

NOTES

THE HOLLOW SHELL OF OHIO H.B. 214: A CRITICAL EXAMINATION OF THE CONSEQUENCES OF DOWN SYNDROME DISCRIMINATION LAWS

Elizabeth I. Beck

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2020.720
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

NOTES

THE HOLLOW SHELL OF OHIO H.B. 214: A CRITICAL EXAMINATION OF THE CONSEQUENCES OF DOWN SYNDROME DISCRIMINATION LAWS

Elizabeth I. Beck*

Mark Schrad called it “the most heart-wrenching moment” of his life.¹ The moment after he and his wife were told their unborn child was expected to have Down Syndrome, they were calmly told that there was a fifty-fifty chance of miscarriage or stillbirth.² He felt that their doctors pressured them to terminate the pregnancy.³ Schrad’s daughter was born with Down Syndrome; “[w]e have never had second thoughts, even though we understand why some parents might choose otherwise,” Schrad says.⁴

The choice to have a baby diagnosed with Down Syndrome in utero is slowly and quietly disappearing in conservative states. In 2015, the largely conservative Ohio legislature—in a move heavily endorsed by the National Right to Life Committee—passed the “Right to Life Down Syndrome Non-Discrimination” bill

* Candidate for J.D., Spring 2020. I would like to thank my family for supporting me throughout this process and encouraging me to research this topic.

¹ Mark Lawrence Schrad, Opinion, *Does Down Syndrome Justify Abortion?*, N.Y. TIMES (Sept. 4, 2015), <https://www.nytimes.com/2015/09/04/opinion/does-down-syndrome-justify-abortion.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

(hereinafter “Ohio H.B. 214”), which makes it illegal for a doctor “to perform an abortion if a woman is terminating her pregnancy to avoid having a baby with Down Syndrome.”⁵ Mike Gonidakis, the President of Ohio Right to Life, stated: “We all want to be born perfect, but none of us are, and everyone has a right to live, perfect or not.”⁶ Advocating for the rights of those with disabilities is undoubtedly a worthy endeavor; however, Schrad says the legislature’s methodology is flawed because there is “no easy answer” to whether or not a woman should have a child with Down Syndrome if presented with that choice, and “the idea that these deeply personal ethical and social decisions could simply be legislated away is ridiculous.”⁷ Such laws interfere both with deeply ingrained legal rights and with personal familial decisions. Sara Ainsworth, Director of Legal Advocacy at the National Advocates for Pregnant Women, said the law “encroach[es] on the right to abortion, step by step, and turn[s] a woman’s health care decision into an issue of discrimination against the fetus”⁸ Kellie Copeland, the Executive Director of NARAL Pro-Choice Ohio, stated that “it comes down to who makes the decision and who’s going to have to live with it. Not knowing the family and the circumstances, the legislature can’t possibly take into account all the factors involved.”⁹

In her response to a *New York Times* article about the law in 2015, Mary Carpenter detailed her own experience with having an abortion, explaining that following an amniocentesis with a diagnosis of Down Syndrome in her unborn baby, she knew she needed an abortion, but not at all because she wanted a perfect baby.¹⁰ She further explained that she, her husband, and three-year-old son were living in a foreign country, away from friends and family who could provide assistance with a newborn, and she was overwhelmed by her current parenting “responsibilities and unable to imagine caring for a baby with extraordinary needs.”¹¹ Carol Beck, also responding to that same *New York Times* article, mentioned that she loves and cares

⁵ Tamar Lewin, *Ohio Bill Would Ban Abortion If Down Syndrome Is Reason*, N.Y. TIMES (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/us/ohio-bill-would-ban-abortion-if-down-syndrome-is-reason.html>.

⁶ *Id.*

⁷ Schrad, *supra* note 1.

⁸ Lewin, *supra* note 5.

⁹ *Id.*

¹⁰ Mary Carpenter, *Opinion, Ban Abortion for Down Syndrome?*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2015/08/29/opinion/ban-abortion-for-down-syndrome.html>.

¹¹ *Id.*

for her eighteen-year-old daughter who has Down Syndrome.¹² But, she wrote, “I judge harshly those who impose their will in the name of ‘life’ when they know and do nothing about the living.”¹³ Beck went on:

What, exactly, are the proponents of this measure . . . doing to make sure that a child with Down Syndrome is included appropriately at preschool and school? What are they doing to make sure that families are not financially wiped out by medical costs? Will they fund a family that needs a lawyer just to navigate the public school system?¹⁴

In the landscape of a legal battle, there is always a gray area. Nothing is black and white, but very often, it is extremely difficult to accommodate that gray space in the context of a codified law. Perhaps in no area of American law are the lines more harshly drawn than on the issue of abortion. The moral plane on which abortion sits—when life begins, which lives are worth living, who should be forced to have a baby, whose rights are most important—remains a fierce battleground for judges, legislators, and voters. While the debate on the morality of abortion remains hotly contested, the landscape of the abortion procedure itself has shifted.¹⁵ Over the forty-five years since *Roe v. Wade*, medical advances have illuminated the power of DNA and “hastened the point at which a fetus is viable outside the womb—while also refuting claims that abortion harms women who undergo it and undermining the notion that pregnancy begins at a single moment of conception.”¹⁶ Medical procedures for abortion have also changed. Where it used to require a surgical procedure, abortion can now be performed with a prescribed pill.¹⁷ All things considered, these factors support the conclusion that science has irreversibly changed

¹² Carol Beck, Opinion, *Ban Abortion for Down Syndrome?*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2015/08/29/opinion/ban-abortion-for-down-syndrome.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Chelsea Conaboy, *The Abortion Debate Doesn't Change, but the Science of Abortion Does*, BOS. GLOBE (Aug. 31, 2018), <https://www.bostonglobe.com/ideas/2018/08/31/the-abortion-debate-doesn-change-but-science-abortion-does/smHRPvw5XDkTXzMUrADawK/story.html>.

¹⁶ *Id.*

¹⁷ *Id.*

the discussion of abortions. In 2016, there were 30,881 abortions performed in the state of Pennsylvania.¹⁸ In Ohio, there were 20,893.¹⁹ In Indiana, there were 7,778.²⁰

Access is complicated, however, by legislation prohibiting women from obtaining, and physicians from performing, abortions when the fetus is confirmed to have, or suspected to have, Down Syndrome. Ohio is the third state,²¹ following suit behind North Dakota²² and Indiana,²³ to pass such a law. The direct and obvious result of such a law is that women whose children have been diagnosed with Down Syndrome are barred from obtaining an abortion they were previously free to seek and receive prior to viability of the fetus. This right to abortion was granted by *Roe v. Wade* and has been articulated, affirmed, reexamined, and reaffirmed by the United States Supreme Court.²⁴

Previously, such a challenge to a woman's right to an abortion prior to viability would likely have been easily struck down by the nation's highest court. However, with the confirmation of Justice Brett Kavanaugh, the Court is now controlled by a five-to-four conservative majority, and Justice Kavanaugh's stance on abortion rights is questionable at best.²⁵ Therefore, it is imperative to examine and weigh the practical consequences for the states passing these restrictions, as well as for America in general, if these laws are to withstand constitutional challenge. Were these laws permitted to stand, the floodgates could open for legislation to ban abortion in other circumstances relating to fetal anomalies. With so many debilitating disabilities, genetic mutations, and anomalies in existence, the possibilities for pre-viability diagnoses and subsequent abortions are seemingly unlimited. If the Court were to find that laws banning abortions in circumstances of Down Syndrome diagnoses did

¹⁸ PA. DEP'T OF HEALTH, 2016 ABORTION STATISTICS 2 (2016), https://www.health.pa.gov/topics/HealthStatistics/VitalStatistics/Documents/Pennsylvania_Annual_Abortion_Report_2016.pdf.

¹⁹ OHIO DEP'T OF HEALTH, INDUCED ABORTIONS IN OHIO 1 (2017), <https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health-statistics---vital-stats/Induced-Abortions-in-Ohio-2017.pdf?la=en>.

²⁰ IND. STATE DEP'T OF HEALTH, TERMINATED PREGNANCY REPORT 2017, at 1 (2018), <https://www.in.gov/isdh/files/2017%20Indiana%20Terminated%20Pregnancy%20Report.pdf>.

²¹ See OHIO REV. CODE ANN. § 2919.10 (LexisNexis 2018).

²² N.D. CENT. CODE § 14-02.1-04.1 (2013).

²³ IND. CODE ANN. § 16-34-4-6 (LexisNexis 2016).

²⁴ See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

²⁵ See *infra* Part I.C.

not pose an undue burden and were justified by a valid state interest, the same rationale could easily be extended to many other diseases, genetic mutations, and disabilities, creating a slippery slope. If an abortion is barred for one disability, and that law is upheld, other laws could follow in a domino effect until the right to an abortion has been ratcheted down to a ghost of what it originally was.

As parents like Mark Schrad understand, deciding whether or not to carry a baby with a Down Syndrome diagnosis to term and raise that child is a *choice*.²⁶ The Down Syndrome bills would “do away with that choice, forcing everyone placed in that unenviable situation to carry to term a child with developmental disabilities, regardless of their willingness and ability to love and care for that child once it is born.”²⁷ Mary Carpenter exercised her right to make that choice.²⁸ There are likely many similarly situated mothers and parents who would choose not to have a child with a disability, for any number of reasons. If the state legislatures feel the problem of mothers terminating their pregnancies due to diagnoses is prevalent enough to warrant rectifying it with a blanket ban, then it is also plausible that a certain percentage of those mothers will find another way out of raising the babies that the law forces them to carry and deliver. It is inevitable that some, if not many, of those children will end up in foster care.

This Note does not argue a constitutional angle, although it will be necessary to review Supreme Court jurisprudence on abortion rights in America. The current composition of the Supreme Court and the introduction of these abortion laws provide a jumping point to imagine the repercussions and pure human toll that these laws will create. The prohibition on abortion in the case of Down Syndrome—and the possibility of other similar laws to follow—would create an influx of children who may be born to parents who do not possess the mental, physical, financial, or emotional capacity to raise a child with such special needs. If states pass laws that force those children into existence with no family to adequately support them, each state passing those laws must create a safety net to facilitate and care for those children inevitably entering the foster system.

Part I of this Note examines the history of abortion at the Supreme Court, and discusses how Ohio H.B. 214 and its sister laws would be invalidated under the current “undue burden” standard were the Court still split ideologically. Because of the recent appointments of Justice Gorsuch and Justice Kavanaugh, it contemplates the possibility that these laws might be upheld by the conservative Court under the

²⁶ Schrad, *supra* note 1.

²⁷ *Id.*

²⁸ Carpenter, *supra* note 10.

Hellerstedt balancing test, and proceeds upon that hypothesis. Part II details current problems in the American foster care system, and specifically examines the hardships experienced by children with developmental and intellectual disabilities in the foster care system. It then explains the disproportionate impact that laws like Ohio H.B. 214 will likely have on children with disabilities entering the foster care system, and further argues that states must take immediate and deliberate action to reinforce the system and support those children. Finally, in Part III, this Note proposes possible ways that states and the federal government could achieve the safety net necessary to accommodate such children.

I. OHIO H.B. 214 AND ITS (UN)CONSTITUTIONALITY

A. *A Brief History of Supreme Court Abortion Jurisprudence*

Since 1973, the Supreme Court has protected a woman's right to have an abortion prior to viability.²⁹ In the landmark case *Roe v. Wade*, the Court held that the right of personal privacy includes a woman's decision to have an abortion, although that right is not unqualified.³⁰ The Court developed the trimester framework to determine when the state's interest in preserving life outweighs a woman's right to privacy and to choose.³¹ Within the first trimester, the Court held that only the woman is entitled to decide whether to have an abortion, without interference from the state.³² Once the fetus reaches the second trimester, when the fetus can exist independently outside the womb, the woman and the state share the interest in the pregnancy.³³ Finally, in the third trimester, the state's interest in preserving the health and life of both the mother and her unborn child becomes compelling enough to outweigh the mother's independent decision.³⁴

After *Roe*, the Justices continued to disagree on which provision of the Constitution guaranteed a woman the right to choose, and lower courts struggled to apply the trimester framework set down in *Roe*.³⁵ In 1992, the Supreme Court heard

²⁹ *Roe*, 410 U.S. 113.

³⁰ *Id.* at 177.

³¹ *Id.* at 162–64.

³² *Id.* at 163.

³³ *Id.*

³⁴ *Id.*

³⁵ Hayley White, Comment, *A Critical Review of Ohio's Unconstitutional "Right to Life Down Syndrome Non-Discrimination" Bill*, 29 GEO. MASON U. C.R.L.J. 87, 99 (2018).

arguments for *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and the Court reaffirmed that the right to privacy is a protected liberty that embraces a woman's right to an abortion.³⁶ The Court threw out the trimester framework, however, and formulated what is the current standard for abortion law—the undue burden test.³⁷ The Court held that the state still must have a legislative purpose that is “reasonably related” to a valid state interest, and that any substantial obstacles that may stand in the way of a woman trying to obtain an abortion are, and should be, invalid, at least during the first trimester.³⁸

However, the “undue burden” standard is not absolute. The Justices in *Casey* explained that if a law persuades or influences a woman to choose childbirth over termination, it is not necessarily automatically unconstitutional.³⁹ The restriction is only an undue burden when the state interferes with a woman's ability to decide whether or not to have an abortion, or if that restriction is likely to prevent a woman from seeking an abortion altogether.⁴⁰

The Court continues to use the undue burden standard and has upheld it several times. However, after *Whole Woman's Health v. Hellerstedt*, the Court has settled into a balancing approach that gives substantial weight to the personal liberty interests of women in seeking an abortion and balances them against the state's purported interests.⁴¹ Under the *Hellerstedt* balancing test, the Court

tends to uphold abortion regulations that relate to a woman's wellbeing on an individual basis, such as waiting periods and informed consent. Second, the Court tends to overturn restrictions that seem to make it harder for women to gain access

³⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

³⁷ *Id.*

³⁸ *Id.* at 877–78.

³⁹ *Id.* at 874.

⁴⁰ *Id.*

⁴¹ *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Although there is no explicit articulation in *Hellerstedt* of a balancing test, the Court's opinion held that, “The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.” *Id.*

to abortion facilities, such as the ambulatory surgical center and admitting privileges requirements rejected in *Hellerstedt*.⁴²

Since *Hellerstedt*, the Court has declined all invitations to take up a direct challenge to *Roe* and *Casey*. However, the summer of 2019 brought a wave of shockingly restrictive new laws on abortion, collectively referred to in the media as “The Heartbeat Bills.”⁴³ The strictest of these came from Alabama, where Governor Kay Ivey signed the Alabama Human Life Protection Act, which bans abortion after six weeks and provides no exceptions for rape and incest.⁴⁴ The law was passed despite controlling precedent in *Roe*, and the Alabama legislature expressly stated that it is intended as a direct challenge to the constitutionality of *Roe*.⁴⁵ Georgia passed a similar law.⁴⁶ That bill was blocked by a judge in October, 2019.⁴⁷ Alabama and Georgia joined Mississippi, Kentucky, and Ohio in the first half of 2019.⁴⁸ Iowa had previously enacted its own heartbeat bill, but after the bill was struck down by the Iowa Supreme Court, Iowa’s governor, Kim Reynolds, decided not to appeal.⁴⁹

⁴² White, *supra* note 35, at 103.

⁴³ Anna North & Catherine Kim, *The “Heartbeat” Bills That Could Ban Almost All Abortions, Explained*, VOX (June 28, 2019), <https://www.vox.com/policy-and-politics/2019/4/19/18412384/abortion-heartbeat-bill-georgia-louisiana-ohio-2019>.

⁴⁴ Alabama Human Life Protection Act, H.B. 314 (Ala. 2019).

⁴⁵ See Caroline Kelly, *Alabama Governor Signs Nation’s Most Restrictive Anti-Abortion Bill Into Law*, CNN POLITICS (May 16, 2019), <https://www.cnn.com/2019/05/15/politics/alabama-governor-signs-bill/index.html>; see also *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, STATE OF ALA. OFFICE OF THE GOVERNOR (May 15, 2019), <https://governor.alabama.gov/statements/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/> (“No matter one’s personal view on abortion, we can all recognize that, at least for the short term, this bill may similarly be unenforceable. As citizens of this great country, we must always respect the authority of the U.S. Supreme Court even when we disagree with their decisions. Many Americans, myself included, disagreed when *Roe v. Wade* was handed down in 1973. The sponsors of this bill believe that it is time, once again, for the U.S. Supreme Court to revisit this important matter, and they believe this act may bring about the best opportunity for this to occur.”).

⁴⁶ See Living Infants Fairness and Equality Act, H.B. 481 (Ga. 2019).

⁴⁷ Nicquel Terry Ellis, *Federal Judge Blocks Georgia’s Abortion Ban, Stopping “Heartbeat Bill” from Becoming Law*, USA TODAY (Oct. 1, 2019), <https://www.usatoday.com/story/news/nation/2019/10/01/federal-judge-blocks-georgias-controversial-abortion-ban/3834408002/>.

⁴⁸ See S.B. 2116 (Miss. 2019); S.B. 9 (Ky. 2019); Human Rights and Heartbeat Protection Act, S.B. 23 (Ohio 2019).

⁴⁹ Stephen Gruber-Miller & Barbara Rodriguez, *Kim Reynolds Won’t Appeal Ruling Striking Down “Fetal Heartbeat” Law*, DES MOINES REG. (Feb. 18, 2019), <https://www.desmoinesregister.com/story/news/>

The Mississippi, Kentucky, and Georgia Heartbeat Bills have all been stayed or struck down by federal judges, while the Ohio bill is under review.⁵⁰ After the onslaught of highly restrictive heartbeat bills, it would seem that now is the opportune time to examine the vitality of the right to choose.

B. Ohio H.B. 214 as the Courts Have Viewed It

At the time of this writing, four bills exist banning abortion in cases of a fetal diagnosis of Down Syndrome.⁵¹ Only two of these have been passed, while the other two did not pass through their respective state legislatures.⁵² Ohio H.B. 214 states:

No person shall purposely perform or induce or attempt to perform or induce an abortion on a pregnant woman if the person has knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of . . . a test result indicating Down Syndrome in an unborn child.⁵³

politics/2019/02/18/abortion-law-court-governor-fetal-heartbeat-ruling-kim-reynolds-planned-parenthood-decision-iowa/2910822002/.

⁵⁰ See Gene Maddaus, *Georgia's "Heartbeat" Abortion Bill Blocked by Federal Judge*, VARIETY (Oct. 1, 2019), <https://variety.com/2019/biz/news/georgia-heartbeat-abortion-bill-blocked-1203355166/>; Edith Honan & Whitney Lloyd, *Federal Court Blocks Mississippi's Fetal Heartbeat Law From Taking Effect*, ABC NEWS (May 24, 2019), <https://abcnews.go.com/US/federal-court-blocks-mississippi-fetal-heartbeat-law-taking/story?id=63264206>; Bruce Schreiner, *Federal Judge Strikes Down Kentucky Abortion Law*, ASSOCIATED PRESS (May 10, 2019), <https://www.apnews.com/3636bd44d986465bbd5661970b716526>; Eric Heisig, *Abortion Providers Ask Judge to Strike Down Ohio's Restrictive "Heartbeat Bill," Declare Law Unconstitutional*, CLEVELAND.COM (Aug. 20, 2019), <https://www.cleveland.com/court-justice/2019/08/abortion-providers-ask-judge-to-strike-down-ohios-restrictive-heartbeat-bill-declare-law-unconstitutional.html>.

⁵¹ See OHIO REV. CODE ANN. § 2919.10 (LexisNexis 2018); IND. CODE ANN. § 16-34-4-6 (LexisNexis 2016); see also Unborn Children with Down Syndrome Abortion Ban Act, S.B. § 2616 (Miss. 2018) (failed to pass); Down Syndrome Nondiscrimination Abortion Act, H.B. 205 (Utah 2018) (not enacted).

⁵² *Id.*

⁵³ OHIO REV. CODE ANN. § 2919.10(B) (LexisNexis 2018).

The language of the Indiana statute is similar,⁵⁴ and notably, Indiana also prohibits abortions sought based on the sex of the fetus,⁵⁵ other fetal disabilities,⁵⁶ and the race of the fetus.⁵⁷ Under Ohio H.B. 214, a physician who performs an abortion due to a Down Syndrome diagnosis is guilty of a fourth-degree felony and will be stripped of his or her medical license.⁵⁸

In 2016, Planned Parenthood of Indiana and Kentucky challenged the constitutionality of the Indiana's version of the law.⁵⁹ The district court permanently enjoined enforcement of the provisions, stating, "[I]t is a woman's right to *choose* an abortion that is protected, which, of course, leaves no room for the State to examine, let alone prohibit, the basis or bases upon which a woman makes her choice."⁶⁰ On appeal, striking down the law as unconstitutional, the court cited the standards articulated in *Roe* and *Casey*, stating that the non-discrimination provisions "clearly violate[d] this well-established Supreme Court precedent."⁶¹ The court went on to state that the provisions were "far greater than a substantial obstacle; they [were] absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State."⁶²

⁵⁴ IND. CODE ANN. § 16-34-4-6(a) (LexisNexis 2016) ("A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization if . . . the fetus has been diagnosed with Down Syndrome.").

⁵⁵ *Id.* § 16-34-4-5(a) ("A person may not intentionally perform or attempt to perform an abortion after viability of the fetus or twenty (20) weeks of postfertilization if . . . the woman is seeking a sex selective abortion.").

⁵⁶ *Id.* § 16-34-4-7(a) ("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 postfertilization . . . the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with any other disability.").

⁵⁷ *Id.* § 16-34-4-8(a) ("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 postfertilization . . . the pregnant woman is seeking the abortion solely because of race, color, national origin, or ancestry of the fetus.").

⁵⁸ White, *supra* note 35, at 88.

⁵⁹ Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health, 265 F. Supp. 3d 859 (S.D. Ind. 2017).

⁶⁰ *Id.* at 867.

⁶¹ Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 306 (7th Cir. 2018), *reh'g granted*, 727 F. App'x 208, 2018 U.S. App. LEXIS 15520 (7th Cir. 2018), *vacated*, 2018 U.S. App. LEXIS 17676 (7th Cir. 2018), *petition for cert. filed*, No. 18-483 (7th Cir. Oct. 12, 2018).

⁶² *Id.*

In a subsequent challenge to Ohio H.B. 214, the district court also granted a preliminary injunction to the law's enforcement, stating that it "violates a woman's right to choose, in clear derogation of federal law."⁶³ But the court went even further, stating:

The Court agrees with Plaintiffs that because [Ohio] H.B. 214 is an unconstitutional infringement of a categorical right, *Casey*'s "undue burden" test does not apply. *Casey* defined an "undue burden" as a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The very definition of an "undue burden" contemplates that women still have the absolute right to a pre-viability abortion. This Court agrees with the Ninth Circuit Court of Appeals that the "undue burden" test is not an appropriate measure of a law that unconditionally eliminates that right for a defined class of women. See *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) ("this 'undue burden'/'substantial obstacle' mode of analysis has no place where, as here, the state is *forbidding* certain women from choosing pre-viability abortions rather than specifying the [reasonable] conditions under which such abortions are to be allowed").⁶⁴

The Ohio court reasoned that under the "undue burden" standard, the obstacle that the law places in front of pregnant women was not just substantial, it was "insurmountable."⁶⁵ The bill not only creates a burden for women seeking an abortion—it eradicates their right to seek one at all.⁶⁶ The Ohio district court's opinion sheds even more light on the presumptive unconstitutionality of this type of law. A state is not allowed to dictate which factors a woman is allowed to consider when she decides whether or not to terminate her pregnancy.⁶⁷

C. *The Possible Impact of the Conservative Majority Supreme Court*

The principle of stare decisis might very well prevent laws like Ohio H.B. 214 from going into effect. It is clear that this particular ban places an absolute restraint on a woman's right to choose when that woman's unborn child is diagnosed with

⁶³ *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 754 (S.D. Ohio 2018), *appeal docketed*, No. 18-3329 (6th Cir. Apr. 12, 2018).

⁶⁴ *Id.* (internal citations omitted).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 755.

Down Syndrome and wants an abortion for that reason. This almost certainly would fail the undue burden test under current Supreme Court jurisprudence—that is, if the Court is willing to uphold precedent.

After then-Judge Brett Kavanaugh was nominated to the nation’s highest court in July of 2018, two months before he was confronted with allegations of sexual assault by three women in special Senate hearings, much of the controversy surrounding now-Justice Kavanaugh’s nomination centered upon his contentious comments about the precedential weight of *Roe v. Wade*.⁶⁸ During testimony before the Senate Judiciary Committee in September of 2018, Senator Dianne Feinstein questioned Kavanaugh about these views. He stated: “I understand the importance of the issue. I understand the importance that people attach to the *Roe v. Wade* decision, to the *Planned Parenthood v. Casey* decision. I don’t live in a bubble. . . . I understand the importance of the issue.”⁶⁹ This line of questioning was in response to an email Kavanaugh sent as a member of the Bush White House in 2003, in which he wrote that he was “[un]sure that all legal scholars refer[red] to *Roe* as the settled law of the land at the Supreme Court level since the Court can always overrule its precedent.”⁷⁰ The leaked email sparked considerable controversy as to whether Kavanaugh’s past comments reflect his true beliefs.⁷¹ In response to Feinstein’s question about whether those views have changed, Kavanaugh called *Roe* “an important precedent that’s been reaffirmed many times” and referred to *Casey* as “a precedent on precedent.”⁷² He further stated that he tried to understand the “real world effects” of the issue.⁷³

The seemingly obvious problem with these statements is that they do not actually state or imply anything about Kavanaugh’s willingness to uphold or overturn either decision. Stating that both *Roe* and *Casey* are important precedents,

⁶⁸ Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-leaked-documents.html>.

⁶⁹ Associated Press, *Kavanaugh Calls Roe Ruling ‘Important Precedent,’* YOUTUBE (Sept. 4, 2018), <https://www.youtube.com/watch?v=rHBoY2zGKHU>.

⁷⁰ Email from Brett Kavanaugh to James Ho, Chief Counsel, Senate Subcommittee on the Constitution, Civil Rights & Prop. Rights (Mar. 24, 2003, 07:15 EST) (on file with *N.Y. Times*).

⁷¹ John Biskupic, *Roe v. Wade Is ‘Precedent,’ Kavanaugh Says, But There’s More to the Future of Abortion*, CNN (Sept. 6, 2018), <https://www.cnn.com/2018/09/05/politics/kavanaugh-roe-v-wade-planned-parenthood-casey/index.html>.

⁷² Associated Press, *supra* note 69.

⁷³ *Id.*

and that he understands the importance that Americans attach to both decisions, makes no statement one way or another as to whether he feels they are worth upholding, or whether they should be overturned given a compelling argument. Indeed, Kavanaugh's vague answer raised eyebrows and questions across the nation about his true stance on abortion law and how he will rule should the opportunity to overturn the cases appear before him.⁷⁴ Considered together with the ascendance of the Trump Administration and its tightly conservative supporters, the Republican control of the Senate, and the swell of radical right-wing politics in the United States, the uncertainty of Kavanaugh's ruling may be cause for alarm.

Were the Court still anchored by Justice Anthony Kennedy and his infamous swing vote, the question of the certainty of a constitutional right to abortion would likely have been swept aside by politicians and legal scholars alike. However, Justice Kavanaugh joined Trump-nominee Justice Neil Gorsuch, who replaced the late Justice Antonin Scalia in April of 2017. Viewed by some as a bit of a renegade from his first day on the Court, Justice Gorsuch is believed to be the one who will "cement a conservative majority on the Court for a generation."⁷⁵ He is decidedly conservative, having concurred with the majority in the Tenth Circuit's hearing of the *Hobby Lobby* case,⁷⁶ and many believe he stands against abortion.⁷⁷ In his book on physician-assisted suicide and euthanasia, Gorsuch wrote "[w]e seek to protect and preserve life for life's own sake in everything from our most fundamental laws of homicide to our road traffic regulations to our largest governmental programs for health and social security."⁷⁸ Gorsuch also notably dissented in *Planned Parenthood Ass'n of Utah v. Herbert*, a case in which videos surfaced of employees of Planned Parenthood negotiating the sale of fetal tissue and the governor of Utah subsequently suspended government funding of Planned Parenthood and terminated contracts of

⁷⁴ See Biskupic, *supra* note 71; see also Sabrina Siddiqui, *Brett Kavanaugh Sidesteps Senate Questions on Roe v. Wade*, THE GUARDIAN (Sept. 5, 2018), <https://www.theguardian.com/us-news/2018/sep/05/brett-kavanaugh-senate-abortion-supreme-court-roe-v-wade> (explaining that Kavanaugh's comments did not pacify those who were concerned about his views on abortion).

⁷⁵ Tessa Berenson, *Neil Gorsuch is Already Acting Like He's Been on the Court for Years*, TIME (Sept. 29, 2017), <http://time.com/4961416/neil-gorsuch-supreme-court-term-controversy/>.

⁷⁶ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

⁷⁷ Ariane de Vogue, *Neil Gorsuch on the Issues*, CNN (Mar. 20, 2017), <https://www.cnn.com/2017/03/20/politics/neil-gorsuch-abortion-religious-liberty-environment-gun-control/index.html>.

⁷⁸ Joan Biskupic, *Gorsuch's Writings Could Prompt End of Life Questions at Confirmation Hearing*, CNN (Mar. 20, 2017), <https://www.cnn.com/2017/03/17/politics/neil-gorsuch-confirmation-hearing/index.html>.

the employees.⁷⁹ Although the case involved several different arguments, one of them was that the suspension of funding created a substantial obstacle to women seeking abortions.⁸⁰ The trial court first denied plaintiffs' motion for a preliminary injunction against the State Department of Health and temporary restraining order to prevent the State Department from withholding funding, but on appeal, the court denied the preliminary injunction and vacated the restraining order.⁸¹ That order was reversed and remanded, and the Tenth Circuit, on petition for rehearing, denied the petition.⁸² Justice Gorsuch filed a dissent in that case, and while his disagreement was almost entirely procedural, the mere fact that he would have granted the petition to rehear the case when it had been reversed in favor of Planned Parenthood caused some pro-choice advocates to raise an alarm. In their view, Gorsuch's mere opposition to Planned Parenthood signaled that he is pro-life.⁸³

Whether Justice Kavanaugh will add to this suspected anti-abortion animus is uncertain. In December of 2018, the Court declined to hear two lower court decisions that temporarily banned Louisiana and Kansas from cutting Planned Parenthood's Medicaid funding.⁸⁴ Conservatives who were counting on Kavanaugh to be the anti-abortion crusader were upset by the denial.⁸⁵ Before his nomination, however, Kavanaugh has made or taken part in several statements that could hint at his support of restricting abortion rights.

As an appellate judge on the D.C. Circuit, then-Judge Kavanaugh took part in an en banc hearing in a case concerning a pregnant unlawful immigrant minor who wanted to be released from custody to obtain an abortion.⁸⁶ The plaintiff's petitioned

⁷⁹ *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting).

⁸⁰ *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1258 (10th Cir. 2016).

⁸¹ *Planned Parenthood Ass'n of Utah v. Herbert*, 2015 U.S. Dist. LEXIS 171249 (D. Utah 2015).

⁸² *Herbert*, 839 F.3d at 1301.

⁸³ de Vogue, *supra* note 77.

⁸⁴ Tucker Higgins, *Abortion Opponents Are Starting to Worry Supreme Court Justice Brett Kavanaugh Isn't the Ally They Were Expecting*, CNBC, <https://www.cnbc.com/2018/12/12/brett-kavanaugh-may-not-be-solid-ally-abortion-opponents-were-expecting.html> (last updated Dec. 13, 2018).

⁸⁵ *Id.* Notably, the case did not require the court to rule on the legality of abortion itself. Instead, the case was about whether individuals have a right to challenge a state's determination that a Medicaid provider is "qualified." *Id.*

⁸⁶ *Garza v. Hargan*, 2017 U.S. Dist. LEXIS 175415 (D.D.C. 2017), *vacated*, 2017 U.S. App. LEXIS 20711 (D.C. Cir. 2017), *vacated en banc*, 874 F.3d 735 (D.C. Cir. 2017), *injunction granted* 2017 U.S. Dist. LEXIS 209883 (D.D.C. 2017), *appeal dismissed*, 2017 U.S. App. LEXIS 26069 (D.C. Cir. 2017),

for a temporary restraining order to preclude detainees from keeping her in immigration detention until she could obtain an immigration sponsor, and thus preventing her from obtaining an abortion.⁸⁷ The petition was initially granted, but was later vacated and remanded.⁸⁸ When the court reversed in favor of appellee-plaintiff, Kavanaugh filed a dissent.⁸⁹ He argued that it was not absurd or unduly burdensome to suggest that the plaintiff should be transferred to the custody of an immigrant sponsor in order to be “in a better place when deciding whether to have an abortion.”⁹⁰ He continued:

I suppose people can debate as a matter of policy whether this is a good idea. But unconstitutional? . . . After all, the Supreme Court has repeatedly said that the Government has permissible interests in favoring fetal life, protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision.⁹¹

It is also worth mentioning that towards the end of his dissent, Kavanaugh added that “some disagree with cases holding that the U.S. Constitution provides a right to an abortion.”⁹² While none of the statements from *Garza* is particularly inflammatory on the subject of whether Justice Kavanaugh believes abortion is a constitutional right, it is plausible to attach meaning to the fact that he would have held for the government in that case.⁹³ Additionally, Kavanaugh has made statements in favor of Justice Rehnquist’s dissenting opinion in *Roe*, recounting the former Chief Justice’s statement that “any such enumerated right had to be rooted in the traditions in

injunction granted, 304 F. Supp. 3d 145 (D.D.C. 2018), *petition denied in part and stay denied in part*, *Garza v. Azar*, 2018 U.S. App. LEXIS 15445 (D.C. Cir. 2018), *vacated and remanded*, 138 S. Ct. 1790 (2018), *motion granted*, 138 S. Ct. 2616 (2018), *remanded*, 2018 U.S. App. LEXIS 20729 (D.C. Cir. 2018).

⁸⁷ See *Garza v. Hargan*, 304 F. Supp. 3d 145, 149–50 (D.D.C. 2018).

⁸⁸ See *Garza v. Hargan*, 138 S. Ct. 1790 (2018).

⁸⁹ *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

⁹⁰ *Id.* at 755.

⁹¹ *Id.*

⁹² *Id.* at 756.

⁹³ Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn Roe. Here’s How They’d Do It*, VOX (Oct. 5, 2018), <https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump>.

conscience of our people.”⁹⁴ He continued, “[g]iven the prevalence of abortion regulations both historically and over time, Rehnquist said he could not reach such a conclusion about abortion.”⁹⁵ Finally, in an interview in 2000, Kavanaugh characterized the Court’s understanding of the national opinion on abortion as “misperceived.”⁹⁶ Of course, none of these statements are rousing endorsements for dismantling Supreme Court abortion jurisprudence. But given the undertones of Kavanaugh’s statements, it is also clear that unease is not misplaced, either.

Due to the narrow nature of Supreme Court rulings, it is quite possible to say that the door is still open for an abortion case to be argued at court and for a cleverly-construed argument to persuade the Court to overturn its own precedent. Per the *Hellerstedt* balancing test, it could be argued that the state statutory interest involved in protecting fetuses from discrimination based on Down Syndrome is compelling enough to outweigh the individual liberty interests a woman might have.⁹⁷ While the principle of stare decisis acts as a safeguard, it is not infallible. The Court does at times overturn decisions based on years of precedent, if it believes that precedent was decided incorrectly.⁹⁸ In *Planned Parenthood v. Casey*, which overruled *City of Akron v. Akron Center for Reproductive Health*,⁹⁹ Justice Scalia was not shy about establishing his position on *Roe*: “The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.”¹⁰⁰ Scalia went on to say that “the Constitution says absolutely nothing about [abortion].”¹⁰¹ He continued:

⁹⁴ *Id.* (quoting Brett Kavanaugh, U.S. Court of Appeals for the D.C. Circuit, Remarks at the American Enterprise Institute (Sept. 17, 2017)).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

⁹⁸ *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overturned by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁹⁹ *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).

¹⁰⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).

¹⁰¹ *Id.*

In their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention “how wrong was the decision on its face?” Surely, if “the Court’s power lies . . . in its legitimacy, a product of substance and perception” . . . [T]he ‘substance’ part of the equation demands that plain error must be acknowledged and eliminated. *Roe* was plainly wrong. There is of course no way to determine [whether a fetus is a human being] as a legal matter; it is in fact a value judgment . . . [T]he best the Court can do is explain how it is that the word “liberty” *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.¹⁰²

Justice Scalia felt perfectly comfortable stating that the Court can and should overturn decisions that were decided wrongly, even where it goes against the principle of *stare decisis*. Accepting his blunt statements for their truth, it is easy to imagine how an experienced legal scholar like Justice Gorsuch could convince a conservatively-controlled Court to overturn *Roe*, *Casey*, and all cases decided based upon them.

Not to be overlooked, however, is the fact that Justice Clarence Thomas may have been waiting for exactly this moment. In May of 2019, the Court considered *Box v. Planned Parenthood of Indiana & Kentucky*.¹⁰³ In a per curiam decision, the Court granted certiorari with respect to the question of the constitutionality of relevant procedures for disposal of fetal remains,¹⁰⁴ but denied the State’s petition as to the question of whether Indiana’s prohibition of sex-, race-, and disability-selective abortions was constitutional.¹⁰⁵ The Court declined to hear the issue, citing its tradition of denying petitions raising legal issues that have not been considered by multiple Courts of Appeals.¹⁰⁶ However, Justice Thomas wrote a concurrence running upwards of twenty pages, arguing in favor of Indiana’s prohibition of sex-, race-, and disability-selective abortions.¹⁰⁷ As Thomas sees it, “this law and other laws like it promote a State’s compelling interest in preventing abortion from

¹⁰² *Id.*

¹⁰³ *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780 (2019).

¹⁰⁴ *Id.* at 1782.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1783 (Thomas, J., concurring).

becoming a tool of modern-day eugenics.”¹⁰⁸ If the argument that the additions of Justices Gorsuch and Kavanaugh to the Court will catalyze *Roe*’s reversal has merit, Justice Thomas’ evaluation of Indiana’s law demonstrates the foundation on which it can stand. Thomas outlines the history of the eugenics movement in the United States, arguing that abortion carries the potential “to become a tool for eugenic manipulation” the Court will soon have to confront.¹⁰⁹ Thomas expands the eugenics idea into the *Box* fact pattern, stating:

[A]bortion can easily be used to eliminate children with unwanted characteristics. Indeed, the individualized nature of abortion gives it even more eugenic potential than birth control, which simply reduces the chance of conceiving *any* child. As [P]etitioners and several *amicus curiae* briefs point out, moreover, abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics.¹¹⁰

Simultaneously, the boiling pot of the abortion debate sizzled over in the summer of 2019, with several state legislatures passing the most restrictive abortion laws in the nation.¹¹¹ As previously stated, these laws were formulated with the direct intent of sending a challenge of *Roe* to the Supreme Court, and it appears the Court is not shying away from the battlefield.¹¹² In fact, in October of 2019, the Court agreed to hear a challenge to a Louisiana law nearly identical to that which was struck down in *Hellerstedt*.¹¹³ In a surprisingly bold move, the Fifth Circuit blatantly defied Supreme Court precedent and upheld the state’s admitting privileges requirement.¹¹⁴

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1784.

¹¹⁰ *Id.* at 1790.

¹¹¹ *See supra* notes 42–49 and accompanying text.

¹¹² *See supra* notes 42–49 and accompanying text.

¹¹³ *June Med. Servs. v. Gee*, 140 S. Ct. 35 (2019).

¹¹⁴ Notably, the admitting privileges requirement at issue is nearly identical, but the rationale provided by the Fifth Circuit in its opinion demonstrates the differences between the two cases. The Fifth Circuit distinguished the Louisiana law from the one invalidated in *Hellerstedt*, explaining that the admitting privileges requirement at issue promotes a real and significant function benefitting women’s health, unlike the requirement in *Hellerstedt*. *June Med. Servs. v. Gee*, 905 F.3d 787, 806 (5th Cir. 2018). The court also explained that whereas in *Hellerstedt*, the state was unable to provide a specific causal connection between the admitting privileges requirement and the purported interests it served, here, that nexus was adequately identified. *Id.* at 807. At oral argument in February of 2020, some of the more liberal Justices were skeptical of the rationales that had swayed the Fifth Circuit, questioning whether there was in fact a real

If ever there were a time for conservatives like Justice Thomas—and perhaps Justices Gorsuch and Kavanaugh—the current Supreme Court term may be the time. Accordingly, this Note proceeds on the assumption that were Court and its conservative majority to grant certiorari on the merits of Ohio H.B. 214—and mirror-image cases—it might uphold the laws’ constitutionality.

II. THE FOSTER CARE SYSTEM AND THE RIPPLE EFFECT OF OHIO H.B. 214

A. *The Foster Care System by the Numbers*

The American foster care system provides temporary care with foster parents for children who cannot remain in their own homes and who have been placed in state custody by a court.¹¹⁵ The statistics reporting how many children are in the foster care system at any given time are inconsistent; however, in a report by the United States Department of Health and Human Services (HHS) to Congress in 2015, the number of children currently in foster care was estimated to be 428,000.¹¹⁶ Nearly one-quarter of a million of these children remain in foster care for a year or more, while 50,000 stay for five years or more, and 30,000 remain until adulthood.¹¹⁷

and significant function that benefitted women in Louisiana, as the Fifth Circuit had found and the state had asserted. Oral Argument, *June Med. Servs. LLC v. Russo*, 140 S. Ct. 1101 (2020) (No. 18-1323), https://www.supremecourt.gov/oral_arguments/argument_transcript/2019. The Court ultimately reversed the Fifth Circuit in a decision split five to four, with Chief Justice Roberts joining the Court’s liberal Justices only in judgment. *June Med. Servs. LLC v. Russo*, ___ S. Ct. ___ (2020). The Chief Justice wrote separately, stating briefly that he believed *Hellerstedt* was decided wrongly, but that *stare decisis* required the Court to adhere to precedent. *Id.* at 22 (Roberts, C.J., concurring in the judgment). Still, the Supreme Court’s decision to hear *June Medical Services* rang the alarm throughout the nation when it was announced that perhaps the battle for abortion rights that has been looming is now truly on the horizon. See Linda Greenhouse, *How Chief Justice Roberts Solved His Abortion Dilemma*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/07/02/opinion/supreme-court-abortion-roberts.html>. The outcome in *June Medical Services* can hardly soothe the anxieties of pro-choice advocates, however, because as Justice Kavanaugh points out in his dissent, the five votes for the balancing test in *Hellerstedt* no longer exist. *June Med. Servs.*, ___ S. Ct. at 63 (Kavanaugh, J., dissenting).

¹¹⁵ *Foster Care in Pennsylvania*, PA. DEP’T. OF HEALTH, <http://www.dhs.pa.gov/citizens/childwelfareservices/fostercareinpennsylvania/> (last visited Nov. 8, 2018).

¹¹⁶ U.S. DEP’T OF HEALTH & HUMAN SERVS. CHILDREN’S BUREAU, CHILD WELFARE OUTCOMES 2015 REPORT TO CONGRESS, at i (2015), <https://www.acf.hhs.gov/sites/default/files/cb/cwo2015.pdf>.

¹¹⁷ Nicolas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, NAT’L COUNCIL FOR ADOPTION 1 (May 2011), https://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO35.pdf.

Approximately 16,049 children were in the foster care system in Pennsylvania at the end of 2015,¹¹⁸ and approximately 13,205 children were in foster care in Ohio.¹¹⁹

Both federal and state governments spend a substantial amount of money on the foster care system.¹²⁰ Expenditures are estimated to be more than nine billion dollars under Title IV-E of the Social Security Act alone.¹²¹ In addition, even more money is spent on publicly subsidized medical care for foster children, as well as on food stamps, welfare, and childcare payments to the families that care for the children.¹²² In 2010, it was estimated that the average cost to the federal and state government of maintaining a child in foster care was \$19,107.¹²³ Additionally, the average administrative cost of placing and monitoring a child in foster care was \$6,675 bringing the average total cost to \$25,782.¹²⁴ In 2015, “all but a few states struggled to achieve timely adoptions within 12 months of children entering foster care. Across states, the median percentage of adoptions occurring with 12 months of children entering care was 3.3 percent.”¹²⁵

B. *The Trials of Children in Foster Care Who Have Disabilities*

Of the half a million children in the United States foster care system, it is estimated that at least one third have disabilities, ranging from minor developmental

¹¹⁸ PA. DEP’T. OF HEALTH, *supra* note 115, at 11.

¹¹⁹ *Id.*

¹²⁰ Zill, *supra* note 117, at 2.

¹²¹ *Id.* Under Title IV-E of the Social Security Act, states, territories, and tribes are entitled to claim partial federal reimbursement for the cost of providing foster care, adoption assistance, and kinship guardianship assistance to children who meet federal eligibility criteria. 42 U.S.C. §§ 670–79 (2018).

¹²² Zill, *supra* note 117, at 2.

¹²³ *Id.* at 3 (“State and federal government expenditures in FY 2010 for foster care maintenance payments under Title IV-E amounted to \$3.3 billion. The number of children in foster care on September 30, 2009 was 423,773. The average number receiving foster care maintenance payments was 174,300. Thus, the average maintenance cost per child per year was \$19,107, for those children receiving payments under Title IV-E.”).

¹²⁴ *Id.* (“State and federal expenditures for foster care administrative costs (placing and monitoring children in foster care) totaled \$4.3 billion. The number of children entering foster care or in care totaled 679,191. Thus, the average administrative cost per child served per year was \$6,675. The total of maintenance costs and administrative costs per child per year was \$25,782 (\$19,107 plus \$6,675).”).

¹²⁵ U.S. DEP’T OF HEALTH & HUMAN SERVS. CHILDREN’S BUREAU, *supra* note 116, at iii.

delays to significant mental and physical disabilities.¹²⁶ Children who enter foster care with special needs have already “experienced more than 14 different environmental, social, biological and psychological risk factors before coming into care.”¹²⁷ Though the statistics on these children vary, individual state studies find that of the children in foster care, possibly 30%–60% have developmental delays, 50%–80% have mental and behavioral health problems, and 20% are fully handicapped.¹²⁸ When compared to children and youth without disabilities, children with disabilities in foster care are more likely to be maltreated and are less safe.¹²⁹ They have poorer educational experiences and outcomes, including higher rates of school transfer, absenteeism, tardiness, poor grades, dropping out, below-grade-level performance, low state test scores, suspension, and expulsion.¹³⁰ The children experience lower rates of doing homework, receiving help with their schoolwork, and are less likely to be enrolled in college, to receive a high school diploma, or participate in secondary education.¹³¹ They experience more placement instability, have lower rates of achieving permanency in placement, and have lower probability of being reunited with their birth families or of guardianship with relatives or adoption.¹³² Most concerning, however, are the statistics once these children age out of foster care: they have “fewer opportunities for positive adult functioning, including higher rates of homelessness, substance abuse, unemployment, receiving public assistance, criminal justice involvement, non-marital childbearing, being violently or sexually assaulted, and having mental health problems following discharge from foster care.”¹³³

¹²⁶ UNITED CEREBRAL PALSY & CHILDREN’S RIGHTS, FORGOTTEN CHILDREN: A CASE FOR ACTION FOR CHILDREN AND YOUTH WITH DISABILITIES IN FOSTER CARE 3 (2006), https://www.childrensrights.org/wp-content/uploads/2008/06/forgotten_children_children_with_disabilities_in_foster_care_2006.pdf.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

In 1997, the federal Adoption and Safe Families Act¹³⁴ expanded health care coverage for children in the welfare system with special needs.¹³⁵ It requires states to provide health care coverage for any child with special needs for whom the state determines cannot be placed without assistance to provide for the child's medical, mental health, or rehabilitation care.¹³⁶ The Act does not specify the process for obtaining benefits, however. That decision falls to each individual state. Public disability services are available for those with documented intellectual and developmental disabilities.¹³⁷ But the services that children with disabilities like Down Syndrome need are not necessarily medical—they may be behavioral, social, or intellectual.¹³⁸

If a child needs state-funded coverage and services, that child is even more vulnerable in the foster care system, because that child has no permanent family to help during the wait for services. Who will house that child, feed that child, and ensure that child receives the care and support necessary? These are questions of basic survival.¹³⁹

Under the Americans with Disabilities Act (“ADA”), states must provide community-based treatment for those with mental disabilities when it has been determined by medical professionals that placement can be reasonably accommodated, accounting for the resources that are available to the state and the needs of others with disabilities.¹⁴⁰ This framework was established in *Olmstead v. L.C. ex rel. Zimring*.¹⁴¹ The Respondents in *Olmstead*, individuals with mental disabilities who had been institutionalized, filed suit under the ADA.¹⁴² They argued

¹³⁴ Adoption and Safe Families Act, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

¹³⁵ Erika S. Garcia, *Where Do Foster Children with Disabilities Fit? How the State Legislatures Must Create the Programs for Specialized Services to Ensure the Proper Fit*, 30 U. LA VERNE L. REV. 131, 135 (2008).

¹³⁶ *Id.* at 136 (citing CARMELA WELTE, CASA ASS'N, DETAILED SUMMARY OF THE ADOPTION AND SAFE FAMILIES ACT (Dec. 1997)).

¹³⁷ *Id.*

¹³⁸ *Down Syndrome*, CTR. FOR PARENT INFO. & RES. (Mar. 16, 2017), <https://www.parentcenterhub.org/downsyndrome/>.

¹³⁹ Garcia, *supra* note 135, at 133.

¹⁴⁰ *Id.* at 139 (citing *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999)).

¹⁴¹ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999).

¹⁴² *Id.* at 588.

that Georgia refused to place them in a community-based treatment program even when treating physicians had determined they were eligible—an action that the ADA would have directed.¹⁴³ The Supreme Court found for the Respondents, holding that states must make “reasonable accommodations” to place children with disabilities in appropriate settings; however, this standard also allows leniency, in that the holding does not force states to make “fundamental alterations” to their existing programs.¹⁴⁴ The Court held that if a state can demonstrate that it has “a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace,” then it has satisfied the *Olmstead* standard.¹⁴⁵

Those who are indigent can receive medical care through programs in the state they live in. Medicaid is the federal provider for services of indigent clients, but Medicaid does not pay for services that allow individuals who cannot afford it to live in less restrictive community settings, as was the predicament at issue in *Olmstead*.¹⁴⁶ One example of a way to correct this issue is through what is called a Home Community-Based Services (“HCBS”) waiver. An HCBS waiver provides funding for those who prefer to receive government assistance in their homes or communities, rather than in an institutional setting.¹⁴⁷ HCBS waivers require a state program to: “demonstrate that providing waiver services won’t cost more than providing these services in an institution; ensure the protection of people’s health and welfare; provide adequate and reasonable provider standards to meet the needs of the target population; [and] ensure that services follow an individualized and person-centered plan of care.”¹⁴⁸ The services provided under HCBS waivers are extensive and somewhat discretionary. The services “include but are not limited to: case management (i.e. supports and services coordination), homemaker, home health

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 605.

¹⁴⁶ *Id.* at 588.

¹⁴⁷ *Home & Community-Based Services 1915(c)*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html> (last visited Feb. 21, 2019).

¹⁴⁸ *Id.*

aide, personal care, adult day health services, habilitation (both day and residential), and respite care.”¹⁴⁹ States are also permitted to propose “other” services.¹⁵⁰

Obtaining a waiver for these services can be difficult, however, depending on the state. The waiting list for an HCBS waiver can be over one hundred thousand individuals.¹⁵¹ In the United States, 472,997 individuals are on this waiting list.¹⁵² In Ohio alone—of particular relevance given that Ohio enacted one of the bills at issue—there are 68,644 individuals waiting for these services.¹⁵³ In other words, the states are required to provide health care for children in the welfare system but are not doing so with deliberate or efficient speed. This is particularly relevant when it comes to the question of limitations states should be able to put on abortion.

C. *The Inconspicuous Conflict between Ohio H.B. 214 and the Foster System*

The connection between laws like Ohio H.B. 214 and the foster care system is this: mothers who would choose abortion but can no longer get one may turn to the foster care system, and the foster care system is not equipped to adequately care for an influx of children. Although no official data exists, “medical professionals report that often women abort when they discover there is [a mental deficit] or a serious anatomical birth defect, sometimes incompatible with life.”¹⁵⁴ A study conducted in 2015 by de Graaf, Buckley, and Skotko analyzed the present and future live birth prevalence of Down Syndrome.¹⁵⁵ The study estimated that the live birth prevalence for Down Syndrome between 2006 and 2010 was 12.6 per 10,000.¹⁵⁶ In that time

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Waiting List Enrollment for Medicaid Section 1915(c) Home and Community-Based Services Waivers*, KAISER FAMILY FOUND., <https://www.kff.org/health-reform/state-indicator/waiting-lists-for-hcbs-waivers/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Feb. 26, 2020). The numbers on this page are, of course, updated on an ongoing basis as more individuals apply for HCBS waivers. They are correct as of the time of this writing.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Darrin Dixon, *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3 (2008).

¹⁵⁵ Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations With Down Syndrome in the United States*, 167 AM. J. MED. GENETICS 756 (Mar. 29, 2015).

¹⁵⁶ *Id.* at 758.

period, an estimated 3,100 Down Syndrome related pregnancy terminations were performed annually in the United States.¹⁵⁷ Thus, “the estimated rates at which live births with DS [Down Syndrome] were reduced as a consequence of DS-related elective pregnancy terminations were 30% . . . for the U.S. as a whole.”¹⁵⁸ These are admittedly rough estimates, but undoubtedly, they do at least plausibly suggest that more children will be born if Down Syndrome-related abortions are prohibited.

When Ohio H.B. 214 was passed, the hearing on the legislation was expedited due to a report on the significant reduction of births of babies with Down Syndrome in Iceland—a nearly one hundred percent termination rate.¹⁵⁹ Based on that reduction, Ohio H.B. 214 was passed to combat the “specific targeting” of fetuses diagnosed with Down Syndrome in utero.¹⁶⁰ According to Michael Gonidakis, the president of Ohio’s Right to Life organization, the bill is “a crucial step in creating a society that is inclusive of people who are different, no matter how many chromosomes they have.”¹⁶¹ Gonidakis even went so far as to call abortion “one of the most tragic forms of discrimination we can imagine,” and he also stated that “babies with disabilities continue to be targeted for elimination based on the notion that some babies are simply better than others.”¹⁶² He also called abortions in these cases a “search-and-destroy mission” akin to eugenics.¹⁶³

To view Down Syndrome-related abortions as a purely disability-based discriminatory concern oversimplifies a complex, delicate issue, and perhaps mischaracterizes it altogether. Certainly, ensuring that more babies are born with Down Syndrome will create a society that is more inclusive of those who are different, as Gonidakis says, at least from a numbers standpoint. But it does not necessarily follow that disability-based discrimination will be eradicated. On the contrary, it seems there is a myriad of other reasons these women choose to terminate, and they are hardly based on an idealized version of what a child should

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 756.

¹⁵⁹ White, *supra* note 35, at 96.

¹⁶⁰ Steven Ertlet, *Ohio Could Become Third State to Ban Abortions on Babies with Down Syndrome*, LIFENEWS.COM (Aug. 22, 2017), <https://www.lifenews.com/2017/08/22/ohio-could-become-third-state-to-ban-abortions-on-babies-with-down-syndrome/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

be. The assumption seems to be that after passing these laws, a mother or a couple whose child is diagnosed with Down Syndrome will simply choose to raise that child with his or her disability. But that assumption is naïve because it is tragically blind to the heart of the issue.¹⁶⁴

Mary Carpenter explained in her letter to the editor of the *New York Times* that when her baby was diagnosed with Down Syndrome in utero, she knew she had to have an abortion, “but not at all because [she] wanted a perfect baby as contended by the president of the Ohio Right to Life”¹⁶⁵ Carpenter echoed a friend of hers who did have a baby with Down Syndrome, who told her later: “We understand that decisions are made because of personal situations.”¹⁶⁶ On the side of those supporting these laws, voices of parents of children with Down Syndrome are noticeably absent.

The more likely reasons for aborting a fetus with Down Syndrome are the financial, emotional, and physical constraints that accompany raising a child with Down Syndrome.¹⁶⁷ Professor Elizabeth Gettig, practicing genetic counseling in the 1980s, stated that almost all the women she treated chose to terminate because of a lack of economic resources.¹⁶⁸ Perhaps, then, the assumption that a family receiving such a diagnosis terminates their pregnancy strictly because of the diagnosis is flawed, because it rests on the belief that the parents will simply keep the child. Far from the likely end result, this conclusion is almost certainly incorrect. Mark Schrad explains that because these same conservative legislators are pushing to slash public assistance programs like Medicaid and end funding for home-based care in states like Ohio, where those measures could have potentially offset the financial burdens

¹⁶⁴ More to the point, Ohio’s state legislature may believe its narrative about crusading for the lives of the unborn is genuine. However, the claim is contradicted by the fact that Ohio, and many other states working to restrict abortion for the purposes of protecting unborn children, do not recognize drug use during pregnancy as a felony that can be prosecuted until after the child is born. Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PROPUBLICA (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>. Most do categorize it as child abuse. *Id.* It is frankly appalling that these states get credit from pro-life voters for ultra-conservative and draconian abortion laws that merely force babies to be born, but do nothing to stop expectant mothers from using drugs or to protect children from being born addicted to controlled substances because their mothers choose to use them.

¹⁶⁵ Carpenter, *supra* note 10.

¹⁶⁶ *Id.*

¹⁶⁷ Dixon, *supra* note 154, at 8.

¹⁶⁸ *Id.* at 6.

involved, they no longer will be available as a source of assistance.¹⁶⁹ Schrad concludes, “the foreseeable long-term impact of this legislation would be increased stresses on the family, bankruptcies and an *influx of children with disabilities into orphanages and foster care.*”¹⁷⁰

The outcome is not what the Ohio state legislature and those in states enacting similar laws likely hope it will be—namely, that the mothers and fathers in question will have a change of heart and simply raise those children. On the contrary, it is possibly more logical—perhaps even probable—that they will simply find another avenue that allows them the choice of whether to parent that child. This path might be that these families will choose to put those babies up for adoption. Someone will need to feed, clothe, and raise the children who cannot be raised by their biological families—and that burden will fall directly on the foster care system and, tangentially, on the treasuries of state and federal governments. If there are already half a million children in a foster system that already sits on a crumbling foundation, and it is estimated that around 3,100 fetuses with Down Syndrome are terminated nationally in a four-year period,¹⁷¹ the resulting additional weight the system will be required to shoulder will be substantial. Unfortunately, there seems to be no plan from the state legislatures passing these laws to bolster either the families who will keep babies they cannot support or the foster care system obligated to care for those remaining.

It may seem an overreaction to suggest that 3,100 babies will pose a substantial burden on the nation’s foster care system. The true issue, however, is not the children these laws may funnel into the system—it is the price tag these laws come with. As more states enact these kinds of restrictions, a gap opens up that legislatures have not taken the initiative to fill. The only responsible way to enact such a restriction would have been to cushion its blow by providing states with the appropriate financial assistance to care for these children. Yet, bills like Ohio H.B. 214 provide no aid to assist in raising the children they force into existence. This oversight would seem to call the bluff of the legislators citing the rights of those with disabilities and the sanctity of human life: If the true purpose of these laws were saving lives, the legislators would care equally about taking care of these children if no one else will.

¹⁶⁹ Schrad, *supra* note 1.

¹⁷⁰ *Id.* (emphasis added).

¹⁷¹ de Graaf et al., *supra* note 155. Again, this number is an estimate of abortions due to Down Syndrome on a national scale. The number for each individual state enacting the restriction would conceivably be much lower. However, there are no reliable numbers for individual states like Ohio.

The lack of financial support in these laws is reckless. Because there is no consistent number of children with Down Syndrome in the United States and no consistent number of children in the foster care system at any one time, admittedly, it is highly speculative to try to configure the annual costs that a law like Ohio H.B. 214 places on a state welfare system. However, a study done at Harvard attempted to estimate the out-of-pocket health care costs associated with raising a child with Down Syndrome between birth and the age of eighteen.¹⁷² Notably, the parents raising the children with Down Syndrome held commercial insurance that covered the children involved in the study, and thus medical costs typically covered by insurance were not factored into the study.¹⁷³

Parents of patients with Down Syndrome had significantly higher average annual out-of-pocket medical costs compared to those of children without Down Syndrome.¹⁷⁴ Over the first eighteen years of life, the out-of-pocket medical costs on average are \$18,248.¹⁷⁵ The costs are greatest in the first year, \$1,907, as compared with roughly \$500 for a child without Down Syndrome.¹⁷⁶ These high costs are largely surgical, due to the fact that in 40–50% of these infants, there is a need to correct cardiac defects, gastrointestinal complications, or cataracts.¹⁷⁷ These costs decline with age, as patients require less hospitalization and corrective surgery as they grow.¹⁷⁸ It is, however, worth highlighting that the study was strictly medical, and did not address other types of assistance that may be necessary, such as educational and social support. In addition, the total costs of raising a child with Down Syndrome without the benefit of parents with insurance covering that child would obviously be much higher. One takeaway from the projections of the Harvard study and the research of de Graaf, Buckley, and Skotko¹⁷⁹ is that the costs of raising even half of the children born with Down Syndrome in a four-year period would put

¹⁷² ANDREW KAGELEIRY ET AL., OUT-OF-POCKET MEDICAL COSTS FOR PARENTS WITH CHILDREN WITH DOWN SYNDROME IN THE UNITED STATES (May 16, 2015), https://scholar.harvard.edu/files/campbell/files/ispor_ds_poster_-_2015_05_04.pdf.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ de Graaf et al., *supra* note 155.

an astronomical financial burden on an already belabored child welfare system. Conservatively, on a national scale, the costs could be close to \$56 million per 3,100 babies over their lifetimes, and that estimate does not account for the costs of surgeries as well as physical and psychological care that would usually be covered by insurance if the child is parented by those who have coverage.¹⁸⁰

Drowning state foster care systems are not financially equipped to deal with an influx of children for any reason, let alone that of children with Down Syndrome. In fact, Ohio ranks last in the nation in per-capita state funding for children's services.¹⁸¹ A report by the Public Children Services Association of Ohio projected foster care placement costs in 2019 to be \$484,827,560.¹⁸² This number is predicted to increase by another \$100 million in 2020.¹⁸³ Although Ohio has made some positive changes in the direction of pouring more money into the child welfare system, the statistics are glaring.¹⁸⁴

If the serious and substantial financial costs of implementing a law come to light just by crunching a few numbers, it begs the question: do state legislatures even consider the disproportionate impact these laws could have on the child welfare system? Perhaps the glaring absence of financial aid in bills like Ohio H.B. 214 provides the answer.

In the Supreme Court's abortion jurisprudence, much emphasis is placed on the effect any certain law will have on an individual mother's ability to obtain an abortion—that is, whether or not that law will be a roadblock for any one woman who wants to have an abortion.¹⁸⁵ Considerable weight is also given to the state in

¹⁸⁰ This calculation is based on the estimation of 3,100 babies born with Down Syndrome in a span of four years, multiplied by the estimation of roughly \$18,000 in out-of-pocket medical costs for a single child from birth to 18 years of age. *See supra* text accompanying notes 171 & 175.

¹⁸¹ Andrew Cass, *Report: More Than 20,000 Ohio Children Projected in Foster Care by 2020*, NEWS-HERALD (Dec. 30, 2017) https://www.news-herald.com/news/ohio/report-more-than-ohio-children-projected-in-foster-care-by/article_93531344-1e31-58eb-94ca-5b575ec8ce7b.html.

¹⁸² PUB. CHILDREN SERVS. ASS'N OF OHIO, *THE OPIOID EPIDEMIC'S IMPACT ON CHILDREN SERVICES IN OHIO 5* (2017), <http://www.pcsao.org/pdf/advocacy/OpioidBriefingSlidesUpdated12-17.pdf>.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 12.

¹⁸⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (explaining that the undue burden standard is “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 . . .”).

its apparent interest in protecting unborn children and in championing human life.¹⁸⁶ But these concerns come before birth, and it seems there is little consideration, if any, given to what comes after.

It seems easy for a state legislature like Ohio to hide behind the banner of banning abortions based on discrimination, because these laws do support a crucial cause. The purpose behind the law, articulated time and again, comes back to “advocating for the rights of the disabled.”¹⁸⁷ The proposition behind this ethos is, of course, that having a disability does not make a life less worth living. In fact, it would be an inarticulate grunt to suggest otherwise. However, it would be equally ignorant to suggest that only advocating for that child to be carried to term and birthed is the only requirement to fulfilling the purpose behind the pro-life cause. It is a gross oversight to believe that in order to stand for the rights of those with Down Syndrome—or any other disability for that matter—all one has to do is force that life to take place. Being born might create a life, but it does not alone make a life worth living. Being supported, fed and cared for, living without pain and suffering, having the chance to obtain an education or participate, being given access to opportunities, having access to role models and those who will provide love and support—these are all things that matter. These are the things which naturally sustain humanity.

Where are these things written and provided for in these laws?

III. POSSIBLE REMEDIES IF OHIO H.B. 214 AND ITS SISTER LAWS ARE UPHELD

A. Possible State Remedies

Having examined the financial strain Ohio H.B. 214 or its sister legislation could potentially place on state foster care systems, the question becomes what can be done to assist these state foster care systems if the Down Syndrome abortion bans are upheld in the courts. States that want to pass laws limiting abortion in such absolute ways must weave and reinforce a safety net for the children who will inevitably be born. But what should this safety net look like?

The initial remedy is, almost certainly, greater allocation of funds in state budgets towards the states’ respective child welfare and foster systems. This would be the most direct way to improve outcomes of children with Down Syndrome who

¹⁸⁶ *Id.* at 878 (“As with any procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.”).

¹⁸⁷ See Lewin, *supra* note 5.

end up in the system. The logic is simple. More money would improve the system. First, it would help the children directly, by freeing up room in the budget for better short- and long-term medical treatment, required surgeries and routine doctor visits, and better and greater availability of state subsidies such as HCBS waivers. Funding could also be funneled towards free health services such as Medicaid. Some states show positive trends in this regard. Pennsylvania increased its budget for County Child Welfare from \$1,613,199 to \$1,676,054, and budgeted \$1,720,021 for 2019–2020.¹⁸⁸ Budgeting for medical early intervention was decreased from \$63,006 to \$62,188, but increases again to \$63,988 in 2019–2020.¹⁸⁹ Early intervention for children with disabilities was slashed from \$16,446 to \$15,009, and only increases to \$15,722 in 2019–2020.¹⁹⁰ The state general fund for Human Services¹⁹¹ overall has \$1,358,671 available, which increases to \$1,389,230 in 2019–2020.¹⁹² Ohio also trends upwards in spending for child welfare, having dedicated an additional \$3.8 million to child welfare spending in its 2018 enacted appropriation.¹⁹³ The budget also allocates an additional \$65 million to Ohio’s developmental disabilities system, part of the push by Governor Kasich “to provide more opportunities for individuals with developmental disabilities to receive care in the community.”¹⁹⁴

The increased money being poured into the foster care system, however, need not be used strictly as a cash transaction to fund medical care. Additional funding could be funneled into several different avenues that would aim to improve quality of life for children with disabilities in foster care outside the medical arena. These

¹⁸⁸ COMMONWEALTH OF PENNSYLVANIA: OFFICE OF THE GOVERNOR, GOVERNOR’S EXECUTIVE BUDGET 2019–2020, at E26-7 (Feb. 5, 2019), https://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Documents/2019-20%20Proposed%20Budget/2019-20_Budget_Document_Web.pdf.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ For a description of the goals of Human Services in Pennsylvania and a breakdown of the different programs within it, *see id.* at E26-35.

¹⁹² *Id.* at E26-36.

¹⁹³ OHIO OFFICE OF BUDGET & MGMT., ACTUAL EXPENDITURES FOR FISCAL YEARS 2014–2017 AND ORIGINAL ENACTED APPROPRIATIONS FOR FISCAL YEARS 2018–2019, at 19 (2017), https://archives.obm.ohio.gov/Files/Budget_and_Planning/Operating_Budget/Fiscal_Years_2018-2019/FY2014-19_Expenditure_and_Appropriation_Amounts.pdf.

¹⁹⁴ OHIO OFFICE OF BUDGET MGMT., FYS 2018–2019 BUDGET OVERVIEW 2, <https://obm.ohio.gov/Budget/operating/doc/fy-18-19/enacted/FY18-19BudgetFact%20Sheets.pdf>.

categories are, namely, reform of the foster care system itself and education and training for foster families.¹⁹⁵

Unfortunately, there is a general lack of information, communication and collaboration between the child welfare system and the various programs and systems that are supposed to complement one another.¹⁹⁶ These gaps occur in health care, the court system, early intervention, education, as well as disability and mental health systems.¹⁹⁷ The lack of information can result in poor health and well-being outcomes for the children involved who have no physical disabilities, because when things are not communicated, they are overlooked.¹⁹⁸ For children with special needs like Down Syndrome, these gaps potentially become canyons. One remedy is to “universalize the medical home model for all children” in foster care,¹⁹⁹ meaning that the state should establish a uniform and universal mechanism for providing medical and psychological care and support for its foster children. One possibility for this is specialized foster care clinics, wherein the clinics are specifically designed and run for the sole purpose of providing care to foster children.²⁰⁰ Establishing clinics dedicated solely to serving that specific population would at least improve the process of receiving health services for children. Another suggestion is the implementation of medical “passports” that travel with children, so as to ensure that their medical records and documents successfully make it from home to home.²⁰¹ The more available the information, the more likely the child is to get the necessary care, and the less likely it is that certain conditions or needs will be overlooked by the constant shuffle and rearrangement of the system.

Another necessity is an increase in training that prospective foster parents receive. This is one area the federal government is attempting to rectify.²⁰² But in order for the federal efforts to be successful, state governments should follow suit with their own plans and dedicated funding. Implementing training specific to

¹⁹⁵ See UNITED CEREBRAL PALSY & CHILDREN’S RIGHTS, *supra* note 126, at 6–7.

¹⁹⁶ *Id.* at 7.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 8.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See UNITED CEREBRAL PALSY & CHILDREN’S RIGHTS, *supra* note 126, at 9.

identifying the special needs of children with disabilities would allow prospective foster parents to be more prepared and better equipped to care for these children. Such training would ideally include instruction on how to identify and understand different disabilities and locate and access appropriate care providers in the community.²⁰³ It would also be necessary to train and inform prospective parents on how to properly advocate for their foster children with disabilities, whether it be for medical care, a proper educational plan, or for rights that are guaranteed by the ADA.²⁰⁴ Putting a more comprehensive effort into training foster parents and preparing them to care for a foster child with Down Syndrome would likely increase the chances for successful placement for the child and enhance that child's chances of succeeding.

B. Initial Existing Federal Remedies

Foster care funding from the federal government is funneled to the states through the Social Security Act's Title IV-E, and this structure has remained largely the same since 1994.²⁰⁵ This program allows state Title IV-E agencies to claim reimbursement for portions of expenditures on foster care.²⁰⁶ Ultimately the states and the federal government split the costs and share burdens based on statutory rules in the Social Security Act and state rules.²⁰⁷

In 2018, President Trump signed the Family First Prevention Services Act ("FFPSA") as a part of the Bipartisan Budget Act,²⁰⁸ which

includes long-overdue historic reforms to help keep children safely with their families and avoid the traumatic experience of entering foster care, emphasizes the importance of children growing up in families and helps ensure children are

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Title IV-E Foster Care Eligibility Reviews Fact Sheet*, U.S. DEP'T OF HEALTH & HUMAN SERVS. CHILDREN'S BUREAU (Mar. 12, 2015), <https://www.acf.hhs.gov/cb/resource/title-iv-e-reviews-fact-sheet>.

²⁰⁶ *See id.*

²⁰⁷ *See id.*

²⁰⁸ *The Family First Prevention Services Act*, CHILDREN'S LEGAL DEF. FUND 1 (Feb. 2018), <https://www.childrendefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf>.

placed in the least restrictive, most family-like setting appropriate to their special needs when foster care is needed.²⁰⁹

The FFPSA focuses mainly on trying to keep children out of the foster system and with their families, and allocates finances and support accordingly.²¹⁰ However, there are several sections of the FFPSA that benefit the growth and vitality of the foster care system directly.²¹¹

The FFPSA aims to keep children who are at risk of becoming “foster care candidates” from entering it by allocating reimbursement payments to states that prioritize mental health and substance abuse prevention as well as in-home parent skill-based programs.²¹² Children who are considered “candidates” for foster care by the FFPSA are those who have been identified as being at imminent risk of entering foster care but can still remain safely at home.²¹³ The Act requires states choosing to use Title IV-E funds for prevention to come up with plans for how they will monitor and oversee the safety of at-risk candidates.²¹⁴ The federal government will reimburse states for fifty percent of the funds spent on these types of programs,²¹⁵ but only if they are “promising, supported, and well-supported” practices.²¹⁶ The changes also require the Secretary of Health and Human Services to “identify reputable model licensing standards with respect to the licensing of foster family homes.”²¹⁷ This component serves to increase the quality of family homes taking in foster children, and would help states work towards the establishment of more and better foster homes. The FFPSA also sets aside \$8 million specifically for recruitment and retention of high-quality foster care families.²¹⁸ This would in theory

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1–10.

²¹¹ *Id.* at 11–12.

²¹² Family First Prevention Services Act § 50711, 42 U.S.C. § 671 (2018).

²¹³ *Id.* § 50711(b).

²¹⁴ *Id.* § 50711(e)(4).

²¹⁵ *Id.* § 50711(c).

²¹⁶ *Id.* § 50711(e)(4)(c).

²¹⁷ *Id.*

²¹⁸ *Id.* § 50751.

make more families available for children in foster care and ensure that those families are better equipped both to parent and to care for children with special needs.

The FFPSA also prioritizes decreasing the amount of children in congregate, or group, care.²¹⁹ It does so by requiring that federal funding will only be provided for children in a state-licensed foster family home that provides for six or fewer children, or a childcare institution that is a Qualified Residential Treatment Program (“QRTP”),²²⁰ a specialized setting for pregnant or postpartum children, a supervised setting for children who are over the age of 18 but are living independently, or a setting that specializes in caring for victims of sex trafficking.²²¹ Children who are in QRTPs are required to be continually assessed by a qualified individual to determine whether their placement in the QRTP is desirable and appropriate, and steps must also be taken to justify why the child cannot be placed in her or his own family home.²²² QRTPs are exactly the type of institutions that were at issue in *Olmstead*.²²³ In this way, the FFPSA makes further positive movement towards getting children placed where they need to be.

The FFPSA also amends the Adoption and Legal Guardianship Incentive Program by extending it through 2021, where it was previously set to expire in fiscal year 2016.²²⁴ The QRTPs award payments to states based on improvements that they make in increasing children’s exits from foster care to adoption or guardianship.²²⁵ This kind of funding could potentially benefit all foster children, but would likely be

²¹⁹ *Id.* § 50741.

²²⁰ The FFPSA defines a “qualified residency treatment program” as a program that

has a trauma-informed treatment model that is designed to address the needs, including clinical needs as appropriate, of children with serious emotional or behavioral disorders or disturbances, and, with respect to the child, is able to implement the treatment identified for the child by the assessment of the child required under section 475A(c).

Id. § 50741(k)(4).

²²¹ *Id.* § 50741(k)(1)–(2).

²²² *Id.* § 50742(c).

²²³ *See supra* note 143.

²²⁴ Family First Prevention Services Act § 50761, 42 U.S.C. § 673(b); *see also* Adoption and Legal Guardianship Assistance Program, 42 U.S.C. § 673(b) (2018).

²²⁵ Family First Prevention Services Act, 42 U.S.C. § 675.

even more beneficial for children with disabilities, who might have a harder time and wait longer to be adopted.

While most of these changes are positive steps towards a better foster care system as a whole, the FFPSA is a double-edged sword. On the one hand, pouring money and resources into ensuring that foster care “candidates” stay with their families and are not placed in foster care means that there is more support for parents who might be considering putting an unborn child up for adoption based on lack of financial resources. Hypothetically, this theory might even apply to a mother whose baby has been diagnosed with Down Syndrome. But conversely, the provisions of FFPSA serve as a reminder that even the federal government is aware of the massive financial problems that exist in the foster care system, both for the state governments in operating it and for the children the system serves. By its existence and implementation, the FFPSA aims to keep at-risk children out of the foster care system, likely because those who wrote and advocated for the changes are aware of the traumatic and detrimental effects growing up in the foster care system can have on a child’s psychiatric development and overall success in life. If preventing children from entering foster care has become a compelling state interest, should it not be of equal interest to the government to allocate money and other nonmonetary resources to the foster care system itself in order to change the fact that placement in it is such a disfavored alternative? The FFPSA covers a bullet hole with gauze while the heart bleeds out in the chest cavity. If the heart of the problem remains unfixed, how can it be said that a facial remedy at the outskirts of the issue has indeed healed it? The remedies provided by the FFPSA help in the short term, but do not accomplish nearly enough in the long run.

IV. CONCLUSION

If read by someone who is pro-choice, Ohio H.B. 214 and laws like it are complicated. Undoubtedly, the purposes behind the Down Syndrome discrimination laws are commendable. It can hardly be argued that the woman’s right to choose in these cases substantially outweighs the state’s interest in protecting the lives of those who have been diagnosed with Down Syndrome—or any chromosomal anomaly, for that matter. If read by someone who is pro-life, these laws seem like a gilded victory, a giant step forward for those fighting for the rights of the unborn. But reading the laws as a vessel for saving those children from the pervasive disability discrimination, and only that way, glosses over the ugly underbelly of the laws’ consequences. Akin to lifting a rock in a garden and finding hundreds of ants, the unanswered questions go in every direction. How many of these children will be born into loving, caring families? How many will be funneled to the foster system, where their physical, mental, emotional, medical and social needs might never be met? Who will pay for those needs to be met, even when someone advocates enough to try?

States like Ohio, Indiana, and North Dakota have not answered these questions. They have glossed over the disparate consequences and have preyed on the compassions of conservative pro-life advocates to do it. Organizations like Ohio Right to Life have chosen a commendable cause, but they have failed to rally their pockets around it. If laws like these are to be upheld by the conservative majority of the Supreme Court, it is imperative for the future of the country and the future of the child welfare system that states carelessly placing these kinds of limits on abortion draft and enact procedures that will deliver substantial financial aid and physical manpower to meet the demands their laws will inevitably bring. Without the proper support to sustain them, these laws ring hollow.

