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

EDWARD L. WHITE III
ERIK M. ZIMMERMAN*
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

MILES TERRY
MICHELLE K. TERRY
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Counsel for Amicus Curiae

* Not Admitted to Sixth Circuit Bar

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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 hundreds of thousands of individuals who have partnered with the ACLJ to advance its mission and the more than 406,000 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 Constitution does not force states to allow abortion for any reason, no matter how pernicious. The State of Tennessee should be permitted to prohibit selective abortion once there is evidence of a fetal heartbeat or in cases where the individual is seeking an abortion for certain specified reasons, such as for the purpose of gender selection, or in the case of a disability diagnosis. Permitting such discriminatory elective abortions to continue revives discredited and dangerous eugenic practices, gravely damages the practice of equal treatment under the law, and undermines the value of human life. This Court should reverse the district court's grant of Plaintiffs-Appellees' motion for a preliminary injunction. Tennessee should be permitted to enforce Tennessee Code Annotated Sections 39-15-216 and 39-15-217.

I. Tennessee has an Interest in Protecting from Abortion Unborn Babies whose Heartbeats are Detected or who Reach Certain Gestational Age.

Scientific developments over the past decades have heightened society's awareness of the uniqueness, humanity, and sensitivity of unborn children at earlier and earlier stages of gestation. Likewise, the public has begun to appreciate the horrific nature of particular abortion methods, such as partial birth abortion and dismemberment abortion.

The Supreme Court has expressed a willingness to uphold common-sense, defensible measures to limit or regulate abortion, *see Planned Parenthood v. Casey*,

505 U.S. 833 (1992), and in fact has upheld a variety of measures ranging from waiting periods, *id*. at 885-87, to informed consent requirements, *id*. at 887, to recordkeeping and reporting requirements, *id*. at 900-01, to bans on the use of state resources to facilitate abortion, *Rust v. Sullivan*, 500 U.S. 173 (1991), to bans on abortions by non-physicians, *Mazurek v. Armstrong*, 520 U.S. 968 (1997), to parental involvement statutes, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326-27 (2006), to a ban on a particularly heinous method of abortion, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003). These examples certainly do not exhaust the possible responses a state could undertake. For example, states presumably can ban forced abortions, can protect the consciences of medical students, nurses, and pharmacists who do not wish to participate in abortions, and can also require basic sanitary conditions in abortion facilities.

Tennessee Code Annotated Section 39-15-216 follows the path laid out by these cases upholding common-sense abortion regulations. The challenged law attempts to secure additional protection for unborn children, namely, those whose hearts have begun to beat. By calling a halt to the deliberate slaying of innocent human beings with beating hearts, and criminalizing the actions of those who kill these babies, the law provides a level of protection for unborn children that is more consonant with basic human dignity.

II. Pre-Born Individuals should not be Deprived of the Protections that are Afforded to them Post-Birth.

a. Denying Protections to Pre-Born Individuals with Down Syndrome Permits Discrimination based on Disability Otherwise Prohibited and Gives Rise to Eugenics.

Amicus asks this Court to examine the impact that enjoining the enforcement of Section 39-15-217 will have on pre-born 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 based on a disability is an evil that should be eliminated—and clearly, it is—then Tennessee should be empowered to eliminate that evil wherever necessary, including by means of banning abortions involving a child with Down Syndrome.

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. (quoting *United States v. Univ. Hosp., State Univ. of New York at Stony Brook*, 729 F.2d 144, 162 (2d Cir. 1984) (Winter, J., dissenting)).

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, and prohibits discrimination against anyone covered by the statute in several areas, *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). Such children are therefore 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) (Keith, J., dissenting).

Federal criminal law goes further still and punishes crimes targeting individuals because of their disability as hate crimes. *See* 18 U.S.C. § 249(a)(1) and (2) (2009). Under the federal hate crimes act, 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(a)(2)(A) (2009). Congress has codified into law the principle that discrimination and violence against any person because of their race, gender, or real or perceived 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

Section 39-15-217, it is still legally permissible to abort a child due to a Down Syndrome diagnosis *in utero*. In short, while Tennessee 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 held that Tennessee is barred from protecting its citizens from this same harm from the moment of their conception until birth.

All people, including those with Down Syndrome, have inherent human dignity that entitles them to basic human rights, including protection from discrimination, and individuals with Down Syndrome should be protected at every stage of life, even when *in utero*. History clearly shows that trait-selective abortions not only violate human rights, but also lead to disastrous demographic results. Recently, it was reported that Down Syndrome has been virtually eradicated from Iceland.[2] The disappearance of this class of persons, 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 a diagnosis of Down Syndrome.

[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://tinyurl.com/yyj24yys.

The eradication of those with Down Syndrome through abortion is not limited 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]

People with Down Syndrome are not "defects" worthy of extermination. Two recent events serve to remind us 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."[6]

There ramifications to the district court's injunction are troubling: it will help contribute to the eradication of a group of people and undermine the comprehensive

[3] *Id.*

[4] Terri Peters, *Meet the First Gerber Baby with Down Syndrome; His Name is Lucas!*, Today (Feb. 7, 2018, 8:41 AM), https://tinyurl.com/y6lmcwwr.

[5] Transcript of Conor Friedersdorf, *I Am A Man with Down Syndrome And My Life Is Worth Living*, C-SPAN (Oct. 25, 2017), https://tinyurl.com/y7uxzjef.

[6] *Id.*; *see also* Frank Stephens, Frank Stephens Opening Statement on Down Syndrome, C-SPAN (October 25, 2017), https://tinyurl.com/y7uxzjef.

legal protection such persons deserve. 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] Indeed, 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*, 13 Genetics in Medicine 708, 708–710 (Aug. 2011), https://www.nature.com/articles/gim2011115.pdf.

[8] Margaret Sanger, *When Should A Woman Avoid Having Children?*, Birth Control Review 6, 6-7 (Nov. 1918), https://tinyurl.com/yyecpaga.

b. Sex- and Race-Selective Abortion is Discriminatory and has Disastrous Consequences Throughout Generations.

Tennessee, and the nation as a whole, have an undeniable interest in protecting the pre-born from discrimination based on genetic "faults," such as an undesired gender or race. Even 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

[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] Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.*, Newsweek, (April 14, 2016), https://tinyurl.com/y59dc33b.

to create families of 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]

Tennessee has an equivalent interest in prohibiting race-selective abortions. The statistics related to the racial disparities in abortion are staggering: "the abortion rate for black women is almost five times that for white women."[14] And even Planned Parenthood has admitted its racist past, agreeing this year to "remove [Planned Parenthood founder Margaret] Sanger's name from its Manhattan clinic because her 'racist legacy' and 'deep belief in eugenic ideology' can no longer be denied."[15]

Given this troubling history, and the long-term ramifications of the loss of so many black children, the importance of the protection of babies from race-selective abortion is apparent. Sex-, race-, and disability-selective abortions are a clear form of discrimination and a violation of human rights analogous to other internationally-

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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://tinyurl.com/yyjt84z9; *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, 183, (2002), https://tinyurl.com/y23n2ezq.

[14] Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, Guttmacher Policy Review, Vol. 11, Issue 3, (Aug. 6, 2008), https://tinyurl.com/y5s2ny9l.

[15] William McGurn, *Margaret Sanger Gets Canceled,* Wall Street Journal, (July 27, 2020), https://tinyurl.com/yxlclh9x.

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 perceived "undesirable" persons is not to be slowly but surely eradicated. The State of Tennessee should not be prohibited from protecting all persons within the State, born and pre-born, from disability-, racial-, or gender-based discrimination.

III. States have a Strong Interest in Combating the Potentially Lethal Pessimism of some Prenatal Forecasts.

Amicus highlights an additional state interest supporting a ban on eugenic abortions: preventing the pressuring of vulnerable parents into irreversible decisions to abort their children.

Physicians face financial incentives to err on the side of doom and gloom. If they predict the worst, but things turn out well, everyone is relieved and there is no lawsuit. But if physicians do not foretell adverse consequences, and such consequences materialize, the physicians may face legal liability for failure to warn. This is particularly true in the context of pregnancy, since some jurisdictions recognize "wrongful birth" suits predicated upon the parents' having missed the chance to abort a child who is then born with disabilities. *See* W. Ryan Schuster, Note, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 William & Mary L. Rev. 2329, 2332-36 (2016) (canvassing the states). In such jurisdictions, a physician worried about potential legal liability will be sure to note everything that might be wrong with the baby. There is no comparable financial counter-incentive. As a

consequence, prenatal diagnoses will tend to skew toward pessimism and put pressure on parents to choose abortion.

As for the diagnosis itself, there are countless instances in which parents were told a child would be born with severe or fatal disabilities, when in fact the child turned out to be either perfectly healthy or had only minor conditions.[16] In other cases, the predicted severity of the condition may be greatly exaggerated.[17] And

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[16] *See, e.g.*, Jack Evan & Grace Walton, *Mum Warned Four Times to Have an Abortion Gives Birth to Healthy Baby*, 7News.com.au (June 3, 2020), https://tinyurl.com/y4763cox (baby diagnosed prenatally with hydrops fetalis and cystic hygroma); Patty Knap, *The Doctor Advised the Parents to 'Terminate,' But They Chose Prayer Instead*, Aleteia (May 18, 2020), https://tinyurl.com/y3mxo7lb ("A second ultrasound . . . confirmed almost no amniotic fluid, and the doctor said that likely meant the baby wouldn't survive until birth, or would die soon after birth," but baby overcame difficulties after birth and "is now an adorable, healthy two-year-old girl"); Sheila Walsh, *My Doctor Said, 'Your Baby is Incompatible With Life' – Here's What Happened Next*, Fox News (Feb. 8, 2020), https://tinyurl.com/y36zl5ap (test results had been mixed up); Mark Smith & Sam Elliott, *Miracle baby born three months early and weighing just 1lb is now thriving*, Mirror (Dec. 23, 2019), https://tinyurl.com/yxj6cjam (baby diagnosed prenatally with "a number of complications, including a fused kidney" and "skeletal dysplasia" found after birth to have "no abnormalities at all"); Heather Clark, *Australian Woman Advised to Abort Baby With Terminal Condition, Child Born Completely Healthy*, Christian News (Dec. 10, 2019), https://tinyurl.com/y49b97hv ("medical tests had previously shown that the child had a terminal brain condition, resulting in doctors recommending an abortion," but child was born "perfectly healthy"; in response, other mothers reported similar experiences with dire diagnoses that failed to materialize).

[17] *See*, *e.g.*, Monica Charsley, *Three-year-old with Spinal Condition Fundraises for NHS*, Sutton & Croydon Guardian (Apr. 22, 2020), https://tinyurl.com/yyqpyb6z (child with spina bifida walks daily for COVID charity) ("We were told she would likely be in a vegetative state once born and her chances of walking were near impossible.").

these are only the cases where the parents chose not to abort; presumably many, many children die in abortion because they were inaccurately labeled as suffering from various conditions that did not actually exist.[18]

Thus, a ban on eugenic abortions also furthers the legitimate interest in avoiding death from "excessive pessimism," *i.e.*, failure to consider either parental capacity to love or the fallibility of prenatal diagnoses.

Amicus requests that this Court consider the horrible ramifications and human rights implications of allowing indiscriminate abortion based on discriminatory factors. Tennessee should be permitted to extend the protections it provides to its citizens to the most vulnerable among them. Tennessee should be permitted to enforce Code Sections 39-15-216 and 39-15-217.

CONCLUSION

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

[18] *See, e.g.*, Kevin Doyle, *Medic Who Signed Off on Abortion of Child in Belief of Fatal Foetal Abnormality 'Never Examined or Met Mother', Dáil Hears*, Independent.ie (June 12, 2019), https://tinyurl.com/yxsfw3se (baby aborted after diagnosis of Trisomy 18 that final test results, which arrived post-abortion, disproved).

EDWARD L. WHITE III
ERIK M. ZIMMERMAN*
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

FRANCIS J. MANION
GEOFFREY R. SURTEES
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

/s/ Michelle K. Terry
MILES TERRY
MICHELLE K. TERRY
AMERICAN CENTER
FOR LAW & JUSTICE
[redacted]

Counsel for Amicus Curiae

* Not Admitted to Sixth Circuit Bar

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