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

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

BRIEF OF 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

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Plaintiffs-Appellees Preterm-Cleveland, Planned Parenthood Southwest Ohio Region, Women's Med Group Professional Corporation, and Planned Parenthood of Greater Ohio (collectively referred to as "Plaintiffs") are Ohio non-profit corporations and do not have parent corporations. No publicly held corporation owns ten percent or more of Preterm-Cleveland's, Planned Parenthood Southwest Ohio Region's, Women's Med Group Professional Corporation's, or Planned Parenthood of Greater Ohio's stock.

/s/ Jennifer L. Branch
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

/s/ B. Jessie Hill
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

/s/ Alexa Kolbi-Molinas
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

/s/ Carrie Y. Flaxman
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

/s/ Melissa Cohen
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

/s/ Freda J. Levenson
Attorney for Plaintiffs-Appellees
Date: August 22, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT REGARDING ORAL ARGUMENT

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 (collectively referred to as "Plaintiffs") request oral argument in this case due to the importance of the issues concerning the constitutionality of Ohio House Bill 214 of the 132nd General Assembly ("H.B. 214" or "the Ban"), which prohibits previability abortions based on the woman's reason for her decision.

STATEMENT OF THE ISSUES

1. Did the district court correctly apply binding Supreme Court precedent in ruling that Plaintiffs have a substantial likelihood of success on the merits of their claim that H.B. 214 is unconstitutional because, regardless of the state interests asserted or whether exceptions are made for particular circumstances, a state cannot forbid any woman from making the decision to continue or to terminate her pregnancy before viability?

2. In the alternative, did the district court correctly apply binding Supreme Court precedent in ruling that Plaintiffs have a substantial likelihood of success on the merits of their claim that H.B. 214 is unconstitutional because, by imposing a total obstacle to accessing abortion in the path of all women for whom the law is relevant, it constitutes an undue burden on their right to abortion?

STATEMENT OF THE CASE

Although Defendants cast it as an anti-discrimination measure, H.B. 214 does nothing to improve the lives of children or adults with Down syndrome (or any other disability, for that matter) or their families. It does not expand or strengthen the enforcement of existing anti-discrimination laws. It does not allocate much-needed funding for education, health care, or vocational training for people with Down syndrome or any other disabilities. It does not even educate prospective parents about Down syndrome (or any other disability) or otherwise support parents of children with disabilities. Instead, H.B. 214 bans abortions when any part of a woman's reason for the abortion relates to a diagnosis of fetal Down syndrome. As such, H.B. 214 is nothing more than a mandate that women continue pregnancies to term against their will.

The district court saw H.B. 214 for exactly what it is—an unconstitutional abortion ban that violates more than four decades of unwavering Supreme Court precedent—and properly issued a preliminary injunction below. Because binding precedent dictates that a state may not prohibit any woman from obtaining an abortion prior to viability, the district court decision must be affirmed.

A. The Ban

H.B. 214 is an abortion ban that applies before viability. The Ban prohibits any person from performing or inducing or attempting to perform or induce an

abortion if the person "has knowledge" that the woman is seeking to terminate her pregnancy, in whole or in part, because of (1) a test "indicating" Down syndrome; (2) a prenatal diagnosis of Down syndrome; or (3) "any other reason to believe" the fetus has Down syndrome. Ohio Rev. Code § 2919.10(B).

The Ban requires physicians to attest in writing that they are not aware that fetal Down syndrome is a reason for the woman's decision to terminate her pregnancy. Section 2919.101 mandates that, in the abortion report required by state law, "the attending physician shall indicate that the attending physician does not have knowledge that the pregnant woman was seeking the abortion, in whole or in part," for any of the reasons enumerated above. *Id.* at § 2919.101(A). Similarly, as amended, section 3701.79(C) provides that, "insofar as the patient makes the data available that is not within the physician's knowledge," each abortion report submitted to the State shall include "[w]ritten acknowledgment by the attending physician that the pregnant woman is not seeking the abortion, in whole or in part," because of any of the enumerated reasons. *Id.* at § 3701.79(C)(7).[1]

The Ban contains no exceptions, even if the abortion is necessary to preserve the life or health of the woman. Violation of the Ban constitutes a fourth-degree

[1] Under Ohio law, when establishing an element of a criminal offense, knowledge is present when a person "is aware that [the relevant] circumstances probably exist," or when "a person subjectively believes that there is a high probability of [the circumstance's] existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." O.R.C. § 2901.22(B).

felony. *Id.* at § 2919.10(C). In addition, the Ban requires the state medical board to revoke the license of a physician who violates it. *Id.* at § 2919.10(D). A physician who violates H.B. 214 may also be held liable in a civil action for compensatory and exemplary damages to "any person, or the representative of the estate of any person, who sustains injury, death, or loss to person or property" as the result of an abortion or attempted abortion prohibited under the Ban. *Id.* at § 2919.10(E).

B. Factual Background

Approximately one in four women in this country will have an abortion in her lifetime. Lappen Dec. ¶ 10, R.3-1, PAGEID#39. Women seek abortions for a variety of health, familial, economic, and personal reasons. Lappen Dec. ¶ 12, R.3-1, PAGEID#39-40. Being forced to continue a pregnancy to term against her will can pose risks to a woman's physical, mental, and emotional health, and even to her life, as well as to the stability and wellbeing of her family, including existing children. Lappen Dec. ¶¶ 11, 12, 40, 41, R.3-1, PAGEID#39-40, 47.

A small percentage of patients seek abortions based on a prenatal indication or diagnosis of Down syndrome. Harvey Dec. ¶ 11, R.3-2, PAGEID#51; Kade Dec. ¶ 8, R.3-4, PAGEID#59; France Dec. ¶ 11, R.3-3, PAGEID#56. Down syndrome is the common name for a genetic anomaly, also known as Trisomy 21, that exists when an individual has an extra copy, whether full or partial, of the twenty-first chromosome. Lappen Dec. ¶ 20, R.3-1, PAGEID#41. There are

various risk factors for Trisomy 21, such as advanced maternal age and having previously had a child with Down syndrome. *Id.* ¶ 21, R.3-1, PAGEID#41. The range and severity of co-existing medical conditions can vary widely for people with Down syndrome, and some require significant medical and other care and support throughout their lives. *Id.* ¶ 22, R.3-1, PAGEID#41.

Plaintiffs are clinics and an individual physician who provide reproductive health services, including surgical abortion and medication abortion. Surgical abortion is available in Ohio through 21 weeks, 6 days after a woman's last menstrual period ("LMP"), which is a previability point in pregnancy. Harvey Dec. ¶ 4, R.3-2, PAGEID#50; Kade Dec. ¶ 6, R.3-4, PAGEID#58; France Dec. ¶ 3, R.3-3, PAGEID#53. However, the overwhelming majority of abortions are performed during the first trimester of pregnancy, when the pregnancy is fourteen weeks LMP or less. Lappen Dec. ¶ 13, R.3-1, PAGEID#40.

For the small number of Plaintiffs' patients who seek abortion because of a prenatal indication or diagnosis of Down syndrome, these patients typically come to the clinic only after undergoing extensive testing as well as extensive counseling with a high-risk obstetrician-gynecologist, also known as a Maternal-Fetal Medicine specialist ("MFM"), and a genetic counselor. Harvey Dec. ¶¶ 9-10, R.3-2, PAGEID#51; Kade Dec. ¶ 9, R.3-4, PAGEID#59, Lappen Dec. ¶ 36, R.3-1, PAGEID#45-46. The American College of Obstetricians and Gynecologists

("ACOG"), which is the preeminent professional association for OB/GYNs, recommends that all women should be counseled about the availability of prenatal genetic screening or diagnostic testing options as early as possible in the pregnancy, ideally at the first prenatal visit. *Id.* ¶ 25, R.3-1, PAGEID#42. There are multiple screening tests for genetic and other medical conditions available during pregnancy.[2] *Id.* ¶¶ 26-27, R.3-1, PAGEID#42-43. These tests do not provide a diagnosis, but indicate the probability of the fetus having certain medical conditions, including Down syndrome. *Id.*

Rather than make any decisions based solely on the results of a screening test, ACOG recommends that women with positive screening test results be offered further counseling and diagnostic testing. *Id.* ¶ 25, R.3-1, PAGEID#42. If a

---

[2] First trimester genetic screening is available from approximately 10 to 14 weeks LMP. Lappen Dec. ¶ 26, R.3-1, PAGEID#42. One such test, called a nuchal translucency screening, consists of an ultrasound measurement of nuchal translucency (a fluid-filled space on the back of the fetal neck), combined with the measurement of two hormones from the woman's blood. *Id.* Another early screening test is Non Invasive Prenatal Screening, or NIPS. *Id.* ¶ 27, R.3-1, PAGEID#43. Through a maternal blood test, NIPS evaluates fetal DNA that is found in the woman's blood. *Id.* NIPS is often combined with nuchal translucency screening in the first trimester.

In the second trimester, from 15 weeks LMP, a quadruple marker (or "quad") screening is available, which measures the levels of four different hormones in a woman's blood. *Id.* ¶ 26, R.3-1, PAGEID#42. These tests screen for Down syndrome, Trisomy 13, Trisomy 18, and anomalies of the brain and spinal cord. *Id.* Finally, an ultrasound examination to assess fetal anatomy is typically performed between 18 and 20 weeks and can often detect major physical anomalies in the brain and spine, skull, abdomen, heart, and limbs. *Id.*

screening test indicates a possible fetal anomaly, two different diagnostic tests can be used to confirm a diagnosis. The first is chorionic villus sampling (CVS), where a sample of cells is taken from the placental tissue and analyzed. *Id.* ¶ 29, R.3-1, PAGEID#43. CVS is generally performed between ten and thirteen weeks LMP. *Id.* The diagnostic accuracy of CVS for chromosomal abnormalities is greater than 99%. *Id.* The second diagnostic test is amniocentesis. Amniocentesis involves using a needle to extract amniotic fluid from the gestational sac, which is then analyzed for genetic abnormalities. *Id.* ¶ 30, R.3-1, PAGEID#43. Amniocentesis is generally performed beginning at fifteen weeks LMP. *Id.* The diagnostic accuracy of amniocentesis, like CVS, is greater than 99%. *Id.*

For those women who receive a diagnosis of Down syndrome, Ohio law requires that they be provided with a state-created information sheet about Down syndrome. Ohio Rev. Code § 3701.69(B).[3] However, many patients receive

---

[3] Ohio law currently requires that parents receiving a prenatal or postnatal diagnosis of Down syndrome receive the following information:

> (a) A description of Down syndrome, including its causes, effects on development, and potential complications;
>
> (b) Diagnostic tests;
>
> (c) Options for treatment and therapy;

counseling and information from their MFMs and/or genetic counselors about Down syndrome beyond the minimum information mandated by the state. Lappen Dec. ¶ 34, R.3-1, PAGEID#44. For example, Dr. Lappen provides patients in his OB/GYN practice who receive a positive screening test or diagnosis for Down syndrome with further information to inform and support their decision-making, including resources, referrals, and accurate, evidence-based information. *Id.* He has referred patients to medical professionals—including pediatricians and pediatric specialists—and to non-medical resources—including the National Down Syndrome Society, the National Down Syndrome Congress, and the Northeast Ohio-based organization Upside of Downs, which supports families with children with Down syndrome. *Id.* Indeed, Ohio physicians are ethically bound to support each patient in making her own decision about her pregnancy without undue interference or coercion. Lappen Dec. ¶¶ 35, 46, R.3-1, PAGEID#45, 48.

Further, when a woman seeks an abortion from Plaintiffs, she receives further information and counseling to ensure that her decision is fully informed and voluntary. Every woman who wishes to have an abortion makes an initial visit to the abortion provider at least 24 hours before the procedure will be performed.

> (d) Contact information for local, state, and national organizations that provide Down syndrome educational and support services and programs.

Ohio Rev. Code § 3701.69(A)(1).

During that initial visit, she receives certain information, as well as an ultrasound and the opportunity to see or hear the embryonic or fetal heart tone, and she gives her informed consent to the procedure. Ohio Rev. Code §§ 2317.56, 2919.12(A), 2919.191, 2919.192.

Plaintiffs have demonstrated—and Defendants do not contest—that all women visiting Plaintiffs' clinics receive non-directive patient education during the initial visit, meaning that the woman's values and questions guide the process and Plaintiffs do not recommend or pressure individual patients toward any pregnancy outcome, whether abortion or carrying the pregnancy to term. Harvey Dec. ¶ 7, R.3-2, PAGEID#50; Kade Dec. ¶ 7, R.3-4, PAGEID#59; France Dec. ¶ 9, R.3-3, PAGEID#55. The goal of this patient education is to create a safe environment for the woman to ask questions and to talk about her decision, as well as to ensure that her decision is voluntary and informed. Harvey Dec. ¶ 7, R.3-2, PAGEID#50; Kade Dec. ¶ 7, R.3-4, PAGEID#59; France Dec. ¶ 9, R.3-3, PAGEID#55. Although many of Plaintiffs' patients disclose at least some information during this discussion about the reasons they are seeking an abortion, Plaintiffs do not require that patients disclose their reasons. Harvey Dec. ¶ 8, R.3-2, PAGEID#51; Kade Dec. ¶ 8, R.3-4, PAGEID#59. As indicated by uncontradicted evidence in the record below, Plaintiffs will not proceed with an abortion if the woman is uncertain about her decision, or if the decision is not

voluntary. Harvey Dec. ¶ 7, R.3-2, PAGEID#50; Kade Dec. ¶ 7, R.3-4, PAGEID#59; France Dec. ¶ 9, R.3-3, PAGEID#55.

C. Procedural History

Governor John R. Kasich signed H.B. 214 into law on December 22, 2017. Order, R.28, PAGEID#581. On February 15, 2018, before the law's scheduled effective date, Plaintiffs filed suit in the U.S. District Court for the Southern District of Ohio and, at the same time, moved for a temporary restraining order and/or preliminary injunction. R.3, PAGEID# 17-36. Plaintiffs asserted a single claim: that the Ban violates more than four decades of binding Supreme Court precedent holding that the rights to liberty and privacy secured to Plaintiffs' patients by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protect a woman's right to previability abortion, without regard to the woman's reason for seeking the care. Compl. ¶ 49, R.1, PAGEID# 13.

On March 14, 2018, the district court granted Plaintiffs' motion for a preliminary injunction, finding the Ban unconstitutional on its face. Order, R.28, PAGEID#588, 595-96. Reviewing forty-five years of Supreme Court and lower federal court precedent, the district court correctly observed that "federal courts have unanimously found state laws that proscribe previability abortions to be unconstitutional." Order at 9, R.28, PAGEID#586 (citing *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015); *Isaacson v. Horne*, 716 F.3d 1213,

1225 (9th Cir. 2013); *Sojourner T v. Edwards*, 974 F.2d 27, 30-31 (5th Cir. 1992)). Consistent with this precedent, the district court held that the state cannot "dictate what factors a woman is permitted to consider" in making her decision whether to terminate a pregnancy or carry it to term, nor may it "carve out exceptions" to this categorical right. *Id.* at 12, R.28, PAGEID#589. In so holding, the court agreed with the decision of the district court for the Southern District of Indiana—which was recently affirmed by the U.S. Court of Appeals for the Seventh Circuit—striking down a similar ban on previability abortions where the woman's reason is related to, *inter alia*, a Down syndrome diagnosis. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), *aff'd*, 888 F.3d 300 (7th Cir. 2018).

Also applying the undue burden analysis set forth in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the district court correctly held "upon this alternative basis" that H.B. 214 was unconstitutional because, for all women affected by the law, it constituted an "insurmountable" obstacle to the right to choose an abortion before viability. *Id.*, R.28, PAGEID#589. As the district court explained:

> H.B. 214 does not "burden" the right of such women to choose a previability abortion, it eradicates the right entirely. Because H.B. 214 prevents certain women from choosing to terminate a pregnancy previability, and because "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," H.B. 214 is unconstitutional. *Casey*, 505 U.S. at 846.

Id.

The district court properly rejected Defendants' arguments in support of the ban. First, Defendants had argued that *Roe v. Wade*, 410 U.S. 113 (1973), and *Casey* merely protect the binary choice between becoming a parent or not becoming a parent—essentially, that the right to abortion exists only in cases of accidental pregnancy. However, the district court correctly found that this narrow and unprecedented interpretation has no support in the case law. Order at 13, R.28, PAGEID#590 ("The State's argument that a woman must make this choice from behind a veil of ignorance, oblivious to the circumstances of the child she is carrying, finds no support in the law.").

Second, Defendants had argued that the state's asserted interests in the Ban—preventing discrimination, protecting the medical profession, and maintaining the current size of the Down syndrome community—were sufficient to outweigh the woman's privacy right. But the district court also rightly rejected this attempt to evade the central holding of *Roe* and *Casey*. Finding that the state's asserted interests were nothing more than restatements of the state's underlying interest in protecting and promoting fetal life, the district court recognized that the Supreme Court has already struck a balance between these interests and the

woman's fundamental privacy interest, and concluded that they are not sufficient to justify a ban on abortion before viability. Order at 14, R.28, PAGEID#591.

The district court therefore found that Plaintiffs had a substantial likelihood of succeeding on their claim. Given the strength of Plaintiffs' claim, the district court noted that a finding of irreparable harm was not mandatory. Order at 15, R.28, PAGEID# 592. Nonetheless, the district court held Plaintiffs demonstrated irreparable injury to their patients because, in addition to depriving women of a constitutional right, the Ban would force some women to incur significant costs and delays to travel out of state to get the lawful and constitutionally-protected care they need; meanwhile, others would be forced to carry a pregnancy to term against their will. *Id.* Finally, the court held that the balance of harms and the public interest also favored the Plaintiffs because the harms identified by the state (*i.e.*, harm to its ability to enforce an unconstitutional statute, and to its purported anti-discrimination interest) "are not legally cognizable, and, in any event, pale in comparison to the harms facing Plaintiffs, their patients and the public if H.B. 214 were to become effective." Order, R.28, PAGEID#594. The district court therefore preliminary enjoined defendants from enforcing H.B. 214. *Id.*

Defendants appealed the preliminary injunction on April 11, 2018.

SUMMARY OF THE ARGUMENT

H.B. 214 is a ban on abortions that applies previability. As such, it is unquestionably unconstitutional under more than four decades of unwavering Supreme Court precedent. *Whole Woman's Health v. Hellerstedt*, ---U.S.----, 136 S. Ct. 2292, 2299, *as revised* (June 27, 2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 879 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *see also Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007). Whether this Court applies the *per se* rule that previability abortion bans are unconstitutional, or it applies the undue burden test that dictates that H.B. 214 imposes an insurmountable obstacle in the path of an entire class of Ohio women seeking previability abortions, the result is the same. Prior to viability, the state's interests—including those articulated by the Defendants here—do not and cannot outweigh a woman's fundamental right to make the ultimate decision whether to carry a pregnancy to term. This Court is not free to ignore this binding precedent. *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). Accordingly, Plaintiffs are highly likely to succeed on the merits of their claim that H.B. 214 is an unconstitutional ban on previability abortions.

Defendants' arguments in support of the Ban rest on both a misreading of the district court's decision and a misunderstanding of well-established precedent.

First, Defendants incorrectly suggest that the district court found the right to abortion to be an absolute right, "of greater constitutional significance than longstanding rights like the freedom of speech." Br. of Def'ts-Appellants at 46. In fact, the court did not find the right to abortion to be absolute in the sense that it may not be regulated, but rather correctly stated that it was bound by Supreme Court precedent that holds that a ban on previability abortions, with or without exceptions, is unconstitutional. Order, R.28, PAGEID#586.

Second, Defendants ignore the fact that the district court did not merely hold the Ban to be *per se* unconstitutional but, in the alternative, applied the undue burden test and correctly held that the Ban is unconstitutional under that standard as well. Order at 12, R.28, PAGEID#589.

Third, Defendants, unable to escape the controlling precedent, oddly resort to arguing for a higher form of scrutiny than Plaintiffs apply and maintain that strict scrutiny should govern, arguing that the state's asserted interests are sufficient to justify the ban. However, Defendants' version of strict scrutiny is in fact anything but strict; instead, it is a novel and unrecognizable free-wheeling balancing test of Defendants' own creation. This attempted end-run around controlling precedent necessarily fails. Regardless of the test Defendants urge this Court to apply, the Supreme Court has unequivocally held that no interests can justify a previability abortion ban: "Before viability, the State's *interests* are not

strong enough to support a prohibition of abortion." *Id.* at 846 (emphasis added); *see also Isaacson*, 716 F.3d at 1229. Therefore, regardless of whether the interests the state asserts could be considered compelling in other contexts, the Supreme Court has already resolved this question in the context of a previability abortion ban. Like the district court, this Court is bound by that precedent. Moreover, even if strict scrutiny applied, the Defendants do not and cannot satisfy that test, as they are unable to show that the Ban is narrowly tailored to advance a compelling state interest.

ARGUMENT

In determining whether to grant a preliminary injunction, trial courts are to consider the following four factors: (1) whether the party seeking the injunction has shown a substantial likelihood of success on the merits; (2) whether the party seeking the injunction will suffer irreparable harm absent the injunction; (3) whether the injunction will cause others to suffer substantial harm; and (4) whether the public interest would be served by the preliminary injunction. *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir. 1991); *Women's Med. Prof'l Corp. v. Voinovich*, 911 F. Supp. 1051, 1059 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997). The "plaintiff must show more than a mere possibility of success," but need not "prove his case in full." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007) (citations omitted).

This Court reviews the district court's decision granting or denying a preliminary injunction for an abuse of discretion. *McGirr v. Rehme*, 891 F.3d 603, 610 (6th Cir. 2018) (citing *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011)). Thus, the district court's decision should be reversed only if it "relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* (quoting *Hunter* 635 F.3d at 233 (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007))) (internal quotation marks omitted). This Court nonetheless reviews legal questions, such as the Plaintiffs' likelihood of success on the merits, de novo. *Id.*

I. The District Court Correctly Found that the Plaintiffs Have a Substantial Likelihood of Success on the Merits.

A. The District Court Correctly Found that Any Ban on Previability Abortions Is Categorically Unconstitutional According to Longstanding and Unambiguous Supreme Court Precedent.

The district court correctly found that Plaintiffs are highly likely to succeed on the merits of their claim that the Ban is unconstitutional, because the Ban constitutes an unquestionable and unambiguous infringement of the woman's constitutional due process right. Order, R.28, PAGEID#588. The Supreme Court has spoken to the issue before this Court, clearly and unmistakably: "Before viability, the State's *interests* are not strong enough to support a prohibition of abortion. . . Regardless of whether exceptions are made for particular

circumstances, a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 846, 837 (emphasis added); *see also Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health,* 888 F.3d 300, 305 (7th Cir. 2018) ("PPINK"). Thus, the Supreme Court has already decided that any state-asserted interest in prohibiting abortion must give way where, as here, the law bans abortion—or any class of abortions—before viability.[4] *Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 846.

Underlying the privacy right first recognized in *Roe v. Wade* is the principle that the state may not dictate appropriate reasons for a woman's decision to terminate a pregnancy, nor may it commandeer her deliberative process. *Roe* explicitly held that it was the woman's "decision" that merited Fourteenth Amendment protection, and that she must be permitted to engage in consultation with her physician to make that decision. *Roe*, 410 U.S. at 153; *see also Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 987 (7th Cir. 2012) (noting that the abortion right is, in part, "a

[4] Ohio already bans abortions after viability. Ohio Rev. Code Ann. § 2919.17(A). That statute provides exceptions for cases in which the woman's life or health is endangered, but H.B. 214 does not. *Id.* § 2919.17(B)(1)(b), § 2919.201(B)(1)(b). Thus, H.B. 214 also has unconstitutional post-viability applications. *Roe v. Wade*, 410 U.S. 113, 165 (1973) (holding that the state may ban abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion" (quoting *Maher v. Roe,* 432 U.S. 464, 473 (1977) (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 & nn. 24 & 26 (1977))). "The existence and recognition of this constitutional right means that the choice whether to exercise it—including the reasons why—ultimately belongs to the pregnant woman when the decision is hers to make"; she has a right to make it "'without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.'" Marc Spindelman, *On the Constitutionality of Ohio's "Down Syndrome Abortion Ban,"* 79 OHIO ST. L.J. FURTHERMORE 19, 38 (2018) (quoting *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring in the judgment)).

Indeed, as the Supreme Court later explained in *Planned Parenthood of Se. Pa. v. Casey*, "The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S. at 871; *Roe v. Wade*, 410 U.S. 113, 163–64 (1973); *accord Isaacson*, 716 F.3d at 1217, 1221 (stating that the U.S. Supreme Court has been "unalterably clear regarding one basic point": "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable"); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997) (explaining that *Casey* "reaffirmed this 'central holding' of *Roe,* which

mandates that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability" (quoting 505 U.S. at 879)).

Affirming and expanding *Roe*'s understanding of the woman's decisional autonomy, *Casey* explained that constitutional protection for the abortion right reflects the fact that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 851. For this reason, the state may take steps "to inform the woman's free choice," but not to "hinder it." *Casey*, 505 U.S. at 877. In other words, the state may pass regulations to ensure that the woman's decision is informed and voluntary, but "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879; *see also Isaacson*, 716 F.3d at 1226 (explaining that unlike a ban on a particular method of abortion, a ban on abortion beginning at a previability stage of pregnancy means the "woman 'lacks all choice in the matter'" and that this distinction "makes all the difference to the validity of the" law).

The Supreme Court's decisions rest on the fundamental right of every woman to determine the course of her pregnancy before viability, "because . . . [her] liberty . . . is at stake in a sense unique to the human condition and so unique

to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Casey,* 505 U.S. at 852. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," the Court "conclude[d] the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy." *Id.* at 869-70.

Moreover, as recently as 2016, the U.S. Supreme Court reaffirmed that under the Due Process Clause of the Fourteenth Amendment, a state many not ban abortion prior to viability. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, ---U.S.---, 136 S. Ct. 2292, 2299 (2016) (reaffirming that a provision of law is constitutionally invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *see also Gonzales v. Carhart*, 550 U.S. at 146. Given this unwavering line of Supreme Court precedent since *Roe*, the Seventh Circuit recently held unconstitutional a law similar to the one at issue here, which prohibited abortion if sought solely on the basis of, *inter alia*, a prenatal diagnosis of Down syndrome. As that court explained, the right to choose to terminate a pregnancy previability is categorical, even if it is "not absolute." *PPINK*, 888 F.3d at 305 (citing *Casey*, 505 U.S. at 879). This means that the right to choose abortion can be regulated, consistent with longstanding constitutional limitations. Specifically, this means that the Supreme Court has already struck the balance

between the state's interests and the woman's right, and concluded that "[b]efore 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." *Casey*, 505 U.S. at 846.

That the U.S. Supreme Court has never considered a case precisely like this one is thus irrelevant. Indeed, every federal appellate court or state high court to consider the question has ruled that a ban on abortions before viability violates the Fourteenth Amendment—regardless of where a particular state has drawn the line, regardless of whether there are any exceptions, and regardless of whether the Supreme Court has previously considered a virtually identical law.[5] By banning

[5] *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down ban on previability abortions with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (same), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (same), *cert. denied*, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117−18 (10th Cir. 1996) (same), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992) (same), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *DesJarlais v. State, Office of Lieutenant Governor*, 300 P.3d 900, 904–05 (Alaska 2013) (invalidating proposed previability ban on all abortions with exception for "necessity"), *reh'g denied*; *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637−38 (Okla. 2012) (invalidating proposed definition of a fertilized egg as a "person" under due process clause), *cert. denied*, 133 S. Ct. 528 (2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking down proposed abortion ban with exceptions), *cert. denied*, 506 U.S. 1071 (1993).

abortions based solely on a woman's reason, H.B. 214 contravenes the categorical rule that every woman must be allowed to make the ultimate decision whether to terminate her pregnancy before the fetus attains viability. *Casey*, 505 U.S. at 879.

Defendants' attempts to evade this controlling principle are without merit. First, citing decisions in which the Supreme Court upheld regulations on a particular abortion procedure and on minors' access to abortion without parental consent, Defendants contend that the Supreme Court has, contrary to the plain language of its decisions, upheld previability abortion bans in the past. Br. of Def'ts-Appellants at 45 (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Casey*, 505 U.S. at 899-900). This is simply incorrect. In fact, the Supreme Court's decision in *Gonzales v. Carhart* affirms that a state may *not* prohibit any woman from obtaining an abortion prior to viability, upholding a federal ban on an uncommon abortion procedure precisely because the dominant procedure remained available *to every woman seeking a previability abortion*. 550 U.S. at 164-65. By contrast, as this Court itself has recognized, a law that prohibits both common and uncommon abortion methods would prevent women from obtaining previability abortions and would therefore be unconstitutional. *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 337 (6th Cir. 2007) (holding Michigan statute unconstitutional post-*Gonzales* "because it would prohibit several of the most common previability abortion methods.").

Nor does the requirement that minor women seek a judicial bypass before having an abortion without parental consent justify the Act. 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).

Second, Defendants' repeated argument that the district court's decision "wrongly provided greater protection to the right to an abortion than applies to [other constitutional rights]" is a red herring. Br. of Def'ts-Appellants at 32. The district court did not hold that abortion is an absolute right that is immune from regulation; rather, it held that a woman's right to make the *ultimate decision* to choose abortion prior to viability is categorical inasmuch as no state interest is sufficient to outweigh it. As explained below, the idea that certain aspects of a constitutional right cannot be overridden by the state, regardless of the interest asserted, is not unique to abortion.

To illustrate this point with examples from Defendants' brief, the freedom of speech under the First Amendment is not absolute in all respects. *See, e.g. Burson*

v. Freeman, 504 U.S. 191, 211 (1992) (upholding a state law regulating speech within 100 feet of polling places on election day). Yet, although it permits regulation of speech in certain instances, the Supreme Court has nonetheless held—unequivocally and repeatedly—that the state cannot compel private individuals to deliver a government-mandated ideological message. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463–64 (2018) (stating that "[c]ompelling individuals to mouth support for views they find objectionable violates" a "cardinal constitutional command," and that [n]o one … would seriously argue" that a hypothetical example of compelled ideological speech would be constitutional); *Nat'l Inst. of Family & Life Advocates v. Becerra*, ---U.S.----, 138 S. Ct. 2361, 2371 (2018); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Indeed, as the Court forcefully explained in *West Virginia State Board of Education v. Barnette*, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us.*" 319 U.S. at 642 (emphasis added); *see also Agency for Int'l Dev.*, 570 U.S. at 213 ("It is … a basic First Amendment

principle that freedom of speech prohibits the government from telling people what they must say.") (internal citations omitted). Just like the rule against previability abortion bans, the rule that the government cannot compel ideological speech by private individuals is a categorical one. It does not mean that the right to free speech is absolute and subject to no restrictions. But it does mean that unless and until the Supreme Court holds differently, this Court may no more uphold a previability abortion ban than a law forcing private individuals to deliver a government-mandated ideological message.

Similarly, the Free Exercise Clause is not absolute in all respects. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). At the same time, the Supreme Court has carved out certain aspects of that right for categorical protection. For example, a law that expressly targets specific religious beliefs "is *never* permissible." *Id.* (emphasis added). Likewise, in no instance may the government "compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (internal citations omitted).

Constitutional protection for the right to abortion is no different. Although the state may regulate abortion consistent with certain constitutional limitations, the Supreme Court has ruled there is a line no state may cross: it may not ban abortion for any or all women before viability. *Casey*, 505 U.S. at 879. Just like a ban on particular religious doctrines or beliefs or a law compelling ideological speech by private individuals, a ban on previability abortions strikes at the very heart of the relevant constitutional protection and is *per se* unconstitutional.

In sum, the district court applied straightforward Supreme Court precedent and held—just like every appellate court to address this question—that any ban on previability abortions is blatantly and categorically unconstitutional.

B. The District Court Correctly Found, in the Alternative, that a Previability Abortion Ban Fails Muster Under the Undue Burden Standard.

Defendants largely ignore the fact that the district court also applied the undue burden test, established in *Planned Parenthood of Se. Pa. v. Casey* and affirmed in *Whole Women's Health*, and held that H.B. 214 is unconstitutional under that framework as well. The district court clearly concluded – weighing the burdens the Ban would impose on the woman's right to abortion against the interests asserted by the state – that the Ban constitutes an undue burden. Order, R.28, PAGEID#589 ("In any event, even if the undue burden analysis applies, the Court likewise finds, upon this alternative basis, that Plaintiffs are likely to succeed

on their claim that H.B. 214 is unconstitutional."). In so doing, the court once again followed "well-established Supreme Court precedent." *See PPINK*, 888 F.3d at 306.

Under the standard set forth in *Casey*, an abortion regulation constitutes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877. As *Casey* explained,

> [a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. Straightforwardly applying the analysis prescribed by *Casey* to a law that bans previability abortions outright, the district court explained:

> The "obstacle" [the Ban] places in the path of women seeking a previability abortion for one of the proscribed reasons is not merely "substantial," it is insurmountable. H.B. 214 does not "burden" the right of such women to choose a previability abortion, it eradicates the right entirely.

Order, R.28, PAGEID#589.[6]

[6] *Casey* also explained that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.… The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Here, the class of women for whom the law is a restriction—those women seeking an abortion after a

As the Supreme Court explained in *Whole Woman's Health*, in applying the undue burden test this Court must balance the burdens imposed by an abortion restriction—here, a complete obstacle to abortion—against the interests asserted by the State in support of the law. *Whole Woman's Health*, 136 S. Ct. at 2309. The more severe the burdens, the more robust the state interests must be. *Id.*; *see also West Ala. Women's Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1264 (M.D. Ala. 2017). But the interests asserted by Defendants here, Br. of Def'ts-Appellants at ii, cannot save the law from unconstitutionality. Regardless of how Defendants describe the state interests here, and regardless of how they mischaracterize the motives and impugn the personal and private decisions of women who choose abortion because of a fetal Down syndrome diagnosis, any interest in forcing a woman to continue her pregnancy to term is necessarily an interest in protecting and promoting potential life.[7] And far from intimating—as the Defendants do—that a previability ban could be constitutional so long as the state articulates an additional interest to bolster its interest in potential life, the Supreme Court has squarely rejected the claim that *any* State interest is weighty enough to justify a ban on abortion prior to

---

diagnosis or indication of fetal Down syndrome—is identical with the class of women for whom the law is a substantial obstacle, since it bans them entirely from obtaining an abortion in Ohio.

[7] To the extent that the State's argument depends on treating a fetus as equivalent to a person who has already been born, as the district court found, the Supreme Court has already made clear that embryos and fetuses are not "persons" with rights under the Fourteenth Amendment. *Roe*, 410 U.S. at 158.

viability—including the interest in protecting potential life, no matter what variant of that interest is put forward. Br. of Def'ts-Appellants at 50 (conceding that an interest in potential life alone is insufficient to justify the Ban); *See Casey*, 505 U.S. at 846; *see also, e.g.*, *Gonzales*, 550 U.S. at 126 ("Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, *if they are not a substantial obstacle* to the woman's exercise of the right to choose.") (citing *Casey*, 505 U.S. at 877) (emphasis added).

Ultimately, the "categorical" rule barring bans on abortion previability and the undue burden test are simply two ways of stating the same principle: that any ban on previability abortions will always function as a complete and total obstacle to the affected women's ability to make the "ultimate decision" whether to terminate a pregnancy, and prior to viability no state interest is strong enough to support that ban. *Casey*, 505 U.S. at 877; *Isaacson*, 716 F.3d at 1222. Therefore, the district court correctly held that H.B. 214, like every previability abortion ban—whether applicable to all women or only some subset of women—will always constitute an undue burden and is therefore *per se* unconstitutional. Order, R.28, PAGEID#589.

C. H.B. 214 Does Not Satisfy Strict Scrutiny.

In an attempt to avoid decades of binding Supreme Court precedent concluding that bans on previability abortion are unconstitutional, and incorrectly reading that precedent as applying only to regulations of abortions rather than bans like H.B. 214, Defendants oddly argue that the Ban should be subject to strict scrutiny and, despite the high burdens the State bears under that standard, that it survives that highest standard of constitutional review.[8] Br. of Def'ts-Appellants at 42. As explained above, Defendants misread binding precedent and apply an incorrect legal standard to the Ban. *See supra* Part I.A. But if the Court were to apply strict scrutiny, it is plain that the State would fail to meet its burden under that strict level of review.[9]

[8] As strict scrutiny is the only legal standard that Defendants apply to H.B. 214 in their brief on appeal, Defendants must therefore be understood to have abandoned any argument that a lower level of scrutiny applies.

[9] Defendants also rely on *Roe*'s statement that the woman did not necessarily have an absolute right "terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. Viewed in context, it is clear that the Court was simply countering the notion that no regulation of abortion would ever be permissible. Instead, the Court emphasized that regulations could be imposed, according to the framework set forth in the *Roe* decision, in support of the already-identified interests in potential life and the woman's health, but that prior to viability the state did not have sufficient interests to justify prohibiting any woman from choosing to terminate a pregnancy. *Id.* Indeed, neither in *Roe v. Wade* nor in any other case has a court upheld a restriction regulating the woman's reasons for seeking an abortion.

"Strict scrutiny is 'the most demanding test known to constitutional law.'" *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quoting *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997)); *see also U.S. v. Brandon*, 158 F.3d 947, 956-57 (6th Cir. 1998) (applying strict scrutiny in the context of the right to bodily integrity). Under that test, a law is constitutional only if it is narrowly tailored to serve a compelling government interest. *Brandon*, 158 F.3d at 956; *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015). Moreover, the government bears the burden of demonstrating a "direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Thus, Defendants must make two showings in order to prove that H.B. 214 is constitutional: (1) that it is supported by a compelling state interest or interests; and (2) that it is narrowly tailored to advance those interests. *Brandon*, 158 F.3d at 956. Defendants cannot meet either part of that strict scrutiny test.

1. The Ban does not further compelling government interests.

The state interests asserted by Defendants are not compelling. As explained above, the state's interest in potential life is not magically transformed into a compelling interest simply because it is re-described as, or joined with, a purported interest in preventing discrimination. Moreover, as with the state's interest in potential life, the Supreme Court has already considered states' interest in ethical medical practice and concluded that such an interest cannot justify a law "designed

to strike at the right [to abortion] itself." *Gonzales v. Carhart*, 550 U.S. at 157-58. Indeed, Defendants completely ignore the fact that the Court has only denominated this latter interest "legitimate," but not compelling. *Carhart*, 550 U.S. at 158; *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

In addition, there is no evidence that these interests are actually advanced by the Act. *See Alabama Legislative Black Caucus v. Alabama*, ---U.S. ----, 135 S. Ct. 1257, 1274, (2015) (noting strict scrutiny requires a "strong basis in evidence" to support the means chosen to advance legislative ends); *cf. Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (holding even under intermediate scrutiny "the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals."). Defendants can point to no evidence showing that Ohio women choose to terminate pregnancies after a diagnosis of Down syndrome for reasons that are invidiously discriminatory, rather than based on very personal decisions about what is best for them and their families, or that forcing Ohio women to give birth against their will prevents discrimination against persons with Down syndrome.[10] Br. of Def'ts-Appellants at

[10] The State's asserted interest in "[p]rotecting the Down [s]yndrome [c]ommunity and [i]ts [c]ivic [v]oice," Def. Resp. at 27, appears to be a restatement of its purported interest in preventing discrimination and in potential life, Def. Resp. at 29.

50-53. Likewise, Defendants can point to no evidence showing Ohio women are terminating pregnancies due to pressure by physicians after a fetal Down syndrome diagnosis, particularly in light of existing Ohio law requiring *all* women who receive such diagnoses to be provided with medically accurate information and resources.[11] Br. of Def'ts-Appellants at 52.

On the contrary, Plaintiffs' declarations demonstrate that women make the decision to terminate a pregnancy for a wide variety of reasons. France Dec. ¶ 5, R.3-3, PAGEID#54; Harvey Dec. ¶ 5, R.3-2, PAGEID#50; Lappen Dec. ¶ 12, R.3-1, PAGEID#39. Moreover, all of the Plaintiffs' patients receive non-directive counseling at the clinic, in addition to any prior education they may have received from a genetic counselor, with the goal of ensuring the woman's decision is voluntary and informed. Harvey Dec. ¶ 7, R.3-2, PAGEIE#50; Kade Dec. ¶ 7, R.3-4, PAGEID#59; France Dec. ¶ 9, R.3-3, PAGEID#55; Dec. of Kelly Kuhns ¶ 5, R.25-1, PAGEID#184-187, (Def. Exh. G). In fact, one of Defendants' own declarants learned of a fetal Down syndrome indication while she was pregnant, met with a genetic counselor, was given the option of further testing (which she declined), was provided with additional resources, and chose to continue the

[11] As noted above, *supra* n.2, Ohio law currently requires that all parents receiving a prenatal or postnatal diagnosis of Down syndrome receive specific information designated by the state. Ohio Rev. Code § 3701.69.

pregnancy. Kuhns Dec., Def. Exh. G, R.25-1, PAGEID#184-187. And while Defendants do cite a number of unauthenticated sources referring to trends and cultural beliefs about people with disabilities in the Netherlands, Iceland, France, England, and Canada, *see, e.g.*, Br. of Def'ts-Appellants at 13-17, these sources do not provide evidence that is probative of or relevant to current practices in Ohio, or even in the U.S.—much less sufficient to meet the exacting standards of strict scrutiny. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-04 (1989) (requiring, under strict scrutiny, a geographically specific showing of past discrimination in the construction industry in the city adopting a racial classification for awarding government contracts). Rather, the evidence in Ohio is that prospective parents receive accurate information about Down syndrome together with nondirective counseling.

Nor can the Ban be said to advance a state interest in "safeguarding medical ethics." Br. of Def'ts Appellants at 54. On the contrary, the undisputed evidence shows that by criminalizing one health care option—abortion—the Ban prevents physicians from respecting their patients' right to make autonomous decisions, thus forcing them to violate their ethical obligations. Lappen Dec. at ¶ 47, R.3-1, PAGEID#48. Indeed, Defendants' description of the reasons why medical ethics are threatened by allowing women to make their own decisions about their pregnancies ignores the woman herself entirely. Yet, even Defendants' declarant

Dr. Dennis Sullivan acknowledges that respect for a patient's autonomy—along with beneficence, non-maleficence, and justice—is a key principle of ethical medical practice. Def. Exh. B ¶ 21, R.25-1, PAGEID#146-158. As such, it is the State of Ohio, not Plaintiffs, that seeks to violate medical ethics by coercing women's reproductive decisions.

2. H.B. 214 is not narrowly tailored.

Defendants have not provided any evidence of narrow tailoring, nor have they even argued that the Ban is narrowly tailored to serve the interests they assert. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (stating that under strict scrutiny, the government bears the burden of proving that its law is narrowly tailored to meet the compelling interests it has identified); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 804 (2000) (same). Nor could they do so, as the Ban is both under- and over-inclusive to an extraordinary degree. The Supreme Court has explained a law is particularly suspect under strict scrutiny when the law is "both underinclusive and overinclusive" in relation to its alleged purposes, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792-95 (1978), as H.B. 214 indisputably is. Moreover, Defendants cannot show that the Ban is "necessary" to advance the state's interests, as narrow tailoring requires. *Fisher v. Univ. of Texas*, 570 U.S. 297, 312 (2013); *Perry Educ. Ass'n v. Perry Local Educators'Ass'n*, 460 U.S. 37, 45 (1983).

For example, H.B. 214 is under-inclusive in that it cannot reasonably be said to promote the state's interest in "conveying to *all* members of society that they are equally valued" when it singles out one disability—Down syndrome—and solely in the context of previability abortion. Br. of Def'ts Appellants at 52 (emphasis added). Under the exacting requirements of strict scrutiny, unlike under less stringent review, states are not at liberty to apply such a selective approach to legislating. *Compare, e.g.*, *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955), *with Reed v. Town of Gilbert, Ariz.*, ---U.S.----, 135 S. Ct. 2218, 2232 (2015).

And even if Defendants had marshaled *any* evidence that some Ohio women are pressured into terminating pregnancies after a diagnosis of Down syndrome, the Ban would still be profoundly over-inclusive. Because some women might feel pressured to terminate a pregnancy, Defendants' argument goes, no woman can be permitted to exercise decision-making authority over her own pregnancy. In other words, the State's solution to some hypothetical doctors compromising some hypothetical women's reproductive autonomy is to take away all women's reproductive autonomy. As this flawed logic demonstrates, the Ban is not a narrowly tailored approach to advancing the asserted interests, even if the interests are taken at face value.

Finally, Defendants cannot show the Ban is necessary to advance its interests. Particularly absurd is Defendants' argument that the Ban is needed to protect against a decrease in the Down syndrome population, which could then lead to a decrease in funding and resources for Down syndrome. Br. of Def'ts-Appellants at 56. In other words, Defendants are arguing that the State of Ohio needed to pass H.B. 214 in order to prevent itself from providing insufficient support for persons with Down syndrome. Of course, the state can avoid this difficulty by simply providing already much-needed support for persons with Down syndrome—which would be a narrowly-tailored solution to this purported problem—rather than going through the circuitous and unconstitutional route of infringing women's reproductive autonomy. *See* Thrower Dec. ¶¶ 6-14, R.26-3, PAGEID#535-36 (describing the unmet needs of children with Down syndrome in Ohio).

Indeed, under a long line of federal precedent beginning with *Roe v. Wade*, it is apparent that the state is not at liberty to send "moral message[s]," Br. of Def'ts-Appellants at 52 (quoting Fernandes Decl. ¶17, R.25-1, PageID#172-73), by commandeering women's bodies, futures, and constitutionally-protected procreative liberty. *See Casey*, 505 U.S. at 859 ("If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe,* the State might as readily restrict a woman's right to choose to carry a pregnancy to

term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions."). If the state is concerned with the possibility that women are not fully informed about Down syndrome or are subjected to inappropriate messages, the state could—and indeed, under strict scrutiny, it must—consider measures that are less restrictive of women's autonomy than cutting off their decision-making autonomy altogether.

In sum, the Defendants have not only incorrectly identified the legal standard applicable to this case, but they have also failed to meet their high burden under the standard they identify. There is no competent evidence in the record supporting the State's asserted interests, nor has the State met its burden of showing that the Ban is narrowly tailored to advance those interests. The district court therefore correctly held that Plaintiffs have a strong likelihood of success on their claim that H.B. 214, which violates the *per se* rule against previability abortion bans and imposes an undue and absolute burden on women seeking abortion in Ohio, is unconstitutional on its face.

II. The Remaining Preliminary Injunction Factors Also Favor the Plaintiffs.

The district court did not abuse its discretion in holding that the three remaining preliminary injunction factors weigh heavily in Plaintiffs' favor. First,

as they did in the trial court, Defendants appear to concede that Plaintiffs will suffer irreparable harm in the absence of the preliminary injunction. Br. of Def'ts-Appellants at 57-58 (failing to address the irreparable harm factor). Nor could they dispute that irreparable harm exists, as Plaintiffs' patients would be irreparably harmed as a matter of law by the loss of their constitutional right to seek an abortion before viability. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding irreparable injury where plaintiff has shown substantial likelihood of success on merits of constitutional challenge to abortion regulation); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (holding an infringement on a woman's constitutional right to have an abortion "mandates" a finding of irreparable injury because "once an infringement has occurred it cannot be undone by monetary relief").

Moreover, the Ban will cause Plaintiffs' patients irreparable injuries insofar as some women will be unable to travel out of state for an abortion—for example, due to financial or other constraints—and will thus be forced to carry a pregnancy to term against their will. *See* Harvey Dec. ¶ 12, R.3-2, PAGEID#51; Kade Dec., ¶

11, R.3-4, PAGEID#60; France Dec. ¶ 12, R.3-3, PAGEID#56; *Roe*, 410 U.S. at 153 (noting that women denied an abortion may suffer physical and psychological harm). Indeed, even those women who are able to travel long distances to access abortion outside of Ohio will face irreparable harm in the form of unnecessary and harmful delays. Kade Dec. ¶ 11, R.3-4, PAGEID#60. *See, e.g.*, *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004) (holding likelihood of irreparable harm established where evidence showed pain, complications, and other adverse effects due to delayed medical treatment); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, No. 13-CV-465-WMC, 2013 WL 3989238, at *19 (W.D. Wis. Aug. 2, 2013), *aff'd*, 738 F.3d 786 (7th Cir. 2013) (granting preliminary injunction against abortion restriction because increased health risks due to travel and delay caused irreparable harm to patients).[12]

The Plaintiffs have likewise shown that the equities and the public interest weigh in their favor. A preliminary injunction that merely preserves the status quo – more than four decades of access to previability abortions – will not impose harm

[12] Additionally, as undisputed evidence below demonstrates, some women with high-risk pregnancies have complications that lead them to end their pregnancies to preserve their lives or health. Lappen Dec. ¶ 39-40, R.3-1, PAGEID#46-47. In some percentage of these cases, there is also an (unrelated) prenatal diagnosis of Down syndrome. Lappen Dec. ¶ 40, R.3-1, PAGEID#47. The Ban thus indisputably threatens significant harm to the health of women whose medically complicated pregnancy is accompanied by a diagnosis of fetal Down syndrome.

on Defendants or anyone else. "The public interest in preserving the status quo and in ensuring access to the constitutionally protected health care services while this case proceeds is strong." *Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 961; *see also Doe v. Barron*, 92 F. Supp. 2d 694, 697 (S.D. Ohio 1999) ("A woman's right to choose to terminate her pregnancy was decided [decades] ago in *Roe v. Wade*. It is in the public's interest to uphold that right when it is being arbitrarily [or unconstitutionally] denied."). Indeed, the public interest is always served "by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885, 896 (6th Cir. 2012); *see also Planned Parenthood Ass'n of Cincinnati Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (holding that there was no substantial harm in preventing the enforcement of an ordinance that was likely unconstitutional).

Finally, Defendants' claim that there is a "vital public interest" in preventing discrimination, Br. of Def'ts-Appellants at 57, rests on a mischaracterization of the Ban, the evidence, and of constitutional doctrine. As explained above, the Ban serves no such interest and, even if it did, over four decades of Supreme Court precedent establish that any such interest is insufficient to outweigh woman's constitutional right to procreative liberty—which is severely infringed by the Act, and which the public interest irrefutably protects.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court affirm the preliminary injunction.

Respectfully submitted,

Alexa Kolbi-Molinas (admission *Pro Hac Vice granted*)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
akolbi-molinas@aclu.org
Counsel for Plaintiff Preterm

B. Jessie Hill
B. Jessie Hill #0074770
Cooperating Counsel for the ACLU of Ohio Foundation
ACLU of Ohio
4506 Chester Ave.
Cleveland, OH 44103
(216) 368-0553
(216) 368-2086 (fax)
bjh11@cwru.edu
Counsel for Plaintiff Preterm

Carrie Y. Flaxman (admission *Pro Hac Vice granted*)
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, DC 20005
(202) 973-4800
(202) 296-3480 (fax)
carrie.flaxman@ppfa.org
Counsel for Plaintiffs Planned Parenthood of Greater Ohio and Planned Parenthood Southwest Ohio Region

/s/ Jennifer L. Branch
Jennifer L. Branch # 0038893
Trial Attorney for Plaintiffs
Alphonse A. Gerhardstein # 0032053
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100
(513) 345-5543 (fax)
agerhardstein@gbfirm.com
jbranch@gbfirm.com
Counsel for Plaintiffs Planned Parenthood Southwest Ohio Region, Roslyn Kade, M.D., and Women's Med Group Professional Corporation

Melissa Cohen *(admission Pro Hac Vice granted)*

Planned Parenthood Federation of
America
123 William Street, Floor 9
New York, NY 10038
(212) 541-7800
(212) 247-6811 (fax)
melissa.cohen@ppfa.org
Counsel for Plaintiffs Planned Parenthood of Greater Ohio and Planned Parenthood Southwest Ohio Region

Freda J. Levenson #0045916
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, OH 44103
(216) 472-2220
(216) 472-2210 (fax)
flevenson@acluohio.org
Counsel for Plaintiff Preterm

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Sixth Circuit Local Rule 32(a)(7)(B). According to the word-processing system used for the brief, it contains under 13,000 words.

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

/s/ Jennifer L. Branch
Date: August 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served electronically via the CM/ECF electronic filing system and a copy will be electronically served upon all attorneys of record, on this 22nd day of August, 2018. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Jennifer L. Branch
Attorney for Plaintiff-Appellee

DESIGNATION OF DISTRICT COURT RECORD

Appellees, pursuant to Sixth Circuit Rule 30(g), designate the following filing from the district court's electronic records:

Preterm-Cleveland, et al. v. Himes, et al., 1:18-cv-109

Date Filed	R. Number	PageID#	Document Description
2/15/2018	R. 1	1-14	Complaint
2/15/2018	R. 3	17-36	Motion for Temporary Restraining Order and Preliminary Injunction
2/15/2018	R. 3-1	37-48	Declaration of Lappen
2/15/2018	R. 3-2	49-52	Declaration of Harvey
2/15/2018	R. 3-3	53-56	Declaration of France
2/15/2018	R. 3-4	57-60	Declaration of Kade
3/02/2018	R. 25-1	143-369	Attachment 1 to Memorandum in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction: Exhibits A-L
3/09/2018	R. 26-3	534-537	Declaration of Thrower
3/14/2018	R. 28	578-599	Order Granting Preliminary Injunction