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

REPLY BRIEF OF PETITIONERS

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

*Counsel of Record

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General*
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MATTHEW MICHALOSKI
Deputy Attorneys General

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

STATUTES

RULES

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

REPLY BRIEF OF PETITIONER

The Indiana statutes at stake protect the inherent dignity of every human being, born and unborn, before and after death, without infringing on a woman's constitutional right to decide whether to bear or beget a child. The fetal disposition provision only requires the cremation or burial of aborted or miscarried fetal remains and does not prevent a single woman from having an abortion. And the anti-discrimination provision—or "eugenics" statute, as Judge Easterbrook called it, Pet. App. 121a—protects fetuses from being aborted solely because of disfavored characteristics frequently protected by American law, namely race, sex, and disability.

Planned Parenthood does not refute the national importance of these issues. Nor can it: As the numerous supporting amici demonstrate, debates over the ethics of discriminatory abortion and the proper disposal of fetal remains permeate the country. And while Planned Parenthood struggles to concoct new and creative ways to reconcile the Seventh Circuit and Eighth Circuit decisions, there is no escaping the bottom line: Minnesota may require fetal remains to be buried or cremated while Indiana may not.

With no vehicle problem to cite, Planned Parenthood's only argument against certiorari is that the issues presented need further percolation. But some issues are too important to put off for another day. The Court should grant certiorari to address these nationally important issues before the atrocities they portend become reality.

ARGUMENT

I. The Circuit Split on the Fetal Disposition Issue Is Real

A. The Seventh Circuit's holding conflicts with the Eighth Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*

The Eighth Circuit upheld Minnesota's fetal disposition statute in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). But the Seventh Circuit in this case struck down Indiana's fetal disposition statute, which is "substantially similar in every material respect." Pet. App. 39a (Manion, J., dissenting). The result is that Minnesota can require burial or cremation of fetal remains, but Indiana cannot. The decisions reach irreconcilable positions as to materially identical laws, and—particularly given the equally divided *en banc* Seventh Circuit—only this Court can decide which of these positions is correct.

1. Planned Parenthood argues that *Planned Parenthood of Minnesota* is distinguishable because the Indiana statute allows women to dispose of aborted or miscarried fetal remains themselves. Br. in Opp. to Cert. 10. But as Planned Parenthood begrudgingly recognizes, *id.* at 11 n.6, the Minnesota law *also* exempts women who miscarry at home and choose to dispose of the fetal remains themselves. *See Planned Parenthood of Minn.*, 910 F.2d at 488; *see also* Minn. Stat. § 145.1621(3) (applying only to abortions or miscarriages occurring "at a hospital, clinic, or medical

facility"). The Eighth Circuit found that exception permissible on grounds of personal privacy, *Planned Parenthood of Minn.*, 910 F.2d at 488, and while Indiana also specifies that mothers may dispose of the remains where the abortion or miscarriage occurs at a healthcare facility, that nuance adds no new legal question unaddressed by the Eighth Circuit. A woman who miscarries or aborts at a clinic also has a personal privacy interest in disposing of the remains of her child as she sees fit.

2. Planned Parenthood next attempts to tie the Eighth Circuit's holding to Minnesota's previous lack of sanitary disposal laws. This is a new and desperate distinction. Like Indiana's statute, the Minnesota statute requires healthcare facilities to dispose of fetal remains differently than they dispose of ordinary medical waste. *Planned Parenthood of Minn.*, 910 F.2d at 483 n.4. Accordingly, when Minnesota defended its law, it had to rely on the legislature's authority to require dignified treatment of fetal remains. *Id.* at 488.

Furthermore, the supposed distinction in the respective States' rationales is both hyper-analytical and irrelevant to the existence of a circuit conflict. The differing outcomes in the cases as to materially identical statutes cannot possibly be justified by reference to the regulatory scheme that each statute *replaced*.

First, the existence *vel non* of a circuit conflict does not depend on the congruence of arguments presented

by the parties; rather, it depends on whether the circuits have reached irreconcilable holdings as to materially identical laws. Here, they have. The Eighth Circuit says Minnesota (and therefore the other States in the circuit) may enforce a law requiring cremation or burial of aborted or miscarried fetal remains; the Seventh Circuit says Indiana (and therefore Illinois and Wisconsin) may not do the same. Those decisions are irreconcilable. Particularly because in both cases any *conceivable* legitimate rationale would suffice, the different outcomes cannot be explained by supposedly different state interests.

Second, the interests advanced by Indiana in this case and those relied on by the Eighth Circuit are not "meaningfully different." As Judge Manion explained in dissent, "the same state interest is involved in both cases." Pet. App. 40a. (Manion, J., dissenting). The introductory portion of the Minnesota statute specifically refers to "providing for the *dignified* and sanitary disposition of the remains of aborted or miscarried human fetuses." Minn. Stat. § 145.1621 (emphasis added). If aborted fetuses have no dignity worth protecting, there would be no reason to safeguard against offense of "public sensibilities" in the disposition of fetal remains. Judge Manion recognized that "[w]hether you call it 'public sensibilities,' 'morality,' or 'human dignity,' the state interest is the same." Pet. App. 40a. (Manion, J., dissenting). In both cases, it is the human dignity of the fetus that elevates it above ordinary medical waste, and it is the human dignity of the fetus that triggers public sensibilities with regard to disposition of its remains.

In short, the Seventh Circuit has held that a fetus's lack of Fourteenth Amendment rights *prohibits* States from requiring that fetal remains be treated with human dignity, while the Eighth Circuit has held to the contrary. Only this Court can resolve this critical, fundamental conflict as to whether States may require medical personnel to dispose of fetal remains in a dignified way on par with other human remains.

3. Nor is the validity of *Planned Parenthood of Minnesota* threatened by the pending appeal of an Arkansas fetal disposition statute in *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017). There, the district court invalidated a fetal disposition statute because it required the consent of the woman's sexual partner for disposition of the fetal remains—a provision not included in the Minnesota or Indiana statutes and which presents potential conflicts with *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 893–94 (1992) (invalidating spousal notification requirement). *Hopkins*, 267 F. Supp. 3d at 1098–1104. No matter the outcome in *Hopkins*, the vitality of *Planned Parenthood of Minnesota* is not threatened.

Because of the conflicting answers of two circuits, Minnesota can enforce its statute providing for the dignified disposal of human fetal remains, but Indiana cannot enforce its substantially similar statute. This Court should grant certiorari to decide which of these irreconcilable positions is correct.

B. This case is a proper vehicle to resolve the split over whether States have legitimate interests in human dignity of fetal remains

Curiously, Planned Parenthood next argues that, notwithstanding a circuit conflict over whether a fetal remains statute violates the Fourteenth Amendment as an arbitrary exercise of government power, the Court should deny certiorari because it—Planned Parenthood—failed also to claim that Indiana's fetal remains statute violates the right to abortion. To say the least, it is hard to see the logic of eschewing resolution of one constitutional claim that already divides the circuits merely because different constitutional claims bearing on the same general subject are pending in lower courts.

The logic of taking that approach is especially hard to follow in light of the abortion-rights cases Planned Parenthood cites. As explained above, in contrast with this case, the statute invalidated by the district court in *Hopkins* prompted an undue-burden abortion-rights claim because it requires the consent of the woman's sexual partner before the final disposition of the fetus. 267 F. Supp. 3d at 1098–1104. *Hopkins* is, at heart, a spousal-interference case, not a fetal-disposition case, so questions about the proper legal standard and outcome have no bearing on the appropriate standard and outcome in this case.

Separately, the district court's decision in *Whole Woman's Health v. Smith*, No. A-16-CV-01300-DAE, 2018 WL 4225048, at *14 (W.D. Tex. Sept. 5, 2018),

actually underscores the need for review here. There, the court held that, even if a fetal-disposition law advances legitimate state interests in protecting the human dignity of fetal remains, *id.* at *14, doing so imposes an undue burden on the right to abortion by endorsing a particular viewpoint about the humanity of the fetus, *id.* at *19 ("The challenged laws also impose intrusive and heavy burdens on women whose beliefs about the status of embryonic and fetal tissue and the meaning of abortion or miscarriage diverge from the viewpoint endorsed by the State.").

While the *Smith* court's self-contradictory explanation casts the issue in the terminology of undue burden, it addresses precisely the same substantive question resolved by the courts below—*i.e.*, whether, notwithstanding the right to abortion (and a fetus's concomitant lack of Fourteenth Amendment personhood), States may require burial or cremation of fetal remains based on a view that such remains are imbued with human dignity. *See* Pet. App. 69a ("[I]f the law does not recognize a fetus as a person, there can be no legitimate state interest in requiring an entity to treat an aborted fetus *the same* as a deceased human." (emphasis in original)). Accordingly, *Smith* adds no new dimension to the dispute squarely presented here, and its existence only reinforces the national importance of the fetal disposition issue.

II. The Non-Discrimination Issue Is a Question of National Importance that Merits Resolution by this Court

A. The stakes are too high to await further percolation

New non-invasive genetic testing early in pregnancy has led to an increase in the number of babies that are aborted simply because they have Down syndrome or another disability. *See* Pet. for Writ of Cert. 6–7; Pet. App. 32a–33a; Amicus Br. of Wisconsin 21–23; Amicus Br. of Alliance Defending Freedom 7–9; Amicus Br. of Restoration Project 25–26; Amicus Br. of Foundation Jerome Lejeune 4–5.

Planned Parenthood does not contest this scientific fact. Instead, it argues that "[a]llowing women and their families the freedom to make that decision for themselves is the best way to ensure that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive." Br. in Opp. to Cert. 2. In other words, systematically eliminating children with Down syndrome from our society is preferable to allowing them to be born into the "wrong" families. Surely the Constitution does not require States to embrace this neo-eugenic viewpoint.

Planned Parenthood argues not that this issue is unimportant but that the Court's review would be premature because not enough appellate courts have considered it. But the critical criterion for certiorari is

national importance, not merely circuit conflict: Certiorari is warranted where, as here, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). When the issue is important enough, the Court does grant certiorari, even absent a circuit conflict, to consider the constitutionality of state laws affecting individual constitutional rights. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 551 U.S. 1192 (2007). As here, *Crawford* involved an up-and-coming issue of national importance (there, Indiana's Voter ID law) where other States were already implementing regulations similar to those being challenged but no other federal circuit had yet addressed the issue. Pet. for Writ of Cert. at 15, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (No. 07-21). States, just like civil rights plaintiffs, have an interest in timely resolution of fraught, nationally significant questions of constitutional law.

As Planned Parenthood acknowledges, eight other States currently have bans on sex-selective abortion, three States ban disability-selective abortion, and one bans race-selective abortion. *See* Br. in Opp. to Cert. 17–18 & ns. 8, 10. Moreover, at least two other States—Pennsylvania and Utah—have recently considered enacting similar bans. *See* Michelle L. Price, *Utah House Oks Bill Banning Abortions Based on Down Syndrome*, U.S. News & World Report, Feb. 5, 2018, https://www.usnews.com/news/best-states/utah/articles/2018-02-05/utah-house-oks-bill-banning-abortions-based-on-down-syndrome; Avery Anapol, *Pennsylvania House Passes Bill Banning Abortions*

for Down Syndrome, The Hill, Apr. 16, 2018, https://thehill.com/homenews/state-watch/383456-pennsylvania-house-passes-bill-banning-abortions-for-down-syndrome.

Furthermore, the discriminatory abortion issue has received attention around the world. *See* Cert. Pet. 22–26. Planned Parenthood's own medical director, Dr. Stutsman, admitted in his deposition that approximately half of all babies with Down syndrome are aborted. Appellants' App. 70. And in Iceland and other European countries, that number approaches 100%. Cert. Pet. 26.

The decisions below say that the Constitution prevents States from acting to prevent such systematic elimination of those with disabilities or other undesirable characteristics through private choice. In light of the importance of that issue, further percolation is unwarranted, especially given the separate dissents of Judges Manion and Easterbrook, which fully vet the arguments. As Judge Easterbrook observed, Pet. App. 122a–23a, only this Court can provide the definitive answer.

B. Indiana is not asking the Court to revisit *Roe*, *Casey*, or any other abortion precedents

The Court may uphold Indiana's anti-discrimination statute on its face without disturbing any of its abortion precedents, including *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Those

cases protect abortion only to effectuate the binary choice of "whether to bear or beget a child," *Casey*, 505 U.S. at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)), not to terminate a particular pregnancy only because the child possesses disfavored characteristics. Accordingly, the Court need not disturb those cases to rule Indiana's way.

In addition, the Court has not decided whether *Roe* and *Casey* protect a right to decide *which* child to bear in any other of its prior abortion decisions, including the cases cited by Planned Parenthood. *See* Br. in Opp. to Cert. 21 n.12. In *Harris v. McRae*, 448 U.S. 297, 340 (1980), a dissenting justice noted the unavailability of federal funding for aborting a fetus that may not survive, which at most amounts to an acknowledgment that abortions in such circumstances occur. In *Colautti v. Franklin*, 439 U.S. 379, 389-90 (1979), the Court mentioned the *argument* that a law prohibiting abortion where a fetus may be viable could be unconstitutional because it could affect abortions based on genetic abnormality detected at 18–20 weeks gestational age, but expressly decided the case on other (fair-notice) grounds. And the abortion ban in *Doe v. Bolton*, 410 U.S. 179, 205–07 (1973), exempted fetuses with genetic abnormalities, so the Court had no reason to address the issue.

Planned Parenthood tries to generate conflict between the State's position and *Roe* and *Casey* by suggesting that Indiana's anti-discriminatory abortion law would interfere with abortion by a woman who decides she is too old to have *any* child due to the risk of genetic abnormality. *See* Br. in Opp. to Cert. 21–22

n.13. In that case, the theory goes, the woman would be making a binary abortion decision—no child, period—yet would be stymied because Indiana law precludes abortion based solely on a "potential diagnosis" of a disability. First, however, it is not clear the statute would apply in that circumstance since the woman would be choosing abortion based on *her own* characteristics, not the actual characteristics of the child. Second, even if in that limited circumstance the Indiana law must give way to the binary right defined by *Roe* and *Casey,* that would not justify facial invalidation of the statute as to all other applications of the statute that do *not* implicate the right defined by *Roe* and *Casey*. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)).

Accordingly, to prevail here, Indiana need not, and does not, urge the Court to use this case as a vehicle to overturn *Roe*, *Casey*, or any other of its abortion precedents. It asks the Court only to address whether the abortion right protected by those precedents is so broad that it safeguards even discriminatory abortions. The Court has never before addressed this issue; it should do so now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
MATTHEW MICHALOSKI
Deputy Attorneys General

Counsel for Petitioner

Dated: December 18, 2018