Case No. 18-3329

In the United States Court of Appeals for the Sixth Circuit

PRETERM-CLEVELAND; PLANNED PARENTHOOD OF SOUTHWEST OHIO REGION; WOMEN'S MEDICAL PROFESSIONAL CORPORATION; DOCTOR ROSLYN KADE; PLANNED PARENTHOOD OF GREATER OHIO,

Plaintiffs-Appellees,

v.

LANCE HIMES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, KIM G. ROTHERMEL, SECRETARY, STATE MEDICAL BOARD OF OHIO; BRUCE R. SAFERIN, SUPERVISING MEMBER, STATE MEDICAL BOARD OF OHIO,

Defendants-Appellants, and

JOSEPH T. DETERS, HAMILTON COUNTY PROSECUTOR; MICHAEL C. O'MALLEY, CUYAHOGA COUNTY PROSECUTOR; MATT HECK, JR., MONTGOMERY COUNTY PROSECUTOR; RON O'BRIEN, FRANKLIN COUNTY PROSECUTOR,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 1:18-CV-00109

BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON AND THE DISTRICT OF COLUMBIA AS AMICI *CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI STATES

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amici *curiae* the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, Virginia, Washington, and the District of Columbia file this brief in support of Plaintiffs-Appellees. The amici States have a compelling interest in protecting the health and well-being of their residents. This interest includes ensuring women's access to reproductive health care and to safe and legal abortion.[1] Amici agree that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality op.).

Ohio's H.B. 214—which would effectively prohibit all abortions in which a prenatal diagnosis of Down syndrome might play a role in women's reproductive decision-making—is a threat to those interests. Residents of amici States may need access to reproductive healthcare while present as students, workers, or visitors in Ohio, and physicians licensed in amici States may also practice medicine in Ohio. The amici States are also concerned that the Ohio law would cause women to seek abortion care in other States, burdening the health care systems of the amici States.

[1] The amici States are home to 3.9 million women.

See Norton v. Ashcroft, 298 F.3d 547, 558 (6th Cir. 2002) (citing Congressional testimony that "patients must often travel interstate to obtain reproductive health services").

The amici States recognize and share Ohio's interests in affirming the dignity of persons with Down syndrome, ensuring that women facing reproductive choices do not act on outdated information or harmful stereotypes about Down syndrome, and protecting the integrity of the medical profession. The amici States are committed to advancing such interests in a manner consistent with the States' constitutional obligation to protect women's reproductive rights.

ARGUMENT

I. A STATE MAY NOT PROHIBIT ANY WOMAN FROM MAKING THE DECISION TO TERMINATE HER PREGNANCY BEFORE VIABILITY

A. The District Court Correctly Determined that the Ohio Statute Is an Unconstitutional Ban on Access to Pre-Viability Abortions

In 1973, the Supreme Court held in *Roe v. Wade* that the Fourteenth Amendment's guarantee of a right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 153 (1973). Two decades later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court reaffirmed that holding, explaining that the very essence of this right was "'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453

(1972)). In so doing, the *Casey* Court articulated an undue burden standard under which a statute violates the guarantees of this right if the law "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877; *accord Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

Where a statute amounts to a ban on pre-viability abortion access—such as the Ohio law—this Court need not even apply *Casey*'s undue burden test. *See Isaacson v. Horne,* 716 F.3d 1213, 1225 (9th Cir. 2013) ("this 'undue burden' / 'substantial obstacle' mode of analysis has no place where, as here, the State is forbidding certain women from choosing pre-viability abortions rather than specifying the conditions under which such abortions are to be allowed"). It is established law that any ban on abortion before viability is *per se* unconstitutional. In *Roe*, the Court struck down Texas' criminal abortion laws, explaining that a State's interest in potential life only becomes compelling at the point of viability. *Roe*, 410 U.S. at 163. In *Casey*, the Court reaffirmed its commitment to that rule, emphasizing that "[t]he 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." 505 U.S. at 871. Accordingly, Ohio "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879.

Amici States in support of Defendants-Appellants argue unpersuasively that the categorical right of a woman to choose a pre-viability abortion established by *Roe* and *Casey* exists only in the context of the particular State interests asserted in those cases. *See* State of Wisconsin's Br. 6. But *Casey*'s holding that a State may not prohibit a woman's ultimate decision to terminate her pregnancy before viability was not limited in any way. Indeed, the Court made clear that, no matter the state interest at issue, "the means chosen by the State to further [its] interest . . . must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Ohio's law allows a State to prohibit access to pre-viability abortion care based on a value judgment about a woman's reasoning or motivations for ending her pregnancy, thereby striking at the heart of the decisional and reproductive autonomy *Roe* and *Casey* protect. *See Casey*, 505 U.S. at 851 (recognizing that the decision to terminate a pregnancy is one of the most profoundly difficult and personal decisions a woman may make in her lifetime, involving "intimate and personal choices . . . central to personal dignity and autonomy . . . ."). [2] Ohio's law effectively takes away

[2] The complex and personal nature of reproductive decisions is evident in all decisions to obtain an abortion, including following a fetal diagnosis such as Down syndrome. *See* Lawrence B. Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110, 112, 118 (2005) (finding that respondents generally reported an average of four reasons for obtaining an abortion); Alison Piepmeier, *The Inadequacy of "Choice": Disability and What's Wrong with Feminist Framings of Reproduction*, 39 Feminist Studies 159, 175, 182 (2013) (noting that women who

from women who receive prenatal diagnoses of Down syndrome their decision whether to continue the pregnancy, given that abortion care providers are immediately exposed to possible criminal prosecution if they perform the procedure on a patient they know has received such a diagnosis. *See* Ohio Rev. Code § 2919.10.

The Seventh Circuit recently considered a similar Indiana law that prohibited, among other things, abortion care to women seeking to end their pregnancy solely on the basis of fetal indication of Down syndrome. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health* (hereinafter "*PPINK*."), 888 F.3d 300 (7th Cir. 2018). Applying *Roe* and *Casey*, and the court held that the law imposed an unconstitutional ban on a woman's right to choose a pre-viability abortion. *Id.* at 305-07. Supreme Court precedent requires this Court to strike down the Ohio law.

Ohio's argument that the law should be upheld because it is "narrower" than the laws struck down in *Roe* and *Casey*, in that it would apply to a smaller number of women is unavailing. Appellants' Br. 43. In *Casey* and *Whole Woman's Health*, the Supreme Court explained that a statute is unconstitutional on its face if "it will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a

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made the decision to terminate a pregnancy after a Down syndrome diagnosis demonstrated a "complex" decision-making process).

large fraction of the cases in which" the law is relevant. *Casey*, 505 U.S. at 894-95; *Whole Woman's Health*, 136 S. Ct. at 2320. "The proper focus of the 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. Even if that class is a small percentage of the women who seek an abortion in Ohio, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id*. Here, the Ohio law would bar access to abortion for *all* women for whom a diagnosis of Down syndrome factored into their decision to seek an abortion. *See infra* section I.C. Because Supreme Court precedent mandates that no State may prevent *any* woman from making the ultimate decision to terminate her pregnancy before viability, the Ohio law is unconstitutional.

B. Ohio's Stated Interests Are Insufficient to Justify the Limitations Imposed by the Ohio Law on Women's Right to Choose a Pre-Viability Abortion

In *Casey*, the Court delineated its undue burden test to allow for regulation of women's right to choose a pre-viability abortion, so long as the State does not place a "substantial obstacle" in the path of a woman seeking an abortion before viability. *Casey*, 505 U.S. at 877-79. For example, as Ohio notes, the Supreme Court has recognized that States have legitimate interests in ensuring that women have access to information to make fully-informed decisions. *Id.* at 885-86 (upholding a state-imposed mandatory 24-hour waiting period deemed necessary for informed

consent). The Ohio statute here represents a radical departure from those statutes that have been upheld with respect to the regulation of pre-viability abortion. In contrast to statutes that promote informed decision-making or ensure consent while ensuring that women retain access to abortion services, the Ohio statute has the practical effect of imposing a ban on pre-viability abortions in certain cases. *See PPINK*, 888 F.3d at 305 ("[T]he State may inform a woman's decision before viability, but it cannot prohibit it").

None of Ohio's stated interests suffice to outweigh a woman's right to choose to terminate her pregnancy pre-viability. Ohio concedes that its law would not pass constitutional muster if its interest amounted only to a generalized interest in potential life, but argues it has additional interests that should be recognized: (1) preventing discrimination against those with Down syndrome; (2) safeguarding the integrity of the medical profession; and (3) protecting the Down syndrome community and its civic voice. Appellants' Br. 50-57. As to the first and third interests, the district court correctly concluded that a ban on pre-viability abortions cannot be considered a permissible means of serving these substantial interests. *See* Opinion of the District Court, R. 28, Page ID # 591 (citing *Roe*, 410 U.S. at 163-64); *Casey*, 505 U.S. at 877. Indeed, H.B. 214 is one of a proliferation of state laws that limit access to abortion care and interfere with women's constitutionally protected

right to make reproductive choices.[3] As discussed below in section II.A *infra*, however, Ohio's interests can be advanced without infringing on a woman's constitutional right to choose whether to end a pregnancy.

With respect to Ohio's remaining interest in safeguarding the integrity of the medical profession, that interest cannot sustain a law that completely prohibits some women from obtaining a pre-viability abortion. In *Gonzales v. Carhart*, on which Ohio relies, the Court recognized this interest in the context of upholding a ban on an uncommon method of second-trimester abortion, reasoning that because an alternative procedure—"the usual abortion method in th[e] [second] trimester"—remained available to all women, the law did not impose an undue burden. 550 U.S. at 135, 164. But the Court made clear that the State's interest in protecting the integrity of the medical profession would be insufficient to justify eliminating the availability of *all* second-trimester abortion methods. *See Stenberg v. Carhart*, 530 U.S. 914, 930, 939 (2000); *see also Gonzales*, 550 U.S. at 151-153 (distinguishing the law upheld in that case as significantly more limited in scope as the one invalidated in *Stenberg*). Similarly, by banning certain pre-viability abortions, Ohio's interest in protecting the integrity of the medical profession creates a "substantial obstacle to the woman's effective right to elect the procedure." *Casey*,

[3] Guttmacher Institute, *Targeted Regulation of Abortion Providers*, https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers (last visited Aug. 29, 2018).

505 U.S. at 846. The Ohio law in fact *undermines* the integrity of the medical profession by requiring physicians to withhold reproductive healthcare that might be most appropriate for their patients. Criminalizing the basis for certain abortions will also chill open communication between a physician and her patient regarding fetal diagnoses, resulting in decreased quality of care,[4] and perhaps even leading some women to avoid prenatal care.[5] Indeed, a physician and patient may avoid discussing options for treatment and care of a child with Down syndrome for fear that having such a discussion forecloses the possibility of the patient electing to have an abortion. Such disincentives work at cross purposes with Ohio's own laws requiring physicians to provide patients with evidence-based information on options

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[4] *See, e.g.*, The Am. C. of Obstetricians and Gynecologists, *ACOG Statement on Abortion Reason Bans* (Mar. 20, 2016), https://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Abortion-Reason-Bans ("These 'reason bans' represent gross interference in the patient-physician relationship, creating a system in which patients and physicians are forced to withhold information or outright lie in order to ensure access to care. In some cases, this will come at a time when a woman's health, and even her life, is at stake, and when honest, empathetic health counseling is in order."); Stefanija Giric, *Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy*, 3 J. of L. & Biosciences 736, 740 (2016) ("Fearing punishment under this law, a woman receiving a prenatal diagnosis of potential disability may actually be discouraged from seeking the resources necessary to make an informed choice from her physician: if a medical professional can 'turn her in' for wanting an abortion, she therefore has no incentive to discuss her decision").

[5] *See* Rebecca Reingold & Lawrence Gostin, *Banning Abortion in Cases of Down Syndrome: Important Lessons for Advances in Genetic Diagnosis* (May 18, 2018), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3086&context=facpub.

for treatment and therapy in such instances. *See infra* note 7. In sum, the state interests Ohio asserts cannot justify the prohibition on women's right to choose a pre-viability abortion.

C. Abortion Regulations that Fail to Include an Exception for the Health or Life of the Woman Are Flatly Unconstitutional

Ohio's law is unconstitutional for the additional reason that it fails to include an exception for the health or life of the woman. The Supreme Court has consistently held that abortion regulations that fail to include such an exception are unconstitutional. *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("[T]he law requires a health exception in order to validate even a post-viability abortion regulation"); *Casey*, 550 U.S. at 880 ("[T]he essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health").[6] Ohio's law effectively requires women who have received a fetal diagnosis of Down syndrome to carry

[6] This conclusion is not changed by the Supreme Court's *Gonzales* decision. The Court in *Gonzales* upheld an abortion method restriction that failed to include an exception for the health of the woman (but did include one for the woman's life) and determined that needed health exceptions to that law could be resolved through as-applied challenges, because it remained an open question whether the abortion method would ever be necessary for the health of the woman. *Gonzales*, 550 U.S. at 163. Unlike the law at issue in *Gonzales*, which prohibited only a particular abortion procedure, the Ohio law reaches access to abortion generally, and *Casey* speaks clearly to the requirement that States permit abortion access where the health or life of the woman is at stake. And in any event, the Ohio law contains no exception for the life of the woman.

their pregnancies to term, even if continuing the pregnancy would be detrimental to their health or otherwise unsafe, because a medical provider risks criminal prosecution if the woman's choice to seek an abortion is partially caused by—or *perceived as* being partially caused by—the indication of Down syndrome. Accordingly, Ohio's law is facially unconstitutional with respect to both pre- and post-viability abortions.

II. ADVANCING THE INCLUSION AND EQUAL DIGNITY OF PERSONS WITH DISABILITIES NEED NOT COME AT THE EXPENSE OF WOMEN'S REPRODUCTIVE RIGHTS

The amici States agree with Ohio that combatting discrimination against persons living with disabilities, including Down syndrome, is an important state interest. As the district court found, however, these interests are insufficient to justify the Ohio law's outright ban on access to pre-viability abortions. Moreover, it is the experience of the amici States that prevention of discrimination against persons living with Down syndrome and protecting women's access to reproductive healthcare are not at odds. To the contrary, States have at their disposal a range of options to further the interests asserted by Ohio without infringing on women's reproductive rights, including promoting accurate and non-biased information about Down syndrome, enforcing anti-discrimination laws, and providing supportive services for individuals living with Down syndrome and their families. Indeed,

protecting individuals with disabilities while simultaneously protecting women's reproductive rights furthers common principles of autonomy and self-determination.

A. States Have a Range of Tools to Help Prevent Discrimination Against People with Down Syndrome

Ohio argues that the district court's injunction leaves "the government powerless to take any effort to remedy" alleged discrimination. Appellants' Br. 48. But States can and do mandate and promote provision of medically accurate, unbiased information in order to help women make informed reproductive choices. States can also provide (and publicize) civil rights protections, social and medical services, and support to those living with developmental disabilities and their families. These efforts can help fight discrimination, reduce bias among doctors and patients, and protect the Down syndrome community without infringing on women's reproductive autonomy.

Pro-information laws circulate accurate, non-biased information to dispel discriminatory stereotypes and prejudices regarding individuals with Down syndrome within the medical profession and society at large. In 2010, Congress passed the Prenatally and Postnatally Diagnosed Conditions Awareness Act, which sought to "coordinate the provision of, and access to, new or existing supportive services for patients receiving a positive diagnosis for Down syndrome . . . ." 42 U.S.C. § 280g-8(b)(1)(B). The law expanded the National Dissemination Center for Children with Disabilities, peer-support programs, adoption registries, awareness

and education programs for health care providers, and the dissemination of information relating to Down syndrome. 42 U.S.C. § 280g-8.

A number of States have passed their own pro-information laws.[7] These laws make evidence-based information about Down syndrome available to those who receive a prenatal indication of Down syndrome, including unbiased information on the outcomes, life expectancy, development, and treatment options for those living with Down syndrome. *See, e.g.,* 16 Del. Code § 801B; Mass. Gen. Laws Ann. ch. 111, § 70H(b); Md. Code, Health-Gen. § 20-1501-1502; Minn. Stat. § 145.471; N.J. Stat. Ann. §§ 26:2-194, 26:2-195; 35 Pa. Stat. §§ 6241-44; Va. Code § 54.1-2403.1(B) (various state laws requiring provision of information for patients with prenatal diagnosis of Down syndrome). These laws can help healthcare providers transmit accurate, non-stigmatizing information, while leaving the ultimate decision of whether to terminate a pregnancy to the woman whose right it is to make this personal choice. The Down Syndrome Association of Central Ohio (which was not involved in H.B. 214), describes "empowering families with up-to-date and accurate

[7] Ohio state law likewise requires that women who receive a prenatal indication of Down syndrome be provided evidence-based information on options for treatment and therapy. Ohio Rev. Code Ann. § 3701.69. Ohio is free to revise its laws to counter "statements about Down syndrome that are indeed imbalanced," as suggested in its brief. Appellants' Br. 15-16.

information and resources" as "the best way to support families receiving a Down syndrome diagnosis—both prenatally and postnatally."[8]

Anti-discrimination laws and other civil rights laws provide States with opportunities to both provide valuable legal protection to individuals living with disabilities, and to fulfill the expressive function of law with a message of inclusion and respect. Just as the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.,* the Rehabilitation Act, 19 U.S.C. § 701 *et seq*., and the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., provide federal protections against discrimination for individuals with disabilities, States can—and do—choose to enshrine similar protections in state law.[9] Passage of the landmark Developmental

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[8] Down Syndrome Ass'n of Central Ohio, *Advocacy Initiatives*, http://dsaco.net/advocacyinitiatives/ (last visited Aug. 29, 2018).

[9] *See, e.g*., Cal. Gov't Code §§ 12900-12996 (prohibiting discrimination against individuals with disabilities in employment and housing); Cal. Civ. Code §§ 51, 54.1 (mandating that persons with disabilities have "full and equal access" to public accommodations); Conn. Gen. Stat. §§ 46a-60, 46a-64, 46a-64c and 46a70-76 (prohibiting discrimination based on intellectual disability in employment, public accommodations, housing, and state agency activities); Mass. Gen. Laws ch. 93, § 103 (protecting, among other things, the right to equal participation in any program or activity within the commonwealth); Mass. Gen. Laws ch. 151B, § 4 (prohibiting discrimination in employment and housing); N.J.S.A. § 10:5-5 *et seq*. (providing broad protections against discrimination in a variety of areas, such as public accommodations, employment, housing, etc.); N.M. Stat. Ann. §§ 24-21-4(D), 28-1-7 (prohibiting discrimination based on disability and on genetic information); N.Y. Exec. Law § 291 (declaring that the right to be free of discrimination on the basis of disability in employment, education, the use of public accommodation, and housing is a civil right); N.Y. Exec. Law § 296(1) (prohibiting discrimination on the basis of disability in employment, public accommodations, housing, education and requiring

Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15,001 *et seq*., helped lead society to have "greater faith in the competencies of citizens with [intellectual and developmental disabilities], and these citizens and their families [to] have higher expectations about the types of lives they will lead."[10]

Furthermore, States can reduce bias and support the Down syndrome community by offering supportive medical and social services to individuals with disabilities, including those with Down syndrome. These types of services "make it possible to meet the needs of families raising children, including children with disabilities."[11] For example, California does this in part by contracting with twenty-

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reasonable accommodations and modifications); Or. Rev. Stat. §§ 659A.103-659A.145 (protecting persons with developmental disabilities from discrimination); 43 Pa. Stat. §§ 951-63 (prohibiting discrimination based on disability in employment, housing and public accommodation); Va. Code §§ 51.5-1, 51.5 (setting forth state policy and rights of individuals with disabilities); Vt. Stat. Ann. tit. 3 §§ 961, 963, 1026, 1028; tit. 8 §§ 10403; tit. 9 §§ 2362, 2388, 2410, 4503; tit. 21 §§ 495, 1621, 1726 (prohibiting discrimination based on disability in a wide variety of areas); Wash. Rev. Code § 49.60.30 (example of state protections against discrimination for individuals with disabilities).

[10] Nat'l Council on Disabilities, *Exploring New Paradigms for the Developmental Disabilities Assistance and Bill of Rights Act, Supplement to the 2011 NCD Publication Rising Expectations: The Developmental Disabilities Act Revisited* 10 (2012), https://www.ncd.gov/rawmedia_repository/NCD_Paradigms_Mar26FIN.pdf.crdownload.pdf.

[11] Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together* 541-543 (2011), http://www.arhp.org/UploadDocs/journaleditorialdec2011_1.pdf.

one nonprofit regional centers [12] to provide services for those living with development disabilities, ranging from diagnosis and counseling to advocacy, family support, and planning care. [13] These centers also provide in-home respite care, non-medical care that relieves families from providing constant care to a loved one with a developmental disability. [14] Connecticut's Department of Developmental Services helps individuals with developmental disabilities live in the community through a variety of community-based residential facilities, and established a Community Residential Facility Revolving Loan Fund for construction and renovation of community residences, supportive employment programs, funding for day care programs, recreational programs, and other services. [15] State Medicaid programs can provide home and community-based services for persons with developmental disabilities. [16] These services, which include access to skilled nurses, chore services,

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[12] Cal. Dep't of Developmental Services, https://www.dds.ca.gov (last visited Aug. 29, 2018).

[13] Cal. Dep't of Developmental Services, *Services Provided by Regional Centers*, https://www.dds.ca.gov/RC/RCSvs.cfm (last visited Aug. 29, 2018).

[14] Cal. Dep't of Developmental Services, *Respite (In-Home) Services*, https://www.dds.ca.gov/SupportSvcs/Respite.cfm (last visited Aug. 29, 2018).

[15] Conn. Gen. Stat. §§ 17a-217, 17a-218, 17a-219b, 17a-221 *et seq.*, 17a-226.

[16] *See*, *e.g.*, Cal. Dep't of Health Care Services, *Home and Community-Based Services Waiver for the Developmentally Disabled (HCBS-DD)*, http://www.dhcs.ca.gov/services/medi-cal/Pages/HCBSDDMediCalWaiver.aspx (last visited Aug. 29, 2018); Mass. Dep't of Developmental Services, https://www.mass.gov/orgs/department-of-developmental-services (last visited Aug. 29, 2018); N.M. Stat. Ann. § 28-16A-1 *et seq*. (charging the Department of Health to establish a Developmental Disabilities Planning Counsel to oversee

vehicle adaptations, and therapy, [17] assist those living with developmental disabilities, including Down syndrome, to lead independent, productive lives. *See Ball v. Kasich*, 307 F. Supp. 3d 701, 707-708 (S.D. Ohio 2018) (noting that states' shifts in focus and funding toward community-based services have led to increased satisfaction among individuals with intellectual and developmental disabilities and their families). [18]

States can provide additional services and support for specifically for new or expectant parents. For example, Massachusetts' Down syndrome Congress is a

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provision of community-based services for people with developmental disabilities); N.Y. Dep't of Health, *Homes and Community-Based Services (HCBS) Waiver for Persons, Including Children, with Mental Retardation and/or Developmental Disabilities*, https://www.healthy.ny.gov/publications/0548/hcbs_mental_retardation_dev_disabilities.htm (last visited Aug. 29, 2018); Pa. Dep't Human Servs., *Pennsylvania's Medicaid Waivers for Intellectual Disabilities Supports and Services*, http://www.dhs.pa.gov/learnaboutdhs/waiverinformation/medicaidwaiversforintellectualdisabilitiessupportsandservices (last visited Aug. 29, 2018); Wash. State Dep't of Social and Health Services, Developmental Disabilities Admin., https://www.dshs.wa.gov/dda (last visited Aug. 29, 2018).

[17] *Id.*; *see also* N.J.S.A. § 30:6D-12.1 *et seq*. (providing self-directed support services for persons with developmental disabilities).

[18] The suggestion that availability of abortion care will lead to reduced research and treatment for individuals with Down syndrome is likewise a red herring. For example, California also chooses to invest in research regarding treatment of Down syndrome through the UC San Diego School of Medicine's Down Syndrome Center for Research and Treatment—"one of the first programs in the country to connect academic research with treatment of adults and children with Down syndrome." *See* Down Syndrome Ctr. for Research and Treatment, *About Us*, UC San Diego Sch. of Med., https://neurosciences.ucsd.edu/centers/down-syndrome-center/about/Pages/default.aspx (last visited Aug. 29, 2018).

statewide resource for Down syndrome information, advocacy and networking.[19] In addition to free resources, information and training for potential parents, health professionals, educators and the community at large, it also offers the "Parents' First Call Program," which connects new or expectant parents with a diagnosis of Down syndrome with others who have had the same life experience.

The efforts described above are just some of the ways States can protect and improve the lives of persons with developmental disabilities, including those with Down syndrome, without infringing on reproductive rights.

B. Protection of Persons with Disabilities and Protection of Women's Access to Reproductive Healthcare Are Complementary Objectives

Protecting people with disabilities and women in need of reproductive healthcare share important common principles. State protection of disability rights and reproductive rights both rest on the "universal human rights principles of bodily autonomy, self-determination, equality and inclusion."[20] Both efforts seek to

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[19] Commonwealth of Mass., *Understand Your Pediatric Patient's Down Syndrome Diagnosis*, https://www.mass.gov/info-details/understand-your-pediatric-patients-down-syndrome-diagnosis (last visited Aug. 29, 2018); *see also* Wash. State Dep't of Health, *Down Syndrome: Information for Parents Who Have Received a Pre- or Postnatal Diagnosis of Down Syndrome*, https://www.doh.wa.gov/YouandYourFamily/InfantsandChildren/HealthandSafety/GeneticServices/DownSyndrome (last visited Aug. 29, 2018).

[20] Ctr. for Reproductive Rights, *Shifting the Frame on Disability Rights for the U.S. Reproductive Rights Movement* 5 (2017), https://www.reproductiverights.

remove barriers to full participation in society and to challenge structural inequalities.[21] Amici therefore urge the Court to avoid concluding that the rights of persons with disabilities and the rights of women are mutually exclusive, when those rights are mutually supportive.

Amici States share Ohio's goal of protecting the autonomy and dignity of individuals living with developmental disabilities, providing support to families raising children with developmental disabilities, and ensuring that adults living with such disabilities are included in society. But amici States agree with disability rights advocates and bioethicists who urge that the best way to advance these interests is "to facilitate true reproductive choice for women by urging changes to the way prenatal testing occurs and the rhetoric surrounding it[,] . . . persuade professionals to change what they tell prospective parents about life with disability; [and] convince those parents to learn about how children and adults in today's world survive and thrive."[22] Using the law to force women to bear children with disabilities (when they do not want to do so) will fail to solve . . . broader stigma, and may even be

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org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf.

[21] *See id.*

[22] Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 Fla. St. U. L. Rev. 315, 317, 341 (2003) (citations omitted).

counterproductive."[23] These concerns were echoed by amici in *PPINK*, where a number of disability rights leaders based in Ohio joined an amicus brief opposing the Indiana law that closely resembled the law in this case.[24] They rejected the argument that state abortion bans are ethically necessary, arguing instead that ensuring the right to choose "empowers women and families who make the affirmative choice to see a pregnancy through to term" and "provides the greatest assurance that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive."[25]

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[23] Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 Harv. J. of L & Gender 424, 457-58 (2006) (citing Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 Fla. St. U. L. Rev. 343, 358-59 (2003)). Professor Bagenstos notes that "the most vocal disability-rights critics of prenatal testing and selective abortion do not even urge that those practices be subject to legal regulation . . . ." *Id.* at 441.

[24] Br. for Disability Advocates as Amici Curiae Supporting Pls.-Appellees, *PPINK*, 888 F.3d 300 (7th Cir. 2018). This group included Ashley Barlow, the mother of a child with Down syndrome who serves on the Board of Directors of the Down Syndrome Association of Greater Cincinnati and lobbied the Ohio state government, Emily Chestnut, the mother of a daughter with Down syndrome who is an active member of the Family Advisory Council for the Cincinnati Children's Hospital Division of Developmental and Behavioral Pediatrics and the Down Syndrome Association of Greater Cincinnati, and Leesha Thrower, a professor at Cincinnati State University and the mother of a daughter with Down syndrome who also leads the African American Family Network for the Down Syndrome Association of Greater Cincinnati and serves on the Family Advisory Council for the Cincinnati Children's Hospital Division of Developmental and Behavioral Pediatrics. *Id.* at 1-3.

[25] *Id.* at 4.

Respect for the rights of individuals with disabilities and respect for the rights of women complement, rather than undermine, each other. Just as modern courts have rejected forced sterilization laws, which unfairly prevented some women (including those with disabilities) from making their own reproductive choices,[26] so too has the Supreme Court settled "that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, . . . as well as bodily integrity." *Casey*, 505 U.S. at 849. Indeed, as the Court explained in *Casey*, the core right protected by *Roe*—the right to decide whether to "bear and beget a child"— prevents States from requiring that women undergo an abortion or forced sterilization, just as it prohibits States from prohibiting abortions before viability. *Casey*, 505 U.S. at 859 (citing with approval court of appeal cases relying on *Roe* to conclude that government officials may not force woman to undergo an abortion or sterilization). Abortion bans like Ohio's would roll back the clock, denying respect for women's reproductive choices while failing to advance the dignity and inclusion of persons with disabilities such as Down syndrome.

CONCLUSION

The judgment of the district court should be affirmed.

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[26] *See generally* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. Rev. 30 (1985) (concluding that now-discredited Supreme Court precedent upholding Virginia forced sterilization law reflected proponents' moralism and private prejudices against unmarried, low-income pregnant women and individuals with mental disability or illness).

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DESIGNATION OF DISTRICT COURT RECORD

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

PRETERM-CLEVELAND, ET AL., V. HIMES, ET AL., 1:18-CV-109

Date Filed	R. No.; Page ID#	Document Description
4/12/2018	28; 578-99	Order Granting Plaintiffs' Motion for Preliminary Injunction

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record furnishes the following in compliance with Federal Rule of Appellate Procedure 32(g):

I hereby certify that this brief conforms to the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief has been prepared in a proportionally spaced font and contains 5510 words.

Dated: August 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2018, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

Dated: August 30, 2018

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