No. 20-1434

In the
Supreme Court of the United States

LESLIE RUTLEDGE, in her official capacity as the Attorney General of Arkansas, *et al.*,

Petitioners,

v.

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*,

Respondents.

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

BRIEF *AMICI CURIAE* OF ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, THE FAMILY FOUNDATION (KY), THE FAMILY FOUNDATION (VA), ILLINOIS FAMILY INSTITUTE, WISCONSIN FAMILY ACTION, NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS

in Support of Petitioners

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INTERESTS OF *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Scripture teaches that every person is an image-bearer of God and that the womb is his domain. SBC members believe God's knowledge of unborn life even precedes the creative act of conception. Therefore, abortion is incongruent with SBC beliefs. The ERLC is committed to upholding the freedom of Christian ministries who care for women in unplanned pregnancies because we believe mothers and their unborn children are known and loved by God.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service charities, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical

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[1] The parties were given timely notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

churches and other religious ministries. It believes that human life is sacred because made in the image of God, that civil government has no higher duty than to protect human life, and that that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite. CWA is profoundly committed to the intrinsic value of every human life from conception to natural death, including the life and wellbeing of every female in America.

The Family Foundation (KY) is a Kentucky non-profit, educational organization that works in the public policy arena to protect the family and the values that make families strong. Issues that are particularly germane to The Foundation's work include the sanctity of marriage, the sanctity of life, religious liberty, and excellence in educational opportunities for all of Kentucky's children.

The Family Foundation (VA) ("TFF") is a Virginia non-partisan, non-profit organization

committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** ("IFI") is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. Core values of IFI are to uphold religious freedom and conscience rights for all individuals and organizations and to protect the unborn.

Wisconsin Family Action ("WFA") is a Wisconsin, not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life, and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues, in particular its long-sustained efforts to protect the lives of the unborn.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties, including our First Freedoms of speech, assembly, and religion. The NLF and its donors and supporters, in particular those from Arkansas, are vitally concerned with the outcome of this case because of its effect on life and

liberty of the disabled.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold the view that each individual, even if disabled, is of great value. To this end, PJI has engaged in extensive litigation involving the sanctity of life, including high profile cases involving end-of-life issues.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel, including with respect to abortion and its practice.

SUMMARY OF ARGUMENT

The States have compelling interests in preventing discrimination, even when individuals are otherwise exercising constitutional rights. The Eighth Circuit reluctantly thought that this Court's abortion precedent, even though it has never directly addressed the issue, holds that the "right" found by

the Court allowing women to abort pre-viability always overrides all other, countervailing interests. That grievous error—which here allows the unborn to be killed because of their genetic disability—should be corrected as soon as possible. This case also presents a suitable vehicle for considering whether *Roe* and *Casey* should be reevaluated or overruled, in whole or in part.[2]

ARGUMENT

I. This Court Has Not Previously Considered Discrimination Against the Disabled in Abortion, and the States Have Compelling Interests in Preventing It

The Eighth Circuit panel overread this Court's prior abortion decisions when it enjoined prohibitions against discrimination based on the disability of the unborn child. The States, as well as the Federal Government, have compelling interests in preventing such discrimination, and those interests can and must be harmonized with this Court's abortion precedent.

A. Eugenics Is Real, and the States Have a Compelling Interest in Preventing It

The eugenics movement lost much of its steam

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[2] *Amici* do not believe that any "right to abort" is properly found in the Constitution, as further discussed in section II *infra*, but that the challenged discrimination ban is constitutional even giving full weight to *Roe* and *Casey* and its progeny.

after it had been practiced so efficiently by the Nazis in Europe.[3] But it has come roaring back with abortion, both in Europe and in our own country. Arkansas effectively demonstrates this with many statistics in its petition with respect to those tested for Down Syndrome in utero.[4] Justice Thomas also sketched some of this history in his concurrence in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*[5]

The eugenic practice of aborting children who are tested for potential genetic abnormalities is growing as such testing becomes cheaper and more

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[3] *See Atkins v. Va.*, 536 U.S. 304 (2002) (finding imposition of death penalty on the mentally handicapped to be cruel and unusual). *But see Buck v. Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough.").

[4] *See* David Harsanyi, *Pro-Choicers Should Explain Why They Think Eugenics Is Acceptable-Iceland's 'Eradication' of Down Syndrome Raises Inconvenient Questions. At least, It Should*," Aug. 16, 2017, at https://thefederalist.com/ 2017/08/16/icelands-eradication-syndrome-raises-inconvenient-questions-pro-choicers/ (last visited May 11, 2021).

[5] 139 S. Ct. 1780, 1783-93 (2019) (Thomas, J., concurring); *see also Preterm-Cleveland v. McCloud*, 994 F.3d 512, 518 (6th Cir. 2021) (en banc) (reciting Ohio law's findings about abortion for Down Syndrome in Iceland and the Netherlands); *id.* at 538-40 (Griffin, J., concurring) (reciting eugenics history in the U.S. and elsewhere); *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Erickson, J., concurring) (reciting statistics for abortion for Down Syndrome in Denmark); Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 87 (2018).

widely available. Along with it, the cases of false positives for both genetic and physical pre-birth testing likely will be multiplied, which is another concern of which a State can legitimately be cognizant. This Court should not delay in reconciling the compelling interests in protecting the disabled with its previous decisions concerning abortion.

B. This Court's Prior Cases Do Not Resolve the Question Presented

The Eighth Circuit below, despite two judges disagreeing with the result they joined, believed that this Court had dictated in *Roe* and *Casey* and their progeny an absolute rule that brooks no restriction on a woman's right to abort prior to viability.[6] This was not correct.

First, the obvious: this Court has never directly addressed this issue. As Judge Easterbrook stated in a lower-court opinion in *Box*, "*Casey* did not consider the validity of an anti-eugenics law":

> *Casey* and other decisions hold that, until a fetus is viable, a woman is entitled to decide whether to bear a child. But there is a difference between "I don't want a child" and "I want a child, but only a male" or "I want only children whose genes predict success in life." Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that

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[6] *See Little Rock Family Planning,* 984 F.3d at 687-88; *id.* at 693 (Shepherd, J., concurring); *id.* at 694 (Erickson, J., concurring).

underlay the statutes *Casey* considered.[7]

Second, it is just as obvious that the protection of the genetically disabled is itself a compelling interest.[8] As discussed above, this compelling interest is not a remote or infrequent concern, but one of both recent historical and current importance.

Third, when important interests are in conflict, this Court historically has balanced the relevant interests, rather than stating a categorical rule. For instance, this Court balanced the competing interests of racial discrimination and the free exercise of religion in *Bob Jones University v. United States*.[9] In its recent, *en banc* ruling upholding an Ohio law prohibiting doctors from knowingly aborting for the sole reason that the child may suffer from Down Syndrome, the Sixth Circuit

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[7] *Planned P'hood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting), *rev'd in part sub nom.*, *Box v. Planned P'hood of Ind. and Ky., Inc.*, 139 S. Ct. 1780 (2019); *accord Preterm-Cleveland*, 994 F.3d at 536-37 (Sutton, J., concurring); *id.* at 544-45 (Bush, J., concurring).

[8] *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

[9] 461 U.S. 574 (1983); *see also Wis. v. Yoder*, 406 U.S. 205 (1972) (balancing fundamental right of parents to raise their minor children with the state's compelling interest in educating minors to an appropriate level). Of course, no balancing is done when, as a constitutional matter, the government is totally restrained from interfering in the private decision, such as a religious organization's decision as to who is to be its minister. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

noted that this Court had not established a right to abortion that cannot be outweighed by a compelling interest in a narrowly tailored way: "The right to an abortion before viability is *not* absolute."[10] The Sixth Circuit is correct, and the Eighth Circuit is not. This Court should take this opportunity to resolve this circuit split.

II. This Case Provides an Appropriate Vehicle to Consider Whether Roe and Its Progeny Should Be Reevaluated or Overruled, in Whole or in Part

The curtain has long ago been pulled back on *Roe* and its mid-course correction in *Casey*, exposing the historical and logical deficiencies of those decisions.[11] Although Arkansas is correct that this petition could be granted and the Eighth Circuit's decision could be reversed without overruling *Roe* and *Casey*, this case provides an appropriate vehicle to consider whether revising or overruling them, in whole or in part, is the better course of action.

A recent article in the *Georgetown Journal of Law and Public Policy* catalogues and applies the

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[10] *Preterm-Cleveland*, 994 F.3d at 520 (emphasis in original); *see also id.* at 544-45 (Bush, J., concurring) (balancing interests in abortion and Ohio's compelling interest in preventing discrimination due to genetic disabilities).

[11] *See, e.g.*, Joseph W. Dellapenna, Dispelling the Myths of Abortion History (2006); Clarke Forsythe & Stephen Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 Tex. Rev. of Law & Pol. 301, 313–16.

template provided by this Court in determining whether to overrule its own precedent.[12] *Roe* and *Casey* tick every box: (1) they are not settled precedent; (2) the original decisions were "wrongly decided," with neither being "well-reasoned"; (3) the schema they set out are not workable, but, rather, have caused confusion and conflict in the lower courts; (4) factual changes have eroded the original decisions; (5) legal changes have eroded the original decisions; and (6) reliance interests are not substantial.[13]

As noted, Judges Shepherd and Erickson below, while believing that *Casey* required them to enjoin the Arkansas law prohibiting abortions because the unborn child is suspected to have Down Syndrome, expressed their belief that the *Casey* "viability" rationale is ill-considered and should be retooled.[14] This Court should heed that call.

CONCLUSION

This Court should grant the petition. It presents foundationally important questions about how this Court's abortion jurisprudence can be harmonized with our Nation's compelling interests in preventing discrimination based on genetic disability. This Court should embrace the conclusion

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[12] Clarke D. Forsythe, *A Draft Opinion Overruling* Roe v. Wade, 16 Geo. J. of L. & Pub. Policy 445 (2018).

[13] *Id.*; *see also Janus v. AFSCME, Council 31,* 138 S. Ct. 2448 (2018) (outlining relevant factors for overruling prior precedent).

[14] 984 F.3d at 692 (Shephard, J., concurring); *id.* at 693 (Erickson, J., concurring).

of Judge Bush of the Sixth Circuit that "the Fourteenth Amendment's Due Process Clause, as originally understood, does not prohibit laws that protect unborn life with Down syndrome."[15] If necessary to confirm that conclusion, this Court should consider revising or overruling *Roe* and *Casey*, in whole or in part.

Respectfully submitted,
this 13th day of May, 2021,

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[15] *Preterm-Cleveland*, 994 F.3d at 541 (Bush, J., concurring).