No. 17-3163

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Planned Parenthood of Indiana and Kentucky, Inc., *et. al.*,

Plaintiffs-Appellees,

v.

Commissioner, Indiana State Department of Health, *et. al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:16-cv-00763-TWP-DML,
The Honorable Tanya Walton Pratt, Judge

AMICI CURIAE BRIEF OF WOMEN SPEAK FOR THEMSELVES, FONDATION JÉRÔME LEJEUNE, SAVING DOWN SYNDROME, AND DOWN PRIDE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), **Women Speak for Themselves** states that it is a project of Reconnect Media, a 501(c)(3) non-profit organization that has no parent corporation and does not issue stock.

Fondation Jérôme Lejeune states that it is a recognized public interest organization, incorporated in France, that has no parent corporation, and that does not issue stock.

Saving Down Syndrome states that it is an international public interest organization, founded in New Zealand, that has no parent corporation, and that does not issue stock.

Down Pride states that it is a Dutch grassroots parents' group that advocates and educates internationally, that it has no parent corporation, and that it does not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici include the following public interest organizations:

Women Speak for Themselves, a project of the non-profit Reconnect Media, is a grassroots movement that trains and empowers women across the United States to speak in the media, their local communities, and online about how women are disadvantaged respecting dating, marriage, and other issues of societal and medical harm, especially surrounding contraception and abortion.

The **Fondation Jérôme Lejeune** is an international public interest organization, whose mission is to provide research, care, and advocacy to benefit individuals with genetic disabilities. It continues the work of Professor Jérôme Lejeune, who discovered the genetic basis of Down syndrome.

Saving Down Syndrome is a public interest group that addresses government-sanctioned prenatal screening for selective abortion. It successfully secured changes to the national prenatal screening program in New Zealand and is working with the Human Rights Commission to advance its work in nations around the world.

[1] This brief is filed with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than *amici curiae*, their members, or their counsel contributed money intended to fund preparing or submitting this brief.

Down Pride, along with **Fondation Jérôme Lejeune**, has initiated "Stop Discriminating Down," a campaign and petition in 12 languages aimed at alerting human rights officials about the effects of prenatal testing on the population with Down syndrome.

BACKGROUND

In March 2016, the State of Indiana enacted the Sex Selective and Disability Abortion Ban, IND. CODE § 16–34–4 (Abortion Nondiscrimination Law), limiting abortions sought solely for certain enumerated reasons. The Abortion Nondiscrimination Law specifically provides that "[a] person may not intentionally perform or attempt to perform an abortion before the earlier of viability of the fetus or twenty (20) weeks of post-fertilization age if the person knows that the pregnant woman is seeking" an abortion: (1) "solely because of the sex of the fetus," IND. CODE §§ 16–34–4–4, 16–34–4–5; (2) "solely because the fetus has been diagnosed with, or has a potential diagnosis of Down syndrome or any other disability," IND. CODE §§ 16–34–4–6, 16–34–4–7; or (3) "solely because of the race, color, national origin, or ancestry of the fetus," IND. CODE § 16–34–4–8. Plaintiffs-Appellants brought suit in the Southern District of Indiana, claiming that the Abortion Nondiscrimination Law unconstitutionally restricts a woman's right to a pre-viability abortion. The District Court issued a preliminary injunction prohibiting the enforcement of the Abortion Nondiscrimination Law.

ARGUMENT

The District Court erred in categorically holding that a State may not prohibit any abortion before viability. *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana State Department of Health*, No. 16-cv-00763-TWP-DML, 2017 WL 4224750, at * 5-6. The U.S. Supreme Court has already sanctioned one type of ban on pre-viability abortions. In *Gonzales v. Carhart*, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. §1531—even as applied to abortions performed before viability. 550 U.S. 124 (2007). The District Court also erred in failing to fully analyze the Abortion Nondiscrimination Law under applicable Supreme Court abortion jurisprudence. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (requiring courts to determine if an abortion law furthers a valid state interest such as the protection of unborn human life or imposes an "undue burden" by placing a "substantial obstacle" in the path of a woman seeking an abortion).

The Abortion Nondiscrimination Law survives constitutional scrutiny because the Supreme Court has never recognized a right to abort an unborn child because of his or her sex, genetic abnormality, or disability and because it furthers the State of Indiana's interest in protecting unborn human life by preventing sex and disability discrimination against unborn children. It also promotes the State's interest in drawing a clear boundary against postnatal eugenic infanticide.

I. THE SUPREME COURT HAS NEVER RECOGNIZED A RIGHT TO ABORT AN UNBORN CHILD BECAUSE OF HIS OR HER SEX, GENETIC ABNORMALITY, OR DISABILITY.

The District Court implicitly and erroneously presumes—without any significant reflection, analysis, or citation of authority—that there exists a constitutional right to abort an unborn child because of his or her sex, genetic abnormality, or disability.

On the contrary, "[i]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus . . . ."[2] Picking and choosing among particular children raises the specter of abortion as "a wedge into the 'quality control' of all humans. If a condition (like Down's syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate – eliminate or enhance – other (presumed genetic) socially charged characteristics: sexual orientation, race, attractiveness, height, intelligence?"[3]

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[2] *See* Marsha Saxton, *Disability Rights and Selective Abortion*, Abortion Wars, A Half Century of Struggle: 1950 to 2000 (Univ. of Cal. Press, 1998), *available at* http:// gjga.org/conference.asp?action=item&source= documents&id=17 (last visited Nov. 17, 2017).

[3] *Id.*

Perhaps for these reasons, the Supreme Court has never endorsed a right to abort children only because they are the undesired sex or have been diagnosed with a genetic abnormality or disability. In *Planned Parenthood v. Casey*, the Supreme Court, quoting approvingly from its statement in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), declared that the abortion liberty pertained to "the decision whether to bear or beget a child," *Casey*, 505 U.S. at 851. The Court has never framed the constitutionally protected abortion decision as whether to bear or abort a *particular* child based on his or her sex, genetic abnormality, or disability.

Notably, there is persuasive authority from the U.S. Courts of Appeals for the Federal Circuit against abortions for fetal abnormalities. In *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), the court considered an equal protection challenge to a restriction on the use of Department of Defense funds for abortion. *Id.* at 1372. The plaintiffs in *Britell* were parents of an unborn child diagnosed with a lethal fetal anomaly. They elected to abort the child, then later filed suit when the Department of Defense denied their request for reimbursement for the cost of the abortion. *Id.* The plaintiffs contended that there was no rational basis to apply the funding restriction to their case, arguing that the government's interest in "potential human life" did not extend to the life of an anencephalic unborn child. *Id.* at 1372, 1374.

The Federal Circuit rejected this argument, concluding that the funding restriction was rationally related to the government's legitimate interest in "the

protection and promotion of potential human life." *Id.* at 1380. In reaching its decision, the court explicitly considered and rejected the notion that lesser value could be assigned to an anencephalic unborn child:

> For us to hold, as Britell urges, that in some circumstances a birth defect or fetal abnormality is so severe as to remove the state's interest in potential human life would require this court to engage in line-drawing of the most non-judicial and daunting nature. This we will not do…. It is not the role of courts to draw lines as to which fetal abnormalities or birth defects are so severe as to negate the state's otherwise legitimate interest in the fetus's potential life….

Id. at 1383.[4]

As *Britell* explicitly recognized, Indiana has a legitimate interest in protecting the lives of children even with the most severe disabilities. Further, the rationale in *Britell* logically extends to the protection of unborn children targeted for abortion based on their sex.

II. THE ABORTION NONDISCRIMINATION LAW ADVANCES THE STATE OF INDIANA'S INTEREST IN PREVENTING SEX DISCRIMINATION.

The Abortion Nondiscrimination Law promotes the aims of federal and state laws prohibiting sex discrimination, as the victims of sex-selection abortion are overwhelmingly female.

[4] The U.S. Supreme Court has since abandoned its former use of the phrase "potential human life," in light of the science of human embryology. In *Gonzales v. Carhart*, the majority frequently referred to "fetal life," or the "life of the fetus." 550 U.S. 124 (2007).

Sex discrimination denies its victims equal protection under the law and violates fundamental constitutional liberties. For these reasons, sex discrimination is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et. seq.* (1964), which forbids employment discrimination on the basis of sex, race, color, religion, or national origin. Other federal laws prohibit discrimination on the basis of sex in education, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681; athletics, *id*.; health insurance, Patient Protection and Affordable Care Act, Pub. L., 124 Stat. 1000, *et. seq*. (2010); housing, Fair Housing Act, 42 U.S.C. § 3601, *et. seq.* (1968); and the offering or extending of financial credit, Equal Credit Opportunity Act, 15 U.S.C. § 1691(a), *et. seq*. (1974). Similar state laws also protect against sex discrimination. *See, e.g.*, IND. CODE § 22-9-1-2 (2017) (prohibits sex-based employment discrimination).

Moreover, Americans overwhelmingly oppose abortions performed for reasons of sex-selection. A 2012 poll conducted by the Charlotte Lozier Institute found that 77% of respondents opposed sex-selection abortions (specifically, the abortions of baby girls).[5]

[5] *See* Charlotte Lozier Institute, *Sex-selection Abortion: Worldwide Son-bias Fueled by Population Policy Abuse*, May 30, 2012, *available at* https://lozierinstitute.org/wp-content/uploads/2012/08/CLI-Fact-Sheet-on-Sex-Selection-Abortion-.pdf (last visited Nov. 16, 2017).

Even supporters of abortion commonly acknowledge that it is morally unacceptable to abort an unborn child solely because she is female. For example, in 2013, the European Parliament, which recently declared abortion to be a "fundamental human right,"[6] adopted a report describing sex-selection abortions as instances of "ruthless sexual discrimination."[7] Similarly, the World Health Organization (WHO) declared that "sex selection for non-medical reasons raises serious moral, legal, and social issues. The principal concerns are that the practice of sex selection will distort the natural sex ratio leading to a gender imbalance and reinforce discriminatory and sexist stereotypes towards women by devaluing females."[8]

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[6] Motion for a European Parliament Resolution on Progress on Equality between Men and Women in the European Union, EUR. PARL. DOC. A8-0015/2015 (2015), para. Ae, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2015-0015+0+DOC+XML+V0//EN (last visited Nov. 20, 2017).

[7] European Parliament Resolution of 8 October 2013 on Gendercide: The Missing Women?, ¶ B, P7_TA-PROV(2013)0400, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0400+0+DOC+XML+V0//EN (last visited Nov. 17, 2017); *see also*, *e.g.*, Rahila Gupta, *On sex-selective abortion, we must not make a fetish of choice,"* The Guardian, Oct. 8, 2013 (arguing that "[a] feminist perspective on abortion must take into account a girl's right to life and avoid an absolutist defence of choice"), *available at* http://theguardian.com/commentisfree/2013/oct/08/sex-selective-abortion-choice-right-life (last visited Nov. 17, 2017).

[8] World Health Organization Genomic Resource Centre, Gender and Genetics, *Sex Selection and Discrimination, Ethical Issues Raised by Sex Selection*, available at http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 16, 2017).

Recognizing the discriminatory nature of sex-selection, a number of American states and other nations ban the practice. Currently, eight American states maintain fully enforceable bans on sex-selection abortions: Arizona, Kansas, Illinois (after viability), North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota,[9] while the Center for Genetics and Society states that, as of 2009, Austria, Kosovo, New Zealand, South Korea, Switzerland, and Vietnam explicitly prohibit sex-selection and 31 other nations prohibit non-medical (or "social") use of sex-selection, including China, India, the United Kingdom, France, and Germany.[10]

The analogy between disability selective abortions and sex-selection abortions is obvious. *See*, *e.g*., Saxton, *Disability Rights and Selective Abortion*, *supra*. Just as selecting females for abortion is an example of discrimination on the basis of sex, selecting children with genetic abnormalities or disabilities for abortion constitutes discrimination against them.

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[9] *See* Guttmacher Institute, *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, Oct. 1, 2017, available at https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly (last visited Nov. 17, 2017).

[10] *See* Charlotte Lozier Institute, *Sex-Selection Abortion: The Real War on Women*, Apr. 13, 2016, *available at* https:// lozierinstitute.org/sex-selection-abortion-the-real-war-on-women/ (last visited Nov. 16, 2017).

III. THE ABORTION NONDISCRIMINATION LAW ADVANCES THE STATE OF INDIANA'S INTEREST IN PREVENTING DISABILITY DISCRIMINATION.

The Abortion Nondiscrimination Law also reflects the goals of federal and state laws prohibiting discrimination against people with genetic abnormalities or physical or mental disabilities.

Under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, *et. seq.* and the ADA Amendments Act of 2008, Pub.L. 110-325, 122 Stat 3553, *et. seq.* (2008), the United States prohibits discrimination against persons with physical or mental disabilities in various circumstances, including employment, public services and accommodations, public transportation, and telecommunications. State laws provide similar protections. *See, e.g.*, IND. CODE § 22-9-5, *et. seq*. Reflecting these non-discriminatory principles, North Dakota became the first state to ban abortions predicated on an unborn child's genetic abnormality or disability. N.D. CENT. CODE § 14-02.1-04.1 (2017) (ban enacted in 2013).

Over the last century, we have witnessed a dramatic shift in attitudes toward individuals with disabilities. For instance, there is a sharp contrast between Justice Holmes's notorious dictum in *Buck v. Bell*, 274 U.S. 200 (1927), and the Congressional findings in the Preface to the ADA, 42 U.S.C. § 12101. In *Buck v. Bell*, the Supreme Court approved, by an 8-1 vote, the compulsory sterilization of a

"feeble minded" woman who had been adjudged "the probable potential parent of socially inadequate offspring." *Id.* at 205, 207 (Holmes, J.). In so doing, the Court shamefully declared, "It 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 are enough." *Id.* at 207.

Sixty-three years later, in a dramatic reversal of societal mores, the U.S. Congress, in the ADA, found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination…," 42 U.S.C. § 12101(a). No longer viewed as "imbeciles" who are "manifestly unfit," 274 U.S. at 207, people with mental and physical disabilities have the right to "fully participate in all aspects of society"—including birth itself. 42 U.S.C. § 12101(a)(1).

Even individuals who advocate for abortion rights have expressed discomfort and dismay at the use of disability selective abortion.[11] Indeed, "many [supporters of abortion rights] are finding that, while they support a woman's right to have an

[11] Amy Harmon, *Genetic Testing + Abortion = ???*, NY Times, May 13, 2007, *available at* http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?_r=0 (last visited Nov. 17, 2017).

abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby."[12]

Recognition of the equal dignity of the people with disabilities has led to an emerging sense of disquiet about the widespread practice of disability selective abortion. Alert commentators have raised serious questions about the practice of prenatal screening for fetal disabilities and subsequent abortion. *See* Harmon, *Genetic Testing + Abortion = ???*, *supra*; Saxton, *Disability Rights and Selective Abortion*, *supra*. In particular, permitting this practice risks eliminating entire communities of people with disabilities, despite the fact that our nation recognizes that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1).

Growing legal consensus condemns both sex-selection and disability selective abortions and acknowledges that legal safeguards must be enacted to protect children – born and unborn. For example, the United States is a signatory to the Convention on the Rights of the Child, which states that a child "needs special safeguards and care, including appropriate legal protection, *before as well as after birth*." Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

[12] *Id.*

Recently, the U.N. Committee on the Rights of Persons with Disabilities (CRPD), declared that "[l]aws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities." CRPD also rejected the "incompatible with life" label often used to describe prenatal diagnoses of genetic abnormalities or disabilities, noting "experience shows that assessments on impairment conditions are often false,"[13] and that, even if the diagnosis is correct, the label "perpetuates notions of stereotyping disability as incompatible with a good life."[14]

IV. THE ABORTION NONDISCRIMINATION LAW PROMOTES INDIANA'S LEGITIMATE INTEREST IN DRAWING A CLEAR BOUNDARY AGAINST THE PRACTICE OF POSTNATAL EUGENIC INFANTICIDE.

The Abortion Nondiscrimination Act also serves the legitimate interest of drawing a clear boundary against the practice of postnatal eugenic infanticide. "This Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life … *Glucksberg* found reasonable the State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even

[13] *See, e.g.*, Susan Yoshihara, *Another U.N. Committee Says Abortion May Be a Right, But Not on Basis of Disability*, C-FAM, Center for Family and Human Rights, Oct. 26, 2017, *available at* https://c-fam.org/friday_fax/another-un-committee-says-abortion-may-right-not-basis-disability/ (last visited Nov. 17, 2017).
[14] *Id.*

involuntary euthanasia.'" *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 732-735 (1997)).

The concern about the advent of eugenic infanticide is not merely hypothetical. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, has offered a public justification for infanticide, based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, Practical Ethics 169 (2d ed., Cambridge Univ. Press 1997); *see also, e.g.*, H. Kuhse & P. Singer, Should the Baby Live? The Problem of Handicapped Infants (Oxford Univ. Press 1985).

Similar proposals have been advanced by like-minded thinkers, including open advocacy for infanticide of children with Down syndrome. Alberto Giubilini & Francesca Minerva, *After-birth abortion: why should the baby live?*, Journal of Medical Ethics (Feb. 23, 2012), *available at* http://jme.bmj.com/content/39/5/261 (last visited Nov. 27, 2017) (arguing that parents of infants with disabilities such as Down syndrome should be allowed to terminate the lives of those born children, since "the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn").

Clearly, the State of Indiana may choose to draw a clear boundary against the adoption of such practices. The Abortion Nondiscrimination Act "draw[s] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," such as eugenic infanticide. *Gonzales v. Carhart*, 550 U.S. at 158.

CONCLUSION

For all of these reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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November 28, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 3,131 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

Date: November 28, 2017

s/ *Dorinda C. Bordlee*

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CERTIFICATE OF SERVICE

I certify that on November 28, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Date: November 28, 2017 s/ *Dorinda C. Bordlee*

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