IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-3329

PRETERM-CLEVELAND, et al.,

Plaintiff-Appellee,

v.

LANCE HIMES, in his official capacity as Director of the Ohio Department of Health,

Defendant-Appellant.

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

BRIEF OF INDIANA, KENTUCKY, AND 14 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF LANCE HIMES, IN SUPPORT OF EN BANC PETITION FOR REHEARING

M. STEPHEN PITT
S. CHAD MEREDITH
MATTHEW F. KUHN
Office of the Kentucky Governor
700 Capital Ave., Room 101
Frankfort, Kentucky 40601
Tel: (502) 564-2611
Attorneys for Amicus Curiae Commonwealth of Kentucky

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General
Office of the Attorney General
IGC-South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov
Attorneys for Amicus Curiae State of Indiana

Dated: November 1, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATUTES [CONT'D]

OTHER AUTHORITIES

STATEMENT OF AMICUS INTEREST

A panel of this Court has affirmed an injunction against an Ohio statute that prohibits medical providers from intentionally performing an abortion with "knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of" Down syndrome. Ohio Rev. Code Ann. § 2919.10(B). The panel held that *any* limitation on pre-viability abortions is unconstitutional and that Ohio's interest in preventing discriminatory abortions "does not become compelling until viability." ECF 65-2, 7.

For the amici States, authority to prevent the spread of abortion as a tool for eugenics is a compelling state interest—an interest that Indiana, Kentucky and other States (along with Ohio) have attempted to protect by enacting anti-discriminatory laws similar to the Ohio law at issue here. Indiana, Kentucky and Missouri have passed laws prohibiting abortions based on sex, race, disability, and Down syndrome. *See* Ind. Code § 16-34-4; Ky. Rev. Stat. Ann. § 311.731; Mo. Rev. Stat. § 188.038. Arizona passed a law prohibiting abortion on the basis of race or sex. Ariz. Rev. Stat. Ann. § 13-3603.02. Five States have enacted laws prohibiting sex-selective abortions. *See* N.C. Gen. Stat. Ann. § 90-21.121; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64; Kan. Stat. Ann. § 65-6726. North Dakota has prohibited abortions on the basis of sex or genetic abnormality, and Arkansas has prohibited abortions on the basis of sex or Down

syndrome. *See* N.D. Cent. Code § 14-02.1-04.1; Ark. Code Ann. § 20-16-1904; Ark. Code Ann. § 20-16-2003. Louisiana has prohibited abortions based on genetic abnormality. La. Stat. Ann. § 40:1061.1.2.

To be sure, this is not the first U.S. Court of Appeals called upon to evaluate one of these anti-eugenics laws. In *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018), the Seventh Circuit invalidated Indiana's statute. Upon review of a petition for rehearing, however, Judge Easterbrook commented that he was "skeptical" about the panel's holding because "*Casey* did not consider the validity of an anti-eugenics law," which is "morally and prudentially" distinguishable from the laws considered by *Casey*. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018). In response to Indiana's petition for certiorari, the Supreme Court upheld another provision of Indiana law but refused to consider the anti-eugenics law. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019). Yet, Justice Thomas, in a concurrence, provided a detailed history of the use of abortion to achieve eugenic goals and observed that Indiana's law and others like it "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Id.* at 1783.

Whether States may act to stem the alarming trend outlined by Justice Thomas is an issue of exceptional importance worthy of *en banc* review.

I. Whether States May Prohibit Eugenic Abortions—and Safeguard the Integrity of the Medical Profession in the Process—Is Worthy of *En Banc* Consideration

Ohio's Down syndrome abortion ban serves the State's compelling interests in preventing prenatal discrimination and safeguarding the integrity of the medical profession, and the *en banc* Court should consider this case in light of those interests.

1. Abortion as a tool used to achieve eugenic goals is not merely hypothetical. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). The American Medical Association first endorsed disability selective abortion in 1967. Affidavit of Mary F. O'Callaghan, *EMW Women's Surgical Ctr., et al. v. Beshear et al*., 2019 WL 1233575, ECF 42-1, ¶ 17 (W.D. Ky. March 15, 2019). And in recent years parents in the United States have reported being pressured by physicians to terminate a pregnancy upon receiving a diagnosis of Down syndrome. One study reported that "nearly 1 out of 4 women had a doctor who was insistent on terminating the pregnancy after a diagnosis of Down syndrome," and another study reported that "about half [of the respondents] felt rushed or pressured into making a decision about continuing the pregnancy." O'Callaghan Affidavit, ¶ 14.

Many countries "celebrate the use of abortion to cleanse their populations of babies whom some would view—ignorantly—as sapping the strength of society." ECF 65-2, 10 (Batchelder, J., dissenting). China and Western Australia have

reported abortion rates following a Down syndrome diagnosis of around 94% and 93%, respectively. O'Callaghan Affidavit, ¶ 15. Through selective abortion, Iceland and Denmark have nearly eliminated all children with Down syndrome. *Id.* ¶ 22. Only one or two children with Down syndrome are born each year in Iceland because, as an Icelandic prenatal physician observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, Aug. 16, 2017, https://www.independent.co.uk/life-style/health-and-families/iceland-downs-syndrome-no-children-born-first-country-world-screening-a7895996.html. This kind of seek-and-destroy mentality is, to say the least, chilling and dehumanizing.

The abortion rate in the United States following an in utero Down syndrome diagnosis is around 67%. *Box*, 139 S. Ct. at 1790-1791 (Thomas, J., concurring). Left unchecked, this rate is destined to increase as a result of improvements in pre-natal testing leading to earlier diagnosing of Down syndrome. Non-invasive prenatal screening (such as cell-free DNA testing) that do not carry the risk of miscarriage of traditional diagnostic methods (such as amniocentesis), are expected to reach diagnostic capacity within the next decade and cause a "seismic shift" in rates of prenatal testing. O'Callaghan Affidavit, ¶ 20; *see also* Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear?*, 94 Disease in Childhood 823, 824 (2009). Abortions follow screening results indicating

possible genetic abnormalities "even though the clinical significance of some chromosomal variations is not fully understood." O'Callaghan Affidavit, ¶ 21. As Justice Thomas has observed, such technological advances have "heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability." *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring).

2. In related fashion, States have a compelling government interest in ensuring that medical providers do not become "witting accomplices" to eugenic ideals targeting the eradication of Down syndrome. ECF 65-2, 11 (Batchelder, J., dissenting). In 2007, the American College of Obstetricians and Gynecologist began recommending that all women be screened for fetal anomalies, and within two years, 95% of clinicians had adopted that recommendation. O'Callaghan Affidavit, ¶ 18. If the rates of selective abortion remain constant as prenatal testing becomes more common, then "this will have catastrophic effects on some populations of children, such as those with Down syndrome. *Id.* ¶ 20.

Under this "current paradigm of prenatal testing," physicians who have "professed to do no harm" are the ones pressuring parents to choose abortion following a Down syndrome diagnosis. O'Callaghan Affidavit, ¶ 55. Promoting abortion on the basis of a Down syndrome diagnosis blurs the line between healing

and harming, which controverts the purpose that the medical profession should serve.

The Supreme Court recognized a State's compelling interest in protecting the medical profession's integrity and ethics when it upheld the constitutionality of banning partial-birth abortions. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Here, similarly, Ohio has acted to protect the integrity of the medical profession and to prevent the injustice of using abortion as a mechanism for promoting eugenic policies that, left unchecked, will likely lead to the near eradication of children born with Down syndrome.

II. The Non-Discrimination Provision Does Not Interfere with the Right Protected by *Roe* and *Casey*

The panel decision held that prohibiting medical providers from terminating a pregnancy as a result of a Down syndrome diagnosis violates *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as a prohibition on a woman's right to a pre-viability abortion, a right that the panel described as categorical.

The Supreme Court, however, has not held that there is a categorical right to a pre-viability abortion. In *Roe*, the Court rejected the argument that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe*

v. Wade, 410 U.S. 113, 153 (1973). Furthermore, *Casey* left open the possibility of regulating pre-viability abortions so long as the regulation does not place an undue burden on the exercise of the right to a pre-viability abortion. Indeed, *Casey* upheld a law prohibiting minors from obtaining a pre-viability abortion absent parental consent or a court order, *Casey*, 505 U.S. at 899, and *Gonzales* upheld a prohibition of partial-birth abortion for both pre- and post-viability abortions. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007). Just as banning a particular method of abortion did not unduly burden the right to a pre-viability abortion, *Gonzales*, 550 U.S. at 157-158, banning a particular *reason* for seeking an abortion would not unduly burden the right to a pre-viability abortion. The law, after all, leaves open the possibility of abortion for any other reason.

Furthermore, *Casey* highlighted that the right to privacy at its core is "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Casey*, 505 U.S. at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (emphasis added). And *Roe* protects a woman's ability to choose to have an abortion "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant." *Id.* at 853. *Roe* and *Casey* focused on women who do not want a child at all.

The Ohio law at issue here, however, targets women who otherwise want to bear a child, so long as the child does not have Down syndrome. Yet, until *Box*, no court had ever extended the holding of *Roe* or *Casey* to apply when a woman is willing to bear a child but instead chooses to terminate her pregnancy because she finds a particular child unacceptable. *See Planned Parenthood of Ind. and Ky. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing *en banc*). This is a critical distinction. There is a significant difference between a woman saying "'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Id*.

The Court in *Gonzales* observed that the partial-birth method of providing abortions "implicates additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158. Ohio's law banning a particular reason for abortion is based on moral and ethical justifications that were not addressed in *Roe* and *Casey*. Using abortion as a method for promoting eugenic goals is "morally and prudentially debatable on grounds different than those that underlay the statutes *Casey* considered." *Comm'r of Ind. State Dep't of Health*, 917 F.3d at 536 (Easterbrook, J., dissenting). In fact, the Plaintiffs in *Casey* expressly refused to challenge a law banning abortions performed solely on the basis of sex. Br. of Resp'ts, *Planned Parenthood of Se. Pa.. v. Casey*, 1992 WL 12006423, at *4 (1992).

Accordingly, *Casey* did not determine whether "the Constitution requires States to allow eugenic abortions" and questions of whether a law like Ohio's law is constitutional "remains an open question." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring).

Ohio's narrowly tailored prohibition on aborting a fetus diagnosed with Down syndrome neither implicates the concerns underlying *Roe* and *Casey* nor unduly burdens the right those cases ultimately protect. It regulates those who have *already* made the decision "to bear or beget a child," but simply do not want to bear a child with Down syndrome. Accordingly, this Court should uphold Ohio's anti-eugenic abortion law.

***

Justice Thomas, concurring in *Box*, acknowledged that the Supreme Court will soon need to address the constitutionality of anti-discriminatory abortion prohibitions "[g]iven the potential for abortion to become a tool of eugenic manipulation." *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring). He agreed, however, with the Court's decision to not take up the issue in that case "because further percolation may assist [the Court's] review of this issue of first impression." *Id. En banc* review by this court would provide such percolation by inviting more judges to engage in discussion on this issue of exceptional importance. Accordingly, the Court should grant the petition.

CONCLUSION

Ohio's petition for rehearing *en banc* should be granted.

Respectfully submitted,

M. STEPHEN PITT
S. CHAD MEREDITH
MATTHEW F. KUHN
Office of the Kentucky Governor
700 Capital Ave., Room 101
Frankfort, Kentucky 40601
Tel: (502) 564-2611
Attorneys for Amicus Curiae Commonwealth of Kentucky

CURTIS T. HILL, JR.
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
KIAN J. HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General
Office of the Attorney General
IGC-South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov
Attorneys for Amicus Curiae State of Indiana

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CHRISTOPHER M. CARR
Attorney General
State of Georgia

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF MARTIN LANDRY
Attorney General
State of Louisiana

ERIC S. SCHMITT
Attorney General
State of Missouri

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON RICHARD RAVNSBORG
Attorney General
State of South Dakota

HERBERT SLATERY, III
Attorney Genera
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

PATRICK JAMES MORRISEY
Attorney General
State of West Virginia

CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 2,109 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, of which all parties are participants.

s/ *Thomas M. Fisher*
Thomas M. Fisher
Solicitor General
Counsel of Record

Office of the Attorney General
IGC-South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov

Attorneys for Amicus Curiae
State of Indiana