No. 18-483

In The Supreme Court of the United States

KRISTEN BOX, COMMISSIONER,
INDIANA DEPARTMENT OF HEALTH, ET AL.,
Petitioners,

v.

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

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the fetal remains statute at issue in *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Department of Health* ("*PPINK*"), 888 F.3d 300 (7th Cir. 2018), as well as the standard courts should apply when analyzing statutes passed to preserve and promote fetal human life. Whereas *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), safeguard the States' interest in potential life, the Seventh Circuit and other lower federal courts threaten that interest by interpreting it narrowly and in a manner inconsistent with those decisions. CatholicVote, therefore, comes forward to support the right of States to recognize and promote the dignity of fetal human life through fetal remains statutes and otherwise.

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[1] As required by Rule 37.2(a), counsel of record for each party received timely notice of the intent to file this amicus brief and consented to its filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

Review is warranted in this case for at least two reasons. First, the Seventh Circuit's decision in *PPINK* creates a circuit conflict with the Eighth Circuit on an issue of national import—the constitutionality of fetal remains statutes—and in the process demonstrates broad-based confusion between and among lower federal courts regarding the standard to apply to abortion regulations designed to advance the States' "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. In the Seventh Circuit alone, ten judges have authored or joined four different opinions supporting three distinct analyses of Indiana's fetal remains statute. The panel dissent and the four judges who dissented from denial of rehearing en banc joined the Eighth Circuit in finding that fetal remains statutes readily satisfy rational basis review. The panel majority, on the other hand, concluded that the Indiana statute could not survive that deferential standard because the State's interest in promoting fetal life was not legitimate and no other interest supported the law. Finally, the three judges concurring in the denial of rehearing en banc argued (consistent with district courts in Texas, Louisiana, and Arkansas) that the undue burden test, not rational basis review, should apply to Indiana's fetal remains statute. Moreover, given that the Seventh Circuit denied en banc review, the circuit conflict is entrenched, and only this Court can resolve the split and clarify the constitutionality of fetal remains statutes, which "show [a State's] profound respect for the life within the woman." *Id*. at 157.

Second, the Seventh Circuit's rigorous rational basis analysis directly conflicts with this Court's articulation of that standard in cases such as *Heller v. Doe*, 509 U.S. 312 (1993), and *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). Rather than consider whether "any state of facts reasonably may be conceived to justify" Indiana's law, *McGowan v. Maryland,* 366 U.S. 420, 426 (1961), the Seventh Circuit panel distinguished the Eighth Circuit's decision in *Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which upheld a similar law under rational basis review, and concluded that no legitimate interest supported the Indiana law.

In addition, the split between and among the Seventh and Eighth Circuits, judges within the Seventh Circuit, and district courts in Texas, Louisiana, and Arkansas as to the proper standard to apply to fetal remains statutes—rational basis or undue burden—highlights the need for this Court to clarify the governing standard. Furthermore, if the Court determines that the undue burden test is the appropriate standard, this Court also should explain whether and how the balancing test in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), applies to regulations that are designed to advance and promote the States' interest in fetal human life.

I. The Court Should Grant Certiorari Because the Circuits Are in Conflict over the Appropriate Standard of Review to Apply to Fetal Remains Statutes.

In *Roe v. Wade*, this Court expressly acknowledged that States have an "important and legitimate interest in potential life." 410 U.S. 113, 163 (1973). Almost 20 years later, though, the plurality in *Casey* concluded that *Roe* and its progeny significantly "undervalued" the States' interest in "promoting" and "protecting the life of the unborn." *Casey*, 505 at 873. And *Gonzales* confirmed that a central premise in *Casey* is "that the government has a legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. The split between the Seventh and Eighth Circuits affords this Court with a clean vehicle to determine how courts should assess and value a State's interest in protecting and promoting fetal human life through fetal disposition statutes or otherwise.

At least seven States have adopted fetal remains statutes, which promote respect for fetal human life. By providing for the respectful disposal of fetal remains, a State conveys its belief that the human fetus, which alone has the potential to become a person under the Fourteenth Amendment, is worthy of dignity and respect both while it is alive and after its death. *See Gonzales*, 550 U.S. at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). In striking down Indiana's fetal remains statute, the Seventh Circuit engendered an inter-Circuit conflict and reinforced

another conflict between and among the lower courts. First, the Seventh Circuit expressly rejected the Eighth Circuit's conclusion that a Minnesota fetal remains statute was constitutional. In so doing, the Seventh Circuit denied that Indiana had even a legitimate interest in fetal life that might support the State's fetal remains statute and insisted that, even if the State had an interest in "the humane and dignified disposition of an aborted fetus," the statute was not rationally related to that interest. *PPINK*, 888 F.3d at 309.

Second, the Seventh Circuit's application of rational basis review is inconsistent with decisions of federal district courts in Texas, Louisiana, and Arkansas to assess fetal remains statutes under the undue burden standard. Widespread uncertainty as to the standard governing fetal remain statutes is evidenced by the conflict within the Seventh Circuit itself. Three Seventh Circuit judges contend that the undue burden test should apply, five would follow the Eighth Circuit in applying a deferential rational basis review, and two others (the two constituting the minority position but establishing the binding precedent in the Seventh Circuit) have employed a heightened form of the rational basis standard. This Court's review is warranted, therefore, to determine whether fetal remains statutes require undue burden review and, if so, how *Casey* and *Hellerstedt* apply in this context.

A. The Seventh Circuit's Stringent Rational Basis Analysis Openly Conflicts with the Eighth Circuit, which Gives Greater Deference to a State's Legislative Judgment.

In *PPINK*, the Seventh Circuit expressly considered and rejected the Eighth Circuit's decision upholding Minnesota's fetal remains statute. *PPINK*, 888 F.3d at 308-09. While both courts purported to apply the rational basis standard, the Seventh Circuit panel diverged sharply from the Eighth Circuit's rational basis analysis in two important respects. First, the panel concluded that "the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate." *Id*. at 308. According to the panel, the Indiana statute treated a fetus like a human being, which was tantamount to recognizing the fetus as a Fourteenth Amendment "person." *Id*. at 308. The panel emphasized that because a fetus is not a person under *Roe*, Indiana's interest was illegitimate. In so holding, the Seventh Circuit directly contradicted the Eighth Circuit, which concluded that a State can validly treat fetal human remains like non-fetal human remains:

> Planned Parenthood's argument that the statute represents the state's conclusion that fetal remains are the equivalent of human remains is also unavailing … [and] even assuming this is the true purpose, we do not find it to be an invalid purpose. A state may make a value judgment favoring childbirth over abortion.

Planned Parenthood of Minn., 910 F.2d at 487.

The Seventh Circuit also attempted to distinguish fetal homicide and wrongful death statutes from Indiana's fetal remains disposition requirements. According to the court, whereas the former seek to protect the fetus in utero, when dealing with fetal remains "there is no potential life at stake." *PPINK*, 888 F.3d at 308. In the Seventh Circuit, then, the State's interest in protecting potential life apparently is legitimate only if a challenged statute directly regulates the treatment of a living fetus. *See id.* ("*Gonzales* involved a 'ban on abortions that involve partial delivery of a *living* fetus.'" (quoting *Gonzales*, 550 U.S.at 148)). This holding not only is inconsistent with the Eighth Circuit's decision, *see Planned Parenthood of Minn.*, 910 F.2d at 488 ("[W]e therefore find that the fetal disposal statute is reasonably related to the state's legitimate interests."), but also threatens to "repudiate[]" a premise that this Court found to be central to *Casey*'s analysis—that the State "has a legitimate and substantial interest in [both] *preserving* and *promoting* fetal life." *Gonzales*, 550 U.S. at 145 (emphasis added).

Fetal disposition statutes *promote* a State's view that fetal human life is unique and valuable by treating the remains of the fetus with dignity and respect. Although such statutes do not preserve the life of the deceased fetuses to which the laws apply, *Casey* and *Gonzales* do not define the States' interest in potential life so narrowly. *See Casey*, 505 U.S. at 877 ("Regulations which do no more than create a structural mechanism by which the State … may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle

to the woman's exercise of the right to choose."); *Gonzales*, 550 U.S. at 157 (explaining that the government may "express[] respect for the dignity of human life" through measures that are intended to stop the "'coarsen[ing of] society to the humanity of not only newborns, but all vulnerable and innocent human life, [which] mak[es] it increasingly difficult to protect such life'").

Yet the Seventh Circuit's restrictive interpretation of a State's interest in fetal human life makes it unclear whether a State has a legitimate interest in either fetal homicide statutes (because they apply only after the fetus is killed, a time when "there is no potential life at stake") or the dignified and respectful burial and cremation of non-fetal human remains (because after a human person passes away "there is no [person or human] life at stake"). *PPINK*, 888 F.3d at 308. Thus, review is necessary to resolve the inter-circuit conflict and to clarify the nature and scope of the States' interest in fetal human life.

Second, the Seventh and Eighth Circuits have imposed very different burdens on the government with respect to the requirement that a government interest and a regulation bear a "rational relationship." The Seventh Circuit required a strict connection between Indiana's fetal remains statute and its proffered interest in the "humane and dignified disposal of an aborted fetus." *Id.* at 309. After declaring that that interest is not legitimate because fetuses are not human, the panel contended that, even if the interest were legitimate, the fetal remains statute is not rationally related to the interest because the law does not treat fetuses as

human enough. *See id.* ("[T]he fetal disposition provisions do not treat aborted fetuses the same as human remains."); *Gonzales*, 550 U.S. at 160 ("There would be a flaw in this Court's logic … were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures."). While the fetal remains statute (1) permits a woman to dispose of fetal remains "in whatever manner she wishes, without restriction" and (2) allows for the "simultaneous cremation of aborted fetuses," Indiana provides an exhaustive list of the acceptable ways to dispose of non-fetal human remains and allows for simultaneous cremation of non-fetal human remains only with prior written consent of specified persons. *PPINK*, 888 F.3d at 309. Consequently, the panel held that it could not "identify a rational relationship between the State's interest in 'the humane and dignified disposal of human remains' and the law as written." *Id.*

The Seventh Circuit's analysis not only contravenes the deferential standard the Eighth Circuit employed, but also imposes an impossible standard on the State. *Casey* and *Roe* cannot be interpreted to require Indiana or any other State to treat human fetuses like non-fetal humans in all respects because, if the fetus must receive the same treatment as a human person, then abortion would be illegal. *See Roe*, 410 U.S. at 156-57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."). Rather, *Roe* and *Casey* distinguish between fetal human life and human

persons, which explains why Indiana can reasonably require the dignified and respectful treatment of fetal remains without mandating that fetal remains be treated in precisely the same way as other human remains.

Moreover, requiring a tight connection between the State's interest and the fetal remains statute contradicts the deferential standard used in the Eighth Circuit. According to the Eighth Circuit, under rational basis review "a legislature must have the latitude to 'establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every evil." *Planned Parenthood of Minn.*, 910 F.2d at 488. Applying this standard, the court concluded that it could not "disagree with this [legislative] judgment" and, therefore, held "that the fetal disposal statute is reasonably related to the state's legitimate interests." *Id.*

B. Lower Federal Courts Have Reached Conflicting Conclusions as to Whether Fetal Remains Statutes Implicate a Woman's Fundamental Right to Choose and, If So, What the Proper Standard of Review Is Post-*Hellerstedt*.

While the Seventh and Eighth Circuits diverged as to the constitutionality of fetal disposition statutes, they both (along with the four Judges who dissented from the denial of rehearing en banc in *PPINK*) determined that the statutes do not

implicate a fundamental right. *See PPINK*, 888 F.3d at 307 ("PPINK agrees that no fundamental right is at stake."); *Planned Parenthood of Minn.*, 910 F.2d at 486 (stating that the Minnesota statute has "no significant impact on a woman's exercise of her right to an abortion."). In her opinion concurring in the denial of rehearing en banc in *PPINK*, however, Chief Judge Wood (joined by Judges Rovner and Hamilton) disagreed with that determination. According to Chief Judge Wood, Indiana's fetal remains statute "involves a fundamental right" because it regulates "the final step in the overall process of terminating (or losing) a pregnancy." *PPINK*, No. 17-3163, 2018 WL 3655854, at *2 (7th Cir. June 25, 2018). Consequently, the Chief Judge contended that the undue burden test should apply, requiring courts to consider the financial costs of the statutorily required disposition of fetal remains, the possible psychological trauma resulting from "the potential stigmatizing impact of these measures," and the burden that the Indiana statute might have when viewed in tandem with other abortion regulations, "as is required under [*Hellerstedt*], 136 S. Ct. at 2309, 2313." *PPINK*, 2018 WL 3655854, at *3.

Consistent with Chief Judge Wood's assertion, district courts in Arkansas, Louisiana, and Texas have applied the undue burden standard set out in *Casey* and most recently interpreted in *Hellerstedt*. *See Hopkins v. Jegley*, 267 F. Supp.3d 1024, 1098 (E.D. Ark. 2017); *June Med. Servs., LLC v. Gee*, 280 F. Supp.3d 849, 868 (M.D. La. 2017); *Whole Woman's Health v. Smith*, No: A-16-CV-01300-DAE, 2018 WL 4225048 at *8 (W.D. Tex. Sept. 5, 2018). Each of

these courts has observed that *Hellerstedt* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Hellerstedt*, 136 S. Ct. at 2309. Their invocation of *Hellerstedt*, however, raises at least three important questions that only this Court can answer.

First, does *Hellerstedt*'s balancing test or some other version of the undue burden standard apply when a regulation seeks to advance the State's "substantial" and "profound" interest in potential life? *Casey*, 505 U.S. at 876, 878. As support for the balancing test, *Hellerstedt* cites only to *Casey*'s treatment of Pennsylvania's parental consent and spousal notification requirements, which were predicated on interests other than the promotion of fetal human life.[2] Accordingly, given that *Hellerstedt* did not consider the nature or scope of the government's interest in potential life, this Court must determine whether and how the balancing test applies to a measure designed to serve that important and legitimate interest.

The Seventh and Eleventh Circuits and a district court in the Fifth Circuit have concluded that the same balancing test applies regardless of the

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[2] While the Seventh Circuit has suggested otherwise, *see Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dept. of Health*, 896 F.3d 809, 818 (7th Cir. 2018) (claiming that the State argued in *Casey* that "spousal notification and parental involvement … were related to its interest in potential life."), in addressing the spousal notification and parental consent provisions, *Casey* considers only "the *husband*'s interest in the potential life of the child" and not the State's. *See Casey*, 505 U.S. at 898 (emphasis added).

interest involved. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. St. Dept. of Health ("PPINK II")*, 896 F.3d 809, 818 (7th Cir. 2018) ("The State is incorrect that the standard for evaluating abortion regulations differs depending on the State's asserted interest or that there are even two different tests."); *West Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1326 (11th Cir. 2018) ("The State cites no support for the proposition that a different version of the undue burden test applies to a law regulating abortion facilities."); *Whole Woman's Health v. Hellerstedt ("Hellerstedt II")*, 231 F.Supp.3d 218, 228 (W.D. Tex. 2017) ("DSHS's argument that a different test applies when the State expresses respect for the life of the unborn is a work of fiction … ."). If that is correct, then lower courts need guidance as to the weight of the States' interest in fetal human life and how that interest should be balanced against potential burdens.

Second, when are a regulation's benefits sufficient to survive *Hellerstedt*'s balancing test? Lower court decisions reflect confusion about how to weigh the benefits of an abortion regulation against its burdens. For example, district courts in the Fifth and Eighth Circuits have decided that "[a] regulation will not be upheld unless the benefits it advances outweigh the burdens it imposes." *Hopkins*, 267 F.Supp.3d at 1055-56. *See Hellerstedt II*, No. A-16-CA-1300, 2018 BL 30317, at *6 (W.D. Tex. Jan. 29, 2018) ("[T]he record suggests Chapter 697 imposes an undue burden on abortion access because its burdens exceed its benefits."). A district court in the Eleventh Circuit, on the other hand, has interpreted *Hellerstedt* to require a sliding scale under which a

State must show a greater purported benefit as the burden increases: "[T]he more severe the obstacle a regulation creates, the more robust the government's justification must be, both in terms of how much benefit the regulation provides towards achieving the State's interests and in terms of how realistic it is the regulation will actually achieve that benefit." *West Ala. Women's Ctr. v. Miller*, 299 F.Supp.3d 1244, 1262 (M.D. Ala. 2017).

Moreover, the Seventh and Eight Circuits approach the balancing test in ways that differ from these district courts and from each other. The Seventh Circuit insists that, "[i]f a burden *significantly* exceeds what is *necessary* to advance the state's interests, it is 'undue.'" *PPINK II*, 896 F.3d at 827 (emphasis added) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015)). For its part, the Eighth Circuit interprets *Hellerstedt* to require a court to determine whether a regulation's "benefits are substantially outweighed by the burdens it imposes." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). These varying interpretations evidence the uneven application of *Hellerstedt*'s balancing test and the need for this Court to clarify its demands.

Third, if *Hellerstedt*'s balancing test applies to regulations designed to advance a State's interest in potential life, how does a court weigh the benefits associated with those regulations? *Hellerstedt* does not overrule *Casey* or *Gonzales*, but interprets principles underlying those decisions. Thus, if *Hellerstedt* requires balancing in all circumstances as the Seventh and Eleventh Circuits have

concluded, *Casey* and *Gonzales* necessarily employed the balancing test when upholding the various regulations that were enacted to promote the government's interest in potential life.

In both cases, this Court demanded very little in terms of benefit from those regulations. For example, *Casey* upheld Pennsylvania's 24-hour waiting period because of "[t]he *idea* that important decisions will be more informed and deliberate if they follow some period of reflection." *Casey*, 505 U.S. at 885 (emphasis added). Similarly, *Gonzales* sustained the partial-birth abortion ban based on a "reasonable inference" about its "necessary effect … and the knowledge it conveys." *Gonzales*, 550 U.S. at 159. Moreover, in doing so, the *Gonzales* Court noted: "While we find *no reliable data* to measure the phenomenon, it seems *unexceptionable* to conclude some women come to regret their choice to abort … ." *Id.* at 159 (emphasis added). Therefore, under *Casey* and *Gonzales*, it need only be conceivable that a regulation could cause a woman to choose childbirth over abortion for the regulation to yield benefits sufficient to survive the undue burden test.

Lower courts, however, are asking for much more. The Texas district court in *Smith* stated that "[t]he main benefit (indeed, perhaps the only benefit) of [Texas's fetal remains statute] is the expression of respect for potential life," a benefit the court considered "minimal." *Smith*, 2018 WL 4225048, at *14. In addition, in affirming an injunction against an Indiana law requiring an 18-hour waiting period following an ultrasound, the Seventh Circuit cited a lack of evidence that the waiting period would

produce the benefits the State claimed. *PPINK II*, 896 F.3d at 831 ("A statute that curtails the constitutional right to an abortion ... cannot survive challenge without evidence that the curtailment is justifiable by reference to the benefits conferred by the statute." (alteration in original) (quoting *Schimel*, 806 F.3d at 921)). These lower court decisions appear to "undervalue" the States' interest in preserving and promoting fetal human life and, consequently, conflict with *Casey* and *Gonzales*.

Supreme Court review is critical, then, because the lower courts are splintered as to (1) whether fetal disposition provisions implicate a fundamental right—a determination that, as Chief Judge Wood notes, "is capable of dictating the outcome" in abortion-related litigation—and (2) what the relationship between and among *Casey*, *Gonzales*, and *Hellerstedt* is and how the undue burden standard applies to the States' important interest in fetal human life.

II. Certiorari Should Be Granted Because the Seventh Circuit Misapplies the Rational Basis Standard of Review that This Court Has Articulated, Thereby Impermissibly Interfering with the Legislative Function.

Review also is proper in this case because the Seventh Circuit's application of the rational basis standard of review conflicts with binding precedent of this Court. Specifically, the Seventh Circuit fails to follow this Court's instructions in *Heller* and *Beach Communications* regarding the degree of

deference that courts must afford legislative judgments under rational basis review.

If a measure does not implicate a fundamental right, it need only "be rationally related to legitimate government interests" to withstand rational basis review. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). In this way, rational basis review is "a paradigm of judicial restraint." *Beach Commc'ns*, 508 U.S. at 314. As *Heller* explains, the rational basis standard requires courts to give broad deference to legislative acts:

> [R]ational-basis review … "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." … [A] legislature … need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld … if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Heller, 509 U.S. at 319-20 (citations omitted). The standard is the same for both due process and equal protection challenges. *See Glucksberg*, 521 U.S. at 728 (citing *Heller*, 509 U.S. at 319-20).

Under the rational basis standard, "legislative choice … may be based on rational speculation … ." *Beach Commc'ns*, 508 U.S. at 315; *Heller*, 509 U.S. at 320 (same). And "[a] State … has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Consequently, courts can consider any reasonable purpose—even purposes that never entered the mind of the legislature: "[B]ecause we never require a

legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 315. *See also Flemming v. Nestor*, 363 U.S. 603, 612 (1960) ("[I]t is … constitutionally irrelevant whether [the possible justification this Court identified] in fact underlay the legislative decision, as it is irrelevant that the section [does] not extend to all to whom the postulated rationale might in logic apply.").

Moreover, under rational basis review, courts do not engage in means-ends testing:

> [C]ourts are compelled … to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "it is not made with mathematical nicety … ." "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

Heller, 509 U.S. at 321 (citations omitted). With this broad deference, "the precise coordinates of … legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns*, 508 U.S. at 316.

The problem in *PPINK* is that the Seventh Circuit panel applied the rational basis standard in a manner completely inconsistent with *Heller* and *Beach Communications*. Not only did the panel

refuse to consider the interest in public sensibilities that the Eighth Circuit credited, *PPINK*, 888 F.3d at 309 (dismissing the interest in "protecting the public's sensibilities" because "Indiana focuses on the interest of the *fetus*"), it also rejected Indiana's interest in "promoting respect for potential life." *Id.* at 308 (holding that Indiana lacked a legitimate interest because "there is no potential life at stake").

The Seventh Circuit's application of the rational basis standard reflects at least five serious conflicts with this Court's case law. First, the fact that this Court has determined a fetus is not a "person" for purposes of the Fourteenth Amendment is irrelevant to whether Indiana has a legitimate interest in the "humane and dignified disposal of human remains." *PPINK*, 888 F.3d at 308. In *Webster v. Reproductive Health Services*, 492 U.S. 490, 504 (1989), this Court found that no constitutional consideration even was warranted with respect to a declaration in the preamble of a Missouri law that "[t]he life of each human being begins at conception." And this Court repeatedly has recognized that a State may encourage childbirth over abortion, a position that implicitly reflects the State's view about personhood. *See, e.g.*, *Casey*, 505 U.S. at 886 ("[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion … ."); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) ("[T]he right in *Roe v. Wade* … implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion … .").

Second, as the Eighth Circuit pointed out in *Planned Parenthood of Minn.*, this Court "has

recognized the legitimate interest of states and municipalities in regulating the disposal of fetal remains from abortions and miscarriages." *Planned Parenthood of Minn.*, 910 F.2d at 481. In fact, less than two years after *Roe*, this Court affirmed without opinion a district court's decision upholding a statute requiring "the humane disposition of dead fetuses" as a valid exercise of the State's police power directed at public health. *Planned Parenthood Ass'n. v. Fitzpatrick*, 401 F.Supp. 554, 572-73 (E.D. Pa. 1975), *aff'd sub nom.*, *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). Moreover, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, this Court stated that, although the fetal remains disposition requirement at issue was unconstitutionally vague, the city was "free … to enact more carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains." 462 U.S. at 451 n.45, overruled on other grounds by *Casey*, 505 U.S. at 881-85.

Third, the *PPINK* panel conflated its consideration of the legitimacy of Indiana's interests with the question of whether the statute served one or more of those interests. Contrary to what the panel suggested, the fact that the disposition requirement applies to an aborted fetus in no way diminishes the legitimacy of Indiana's interest in promoting and protecting potential life. *See Gonzales*, 550 U.S. at 145 ("[A] premise central to [*Casey*'s] conclusion [is] that the government has a legitimate and substantial interest in preserving and promoting fetal life … ."); *Casey*, 505 U.S. at 870 ("[T]he State has a legitimate interest in promoting the life or potential life of the unborn … ."); *Roe*, 410

U.S. at 154 ("[A] State may properly assert [an] important interest[] … in protecting potential life."). Thus, the Seventh Circuit obscured the relevant question under rational basis review—whether Indiana's fetal remains disposition requirement conceivably could serve the interest.

Fourth, the court in *PPINK* improperly attempted to divine Indiana's actual motive in enacting the requirement and then assessed the requirement's effectiveness relative to the perceived motive. Given pre-existing requirements of Indiana law, the court determined that the State could not have been seeking to advance a public health interest because that interest already was protected. *See PPINK*, 888 F.3d at 309 ("[T]he State's interest here goes well beyond the sanitary or unitary disposal of aborted fetuses, interests which are already being carried out under current Indiana law and health regulations …"). But *Beach Communications* instructs that a State's motivation "is *entirely irrelevant* for constitutional purposes." *Beach Commc'ns*, 508 U.S. at 315 (emphasis added). That Indiana could have a public health reason for requiring different types of surgical "byproducts" to be disposed of in different ways is wholly conceivable, and that is enough to sustain the fetal remains disposition requirement under *Fitzpatrick* regardless of whether State legislators had some other purpose in mind and even if a court believes the measure is redundant. *See Beach Commc'ns*, 508 U.S. at 314 ("[J]udicial intervention is generally unwarranted no matter how unwisely we may think

a political branch has acted." (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).[3]

Fifth and finally, the Seventh Circuit engaged in the type of means-ends analysis that is repugnant to rational basis review. Under *Heller*, "courts are compelled … to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Nevertheless, the circuit court inappropriately evaluated the extent to which existing law already addressed public health concerns regarding the disposition of fetal remains. In addition, after assuming that the State had a legitimate interest, the panel evaluated the Indiana statute's fit, concluding that the law did not treat fetal remains sufficiently like Indiana treats other human remains. Thus, the panel ignored this Court's admonition in *Beach Communications* that "the precise coordinates of … legislative judgment [are] virtually unreviewable" under the rational basis standard. *Beach Commc'ns*, 508 U.S. at 316.

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[3] In addition, under *Gonzales*, the requirement easily could survive rational basis review as a regulation that might advance the State's interest in promoting potential life. Over Justice Ruth Bader Ginsberg's objection that the federal partial-birth abortion ban "saves not a single fetus from destruction, for it targets only a *method* of performing abortion," *Gonzales*, 550 U.S. at 181 (Ginsberg, J., dissenting), this Court upheld the ban as a measure whose message might encourage some women to choose childbirth over abortion. *See Gonzales*, 550 U.S. at 160 ("It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term … .").

As this Court has explained, applying rational basis review correctly is critical in our system of separation of powers: "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973)). Thus, review of the Seventh Circuit's decision is warranted to confirm the proper application of rational basis review and, in the process, to protect against judicial interference with the policy-making role of the legislative branch.

CONCLUSION

For the reasons set forth above, this Court should grant Indiana's petition for a writ of certiorari.

Respectfully submitted,

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