No. 19-2690

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Little Rock Family Planning Services, et al.,
Plaintiffs-Appellees,

v.

Leslie Rutledge, in her official capacity as
Attorney General of the State of Arkansas, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Arkansas, No. 4:19-cv-00449-KGB, The Honorable Kristine G. Baker

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Brief of *Amici Curiae* State of Missouri and 16 Other States Supporting Defendants-Appellants and Reversal

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INTEREST OF *AMICI* STATES

Under the U.S. Constitution, the States may prohibit doctors from knowingly participating in eugenic abortions of unborn children with Down Syndrome. Arkansas and other States have a compelling interest in protecting the entire class of disabled persons from being eliminated solely because of an immutable characteristic.

The States have the solemn duty and sovereign right to protect the dignity of all human beings within their borders, especially those with developmental disabilities. This year, Arkansas advanced this and other important sovereign interests by prohibiting the discriminatory elimination of human beings with Down Syndrome.

The State of Missouri is defending the constitutionality of a similar law before this Court in contemporaneous briefing. *See Reproductive Health Services of Planned Parenthood of the St. Louis Region v. Parson*, Nos. 19-2882, 19-3134. Missouri's appeal concerns Mo. Rev. Stat. § 188.038.2, which prohibits performing or inducing an abortion when the abortion provider knows that a woman seeks the abortion solely because of a diagnosis, test, or screening suggesting Down Syndrome or the potential for Down Syndrome in an unborn child.

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At least thirteen States have laws preventing the eugenic abortion of the disabled and similar discriminatory practices targeting vulnerable unborn children. Indiana, Kentucky, and Missouri have passed laws prohibiting abortions based on sex, race, disability, and Down Syndrome. Ind. Code § 16-34-4 et seq.; Ky. Rev. Stat. Ann. § 311.731; Mo. Rev. Stat. § 188.038. Arizona prohibits abortion on the basis of race or sex. Ariz. Rev. Stat. Ann. § 13-3603.02. Five states have enacted laws prohibiting sex-selective abortions. N.C. Gen. Stat. §90-21.121; Okla. Stat. tit. 63, §1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64; Kan. Stat. Ann. § 65-6726. North Dakota has prohibited abortions on the basis of sex or genetic abnormality, and Arkansas has prohibited abortions on the basis of sex or Down Syndrome. N.D. Cent. Code §14-02.1-04.1; Ark. Code Ann. §§ 20-16-1904, 20-16-2001 et seq. Louisiana has prohibited abortions based on genetic abnormality. La. Rev. Stat. Ann. §40:1061.1.2. Ohio has prohibited abortions based on Down Syndrome. Ohio Rev. Code § 2919.10.

The States of Missouri, Alabama, Alaska, Georgia, Idaho, Indiana, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia share Arkansas's

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interest in protecting the developmentally disabled and in eradicating eugenic abortions from our society. Thus, they file this brief under Fed. R. App. P. 29(a).[*]

[*] A State "may file an amicus-curiae brief without consent of the parties or leave of court." Fed. R. App. P. 29(a).

SUMMARY OF THE ARGUMENT

The decision below fails to respect the States' authority to protect the dignity of the disabled and to eradicate medicalized eugenic discrimination against those with Down Syndrome.

First, no precedent forbids the States from prohibiting doctors from performing eugenic abortions on unborn children with Down Syndrome. Neither *Casey* nor Eighth Circuit precedent holds that all restrictions on pre-viability abortion are per se unconstitutional or categorically invalid. Neither the Supreme Court nor this Court has ever ruled on the validity of anything like a Down Syndrome provision. By contrast, the Supreme Court has twice *upheld* prohibitions on specific categories of pre-viability abortions.

Second, under any level of scrutiny, anti-discrimination laws like those enacted in Arkansas and Missouri advance a compelling interest in prohibiting unborn children with Down Syndrome from being targeted for elimination because of an immutable characteristic. This state interest is especially compelling because of the horrific and disturbingly recent history of medicalized eugenic discrimination against Down Syndrome individuals. In refusing to consider the state interests

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supporting a prohibition on discriminatory abortions, the district court erroneously failed to give weight to the unique moral, historical, and prudential reasons for this type of law.

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ARGUMENT

I. Neither *Casey* nor any other case forecloses a state from prohibiting abortions targeted at children with Down Syndrome.

No binding precedent holds that all restrictions on pre-viability abortion are per se unconstitutional or categorically invalid. Neither the Supreme Court nor this Court has ever ruled on the validity of anything like a Down Syndrome provision. Instead, the Supreme Court has upheld limits on pre-viability abortions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

This absence of controlling law making pre-viability anti-discrimination provisions per se invalid is fatal to the ruling below, because the district court presented no other argument against the validity of the law. *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-CV-00449-KGB, 2019 WL 3679623, at *47-52 & nn. 8 & 11 (E.D. Ark. Aug. 6, 2019). As a result, this Court is free to examine and uphold Arkansas's law based on its best understanding of the federal Constitution's text and the case's evidence.

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A. No Supreme Court precedent governs Down Syndrome abortions

1. The sole basis for the district court's holding is that an anti-discrimination provision applying to pre-viability abortions is per se unconstitutional under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). *Little Rock Family Planning Servs.* 2019 WL 3679623, at *47-52 & nn. 8 & 11. According to the lower court, Supreme Court precedent forecloses these laws categorically—no matter how strong the state interests supporting the law, no matter how carefully tailored the law is to achieve these state interests, even if the Supreme Court has never considered this law or these state interests, and even if no evidence shows how the law affects the ability to have an abortion. *Id.*

Neither *Casey* nor *Roe* ever considered anything similar to a Down Syndrome provision. 505 U.S. at 844. *Casey* addressed only Pennsylvania's 24-hour informed-consent provision, parental-consent provision, spousal-notification provision, and abortion-facility reporting requirements. *Id. Roe* considered only a complete prohibition on all abortions with an exception for saving the mother's life. *Roe v. Wade*, 410 U.S. 113, 119 (1973), overruled in part by *Casey*, 505 U.S. 833. In fact, a

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similar provision in Pennsylvania's law—a restriction on sex-selective abortions—went unchallenged in *Casey*. Br. for Respondents, *Casey*, 505 U.S. 833, 1992 WL 12006423, at *4. And in *Roe*, the Court rejected the argument that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

As Justice Thomas recently stated in this precise context: "Whatever else might be said of *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions. It addressed the constitutionality of only 'five provisions of the Pennsylvania Abortion Control Act of 1982' that were said to burden the supposed constitutional right to abortion. None of those provisions prohibited abortions based solely on race, sex, or disability." *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*., 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). "[T]he constitutionality of other laws like [Arkansas's and Missouri's] thus remains an open question." *Id.*

Several judges of the Seventh Circuit also agree that no binding precedent governs eugenic abortions: "*Casey* did not consider the validity

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of an anti-eugenics law." *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health* (*PPINK*), 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing en banc, joined by Judges Sykes, Barrett, and Brennan). "None of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Id.* Simply put, "the right identified in *Roe* and *Casey* is only the right to decide *whether* to have a child, not the right to decide *which* child to have." *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Indiana State Dep't of Health* (*PPINK*), 888 F.3d 300, 311 (7th Cir. 2018) (Manion, J., concurring in the judgment).

To argue that *Casey* decided an issue that was never raised or considered—and in fact was purposely not raised—contradicts well-established law. "Judicial opinions are not statutes; they resolve only the situations presented for decision." *PPINK*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing en banc). If an issue "was not . . . raised in the briefs or argument nor discussed in the opinion of the Court," then "the case is not a binding precedent on this point." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). No binding

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precedent thus exists when the Court "ha[s] never squarely addressed the issue." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

Likely for this reason, the Supreme Court has suggested that the lower federal courts should consider the question of whether States may prohibit abortions sought for discriminatory reasons. *Box*, 139 S. Ct. at 1782 (maj. op.).

2. Even if *Casey*'s statements on pre-viability abortions in other contexts constituted binding precedent on anti-discrimination provisions—which they do not—*Casey* itself rejects the extreme "categorical" position that the court below reads into it.

Under *Casey*'s plain language, only a complete "prohibition" of pre-viability abortions (like that invalidated in *Roe v. Wade*) is per se unconstitutional. That opinion suggests that, at most, "[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." *Casey*, 505 U.S. at 846. Under this holding, only a complete prohibition of pre-viability abortions, defined as a law that completely removes the "ultimate decision to terminate her pregnancy," is per se unconstitutional. *Id*. at 879.

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Laws short of a complete prohibition of abortion are instead subject to the "substantial obstacle" or "undue burden" test. *Id*. The "undue burden" standard considers whether the law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id*. at 878.

Under this undue burden framework, *Casey* held that States cannot completely prohibit all pre-viability abortions but they can prohibit certain categories of pre-viability abortions, such as certain abortions by minors. 505 U.S. at 899; *id*. at 970 (Rehnquist, C.J., concurring in judgment, in part). *Casey* held that the State's interests in protecting unborn human life and promoting women's health apply to pre-viability abortions in general: the "State has legitimate interests from the outset of the pregnancy in protecting the health of the women and the life of the fetus." *Id*. at 834, 846 (plurality op.). And *Casey* upheld a law that banned abortions for minors where the parents do not consent and a court did not grant judicial bypass, holding that the interest in the health and welfare of minors justifies parental-consent laws. *Id*. at 899; *id*. at 970 (Rehnquist, C.J., concurring in judgment, in part).

Casey's application of the undue burden framework is key because if the right to a pre-viability abortion is categorical, then *Casey* would have invalidated this complete ban on a class of abortions. But because *Casey* held that the State's interest in minors' welfare is strong enough to prohibit some pre-viability abortions, it follows that courts must consider the possibility that other state interests might justify prohibiting other categories of pre-viability abortions.

This is precisely what the Supreme Court has since interpreted *Casey* to mean. *Gonzales v. Carhart*, 550 U.S. 124 (2007). In *Gonzales*, the Supreme Court upheld a prohibition against pre-viability abortions performed using the gruesome "partial-birth" procedure. *Id.* at 135-39. *Gonzales* applied *Casey*'s undue-burden standard—not a "per se" categorical rule. *Id.* at 150, 156. And *Gonzales* held that *Casey* "rejected . . . the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Id.* at 146.

Gonzales concluded that, under *Casey*, the government could prohibit partial-birth abortion because that type of abortion "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." *Id.* at 158. The Supreme

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Court recognized that the "interest in protecting the integrity and ethics of the medical profession" justified prohibiting this kind of abortion, which bears "disturbing similarity to the killing of a newborn infant." *Id.* at 157-58. The Supreme Court acknowledged the government interest in protecting fetal life from this "'brutal and inhumane procedure,'" which Congress had found "'coarsen[s] society to the humanity of not only newborns, but all vulnerable and innocent human life.'" *Id.* at 157 (quoting congressional findings).

3. So too here. A law prohibiting pre-viability abortions of unborn children with Down Syndrome is not a ban on all pre-viability abortions. It leaves women free to obtain abortions for any reason other than a Down Syndrome diagnosis.

This type of partial prohibition thus falls under *Gonzales*'s framework. "What makes *Gonzales* particularly applicable here is that there, as here, the Court dealt not with a total ban against abortion but with a regulation that prohibited physicians from performing abortions under certain conditions." *Preterm-Cleveland v. Himes*, 940 F.3d 318, 327 (6th Cir. 2019) (Batchelder, J., dissenting). Preventing doctors from performing pre-viability abortions for a particular *reason* is no more a

complete pre-viability "prohibition of abortion" than, as in *Gonzales*, preventing pre-viability abortions performed in a particular *manner*.

An anti-discrimination law thus is not categorically invalid under *Casey*. It does not deprive women of the "ultimate decision" whether to have an abortion. Rather, it merely requires women to make that "ultimate decision" on a nondiscriminatory basis.

For these reasons, as Judge Batchelder reasoned, if these laws fall under *Casey* and its progeny, that "precedent requires that" courts review anti-discrimination laws like Arkansas and Missouri's "under an undue-burden analysis, which is fact-intensive." *Preterm-Cleveland*, 940 F.3d at 327. Courts must balance the gravity of "the State's interests and the benefits of the law," rather than just focus on "the potential burden it places on women seeking an abortion." *Id*. Focusing only on the law's effect on women "fails the mandate of *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309 (2016), in which the Court held that the undue-burden analysis requires an examination of 'the burdens a law imposes on abortion access together with the benefits those laws confer.'" *Preterm-Cleveland*, 940 F.3d at 328.

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The court below thus erred in concluding that pre-viability anti-discrimination provisions are per se invalid and in concluding that it had no need to consider the weight of the state interest or to examine whether, and how, they burden the right to an abortion. *Little Rock Family Planning Servs.* 2019 WL 3679623, at *47-52 & nn. 8 & 11.

Instead, the court below should have examined whether these abortion laws, like all other laws, rationally further legitimate government interests, or provide "a rational basis to act." *Gonzales*, 550 U.S. at 158. Then, if it found that the legislature passed the law in "furtherance of legitimate government interests," the court should have examined how these interests "bear[] upon" whether the law imposes an undue burden. *Id.* at 161. A regulation imposes an "undue burden" if its "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 146 (citation omitted). Not only does a law that furthers legitimate government interests not have the *purpose* of placing a substantial obstacle between a woman and her right to an abortion, but also any *effect* of the law is less "substantial" if it exists to further a significant government interest. That would be the case under *Gonzales* if the particular type of abortion

"requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." *Id*. at 158.

4. In the end, any theory that *Casey* and *Roe* create an absolute right to a pre-viability abortion leads to absurd results. This interpretation would elevate the unenumerated right to pre-viability abortion above core protections of the Bill of Rights.

The Supreme Court has never declared any right to be "categorical." "[E]ven fundamental rights of the Bill of Rights are not absolute." *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949). Even the most fundamental constitutional freedoms may be subject to tailored restrictions for compelling governmental reasons, such as complying with the Voting Rights Act, preventing prison riots, or eliminating discrimination. *See, e.g.*, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800-02 (2017); *Johnson v. California*, 543 U.S. 499, 512-14 (2005); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Congress and the States passed the Fourteenth Amendment to end discrimination, not to require it.

Both Congress and the States thus may prohibit the "moral and social wrong" of discrimination by private parties in public

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accommodations and other areas, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964), including by prohibiting invidious discrimination against the disabled, *see, e.g.*, Americans with Disability Act, 42 U.S.C. § 12132; Rehabilitation Act, 29 U.S.C. § 794; Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §2000ff-5; *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988). If a State has the authority to protect the Down Syndrome community from invidious discrimination in employment or public accommodations, it can also protect them from wholesale elimination by eugenic practices.

But, on the lower court's view, the "penumbral" right to pre-viability abortion overrides all state interests and rights, which is an "absurd" result. *PPINK*, 888 F.3d at 311 (Manion, J., concurring in the judgment). The court below made the scrutiny more stringent for pre-viability abortions than even *Roe* did, holding that a pre-viability abortion is an absolute right that, alone among all other constitutional rights, cannot be limited even by a law that satisfies strict scrutiny. But *Casey* relaxed the strict scrutiny governing abortion regulations because *Roe* had "undervalue[d] the State's interest." *Casey*, 505 U.S. at 873.

Casey should not be interpreted as *elevating* the standard of scrutiny for pre-viability abortions above strict scrutiny. *Id.*

B. No Eighth Circuit precedent governs Down Syndrome abortions

Similarly, the Eighth Circuit has no controlling precedent on this point. This Court has never considered the validity of a Down Syndrome provision, and this Court has not addressed the unique issues presented by an anti-discrimination restriction on pre-viability abortion.

To be sure, in 2015, this Court invalidated Arkansas and North Dakota statutes that prohibited pre-viability abortions based on the presence of a detectable fetal heartbeat. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 770 (8th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015). But in both 2015 cases from Arkansas and North Dakota, this Court repeatedly emphasized that its holding was based on the factual record before it, and that a future State defending a future law (like Arkansas or Missouri) would have the opportunity to create its own factual and scientific record to justify its own laws. *Edwards*, 786 F.3d at 1117 (holding that *Casey* "render[s] more critical the parties' obligation to assure that the court has the benefit of an adequate scientific record in cases where the standard is applied"); *id.* at

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1119 ("This case underscores the importance of the parties, particularly the state, developing the record in a meaningful way . . . ."); *MKB*, 795 F.3d at 773 (quoting the same language from *Edwards*); *MKB*, 795 F.3d at 770 (noting that the court's decision was based on "the current state of medical science").

This Court recently reaffirmed this principle in *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750 (8th Cir. 2018), holding that Missouri is entitled to the opportunity to make a factual record to defend its own regulations of abortion. *Hawley*, 903 F.3d at 752, 758; *see also Karlin v. Foust*, 188 F.3d 446, 483-85 (7th Cir. 1999).

The fact-dependent nature of this inquiry extends to this case. And it requires the court to consider evidence of the worldwide problem of eugenic abortion, the stigma from attempts to "eliminate" Down Syndrome by abortion, and the adverse impact of Down Syndrome abortions on the integrity of the medical profession.

II. States have a compelling interest in prohibiting eugenic abortion because of the horrific history of medicalized discrimination suffered by Down Syndrome individuals

Anti-discrimination laws like Arkansas's satisfy strict scrutiny (or any other level of scrutiny) because they are precisely tailored to advance

the most compelling of state interests. They seek to prohibit an invidiously discriminatory practice that violates the Nation's most core commitments: the targeting of people for eugenic elimination solely because of an immutable characteristic. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

1. This anti-discrimination interest is at its most compelling here in the context of eugenic abortion because of the horrifying history of medicalized discrimination and abuse experienced by persons with Down Syndrome. *See* Add. 1 (Declaration of Dr. Martin McCaffrey), ¶¶12-42. "It is not hyperbole to state that the history of the medical establishment's approach to Down syndrome over the last century has been dominated by discrimination." *Id.* ¶14. During the first half of twentieth century, elite medical opinion in America and abroad lobbied for eugenic "solutions" to intellectual disabilities, that sought to "reduc[e] undesirable populations through selective reproduction." *Box*, 139 S. Ct. at 1784–87.

Only a few decades ago, institutionalization, marginalization, abuse, and neglect of persons with Down Syndrome were the norm and were widely accepted within the medical community. McCaffrey Decl.

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¶14. Not uncommonly, "mothers were shielded from the knowledge that she had a child born with Down syndrome and the child would be sent off to an institution after being told the child had died." *Id.* ¶14. "Sterilization, lobotomies, experimental 'treatments' and physical abuse were common at these facilities." *Id.* Physicians in the 1970s admitted that the care provided the disabled in institutions was horrific but often their less "cruel" or "merciful" solution was just to withhold any care and thus end the life of the child. *Id.* ¶¶15-16.

As recently as 1982, a prominent medical practitioner described children with Down Syndrome as "mere blobs," in his court testimony in the famous Baby Doe case. *Id.* ¶¶18-19. Arguing against life-saving surgery and instead advocating that a Down Syndrome child should suffer death by starvation and dehydration, this doctor told the child's parents and the courts that this child, even if saved, "would still be a mongoloid, a Down's syndrome child with all of the problems that even the best of them have." *Id.* ¶19. In his view, they had "another alternative which was to do nothing. In which case the child probably live only a matter of several days and would die of pneumonia probably. Some of these children, as I indicated in my testimony to Judge Baker, are mere

blobs. Some of them are. Most of them eventually learn to walk, and most of them eventually learn to talk...This talk consists of a single word or something of this sort at best. … They require at best constant attention…. These children are quite incapable of telling us what they feel, and what they sense, and so on." *Id.*

Only well into the 1980s did the medical profession abandon institutionalization of children with Down Syndrome, close infamously neglectful facilities, and require NICUs to extend routine medical care to Down Syndrome infants. *Id.* ¶¶12-13. Still, a decade later, in 1992, 15 percent of pediatricians still supported not repairing duodenal atresia, a straightforward, low-risk, and life-saving surgery, in a child with Down Syndrome. *Id.* ¶20.

Since the 1990s, our society has eliminated many of these treatment disparities after birth. A few decades ago, persons with Down Syndrome had a life expectancy of 10 years. *Id.* ¶12. Now their life expectancy with ordinary medical care is 47 years. *Id.*

But the eugenic attitude and the discrimination against persons against Down Syndrome have not disappeared. With the advent of genetic screening, this discrimination has moved to abortion decisions

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made before birth. *Id.* ¶¶21-27. These "prenatal genetic screening programs offer no corrective intervention or earlier introduction of therapies to deal with a condition." *Id.* ¶43. Instead, their overriding purpose is to enable abortion of Down Syndrome children. *Id.* ¶¶38, 43-44.

Abundant literature attests to the positive outcomes and high quality of life of persons with Down Syndrome and their families. *Id.* ¶27, 51. Nearly all parents report feeling loving (99%) and being proud (97%) of their child with Down Syndrome, and about 79% said that their outlook on life was more positive because of their son/daughter with Down Syndrome. *Id.* ¶51. Brothers and sisters nearly all reported love (97%) and pride (94%). *Id.* And older siblings reported being a better person (88%) because of their brother/sister with Down Syndrome. *Id.*

But counseling of parents expecting children with Down Syndrome continues to reflect the medical community's powerful bias against persons with Down Syndrome. *Id.* ¶¶28-42. In 1994, a study showed that 60% of obstetricians and 40% of geneticists reported counseling for termination of the pregnancy in a directive manner. *Id.* ¶39. Studies since then show that counseling consists overwhelmingly of unbalanced

or negative information, often only of a strictly medical description with no positive or comprehensive information or social support. *Id.* ¶¶34-38. In other words, the medical profession's institutionalized discrimination against children with Down Syndrome now exercises its influence in favor of the pre-birth elimination of these children.

Not much has changed in the medical profession's attitudes since the twentieth century. Even in 2012, a survey revealed that 73% of obstetrical residents and 43% of pediatric residents would abort their child if the child was diagnosed with Down Syndrome. *Id.* ¶40.

This institutionalized medical bias now threatens to eliminate the entire class of persons with Down Syndrome. Under the influence of this medicalized discrimination, parents in the United States and other Western nations are choosing to abort children with Down Syndrome in overwhelming numbers. "In Iceland, the abortion rate for children diagnosed with Down Syndrome in utero approaches 100%." *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring). "Other European countries have similarly high rates, and the rate in the United States is approximately two-thirds." *Id.* The rate of elimination is "98% in Denmark, 90% in the United Kingdom, 77% in France, and 67% in the United States." *Id.* at

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1790–91. Between "61 to 93 percent of parents in the United States who learn that their child will be born with Down Syndrome have an abortion." *Id.*; *see also* McCaffrey Decl. *Id.* ¶¶21-27, 48, 50.

For most women, the central factor in decision to abort a Down Syndrome child is the effect on the family's quality of life. Women decide to abort Down Syndrome children not because of concern for the Down Syndrome child's suffering from the "associated medical conditions which are treatable," but because the parents have fears about "the acceptance of a child with cognitive impairment and intellectual disability" and because of "the negative impact many believe it will have on a family's quality of life." *Id.* ¶¶41-42. Implicit in these decisions is an assumption that a Down Syndrome child has a limited capacity for independent living and adult financial security. *Id.* This "intolerance and subtle discrimination…prioritizes perceived impact on the quality of life of those already living, and accepts the abortion of Down syndrome infants, on a grand scale, as a morally acceptable choice." *Id.* ¶42.

The lower prices and continued improvement of private screening technologies only exacerbate this problem. *Box*, 139 S. Ct. at 1783-84; McCaffrey Decl. ¶22, 24. Every advance in non-invasive screenings

earlier in pregnancy increases the medical pressure on mothers to abort their unborn children with Down Syndrome. This leads to a vicious cycle, in which more Down Syndrome abortions take place, and so society has less and less personal experience with Down Syndrome individuals, and thus provides less support for Down Syndrome individuals, which ultimately increases pressure for even more Down Syndrome abortions. In fact, "some countries are now celebrating the 'eradication' of Down syndrome through abortion… That not only devalues the lives of those living with Down syndrome, but it disincentivizes research that might help them in the future." *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment).

As Frank Stephens, a disability-rights activist who himself has Down Syndrome, powerfully testified before Congress, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just terminate those pregnancies." Frank Stephens, Testimony Before House Subcommittee on Labor, Health and Human Services, and Education 1 (Oct. 25, 2017), https://perma.cc/S73U-GYKS. Recent efforts to "eliminate" Down

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syndrome are nothing more than "people pushing [a] particular 'final solution' [ ] that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist." *Id*. By enacting anti-discrimination laws, States like Arkansas and Missouri affirm that Mr. Stephens and those like him are equal human beings and that they have lives "worth living."

2. Anti-discrimination laws thus seek to prevent "invidious discrimination against people whom nobody would deny would be members of protected classes were they allowed to be born." *PPINK*, 888 F.3d at 311, 314-15 (Manion, J., concurring in the judgment).

Laws prohibiting eugenic abortions on unborn children reflect three important government purposes: they seek to stem the worldwide problem of eugenic abortion; they seek to eradicate the critical stigma from attempts to "eliminate" Down Syndrome and others with developmental disabilities by abortion, and they seek to protect the integrity of the medical profession from the adverse impact of Down Syndrome abortions.

First, anti-discrimination laws seek to stem the worldwide problem of eugenic abortion. The people of Arkansas, Missouri, and other states,

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through their representatives, have acted now to prevent an injustice nearing complete realization in parts of Europe—the eradication of people with Down Syndrome. In "many countries" today, people "celebrate the use of abortion to cleanse their populations of babies whom some would view—ignorantly—as sapping the strength of society." *Preterm-Cleveland*, 940 F.3d at 326. The States need not ignore this canary in the coal mine, and let the total eradication of the Down Syndrome community come to pass in America as it has abroad.

Second, anti-eugenics laws promote "the principle that the Down Syndrome population is equal in value and dignity to the rest of [the State's] population." *Id.* A State that combats this invidious discrimination by prohibiting Down Syndrome abortions sends a powerful signal to members of the Down Syndrome community and others with developmental disabilities that it is "inhumane" to terminate them and it affirms the "profound respect" that the State holds for all people, especially the most vulnerable. *See Gonzales*, 550 U.S. at 157.

In contrast, when society targets, and courts enshrine in federal precedent, the eradication of unborn children with Down Syndrome, it sends a message that people with developmental disabilities are not as

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valuable as others. "Permitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others and increases the 'stigma associated with having a genetic disorder.'" *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment) (quotation omitted).

But every life matters. That is why the "compelling interest in prohibiting abortions sought because of the unborn child's disability stems primarily from the intrinsic value and dignity of all humans, before and after birth, regardless of their utilitarian worth." *Id.* at 316. Prohibiting eugenic abortions of children with Down Syndrome is an important way to send a message of worth and inclusion to every member of our society with developmental disabilities.

Third, anti-eugenics laws keep physicians from becoming "witting accomplices to the deliberate targeting of Down Syndrome babies." *Preterm-Cleveland*, 940 F.3d at 326. Eugenic abortions "do deep damage to the integrity of the medical profession." *Id.* They perpetuate the eugenic goals and medicalized discrimination that marked the profession throughout the twentieth century, and, as with euthanasia of the

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disabled, they "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997). "The grisly reality is that abortion of human beings with Down syndrome is driven by a sector of society that doesn't want disabled people to be part of society." *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-CV-00449-KGB, 2019 WL 3679623, at *35 (E.D. Ark. Aug. 6, 2019) (quoting Dkt. No. 49-7, at 1-22, ¶43; Decl. of Donna J. Harrison, M.D.). Both here and in Missouri's case, the challengers to anti-discrimination laws seek to continue to be free to assist this discrimination under the guise of patient autonomy.

As Judge Batchelder recognized, one hears in these cases "the distant echo of the sorry case of *Buck v. Bell*, 274 U.S. 200, 207 (1927)," when the Supreme Court upheld a state law under which state officials could forcibly sterilize people they considered mentally disabled. *Preterm-Cleveland*, 940 F.3d at 326. Fearing that these "births would 'sap the strength of the State' and 'swamp' society 'with incompetence,' *Buck*'s "effect was the federal judicial endorsement of eugenics." *Id*. But, as the practice of aborting those with Down Syndrome shows, the "eugenicist

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impulse on display in *Buck*, and amplified in its aftermath, is no mere relic of history." *Id.*

Seen from the perspective of the disabled, the lower court's decision is even worse than *Buck v. Bell*. *Buck* did not require the States to pursue eugenics or prevent the conception of certain classes of people. But the lower court required Arkansas to let eugenic practices thrive in the medical profession and to continue the widespread abortion of already-living unborn children diagnosed with Down Syndrome.

It is no answer to say that this eugenic result is tolerable so long as it stems from private choices. Discrimination against Down Syndrome children through private abortions is a eugenic force in the aggregate just as much as state-compelled programs of mass eugenics. *PPINK*, 888 F.3d at 311 (Manion, J., concurring in the judgment). Voluntary individual abortion not only is rife with the potential to become an intentional "tool of eugenic manipulation," but in practice already has a collective impact as "a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics." *Box*, 139 S. Ct. at 1787, 1790 (Thomas, J., concurring). The overwhelming disparate impact of abortion on Down Syndrome individuals, while the result of individual maternal

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decisions, inescapably reflects social and medical bias against Down Syndrome individuals and others in our society with developmental disabilities. *Id*. at 1790–91.

States like Arkansas and Missouri thus have exceptionally strong interests in eradicating historical invidious discrimination against persons with Down Syndrome and other developmental disabilities, and in protecting the most vulnerable in society from being targeted for complete elimination based on an immutable characteristic. McCaffrey Decl. ¶¶12-42.

As with the law at issue in *Gonzales*, the "abortion of unborn children diagnosed with Down Syndrome "requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158; *see Preterm-Cleveland*, 940 F.3d at 328. Using abortion as a method for promoting eugenic goals is "morally and prudentially debatable on grounds different than those that underlay the statutes *Casey* considered." *PPINK*, 917 F.3d at 536 (Easterbrook, J., dissenting).

3. Nor have the challengers in any of the cases carried their burden to prove that eugenics laws impose an undue burden. *Mazurek v.*

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Armstrong, 520 U.S. 968, 972 (1997) (plaintiffs bear the burden of proof in undue-burden cases).

To the contrary, these anti-discrimination laws are narrowly tailored because they prevent only abortions "performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability." *PPINK*, 888 F.3d at 316 (Manion, J., concurring in the judgment). They directly "protect the most vulnerable members of an already vulnerable group," *id.* at 320, while allowing abortion for any other reason. Indeed, "it is hard to imagine legislation more narrowly tailored to promote this interest than the nondiscrimination provisions." *Id.* at 316.

Nor can States achieve these anti-discrimination interests by prohibiting only post-viability Down Syndrome abortions. Anti-discrimination laws apply to new problems that arose since *Casey*. *Casey*'s logic is that the more developed the unborn child, the stronger the State's interest in keeping that child alive. *Casey*, 505 U.S. at 846, 860. But the strength of the State's anti-discrimination interest does not correspond to the unborn child's stage of development. It is equally strong at all gestational ages. When the States' interest is the prevention of the

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discriminatory elimination of classes of human beings, it does not matter if unborn children with Down syndrome are systematically eliminated at 10 weeks or 25 weeks: the timing is different but the result is the same. And the only way to protect the Down Syndrome community, now that genetic screening routinely begins at 10 weeks of pregnancy, is to prohibit pre-viability abortions on Down Syndrome children.

Yet the district courts in this circuit to consider this type of law have perpetuated the medical profession's discriminatory stereotype against Down Syndrome members of our society. When the court below temporarily restrained Arkansas from enforcing its anti-discrimination law, it held that requiring doctors not to abort a Down Syndrome child unduly burdens the mother. *Little Rock Family Planning Servs. v. Rutledge*, No. 4:19-CV-00449-KGB, 2019 WL 3323731, at *47 (E.D. Ark. July 23, 2019). Likewise, just weeks ago, the district court that enjoined Missouri's anti-discrimination law said that "[c]ommon understanding and judicial notice would conclude that Down syndrome diagnosis (or even a strong suspicion based on testing) would often be received with dismay by a pregnant woman and any family members." *Reproductive Health Servs. of Planned Parenthood of the St. Louis Region v. Parson*,

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No. 2:19-cv-4155-HFS, Doc. 69, at 4. This supposition lacked any evidence submitted by the parties, and it reflects the deeply ingrained, systemic, and highly medicalized discrimination still faced by persons with Down Syndrome and other developmental disabilities. The concern that persons with Down Syndrome may often be greeted with "dismay" by our society is a powerful reason to uphold laws like those in Arkansas and Missouri, not to enjoin them.

CONCLUSION

The preliminary injunction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND OF SERVICE

On November 5, 2019, this brief was served electronically through the courts CM/ECF system upon the parties.

This foregoing brief complies with the limitations in Rule 29, 32(a)(5), 32(a)(6), and 32(a)(7)(B) and the brief contains 6,350 words. The undersigned certifies that the electronically filed brief has been scanned for viruses and is virus-free.

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