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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit correctly held that the State may not prohibit any woman from obtaining an abortion before viability based on her reasons for seeking care.

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INTRODUCTION

As this Court has recognized for decades, a State may not prohibit anyone from obtaining an abortion before fetal viability. The decision whether to bear a child is too "intimate and personal" to be "form[ed] under compulsion of the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). Because they are "subject to anxieties, to physical constraints, to pain that only [they] must bear," *id.* at 852, pregnant people have the right to decide—in consultation with their doctors, their family, and others in their life—whether to terminate a pregnancy before viability, without the State dictating what reasons are permissible or impermissible. That decisional autonomy—"the private realm of family life which the state cannot enter"—lies at the very core of the abortion right. *Id.* at 851.

In the decision below, the Eighth Circuit correctly applied these longstanding principles to invalidate an Arkansas law barring abortion in cases where the pregnant person seeks care because of a fetal indication of Down syndrome. The Eighth Circuit's decision is consistent with the decisions of other courts of appeals. The one decision that Arkansas cites to manufacture a circuit split *agreed* with the Eighth Circuit that a State may not impose a pre-viability abortion ban based on a patient's reason for obtaining an abortion; it simply concluded that the Ohio statute at issue was likely constitutional because it—unlike the Arkansas statute here—did *not* prohibit anyone from obtaining an abortion based on their reason for seeking care.

In any event, this case is a poor vehicle to address the question presented. Arkansas did not advance the legal framework it now urges this Court to adopt when it was before the Eighth Circuit. In fact, *no* lower court has considered (much less adopted) Arkansas's novel argument. And even if this Court were to embrace Arkansas's newly minted legal framework, Arkansas would still lose on the record it created. The Court should deny the petition.

STATEMENT OF THE CASE

1. In April 2019, Arkansas enacted Act 619, which prohibits a physician from providing an abortion "with the knowledge" that a patient is seeking an abortion "solely on the basis of" (1) a test result "indicating" that the fetus has Down syndrome; (2) a prenatal diagnosis of Down syndrome; or (3) "[a]ny other reason to believe" that the fetus has Down syndrome. Ark. Code Ann. § 20-16-2103(a). "Before performing an abortion, the physician performing the abortion" is required to "ask the pregnant woman if she is aware of any test results, prenatal diagnosis, or any other evidence that the unborn child may have Down [s]yndrome." *Id.* § 20-16-2103(b)(1). If the patient so informs the physician, the physician must tell "the pregnant woman of the prohibition of abortion" contained in the statute and "[r]equest the medical records of the pregnant woman relevant to determining whether she has previously aborted an unborn child or children after she became aware of any test results, prenatal diagnosis, or any other evidence that the unborn child may have had Down [s]yndrome." *Id.* § 20-16-2103(b)(2).

Act 619's two narrow exceptions allow abortion only where necessary to save the woman's life or preserve her health or where the pregnancy resulted from rape or incest. *Id.* §§ 20-16-2102(1)(B)(i), 20-16-2103(d). Violation of the law is a Class D felony, punishable by six years in prison and a fine of $10,000. *Id.* §§ 5-4-201(a)(2), 5-4-401(a)(5), 20-16-2104. Violation also leads to mandatory license revocation and renders the physician liable for actual and punitive damages. *Id.* § 20-16-2105.

Act 619 was scheduled to take effect on July 24, 2019. Pet. App. 22a.

3. On June 26, 2019, respondents filed a Section 1983 complaint challenging the constitutionality of this statute, as well as two other newly enacted abortion restrictions. They asked the district court to enter a temporary restraining order and a preliminary injunction to preclude petitioners from enforcing all three laws.

In opposition, Arkansas claimed, as it does now, that Act 619 counters "systemic prejudice favoring eugenic abortion of children with Down syndrome." Dkt. 43, at 21. But, in fact, the number of children born with Down syndrome in the United States has "*increased* over the last three decades." Amicus Br. for California et al. 18 n.41, *Little Rock Family Planning Servs. v. Rutledge*, No. 19-2690 (8th Cir. Jan. 7, 2020).[1] At the same time, abortions in cases where

[1] *See also* Mikyong Shin et al., *Prevalence of Down Syndrome Among Children and Adolescents in 10 Regions of the United States*, 124 Pediatrics 1565 (Dec. 2009) (number of children born with Down syndrome increased 31.1% between 1979 and 2003).

there is a fetal indication of Down syndrome have been decreasing, as Arkansas's own evidence shows. *See* CA App. 898-909.[2]

Arkansas conceded that its law acts as a wholesale ban on pre-viability abortions for everyone to whom it is relevant. *See, e.g.*, Dkt. 43, at 30. Because such bans are unconstitutional under a half-century of this Court's precedent, the district court granted respondents' motion for a temporary restraining order on July 23, 2019. Dkt. 119. Although the district court held a full-day hearing before issuing that order, Arkansas's arguments and evidence largely focused on another one of the laws respondents challenged, not Act 619.

On August 6, 2019, the district court issued a preliminary injunction. As relevant here, it held that the ban at issue is likely unconstitutional because it prohibits "certain abortions prior to viability." Pet. App. 136a. As the court explained, before viability, "the State's interests are not strong enough to support a prohibition of abortion." *Id.* 132a. Consequently, the court held that respondents were likely to prevail on the merits of their due process challenge to Act 619. *Id.* 134a. Because the district court also found that the ban would imminently and irreparably harm respondents and their patients, the district court preliminarily enjoined the State from enforcing it. *Id.* 130a-137a.

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[2] *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systemic Review of Termination Rates (1995-2011)*, 32 Prenatal Diagnosis 142, 147 (2012).

Arkansas then filed an interlocutory appeal.

4. After the parties completed their appellate briefing but before the Eighth Circuit heard oral argument, this Court issued its decision in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020). There, the Court reversed a Fifth Circuit decision allowing Louisiana to implement a law requiring every physician who provides abortion care to have active admitting privileges at a hospital within 30 miles.

Five Justices supported this result. Both the plurality opinion and the separate concurrence written by Chief Justice Roberts reaffirmed "the most central principle of *Roe v. Wade*": "a woman's right to terminate her pregnancy before viability." *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment); *see id.* at 2120 (plurality op.). And both reaffirmed that abortion restrictions are invalid if they do not "further[] [a] valid state interest" or if they "present[] a substantial obstacle to a woman seeking an abortion." *Id.* at 2120 (plurality op.) (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)) (second alteration on original); *see id.* at 2135 (Roberts, C.J., concurring in the judgment).

The plurality and concurring opinions differed, however, with respect to whether a law's burdens should be weighed against its benefits. The plurality stated that courts evaluating abortion restrictions must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 2120 (plurality op.) (quoting *Whole Woman's Health*, 136 S. Ct. at 2324). But, in the Chief Justice's view, courts evaluating abortion restrictions should

not engage in "a weighing of costs and benefits." *Id.* at 2136 (Roberts, C.J., concurring in the judgment). Rather, as long as the State has a "'legitimate purpose'" and the law is "'reasonably related to that goal,'" the Chief Justice would hold that restrictions that do "not impose a substantial obstacle [a]re constitutional." *Id.* at 2138 (quoting *Casey*, 505 U.S. at 878). Conversely, under the Chief Justice's opinion, restrictions that are not reasonably related to a legitimate purpose or do "impose a substantial obstacle" are "unconstitutional." *Id.*

5. Arkansas urged the Eighth Circuit to adopt the Chief Justice's view of the law in another then-pending abortion case. *See* Response to Rule 28(j) Letter, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. July 6, 2020); Response to Pet'n for Rehearing En Banc, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. Oct. 14, 2020). The Eighth Circuit did so, holding that "Chief Justice Roberts's separate opinion in *June Medical* . . . is controlling." *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020). In the Eighth Circuit's view, that means that courts may no longer weigh the costs and benefits of challenged abortion restrictions. *Id.* at 915. Instead, "the appropriate inquiry . . . is whether the law poses a substantial obstacle or substantial burden." *Id.* (internal quotation marks and citation omitted).

6. Subsequently, in this case, an Eighth Circuit panel unanimously affirmed the district court's grant of a preliminary injunction to bar enforcement of Act 619. It held that Act 619 is unconstitutional under fifty years of this Court's precedent—as well as Chief Justice Roberts's opinion in *June Medical*—because

"it is undisputed that" Act 619 "is a substantial obstacle" to obtaining an abortion. Pet. App. 4a-10a. "[I]ndeed, it is a complete prohibition of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability." *Id.* at 10a.

The Eighth Circuit also noted that the lower courts have consistently recognized that allowing the State to interrogate and pass upon a person's reason for making the decision to end a pregnancy is antithetical to the core privacy right at issue. As the court explained: "We agree with our sister circuits that it is 'inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if . . . the State can eliminate this privacy right if [she] wants to terminate her pregnancy for a particular purpose.'" *Id.* (quoting *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300, 307 (7th Cir. 2018), *rev'd in part on other grounds sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019)).

REASONS FOR DENYING THE PETITION

A. There is no conflict on the question presented.

1. Only two other courts of appeals have confronted an abortion restriction similar to Arkansas's, and their decisions are consistent with the decision below. Both decisions, like the Eighth Circuit's decision here, held that a law prohibiting women from obtaining abortions based on their reasons for seeking such care is unconstitutional. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 521-22 (6th Cir. 2021);

Planned Parenthood of Ind. & Ky., 888 F.3d at 307. In one of these cases, this Court had the opportunity to review a holding invalidating a state law similar to the Arkansas law here but it declined to do so, despite issuing a per curiam decision regarding another provision of state law presented in that petition. *See Box* Pet. i; *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

There is no reason for a different outcome now. Although the Sixth Circuit vacated a preliminary injunction against the Ohio restriction challenged in *Preterm-Cleveland*, it did so only because it determined that Ohio's restriction does *not* bar anyone from "obtain[ing] an abortion because the forthcoming child would have Down syndrome." 994 F.3d at 522. Here, in contrast, it is "undisputed" that Arkansas's Act 619 operates as "a *complete prohibition* of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability." Pet. App. 10a (emphasis added); *see id.* at 4a, 7a-10a, 136a; *see* Pet. 32 (conceding that there is no dispute on "the severity" of the law's effect in this case).

The laws' different effects have two primary causes: First, in Ohio, providers are not required to ask patients if they have any reason to believe a fetus has Down syndrome or to initiate a search for the patient's medical records. *Preterm-Cleveland*, 994 F.3d at 519. "[E]ven under the full force" of the Ohio law, as the Sixth Circuit understood it, doctors are free to remain ignorant of a woman's reasons for seeking an abortion and "any woman" remains free to "lawfully obtain an abortion solely" because she does "not want

a child with Down syndrome." *Id.* at 522. The Arkansas law, however, requires anyone providing abortion care to first "ask the pregnant woman if she is aware of any . . . evidence that the unborn child may have Down [s]yndrome." Ark. Code Ann. § 20-16-2103(b)(1); *see* Pet. 9. If she says yes, the provider must tell her about Act 619 and "[r]equest the medical records of the pregnant woman relevant to determining whether she has previously aborted an unborn child or children after she became aware of any test results, prenatal diagnosis, or any other evidence that the unborn child may have had Down [s]yndrome." Ark. Code Ann. § 20-16-2103(b)(2).

Second, if a doctor in Ohio does learn that a woman is seeking an abortion because the fetus may have Down syndrome, the Sixth Circuit found that she can obtain care elsewhere in the State because Ohio has multiple abortion clinics and doctors who provide care at the stage of pregnancy when Down syndrome can be detected in a fetus. *Id.* at 528. As long as the new doctor does not learn of the patient's reason, the abortion is legal. In Arkansas, however, only one clinic provides abortion care at the stage of pregnancy when a woman would learn about a fetal indication of Down syndrome. *See* Pet. App. 218a. Thus, as a practical matter, a woman in Arkansas seeking an abortion on the basis of a belief that the fetus has Down syndrome would not be able to obtain an abortion once her provider learns of her reason for seeking care.

Accordingly, the Sixth Circuit's decision does not conflict with the decision below and there is no disagreement in the courts of appeals on the question presented.

2. The bulk of Arkansas's argument that there is a split in the courts of appeals relates to a different issue: "whether courts still can consider state interests in reviewing abortion laws." Pet. 30. This question is not properly presented in the petition, *see* S. Ct. R. 14.1(a), and it has no bearing on the outcome of this case, *see infra* Part C.3.

Even if this question were properly presented and relevant to the outcome, it would be unworthy of review because the courts of appeals agree that they may consider state interests in assessing the constitutionality of abortion restrictions. Pet. App. 8a-9a; *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir.) (court may consider alleged benefits of State's prohibition on standard dilation-and-evacuation procedure for second-trimester abortions), *vacated and en banc review granted*, 978 F.3d 974 (5th Cir. 2020); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 439 (6th Cir. 2020) (discussing State's asserted interest in requiring abortion providers to obtain hospital transfer and transport agreements); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 751 (7th Cir.) (although State could "offer evidence of benefits" of restriction on minors' access to abortion, State did not do so), *cert. pet. filed*, No. 20-1375 (Apr. 1, 2021). And *no* court has held that state interests, compelling or otherwise, can justify a pre-viability abortion ban. That is because this Court's precedent squarely forecloses that notion.

See June Med. Servs., 140 S. Ct. at 2120 (plurality op.); *id.* at 2135 (Roberts, C.J., concurring in the judgment); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007); *Casey*, 505 U.S. at 846; *see also infra* Part C.

B. This case is a poor vehicle to address the question presented.

1.a. This case is a poor vehicle to consider the question presented because no court has ever applied the novel tests Arkansas proposes to evaluate the constitutionality of abortion restrictions, and Arkansas did not argue for these tests before the Eighth Circuit.

Arkansas's novel test seems to be that abortion restrictions are valid as long as they "reasonably further compelling interests." Pet. 18, 29. At other times, however, Arkansas contends that even "laws that place a substantial obstacle in the path of a woman seeking an abortion . . . are permissible if they further a compelling interest." Pet. 13.

Arkansas did not argue either test below, let alone assert (as it does now) that this Court's precedent already establishes one or both of these tests. Instead, in the Eighth Circuit, Arkansas conceded that this Court's precedent forecloses application of even strict scrutiny—a more demanding test than those it now proposes. CA Br. 30-31. But it argued that Act 619 would survive strict scrutiny because it serves a compelling state interest and is "narrowly tailored" to that interest. CA Br. 28; *see* Pet. 29.

Even if Arkansas were correct that one of these novel tests applies, it would still lose on the record it created. Both tests require factual analysis: When this Court evaluates the validity of a regulation of a

fundamental right by asking whether "it is reasonably related to" a State's legitimate interest, the Court considers whether the State has "presented persuasive data to show that" the law advances the State's interest. *Doe v. Bolton*, 410 U.S. 179, 195 (1973). Even in the context of incarceration, where the protection of some constitutional rights may be diminished, courts applying this test consider factors such as whether "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational"; "whether there are alternative means of exercising the [constitutional] right that remain open to" those regulated; "the impact" that other efforts to accommodate "the asserted constitutional right will have"; and whether "obvious, easy alternatives" to the regulation exist, such that the regulation is an "exaggerated response" to the purported state interest. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) (internal quotation marks and citations omitted).

Similarly, when this Court considers whether a regulation is narrowly tailored to serve a State's compelling interest, it asks whether the State engaged in "serious, good faith consideration of" alternatives. *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007). Such consideration, though "necessary . . . is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable" alternatives would "suffice." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013).

Arkansas had the opportunity (over respondents' objection) to introduce evidence relevant to sustaining

Act 619 under either of these tests, but it did not. *See* Dkt. 83, at 2 (denying respondents' motion to strike, Dkt. 75-1); TRO Tr. 235:13-236:21. That makes this case a bad vehicle to address Arkansas's novel legal tests, even setting aside Arkansas's failure to argue for those tests in the courts below.

b. This case is also a poor vehicle to address the question presented because the district court granted a preliminary injunction only on respondents' privacy claim; the merits of that challenge, as well as respondents' vagueness challenge to Act 619, remain pending before that court. Dkt. 1, ¶¶ 118-119. As respondents explained in their district court briefing, Act 619 is invalid not only because it unduly burdens access to abortion before viability—the ground on which the district court enjoined it, and the ground on which the Eighth Circuit upheld that injunction—but also because it is unconstitutionally vague. *See* Dkt. 1, ¶¶ 66-74. Even if the Supreme Court were to grant review and agree with Arkansas, respondents' vagueness challenge to Act 619 would continue in district court, and applicable precedent would require the district court to invalidate the law on that ground.

C. The Eighth Circuit's ruling is correct.

1. The Eighth Circuit's decision is correct. This Court has consistently held that, "[b]efore viability, a State 'may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales*, 550 U.S. at 146 (emphasis added) (quoting *Casey*, 505 U.S. at 879); *see Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at

870)). This Court has never wavered from this essential principle. *See, e.g.*, *June Med. Servs.*, 140 S. Ct. at 2120 (plurality op.); *id.* at 2134-38 (Roberts, C.J., concurring in the judgment); *Whole Woman's Health*, 136 S. Ct. at 2320.

Arkansas's ban strikes at the core of the abortion right: the right of a pregnant person to *decide* for herself whether to terminate a pregnancy. *See Casey*, 505 U.S. at 869-70; *Roe v. Wade*, 410 U.S. 113, 163 (1973). That decision is one of "the most intimate and personal choices a person may make in a lifetime" and is "central to personal dignity and autonomy," which are in turn "central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. As *Casey* recognized, this highly personal decision is influenced by "intimate views with infinite variation" and "must" "be shaped to a large extent" by the woman's "own conception of her spiritual imperatives and her place in society." *Id*. at 852-53; *see also id.* at 853 (explaining that right to privacy involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it").

Arkansas's argument is antithetical to this longstanding precedent. Arkansas's view is that the right to privacy countenances government interrogation of a person's reasons for ending a pregnancy before viability and delegating to the State the power to decide which reasons are acceptable. Not so. The State may not dissect a person's reasons for exercising this right, nor dictate "right" and "wrong" reasons for terminating her pregnancy, any more than it may leg-

islate acceptable and unacceptable reasons for exercising other constitutional rights. The State cannot regulate proper reasons for going to church, attending a protest, contributing to a political campaign, or inviting only particular guests into one's home. So, too, the State cannot circumscribe the reasons a person chooses to exercise her right to obtain a pre-viability abortion.

The State's intervention in a person's decision whether to terminate a pregnancy before fetal viability is especially inappropriate because the woman "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Casey*, 505 U.S. at 852. That "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Id.* For all of these reasons, a "woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty" that this Court "cannot renounce." *Id.* at 871.

2.a. Tacitly recognizing the strength of this precedent, Arkansas never asks this Court to overturn its holdings in *Roe*, *Casey*, and their progeny. Instead, Arkansas tries to imagine this precedent away. It claims that *Casey* already allows States to prohibit people from obtaining abortions before viability if "a compelling interest" motivates the prohibition. Pet. 13. That is wrong. *Casey* specifically held that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." 505 U.S. at 846.

The Court added: "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice" before viability "cannot be considered a permissible means of serving [the State's] legitimate ends" and is unconstitutional. *Id*. at 877.

This Court has repeatedly affirmed that "[b]efore viability, a State 'may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy.'" *Gonzales*, 550 U.S. at 146 (emphasis added) (quoting *Casey*, 505 U.S. at 879); *see also June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, J., concurring in the judgment) (*Casey* reaffirmed "the most central principle of *Roe v. Wade*," "a woman's right to terminate her pregnancy before viability"); *id.* at 2120 (plurality op.); *Stenberg,* 530 U.S. at 921 (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)); *Roe*, 410 U.S. at 163 (explaining that, before viability, doctors and patients are "free to determine, without regulation by the State" that abortion is the appropriate course of action). Neither this Court nor any other court has ever embraced the contrary rule that Arkansas invents—namely, that States may ban abortion before viability in certain circumstances, and thereby prohibit people from making the ultimate decision to terminate their pregnancies.

Arkansas nevertheless maintains that different rules should govern pregnant people whose fetuses have Down syndrome. It concedes that the State can-

not force a woman to carry to term a pre-viability fetus *without* Down syndrome, Pet. 15, 19-20, no matter her reasons for doing so. But it maintains that the State *can* force her to carry to term a fetus *with* Down syndrome, if it is the diagnosis that prompts the decision to obtain an abortion. Pet. 24-29. That makes no sense. And under *Roe* and *Casey*, the State's interests, whatever they may be, become compelling enough to prohibit abortion only at viability. *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163-64. Arkansas's approach runs directly contrary to the "deep, personal character" of the right to decide whether to terminate a pre-viability pregnancy. *Casey*, 505 U.S. at 853.

To the extent Arkansas suggests that, at the time of *Roe* and *Casey*, this Court did not consider that some patients may choose an abortion because they obtain a fetal-anomaly diagnosis, it is wrong. In *Colautti v. Franklin*, 439 U.S. 379 (1979), for example, "[t]he plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome." *Id.* at 389 n.8. At the time, such testing could not "be completed until after 18-20 weeks' gestation," a pre-viability point in pregnancy. *Id.* Yet the *Colautti* Court invalidated the abortion restrictions challenged in that case because they could be read to limit the right to abortion before "viability, as that term has been defined in *Roe* and in" subsequent cases. *Id.* at 389, 390, 398.[3]

[3] Although Arkansas suggests that some of this Court's precedents upheld burdensome abortion laws as long as there was "a

b. Even if this Court embraced Arkansas's novel test(s), Arkansas would still lose. Despite Arkansas's assertion that "[w]omen make these choices, for the most part, not for self-interested reasons, but because of the false narrative surrounding" Down syndrome, Pet. 8, "there is no record evidence that Arkansas has taken steps to regulate the speech of relevant medical providers on this issue to ensure a thoughtful and informed choice and to advance the State's interest," Pet. App. 133a-134a. Unlike many other States, Arkansas has not enacted a law requiring patients who receive a fetal diagnosis of Down syndrome to be provided with medically accurate, unbiased information about the condition.[4] Nor has Arkansas elected to adequately fund state services designed to assist those living with Down syndrome and their families, despite the fact that individuals with Down syndrome

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reasonable medical basis" for them, *see* Pet. 15-22, that is incorrect. Those decisions consistently invalidated laws that unnecessarily burdened access to pre-viability abortion, while upholding laws that did not impose an undue burden. *See City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438-39 (1983); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam); *Simopoulos v. Virginia*, 462 U.S. 506, 517-19 (1983); *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979) (plurality op.); *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990) (plurality op.); *id.* at 500 (Kennedy, J., concurring in the judgment in part and dissenting in part); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490 (1983); *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (per curiam).

[4] Disability-rights advocates have successfully persuaded several other state legislatures to enact such requirements. *See, e.g.*, Deborah Levenson, *Debate Surrounding State Laws for Down Syndrome Fact Sheets*, 170 Am. J. Med. Genetics 555 (Wiley Periodicals, Inc. 2016).

often lack the "access to affordable resources and supports they need to live a healthy, comfortable life, including medical care, therapies, inclusion in schools, employment opportunities, and independent living." S*ee* Dkt. 63, ¶¶ 6-8 (declaration of parent of child with Down syndrome in Arkansas)

Instead of adopting any of these measures, the Arkansas legislature simply enacted Act 619 without consideration of any alternatives to advance the State's purported interest. Pet. App. 134a. The Arkansas legislature does not seem to have considered even the evidence Arkansas put into the record in this case, which shows that—long *before* any State enacted Act 619—birth rates for babies with Down syndrome in the United States were rising, while abortion rates for fetuses with Down syndrome were falling. *See supra* pp. 3-4.

If Arkansas wanted to justify Act 619 on reasonable-relationship or narrow-tailoring grounds, it had the opportunity to introduce evidence to support that argument. The district court accepted thousands of pages of evidence into the preliminary-injunction record, including voluminous evidence regarding Act 619, over respondents' objection. *See supra* pp. 12-13. But Arkansas offered no evidence to support the argument it now makes. As a result, even if this Court were to embrace one of Arkansas's newly minted tests for abortion restrictions, the district court still acted properly in preliminarily enjoining Act 619.

3.a. To the extent Arkansas argues that *June Medical* supports its position, it is also incorrect. Under both the plurality opinion and Chief Justice Roberts's

concurring opinion in *June Medical*, the ban is unconstitutional.

According to the plurality opinion, abortion restrictions are invalid if they do not "further[] [a] valid state interest" or if they have "the effect of placing a substantial obstacle in the path of a woman's choice" when "consider[ing] the burdens a law imposes on abortion access together with the benefits those laws confer." 140 S. Ct. at 2120 (plurality op.) (second alteration in original) (quoting *Whole Woman's Health*, 136 S. Ct. at 2309, 2324). Arkansas concedes that Act 619 imposes a substantial obstacle to abortion care for all women to whom it is relevant, and thus is unconstitutional under the plurality's test.[5]

Act 619 also fails under the legal framework articulated in the *June Medical* concurrence. Under that framework, courts should not "weigh[]" the "costs and benefits of an abortion regulation," but ask whether the regulation is reasonably related to a legitimate state interest and, if so, whether it imposes "a substantial obstacle." *Id.* at 2136 (Roberts, C.J., concurring in the judgment). Restrictions that are reasonably related to a legitimate state interest and do "not impose a substantial obstacle [a]re constitutional,

[5] As the language just quoted from the plurality opinion shows, Arkansas is simply wrong to say that the plurality held that "only 'unnecessary' health regulations are invalid," irrespective of any analysis of a law's burdens. Pet. 23. That is *one* way an abortion restriction might be unconstitutional. Arkansas correctly recognized this in the Eighth Circuit. *See* Response to Pet'n for Rehearing En Banc 2, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. Oct. 14, 2020).

while" restrictions that do "impose a substantial obstacle" are "unconstitutional." *Id.* at 2138. Again, Arkansas admits that Act 619 imposes a substantial obstacle. In fact, the Eighth Circuit already applied the *June Medical* concurrence's test, as well as the half-century of this Court's precedent that preceded *June Medical*, to invalidate Arkansas's law. *See* Pet. App. 9a-10a.

b. Moreover, Arkansas never briefed the import of *June Medical* below or even asked for an opportunity to do so. And, in a related case challenging other abortion restrictions, Arkansas argued that courts should not balance the benefits of abortion restrictions against their burdens in assessing whether they impose an undue burden. Rather, it urged the Eighth Circuit to hold that "the existence of a 'substantial obstacle' [i]s 'a sufficient basis for' invalidating the challenged regulations and no additional analysis or weighing [i]s necessary." Response to Pet'n for Rehearing En Banc 5, *Hopkins v. Jegley*, No. 17-2879 (8th Cir. Oct. 14, 2020) (quoting *June Med. Servs.*, 140 S. Ct. at 2139 (Roberts, C.J., concurring in the judgment)); *see id.* at 6-7 (urging Eighth Circuit to adopt this view). But here, it changes course and argues that the existence of a substantial obstacle should not be the end of the inquiry. Pet. 23. Instead, it now contends, courts *should* consider the benefits of abortion regulations. The State should not be able to obtain this Court's review based on novel arguments not only not advanced below, but directly contradicted by the State's own position in a related case. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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