

No. 20-5969

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, et al.
Plaintiffs-Appellees

v.

HERBERT H. SLATERY III, et al.
Defendants-Appellants

Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:20-cv-00501)

**BRIEF OF AMICI CURIAE, DISABILITY ADVOCATES,
SUPPORTING PLAINTIFFS-APPELLEES
BRIEF FILED WITH THE PARTIES CONSENT**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 20-5969

Case Name: Memphis Ctr. Repro. Health v. Slattery

Name of counsel: Geoffrey M. Wyatt

Pursuant to 6th Cir. R. 26.1, Amici Curiae, Disability Advocates
Name of Party

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No.

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Not to the best of amici's knowledge.

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s/ Geoffrey M. Wyatt

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTERESTS OF AMICI CURIAE

Amici are persons with disabilities, the parents of persons with disabilities or parents who chose to terminate a pregnancy in light of fatal fetal conditions. All advocate for their own rights, and the rights of their sons and daughters regardless of disability, to be treated with equal dignity as members of society.¹

Ashley Barlow is an attorney and the mother of two sons, one of whom has Down syndrome. Ms. Barlow's legal practice focuses on matters involving people with disabilities, and she conducts in-person and on-line trainings for families, teachers and community members on special education, guardianship, estate planning and divorce topics. Ms. Barlow is a past President of the Down Syndrome Association of Greater Cincinnati and currently serves as an advocate with the National Down Syndrome Congress.² She has lobbied the Ohio and Kentucky state governments, as well as the federal government, on issues relevant to the disability community.

¹ This brief is filed with the consent of all parties. No party or party's counsel has authored this brief either in full or in part; nor have they contributed financially to this brief. No one other than amici curiae and their counsel has contributed money to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

² All amici participate in their personal capacity. To their knowledge, none of the Down syndrome advocacy organizations in which any amicus participates has taken a position in this litigation.

David Perry is a history professor and freelance journalist and the father of two children, including Nicholas, who has Down syndrome. Prof. Perry is an advocate for improved education and employment opportunities for persons with disabilities. He has written extensively about disability issues and has advocated for removing the stigma surrounding disability. As particularly relevant here, he has focused on improving the quality of information provided to expectant parents about the life that their children can enjoy with a Down syndrome diagnosis. Prof. Perry believes that improved information, not state mandates, is the best way to empower parents and to encourage them to carry fetuses with disabilities to term.

Hadleigh Tweedall is a marketing manager and mother living in Nashville. Shortly after her first son turned one, she became pregnant. She and her husband were beyond excited at the chance to grow their family. Fifteen weeks into her pregnancy, she received a positive screening suggesting a fetal diagnosis of Down syndrome. Her doctor suggested an amniocentesis test to confirm, and despite her effort to get one immediately, she was unable to schedule it for two weeks. In that time, Ms. Tweedall and her husband undertook all the research they possibly could to understand what it would entail physically, mentally, emotionally and financially to raise a child with Down syndrome. Among other things, she reached out to the Director of the Middle Tennessee Down Syndrome Association and spoke with a local family with a daughter with Down syndrome. Ms. Tweedall

and her husband learned that a Down syndrome diagnosis represents a very wide spectrum of disabilities.

At her amniocentesis appointment two weeks later, Ms. Tweedall received a fetal diagnosis of non-immune Hydrops – the excessive build-up of fluid causing extreme swelling and organ failure. Ms. Tweedall learned that Hydrops was fatal, that the fetus would be unlikely to survive the next few weeks, that a live birth was not possible, and that continued pregnancy would put Ms. Tweedall at risk of maternal infection, hemorrhaging and death. She was faced with what she has called the most horrific choice of her life and decided to end her pregnancy. While an abortion 17 weeks into her pregnancy would not have been prohibited under Tennessee law at the time, Ms. Tweedall was nevertheless told that in order to obtain abortion services at that stage of a pregnancy, she would be required to travel out of state for one of the most heartbreaking days of her life.

Winifred Forrester is a financial professional from Nashville, and the mother of an 18-year-old daughter with Down syndrome. Although she became pregnant at a relatively advanced age, she and her husband chose not to have any tests in utero for genetic abnormalities or conditions that might lead to disability. They felt that the pregnancy was well-planned, that they had sufficient resources, both financial and otherwise, and that they would choose to raise the child regardless of the results of such testing. Forrester's daughter's early years were

difficult, requiring help from numerous therapists, medical professionals and early childhood educators. Ms. Forrester loves her daughter completely, and their relationship has served to reinforce her belief that choices about pregnancy should be made privately by pregnant women and their families, informed by conversations with their physicians, rather than by strangers. Ms. Forrester is deeply pained that people like her daughter have been turned into pawns in the broader fight over the legality of abortion.

LaQuita Martin is a resident of Nashville. She and her husband went through multiple rounds of fertility treatments, and she was thrilled when she became pregnant. Nineteen weeks into her pregnancy, she underwent a routine ultrasound and learned that her fetus had been diagnosed with multiple heart abnormalities. The only possible option for the fetus's survival would have been a heart transplant, but infant heart transplants are infrequent and rarely successful. Ms. Martin and her husband consulted with five physicians around the country, family, friends and clergy before ultimately coming to the painful decision that termination represented the least bad outcome. Before she could terminate her pregnancy, her case had to be reviewed, and ultimately approved, by the hospital's ethics committee. Ms. Martin underwent 21 hours of labor as part of her induced termination, after which she donated the remains of her fetus to Vanderbilt University. Through that donation, she hoped to support research for a cure for the

heart defects at issue, and to spare other families the suffering she had experienced. Since then, Ms. Martin has become an advocate to ensure that painful choices like hers are made by women and their families, in consultation with those close to them and medical professionals, rather than by the State.

Kimberly Peterson, from Knoxville, is a mother of two children, including a 12-year old daughter with a rare genetic condition known as Joubert Syndrome. During a routine ultrasound five months into her second pregnancy, her doctor noticed abnormal fetal skull shape and referred Ms. Peterson to a specialist who diagnosed the fetus with Dandy-Walker Syndrome, a broader grouping of brain abnormalities that can be caused by Joubert. In consultation with her then-husband and with her doctors, Ms. Peterson made the decision that her family was emotionally and financially ready to bring the pregnancy to term and to raise a disabled child. After giving birth, Ms. Peterson left her career to become her daughter's full-time caregiver. She has no regrets about her decision. She believes deeply, however, that such decisions should be made by pregnant women and those close to them. She is also confident that the relationship she has with her daughter would not be as strong as it is if the decision to bring her into the world had been dictated by the State.

Alice Wong is an activist with a neuromuscular disability and the founder of the Disability Visibility Project. She advocates extensively about a wide range of

disability issues including disability, reproductive justice and bioethics. She has been published in a wide range of media outlets, including *The New York Times*. In 2013, Ms. Wong was appointed by President Barack Obama, confirmed by the United States Senate, and served on the National Council on Disability.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As part of a longstanding and comprehensive effort to restrict abortion rights, the Tennessee General Assembly passed House Bill 2263 (“HB 2263”), codified in relevant part in Sections 39-15-216 and -217 of the Tennessee Code Annotated.³ The Act provides for severe criminal sanctions against doctors who perform pre-viability abortions for certain prohibited reasons (“reasons bans”). In particular, a doctor would commit a felony punishable by up to 15 years in prison if he or she performs an abortion “know[ing] that the [pregnant] woman is seeking” it for one of three reasons: the sex of the fetus, the race of the fetus, or “a prenatal diagnosis, test, or screening indicating Down syndrome or the potential for Down syndrome.” Tenn. Code Ann. § 39-15-217(b)-(d). In addition, in open defiance of *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, HB 2263 would prohibit pre-viability abortions that take place after detectable fetal cardiac activity,

³ The statute added Tennessee Code Annotated Sections 39-15-214 through -218 to the Code. Sections 39-15-214, -215, and -218 are not at issue in this litigation.

(cont'd)

which occurs approximately six weeks after a woman's last menstrual period ("LMP"), and any abortions that take place more than eight weeks after a woman's LMP, regardless of cardiac activity. Tenn. Code Ann. § 39-15-216(c).⁴

Each of the Act's challenged provisions plainly violates a woman's constitutional right to choose as articulated in *Roe*, 410 U.S. 113 and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for the reasons explained in the district court's cogent opinion and in the appellees' brief. Amici write separately to articulate three additional issues presented by the Down syndrome ban in particular.⁵

First, despite the often-hyperbolic rhetoric of appellants and their amici, their contention that the Down syndrome ban serves a state interest in advancing

⁴ The statute contains cascading bans with independent provisions prohibiting abortion at various points throughout pregnancy. All precede viability and, for that reason, all are unconstitutional. The later bans would have no independent effect unless and until the earlier bans are struck down by a court.

⁵ Although amici agree with the district court and the appellees that the sex- and race-based "reasons bans," along with categorical abortion bans in Section 39-15-216, all unconstitutionally prohibit pre-viability abortion in defiance of *Roe* and *Casey*, and amici therefore urge the Court to affirm the decision below in full, they focus this brief on the Down syndrome ban in particular. Amici recognize that a challenge to a similar "reasons ban" on some, though not all, of the grounds at issue here is under advisement before the en banc Court in *Preterm-Cleveland v. Himes*. See 944 F.3d 630 (6th Cir. 2019) (granting en banc review). Amicus Ashley Barlow was part of a group of mothers who filed a brief in that case. See Br. of Amici Curiae, Mothers in Supp. of Pls.-Appellees & Affirmance, No. 18-3329, ECF No. 33 (6th Cir. filed Aug. 28, 2018).

the interests of disabled persons and their communities or in preventing “eugenics” is false. The freedom to choose whether to create a family that might include a child with a disability – based on accurate and unbiased information – is critically important to advancing the interests of disabled persons. Such freedom empowers women and families who make the affirmative decision to give birth to a child with Down syndrome, in a way that a state-imposed requirement cannot do. And that choice, made after careful reflection on the rewards and challenges of carrying a pregnancy to term, provides the greatest assurance that a family will be able to create and maintain an environment in which a child with Down syndrome is likely to thrive. By contrast, HB 2263 reduces children with Down syndrome and other disabled children to another pawn in the political debate over abortion rights, a fact made abundantly clear by the reality that it was part of a broader effort to restrict all types of abortion.

Second, the “reasons ban” imposes a pernicious burden on the rights of Tennessee women and will interfere with the doctor-patient relationship by discouraging honest communication. HB 2263 on its face requires women to seek abortions only if the state approves of their reason for doing so. The “don’t-ask-don’t-tell” work-around suggested by the appellants and their amici – that doctors remain willfully ignorant of their patients’ motivations and concerns – would discourage desperately-needed open and honest conversations regarding critical

healthcare decisions. Indeed, the law could make it harder for women to obtain the accurate information about Down syndrome that they need to make an informed decision – and therefore more likely that they will terminate their pregnancies based on fears that might have been alleviated with further information.

Third, HB 2263 is so vague that it may have an alternative effect: prohibiting a huge class of abortions regardless of reason. By failing to define two of its key terms (“know” and “because of”), the statute fails to inform people of ordinary intelligence exactly when performing an abortion carries the risk of 15 years in prison. Given the vagueness of the statute and the severe penalties at issue, the practical consequence of the statute could be to deter physicians from providing any abortion services in cases where they are aware of a fetal diagnosis, at least unless and until a patient affirmatively promises that she is not seeking to abort because of a potential Down syndrome diagnosis.

ARGUMENT

As the Supreme Court has repeatedly reaffirmed, the core holding of *Roe* and its progeny is that any ban on pre-viability abortion is unconstitutional. *See Casey*, 505 U.S. 833; *see also, e.g., June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring) (“*Casey* reaffirmed ‘the most central principle of *Roe v. Wade*,’ ‘a woman’s right to terminate her pregnancy before viability.’”) (quoting *Casey*, 505 U.S. at 871). In addition, any statute that restricts

access to abortion must not unduly burden a woman’s right to terminate a pregnancy prior to viability, and even laws that do not impose an undue burden must advance a valid state interest. *See, e.g., June Med.*, 140 S. Ct. at 2112-13, 2120 (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). HB 2263, including the Down syndrome ban, runs headlong into these prohibitions. As a threshold matter, and as explained in appellees’ brief, the Down syndrome ban constitutes an impermissible categorical prohibition on pre-viability abortions. Amici write to focus on the additional reasons why it must be struck down: it does not advance the purported state interest in preventing “eugenics,” and it imposes an undue burden on a woman’s constitutional right to terminate a pregnancy prior to viability. In addition, the statute is unconstitutionally vague because it fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

I. THE STATUTE DOES NOT SERVE ANY STATE INTEREST IN PREVENTING “EUGENICS.”

Appellants and their amici attempt to justify HB 2263 by claiming that without the Down syndrome ban, legal abortion leads to “eugenics,” “creates disdain for human life and dignity and contravenes equal protection principles,” as applied to persons with disabilities. (Appellants’ Br. at 4, 42; *see, e.g.*, Br. of Amicus Curiae Alliance Defending Freedom at 15-17.) The Legislature that

enacted the “reasons ban” invoked a similar rationale. *See* Tenn. Code Ann. § 39-15-214(a)(53)-(60), (63) (legislative findings). But this effort to smear advocates for reproductive autonomy misunderstands the nature of the decision confronting pregnant individuals. Women and their families give deep thought to decisions about pregnancy, and children with disabilities are most likely to succeed when their parents make an informed and affirmative decision to carry a pregnancy to term. Moreover, the circumstances surrounding the enactment of HB 2263 demonstrate that far from promoting respect for the rights of persons with disabilities, the backers of the statute used them as pawns to advance a broader anti-abortion agenda.

Courts have an obligation to independently review the proffered justification for any abortion restriction. *See Whole Woman’s Health*, 136 S. Ct. at 2310 (“The statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with th[e Supreme] Court’s case law.”); *June Med.*, 140 S. Ct. at 2112 (plurality opinion) (reaffirming “require[ment that] courts independently . . . review the legislative findings upon which an abortion-related statute rests”). The premise underlying HB 2263 – that the interests and dignity of disabled persons are best served by an inflexible rule that takes from pregnant women the very personal choice about whether to carry a fetus to term – cannot survive such review. As the varied experiences of amici demonstrate, guaranteeing

a pregnant woman’s liberty to make this important decision for herself, after careful and informed deliberation, contributes to the creation of a family environment in which children with Down syndrome are most likely to thrive. Thus, it is HB 2263, and the assumptions that undergird it, that disrespect the equal dignity of persons with disabilities, for several reasons.

First, the Tennessee statute presupposes that a woman faced with the possibility of bearing a child with Down syndrome would inevitably choose to terminate, and denies her the right to undertake careful consideration of the best option for her and her family. This presumption is fundamentally at odds with both the governing caselaw and with amici’s own experience.

The Supreme Court has acknowledged that a pregnant woman, in consultation with her doctor and others, will treat with seriousness “the decision whether to bear . . . a child,” which the Court described as “the most intimate and personal choice[] a person may make in a lifetime.” *Casey*, 505 U.S. at 851 (citation omitted). Amici’s experiences validate this precedent. Women and their families treat decisions about pregnancy with appropriate gravity, including in cases of fetal Down syndrome diagnosis. For example, amicus Hadleigh Tweedall has explained that after her fetal Down syndrome diagnosis, she and her husband researched everything they possibly could to understand what raising a child with Down syndrome would require, physically, emotionally and financially. Among

other things, Ms. Tweedall reached out to the Director of the Middle Tennessee Down Syndrome Association and spoke with a local family raising their own daughter with Down syndrome. Amicus Winifred Forrester and her husband made the very personal decision that any diagnosis of disability would not change their intention to bring a pregnancy to term only after considering their financial resources and family support.

Appellants suggest that even if pregnant women give careful and open-minded consideration to their options following a fetal diagnosis, “medical professionals either overtly or subtly pressure [them] . . . to have an abortion.” (Appellants’ Br. at 43.) But both the record and amici’s own experiences belie such a characterization. The record makes clear that appellees’ doctors provide “counseling” “designed to ensure that patients are well-informed” “without directing their course of action” (Looney Declaration, R. 8-1, Page ID # 152), and none of the amici reports having been pressured to seek an abortion. In any event, even if the hypothesized problem were real, it would be better addressed by facilitating informed choice than by taking away choice altogether. As amicus David Perry has explained, individuals on all sides of the abortion debate worked together to build a “pro-information” movement, ensuring that women and their doctors are able to receive the accurate information they need to fully consider what it means to bring a child with Down syndrome into the world. *See* David

Perry, *Don't Politicize My Son Over Down Syndrome*, CNN (Aug. 24, 2015, 11:49 AM), <https://www.cnn.com/2015/08/24/opinions/perry-abortion-down-syndrome-ohio/index.html>. According to Prof. Perry, this work helps make a fetal diagnosis of Down syndrome “less scary” to pregnant women and to doctors alike, and is the “best way to get people to choose to carry a fetus with Down syndrome to term.” *Id.*; *see also, e.g.*, David Perry, Testimony in Opposition to Missouri Senate Bill 802, <https://www.davidmperry.com/testimony-for-missouri-senate-sb-802/> (“The best way to prevent abortions after a prenatal diagnosis is to make the words ‘Down syndrome’ less scary.”). Unfortunately, political warfare over abortion rights has undermined the ability of this diverse group to work together. *See Perry, Don't Politicize, supra.*

By contrast, the experiences of amici and others likewise demonstrate that forcing women to carry a pregnancy to term after a Down syndrome diagnosis under state compulsion would make families worse off by devaluing the lives of those very children. For instance, Ms. Forrester has stated that it is vitally important to her that she chose to have her child through a decision-making process that involved her immediate family and her physicians, not one that was dictated by strangers. Likewise, Ms. Peterson believes that she has a stronger bond with her daughter because the decision to give birth after a prenatal diagnosis of disability was hers, not the state's.

Empowering parents of children with Down syndrome takes on special importance in light of the “high[] incidence of abuse [and neglect] among disabled children” in the United States. Kirsten Stalker & Katherine McArthur, *Child Abuse, Child Protection & Disabled Children: A Review of Recent Research*, *Child Abuse Rev.*, Vol. 21:24-40 (2010) (meta-analysis of 15 studies from the United States and of studies from 20 other countries). The leading American study showed that *31 percent* of disabled children suffered from abuse, compared to just nine percent of children without disabilities. *Id.* Given these sobering statistics, parents need support, not coercion, to ensure that every child with Down syndrome or any other disability grows up in a safe and supportive home. When parents *choose* to bring children with disabilities into the world, they create a positive and affirming environment that birth by state coercion simply precludes.

Second, HB 2263 further injures individuals with disabilities because the statute’s true intent is to exploit that community for purposes of advancing a broader anti-abortion agenda. After all, the “reasons ban” was not part of a broader legislative package to advance the rights or interests of disabled people and their communities. Rather, it was part of a large-scale assault on abortion rights generally.

The Down syndrome ban was passed as a part of legislation that Governor Lee described as “comprehensive pro-life legislation,” *see* Gov. Bill Lee

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<https://www.tn.gov/governor/news/2020/1/23/gov--bill-lee-introduces-comprehensive-pro-life-legislation.html> (“Lee Release”), alongside a series of other provisions, including the prohibition on pre-viability abortions for any reason starting six to eight weeks after a woman’s LMP. And the legislative findings that accompany the statute make clear that its target is far broader than even those classes of abortion that it expressly seeks to criminalize. Those findings state in no uncertain terms that “[l]ife begins at conception,” Tenn. Code Ann. § 39-15-214(b)(7), and reference the supposed “fundamental and absolute right of unborn human beings to life . . . and all rights protected by the Fourteenth . . . Amendment[,],” Tenn. Code Ann. § 39-15-214(a)(6), in brazen contempt of federal constitutional law, which holds that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,” *Roe*, 410 U.S. at 158.

Lest there be any doubt about the intentions of the 111th Tennessee General Assembly, in 2019, the session before HB 2263 was passed, the same legislature passed a law to outlaw abortion *in any circumstances*, as soon as constitutionally permissible. Tenn. Code Ann. § 39-15-213 (abortion ban to be effective “the thirtieth day after issuance of a judgment overruling, in whole or part, *Roe* . . . , as modified by . . . *Casey*”). The wholesale ban to which Tennessee aspires is expressly incorporated into both the legislative findings of HB 2263, *see* Tenn.

Code Ann. § 39-15-214(b)(7) (“specifically acknowledg[ing]” wholesale ban), and into the “reasons ban” itself, *see* Tenn. Code Ann. § 39-15-217(j)(4) (wholesale ban “shall control upon becoming effective”). In sum, as House Speaker Cameron Sexton proudly proclaimed, HB 2263, including the Down syndrome ban, was the culmination of a comprehensive anti-abortion push by the General Assembly “over the last decade.” Lee Release, *supra*. This sustained assault on abortion rights belies any serious contention that the “reasons ban” was motivated by any genuine concern for the dignity of the disabled.

Members of the disability community, including amici, understand what this legislation is truly about, and have expressed dismay about being used as “pawn[s]” in the wider political battle over abortion. Sarah McCammon, *Down Syndrome Families Divided Over Abortion Ban*, NPR (Dec. 13, 2017, 5:30 AM), <https://www.npr.org/2017/12/13/570173685/down-syndrome-families-divided-over-abortion-ban>. As Prof. Perry has put it, “[t]he function . . . of . . . laws” like HB 2263 “is not to improve the lives of people with Down syndrome or even to stop abortion based on prenatal diagnoses,” but to “use the public’s positive feelings about cute kids with Down syndrome . . . to undermine reproductive rights” more broadly. David Perry, *Republicans Are Using Fear Of Eugenics To Attack Reproductive Rights*, *The Nation* (Jan. 4, 2018), <https://www.thenation.com/article/archive/republicans-are-using-fear-of-eugenics-to-attack-reproductive->

rights/; *see also* David Perry, *Indiana Abortion Law Won't Help The Disabled*, USA Today (Mar. 26, 2016, 10:47 AM), <https://www.usatoday.com/story/opinion/2016/03/26/indiana-abortion-law-down-syndrome-disabled-column/82272912/> (Down syndrome bans “won’t help people who have Down syndrome. Moreover, they aren’t really intended to.” Rather, “[p]eople with Down syndrome are just collateral damage” in a campaign “that’s going to make the words ‘Down syndrome’ even scarier.”) (*“Indiana Law Won’t Help”*). That is why Ms. Martin and Ms. Tweedall both testified against an earlier version of similar legislation based on their experiences as mothers and with pregnancy.

In short, HB 2263 does not advance any purported state interest in opposing “eugenics”; instead, it exploits the very community it claims to protect. Because the law intrudes on the constitutionally-protected right to pre-viability abortion, and cynically attempts to hijack the interests of people living with Down syndrome to promote an anti-abortion agenda, it is unconstitutional and was properly stricken by the district court.

II. THE STATUTE WOULD IMPOSE AN UNDUE BURDEN ON A WOMAN’S CONSTITUTIONAL RIGHT TO CHOOSE BY INTERFERING WITH THE DOCTOR-PATIENT RELATIONSHIP.

Even if HB 2263 served a legitimate state interest – and it does not – it would still be unconstitutional because it “has the effect of placing a substantial obstacle in the path of a woman’s choice.” *Whole Woman’s Health*, 136 S. Ct. at

2309 (quoting *Casey*, 505 U.S. at 877); see *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 877) (“Under *Casey*, the [s]tate may not impose an undue burden on the woman’s ability to obtain an abortion. ‘A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non[-]viable fetus.’”). Several federal courts confronting nearly-identical legislation have already held as much. See, e.g., *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 306-07 (7th Cir. 2018), cert. denied in relevant part and judgment vacated in non-relevant part sub nom. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam); *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1274-75 (E.D. Ark. 2019), appeal argued, No. 19-2690 (8th Cir.). That reality is driven home by the fact that appellants are reduced to citing statements from dissents or concurrences, rather than any opinions that actually carried the day. See, e.g., Appellants’ Br. at 47 (citing *Box*, 139 S. Ct. at 1792 (Thomas, J., writing for himself only) and *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc)).⁶

⁶ Appellants’ argument that the Down syndrome ban “does not implicate a woman’s right to decide whether to have an abortion” at all because in this context, (cont’d)

This Court should reach the same conclusion. The legislation at issue here seeks to do precisely what *Roe* and its progeny forbid: to require a pregnant woman seeking a pre-viability abortion to justify her decision-making process to the State, and would do so in a way that significantly interferes with the doctor-patient relationship, as appellants essentially admit.

Before viability, the State cannot constitutionally insert itself into a pregnant woman's decision-making process and require her to justify her choice to seek an abortion. To do so undermines the "right of personal privacy" at the foundation of the right to choose. *Roe*, 410 U.S. at 154. As the Supreme Court has repeatedly made clear, this right protects "the private realm of family life which the state cannot enter." *Casey*, 505 U.S. at 851 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). That is because the decision whether to terminate a pregnancy is among "the most intimate and personal choices a person may make in a lifetime" including "the right to define *one's own* concept of . . . meaning . . . and of the mystery of human life" without "compulsion of the State." *Casey*, 505 U.S. at 851 (emphasis added). If the decision to seek an abortion falls within a zone of privacy that the State cannot invade, it follows perforce that a woman's reason for making

"[s]he is deciding only that she does not want a particular *kind* of child" rather than any child at all (Appellants' Br. at 47) is contrary to law. *See Roe*, 410 U.S. at 153 (noting a woman's protected interest in avoiding *additional* children). It is also absurd. The same logic would deny abortion rights to anyone who may want to become a mother at a different point in her life.

that decision must also be protected. Because HB 2263 requires a woman who seeks an abortion to do so for a reason that the State condones, it inserts the State into the constitutionally protected zone of privacy, just as surely as if the Tennessee Legislature had accomplished its more fundamental goal of banning abortion altogether.

Appellants essentially concede that they cannot constitutionally require pre-viability abortions to be sought for a State-approved reason. Instead, they suggest that HB 2263 is constitutional because its effects can be avoided if women are willing to lie to their doctors, and if their doctors willfully blind themselves to their patients' true motivations. According to appellants, a "woman who seeks an abortion because of a prohibited reason may still obtain one simply by not disclosing her reason." (Appellants' Br. at 45.) As discussed below and in the district court's opinion, the statute is far too vague for this construction – invented for the first time for purposes of this litigation – to be considered authoritative. But even taken at face value, this work-around would interfere profoundly with the doctor-patient relationship, which *Roe* expressly protects, *see* 410 U.S. at 153 (discussing importance of "consultation" between a "woman and her responsible physician"), and thus itself impose an undue burden on the abortion right. The American College of Obstetricians and Gynecologists ("ACOG") has strongly criticized laws like this one – which would require "patients and physicians . . . to

withhold information or outright lie in order to ensure access to care” – as constituting a “gross interference [with] the patient-physician relationship.” Am. Coll. of Obstetricians & Gynecologists, *ACOG Statement on Abortion Reason Bans* (Mar. 10, 2016), <https://www.acog.org/news/news-releases/2016/03/acog-statement-on-abortion-reason-bans>. As the ACOG explained, “at a time when a woman’s health . . . is at stake, . . . honest empathetic health counseling is in order.” *Id.*

Moreover, the secrecy that HB 2263 mandates could have the perverse effect of leading women to seek abortions that they would not have chosen if more open communication were allowed. In particular, by encouraging women to hide their concerns about a prenatal Down syndrome diagnosis from their doctors, the statute would prevent them from obtaining information from a trusted source. As a result, pregnant women and their families would be forced to rely on information that is less accurate, less trustworthy and very possibly overly pessimistic about the experience of raising a child with Down syndrome. As Prof. Perry has written, Down syndrome “remains . . . stigmatized in our society,” and expectant parents are generally “ignorant[t]” about the issue. Perry, *Indiana Law Won’t Help*, *supra*. Women are unlikely to be able to overcome that stigma, and the fear that it generates, if they “can’t even talk about it [with their] doctor[s].” *Id.*

In sum, HB 2263 on its face requires the State to approve of a woman's reason for seeking to terminate her pregnancy prior to viability, which alone renders it unconstitutional. Appellants' retort – that a woman can simply hide the truth from her doctor – imposes an undue burden on the right to seek an abortion and on the physician-patient relationship. Moreover, it would do so in a way that may well lead to fewer women with prenatal Down syndrome diagnoses choosing to bring their pregnancies to term. For this reason, too, the district court ruling should be upheld.

III. THE STATUTE IS UNCONSTITUTIONALLY VAGUE AND COULD LEAD DOCTORS TO INTERROGATE THEIR PATIENTS.

To the extent women are unable or unwilling to hide their thoughts from their doctors to circumvent the “reasons bans,” HB 2263 could have different but equally perverse ramifications. The risk of prosecution for violating an ill-defined prohibition could prevent providers from performing an abortion in any case in which the fetus has been diagnosed with Down syndrome regardless of the reason that termination is sought because of the risk of prosecution. That is so because, as the district court correctly held, HB 2263 is unconstitutionally vague insofar as it does not explain the terms “know” and “because of.” The practical result of the statute's lack of precision, coupled with its draconian penalties, will likely be that doctors steer clear of performing any abortion in cases involving a fetal diagnosis of Down syndrome, at least without detailed probing of a woman's motives.

As the district court explained, the statute leaves open “several pivotal questions,” including whether a physician could be punished only when the patient expressly states that she is seeking an abortion because of a Down syndrome diagnosis (i.e., what does it mean to “know”) and whether the Down syndrome diagnosis needs to be “the only reason [for] an abortion” or can be “one of several reasons” (i.e., the meaning of “because”). (Memorandum, R. 41, Page ID ## 759-760.) Instead, these questions and others are delegated to “law enforcement, prosecutors, and the courts or juries.” (*Id.* at Page ID # 761.) Given the harsh penalties attached to violation of the law – including up to *15 years* in prison – providers will err well on the side of safety, by ensuring that they do not, knowingly or otherwise, provide an abortion to a woman who is even possibly seeking it on account of fetal impairment.⁷ The record below demonstrates as much. Dr. Looney testified that she “do[es] not understand the [r]eason[s] [b]an[.]” and that in light of the severe penalties, her organization “will be forced to stop providing . . . pre-viability abortion care.” (Looney Declaration, R. 8-1, Page ID ## 153-154.) Similarly, Dr. Zite, who already “do[es] not perform any

⁷ The stay panel’s suggestion that vagueness concerns can be alleviated by the requirement that knowledge and causation be proved beyond a reasonable doubt (*see* Order at 4, ECF No. 33-2) is out of touch with reality. Physicians quite reasonably will wish to avoid rolling the dice on the post hoc judgments of judges and juries, especially given the passionate opinions so many people hold on the issue of abortion.

terminations . . . solely on the basis of a diagnosis of Down syndrome” testified that “it is unclear to” her when HB 2263 would criminalize abortions performed when “Down syndrome is accompanied by other conditions.” (Zite Declaration, R. 8-3, Page ID # 207.)

At a minimum, doctors will be forced to interrogate their patients in an attempt to ascertain the true basis for the decision to terminate the pregnancy – a conversation made all the more difficult by patients’ understandable reticence to speak honestly in light of the law. Such questioning runs afoul of any patient’s right to be treated with respect and to have her decisions respected. *See* Am. Med. Ass’n, *Code of Medical Ethics Opinion 1.1.3*, <https://www.ama-assn.org/delivering-care/ethics/patient-rights>.

Appellants argue that the statute is not impermissibly vague because the prohibition on abortions performed “because of” a Down syndrome diagnosis “incorporates the ‘simple and traditional standard of but-for causation.’” (Appellants’ Br. at 25 (citation omitted).) In reality, however, but-for causation is not as simple as appellants suggest. Amici’s own experience demonstrates the point. For example, Ms. Tweedall was forced to make a decision about her pregnancy in light of a complex reality that included diagnoses of both Down syndrome and Hydrops. She may not herself even know whether Hydrops was the sole but-for cause of her decision to terminate her pregnancy or whether Down

syndrome was a but-for cause as well. More to the point, a doctor, with no special ability to read his or her patients' minds, might not know, and may not be willing to take a chance that years down the line a judge or jury could see things differently.

In short, HB 2263 is both vague and draconian. As a result, to the extent that HB 2263 does not lead women to hide the truth from their doctors and thereby deprive them of information, it could lead doctors to avoid performing any abortion in Down syndrome cases without a probing, and medically inappropriate, interrogation of a woman's decisions, chilling the exercise of the constitutionally protected right for a pregnant individual to make her own choice about pre-viability abortion.

CONCLUSION

For the foregoing reasons, as well as those laid out in appellees' brief, the well-reasoned judgment of the district court should be affirmed.

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Respectfully submitted,

s/ Geoffrey Wyatt

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that the foregoing document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 6,253 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b). This document complies with the typeface and the type-style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which sent notice of such filing to all parties and amici.

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