

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION**

<b>PRETERM-CLEVELAND, et al.</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Case No. 1:18-cv-109</b>
	:	
<b>v.</b>	:	<b>Judge Timothy S. Black</b>
	:	
<b>LANCE HIMES, DIRECTOR, et al.</b>	:	
	:	
<b>Defendant.</b>	:	

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**RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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Respectfully submitted,

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*s/ Steven T. Voigt*

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People with Down syndrome, a condition involving an extra chromosome, tend to lead happy, rewarding, and productive lives. Brian G. Skotko et al., *Self-Perceptions from People with Down Syndrome*, 155 Am. J. Med. Genet. Part A 2360, 2360 (2011).

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Overt discrimination against individuals with disabilities has a widespread history. Disturbingly, in the early twentieth century, a variety of ordinances condoned fining and jailing people with physical and mental challenges for merely appearing in public. *Tennessee v. Lane*, 541 U.S. 509, 534-35 (2004) (Souter, J., concurring); Alexandra Minna Stern, *That Time the United States Sterilized 60,000 of Its Citizens*, The Huffington Post, Jan. 7, 2016.

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Beginning in the 1960s, both Ohio and the federal government passed laws in response to discrimination and unfair treatment of individuals with disabilities. *See, e.g.*, The Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.

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Even today, people with Down syndrome continue to face discrimination. Linda L. McCabe et al., *Down Syndrome: Coercion and Eugenics*, 13 Genetics in Medicine 708, 709 (2011).

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As prenatal genetic testing for Down syndrome has become more commonly available, abortions of unborn children with Down syndrome have increased. Misinformation about the condition is widespread. 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).

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The Ohio law, as with various other States’ abortion laws, protects against discrimination. H.R. 214, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

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A preliminary injunction is an extraordinary remedy, which requires a plaintiff to show a strong likelihood of success and a likelihood of irreparable injury. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 22 (2008); *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012).

**B. The Supreme Court of the United States Has Never Recognized a Right to Abort an Unborn Child on the Basis of a Disability ..... 19**

The Ohio law falls outside the analysis of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Those cases involve the decision whether or not to bear a child. The Supreme Court has never framed the due process abortion decision as whether to bear or abort a child based on a diagnosis of a physical or mental challenge. Because Ohio’s law does not interfere with the abortion right in *Roe* and *Casey*, it need only satisfy rational basis review. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (judging a substantive due process claim under rational basis because there was no fundamental liberty interest at issue). The Ohio law easily passes this test based on Ohio’s strong interest in protecting against discriminatory practices.

**C. Present Here Are Compelling State Interests that Were Not Present in *Roe* and *Casey* and that Withstand Even Strict Scrutiny ..... 23**

The state interests *Roe* and *Casey* considered were “the health of the woman and the life of the fetus.” *Casey*, 505 U.S. at 846. The State continues to have, from conception onward, a legitimate interest in protecting life. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989). Here, the State also advances compelling interests not assessed in *Roe* or *Casey*.

**1. Ohio’s Interest in Preventing Discrimination ..... 25**

Ohio has a compelling interest in protecting vulnerable groups, including people with disabilities, from discrimination. *See, e.g., Glucksberg*, 521 U.S. at 731; *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 14 n.5 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

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Ohio also has an important state interest in “protecting the integrity and ethics of the medical profession.” *Glucksberg*, 521 U.S. at 731.

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Ohio has a compelling interest in “recogniz[ing] 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).

**D. The Ohio Law Does Not Prevent Abortions that Are Medically Necessary for the Life or Health of the Mother ..... 29**

A “life and health” of the mother exception need not be explicitly stated within legislation. See *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 485 n.8, 494 (1983). Here, the Ohio law implicitly allows abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

**E. The Equities and the Public Interest Favor Ohio ..... 30**

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. Additionally, “[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.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

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Plaintiffs fail to meet their high burden for temporary or preliminary injunction.

**CERTIFICATE OF SERVICE ..... 32**

“I am a man with Down syndrome and my life is worth living.”

- Frank Stephens,  
Special Olympian and Advocate for Individuals with Disabilities<sup>1</sup>

## I. INTRODUCTION

The State of Ohio agrees with Frank Stephens. His life is valuable, rewarding, and certainly worth living. So, too, are the lives of millions of others with Down syndrome, and Ohio has acted in a way to affirm the value of their lives. Ohio recognizes that the United States Supreme Court has created a general right to an abortion, but the Court has never considered a law of the type here: a prohibition on doctors from performing abortions that target unborn children who are diagnosed with Down syndrome. More broadly, the Court *also* has never considered the compelling state interest presented here: preventing the elimination of a class of human beings based on a disability.

The abortion right declared in *Roe* and *Casey* involves whether or not to “beget *a* child.” Here, by contrast, the issue is whether to beget “this particular” child. And more specifically, a particular child who has a prenatal diagnosis of Down syndrome. Because no controlling case law supports a doctor’s authority to terminate an unborn life based on the child’s disability, Plaintiffs should not succeed in their quest to invalidate the law. The Court should not grant the extraordinary relief of an injunction to stop Ohio’s goal of valuing all life and preventing discrimination based on a particular disability.

While the rational basis standard applies here, preventing abortions that target unborn children based on a disability is a compelling state interest. As is protecting the most vulnerable in society. Given the recent, striking demonstrations of the broad-scale effect of discriminatory

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<sup>1</sup> Testimony Before House Subcommittee on Labor, Health and Human Services, and Education, U.S. House of Representatives 1 (Oct. 25, 2017), Ex. A.

abortions, such as Iceland’s widely publicized alleged effort to “eradicate” Down syndrome from its population through abortion, the State’s interest is particularly critical. If this bill is struck down, where then can a State draw the line? Enjoining this bill could someday open the door to abortions based on sex or race, or based on statistical probabilities for intellect, athletic ability, and physical appearance. Such genetic testing for all of these features may not yet be here. But it will be soon. To say that abortions based on sex or race are *not* acceptable, but an abortion based on a disability *is*, would upend numerous fundamental principles.

Medical advances in the last few years have made possible non-invasive prenatal testing for Down syndrome. This screening is now widespread. The abortion rate after a test indicating potential Down syndrome is incredibly high, far surpassing the rate in most other circumstances. This prevalence of abortions, which is partly due to the pressure that some individuals experience from doctors to abort after a prenatal indication of Down syndrome, presents a serious social problem.

The reality of Down syndrome is much different from what is often portrayed. Individuals with Down syndrome are valuable members of society who lead fulling lives. But a number of influential leaders and governments around the world say otherwise. These voices, combined with gross misinformation about Down syndrome and documented bias and coercion during the prenatal counseling and care process, have led to anywhere from a 61% to 91% rate of abortion after Down syndrome is discovered on a prenatal test. Sullivan Decl., ¶ 8, Ex. B

The state statute at issue is premised on the view that no civilized society should sanction the targeted elimination of this demographic or any other. Ohio’s law contemplates a society that says, unequivocally, that all—including those with mental or physical challenges—have inherent, equal value.

Abortion is a topic with strong opinions on all sides often influenced by personal experiences of individuals who have made difficult reproductive decisions based on many different circumstances. Ohio's HB 214 ("the Ohio law") does not disparage or single out individuals who have gone through such decisions. The challenged enactment, rather, reflects Ohio's recognition that those who have Down syndrome have just as much right to be here and are worth just as much to our communities and to our State as everyone else. The law is designed to address real discrimination and to offer protections that are of fundamental significance to the State and its citizenry.

The Ohio law responds to a collective social impact on a vulnerable demographic created by many forms of both overt, and subtle, discrimination by some professionals in the medical field. It protects society from the negative impacts of pressure toward abortions after a diagnosis of Down syndrome.

## **II. BACKGROUND TO THE STATUTE**

### **A. Down Syndrome**

Down syndrome, or Trisomy 21, occurs when a person has an extra chromosome. Chromosomes are carriers of the genetic material found in the nucleus of cells. *Chromosomes*, U.S. Nat'l Library of Med., <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0025047/> (last visited Feb. 28, 2017). Most individuals have 46 chromosomes, but individuals with Down syndrome have an extra copy of chromosome 21. *Facts About Down Syndrome*, Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html> (last visited Feb. 28, 2017).

People with Down syndrome usually have "mild developmental disabilities" and can have other medical problems, such as heart or endocrine issues. *Fernandes* ¶ 3, Ex. D. However, advances in medicine, education, and support have dramatically changed the potential of persons

with Down syndrome. *Health and Medical Issues*, Down Syndrome Education International, <https://www.down-syndrome.org/en-us/about-down-syndrome/health> (last visited Mar. 2, 2018); *For New Parents: General*, Down’s Syndrome Ass’n, <https://www.downs-syndrome.org.uk/for-new-parents/faqs/general/> (last visited Mar. 2, 2018).

“[T]here is a lot of support—both financial and emotional—for parents of children with Down syndrome.” Keough Decl. ¶ 6, Ex. E; *see also* Scheid Decl. ¶ 4, Ex. F (stating that her daughter received services and therapies through county-sponsored programs). One parent of a child with Down syndrome noted that her family “qualified for financial support through the Bureau of Children with Medical Handicaps that paid entirely for an open-heart surgery” that her son with Down syndrome “needed when he was three months old.” Kuhns Decl. ¶ 6, Ex. G.

In addition, support groups, such as chapters of the “Down Syndrome Association . . . help parents of children with Down syndrome to focus on their children’s’ abilities rather than their disabilities.” Keough Decl. ¶ 5, Ex. E. Other organizations focus on teaching life and job skills and receive funding through Medicaid. *See, e.g.*, Custer Decl. ¶¶ 1-2, Ex. M. Representative Sarah LaTourette, one of the sponsors 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. In Northeast Ohio, The Up Side of Downs provides support, education and advocacy. In Central Ohio, The Down Syndrome Association of Central Ohio serves 18 counties and promotes community involvement, and in Southwest Ohio the Downs Syndrome Association of Greater Cincinnati empowers individuals, educates families, enhances communities and celebrates the lives of people with Down syndrome.

LaTourette Test. at 2, Ex. H. Adoption agencies also have parents who are waiting to adopt a child with Down syndrome. Boblitt Decl. ¶¶ 5-7, Ex. I.

Most individuals who have Down syndrome report positive self-esteem and happiness. In a survey of 284 people with Down syndrome, 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), Ex. J. Only four percent expressed sadness about their lives. *Id.* at 2364. “The vast majority of brothers and sisters describe their relationship with their sibling with D[own] S[yn]drome] as positive and enhancing.” Fernandes Decl. ¶ 15, Ex. D. Over the past decades, advances in health care have extended the average life expectancy for children born with Down syndrome from nine years in the 1930s 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), Ex. K.

“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.), Ex. L. Indeed, such parents talk of their children’s value and that they are a blessing, and of their contributions to society. One parent said her son “laughs, plays, walks, eats, signs and loves fiercely!” Kuhns Decl. ¶ 5, Ex. G. A mother said her 19-year-old daughter helped her with a “site installation for a webpage,” and that they plan “to start a greeting card business” together. Scheid Decl. ¶¶ 11-12, Ex. F. Another said that her 23-year-old son completed job training through his high school, finished an internship, and has been working at the zoo since 2016. Gill Decl. ¶¶ 1, 5, Ex. N. A different parent stated “that all children have varying challenges and none is immune from maladies, disease, disorders or addictions,” 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, Ex. E. Notably, some individuals with Down syndrome can have gainful employment, have

active social lives, 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 Mar. 2, 2018).

## **B. Substantive Due Process Considerations**

Despite progress that our society has made to provide better educational and employment opportunities and other support for individuals with Down syndrome and their families, those who have Down syndrome continue to face discrimination.

More broadly, America has not been without its struggles involving discrimination against the wider disabled community. A brief explanation of some of this history is appropriate because Plaintiffs raise a substantive due process claim. As the Supreme Court stated in *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997), all substantive due process analyses begin with an examination of “our Nation’s history, legal traditions, and practices.”

In the early twentieth century, public attitude about those having physical or mental challenges differed greatly from perceptions today. Various municipal ordinances of that time condoned fining and jailing people with physical and mental challenges for merely appearing in the public view. *Tennessee v. Lane*, 541 U.S. 509, 534-35 (2004) (Souter, J., concurring). Even more troubling, during this time—sometimes under the guise of “science”—many deemed “feeble minded,” for example, were forcibly institutionalized and even sterilized. *Id.*; *Buck v. Bell*, 274 U.S. 200, 205-08 (1927). Beginning in the 1960s, the United States and individual States began to respond to the scourge of disability discrimination with accessibility legislation and with the Americans with Disabilities Act.

Dennis M. Sullivan, M.D., M.A. (Bioethics), and the Director of the Center for Bioethics at Cedarville University, worries that, with regard to Down syndrome in particular, society is “on the verge of committing many of the same mistakes” of the past. Sullivan Decl. ¶¶ 1, 14, Ex. B.

Targeted discrimination against Down syndrome by some in the medical profession, he asserts, is a “subtle” version of past “violations of human dignity.” *Id.* ¶¶ 11, 14.

### **1. Legally-Sanctioned Discrimination Against Individuals with Disabilities in the Early Twentieth Century**

In the early twentieth century, overt discrimination against individuals with disabilities was widespread. *See Lane*, 541 U.S. at 534-35 (Souter, J., concurring). This was followed, beginning in the 1960s, by laws enhancing access for those with disabilities and providing protection against discrimination.

To be sure, societal discrimination against those with disabilities has extended beyond the Down syndrome population. Beginning in the mid-1800s and extending into the early twentieth century, for example, many cities and towns had ordinances restricting individuals with physical or mental challenges from merely appearing in public places. *Id.*; *see also* Susan M. Schweik, *The Ugly Laws: Disability in Public* 1-2 (N.Y. Univ. Press 2009). As one example, a Chicago ordinance enacted in 1881 prohibited anyone deemed “diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object” from being in the “public view.” Schweik at 1-2. Cleveland and Columbus were among the cities with similar laws. *Id.* at 3, 15.

During this period in history, laws

indiscriminately require[ed] institutionalization, and prohibit[ed] certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public. One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he produce a depressing and nauseating effect upon others.

*Lane*, 541 U.S. at 534-35 (Souter, J., concurring) (quotation and alteration omitted). One researcher has observed that “it 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 nineteenth or very early twentieth century.” Schweik at 3.

Even more disturbing, in the early twentieth century, a number of States also had “eugenics laws”<sup>2</sup> under which, by some estimates, more than 60,000 individuals deemed “feeble-minded” were forcibly sterilized. Alexandra Minna Stern, *That Time the United States Sterilized 60,000 of Its Citizens*, The Huffington Post, Jan. 7, 2016, Ex. O. 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).

The United States Supreme Court was no refuge for those targeted for sterilization. In a notorious 1927 case, the Supreme Court, by an eight to one vote, approved the compulsory sterilization of a “feeble minded” woman who was “the probable potential parent of socially inadequate offspring.” *Buck*, 274 U.S. at 207 (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.*

A sentiment for “improving” the genetic stock of humanity (*i.e.*, eugenics) propelled these discriminatory laws into existence and was promoted by various influential American citizens. 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”

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<sup>2</sup> “Eugenics” is defined as “the study of or belief in the possibility of improving the qualities of the human species or a human population, especially by such means as discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits . . . .” <http://www.dictionary.com/browse/eugenics?s=t> (last viewed Feb. 2, 2018).

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, as one research scholar from Princeton observed, “Eugenics 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. Protection for People with Physical and Mental Challenges in the Late Twentieth Century**

In the mid-twentieth century, the public attitude toward individuals with mental and physical challenges began to change, and laws were passed in response to discrimination against and unfair treatment of individuals with disabilities. In 1965, Ohio adopted state policies requiring accessibility and accommodation. Ohio Rev. Code § 3781.111 (1965). Then, in 1976, Ohio passed legislation that prohibited discrimination on the basis of a disability in employment and housing. *Id.* § 4112.02 (1976).

The federal government followed. The Architectural Barriers Act of 1968 required many federal buildings to be built accessible to the physically challenged. Pub. L. 90-480 (42 U.S.C. §§4151 et seq.). In 1973, the Rehabilitation Act made disability discrimination illegal in any federal agency or any program that receives federal financial assistance. Pub. L. No. 930112, 87 Stat. 355 (1973). The Individuals with Disabilities in Education Act of 1975 ensured free, public education for all children with disabilities. Pub. L. No. 94-142, 89 Stat. 773 (1975). And in 1986, the Protection and Advocacy for Individuals with Mental Illness Act assisted States with

the establishment and operation of “a protection and advocacy system for individuals with mental illness.” 42 U.S.C. § 10801(b)(2).

This was also the time when the vestiges of the laws prohibiting individuals with disabilities from appearing in public places were repealed. Schweik 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.

In 1990 came perhaps the broadest law regarding people with disabilities—the Americans with Disabilities Act (“ADA”)—which was a response to historical discrimination. *Id.* at 276-78. As Congress stated, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101 (a)(2).

The ADA prohibited discrimination in employment, public services, public accommodations, and telecommunications. *See id.* §§ 12111-12213. In the ADA, 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 Down Syndrome

Even today, individuals with mental and physical challenges continue to face discrimination. Schweik at 284. People with Down syndrome have been a focus of both day-to-day and more systemic discrimination. Some opinion sources also appear to portray a reduction of the number of people with Down syndrome in society as a positive cultural advance.

The Dutch government is aggressively marketing non-invasive prenatal testing as a means to “end” Down Syndrome, with the National Institute for Public Health and the Environment there funding a television series cruelly named “The Last Downer.” Renate Lindeman, *A Moral Duty to Abort*, Huffington Post, Sept. 21, 2017, Ex. C. A prominent news source reported that Iceland is “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), Ex. P. “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.* The article also noted that “[o]ther countries aren’t lagging too far behind in Down syndrome termination rates.” *Id.*

A 2009 brochure from California for women with a positive screen 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), Ex. Q. In California, a prenatal screening program also “described such pregnancies that are continued as ‘missed opportunities.’” *Id.* 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, Ex. R. In Canada, a study of informational 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), Ex. S. The Dutch Ministry of Health has published a chart depicting Down syndrome as the most “costly” condition to Dutch society. Lindeman, *A Moral Duty to Abort*, Ex. C.

An Oxford professor recently advocated that, after a prenatal diagnosis of Down syndrome, there is 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, Ex. T. In a debate before the U.N. Human Rights Committee, the representative from Tunisia declared that, “though it is necessary to help disabled people once they are born, this doesn’t mean that we have to accept 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, Ex. U. He added, “we must do everything we can to avoid disabilities.” *Id.*

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*, Ex. C. An influential writer in France has referred to Down syndrome as “a Greek tragedy.” Sullivan Decl. ¶ 9, Ex. B. One philosopher has argued that woman have an “ethical responsibility to abort . . . and try again” after a diagnosis of Down syndrome. Bingham, Ex. 2. Last year, the Dutch Minister of Health commented 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, Ex. V. A professor of bioethics at Princeton “has endorsed the actual infanticide of newborns.” Sullivan Decl. ¶ 23, Ex. B. And a journalist and historian has advocated for a right to what he terms “eugenic abortion.” Fernandes Decl. ¶ 10, Ex. D.

Families of individuals with Down syndrome see some of this media coverage about Down syndrome as particularly offensive. 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, Ex. W. 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, Ex. X. Another said, “[e]liminating a population of people based on ignorance and fear is reprehensible.” Gill Decl. ¶ 6, Ex. N. Recently, a contributor to the Huffington Post bluntly 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*, Ex. U.

**4. Biases Among Some in the Media and Medical Fields, and Expressed by Various Influential Leaders Has Led to Misinformation and Distortion of Facts**

Study after study reveals that the process of prenatal testing and the advice and care that follows it can be woefully lacking in accurate information, empathy, and access to support.

In recent years, “cell-free” DNA testing has greatly expanded the availability of prenatal screening. Fernandes Decl. ¶ 6, Ex. D. “Cell-free DNA is fetal DNA circulating in the maternal bloodstream.” *Id.* Cell-free DNA testing is relatively non-invasive, requiring only a simple blood draw from the mother. *Id.* This testing can be done “[t]ypically ten weeks or more into a pregnancy.” Sullivan Decl. ¶ 4, Ex. B. The screening carries a “5% false-positive rate for Down syndrome,” and if Down syndrome is detected, is often followed by other, more invasive

diagnostic testing. *Id.* As a recent technological development, cell-free DNA screening was not available at the time of *Roe* in 1974. Fernandes Decl. ¶¶ 5-6, Ex. D.

As prenatal genetic testing for Down syndrome has become more commonly available, abortions of unborn children with Down syndrome have increased. Dr. Peter McPharland, at a recent conference, remarked that the “impact” of widespread genetic testing has been profound. Peter McPharland, *Second Meeting of the Citizens’ Assembly* (Jan. 7, 2017), <https://www.youtube.com/watch?v=GC1c3ETy8Jo>. “In Iceland,” he said, “no babies have been born with Down Syndrome in the past 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, Ex. B. In the United Kingdom, the rate is nearly 100%. *Id.*

In the United States, the numbers 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, Ex. B. Moreover, a recent report has estimated that the cumulative effect of abortions “over the past several years has been to reduce the Down syndrome community by 30%.” *Id.* ¶ 10.

Studies show that some in the medical profession and the counseling process itself have been at least partly responsible for the high rate of abortion after a diagnosis of Down syndrome. Dr. Sullivan’s opinion is that “overt or subtle bias or coercion of the medical profession related to abortions after a diagnosis of Down syndrome is a serious problem.” *Id.* ¶ 15. Robin Lynn Treptow, Ph.D. (Psychology), M.A. stated:

Accruing 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 and others with intellectual disability, as well as disability generally. Parents are often told about their infant’s T21(DS) diagnosis in a cautionary way even though such pessimism does not match what persons with T21 and their families think, or fit emerging data on the capabilities of these babies.

Treptow Decl. ¶ 6, Ex. V (citations omitted). Ashley K. Fernandes, M.D., Ph.D. (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, Ex. D.

Studies provide data consistent with these opinions. A 2013 study reported that many parents of children with Down syndrome had experienced “pressure to terminate the pregnancy.” 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), Ex. Z. The parents in the study “reported a lack of accurate and current information about D[own] S[yn]drome] 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.

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, Ex. B. Likewise, a 2011 medical paper reported that “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, Ex. D (quotation omitted).

A 2009 study noted that mothers who “received a prenatal diagnosis of D[own] S[yn]drome] and chose to continue their pregnancies . . . indicated that their physicians often

provided incomplete, inaccurate, and, sometimes, offensive information about D[own] S[yn]drome.” Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear*, 94 Arch Dis Child 823, 824 (2009), Ex. AA. Another study reported that 63.31% of physicians support abortion as a “treatment option” for non-lethal fetal abnormalities. Denis Cavanaugh et al., *Changing Attitudes of American OB/GYNs on Legal Abortion*, 20 Female Patient 48, 49 (1995), Ex. BB.

In a 2004 survey of 499 primary care physicians, thirteen percent admitted that “they ‘emphasize’ the negative aspects of D[own] S[yn]drome so that parents would favor 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), Ex. CC. 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[yn]drome would be an undesired outcome and wish to terminate her pregnancy if such a diagnosis were made prenatally.” *Id.* at 676.

Studies also suggest that pregnant women often do not receive accurate and objective information about Down syndrome. In one German study, 25 percent of women stated that they opted for prenatal testing because their physician wanted it, 36 percent thought that it was an almost mandatory part of routine maternal care, and 16 percent had either not given consent for the test or could not remember giving consent. Dagmar Schmitz et al., *An Offer You Can't Refuse? Ethical Implications of Non-Invasive Prenatal Diagnosis*, 10 Nature Reviews Genetics 515, 515 (2009), Ex. DD. A 2007 study of Dutch women who had had an abortion after a diagnosis of Down syndrome found that 92% percent felt their child would not be able to function independently, 83% percent said the burden of raising such a child would be too heavy,

73% cited the burden on their other children, and 45% cited low respect in society for individuals with disabilities. Holt at 15-16, Ex. L; *see also* Fernandes ¶ 14, Ex. D (“The decision to terminate after a prenatal diagnosis of Down Syndrome is generally based on *perceived* factors such as perceived parenting burden, perceived quality of life of children with Down Syndrome, perceived support in society, and perceived standing in society.”).

These numbers become much more real when parents talk about their experiences. One couple stated that after experiencing the joy of a newborn child, doctors noted that the 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. ¶ 3, Ex. E. During pregnancy for a different child, the couple was “strongly encouraged to consider abortion” because “there was a 1 in 26 chance” of “a severe disability.” *Id.*, ¶¶ 8-9. A different 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), Ex. EE. 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 27, 2016), Ex. FF. 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, Ex. Y. 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, Ex. D.

##### **5. The Ohio Law Responds to Concerns over a Bias Within the Medical Field Toward Abortion After a Test Indicating Down Syndrome**

The Ohio law states, in part:

(B) No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the

pregnant woman is seeking the abortion, in whole or in part, because of any of the following:

- (1) A test result indicating Down syndrome in an unborn child;
- (2) A prenatal diagnosis of Down syndrome in an unborn child;
- (3) Any other reason to believe that an unborn child has Down syndrome.

Ohio is not alone in addressing discrimination in aborting unborn children. Nine States prohibit abortions based on the sex of the unborn child. Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1904; Ind. Code § 16-34-4-4; Kan. Stat. § 65-6726; N.C. Gen. State § 90-21.121; N.D. Cent. Code § 14 02.1-04.1; Okla. Stat. title 63, § 1-731.2(B); 18 Pa. Cons. Stat. § 3204(c); S.D. Codified Laws § 34-23A-64. Two States prohibit abortions based on the race of the unborn child. Ariz. Rev. Stat. § 13-3603.02; Ind. Code § 16-34-4-8. And two States also prohibit abortions based on a genetic abnormality or disability. Ind. Code §§ 16-34-4-6 & 16-34-4-7; N.D. Cent. Code § 14 02.1-04.1.

Ohio Senator Frank LaRose testified that “[t]his legislation will protect the lives of unborn children with disabilities and value them as equal members of society.” LaRose Test., Ex. II. Separately, in Washington D.C., Frank Stephens, Special Olympian, powerfully testified 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, Ex. A. He further noted that recent efforts to eliminate Down syndrome push an agenda “that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist.” *Id.*

### **III. LEGAL ARGUMENT**

The Ohio law falls outside the analysis of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) for two reasons. First, *Roe* and *Casey*

concerned only the decision whether “to beget or bear a” child, not a doctor’s action to perform an abortion arising from a genetic test indicating a disability. *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). Second, in addition to the State’s interest in protecting unborn life, as acknowledged by the Supreme Court, here there are at least three additional, compelling state interests: combatting discrimination, protecting the integrity of the medical profession, and seeking to protect the Down syndrome community and its civic voice in our pluralistic society.

**A. Plaintiffs’ Claims Do Not Merit an Injunction**

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). This standard is demanding because an injunction is an “extraordinary remedy.” *Id.* at 22. A plaintiff must establish a “strong” likelihood of success, *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012) (quotation omitted); a mere “possib[ility]” of success does not suffice, *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Similarly, the plaintiff must show a likelihood, not just a possibility, of irreparable injury. *Winter*, 555 U.S. at 22. As discussed more fully below, Plaintiffs here fail on all counts.

**B. The Supreme Court of the United States Has Never Recognized a Right to Abort an Unborn Child on the Basis of a Disability**

*Roe* concerned the decision *whether or not to bear a child*—“[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.” *Carey v. Population Servs., Int’l.*, 431 U.S. 678, 685 (1977). Indeed, a *Roe* concern, as *Casey* observed, was a choice potentially arising from “unplanned activity” or “in the event that contraception should fail.” 505 U.S. at 856. The “dimension of personal liberty that *Roe*

sought to protect” was the decision to have an abortion “when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.” *Id.* at 853.

Never has the Supreme Court—not in *Roe*, in *Casey*, or in any other decision—endorsed abortion based on a diagnosis of a physical or mental challenge. The Court has never framed the due process abortion decision as whether to bear or abort a child based on his or her genetic abnormality. The single claim Plaintiffs raise—substantive due process—has never included a right to abort an unborn child based on a disability.

The Ohio law does not interfere with the abortion right in *Roe* and *Casey*. It does not affect a decision whether to have “a” child. Instead, the statute restricts a doctor’s performance of an abortion based on a diagnosis of Down syndrome. Such an action is quite distinct from the circumstances and rule of *Roe* and *Casey*. The decision to have an abortion after a diagnosis of Down syndrome is fundamentally different from the generalized decision “whether or not to beget or bear a child.” *Carey*, 431 U.S. at 687.

And if it became legally permissible, indeed constitutionally protected, for abortions to be based on the diagnosis of a potential disability, then there is conceivably no end to selective abortions. 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 number of traits. Already, selective abortions are a documented problem 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, Jul. 27, 2017, Ex. GG; accord Nicholas Eberstadt, *The Global War Against Baby Girls*, 33 *The New Atlantis* 3 (2011), Ex. HH (documenting similar phenomenon in China, South Korea, and other countries).

Plaintiffs' argument that "[a] ban on abortion at any point prior to viability, whether partial or total, is . . . *per se* unconstitutional" (Motion p. 12) misapprehends *Roe* and *Casey*. These decisions did not, at any time in a pregnancy, create "an absolute constitutional right to an abortion on . . . demand." See, e.g., *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 disability. *Casey* addressed informed consent and notification statutes. 505 U.S. at 844. And *Roe* involved a law prohibiting most abortions. 410 U.S. at 118.

Other decisions, moreover, do indeed limit certain abortions prior to viability. Take *Casey*. There, the Court upheld a statute requiring a minor to obtain parental consent or judicial bypass prior to having an abortion. *Casey*, 505 U.S. at 899-90. 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. *Id.* at 899. Similarly, in *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007), the Court upheld the federal Partial-Birth Abortion Ban Act of 2003 (18 U.S.C. §1531), which prohibited a partial-birth abortion "both previability and postviability."

Plaintiffs' "*per se* unconstitutional" position also is wrong because it ascribes to the Supreme Court the unreasonable position that pre-viability abortion is of greater constitutional significance than core rights like the freedom of speech or assembly. "[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). For example, the First Amendment provides in categorical terms that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. But

this protection is “not absolute.” *Virginia v. Black*, 538 U.S. 343, 358 (2003). The Court has, for example, recognized “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). And the Supreme Court also has held that the States can prohibit even fully protected speech where a law satisfies strict scrutiny. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665-66 (2015).

Indeed, the Supreme Court has held explicitly that state laws designed to protect against discrimination can withstand challenge even despite baseline constitutional protections, including the freedom of association as founded in the First Amendment. For example, in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), 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.”

*Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017), the Indiana district court decision on which Plaintiffs rely, of course is not binding on this Court. *See Krumpelbeck v. Breg, Inc.*, 2011 U.S. Dist. LEXIS 100231, \*18 n.11 (S.D. Ohio June 21, 2011) (“A district court is not bound by another district court’s decision, or even an opinion by another judge of the same district court.” (quotation omitted)). Indiana has appealed that decision, and the decision is wrong. Contrary to Supreme Court precedent, the district court incorrectly held that there is a “categorical” right to abortion pre-viability, and it failed to consider Indiana’s interests in protecting unborn children from discrimination. *Planned Parenthood of Ind. & Ky., Inc.*, 265 F. Supp. 3d at 866-69.

Rational basis review is appropriate. Because the United States Supreme Court has never held that there is a substantive due process right to have an abortion because of a disability, the Ohio law need only be rationally related to a legitimate government interest. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (judging a substantive due process claim under rational basis because there was no fundamental liberty interest at issue). Plaintiffs have a “heavy burden” under rational basis review. *Doe v. Mich. Dep’t of State Police*, 490 F.3d 491, 504 (6th Cir. 2007). Rational basis review provides that “a law is valid if it rationally furthers a legitimate [state] interest.” *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001). Courts must accord a statute “a strong presumption of validity,” *id.*, and the party challenging a statute “must negate every conceivable basis which might support it,” *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) (quotation omitted).

The statute easily passes rational basis review. The Ohio law sought to address an invidiously discriminatory practice, which violates this Nation’s most core values: the elimination of a class of human beings solely because of a disability.

Ohio has a strong interest in protecting the most vulnerable in society from discrimination, even before birth. The Ohio law serves a legitimate state interest and no injunction should be issued under rational basis review. And even if strict scrutiny applies, Ohio interests protected by this legislation are compelling and withstand scrutiny even under the strictest standards.

**C. Present Here Are Compelling State Interests that Were Not Present in *Roe* and *Casey* and that Withstand Even Strict Scrutiny**

The Ohio law is outside of *Roe* and *Casey* for another reason. *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 due process privacy. *Roe*, 410 U.S. at 154 (holding

that the abortion decision “is not unqualified and must be considered against important state interests in regulation”). Here, there are at least three compelling state interests in addition to protecting unborn life: (1) guarding against social/medical discrimination, (2) protecting the integrity of the medical profession, and (3) protecting the Down syndrome community and its civic voice. All are vital state interests.

The State continues to have, from conception onward, a legitimate interest in protecting life. In *Gonzales*, the Supreme Court of the United States 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. Justices Rehnquist, White, and Kennedy wrote that “[t]he State’s interest, if compelling after viability, is equally compelling before viability.” *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 519 (1989).

*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. Justices O’Conner, Kennedy, and Souter referred to that interest as “profound.” *Id.* at 877. They also criticized abortion jurisprudence for giving “too little acknowledgment” of “the interest of the State in the protection of potential life.” *Id.* at 871.

The protection of life is no less legitimate in instances when an individual has a disability. This is so even for extremely serious conditions, such as “anencephaly,” which is “a neural tube defect in which the fetus develops without forebrain, cerebellum, or cranium.” *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.

## 1. Ohio's Interest in Preventing Discrimination

In addition to the protection of life, here, with the Ohio law, Ohio also has the important “interest in protecting vulnerable groups—including . . . disabled persons.” *Glucksberg*, 521 U.S. at 731. The State’s 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 o’ Duarte*, 481 U.S. 537, 549 (1987)); *Jaycees*, 468 U.S. at 623.

The State’s 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.*

This interest was not weighed or evaluated in any way by the *Roe* and *Casey* Courts, which were primarily concerned with unplanned pregnancies. And it is unquestionably strong. 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.

Unborn children who may have Down syndrome are disproportionately selected for abortion. *See supra* at 14. Data from numerous studies demonstrates that the high rate of

abortions for this demographic, 61% to 91%, is 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 15-16, and by, in many instances, “little to no compassion or support” during the counseling and care process, *supra* at 15. Rhetoric from some foreign governments and influential opinion leaders has also played a role, *supra* at 10-13, as have attitudes within some of the medical community, *supra* at 14-17.

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, Ex. D. 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.

The State has the important interest of conveying to those with disabilities that they are wanted as all others are. The Ohio law responds to the dangerous idea spread by some that the “eradication” of one demographic is good. 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, Ex. Y (citation omitted).

Preventing discrimination in all of its forms has been, and should always be, a vital state interest. As Dr. Sullivan stated in his declaration, “we all should agree on . . . protect[ing] the disadvantaged and vulnerable among us, and we should prevent genetic discrimination.”

Sullivan Decl. ¶ 18, Ex. B. Preventing discriminatory abortions preserves human dignity and advances equality.

## **2. Ohio’s Interest in Protecting 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.* at 732. And for partial birth abortion, the Court cited Congress’s concern that

Partial-birth abortion . . . 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.

*Gonzalas*, 550 U.S. at 157 (quotation omitted) (alteration in original). Similarly, here, safeguarding medical ethics is important. As Dr. Sullivan opines, the Ohio law serves to protect “the integrity of the medical profession.” Sullivan Decl. ¶ 19, Ex. B. 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. While “the information gained from genomic testing . . . can be used for good purposes,” it can also “be subverted to reinforce social biases and introduce discrimination.” *Id.* ¶ 23. The Ohio law protects the medical profession from participating in a trend that is contrary to core medical ethics.

## **3. Ohio’s 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, Ex. E. As Congress stated, “physical and 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 9-10, 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, we are witnessing in some places in the world a systemic effort to target 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, Ex. D.

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, Ex. B. 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, Ex. E. 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. at 2, Ex. H.

To the extent that efforts to systematically abort those diagnosed with Down syndrome succeed, however, the Down syndrome community would have more difficulty mobilizing support and fending off further discrimination. However, “[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, Ex. D. 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. “Laws can and do have a significant effect on attitudes,” and “HB 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.

Again, Ohio’s interests in safeguarding against discrimination through systematic abortions are compelling.

**D. The Ohio Law Does Not Prevent Abortions that Are Medically Necessary for the Life or Health of the Mother**

Plaintiffs are wrong that the Ohio law has no exception for the health or life of the mother. *See* Compl. ¶ 40. Although not explicit, the legislation implicitly allows abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. On its face, H.B. 214 prohibits abortions only when the reason for the abortion is based on a diagnosis of Down syndrome. If the medical judgment of a woman’s physician is that an abortion is necessary to preserve the life or health of the mother, then the decision to abort would not be based on a diagnosis of Down syndrome. The prohibitions in H.B. 214 would not apply.

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”); *Planned Parenthood Region v. Taft*, 444 F.3d 502, 510 (6th Cir. 2006) (“[T]he district court’s holding that the [health and life exception] requirement is a per se rule was erroneous.”). Two final points on this. First, if there is any doubt, the canon of constitutional avoidance saves the statute. “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Gonzales*, 550 U.S. at 153 (quotation omitted) (alteration in original). And, second, even if the Court does not agree that the Ohio 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”).

#### **E. 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 has been, and should always be, a vital public interest.

Additionally, a decision to grant a preliminary injunction would “subject[] [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)).

#### IV. CONCLUSION

Plaintiffs have not begun to meet their high burdens for entitlement to preliminary relief. For the foregoing reasons, the Court should deny Plaintiffs motion for a preliminary injunction.

Respectfully submitted,

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*s/ Steven T. Voigt*

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## **CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2018, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

*s/ Steven T. Voigt*

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