No. 18-483

In the Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, *ET AL.*

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS IN SUPPORT OF REVERSAL

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended federalism and supported state and local autonomy in areas – such as public health – of traditionally state and local concern. In addition, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

written. For these reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Planned Parenthhod chapters and doctors have sued Indiana officials to challenge Indiana's House Enrolled Act ("HEA") 1337. *Amicus* EFELDF adopts the facts as stated by Indiana. *See* Pet. at 3-13. Insofar as these are facial challenges, the "facts" are the challenged Indiana statutes.

Constitutional Background

The federal Constitution preempts state law whenever the two conflict. U.S. CONST. art. VI, cl. 2. The merits questions presented here involve the contours of federal abortion rights created by this Court in *Roe v. Wade,* 410 U.S. 113 (1973), and its progeny. Those abortion rights are not absolute, but balance against states' powers to regulate maternal health and safety, as well as to protect the life of the fetus under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and its progeny.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In addition to that constitutional baseline, standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the

absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004).

Statutory Background

This litigation concerns two parts of Indiana's House Enrolled Act ("HEA") 1337: (1) a fetal-remains provision requiring burial or cremation of fetal remains by healthcare facilities, Ind. Code § 16-34-3-4(a), but that requirement does not apply to pregnant woman who get the abortion, *id.* §16-34-3-2(a); and (2) an anti-discrimination provision that prohibits aborting a fetus on the basis of race, sex, or disability. *Id.* §§16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8.

SUMMARY OF ARGUMENT

This Court should normalize abortion litigation to the same standards (*e.g.*, on third-party standing and facial challenges) that apply to other constitutional claims (Section I). With respect to the fetal-remains provisions, the Seventh Circuit did not follow binding precedent on the rational-basis test, which credits not only why a government acted but also any other plausible bases on which the government *may have* acted (Section II.A). In doing so, the Seventh Circuit split with the Eighth Circuit and this Court on the viability of fetal-remains laws (Section II.B), but was correct that the rational-basis test – as opposed to *Roe-Casey* undue-burden test – applied here because Planned Parenthood lacks third-party standing to assert female patients' *Roe-Casey* rights (Section II.C). With respect to the eugenics provisions, the Seventh Circuit would extend a constitutional right without first assuring itself and this Court that Planned Parenthood has third-party standing or that

the third-party rights holders both want these rights pressed and themselves have a case or controversy (Section III).

ARGUMENT

I. THIS COURT SHOULD REJECT THE PRINCIPLE THAT ABORTION CASES OPERATE UNDER DIFFERENT RULES THAN ANY OTHER LITIGATION.

EFELDF agrees with Judge Manion's partial concurrence and dissent that only this Court can cure "the legal misdirection that occurs in abortion cases." Pet. App. 21a-22a (*citing Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting) (Manion, J., concurring in part and dissenting in part). As Justice Scalia explained:

> None of these remarkable conclusions should come as a surprise. *What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.*
>
> …
>
> Does the deck seem stacked? You bet. As I have suggested throughout this opinion, *today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many aggressively proabortion novelties announced by the Court in recent years.* Today's distortions, however, are particularly blatant.

Hill, 530 U.S. at 741, 764-65 (citations omitted, emphasis added) (Scalia, J., dissenting). The doctrinal distortions to which Justice Scalia referred include selectively neutering the doctrines of narrow tailoring and overbreadth, *Hill,* 530 U.S. at 762, ignoring content-based regulation of speech, *id.* at 746-47, and inventing a "right to be left alone" in a public forum, *id.* at 754. But the issue extends well beyond speech, such as third-party standing, *compare Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2321-23 (2016) (Thomas, J., dissenting) *with Kowalski*, 543 U.S. at 128-30, and the availability of facial challenges. *Compare Casey,* 505 U.S. at 895 *with U.S. v. Salerno,* 481 U.S. 739, 745 (1987). There is simply no warrant in the Constitution for this Court to favor one right – which is not enumerated – over many other enumerated rights.

II. THIS COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S DISTORTION OF THE RATIONAL-BASIS TEST AND RESOLVE THE SPLIT IN AUTHORITY OVER FETAL-REMAINS STATUTES.

The Seventh Circuit's rational-basis analysis of the fetal-remains statute defies this Court's precedent on the rational-basis test and warrants review.

A. The Seventh Circuit misapplied the rational-basis test.

The Seventh Circuit majority invalidated the fetal-remains statute under the rational-basis test, but misapplied that test. Regardless of whether that misapplication represents a garden-variety split with other circuits' and this Court's precedents under the rational-basis test or yet another instance of there

being different rules for abortion cases, this Court should grant the writ.

A successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 462-63 (1988). Moreover, it is enough if the challenged state actor "rationally may have been considered [it] to be true" that the challenged state law would provide benefits. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). Further, because "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), rational-basis plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" *vis-à-vis* the legislative purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981). Instead, they must affirmatively negate "the *theoretical* connection" between the two. *Id.* (emphasis in original). The Seventh Circuit evaded the clear and well-understood confines of rational-basis review, and this Court's review is required to correct that split with precedents from this Court and other circuits.

Instead of considering the bases on which Indiana plausible *may have acted*, the panel majority seeks to pin purportedly impermissible views on why Indiana *did* act. One such *non sequitur* is the argument that a fetus does not qualify as a "person" for purposes of the

Fourteenth Amendment. Pet App. 17a (*citing Roe*, 410 U.S. at 158). An adult corpse also lacks personhood under the Fourteenth Amendment, *Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 559-60, 109 N.E. 206, 208 (Ind. 1915); *Robertson v. Wegmann*, 436 U.S. 584, 590-92 (1978), but that does make the remains anything other than human remains.

Contrary to the Seventh Circuit's misapplication of the rational-basis test, it is irrelevant that Indiana choose not to regulate how the mother of an aborted fetus disposes of her child's remains. Legislatures have wide authority to solve only part of a perceived problem, leaving the balance to future legislation, *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 487-89 (1955), which Indiana has done. Moreover, if Indiana never regulates maternal actions, that would not matter: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314 (1976). Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley,* 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia,* 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring). Once again, the Seventh Circuit

majority's focus on this aspect of Indiana's law did not apply the rational-basis test correctly.

Either to ensure a properly applied rational-basis test or to prevent the creation of yet another abortion exception to the rules of constitutional litigation, this Court should resolve the split in authority here.

B. States have a legitimate interest in fetal remains.

This Court already has recognized that states have a "legitimate interest in proper disposal of fetal remains," *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 n.45 (1983), *abrogated on other grnds.*, *Casey,* 505 U.S. at 882-83, and the Eighth Circuit has upheld a law like Indiana's. *See Planned Parenthood of Minn. v. State of Minn.*, 910 F.2d 479, 481 n.2 (8th Cir. 1990). This Court should resolve the split in authority over this issue.

Further, this Court should reject the Seventh Circuit's attempt to paint the Eighth Circuit's holding as mere *dicta* because "'Planned Parenthood conceded the state had a legitimate interest in protecting public sensibilities.'" Pet. App. 17a (*quoting Planned Parenthood of Minn.*, 910 F.2d at 488). That concession merely acknowledged this Court's finding in *City of Akron*, 462 U.S. at 452 n.45. Even without a Supreme Court decision compelling a concession, a party cannot evade a holding by refusing to defend the most indefensible and obvious faults in its position. Indeed, *Hellerstedt* itself acknowledged the weakness of *stare decisis* for holdings reached through a party's waiver

of an issue, 136 S.Ct. at 2320, but weak *stare decisis* is still *stare decisis*: it is not *dicta*.[2]

The Seventh Circuit's result thus conflicts with decisions of other circuits – not only in the rational-basis methodology used, *see* Section II.A, *supra*, but also in the substantive result reached. This litigation is an appropriate vehicle to resolve these splits.

C. The rational-basis test applies because Planned Parenthood lacks third-party standing to enforce *Roe-Casey* rights.

Leaving temporarily aside the important fact that the Seventh Circuit majority *misapplied* the rational-basis test, it is also important to note that the majority was correct to apply the rational-basis test, rather than the *Roe-Casey* undue-burden framework. With respect to fetal-remains, the abortion-industry lacks third-party standing to enforce its patients' *Roe-Casey* rights.

While EFELDF does not doubt that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Planned Parenthood and its *future* patients who may seek abortions at an abortion clinic: an *"existing* attorney-client relationship is, of

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[2] Significantly, the Minnesota case did not involve a situation where the parties "desired precisely the same result," so that "there is, therefore, no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47-48 (1971) (citation omitted). An Article III case or controversy existed between the parties, and Planned Parenthood conceded – *as it had to* – that states have an interest in fetal remains. *See* MINN. R. PROF'L CONDUCT r. 3.3 (counsel's duty of candor to tribunal).

course, quite distinct from the *hypothetical* attorney-client relationship posited here." *Kowalski,* 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Planned Parenthood lacks third-party standing to assert *Roe-Casey* rights unless it meets this Court's criteria for doing so. Specifically, the instances where this Court has found across-the-board standing for abortion doctors involve laws that apply equally to *all abortions* – or an entire category of abortions – and to *all relevant abortion doctors*.[3] That scenario provides the required identity of interests between the women patients who would receive the abortions and the physicians who would perform the abortions.

If this Court found that Planned Parenthood lacks third-party standing to assert its patients' *Roe-Casey* rights, the rational-basis test would apply. *Village of*

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[3] *See*, *e.g.*, *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (identity of interests existed between women seeking abortions and doctors performing them because the law outlawed all abortions, with exceptions only for the mother's health, rape, and birth defects); *City of Akron,* 462 U.S. at 440 n.30; *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 62 (1976).

Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (elevated scrutiny does not apply if plaintiff cannot assert third parties' rights). Because the rational-basis test *correctly applies* here, this Court should review whether the rational-basis test was *applied correctly*.

III. THIS COURT SHOULD REJECT THE SEVENTH CIRCUIT'S ALLOWING THIS LITIGATION TO PROCEED FACIALLY UNDER *ROE-CASEY* RIGHTS WITHOUT ANY EVIDENCE THAT INDIANA INFRINGED *ROE-CASEY* RIGHTS.

As Indiana explains, the *Roe-Casey* right never has extended beyond the right to decide whether to have *a child*. See Pet. at 28-29. *Roe* explicitly rejected a woman's "to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." *Roe*, 410 U.S. at 153 (emphasis added). On that foundation, *Casey* found three core *Roe* ideas:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the *State has legitimate interests from the outset of the*

> *pregnancy in protecting the health of the woman and the life of the fetus that may become a child.*

Casey, 505 U.S. at 846 (emphasis added). Absent there – and in this Court's other abortion cases – is a holding extending the *Roe-Casey* right to abortions for *any reason*.

Before this Court – or any court – hears a party's claim to expand the *Roe-Casey* right to this brave new world, *amicus* EFELDF respectfully submits that the Court should assure itself that the plaintiff has a case or controversy, U.S. CONST. art. III, §2, meeting both constitutional and prudential tests for constitutional litigation. While the Court can count on Planned Parenthood to argue for abortion on demand, it has not been established that the actual third-party rights holders want their *Roe-Casey* rights pressed here[4] or that the rights holders themselves have an Article III case or controversy. Moreover, these threshold issues all are a *plaintiff's* burden, *Renne v. Geary*, 501 U.S. 312, 316 (1991) ("[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record") (interior quotations omitted). *Amicus* EFELDF respectfully submits that the eugenics challenge here should be dismissed for

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[4] For example, the predominantly Asian women reportedly seeking sex-selected abortions may be coerced into that position by the same culture that asks them to abort female children. Not only reviewing courts but also the opposing state defendants – which, unlike Planned Parenthood, has *parens patrie* standing for these women, *Mills v. Rogers*, 457 U.S. 291, 297-98 (1982) – should assure themselves that *Roe-Casey* rights are voluntarily and truly invoked.

lack of an Article III case or controversy, as well as on prudential, third-party-standing grounds.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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Respectfully submitted,

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