IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3329

PRETERM-CLEVELAND, et al.,

Plaintiff-Appellee,

v.

LANCE HIMES, in his official capacity as Director of the Ohio Department of Health,

Defendant-Appellant.

On Appeal from the United States District Court
Southern District of Ohio, No. 1:18-cv-00109
Honorable Timothy S. Black

BRIEF OF INDIANA, KENTUCKY, AND 16 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF LANCE HIMES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATUTES [CONT'D]

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

STATEMENT OF AMICUS INTEREST

The authority to prevent the spread of abortion as a tool for eugenics is a compelling state interest that Indiana, Kentucky, and other States vindicate via anti-discrimination laws similar to the Ohio law at issue here. Subject (in some States) to court rulings, eleven States have enacted a variety of statutes precluding abortions based on discrimination against the fetus, such as on grounds of race, sex, or disability (including Down syndrome or genetic abnormality): Ariz. Rev. Stat. Ann. § 13-3603.02 (race or sex;) Ark. Code Ann. § 20-16-1904; Ark. Code Ann. § 20-16-2103 (sex or Down syndrome); Ind. Code § 16-34-4 (race, sex, disability); Kan. Stat. Ann. § 65-6726 (sex); Ky. Rev. Stat. Ann. § 311.731 (race, sex, disability); La. Stat. Ann. § 40:1061.1.2 (genetic abnormality); Mo. Rev. Stat. § 188.038 (race, sex, Down syndrome); N.C. Gen. Stat. Ann. § 90-21.121 (sex); N.D. Cent. Code Ann. § 14-02.1-04.1 (sex or genetic abnormality); Okla. Stat. Ann. tit. 63, § 1-731.2 (sex); 18 Pa. Cons. Stat. Ann. § 3204 (sex); S.D. Codified Laws § 34-23A-64 (sex).

The *amici* States urge the *en banc* Court to hold that, while *Roe* and *Casey* find a right for a woman to decide whether to bear or beget a child, they do not safeguard a broader right to decide *which* child to bear, and that consequently States may preclude abortions undertaken on the basis of supposedly undesirable characteristics of the fetus.

I. States Have a Compelling Interest in Prohibiting Eugenic Abortions and Safeguarding the Integrity of the Medical Profession in the Process

In *Washington v. Glucksberg*, the Supreme Court held that "[t]he State's interest . . . extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'" 521 U.S. 702, 732 (1997). This critical objective supports various civil rights protections, including the Americans with Disabilities Act, where 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." 42 U.S.C. § 12101(a)(1).

The commitment to protecting individuals with disabilities has implications for abortion, and indeed the United Nations Committee on the Rights of Persons with Disabilities has stated that disability-selective abortions "perpetuate[] notions of stereotyping disability as incompatible with a good life." Susan Yoshihara, *Another UN Committee Says Abortion May be a Right, but not on Basis of Disability*, Center for Family & Human Rights, October 26, 2017, https://c-fam.org/friday_fax/another-un-committee-says-abortion-may-right-not-basis-disability/. Anti-eugenic laws such as Ohio's fit firmly within the American tradition of expanding laws that preclude discrimination against the disabled.

A. The eugenic history of abortion in the United States, improvements in prenatal-screening technology, and global Down syndrome abortion rates all support a compelling anti-eugenics government interest

The eugenic roots of abortion justify stemming its use to eliminate "undesirable" genetic characteristics, such as Down syndrome. As Justice Thomas observed just last year, "Planned Parenthood founder Margaret Sanger . . . emphasized and embraced the notion that birth control 'opens the way to the eugenist' . . . [a]s a means of reducing the 'ever increasing, unceasingly spawning class of human beings who never should have been born at all.'" *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783–84 (2019) (Thomas, J., concurring). While Margaret Sanger never personally advocated for eugenic abortions, other "eugenicists . . . supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons." *Id.* at 1784. During the 1960s, "abortion advocates echoed the arguments of early 20th-century eugenicists by describing abortion as a way to achieve 'population control' and to improve the 'quality' of the population." *Id.* at 1790.

The risk that abortion may be used for eugenics increases as advances in fetal screening technology decrease the costs of learning whether a particular fetus may have a disability. In particular, cell-free DNA testing permits genetic screening through a simple maternal blood draw in the first trimester, without the risk of miscarriage of traditional diagnostic methods such as amniocentesis. As Justice Thomas

observed, such technological advances have "heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability." *Id.* at 1784.

Indeed, whereas amniocentesis is typically offered only to women over 35, the American College of Obstetricians and Gynecologists recommends offering cell-free testing for Down syndrome to all pregnant women "as early as possible in pregnancy, ideally at the first obstetric visit." American College of Obstetricians & Gynecologists, Practice Bulletin 162: Prenatal Diagnostic Testing for Genetic Disorders (May 2016). And if rates of selective abortion increase proportionate to the use of cell-free genetic screening, "this will have catastrophic effects on some populations of children, such as those with Down syndrome." Affidavit of Mary F. O'Callaghan, *EMW Women's Surgical Ctr. v. Beshear*, 2019 WL 1233575, ECF 42-1, ¶¶ 17, 20. (W.D. Ky. Mar. 15, 2019). Already, a 2014 Stanford study of women who had given birth to children with Down syndrome found that 88% of the respondents agreed or strongly agreed that non-invasive prenatal screening would lead to the termination of more pregnancies with Down syndrome. Gregory Kellogg et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing* at 4, October 1, 2015, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4119092/pdf/nihms-562172.pdf.

Worldwide, the temptation toward eugenic treatment of the unborn afforded by cell-free DNA screening is proving irresistible. As Judge Batchelder observed in her dissent from the panel opinion, many countries "celebrate the use of abortion to cleanse their populations of babies whom some would view—ignorantly—as sapping the strength of society." ECF 65-2 at 10 (Batchelder, J., dissenting).

As a consequence, China and Western Australia have reported abortion rates following a Down syndrome diagnosis of around 94% and 93%, respectively. O'Callaghan Affidavit, ¶ 15. Through selective abortion, Iceland and Denmark have nearly eliminated all children with Down syndrome. *Id.* ¶ 22. Since prenatal screening was introduced in Iceland, "close to 100 percent" of women who receive a test result indicating Down syndrome choose to terminate the pregnancy. Julian Quinones & Arijeta Lajka, *"What Kind of Society Do You Want to Live in?": Inside the Country Where Down Syndrome is Disappearing*, CBS News, August 14, 2017, https://www.cbsnews.com/news/down-syndrome-iceland/. Only one or two children with Down syndrome are born each year in Iceland because, as an Icelandic prenatal physician chillingly observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, August 16, 2017, https://www.independent.co.uk/life-style/health-and-families/iceland-downs-syndrome-no-children-born-first-country-world-screening-a7895996.html.

Nor is eugenic use of abortion in the United States merely hypothetical, as Justice Thomas observed, with the abortion rate following an in utero Down syndrome diagnosis coming in around 67%. *Box*, 139 S. Ct. at 1783, 1790 (Thomas, J., concurring). Others estimate that 80% of women who learn of a Down syndrome diagnosis before 24 weeks choose to terminate the pregnancy. Susan Donaldson James, *Down Syndrome Births are Down in the U.S.*, ABC News, October 30, 2009, https://abcnews.go.com/Health/w_ParentingResource/down-syndrome-births-drop-us-women-abort/story?id=8960803.

Even more alarming, a review of nine hospital-based studies revealed a rate of over 85% of pregnancies terminated following a prenatal diagnosis of Down syndrome. Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates* (1995-2011), 32:2 Prenatal Diagnosis 142, 147 (2012). This review also suggested that higher termination rates following a Down syndrome diagnosis "were consistently associated with earlier gestational age," with one study reporting that 93% of women at 16 weeks or less chose termination compared to 85% at 17 weeks or greater. *Id.* at 149.

In short, concern for eugenic use of abortion, and the dramatic consequences that will follow, is justified by concrete, real-world trends.

B. With eugenic abortions, the integrity of the medical profession is on the line

Separately, States have a compelling government interest in ensuring that medical providers do not become "witting accomplices" to eugenic ideals targeting the eradication of Down syndrome. ECF 65-2 at 11 (Batchelder, J., dissenting). This interest is implicated here. By way of example, the American Medical Association endorsed disability selective abortion in 1967. Affidavit of Mary F. O'Callaghan, *EMW Women's Surgical Ctr. v. Beshear*, 2019 WL 1233575, ECF 42-1, ¶ 17 (W.D. Ky. Mar. 15, 2019); *see also* American Medical Association, House of Delegates Proceedings, Annual Convention 1967 40, 50 (adopting as policy: "an occasional obstetric patient. . . would warrant the instituion [*sic*] of therapeutic abortion. . . to prevent the birth of a severely crippled, deformed or abnormal infant").

Under this "current paradigm of prenatal testing," physicians who have "professed to do no harm" are the ones pressuring parents to choose abortion following a Down syndrome diagnosis. O'Callaghan Affidavit, ¶ 55. In expert testimony supporting Indiana's anti-discrimination abortion law, Dr. Steve Calvin, a board-certified OB/GYN specializing in maternal-fetal medicine, observed that "[w]omen have described to me the pressure—both subtle and overt—they have felt to . . . have an abortion if Down syndrome is detected," including from "genetic counselors, physicians, and other medical personnel." Declaration of Steven E. Calvin, M.D., *Planned*

Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health, 265 F. Supp. 3d 859, ECF 54-1, ¶ 20 (S.D. Ind. 2017).

Broader surveys also detect the problem. One study reported that "nearly 1 out of 4 women had a doctor who was insistent on terminating the pregnancy after a diagnosis of Down syndrome," and another study reported that "about half [of the respondents] felt rushed or pressured into making a decision about continuing the pregnancy." O'Callaghan Affidavit, ¶ 14. An anonymous survey of nearly 500 physicians who had delivered after prenatal diagnoses revealed that 13% of the providers emphasized the negative aspects of Down syndrome so that patients would favor terminating the pregnancy and 10% actively "urge" parents to terminate the pregnancy. Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 American Journal of Obstetrics and Gynecology 670, 670-71 (Nov. 2004).

Promoting abortion on the basis of a Down syndrome diagnosis blurs "the time-honored line between healing and harming," *Glucksberg*, 521 U.S. at 731, which distorts the purpose that the medical profession should serve. The Supreme Court recognized a State's compelling interest in protecting the medical profession's integrity and ethics when it upheld laws banning physician-assisted suicide (*Glucksberg*, 521 U.S. at 735) and a federal law banning partial-birth abortions (*Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)); *see also Trs. of Ind. Univ. v. Curry*, 918 F.3d

537, 542–43 (7th Cir. 2019) (upholding Indiana law prohibiting sale, purchase, transfer, or acquisition of fetal tissue as a means to "protect[] the integrity and ethics of the medical profession"). Ohio's statute fits within this well-established tradition of curbing medical practices that undermine the trust earned by centuries of practice and understanding that medicine is solely to be used for the benevolent treatment of human beings.

II. The Non-Discrimination Provision Does Not Interfere with the Right Protected by *Roe* and *Casey*

Fundamentally, *Casey* said that the right to abortion at its core is "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (emphasis added). And *Roe* protects a woman's ability to choose 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.

The panel decision, however, invalidated the Ohio law based on the erroneous understanding that *Roe* and *Casey* afford a "categorical" "right to abortion." ECF 65-2 at 6. In so doing the panel expanded the right recognized by *Casey* to include not only the decision whether to have a child at all, but also the decision *which* child to have.

The Supreme Court had never extended the holding of *Roe* or *Casey* to apply when a woman is willing to bear a child but wishes to terminate her pregnancy because she finds a particular child unacceptable—"[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *See Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting in part from denial of rehearing *en banc*). There is a significant difference, Judge Easterbrook observed, between a woman saying "'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Id*.

Furthermore, the Supreme Court has never declared a *categorical* right to a pre-viability abortion. In *Roe*, the Court rejected the argument that a woman's right to abortion "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 v. Wade*, 410 U.S. 113, 153 (1973). And in *Casey*, the Court recognized that *Roe* "was not recognizing an absolute." *Casey*, 505 U.S. at 875. So while the panel in this case erroneously declared that "[t]his right [to a pre-viability abortion] is categorical," ECF 65-2 at 6, banning a particular *reason* for seeking an abortion burdens the right actually recognized by *Roe* and *Casey* no more than banning a particular *method* does. *See Gonzales v. Carhart*, 550 U.S. 124, 157–158 (2007). Where abortions are

available by methods other than that which is prohibited, *see id.* at 165—and by extension, for reasons other than that which is prohibited—the restriction is valid.

In her dissent, Judge Batchelder properly recognized that the undue-burden analysis requires a consideration of "the State's interests and the benefits of the law, not just the potential burden it places on women seeking an abortion." ECF 65-2 at 11 (Batchelder, J., dissenting). Critically, laws banning Down syndrome abortions vindicate moral and ethical justifications not addressed in *Roe* and *Casey*. *See Gonzales*, 550 U.S. at 158 (observing that partial-birth abortion "implicates additional ethical and moral concerns that justify a special prohibition"). As Judge Easterbrook observed, using abortion for eugenic goals is "morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." *Comm'r of Ind. State Dep't of Health*, 917 F.3d at 536 (Easterbrook, J., dissenting).

Accordingly, *Casey* did not determine whether "the Constitution requires States to allow eugenic abortions" and whether a law like Ohio's law is constitutional "remains an open question." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). As Justice Thomas and Judge Batchelder have warned, courts, like States, must take seriously the "potential for abortion to become a tool of eugenic manipulation," *id.* at 1784 (Thomas, J., concurring), such that "the abortion of unborn children diagnosed with Down Syndrome

'requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition,'" ECF 65-2 at 14 (Batchelder, J., dissenting) (citing *Gonzales*, 550 U.S. at 158).

Ultimately, Ohio regulates those who have *already* made the decision "to bear or beget a child," but simply do not want to bear a child with Down syndrome. It does not, therefore, impinge on the right declared by *Roe* and *Casey*.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, of which all parties are participants.

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