No. 20-1434

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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Amicus Life Legal Defense Foundation is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. Human life begins at the moment of conception and does not end until natural death. Life Legal litigates cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care.

Life Legal Defense Foundation sees in the present case an opportunity for this Court to right a 48-year-old wrong: the stripping from states of their authority to protect the lives of innocent human beings within their borders.

SUMMARY OF THE ARGUMENT

While Amicus Life Legal Defense Foundation agrees with Petitioners that the Arkansas Down

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing.

Syndrome Discrimination by Abortion Prohibition Act (Ark. Code Ann. §§20-16-2101 to 2107) (the "Act") is constitutional and that the decision of the Eighth Circuit warrants review and reversal, it respectfully presents an alternative rationale to Petitioners' reasoning. Neither the Fourteenth Amendment nor any other provision of the United States Constitution bars states from prohibiting abortions sought solely on the basis of a diagnosis of Down-syndrome, because neither the Fourteenth Amendment nor any other provision of the Constitution bars states from prohibiting abortions.

Unfortunately, by defending its prohibition on the far narrower grounds that the Act serves the state's compelling interest in preventing discrimination, Arkansas risks further complicating not just one but three areas of law already suffering from jurisprudential confusion: discrimination, compelling interests, and abortion.

This Court should grant certiorari, reverse the lower court, and uphold the Act on the grounds that *Roe v. Wade*, 401 U.S. 113 (1972) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) were wrongly decided.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO OVERTURN *ROE* AND *CASEY*, NOT TO CREATE FURTHER CONFUSION IN THE LAW.

In defending the Act, Arkansas argues that abortion regulations that serve compelling

governmental interest are valid even if they impose a substantial obstacle to a woman seeking a pre-viability abortion. Pet. at 13-18. It then asserts that the Act serves the state's "compelling interest in eliminating discrimination," citing this Court's precedents in *Bd. of Dirs. of Rotary Club Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); and *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Pet. at 24-28.

There are three problems with this argument. First, Arkansas falls into the error of assuming that all discrimination is equal. This Court's precedents, however, carefully distinguish between those types of discrimination that trigger strict scrutiny, such as race discrimination, and those that do not, such as discrimination based on age or disability. Compare *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) ("we must subject all racial classification to the strictest of scrutiny"), with *City of Cleburne v. Cleburne Living Center*, 473 US. 432, 441-42 (1985) (age and mental disability discrimination does not trigger strict scrutiny). A new holding that any practice labeled by a state as discrimination can be banned could have dangerous unintended consequences by allowing states to control the decisions and actions of private parties, irrespective of any countervailing rights.

Second, and relatedly, this Court's induction of new interests into the pantheon of "compelling interests" is frequently ad hoc and result-driven. See Note, Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling-and Important-Interest Inquiries, 129 Harv. L. Rev.

1406, 1427 (2016) ("the distinction between legitimate, important, and compelling interests is virtually never of consequence"). Thus, it is unlikely that a finding by this Court that the state has a compelling interest in prohibiting abortions motivated by a Down-syndrome diagnosis will be the deciding factor on the constitutionality of the Act. Based on past experience, this Court is more likely to assume without deciding the interest is compelling, but proceed to decide the case on other grounds.

Finally, Arkansas's argument for granting the writ leads down yet another rabbit trail in abortion jurisprudence: whether abortion regulations should be subject to a balancing test.

Arkansas points out the confusion in the lower court after this Court's decisions in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), over whether or not courts are to apply a balancing test to the benefits and burdens of abortion regulations. Pet. at 30-31. Notably, Arkansas does not speak of the "benefits" of the Act, but of the state's "interests" that it furthers.

Some laws, such as the health regulations at issue in *Hellerstedt* and *Russo*, present at least the possibility of a quantitative assessment of benefits, or the lack thereof. Other laws, however, such as the Act challenged here, are supported by interests that defy measurement. What weight in the scales should the state's interest "in protecting their populations with Down-syndrome from elimination" (Pet. at 26) and "preventing selective

abortion from stigmatizing people with Down syndrome" (Pet. at 27) be given? Should that weight be "balanced" against the possible additional burdens (and benefits) of raising a child with Down-syndrome, or against the obstacles to obtaining eugenically-motivated abortions in other states? If the evidence at trial were to show a higher survival rate of those diagnosed prenatally with Down syndrome than appears in the legislative record, would the state's interest in preserving that population from elimination be significantly undercut? Is there a survival rate that is high enough to erase the "compelling interest" justification for the state's ban on eugenically-motivated abortions?

Thus, should this Court resolve the circuit split in favor of a balancing test, or, as Arkansas urges, in favor of consideration of "compelling interests," that resolution will move no closer to deciding in any principled and intelligible way what to do with the interests that Arkansas here proffers in favor of the Act. That final determination will depend solely on whether or not the value judgments of a majority of the members of this Court are in accord with the value judgments of the Arkansas legislature, at least in the context of eugenically-motivated abortions.

But resolving the circuit split against a balancing test will not fare any better. In his concurrence in *June Medical Services*, the Chief Justice wrote:

> [C]ourts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of

> human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were . . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus."

140 S.Ct. at 2136 (internal citations omitted). The Chief Justice's statement stands as an indictment of both *Roe* and *Casey* on their own terms. In both cases, this Court engaged in a "grand balancing" (*id*. at 2135; quotation marks omitted) of imponderables with the intent of deciding, as judges, once and for all, matters that should be left to legislators or the voters. *E.g., Roe*, 401 U.S. at 165 ("This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day"); *Casey*, 505 U.S. at 871 (plurality) ("The *Roe* Court recognized the State's 'important and legitimate interest in protecting the potentiality of human life.' The weight to be given this state interest, not the

strength of the woman's interest, was the difficult question faced in *Roe*.") If balancing these interests is wrong, then *Roe* and *Casey* are wrong.

This Court does not need another recitation of the errors of *Roe* and *Casey*. Cogent and compelling criticisms can be found in law review articles spanning five decades. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Forsythe, *A Draft Opinion Overruling Roe v. Wade*, 16 Geo. J. L. & Pub. Pol. 445 (2018) (compiling scholarly and judicial criticism of *Roe*). More criticism can be found in the opinions (majority, concurring, and dissenting) of deeply divided and confused circuit courts, including the court below here. (Pet. App. 15a–20a) (concurring opinions). In addition to the numerous party and amicus briefs filed urging the Court to reconsider and overrule these decisions, many members of this Court have expressed the same opinion of these "grievously wrong" decisions in their dissents. *June Medical Services, L.L.C. v. Russo*, 140 S.Ct. 2103, 2152 (2020) (Thomas, J., dissenting) (collecting concurring and dissenting opinions) ("[T]he fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy.")

Merely resolving the circuit split on the issue of balancing will not produce any clearer guidance for courts going forward. Behind balancing await myriad other questions raised by this Court's fractured abortion jurisprudence. This Court should grant certiorari in order to reconsider and overrule *Roe* and *Casey*.

CONCLUSION

This Court should grant the petition and reverse the lower court, holding that *Roe v. Wade*, *Planned Parenthood v. Casey*, and their progeny were wrongly decided and are no longer binding on the lower courts.

Respectfully submitted,

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