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
District Court Case No. 1:18-cv-00109

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because this case raises important constitutional questions, the State Defendants-Appellants—officials from the Ohio Department of Health and Ohio Medical Board—request oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On March 14, 2018, the district court granted a preliminary injunction to the plaintiff abortion providers. Order, R.28, PageID#578. On April 11, 2018, the State Defendants timely appealed the preliminary injunction. Notice, R.30, PageID#629. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

A recently enacted Ohio law—the "Antidiscrimination Law"—prohibits an abortion provider from performing an abortion if the provider knows that the decision to abort arises from a diagnosis or indication that the unborn child has Down syndrome. The ultimate question in this case is whether the district court properly granted a preliminary injunction facially enjoining this law. That general question incorporates two legal issues:

1. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court expressly rejected the claim that the right to abortion is "absolute" and entitles a woman to obtain an abortion "for whatever reason she alone chooses." *Id.* at 153. Here, however, the district court repeatedly treated this right to a previability abortion that was developed in *Roe* as a "categorical" right that does not allow for any limitations based upon the reasons for the abortion. Did the district court properly interpret *Roe* and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)?

2. If the Court determines that the district court legally erred in its broad reading of Supreme Court precedent, the Court may vacate the preliminary injunction and remand for the district court to apply the correct legal standard in the first instance. The Court may, alternatively, answer a second question for the first time on this appeal: Does Ohio have sufficiently important antidiscrimination interests to justify a narrow limitation that bars only those previability abortions arising from a Down-syndrome diagnosis?

INTRODUCTION

In the decades since *Roe v. Wade*, 410 U.S. 113 (1973), declared a constitutional right to an abortion, the status and scope of that right have been much debated, but the Supreme Court has never wavered in stressing this limit: The right is not absolute. Indeed, *Roe rejected* the claim that a "woman's right is absolute" and entitles her to abort "at whatever time, in whatever way, and *for whatever reason* she alone chooses." *Id.* at 153 (emphasis added). The Court has thus rejected challenges to laws that limit the "time" or "way" to obtain an abortion, upholding waiting periods as to "time" and method-of-abortion limits as to "way." *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (partial-birth method); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-87 (1992) (plurality op.) (24-hour waiting period). Here, Ohio enacted an important limit on

performing abortion "for any reason"—as Ohio seeks to prevent discrimination against some of the most vulnerable among us.

Ohio seeks to protect those with Down syndrome from discrimination: specifically, discrimination in being targeted for abortion. Ohio enacted a law that bars any person from performing an abortion if the person knows that the decision to abort is motivated by a diagnosis or indication that the unborn child has Down syndrome. Ohio did so because of an emerging trend: In America and around the world, some voices, from medicine to academia to government, are calling for the complete elimination of the Down-syndrome population through abortion. Many families are also reporting, and studies are showing, that some purportedly neutral prenatal testing and counseling programs amount to an improper pressure to abort. Some countries even claim to be close to "eradicating" Down syndrome in this way. So Ohio's General Assembly stepped in to stop such discrimination.

Plaintiffs, several abortion providers, sued to enjoin the law, saying that Ohio could not protect those with Down syndrome in this way. The district court agreed and preliminarily enjoined the law on its face. But the court did not weigh Ohio's interests and find them wanting as in a typical balancing-test case. It did not apply *Casey*'s undue-burden test or revert to *Roe*'s strict-scrutiny test, asking if Ohio's interests were "compelling" enough for the law to survive. Instead, the

court said that the abortion right was "categorical" or "absolute," such that no interests could even be considered, let alone suffice, to justify the law.

The district court got the law wrong in saying that previability abortion is an unlimited right. *Roe* says otherwise. And the court's "categorical" approach elevates abortion above express constitutional rights, such as free speech, freedom of religion, or equal protection. Here, Ohio has compelling interests in protecting those with Down syndrome, including children and adults who feel threatened by the moves to eliminate the Down-syndrome population, and Ohio also is interested in protecting the integrity of the medical profession from advancing this trend. The court's flawed premise is a legal error that undercuts any basis for its injunction. This Court should reverse.

STATEMENT OF THE CASE AND FACTS

The district court preliminarily enjoined an Ohio law that is designed to protect those with Down syndrome. The facts thus necessarily begin with the history and reasons that led Ohio to pass this law.

A. Ohio Has Long Supported People With Down Syndrome And Their Families, Who Face Both Inherent Challenges And Challenges From Third-Party Discrimination

Every human being, from conception, has genetic material in chromosomes contained in the nucleus of every cell, and those genes and chromosomes determine or influence various characteristics. *Chromosomes*, U.S. Nat'l Library

of Med., www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0025047/ (last visited June 20, 2018). Most individuals have 23 pairs of chromosomes. *Id.* Those who have a third chromosome on the 21st pair have Trisomy 21 or Down syndrome. *Facts About Down Syndrome*, Centers for Disease Control and Prevention, https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html (last visited June 20, 2018).

People with Down syndrome usually have "mild developmental disabilities" and often have other medical problems, such as heart or endocrine issues. Fernandes Decl. ¶ 3, R.25-1, PageID#165. Yet advances in medicine, education, and support have dramatically changed the circumstances of persons with Down syndrome. *Health and Medical Issues*, Down Syndrome Education Int'l, https://www.down-syndrome.org/en-us/about-down-syndrome/health (last visited June 20, 2018); *For New Parents: General*, Down's Syndrome Ass'n, https://www.downs-syndrome.org.uk/for-new-parents/faqs/general/ (last visited June 20, 2018).

Ohio offers "a lot of support—both financial and emotional—for parents of children with Down syndrome." Keough Decl. ¶ 6, R.25-1, PageID#177; *see also* Scheid Decl. ¶ 4, R.25-1, PageID#180-81 (describing her daughter's services and therapies through county programs). Some Medicaid-funded organizations teach life and job skills. *See, e.g.*, Custer Decl. ¶¶ 1-2, R.25-2, PageID#371. Support

groups, such as chapters of the Down Syndrome Association, also "help parents of children with Down syndrome to focus on their children's abilities rather than their disabilities." Keough Decl. ¶ 5, R.25-1, PageID#177. Representative Sarah LaTourette, a sponsor of the Ohio law, testified, "Regardless of [in] which corner of the state you live, there is an organization dedicated to improving the lives of people with Down syndrome and their families." LaTourette Test. at 2, R.25-1, PageID#190. Adoption agencies also have parents who are waiting specifically to adopt a child with Down syndrome. Boblitt Decl. ¶¶ 5-7, R.25-1, PageID#193-94.

Most individuals who have Down syndrome report positive self-esteem and happiness. In one survey, 99% felt happy with their lives, 97% liked who they were, and 86% said they could make friends easily. Brian G. Skotko et al., *Self-Perceptions From People With Down Syndrome*, 155 Am. J. Med. Genet. Part A 2360, 2360 (2011), R.25-1, PageID#196. Health-care advances have extended the average life expectancy for children born with Down syndrome from nine years in 1929 to over 60 years today in developed countries. A. Lee et al., *Ethical Public Health: More than Just Numbers*, 144 Public Health A1, A1 (2017), R.25-1, PageID#207. Many individuals with Down syndrome can have gainful employment, have active social lives, and marry and live independently. *For New Parents: General*, Down's Syndrome Ass'n, https://www.downs-syndrome.org.uk/for-new-parents/faqs/general/ (last visited June 20, 2018).

Families are also positive. "Some studies on actual parents of children with Down Syndrome find that parenting such a child is personally enriching, and even joyful." Laura E. Holt, *Parental Opinions About Prenatal Genetic Screening and Selective Abortion for Down Syndrome* 8 (May 2017) (unpublished M.A. thesis, Univ. of Louisville) (on file with Univ. of Louisville's Inst'l Resp.), R.25-1, PageID#226. Indeed, such parents talk of their children's value and of their contributions to society. One parent said her son "laughs, plays, walks, eats, signs and loves fiercely!" Kuhns Decl. ¶ 5, R.25-1, PageID#186. A mother said her 19-year-old daughter helped her with the "site installation for a webpage," and that they plan "to start a greeting card business" together. Scheid Decl. ¶¶ 11-12, R.25-1, PageID#182. Another said that her 23-year-old son completed job training during high school, finished an internship, and has been working at the zoo since 2016. Gill Decl. ¶¶ 1, 5, R.25-2, PageID#374-75. A different parent stated "that all children have varying challenges," but "we live among a diverse population and that we are better for it. Getting to know people with Down syndrome teaches us that they have gifts too and the world is a better place with them in our lives." Keough Decl. ¶¶ 5, 7, R.25-1, PageID#177. "The vast majority of brothers and sisters describe their relationship with their sibling with D[own] S[yndrome] as positive and enhancing." Skotko et al., *Having a Brother or Sister With Down*

Syndrome: Perspectives From Siblings, 155 Am. J. Med. Genet. Part A 2348, 2348 (2011).

B. Notwithstanding These Positive Developments, People With Down Syndrome Have Long Faced—And Continue To Face—Discrimination

Despite positive developments in recent decades, individuals with Down syndrome continue to face challenges not inherent in their genetic condition, but arising from discrimination. This history shows vast discrimination by governments and society in the early twentieth century, positive attempts to counter that discrimination in the later 20th century, and an emerging resurgence of the attitudes behind the older approach.

One Ohio bioethicist—Dennis M. Sullivan, M.D., M.A. (Bioethics and Moral Philosophy), and the Director of the Center for Bioethics at Cedarville University—explained that society is "on the verge of committing many of the same mistakes" of the past with regard to Down syndrome. Sullivan Decl. ¶¶ 1, 14, R.25-1, PageID#147, 151. Discrimination against Down syndrome by some in the medical profession today, he asserts, is a "subtle" version of past "violations of human dignity." *Id.* ¶¶ 11, 14, R.25-1, PageID#151.

1. In the early twentieth century, government discrimination against the disabled, especially those with mental challenges, was widespread

In the early twentieth century, overt discrimination against individuals with disabilities was widespread. *See Tennessee v. Lane*, 541 U.S. 509, 534-35 (2004) (Souter, J., concurring). That discrimination extended to governments. And reaching beyond the familiar categories of housing, employment, and the like, the discrimination even sought to keep the disabled invisible from the rest of society.

As early as the mid-1800s and extending into the early twentieth century, many cities had ordinances restricting individuals with physical or mental challenges from even appearing in public. *Id.*; *see also* Susan M. Schweik, *The Ugly Laws: Disability in Public* 1-2 (N.Y. Univ. Press 2009). An 1881 Chicago ordinance barred anyone "diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object" from being in the "public view." Schweik, *supra*, at 1-2. Cleveland and Columbus had similar laws. *Id.* at 3, 15.

Other laws at the time did even more, as they "indiscriminately requir[ed] institutionalization, and prohibit[ed] certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public." *Lane*, 541 U.S. at 534-35 (Souter, J., concurring). "[I]t was probably more the norm than the exception for th[ese] law[s] to show up on the code books

of American cities sometime in the nineteenth or very early twentieth century." Schweik, *supra*, at 3.

Discrimination gradually shifted from keeping the disabled invisible to preventing them from being born, with a focus on those labeled as mentally limited. Under States' "eugenics laws," over 60,000 individuals deemed "feeble-minded" were forcibly sterilized. Alexandra Minna Stern, *That Time the United States Sterilized 60,000 of Its Citizens*, Huffington Post, Jan. 7, 2016, R.25-2, PageID#377. Many of those who were forcibly sterilized were incarcerated in institutions for the mentally ill. *Lane*, 541 U.S. at 534-35 (Souter, J., concurring).

This discrimination extended to the courts. The Supreme Court, rather than protecting the rights of discrete and insular minorities, applauded the reduction of the "unfit" population. In a notorious 1927 case, the Court approved the compulsory sterilization of a "feeble minded" woman who was "the probable potential parent of socially inadequate offspring." *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (quotation omitted). The Court opined that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id*. at 207.

The drive to "improve" the genetic stock of humanity (*i.e.*, eugenics) was popular and promoted by many influential Americans. Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 2, 57 (Penguin Books 2016). It "permeated the popular culture," with "mass-market magazines urg[ing] their readers to do their part to breed superior human beings." *Id*. at 3. "New York's American Museum of Natural History hosted the Second International Eugenics Congress—and the U.S. State Department sent out the invitations." *Id*. At that conference, the museum's president implored those in attendance to "enlighten the government" about the "multiplication of worthless members of society." *Id*. at 3-4. At least 376 American universities taught courses on the topic. *Id*. at 4.

Overall, "[e]ugenics was ubiquitous during the first three decades of the twentieth century. Hundreds and probably thousands of scholars and scientists . . . proudly claimed to be eugenicists." Thomas C. Leonard, *Illiberal Reformers: Race, Eugenics & American Economics in the Progressive Era* 190 (Princeton Univ. Press 2016). These influential individuals "convinced governments to regulate," among other things, "reproduction . . . in the name of eugenics." *Id*.

2. Later in the twentieth century, society and governments turned to protecting people with physical and mental challenges

By the mid-twentieth century, public attitudes toward individuals with mental and physical challenges began to change. Many discriminatory laws were repealed or struck down. Laws prohibiting the disabled from appearing in public places, for example, were finally repealed. Schweik, *supra*, at 6. Chicago repealed its ordinance in 1973, and possibly the last arrest relying on one of these laws was in Omaha in 1974. *Id*. at 6, 279-80.

New laws sought to address discrimination and unfair treatment of individuals with disabilities, and to accommodate differences instead. In 1965, Ohio enacted laws requiring accessibility and accommodation. Ohio Rev. Code § 3781.111. In 1976, Ohio prohibited disability-based discrimination in employment and housing. *Id.* § 4112.02.

In 1990, the federal government followed the States' lead and enacted the broad Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101 *et seq*. It prohibits discrimination in employment, public services, public accommodations, and telecommunications. *Id*. §§ 12111-12213. Congress found 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." *Id.* § 12101(a)(1). Congress

also found that "discrimination against individuals with disabilities persists in such critical areas as . . . health services," and "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(3)-(4).

3. Modern bias against those with Down syndrome nevertheless continues, including an effort to eliminate the Down-syndrome population

Despite decades of anti-discrimination efforts, individuals with mental and physical challenges continue to face discrimination. Schweik, *supra*, at 284. Those with Down syndrome face particular discrimination that is both targeted and more systemic. Specifically, many people and governments promote the idea that reducing or even eliminating the number of people with Down syndrome in society would be a positive cultural advance.

The Dutch government, for example, aggressively markets prenatal testing as a means to "end" Down syndrome, with the National Institute for Public Health and the Environment in that country aiding a television series named "The Last Downer." Renate Lindeman, *A Moral Duty to Abort*, Huffington Post, Sept. 21, 2017, R.25-1, PageID#160. Iceland is reportedly "close to *eradicating* Down syndrome births." Julian Quinones et al., "*What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome Is Disappearing*, CBS

News, Aug. 14, 2017 (emphasis added), R.25-2, PageID#382. "With the rise of prenatal screening tests across Europe and the United States, the number of babies born with Down syndrome has significantly decreased, but few countries have come as close to *eradicating* Down syndrome births as Iceland." *Id.* Yet "[o]ther countries aren't lagging too far behind in Down syndrome termination rates." *Id*.

Such blunt discussion of "ending" Down syndrome is supplemented by public discussion of not just an *option* to abort, but a claimed *duty* to abort. An Oxford professor advocated that, after a prenatal diagnosis of Down syndrome, parents have an "an ethical responsibility to 'abort it and try again.'" John Bingham, *Richard Dawkins: 'Immoral' to Allow Down's Syndrome Babies to Be Born*, The Telegraph, Aug. 20, 2014, R.25-2, PageID#403. In a debate before the U.N. Human Rights Committee, one nation's representative declared that helping "disabled people once they are born . . . doesn't mean that we have to . . . allow a fetus suffering with impairment to live." Renate Lindeman, *UN Human Rights Committee: Stop Equating Life with a Disability to Suffering*, Huffington Post, Nov. 9, 2017, R.25-2, PageID#407.

A professor of medical ethics contends that parents who decline prenatal testing "morally" should be "asked to be held amenable for their choice." Lindeman, *A Moral Duty to Abort*, R.25-1, PageID#161. An influential writer in France has referred to Down syndrome as "a Greek tragedy." Sullivan Decl. ¶ 9,

R.25-1, PageID#150. One journalist and historian has advocated for a right to what he terms "eugenic abortion." Fernandes Decl. ¶ 10, R.25-1, PageID#169.

At times, some sources have described abortion of those with Down syndrome as a voluntary "choice," while simultaneously seeking to influence that choice. The Dutch Minister of Health, for example, said that, "[i]f freedom of choice results in a situation that nearly no children with Down syndrome are being born, society should accept that." Renate Lindeman, *Dutch Minister of Health: If National Screening Program Leads to Disappearance of People with Down Syndrome, Society Has to Accept That*, Huffington Post, Jan. 9, 2017, R.25-2, PageID#413. But her agency, the Dutch Ministry of Health, published a chart depicting Down syndrome as the most "costly" condition to Dutch society. Lindeman, *A Moral Duty to Abort*, R.25-1, PageID#160. And, as noted above, the Dutch government is aggressively seeking to "end" Down syndrome.

Similarly, statements that are superficially neutral and factual are often supplemented by other non-neutral statements. In California, for example, a 2009 brochure for pregnant women whose children screen positive for Down syndrome stated that "[t]his birth defect causes mental retardation and some serious health problems." Linda L. McCabe et al., *Down Syndrome: Coercion and Eugenics*, 13 Genetics in Medicine 708, 709 (2011), R.25-2, PageID#387. A California prenatal

screening program also "described such pregnancies that are continued as 'missed opportunities.'" *Id.*

Often, "descriptive" materials are imbalanced in stressing only perceived negatives. A study of pamphlets from Canadian prenatal screening centers and clinics found that only 2.4% "of the extracted sentences were categorized as conveying a positive message about" Down syndrome. Karen L. Lawson et al, *The Portrayal of Down Syndrome in Prenatal Screening Information Pamphlets*, 34 J. Obstet. Gynaecol. Can. 760, 762, 764 (2012), R.25-2, PageID#395, 397.

The imbalance is furthered when positive speech about those with Down syndrome is not only omitted, but suppressed. The French Broadcasting Council has banned a video that features children with Down syndrome talking about their happy lives. Elizabeth Koh, *'Dear Future Mom' Ad Banned Because It Could 'Disturb' Women Who Had Abortions*, Miami Herald, Nov. 25, 2016, R.25-2, PageID#390-91.

All of this discrimination affects those with Down syndrome and their families. As one parent observed, "[a] woman in a white lab coat" on television "cited the [Iceland] statistic as a cultural values achievement." Custer Test., at 1-2, R.25-2, PageID#418-19. Another testified, "how sad it was that anyone in today's world could ever be proud of a statistic like this," and asked "[w]here does this genetic selectivity stop[?]" Ryan Test. at 2, R.25-2, PageID#423. Another said,

"[e]liminating a population of people based on ignorance and fear is reprehensible." Gill Decl. ¶ 6, R.25-2, PageID#375. Recently, a contributor to the Huffington Post asked, "[i]f there is International consensus that sex-selective abortion is a threat to the human rights of women, then WHY does the same U.N. push disability-selective abortion as a human right?" Lindeman, *UN Human Rights Committee*, R.25-2, PageID#410.

Those with Down syndrome and their families are sensitive to how current trends echo past discrimination. "Communities oppressed by the scientific misuse of the eugenics movement are apt to be wary when similar genetic tools are repackaged." Paul Steven Miller & Rebecca Leah Levine, *Avoiding Genetic Genocide: Understanding Good Intentions and Eugenics in the Complex Dialogue Between the Medical and Disability Communities*, 15 Genet. Med. 95, 96-97 (2013).

Frank Stephens, Special Olympian and advocate for individuals with disabilities, added in congressional testimony that "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just terminate those pregnancies." Stephens Test. at 1, R.25-1, PageID#144. And, he said, recent efforts to eliminate Down syndrome push an agenda "that people [with Down syndrome] should not exist." *Id.*

For families of those with Down syndrome, these concerns are especially heightened when pressure or biased information arises from some in the medical community.

4. Information by some in the medical community distorts the field of prenatal testing and responses to test results, and harms understanding of those with Down syndrome

Many studies show that the process of prenatal testing, along with the advice and care that follows it, can provide biased information and pressure to abort, rather than accurate information, empathy, and access to support for families who have babies with Down syndrome.

In recent years, "cell-free" DNA testing has greatly expanded the availability of prenatal screening for Down syndrome. Fernandes Decl. ¶ 6, R.25-1, PageID#166-67. "Cell-free DNA is fetal DNA circulating in the maternal bloodstream." *Id.* Cell-free DNA testing is relatively non-invasive, requiring only a blood draw from the mother. *Id.* It carries a "5% false-positive rate for Down syndrome," and if Down syndrome is detected, more invasive diagnostic testing often follows. Sullivan Decl. ¶ 4, R.25-1, PageID#148.

As prenatal genetic testing for Down syndrome has become commonly available, abortions of unborn children with Down syndrome have increased. Dr. Peter McPharland recently noted the profound "impact" of widespread genetic testing. Peter McPharland, *Second Meeting of the Citizens' Assembly* (Jan. 7,

2017), https://www.youtube.com/watch?v=GC1c3ETy8Jo (last visited June 20, 2018). "In Iceland," he said, "no babies have been born with Down syndrome in the last four or five years." *Id*. And "in Denmark over the past three or four years there have only been a handful of babies with Down syndrome born." *Id*. In France, 96% of babies are aborted after a diagnosis of Down syndrome. Sullivan Decl. ¶ 9, R.25-1, PageID#150. In the United Kingdom, the rate is nearly 100%. *Id*.

In America, abortion rates after a Down-syndrome diagnosis are also high. Dr. Sullivan notes that "a recent systematic review of 24 studies, all from clinical sites in the United States, revealed that Down syndrome is a significant reason for women to terminate their pregnancies, with between 61% and 91% choosing abortion when Trisomy 21 is discovered on a prenatal test." Sullivan Decl. ¶ 8, R.25-1, PageID#149-50. Those high rates have a long-term effect: A recent report estimated that the cumulative effect of abortions "over the past several years has been to reduce the Down-syndrome community by 30%." *Id.* ¶ 10.

Some doctors expressly urge that abortion should be the goal of prenatal testing. A Mount Sinai medical professor advocated that "selective pregnancy terminations and reduced birth prevalence" of Down syndrome is "a desirable and attainable goal." David A. Savitz, *How Far Can Prenatal Screening Go in Preventing Birth Defects?*, 152 J. Pediatrics 3, 3 (2008). He also wrote that "[t]he

ideal screening program" would involve "the health care community and public" "fully embrac[ing] the strategy" of "prevent[ing] the adverse outcome [Down syndrome]." *Id*.

Studies show that some in the medical profession, and in the counseling process itself, have been at least partly responsible for the high rate of abortion after a diagnosis of Down syndrome. Dr. Sullivan opined that "overt or subtle bias or coercion" in this context "after a diagnosis of Down syndrome is a serious problem." Sullivan Decl. ¶ 15, PageID#151. Robin Lynn Treptow, Ph.D. (Psychology), M.A. stated, "[a]ccruing data shows moderate to strong bias against children and adults with T21—with greater effects when faces have more stereotypic DS features (e.g., viewed as less intelligent, less human)—and others with intellectual disability. Even health care professionals show bias against persons with T21." Treptow Decl. ¶ 6, R.25-2, PageID#427 (citations omitted). Ashley K. Fernandes, M.D., Ph.D. (Philosophy (Bioethics)), and also President Trustee of Ohio Right to Life, agrees, stating that "[t]he availability of non-invasive screening is now placed into the context of an empirically-known, implicit-bias among many genetic counselors." Fernandes Decl. ¶ 2, 7, R.25-1, PageID#164-65, 167.

Studies provide data consistent with these opinions. A 2017 study noted that mothers of children with Down syndrome found "that one major barrier" was "the

medical professional or caseworker's biases toward raising a child with D[own] S[yndrome]." Hannah Korkow-Moradi et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*, 28 J. Fam. Psychotherapy 193, 197 (2017). "A mother shared that she was encouraged to terminate, and that if it was an issue for them [healthcare professionals] personally, they would choose to terminate as well." *Id.* Further, "[o]ther mothers who received a post-natal diagnosis were given the option and strongly encouraged to either institutionalize or allow their child to become a ward of the state after testing revealed indicators of D[own] S[yndrome]." *Id.*

A 2013 study reported that many parents of children with Down syndrome had experienced "pressure to terminate the pregnancy." Briana S. Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group Experiences*, 51 Intellectual and Developmental Disabilities 446, 455 (2013), R.25-2, PageID#438. The parents in the study "reported a lack of accurate and current information about D[own] S[yndrome] and little to no compassion or support from the medical professionals with whom they interacted." *Id.* The parents in the study were 2.5 times more likely to have a negative experience after receiving the diagnoses than to have a positive one. *Id.* at 453, PageID#436.

A 2012 report observed that some "[g]enetic counselors were more likely to emphasize the clinical information and negative aspects of the diagnosis." Sullivan Decl. ¶ 16, R.25-1, PageID#152 (quotation omitted). Likewise, a 2011 medical paper reported that some "genetic counselors . . . are known to have a more negative perspective on disabilities than individuals whose lives are directly affected by them and these attitudes may affect their description of disabling conditions in a prenatal setting." Fernandes Decl. ¶ 7, R.25-1, PageID#167 (quotation omitted).

A 2009 study noted that mothers who "received a prenatal diagnosis of D[own] S[yndrome] and chose to continue their pregnancies . . . indicated that their physicians often provided incomplete, inaccurate, and, sometimes, offensive information about D[own] S[yndrome]." 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#445. Another study reported that 63.31% of obstetrician/gynecologists support abortion as a "treatment option" for non-lethal fetal abnormalities. Denis Cavanagh et al., *Changing Attitudes of American OB/GYNs on Legal Abortion*, 20 Female Patient 48, 49 (1995), R.25-3, PageID#450.

In a survey of 499 primary care physicians, thirteen percent admitted that "they 'emphasize' the negative aspects of D[own] S[yndrome] so that parents

would favor a termination." Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 Am. J. Ob. & Gyn. 670, 670-71 (2005), R.25-3, PageID#453-54. The researcher noted that "health care providers have historically operated under the assumption that if a woman consents to prenatal screening or diagnosing, she must believe that having a child with D[own] S[yndrome] would be an undesired outcome and wish to terminate her pregnancy if such a diagnosis were made prenatally." *Id.* at 676, PageID#459.

A Canadian study found "evident and significant" judgmental bias among doctors and other professionals. Karen L. Lawson, *Perceptions of Deservedness of Social Aid as a Function of Prenatal Diagnostic Testing*, 33 J. Applied Social Psychology 76, 79-80, 86 (2003). That article also cites other papers describing "social commentators promoting financial and legal repercussions for women who do not use PDT [prenatal diagnostic testing] to prevent the birth of a child with a disability." *Id.* at 87.

Studies also suggest that pregnant women often do not receive accurate, objective information about Down syndrome. A Stanford study reported that mothers of children with Down syndrome "commonly expressed" that the medical information they had received was "biased or overly negative." Gregory Kellogg et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive*

Prenatal Testing, 23 J. Genet. Counsel 805, 810 (2014). Another paper noted that "several studies" of genetic counseling "indicate that descriptive information-giving about Down syndrome is frequently brief and often has a negative bias." Jan Hodgson & Jon Weil, *Talking About Disability in Prenatal Genetic Counseling: A Report of Two Interactive Workshops*, 21 J. Genet. Counsel 17, 19 (2012). Another paper observed, "Professionals often perceive that a person with a significant physical or cognitive disorder . . . might not want to be alive because their quality of life is perceived as poor" and "[t]he attitudes of health care providers toward disability are important because they can affect the health care provided." Kristi L. Kirschner et al., *The Impact of Genetic Technologies on Perceptions of Disability*, 8 Quality Mgmt. in Health Care 19, 22 (2000).

Studies from other countries provide similar findings. A 2007 study of Dutch women who aborted after a Down-syndrome diagnosis found that many had adopted a negative perception about society's respect for children with Down syndrome. Holt at 15-16, R.25-1, PageID#233-34. A study of genetic counseling at public hospitals in Australia found that the "descriptions of Down syndrome were frequently narrow, with a focus on the negative aspects of the condition." Jan M. Hodgson et al., *"Testing Times, Challenging Choices": An Australian Study of Prenatal Genetic Counseling*, 19 J. Genet. Counsel 22, 23, 34 (2010).

Those data are supported by parents explaining their experiences of biased counseling. One couple stated that doctors noted that their newborn child had characteristics associated with Down syndrome and the couple "could, and probably should, institutionalize" their child because "she would be a drain on [their] family." Keough Decl. ¶¶ 2-3, R.25-1, PageID#176-77. The same couple, with another pregnancy, was "strongly encouraged to consider abortion" because "there was a 1 in 26 chance" of "a severe disability." *Id.*, ¶¶ 8-9, R.25-1, PageID#177-78. Another mother, after an abnormal ultrasound, felt "pressure[d]" to have an abortion. Mazelin Decl. ¶ 16, *Planned Parenthood v. Comm'r*, Case No. 1:16-cv-763-TWP-DML (S.D. Ind.) (May 27, 2016), R.25-3, PageID#467. And another said that, after being told that her "baby was at high risk for several genetic problems," doctors "bullied" her and "tried to convince [her] to have an abortion." Moon Decl. ¶¶ 4, 8-9, *Planned Parenthood v. Comm'r*, Case No. 1:16-cv-763-TWP-DML (S.D. Ind.) (May 26, 2016), R.25-3, PageID#470-71. Dr. Treptow also received pressure, stating that she "felt" the doctors made "a strong unspoken push for us to abort this baby if" there were "signs of T21." Treptow Decl. ¶ 3, R.25-2, PageID#426. And Dr. Fernandes described a health care co-worker who was "strongly pressur[ed]" to have an abortion after a positive prenatal screen. Fernandes Decl. ¶ 8, R.25-1, PageID#168.

C. Ohio's General Assembly Passed The Challenged Law Out Of Concern For Discrimination Against Those With Down Syndrome

Addressing these concerns, Ohio's General Assembly passed H.R. 214, which enacted Ohio Revised Code §§ 2919.10 and 2919.101, and amended Ohio Revised Code § 3701.79 (together, the "Antidiscrimination Law").

Section 2919.10 prohibits an individual from intentionally performing or inducing an abortion if the individual "has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of" a test resulting indicating that the unborn child has Down syndrome, a prenatal diagnosis of Down syndrome, or "any other reason to believe that an unborn child has Down syndrome." Ohio Rev. Code § 2919.10(B). The law treats violations of this prohibition as a "felony of the fourth degree," *id.* § 2919.10(C), and directs the state medical board to revoke the license of physicians who violate it, *id.* § 2919.10(D). Section 3701.79 requires physicians who perform abortions to provide Ohio's Department of Health with an "abortion report" that contains various information. *Id.* § 3701.79(C). Section 2919.101 changed the reporting information to include the physician's acknowledgment that the abortion was not because of the unborn child's Down syndrome. *Id.* § 2919.101(A).

D. Ohio Abortion Providers Challenged Ohio's Antidiscrimination Law, And The District Court Preliminarily Enjoined It

In February 2018, Plaintiffs (together, "abortion providers") sued, asserting one claim: that the Antidiscrimination Law violated the substantive-due-process right to abortion established by *Roe v. Wade*, 410 U.S. 113 (1973). Compl., R.1, PageID#4-6, 13. The abortion providers sued the Director of Ohio's Department of Health (which administers the law's reporting requirements), two officers of the State Medical Board (which must revoke the license of physicians who violate the law), and four county prosecutors (as the law has criminal penalties). *Id.*, PageID#6-7. The county prosecutors deferred to the State Defendants and the Ohio Attorney General to defend the law. Notice, R.19, PageID#94-95. The abortion providers sought a preliminary injunction to enjoin the law before its then-approaching effective date in March 2018. Mot., R.3, PageID#17.

The district court granted a preliminary injunction facially enjoining the law. Order, R.28, PageID#596. The court recognized that it must consider four factors when deciding whether to grant an injunction: (1) the likelihood of success on the merits; (2) the plaintiffs' alleged irreparable injury; (3) any harm to third parties; and (4) the public interest. *Id.*, PageID#583.

The district court held that the abortion providers were likely to succeed on the merits. It stated that "[t]he Supreme Court has recognized that the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those

guarantees that help give them life and substance." *Id.*, PageID#584. A right to privacy, the court added, flowed out of these penumbras for "[p]ersonal rights that can be deemed 'fundamental.'" *Id.* And the court noted that *Roe* had found this privacy right "'broad enough to encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.*, PageID#585 (quoting 410 U.S. at 153). It read *Roe* to hold that the state interest in promoting potential life "only becomes 'compelling' enough to justify limiting the woman's right to choose at the point of viability." *Id.*, PageID#585 (quoting 410 U.S. at 163). The district court said that *Planned Parenthood of Pennsylvania v. Casey* "reaffirmed *Roe*'s essential holding" that "[b]efore viability," States may not ban abortion or impose substantial obstacles on obtaining abortion. *Id.*, PageID#585-86 (citing 505 U.S. 833, 846 (1992)). The court interpreted *Casey* as establishing an "unfettered constitutional right" before viability to obtain an abortion for any reason whatsoever. *Id.*, PageID#586.

To support this categorical right, the district court cited other cases that had enjoined laws limiting previability abortions. *Id.* It relied especially on *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner, Indiana State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), *aff'd*, 888 F.3d 300 (7th Cir. 2018), *en banc reh'g granted*, 2018 U.S. App. LEXIS 15520 (review "limited to" a different issue). Order, R.28, PageID#586-87. *Planned Parenthood of Indiana*

held that the previability abortion right was categorical, so it enjoined an Indiana law that barred a doctor from performing an abortion if the woman sought the abortion because of the fetus's sex, race, or disability. *Id.*

Relying on these cases, the district court here held that it could invalidate the Antidiscrimination Law without considering *Casey*'s undue-burden framework because the law was "an unconstitutional infringement of a categorical right." *Id.*, PageID#588. Alternatively, it held that the law imposed an undue burden because "[t]he 'obstacle' it places in the path of women seeking a pre-viability abortion for one of the proscribed reasons is not merely 'substantial,' it is insurmountable." *Id.*, PageID#589.

The district court then rejected the State's defenses. Ohio argued that neither *Roe* nor *Casey* considered a law like Ohio's, as Ohio barred only those abortions that were undertaken because of a disability. Even so, the court responded, the Supreme Court's abortion right was "categorical." *Id.*, PageID#589. In support, it cited *Casey*'s statement that the government "may not prohibit 'any woman' from choosing to terminate her pregnancy before viability." *Id.*, PageID#590 (quoting *Casey*, 505 U.S. at 879 (plurality op.)) (district court's emphasis). The court also rejected Ohio's interests in stopping discrimination against the disabled. "[T]hese arguments," the court asserted, "simply rephrase the State's interest in potential life, which the Supreme Court has already held does not

become compelling under the law until viability." *Id.*, PageID#591 (emphasis in original). The court also rejected Ohio's concerns regarding the integrity of the medical profession. *Id.*, PageID#591-92.

After holding that the abortion providers established a likelihood of success, the district court found that they met the other preliminary-injunction factors. *Id.*, PageID#592-94. The court reasoned that its conclusion that the law impaired abortion rights was enough to show an irreparable injury. *Id.*, PageID#592. As for harms to those with Down syndrome, the court reiterated that "the State's interest in potential life—whether couched as anti-'discrimination' or otherwise—does not become compelling until viability." *Id.*, PageID#594 (emphasis in original).

The State Defendants appealed the district court's preliminary injunction. The district court stayed further proceedings pending this appeal.

SUMMARY OF THE ARGUMENT

This Court may reverse a preliminary injunction, which is a drastic remedy, whenever a district court applies an "erroneous legal standard." The district court in this case made such a legal error. This Court thus may either remand for the district court to apply the correct legal standard in the first instance or reverse the injunction outright because of Ohio's compelling antidiscrimination interests.

I. The district court held that *Roe v. Wade*, 410 U.S. 113 (1973), created an "absolute" or "categorical" right to a previability abortion, which allowed it to

avoid considering Ohio's antidiscrimination interests. Both general constitutional principles and specific abortion cases, however, show that the district court misinterpreted the scope of the right that *Roe* established.

A. *General Principles*. To decide whether a challenged law violated the Constitution at the time of *Roe*, the Supreme Court had repeatedly applied constitutional "balancing" tests weighing an individual's private interests against the government's public interests. If the law implicated "fundamental" individual interests, the Court would apply a demanding strict-scrutiny test; if it implicated interests seen as less fundamental, it would apply a deferential rational-basis test. As the Supreme Court has recognized in a variety of areas ranging from the Free Speech Clause to the Equal Protection Clause, no right governed by one of these balancing tests can be characterized as "absolute."

B. *Abortion Precedent*. When invalidating Texas's broad ban on most previability abortions, the Supreme Court in *Roe* followed the same balancing approach that the Court had adopted in other areas. It recognized the government's interest in women's health and potential life, as well as the potential hardships that the broad ban could impose on individuals. It then held that the right to abortion fell within the "fundamental" right to privacy, and that Texas's broad ban triggered strict scrutiny. So Texas was required to support that ban with a "compelling" interest and show that the ban was narrowly drawn to serve that interest. Texas

could not do so, the Court concluded, because its interest in potential life only became compelling after viability and because its interest in women's health only became compelling after the second trimester.

In this case, by contrast, the Court must undertake a different constitutional "balancing" of interests because the interests on both sides are different. On the one hand, Ohio's Antidiscrimination Law affects the right to abortion much more narrowly than did Texas's broad ban. Ohio's law limits only a small subset of previability abortions—those undertaken because of a Down-syndrome diagnosis. On the other hand, Ohio has important antidiscrimination interests in this case that Texas did not even allege in *Roe*.

C. The district court's contrary interpretation of the Supreme Court's cases lacks merit. It found that *Roe* and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), created a "categorical" or "absolute" right to a previability abortion, so it did not even analyze Ohio's antidiscrimination interests. The district court was wrong. It misinterpreted both *Roe* and *Casey*. It wrongly provided greater constitutional protection to the right to abortion than applies to rights specifically referenced in the Constitution. It mistakenly relied on out-of-circuit precedent. Its conclusion has no logical stopping point and would invalidate race- or sex-selective abortion bans.

II. The Court may remand based on the district court's legal error and allow it to apply the correct standard in the first instance. If the Court opts to apply that standard now, however, it should deny the preliminary injunction outright.

A. Under the proper legal standard, the abortion providers have not established a likelihood of success on the merits. In addition to the state interests in potential life that *Roe* and *Casey* found important, Ohio has compelling interests in protecting those with Down syndrome.

First, Ohio has a strong interest in preventing discrimination against those with Down syndrome. In other contexts, the Supreme Court has found such an antidiscrimination interest to be "compelling." It is compelling here too. This interest includes the prevention of coercion and the protection of the vulnerable against irrational prejudice or societal indifference. The interest has become particularly acute now that new technologies have led to those with Down syndrome being disproportionately selected for abortion. And it seeks to rebut the mistaken notion that the "eradication" of one demographic is a good idea.

Second, Ohio has a strong interest in safeguarding the integrity of the medical profession. The Supreme Court, too, has found this interest important in other contexts, such as with respect to physician-assisted suicide or partial-birth abortion. Here, it is important to prevent the medical profession from being used to condone or justify social biases against vulnerable groups.

Third, Ohio has a strong interest in protecting the Down-syndrome community and its civic voice. As noted, efforts to target the Down-syndrome community through abortion have resulted in an estimated 30% reduction in that community. These efforts will reduce the community's ability to mobilize support and stop further discrimination.

B. The equities also favor the denial of a preliminary injunction. Preventing discrimination is a vital public interest. And a State always faces irreparable injury whenever a court enjoins its laws.

ARGUMENT

"'A preliminary injunction is an extraordinary and drastic remedy.'" *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017) (quoting *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). When determining whether to grant a party's request for such a remedy, district courts must balance four factors: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.'" *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (citation omitted).

On appeal from a decision granting or denying a preliminary injunction, this Court reviews the district court's legal rulings (including its ruling on the likelihood-of-success factor) de novo, but reviews the district court's "'ultimate conclusion as to whether to grant the preliminary injunction for abuse of discretion.'" *Lexington H-L Servs. v. Lexington-Fayette Urban Cnty. Gov't*, 879 F.3d 224, 227 (6th Cir. 2018) (citation omitted). Under this framework, the Court may reverse the district court's injunction if the district court "used an erroneous legal standard." *City of Pontiac*, 751 F.3d at 430. That is because "a district court necessarily abuses its discretion when it commits an error of law." *S. Glazer's Distribs.*, 860 F.3d at 854.

Under these standards, the district court's preliminary injunction in this case was wrong. The court relied on a mistaken legal standard by basing its ruling on what it described as a "categorical" or "absolute" right to a previability abortion. This Court thus may reverse the injunction on the basis of the district court's legal error alone, and remand for the district court to apply the proper legal standard in the first instance. *See infra* Part I. Or, if the Court deems it appropriate, it should immediately deny any preliminary injunction outright on the basis of Ohio's compelling antidiscrimination interests. *See infra* Part II.

I. THIS COURT SHOULD REVERSE BECAUSE THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD BY HOLDING THAT THE RIGHT TO OBTAIN A PREVIABILITY ABORTION IS "CATEGORICAL"

The district court refused even to consider Ohio's compelling interest in preventing discrimination against those with Down syndrome because of the court's holding that *Roe* created a "categorical" right to a previability abortion. Order, R.28, PageID#588. The district court was mistaken. The Supreme Court's general constitutional jurisprudence at the time of *Roe* and its specific abortion jurisprudence since then both prove that the district court should have considered whether Ohio provided a sufficiently compelling reason to bar a small subset of previability abortions—those undertaken because of a Down-syndrome diagnosis. The district court never asked, let alone answered, that critical question.

A. *Roe* Arose From An Age In Which The Supreme Court Began To "Balance" Government Interests Against Private Ones

The Supreme Court's general constitutional principles at the time of *Roe* show that *Roe* did not establish a "categorical" or "absolute" right to a previability abortion. The Supreme Court had refrained from adopting such a "categorical" approach even for rights that the Constitution specifically mentions.

At the time of *Roe*, in assessing a wide array of constitutional provisions, the Supreme Court had adopted "a form of constitutional reasoning" that often involved the "balancing" of competing government and private interests. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J.

943, 943-44, 946-47 (1987). When the Court found that a challenged law implicated a private interest that was "fundamental," it applied the modern "strict scrutiny" test—which asks whether the law is narrowly tailored to serve a compelling government interest. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1268-69 (2007); *see, e.g.*, *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969) (voting); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (travel). When the Court found that the law implicated a private interest that was less fundamental, it applied the modern "rational-basis" test—which asks whether a law has a rational connection to a legitimate government interest. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (education).

No right that is governed by one of these "balancing" tests—whether the test is demanding of the government or deferential to it—can be characterized as "categorical" or "absolute." Indeed, even "[t]he protections afforded by the First Amendment . . . are not absolute." *Virginia v. Black*, 538 U.S. 343, 358 (2003); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (noting that "[t]he right to associate for expressive purposes is not . . . absolute"). While the Free Speech Clause broadly bars Congress from making any law "abridging the freedom of speech," U.S. Const. amend. I, the Supreme Court has never read the clause as permitting individuals to say whatever they want whenever they want—such as, for example, by falsely shouting "fire" in a crowded theater, *Schenck v. United*

States, 249 U.S. 47, 52 (1919). Instead, the Supreme Court has said that the government can enact even content-based restrictions on speech if those restrictions can survive the test that applies to fundamental constitutional rights—strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28-33 (2010).

Many other examples illustrate this point. Even though the First Amendment also bars Congress from passing laws "prohibiting the free exercise" of religion, U.S. Const. amend. I, the Free Exercise Clause does not categorically bar laws that facially target religious groups; they, too, can survive if the government can show a sufficiently compelling interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). Likewise, even though the Confrontation Clause gives a criminal defendant the right "to be confronted with the witnesses against him," U.S. Const. amend. VI, the Supreme Court has never held that this clause "guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial." *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The government may restrict that confrontation if it "is necessary to further an important public policy." *Id.* at 850. And while the Constitution—on its face—categorically bars the States from "impairing the obligation of contracts," U.S. Const. art. I, § 10, cl. 1, the Supreme Court has long held that States may impair private contract rights if the state law reasonably

"advance[s] 'a significant and legitimate public purpose.'" *Sveen v. Melin*, 2018 U.S. LEXIS 3503, at *3 (U.S. June 11, 2018) (citation omitted).

The Fourteenth Amendment's substantive protections were following the same balancing path at the time of *Roe*. Under the Equal Protection Clause, for example, the Court had held that the right to vote was fundamental and that New York lacked a sufficiently compelling justification to restrict voting in elections for local school districts only to certain classes of voters. *Kramer*, 395 U.S. at 627, 632-33; *see also Shapiro*, 394 U.S. at 634. And, under the Due Process Clause, the Court had held that the right to marital privacy was fundamental and that a Connecticut law banning the use of contraceptives was not narrowly tailored to serve any legitimate interest. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

B. Against This Constitutional Backdrop, Neither *Roe* Nor *Casey* Should Be Interpreted To Establish A Categorical Right To A Previability Abortion

1. When *Roe* invalidated a longstanding Texas law that broadly banned most previability abortions, the Court followed this same balancing approach that had become common by the 1970s—weighing the government's public interest against the individual's private interest. On the government's side of this balance, the Court explained that Texas relied on two state interests: protecting women's health and "protecting prenatal life." 410 U.S. at 149-50, 154, 162-63. On the individual's side of the balance, the Court detailed the physical and physiological

harms that it found are imposed on women from a broad prohibition that bans most abortions no matter the circumstances. *Id.* at 153.

After recognizing these dueling interests, the Court decided on the proper standard of review for its constitutional balancing. Specifically, *Roe* concluded that abortion should fall within the general "right of privacy" that the Court had recognized in earlier decisions, including *Griswold* and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). This decision meant that the right to abortion qualified as a "fundamental" right. *Id.* at 152-54. Yet *Roe* rejected the same constitutional test that the district court applied to Ohio's Antidiscrimination Law in this case. The challengers there, like the abortion providers here, argued that "the woman's right is *absolute* and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." *Roe*, 410 U.S. at 153 (emphases added). The Court emphatically rejected this categorical claim: "With this we do not agree." *Id.*

Instead, the Court held only that Texas's broad ban on almost all abortions triggered strict scrutiny: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citations omitted). Applying this test to Texas's law, the Court determined that the first

governmental interest—maternal health—did not become compelling until the second trimester of pregnancy. *Id.* at 162-63. And Texas's second interest—potential life—did not become compelling until viability "because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. At that point, the Court held, the State could enact a ban on all abortions, subject to an exception for the life or health of the mother. *Id.* at 163-64. Under this trimester framework, the Court concluded, Texas's *broad* ban could not stand. *Id.* at 164.

In sum, *Roe* struck a constitutional balance by weighing a Texas ban on nearly all previability abortions against the two state interests that Texas asserted in the case—women's health and potential life. It ultimately found that those two interests were not sufficiently compelling to sustain the broad prohibition that Texas had imposed on previability abortions. *Id.*

2. *Casey*, in turn, did nothing to transform *Roe*'s constitutional balance into a categorical right to a previability abortion. To be sure, *Casey* reaffirmed *Roe* by holding that, "[b]efore viability, *the State's interests* are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." 505 U.S. at 846 (emphasis added). But, in making that determination, *Casey* considered the *same two* governmental interests from *Roe*, because again those were the interests the State advanced. The

Court concluded that "the interest of the State in the protection of potential life" and in the "health of the woman" could not suffice to justify an absolute prohibition on nearly all previability abortions. *Id.* at 871 (plurality op.).

Not only that, *Casey* otherwise *relaxed* the scrutiny applicable to abortion regulations. It jettisoned some post-*Roe* cases that had held that *Roe*'s strict-scrutiny test applied not just to broad regulations like Texas's law, but also to every "regulation touching upon the abortion decision." *Id.* Such a far-reaching test, *Casey* concluded, "undervalue[d] the State's interest in potential life." *Id.* at 873. *Casey* instead adopted the undue-burden test for laws that merely regulate, rather than limit, abortions. *Id.* at 874, 878. In doing so, however, *Casey* did not silently suggest that all laws limiting previability abortions should be judged by a new categorical prohibition rather than by the compelling-interest test that *Roe* had applied to Texas's broad ban.

3. This jurisprudential history shows that Ohio's Antidiscrimination Law should be judged by—at most—*Roe*'s compelling-interest standard. Critically, moreover, this case does not involve the same constitutional balance as the one undertaken in *Roe* and then reaffirmed in *Casey*. Ohio's law does not affect the *general* decision whether to have "a" child. Instead, the law restricts a doctor's performance of an abortion based only on one *specific* "reason"—a diagnosis of Down syndrome. *Roe*, 410 U.S. at 153. Such a law is distinct from the state laws

and interests addressed in *Roe* and *Casey*. The specific decision to have an abortion because of a diagnosis of Down syndrome is fundamentally different from the generalized decision "whether or not to beget or bear a child." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

Given this distinction, both sides of the constitutional balance differ here from what they were in *Roe* and *Casey*. On the individual side, the intrusion into any protected liberty interest is less expansive than it was in *Roe*. Unlike the *broad ban* on all previability abortions that was at issue in *Roe* (and reconsidered in *Casey*), Ohio's Antidiscrimination Law enacts a far narrower limitation—prohibiting only those abortions undertaken because of a Down-syndrome diagnosis. Ohio Rev. Code § 2919.10(B). The Supreme Court has never considered Ohio's interest in prohibiting discrimination—not in *Roe*, *Casey*, or any other decision. *Roe*, in fact, rejected both the notion that the "woman's right [was] absolute" and the notion that it gave her the option to obtain an abortion "*for whatever reason* she alone chooses." 410 U.S. at 153 (emphases added). And the challengers in *Casey*, while seeking to enjoin several Pennsylvania abortion regulations, did not even attempt to block that State's ban on sex-discriminatory abortions. *See* Br. for Respondents, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 U.S. S. Ct. Briefs LEXIS 313, at *5.

On the government side, the States have at least three compelling governmental interests in addition to protecting unborn life—interests that *Roe* and *Casey* did not consider. These include: (1) guarding against discrimination against the disabled, (2) protecting the integrity of the medical profession, and (3) protecting the Down-syndrome community and its civic voice. *See infra* Part II. All are vital state interests. In short, the *broader* state interests involved in this case—when combined with the *narrower* limitation on previability abortions—mandate a new constitutional weighing.

C. The District Court Wrongly Interpreted *Roe* And *Casey* As Establishing Greater Protections For Abortion Than For Other Rights That The Constitution Specifically Mentions

The district court repeatedly indicated that "'[t]he woman's right to choose to terminate a pregnancy pre-viability is *categorical*'" or "*absolute*." Order, R.28, PageID#579, 587, 588-589 (quoting *Planned Parenthood of Ind. & Ky* (emphasis added)). And Ohio's Antidiscrimination Law cannot stand, the district court added, because the Ohio law was an "unconstitutional infringement of a *categorical right*." *Id.*, PageID#588 (emphasis added). This conclusion permitted the court to avoid examining any governmental interest in preventing discrimination against those with Down syndrome or weighing Ohio's new interest against the law's narrower limitation on only some previability abortions. *Id.*,

PageID#588. But the district court's central premise—that *Roe* and *Casey* establish an absolute right to a previability abortion—was wrong.

First, the district court's reasoning misapprehends both *Roe* and *Casey*. As explained above, these cases did not create "an absolute constitutional right to an abortion on . . . demand." *See Doe v. Bolton*, 410 U.S. 179, 189 (1973). Nor did the facts of *Roe* and *Casey* involve terminating a pregnancy based on a diagnosis of a physical or mental disability. When determining whether the Court should outright overrule *Roe*, *Casey* considered only informed-consent and notification statutes. 505 U.S. at 844. As for *Roe*, it involved a much broader law prohibiting most previability abortions. 410 U.S. at 118.

The Supreme Court's decisions, moreover, *have* limited certain abortions before viability. *Casey*, for example, upheld a statute requiring a minor to obtain a parent's permission or a judicial bypass before having an abortion. 505 U.S. at 899-900 (plurality op.). Under the statute in *Casey*, then, if a minor was unable to secure parental permission or judicial approval, that minor was absolutely prohibited from obtaining a previability abortion. *Id.* at 899. Similarly, in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court upheld the Partial-Birth Abortion Ban Act, which prohibited partial-birth abortions "both previability and postviability." *Id.* at 147.

Second, the district court's reasoning wrongly ascribes to the Supreme Court the unreasonable position that previability abortion is of greater constitutional significance than longstanding rights like the freedom of speech. "[E]ven the fundamental rights of the Bill of Rights," the Supreme Court has said, "are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). When, for example, speech rights are subject to a strict-scrutiny balancing test like the one that *Roe* adopted, the Supreme Court has applied that strict-scrutiny test to the specific governmental interest asserted in each case. So even if the government lacks a sufficiently compelling interest to ban corporations from spending money on speech supporting *political* candidates, *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010), the government may nevertheless have a compelling interest in restricting *judicial* solicitations for funds, *Williams-Yulee*, 135 S. Ct. at 1662.

Similarly, racial classifications also do not *categorically* violate the Equal Protection Clause, and can survive if the government can show a sufficiently compelling reason for the classification. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208, 2214-15 (2016). This test, too, depends on the particular state interest asserted in each case and how tailored the state's law is to serving that interest. So the broad use of racial classifications in college admissions violates strict scrutiny, *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003), even if a narrower use of race may survive that scrutiny, *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). The

Court did not say in *Gratz* that since the broad racial classification failed, the narrower one in *Grutter* also violated a "categorical" right to equal protection.

The district court wrongly refused to undertake this balancing analysis here. Yet there is a basic difference—one of constitutional significance—between a broad law banning all previability abortions, and a narrow law banning only previability abortions tied to a Down-syndrome diagnosis. The district court's categorical approach to the right to abortion thus mistakenly places the right above nearly every other right in the Constitution.

Third, the district court mistakenly relied on the Indiana decision in *Planned Parenthood of Indiana & Kentucky*. The district court's decision in that case has been affirmed by a panel of the Seventh Circuit (although the Seventh Circuit has since granted rehearing en banc of that panel decision to address a different issue). The Seventh Circuit's panel decision erred by interpreting *Casey* and *Roe* as addressing (and rejecting) *all* conceivable state interests when determining that the government could not impose a general ban on previability abortions. *See Planned Parenthood of Ind. & Ky.*, 888 F.3d at 307. Neither Supreme Court decision so much as referenced the interests on which Ohio relies in this case, let alone rejected those interests as applied against a narrower limitation on previability abortions. *See Casey*, 505 U.S. at 871 (plurality op.); *Roe*, 410 U.S. at 163-64.

Fourth, the district court's reasoning lacks any logical stopping point. If it became legally permissible, indeed constitutionally protected, for abortions to be based on the diagnosis of a potential disability, selective abortions are protected on all bases with no end, and States are powerless to address them. If protecting Down syndrome from unequal treatment is not permitted, then—with rapidly advancing genetic understanding and testing—it is only a matter of time before selective abortions target other disabilities, or sex, or intellect, or attractiveness, or athletic ability, or any trait that might become detectible to some degree.

Already, selective abortions are a documented concern elsewhere in the world. Some researchers have concluded that there are 100 to 160 million "missing" women in Asia. *See* Mara Hvistendahl, *Unnatural Selection: Choosing Boys Over Girls, and the Consequences of a World Full of Men* 5-12 (Public Affairs 2011). In India, for example, each year "[o]ver the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted." Sital Kalantry, *How to Fix India's Sex-Selection Problem*, N.Y. Times, July 27, 2017, R.25-3, PageID#475; *accord* Nicholas Eberstadt, *The Global War Against Baby Girls*, 33 The New Atlantis 3, 4, 9-10 (2011), R.25-3, PageID#481, 486-87 (documenting similar phenomena in China, South Korea, and other countries). The district court's "categorical" right would leave the government powerless to take any effort to remedy this significant discrimination.

II. IF THE COURT DECIDES TO APPLY THE PROPER LEGAL STANDARD TO OHIO'S LAW NOW, IT SHOULD DENY THE PRELIMINARY INJUNCTION

The Court may simply remand for the district court to apply the correct legal standard in the first instance. Alternatively, if it decides to apply the appropriate standard itself, it should reverse the district court's preliminary injunction outright.

A. The Abortion Providers Are Unlikely To Succeed On The Merits Because The State Has A Compelling Interest In Alleviating Discrimination Against Those With Down Syndrome

Roe and *Casey* considered, as state interests, "the health of the woman and the life of the fetus." *Casey*, 505 U.S. at 846. Against these interests the Court weighed individual privacy concerns. *See Roe*, 410 U.S. at 154 (holding that the abortion right "is not unqualified and must be considered against important state interests in regulation").

Here, the State continues to have, from conception onward, a legitimate interest in promoting potential life. *Gonzales* held that the "government may use its voice and regulatory authority to show its profound respect for the life within the woman." 550 U.S. at 157. *Roe* itself acknowledged the "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. As did *Casey*: "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child." 505 U.S. at 846. *Casey* also criticized earlier abortion jurisprudence for giving "too little acknowledgment" of "the interest of the State in the protection of potential life."

Id. at 871 (plurality op.). The protection of life is no less legitimate in instances when an individual has a disability. This is so even for extremely serious conditions. *Britell v. United States*, 372 F.3d 1370, 1373 n.1 (Fed. Cir. 2004). "It is not the role of the courts to draw lines as to which fetal abnormalities or birth defects are so severe as to negate the state's otherwise legitimate interest in the fetus' potential life." *Id.* at 1383.

Ohio readily concedes that if the State had *only* this generalized interest in potential life, its law might not survive under precedent. But Ohio's Antidiscrimination Law serves *more* than just this interest in potential life; it also serves at least three additional compelling state interests designed to prevent discrimination against those with disabilities.

1. Ohio has a strong interest in preventing discrimination against those with Down syndrome

Ohio has a compelling interest in eliminating discrimination against those with Down syndrome. The Supreme Court has held that state laws designed to protect against discrimination can withstand constitutional challenges even despite baseline protections, including the First Amendment freedom of association. In *Jaycees*, for example, the Court stated: "We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms." 468 U.S. at 623.

That same interest in preventing sex discrimination applies to those with disabilities. Ohio has an important "interest in protecting vulnerable groups—including . . . disabled persons." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). That interest is compelling. *See, e.g.*, *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." (citing *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987)); *Jaycees*, 468 U.S. at 623.

This interest in protecting the vulnerable from discrimination has many aspects. It includes preventing "coercion," particularly in "end-of-life situations." *Glucksberg*, 521 U.S. at 732. It includes "protecting disabled . . . people from prejudice." *Id.* It includes preventing "negative and inaccurate stereotypes" of individuals with disabilities. *Id.* And it includes protecting the vulnerable from "societal indifference." *Id.* Combined with the "unqualified interest in the preservation of human life" and "in protecting the integrity and ethics of the medical profession," the interest was sufficient to uphold Washington's ban on physician-assisted suicide against a substantive-due-process challenge. *Id.* at 728, 731, 736 (quotation omitted). In that decision, the Court held that the "assisted-suicide ban reflects and reinforces [the State's] policy that the lives of terminally

ill, disabled, and elderly people must be no less valued than the lives of the young and healthy." *Id.* at 732.

This interest is particularly acute here. As noted above, *see supra* at 18-19, unborn children who may have Down syndrome are disproportionately selected for abortion. Data from many studies shows that the high rate of abortions for this demographic—a staggering 61% to 91%—is even fueled by pressure and bias from some within the medical community. *Id.* It is also caused by "incomplete, inaccurate, and, sometimes, offensive information" about Down syndrome," *supra* at 22, and by, in many instances, "little to no compassion or support" during the counseling and care process, *supra* at 21. Rhetoric from some foreign governments and influential opinion leaders has also played a role, *supra* at 13-17, as have attitudes within some of the medical community, *supra* at 18-25.

Beyond preventing the direct effects of discrimination, the State also has an interest in conveying to all members of society that they are equally valued. As Dr. Fernandes stated, the Ohio law "sends an unambiguous *moral* message to the citizens of Ohio that Down Syndrome children, whether born or unborn, are equal in dignity and value to the rest of us." Fernandes Decl. ¶ 17, R.25-1, PageID#172-73. Beyond this message, "[t]he more our 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." *Id.* ¶ 13, PageID#170.

Conversely, the Ohio law responds to the dangerous idea spread by some that the "eradication" of one demographic is a good idea. Quite the opposite. Even more, stereotyping disabilities, while hurtful, is also often inaccurate. Dr. Treptow observed that the "moderate to strong bias against children and adults" with Down syndrome "does not match what persons with T21 [Down syndrome] and their families think or fit emerging data on the capabilities of these babies." Treptow Decl. ¶ 6, R.25-2, PageID#427 (citations omitted).

Preventing discrimination in all of its forms has been, and should always be, a vital state interest. As Dr. Sullivan stated, "we all should agree on . . . protect[ing] the disadvantaged and vulnerable among us, and we should prevent genetic discrimination." Sullivan Decl. ¶ 18, R.25-1, PageID#153. Stopping discriminatory abortions preserves human dignity and advances equality—separate and in addition to Ohio's general interest in potential life.

2. Ohio has a strong interest in safeguarding the integrity of the medical profession

A third important state interest is "protecting the integrity and ethics of the medical profession." *Glucksberg*, 521 U.S. at 731. With regard to physician-assisted suicide, the Supreme Court cited favorably arguments that the practice could "undermine the trust that is essential to the doctor-patient relationship by

blurring the time-honored line between healing and harming." *Id.* For partial-birth abortion, the Court likewise cited Congress's concern that the procedure "'confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life.'" *Gonzales*, 550 U.S. at 157 (citation omitted).

Similarly, here, safeguarding medical ethics is important. As Dr. Sullivan opines, the Ohio law protects "the integrity of the medical profession." Sullivan Decl. ¶ 19, R.25-1, PageID#153. Medical principlism includes "beneficence (having the best interests of patients in mind), non-maleficence (avoiding harm), and distributive justice (treating all patients equally, regardless of gender, social class, or other medically non-relevant factors)." *Id.* ¶¶ 18, 19, R.25-1, PageID#153. While "the information gained from genomic testing . . . can be used for good purposes," it can "be subverted to reinforce social biases and introduce discrimination." *Id.* ¶ 26, R.25-1, PageID#155. The Ohio law protects the medical profession from participating in a trend that is contrary to core medical ethics.

Moreover, not only is the medical profession's integrity threatened by performing discriminatory abortions, but also, the practice threatens the profession's integrity in dealing with Down syndrome patients of all ages. The medical profession must treat the lives of those with Down syndrome as equally

valuable in regard to all treatment, from lifesaving to routine. But an ethic of ending those lives as less worthy threatens to infect all treatment.

3. Ohio has a strong interest in protecting the Down-syndrome community and its civic voice

Ours is a diverse society and individuals with physical or mental challenges are part of that diversity. Their stories, their relationships, their contributions, and their thoughts are all as important as the marks left by others in society. We are better because we live in a diverse society, and "[g]etting to know people with Down syndrome teaches us that they have gifts too and the world is a better place with them in our lives." Keough Decl. ¶ 7, R.25-1, PageID#177. As Congress stated, "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. §12101(a)(1). And, as one court recently observed, advocacy in the 1960s and 1970s that led to legislative protections for those with disabilities, *see supra* at 12-13, was based on the insistence "that society recognize disabled people not as unfortunate, afflicted creatures but as equal citizens, individually varying across the spectrum of human abilities, whose over-riding needs are freedom from discrimination and a fair chance to participate fully in society." *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 265 (D.D.C. 2015) (quotations omitted).

Yet, as detailed above, some places in the world have begun a systemic effort to target those with Down syndrome for abortion. Dr. Fernandes opines:

"[i]t is clear that Down Syndrome, with technology that can detect it with greater accuracy and at an earlier stage, has been specifically selected . . . for *elimination* from the genetic pool under eugenical justifications." Fernandes Decl. ¶ 12, R.25-1, PageID#170.

Even in the United States, the efforts to target Down syndrome have resulted in an estimated 30% reduction in the Down-syndrome community. Sullivan Decl. ¶ 10, R.25-1, PageID#150. Naturally, a reduction in the number of individuals with Down syndrome "will have the perverse impact of making fewer and fewer resources available for training and encouragement of people with this genetic marker." *Id.* Currently, "there is a lot of support—both financial and emotional—for parents of children with Down syndrome." Keough Decl. ¶ 6, R.25-1, PageID#177. And "[r]egardless of [in] which corner of the state you live, there is an organization dedicated to improving the lives of people with Down syndrome and their families." LaTourette Test., R.25-1, PageID#190.

To the extent that efforts to systematically abort those diagnosed with Down syndrome succeed, the Down-syndrome community would have more difficulty mobilizing support and fending off further discrimination. "The more [the] state affirms and values the lives of these individuals from conception," by contrast, "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, PageID#170. Additionally, "[t]he medical literature supports the notion that the quality of life of families is dependent on the psychological support and social support they receive." *Id.* ¶ 14, PageID#170. "Laws can and do have a significant effect on attitudes," and H.R. 214 "sends an unambiguous *moral* message to the citizens of Ohio that Down Syndrome children . . . are equal in dignity and value to the rest of us." *Id.* ¶ 17, PageID#172-73.

Again, Ohio's interests in safeguarding a vulnerable population against discrimination through systematic abortions are compelling.

B. The Equities And The Public Interest Favor Ohio

While Plaintiffs are unlikely to succeed on the merits, the remaining injunction factors also favor Ohio. An injunction is not in the public interest. The Ohio law addresses an area of profound unequal treatment for individuals who have Down syndrome. It responds to recent medical advances that have made it much easier to prenatally predict Down syndrome, to a disproportionately high rate of abortions after a diagnosis of potential Down syndrome, to some influential leaders and some in the media who present the "eradication" of Down syndrome as a positive social development, and to studies and anecdotal evidence that prenatal counseling and care is often biased in favor of aborting unborn babies diagnosed with Down syndrome. Preventing discrimination is a vital public interest.

Additionally, a preliminary injunction "subjects [the State] to ongoing irreparable harm." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). As Supreme Court Justices have recognized over the years, "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Id.* (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

CONCLUSION

The Court should reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5):

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 12,927 words.

2. The brief has been prepared in monospaced (nonproportionally spaced) typeface using a Times New Roman, 14 point font.

s/ Steven T. Voigt

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 22nd day of June 2018. Electronic service was therefore made upon all counsel of record on the same day.

s/ Steven T. Voigt

DESIGNATION OF DISTRICT COURT RECORD

Appellants, 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-00109**

Date Filed	R. No.; PageID#	Document Description
2/15/2018	R.1; 1-14	Complaint
2/15/2018	R.3; 17-36	Motion for Preliminary Injunction and Temporary Restraining Order
2/23/2018	R.19; 94-97	Notice by State Defendants to Court Regarding Defense
3/02/2018	R.25; 107-142	Brief of State Defendants Opposing Motion for Preliminary Injunction
3/02/2018	R.25-1; 143-369	Exhibits A-L
3/02/2018	R.25-2; 370-442	Exhibits M-Z
3/02/2018	R.25-3; 443-497	Exhibits AA-II
3/14/2018	R.28; 578-599	Order Granting Plaintiffs' Motion for Preliminary Injunction
4/11/2018	R.29; 600-628	State Defendants' Answer and Affirmative Defenses to Plaintiffs' Complaint
4/11/2018	R.30; 629-631	Notice of Appeal