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,

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 U.S. District Court for the Southern District of Ohio
Case No. 1:18-cv-00109

REPLY BRIEF OF DEFENDANTS-APPELLANTS LANCE HIMES, KIM G. ROTHERMEL, AND BRUCE R. SAFERIN

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INTRODUCTION

With its Antidiscrimination Law, Ohio works to prevent discriminatory abortions on the basis of a Down-syndrome diagnosis. Ohio's law seeks to protect the vulnerable Down-syndrome community from well-documented bias and pressure that has resulted in the abortion of up to 9 out of every 10 unborn children diagnosed with Down syndrome. But not everyone shares Ohio's concern for this group; in fact, some countries say that the world would be better off without anyone who has Down syndrome. Ohio enacted its law against the backdrop of that cautionary international example and in the face of growing domestic tendency toward selective abortions targeting Down syndrome.

Despite these staggering numbers, the district court essentially ended this case before it began, saying that the previability abortion right stated in *Roe v. Wade* is "categorical" and "absolute." That "absolute" approach, echoed by Plaintiffs, elevates abortion to a super-right above other rights, not subject to the weighing of interests that occurs with rights expressly designated in the Constitution.

Plaintiffs and the district court are wrong. Ohio has compelling reasons for the Antidiscrimination Law different from the state interests considered by the U.S. Supreme Court in *Roe* and *Planned Parenthood v. Casey*. Those cases weighed the state interests there one by one and made different rulings based on each

interest. And the judicial tests for the state interests *there* do not preclude consideration of the different state interests *here*.

Plaintiffs' view that Ohio's evidence is irrelevant highlights the key misstep that gives rise to this appeal. Ohio deserves a true day in court to advocate, within a traditional balancing analysis and structure, the interests at stake here. This case is not about a general right to an abortion, as was the issue in *Roe* and in *Casey*. Here, Ohio offers different arguments, and different state interests, with different legislation at issue. A new weighing, just as would happen in any other circumstance, as with any other right, as with any other protected group, is merited.

LEGAL ARGUMENT

I. OHIO'S ANTIDISCRIMINATION LAW DESERVES A TRUE DAY IN COURT WITH A FULL AND FAIR LOOK BECAUSE THE SUPREME COURT'S PREVIABILITY ABORTION RIGHT IS NOT CATEGORICAL

In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court balanced two state interests against a generalized right to privacy to reach specific tests for each state interest. Three *different* state interests—interests that *Roe* did not weigh—support the Antidiscrimination Law. The two tests in *Roe* do not categorically invalidate the interests here, and these three different interests require a constitutional analysis that accords them due weight.

Plaintiffs and the district court are mistaken in concluding that *Roe* created an inexorably "absolute" and "categorical" right to abortion without any regard for

anti-discrimination principles. Order, R.28, PageID#588; Pl. Brief at 30. Under any level of scrutiny, even the highest level used in *Roe*, the Antidiscrimination Law should be upheld.

A. Plaintiffs are wrong in asserting that Ohio's state interests are irrelevant

The state interests supporting the Antidiscrimination Law—(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—differ from the two state interests before the U.S. Supreme Court in *Roe*: (1) "preserving and protecting the health of the pregnant woman" and (2) "protecting the potentiality of human life." 410 U.S. at 162.

Plaintiffs are mistaken that the distinctions among these state interests are "irrelevant," Pl. Brief at 22, because *Roe* itself *separately balanced* each of the two "distinct" state interests there against a general right to privacy, *Roe*, 410 U.S. at 153, 162-63. Significantly, *Roe*'s analysis for each state interest resulted in different outcomes. *Id.* at 162-63.

The *Roe* Court held that the "compelling" point for maternal health is when the woman's "mortality in abortion" exceeds "mortality in normal childbirth." *Id.* at 163. Separately, it held that the "compelling" point for the life of the unborn child is "the capability of meaningful life outside the mother's womb." *Id.* For the former (health of the mother), at the compelling tipping point, *Roe* said that States

can regulate abortion to protect maternal health. *Id*. For the latter (protecting life), at the compelling tipping point, States can prohibit all abortions. *Id*. at 163-64.

Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992), considered the same two state interests—the life of the unborn child and maternal health. *Casey* did not change *Roe*'s abortion right into an absolute. Instead, *Casey* affirmed that *Roe* involved balancing, and *Casey*'s balancing tests for the two state interests again were distinct. *Id*. at 846, 929, 953. As Justices O'Connor, Kennedy, and Souter stated, the "weight to be given" to the different state interests "was the difficult question faced in *Roe*." *Id*. at 871.

Every single Justice on the *Casey* Court saw the *Roe* abortion right as requiring weighing of the interests. Justices O'Connor, Kennedy, Souter, Blackmun, and Stevens characterized *Roe* as weighing a privacy interest against the strength of the State's interest "in protecting the health of the woman and the life of the fetus that may become a child." *Id*. at 846. Chief Justice Rehnquist and Justices White, Scalia, and Thomas said that *Roe* "was mistaken . . . when it classified a woman's decision to terminate her pregnancy as a 'fundamental right' that could be abridged only in a manner which withstood 'strict scrutiny.'" *Id*. at 953. Justice Blackmun wrote that the "'strict' constitutional scrutiny" principle (which itself takes discrete interests into account) was "applied . . . specifically" in *Roe*. *Id*. at 929.

As with any balancing, the respective weights of the state interests and of the privacy interest matter. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."). This is why *Roe* held that the abortion right "*is not absolute*," 410 U.S. at 155 (emphasis added), and both *Roe* and *Casey* had different outcomes upon balancing each of the two state interests.

Neither case balanced any of the three state interests Ohio adduced in this litigation. Nor did they consider whether a general right to abortion is different from a doctor performing an abortion because of a disability. Plaintiffs' view that two balancing tests under the different circumstances of *Roe* and *Casey* "categorical[y]" and forever preclude any fresh balancing using any other state interests does not match traditional constitutional principles or even the precedent on which Plaintiffs rely. *See* Pl. Brief at 23.

B. The balancing tests in *Roe* and *Casey* do not bar a case-specific analysis of the Antidiscrimination Law and the interests it protects

Plaintiffs concede that no U.S. Supreme Court decision has held that States are powerless to prevent abortions systemically targeting one demographic. *Id.* at 31. Thus, Plaintiffs cannot rely on a decision decreeing how the interests *here*—(1) preventing discrimination, (2) safeguarding medical ethics, and (3) protecting

the Down-syndrome community—measure up. Nevertheless, despite conceding there is no precedent "precisely like" this case, Plaintiffs insist that the different state interests here are merely "restatements" of the state interests in *Roe*. *Id.* at 12, 22.

But *Roe* and *Casey*'s tipping point for the interest there of protecting life—when modern science can preserve the unborn child's "capability of meaningful life outside the mother's womb," *Roe*, 410 U.S. at 163—does not assess or address the State's interest in preventing discrimination. Down syndrome is an immutable genetic condition that exists from the moment of conception. Sullivan Decl. ¶ 5, R.25-1, PageID#149. Down syndrome is often detected earlier than viability of the unborn child. *Id.* ¶ 4. And the pressures toward termination are most pronounced at the time when Down syndrome is potentially indicated in testing. *See id.* at 11-18, PageID#121-28; *see also* Ohio Answer ¶ 1, R.29, PageID#600-15.

Ohio's other state interests—protecting the integrity of the medical profession and preserving the Down-syndrome community's civic voice—are also different questions from the life-of-the-child and health-of-the-mother considerations of *Roe* and *Casey*. "[S]ubvert[ing]" genomic testing to "reinforce social biases and introduce discrimination," Sullivan Decl. ¶ 23, R.25-1, PageID#154, is unconnected to viability or physical health. So, too, is sending "an unambiguous *moral* message to the citizens of Ohio that Down Syndrome children . . . are equal in dignity and value to the rest of us." Fernandes Decl. ¶ 13, R. 25-1, PageID#170.

In sum, an abortion doctor terminating "this" child having Down syndrome triggers a different inquiry from that involving the generalized abortion of "a" child in *Roe* and *Casey*. *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 687-88 (1977). Ohio's interests cannot be lumped together with different interests and consequently swallowed by rubrics that do not assess the societal interests implicated in this case.

C. With different state interests for the Antidiscrimination Law, a fresh judicial inquiry is required

Plaintiffs' contention that the issues in this case have "already been resolved," Pl. Brief at 16, is contrary to established precedent that conducted new analyses when confronted with new state interests. That precedent controls; the state interests supporting the Antidiscrimination Law—interests that were not presented or considered in *Roe* or *Casey*—mandate their own assessment. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law . . . ."); *Planned Parenthood v. Comm'r of the Ind. State Dep't of Health*, No. 17-3163, 2018 U.S. App. LEXIS 17676, at *12 (7th Cir. June 25, 2018) (Easterbrook, Sykes, Barrett, and Brennan, dissenting) ("Judicial opinions are not statutes; they resolve only the situations presented for decision.").

This is the judicial practice in other constitutional contexts. For example, despite Supreme Court precedent related to "all anonymous handbilling in any place under any circumstances," the Supreme Court conducted a separate First Amendment analysis of a statute limited to anonymous campaign literature that was supported by state interests "different" from the Court's precedent. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344, 356 (1995) (quotation omitted).

And in *Washington v. Glucksberg*, 521 U.S. 702, 728-33 (1997), the Supreme Court examined separately a number of state interests implicated by Washington's assisted-suicide ban. These included the State's "insist[ence] that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law," "an interest in protecting the integrity and ethics of the medical profession," "protecting vulnerable groups," and avoiding a "path to voluntary and perhaps even involuntary euthanasia." *Id.* at 729, 731-32. The Court accorded each interest its own evaluation.

The Sixth Circuit is no different. As this Court recognized, a state law "criminalizing incest" was supported by "greater" and "different" state interests than a statute involving "sexual relationships between unrelated same-sex adults," and therefore, came outside of a decision by the Supreme Court invalidating the latter statute. *Lowe v. Swanson*, 663 F.3d 258, 264-65 (6th Cir. 2011).

Countless other examples show how courts have inspected state interests one by one. *See, e.g., Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (public confidence in voting has "independent significance" from preventing voter fraud); *Edenfield v. Fane*, 507 U.S. 761, 768-70 (1993) (analyzing separately state interests in preventing fraud, protecting privacy, and upholding accounting independence); *In re Ballay*, 482 F.2d 648, 662 (D.D.C. 1973) ("[T]wo entirely distinct state interests are involved in the civil involuntary commitment system."); *see also Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2477 (2018) (noting that a party asserted an interest "different" from potential precedent).

This principle applies with as much force in abortion jurisprudence. As four judges in the Seventh Circuit observed, the differences between laws like the Antidiscrimination Law and laws considered under other Supreme Court precedent are relevant: "Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." *Comm'r of the Ind. State Dep't of Health*, 2018 U.S. App. LEXIS 17676, *12 (Easterbrook, Sykes, Barrett, and Brennan, dissenting). Those judges were rightly "skeptical" that *Casey* is dispositive of "anti-eugenics" abortion "law[s]." *Id*. at *11-12.

The Court should freshly weigh the interests supporting the Antidiscrimination Law, a task *Roe* and *Casey* did not do.

D. Ohio has not "abandoned" rational-basis review

Contrary to Plaintiffs' contention, Ohio has not "abandoned any argument" that rational-basis review applies. Pl. Brief at 31 n.8. In Ohio's initial brief, Ohio argued that "Ohio's Antidiscrimination Law should be judged by—*at most*—*Roe*'s compelling-interest standard." Ohio Brief at 42 (emphasis added). Ohio's point is that, under the district court's decision, Ohio has no practical opportunity to put its case before the court. And that, regardless of whether the benchmark is low (rational basis) or high (strict scrutiny), Ohio's interests supporting the Antidiscrimination Law prevail.

As the case stands, however, under the district court's "categorical" and "absolute" view of previability abortion, the State's evidence necessarily fails to matter. This is wrong. *Cf. Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (warning against "resort[ing] to easy slogans or pigeonhole analysis" to resolve constitutional questions). As Ohio stated in its initial brief, "the *broader* state interests involved in this case—when combined with the *narrower* limitation on previability abortions—mandate a new constitutional weighing." Ohio Brief at 44. This weighing involves both sides of the scale.

Ohio's state interests supporting the Antidiscrimination Law are on one side of the scale. On the other is a much weaker claim for abortion based on a diagnosis of Down syndrome rather than the more general "decision whether or not to beget or

bear *a* child." *Carey*, 431 U.S. at 685 (emphasis added). Rational-basis review is appropriate because the Supreme Court has never held that there is a substantive due process right to conduct an abortion because of a disability. *Cf. Glucksberg*, 521 U.S. at 728. But even under higher scrutiny, Ohio's interests prevail.

E. Previability abortion is not a super-right above other rights

Plaintiffs insist that treating a previability abortion right as categorical does not place abortion above expressly-enumerated constitutional rights because "certain aspects of" express constitutional rights "cannot be overridden by the state." Pl. Brief at 24. But Plaintiffs are not arguing that merely "certain aspects" of an abortion right are sacrosanct. They are saying the *entirety* is off-limits from *any* scrutiny.

This greatly differs from the cases on which Plaintiffs rely. In a few of the opinions, the Supreme Court referenced *narrow portions* of an expressly-stated constitutional right, such as forcing someone to believe in a particular religion. Thus, while "[t]he government may not compel affirmation of religious belief," far more broadly, an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Empl't Div. v. Smith*, 494 U.S. 872, 877-79 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, *as recognized in Cutter v. Wiklinson*, 544 U.S. 709 (2005). And while "a law targeting religious

beliefs is never permissible, if the object of a law is to . . . restrict practices because of their religious motivation," then the law is subject to strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (citations omitted). Similarly, in the free speech context, the government is prohibited "from telling people what they *must* say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quotation omitted) (emphasis added) (discussing whether federal funds can be conditioned on an organization's explicit agreement with government policy).

Aside from these cases that at most reference narrow portions of a constitutional right, most of Plaintiffs' cases do not refer to "absolutes" at all, but instead balance private and government interests—precisely what Plaintiffs here seek to avoid. Thus, in *Janus*, the Court held that "compelling" non-union members "to subsidize private [union] speech on matters of substantial public concern" should be tested using either exacting or strict scrutiny. 138 S. Ct. at 2460, 2465. In *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 2375 (2018), the Court held that a California law requiring crisis pregnancy centers to "provide a government-drafted script about the availability of state-sponsored [abortion] services" would not survive "even intermediate scrutiny." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), involved public schools requiring students to salute the flag. There, the Court contrasted

"the vagueness of the due process clause" and free speech, which is "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Id*. at 639. These cases therefore involved various levels of scrutiny in which the state interests advanced were given due consideration. The same approach should apply here.

Plaintiffs cannot claim that the entire scope of any right expressly set forth in the Constitution is immune from standard constitutional balancing. Yet, this is what Plaintiffs would have the Court do with the *Roe* and *Casey* previability abortion right. Such a result would elevate abortion as paramount over any other right. Moreover, existing law *already* sets out various circumstances prohibiting abortion previability. Under the statute in *Casey*, if a minor is unable to secure parental permission or judicial approval, that minor is prohibited from aborting her unborn child. 505 U.S. at 899. Likewise, in *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007), the Court upheld a statute prohibiting partial-birth abortion "both previability and postviability."

II. THE *CASEY* "UNDUE BURDEN" TEST ALSO DOES NOT CREATE A CATEGORICAL PREVIABILITY ABORTION RIGHT

Plaintiffs submit that "the 'categorical' rule . . . and the undue burden test are simply two ways of stating the same principle." Pl. Brief at 30. But for all of the reasons already stated, *Casey*'s "undue burden" test is not categorical.

First, *Casey*—like *Roe*—involved *balancing* state interests against a privacy right. *Supra* pp. 4-5. The Eighth Circuit recently affirmed that the "undue burden standard" is "so intertwined with underlying facts" that enjoining a law as unduly burdensome is improper without fact-finding and "weigh[ing]" the state's interests. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, No. 17-1996, 2018 U.S. App. LEXIS 25545, at *14 (8th Cir. Sept. 10, 2018).

Second, *Casey* examined the same interests that had been before the *Roe* Court. 505 U.S. at 871, 878. These did not include anti-discrimination principles.

Third, *Casey* considered regulations completely unlike the Antidiscrimination Law. They involved (1) informed consent (specifically, "inform[ing] the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child'"); (2) spousal notification, (3) parental consent for minors, and (4) recordkeeping. *Id.* at 881, 887, 889, 900. And other decisions that have used the undue burden test have done so in the context of regulations, not anti-discrimination laws. *See, e.g.*, *Planned Parenthood SW Ohio Reg. v. DeWine*, 696 F.3d 490 (6th Cir. 2012) (applying undue burden test to regulations on the use of mifepristone for medical abortions); *Women's Med. Prof's Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003) (applying undue burden to a statute regulating the types of abortion procedures allowed in the State).

Fourth, *Casey* cautioned that *Roe* significantly under-stated the State's interests there, specifically the protection of life: "in practice," *Roe* "undervalues the State's interest in the potential life within the woman." 505 U.S. at 875.

The undue burden approach of *Casey* does not result in an absolute, unconsidered, categorical rejection of all state interests not before the Court or addressed by *Casey* (or *Roe*). This is not how our system of justice works. "[E]ven the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). And, "[f]actual developments" and "changed circumstances" can give rise to a new constitutional inquiry. *Hellerstedt*, 136 S. Ct. at 2305. Ohio's compelling evidence supporting the Antidiscrimination Law should not be shuffled aside, never to be heard, based on a rigid, inflexible approach that exists in no similar constitutional-law context.

For these reasons, this Court should hold that the district court used the wrong legal standard in rejecting Ohio's interests preemptively. The Court's guidance is necessary to allow Ohio the opportunity to fully present its case.

III. THE ANTIDISCRIMINATION LAW SHOULD BE UPHELD UNDER ANY PROPER LEGAL STANDARD

The Antidiscrimination Law is supported by compelling state interests and is narrowly tailored. The law should prevail under any level of scrutiny—rational basis or strict scrutiny. Plaintiffs have not met their burden for the extraordinary relief sought.

A. Compelling state interests support the Antidiscrimination Law

The Antidiscrimination Law would survive strict scrutiny. Necessarily, therefore, it also survives any lower level of review.

Plaintiffs were unable to substantively contradict the State's compelling evidence establishing the high and widespread rate at which unborn children with Down syndrome are aborted. So instead, they chose to denigrate this evidence, claiming for example that the State presented "no evidence," that the State's arguments are "absurd," and that the State "impugn[ed] . . . women." Pl. Brief at 29, 33, 38. None of this is true, and hyperbole does not trump the record.

1. Preventing discrimination is a compelling state interest

Both Ohio and the federal government have a long history of efforts to eradicate discrimination against vulnerable populations. In 1990, Congress passed the Americans with Disabilities Act (ADA), finding that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." 42 U.S.C. § 12101(a)(1). Ohio also enacted legislation requiring accessibility and accommodation and prohibiting forms of discriminations. *See* Answer ¶ 1(f), R.29, PageID#612.

Ohio's Antidiscrimination Law is supported by this interest. And it is compelling. Courts have held that "[a] state's interest in eliminating

discrimination is a 'compelling interest' 'of the highest order.'" *Figueroa v. Foster*, 864 F.3d 222, 232 (2d Cir. 2017) (quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987)); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (stating that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent"). Preventing discrimination of all forms is salient: "the government has a compelling interest in eradicating discrimination *in all forms*." *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980) (emphasis added); *see also Russell v. Belmont College*, 554 F. Supp. 667, 677 (M.D. Tenn. 1982) ("[T]his nation has a strong policy against discrimination not only on the basis of sex *but in all forms*." (emphasis added)); *cf. EEOC v. R.G.*, 884 F.3d 560, 591 n.12 (6th Cir. 2018) (noting that Title VII serves a compelling interest in eradicating "all forms" of invidious discrimination).

Even though Plaintiffs concede that preventing discrimination can be compelling, Pl. Brief at 16, they say here the interest is just another way of "promoting potential life," *id.* at 29. But preventing discrimination and promoting life are not identical. After all, combatting discrimination in employment is not the same as promoting employment over unemployment generally. Nor is combatting discrimination in housing the same as promoting housing over homelessness

generally. The discrimination is the problem, regardless of the context. *Roe* and *Casey* did not consider discrimination. *See supra* pp. 3-5. And they did not lump the State's interest in maternal life into the same bin as protecting unborn life. *See id.* Moreover, preventing discrimination is its own justification that by itself is often sufficient to satisfy all levels of scrutiny. *See Roberts*, 468 U.S. at 628.

Traditionally, courts examine laws on the basis of all asserted state interests, even when that means considering new state interests not previously considered in precedent. *See supra* pp. 7-10. That should be so here. *See generally N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) ("In making this case-by-case inquiry into the constitutionality of Local Law 63 as applied to particular associations, it is relevant to note that the Court has recognized the State's 'compelling interest' in combating invidious discrimination."); *see also Glucksberg*, 521 U.S. at 731 (noting that a state has an interest in protecting "vulnerable groups," including the disabled). The State's interests here are distinct from the interests considered in *Roe* and *Casey*.

2. Ohio presented overwhelming evidence establishing extraordinarily high numbers of abortions after a diagnosis of Down syndrome

The Supreme Court has stated that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v.*

Shrink Mo. Gov't Pac, 528 U.S. 377, 391 (2000). Because preventing discrimination is not novel, the evidence needed to sustain the Antidiscrimination Law should not be extraordinary.

Regardless, Ohio has presented extensive evidence showing that the Antidiscrimination Law serves the compelling interest of eliminating discrimination against unborn children diagnosed with Down syndrome. One researcher has reported that the abortion rate after a prenatal diagnosis of Down syndrome is upwards of 92%. Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear*, 94 Arch Dis Child 823, 824 (2009), R.25-3, PageID#444. Others report numbers between 61% and 91%. Jamie L. Natoli et. al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates* (1995-2011), 32 Prenat. Diagn. 142, 142 (2012), R.29, PageID#601. Whether 9 out of every 10 babies with a Down-syndrome diagnosis are aborted, or "only" 6 out of 10, no one could reasonably dispute that the rate is staggeringly high. As to Plaintiffs' argument that the State's evidence is not limited to Ohio, Plaintiffs do not claim that the statistics are any different in Ohio. Nor do they provide even a single study with contrary findings. In any event, the studies on which Ohio relies show that this is both a global and a nationwide problem. *See* Ohio Brief at 18-19.

Furthermore, preventing discrimination extends to protecting the Down-syndrome community. Targeting Down syndrome for abortion has resulted in an estimated 30% reduction in the Down-syndrome community, Sullivan Decl. ¶ 10, R25-1, PageID#150, at a time when researchers would expect this number to increase, based on more women waiting longer to have children, *see* Skotko, *With New Prenatal Testing*, R.25-3, PageID#444. It is self-evident that decreasing the numbers of a demographic weakens its civic voice.

Moreover, fewer individuals with Down syndrome lead to reduced social interactions and fewer opportunities to "make friends with like individuals." Laura E. Holt, R.25-1, PageID#296-97. And, "[t]he more [the] state affirms and values the lives of these individuals from conception, the greater the impetus to refine and improve the support structures which are so crucial to the quality of life of these children and their families." Fernandes Decl. ¶ 13, R.25-1, PageID#170. On the other hand, selective abortions could lead to the belief that persons with Down syndrome "are dispensable." Sullivan Decl. ¶ 12, R.25-1, PageID#151.

Ohio has a compelling interest in protecting this vulnerable group from discrimination—indeed, potential elimination. *Glucksberg*, 521 U.S. at 731. Continuing to allow discriminatory abortions based on a diagnosis of this disability sends a message that those in the Down-syndrome community are not worth protecting. As some groups have asserted, selective abortions "violate the rights of

[the Down-syndrome] community" and take away from the need to change society's perception of individuals with Down syndrome and society's willingness to be more supportive and inclusive. A. Lee et al., *Ethical Public Health: More than Just Numbers*, 144 Public Health A1, A1 (2017), R.25-1, PageID#207.

3. Ohio presented extensive evidence about bias based on a diagnosis of Down syndrome

Numerous studies establish that some in the medical profession and the counseling process have biases toward abortions after a diagnosis of Down syndrome. For example, a Stanford study from 2014 reported that mothers of children with Down syndrome "commonly expressed" that the medical information they had received in prenatal counseling was "biased or overly negative." Gregory Kellogg et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Gent. Counsel 805, 810 (2014). Ohio's initial brief listed many additional recent studies all reporting substantially the same finding. Ohio Brief at 20-24. Ohio also presented declarations of individuals who had personally experienced bias and pressure. *Id*. at 25.

In addition to bias and pressure, some thought leaders openly advocate for what one journalist and historian has dubbed "eugenic abortion" targeting Down syndrome. *Id*. at 15. Others present the idea in more clinical-sounding terms, such as writing that "selective pregnancy terminations and reduced birth prevalence" of Down syndrome is "a desirable and attainable goal" that should be "fully

embrace[d]." *Id*. at 19-20. And others are arguing that with the rise of prenatal screening, those who choose not to have an abortion after a Down-syndrome diagnosis "morally" should be "asked to be held amenable for their choice." *Id*. at 14. In its initial brief, Ohio presented many more examples of this rhetoric and pressure. *Id*. at 13-20. The point remains unrebutted.

Plaintiffs' argument that "Defendants do not contest" that their clinics provide "non-directive patient education" is not persuasive because Ohio has not yet had any opportunity to discover Plaintiffs' practices. Pl. Brief at 9. Moreover, because Plaintiffs facially challenge the law, their practices, while relevant, are not the only relevant evidence: Plaintiffs seek to have the law invalidated as to all abortion providers. *Cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (holding courts should "[e]xercis[e] judicial restraint" with "facial challenge[s]" to prevent "premature interpretations of statutes").

4. Ohio's Antidiscrimination Law does not harm patient autonomy

Plaintiffs and one amicus group argue incorrectly that the law intrudes upon "patient autonomy." Pl. Brief at 35-36; Bioethicists Brief at 6-16. The amici briefly discuss other principles including beneficence and nonmaleficence, but that discussion is largely devoted to discussing "criminal and professional liability" rather than a substantive discussion of the principles. Bioethicists Brief at 19-20.

The principle of patient autonomy is not served by discriminatory abortions and biased counseling or other pressures toward abortions of unborn children with Down syndrome. As one amicus signatory has conceded, "the subtle shading of information by counselors against persons with Down syndrome" might be a cause for the extraordinary high number of abortions. Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement Challenging a Core Ethical Norm of Genetic Testing*, 13 PLoS Biol. 1, 2 (2015); Bioethicists Brief at A1-A2. He also candidly observed that: "When it comes to testing for Down syndrome, the impact of genetic testing and counseling is clear—abortions." *Id*.

The idea of singling out disabilities for abortion has become so extreme in some quarters that it is extending now to arguments for legalized infanticide, particularly when "abnormalities" are discovered after birth. *See* Alberto Giubilini, Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 J. Med. Ethics 261, 261 (2013). The authors of that paper singled out Down syndrome for special discussion, stating that "to bring up such children [with Down syndrome] might be an unbearable burden on the family and on society as a whole." *Id*. This viewpoint is contrary to all principles of medical ethics, particularly nonmaleficence (do no harm), which "typically does override other principles" such as patient autonomy. Beauchamp & Childress, Principles of

Biomedical Ethics, 152 (Oxford University Press, 7th ed. 2012). And it is contrary to the State's interest in preventing discrimination.

The Antidiscrimination Law also preserves the integrity of medicine. *See Gonzales*, 550 U.S. at 157 (noting that States have an interest in "protecting the integrity and ethics of the medical profession"); *cf. Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("[T]he States have a compelling interest in the practice of professions within their boundaries."). It promotes beneficence (having the best interests of patients in mind), nonmaleficence (avoiding harm), and distributive justice (treating all patients equally, regardless of gender, social class, or other medically non-relevant factors)." Sullivan ¶¶ 18, 19, R.25-1, PageID#153.

B. Ohio's Antidiscrimination Law is narrowly tailored

The Antidiscrimination Law is narrowly tailored to serve Ohio's compelling state interests.

Contrary to Plaintiffs' argument, the law is not "under-inclusive." Pl. Brief at 36. The State need not address all forms of discrimination, or indeed, all forms of disability discrimination, in order to be narrowly tailored. *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975) ("This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it."). This principle applies in every judicial-scrutiny context, including the highest. *See Williams-Yulee v. Fla.*

Bar, 135 S. Ct. 1656, 1669 (2015) (holding that, even under strict scrutiny, "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns").

Thus, when considering an area of concern, the legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955). And the Constitution "does not put a State to that all-or-nothing choice." *Williams-Yulee*, 135 S. Ct. at 1670.

The termination of up to 9 out of every 10 unborn children with Down syndrome is unquestionably an "acute" and "pressing" problem. Ohio's General Assembly was not required to address *all* forms of discrimination against those with disabilities to stop *this* discrimination; the law is not under-inclusive.

Likewise, the Antidiscrimination Law is not over-inclusive. Plaintiffs' argument to the contrary rests on second-guessing Ohio's legislative decision-making. They argue, for instance, that instead of the Antidiscrimination Law, Ohio should have passed new spending bills for "support for persons with Down syndrome." Pl. Brief at 38. This argument fails. The United States Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quotation omitted). Ohio

responded proportionately to a staggering rate of abortion in a vulnerable community. The State's compelling interest in eliminating invidious discrimination extends to discrimination itself—the selective termination of unborn children with Down syndrome and the effects this has on those with Down syndrome.

And contrary to Plaintiffs' assertion, the State can send a message regarding ethical and moral concerns. In *Glucksberg*, for example, the Supreme Court said that Washington had an "interest" in "protecting the vulnerable" from "prejudice" and "societal indifference." 521 U.S. at 732. The Court noted approvingly that the State could reject a "sliding-scale approach" to the value of life that depends on a person's "physical or mental condition." *Id*. at 729.

In *Gonzales*, the Supreme Court, in upholding the federal partial-birth abortion ban, held that the government can conclude that a type of abortion "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." 550 U.S. at 158. The Court further noted Congress was concerned that "approving . . . a brutal and inhumane procedure *by choosing not to prohibit it* will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Id.* at 157 (emphasis added). Similarly, by allowing discriminatory abortions, the State could be understood

implicitly to endorse the practice. In passing the Antidiscrimination Law, Ohio affirmed that discrimination against those with Down syndrome is not permissible and that those with Down syndrome are valued members of society. The law targets the exact problem at issue—discriminatory abortions—and no lesser regulation would fully address the problem.

Finally, the law does not prohibit abortions based on the health or life of the mother. If the medical judgment of a physician is that an abortion is necessary to preserve the life or health of the mother, then the abortion is not based on a diagnosis of Down syndrome. Moreover, it is well-established that the "life and health" requirement need not be explicitly stated within the legislation. *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 485 n.8, 494 (1983) (upholding requirement that a second physician attend abortions even though there was "no clearly expressed exception on the fact of the statute"). And if the Court does not agree that the law implicitly includes a "life and health" exception, any remedy should be limited to protecting the life and health of the mother—not wholesale invalidation of the law. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 331-32 (2006) (holding that courts need not "invalidate the law wholesale" and relief should be limited to an "injunction prohibiting unconstitutional applications").

* * *

Here, the State's compelling interests outweigh any countervailing considerations, and the law is narrowly tailored to address those interests. Accordingly, because the Antidiscrimination Law satisfies strict scrutiny, it would also satisfy rational-basis and all other types of review—except, of course, *no review*, which is what the district court's categorical and absolute approach entails.

IV. THE EQUITIES AND THE PUBLIC INTEREST FAVOR OHIO

The injunction factors other than the merits also favor Ohio. Preventing discriminatory abortions does not harm the Plaintiff abortion providers. But enjoining the law does harm Ohio: "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers).

Furthermore, an injunction is not in the public interest. Ohio has provided extensive evidence of the pressure to terminate based on a Down-syndrome diagnosis that occurs prior to viability. *See* Ohio Opp. at 11-18, R.25, PageID#121-128; *see also* Answer ¶ 1, R.29, PageID#600-15. The Antidiscrimination Law seeks to eliminate this discrimination based this diagnosis. It is undisputed that eliminating discrimination is in the public interest. *See Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 331, 318 n.8 (3d Cir. 2006) (eliminating discrimination in the workplace is in the public interest); *Naekel v.*

Dep't of Transp., 845 F.2d 976, 980 (Fed. Cir. 1988) (stating that the elimination of discrimination is in the public interest).

CONCLUSION

Because the district court's decision used a novel "absolute" approach to abortion that is found nowhere else in constitutional law including in *Roe* and *Casey*, the Court should hold that the district court used the wrong legal standard in rejecting Ohio's interests and reverse the court's injunction against the Antidiscrimination Law. If the interests here are weighed, the Antidiscrimination Law should survive any level of judicial scrutiny.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a).

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32(a)(7), the brief contains 6,453 words.

2. The brief has been prepared in a proportionally spaced typeface using a Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 19th day of September 2018. Electronic service was therefore made upon all counsel of record on the same day.

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