No. 18-483

In the Supreme Court of the United States

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

BRIEF *AMICI CURIAE* OF AMERICANS UNITED FOR LIFE AND CHARLOTTE LOZIER INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the Constitution and pro-life policy, and are often consulted on various bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including a human fetal remains model bill that ensures a proper and respectful final disposition. See Ams. United for Life, DEFENDING LIFE 290–301 (2018 ed.) (state policy guide providing model bill that requires unborn humans to be treated with dignity and respect).

Charlotte Lozier Institute (CLI) is the education and research arm of the Susan B. Anthony List. Named after a nineteenth century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, CLI studies federal and state policies and their impact on women's health and on child and family well-being. CLI is

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1 No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice and have consented to the filing of this brief.

committed to bringing the power of science, medicine, and research to law and public policy. It has continued to provide scientific information on fetal research, fetal disposition, and related bioethical issues to members of Congress and their staff, state legislators, and media entities. Since 2015, CLI scholars and staff have published research and given legislative testimony regarding the disposition of fetal remains in Indiana and across the nation.

SUMMARY OF ARGUMENT

Without regulations, medical practitioners are free to dispose of human fetal remains by incineration with medical waste, by dumping in landfills, and even by burning the remains to generate energy. In response to reports that human fetal remains were being disposed of in inhumane ways such as these, Indiana passed House Enrolled Act 1337, which included a fetal disposition provision requiring the humane and dignified disposition of human fetal remains. This provision recognized the simple biological fact that human fetuses are human beings—a fact that is consistently recognized in federal and state laws, as well as by this Court and other courts.

Despite the rationality of treating human fetal remains humanely and with dignity, the Seventh Circuit—in conflict with the Eighth Circuit—found that there was no rational reason for Indiana to do so. Without intervention by this Court, Indiana will be unable to stop the inhumane disposition of human fetal remains within its borders. And without clarification on whether or not these laws are

constitutional, other states that want to require the humane and dignified disposition of human fetal remains are left in limbo. As such, this Court should grant Indiana's petition.

ARGUMENT

The Supreme Court should grant certiorari to determine a nationally important question: Whether the Constitution prohibits states from requiring the humane and dignified disposition of human fetal remains.

A. Human fetuses are human.

1. Human fetuses are unborn human beings, who are unique and separate from their mother.

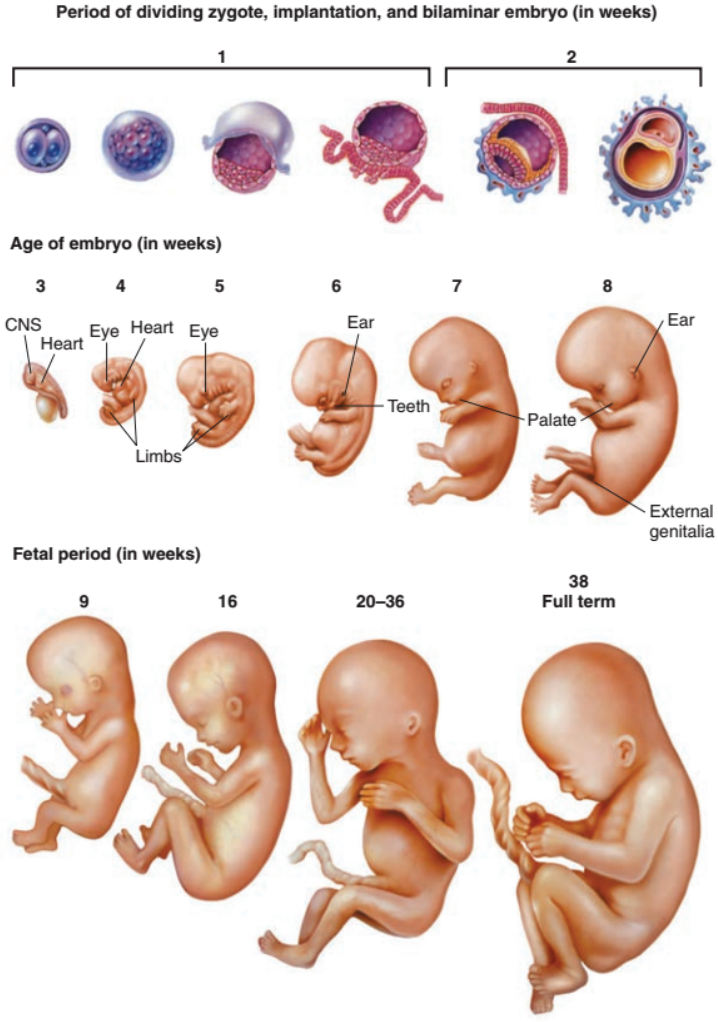
After conception and prior to birth, mammals go through two major stages of development: embryo and fetus. An "embryo" is the "young of any organism in an early stage of development," while a "fetus" is "an unborn animal in its later stages of development." *Embryo*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 783 (23d ed. 2017); *Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 911.

For humans, "[t]he embryo and the fetus are the two primary names given to the unborn human during gestation." Clarke D. Forsythe, *Legal Perspectives on Cloning: Human Cloning and the Constitution*, 32 Val. U. L. Rev. 469, 474 (1998). "Embryo" is "the stage of prenatal development from the time of fertilization of

the ovum (conception) until the end of the eighth week." *Embryo*, MOSBY'S MEDICAL DICTIONARY 605 (10th ed. 2017). The embryonic period is "characterized by rapid growth, differentiation of the major organ systems, and development of the main external features." *Id.* A "fetus" is "the human being in utero after the embryonic period and the beginning of the development of the major structural features, from the ninth week after fertilization until birth." *Fetus*, MOSBY'S MEDICAL DICTIONARY 690. The graphic on the next page shows the stages of development of an unborn human from embryo to fetus. See *Stages of Development of Human Embryo Including Mature Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 784.

Indiana's fetal disposition provision uses "fetus" as shorthand for all stages of development of an unborn human (embryo and fetus), and defines "fetus" as "an unborn child, irrespective of gestational age or the duration of the pregnancy." Ind. Code § 16-18-2-128.7. For the remainder of this brief, all references to "fetus" mirror Indiana's broader statutory definition.

Fetuses by definition are not egg, sperm, or mere tissue; they are unborn human beings. See *Fetus*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 911 (defining "fetus" as "an *unborn human*"); Forsythe, 32 Val. U.L. Rev. at 477 ("[T]he one-celled human embryo is not simply 'human life' but a human being."). "A human being is simply a member of the species homo sapiens, and it is defined biologically, by species, not developmentally." Forsythe, 32 Val. U.L. Rev. at 478. Although unborn humans develop in their mother's womb and are dependent on their mother for survival,



STAGES OF DEVELOPMENT OF HUMAN EMBRYO INCLUDING MATURE FETUS

they are separate and unique human beings from their mother. An unborn human has unique DNA that is distinct from his or her mother (and father). See *id.* at 475, 477. A male unborn human is a different sex from his pregnant mother, a female. An unborn

human conceived by parents of different races is a combination of his or her parents' races and thus a different racial composition from his or her mother (and father). In sum, unborn humans are unique and separate human beings from their mother.

2. Federal and state laws recognize the humanity of unborn humans.

Federal and state laws, both inside and outside of the abortion context, recognize the humanity of unborn humans. For example, federal and state laws define unborn humans as human beings. The federal Unborn Victims of Violence Act defines "unborn child" as a "child in utero," which means "a member of the species homo sapiens, at any stage of development, who is carried in the womb." 18 U.S.C. § 1841(d). Many state laws either mirror this definition or adopt a version of their own.[2]

Outside the context of a legal abortion, federal and state laws criminalize and provide remedies for killing an unborn human. The Unborn Victims of Violence Act makes it a federal crime to kill or cause bodily injury to an unborn human in utero. 18 U.S.C. § 1841(a)(1). Thirty-eight states currently treat the killing of an unborn human as homicide, with at least

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2 See, *e.g.*, Alaska Stat. § 11.81.900(b)(64); Ark. Code Ann. § 5-1-102(13); Fl. Stat. § 775.021(5); Ga. Code Ann. § 52-7-12.3(a); 720 Ill. Comp. Stat. § 5/9-2.1(d); Kan. Stat. Ann. § 21-5419; Ky. Rev. Stat. Ann. § 507A.010; La. Rev. Stat. Ann. §§ 14:2(7), (11); Minn. Stat. § 145.4241; Miss. Code Ann. § 97-3-37; N.C. Gen. Stat. § 14-23.1; Okla. Stat. tit. 21, § 691; S.C. Code Ann. § 16-3-1083; Wis. Stat. § 939.75(1).

twenty-eight of those states criminalizing the act from conception.[3] Nearly all fifty states, as well as the District of Columbia, have wrongful death statues, allowing recovery for the death of an unborn human or the subsequent death of an infant born alive who was injured while in utero.[4]

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3 See, *e.g.*, Ala. Code § 13A-6-1; Alaska Stat. § 11.41.150; Ariz. Rev. Stat. Ann. § 13-1102; Ark. Code Ann. § 5-1-102(13); Cal. Penal Code § 187(a); Fla. Stat. § 775.021(5); Ga. Code Ann. § 16-5-80; Idaho Code Ann. § 18-4001; 720 Ill. Comp. Stat. 5/9-1.2; Ind. Code § 35-42-1-1; Kan. Stat. Ann. § 21-5419; Ky. Rev. Stat. Ann. § 507A.020; La. Rev. Stat. Ann. § 14:32.5; Md. Code Ann., Crim. Law § 2-103; Mass. Gen. Laws ch. 90, § 24G (as interpreted by *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984)); Mich. Comp. Laws § 750.322; Minn. Stat. § 609.2114; Miss. Code Ann. § 97-3-19; Mo. Rev. Stat. § 565.020 (as defined by *id*. § 1.205); Mont. Code Ann. § 45-5-102; Neb. Rev. Stat. § 28-389; Nev. Rev. Stat. § 200.210; N.H. Rev. Stat. Ann. § 630:1-a; N.C. Gen. Stat. § 14-23.2; N.D. Cent. Code § 12.1-17.1-02; Ohio Rev. Code Ann. § 2903.01; Okla. Stat. tit. 21, § 691; 18 Pa. Cons. Stat. § 106; R.I. Gen. Laws § 11-23-5; S.C. Code Ann. § 16-3-1083; S.D. Codified Laws § 22-16-1.1; Tenn. Code Ann. § 39-13-214; Tex. Penal Code Ann. § 19.02 (as defined by *id.* § 1.07); Utah Code Ann. § 76-5-201; Va. Code Ann. § 18.2-32.2; Wash. Rev. Code § 9A.32.060; W. Va. Code § 61-2-30; Wis. Stat. § 940.04.

4 See, *e.g.*, Ala. Code § 6-5-410 (as interpreted by *Mack v. Carmack*, 79 So.3d 597 (Ala. 2011)); Alaska Stat. § 09.55.585; Ariz. Rev. Stat. Ann. § 12-611 (as interpreted by *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985)); Ark. Code Ann. § 16-62-102; Colo. Rev. Stat. § 13-21-202 (as interpreted by *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986)); Conn. Gen. Stat. § 52-555 (as interpreted by *Florence v. Town of Plainfield*, 849 A.2d 7 (Conn. Super. Ct. 2004)); Del. Code Ann. tit. 10, § 3724 (as interpreted by *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956)); D.C. Code § 12-101 (as interpreted by *Greater Se. Cmty. Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984)); Fla. Stat. § 768.19 (as interpreted by *Stern v. Miller*, 348 So.2d 303 (Fla. 1977)); Ga. Code Ann. § 19-7-1 (as interpreted by *Porter*

v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955)); Haw. Rev. Stat. § 663-3 (as interpreted by *Wade v. United States*, 745 F. Supp. 1573 (Dist. Haw. 1990)); Idaho Code Ann. § 5-310 (as interpreted by *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982)); 740 Ill. Comp. Stat. § 180/2 (as interpreted by *Chrisafogeorgis v. Brandenberg*, 304 N.E.2d 88 (Ill. 1973)); Ind. Code § 34-23-2-1; Kan. Stat. Ann. § 60-1901; Ky. Rev. Stat. Ann. § 411.130 (as interpreted by *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955)); La. Civ. Code Ann. art. 2315.2 (as defined by *id.* art. 26); Me. Rev. Stat. tit. 18-A, § 2-804; (as interpreted by *Milton v. Cary Med. Ctr.*, 538 A.2d 252 (Me. 1988)); Md. Code Ann., Cts. & Jud. Proc. § 3-904 (as interpreted by *State ex. rel. Odham v. Sherman*, 198 A.2d 71 (Md. 1964)); Mass. Gen. Laws ch. 229, § 2 (as interpreted by *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975)); Mich. Comp. Laws § 600.2922a; Minn. Stat. § 573.02 (as interpreted by *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949)); Miss. Code Ann. § 11-7-13; Mo. Rev. Stat. § 537.080 (as defined by *id.* § 1.205.2); Mont. Code Ann. § 27-1-513 (as interpreted by *Strzelczyk v. Jett*, 870 P.2d 730 (Mont. 1994)); Neb. Rev. Stat. § 30-809; Nev. Rev. Stat. § 41.085 (as interpreted by *White v. Yup*, 485 P.2d 617 (Nev. 1969)); N.H. Rev. Stat. Ann. § 556:7 (as interpreted by *Poliquin v. MacDonald*, 135 A.2d 249 (N.H. 1957)); N.J. Stat. Ann. § 2A:31-1 (as interpreted by *Graf v. Taggert*, 204 A.2d 140 (N.J. 1964)); N.M. Stat. Ann. § 41-2-1 (as interpreted by *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. 1980)); N.C. Gen. Stat. § 28A-18-2 (as interpreted by *DiDonato v. Wortman*, 358 S.E.2d 489 (N.C. 1987)); N.D. Cent. Code § 32-21-01 (as defined by *id.* § 14-10-15); Ohio Rev. Code Ann. § 2125.01 (as interpreted by *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985)); Okla. Stat. tit. 12, § 1053; Or. Rev. Stat. § 30.020 (as interpreted by *Libbee v. Permanente Clinic*, 518 P.2d 636 (Or. 1974)); 42 Pa. Const. Stat. § 8301 (as interpreted by *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985)); R.I. Gen. Laws § 10-7-1 (as interpreted by *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976)); S.C. Code Ann. § 15-51-10 (as interpreted by *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964)); S.D. Codified Laws § 21-5-1; Tenn. Code Ann. § 20-5-106; Tex. Civ. Prac. & Rem. Code Ann. §§ 71.001, 71.002; Vt. Stat. Ann. tit. 14, §§ 1491, 1492 (as interpreted by *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425

In addition to criminal laws, states have increasingly afforded unborn humans the protections of the law and recognized unborn humans as "persons" with legally enforceable rights in the areas of tort law, guardianship law, healthcare law, property law, and family law. See *Phillips v. State*, No. 1160403, slip op. at 149, 158–76 (Ala. Oct. 19, 2018) (Parker, J., concurring specially) (surveying state laws demonstrating that "unborn children have numerous rights that all people enjoy").[5]

Even in the context of abortion, federal and state laws still recognize the humanity of unborn humans. In 2002, Congress passed the Born-Alive Infant Protection Act, guaranteeing legal protections as a "person" under federal law to all infants born alive, including those who survive an abortion procedure. 1 U.S.C. § 8. In 2003, Congress passed the Partial-Birth Abortion Ban Act, making it a federal crime to perform the gruesome and inhumane partial-birth abortion procedure. 18 U.S.C. § 1531; accord *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial-Birth Abortion Ban Act as constitutional). In addition, several states, including Petitioner Indiana, have informed consent laws for abortion that recognize the

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A.2d 92 (Vt. 1980)); Va. Code Ann. § 8.01-50; Wash. Rev. Code § 4.24.010 (as interpreted by *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975)); W. Va. Code § 55-7-5 (as interpreted by *Baldwin v. Butcher*, 184 S.E.2d 428 (W. Va. 1971)); Wis. Stat. § 895.03 (as interpreted by *Kwaterski v. State Farm Mut. Auto Ins. Co.*, 148 N.W.2d 107 (Wis. 1967)).

5 *Available at* http://acis.alabama.gov/displaydocs.cfm?no=906161&event=5BM0OIZOW.

humanity of an unborn human.[6] For example, several states require the abortion provider to inform a woman seeking an abortion that the abortion "terminate[s] the life of a whole, separate, unique, living human being."[7]

Mirroring federal and state laws that prohibit the selling of human organs and prevent the premeditated commodification of human body parts, the federal government and many states have laws specifically prohibiting the sale and purchase of human fetal remains.[8] As further discussed in *infra* Section B.2, many states also require the humane disposition of aborted (and miscarried) human fetal remains.[9]

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6 See Ind. Code § 16-34-2-1.1 (Women seeking an abortion must be informed that "human physical life begins when a human ovum is fertilized by a human sperm.").

7 See Kan. Stat. Ann. § 65-6709; N.D. Cent. Code § 14-02.1-02; Okla. Stat. tit. 63, § 1-738.3; S.D. Codified Laws § 34-23A-10.1; see also Mo. Rev. Stat. § 188.027 (Abortion "terminate[s] the life of a separate, unique, living human being.").

8 See, *e.g.*, 42 U.S.C. § 289g-2; Ala. Code § 26-23F-5; Ariz. Rev. Stat. Ann. § 36-2302; Ark. Code Ann. § 20-17-802; Colo. Rev. Stat. § 25-2-111.5; Fla. Stat. § 873.05; Idaho Code Ann. § 39-9306; 410 Ill. Comp. Stat. 110/45; Ind. Code § 35-46-5-1.5; Kan. Stat. Ann. § 65-67a06; Ky. Rev. Stat. Ann. § 436.026; La. Rev. Stat. Ann. § 14:87.3; Me. Rev. Stat. tit. 22, § 1593; Mass. Gen. Laws ch. 112, § 12J; Mo. Rev. Stat. § 188.036; Neb. Rev. Stat. § 28-342; N.M. Stat. Ann. § 24-9A-5; N.C. Gen. Stat. § 14-46.1; N.D. Cent. Code § 14-02.2-02; Ohio Rev. Code Ann. § 2919.14; Okla. Stat. tit. 63, § 1-735; 18 Pa. Cons. Stat. § 3216; R.I. Gen. Laws § 11-54-1; S.D. Codified Laws § 34-23A-17; Tenn. Code Ann. § 39-15-208; Tex. Penal Code Ann. § 48.03; Utah Code Ann. § 76-7-311; Wyo. Stat. Ann. § 35-6-115.

9 See, *e.g.*, Ala. Code § 26-23F-4; Ark. Code Ann. § 20-17-801; Idaho Code Ann. § 39-9304; La. Rev. Stat. Ann. § 40:1191.2; N.C.

3. This Court and other courts have recognized the humanity of unborn humans.

In the context of abortion, this Court has repeatedly recognized the humanity of the unborn. In *Roe v. Wade*, this Court acknowledged that at the point of viability, a human fetus "has the capability of meaningful life outside the mother's womb." 410 U.S. 113, 163 (1973). And in *Gonzales*, this Court acknowledged that the federal Partial-Birth Abortion Ban Act "expresses respect for the dignity of human life," and affirmed Congress' intent to protect "all vulnerable and innocent human life." 550 U.S. at 157. As this Court explained, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *id.* at 147.

Many other courts have also recognized the humanity of unborn humans. For instance, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the *en banc* Eighth Circuit rejected Planned Parenthood's challenge to South Dakota's provision on informed consent for abortion, which included a required disclosure that: (1) "the abortion will terminate the life of a whole, separate, unique, living human being"; (2) the mother "has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South

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Gen. Stat. § 130A-131.10; N.D. Cent. Code § 14-02.1-09; Ohio Admin. Code § 3701-47-05; Okla. Stat. tit. 63, § 1-301(10); Tex. Health & Safety Code Ann. § 697.004.

Dakota"; and (3) "by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated." S.D. Codified Laws § 34-23A-10.1(1)(b)–(d). A separate section defined "human being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." *Id.* § 34-23A-1(4). The *en banc* court explained that the disclosure was not ideological, "untruthful, misleading or [ir]relevant to the decision to have an abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc); accord *Planned Parenthood of Ind., Inc. v. Comm'r, Ind. State Dep't of Health*, 794 F. Supp. 2d 892, 914 (S.D. Ind. 2011) (finding that the phrase "human physical life begins when a human ovum is fertilized by a human sperm" is an accurate, non-misleading biological fact).

4. The humanity of an unborn human is a different question from "personhood" under the Fourteenth Amendment.

The Seventh Circuit panel erroneously conflated the humanity of a human fetus with its legal status as a "person" for purposes of the Fourteenth Amendment. See *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health* (*PPINK*), 888 F.3d 300, 308 (7th Cir. 2018). The court of appeals assumed that Indiana cannot have a legitimate interest in the humane and dignified disposition of human fetal remains *unless* the human fetus is legally recognized as a "person" under the Fourteenth

Amendment. *Id.* But the Fourteenth Amendment is not the arbiter of humanity, nor does it confer dignity. Humanity and dignity are inherent in being human, whether alive or dead. A human fetus is a human being (and legally recognized as a "person" for many purposes under state law), whether or not he or she is legally considered a "person" for purposes of the Fourteenth Amendment. See Forsythe, 32 Val. U.L. Rev. at 478 ("Human being is an anthropological term that is based on biology and species, whereas 'person' is a moral or philosophical term."). Thus, this Court need not reach the issue of "personhood" under the Fourteenth Amendment to agree that human fetuses are human beings and find that Indiana has a legitimate state interest in the humane and dignified disposition of human fetal remains.

B. It is constitutional and rational to require the humane and dignified disposition of human fetal remains.

1. Although human fetal remains can be disposed of humanely, they are often treated inhumanely.

How human fetal remains can and should be disposed of is an important national question. With at least 926,200 abortions each year in the United States (not to mention fetal deaths from miscarriages), medical practitioners need to dispose of the remains of approximately 2,538 unborn humans every day.[10]

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10 The most recent data available is for the year 2014. See Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service*

There are three main ways to dispose of human fetal remains: burial, cremation (or interment), and incineration as medical waste. Cremation and incineration are similar except the former means "[t]o reduce a dead body to ash by burning," *Cremate*, TABER'S CYCLOPEDIC MEDICAL DICTIONARY 580, while the latter means "the removal or reduction of waste materials by burning." *Incineration*, MOSBY'S MEDICAL DICTIONARY 913. It is considered inhumane to incinerate a human body, especially when incinerated together with medical waste. Even more inhumanely, human fetal remains have been dumped in landfills and burned to generate electricity.[11]

Availability in the United States, 2014, 49 Perspectives on Sexual & Reprod. Health 17, (2017), https://doi.org/10.1363/psrh.12015; see also Tara C. Jatlaoui et al., *Abortion Surveillance—United States, 2014*, CDC (Nov. 24, 2017), https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1.htm?s_cid=ss6624a1_w (Based on voluntary reporting by states, the U.S. Center for Disease Control and Prevention reported that in 2014 there were at least 652,639 abortions.).

11 See, *e.g.*, Jeremy Pelzer, *Aborted Fetal Remains from Ohio Planned Parenthood Ended Up in Landfills, Incinerators, Attorney General Says*, Cleveland.com (Dec. 11, 2015, 12:16 PM), http://www.cleveland.com/open/index.ssf/2015/12/aborted_fetal_remains_from_ohi.html; Katie Pavlich, *Horrifying: Bodies of Aborted Babies Burned to Power Homes in Oregon*, Townhall (Apr. 24, 2014, 8:21 AM), http://townhall.com/tipsheet/katiepavlich/2014/04/24/horrifying-bodies-of-aborted-babies-burned-to-power-homes-in-oregon-n1828680; AP, *2 Texas Abortion Clinics Fined for Fetus Disposal*, My San Antonio (Feb. 11, 2012, 8:35 PM), http://www.mysanantonio.com/news/local_news/article/2-Texas-abortion-clinics-fined-for-fetus-disposal-3305551.php.

2. To avoid treating human fetal remains inhumanely, Indiana and other states require the humane disposition of human fetal remains.

Indiana's fetal disposition provision was proposed in the wake of and in response to reports of the inhumane ways human fetal remains were being disposed of. The legislator who sponsored the bill, Indiana State Senator Todd Young, did so because an Indiana waste company in his district accepted out-of-state aborted human fetal remains in violation of its permit. The waste company would treat infectious waste, including human fetal remains, with microwaves and steam before transporting it to its final disposal facility where the company would grind up the "waste" and dump it into a landfill. While that waste company was ultimately fined $11,250 for violating its permit, there was no law prohibiting four other Indiana waste companies from disposing of human fetal remains—from within the state or outside of the state—in similar, inhumane manners.[12]

Indiana's fetal disposition provision addressed the health, safety, and moral concerns over how to properly dispose of human fetal remains, regardless of whether the death resulted from a miscarriage or an

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12 See Agreed Order at 2, 3, *Comm'r, Dep't of Ind. Envtl. Mgmt. v. MedAssure of Ind. LLC*, No. 2016-23569-S (Ind. Dep't of Envtl. Mgmt. Feb. 2, 2016), http://www.irtl.org/wp-content/uploads/2010/06/MedAssure-PAO-2-9-16.pdf; Senate Chamber Session Video at 3:43:30–3:48:35, 2016 Archived Video, Ind. General Assembly (Mar. 1, 2018), http://iga.in.gov/information/archives/2016/video/senate/.

abortion. The Indiana legislature found that the provision was necessary to ensure that human beings—albeit unborn—are treated humanely and with dignity.

Indiana specifies that both "infectious waste" and "pathological waste" do "not include an aborted fetus or a miscarried fetus." Ind. Code §§ 16-41-16-4, 16-41-16-5. An abortion clinic or health care facility that has possession of an aborted or miscarried fetus "shall provide for the final disposition" of the fetus. *Id.* §§ 16-21-11-6, 16-34-3-4. In recognition of practical and privacy concerns, Indiana clarifies that the mother of an aborted fetus "has the right to determine the final disposition of the aborted fetus," *id.* § 16-34-3-2(a), and allows aborted fetuses to be "cremated by simultaneous cremation." *Id.* § 16-34-3-4; see also *id.* § 16-21-11-4 (allowing the parent or parents of a miscarried fetus to determine the final disposition of the remains); *id.* § 16-21-11-6 (allowing the simultaneous cremation of miscarried fetuses).

Indiana is not alone. Most states regulate the disposition of human fetal remains, and many explicitly require the humane disposition of human fetal remains, including Alabama, Arkansas, Idaho, Louisiana, North Carolina, North Dakota, Ohio, Oklahoma, and Texas. See *supra* note 9. However, the constitutionality of these state laws, as well as any future state fetal disposition laws, is now in limbo due to the Seventh Circuit's ruling below. Clear guidance is needed from the Supreme Court to clarify whether such laws are permissible health, safety, and moral state regulations.

3. Unlike the Seventh Circuit, this Court and the Eighth Circuit have recognized that states have a legitimate interest in the proper disposition of human fetal remains.

This Court has recognized that the "proper disposal of fetal remains" is a legitimate government interest. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 n.45 (1983) ("Akron remains free, of course, to enact more carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains*." (emphasis added)), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Akron*, this Court addressed whether Akron, Ohio could require physicians performing abortions to ensure that fetal remains were disposed of in a "humane and sanitary manner." *Id*. at 451–52. Ultimately, the Court found that the law violated the Due Process Clause because the undefined phrase "humane and sanitary," coupled with the imposition of criminal liability, failed to give a physician "fair notice that his contemplated conduct [wa]s forbidden." *Id.*; but see *id*. at 474–75 (O'Connor, White, Rehnquist, J.J., dissenting) (disagreeing that the provision was vague).

After *Akron*, the Eighth Circuit addressed the constitutionality of a Minnesota law regulating the disposal of human fetal remains by hospitals, clinics, and medical facilities within the state. See *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). The court recognized that "*Akron* makes clear that more carefully drawn regulations

might suffice to 'further [the government's] legitimate interest in proper disposal of fetal remains.'" *Id.* at 482 (alteration in original) (quoting *Akron*, 462 U.S. at 452 n.45). And unlike *Akron*'s fetal disposition law, Minnesota's fetal disposition law was "sufficiently clear to avoid vagueness concerns." *Id.* at 484.

Since the *Akron* Court recognized "the legitimate interest of states and municipalities in regulating the disposal of fetal remains from abortions and miscarriages," *id.* at 481 (citing *Akron*, 462 U.S. at 451–52 nn.44–5), the Eighth Circuit concluded that Minnesota's law was reasonably related to the state's legitimate interest in protecting "public sensibilities." *Id.* at 488. The Minnesota legislature's decision to draw the line at regulating abortions and miscarriages at home was not enough to invalidate the state's interest, especially given "the privacy concerns implicit in activity in one's home." *Id.*

In contrast to both this Court and the Eighth Circuit, the Seventh Circuit panel refused to find that Indiana had a legitimate state interest in the proper and humane disposition of human fetal remains. See *PPINK*, 888 F.3d at 308–09. And unlike the Eighth Circuit, the Seventh Circuit failed to recognize the rational reasons for regulating medical practitioners, but not women in their homes. See *id.* at 309 (finding that, even if Indiana had a legitimate state interest, Indiana's fetal disposition provision was not rationally related to its interest, in part, because the provision allows a woman to dispose of her child's fetal remains in whatever manner she wishes). This

conflict between the Seventh and Eighth Circuits can only be resolved by this Court.

4. A state's legitimate interest in the humane and dignified disposition of human fetal remains does not conflict with *Roe* or *Casey*.

This Court has consistently recognized a state's interest in unborn human fetal life. In *Roe*, this Court recognized that states have an "important and legitimate interest in potential life." 410 U.S. at 163. In *Casey*, this Court rejected *Roe*'s trimester framework because it "undervalue[d] the State's interest in potential life." 505 U.S. at 873. In *Stenberg v. Carhart*, this Court again recognized the state's interest "to ensure respect for all human life and its potential." 530 U.S. 914, 957 (2000) (citing *Casey*, 505 U.S. at 871). The *Stenberg* Court explained that "*Casey*'s assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal." *Id.* at 964. And in *Gonzales*, the Court further emphasized:

> The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, *including life of the unborn*.

550 U.S. at 157–58 (emphasis added).

The state has "important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Roe*, 410 U.S. at 154. Regarding the regulation of medical practitioners, states have a legitimate interest and play a significant role in "protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 451 (1954) (indicating the state has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). This includes a medical practitioner's disposition of human fetal remains within his or her possession. Cf. *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) ("States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."); *id.* at 979 (Kennedy, J., dissenting) (It is also legitimate to affirm "that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including life of the unborn.").

Regulating the disposition of human fetal remains does not conflict with *Roe* or *Casey*. As the Eighth Circuit explained, Minnesota's human fetal disposition law "does not burden the abortion choice," because the regulation had "no significant impact" on a woman's exercise of her choice. *Minnesota*, 910 F.2d at 486. "Rather than regulating abortion, [a human

fetal disposition] statute acknowledges the existence of abortion and regulates an issue related to abortion." *Id.* at 487. While a human fetal disposition law admittedly touches on abortion, it does not interfere with or burden a woman's abortion choice, which by definition has already been made at the time of fetal disposition. See *id.* The Eighth Circuit also rejected Planned Parenthood's arguments that the increased cost from disposing of fetuses and the alleged associated psychological trauma created an undue burden on a woman's abortion decision. *Id.* at 487. Notably, in this case, Planned Parenthood conceded that Indiana's fetal disposition provision does not interfere with a fundamental right. See *PPINK*, 888 F.3d at 307. In short, requiring the humane disposition of human fetal remains does not conflict with *Roe* or *Casey* because it does not burden a woman's abortion choice.

5. It is rational for Indiana to require the humane and dignified disposition of human fetal remains.

It was rational for the Indiana legislature to decide that it wanted to ensure that human fetal remains are disposed of humanely and with dignity. According to scientific and medical definitions, and as recognized by federal and state governments, as well as this Court and other courts, human fetuses are human beings—albeit unborn human beings in early stages of development. As human beings, human fetuses are worthy of being treated humanely and with dignity, whether in life or in death. Laws requiring the

humane and dignified disposition of human fetal remains are a natural extension of this fact.

It is rational to treat the disposition of human fetal remains consistently with other federal and state laws that recognize the humanity (and even personhood) of an unborn human. For instance, if a state can apply the same penalty to the unlawful killing of an unborn human that is applied to the killing of his or her mother, then it is certainly rational for a state to require that the unborn human's remains receive the same humane and dignified treatment as his or her mother's remains.

It is rational to regulate the proper disposition of human fetal remains by medical practitioners as an exercise of a state's legitimate interests in the life of the unborn and the regulation of the medical profession, as recognized by this Court and other courts.

It is rational to regulate fetal remains in the possession of medical practitioners, but not in the possession of the mother. It is rational to take into consideration competing, and possibly contradicting, practical and logistical concerns when crafting a law.

Indiana's fetal disposition provision rationally addresses the health, safety, and moral concerns over how to properly dispose of human fetal remains by medical practitioners—regardless of whether the death is a result of a miscarriage or an abortion. The Seventh Circuit panel incorrectly assumed that the "exceptions" to Indiana's fetal disposition provision

disprove Indiana's legitimate state interest. See *PPINK*, 888 F.3d at 309. But the lines Indiana drew are rational given the other competing, and potentially conflicting, interests Indiana had to balance. The constitutional standard is not whether the law is comprehensive, but whether it is a rational exercise of a legitimate state interest. See *Gonzales,* 550 U.S. at 157–58. Indiana's fetal disposition provision clearly is.

C. Without intervention by this Court, Indiana and other states will be unable to require the humane disposition of human fetal remains.

Without intervention by this Court, Indiana will be unable to stop the inhumane disposition of human fetal remains within its borders. With the existing conflict in the circuit courts, some states, like Minnesota in the Eighth Circuit, are able to enforce fetal disposition laws while others, like Indiana in the Seventh Circuit, are not. Without clarification by this Court, other states will be left wondering whether or not the Constitution allows them to ensure that the disposition of human fetal remains is done humanely and with dignity.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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