No. 18-3329

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRETERM-CLEVELAND, *et al.*,

Plaintiffs-Appellees

v.

LANCE HIMES, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS EN BANC AND URGUING REVERSAL

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INTEREST OF THE UNITED STATES

The United States respectfully submits this amicus brief in support of Ohio.[1] Ohio Revised Code § 2919.10(B) prohibits abortion providers from performing an abortion they know is sought because of Down syndrome. Both the district court and a divided panel of this Court erred in holding this law unconstitutional under the undue-burden standard. Nothing in Ohio's law creates a substantial obstacle to women obtaining an abortion, and nothing in the Constitution or Supreme Court precedent requires States to authorize medical providers to participate in abortions the providers *know* are based on Down syndrome.

Given Congress's abortion legislation, *e.g.*, 18 U.S.C. 1531, the United States has an interest in the scope of the undue-burden standard and has participated in cases involving state abortion laws, see, *e.g.*, *June Medical Services L.L.C.* v. *Gee*, Nos. 18-1323 & 18-1460 (U.S. filed Jan. 2, 2020) (U.S. *June Medical* Br.); *Women's Med. Prof'l Corp.* v. *Taft*, 353 F.3d 436 (6th Cir. 2003). The federal government also has an interest in the equal dignity of those living with disabilities. It enforces civil rights laws that outlaw various forms of disability discrimination, including the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. It also enforces the Genetic Information Nondiscrimination Act, which protects against discrimination as to health insurance and employment on the basis of genetic

[1] Under Rule 29(a)(2), the United States may file an amicus brief in the courts of appeals "without the consent of the parties or leave of court." See also 28 U.S.C. 517.

information, including "of any fetus carried by [a] pregnant woman," 42 U.S.C. 2000ff-8(b). And more generally, the United States has an interest in protecting individuals from discrimination on the basis of disability, race, sex, and other protected grounds.

STATEMENT OF THE CASE

In 2017, Ohio's General Assembly passed, and Governor John Kasich signed, legislation (the Antidiscrimination Law) directing that an abortion provider cannot "purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if" the provider "*has knowledge* that the pregnant woman is seeking the abortion, in whole or in part, because of" a "test result" or "prenatal diagnosis" of "Down syndrome in an unborn child" or "[a]ny other reason to believe that an unborn child has Down syndrome." Ohio Rev. Code § 2919.10(B) (emphasis added). The Antidiscrimination law also adds an item to Ohio's abortion reporting regime, directing the attending physician to indicate that he or she "does not have knowledge" the abortion violated Section 2919.10(B). Ohio Rev. Code § 2919.101(A). Finally, the law expressly shields women who seek such abortions from any liability. *Id.* § 2919.10(F).

Plaintiffs brought a facial challenge before the law took effect. The district court entered a preliminary injunction, *Preterm-Cleveland* v. *Himes*, 294 F. Supp. 3d 746 (S.D. Ohio. 2018) (*Preterm I*). A divided panel of this Court affirmed by purporting to apply the joint opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992). *Preterm-Cleveland* v. *Himes*, 940 F.3d 318, 323-325 (6th Cir. 2019) (*Preterm II*).

Judge Batchelder dissented, observing the district court cited "no evidence" that the law created a substantial obstacle to obtaining an abortion. *Id.* at 328.

ARGUMENT

To establish that the Antidiscrimination Law imposes an undue burden, plaintiffs had the burden to show both that (i) the law "places a substantial obstacle in the path of women seeking a previability abortion," and (ii) that the substantial obstacle is not outweighed by "benefits sufficient to justify the burdens." *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). They failed to do so.

At the outset, the Antidiscrimination Law serves several important purposes. It protects individuals with disabilities from prejudice and indifference and the medical profession from harm to its integrity and reputation. The law also wards against the slippery slope to medical involvement in race- or sex-based abortions. And it protects women themselves by separating them from potentially coercive abortion providers who may seek to pressure them into obtaining an abortion because of Down syndrome.

Consistent with those goals, the law does not prohibit any abortions. Instead, it merely forbids providers to participate in abortions they *know* are sought on the basis of Down syndrome. This is what the text of the law says, this is how the State of Ohio understands the statute, and this is the construction the canon of constitutional avoidance compels. Thus, whether one considers its purpose or effect, the law does not create a substantial obstacle to obtaining a previability abortion. It certainly does not create a substantial obstacle for a large fraction of affected women—let alone all

such women. And regardless, any burdens would be outweighed by the law's substantial benefits. Nothing in *Casey* (or any other Supreme Court decision) holds otherwise.

I. Plaintiffs Failed To Establish A Substantial Obstacle In This Facial Challenge.

To carry their "heavy burden" in this facial challenge, *Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007), plaintiffs had to "present evidence" that the Antidiscrimination Law would create a substantial obstacle to obtaining an abortion for at least a "large fraction" of affected women. *Hellerstedt*, 136 S. Ct. at 2313, 2320 (citation omitted). They did not do so.

1. Given their choice to bring a pre-enforcement facial challenge before the Antidiscrimination Law took effect, plaintiffs could not provide any direct evidence of the law's impact. Plaintiffs likewise offered no evidence that any of the many other state laws that prohibit abortions because of race, sex, or genetic abnormality—some of longstanding vintage—have imposed substantial burdens (or even any burden) within their respective jurisdictions. See *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 n.2 (2019) (Thomas, J., concurring) (collecting statutes). Instead, plaintiffs simply maintained that the law would prohibit "women seeking an abortion after a diagnosis or indication of fetal Down syndrome" from "obtaining an abortion in Ohio." Panel Br. 28 n.6. That assumption is flatly incorrect. As Ohio represented to this Court:

> The law does not prohibit *any abortions at all*. Any woman can obtain a pre-viability abortion of any pregnancy for any reason except a Down

> syndrome diagnosis. *Even if* she wants an abortion for that reason, *she can get one*: The Antidiscrimination Law does not require that a physician inquire into the motivations of the woman seeking an abortion, nor does it require the woman to disclose her motivations, nor does it instruct a physician to speculate.

En Banc Pet. 13-14 (emphasis altered); see also Ohio Supp. Br. 16-18.

Thus, unless a woman discloses such a motivation to an abortion provider, her ability to obtain an abortion from that provider is unfettered. And even if she were to volunteer this motivation, nothing in the law would prevent her from seeking out a second provider. See *Preterm II*, 940 F.3d at 328 (Batchelder, J., dissenting). Furthermore, nothing in the law prevents a doctor or abortion provider with knowledge of a Down syndrome-motivated abortion from referring the patient elsewhere. Plaintiffs have not shown that this would create a substantial obstacle. Cf. *Casey*, 505 U.S. at 886 (joint opinion) (waiting period requiring "at least two visits to the doctor" not substantial obstacle). Ohio's construction of the Antidiscrimination Law also allows this Court to avoid more difficult constitutional questions. See *Davet* v. *City of Cleveland*, 456 F.3d 549, 554 (6th Cir. 2006).

Plaintiffs respond by claiming that the "evidence shows not only that patients voluntarily disclose the reasons for their abortion (including this reason), but also that patients' medical records often reveal when testing indicates or diagnoses Down syndrome." En Banc Opp'n 7. But the only evidence they cite for this proposition (their own declarant) does not suggest that the majority of relevant patients expressly explain to their providers their reasons for seeking an abortion (or that they identify

Down syndrome as their motivation). See Lappen Decl. ¶¶ 35-37, R. 3-1, PAGE ID# 46; En Banc Opp'n 11. And, the mere fact that a woman seeks an abortion *after* receiving a Down syndrome diagnosis cannot serve as proof of a provider's *knowledge* of her motivation, which—as the same declarant and plaintiffs acknowledge, *id.*—is often complex and evolving. Simply put, although a genetic test result or specialist's referral may cause an abortion provider *to suspect* the patient's subjective motive, a provider in these circumstances cannot presume *to know* the patient's mind on such a multifaceted decision, and providers need not "inquire" or "speculate." See Ohio Supp. Br. 24 ("Speculation is not 'knowledge,' so the law does not stop doctors from performing abortions simply because they think—based on medical records or anything else—that the patient *might* want the abortion based on a Down syndrome indication.").

That the Antidiscrimination Law applies before viability does not change the analysis. *Casey* recognized that a State has a "substantial * * * interest" in protecting "potential life *throughout pregnancy*"—not just after viability—and *rejected* a constitutional rule that would impose a "rigid prohibition on all previability regulation." 505 U.S. at 873, 876 (joint opinion) (emphasis added). *Casey* accordingly upheld multiple restrictions on abortion that applied before viability, including a mandatory waiting period and an informed-consent requirement. See *id.* at 881-887. Likewise, the Court in *Gonzales* upheld the federal partial-birth abortion ban even though that statute applied "both previability and postviability." 550 U.S. at 147. Plaintiffs try to distinguish *Gonzales* on the ground that the statute at issue permitted alternative avenues for

obtaining abortion. En Banc Opp'n 8. But the same is true here; as noted, the law leaves a woman free to obtain an abortion (even on the basis of a Down syndrome diagnosis) without disclosing her motive to her provider, or to obtain an abortion from an alternative provider if she has disclosed her motive to the first one.

Given that the effect of the Antidiscrimination Law so clearly does not create a substantial obstacle to obtaining previability abortions, it is unsurprising that it lacked such a purpose. *Gonzales*, 550 U.S. at 157. That is not because Ohio passed a toothless law, but rather because this legislation carefully targets the *knowing* participation of a provider in an abortion on the basis of Down syndrome given the State's significant interest in protecting the reputation and integrity of its medical profession. See Part II, *infra*. And, it is only women—not abortion providers—who matter in the undue-burden analysis. Indeed, just last year, this Court specifically observed that "[t]he Supreme Court has never identified a freestanding right to perform abortions." *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc).

Accordingly, plaintiffs have not carried their "heavy burden," *Gonzales*, 550 U.S. at 167 (citation omitted), of establishing that the Antidiscrimination Law will impose a substantial obstacle for any Ohio woman who wishes to obtain an abortion on the basis of Down syndrome, let alone the large fraction required to sustain a facial challenge under the standard most favorable to plaintiffs.

2. Alternatively, this Court could reverse by applying the general rule that a law is facially unconstitutional only if "no set of circumstances exists under which the

Act would be valid," *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)—a standard the Supreme Court has applied to a facial challenge to an abortion regulation, see *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). To be sure, in the course of facially invalidating a spousal-notification provision, the joint opinion in *Casey* stated that, "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle." 505 U.S. at 895. Yet *Casey* did not apply the large-fraction formulation to any other provision, nor did the Court use the formulation in striking down a state partial-birth abortion ban in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), see *id.* at 1019 (Thomas, J., dissenting), and the Court reserved the question in *Gonzales*, 550 U.S. at 167. *Hellerstedt* invoked the large-fraction formulation, but while noting that "Texas reads *Casey* to have required" that approach. 136 S. Ct. at 2320. The proper standard thus remains an "open question" in the Supreme Court. *Id.* at 2343 n.11 (Alito, J., dissenting). And although panels of this Court (including the one here) have invoked the "large-fraction test" in adjudicating facial challenges to abortion regulations, see, *e.g.*, *Preterm* II, 940 F.3d at 325, this Court sitting en banc could clarify that the *Salerno* standard applies. See U.S. *June Medical* Br. at 29-31.

In all events, Plaintiffs cannot satisfy either *Salerno*'s "no set of circumstances" standard or the large-fraction standard. For example, they have not disputed that a woman who seeks an abortion after receiving a Down syndrome diagnosis, but does not disclose her motivations, faces no burden, let alone a substantial one. See En Banc

Opp'n 7. And, upholding the law facially will still allow "preenforcement, as-applied challenges to the Act [to] be maintained." *Gonzales*, 550 U.S. at 167.

II. The Antidiscrimination Law's Benefits Justify Any Burdens.

Because the Antidiscrimination Law does not create a substantial obstacle, this Court need not consider its benefits. See U.S. *June Medical* Br. at 17-21. But the law's benefits are more than sufficient to prevail in any balancing.

First, the law advances Ohio's legitimate "interest in protecting the integrity and ethics of the medical profession." *Gonzales*, 550 U.S. at 157 (citation omitted). Ohio was entitled to conclude that permitting providers knowingly to perform abortions based on Down syndrome could "do deep damage to the integrity of the medical profession," *Preterm II*, 940 F.3d at 326 (Batchelder, J., dissenting)—both in the eyes of those with Down syndrome and the public more generally. Cf. *Gonzales*, 550 U.S. at 157-158 (explaining that federal partial-birth abortion ban helped maintain "a bright line that clearly distinguishes abortion and infanticide" and thereby helped avoid "confus[ing] the medical, legal, and ethical duties of physicians") (citations omitted). This interest explains why the law permits a woman to obtain an abortion on the basis of Down syndrome so long as the provider remains unaware of her motivation. Although Ohio's interest in protecting the dignity of those with Down syndrome exists regardless of a provider's knowledge, its interest in protecting the integrity and reputation of the medical profession is particularly implicated when that provider knowingly performs an abortion on the basis of that condition. Relatedly, this aspect

of the Antidiscrimination Law helps protect women against the risk that some or any abortion providers may pressure them to obtain an abortion on the basis of Down syndrome rather than leaving this difficult decision to them. The suggestion that Ohio's decision to draw the line at a provider's knowledge is irrational, see En Banc Opp'n 7, is thus no more tenable than the argument *Gonzales* rejected that "standard D & E" abortions are "as brutal, if not more, than" partial-birth (or "intact D & E") abortions, 550 U.S. at 160.

Second, the Antidiscrimination Law "protect[s] disabled * * * people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 732 (1997). A prohibition on abortion providers from knowingly performing abortions based on disability—like a prohibition on knowingly participating in assisted suicides—replaces "negative messages" with a public statement that the lives of individuals with "disabil[ities] * * * must be no less valued than the lives" of others. *Id.* Many women whose unborn children are diagnosed with Down syndrome receive the message that those children would be better off never being born. See Ohio Supp. Br. 15. The Antidiscrimination Law promotes Ohio's contrary message that people with Down syndrome have lives worth living, lives worth protecting. The validity of such a message is evident, especially, when one considers "the once-pervasive practice of involuntarily sterilizing those with mental disabilities," which "the judiciary itself * * * endorsed." *Tennessee* v. *Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring).

Third, the law "draw[s] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." *Gonzales*, 550 U.S. at 158. Just as a State may reasonably "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia," *id.* (citation omitted), it may also conclude that permitting providers knowingly to perform abortions on the basis of Down syndrome will open the door to the involvement of the State's medical profession with abortions done on the basis of race, sex, genetic makeup, or other attributes that can be detected prenatally, see *Box*, 139 S. Ct. at 1784-1793 (Thomas, J., concurring).

III. *Casey* Did Not Purport To Resolve The Issues Here.

In a recent opinion joined by Judges Sykes, Barrett, and Brennan, Judge Easterbrook explained that "[n]one of the [Supreme] Court's abortion decisions hold[] that states are powerless to prevent abortions designed to [select] sex, race, and other attributes." *Planned Parenthood of Ind. & Ky., Inc.* v. *Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532, 535 (7th Cir. 2018) (dissenting from denial of rehearing en banc), judgment rev'd in part, 139 S. Ct. 1780 (2019). Those who disagree believe that the Supreme Court should be understood to have conclusively held that all previability prohibitions are unconstitutional, including prohibitions on abortions done on the basis of disability, sex, or race. They base that belief on the following language from *Casey*: "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. This appeal does not require this

Court to resolve that debate. Instead, the Antidiscrimination Law does not prohibit women from obtaining a previability abortion on any ground, including Down syndrome. See Part I, *supra*. Thus, this Court can reverse the district court's preliminary injunction by applying *Casey*'s undue-burden framework.

That being said, nothing in *Casey* (or any other Supreme Court decision) has purported to address whether States may prohibit previability abortions when the provider knows they are being sought on the basis of Down syndrome (or other characteristics such as race or sex). *Casey* did not involve a challenge to a state law prohibiting abortions based on a provider's knowledge that the woman was seeking the procedure on the basis of Down syndrome. This is important, because "[j]udicial opinions are not statutes; they resolve only the situations presented for decision." *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing en banc). For example, in *Gonzales*, the Supreme Court did not adhere to language from its opinion in *Stenberg* that, in isolation, could be read to suggest that a statute banning a particular abortion method would be unconstitutional if there is conflicting evidence as to whether the statute would create significant health risks. See *Gonzales*, 550 U.S. at 166; cf. *Miller* v. *Alabama*, 567 U.S. 460, 481 (2012) (similarly distinguishing on factual grounds language in prior precedent).

Indeed, the United States informed the Supreme Court in *Casey* that the petitioners did not challenge a provision of the Pennsylvania law "prohibit[ing] pre-viability abortions based on the sex of the fetus," and argued that, presumably, they had

not done so because in "a free, egalitarian, and democratic society * * * no one could seriously claim that the Constitution offers the remotest protection for such a macabre act." U.S. Amicus Br. at 18 n.13, *Casey*, *supra* (Nos. 91-744, 91-902), 1992 WL 12006421 (Apr. 6, 1992). And the Supreme Court gave no indication that, in upholding nearly all of Pennsylvania's abortion restrictions, it also held (*sub silentio*) that the Constitution protects abortions on the basis of sex (and by extension, disability). Cf. *Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (declining to endorse the proposition that a woman is "entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason she alone chooses*") (emphasis added).

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) and this Court's en banc briefing order because it does not exceed twelve and one-half pages.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Eric S. Dreiband
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DATE: January 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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