No. 17-3163

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.,
DEFENDANTS-APPELLANTS

On Appeal From The United States District Court
For The Southern District Of Indiana
Case No. 16-cv-763-TWP-DML
The Honorable Tanya Walton Pratt, Judge

BRIEF OF THE STATES OF WISCONSIN, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA, THE MICHIGAN ATTORNEY GENERAL, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI, AS *AMICI CURIAE* SUPPORTING APPELLANTS' PETITION FOR REHEARING *EN BANC*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici curiae* are the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia, the Michigan Attorney General, and Governor Phil Bryant of the State of Mississippi (hereinafter "the States"), who file this brief under Federal Rule of Appellate Procedure 29(b). The States have the solemn right to ensure that human remains—including the remains of unborn children—are disposed of in a respectful manner and to prohibit the discriminatory elimination of classes of human beings. The panel's decision, which upholds the injunction of Indiana's House Enrolled Act 1337 ("HEA 1337"), harms the States' ability to enforce and enact substantially similar laws. *See, e.g.*, Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1804; Kan. Stat. § 65-6726; La. Stat. § 40:1061.1.2; Ohio Rev. Code § 2919.10; Okla. Stat. tit. 63, § 1-731.2(B).

INTRODUCTION

The panel's opinion consists of two holdings, which—especially when viewed together—enshrine in this Circuit an unprecedented hostility to the States' authority to protect and respect unborn children: (1) unborn children deserve so little consideration that it is *irrational* for a State to require that their remains be treated with dignity, and (2) obtaining a pre-viability abortion is such an absolute right that it, *alone among all rights in the constitutional constellation*, cannot be limited even by a law that satisfies strict scrutiny; that is, by a statute that is narrowly tailored to furthering the compelling government interest of stopping the discriminatory

elimination of classes of human beings based upon race, sex, or disability. These holdings are gravely mistaken and warrant *en banc* review.

As to the first holding, the States agree with Indiana's Petition, asking this Court to review the panel majority's erroneous decision invalidating Indiana's Respectful-Disposition Provision. Indiana properly focused its Petition on this holding, given the unambiguous conflict with the Eighth Circuit.

As to the panel's second holding, the States respectfully submit that, if this Court chooses to grant *en banc* review on the panel's first holding, it should review the panel's invalidation of Indiana's Antidiscrimination Provisions as well. These Antidiscrimination Provisions—which prohibit abortions sought solely because of the unborn child's race, sex, or disability—are a narrowly tailored implementation of the States' compelling interests in protecting categories of human beings from elimination. Such provisions are so constitutionally uncontroversial that, although the plaintiffs in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "sought declaratory and injunctive relief against a wide array of" Pennsylvania's abortion regulations, they declined to challenge Pennsylvania's prohibition of sex-discriminatory abortions. *See* Br. for Respondents, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006423, at *4. The panel's conclusion that *Casey* nevertheless mandates the invalidation of such laws rests entirely upon the premise that pre-viability abortion is an absolute right, which a State can never limit, no matter how powerful its interests or narrowly tailored its law. But "even the fundamental rights of the Bill of Rights are not absolute," *Kovacs v. Cooper*, 336 U.S.

77, 85 (1949), and there is no basis in the Supreme Court's precedent, let alone in the Constitution's text or history, for placing the unenumerated right to pre-viability abortion above every other right, including rights as fundamental as freedom of speech.

ARGUMENT

I. This Court Should Grant Indiana's *En Banc* Petition To Settle The Conflict With The Eighth Circuit Over The Constitutionality Of Respectful-Disposition Provisions

The Supreme Court has explained that a State "remains free, of course, to enact [ ] carefully drawn regulations that further its legitimate interest in proper disposal of fetal remains." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983), *overruled on other grounds by Casey*, 505 U.S. 833. Consistent with this conclusion, the Eighth Circuit has upheld a Minnesota law that "provid[ed] for the *dignified* and sanitary disposition of the remains of aborted [ ] human fetuses," Minn. Stat. § 145.1621, subd. 1 (emphasis added), by requiring their "cremation" or "burial," *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479, 483 (8th Cir. 1990). Indiana's Respectful Disposition Provision is in accord with the respectful-disposition statute contemplated by the Supreme Court in *Akron* and materially identical to the statute affirmed by the Eighth Circuit in *Planned Parenthood of Minnesota*. By invalidating Indiana's law, the panel majority created a split with the Eighth Circuit, thereby warranting *en banc* review. *See* Slip Op. 34–35 & n.11 (Manion, J., concurring in the judgment in part and dissenting in part);

accord Mitchell v. JCG Indus., Inc., 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring) ("intercircuit conflict[s]" warrant *en banc* review).

II. The Court Should Also Rehear *En Banc* The Panel's Decision On The Constitutionality Of The Antidiscrimination Provisions

This Court should also consider *en banc* the constitutionality of the Antidiscrimination Provisions. Indiana understandably focused its Petition on the invalidation of its Respectful-Disposition Provision because that portion of the panel's decision created a split with the Eighth Circuit. Should this Court grant Indiana's *en banc* Petition, however, the States respectfully suggest that this Court also review the panel's invalidation of Indiana's Antidiscrimination Provisions, as the constitutionality of these Provisions is a "question of exceptional importance." Fed. R. App. P. 35(a).* With regard to Wisconsin, in particular, the panel's decision on the Antidiscrimination Provisions—which governs the States within this Court's jurisdiction—poses grave difficulties for its Legislature's decision whether to join its sister States in enacting a similar law. *See, e.g.*, Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1804; Kan. Stat. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2919.10; Okla. Stat. tit. 63, § 1-731.2(B); 18 Pa. Cons. Stat. § 3204(c); S.D. Codified Laws § 34-23A-64; *see also* Slip Op. 27 (Manion, J.,

* This Court can, of course, consider *en banc* any issue presented by a case, even when a party has not sought *en banc* review on that issue. *See United States v. Blagojevich*, 614 F.3d 287 (7th Cir. 2010); *accord United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) (en banc) (en banc rehearing where government only sought panel rehearing), *proceedings described in Parisie v. Greer*, 705 F.2d 882, 889 (1983) (en banc) (Cudahy, J., concurring in part and dissenting in part).

concurring in the judgment in part and dissenting in part) ("Other states have followed Indiana's lead, so this particular issue is not going away.").

A. As both Indiana and the States explained before the panel, the Antidiscrimination Provisions of HEA 1337 are constitutional.

The Antidiscrimination Provisions prohibit doctors from performing abortions sought "solely because of the sex of the fetus"; "solely because the fetus has been diagnosed with Down syndrome" or "any other disability"; or "solely because of the race, color, national origin, or ancestry of the fetus." HEA 1337, § 22. A doctor who violates these prohibitions "may be subject to" "disciplinary sanctions" or "civil liability for wrongful death." *Id.*

The Supreme Court analyzes the constitutionality of such abortion regulations under the "undue burden" test, a sliding-scale inquiry "on the spectrum between rational-basis and strict scrutiny review," *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting), calibrated by the level of interference with a woman's abortion rights, *see Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). The *highest* scrutiny that can be applied to *any* regulation is strict scrutiny. Put another way, if an abortion statute satisfies strict scrutiny—because it is narrowly tailored to achieving a compelling governmental interest—that statute is constitutional. *See* States' Amicus 6–8; *see also infra* pp. 6–7.

Assuming *arguendo* that this most stringent form of scrutiny applies to Indiana's Antidiscrimination Provisions,† these Provisions satisfy such scrutiny and so are constitutional. Antidiscrimination Provisions like Indiana's seek to prohibit an invidiously discriminatory practice that violates the Nation's most core commitments: prohibiting the "targeting" of individuals for disfavored treatment "because of [their] immutable human characteristics" like race, sex, or disability. Slip Op. 20 (Manion, J., concurring in the judgment in part and dissenting in part). Such laws further the most compelling of government interests, and "it is hard to imagine legislation more narrowly tailored to promote this interest." Slip Op. 30–31 (Manion, J., concurring in the judgment in part and dissenting in part). The Supreme Court has upheld prohibitions against invidious discrimination in a wide range of areas, including education, organization-membership, public accommodations, and employment—even when such prohibitions restrict First Amendment values—to forward the compelling state interest of enabling marginalized individuals to participate fully in society. States' Amicus 11–12 (citing, among other authorities, *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987)). The Provisions here further at least as strong a compelling interest: stopping the discriminatory elimination of classes of human beings. States' Amicus 11–12.

† Indiana argued before the panel that the Antidiscrimination Provisions were subject only to rational-basis review, while also arguing that these Provisions satisfy any level of scrutiny. Opening Br. 21–22, 26. The States focus their arguments on the highest standard of review, as a law that satisfies this standard necessarily survives under a lower standard.

The evil that the Provisions seek to combat—the elimination of classes of human beings or, as Judge Manion put it, "private eugenics," Slip Op. 21—is extremely serious. Discriminatory abortions in this Nation are becoming more common because of the availability of early pre-natal screening. *See* States' Amicus 9–10, 12–13. And practices in other parts of the world demonstrate how serious this problem will become, absent immediate action. "[W]idespread sex-selective abortion in Asia" has caused "disastrous effects," Slip Op. 28 n.5 (Manion, J., concurring in the judgment in part and dissenting in part), with the loss of tens of millions of girls, *see* States' Amicus 10–11. And countries like Iceland "are now celebrating the 'eradication' of Down syndrome" by eliminating virtually *all* unborn children diagnosed with this condition *in utero*. Slip Op. 29 (Manion, J., concurring in the judgment in part and dissenting in part). Surely, the Constitution does not prohibit States from addressing this grave problem with the most narrowly tailored method available.

B. The reasons that the panel majority and Judge Manion offered for invalidating Indiana's Antidiscrimination Provisions rest upon an erroneous reading of the Supreme Court's abortion caselaw. Judge Manion even granted that this understanding of the Court's abortion doctrine leads to "absurd results." Slip Op. 31.

The panel majority's reasons for invalidating the Indiana Antidiscrimination Provisions are wrong. The panel majority concluded that "*Casey*'s holding that a woman has the right to terminate her pregnancy prior to viability is *categorical*" and may not be limited for any reason, no matter how compelling. Slip Op. 8 (emphasis

added). But the Supreme Court has never considered *any* constitutional right categorical: "even the fundamental rights of the Bill of Rights are not absolute." *Kovacs*, 336 U.S. at 85. The Court has even allowed the States to prohibit otherwise-protected political speech, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665–66 (2015), or to redistrict by race, *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 800–02 (2017), when the States can satisfy strict scrutiny. And the panel majority's conclusion that pre-viability abortions are categorically immune from state regulation is squarely contradicted by *Casey* itself. *See* States' Amicus 6. *Casey* held that a State *could* prohibit some pre-viability abortions; namely, the State may prevent a minor from obtaining a pre-viability abortion when her parents do not consent, and where a court finds that the abortion is not in the minor's best interests and that the minor is "not mature and capable of giving informed consent." *Casey*, 505 U.S. at 899, 905 (plurality op.). More generally, *Casey* could not have held that the right to pre-viability abortion outweighs *every* conceivable state interest, in every possible circumstance, because the only interests under consideration in that case were the State's "profound interest in potential life" and "the health or safety of a woman seeking an abortion." *Casey*, 505 U.S. at 878 (plurality op.). *Casey* did not consider, most importantly for this case, the State's interest in prohibiting the discriminatory elimination of classes of individuals—an interest, unlike the state interests in *Casey*, not tied to the unborn child's stage of development.

Judge Manion, concurring in relevant part, largely agreed with Indiana's and the States' arguments, but nevertheless concluded that the Supreme Court's pre-

viability abortion jurisprudence must be read to require the "absurd" result that Indiana's Antidiscrimination Provisions are unconstitutional. Judge Manion understood that "if [the Court] applied strict scrutiny in this case, Indiana could prevail." Slip Op. 21. Yet he concluded that "*Casey* disavowed universal application of strict scrutiny in abortion cases," and that the undue-burden test "is actually *more difficult* to satisfy in many cases," like in the case here. Slip Op. 21, 25. In Judge Manion's view, "*Roe* . . . spawn[ed] a body of jurisprudence that has made abortion the only true 'super right' protected by the federal courts today," "more untouchable [ ] than even the freedom of speech." Slip Op. 21–22. "The doctrinal reason for this is that *Casey*'s 'undue burden' standard is not a means-ends test," like strict scrutiny and the other traditional tiers of scrutiny, "but a pure effects test." Slip Op. 23. So if a regulation is "narrowly tailored to serve a compelling state interest," but nonetheless has the effect of "prohibit[ing] [ ] abortions before viability," such a regulation "is invalid" under the undue-burden standard. Slip Op. 23.

Judge Manion adopted an unnecessarily aggressive reading of the Supreme Court's abortion caselaw, which he acknowledged leads to "absurd results" in cases such as this one; but there is simply no reason to read Supreme Court doctrine in such an "absurd" manner. The Court has never declared pre-viability abortion to be a "super-right." Had it done so, it would not have, for example, upheld the limitation on minors' access to pre-viability abortion in *Casey*. *Supra* p. 8; *Casey*, 505 U.S. at 899 (plurality op.). More fundamentally, *Casey* replaced the post-*Roe* strict-scrutiny test, which had developed as part of *Roe*'s trimester-framework, with the undue-

burden standard *precisely to make it easier for States to regulate abortions* than under *Roe*'s regime. *See Casey*, 505 U.S. at 871–73 (plurality op.) ("[I]n practice," *Roe* "undervalue[d] the State's interest[.]"). It is thus wrong to read the undue-burden standard as making it, in Judge Manion's words, "*more difficult*" for States to regulate abortion under the *Casey* undue-burden framework than under *Roe*'s strict-scrutiny regime. And while the label "undue burden" could at first blush appear to be (in Judge Manion's phrasing) a "pure effects test," *Casey* made clear that this label was nothing more than a "shorthand" for a traditional means-ends test, albeit one specifically fashioned for the abortion context. *Casey*, 505 U.S at 877 (plurality op.).

This Court should grant *en banc* review and reject the conclusion that pre-viability abortion is a "super-right." Because, as Judge Manion properly noted, "Indiana could prevail" on the constitutionality of the Provisions if the Court simply "applied strict scrutiny in this case," Slip Op. 21, the panel's affirmance of the district court's decision enjoining those Provisions should be reversed.

CONCLUSION

The Court should grant *en banc* review of the entire panel decision and then reverse the district court's injunction in whole.

Dated, May 10, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 2,569 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: May 10, 2018

/s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2018, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: May 10, 2018

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