UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRETERM-CLEVELAND, INC., et al., **Plaintiffs,** **vs.** **LANCE HIMES, et al.,** **Defendants.**	:	**Case No. 1:18-cv-109** **Judge Susan J. Dlott** **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND/OR MEMORANDUM IN SUPPORT**

MOTION

Pursuant to Fed. R. Civ. Pro. 65, Plaintiffs Preterm Cleveland Ohio, Planned Parenthood Southwest Ohio Region, Women's Med Group Professional Corporation, Roslyn Kade, M.D., and Planned Parenthood Greater Ohio, move for a temporary restraining order and preliminary injunction to declare unconstitutional Ohio House Bill 214 of the 132nd General Assembly ("H.B. 214" or "the Ban"), which will become effective on March 22, 2018. Plaintiffs also move to enjoin all Defendants; their officers, agents, servants, employees, and attorneys; and any persons in active concert or participation with them from enforcing or complying with H.B. 214. Plaintiffs request an injunction be issued on or before March 15, 2018 to provide time for an orderly transition in scheduling patients if the law were to take effect.

Plaintiffs have provided notice to Director Himes and will provide notice to all defendants today. However, due to the effective date of the Ban of March 22, 2018, an expedited briefing schedule, hearing, and ruling on the merits is requested.

Plaintiffs request that if a bond is required, it be set at $1.00.

MEMORANDUM IN SUPPORT

INTRODUCTION

Ohio House Bill 214 of the 132nd General Assembly ("H.B. 214" or "the Ban"), which prohibits "a person from performing, inducing, or attempting to perform or induce an abortion on a pregnant woman who is seeking the abortion because an unborn child has or may have Down Syndrome," does not provide support for parents raising children with Down syndrome. It does not allocate any state resources for education or care of individuals with Down syndrome throughout their lives, nor does it protect individuals with Down syndrome from discrimination in access to education, housing, or employment, to name just a few examples. Far from honoring the decisions of women and families who learn their fetus has Down syndrome--some of whom will decide to continue their pregnancies to term and parent, some of whom will place the child for adoption, and some of whom will decide to terminate their pregnancies--H.B. 214 takes the decisional authority away from women, in violation of the U.S. Constitution.

When a pregnant woman receives a diagnosis of Down syndrome, only she can decide how to proceed, along with her family, her pastor, her clinical team, and whomever else she involves in this intimate decision. Some women decide to continue the pregnancy, knowing that bringing a special needs child into the world is the right thing to do for them; others decide to terminate, knowing that that is the right decision given the needs of their existing children and other family members, their health, and a host of other factors that only they can weigh. Yet, H.B. 214 unconstitutionally bans abortions based on one's reason for seeking them, undermining women's right to make the best decision for themselves and their families.

Well-established constitutional limits, which ensure that a woman—not the state—is free to make the final decision regarding any previability abortion, apply regardless of what exceptions the ban may provide, and regardless of what interests the state may assert to justify it. The right to terminate a pregnancy prior to viability is a core principle of the constitutional protection afforded to women under the Fourteenth Amendment. The Ban plainly violates this core right and is thus *per se* unconstitutional.

STATEMENT OF FACTS

I. Abortion Practice and Safety

Approximately one in four women in this country will have an abortion in her lifetime. Lappen Dec. ¶ 10. Women seek abortions for a variety of health, familial, economic, and personal reasons. Lappen Dec. ¶ 12. Most women who have an abortion (nearly 60%) already have at least one child, and 66% plan to have children. Lappen Dec. ¶¶ 10, 12. 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.

Plaintiffs are clinics and an individual physician who provide reproductive health services, including surgical abortion and medication abortion. Harvey Dec. ¶¶ 1-2; Kade Dec. ¶¶ 1-2; France Dec. ¶¶ 2-3. Plaintiffs provide medication abortion through 70 days LMP. Harvey Dec. ¶ 4; Kade Dec. ¶ 5; France Dec. ¶ 3. Medication abortion is a method of ending an early pregnancy by taking medications that cause the woman to undergo a process similar to an early miscarriage. Lappen Dec. ¶ 16. Surgical abortion, despite its name, is not a typical surgical procedure: it does not involve any incision. Lappen Dec. ¶

17. Surgical abortion is available in Ohio through 21 weeks, 6 days LMP, which is a previability point in pregnancy. Harvey Dec. ¶ 4; Kade Dec. ¶ 6; France Dec. ¶ 3. However, the overwhelming majority of abortions are performed during the first trimester of pregnancy, when the pregnancy is at or less than fourteen weeks LMP. Lappen Dec. ¶ 13.

Under Ohio law, a woman who wishes to have an abortion must visit the abortion provider at least 24 hours before the procedure will be performed. During that initial visit, she must receive certain information, as well as an ultrasound and the opportunity to see or hear the embryonic or fetal heart tone, and she must give her informed consent to the procedure. Ohio Rev. Code §§ 2317.56, 2919.12(A), 2919.191, 2919.192. Plaintiffs Preterm-Cleveland ("Preterm"), Planned Parenthood Southwest Ohio Region ("PPSWO"), Women's Med Group Professional Corporation ("WMGPC"), Planned Parenthood Greater Ohio ("PPGOH"), and Roslyn Kade, M.D. engage in non-directive patient education during the initial visit to ensure informed consent. That discussion is designed to make certain that patients are well-informed with respect to all of their options, including terminating the pregnancy; carrying the pregnancy to term and parenting; and carrying to term and placing the child for adoption. Harvey Dec. ¶ 7; Kade Dec. ¶ 7; France Dec. ¶ 9. In addition, the discussion is designed to ensure that the woman's choice is voluntary and not coerced. *Id*. Although some 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; Kade Dec. ¶ 8.

Plaintiffs are aware that a small percentage of their patients seek abortions based on a prenatal diagnosis of or, in exceedingly rare cases, a test indicating, Down syndrome. Harvey Dec. ¶ 11; Kade Dec. ¶ 8; France Dec. ¶ 11. These patients typically come to the clinic only after undergoing extensive counseling with a high-risk obstetrician-gynecologist, also known as a specialist in Maternal-Fetal Medicine ("MFM"), and a genetic counselor. Harvey Dec. ¶¶ 9-10; Kade Dec. ¶ 9.

II. Down Syndrome

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 21st chromosome. Lappen Dec. ¶ 20. There are various risk factors for Trisomy 21, such as advanced maternal age and having had a child with Down syndrome. *Id.* ¶ 21. The range of medical conditions and abilities can vary widely for people with Down syndrome, and many require significantly more care than individuals born without any such condition, sometimes stretching into adulthood. *Id.* ¶ 22.

There are various screening and diagnostic tests available to detect genetic, chromosomal, or structural anomalies, including Down syndrome. *Id.* ¶ 23. "Screening" tests cannot diagnose any particular anomaly, but rather indicate a likelihood or probability that one or more anomalies exist. *Id.* ¶ 24. These tests usually screen for a range of anomalies at the same time. *Id.* By contrast, "diagnostic" tests diagnose the existence or non-existence of particular anomalies with near certainty. *Id.*

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 prenatal genetic screening or diagnostic testing options as

early as possible in the pregnancy, ideally at the first prenatal visit. *Id.* ¶ 25. ACOG recommends that all women be offered the option of screening or diagnostic testing for fetal genetic disorders, regardless of the woman's age. *Id.* ACOG also recommends that women with positive screening test results be offered further counseling and diagnostic testing. *Id.*[1] For example, Dr. Lappen provides patients with further information regarding Down syndrome to inform and support their decision-making, including resources, referrals, and accurate, evidence-based information. *Id.* ¶ 34. He has referred patients both to medical professionals, including pediatricians and pediatric specialists, and to non-medical resources, including the National Down Syndrome Society and the National Down Syndrome Congress, as well as the Northeast-Ohio based organization Upside of Downs. *Id.*

There are multiple screening tests available during pregnancy. First trimester genetic screening is available from approximately 10 to 14 weeks LMP. *Id.* ¶ 26. One early 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, available as early as 10 weeks LMP, is called a Non Invasive Prenatal Screening, or NIPS. *Id.* ¶ 27. 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. *Id.* The results of NIPS are usually available within 7 days. *Id.* Among other anomalies, these tests indicate the probability of Down syndrome. *Id.*

[1] Ohio law also requires that any patient receiving a prenatal or postnatal diagnosis of Down syndrome be provided with a state-created information sheet about Down syndrome. Ohio Rev. Code § 3701.69(B). Many patients receive counseling and information about Down syndrome beyond the minimum mandated by the state, however. Lappen Dec. ¶ 34.

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. 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.*

There are two primary diagnostic tests that can confirm a diagnosis of Trisomy 21 or Down syndrome. The first is chorionic villus sampling (CVS), where a sample of cells is taken from the woman's placental tissue and analyzed. *Id.* ¶ 29. CVS is generally performed between 10 and 13 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. Amniocentesis is generally performed beginning at 15 weeks LMP. *Id.* The diagnostic accuracy of amniocentesis, like CVS, is greater than 99%. *Id.*

III. The Ban

H.B. 214 amends Section 3701.79 of the Revised Code and enacts Sections 2919.10 and 2919.101. Section 2919.10 prohibits any person from purposely performing or inducing or attempting to perform or induce an abortion if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of any of the following reasons: (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").[2] Violation of the Ban constitutes a fourth-degree 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) and makes that physician 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). The Ban contains no exception to its criminal or other sanctions if the abortion is necessary to preserve the life or health of the woman.

The Ban also requires the physician to attest in writing that he or she is not aware that fetal Down syndrome is a reason for the woman's decision to terminate her pregnancy. Section 2919.101 states: "In the abortion report required under section 3701.79 of the Revised Code, 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) (emphasis added). 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 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 reasons enumerated above. *Id.* at § 3701.79(C)(7) (emphasis added). 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 "if a person subjectively

[2] The provision defines "Down syndrome" as a "chromosome disorder associated either with an extra chromosome twenty-one, in whole or in part, or an effective trisomy for chromosome twenty-one." *Id.* at 2910.10(A)(1).

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). Finally, the Ban requires the department of health to adopt rules "to assist in compliance with" section 2919.101 within 90 days of its effective date. *Id.* at § 2919.101(B).

ARGUMENT

The standard for evaluating a request for a temporary restraining order or preliminary injunction under Rule 65 is well established in this Circuit. Though there is no "rigid and comprehensive test" for determining the appropriateness of this relief, *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984), the Court should 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. *Doe v. Barron*, 92 F. Supp. 2d 694, 695 (S.D. Ohio 1999); *Memphis Planned Parenthood, Inc. v. Sundquist*, 175 F.3d 456, 460 (6th Cir. 1999); *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).

These factors are "to be balanced and [are] not prerequisites that must be satisfied." *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc) (citation omitted). "[T]hey are not meant to be rigid and unbending requirements." *Id.* 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).

Here, as set forth below and in the accompanying declarations, Plaintiffs easily meet the test for a temporary restraining order or preliminary injunctive relief. Because the Ban conflicts with more than four decades of unwavering Supreme Court precedent, Plaintiffs are extremely likely to succeed on the merits of their substantive due process claim. Further, the Ban would irreparably harm Plaintiffs and their patients, and the balance of hardships and the public interest strongly favor the issuance of a temporary restraining order or preliminary injunction.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claim Because H.B. 214 Is a Blatantly Unconstitutional Ban on Previability Abortions.

H.B. 214 constitutes a clear violation of the Fourteenth Amendment under long-standing and unquestioned Supreme Court precedent because it bans abortions based solely on women's reason for seeking them. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992). This violates the categorical rule that every woman must be allowed to make her own final decision whether to terminate her pregnancy before the fetus attains viability. *Id.* Moreover, while it is unnecessary to apply the undue burden test to a previability ban such as H.B. 214, *see Isaacson v. Horne*, 716 F.3d 1213, 1226 (9th Cir. 2013) (explaining that it is a "bright-line rule that the state may not proscribe abortion before viability," and courts need not apply the "undue burden" standard to previability bans), there is no question that H.B. 214 fails that test because it poses a substantial—indeed, insurmountable—obstacle to the ability of certain women to obtain a previability abortion. Accordingly, Plaintiffs are likely to succeed on the merits of their claim that H.B. 214 is an unconstitutional ban on previability abortions.

A. Any Ban on Previability Abortions Is Per Se Unconstitutional Under Binding and Unquestioned Supreme Court Precedent.

The U.S. Supreme Court has repeatedly and unequivocally held 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)). Indeed, the Supreme Court stated in *Planned Parenthood 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)).

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.

Underlying the privacy right first recognized in *Roe* and reaffirmed in *Casey* and *Whole Woman's Health* 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. Extending further this understanding of the woman's decisional autonomy, *Casey* explained that 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 (1992); *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 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 State, in other words, has no right to stand in judgment of the woman's decision or of her reasons for that decision.

A ban on abortion at any point prior to viability, whether partial or total, is therefore *per se* unconstitutional, no matter what interests the state asserts to support it. "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, 879 (emphasis added). Given this unwavering line of Supreme Court precedent, since *Roe*, every federal appellate court or state high court to consider the question has ruled that a ban on abortions before viability, with or without exceptions, violates the Fourteenth Amendment.[3]

Indeed, the federal district court in Indiana 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, "[t]he woman's right to choose to terminate a pregnancy pre-viability is categorical." *Planned Parenthood of Indiana & Kentucky, Inc.* ("*PPINK*") *v. Comm'r, Indiana State Dep't of Health*, 265 F. Supp. 3d 859, 866 (S.D. Ind. 2017) (citing *Casey*, 505 U.S. at 879). That court continued:

> For this Court to hold such a law constitutional would require it to recognize an exception where none have previously been recognized. Indeed, the State has not cited a single case where a court has recognized an exception to the Supreme Court's categorical rule that a woman can choose to terminate a pregnancy before viability. This is unsurprising given that it is a woman's right to *choose* an abortion that is protected, which, of course, leaves no

[3] *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).

> room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice.

Id. at 867 (citing *Casey*, 505 U.S. at 846, 879).

In sum, the Supreme Court has squarely rejected the claim that any State interest, including its interest in potential life—no matter what variant of that interest is put forward—can justify a ban on abortion prior to viability. The Supreme Court has already "struck a balance" between the State's interests in regulating or restricting abortion and a woman's liberty interests in obtaining an abortion and has "concluded that, prior to viability, the woman's right trumps the State's interest[s]." *PPINK*, 265 F. Supp.3d at 867. Any claims by the State as to the number or strength of the interests it asserts simply cannot change this inevitable result. To hold otherwise would require this Court to overrule the central holdings of *Roe* and *Casey*, which of course it cannot do. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) ("[t]he [Supreme Court] has yet to overrule the *Roe* and *Casey* line of cases," and thus all federal courts "are bound by those decisions").

B. H.B. 214 Imposes an Undue Burden on the Right to Seek an Abortion Before Viability.

As the Ninth Circuit has recognized, the undue burden "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." *Isaacson*, 716 F.3d at 1225 (emphasis in original). Thus, only laws that *regulate* the performance of abortions, but do not *prohibit* them outright, are evaluated under the undue burden test. 505 U.S. at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the

path of a woman seeking an abortion before the fetus attains viability."). The state may use its regulatory authority if and only if such actions do not "strike at the right itself." *Gonzales v. Carhart*, 550 U.S. 124, 157–158 (2007); *see also id.* at 145 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion *or* the imposition of a substantial obstacle to the woman's effective right to elect the procedure.") (emphasis added).

Nonetheless, even applying the undue burden test, H.B. 214 is patently unconstitutional. It has the unmistakable purpose and effect of imposing a substantial obstacle in the path of certain women seeking previability abortions. As the Supreme Court has instructed, a court evaluating whether a law constitutes an undue burden must consider its effect only on those women "for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894. Here, for a woman choosing abortion due, in whole or in part, to a Down syndrome diagnosis or indication, the law is not only a substantial obstacle to her "right to make the ultimate decision" about her pregnancy prior to viability, but an absolute one. *Id.* at 877. In other words, it would prevent all women for whom it is relevant from obtaining a previability abortion. *See, e.g.*, *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (holding that a ban on abortions after 20 weeks, with limited exceptions, had "both the purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus" and was therefore unconstitutional). Moreover, no state interest is constitutionally sufficient to outweigh a burden that constitutes a complete obstacle to a woman's previability abortion decision. *See Whole Woman's Health*, 136 S. Ct. at 2309 (holding that *Casey* "requires that courts consider the burdens a law imposes on abortion access

together with the benefits those laws confer"). Therefore, H.B. 214 is necessarily unconstitutional.

The blatant unconstitutionality of H.B. 214 is only aggravated by the fact that it contains no exception allowing an abortion to proceed if a woman's health or life is at risk. If one reason for the woman's abortion decision is a diagnosis or other test indicative of Down syndrome, she is forbidden to proceed—even if continuing the pregnancy would endanger her life or health. The principle that the woman retains the right to seek an abortion if the procedure is necessary to protect her life or her health, which was first articulated in *Roe*, 410 U.S. at 163-164, has never been questioned by the U.S. Supreme Court, *see also Casey*, 505 U.S. at 880 (noting that "the 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"). In forcing a woman to continue a pregnancy that endangers her life or health when (and only when) a Down syndrome diagnosis also provides a reason for the abortion, H.B. 214 violates a clear constitutional proscription.

II. Enforcement of the Ban Will Inflict Irreparable Harm on Plaintiffs' Patients.

In the absence of a preliminary injunction, Plaintiffs and their patients will suffer irreparable harm. First, the law directly violates Plaintiffs' patients' constitutional right to abortion, which constitutes *per se* irreparable harm. *See, e.g.*, *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)); *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); *see also Planned Parenthood Sw. Ohio Region v. Hodges*, 138 F. Supp. 3d 948, 960 (S.D. Ohio 2015).

Second, the Ban will cause Plaintiffs' patients other irreparable, tangible injuries, as well. 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; Kade Dec. ¶ 11; France Dec. ¶ 12; *Roe*, 410 U.S. at 153 ("The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981) (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").

Even those women who are able to travel long distances to access abortion outside of Ohio will face unnecessary and harmful delays. Kade Dec. ¶ 11. These threats to Plaintiffs' patients' health and wellbeing also constitute irreparable harm. *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 I*, 963 F. Supp. 2d 858, 868 (W.D. Wisc. 2013) (holding that an abortion restriction caused irreparable harm to patients by causing an undue travel burden and by imposing increased health risks through delay).

Finally, as the evidence 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. There are numerous conditions that pose a substantial mortality risk in pregnancy, including pulmonary hypertension and maternal cardiac disease, some with mortality risks as high as 50%. Lappen Dec. ¶ 41. In some percentage of these cases, there is also an (unrelated) prenatal diagnosis of Down syndrome. Lappen Dec. ¶ 40. The Ban thus threatens significant harm to the health of women whose medically complicated pregnancy is accompanied by a diagnosis of fetal Down syndrome.

III. An Injunction That Maintains the Status Quo Will Not Cause Harm to Others and Will Serve the Public Interest.

In contrast to the irreparable harm the Ban will inflict on women seeking abortions in Ohio, a temporary restraining order or preliminary injunction that merely preserves the status quo – more than four decades of access to previability abortions – will not impose any harm 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*, 138 F. Supp.3d at 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.*, 822 F.2d at 1400 (holding that there was no substantial harm in preventing the enforcement of an ordinance that was likely unconstitutional).

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant their motion for a temporary restraining order and/or a preliminary injunction.

Respectfully submitted,

/s/ B. Jessie Hill

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2018, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail and email upon all parties for whom counsel has not yet entered an appearance electronically, including:

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