

No. 20-1434

**In The
Supreme Court of the United States**

**LESLIE RUTLEDGE, ATTORNEY GENERAL OF
ARKANSAS, *ET AL.*,**

Petitioners,

v.

LITTLE ROCK FAMILY PLANNING SERVICES, *ET AL.*,

Respondents.

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

**AMICUS BRIEF OF THE AMERICAN
CENTER FOR LAW AND JUSTICE
IN SUPPORT OF PETITIONERS**

JAY ALAN SEKULOW

Counsel of Record

STUART J. ROTH

COLBY M. MAY

WALTER M. WEBER

OLIVIA SUMMERS

AMERICAN CENTER FOR

LAW & JUSTICE

201 Maryland Ave., N.E.

Washington, DC 20002

(202) 546-8890

sekulow@aclj.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. There Is No Right to Abort for Invidiously Discriminatory Reasons.....	2
II. States Have a Strong Interest in Combating the Potentially Lethal Pessimism of Some Prenatal Forecasts.....	3
CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES	Page
<i>June Medical Servs. v. Russo</i> , 140 S. Ct. 2103 (2020)	1
<i>Pleasant Grove City v. Summum</i> , 555 U.S. 460 (2009)	1
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	2
OTHER AUTHORITIES	
Micaiah Bilger, “Doctors Advised Her Parents to Abort Their Severely Disabled Baby, She’s Born Healthy,” <i>LifeNews</i> (May 11, 2016)	8
Micaiah Bilger, “Doctors Said Sarah Catherine Was ‘Incompatible With Life’ and Urged Abortion. She’s Now 19 Months Old,” <i>LifeNews</i> (Jan. 13, 2021)	6
Robert Brodsky, “He’s his mom’s ‘miracle baby:’ Doctors save boy born with dangerous cyst,” <i>Newsday</i> (Jan. 27, 2020)	5
Danielle Campoamor, “My Son was Misdiagnosed with Down Syndrome and it was Terrifying,” <i>Romper</i> (Dec. 11, 2016)	6

Monica Charsley, “Three-year-old with spinal condition fundraises for NHS,” <i>Sutton & Croydon Guardian</i> (Apr. 22, 2020)	8
Heather Clark, “Australian Woman Advised to Abort Baby With Terminal Condition, Child Born Completely Healthy,” <i>Christian News</i> (Dec. 10, 2019)	7
Kevin Doyle, “Medic who signed off on abortion of child in belief of fatal foetal abnormality ‘never examined or met mother’, Dáil hears,” <i>Independent.ie</i> (June 12, 2019)	9
Nicole Weisensee Egan, “Congresswoman’s ‘Miracle Baby’ Born Without Kidneys Finally Gets One – from Her Dad: ‘We Are Blessed,’” <i>People</i> (Apr. 15, 2016)	5
Daniel P. Finney, “Meet ‘Matthew the Great’: The Iowa baby who defied a terminal diagnosis and lived,” <i>Des Moines Register</i> (Aug. 27, 2018)	8
Dr. Christina Francis, “Your baby’s prenatal diagnosis is not a death sentence. Just ask my giggling goddaughter,” <i>USA Today</i> (Mar. 6, 2021)	6
Aimee Green, “Jury awards nearly \$3 million to Portland-area couple in ‘wrongful birth’ lawsuit against Legacy Health,” <i>The Oregonian/OregonLive</i> (Mar. 9, 2012)	4

Emma Innes, “I was told to abort my healthy baby’: Mother, 38, sues hospital after ‘brain dead’ son was born kicking and breathing,” <i>Daily Mail</i> (Sept. 3, 2013)	8
Caitlin Keating, “Miracle Baby’ not Supposed to Live After Childbirth Celebrates Her First Birthday,” <i>People</i> (Apr. 7, 2015)	5
Patty Knap, “The doctor advised the parents to ‘terminate,’ but they chose prayer instead,” <i>Aleteia</i> (May 18, 2020)	7
Miranda Larbi, “TRUST YOUR GUT Doctors told me I was inhumane for NOT aborting my boys – but my instinct was right, I have healthy twins,” <i>The Sun</i> (Feb. 12, 2019)	8
“Down syndrome,” <i>Mayo Clinic</i>	5
Leigh McManus, “Mother who was encouraged to abort her unborn baby because medics thought he had Downs Syndrome warns others to get a second opinion after he was born perfectly healthy,” <i>Daily Mail</i> (Nov. 16, 2018)	6
Note, <i>Rights Gone Wrong: A Case Against Wrongful Life</i> , 57 <i>William & Mary L. Rev.</i> 2329 (2016)	3
Ronen Perry & Yehuda Adar, <i>Wrongful Abortion: A Wrong in Search of a Remedy</i> , 5 <i>Yale J. Health Pol’y, L. & Ethics</i> 507 (2005)	3

Elizabeth Picciuto, “Parents Sue for ‘Wrongful Birth,”” <i>Daily Beast</i> (Aug. 17, 2014)	4
Ellen Scott, “First-time mum who was told abortion was her best option gives birth to healthy ‘miracle’ baby,” <i>Metro</i> (June 2, 2020) . . .	7
“Scottish mum gives birth to healthy baby after ‘ignoring medical advice to terminate pregnancy,”” <i>The Scotsman</i> (June 16, 2019)	8
Mark Smith & Sam Elliott, “Miracle baby born three months early and weighing just 1lb is now thriving,” <i>Mirror</i> (Dec. 23, 2019)	7
Sheila Walsh, “My doctor said, ‘Your baby is incompatible with life’ – Here’s what happened next,” <i>Fox News</i> (Feb. 8, 2020)	7
Elizabeth Weil, “A Wrongful Birth?” <i>New York Times</i> (Mar. 12, 2006)	4
Katie Weston, “Mother, 21, prepares to celebrate Christmas with her 14-month-old daughter after turning down TEN chances for abortion over baby’s fatal heart condition that medics thought would kill her before first birthday,” <i>Daily Mail</i> (Dec. 19, 2019)	7
Brandy Zadrozny, “Parents Sue Doctors Over ‘Wrongful Abortion,”” <i>The Daily Beast</i> (Jan. 29, 2015)	4

INTEREST OF AMICUS¹

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. Sumnum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020), 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.

SUMMARY OF ARGUMENT

At issue is a law that prohibits a physician from aborting a child when the abortion is done for an invidiously discriminatory reason, namely, that the child has Down syndrome. The Eighth Circuit ruled this provision unconstitutional. This Court should grant review.

The decision below 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

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 amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

child regardless of any disability). This Court should grant review and reverse the judgment below.

ARGUMENT

The Constitution does not compel states to allow abortions done for perniciously discriminatory reasons. In particular, states may prevent physicians from doing abortions that target Down syndrome children with the message, “We’d rather you were dead than born alive.” The Eighth Circuit’s contrary holding warrants this Court’s review.

I. THERE IS NO RIGHT TO ABORT FOR INVIDIOUSLY DISCRIMINATORY REASONS.

The Eighth Circuit invalidated an Arkansas statute forbidding a physician from doing an abortion where the baby is being aborted “solely on the basis of” a Down syndrome diagnosis. Pet. App. 7a. The court below inferred that because *Roe v. Wade*, 410 U.S. 113 (1973), declared that a woman has a right to abort a child when pregnant, she – and by extension, the abortionist – therefore has a right to abort for *any* “particular” reason – including the desire to extinguish a Down syndrome child before birth. Pet. App. 10a. *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), 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.

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

There is 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.² As a consequence, prenatal

² 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

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, a state 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.*, 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

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).

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”).

Moreover, the diagnosis of disorders previously deemed irremediable, or virtually so, can provide the occasion for the development of new treatments that can benefit not only the child at issue but those who may later have a similar diagnosis. *See, e.g.*, Robert Brodsky, “He’s his mom’s ‘miracle baby:’ Doctors save boy born with dangerous cyst,” *Newsday* (Jan. 27, 2020) (prenatal diagnosis of lymphatic cysts set child’s chances of survival at 10%, but mother relentlessly researched malady and helped assemble team that successfully treated child); Nicole Weisensee Egan, “Congresswoman’s ‘Miracle Baby’ Born Without Kidneys Finally Gets One – from Her Dad: ‘We Are Blessed,’” *People* (Apr. 15, 2016) (after child diagnosed prenatally with condition that is “100% fatal,” parents tried novel therapy that proved successful). Down syndrome babies in particular have seen remarkable progress in their health outcomes. *See* “Down syndrome,” *Mayo Clinic* (“Life spans have increased dramatically for people with Down syndrome”), available at <https://www.mayoclinic.org/diseases-conditions/down-syndrome/symptoms-causes/syc-20355977>. The loving management of the babies’ health and treatment of associated conditions, instead of the discarding of their lives, helps pave the way to even better outcomes in the future.

As for the diagnosis itself, there are countless instances in which parents were told a child would be born with severe or fatal disabilities, when in fact the child turned out to be either perfectly healthy or had manageable, or even only minor, conditions. This has specifically happened regarding a false diagnosis of Down syndrome or related maladies. *See, e.g.*, Leigh McManus, “Mother who was encouraged to abort her unborn baby because medics thought he had Downs Syndrome warns others to get a second opinion after he was born perfectly healthy,” *Daily Mail* (Nov. 16, 2018) (misdiagnosed at 12 weeks); Danielle Campoamor, “My Son was Misdiagnosed with Down Syndrome and it was Terrifying,” *Romper* (Dec. 11, 2016) (misdiagnosed at 12 weeks; born perfectly healthy). *See also* Dr. Christina Francis, “Your baby’s prenatal diagnosis is not a death sentence. Just ask my giggling goddaughter,” *USA Today* (Mar. 6, 2021) (baby diagnosed prenatally with cystic hygroma, hydrops fetalis, and likely Down syndrome with “a 0% chance of survival after birth” now a happy eight-year-old).

These cases are just part of a larger set of incorrect, or overly pessimistic, diagnoses of prenatal anomalies.

[W]e know that about 9% of adverse fetal diagnoses on ultrasounds turn out to be wrong, and that is only among the babies who are given the opportunity to continue living. In some cases, depending on the method, false positives for fetal abnormalities are as high as 50%.

Id. See, e.g., Micaiah Bilger, “Doctors Said Sarah Catherine Was ‘Incompatible With Life’ and Urged

Abortion. She's Now 19 Months Old," *LifeNews* (Jan. 13, 2021) (Trisomy 18); Ellen Scott, "First-time mum who was told abortion was her best option gives birth to healthy 'miracle' baby," *Metro* (June 2, 2020) (baby diagnosed prenatally with hydrops fetalis and cystic hygroma born in "perfect health"); Patty Knap, "The doctor advised the parents to 'terminate,' but they chose prayer instead," *Aleteia* (May 18, 2020) ("A second ultrasound . . . confirmed almost no amniotic fluid, and the doctor said that likely meant the baby wouldn't survive until birth, or would die soon after birth," but the baby overcame difficulties after birth and "is now an adorable, healthy two-year-old girl"); Sheila Walsh, "My doctor said, 'Your baby is incompatible with life' – Here's what happened next," *Fox News* (Feb. 8, 2020) (test results had been mixed up); Mark Smith & Sam Elliott, "Miracle baby born three months early and weighing just 1lb is now thriving," *Mirror* (Dec. 23, 2019) (baby diagnosed prenatally with "a number of complications, including a fused kidney" and "skeletal dysplasia" found after birth to have "no abnormalities at all"); Katie Weston, "Mother, 21, prepares to celebrate Christmas with her 14-month-old daughter after turning down TEN chances for abortion over baby's fatal heart condition that medics thought would kill her before first birthday," *Daily Mail* (Dec. 19, 2019); Heather Clark, "Australian Woman Advised to Abort Baby With Terminal Condition, Child Born Completely Healthy," *Christian News* (Dec. 10, 2019) ("medical tests had previously shown that the child had a terminal brain condition, resulting in doctors recommending an abortion," but the child was born "perfectly healthy"; in response, other mothers reported similar

experiences with dire diagnoses that failed to materialize); Miranda Larbi, “TRUST YOUR GUT Doctors told me I was inhumane for NOT aborting my boys – but my instinct was right, I have healthy twins,” *The Sun* (Feb. 12, 2019); Daniel P. Finney, “Meet ‘Matthew the Great’: The Iowa baby who defied a terminal diagnosis and lived,” *Des Moines Register* (Aug. 27, 2018) (misdiagnosed at 23 weeks with terminal brain condition; 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* (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); “Scottish mum gives birth to healthy baby after ‘ignoring medical advice to terminate pregnancy,’” *The Scotsman* (June 16, 2019) (“The young mum said she left medics ‘gobsmacked’ when her baby boy arrived without any problems – despite being told the chances of him making it were low” because of a “major bladder blockage” and suspected Edwards Syndrome).

In other cases, the predicted severity of the condition may be greatly exaggerated. *E.g.*, Monica Charsley, “Three-year-old with spinal condition fundraises for NHS,” *Sutton & Croydon Guardian* (Apr. 22, 2020) (child with spina bifida walks daily for COVID charity; “We were told she would likely be in a vegetative state once born and her chances of walking were near impossible”).

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. *See, e.g.*, Kevin Doyle, “Medic who signed off on abortion of child in belief of fatal foetal abnormality ‘never examined or met mother’, Dáil hears,” *Independent.ie* (June 12, 2019) (baby aborted after diagnosis of Trisomy 18 that final test results, which arrived post-abortion, disproved).

Thus, a ban on eugenic abortions of Down syndrome children furthers 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 Eighth Circuit.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Walter M. Weber
Olivia Summers
American Center for
Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

May 11, 2021