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SELECTIVE ABORTION BANS: THE BIRTH OF A NEW STATE COMPELLING INTEREST

Tori Gooder

I. INTRODUCTION

Roe v. Wade is one of the most notorious cases in American history because it established that a woman has a constitutional right to choose to have an abortion.¹ Ever since this landmark case, the Supreme Court has attempted to outline a jurisprudence that protects this constitutional right, while acknowledging various state interests—which has proved to be a difficult task. Because there are few Supreme Court cases regarding abortion jurisprudence, the lower courts have faced, and will continue to face, an uphill battle concerning how a state may regulate this constitutional right to obtain an abortion.

As of September 16, 2018, at least twelve states have enacted some type of selective abortion ban, all of which prohibit a physician from performing an abortion on a woman if her reason for obtaining the abortion is based on the sex, race, and/or genetic disability of the fetus. Because of differing interpretations of *Planned Parenthood v. Casey*, and the most recent Supreme Court decisions, *Gonzales v. Carhart* and *Whole Woman's Health v. Hellerstedt*, it is unclear whether these selective abortion bans will fail under *Casey*'s undue burden standard.² However, considering the Court's apparent dislike for absolute bans on pre-viability abortions in *Casey*, many of the broader selective abortion bans are likely to be held unconstitutional—as shown by the Indiana Southern District Court overturning Indiana's Sex Selective and Disability Abortion Ban.³

This article explores the United States' complicated abortion jurisprudence and its implications that the Supreme Court may be open to a new state compelling interest to weigh against a woman's right to an abortion. Part II of this article analyzes how the constitutional right to an abortion developed from *Roe v. Wade* to *Whole Woman's Health*.⁴ In addition, this section examines the

1. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

2. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

3. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 866-67 (S.D. Ind. 2017).

4. *Roe*, 410 U.S. at 116; *Whole Woman's Health*, 136 S. Ct. at 2292.

different state selective abortion bans enacted throughout the country and the challenges these statutes have encountered in the lower courts—including the American Civil Liberties Union’s (“ACLU”) recent complaint filed against Ohio’s selective Down syndrome abortion ban. Part III investigates the recent trend from states with selective abortion bans to establish discrimination as a new compelling state interest in regulating abortions pre-viability, and the constitutional muster this trending interest holds. Then, this article examines the new prenatal technology and the opportunities it provides for a completely new compelling state interest in the abortion discussion—prohibition of abortion as a tool for eugenics. Finally, the article discusses Ohio’s selective Down syndrome abortion ban and the Ohio statute’s ability to satisfy *Casey*’s undue burden analysis.

II. BACKGROUND

Under the Due Process Clause of the Fifth and Fourteenth Amendments, a woman has a constitutional right to choose to have an abortion.⁵ Ever since *Roe* granted a woman the right to obtain an abortion, the Supreme Court has wrestled with the colliding interests between the woman’s right and particular state interests. For purposes of this article, the evolution of abortion jurisprudence will set up the framework to understand the current wave of selective abortion bans developing in state legislation. Many states have enacted selective abortion bans to prohibit a woman from obtaining an abortion, if the reason for the abortion is based on the fetus’ sex, race, or a diagnosis of disability. While challenges to the constitutionality of these selective abortion bans are scarce in some states, other courts have held the bans unconstitutional or temporarily enjoined enforcement, while further litigation is pending. As of March 23, 2018, Ohio joined the trend and enacted a selective abortion ban, specifically prohibiting the performance of an abortion on a woman whose reasons for the abortion are based on a fetus’ diagnosis for Down syndrome or another disability.

A. Abortion Jurisprudence

While the Constitution does not explicitly mention the right to privacy, the Court has long recognized a fundamental right to

5. *Roe*, 410 U.S. at 116.

personal privacy lurking in the shadows of the Constitution.⁶ In a variety of contexts and cases, the Court, or individual Justices, have found this “right of personal privacy, or a guarantee of certain areas or zones of privacy,”⁷ to exist within the First Amendment,⁸ the Fourth and Fifth Amendments,⁹ the Ninth Amendment,¹⁰ and the Fourteenth Amendment.¹¹ However, the bulk of the right to privacy jurisprudence is rooted in the Due Process Clause of the Fourteenth Amendment. This is not because the Due Process Clause mentions privacy, but because it prohibits the state from depriving anyone of “life, liberty, or property, without due process of law.”¹²

1. Historical Context to the Right to Privacy

Historically, the Court has found the word “liberty” within the Due Process Clause to encompass certain decisions and activities considered “fundamental.”¹³ Whenever the Court deems these liberty interests sufficiently “fundamental,” the state’s regulation of these rights “may be justified only by a compelling interest, and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”¹⁴

The Court concretely defined this right to privacy in *Griswold v. Connecticut*.¹⁵ In *Griswold*, the Supreme Court held a Connecticut statute prohibiting any person from using any drug or article to prevent conception in violation of the right to marital privacy protected by the Fourteenth Amendment.¹⁶ Although neither the Constitution nor the Bill of Rights explicitly guarantees a right to privacy, the Court found the Bill of Rights to have “penumbras, formed by emanations from those guarantees that help give life and substance,” that warrant a zone of privacy around certain personal

6. *Griswold v. Conn.*, 381 U.S. 479 (1965).

7. *Roe*, 410 U.S. at 152.

8. *Stanley v. Ga.*, 394 U.S. 557, 564-65 (1969) (holding statutes making mere private possession obscene material in the privacy of an individual’s home a crime in violation of the First and Fourteenth Amendments).

9. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (finding the Fourth and Fifth Amendments allows an individual to “harbor a reasonable ‘expectation of privacy’”).

10. *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring).

11. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (holding that parents have a fundamental right to the personal private choice of education for their children).

12. U.S. Const. amend. XIV, § 1.

13. *Roe*, 410 U.S. at 152-53.

14. *Id.* at 155.

15. *Griswold*, 381 U.S. at 479.

16. *Id.* at 486.

choices held to be fundamental.¹⁷ In the past, the Court has extended this privacy right to activities relating to procreation,¹⁸ family relationships,¹⁹ child rearing, and education.²⁰

Drawing from these past cases, the Court once again expanded the privacy right to include the personal choice between a married couple to use contraceptives or not.²¹ The Court in *Griswold* found the state's interest in regulating the use of contraceptives swept "unnecessarily broadly and thereby invade[d]" the zone of privacy that protects marital intimacy.²² Soon after *Griswold*, the Court naturally extended this privacy right to decide "whether to bear or beget a child" to all individuals—whether single or married—in *Eisenstadt v. Baird*.²³

2. The Right to an Abortion

Both *Griswold* and *Eisenstadt* set up the Supreme Court to decide *Roe v. Wade* in 1973, expanding the right of personal privacy to include a woman's decision whether to obtain an abortion.²⁴ However, the Court held this right was not absolute, but "must be considered against important state interests in regulation."²⁵ In order to define the breadth of the state's regulatory interests, the Court outlined a trimester framework to balance the state's interest to protect the health of the pregnant woman and the potential of human life and the woman's fundamental right to choose.²⁶

During the first trimester, the woman has a complete right to obtain an abortion and the state's interest is not "compelling" enough to regulate the woman's choice during this time.²⁷ However, during the second trimester, the state's interest grows more compelling, and it therefore may regulate certain aspects of abortions, as long as the regulations reasonably relate to the preservation and protection of maternal health.²⁸ The state may completely outlaw abortions during

17. *Id.* at 484.

18. *Skinner v. Okla.*, 316 U.S. 535, 541 (1942).

19. *Prince v. Mass.*, 321 U.S. 158, 166 (1944).

20. *Meyer v. Neb.*, 262 U.S. 390, 401-03 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

21. *Griswold*, 381 U.S. at 485-86.

22. *Id.*

23. 405 U.S. 438, 453 (1972).

24. 410 U.S. 113, 154 (1973).

25. *Id.*

26. *Id.* at 162-63.

27. *Id.* at 163.

28. *Id.* at 165.

the third trimester, because the state's interest is at its most "compelling point," but there must be an exception for the life or health of the mother.²⁹

The first test for *Roe*'s holding was in *Webster v. Reproduction Health Services*.³⁰ In *Webster*, the Court held Missouri's statutory prohibition against the use of public funds, employees, and facilities to provide abortions to be valid in light of *Roe* and the Due Process Clause of the Fourteenth Amendment.³¹ While a woman has a right to choose whether to obtain an abortion, that right does not extend so far as to require that states fund abortions.³² Nor does the Constitution require states to provide public access and facilities for the performance of abortions.³³ As long as the state does not place an impermissible "governmental obstacle in the path of a woman who chooses to terminate her pregnancy," the state may refuse to fund or assist abortions under *Roe*.³⁴

The essence of *Roe* dramatically altered in 1992, when the Court in *Planned Parenthood v. Casey* shifted its analysis from the trimester framework to an analysis that turns on viability.³⁵ Under *Roe*, the state was unable to interfere during the first trimester because the state's interest was not compelling until viability.³⁶ Contrastingly, the Court in *Casey* allowed state interference before viability; the caveat being that any regulation could not be an "undue burden" on the woman and still furthered a legitimate and compelling interest.³⁷ In *Casey*, the Court rejected *Roe*'s trimester framework, holding that it "misconceive[d] the nature of the pregnant woman's interest" and "undervalue[d] the State's interest in potential life."³⁸ Arguably, the "undue burden" allowed for more freedom for the states to regulate before viability.³⁹

In *Casey*, the plaintiff, Planned Parenthood, challenged five particular provisions of a Pennsylvania statute: (1) a requirement that

29. *Id.*

30. 492 U.S. 490 (1989).

31. *Id.* at 509.

32. *Id.* at 510.

33. *Id.*

34. *Id.* at 509.

35. Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 UNIV. OF MICH. J. OF GENDER & L. 291, 319 (2013).

36. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (defining viability as the fetus' capability of meaningful life outside the mother's womb).

37. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).

38. *Id.* at 873.

39. *Donley*, *supra* note 35, at 319.

a woman give informed consent twenty-four hours before the abortion procedure; (2) a requirement that at least one parent give consent if the woman is a minor; (3) a requirement for the woman, if married, inform her husband; (4) an exception to these requirements for women in medical emergencies; and (5) particular record keeping and recording requirements for the facilities performing abortions.⁴⁰ Out of the five provisions challenged, the Court struck down only the spousal notification requirement.⁴¹ The Court acknowledged that the challenged structural mechanisms might impose some burdens on a woman; but as long as the state regulations are not an “undue burden”—that is a “substantial obstacle to the woman’s exercise of the right to choose”—the Court will uphold the provision if reasonably related to that state interest.⁴²

After *Casey* only three core principles of *Roe* survived. First and foremost, a woman has a right, protected by the Due Process Clause of the Fourteenth Amendment, to choose to have an abortion before viability and to obtain it without undue interference from the state.⁴³ Second, states have the power to restrict abortions after fetal viability, as long as the law contains exceptions for pregnancies that endanger the life or health of the mother.⁴⁴ Third, states have “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.”⁴⁵ Leaving the rest of *Roe* behind, the Court in *Casey* held that an undue burden exists, and a provision is invalid, “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁴⁶

3. The Abortion Right Post-Casey

In the wake of *Casey*, few abortion cases have made it to the Supreme Court, and for this reason, there is little Supreme Court jurisprudence to help the lower courts interpret the undue burden analysis.⁴⁷ Both *Stenberg v. Carhart* and *Gonzales v. Carhart* involved state prohibitions on the use of the dilation and extraction

40. *Casey*, 505 U.S. at 844.

41. *Id.* at 879.

42. *Id.* at 877-78.

43. *Id.* at 846.

44. *Id.*

45. *Id.*

46. *Id.* at 878.

47. Donley, *supra* note 35, at 320.

abortion procedure (also known as partial-birth abortion).⁴⁸ *Stenberg* involved a Nebraska statute that criminalized performance of “partial birth abortions.”⁴⁹ The Court held the statute was unconstitutional under the *Casey* undue burden analysis for two specific reasons. First, the Court found it was an undue burden to prohibit “partial birth abortion” procedures without a health exception for the woman.⁵⁰ Second, the Court held the Nebraska statute was unconstitutionally vague because the language covered another dominant abortion procedure, D&E.⁵¹ The Court noted that if the statute was to be interpreted as a prohibition on both the “partial birth abortion” and the D&E procedure, then “the result is an undue burden upon a woman’s right to make an abortion decision.”⁵²

Just seven years after the Court decided *Stenberg*, the federal government enacted the Partial-Birth Abortion Ban Act.⁵³ Similar to the Nebraska statute in *Stenberg*, the federal statute criminalized the performance of partial-birth abortion procedures.⁵⁴ However, unlike the Nebraska statute, the Act included a health exception to save the life of the mother and distinguished between the partial-birth abortion procedure and the D&E procedure.⁵⁵ Because of these differences, the Supreme Court held that the Act did not place an undue burden on a woman and the statute was not unconstitutionally vague.⁵⁶ Further, the Court heavily relied on the government’s “legitimate and substantial interest in preserving and promoting fetal life” as a justification for the regulations on a woman’s right to an abortion.⁵⁷

These seemingly contradictory holdings created tension around the undue burden analysis. Since *Casey*, the only regulations understood to be an undue burden were spousal consent requirements and bans on both D&E and partial-birth abortions. The country had to wait almost ten years before the Supreme Court added to the undue

48. *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007). Partial birth abortion is a procedure where “the abortionist initiates the woman’s natural delivery process by causing the cervix of the woman to be dilated...the physician manually performs breech extraction of the body of a live fetus...[w]ith only the head of the fetus remaining in utero” where the head is then separated from the fetus’ body. *Stenberg*, 530 U.S. at 959-60.

49. *Stenberg*, 530 U.S. at 929.

50. *Id.* at 938.

51. *Id.* at 939. D&E procedure “requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina.” *Id.* at 958.

52. *Id.* at 946.

53. *Gonzales*, 550 U.S. at 141.

54. *Id.*

55. *Id.*

56. *Id.* at 147-48.

57. *Id.* at 145.

burden list in *Whole Woman's Health v. Hellerstedt*.⁵⁸ In this case, Texas enacted a Bill that required (1) doctors performing abortions to obtain admitting privileges from a hospital located no further than thirty miles from the location the abortion was performed,⁵⁹ and (2) the abortion facility to meet the minimum standards, under Texas law, for ambulatory surgical centers.⁶⁰ The Supreme Court found both the admitting-privileges requirement and the surgical-center requirement to be an undue burden on a woman's constitutional right to obtain an abortion.⁶¹

However, the Court deviated from *Casey*'s undue burden standard, ever so slightly. Instead of evaluating the statutes burden on the woman's choice to terminate her pregnancy, the Court concentrated on whether the regulation granted "medical benefits sufficient to justify the burdens" that placed a "substantial obstacle in the path of the woman seeking a pre-viability abortion."⁶² This slight, but critical, deviation from *Casey* emphasizes the Court's readiness to observe abortion regulations more in light of the state's interest and less in light of the woman's right to choose an abortion.⁶³

B. The Trend Towards Anti-Discrimination Pre-viability Regulations

Abortion jurisprudence looks very different today than it did after the original holding in *Roe*. Post-*Roe* cases have drastically changed *Roe*'s initial presumption that all state regulation on pre-viability abortions is per se unconstitutional.⁶⁴ The Court in *Casey* paved the way for more state regulation on abortion care, even during the first trimester, as long as the state's vested interest is in the woman's health and to promote fetal life.⁶⁵ As a result, both states and the federal government have passed a plethora of regulations on abortions, attempting to identify the expansive new boundaries of *Casey*'s undue burden test.⁶⁶ Generally, abortion regulations by states and the federal government are not new, however regulations based on the woman's reasons for seeking an abortion are. This section will

58. 136 S. Ct. 2292 (2016).

59. *Id.* at 2310.

60. *Id.* at 2314.

61. *Id.* at 2318.

62. *Id.* at 2300.

63. *Eighteenth Annual Review of Gender and the Law: Annual Review Article: Abortion*, 18 GEO. J. GENDER & L. 395, 402 (2017).

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

65. *Eighteenth Annual Review of Gender and the Law: Annual Review Article: Abortion*, *supra* note 63, at 402.

66. *Id.* at 402-03.

examine closely the specific regulations states have enacted to stop abortions when the woman bases her abortion decision on the fetus' race, sex, and/or genetic abnormality.

In 2011, Arizona became one of the first states to enact legislation threatening the physicians with a class three felony if they perform “an abortion knowing that the abortion is sought based on the sex or race of the child.”⁶⁷ Interestingly, the woman on “whom a sex-selection or race-selection abortion is performed is *not* subject to criminal prosecution or civil liability.”⁶⁸ Legislative history illustrates that some Arizona legislators were concerned that abortion providers were targeting African American and Hispanic women, and therefore enacted the legislation to protect certain populations.⁶⁹ The Maricopa County chapter of the NAACP brought suit to enjoin the Arizona selective abortion bill, arguing that the legislation had a stigmatizing effect on African American and Hispanic women.⁷⁰ However, the Ninth Circuit held there was insufficient standing and affirmed the district court's dismissal.⁷¹

Currently, Arizona is the only state to have enacted both race-selective and sex-selective abortion prohibitions.⁷² However, many other states have followed Arizona's lead and have enacted sex-selective and/or genetic anomaly abortion bans. Currently, eight states prohibit sex-selective abortions at some point during pregnancy.⁷³ Three states, North Dakota, Ohio, and Louisiana prohibit abortions for reason of genetic anomaly, such as Down syndrome.⁷⁴ However, both Louisiana and Ohio have a court ordered temporary injunction on the legislation, pending litigation.⁷⁵ Oklahoma, Kansas, and Arizona require counseling about perinatal hospice services if seeking abortion based on lethal fetal condition or abnormality.⁷⁶ The only state to have a ban deemed unconstitutional

67. Ariz. Rev. Stat. Ann. § 13-3603.02(A)(1) (2011).

68. § 13-3603.02(E) (emphasis added).

69. Ariz. Leg. 2443, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

70. NAACP v. Horne, 626 F. App'x 200, 201 (9th Cir. 2015).

71. *Id.* (holding that “only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct” may have standing to bring a claim for a “stigmatizing injury”).

72. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>.

73. *Id.* The eight states include Arizona, Arkansas, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania, and South Dakota.

74. *Id.*

75. *Id.*; See also Jessie Hellmann, *Federal judge blocks Ohio Down syndrome abortion ban*, THE HILL (Mar. 14, 2018).

76. *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, *supra* note 72.

is Indiana.⁷⁷

In 2017, the Indiana Southern District Court held the state's Sex Selective and Disability Abortion Ban unconstitutional under *Casey*'s undue burden standard and *Roe*'s essential holding.⁷⁸ The statute prohibited physicians from performing abortions if the woman sought an abortion: (1) "solely because of the sex of the fetus;"⁷⁹ (2) "solely because the fetus has been diagnosed with Down syndrome or has a potential diagnosis of Down syndrome;"⁸⁰ or (3) "solely because of the race, color, national origin, or ancestry of the fetus."⁸¹ The statute also mandated that the abortion providers inform their patients "Indiana does not allow a fetus to be aborted solely because of the fetus' race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability."⁸²

In defending its statute, the Indiana government argued that technological advances have increased the state's legitimate interest in protecting potential life from discrimination.⁸³ The technological advances, argued the state, allows for an earlier understanding of a fetus' diagnosis or potential diagnosis of Down syndrome or other disabilities, which in turn has led to an increase in abortions sought for reasons related to these disabilities.⁸⁴ While the court recognized that the state has "legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child," those interests are "not strong enough to support a prohibition of abortion" pre-viability.⁸⁵ In other words, new technological developments related to disability screening do not increase the state's interest in protecting the potential life enough to outweigh the woman's liberty interest in choosing to terminate her pregnancy prior to viability, at least under *Roe* and *Casey*'s holdings.⁸⁶

The court quickly dismissed the state's second argument that the statute does not interfere with a right protected by *Roe* and *Casey* if observed through a "binary choice" interpretation.⁸⁷ The state

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

78. *Id.* at 867.

79. Ind. Code Ann. § 16-34-4-4 (2016).

80. § 16-34-4-6.

81. § 16-34-4-8.

82. § 16-34-2-1.1(a)(1)(K).

83. *Planned Parenthood of Ind. & Ky., Inc.*, 265 F. Supp. 3d at 867.

84. *Id.*

85. *Id.* at 866 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992)).

86. *Id.* at 867-68.

87. *Id.* at 868.

perceived *Roe* and *Casey* to protect a woman's right to terminate her pregnancy only if the woman does not want a child generally at that point in time, as opposed to terminating the pregnancy based on the potential characteristics of that particular child.⁸⁸ The court found no support in *Roe*, *Casey*, or any legal authority that such a distinction exists in the eyes of the Supreme Court.⁸⁹ Moreover, the court reminded the state that the Fourteenth Amendment protects a woman's liberty right to terminate her pregnancy based on a right to privacy.⁹⁰ Accordingly, the court believed this right to privacy "to make important, personal, and difficult decision[s] of whether to terminate" prohibits against state regulations on any reasons or factors that may influence this private decision.⁹¹

While the Indiana Southern District Court held Indiana's selective abortion ban unconstitutional, both North Dakota and Ohio have enacted extremely similar legislation. In 2013, North Dakota enacted legislation that makes it a class A misdemeanor for physicians to intentionally perform abortions on women who seek to have an abortion solely "on account of the sex of the unborn child" or "because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality."⁹² The law defines genetic abnormality even broader than Indiana's statute, not including an exception for a "lethal fetal anomaly."⁹³ In its definition of genetic abnormality, the law includes: "any defect, disease, or disorder that is inherited genetically" and "any disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality, or disease."⁹⁴ Yet, even with North Dakota's broader definition of abnormality, the specific prohibition has yet to be challenged on substantive due process grounds—leaving the statute to cover most disability diagnoses recognized during prenatal testing.⁹⁵

Ohio's legislation, effective as of March 2018, is both broader and narrower than Indiana and North Dakota's prohibitions on selective abortions.⁹⁶ Instead of prohibiting abortions based on a myriad of disabilities or abnormalities, the Ohio statute only bans abortions for

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 868-69.

92. N.D. Cent Code § 14-02.1-04.1 (2013).

93. Ind. Code Ann. § 16-34-4-1 (2016).

94. § 14-02.1-02.

95. § 14-02.1-02. See Donley, *supra* note 35, at 304.

96. Ohio Rev. Code Ann. § 2919.10.

women who seek the abortion because the fetus has Down syndrome or potentially has Down syndrome.⁹⁷ However, the language of the statute does not mandate that Down syndrome be the sole reason for the abortion, but prohibits the abortion if it is sought “in whole or in part” because of Down syndrome.⁹⁸ Unlike both Indiana and North Dakota’s statute, Ohio bans the performance of abortions for reasons of Down syndrome, but not for reasons of sex or race.⁹⁹ The ACLU filed a complaint on behalf of Planned Parenthood and other abortion providers, and recently the United States District Court for the Southern District of Ohio temporarily enjoined the ban.¹⁰⁰

III. ANALYSIS

Traditionally, the Supreme Court has recognized compelling state interests such as the health of the mother and the potential life of the fetus. However, under particular interpretations of *Gonzales* and *Whole Woman’s Health*, the Supreme Court has recently opened itself to consider other compelling interests. States have taken advantage of this opportunity and presented compelling interests such as eradicating discrimination and protecting the potential life from discrimination. Yet, another compelling interest may be even more persuasive and pressing to the Supreme Court: the prohibition of abortion as a tool for eugenics. Regardless of Ohio’s compelling interest in enacting the selective Down syndrome abortion ban, the Southern District of Ohio Court will likely find the statute unconstitutional under *Casey*’s undue burden test because of the broad statutory language and the substantial obstacle it places in front of a woman’s ability to obtain an abortion pre-viability.

A. Discrimination as a Compelling State interest

Under many of the selective abortion bans, it is unclear what exactly the state’s compelling interest is. In the recent Indiana case striking down Indiana’s Sex Selective and Disability Ban, the state’s compelling interest was protecting the potential life from discrimination.¹⁰¹ On the other hand, states have introduced more untraditional interests foreign to abortion jurisprudence, such as the

97. § 2919.10(B).

98. § 2919.10(B).

99. § 2919.10.

100. *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 749 (S.D. Ohio 2018).

101. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017).

elimination of discrimination based on sex, race, or disability from society.¹⁰² Both of these state interests have a chance of surviving *Casey*'s undue burden analysis if limited to post-viability. However, the interests will have much more difficulty surviving *Casey* if the bans are applicable pre-viability. Almost all of the selective abortion bans enacted or proposed, including Ohio and Indiana, are in effect throughout the woman's pregnancy.

Accordingly, all of the bans must satisfy the standards set for pre-viability and post-viability state regulations provided in *Casey*.¹⁰³ For post-viability selective abortion bans, satisfying *Roe*'s essential holding and *Casey*'s undue burden analysis is much easier: "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother."¹⁰⁴ As many of the selective abortion bans contain the word "solely," a narrow post-viability selective abortion ban can satisfy *Casey*'s undue burden analysis, without any health exception for the mother.¹⁰⁵ If a woman seeks an abortion because her life is in danger, then accordingly she is not seeking the abortion procedure *solely* based on the sex, race, or disability of the fetus, and therefore the procedure will not be prohibited.¹⁰⁶

However, pre-viability selective bans find the undue burden analysis more difficult to hurdle, due to the uncertainty of whether pre-viability bans are per se unconstitutional. The courts disagree as to whether *Casey* categorically holds all pre-viability bans as prohibited regardless of the undue burden analysis¹⁰⁷ or whether *Casey*'s undue analysis places a blanket moratorium on pre-viability bans *only* if the ban heavily infringes on a woman's ability to make the "ultimate decision."¹⁰⁸ Yet, recent abortion jurisprudence

102. Thomas J. Molony, *Roe, Casey, and Sex-Selective Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1109 (2014).

103. *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (explaining that "[t]he abortions affected by the Act's regulations take place both pre-viability and post-viability; so . . . the undue burden analysis . . . [is] applicable.").

104. *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

105. Molony, *supra* note 102, at 1104.

106. *Id.*

107. *See Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017).

108. *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1151 (D. Idaho 2013); *Reprod. Health Servs. v. Marshall*, 268 F. Supp. 3d 1261, 1270 (M.D. Ala. 2017); *Whole Woman's Health v. Paxton*, No. A-17-CV-690-LY (W.D. Tex. 2017).

developed in *Gonzales* and *Whole Woman's Health* implies that a third interpretation may be available: the undue burden analysis applies to pre-viability bans, and government interests different from those traditionally considered—health of the mother and protection of potential life—are relevant in the undue burden inquiry.¹⁰⁹

If applying either of the first two interpretations of *Casey*, any selective abortion pre-viability ban, no matter the state's compelling interest, would not survive a constitutional inquiry. Accordingly, if following the Ninth Circuit's categorical approach, a pre-viability selective abortion "prohibition on the exercise of [the abortion] right is per se unconstitutional," and thereby the state "may not *proscribe* a woman from electing abortion"¹¹⁰ Similarly, if applying *Casey*'s undue burden test to pre-viability selective abortion bans effect on a woman's ultimate decision to terminate her pregnancy, the ban would be invalid because it places more than "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"¹¹¹ but an "insurmountable" or "absolute" obstacle.¹¹²

However, under the third interpretation, pre-viability selective abortion bans have a better chance of surviving *Casey*'s undue burden analysis. As an agitated Justice Ginsburg pointed out in her dissent, the Supreme Court in *Gonzales* took into account other interests when applying *Casey*'s undue burden test to the federal partial-birth abortion ban.¹¹³ The Court recognized the traditional *Roe* and *Casey* state interests in protecting potential life and the health of the mother, but it also focused on the government's "interest in protecting the integrity and ethics of the medical profession."¹¹⁴ Moreover, the Court acknowledged moral and ethical concerns, finding the D&E procedure had the power to "devalue human life."¹¹⁵

Whole Woman's Health expanded *Casey*'s undue burden analysis one-step further than *Gonzales*. While many pro-choice groups rallied behind *Whole Woman's Health*'s holding, the Court's opinion ever so slightly deviated from the previous interpretation of *Casey*'s

109. Molony, *supra* note 102, at 1105.

110. *Isaacson*, 716 F. 3d at 1217.

111. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

112. *McCormack*, 900 F. Supp. 2d at 1151.

113. *Gonzales v. Carhart*, 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting) ("Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life.").

114. *Id.* at 157.

115. *Id.* at 158.

undue burden analysis.¹¹⁶ In fact, the Court reframed the undue burden analysis illustrating its willingness to look closely at the particular abortion regulations in light of whether the means behind the regulations actually justify and serve the state's interests.¹¹⁷ Therefore, since the Texas surgical center and admitting privileges requirements produced a "substantial obstacle in the path of women seeking a pre-viability abortion" without "confer[ing] medical benefits sufficient to justify the burdens," the Court held the statute impermissible.¹¹⁸ Together, *Gonzales* and *Whole Woman's Health* illustrate the Court's willingness to apply *Casey*'s undue burden test broadly to pre-viability abortion regulations as long as the state regulation is substantial enough to justify and serve a compelling state interest different from those established in *Roe* and *Casey*, such as "protecting the potential life from discrimination"¹¹⁹ or eradicating discrimination in society.

Applying this third interpretation of *Casey* to a state's interest in protecting the potential life from discrimination is bound to fail the undue burden test. Not because the state interest is not legitimate, but because protecting the "potential life from discrimination" is the same state interest addressed in *Roe* and *Casey*, just repackaged. The Court recognizes the "State has legitimate interests from the outset of the pregnancy . . . the life of the fetus that may become a child," but refuses to allow that particular state interest to create a substantial obstacle in the path of a woman's right to terminate her pregnancy prior to viability.¹²⁰ Further, the Court in *Roe* refuses to address whether "life begins at conception or at some other point prior to live birth," and therefore defines viability to be the time when the state's interest may become "compelling."¹²¹ Accordingly, if the Court does not recognize, or at least take a stance, on life at conception, then discrimination cannot attach to a fetus because the Court does not recognize a fetus as a legal person.¹²²

On the other hand, a selective abortion ban grounded in a state's interest to eradicate discrimination in society might survive the post *Gonzales* and *Whole Woman's Health* expansion of *Casey*'s undue burden test. The state's interest in ending discrimination might be a

116. *Eighteenth Annual Review of Gender and the Law*, *supra* note 63, at 402.

117. *Id.*; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

118. *Whole Woman's Health*, 136 S. Ct. at 2300.

119. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 867 (S.D. Ind. 2017).

120. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

121. *Roe v. Wade*, 410 U.S. 113, 150, 163 (1973).

122. *Id.* at 158.

new development in the arena of abortion jurisprudence. However, this interest is a familiar and recognized state interest in the constitutional realm of freedom of association for expressive purposes.¹²³

In a line of freedom of association cases, the Court pondered whether public accommodation statutes that prohibited discrimination based on race, sex, sexual orientation, or religion unconstitutionally violated a group's associational rights.¹²⁴ The Court applied an "undue burden-like balancing test," instead of strict scrutiny, in all of the cases.¹²⁵ In two of the cases, the Court held that the state's interest in eliminating sex discrimination was compelling and justified the statute that infringed on the group's associational rights.¹²⁶ Importantly, the Court in *Roberts v. United States, Board of Directors of Rotary International v. Rotary Club of Duarte*, and *Boy Scouts of American v. Dale* only permits infringement in expressive associational rights when the infringement is slight and when the state has a compelling interest, such as eradication of discrimination that is "unrelated to the suppression of ideas."¹²⁷

Applying this same line of reasoning, there might be a reasonable argument that a state's compelling interest in eradicating discrimination justifies a slight infringement on a woman's right to choose.¹²⁸ There is ample room to attack this argument, beginning with the notion that a selective abortion ban pre-viability is far from a slight infringement. Yet, there is a possibility that a narrow selective abortion ban with the infringement on a woman's right to choose tailored to the word "solely" might have constitutional muster in light of a state's compelling interest. The woman's choice is only infringed upon if her decision to terminate her pregnancy is "solely" based on the fetus' sex, race, or potential disability, and therefore if any other reason is presented for the abortion, then the woman's right to choice trumps the state's compelling interest. Drawing on the eradication of discrimination as a compelling state interest, there

123. Molony, *supra* note 102, at 1118.

124. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Boy Scouts of America v. Dale* 530 U.S. 640 (2000).

125. Molony, *supra* note 102, at 1118-1119.

126. *Roberts*, 468 U.S. at 628-29 (holding that a state public accommodation statute did not violate the constitutional rights of the United States Jaycees by mandating the group admit women as full voting members); *Duarte*, 481 U.S. at 549 (holding that a state public accommodation statute did not violate the constitutional associational rights of Rotary International by requiring the group open its membership to women, and not exclusively to men); *Dale*, 530 U.S. at 640.

127. Molony, *supra* note 102, at 1123; *Roberts*, 468 U.S. at 623.

128. Molony, *supra* note 102, at 1129.

might be an even more powerful interest for the state to put forth: the prohibition of abortion as a tool for eugenics.

B. A New Compelling State Interest

While the eradication of discrimination is a worthwhile state interest and has some merit, there is an even more powerful interest that the Court, and the world in general, has already wrestled with for centuries: eugenics. A term coined in 1883 by Francis Galton, eugenics is a term used to refer to the practice of improving the human race by controlling reproduction.¹²⁹ Although connected most notoriously to the Nazi regime, eugenics was a movement founded in the United States at the turn-of-the-century.¹³⁰ The American eugenics movement sponsored “forced sterilization of criminals and the [mentally disabled], selective ethnic restrictions on immigration, and even euthanasia for those deemed unfit to live.”¹³¹

The eugenics movement colors America’s history. In the famous words of Justice Holmes in *Buck v. Bell*, “three generations of imbeciles are enough,” justified the use of compulsory sterilization against a “patient afflicted with hereditary forms of insanity, imbecility.”¹³² Not only did the Supreme Court support the use of eugenics, but the federal and state legislatures did as well. In 1924, Congress enacted the Federal Immigration Restriction Act to curb the “rising tide of defective germ-plasm” carried by particular suspected classes of migrants journeying from Southern and Eastern Europe.¹³³ States, during the 1970s, required genetic screening programs of African Americans for sickle cell anemia (an inherited disease commonly developed in people of African descent).¹³⁴

As genetic technology continues to develop, a modern form of eugenics becomes more and more plausible. Just recently, in 2010, a major change in prenatal genetic testing occurred, allowing women to obtain a non-invasive prenatal genetic test as earlier as ten weeks into their pregnancy.¹³⁵ This prenatal genetic test provides for hundreds and potentially thousands of traits with a single blood test, thereby

129. Martin S. Pernick, *Eugenics and Public Health in American History*, 87 AM. J. PUB. HEALTH 1767, 1767 (1997).

130. *Id.*

131. *Id.*

132. 274 U.S. 200, 206-07 (1927).

133. Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL’Y 1, 5 (1996).

134. Sonia M. Suter, *The Allure and Peril of Genetics Exceptionalism: Do We Need Special Genetics Legislation?*, 79 WASH. U.L.Q. 669, 676 (2001).

135. Donley, *supra* note 35, at 297.

providing women with the ability to find out any known genetic markers their fetus contains, or may contain.¹³⁶ These known genetic markers span from Down syndrome, Tay Sachs, and Cystic Fibrosis to breast cancer, heart disease, and diabetes.¹³⁷ Not only does prenatal genetic testing increase the mass amount of information women have available to them regarding their fetus' genetics, but the prenatal genetic testing allows women to have this information as early as ten weeks into their pregnancy.¹³⁸

As *Gonzales* illustrated, the Supreme Court is open to other legitimate state interests at play in abortion jurisprudence, such as the "integrity and ethics of the medical profession."¹³⁹ Moreover, the Court in *Gonzales* recognized Congress' interest to create specific prohibitions against abortions that "implicate additional ethical and moral concerns" and to draw "a bright line that clearly distinguishes abortion and infanticide."¹⁴⁰ Therefore, the Court looked much further than the traditional interests of the state—the protection of the potential life and the health of the mother—to justify the regulations. The Court's logic in *Gonzales* already connects abortion and infanticide, a form of eugenics, and appears to be only a step away from justifying selective abortion bans under the banner of prohibiting the use of eugenics.

The potential state interest in preventing the use of abortion as a means of eugenics is a compelling interest both before and after viability. According to both *Roe* and *Casey*, the state interest in protecting the potential life increases as the fetus develops, to the point that it eventually outweighs the woman's abortion right, with the exception for "the preservation of the life or health of the mother."¹⁴¹ Yet, the potential state interest in preventing abortion as a means of eugenics does not increase or decrease in correlation with the viability of the fetus. The prevention of eugenics is just as important an interest pre-viability as it is post-viability, and therefore begs the question whether the prevention of eugenics as a compelling state interest outweighs the woman's abortion right from the moment genetic testing provides the sex, race, or potential disabilities of the fetus.

The Court's application of *Casey*'s undue burden test in *Whole*

136. *Id.* at 297-98.

137. *Id.* at 301.

138. *Id.* at 302.

139. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

140. *Id.* at 158.

141. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *Roe v. Wade*, 410 U.S. 113, 163-164 (1973).

Woman's Health also supports the idea that a new compelling interest can outweigh a woman's privacy interest pre-viability. Reframing the undue burden analysis in the dicta of the opinion, the Court exposes its willingness to allow the ends to justify the means. While the selective abortion ban might place a "substantial obstacle in the path of women seeking a pre-viability abortion," if the selective abortion ban "confers [medical] benefits sufficient to justify the burdens," then the ban might be justified.¹⁴² Accordingly, the benefits must derive from the state's interests, and must outweigh the burdens imposed upon a woman. The Court is required to "consider the burdens a law imposes on abortion access together with the benefits those laws confer."¹⁴³

Appropriately, if the benefits to preventing eugenics justify the burden imposed on the woman's privacy interest, then a selective abortion ban just might survive the undue burden test. Obviously, benefits include the specific moral and ethical values of protecting the breeding out of certain sexes, races, and disabilities. The Court has already recognized ethical and moral concerns as a compelling state interest worth weighing in the abortion analysis. The D&E procedure present in *Gonzales* had the power to "devalue human life,"¹⁴⁴ which the Court found to be a moral and ethical interest the state may depend on, in addition to other compelling interests such as ethics and integrity of medical professionals. Clearly, eugenics and its history in America illustrates the ethical and moral concerns in allowing individuals or governments to have the power to "devalue human life" by deeming what races, sexes, or genetic disabilities are worth bringing to life.

More broadly, selective abortion regulations can benefit society by protecting public health and combating discrimination against protected classes. Protecting America's public health can benefit society by preventing the grave social consequences of an unbalanced male to female ratio, which is already an issue in other parts of the world.¹⁴⁵ The protection of public health may also include prohibiting individuals from having the power to determine what characteristics are desirable in a potential human being, and thereby having the extraordinary power to filter particular types of qualities. In terms the Court already recognizes, the "integrity and

142. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

143. *Id.* at 2309.

144. *Gonzales*, 550 U.S. at 158.

145. Prabhat Jha et al., *Trends in Selective Abortion of Female Fetuses in India: Analysis of Nationally Representative Birth Histories from 1990-2005 and Census Data from 1991-2011*, LANCET 1, 2 (2011) (unpublished manuscript), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3166246/>.

ethics of the medical profession” is hindered when medical professionals are given not only the responsibility of disclosing to a patient the prenatal genetic testing results that include a potential disability or disease, but also the responsibility of directly performing an abortion on the fetus, knowing the reasons for its termination. If the integrity and ethics of medical professionals proved compelling enough in *Gonzales* to justify the prohibition of partial-birth procedures, then it is plausible that the same justification may be upheld for prohibiting selective abortions.

The Court has already deemed state’s interests in combating discrimination against protected classes to be a benefit to society, as seen in the *Roberts*, *Duarte*, and *Dale* line of cases, and therefore a compelling governmental interest to override the particular fundamental liberties of expressive associational rights. Historically, eugenics has been used to discriminate against certain types of individuals based on their race, mental capabilities, and sex. The Supreme Court itself held that a state may not use eugenics because “invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws,” and because the sterilization “perpetuate[s] the discrimination which we have found to be fatal.”¹⁴⁶ Similarly, in *Loving v. Virginia*, many eugenic enthusiasts supported and helped enact the 1924 Virginia Racial Integrity Act to combat the “threat to the health of the while gene pool.”¹⁴⁷ The Court held the state’s miscegenation statute as unconstitutional in violation of the Equal Protection Clause because of its discrimination and classification on the basis of race.¹⁴⁸

Clearly, the Court has already recognized the connection between the use of eugenics and discrimination. Using the same line of reasoning, when a state has a compelling interest, such as eradication of discrimination, “unrelated to the suppression of ideas,”¹⁴⁹ and is only a slight infringement, then the statute may infringe on the fundamental associational rights of particular groups. Accordingly, this reasoning is applicable to the fundamental right of abortion as well: the state’s compelling interest to combat and eradicate discrimination, by prohibiting the use of eugenics, if unrelated to the actual abortion right, may be compelling enough to infringe on the

146. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 543 (1942) (prohibiting sterilization of habitual criminals).

147. 388 U.S. 1 (1967); Lombardo, *supra* note 133, at 20.

148. *Loving*, 388 U.S. at 1.

149. *Molony*, *supra* note 102, at 1123; *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

fundamental right of abortion.

The argument against the use of selective abortion legislation will be that the infringement on a woman's right to abortion is not slight. However, if selective abortions are narrowly tailored enough to prohibit abortions only if based "solely" on the sex, race, or potential disability, then the Court might consider the infringement slight. If the benefits—protection of public health and eradication of discrimination—derived from the state's interests in prohibiting the use of eugenics, outweigh the burdens imposed upon the woman's abortion right, then the selective abortion bans could be justifiable. As prenatal genetic testing provides for information regarding the fetus' potential disabilities and other attributes as early as ten weeks, the state's compelling interest is just as heightened pre-viability as post-viability, unlike previous state interests such as health of the mother and the potential life of the fetus. Considering the burdens selective abortion bans impose on abortion access together with the benefits those laws confer, it would appear that states' selective abortion bans might confer a benefit that is just compelling enough to outweigh a woman's abortion right.

C. Ohio's Down Syndrome Abortion law

While Ohio's Down syndrome abortion law is distinct from Indiana's overruled Sex Selective and Disability Abortion Ban, the Ohio law will likely fail *Casey's* undue burden analysis, and therefore violate a woman's right to an abortion. There are two differences that distinguish the Ohio statute from the Indiana statute: (1) the prohibition on selective abortions is limited to only the genetic abnormality of Down syndrome and other disabilities and (2) the woman's reasons for the abortion may be prohibited if based either wholly or in part on a prenatal diagnosis of Down syndrome.¹⁵⁰ However, these distinctions are unable to satisfy *Casey's* undue burden analysis, even when using the third interpretation of *Casey* in light of the *Gonzales* and *Whole Woman Health's* expansions.

Recently, the ACLU filed a complaint for declaratory and injunctive relief to the Southern District Court of Ohio.¹⁵¹ The ACLU argues that the Ohio law "imposes an unconstitutional undue burden on the abortion right" and "violates the rights to liberty and privacy secured to [women] by the Due Process Clause of the Fourteenth

150. Ohio Rev. Code Ann. § 2919.10.

151. *Preterm-Cleveland et al., v. Himes*, Verified Complaint for Declaratory and Injunctive Relief, No. 1:18-cv-109 (S.D. Ohio 2018).

Amendment to the United States Constitution.”¹⁵² To make this determination, the Southern District Court of Ohio must decide whether the Ohio prohibition on abortions based, in part or in whole, on a diagnosis (or possible diagnosis) of Down syndrome, or another disability, is a “substantial obstacle in the path of the woman seeking a previability abortion.”¹⁵³

The Ohio statute criminalizes the performance of abortions on a pregnant woman if the provider has “knowledge that the pregnant woman is seeking the abortion, in whole or in part” because a test, prenatal diagnosis, or another resource indicates that the unborn child will have Down syndrome, or another disability.¹⁵⁴ On the other hand, the Indiana statute prohibits the performance of abortions before or after viability if the person knows that the pregnant woman is seeking an abortion solely because of (1) the sex of the fetus, (2) the diagnosis of Down syndrome or any other disability, or (3) the race of the fetus.¹⁵⁵ The Ohio statute is obviously narrower than the Indiana statute, criminalizing the performance of abortions only if the reason for the abortion is because the fetus has a diagnosis of Down syndrome or another disability.

However, ironically, the Ohio statute is much more of a substantial obstacle to the woman’s obtainment of an abortion than the Indiana statute because of its use of the words “in whole or in part.”¹⁵⁶ The reason for a woman to obtain an abortion only needs to be based “in part” on the fetus’ indication of having Down syndrome. Theoretically, this means that no matter how small a role a diagnosis played into the woman’s decision, a doctor may not perform an abortion. Therefore, the Ohio Southern District Court’s reasoning will likely be similar to the Indiana District Court, finding the selective abortion ban places a substantial obstacle in the path of the woman seeking an abortion prior to fetal viability.¹⁵⁷

Even if Ohio announces that the compelling interest behind the Down syndrome selective abortion ban is to prohibit the use of abortion as a tool for eugenics, the selective abortion ban will still likely be held unconstitutional because the infringement on a woman’s abortion right is not slight. However, if Ohio’s compelling interest was to prohibit eugenics, and the statute only prohibited the

152. *Id.* at 3, 13.

153. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

154. § 2919.10(B).

155. *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r, Ind. State Dep’t of Health*, 265 F. Supp. 3d 859, 862 (S.D. Ind. 2017).

156. § 2919.10 (B).

157. *Planned Parenthood of Ind. & Ky.*, 256 F. Supp. 3d at 869.

reason for the abortion to be “solely” based on the fetus’ disability, then the statute might satisfy *Casey*. Applying the Court’s reasoning in the culmination of the *Roberts*, *Duarte*, and *Dale* cases, the infringement on a woman’s abortion right is only permitted when the infringement is slight and when the state’s compelling interest, such as prohibition of eugenics, is unrelated to the abortion right. Accordingly, the word “solely” would limit the infringement on the abortion right only to cases where the woman has absolutely based her abortion decision on the fetus’ diagnosis of Down syndrome and disclosed this absolute basis to the doctor performing the abortion.

A Court would hold the Ohio selective abortion ban unconstitutional, even if the statute limited the prohibition of selective Down syndrome abortions post-viability, because the Ohio law contains no exception allowing the doctor to perform the abortion when it is necessary to preserve the health or life of the mother.¹⁵⁸ As the Court has made clear, an undue burden exists when the state heavily regulates abortions without a health exception for the woman.¹⁵⁹ In *Gonzales*, the partial-birth abortion ban was valid, but only because the Act included a health exception to save the life of the mother.¹⁶⁰ In Indiana and other states that use the language “solely,” a health exception is unnecessary because as long as the woman has another reason to base her abortion decision on, such as for her health or in an emergency, the statute does not limit her ability to do so. On the other hand, Ohio’s statute’s use of “in whole or in part” creates a need for the health exception. Otherwise, the threat to the life of the mother, or any other medical emergency, would be an unavailable exception to obtain an abortion, at least if the reasoning for the abortion also included the fetus diagnosis of Down syndrome or another disability. Therefore, the Ohio statute with no health exception for the mother, just like the statute in *Gonzales*, creates an undue burden on the woman’s right to an abortion.

As repeated in all post-*Casey* Supreme Court abortion case law, a woman has a right, protected by the Due Process Clause of the Fourteenth Amendment, to choose to have an abortion before viability and to obtain it without undue interference from the state. The Ohio statute clearly places a “substantial obstacle in the path of the woman seeking an abortion of a nonviable fetus,” as well as a significant obstacle post-viability since the statute contains no health

158. *Preterm-Cleveland et al., v. Himes*, Verified Complaint for Declaratory and Injunctive Relief, No. 1:18-cv-109, 11 (S.D. Ohio 2018).

159. *Stenberg v. Carhart*, 530 U.S. 914, 938 (2002).

160. *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

exception for the woman in direct violation of *Gonzales*.¹⁶¹ If any woman in Ohio mentions, or even indicates, that her reasoning “in whole or in part” for seeking an abortion is based on the belief that the fetus has Down syndrome or another disability, then the doctor is prohibited from performing the abortion.¹⁶² Similar to Indiana’s law, the Ohio law takes the “ultimate decision to terminate her pregnancy before viability” out of the woman’s hand and into the state’s.¹⁶³

Even with a compelling interest that potentially “confers [medical] benefits sufficient to justify the burdens,” the language of the Ohio statute produces much more than a slight burden on the woman’s right to an abortion. The Southern District Court of Ohio, therefore, will likely follow the Indiana court’s reasoning. No matter the state’s interest, it is not strong enough to support a prohibition of abortion pre-viability. Thus, in light of *Roe*’s essential holding and *Casey*’s undue burden standard, the Southern District Court of Ohio will most likely find the Ohio selective Down syndrome ban to be an undue burden on a woman’s fundamental right to obtain an abortion.

VI. CONCLUSION

Ohio’s Down syndrome selection abortion ban, like many other state’s abortion bans, is likely to fail under *Casey*’s undue burden analysis, in light of the traditionally compelling interests the Supreme Court has explicitly recognized in abortion jurisprudence. However, the Court has illustrated in *Gonzales* that it will consider other interests than just the traditional state interests in the health of the mother and the potential life of the fetus. Further, *Whole Woman’s Health* redirected the undue burden analysis enough to allow the Court to weigh the benefits and burdens of the state’s regulations against the woman’s abortion right. If states adopt the interest in prohibiting eugenics, the benefits conferred—protecting the public health, combating and eradicating the discrimination of protected classes of persons, and safeguarding the integrity and ethics of the medical profession—may outweigh the burden that is a slight infringement on a woman’s right to an abortion.

Yet, the infringement must be slight. Selective abortion statutes must be narrowly tailored enough to only prohibit abortions if based “solely” on the sex, race, or potential disability. Then, and only then, will the Court consider the infringement slight. As prenatal genetic testing continues to develop and become more readily available

161. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

162. Ohio Rev. Code Ann. § 2919.10(B).

163. *Casey*, 505 U.S. at 879.

regarding the fetus' potential disabilities and other attributes, the state's compelling interest continues to increase both pre-viability and post-viability, unlike previous state interests such as health of the mother and the potential life of the fetus. Considering the burdens the selective abortion bans impose on abortion access together with the benefits those laws confer, it would appear that state's selective abortion bans might confer a benefit that is just compelling enough to outweigh a woman's abortion right.