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.

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

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, SUPPORTING DEFENDANTS-APPELLANTS AND URGING REVERSAL; BRIEF FILED WITH THE PARTIES' CONSENT

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June 29, 2018

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit
Case Number: 18-3329 Case Name: Preterm-Cleveland v. Lance Himes

Name of counsel: Michelle K. Terry

Pursuant to 6th Cir. R. 26.1, the American Center for Law and Justice, *amicus curiae*, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   The American Center for Law and Justice is unaware of any.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. It regularly litigates in the areas of free speech and religious liberty. ACLJ attorneys have argued before the Supreme Court of the United States, this Court, and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 646 (6th Cir. 2005). The ACLJ has also participated as *amicus curiae* in many cases involving pro-life issues. *E.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).[1]

This brief is supported by the thousands of individuals who have partnered with the ACLJ to advance its mission and the more than 169,000 members of the ACLJ's Committee to Defend Pro-Life Laws and Babies with Disabilities.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* and its counsel made such a monetary contribution. Fed. R. App. P. 29(4)(E). All parties consented to the filing of this brief.

ARGUMENT

The State of Ohio should be permitted to prohibit discrimination via selective abortion against the protected class of individuals with Down Syndrome. Permitting this discrimination to continue revives discredited and dangerous eugenic practices, gravely damages the practice of equal treatment under the law, and undermines the value of all life. This Court should reverse the district court's grant of Plaintiffs-Appellees' motion for a preliminary injunction. Ohio should be permitted to implement and enforce H.B. 214, the Prohibit Abortion if Unborn Has or May Have Down Syndrome Bill.

I. The District Court Failed to Examine the Ramifications of Allowing Systemic Discrimination Against Pre-Born Individuals With Down Syndrome.

Amicus asks this Court to do what the district court did not: examine the impact that enjoining the enactment of H.B. 214 will have on disabled and handicapped individuals, specifically those with Down Syndrome, who face termination through selective abortion despite the legal protection they have in every other aspect of their lives. If discrimination against the disabled is an evil that should be eliminated—clearly, it is—then the State of Ohio should be empowered to eliminate that evil wherever necessary, including by means of banning abortions involving a child with Down Syndrome.

II. Pre-Born Individuals with Down Syndrome Should Not Be Deprived of the Protections That Are Afforded to Them Post-Birth.

The Supreme Court has held that individuals with Down Syndrome are a protected class, worthy of protection from discrimination on the basis of their disability. In *Bowen v. American Hospital Association*, the Court held that persons with Down Syndrome are entitled to protection under the anti-discrimination provisions of the Rehabilitation Act. 476 U.S. 610, 624 (1986) ("[The Act] protects [infants born with congenital defects] from discrimination 'solely by reason of his handicap.'" (quoting § 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794)). The Court further clarified that Down Syndrome is worthy of anti-discrimination protection in the same way as race:

> A judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So too, a decision not to correct a life-threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment. The issue of parental authority is also quickly disposed of. A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent.

Id. at 623.

Moreover, federal statutory law offers extensive and systematic protections to those with disabilities, including those with Down Syndrome. The Americans with Disabilities Act ("ADA") is the most prominent example. The ADA was passed with the express purpose of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.

§ 12101(b)(1) (2008). Its mandate is backed with the full "sweep of congressional authority." 42 U.S.C. § 12101(b)(4) (2008).

The ADA protects a wide class of persons with disabilities, including those with Down Syndrome. The ADA prohibits discrimination against anyone covered by the statute, including those with Down Syndrome, in several arenas, *e.g.*, employment, the provision of public services, and access to public accommodations. Violations of these protections are investigated by and punished through severe fines and litigation by the EEOC. 42 U.S.C. § 12117(a) (1990); *see also* 42 U.S.C. §§ 2000e-4–6, 8–9 (1995).

This Court has affirmed similar anti-discrimination protections for children with Down Syndrome in education and employment. In 2003, this Court held that a child "diagnosed with a condition commonly known as Down Syndrome . . . is a 'child with a disability' as defined in the [Rehabilitation] Act." *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 667 (6th Cir. 2003). Thus, such children are entitled to the same anti-discrimination protections as any other disabled child. *Id.* Elsewhere, this Court has recognized the utmost importance of ending discrimination against this vulnerable population: "People with Down Syndrome . . . are among those most in need of the protection of our courts." *Jordan v. Hurley*, 397 F.3d 360, 368 (6th Cir. 2005).

Federal criminal law goes further still and punishes crimes targeting disabled individuals as hate crimes. *See* 18 U.S.C. § 249(2) (2009). Under the federal hate crimes statute, anyone who "willfully causes bodily injury to any person" or even "attempts to cause bodily injury to any person" on account of their "actual or perceived" disability is guilty of a felony. 18 U.S.C. § 249(2)(A) (2009). Congress has codified into law the principle that discrimination and violence against any person with a disability is intolerable.

Notwithstanding the vast body of law that protects individuals born with Down Syndrome, in light of the district court's order enjoining the enforcement of H.B. 214, it is still legally permissible to abort a child due to a Down Syndrome diagnosis *in utero*. In short, while Ohio is permitted and empowered to protect its citizens from discrimination and harm, and while the federal government has issued a "national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1) (2008), the district court has held that Ohio is barred from protecting its citizens from this same harm from the moment of their conception until birth.

If disability discrimination is an evil that should not be tolerated in our society—and if the State is empowered to prevent such discrimination—Ohio should be permitted to extend that protection as widely as its people, through their elected State representatives, desire, as was done with the passage of H.B. 214.

III. Court-Sanctioned Discrimination Against Individuals With Down Syndrome *In Utero* Opens the Door to Eugenics.

A. Permitting Selective Abortion in Response to a Down Syndrome Diagnosis Has Far-Reaching Implications.

All people, including those with Down Syndrome, have inherent human dignity that entitles them to basic human rights, including protection from discrimination. Currently, individuals with Down Syndrome are afforded such rights and a recognition of their inherent dignity in every area of life except while *in utero*. History clearly shows, however, that trait-selective abortions not only violate human rights, but also lead to disastrous demographic results.

In August of last year, it was reported that Down Syndrome has been virtually eradicated from Iceland.[2] This disappearance, however, is not due to any medical cure, but from a rise in prenatal screening tests since the early 2000s and a near-100% abortion rate when the tests revealed the unborn child has Down Syndrome. The eradication of those with Down Syndrome through abortion is not restricted to Iceland. The estimated termination rates for Down Syndrome pregnancies in other countries are also high: 67% for the United States, 77% for France, and 98% for Denmark.[3]

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[2] Julian Quinones and Arijeta Lajka, *What Kind Of Society Do You Want To Live In?: Inside The Country Where Down Syndrome Is Disappearing*, CBS News (Aug. 15, 2017, 2:17 AM), https://www.cbsnews.com/news/down-syndrome-iceland/?linkId=40953194.

[3] *Id.*

People with Down Syndrome are not "defects" worthy of extermination. Two recent events served to remind the public of the value of the lives of those with Down Syndrome. Early in 2018, Gerber named the winner of the 2018 Gerber Baby Photo Contest as Lucas Warren, a baby born with Down Syndrome.[4] Additionally, in late 2017, actor and Down Syndrome advocate Frank Stephens gave testimony to a Congressional committee about his life and why it has value:[5]

> No one knows more about life with Down Syndrome than I do. Whatever you learn today, please remember this: I am a man with Down Syndrome and my life is worth living.
>
> . . .
>
> I completely understand that the people pushing this particular "final solution" are saying that people like me should not exist. That view is deeply prejudiced by an outdated idea of life with Down Syndrome.
>
> . . .
>
> Is there really no place for us in the world? . . . Let's be America.[6]

If a court is going to permit the eradication of a group of people and prevent their comprehensive protection, as the district court did through its preliminary

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[4] Terri Peters, *Meet the First Gerber Baby with Down Syndrome; His Name is Lucas!*, Today (Feb. 7, 2018, 8:41 AM), https://www.today.com/parents/2018-gerber-baby-first-gerber-baby-down-syndrome-t122258?cid=sm_npd_td_fb_ma.

[5] Transcript of Conor Friedersdorf, *I Am A Man with Down Syndrome And My Life Is Worth Living*, C-SPAN (Oct. 25, 2017), https://www.c-span.org/video/?c4687834/frank-stephens-opening-statement-syndrome.

[6] *Id.*; *see also* Frank Stephens, Frank Stephens Opening Statement on Down Syndrome, C-SPAN (October 25, 2017), https://www.c-span.org/video/?c4687834/frank-stephens-opening-statement-syndrome.

injunction order, it must at least recognize the troubling ramifications of such a decision and acknowledge where the road it has paved leads. Using selective abortions to rid the population of "undesirables" is chillingly similar to abhorrent practices utilized by certain cultures and societies over the course of human history.

The eugenics movement to end "life unworthy of life" of the early 20th Century found fertile ground in Nazi Germany, where, in the absence of prenatal genetic testing, diagnoses were not discovered until after birth, leading to "defective" children being born and then left to die.[7] Similarly, early American abortion advocates openly praised the use of abortion as a tool to advance eugenics. Indeed, it was Margaret Sanger, founder of Planned Parenthood, who said,

> No matter how much they desire children, no man and woman have a right to bring into the world those who are to suffer from mental or physical affliction. It condemns the child to a life of misery and places upon the community the burden of caring for them, [and] probably of their defective descendants for many generations.[8]

When a life's value is diminished in the womb, it is diminished out of the womb, and vice versa. *If a person with Down Syndrome is worthy of protection after he is born, he is worthy of protection before that time.*

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[7] Linda L. McCabe and Edward R. B. McCabe, *Down syndrome: Coercion and Eugenics*, Genetics in Medicine 13, 708–710 (Aug. 2011), https://www.nature.com/articles/gim2011115.pdf.

[8] Margaret Sanger, *When Should A Woman Avoid Having Children?*, Birth Control Review (Nov. 1918), https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=237888.xml.

B. Preventing Ohio from Offering Protection to the Pre-Born with Disabilities Will Hinder the Protection of the Pre-Born Based on Gender and Other Perceived Faults.

If the government is prevented from protecting children with Down Syndrome in the womb, the question arises whether the pre-born may be protected from discrimination based on other genetic "faults," such as an undesired gender.

The United Nations Population Fund explicitly calls sex-selective abortion "a form of discrimination."[9] Because of animus against females—often manifested through sex-selective abortion and infanticide—the United Nations estimates that Asia and Eastern Europe are missing 117 million women.[10] In fact, gender animus is so severe in some countries that birth ratios are as high as 130 boys for every 100 girls.[11] In the United States, among foreign-born Chinese, Indians, and Koreans who already had two daughters, birth ratios of 151 boys to 100 girls have been observed.[12] In effect, sex-selective discrimination in abortion has created an entire generation in which millions will simply be unable to marry and find partners to create families of

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[9] United Nations Population Fund, *Gender-Biased Sex Selection* (March 15, 2017), https://www.unfpa.org/gender-biased-sex-selection.

[10] *Id.*

[11] *Id.*; *see also It's a Girl: The Three Deadliest Words in the World*, (2012), http://www.itsagirlmovie.com/ (documenting the devastating impact that sex-selective abortions and infanticide have had on the female population in China and India).

[12] Harkness, Kelsey, *Sex Selection Abortions are Rife in the U.S.*, Newsweek, (April 14, 2016), http://www.newsweek.com/sex-selection-abortion-rife-us-447403.

their own. The World Health Organization states it plainly: "Imbalanced sex ratios are an unacceptable manifestation of gender discrimination against girls and women and a violation of their human rights."[13]

Additionally, in the earlier part of the twentieth century, the United States saw a robust movement to "refuse to treat" individuals with conditions deemed too severe to permit a desirable life.[14] And, as recently as the 1980s, some doctors counseled that children born with Down Syndrome should not be given life-saving surgeries. These doctors ordered that "the babies not be fed, and the end result was that babies were starved to death in quiet corners of some hospitals."[15] Now, policies

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[13] *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women, and WHO*, World Health Organization, 12 (2011), https://www.unfpa.org/sites/default/files/resource-pdf/Preventing_gender-biased_sex_selection.pdf; *see also* Nandini Oomman and Bela R. Ganatra, *Sex Selection: The Systematic Elimination of Girls*, Reproductive Health Matters: An International Journal on Sexual and Reproductive Health and Rights, (2002), https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2802%2900029-0?needAccess=true.

[14] Tom Koch, *Symposium: Cost and End-of-Life-Care: Care, Compassion, or Cost: Redefining the Basis of Treatment in Ethics and Law*, 39 J.L. Med. & Ethics 130, 131 (2011) (*citing* Martin S. Pernick, *The Black Stork: Eugenics and the Death of 'Defective' Babies in American Medicine and Motion Pictures Since 1915* (1996)).

[15] *History of NADS*, National Association for Down Syndrome, http://www.nads.org/about-us/history-of-nads/ (last visited June 21, 2018).

encouraging abortion where Down Syndrome is detected are achieving the same result as the infanticides of "defective" children from years ago.[16]

Sex- and disability-selective abortions are a clear form of discrimination and a violation of human rights analogous to other internationally-recognized forms of discrimination. Discrimination on the basis of immutable traits must be ended, beginning at the moment of conception, if an entire class of "undesirable" persons is not to be slowly but surely eradicated. The State of Ohio should not be prohibited from protecting all persons within the State, born and pre-born, from disability discrimination.

Amicus requests that this Court consider the horrible ramifications and human rights implications of allowing indiscriminate abortion based on discriminatory factors. Ohio should be permitted to extend the protections it provides to its citizens to the most vulnerable among them. H.B. 214 should be enforced.

[16]Ariana Eunjung Cha, *Babies With Down Syndrome Are Put on Center Stage in the U.S. Abortion Fight*, The Washington Post (Mar. 5, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/03/05/down-syndrome-babies-are-taking-center-stage-in-the-u-s-abortion-fight/?utm_term=.8f15f9bef023.

CONCLUSION

Amicus respectfully requests that this Court reverse the district court's order granting the preliminary injunction and vacate the injunction.

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CERTIFICATE OF COMPLIANCE

This *amicus curiae* brief contains 2,548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and is no more than one-half the maximum number of words allowed for the Defendants-Appellants' principal brief. *See* Fed. R. App. P. 29(a)(5). This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on June 29, 2018, I caused the brief to be filed electronically via the Court's CM/ECF system, which will send notice of filing to all registered attorneys involved in this appeal. *See* Fed. R. App. P. 25(d); 6th Cir. R. 25(f)(2).

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