

No. 18-3329

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

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PRETERM-CLEVELAND, et al.,  
*Plaintiffs-Appellees,*

v.

AMY ACTON, et al.,  
*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Southern District of Ohio, Western Division, No. 1:18-cv-00109

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**BRIEF FOR AMERICAN COLLEGE OF OBSTETRICIANS AND  
GYNECOLOGISTS, AMERICAN MEDICAL ASSOCIATION, AMERICAN  
COLLEGE OF OSTEOPATHIC OBSTETRICIANS AND  
GYNECOLOGISTS, AMERICAN COLLEGE OF PHYSICIANS,  
AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, NORTH  
AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT  
GYNECOLOGY, AND SOCIETY FOR MATERNAL-FETAL MEDICINE  
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND  
AFFIRMANCE**

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, the American College of Obstetricians and Gynecologists, American Medical Association, American College of Osteopathic Obstetricians and Gynecologists, American Society for Reproductive Medicine, American College of Physicians, North American Society for Pediatric and Adolescent Gynecology, and Society for Maternal-Fetal Medicine (together, Amici) make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

**No. Amici are non-profit organizations, with no parent corporations or publicly traded stock.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

**None.**

/s/ Kimberly A. Parker

KIMBERLY A. PARKER

February 19, 2020

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The American College of Obstetricians and Gynecologists (ACOG), American Medical Association (AMA), American College of Osteopathic Obstetricians and Gynecologists (ACOOG), American College of Physicians (ACP), American Society for Reproductive Medicine (ASRM), North American Society for Pediatric and Adolescent Gynecology (NASPAG), and Society for Maternal-Fetal Medicine (SMFM) (together, Amici) are major medical organizations representing physicians and other clinicians who serve patients in Ohio and nationwide. Their work has been cited frequently by the Supreme Court and other federal courts seeking authoritative medical data regarding the provision of women's health care, including childbirth and abortion.<sup>2</sup>

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<sup>1</sup> The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or person other than Amici, their members, and their counsel contributed money towards the preparation or filing of this brief.

<sup>2</sup> See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2315 (2016) (citing ACOG and AMA's brief for academic hospital admitting requirements, medical procedure mortality rate data, and treatment procedures after a miscarriage); *Stenberg v. Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG's brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the abortion procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing ACOG's brief in assessing disputed parental notification requirement); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG publication in discussing "accepted medical standards" for the provision of obstetric-gynecologic services, including abortions).

## SUMMARY OF ARGUMENT

Ohio's House Bill 214 ("H.B. 214" or "the Ban") prohibits and criminalizes the provision of pre-viability abortions where the physician believes that the woman is seeking an abortion because of an indication of fetal Down syndrome. This law is fundamentally at odds with principles governing the provision of safe and essential health care, medical ethics, and well-settled constitutional law. Contrary to the assertions made by the Ohio General Assembly and the State here, H.B. 214 does *not* protect the integrity and ethics of the medical profession. Instead, the Ban undermines longstanding principles of medical ethics and places physicians in the untenable position of choosing between providing care consistent with their best medical judgment and ethical obligations *or* risking their license and criminal sanction. The Ban also impermissibly intrudes into the patient-physician relationship by limiting a physician's ability to perform the medical treatment that she and her patient decide is best for the patient's particular circumstances and medical interests. For the above reasons and those discussed below, Amici urge the Court to affirm the district court's injunction.

## ARGUMENT

### **I. THE BAN INTRUDES ON THE PATIENT-PHYSICIAN RELATIONSHIP, ENDANGERING WOMEN'S PSYCHOLOGICAL AND PHYSICAL WELL-BEING**

As the Plaintiffs-Appellees capably explain, H.B. 214 is an unconstitutional pre-viability restriction on abortion that strips women receiving prenatal diagnoses

of Down syndrome of their reproductive and decisional autonomy and endangers the physical and psychological health of women.<sup>3</sup>

Patient safety is of paramount importance to Amici. While some regulation of medical practice is necessary to protect patient safety, legislation that substitutes a political agenda for a physician's sound medical judgment impermissibly interferes with the patient-physician relationship. Physicians have an ethical responsibility to prioritize patients' welfare as the basis of all medical judgments and to exercise all reasonable means to ensure that the most appropriate care is provided to the patient.<sup>4</sup>

The patient-physician relationship is critical for the provision of safe and quality medical care.<sup>5</sup> At the core of this relationship is the ability to speak frankly and confidentially about important issues and concerns. For this reason, Amici oppose laws that unduly threaten the patient-physician relationship absent a justifiable public health reason. Laws that "require physicians to give, or withhold, specific information when counseling patients, or that mandate which tests, procedures, treatment alternatives or medicines physicians can perform, prescribe,

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<sup>3</sup> Appellees' Supp. Br. on Rehearing En Banc 6-24.

<sup>4</sup> ACOG, *Code of Professional Ethics* 2 (Dec. 2018); AMA Code of Medical Ethics Opinion 1.1.1 Patient-Physician Relationships.

<sup>5</sup> ACOG, *Statement of Policy, Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship* (May 2013, reaffirmed July 2016).

or administer are ill-advised.”<sup>6</sup> Laws should not interfere with the ability of physicians to determine appropriate courses of treatment and to discuss those options with their patients openly, honestly, and confidentially.<sup>7</sup>

By criminalizing the performance of certain pre-viability abortions, H.B. 214 greatly intrudes on the trust and open communication that is essential to the physician-patient relationship.<sup>8</sup> Indeed, the Ban is so vague that it criminalizes abortions where the woman has “[a]ny other reason to believe” that Down syndrome is a possibility—an overbroad and unworkable metric.<sup>9</sup> On one end of the dialogue, the Ban would incentivize patients not to be completely forthcoming and withhold information from their physicians for fear of being denied a wanted abortion or exposing the physician to liability. On the other end, it would cause physicians to worry about whether, and how, to ask questions that are critical for the provision of optimal care. For example, if a patient mentions concern about the

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; AMA Policy H-5.989, *Freedom of Communication Between Physicians and Patients* (2013); see also Weinberger et al., *Legislative Interference with the Patient-Physician Relationship*, 367 *New Eng. J. Med.* 1557, 1557-1559 (2012) (generally discussing negative ramifications of inappropriate legislative interference in medicine).

<sup>8</sup> AMA Code of Medical Ethics Opinion 1.1.1 Patient-Physician Relationships (“The relationship between a patient and a physician is based on trust[.]”).

<sup>9</sup> Ohio Rev. Code §2919.10(B)(3).

possibility of fetal Down syndrome, the Ban may prevent a physician from recommending or performing an abortion that the patient seeks and the physician deems medically necessary and appropriate for reasons entirely unrelated to Down syndrome. Similarly, the Ban would disincentivize physicians from recommending or performing prenatal testing, which is a vital medical tool used to detect health problems that could affect the woman, fetus, or newborn.<sup>10</sup> Prenatal genetic testing has a broad range of benefits, including reassuring patients when results are normal, identifying disorders for which prenatal treatment may provide benefit, and optimizing neonatal outcomes by ensuring the appropriate location for delivery and the necessary personnel to care for affected infants.<sup>11</sup>

In short, the Ban would create a system in which patients and physicians are compelled to withhold information or outright lie in order to ensure access to care—a gross interference on the patient-physician relationship that would imperil women’s physical and psychological health. It would force some patients to carry unwanted pregnancies to term or otherwise self-induce abortions—outcomes with

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<sup>10</sup> ACOG, *Practice Bulletin No. 162: Prenatal Diagnostic Testing for Genetic Disorders*, 127 *Obstetrics & Gynecology* 108 (May 2016); AMA Code of Medical Ethics Opinion 4.1.2, *Genetic Testing for Reproductive Decision Making*.

<sup>11</sup> ACOG, *Practice Bulletin No. 162: Prenatal Diagnostic Testing for Genetic Disorders*, 127 *Obstetrics & Gynecology* 108 (May 2016).

drastically higher rates of complication than abortion care managed by clinicians.<sup>12</sup>

Additionally, recent long-term studies have found that women who received wanted abortions had “similar or better mental health outcomes than those who were denied a wanted abortion,” and that being forced to carry an unwanted pregnancy to term increased the likelihood of developing symptoms associated with depression, anxiety, post-traumatic stress, or suicidal ideation.<sup>13</sup>

## **II. THE BAN IS CONTRARY TO CORE PRINCIPLES OF MEDICAL ETHICS AND PLACES PHYSICIANS IN ETHICALLY COMPROMISED POSITIONS**

Contrary to Appellants’ claims that H.B. 214 would protect “the integrity of the medical profession,”<sup>14</sup> the Ban represents a violation of long-established—and widely accepted—principles of medical ethics. Specifically, the Ban asks medical professionals to violate the age-old principles of beneficence, non-maleficence, and

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<sup>12</sup> See Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215, 216 (2012) (noting the risk of death associated with childbirth is approximately fourteen times higher than from abortion); Grossman et al., *Tex. Pol’y Eval. Proj. Res., Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas* 3 (2015).

<sup>13</sup> Biggs et al., *Women’s Mental Health and Well-Being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 *JAMA Psychiatry* 169, 177 (2017) (discussing adverse mental health consequences for women denied abortions); Biggs et al., *Does Abortion Reduce Self-Esteem and Life Satisfaction?*, 23 *Quality of Life Research* 2505 (2014) (finding that women who received an abortion experienced higher self-esteem in the short term than women denied an abortion).

<sup>14</sup> Appellants’ Supp. Br. on Rehearing En Banc 3.

patient autonomy in order to avoid facing license suspension and civil and criminal penalties. As a result, the Ban would do more to undermine the integrity and ethical standards of the medical community than to safeguard them.

**A. The Ban Violates The Principles Of Beneficence And Non-Maleficence**

Beneficence, the obligation to promote the well-being of others, and non-maleficence, the obligation to do no harm and cause no injury, have been the cornerstones of the medical profession since the Hippocratic tradition nearly 2500 years ago.<sup>15</sup> Both of these principles arise from the foundation of medical ethics which requires that the welfare of the patient form the basis of all medical decision-making.<sup>16</sup>

Obstetricians, gynecologists, and other clinicians providing abortion respect these ethical duties by providing patients with enough information to allow them to make fully informed decisions about pregnancy management or pre-viability termination. Clinical guidelines state that all physicians should offer their patients

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<sup>15</sup> ACOG, *Committee Opinion No. 390, Ethical Decision Making in Obstetrics and Gynecology* 1, 3 (Dec. 2007, reaffirmed 2019).

<sup>16</sup> ACOG, *Code of Professional Ethics*, *supra* note 4, at 2.

prenatal assessment and instruct that where patients indicate that they wish to consider pregnancy termination, the option should be discussed.<sup>17</sup>

H.B. 214 compromises these principles by pitting physicians' interests against those of their patients. If a physician concludes that an abortion is medically necessary, the principles of beneficence and non-maleficence require the physician to recommend that course of treatment. Yet the Ban's lack of exceptions for maternal health will mean that physicians must decline to perform the procedure for patients who have received a prenatal Down's diagnosis, regardless of the medical necessity. Additionally, the Ban may drive physicians to forego the provision of prenatal testing and counseling so that a possible Down's diagnosis is not assumed to be a reason that a patient chooses to seek an abortion. This is so despite the fact that it is a misperception that the Down's community would

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<sup>17</sup> ACOG, *Practice Bulletin No. 162: Prenatal Diagnostic Testing for Genetic Disorders*, 127 *Obstetrics & Gynecology* 108 (May 2016); AMA Code of Medical Ethics Opinion 4.1.2 *Genetic Testing for Reproductive Decision Making* ("Physicians who provide reproductive health care that includes genetic testing should ... [a]dhere to standards of nondirective counseling and avoid imposing their personal moral values or judgment on the patient ... [and r]espect an individual's decision to terminate or continue a pregnancy when testing reveals a genetic abnormality in the fetus"); ACP Ethics Manual: seventh edition (2019) (physicians have a duty to inform patients about care options and alternatives even if these options conflict with the physician's personal values).

disappear due to early prenatal screenings.<sup>18</sup> Indeed, the evidence shows that the rate of live births with Down syndrome has increased over the last decade despite the widespread availability of early detection.<sup>19</sup>

The practical effect of the Ban will be to force women to carry pregnancies to term in cases where they would not otherwise do so. Given that childbirth inherently poses more risks to maternal health than abortion, physicians will essentially be complicit in forcing women to forgo an exceptionally safe and low-risk medical procedure for increased likelihood of physical complications and emotional harm.<sup>20</sup> This is contrary to the ethical duties of non-maleficence and beneficence.

H.B. 214 therefore places physicians in the ethical dilemma of choosing between providing the best available medical care for their patients while themselves risking substantial, even criminal, penalties *or* protecting their ability to continue their practices.

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<sup>18</sup> *Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases*, Hearing Before the Subcomm. On Labor, Health and Human Services of the H. Comm. On Appropriations, 115th Cong. (Oct. 25, 2017) (statement of Dr. Joaquín M. Espinosa, Exec. Dir., Linda Crnic Institute for Down Syndrome).

<sup>19</sup> *Id.*

<sup>20</sup> *See supra* note 12 and accompanying text.

**B. The Ban Violates The Ethical Principle Of Respect For Patient Autonomy**

Alongside beneficence and non-maleficence, the other core principle of medical practice is patient autonomy—the recognition that patients have ultimate control over their bodies and a right to a meaningful choice when making medical decisions.<sup>21</sup> Physicians must respect the right of individual patients to make their own choices about their health care.<sup>22</sup> Patient autonomy revolves around self-determination, which, in turn, is safeguarded by the ethical concept of informed consent and its rigorous application to a patient’s medical decisions.<sup>23</sup>

The Ban would undermine the principle of patient autonomy by depriving patients of their ability to choose their own reasons for terminating a pregnancy. In doing so, the Ban would invade patient privacy interests, impede patient self-determination, and restrict a woman’s ability to obtain desired medical care. The right to privacy does not countenance official interrogation of a woman’s reasons for ending a pre-viability pregnancy and especially does not countenance

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<sup>21</sup> ACOG, *Code of Professional Ethics*, *supra* note 4, at 1 (“respect for the right of individual patients to make their own choices about their health care (*autonomy*) is fundamental”).

<sup>22</sup> *Id.*

<sup>23</sup> ACOG, *Committee Opinion No. 439, Informed Consent 2-3* (Aug. 2009, reaffirmed 2015).

prohibition of her seeking such a procedure because of politicians' disapproval of her reasons for doing so.

Obstetricians and gynecologists and other clinicians providing abortion respect patient autonomy by providing their patients with information and guidance so that they are empowered to make informed and voluntary decisions. The Ban would violate this principle by forcing physicians either to avoid offering prenatal counseling and testing so that the reason for an abortion is not questioned, or by preventing physicians from discussing abortion as an option when a potential Down syndrome diagnosis is at play.<sup>24</sup> As a result, the Ban would increase the likelihood that patients are not given the proper information and guidance required to make their own decisions about their health care. Alarming, H.B. 214 entirely ignores the extensive counseling typically provided to women who receive a prenatal Down syndrome diagnosis. After such an evaluation, women are often referred to a genetic counselor to receive in-depth, neutral, and supportive counseling to make informed choices given their particular circumstances.<sup>25</sup>

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<sup>24</sup> *Supra* note 18.

<sup>25</sup> See National Society of Genetic Counselors, *Code of Ethics* (2017) (genetic counselors work to “[e]nable their clients to make informed decisions, free of coercion, by providing or illuminating the necessary facts, and clarifying the alternatives and anticipated consequences”).

Ultimately, a patient’s informed decision about her medical choices must be respected by her physician.<sup>26</sup>

By restricting the ability of physicians to render care consistent with their patients’ wishes, H.B. 214 acutely undermines physicians’ ethical obligations.

Amici oppose any laws which cause such grave ethical dilemmas and incentivize physicians to prioritize their professional security over the welfare of their patients through the provision of medical care that falls short of the accepted clinical standards. Abortion is a safe, common, and necessary medical procedure.<sup>27</sup>

Physicians should not face criminal liability for providing basic medical care that approximately one-quarter of all women will require in their lifetimes.<sup>28</sup> Even

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<sup>26</sup> AMA Code of Medical Ethics Opinion 1.1.3 *Patient Rights*.

<sup>27</sup> See, e.g., National Academies of Sciences, Engineering, Medicine, *The Safety and Quality of Abortion Care in the United States* 10 (2018) (“*Safety and Quality of Abortion Care*”) (“The clinical evidence clearly shows that legal abortions in the United States—whether by medication, aspiration, D&E or induction—are safe and effective. Serious complications are rare.”); Editors of the *New England Journal of Medicine*, the American Board of Obstetrics and Gynecology, et al., *The Dangerous Threat to Roe v. Wade*, 381 *New Eng. J. Med.* 979 (2019) (stating the view of the Editors of the *New England Journal of Medicine* along with “several key organizations in obstetrics, gynecology, and maternal-fetal medicine” including the American Board of Obstetrics and Gynecology, that “[a]ccess to legal and safe pregnancy termination . . . is essential to the public health of women everywhere”); ACOG, *Abortion Policy*; Soc’y for Maternal-Fetal Med., *Access to Pregnancy Termination Services* (2017).

<sup>28</sup> Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 *Am. J. Pub. Health* 1904, 1908 (2017) (approximately one-quarter of American women will have an abortion before the age of 45).

more pressingly, physicians should not be made to choose between facing criminal liability or providing care consistent with their ethical duties and guidelines of good clinical practice.

### CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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February 19, 2020

## CERTIFICATE OF COMPLIANCE

1. Exclusive of the exempted portions, as provided in Fed. R. App. P. 32(f), this brief does not exceed twelve and one-half pages, in compliance with this Court's en banc briefing order.

2. In compliance with Fed. R. App. P. 32(a)(5)-(6), this brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font.

/s/ Kimberly A. Parker  
KIMBERLY A. PARKER

February 19, 2020

### **CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 2020, I electronically filed the foregoing with the United States Court of Appeals for the Sixth Circuit by e-mail to Court Clerk, En Banc Coordinator Beverly Harris, who will in turn and once accepted, file same via the CM/ECF system, automatically generating and sending by e-mail a Notice of Docket activity to all registered attorneys currently participating in this case. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kimberly A. Parker

KIMBERLY A. PARKER