of advancing the idea that adding more stress on an already stressed system is the solution to a lack of funding, the State could simply directly fund disability

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<sup>5</sup> Similarly, Ashley, who is a Kentucky resident, has to travel one and half hours to Lexington to obtain orthotics for her son Jack.

resources. Targeted and robust financing would lead to the creation of stable support networks, which would, indeed, likely have the effect of encouraging women to exercise their rights and *choose* to carry their pregnancies to term. If women faced with a fetal Down syndrome diagnosis knew that Ohio had created, funded and institutionalized strong social and medical services that would allow them to properly care for their children if they carried to term, the State might actually achieve its stated goal.

Third, H.B. 214 does not support the civic and community needs of persons with Down syndrome. Amici would applaud real and sustained efforts that the State could take to advance the goal of a “diverse society” that celebrates persons with physical or mental challenges. But the lip service that Appellants have paid toward that goal is frustrating because H.B. 214 does not advance that goal. *See* Br. of Def’ts-Appellants at 55. H.B. 214 does nothing to ensure that persons with Down syndrome have access to medical care throughout their lives, H.B. 214 does not ensure that persons with Down syndrome have access to intervention and needed therapies, and H.B. 214 does not ensure that persons with Down syndrome have access to jobs that will allow them to lead independent and productive lives. If the legislature truly cared about the lives of Ohioans with Down syndrome, it would have enacted measures to care for these persons once they are born, rather than merely attempting to protect the possibility of life.

**C. Women Should Have the Right to Privacy and Autonomy to Enthusiastically Choose Parenthood but H.B. 214 Unduly Burdens that Right**

The freedom to choose whether to create a family that might include a child with Down syndrome is *critically* important, as the Amici know first-hand.

Catherine and Dawn both received fetal hydrops and Down syndrome diagnoses, and, despite the risks associated with a hydrops diagnosis, it was their choice to carry their fetus to term. For Catherine, because she was able to choose to be a parent, she was afforded the freedom to enthusiastically love and parent, free from possible resentment or frustration if the choice had been thrust upon her.

Catherine's fear is that other women, forced to bring pregnancies to term without that same choice, would become trapped and angry. Catherine is grateful for the autonomy she was afforded to decide to bring her child into the world. Likewise, Holly and Kathleen, who each declined to do amniocentesis testing, made the choice that a fetal diagnosis, such as Down syndrome, would not have affected their choice to carry their fetuses to term and, therefore, declined testing.

But these women were *afforded* the choice. The choices these women made were free from government interference but, more importantly, they were made “in accordance with [their] own values.” Chris Kaposy, *The Ethical Case for Having a Baby With Down Syndrome*, Opinion, THE NEW YORK TIMES, (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/opinion/down-syndrome-abortion.html> (last

visited Aug. 6, 2018). The values of the government were not foisted upon the Amici. H.B. 214 tramples on a woman's autonomy and rejects the notion that she will consider carefully whether to carry a pregnancy to term. But the experiences of the Amici belie that notion.

Moreover, while adoption has been considered by many as a panacea, adoption is not simple or easy, especially when it involves a disabled child. Many of these children struggle to find homes and, once placed, the adoption process can be cumbersome and lengthy. Victoria knows this fact from first-hand experience. Victoria and her husband first brought R. into their home when she was five months old. Prior to meeting Victoria and her husband, R. had met several potential adoptive families, none of whom wanted to adopt her. R. came to live with Victoria; however, the adoption process took almost two years. That is not to say that the Amici do not support adoption—each of them believe that adoption is a viable and much needed option but it is only an *option*.

### **CONCLUSION**

For the reasons set forth herein, and as set forth in Appellees' merit brief, Amici respectfully urge this Court to affirm the judgment of the District Court, which enjoined the enforcement of HB 214.



Respectfully submitted,

*/s/ Justine Lara Konicki*

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(G)(1)**

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and 6<sup>th</sup> Cir. R. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6<sup>th</sup> Cir. R. 32 (b)(1), this document contains 2,654 words.

I certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010's Times New Roman font in 14 point.

*/s/ Justine Lara Konicki*

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Date: August 28, 2018

### **CERTIFICATE OF SERVICE**

I certify that on August 28, 2018, I electronically filed the foregoing through the Court's electronic filing system and a copy will be electronically served upon all attorneys of record.

*/s/ Justine Lara Konicki*

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Counsel for Amici Mothers