Case No. 18-3329

In the United States Court of Appeals for the Sixth Circuit

PRETERM-CLEVELAND, ET AL.,

Plaintiffs-Appellees,

v.

AMY ACTON, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 1:18-CV-00109

BRIEF OF THE STATES OF CALIFORNIA, CONNECTICUT, COLORADO, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NEVADA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE EN BANC

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February 19, 2020

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INTEREST OF AMICI STATES

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* the States of California, Connecticut, Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia file this brief in support of Plaintiffs-Appellees. Amici States have a compelling interest in protecting the health and well-being of their residents. This interest includes ensuring access to reproductive health care and to safe and legal abortion. Amici agree that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality op.).

Ohio's H.B. 214—which would have the effect of prohibiting all abortions in which a prenatal diagnosis of Down syndrome might play a role in a woman's reproductive decision-making—is a threat to those interests. Residents of amici States may need access to reproductive healthcare while present in Ohio as students, workers, or visitors, and physicians licensed in amici States may also practice medicine in Ohio. Amici States are also concerned that the Ohio law would cause pregnant Ohio residents to seek abortion care in other States, straining the health care systems of the amici States. *See Norton v. Ashcroft*, 298 F.3d 547, 558 (6th Cir. 2002) (citing Congressional testimony that "patients must often travel interstate to obtain reproductive health services").

Amici States recognize and share Ohio's interests in affirming the dignity of persons with Down syndrome, ensuring that people facing reproductive choices do not act on outdated information or harmful stereotypes about Down syndrome, and protecting the integrity of the medical profession. Amici States are committed to advancing such interests in a manner consistent with the States' constitutional obligation to protect women's reproductive rights.

ARGUMENT

None of Ohio's stated interests suffice to outweigh a woman's right to choose to terminate her pregnancy pre-viability. Ohio concedes that its law would not pass constitutional muster if its interest amounted only to a generalized interest in potential life, but argues it has additional interests that should be recognized: (1) preventing discrimination against those with Down syndrome; (2) safeguarding the integrity of the medical profession; and (3) protecting the Down syndrome community and its civic voice. Appellants' Br. 50-57. The district court correctly concluded that a ban on pre-viability abortions cannot be considered a permissible means of serving these interests. *See* Opinion of the District Court, R. 28, Page ID # 591 (citing *Roe*, 410 U.S. at 163-64); *Casey*, 505 U.S. at 877.

Ohio, and the amici states urging reversal, present the Court with a false dichotomy between advancing the inclusion and equal dignity of persons with disabilities and protecting a woman's constitutional right to choose whether to end a pregnancy. In the experience of amici States, dispelling discriminatory views about Down syndrome and protecting access to reproductive healthcare are not at odds. To the contrary, States have at their disposal a range of options to further the interests asserted by Ohio without infringing on women's constitutional rights. These include promoting accurate and non-biased information about Down syndrome, enforcing anti-discrimination laws, and providing supportive services for individuals living with Down syndrome and their families. Indeed, protecting individuals with disabilities while simultaneously protecting women's reproductive rights furthers the principles of autonomy and self-determination.

I. STATES HAVE A RANGE OF TOOLS TO HELP PREVENT DISCRIMINATION AGAINST PEOPLE WITH DOWN SYNDROME

The district court's injunction does not leave States "powerless to take any effort to remedy" alleged discrimination, as Ohio suggests. Appellants' Br. 48. States can and do promote provision of medically accurate, unbiased information in order to help individuals make informed reproductive choices. States can also provide (and publicize) civil rights protections, social and medical services, and support to those living with developmental disabilities and their families. These efforts help combat discrimination, reduce bias among doctors and patients, and protect individuals with Down syndrome and their families without infringing on women's reproductive autonomy.

Pro-information laws circulate accurate, non-biased information to dispel discriminatory stereotypes and prejudices regarding individuals with Down syndrome within the medical profession and society at large. In 2008, Congress passed the Prenatally and Postnatally Diagnosed Conditions Awareness Act, which sought to "coordinate the provision of, and access to, new or existing supportive services for patients receiving a positive diagnosis for Down syndrome." 42 U.S.C. § 280g-8(b)(1)(B). The law expanded the National Dissemination Center for Children with Disabilities, peer-support programs, adoption registries, awareness and education programs for health care providers, and the dissemination of information relating to Down syndrome. 42 U.S.C. § 280g-8.

Several States have passed their own pro-information laws. These laws make evidence-based information about Down syndrome available to those who receive a prenatal indication of Down syndrome, including unbiased information on the outcomes, life expectancy, development, and treatment options for those living with Down syndrome. *See, e.g.*, 16 Del. Code § 801B; Mass. Gen. Laws Ann. ch. 111, § 70H(b); Md. Code, Health-Gen. § 20-1501-1502; Minn. Stat. § 145.471; N.J. Stat. Ann. §§ 26:2-194, 26:2-195; 35 Pa. Stat. §§ 6241-44; Va. Code § 54.1-

2403.1(B). These laws can help healthcare providers transmit accurate, non-stigmatizing information, without infringing on a woman's constitutional rights.

Moreover, these programs and policies are effective means of advancing the interests of individuals with Down syndrome and their families. As the Down Syndrome Association of Central Ohio explains, "empowering families with up-to-date and accurate information and resources" is "the best way to support families receiving a Down syndrome diagnosis—both prenatally and postnatally."[1] The National Down Syndrome Society (NDSS), the "leading human rights organization for all individuals with Down Syndrome,"[2] explains that as a threshold matter, the decision "[w]hether to undergo prenatal testing must be solely that of the pregnant woman."[3] But once a woman decides to undergo prenatal testing, that testing

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[1] Down Syndrome Ass'n of Central Ohio, *Advocacy Initiatives*, http://dsaco.net/advocacyinitiatives/ (last visited Aug. 29, 2018). The Association was not involved in the deliberations surrounding H.B. 214.

[2] National Down Syndrome Society, https://www.ndss.org/our-story/mission/; *see also* Sarah McCammon, *Down Syndrome Families Divided over Abortion Ban*, Nat'l Public Radio (Dec. 13, 2017) https://www.npr.org/2017/12/13/570173685/ down-syndrome-families-divided-over-abortion-ban (explaining that the National Down Syndrome Congress "isn't taking a position" on the Reason Ban).

[3] *NDSS Position Statement on Prenatal Testing*, https://www.ndss.org/wp-content/uploads/2018/06/NDSS-Position-Statement-on-Prenatal-Testing.pdf; *see also A Promising Future Together: A Guide for New and Expectant Parents*, National Down Syndrome Society, at 7 (2015), https://ardownsyndrome.org/wp-content/uploads/2018/02/NDSS-NPP-English.pdf; JA669 ("Truthfully educating patients is not aimed at discrimination. Rather, providing accurate and complete

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"should be made available to any pregnant woman" because "[k]nowing in advance either the risk or diagnosis of Down syndrome can help parents educate, inform and prepare themselves for all issues regarding this genetic condition."[4] Furthermore, "[i]t is important that [families] receive accurate information and understand all [] options."[5] Some families once learning about a diagnosis begin "mak[ing] preparations (like informing other family members and doing research on Down syndrome) prior to the birth," while other parents "make arrangements for adoption," as there is "a long waiting list of families in the United States ready to adopt a child with Down syndrome," while other parents may "discontinue their pregnancy."[6]

In addition to policies that promote information about Down syndrome, anti-discrimination laws and other civil rights laws enable States to both provide valuable legal protection to individuals living with disabilities, and to fulfill the

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information to patients about their circumstances is a core responsibility of all physicians").

[4] *NDSS Position Statement on Prenatal Testing*, https://www.ndss.org/wp-content/uploads/2018/06/NDSS-Position-Statement-on-Prenatal-Testing.pdf.

[5] *A Promising Future Together: A Guide for New and Expectant Parents*, National Down Syndrome Society, at 7 (2015), https://ardownsyndrome.org/wp-content/uploads/2018/02/NDSS-NPP-English.pdf.

[6] *Id.; see also NDSS Position Statement on Prenatal Testing*, https://www.ndss.org/wp-content/uploads/2018/06/NDSS-Position-Statement-on-Prenatal-Testing.pdf (after diagnostic testing, "[a]ll women, regardless of age, reproductive history or disability statutes, must be given the absolute right to continue a pregnancy").

expressive function of law with a message of inclusion and respect. Just as the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Rehabilitation Act, 19 U.S.C. § 701 *et seq.*, and the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, provide federal protections against discrimination for individuals with disabilities, States can—and do—choose to enshrine similar protections in state law.[7] Passage of the landmark Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15,001 *et seq.*, helped lead society to have "greater faith in the competencies of citizens with [intellectual and developmental disabilities], and these citizens and their families [to] have higher expectations about the types of lives they will lead."[8]

Furthermore, States can reduce bias and support individuals with Down syndrome and their families by offering supportive medical and social services to individuals with disabilities. These types of services "make it possible to meet the

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[7] *See, e.g.*, Cal. Gov't Code §§ 12900-12996; Cal. Civ. Code §§ 51, 54.1; Conn. Gen. Stat. §§ 46a-60, 46a-64, 46a-64c and 46a70-76; Mass. Gen. Laws ch. 93, § 103; Mass. Gen. Laws ch. 151B, § 4; N.J.S.A. § 10:5-5 *et seq.*; N.M. Stat. Ann. §§ 24-21-4(D), 28-1-7; N.Y. Exec. Law § 291; N.Y. Exec. Law § 296(1); Or. Rev. Stat. §§ 659A.103-659A.145; 43 Pa. Stat. §§ 951-63; Va. Code §§ 51.5-1, 51.5; Vt. Stat. Ann. tit. 3 §§ 961, 963, 1026, 1028; tit. 8 §§ 10403; tit. 9 §§ 2362, 2388, 2410, 4503; tit. 21 §§ 495, 1621, 1726; Wash. Rev. Code § 49.60.30.

[8] Nat'l Council on Disabilities, *Exploring New Paradigms for the Developmental Disabilities Assistance and Bill of Rights Act, Supplement to the 2011 NCD Publication Rising Expectations: The Developmental Disabilities Act Revisited* 10 (2012), https://www.ncd.gov/rawmedia_repository/NCD_Paradigms_Mar26FIN.pdf.crdownload.pdf.

needs of families raising children, including children with disabilities."[9] For example, California contracts with twenty-one nonprofit regional centers[10] to provide services for those living with development disabilities, ranging from diagnosis and counseling to advocacy, family support, and planning care.[11] These centers also provide in-home respite care, non-medical care that relieves families from providing constant care to a loved one with a developmental disability.[12] Connecticut's Department of Developmental Services helps individuals with developmental disabilities live in the community through a variety of community-based residential facilities, and it established a Community Residential Facility Revolving Loan Fund for construction and renovation of community residences, supportive employment programs, and funding for day care programs, recreational programs, and other services.[13] Additionally, States' Medicaid programs can provide home and community-based services for persons with developmental

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[9] Sujatha Jesudason & Julia Epstein, *The Paradox of Disability in Abortion Debates: Bringing the Pro-Choice and Disability Rights Communities Together* 541-543 (2011), http://www.arhp.org/UploadDocs/journaleditorialdec2011_1.pdf.

[10] Cal. Dep't of Developmental Services, https://www.dds.ca.gov (last visited Aug. 29, 2018).

[11] Cal. Dep't of Developmental Services, *Services Provided by Regional Centers*, https://www.dds.ca.gov/RC/RCSvs.cfm (last visited Aug. 29, 2018).

[12] Cal. Dep't of Developmental Services, *Respite (In-Home) Services*, https://www.dds.ca.gov/SupportSvcs/Respite.cfm (last visited Aug. 29, 2018).

[13] Conn. Gen. Stat. §§ 17a-217, 17a-218, 17a-219b, 17a-221 *et seq.*, 17a-226.

disabilities.[14] These services, which include access to skilled nurses, chore services, vehicle adaptations, and therapy,[15] assist those living with developmental disabilities, including Down syndrome, to lead independent, productive lives. *See Ball v. Kasich*, 307 F. Supp. 3d 701, 707-708 (S.D. Ohio 2018) (noting that states' shifts in focus and funding toward community-based services have led to increased satisfaction among individuals with intellectual and developmental disabilities and their families).[16]

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[14] *See, e.g.*, Cal. Dep't of Health Care Services, *Home and Community-Based Services Waiver for the Developmentally Disabled (HCBS-DD)*, http://www.dhcs.ca.gov/services/medical/Pages/HCBSDDMediCalWaiver.aspx (last visited Aug. 29, 2018); Mass. Dep't of Developmental Services, https://www.mass.gov/orgs/department-of-developmental-services (last visited Aug. 29, 2018); N.M. Stat. Ann. § 28-16A-1 *et seq.* (charging the Department of Health to establish a Developmental Disabilities Planning Counsel to oversee provision of community-based services for people with developmental disabilities); N.Y. Dep't of Health, *Homes and Community-Based Services (HCBS) Waiver for Persons, Including Children, with Mental Retardation and/or Developmental Disabilities*, https://www.healthy.ny.gov/publications/0548/hcbs_mental_retardation_dev_disabilities.htm (last visited Aug. 29, 2018); Pa. Dep't Human Servs., *Pennsylvania's Medicaid Waivers for Intellectual Disabilities Supports and Services*, http://www.dhs.pa.gov/learnaboutdhs/waiverinformation/medicaidwaiversforintellectualdisabilitiessupportsandservices (last visited Aug. 29, 2018); Wash. State Dep't of Social and Health Services, Developmental Disabilities Admin., https://www.dshs.wa.gov/dda (last visited Aug. 29, 2018).

[15] *Id.; see also* N.J.S.A. § 30:6D-12.1 *et seq.* (providing self-directed support services for persons with developmental disabilities).

[16] The suggestion that availability of abortion care will lead to reduced research and treatment for individuals with Down syndrome is wrong. For example, California invests in research regarding treatment of Down syndrome

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Many States provide additional services and support specifically for new or expectant parents of a child with a disability. For example, Massachusetts' Down syndrome Congress is a statewide resource for Down syndrome information, advocacy and networking.[17] In addition to free resources, information and training for potential parents, health professionals, educators and the community at large, it also offers the "Parents' First Call Program," which connects new or expectant parents with a diagnosis of Down syndrome with others who have had similar life experience.

The efforts described above are just some of the ways States can protect and improve the lives of persons with developmental disabilities, dispel outdated stereotypes and discrimination, and support families with disabled children. None of these efforts require infringement on reproductive rights.

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through the UC San Diego School of Medicine's Down Syndrome Center for Research and Treatment—"one of the first programs in the country to connect academic research with treatment of adults and children with Down syndrome." *See* Down Syndrome Ctr. for Research and Treatment, *About Us*, UC San Diego Sch. of Med., https://neurosciences.ucsd.edu/centers/down-syndrome-center/about/Pages/default.aspx (last visited Aug. 29, 2018).

[17] Commonwealth of Mass., *Understand Your Pediatric Patient's Down Syndrome Diagnosis*, https://www.mass.gov/info-details/understand-your-pediatric-patients-down-syndrome-diagnosis (last visited Aug. 29, 2018); *see also* Wash. State Dep't of Health, *Down Syndrome: Information for Parents Who Have Received a Pre- or Postnatal Diagnosis of Down Syndrome*, https://www.doh.wa.gov/YouandYourFamily/InfantsandChildren/HealthandSafety/GeneticServices/DownSyndrome (last visited Aug. 29, 2018).

II. PROTECTION OF PERSONS WITH DISABILITIES AND PROTECTION OF WOMEN'S ACCESS TO REPRODUCTIVE HEALTHCARE ARE COMPLEMENTARY OBJECTIVES

The goals of eliminating outdated views on disability and protecting women in need of reproductive healthcare are rooted in shared important principles. Both rest on the "universal human rights principles of bodily autonomy, self-determination, equality and inclusion."[18] Both seek to remove barriers to full participation in society and to challenge structural inequalities.[19] The rights of persons with disabilities and the rights of women are therefore mutually supportive.

Amici States share Ohio's goal of protecting the autonomy and dignity of individuals living with developmental disabilities, providing support to families raising children with developmental disabilities, and ensuring that adults living with such disabilities are included in society. But using the law to "force women to bear children with disabilities (when they do not want to do so) will fail to solve . . . broader stigma, and may even be counterproductive."[20] These concerns were

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[18] Ctr. for Reproductive Rights, *Shifting the Frame on Disability Rights for the U.S. Reproductive Rights Movement* 5 (2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf.

[19] *See id.*

[20] Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 Harv. J. of L & Gender 424, 457-58 (2006) (citing Janet Dolgin, *The Ideological Context of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 Fla. St. U. L.

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echoed by disability rights leaders based in Ohio who opposed a similar Indiana law.[21] They rejected the argument that state abortion bans are ethically necessary, arguing instead that ensuring the right to choose "empowers women and families who make the affirmative choice to see a pregnancy through to term" and "provides the greatest assurance that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive."[22]

As these statements make clear, appellants present a false choice between protecting "a person's most basic decisions about family and parenthood, . . . as well as bodily integrity," *Casey*, 505 U.S. at 849, and respecting the dignity of those with Down syndrome. Abortion bans like Ohio's would roll back the clock, denying respect for women's reproductive choices while failing to advance the inclusion of persons with disabilities.

CONCLUSION

The judgment of the district court should be affirmed.

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Rev. 343, 358-59 (2003)). Professor Bagenstos notes that "the most vocal disability-rights critics of prenatal testing and selective abortion do not even urge that those practices be subject to legal regulation . . . ." *Id.* at 441.

[21] Br. for Disability Advocates as Amici Curiae, *Planned Parenthood of Indiana and Kentucky, Inc., v. Commissioner of Indiana State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018).

[22] *Id.* at 4.

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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 style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: February 19, 2020

/s/ Anna Rich
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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

Dated: February 19, 2020

/s/ Anna Rich
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