

SELECTIVE ABORTION PROVISIONS: BIRTH OF A COMPELLING INTEREST AND THE FUTURE OF ABORTION JURISPRUDENCE

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I. INTRODUCTION

It is well-settled that a woman has the fundamental right to decide to have an abortion.¹ But does having the right to decide *whether* to have a child extend to deciding *which* child to have? States like Ohio and Indiana have begun to examine abortion with that question in mind. These states have introduced selective abortion provisions.² Instead of placing restrictions on abortions generally, selective abortion provisions more narrowly target the reason for having an abortion. These provisions generally restrict a doctor from providing an abortion if the abortion is sought either solely or partly on the basis of a protected class such as sex, race, or disability.³ Last year, a circuit split emerged between the neighboring Sixth⁴ and Seventh Circuits.⁵ Both cases, *Preterm-Cleveland v. McCloud* and *Planned Parenthood of Indiana and Kentucky, Inc., v. Commissioner, Indiana State Department of Health*, sharply divided the justices in both Circuits. The Seventh Circuit majority held Indiana's selective abortion provisions constituted an undue burden under *Casey*.⁶ The Sixth Circuit then split from the Seventh Circuit by upholding the constitutionality of Ohio's selective abortion provision.⁷

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¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992).

² See *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, 1–3 GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> (last updated Mar. 1, 2022).

³ *Id.*

⁴ *Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021).

⁵ *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018).

⁶ *Id.* at 310.

⁷ See *McCloud*, 994 F.3d at 535.

While abortion jurisprudence is rarely clear, this circuit split has made clear the need for judicial guidance from the Supreme Court.

This article seeks to provide some clarity in this confusing area of abortion jurisprudence by examining the circuit split and analyzing Indiana and Ohio's articulated state interest in eradicating discrimination. Part II will examine the modern undue burden standard, what has been decided, and what remains unsettled. Part III will discuss the procedural history of *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, the series of decisions by the Seventh Circuit ultimately striking down Indiana's selective abortion provision, HEA 1337. Part IV will discuss the Sixth Circuit's response in *Preterm-Cleveland v. McCloud*, in which the Sixth Circuit upheld Ohio's selective abortion provision, H.B. 214. Part V will apply the undue burden analysis to Ohio and Indiana's selective abortion provisions by (1) explaining why *Casey* has not answered this question, (2) analyzing the state's adaptation of long-standing compelling interests, and (3) discussing the importance of the language used in the statute. Finally, Part VI will conclude the article by explaining why the Sixth Circuit approach should be adopted once this question inevitably makes it to the Supreme Court.

II. THE MODERN UNDUE BURDEN STANDARD AND CONFLICTING INTERESTS

Abortion jurisprudence has left judges and scholars confused.⁸ Before getting into the confusion, several things are clear in the Court's decisions over the last half-century. First, the right to privacy naturally extends to a woman's decision to seek an abortion.⁹ Second, this right, like all fundamental rights, is not absolute.¹⁰ Third, states have a legitimate and important interest in protecting potential life, protecting the health and safety of the mother, and maintaining medical ethics.¹¹ While these interests are present at the outset of the pregnancy, they alone do not become sufficiently compelling to justify nontherapeutic abortions until fetal viability.¹² The Court first recognized these three propositions in *Roe* and have maintained each of them since *Roe*.

⁸ See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 665 (2019).

⁹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹⁰ *Id.*

¹¹ *Id.* at 154.

¹² See *id.* at 163; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992).

In *Planned Parenthood v. Casey*, the Court reiterated each of these propositions from *Roe*.¹³ But *Casey* departed from *Roe* in two significant ways. First, *Casey* rejected the rigid trimester framework of *Roe* to determine viability.¹⁴ Second, *Casey* introduced the modern undue burden standard at the pre-viability stage.¹⁵ The Court provided this explanation of its undue burden analysis: “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 nonviable fetus.”¹⁶ Unfortunately, the Court did not provide much guidance on what this means.

Casey has been interpreted to require that courts engage in a balancing test between the woman’s right to privacy and the government’s interests.¹⁷ In *Casey*, on one side of the scales, are the state’s important interests in protecting potential life, the health and safety of the mother, and the integrity of the medical profession.¹⁸ On the other side of the scales is the intrusion upon the woman’s right to privately decide whether to seek an abortion.¹⁹ At the pre-viability stage, for a ban on nontherapeutic abortions, the scales tip in favor of a woman; whether the Court calls it an undue burden or something else, such an intrusion is unconstitutional.²⁰ However, the state can institute regulations to “persuade [the woman] to choose childbirth over abortion” or to “foster the health of a woman seeking an abortion”; such an intrusion does not constitute an undue burden and is thus not unconstitutional.²¹

The undue burden standard has gone through several changes following *Casey*. In *Stenberg v. Carhart*, the Court seems to strengthen what undue burden means by striking down a Nebraska statute that prohibited a specific

¹³ *Casey*, 505 U.S. at 860.

¹⁴ *Id.* at 873.

¹⁵ *Id.* at 834. An undue burden standard existed before *Casey* in a variety of contexts including abortion, but *Casey* largely glosses over this history and provides a new enunciation of the standard that has since been followed in abortion cases. See John A. Robertson, *Whole Woman’s Health v. Hellerstedt and the Future of Abortion Regulation*, 7 UC IRVINE L. REV. 623, 631–32 (2017).

¹⁶ *Casey*, 505 U.S. at 877.

¹⁷ *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

¹⁸ See *Casey*, 505 U.S. at 878.

¹⁹ See *id.*

²⁰ See *id.*

²¹ *Id.*

procedure.²² The Court reasoned that banning a specific procedure without a maternal health exception unduly burdens a woman's right to make the abortion decision.²³ However, seven years later in *Gonzales v. Carhart*, another Nebraska statute prohibiting the same abortion procedures at issue in *Stenberg* was upheld.²⁴ The Court held that the procedure at issue was "laden with the power to devalue human life," which compromises the integrity and ethics of the medical profession.²⁵ Additionally, the Court upheld the statute even though it did not contain an exception for medical necessity despite disagreement over the potential medical necessity of the procedure.²⁶ The decision in *Gonzales* added a new level of judicial deference towards the legislature and legislative determinations.²⁷

In *Whole Woman's Health v. Hellerstedt*, the Court walked back on its legislative deference from *Gonzales* by instead affording more weight to the judicial record.²⁸ Additionally, the Court explained the undue burden analysis as a weighing of the benefits against the burdens the law imposes.²⁹ Notably, the Court moved away from the traditional rational basis review of an abortion provision by declaring the statute at issue did not serve its intended purpose.³⁰ *Hellerstedt* shifted the Court from generally deferring to the state and placing the burden squarely on the plaintiff to show a substantial obstacle to placing more of a burden on the state.³¹ In *June Medical Services L.L.C. v. Russo*, Justice Breyer, writing for the four-justice plurality, clarified that it now balances the burden against the benefits and interest articulated by the state and that the burden is now roughly even between the individual and the

²² 530 U.S. 914, 945–46 (2000) (The statute prohibited "partial birth abortions" using the dilation and evacuation procedure or dilation and extraction procedure. Physicians would first dilate the pregnant woman's uterus. Then, the physician would collapse the skull of the fetus and remove it.).

²³ *Id.*

²⁴ 550 U.S. 124, 158–59 (2007).

²⁵ *Id.*

²⁶ *Id.* at 158.

²⁷ See e.g., Shannon Russell, *The Burden Is Undue: Whole Woman's Health and the Evolution, Clarification, and Application of the Undue Burden Standard*, 24 GEO. MASON L. REV. 1271, 1283 (2017).

²⁸ 136 S. Ct. 2292, 2310 (2016).

²⁹ *Id.* at 2309.

³⁰ See *id.* at 2313–14, 2318.

³¹ See Barry P. McDonald, *A Hellerstedt Tale: There and Back Again?*, 85 U. CIN. L. REV. 979, 1002 (2018).

state.³² A circuit split has emerged as to whether the four-justice plurality recognizing the *Hellerstedt* balancing test or Justice Roberts's more narrow concurrence returning to *Casey*'s burden analysis controls.³³ While the Sixth Circuit follows Justice Roberts's concurrence, the Sixth Circuit's analysis of H.B. 214 should survive under either test.

III. *PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC. V. COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH AND THE SEVENTH CIRCUIT APPROACH*

On March 24, 2016, Indiana's governor signed into law House Enrolled Act (HEA) 1337, which introduced several new provisions to Indiana's abortion legislation.³⁴ HEA 1337 introduced several provisions prohibiting physicians from intentionally performing an abortion prior to viability if the physician knows the pregnant woman is seeking the abortion solely because of the fetus's sex³⁵ or race,³⁶ or because the fetus has been diagnosed with Down syndrome or any other disability, or has a potential diagnosis of Down syndrome or any other disability.³⁷ In response to HEA 1337, Planned Parenthood of Indiana and Kentucky ("Planned Parenthood") challenged these provisions as violative of the Fourteenth Amendment and moved for summary judgment.³⁸ Both parties agreed at the summary judgment stage that a significant number of women seek abortions solely because of the diagnosis of a disability or the risk thereof and that that number will likely increase as testing becomes more available.³⁹ Consequently, most of the discussion by

³² 140 S. Ct. 2103, 2120 (2020); see also *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669–70 (2019); see also *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 531 (6th Cir. 2021).

³³ See generally Aaron M. Smith, *One Step Forward, Two Steps Back: June Medical Revives the Casey Standard for Abortion Jurisprudence*, 74 BAYLOR L. REV. 219, (2022) (explaining Justice Breyer's majority opinion in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the plurality and concurrence in *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2019), and the emergent circuit split).

³⁴ *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 861–62 (S.D. Ind. 2017) (*PPINK I*).

³⁵ IND. CODE ANN. § 16-34-4-5 (West 2016).

³⁶ *Id.* § 16-34-4-8 (West 2016).

³⁷ *Id.* §§ 16-34-4-6, 16-34-4-7 (West 2016). The other relevant provision of HEA 1337 changed how fetal tissue may be disposed. This is the provision that the Supreme Court will end up granting certiorari on but otherwise does not impact the anti-discrimination provision that is the focus of this article.

³⁸ *PPINK I*, 265 F. Supp. 3d at 861.

³⁹ *Id.* at 862–63.

the courts revolved around the disability provisions despite the presence of the sex and race provisions.

Indiana, in its various filings, responded with two distinct arguments for the constitutionality of the anti-discrimination provisions.⁴⁰ Both arguments attempt to demonstrate that *Roe* and *Casey* did not consider nor protect abortion solely for discriminatory reasons.⁴¹ The state attempted to get around *Roe* and *Casey* by arguing that *Roe* and *Casey* protect a woman from having to carry an unwanted child to term, but those cases do not create the right to abort an otherwise wanted child on a discriminatory basis.⁴² In other words, the state argued that *Roe* and *Casey* recognize a woman's right to choose whether to have a child, not *which* child to have.⁴³ The district court referred to this argument as the "binary choice" interpretation of *Casey* and *Roe*.⁴⁴ Recognizing such a right, the state argued, would undermine America's efforts to eradicate discrimination and promote equality.⁴⁵

Indiana additionally argued that anti-discrimination abortion provisions are the next wave of anti-discrimination legislation.⁴⁶ Looking at disability in particular, the state argued that technological advancements have led to earlier and more accurate diagnoses of Down syndrome and other disabilities.⁴⁷ Planned Parenthood agreed that these advancements have increased the number of abortions sought solely on discriminatory grounds.⁴⁸ The state cited studies and examples of the negative pressure applied by physicians on women to seek an abortion when a fetal disability is possible.⁴⁹

⁴⁰ See Def.'s Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 1, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁴¹ *Id.*; Def's. Mem. Supp. Summ. J. at 1–2, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁴² See Def's. Mem. Supp. Summ. J. at 16–17, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁴³ See *id.*

⁴⁴ *PPINK I*, 265 F. Supp. 3d at 868.

⁴⁵ See Def.'s Mem. in Opp'n to Pls.' Mot. Prelim. for Inj. at 17–18, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁴⁶ *Id.* at 1.

⁴⁷ Def's. Mem. Supp. Summ. J. at 2, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁴⁸ See *id.* at 2–3.

⁴⁹ *Id.* at 5–6; see also Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear?*, 94 ARCH. DIS. CHILD 823, 825 (2009) ("Mothers from the USA... who have received a prenatal diagnosis of DS and chose to continue their pregnancies have indicated that their physicians often provided incomplete, inaccurate, and, sometimes, offensive information about DS." Additionally, 10% of physicians actively urge mothers to terminate and 13% admit they overemphasize the negative aspects of Down Syndrome hoping the mother will seek an abortion); Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A*

The state argued that the current practice of allowing abortion based solely on disability not only discriminates against potential life but also devalues and undignifies persons with disabilities, especially those with intellectual disabilities.⁵⁰ Thus, according to the state, anti-discrimination provisions fit within the “admirable American tradition of expanding laws that preclude discrimination.”⁵¹

The district court rejected both arguments by finding *Casey* on point.⁵² The district court treated the discrimination argument as just another argument about protecting potential life which the *Casey* court said is insufficient pre-viability to interfere with the decision of a woman to have an abortion.⁵³ The district court deemed the state’s focus on technological advancements as irrelevant because the district court believed that did not give them license to reevaluate the Supreme Court’s judgment.⁵⁴ The district court rejected the “binary choice” interpretation as well because the court believed nothing in *Roe* or *Casey* suggests that a woman cannot change her mind in making a highly private, personal, and difficult decision.⁵⁵

While the district court rejected the anti-discrimination argument, it failed to address the second interest advanced by the state. The state contended that the anti-discrimination provisions promote the integrity of the medical profession which the Court relied on in *Gonzales*.⁵⁶ The provisions promote the integrity of the medical profession by restricting the involvement of medical professionals in discriminatory practices.⁵⁷ The State reminded the district court that it was not too long ago that over 70,000 persons were

Comparison of Prenatal and Postnatal Parent Group Experiences, 51 INTELL. & DEV. DISABILITIES 446, 453 (2013) (35% of mothers reported negative experiences with their physician after receiving a prenatal diagnosis of down syndrome including pressure to terminate the pregnancy.); Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 AM. J. OBSTETRICS & GYNECOLOGY 670, 672 (2005) (In the study, mothers reported feeling “rushed or pressured into making a decision about continuing the pregnancy.”).

⁵⁰ *Id.* at 15; see also Def.’s Mem. in Opp’n to Pls.’ Mot. for Prelim. Inj. at 16-17, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁵¹ See Def.’s Mem. Supp. Summ. J. at 12, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

⁵² See *PPINK I*, 265 F. Supp. 3d at 867.

⁵³ *Id.*

⁵⁴ *Id.* at 867-68.

⁵⁵ *Id.* at 868-69.

⁵⁶ Def.’s Mem. Supp. Summ. J. at 15, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763); *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007).

⁵⁷ Def.’s Mem. Supp. Summ. J. at 15, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763).

forcibly sterilized due to the Court's decision in *Buck v. Bell*.⁵⁸ The State here pointed to the pressure physicians apply to women to have abortions based on the possibility of a disability.⁵⁹ Anti-discrimination provisions would prevent physicians from making unethical decisions that could undermine the medical provision.⁶⁰

The Seventh Circuit affirmed the district court's granting of summary judgment through the same analysis employed by the district court.⁶¹ Judge Daniel Manion authored a concurring opinion in which he agreed with the state that the state has a compelling interest in eradicating discrimination and preventing a type of "private eugenics" that would survive strict scrutiny.⁶² He even agreed with the state that *Roe* and *Casey* recognized the right to decide *whether* to have a child, not the right to decide *which* child to have.⁶³ However, because he viewed the undue burden standard as impossible to overcome, he concurred with the majority.⁶⁴

Judge Manion is not alone in his support of the anti-discrimination abortion provisions. In a rehearing on the fetal tissue disposition provision of HEA 1337, then-Circuit Judge Amy Coney Barrett, along with Circuit Judges Diane Sykes and Michael Brennan, joined Judge Frank Easterbrook in a dissent analyzing the anti-discrimination provision.⁶⁵ While the anti-discrimination provisions were not before the court, Judge Easterbrook expressed skepticism over the Seventh Circuit's opinion in *PPINK II* because *Casey* did not consider "the validity of an anti-eugenics law."⁶⁶ Judge Easterbrook agreed with the position of the state that the interest argued by the state and the nature of the HEA 1337 are distinct from anything the *Casey* court considered when it determined the state had an insufficient interest pre-viability.⁶⁷ The dissent here differed from Judge Manion's prior concurrence

⁵⁸ *Id.* at 14; *see also supra* notes 160–161 and accompanying text.

⁵⁹ *Id.* at 15.

⁶⁰ *Id.*

⁶¹ *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300, 310 (7th Cir. 2018) (*PPINK II*).

⁶² *Id.* at 311.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting) (*PPINK III*).

⁶⁶ *Id.*

⁶⁷ *See id.*

by suggesting that the state could succeed under the undue burden analysis.⁶⁸ Judge Easterbrook cautioned the majority about “imput[ing] to the Justices decisions they have not made about problems they have not faced.”⁶⁹

Justice Thomas agreed with Judge Easterbrook when the fetal tissue disposition provision came before the Supreme Court.⁷⁰ Justice Thomas authored a concurring opinion specifically to address the anti-discrimination provision. In his concurrence, Justice Thomas reflected on the long history of ableist discrimination in America, the use of eugenics as a response, and the role Planned Parenthood and the Court have played in all of this.⁷¹ Justice Thomas agreed on the refusal to grant certiorari on the anti-discrimination provision due to a lack of a circuit split at that time but closed his concurrence by acknowledging that the Court cannot avoid this question forever.⁷² Now that circuit split exists.⁷³

IV. *PRETERM-CLEVELAND V. MCCLOUD* AND THE SIXTH CIRCUIT RESPONSE

During the heat of Indiana’s litigation over HEA 1337, Ohio passed and signed into law its own selective abortion provision—H.B. 214. Governor John Kasich signed H.B. 214 into law on December 22, 2017.⁷⁴ Ohio’s H.B. 214 prohibits physicians from performing abortions if the physician knows:

[T]he pregnant woman is seeking the abortion in whole or in part, because of any of the following: (1) A test result indicating Down syndrome in an unborn child; (2) A prenatal diagnosis of Down syndrome in an unborn child; (3) Any other reason to believe that an unborn child has Down syndrome.⁷⁵

Both HEA 1337 and H.B. 214 focus on a physician’s knowledge of a pregnant woman’s reason for seeking an abortion. Ohio’s provision differs

⁶⁸ *Id.* at 538.

⁶⁹ *Id.* at 536.

⁷⁰ *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring).

⁷¹ *See id.* at 1787–91.

⁷² *Id.* at 1793.

⁷³ *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 529–30 (6th Cir. 2021).

⁷⁴ *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 750 (S.D. Ohio, 2018).

⁷⁵ OHIO REV. CODE ANN. § 2919.10 (West 2018).

from Indiana's in two ways. First, Ohio narrowly tailored H.B. 214 to target abortions based on the potentiality of Down syndrome. Second, H.B. 214 has a broader reach than Indiana's provision by using the language "in whole or in part" instead of requiring that the protected class be the sole reason.⁷⁶ Thus, Ohio's H.B. 214 is simultaneously narrower in the category of types of discrimination and broader in coverage for the discrimination that it prohibits.

One of Ohio's abortion clinics, Preterm Cleveland, immediately challenged the constitutionality of H.B. 214 and moved for a preliminary injunction.⁷⁷ Preterm Cleveland argued that H.B. 214 is a ban on pre-viability abortions and that *any* ban on pre-viability abortions is per se unconstitutional under *Casey* and *Hellerstedt*.⁷⁸ Preterm Cleveland also argued that even if a woman could still obtain abortions for any reason, even based on Down syndrome, so long as the physician does not know, the effect of the law will be to chill physician's willingness to perform abortions, especially if the physician learns of a confirmed Down syndrome diagnosis.⁷⁹

The State of Ohio made similar arguments to the State of Indiana in the *PPINK* series of decisions. Ohio also argued the binary choice interpretation of *Casey*.⁸⁰ Advances in prenatal testing have made possible the detection of Down syndrome in fetuses.⁸¹ Ohio claimed that influential medical and governmental leaders and the media have combined to spread misinformation about persons with Down syndrome resulting in bias and coercion in prenatal counseling for the abortion of fetuses testing positive for Down syndrome.⁸² The misinformation, bias, and coercion resulted in the abortion of 61% to 91% of fetuses testing positive for Down syndrome.⁸³ The legislature passed and the Governor signed into law H.B. 214 because "no civilized society

⁷⁶ *Id.*

⁷⁷ *Himes*, 294 F. Supp. 3d at 751.

⁷⁸ Pl.'s Mot. for TRO and Prelim. Inj. at 12, *Himes*, 294 F. Supp. 3d 746 (No. 1:18-cv-109).

⁷⁹ *See id.*

⁸⁰ *See* Def.'s Resp. to Pl.'s Mot. for TRO and Prelim. Inj. at 3, 12, *Himes*, 294 F. Supp. 3d 746 (No. 1:18-cv-109) (arguing that *Casey* answered the question of whether to "beget a child" not "whether to beget this particular child," and that *Casey* did not recognize a right to abort a fetus on the basis of disability); *see* Discussion *supra* part III.

⁸¹ Def.'s Resp. to Pl.'s Mot. for TRO and Prelim. Inj. at 3, *Himes*, 294 F. Supp. 3d 746 (No. 1:18-cv-109).

⁸² *Id.* at 9.

⁸³ *Id.* at 3.

should sanction the targeted elimination of this demographic or any other.”⁸⁴ The absence of such a law constitutes “[l]egally-[s]anctioned [d]iscrimination [a]gainst [i]ndividuals with [d]isabilities.”⁸⁵ The misinformation and systematic elimination of fetuses with a prenatal diagnosis of Down syndrome results in negative societal views and active discrimination against persons with Down syndrome.⁸⁶ Thus, according to Ohio, the state has a legitimate and sufficient state interest in eradicating such discrimination and in protecting the medical profession.⁸⁷ Because the scienter requirement is solely on the physician and the law recognizes medical necessity as an exception, a pregnant woman could still obtain an abortion for any reason so long as the physician was unaware of the discriminatory basis.⁸⁸ Thus, according to the state, the law places no undue burden on pregnant women seeking an abortion.

Much like the district court in Indiana, the district court in *Preterm-Cleveland* agreed with the plaintiffs and held that *Casey* rendered selective abortion provisions like H.B. 214 per se unconstitutional.⁸⁹ The district court suggested that H.B. 214 does not merely place a burden on a woman’s right to an abortion pre-viability, but eliminates the right altogether.⁹⁰ The district court specifically rejected Ohio’s binary choice interpretation of *Casey*, stating that the right to terminate a pregnancy pre-viability is categorical.⁹¹ According to the district court, the Supreme Court made its decision in *Roe* and *Casey* contemplating that a woman will exercise her right while being well-informed of all the circumstances of the pregnancy, including such factors as a prenatal diagnosis of Down syndrome.⁹² In regard to Ohio’s arguments about eradicating discrimination toward persons with Down syndrome, the district court dismissed that argument as simply a rephrasing of the state’s argument in protecting potential life.⁹³

⁸⁴ *Id.*

⁸⁵ *Id.* at 6.

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 14.

⁸⁸ *See id.* at 17.

⁸⁹ *See Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 754 (S.D. Ohio 2018). The district court states it agrees with the Southern District of Indiana in *PPINK I. Id.* at 755.

⁹⁰ *Id.* at 754.

⁹¹ *Id.* at 755.

⁹² *Id.*

⁹³ *Id.*

Initially, the Sixth Circuit, citing *PPINK II*, agreed with the district court that the right to an abortion pre-viability is categorical under *Casey* despite express language in *Roe* rejecting the idea of a categorical right.⁹⁴ The Sixth Circuit similarly held that the state's interest in eradicating discrimination is "inescapably intertwined with the state's interest in potential life."⁹⁵ The Sixth Circuit reasoned that without the potential life, there would be no interest in preventing discrimination.⁹⁶ Thus, *Casey* controls and H.B. 214 is unconstitutional per se.⁹⁷

Relying on Justice Thomas's concurrence in *Box*, Judge Alice Batchelder dissented, arguing that *Casey* never decided whether the Constitution requires states to allow eugenic abortions.⁹⁸ Judge Batchelder indicted the majority opinion for ignoring *Hellerstedt*, which requires courts to consider the burden together with the benefits conferred by the law.⁹⁹ Judge Batchelder argued that H.B. 214 did not impose an undue burden because it does not require physicians to inquire about the motivations of a patient seeking an abortion nor does it instruct a physician to speculate about the reasons.¹⁰⁰ Thus, a woman could still potentially obtain an abortion because of a Down syndrome diagnosis so long as the woman did not convey to the physician that she desired an abortion because of the Down syndrome diagnosis.

Three months after the Sixth Circuit affirmed the district court's ruling, the Sixth Circuit vacated its judgment and granted a rehearing en banc.¹⁰¹ On rehearing en banc, Judge Batchelder, no longer in the minority, authored the majority opinion reversing the district court's ruling granting the preliminary injunction.¹⁰² The majority distinguished *McCloud* from *Casey* in that the "common denominator" of the interests advanced by the state in *McCloud* is the doctor's knowing participation in a woman's decision to abort a pregnancy because she does not want a child with Down syndrome.¹⁰³ The majority points out that one of the plaintiff's experts admitted that a woman's

⁹⁴ *Preterm-Cleveland v. Himes*, 940 F.3d 318, 323 (6th Cir. 2019).

⁹⁵ *Id.* at 324.

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.* at 325–26.

⁹⁹ *Id.* at 328.

¹⁰⁰ *Id.*

¹⁰¹ *Preterm-Cleveland v. Himes*, 944 F.3d 630, 631 (6th Cir. 2019).

¹⁰² *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021).

¹⁰³ *Id.* at 518 (Notably, "knowledge of the diagnosis is not knowledge of the reason.").

reason for seeking an abortion is not medically relevant and need not be discussed prior to the procedure.¹⁰⁴ The majority accepted the state's argument that H.B. 214 still allows for abortions for any reason, even because the woman does not want a child with Down syndrome, if the doctor does not know that Down syndrome is a reason.¹⁰⁵ Thus, there is no undue burden because of the scienter requirement on doctors.

V. UNDUE BURDEN ANALYSIS

The Sixth and Seventh Circuit opinions demonstrate that, regardless of the outcome, states face two main obstacles in litigating selective abortion provisions. First, states face the legal quagmire that is the *Casey* opinion. If states fail to convince courts that *Casey* did not address the issues at play in selective abortion provisions, then any restriction pre-viability is going to be unconstitutional as the Seventh Circuit held. Next, even if *Casey* has not already answered the question, states must still win under the undue burden analysis.

A. Overcoming *Casey*.

In *Casey*, the state did not argue that the regulations at issue furthered the state's interest in eradicating discrimination; the state relied on the same argument it always has that the state has an interest in protecting potential life.¹⁰⁶ The Court in *Casey* focused heavily on the state's interest in protecting potential life.¹⁰⁷ Furthermore, the Court in *Casey* stated that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."¹⁰⁸ Staying faithful to *Roe* would imply that the Court did not intend to prohibit *any* ban on pre-viability abortions, only *comprehensive* bans on abortion pre-viability.¹⁰⁹ Neither the statute in *Roe* nor *Casey* considered a narrow abortion ban; the statutes in each case were comprehensive abortion bans.¹¹⁰ The

¹⁰⁴ *See id.* at 519.

¹⁰⁵ *See id.* at 518.

¹⁰⁶ *See* Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

¹⁰⁷ Mary Ziegler, *Rethinking an Undue Burden: Whole Woman's Health's New Approach to Fundamental Rights*, 85 TENN. L. REV. 461, 481 (2018).

¹⁰⁸ *Casey*, 505 U.S. at 846.

¹⁰⁹ *See* Thomas J. Molony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1110 (2014).

¹¹⁰ *Id.* at 1111.

language relied upon by the Seventh Circuit¹¹¹ conveniently ignores the fact that the preceding sentence states “our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*.”¹¹² If the Court is reaffirming *Roe* in reaching its determination that the state does not have a sufficient interest pre-viability, then the Court could not have intended to capture narrow, novel, anti-discrimination abortion bans.¹¹³

Moreover, the interests at play in *Roe* and *Casey* fundamentally differ from the interests advanced by the state in the *PPINK* and *Preterm-Cleveland* cases. The interests discussed in *Roe* and *Casey* turned on the question of viability.¹¹⁴ The state lacked a compelling interest pre-viability because it had no interest in defending a nonperson; however, once that fetus could survive outside the womb, then the state had a compelling interest in defending it.¹¹⁵ The state’s interest in protecting the ethics of the medical profession, eradicating discrimination, and protecting mothers from coercion by doctors impact those groups regardless of whether the abortion occurs before or after the fetus becomes viable.¹¹⁶ Taking disability, for example, the state’s interest in eradicating discrimination has nothing to do with the fetus itself or the life the fetus will have but rather the very real effect that abortions on the basis of disability have on the community of persons with disabilities. France, for example, banned a video that featured children with Down syndrome talking about their happy lives.¹¹⁷

The next revealing tell in the Court’s opinion comes in their treatment of the parental consent provision of *Casey*. The Court in *Casey* upholds the

¹¹¹“Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Casey*, 505 U.S. at 879.

¹¹²*Id.*

¹¹³See Molony, *supra* note 109, at 1111.

¹¹⁴See *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 521 (6th Cir. 2021); *Casey*, 505 U.S. at 879.

¹¹⁵See *McCloud*, 994 F.3d at 521; see also *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”).

¹¹⁶*McCloud*, 994 F.3d at 521.

¹¹⁷Def.’s Resp. to Pl.’s Mot. for TRO and Prelim. Inj. at 11, *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio, 2018) (No. 1:18-cv-109) (citing Elizabeth Koh, ‘*Dear Future Mom*’ Ad Banned Because it Could ‘Disturb’ Women who had Abortions, MIAMI HERALD, Nov. 28, 2016).

parental consent provision of the Pennsylvania statute.¹¹⁸ The statute in *Casey* took the decision out of the woman's hands.¹¹⁹ Under the statute in *Casey*, a minor woman could not seek an abortion if she does not have parental consent unless a court determined she was mature enough to make the decision or for medical emergency.¹²⁰ HEA 1337 and H.B. 214 read in a very similar manner.¹²¹ A woman under either statute can still consider any of the protected classes in deciding whether to have an abortion as long as the physician does not have knowledge of the discriminatory reason, or, in Indiana, the discriminatory reason is not the sole reason for the abortion.¹²² If the Court truly meant that states never have a sufficient interest in restricting or partially banning abortion pre-viability, then the Court would not have upheld the parental consent partial ban.¹²³ Furthermore, if a woman has an absolute right to an abortion pre-viability, then abortion has indeed been elevated above any other fundamental right, as no other right is absolute.¹²⁴ But by affirming *Roe*'s central principles, the *Casey* Court affirmed *Roe*'s holding that abortion is not an absolute right.¹²⁵

B. The State's New Adaptations of Long-standing Compelling Interests.

Indiana and Ohio each advanced two compelling interests in their arguments. First, they each argued that preventing abortions for discriminatory purposes protects the integrity of the medical profession. Second, they each argued that eradicating discrimination in society applies in the abortion context as well. Historically, the state's interest in eradicating discrimination has justified encroaching on fundamental rights such as the right of association. In regard to the disability context, abortion and disability have a unique history that should enhance the state's interest in eradicating ableist discrimination.

¹¹⁸ See *Casey*, 505 U.S. at 899.

¹¹⁹ See Molony, *supra* note 109, at 1112.

¹²⁰ *Id.*

¹²¹ See IND. CODE ANN. § 16-34-4 (West 2016); see also OHIO REV. CODE ANN. § 2919.10 (West 2018).

¹²² See IND. CODE ANN. § 16-34-4 (West 2016); see also OHIO REV. CODE ANN. § 2919.10 (West 2018).

¹²³ See Molony, *supra* note 109, at 1113.

¹²⁴ *Id.* at 1117.

¹²⁵ See *Roe v. Wade*, 410 U.S. 113, 153 (1973); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

1. The Integrity of the Medical Profession

The state's interest in protecting the integrity of the medical profession seemingly goes unconsidered by the district court and the Seventh Circuit. The Court has recognized this interest as compelling.¹²⁶ The words 'integrity' and 'ethics' never appear in the district court opinion nor any of the Seventh Circuit opinions in *PPINK*.¹²⁷ Indiana argued this interest to both the district court and the Seventh Circuit.¹²⁸ Eugenic ideals embraced in the name of eradicating disability have long undermined medical ethics and continue to do so today.¹²⁹ Reports indicate there are medical professionals in the United States who encourage Down syndrome-selective abortions, some going so far as to provide families with "inaccurate and overly negative information."¹³⁰ In California, a prenatal screening program described pregnancies continued after a Down syndrome diagnosis as a missed opportunity.¹³¹ As Ohio argued in *McCloud*, "an industry associated with the view that some lives are worth more than others is not likely to earn or retain the public's trust."¹³² Ignoring a recognized compelling interest, especially in the face of evidence supporting the compelling interest, certainly calls into question the decision of the Seventh Circuit.

¹²⁶ See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007); see also *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

¹²⁷ See generally *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859 (S.D. Ind. 2017) (*PPINK I*); see generally *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018) (*PPINK II*); see generally *Planned Parenthood of Ind. and Ky., Inc., v. Comm'r, Ind. State Dep't of Health*, 917 F.3d 532 (7th Cir. 2018) (*PPINK III*).

¹²⁸ Def.'s Mem. Supp. Summ. J. at 15, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763); Reply Br. Appellant at 5, *PPINK II*, 888 F.3d 300, 312 (No. 17-3163).

¹²⁹ See Seema Mohapatra, *Politically Correct Eugenics*, 12 FIU L. REV. 51, 54-57 (2016) ("[T]he district court found that approximately '100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs.'" (quoting *Relf v. Weinberger* 372 F. Supp. 1196 (D.D.C. 1974))).

¹³⁰ *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021); see also the Skotko studies, *supra* note 49 and the Goff et al., study, *supra* note 49.

¹³¹ Linda L. McCabe et al., *Down Syndrome: Coercion and Eugenics*, 13 GENETICS IN MED. 708, 709 (2011).

¹³² *McCloud*, 994 F.3d at 518.

2. Eradicating Discrimination as a Compelling Interest for Infringing on Fundamental Rights.

Courts have consistently upheld restrictions to fundamental rights to advance the state's compelling interest in prohibiting discrimination. In three First Amendment freedom to associate cases, the Court weighed the state's interest in prohibiting discrimination on the basis of sex against the infringement on the group's right to associate.¹³³ In each of the cases, the Court employed an undue burden-like balancing test rather than strict scrutiny to determine the constitutionality of the statutes.¹³⁴

In *Roberts v. U.S. Jaycees*, a Minnesota statute required the United States Jaycees to admit women as full voting members.¹³⁵ The Court upheld the statute because it determined that the "unique evils that government has a compelling interest to prevent," referring to sex-based discrimination, outweighed any infringement on the Jaycees' freedom of speech.¹³⁶ In *Board of Directors of Rotary International v. Rotary Club of Duarte*, Rotary International revoked the charter of the Duarte chapter for admitting women.¹³⁷ The Duarte chapter sued under a California statute prohibiting discrimination on the basis of sex, among other things.¹³⁸ Citing to *Roberts*, the Court once again held that a slight infringement on Rotary's First Amendment rights is justified because "it serves the state's compelling interest in eliminating discrimination against women."¹³⁹ In *Boy Scouts of America v. Dale*, an eagle scout, James Dale, sued after his membership was revoked because Dale revealed he was homosexual.¹⁴⁰ The Court applied a similar balancing test as it did in *Roberts* and *Duarte*, even citing to both cases, but nevertheless determined, without explanation, that the state's compelling interest did not outweigh the infringement on the Boy Scouts' freedom of association.¹⁴¹

On more than one occasion, the Court has found eradicating racial discrimination as a compelling interest to intrude upon a fundamental right,

¹³³ See Molony, *supra* note 109, at 1118.

¹³⁴ *Id.* at 1118–19.

¹³⁵ 468 U.S. 609, 615 (1984).

¹³⁶ *Id.* at 628.

¹³⁷ 481 U.S. 537, 541 (1987).

¹³⁸ *Id.*

¹³⁹ *Id.* at 549.

¹⁴⁰ 530 U.S. 640, 644–45 (2000).

¹⁴¹ *Id.* at 657–58.

most notably, the freedom to associate.¹⁴² The cases concerning racial discrimination and the freedom to associate bear a striking resemblance to the sex-based discrimination cases discussed above. In *New York State Club Association v. City of New York*, the Court heavily relied on *Duarte* and *Roberts* to uphold a local law prohibiting clubs from excluding minorities and women from becoming members.¹⁴³ In reaching its decision, the Court noted that there may be a “considerable amount of private or intimate association” that occurs in these clubs, but that does not grant clubs “constitutional immunity to practice discrimination.”¹⁴⁴ In *Railway Mail Association v. Corsi*, the Court similarly upheld a New York law prohibiting unions from denying membership to persons on the basis of race.¹⁴⁵ The Court noted that it did not matter whether the employer was a government entity.¹⁴⁶ While the Court did not use the term ‘undue burden,’ the Court determined that prohibiting unions from discriminating on the basis of race did not impose any burden on the selection of employees.¹⁴⁷

These cases, though distinguishable from abortion jurisprudence, illustrate two key points. First, prohibiting discrimination qualifies as a compelling state interest and can justify at least some slight infringements on fundamental rights.¹⁴⁸ It follows that if abortion is a fundamental right, then prohibiting discrimination should justify at least some slight infringements on the right to choose to have an abortion. If, as the concurrence in the Seventh Circuit¹⁴⁹ and dissent in the Sixth Circuit¹⁵⁰ suggest, the state has no compelling interest pre-viability, even for previously unconsidered interests such as prohibiting discrimination, then abortion appears to have been elevated above the fundamental rights actually enumerated in the Bill of Rights as Judge Manion suggests.¹⁵¹ Second, because states did not argue prohibiting discrimination as a compelling interest in previous abortion cases such as *Roe*, *Casey*, and *Hellerstedt*, courts should consider the broader body

¹⁴² See, e.g., *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 13–14 (1988).

¹⁴³ See *id.* at 12.

¹⁴⁴ *Id.*

¹⁴⁵ 326 U.S. 88, 94 (1945).

¹⁴⁶ *Id.*

¹⁴⁷ See *id.* at 95–96.

¹⁴⁸ Molony, *supra* note 109, at 1121.

¹⁴⁹ *PPINK II*, 888 F.3d 300, 312 (7th Cir. 2018) (Manion, J., concurring).

¹⁵⁰ *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 577 (6th Cir. 2021) (Donald, J., dissenting).

¹⁵¹ *PPINK II*, 888 F.3d at 312.

of case law surrounding fundamental rights and discrimination in addressing selective abortion provisions.¹⁵²

3. Dehumanization of Disability: A Tale as Old as Time.

Perhaps the most overlooked, but arguably most compelling, state interest is in the field of disability. Throughout human history, persons with disabilities have experienced brutal discrimination and have been subject to extermination policies. Disability rights scholars refer to the methods of viewing and describing disability as the models of disability.¹⁵³ The moral model of disability (which lasted until around the twentieth century) viewed disability as a sign of sin or scorn by the gods.¹⁵⁴ The abortion of persons with disabilities is quite literally a tale as old as time. Ancient Rome threw babies with disabilities into the Tiber River.¹⁵⁵ Ancient Sparta had laws requiring the abandonment of babies with disabilities.¹⁵⁶ Fast forward to the twentieth century and not much had changed:

The murder of the handicapped preceded the murder of Jews and Gypsies, and it is therefore reasonable to conclude that T4's killing operation served as a model for the final solution. The success of the euthanasia policy convinced the Nazi leadership that mass murder was technically feasible, that ordinary men and women were willing to kill large numbers of innocent human beings, and that the bureaucracy would cooperate in such an unprecedented enterprise.¹⁵⁷

While the world shuddered at the idea of mass extermination, the United States of America and the rest of the world wholly embraced the eugenics movement and the forced sterilization of persons with disabilities.¹⁵⁸

¹⁵² *Id.*; see *McCloud*, 994 F.3d at 544 (Bush, J., concurring).

¹⁵³ See LISA SCHUR ET AL., *PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED?* 3 (Peter Blanck & Robin Paul Malloy eds., 2013).

¹⁵⁴ *Id.* at 1.

¹⁵⁵ *Id.*; see also Governor's Council on Developmental Disabilities, Minn. Dep't of Admin., *Parallels in Time Part One: The Ancient Era*, <https://mn.gov/mnddc/parallels/one/3.html> (last visited Apr. 22, 2022).

¹⁵⁶ *Id.*

¹⁵⁷ HENRY FRIEDLANDER, *THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION* 284 (U.N.C. Press ed., 3rd ed. 2000).

¹⁵⁸ See *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1785–86 (2019); see also James B. O'Hara & T. Howland Sanes, *Eugenic Sterilization*, 45 *GEO. L. J.* 20, 20 (1956).

In the United States of America, the medical and legal communities worked in concert to implement broad eugenics policies.¹⁵⁹ In *Buck v. Bell*, the Supreme Court upheld a policy allowing for the forced sterilization of persons with disabilities because according to Justice Holmes “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are *manifestly unfit* from continuing their kind. . . . Three generations of imbeciles is enough.”¹⁶⁰ *Buck v. Bell* has never expressly been overturned.¹⁶¹ In fact, courts rejected Eighth Amendment arguments against sterilization.¹⁶² According to those courts, sterilization did not meet the definition of punishment because it relieved the person from worrying about whether they would have an “undesired offspring.”¹⁶³ It took until 2017 for the Court to reject Texas’s use of Steinbeck’s fictional character Lennie from *Of Mice and Men* as the standard for whether someone with intellectual disabilities could receive the death penalty.¹⁶⁴ Even as the U.S. began to take sterilization laws off the books, groups such as the American Bar Association continued to look for new laws to create to discourage reproduction and encourage abortion among minorities and persons with disabilities.¹⁶⁵ Scholars still today even argue for imposing tort liability on women who have chosen not to abort a fetus that tested positive for a disability such as Down syndrome.¹⁶⁶

¹⁵⁹ See *Box*, 139 S. Ct. at 1788.

¹⁶⁰ 274 U.S. 200, 207 (1927) (emphasis added).

¹⁶¹ The Court has walked back its position on *Buck* in *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.”).

¹⁶² See O’Hara & Sanes, *supra* note 158, at 24–25.

¹⁶³ *Id.* at 25.

¹⁶⁴ See *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (overturning Texas’s *Briseno* factors); see also *Ex parte Briseno*, 135 S.W.3d 1, 4 (Tex. Crim. App. 2004) (“Most Texas citizens might agree that Steinbeck’s Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt [from the death penalty].”).

¹⁶⁵ See Mary Elizabeth Dial, *Two Steps Forward, One Step Back: The Story of Eugenics in America, Past and Present*, 11 ALA. C.R. & C.L.L. REV. 177, 188 (2019); see also Lisa Powell, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL’Y REV. 481, 491 (2002).

¹⁶⁶ See Sara Weinberger et al., *They Chose . . . Poorly: A Novel Cause of Action to Discourage Detrimental Genetic Selection*, 43 AM. J.L. & MED. 107, 127 (2017).

Meanwhile, as the U.S. legal system upheld sterilization, the medical community sterilized over 60,000 persons.¹⁶⁷ Forced sterilizations continued in the United States until 1973.¹⁶⁸ While eugenicists in the medical community can no longer forcibly sterilize persons with disabilities, many doctors continue to heavily pressure women to abort their fetuses solely on the basis of a potential disability.¹⁶⁹ In the U.S., an estimated 90% of fetuses that test positive for Down syndrome are aborted.¹⁷⁰ While some argue eugenics only applies to state policies, medical professionals and segments of American society has embraced eugenic ideals.¹⁷¹ Congress has explicitly recognized this long-standing history of discrimination against persons with disabilities.¹⁷²

Eradicating discrimination against persons with disabilities certainly constitutes a compelling interest for the state.¹⁷³ As Indiana and Ohio lawmakers, a minority of Seventh Circuit judges, a majority of Sixth Circuit judges, Justice Amy Coney Barret, and Justice Thomas all recognize, no such interest has been considered by the Court. The Sixth Circuit has held that such an interest is compelling.¹⁷⁴ Allowing abortions solely on the basis of disability tells everyone with a disability, especially persons with Down syndrome, that their life is not worthy, and society is better off without them.¹⁷⁵

¹⁶⁷Sam Rowlands and Jean-Jacques Amy, *Sterilization of Those with Intellectual Disability: Evolution from Non-consensual Interventions to Strict Safeguards*, J. OF INTELL. DISABILITIES, 233, 236 (2017).

¹⁶⁸*Id.* at 237.

¹⁶⁹*See* Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting “Discriminatory” Abortions: Constitutional and Ethical Challenges*, 96 U. DET. MERCY L. REV. 605, 611 (2019); *see also* Def.’s Mem. in Opp’n to Pls.’ Mot. for Prelim. Inj. at 5, *PPINK I*, 265 F. Supp. 3d 859 (S.D. Ind. 2017) (No. 1:16-cv-763); Def.’s Mem. Supp. Summ. J. at 5, *PPINK I*, 265 F. Supp. 3d 859 (No. 1:16-cv-763); Def.’s Resp. to Pl.’s Mot. for TRO and Prelim. Inj. at 15, *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018) (No. 1:18-cv-109).

¹⁷⁰Hayley White, *A Critical Review of Ohio’s Unconstitutional “Right to Life Down Syndrome Non-Discrimination” Bill*, 29 GEO. MASON U. C.R.L.J. 87, 88 (2018).

¹⁷¹Mohapatra, *supra* note 129, at 54.

¹⁷²42 U.S.C.A. § 12101 (West 2009) (“[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion . . .”).

¹⁷³*See* L. Sch. Admissions Council, Inc. v. California, 222 Cal. App. 4th 1265, 1294 (2014).

¹⁷⁴*Preterm-Cleveland v. McCloud*, 994 F.3d 512, 527 (6th Cir. 2021).

¹⁷⁵*See, e.g.,* *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1786.

C. The Difference a Word Can Make in Selective Abortion Provisions.

Words matter. This could not be any truer than in crafting abortion legislation. Indiana carefully crafted their statute to prohibit abortions that solely had a discriminatory basis.¹⁷⁶ Depending on a court's interpretation of the undue burden standard, it is possible that a statute will be upheld if it causes only a slight infringement on a woman's right to choose.¹⁷⁷ The Sixth Circuit recognized as much in *McCloud*.¹⁷⁸ The Sixth Circuit majority remarks that the dissenting judges reached their conclusion because they interpreted the words of the Ohio provision differently than the majority, resulting in the majority and the dissent looking at essentially two differently worded laws.¹⁷⁹ The dissent in *McCloud* read the statute as a ban *on women* seeking abortions whereas the majority interpreted the statute as a prohibition *on doctors* knowingly performing abortions for a discriminatory purpose.¹⁸⁰ The Sixth Circuit goes on in dicta to note how the Seventh Circuit construed HEA 1337 in a similar way to the dissent in *McCloud*, explaining the Seventh Circuit's decision.¹⁸¹

Even though the Sixth Circuit read Ohio's H.B. 214 the same as Indiana's HEA 1337,¹⁸² Ohio's provision differed from Indiana's because it did not have the word "solely."¹⁸³ By prohibiting abortions when Down syndrome is simply a factor even if it is not the sole factor, plaintiffs have a stronger argument challenging the statute as an undue burden as it could appear to eliminate a category of abortions.¹⁸⁴ This should not ultimately make much of a difference in determining the constitutionality of the provision because the states would respond that the statute places the scienter requirement on physicians. Thus, in prosecuting the statute, whether a woman's decision is truly wholly or partially motivated by a discriminatory basis is irrelevant. The state must prove what the physician knew. Regardless, states may be better off following Indiana's lead by requiring that the discriminatory basis be the

¹⁷⁶ See IND. CODE ANN. §§ 16-34-4-5 to 8 (West 2016).

¹⁷⁷ Molony, *supra* note 109, at 1129.

¹⁷⁸ See *McCloud*, 994 F.3d at 523.

¹⁷⁹ *Id.* at 522.

¹⁸⁰ *Id.*

¹⁸¹ See *id.* at 530.

¹⁸² See *id.*

¹⁸³ *Id.* at 522.

¹⁸⁴ *Id.* at 527; see also Molony, *supra* note 109, at 1130.

sole reason for the abortion.¹⁸⁵ Such a narrowly crafted provision likely does not place a substantial obstacle in the path of a woman seeking an abortion because the woman can still elect to have an abortion for any reason, even for a discriminatory reason, so long as it is not the sole purpose.¹⁸⁶

VI. CONCLUSION

In *Hellerstedt*, the United States Supreme Court held that the *Casey* undue burden standard entails courts to engage in a balancing test. While *June Medical* has created uncertainty in what the undue burden standard will be in the future, the result for narrowly tailored selective abortion provisions like HEA 1337 and H.B. 214 should remain the same. States have a recognized interest in protecting potential life, the health and safety of the mother, and the integrity of the medical profession, which at the point of viability becomes compelling in a traditional abortion ban case. However, selective abortion provisions like HEA 1337 and H.B. 214 present unique challenges to the abortion debate. The Sixth Circuit approach should win the day. Selective abortion provisions are fundamentally different from traditional abortion restrictions because they target the physician's knowing participation in the exercise of a fundamental right, abortion, to carry out discriminatory eugenic practices. Under the Sixth Circuit approach, which follows Roberts's concurrence in *June Medical*, this scienter requirement on the doctors does not pose an undue burden because women can still seek and obtain an abortion for any reason at all. Under the *Hellerstedt* balancing test, adding a new interest or benefit to the state's side tips the scales at least somewhat towards the state. Thus, *Casey* could not possibly have answered the question when the mandated balancing test has different interests to balance; the scales have shifted. Selective abortion provisions shift the discussion from the temporal aspect of trimester/viability as discussed in *Roe* and *Casey* to the motivational aspect of pregnant women and physicians. Only the Sixth Circuit recognized the distinction between the abortion provisions in *Roe* and *Casey* and selective abortion provisions. Regardless of the outcome, such an approach surpasses one that begins and ends its analysis with *Casey*. As the Supreme Court continues to take on abortion cases, the Court will have to address the issue of selective abortion provisions, especially now that a circuit split has emerged. If the Court truly wants to

¹⁸⁵ See Molony, *supra* note 109, at 1130.

¹⁸⁶ *Id.* at 1129.

move on from the horrors of *Buck v. Bell*, then the Court must avoid making the same mistakes that the Seventh Circuit did.