No. 20-1434

IN THE

Supreme Court of the United States

LESLIE RUTLEDGE, in her official capacity as Attorney General of the State 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The day this petition was docketed, a circuit split opened up on the question it presents. The en banc Sixth Circuit held States may prohibit knowingly performing Down-syndrome-selective abortions, contrary to the decision below, which held the opposite.

In a different era, Respondents might encourage review of that question. Instead, to avoid it, Respondents hide behind a farrago of illusory, split-denying distinctions, misleading statistics, decontextualized quotations of precedent, and an outlandish claim that Arkansas is estopped from advocating its best reading of this Court's abortion cases by its response to another party's rehearing petition in a different case. And nowhere do they acknowledge this Court's decision to grant certiorari on a closely related question in *Dobbs v. Jackson Women's Health*.

None of Respondents' objections to review hold water. The circuit split is unusually crisp; Arkansas's reading of precedent is far superior to Respondents' and at least cert-worthy; Respondents' vehicular arguments are meritless; and the urgency of review, as illustrated by the true numbers of selective abortions, is manifest.

But amid the usual sniping about vehicles and splits, one thing should not be lost. This is not a case about just any ambiguity of a vexed abortion jurisprudence. This case is about whether selective abortion may cause a small group of people with disabilities "to wither or disappear." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). It's about whether selective abortion will continue to send people with Down syndrome messages of inferiority that once received may never be forgotten. And it's about whether the laws of 12 States and counting enacted

to prevent these harms, four in the Circuit below, can be given effect. States Br.2-3. The Court not only needs to decide this case; it needs to decide it now.

I. The Circuits are split on the question presented.

When the petition for certiorari was filed in this case, there was not yet a circuit split on whether States could prohibit performing Down-syndrome-selective abortions.[1] But there is now. Days after the petition's filing, an en banc panel of the Sixth Circuit upheld a law that—just like the one struck down below—prohibits practitioners from knowingly performing abortions sought because of a diagnosis of Down syndrome. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 517 (6th Cir. 2021) (en banc) (reproducing statute). In doing so, that court acknowledged it had created a circuit split. *See id.* at 529-30 (plurality opinion); *id.* at 550 (Kethledge, J., concurring in part and concurring in the judgment).

Appreciating the implications of that decision for the petition, Respondents devote the first several pages of their opposition's arguments to a preemptive strike on its relevance, claiming the law it upheld critically differed from the one here. Opp.7-10. But the differences they point to are minor, and none would make a difference under the Sixth Circuit's

[1] Respondents' attempt, Opp.10, to paper over the disarray among the Circuits about the standard for reviewing abortion regulations, Pet.30-31, does not merit response. It does bear note, however, that since the petition's filing a *fifth* circuit has taken sides in that circuit split and held benefit-burden balancing survived *June Medical*. *See Reprod. Health Servs. v. Strange*, — F.4th —, 2021 WL 2678574, at *12 & n.6 (11th Cir. 2021). This state of affairs cannot last.

rationale. If Arkansas were in the Sixth Circuit, its law would be in effect today.

Allowing that a law criminalizing women's obtaining selective abortions would present "different" questions, *Preterm-Cleveland*, 994 F.3d at 522, the Sixth Circuit didn't reach them because it read Ohio's law to do something less. Ohio's law, like Arkansas's, only forbids practitioners from performing abortions that they know are sought on account of a Down-syndrome diagnosis. *Id.* at 527. And prohibiting knowing performance of selective abortions did not amount to prohibiting selective abortions themselves, the Sixth Circuit held, because only "the woman [is] in control of who knows, and who does not know, the reason for her abortion." *Id.* at 529. That logic would compel upholding Arkansas's identical (except in some respects *less* onerous[2]) prohibition.

Hoping to distinguish that square circuit split away, Respondents essentially claim that due to ancillary provisions of Arkansas's law, *Arkansan* women do not control who knows the reasons for their abortions. But however effective those provisions may be in deterring selective abortions, the Sixth Circuit has already rejected arguments just like Respondents' in upholding Ohio's law.

First, Respondents note that Arkansas requires practitioners to ask about Down-syndrome test results. Opp.9. But in *Preterm-Cleveland*, the plaintiffs similarly argued that practitioners would learn of a Down-

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[2] Arkansas prohibits knowingly performing abortions sought "solely" because of Down syndrome, Pet.App.241a, while the *Preterm-Cleveland* law prohibited knowingly performing abortions sought even "in part" because of Down syndrome, Ohio Rev. Code 2919.10(B).

syndrome diagnosis in "the ordinary course." 994 F.3d at 519. The Sixth Circuit didn't dispute that premise; it said it didn't matter because "knowledge of the diagnosis is not knowledge of the reason." *Id.*

Second, Respondents note that if a woman says she has received a fetal Down-syndrome diagnosis, Arkansas requires practitioners to review her records for past selective abortions. Opp.9. But in *Preterm-Cleveland*, the plaintiffs similarly observed that Ohio law's definition of knowledge required practitioners to "proactively investigate a woman's reasons" if they had reason to believe she was motivated by a Down-syndrome diagnosis. 994 F.3d at 529. No matter, the Sixth Circuit said; investigate though they might, "the woman remains in control of who knows . . . the reason for her abortion." *Id.*

Third, Respondents observe that if a woman advises a practitioner of a Down-syndrome diagnosis, Arkansas requires the practitioner to inform her that he cannot knowingly perform an abortion sought on that basis. Opp.9. But on the Sixth Circuit's logic, that shouldn't cause women to disclose their reasons; it should cause them not to. *See Preterm-Cleveland*, 994 F.3d at 528 ("What happens if the woman accidentally . . . or without an understanding of the law reveals [her] reason to the doctor?"). Further, the Down-syndrome-selective abortion law that the Sixth Circuit said the Seventh Circuit erroneously invalidated, *Preterm-Cleveland*, 994 F.3d at 530, had the same requirement. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health* ("*PPINK*"), 888 F.3d 300, 303 (7th Cir. 2018).

Fourth, Respondents argue that Arkansas has fewer providers that perform abortions at the stage when Down-syndrome diagnoses are made than Ohio. Opp.9.

But the Sixth Circuit did not rest its decision on women's ability to shop for an easily fooled doctor, but on "the reality that the woman [is] in control of who knows, and who does not know, the reason for her abortion." 994 F.3d at 529. If that's correct, Arkansas's law would not impose an undue burden regardless of the number of selective-abortion providers.

To be sure, Arkansas does not defend its law on the same grounds the Sixth Circuit upheld Ohio's. Rather, it hopes its law will greatly reduce selective abortions. But that does not erase the circuit split. In the Sixth Circuit, prohibitions on knowingly performing selective abortions will be upheld. In the Seventh and Eighth Circuits, they will be struck down. Indeed, the Seventh Circuit has already struck down a law without the provisions Respondents claim make Arkansas's unique. *See PPINK*, 888 F.3d at 303. Whether States, under the Constitution, can prohibit practitioners from performing abortions motivated by an unborn child's anticipated disability shouldn't turn on the lines on a judicial-circuits map.

II. The court of appeals' decision is wrong.

This Court has always upheld abortion regulations that reasonably further compelling interests, whether they impose substantial burdens or not. Arkansas's law directly furthers two undeniably compelling interests: protecting a small group of people with disabilities from elimination, and protecting those who remain from receiving the stigmatic message that their lives aren't worth living. The court of appeals' decision, which refused to even consider those interests, conflicts with this Court's precedent and cannot stand.

A. In response, Respondents devote the bulk of their opposition to a peculiar reading of this Court's abortion decisions, under which only protecting viable life can justify burdensome abortion regulation, no matter how compelling other interests may be. Opp.13-17. Whatever that reading's merits, this Court has already granted certiorari to decide whether it, or the one Arkansas advocates, is correct. *Dobbs v. Jackson Women's Health*, No. 19-1392 (May 17, 2021). So Respondents cannot claim Arkansas's theory isn't cert-worthy. However, it is also emphatically correct.

Respondents don't seriously dispute that under this Court's precedent, compelling interests have always sustained even burdensome abortion regulations—from parental-consent requirements and second-trimester clinic-only laws to post-viability bans. Pet.15-22. Indeed, like practitioners before them, Respondents lament those laws' effects. Opp.9 (complaining that Arkansas has but one clinic to provide second-trimester abortions). Rather, Respondents' real claim is that *Casey* established for all time that a State's *only* compelling interest is protecting life post-viability. Opp.17 (claiming that under *Casey*, a "State's interests, whatever they may be, become compelling enough to prohibit abortion only at viability").

But the Court couldn't have held that, because it didn't have every compelling interest a State might ever assert before it. Rather, all that the Court had before it there were "the State's interests" Pennsylvania had asserted and that States had traditionally asserted. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). And what it said was that of *those* interests, only viable life justified prohibition—a statement it then qualified by clarifying that only "[u]nnecessary" health regulations are

invalid, *id.* at 878, and by upholding parental-consent laws that acted as bans for minors who could not obtain a bypass or consent, *id.* at 899. It did not have before it the antidiscrimination interests Arkansas advances here.[3] *See Planned Parenthood 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 from the denial of rehearing en banc).

Quite to the contrary, the plaintiffs in *Casey* declined to challenge Pennsylvania's sex-selective abortion ban. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). Respondents' reading of *Casey* supposes that though that law wasn't challenged—much less briefed—the Court effectively struck it down by dictum anyway. *See Preterm-Cleveland*, 994 F.3d at 537 (Sutton, J., concurring). That is a reading of *Casey* as offensive to Article III, *see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1259-60 (2006), as it is antithetical to how opinions are supposed to be read.

B. Besides their claim that *Casey* held viable fetal life exhausts States' compelling interests in regulating abortion, Respondents make three arguments that Arkansas's law is invalid under the controlling test. Each is unavailing.

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[3] Respondents note (Opp.17) that the Court was advised of selective abortion in *Colautti v. Franklin*, 439 U.S. 379 (1979). But this misses the point; the State there didn't advance an interest in preventing selective abortion. Rather, the *plaintiffs* there made the appalling argument that their patients had a particular right to abort late-term unborn children with "mongolism." *Id.* at 389 & n.8. The Court did not endorse that claim, instead holding the challenged statute vague. *Id.* at 390.

First, Respondents puzzlingly claim States cannot "legislate acceptable and unacceptable reasons for exercising [one's] constitutional rights." Opp.14-15. But as applied to otherwise constitutionally protected activities, that's precisely what antidiscrimination law does. A State can prohibit sex-discriminatory reasons for keeping women out of a private club, *see Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); a State can block parents' racially discriminatory reasons for choosing their children's school, *see Runyon v. McCrary*, 427 U.S. 160, 177-79 (1976). And a State can likewise regulate the privacy right recognized in *Roe* if the reason for exercising it is disfavor of the disabled.

Second, relying on two-decades-old statistics (Opp.3 n.1), amicus-brief citations to unsourced claims in committee hearings (Opp.3), and gross exaggerations of the record,[4] Respondents proclaim that "birth rates for babies with Down syndrome in the United States [are] rising, while abortion rates for fetuses with Down syndrome [are] falling." Opp.19. Thus, they hint—though don't outright say—that Arkansas has no interest in preventing selective abortion.

This argument is incomplete, factually false, and irrelevant. To begin, it doesn't address Arkansas's compelling interest in protecting "the Down syndrome community from the stigma associated with the practice of Down-syndrome-selective abortions." *Preterm-Cleveland*, 994 F.3d at 527. Indeed, Respondents never mention it. People with Down syndrome are hardly likely to feel less stigma from selective abortion

[4] Respondents' basis for asserting selective-abortion rates are "decreasing" (Opp.4) is one 2005-07 study showing a 61% termination rate. C.A.App.903. But other studies from the same period in the same literature review show termination rates of 86% to 93%. C.A.App.903-04.

if, as Respondents suggest, *supra* n.4, three-*fifths*, rather than three-fourths, of unborn children diagnosed with Down syndrome are aborted.

That said, selective abortion and its effects on the population are not going away. Here are the undisputed facts. Somewhere between 67% and 85% of fetuses diagnosed with Down syndrome are aborted. Pet.7-8. As screening for Down syndrome has become more common, selective abortion's effects on the population have skyrocketed. Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167 Am. J. Med. Genetics Part A 756, 761 (2015). By 2007, selective abortion had reduced the numbers of children born with Down syndrome by 30%, C.A.App.864 (citing de Graaf)—3,000 unborn children with Down syndrome a year. De Graaf at 758. And these unchallenged findings precede the advent of transformative, vastly more sensitive, non-invasive screening tests. Pet.8. Selective abortion isn't going away, and Arkansas "is under no obligation to wait until the entire harm occurs" before it "may act to prevent it." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 212 (1997).

Third, Respondents suggest Arkansas failed to pursue alternative methods of advancing its interests. What is the alternative Respondents suggest? Taking "steps to regulate the speech of relevant medical providers on this issue." Opp.18. Not only is the suggestion that States should regulate speech rather than discriminatory conduct constitutionally backwards, it trivializes the interests at stake. Respondents would never argue that States must try anti-discriminatory education before they can forbid any other form of discrimination. Yet here, they say States must

attempt to teach their citizens that people with Down syndrome are worth living before they can act to protect them. There isn't time for that.

III. Respondents' vehicular objections are meritless.

Finally, Respondents turn to the last pleas of the desperate respondent: waiver, underdeveloped record, alternative grounds to affirm, and supposedly inconsistent positions. All are unavailing.

Respondents say Arkansas didn't preserve its current arguments below. Opp.11. No; it argued at length its law would even survive strict scrutiny and therefore "survive[d] regardless of the applicable standard of scrutiny," including the less demanding undue-burden test. C.A.Br.28.

Respondents next suggest the record is too underdeveloped to review Arkansas's theory. Opp.12-13. No; the record is replete with evidence on selective abortion's causes and effects. Pet.4-8.

Respondents next note they have a pending vagueness claim. Opp.13. Yet they didn't even seek a preliminary injunction on that claim, which is also belied by their confident assertions about what Arkansas's law prohibits. Opp.8.

Last, Respondents suggest at length that Arkansas is estopped from advancing its compelling interests by filings in a different case involving different plaintiffs. Opp.6, 21. Like the petition, Pet.23, those filings only argued that *June Medical* rejected benefit-burden balancing in measuring a law's burdens—not that compelling interests can't sustain burdensome laws. Besides, judicial estoppel is inapplicable when it "would compromise a governmental interest in enforc-

ing the law." *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001).

IV. The Court should grant review now.

All told, the only question is whether the Court should grant the petition now or hold it pending *Dobbs*. That's the subtext of Respondents' dink-and-dunk vehicular nitpicks, which never mention *Dobbs*: hold this case another Term; maybe GVR it in a year. Anything to avoid a decision from this Court.

The Court could take that path, but it should not. First and least, *Dobbs* may cast little light on this case; the Court may only hold that gestational-age laws do not impose undue burdens because women can obtain abortions sooner. Second, if *Dobbs* clarifies that interests besides viable life can sustain abortion regulation, that wouldn't resolve whether antidiscrimination interests can. And such a weighty question, on which the circuits are split, should not be left to the vagaries of a GVR. Third, this case presents a compelling vehicle to hear alongside *Dobbs*. Where *Dobbs* presents the Court the binary question of whether to modify *Roe* and *Casey*, this case presents an opportunity to make plain what was present in *Roe* and *Casey* all along: that like all rights, the right they recognized bows to compelling interests.

Most critically, however, the Court should grant the petition this Term because of the interests at stake. This is not a case about damages, or even a run-of-the-mill injunction; this is a case about a two-year-old law—never allowed to go into effect—that seeks to protect a small and vulnerable population from egregious stigma and selective diminution. Two years ago this Court declined to consider the constitutionality of such laws because the question had not been

ventilated. Now that it has, Respondents would postpone review at least one year more. And every year that passes, 3,000 unborn children with Down syndrome are lost—not because their parents don't want children, but because of who they are. "No better illustration . . . of the preciousness of time, is presented than in this case." *Hill v. Colorado*, 530 U.S. 703, 792 (2000) (Kennedy, J., dissenting). Again: The Court not only needs to decide this case; it needs to decide it now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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