No. 18-483

In The
Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND PARENTS OF DISABLED CHILDREN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to combating the injustice of denying human rights to unborn children and has filed as amicus in previous abortion cases in this Court.

Amici parents (listed in an Appendix to this brief) are the parents of children born with various disorders including Down Syndrome, Noonan Syndrome, Patau Syndrome, Turner Syndrome, Edwards Syndrome, Meckel-Gruber Syndrome, Potter Syndrome, spina bifida, and congenital heart disease, among others. Learning of these prenatal diagnoses did not change the love these parents felt for their children. Though many of these families ultimately lost their children, these parents do not consider that to have diminished the importance of the children's lives. Indiana's law protects children like theirs and recognizes that unborn children deserve protection from invidious discrimination.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No person or entity aside from amici, members of amicus ACLJ, or counsel for amici made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

At issue are two abortion regulations in Indiana. One sets requirements for the humane disposition of fetal remains. The other prohibits the abortion of a child when done for certain invidiously discriminatory reasons. The Seventh Circuit erred in ruling these provisions unconstitutional.

Amici wish to highlight two points. First, the Seventh Circuit ruled that, because this Court has held that preborn human beings are not "persons" under the Fourteenth Amendment, it is irrational for a state to treat their remains as human. This is not just a logical *non sequitur*, it is a notion that is profoundly unsettling to the many areas of law that treat unborn children as human beings.

Second, regarding the nondiscrimination provision, the Seventh Circuit's ruling disregards the important state interest in protecting expectant parents from the pressure caused by overly gloomy prenatal diagnoses – diagnoses that all too often prove inaccurate (the baby turns out healthy or only mildly disabled) or excessively pessimistic (the parents deeply love the child regardless of any disability).

This Court should grant review and reverse the judgment of the Seventh Circuit.

ARGUMENT

The Constitution does not compel states to treat the bodies of dead unborn children as just so much "medical trash." Pet. App. 121a (dissent from denial of en banc rehearing). Nor does the Constitution force states to allow abortion for any reason at all, no matter

how pernicious. The Seventh Circuit's contrary holding warrants this Court's review.

I. STATES CAN TREAT HUMAN REMAINS AS HUMAN REMAINS.

Concern for the proper disposition of human remains is ancient, indeed rooted in civilization itself. Burying the dead is a traditional obligation in Judaism,[2] a corporal work of mercy in the Christian tradition,[3] and a universal human value immortalized in the ancient Greek play, *Antigone*. To say that a state has *at the very least* a legitimate interest in seeing to the proper disposition of human remains is to understate the matter. States certainly have the authority to prohibit the "mindless dumping of aborted fetuses onto garbage piles," *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 451 (1983) (quoting state's asserted interest); *id.* at 474-75 (O'Connor, J., joined by White and Rehnquist, JJ.) (same).[4] *See also Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (summarily affirming three-judge district court ruling which, *inter alia*, rejected facial challenge to humane disposition statute). In this case Indiana has taken the straightforward step of, as the Seventh Circuit panel phrased it, "essentially requir[ing]

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[2]http://www.jewish-funeral-guide.com/tradition/jewish-burial-society.htm.

[3]http://www.newadvent.org/cathen/10198d.htm.

[4]The *Akron* Court did not reject the legitimacy of this interest, ruling instead that the particular provision at issue was unconstitutionally vague. *Id.* at 451.

abortion providers to dispose of aborted fetuses in the same manner as [other] human remains, as required under Indiana law." Pet. App. 15a. Since "aborted fetuses" are "human remains," this makes perfect sense.

The Seventh Circuit disagreed with this reasoning, perceiving a constitutional difficulty in any "recognition that aborted fetuses are human beings, distinct from other surgical byproducts, such as tissue or organs." *Id.* The panel did not cite any scientific basis for this objection, of course. After all, expectant mothers are not pregnant with "organs" or with some species other than *homo sapiens*. Instead, the Seventh Circuit, Pet. App. 15a-16a, pointed to this Court's ruling, in *Roe v. Wade*, 410 U.S. 113 (1973), that an unborn child is not a "person" within the meaning of that term in the Fourteenth Amendment. *Id.* at 156-58.[5] But to say that this holding controls all other areas of law is a profound *non sequitur*, as the dissents below noted. Pet. App. 41a (panel dissent), 123a (en banc dissent). Just as a corporation or a municipal entity can be or not be a "person" under the Fourteenth Amendment regardless of other laws, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2769 (2014); *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978),

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[5] *Roe*'s conclusion on this point is questionable. The notion that "there could be 'human beings' who are not 'constitutional persons' is unfortunate," *Alexander v. Whitman*, 114 F.3d 1392, 1409 (3d Cir. 1997) (Alito, J., concurring). *See also* Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. Law & Pub. Pol'y 539 (2017); Amicus Brief of Catholics United for Life et al., *Planned Parenthood of SE Pa. v. Casey*, Nos. 91-744 & 91-902 (Apr. 6, 1992). But in any event, the proposition is unhelpful to the challengers here, as explained in the text.

unborn children can be persons for some legal purposes and not others. *E.g.*, David Kadar, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 657 (1980) ("*Roe v. Wade* neither prohibits nor compels consistency of interpretation of the meaning of 'person' as between the fourteenth amendment and wrongful death statutes"). Furthermore, if *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion," *Maher v. Roe*, 432 U.S. 464, 474 (1977), then surely *Roe* creates no limitation on a State's authority to value the humanity of what was once a living unborn child by regulating the disposition of that child's remains. Indeed, one does not even have to be a Fourteenth Amendment person at all to receive the protection of laws. As the *en banc* dissent observed, states regularly adopt animal welfare laws protecting non-persons and their remains. Pet. App. 123a.

The problem with the decision below, however, is not just a failure of logic. The Seventh Circuit's ruling calls into question a host of laws that treat unborn children as human beings, namely, laws that protect unborn babies from torts and crimes.[6] Are these statutes now on uncertain constitutional footing? The Seventh Circuit summarily brushed off such concerns:

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[6] *E.g.*, *Bolin v. Wingert*, 764 N.E.2d 201, 205 (Ind. 2001) (cataloguing various state rules governing recovery for wrongful death of unborn). The National Conference of State Legislatures lists 38 states as currently having fetal homicide laws. www.ncsl.org/research/health/fetal-homicide-state-laws.aspx. Federal law likewise protects prenatal children as human beings. 18 U.S.C. § 1841 (protection of unborn children).

> The State asks us to infer a legitimate interest by pointing to state and federal fetal homicide statutes, as well as state wrongful death statutes that treat non-viable fetuses as human beings. But these statutes seek to address a valid state interest in promoting respect for potential life. The fetal disposition provisions differ because there is no potential life at stake.

Pet. App. 16a. But this makes no sense. In every fetal homicide or wrongful death case, the unborn baby is *already dead*, and thus there is no more "potential life" to respect. Indeed, the same goes for the application of tort, criminal, and disposition of remains laws to *born* humans – after death, there is no life to save. It nevertheless makes sense to adopt laws governing the remains of those who *were once* living human beings. The deceased unborn belong to that category. To say otherwise would not just be biologically ignorant, but profoundly insensitive to all those who feel the pain and loss of a miscarriage.

The Seventh Circuit's decision thus injects a deep uncertainty into the constitutionality of a host of laws that treat unborn children as human beings.[7] This Court should grant review to dispel that uncertainty.

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[7] *Cf. Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986) (rejecting *Roe*-based challenge to wrongful death cause of action for unborn baby).

II. STATES HAVE A STRONG INTEREST IN COMBATING THE POTENTIALLY LETHAL PESSIMISM OF SOME PRENATAL FORECASTS.

The Seventh Circuit also invalidated an Indiana statute prohibiting abortion where the baby is aborted "solely because the fetus has been diagnosed with . . . any . . . disability". Pet. App. 132a-133a. The court below inferred that because *Roe* declared that a woman has a choice to abort a child when pregnant, she has a right to abort for any reason – including "that she does not want a particular child" for invidiously discriminatory reasons. Pet. App. 12a. Of course, *Roe* said no such thing. Nor does such a rule follow logically. There are plenty of things a person has a "right" to do (e.g., hiring or firing employees, refusing to sell property or goods, ignoring student questions), but not when that right is exercised in an invidiously discriminatory manner. States have a valid interest in combating such discrimination, especially where, as here, it has lethal consequences.

Amici wish to highlight an additional state interest supporting a ban on eugenic abortions: preventing the pressuring of vulnerable parents into irreversible decisions to abort their children.

Physicians face financial incentives to err on the side of doom and gloom. If they predict the worst, but things turn out well, everyone is relieved and there is no lawsuit. But if physicians don't foretell adverse consequences, and such consequences materialize, the physicians may face legal liability for failure to warn. This is particularly true in the context of pregnancy, since some jurisdictions recognize "wrongful birth" suits predicated upon the parents' having missed the

chance to abort a child who is then born with disabilities. *See* Note, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 William & Mary L. Rev. 2329, 2332-36 (2016) (canvassing the states). In such jurisdictions, a physician worried about potential legal liability will be sure to note everything that might be wrong with the baby. There is no comparable financial counter-incentive.[8] As a consequence, prenatal diagnoses will tend to skew toward pessimism and put pressure on parents to go the abortion route.

There are serious moral and human rights problems associated with the idea of aborting a child because of that child's anticipated disability. Beyond that, however, Indiana can properly respond to at least two very worldly concerns: failure to anticipate the parental capacity to love children regardless of disabilities, and downright erroneous prenatal diagnoses.

Even parents who say they would have aborted had they known of their child's disabilities commonly profess great love for those same children. *See, e.g.*,

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[8]In theory there could be a counterbalancing "wrongful abortion" cause of action for those cases where the diagnosis of fetal disability is made negligently. *See* Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 Yale J. Health Pol'y, L., & Ethics 507 (2005). Problems of proof and causation, however, make such a cause of action challenging in practice, if not precluded in theory:

> To detect a wrongful abortion, a mother would have to suspect that the initial diagnosis was incorrect—which is not likely to be the case if a woman decides on an abortion precisely because of a genetic test or a doctor's advice—and to have access to some proof, also problematic considering the fetus is usually disposed of after the procedure.

Brandy Zadrozny, "Parents Sue Doctors Over 'Wrongful Abortion,'" *The Daily Beast* (Jan. 29, 2015).

Elizabeth Weil, "A Wrongful Birth?" *New York Times* (Mar. 12, 2006) ("the Brancas came to love A.J. deeply"); Elizabeth Picciuto, "Parents Sue for 'Wrongful Birth,'" *Daily Beast* (Aug. 17, 2014) ("It is indeed the case that they would have terminated the pregnancy. Now, however, they adore their daughter"); Aimee Green, "Jury awards nearly $3 million to Portland-area couple in 'wrongful birth' lawsuit against Legacy Health," *The Oregonian/OregonLive* (Mar. 9, 2012) ("his clients deeply love their daughter"). The grim prognosis a physician or genetic counselor offers a pregnant woman cannot possibly capture, and offer as a realistic counterweight, the genuine loving bond a mother or father later experiences. *See, e.g.,* Caitlin Keating, "'Miracle Baby' not Supposed to Live After Childbirth Celebrates Her First Birthday," *People* (Apr. 7, 2015) (parents of baby diagnosed with anencephaly decided to continue the pregnancy; "'Angela has made us better people . . . . I see life differently now. I only see love. I am a lucky mom'").

As for the diagnosis itself, there are countless instances in which parents were told a child would be born with severe disabilities, when in fact the child turned out to be either perfectly healthy or had only minor conditions. *See, e.g.,* Danielle Campoamor, "My Son was Misdiagnosed with Down Syndrome and it was Terrifying," *Romper* (Dec. 11, 2016) (baby misdiagnosed at 12 weeks with Down syndrome; son born perfectly healthy); Daniel P. Finney, "Meet 'Matthew the Great': The Iowa baby who defied a terminal diagnosis and lived," *Des Moines Register* (Aug. 27, 2018) (baby misdiagnosed at 23 weeks with terminal brain condition; baby was born with a manageable condition and may have no disabilities at

all); Micaiah Bilger, "Doctors Advised Her Parents to Abort Their Severely Disabled Baby, She's Born Healthy," *LifeNews.com* (May 11, 2016); Emma Innes, "'I was told to abort my healthy baby': Mother, 38, sues hospital after 'brain dead' son was born kicking and breathing," *Daily Mail* (Sept. 3, 2013). And these are only the cases where the parents chose *not* to abort; presumably many, many children die in abortion because they were inaccurately labeled as suffering from various conditions that did not actually exist.

Thus, aside from the interests Indiana identifies in its briefing, a ban on eugenic abortions furthers as well the legitimate interest in avoiding death from "excessive pessimism," i.e., failure to consider either parental capacity to love or the fallibility of prenatal diagnoses.

CONCLUSION

This Court should grant review and reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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Nov. 15, 2018

APPENDIX

APPENDIX: List of individual amici parents

1. Sara Breeggemann
Baby L[redacted] (anencephaly)
North Carolina

2. Mike and Theresa Farnan
Baby A[redacted] (T21)
Pennsylvania

3. Brenda Lefever
Baby (T21)
Pennsylvania

4. Kristi Holden
Baby H[redacted] (T13)
Texas

5. Gina Schmittdiel
Baby G[redacted] (T21)
Minnesota

6. Renee Pierson
Baby T[redacted] (PUV)
North Carolina

7. Janina Arritola
Baby A[redacted] E[redacted] (T13)
Georgia

8. Katherine Brown
Baby G[redacted] (undetermined genetic condition)
South Carolina

9. Menzea and Sam Nielsen
Baby G[redacted] (T13)
Iowa

10. Teresa Werner
Baby M[redacted] (Spina bifida)

11. Denise & David Lane
Baby B[redacted] (T13)
Texas

12. Melissa and Taylor Blanton
Baby L[redacted] (CHD)
North Carolina

13. Roberta Wickman
Baby D[redacted] R[redacted] (T18)
Illinois

14. Katrina Roldan
Baby A[redacted] (T13)
California

15. Jennifer and Bob Babbitt
Baby S[redacted] and Baby S[redacted] (rare genetic syndrome)
Indiana

16. Mike and Denise Sanchez
Baby D[redacted] G[redacted] (suspected T21/born typical)
Texas

17. Jonathan and Rebecca Beckler.
Baby T[redacted] (Spina Bifida and Hydrocephalus)
Wisconsin

18. Eric and Amy Peterson
Baby E[redacted] J[redacted] (T13)
Massachusetts

19. Hannah and Simon Lemaire
Baby Z[redacted] (Meckel Gruber Syndrome)
Minnesota

20. Wanda Smith
Montana

21. Sarah Connors
Baby B[redacted] (Limb Body Wall Complex)
New York

22. Virginia Moore
Baby D[redacted] (fetal hydrops)

23. Anna Klein
Baby N[redacted] (T21)
Texas

24. Chris & Elizabeth Arendale
Baby J[redacted] J[redacted] (T13)
Washington

25. Chaeli Meerman
Baby J[redacted] H[redacted] (anencephaly)
Michigan

26. Amy Vawter
Baby M[redacted] (CHD)
Washington

27. Joy Keith
Baby O[redacted] (T18)
Ohio

28. Amy Horlander
Baby A[redacted] B[redacted] (undetermined genetic condition)
Indiana

29. Nathaniel and Tricia Stevens
Baby E[redacted] (encephalocele)
Wisconsin

30. Constance Bell-Merck
Baby B[redacted] A[redacted]
North Carolina

31. Julie and Jonathan Kersting
Baby G[redacted] (premature rupture of membranes)
Massachusetts

32. Heather Johnson
Baby I[redacted] (T18)
Florida

33. Gennie Shelor
Baby A[redacted] (CHD)
North Carolina

34. Jason and Lauren Peetz
Baby J[redacted] (multiple anomalies)
North Carolina

35. Thomas & Elizabeth Warren
Baby A[redacted] & Baby B[redacted] (conjoined twins sharing a heart)
Delaware

36. Janet Onufer-Michael
Baby K[redacted] (Spina Bifida and Hydrocephalus)
New Jersey

37. Blake and Rebecca Fisher
Baby M[redacted] I[redacted] (T18)
Florida

38. David & Frances Liberto
Baby M[redacted] (CHD)
North Carolina

39. Catherine and George Merovich
Baby A[redacted] F[redacted] (fetal hydrops)
Pennsylvania

40. Katie James
Baby E[redacted] (anencephaly)
North Carolina

41. Jodi B.
Baby G[redacted] (Noonan Syndrome)
Iowa

42. Melissa Powell
Baby A[redacted] (T13)
South Carolina

43. Britney Stout
Baby C[redacted] (Potter's Syndrome)
Ohio

44. Kristiana Donahue
Baby W[redacted] (rare genetic syndrome)
Indiana