No. 18-483

In the Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF WISCONSIN, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a State may mandate the respectful disposition of the remains of aborted "child[ren] assuming the human form," *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

2. Whether a State may ban the invidiously discriminatory practice of aborting unborn children solely because of their race, sex, or disability diagnosis.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rule

Other Authorities

INTEREST OF *AMICI CURIAE*[*]

Amici are the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Governor Phil Bryant of the State of Mississippi (hereinafter "the States"). The States have the solemn duty and sovereign right to protect the dignity of all human beings within their borders. Through House Enrolled Act 1337 ("HEA 1337" or "the Act"), Indiana forwarded this and other important sovereign interests by requiring the respectful disposition of the remains of unborn children and prohibiting the discriminatory elimination of classes of human beings based upon race, gender, or disability. App. 131a–36a. Many "[o]ther states have followed Indiana's lead" by enacting laws similar to HEA 1337. App. 31a (Manion, J., concurring in the judgment in part, dissenting in part); *e.g.*, Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1904; Kan. Stat. § 65-6726; La. Rev. Stat. § 40:1061.1.2; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2919.10; Okla. Stat. tit. 63, § 1-731.2(B); S.D. Codified Laws § 34-23A-64.

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[*] Counsel of record received timely notice of the States' intent to file this amicus brief at least ten days before the due date. Sup. Ct. R. 37.2(a). Pursuant to Supreme Court Rule 37.4, the consent of the parties is not required for the States to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Seventh Circuit's decision below contains two holdings that, especially when taken together, exhibit an unprecedented, unlawful hostility to the States' authority to honor human life and dignity.

The Seventh Circuit first held that Indiana had no constitutional authority to enact the Respectful-Disposition Provision, which requires providers to dispose respectfully of aborted unborn children, rather than dumping them as medical waste (as is Respondents' practice). Disregarding this Court's explanation in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 & n.45 (1983), *overruled on other grounds by Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and in direct conflict with the Eighth Circuit's holding in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479, 487–88 (8th Cir. 1990), the Seventh Circuit concluded that Indiana's "interest in requiring . . . dispos[al] of aborted fetuses in the same manner as human remains is not *legitimate*" because this Court has held that those unborn children are not "persons" under the Fourteenth Amendment. App. 15a–16a (emphasis added). The Seventh Circuit's unprecedented holding that unborn children are so unworthy of dignity that it is not even "legitimate" for the State to require that their remains not be thrown away like medical waste warrants this Court's review.

The Seventh Circuit also invalidated Indiana's Antidiscrimination Provision, which prohibits the elimination of classes of human beings through discriminatory abortion based upon race, gender, and disability because, in the Seventh Circuit's view, *Casey* foreclosed *any* prohibition on pre-viability abortions, no matter the interest being sought, no matter how carefully tailored the law. But the plaintiffs in *Casey* specifically declined to challenge Pennsylvania's discriminatory-abortion prohibition, and this Court, accordingly, did not rule upon that prohibition. *See* Br. for Respondents, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006423, at *4. Nevertheless, the Seventh Circuit concluded that *Casey* controlled the outcome in this case because, in the Seventh Circuit's view, *Casey* enshrined the right to pre-viability abortion as "categorical." But this Court has never declared *any* right to be "categorical," and *Casey* itself upheld one type of pre-viability abortion prohibition. Under a proper understanding of *Casey*'s undue-burden test, the Antidiscrimination Provision furthers the State's compelling interest in prohibiting the discriminatory elimination of classes of human beings by race, gender, or disability. This issue is ripe for this Court's review, as Judge Easterbrook, joined by Judges Sykes, Barrett and Brennan, explained below. App. 123a.

This Court should grant the Petition.

REASONS FOR GRANTING THE PETITION

I. The States May Require The Respectful Disposition Of The Remains Of Aborted Unborn Children

Indiana's Respectful-Disposition Provision requires an abortion clinic to "inter[ ] or cremate[ ]" the remains of any "aborted fetus" in its "possession." App. 136a. This ensures that the remains of unborn children receive the same dignified disposition as the remains of other human beings. *Compare* App. 136a, *with* Ind. Code §§ 23-14-54-1, -4. The Seventh Circuit invalidated Indiana's Provision, taking the remarkable position that "the State's interest in requiring . . . dispos[ition] of aborted fetuses in the same manner as human remains *is not legitimate*." App. 16a (emphasis added). Since that decision violates this Court's explanation in *Akron* and creates a division with the Eighth Circuit, this Court's review is warranted. *See* Sup. Ct. R. 10(a), (c).

A. In *Akron*, this Court considered the constitutionality of Akron's fetal-disposition ordinance, holding that the statute was unconstitutionally vague because of the statute's particular wording. 462 U.S. at 451–52. In articulating the narrow limits of this holding, however, this Court specifically explained that a State "remains free, of course, to enact [ ] carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains*." 462 U.S. at 452

n.45 (emphasis added). Most relevant here, this Court explained that a State may enact a statute that "preclude[s] the mindless dumping of aborted fetuses on garbage piles." *Id.* at 451 & n.44 (citing *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (mem.)).

Consistent with this Court's guidance in *Akron*, the Eighth Circuit in *Planned Parenthood of Minnesota*, 910 F.2d 479, upheld Minnesota's fetal-disposition statute, which ensured "the dignified and sanitary disposition of the remains of aborted [ ] human fetuses" by requiring all "medical facilities" to "provide for the disposal of the[se] remains" in their possession "by cremation, internment by burial, or in a manner directed by the commissioner of health." *Id.* at 481 n.2, 483 (quoting Minn. Stat. § 145.1621, subds. 1, 4); *compare* App. 136a (Indiana's Respectful-Disposition Provision). The Eighth Circuit held that the statute furthered the "legitimate interest in proper disposal of fetal remains" recognized by this Court in *Akron*. 910 F.2d at 482 (quoting *Akron*, 462 U.S. at 452 n.45). Since, as this Court has held, "a state may make a value judgment favoring childbirth over abortion," it must for the same reason be allowed to "conclu[de] that fetal remains are the equivalent of [born] human remains." *Id.* at 487 (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 505–06 (1989)); *accord Whole Woman's Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring) ("[N]othing in the text or original understanding of the Constitution prevents a state from requiring the proper burial of fetal remains.").

B. In the decision below, a divided panel majority invalidated Indiana's Respectful-Disposition Provision. That holding creates a direct split of authority with the Eighth Circuit's decision in *Planned Parenthood of Minnesota*, ignores this Court's explanation of the legitimate interests underlying respectful-disposition laws from *Akron*, and makes numerous other legal errors.

The divided panel's decision below conflicts directly with the Eighth Circuit's upholding of a materially indistinguishable respectful-disposition provision. Indiana's Provision requires that an abortion clinic "inter[ ] or cremate[ ]" any "aborted fetus" in its "possession," App. 136a, just like Minnesota's law that the Eighth Circuit upheld against an identical legal challenge, *see Planned Parenthood of Minn.*, 910 F.2d at 481 n.2. Applying rational-basis review, as all conceded was proper, App. 14a–15a, the panel majority nevertheless held that Indiana's interest in showing respect to the remains of unborn children was "not legitimate" because this Court "has concluded that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," App. 15a–17a (citation omitted), and that, even if Indiana's interest were legitimate, the law failed to pursue it through "rationally related" means, App. 18a–19a. That conclusion "create[s] a conflict with" the Eighth Circuit's decision in *Planned Parenthood of Minnesota*, App. 124a (Easterbrook, J., dissenting from the denial of rehearing en banc), given that the

Eighth Circuit held that fetal-disposition laws further legitimate purposes, *Planned Parenthood of Minn.*, 910 F.2d at 487–88; *supra* p. 5, and any one legitimate purpose is sufficient to sustain a law on rational-basis review, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Simply put, the Seventh Circuit split with the Eighth Circuit in a case that is "substantially similar in every material respect." App. 39a (Manion, J., concurring in the judgment in part, dissenting in part).

The panel majority's decision invalidating the Respectful-Disposition Provision similarly conflicts with this Court's explanation that a State "remains free, of course, to enact [ ] carefully drawn regulations that further its *legitimate interest in proper disposal of fetal remains*." *Akron*, 462 U.S. at 452 n.45 (emphasis added). The panel majority *did not even discuss Akron*, relegating it to a "*see also*" cite. App. 17a. Instead, the panel majority claimed that its holding followed from this Court's decision in *Roe*, which had concluded that unborn children are not "persons" under the Fourteenth Amendment's Due Process Clause. App. 15a–16a (citing *Roe v. Wade*, 410 U.S. 113, 158–59 (1973)). From *Roe*, the panel majority derived the conclusion that Indiana's requirement that the remains of unborn children be disposed of in the same manner as the remains of other babies is "not legitimate." App. 15a–16a. But *Roe* predated *Akron* and, in any event, its holding on this score is a "red herring." App. 41a (Manion, J., concurring in the judgment in part, dissenting in

part). The question of who counts as a "person" under the Fourteenth Amendment is analytically distinct from the question of "whether the fetus is a 'human being'" in a scientific, moral, or philosophical sense. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting), *overruled in part by Casey*, 505 U.S. 833. Nothing prevents Indiana from reaching its own considered judgments on these questions. App. 41a–42a (Manion, J., concurring in the judgment in part, dissenting in part). Indeed, the sovereign authority of the States to make such judgments is precisely the reason why, under this Court's settled precedent, States may "make a value judgment favoring childbirth over abortion." *Webster*, 492 U.S. at 505–06 (citation omitted).

Far from being irrational, respect for unborn children as human beings is a well-recognized basis for legislative action. *Accord Gonzales*, 550 U.S. at 160 ("the fast-developing brain of her unborn child, a child assuming the human form"). The Federal Government and 38 States rely on that same judgment as the core justification for their fetal-homicide laws. *See* 18 U.S.C. § 1841; Ind. Code § 35-50-2-16; Wis. Stat. § 940.01(1)(b); *Fetal Homicide Laws*, Nat'l Conf. of State Legislatures, https://perma.cc/A7D3-SF3V (all links last visited Nov. 7, 2018). These laws have survived legal challenge time and again, App. 41a, with courts often rejecting arguments practically identical to the Seventh Circuit's wrongheaded reliance on *Roe*, *see,*

e.g., *Coleman v. DeWitt*, 282 F.3d 908, 911–13 (6th Cir. 2002). Additionally, the Federal Government bans the commercial sale of fetal tissue, 42 U.S.C. § 289g–2, and many States ban experimentation on fetal remains, *e.g.*, Ind. Code § 16-34-2-6; Ohio Rev. Code § 2919.14, all in recognition of the unborn child's humanity. And the "majority" of biologists define "human beings" to include the unborn, Patrick Lee, *Abortion & Unborn Human Life* 71–107 (2d ed. 2010), as do many eminent bioethicists, *e.g.*, John Finnis, *Abortion and Health Care Ethics*, *in* Bioethics: An Anthology 15 (Helga Kuhse et al. eds., 3d ed. 2016).

The Seventh Circuit's interference with the State's provision for the respectful disposition of human remains is also contrary to history. Society has long practiced the proper disposition of human remains as a sign of respect. *See, e.g.*, Homer, *The Iliad*, Book XXIV ("And Priam answered [Achilles], . . . 'Nine days, therefore, will we mourn Hector in my house; on the tenth day we will bury him . . . ; on the eleventh we will build a mound over his ashes . . . .'"). Performing a proper disposition has long been a duty owed to the deceased. *See, e.g.*, Sophocles, *Antigone*, Scene I, Line 413 ("Nevertheless, there are honors due all the dead."); 2 William Blackstone, *Commentaries*, *508 ("[The executor] must *bury* the deceased in a manner suitable to the estate which he leaves behind him."). A State enshrining this duty in the law, *see, e.g.*, Ind. Code §§ 23-14-54-1, -4, as an exercise of its police power, furthers the rational purpose of showing this type of respect, *see Barnes v. Glen Theatre, Inc.*,

501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."); *accord Gonzales*, 550 U.S. at 137, 158 (banning of the "intact D&E" abortion procedure is "justif[ied]" because it "implicates additional ethical and moral concerns"). As this Court recognized in *Akron*, States have a "legitimate interest in proper disposal of fetal remains," 462 U.S. at 452 n.45, since they have an interest in the proper disposal of all human remains.

Finally, even if the Constitution somehow prohibited the States from requiring the treatment of unborn children as human beings for purposes of the respectful disposition of remains, this would still not render the Respectful-Disposition Provision unlawful under the rational-basis standard that all parties agree applies here. *See Beach Commc'ns*, 508 U.S. at 315 ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature."). As Judge Easterbrook explained below, the States' "regulatory authority" extends well beyond human beings. App. 123a. States have, for example, ample authority to enact "animal-welfare statutes," including statutes that "prescribe how animals' remains must be handled." App. 123a; *accord Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, No. 17-71 (U.S. argued Oct. 1, 2018) (considering federal protections for the "dusky gopher frog"). In Judge Easterbrook's words, "[t]he panel has held invalid a

statute that would be sustained had it concerned the remains of cats or gerbils." App. 123a. This Court should grant review and correct this horrific consequence of the Seventh Circuit's decision.

II. The States May Prohibit The Elimination Of Classes Of Human Beings By Invidiously Discriminatory Abortions

Indiana's Antidiscrimination Provision prohibits the "eugenic" practice of doctors performing abortions sought solely because of the race, sex, or disability status of the unborn child. App. 121a (Easterbrook, J., dissenting from the denial of rehearing en banc); App. 132a–33a. The Seventh Circuit invalidated this law by purporting to find within this Court's case law a "*categorical*" right to pre-viability abortion, a right that a State cannot infringe no matter how powerful its interest, App. 10a (emphasis added), even if this Court has never confronted a case dealing with that interest, App. 121a–22a (Easterbrook, J., dissenting from the denial of rehearing en banc). That conclusion is legally wrong and would perversely place the unenumerated right to pre-viability abortion above even core protections of the Bill of Rights.

A. Whether a State's anti-discrimination interests justify the prohibition of discriminatory abortions is an issue that this Court has never addressed. In *Casey*, the challengers "sought declaratory and injunctive relief against a wide array of

[Pennsylvania's] 1988 and 1989" abortion regulations, but did *not* seek to block Pennsylvania's prohibition of gender-discriminatory abortions, which Pennsylvania enacted during the same period. *See* Br. for Respondents, *Casey*, 505 U.S. 833, 1992 WL 12006423, at *4.

Failing to recognize this as an issue of first impression, the Seventh Circuit concluded that certain language in *Casey* enshrined the pre-viability abortion right as "categorical," preemptively foreclosing any anti-eugenics prohibitions on pre-viability abortions. App. 10a. In reaching this conclusion, the Seventh Circuit relied on a single passage from *Casey*: "'a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" App. 10a (quoting *Casey*, 505 U.S. at 879 (plurality op.)). The Seventh Circuit read this passage as mandating the conclusion that *every effort* by the State to prohibit any pre-viability abortion is automatically unconstitutional, without any need to even consider either the weight of the State's proffered interest or how narrowly tailored the law is to achieving that interest. App. 13a–14a.

The Seventh Circuit's interpretation of this passage from *Casey* is incorrect. As Judge Easterbrook explained below, the passage has no bearing on the Antidiscrimination Provision because *Casey* "did not consider the validity of an anti-eugenics law." App. 121a. "Judicial opinions are not

statutes; they resolve only the situations presented for decision." App. 121a. The passage is best understood as limited to only "the State's interests" *actually urged* before this Court in *Casey*—the State's general interest in unborn life and the health of the mother. *See Casey*, 505 U.S. at 846; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). And since "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay statutes *Casey* considered," the lower courts "ought not impute" a decision on that question to this Court. App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc). In short, "*[n]one* of th[is] Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc) (emphasis added).

No other passages in *Casey* support the Seventh Circuit's conclusion. So, for example, while Judge Manion believed that the label "undue burden" suggests a "pure effects test," blind to any compelling interests of the State, App. 26a, this label was a "shorthand" for a traditional means-ends test—albeit one specifically fashioned for the abortion context. *Casey*, 505 U.S at 876–77 (plurality op.). Thus, the test calls for weighing the State's "interest[s]" against the "burdens on the right to decide whether to terminate a pregnancy." *Id.* at 876.

Casey itself rejects the extreme "categorical" position that the Seventh Circuit ascribes to it. *Casey* held that the State *could* prohibit some pre-viability abortions, namely, those of a minor when her parents do not consent and a court finds both that the abortion is not in the minor's best interests and that the minor is not "mature and capable of giving informed consent." 505 U.S. at 899 (plurality op.). That prohibition is justified not by the State's interest in the life of the unborn child or the health of the mother, but by its "strong and legitimate interest in the welfare of its young citizens." *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990). Had *Casey* elevated the right to a pre-viability abortion to "categorical" status, as the Seventh Circuit believed, this restriction would have fallen. Put another way, since this Court in *Casey* concluded that the State's interest in youngsters' welfare is sufficiently powerful to prohibit some pre-viability abortions, it follows that courts must consider the possibility that other interests might justify the prohibition of other such abortions.

The Seventh Circuit also misunderstood *Casey*'s broader place within the development of this Court's abortion jurisprudence. *Casey*'s undue-burden standard replaced the post-*Roe* strict-scrutiny test, which had developed as part of *Roe*'s trimester framework, to make it *easier* for States to regulate abortions. *See Casey*, 505 U.S. at 871–73 (plurality op.); *e.g.*, *Akron*, 462 U.S. at 427, 434. The *Casey* plurality found this shift justified because *Roe* had "undervalue[d] the State's interest." *Casey*, 505 U.S.

at 873 (plurality op.). To make the undue-burden test "*more difficult* to satisfy" than *Roe*'s "strict-scrutiny test," as the Seventh Circuit did in this case, would be an "absurd result[ ]." App. 24a (Manion, J., concurring in the judgment in part, dissenting in part).

More generally, this Court has never declared any right in the Constitution to be absolute, so the Seventh Circuit's enshrining of the right to a pre-viability abortion as "categorical" cannot be correct. Even assuming that pre-viability abortion is a right on par with core constitutional rights like free speech or equal protection—a doubtful proposition—"[n]o fundamental right . . . is absolute." *McDonald v. City of Chicago*, 561 U.S. 742, 802 (2010) (Scalia, J., concurring). "[E]ven the fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949); *Virginia v. Black*, 538 U.S. 343, 358 (2003). Accordingly, "the strength of the individual's liberty interests and the State's regulatory interests must *always* be assessed and compared" when evaluating a law's constitutionality. *McDonald*, 561 U.S. at 879 (Stevens, J., dissenting) (emphasis added). For example, the First Amendment provides in categorical terms that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press," U.S. Const. amend. I, but it recognizes "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have

never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). The First Amendment also permits the States to prohibit even fully protected political speech where it satisfies strict scrutiny. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015). Moving beyond the Bill of Rights, the Fourteenth Amendment's Equal Protection Clause provides, without qualification, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Yet, as this Court has explained, a State may even use racial classifications where it satisfies strict scrutiny; for example, to prevent prison riots, *see Johnson v. California*, 543 U.S. 499, 512–14 (2005), or to comply with the Voting Rights Act, *see Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017). It is unthinkable that *Casey* endowed the unenumerated right to pre-viability abortion with greater status than enumerated rights like the freedom of speech or the freedom from state-sponsored racial classification.

While the Seventh Circuit's interpretation of *Casey* wrongly "impute[s] to [this Court] decisions [it has] not made about problems [it has] not faced," App. 122a (Easterbrook, J., dissenting from the denial of rehearing en banc), if *Casey*'s "broad dicta" is causing the lower courts to err, that is reason enough for review here, *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009). It is this Court's role to reevaluate periodically the soundness of the

statements in its decisions, *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 311 (2012) ("[*Abood*] is an anomaly."), and, if it finds that precedent flawed, *Harris v. Quinn*, 134 S. Ct. 2618, 2638 (2014) ("*Abood*[ ] [has] questionable foundations"), to reconsider it, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) ("*Abood* is [ ] overruled.").

B. The correct understanding of *Casey*'s undue-burden standard is that it balances the burdens imposed by the law, on the one hand, with the gravity of the state interest that the law furthers, on the other. The exactness required in this balancing is a sliding-scale level of inquiry—ranging from rigorous to permissive, based upon how substantial the law's level of interference with the right to abortion, if any. *See Gonzales*, 550 U.S. at 146. Put another way, "*Casey*'s undue-burden test [is a] right-specific test on the spectrum between rational-basis and strict-scrutiny review." *Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting). It is a means-end balancing test of the type this Court applies in countless other contexts. So, when reviewing an abortion law under the undue-burden standard—no matter how rigorously calibrated—a court must consider both "the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309.

Assuming, *arguendo,* that the most stringent form of scrutiny applies to Indiana's Antidiscrimination

Provision, the Provision satisfies such scrutiny. *See* App. 21a (Manion, J., concurring in the judgment in part, dissenting in part). Antidiscrimination Provisions like Indiana's seek to prohibit an invidiously discriminatory practice that violates the Nation's most core commitments: eliminating the "targeting" of individuals for disfavored treatment "because of [their] immutable human characteristics" like race, sex, or disability. App. 23a (Manion, J., concurring in the judgment in part, dissenting in part). Such laws further the most compelling of government interests, and "it is hard to imagine legislation more narrowly tailored to promote this interest." App. 35a (Manion, J., concurring in the judgment in part, dissenting in part); *see Washington v. Glucksberg*, 521 U.S. 702, 728–29 (1997).

That States have a compelling interest in stopping such discriminatory practices follows from the logic underlying this country's legal protections against private discrimination. This Court has held, for example, that States have a "compelling interest in eliminating discrimination against women," even where antidiscrimination laws conflict with First Amendment associational values. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see, e.g.*, Wis. Stat. § 106.52. Similarly, both Congress and the States may prohibit the "moral and social wrong" of discrimination by private parties in public accommodations. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *e.g.*,

Wis. Stat. § 106.52, and in other areas, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). And both Congress and the States have legislated to forbid discrimination against disabled individuals, including by enacting laws such as the Americans With Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987); *e.g.*, Wis. Stat. § 111.321. Given that stopping private discrimination based upon gender, race, or disability—in areas as diverse as public accommodations, employment, and organization membership—is a "compelling" state interest, *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988), the state interest in stopping the *elimination* of classes of people based on these same characteristics is even *more* compelling. Surely a State that has the constitutional authority to protect members of the Down syndrome community from being discriminated against in employment or public accommodations can protect that same community from wholesale elimination by eugenic practices.

The evil that the Antidiscrimination Provision seeks to combat is quite serious. Iceland is a canary in the coal mine. "[T]he vast majority of women [in Iceland]—close to 100 percent—who receive[ ] a positive test for Down syndrome terminate[ ] their pregnancy." Julian Quinones & Arijeta Lajka, *"What kind of society do you want to live in?": Inside the country where Down syndrome is disappearing*, CBS News (Aug. 14, 2017), https://perma.cc/A5P4-8KBX.

Nor is Iceland alone, as the "estimated termination rate" of unborn children with Down syndrome is 98 percent in Denmark. *Id.* Such countries "are now celebrating the 'eradication' of Down syndrome" by eliminating virtually *all* unborn children diagnosed with this condition *in utero*. App. 33a (Manion, J., concurring in the judgment in part, dissenting in part).

In Asia, "widespread sex-selective abortion" has caused "disastrous effects." App. 32a n.5 (Manion, J., concurring in the judgment in part, dissenting in part). Some experts have concluded that this continent has 100 to 160 *million* "missing" women. *See* Mara Hvistendahl, *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men* 5–12 (2011). In India, "[o]ver the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted [ ] each year." Sital Kalantry, *How to Fix India's Sex-Selection Problem*, N.Y. Times (Jul. 27, 2017), https://perma.cc/B4UN-UDX3; *accord* Nicholas Eberstadt, *The Global War Against Baby Girls*, The New Atlantis (2011), https://perma.cc/ZCM9-MU3K (documenting similar phenomenon in China, South Korea, and other countries). This male favoring "is a symptom of pervasive social, cultural, political and economic injustices against women, and a manifest violation of women's human rights." *Sex Imbalances at Birth: Current Trends, Consequences, and Policy Implications*, U.N. Population Fund Asia & Pacific Regional Office (Aug. 2012), https://perma.cc/Y6CB-

GCK2; *Gender-Biased Sex Selection*, U.N. Population Fund, https://perma.cc/KCT4-6T23?type=image. And it causes social disruption as the generations mature. "[F]eminists in Asia worry that as women become scarce, they will be pressured into taking on domestic roles and becoming housewives and mothers rather than scientists and entrepreneurs." Mara Hvistendahl, *Where Have All the Girls Gone?*, Foreign Policy (June 27, 2011), https://perma.cc/2735-FQD6; *accord* Simon Denyer & Annie Gowen, *Too Many Men*, The Washington Post (Apr. 24, 2018), https://perma.cc/2U6J-WC8G.

The United States is not immune from these evil practices; indeed, the *casus belli* of this lawsuit is Respondents' unabashed desire to assist in such discrimination. *E.g.*, App. 5a. According to the best available estimates, 50 percent or more of pregnant women in the United States who learn that their child will be born with Down syndrome eliminate that child by abortion. Dist. Ct. Dkt. 54-2:13; *see also, e.g.*, Jamie L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995–2011)*, 32 Prenat. Diagn. 142, 142 (2012) (between 61% and 93%), https://perma.cc/4JDV-R69B. This practice has reduced the Down syndrome community by 30 percent, Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167A(4) Am. J. Medical Genetics 756–67 (2015), https://perma.cc/A9VT-33V5, and the loss may be expected to grow as the availability of early

prenatal screening increases, *see* Rachèl V. van Schendel et al., *What Do Parents of Children with Down Syndrome Think about Non-Invasive Prenatal Testing (NIPT)?*, 26 J. Genetic Counseling 522 (2017), https://perma.cc/D8YE-WQYU. This discriminatory practice is partly due, no doubt, to the pressure that some women experience from doctors to abort unborn children with Down syndrome. Dist. Ct. Dkt. 54-1:6; *see, e.g.*, Hannah Korkow-Moradi et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*, 28 J. Fam. Psychotherapy 193, 197 (2017); Briana S. Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group Experiences*, 51 Intellectual & Developmental Disabilities 446, 455 (2013). For example, mothers of children with Down syndrome "commonly express[ ]" that the medical information they receive in prenatal counseling is "biased or overly negative." Gregory Kellogg et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Genetic Counseling 805, 810 (2014), https://perma.cc/TG3Z-8387. This bias takes the form of the "subtle shading of information by counselors against persons with Down syndrome," Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement Challenging a Core Ethical Norm of Genetic Testing*, 13 PLoS Biol. 1, 2 (2015), https://perma.cc/A92V-CYGQ, or even open advocacy for the "eradication" of Down syndrome via "widespread acceptance of selective termination" of unborn children with the condition, David A. Savitz,

How Far Can Prenatal Screening Go in Preventing Birth Defects, 152 J. Pediatrics 3, 3 (2008), https://perma.cc/HP2Q-JNKH (also calling this "a desirable and attainable goal").

Sex-selective abortions are common in some communities in the United States. *See* Douglas Almond & Lena Edlund, *Son-biased sex ratios in the 2000 United States Census*, 105 Proc. of the Nat'l Acad. of Sci. 5861, 5861 (2008), https://perma.cc/F9X5-KWX6; Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1(2) Am. Econ. J.: Applied Econ. 1–34 (2009), https://perma.cc/KXJ9-2XW8. A recent Gallup survey confirms that the longstanding "tendency for American adults to express overall preferences for a boy over a girl" persists today. Frank Newport, *Slight Preference for Having Boy Children Persists in U.S.*, Gallup (July 5, 2018), https://perma.cc/36SP-AYW2 (noting that this bias towards boys is greater for "Americans aged 18 to 29"). As reported in The New York Times, a physician described her experience with this bias in patients that are pregnant with their third child: "'If it's a boy, they keep it. If it's a girl, they'll abort.'" Sam Roberts, *U.S. Births Hint at Bias for Boys in Some Asians*, N.Y. Times (June 14, 2009), https://perma.cc/5RL8-3D8D. As with discriminatory abortions based on disability status, the negative effects of sex-selective abortions may only be expected to grow in the future: "[a]s the ability to . . . create 'designer babies' with specified characteristics [like sex] becomes more of a reality,"

the bias toward children of a certain sex could even more directly affect fertility patterns. Newport, *supra*.

The State combating this invidious discrimination by enacting its nondiscrimination interests into law sends a powerful signal to members of minority communities that it is "inhumane" to terminate them, thereby affirming the "profound respect" that the State holds for all people. *See Gonzales*, 550 U.S. at 157 (citation omitted). As Frank Stephens, a disability-rights activist who himself has Down syndrome, powerfully testified before Congress, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just terminate those pregnancies." Frank Stephens, Testimony Before House Subcommittee on Labor, Health and Human Services, and Education 1 (Oct. 25, 2017), https://perma.cc/S73U-GYKS. Recent efforts to "eliminate" Down syndrome are nothing more than "people pushing [a] particular 'final solution' [ ] that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist." *Id.* By enacting laws like Indiana's Antidiscrimination Provision, the State affirms Mr. Stephens' poignant claim that those like him are equal human beings. *Id.* These laws thus advance the vital cause of demonstrating to society that *all* human beings—

including women, racial minorities, and those with disabilities—have lives "worth living."

Finally, that Indiana's Antidiscrimination Provision includes pre-viability abortions does not affect its constitutionality because the State's interests do not correspond to the unborn child's stage of development. In the traditional abortion-regulation context, this Court has held that the State's interest in protecting an unborn child's life is "not strong enough" to prohibit a pre-viability abortion. *See Casey*, 505 U.S. at 846, 860. The logic is that the more developed the unborn child, the stronger the State's interest in keeping that child alive. *Id.* This reasoning has no applicability where the strength of the State's interests does not correspond to the unborn child's stage of development. The State's interest is the prevention of the discriminatory elimination of classes of human beings; it makes no difference from the point of view of that interest if unborn children with Down syndrome are systematically eliminated at 10 weeks or 25 weeks, if the result is the same. Genetic screening for Down syndrome now regularly occurs "as early as 10 weeks" into the pregnancy, well before the unborn child is viable. *See* Nat'l Down Syndrome Soc'y, *Understanding a Diagnosis of Down Syndrome*, https://perma.cc/249P-5FD3; *accord* van Schendel, *supra*, at 525. So to prohibit effectively the discriminatory elimination of this class of society, the Provision must operate pre-viability.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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