No. 18-483

In The
Supreme Court of the United States

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* FONDATION JEROME LEJEUNE, SAVING DOWN SYNDROME, AND DOWN PRIDE IN SUPPORT OF PETITIONERS

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
MADELINE MOREIRA
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
(504) 454-7175 (fax)
dbordlee@bdfund.org

November 15, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether this Court's abortion jurisprudence was erroneously broadened by the lower court to strip States of their compelling interest in disfavoring disability discrimination and eugenics by prohibiting abortions motivated solely by a human being's disability, race, or sex.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

Amici include the following public interest organizations:

The **Fondation Jérôme Lejeune** is an international public interest organization, whose mission is to provide research, care, and advocacy to benefit individuals with genetic disabilities. It continues the work of Professor Jérôme Lejeune, who discovered the genetic basis of Down syndrome.

Saving Down Syndrome is a public interest group that addresses government-sanctioned prenatal screening for selective abortion. It successfully secured changes to the national prenatal screening program in New Zealand and is working with the Human Rights Commission to advance its work in nations around the world, including the United Kingdom-based "Don't Screen Us Out" campaign.

Down Pride, along with **Fondation Jérôme Lejeune**, has initiated "Stop Discriminating Down," a campaign and petition in 12 languages aimed at alerting human rights officials about the effects of prenatal testing on the population with Down syndrome.

[1] This brief is filed with the consent of all parties. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than *amici curiae* or their counsel contributed money intended to fund preparing or submitting this brief. The parties received notice of this filing.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Seventh Circuit erred in categorically holding that a State may not prohibit discriminatory abortions before viability. *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health,* 888 F.3d 300 (7th Cir. 2018) opinion (affirming *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health,* 265 F. Supp. 3d 859 (S.D. Ind. 2017)). This case is not about a general right to an abortion, as was the issue in *Roe* and *Casey*. Here, different and compelling state interests are at issue such that a new weighing is merited by this Court. This weighing must consider the state's interests against discrimination; that such interest is meaningful only if it exists from the outset of pregnancy; and, finally, that an erosion of that interest could lead to the slippery slope of postnatal eugenics.

Section I distinguishes the two interests addressed by this Court in its *Roe* and *Casey* decisions (namely, fetal life and maternal health), and establishes that Indiana's Nondiscrimination Law embodies the state's different and compelling interest in protecting vulnerable Down syndrome and minority communities from discrimination – an interest of no small import that deserves to be addressed and balanced by this Court on its own terms.

Section II sets forth the unique timing and duration of state interests versus the abortion right. The government interest in prohibiting discrimination based on disabilities or other immutable traits must

logically exist from the outset of that individual's life or not at all. Indiana's interest against disability discrimination exists from the outset of pregnancy, consistent with other state interests recognized as existing from pregnancy's outset in *Gonzales v. Carhart*, where this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, even as applied to abortions performed before viability. 550 U.S. 124 (2007). If left standing, the Seventh Circuit's broadened characterization of the abortion right as "categorical" before viability erodes both the government interest in preventing disability discrimination, as well as eroding the state's recognized interests in the ethics and integrity of the medical profession. 888 F.3d at 308.

Section III concludes by addressing the additional government interest in drawing a clear boundary against eugenics *after* the birth of a child with disabilities or even during the child's juvenile years – an abhorrent practice that is promoted by some academics, and which is currently being practiced on juveniles under the laws of the government of Belgium. Henry Samuel, *Belgium authorized euthanasia of a terminally ill nine and 11-year-old in youngest cases worldwide*, THE TELEGRAPH, Aug. 7, 2018.

The use of abortion to end the life of human beings who are prenatally determined to have Down syndrome is well-documented, as briefly set forth at the outset of *amici*'s argument. *Amici* urge this Court to grant certiorari to address the profound societal consequences of its jurisprudence being broadened to give

constitutional protection to the eugenic practice of killing unborn human beings[2] based on disability or other discrimination.[3]

REASONS FOR GRANTING CERTIORARI

The use of abortion to kill human beings[4] who are prenatally determined to have Down syndrome is well-documented: A systematic review of U.S. abortion

[2] *See* n. 4, *infra*. Since this Court's *Roe* decision in 1973, science's understanding of embryology has exploded exponentially. This Court's analysis of the state interests relevant to human beings determined to have disabilities or other immutable traits via cutting-edge prenatal testing techniques should not be limited by 45-year-old science.

[3] As organizations in the care and service of individuals with Down syndrome, *amici* bring this Court's attention to the lower court's broadened right to prenatal *disability* discrimination. While not specifically addressed in this brief, the same arguments apply equally to prenatal discrimination on the basis of the immutable characteristics of race and sex.

[4] This Court has recognized that in abortion, "the fetus will be killed." *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007). Science also establishes that the fetus is a human being from the moment of fertilization. *See* Keith L. Moore, *Before We Are Born: Essentials of Embryology* 2 (Saunders ed., 7th ed. 2008) ("[The zygote], formed by the union of an oocyte and a sperm, is the beginning of a new human being."); ML Condic, *The Origin of Human Life at Fertilization: Quotes Compiled from Medical Textbooks and Peer-Reviewed Scientific Literature* (Nov. 2017) (compiling sixty-one short quotes from medical school textbooks and peer-reviewed scientific journals published since 2001 identifying sperm-egg fusion as the beginning of a new individual human life), *available at* http://bdfund.org/wp-content/uploads/2016/05/Condic-Sources-Embryology.pdf. (Last visited Nov. 13, 2018.)

prevalence after a prenatal diagnosis of Down syndrome revealed alarmingly high rates of over 85% among nine hospital-based studies.[5] In one anonymous survey of nearly 500 physicians who deliver a variety of prenatal diagnoses, 23% of them admitted that they urged termination of disabled unborn children.[6] A Stanford study from 2014 reported that mothers of children with Down syndrome "commonly expressed" that the medical information they had received in prenatal counseling was "biased or overly negative."[7]

I. THE ABORTION NONDISCRIMINATION LAW ADVANCES THE STATE OF INDIANA'S INTEREST IN PREVENTING DISABILITY DISCRIMINATION – AN INTEREST NEVER BEFORE ADDRESSED BY THIS COURT.

Contrary to the overreaching decision of the lower court, *Roe v. Wade*, 410 U.S. 113 (1973) did not create an inexorably absolute and categorical right to abortion without any regard for anti-discrimination principles.

---

[5] Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32:2 Prenatal Diagnosis 142 (Feb. 2012). See also Lord, A., *University Professor Supports Killing Disabled Babies: "Time to Support Eugenic Abortion,"* LifeNews (01/04/2018).

[6] Wertz DC, *Drawing lines: notes for policymakers* (In: Parens E, Asch A, eds. *Prenatal Testing and Disability Rights*, Washington, DC: GEORGETOWN UNIVERSITY PRESS, 261-287 (2000)).

[7] Gregory Kellogg, et al., *Attitudes of Mothers of Children with Down Syndrome Towards Noninvasive Prenatal Testing*, 23 J. Gent. Counsel 805, 810 (2014).

Roe itself separately balanced each of two distinct state interests against a general right to privacy. *Id.* at 153, 162-63. The only two state interests addressed by *Roe* were the interests in (1) "preserving and protecting the health of the pregnant woman" and (2) "protecting the potentiality of human life." 410 U.S. at 162.

Yet, the Seventh Circuit implicitly and erroneously presumes – without any significant reflection, analysis, or citation of authority – that there exists a constitutional right to abort an unborn child because of his or her sex, race, or disability. But no decision of this Court has ever held that States are powerless to prevent abortions systemically targeting individuals prenatally identified to have certain immutable traits.

On the contrary, "[i]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus. . . ."[8] Picking and choosing among particular children raises the specter of abortion as "a wedge into the 'quality control' of all humans. If a condition (like Down syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate – eliminate or enhance – other (presumed genetic) socially charged

[8] *See* Marsha Saxton, *Disability Rights and Selective Abortion*, Abortion Wars, A Half Century of Struggle: 1950 to 2000 (Univ. of Cal. Press, 1998), *available at* http://gjga.org/conference.asp?action=item&source=documents&id=17 (last visited Nov. 13, 2018).

characteristics: sexual orientation, race, attractiveness, height, intelligence?"[9]

Perhaps for these reasons, this Court has never endorsed a right to abort children solely because they have been identified prenatally to have a genetic abnormality or disability, or to be of a particular race or sex. In *Planned Parenthood v. Casey*, the Supreme Court, quoting approvingly from its statement in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), declared that the abortion liberty pertained to "the decision whether to bear or beget *a* child," *Casey*, 505 U.S. at 851. The Court has never framed the constitutionally protected abortion decision as whether to bear or abort a *particular* child based on his or her sex, race, or disability.

Notably, there is persuasive authority from the U.S. Courts of Appeals for the Federal Circuit against abortions based on disability – even where the fetal anomaly was lethal as excluded by the statute at issue in this case. In *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), the court considered an equal protection challenge to a restriction on the use of Department of Defense funds for abortion. *Id.* at 1372. The plaintiffs in *Britell* were parents of an unborn child diagnosed with a lethal fetal anomaly. They elected to abort the child, then later filed suit when the Department of Defense denied their request for reimbursement for the cost of the abortion. *Id.* The plaintiffs contended that there was no rational basis to apply the funding

[9] *Id.*

restriction to their case, arguing that the government's interest in "potential human life" did not extend to the life of an anencephalic unborn child. *Id.* at 1372, 1374.

The Federal Circuit rejected this argument, concluding that the funding restriction was rationally related to the government's legitimate interest in "the protection and promotion of potential human life." [10] *Id.* at 1380. In reaching its decision, the court explicitly considered and rejected the notion that lesser value could be assigned to an anencephalic unborn child:

> For us to hold, as Britell urges, that in some circumstances a birth defect or fetal abnormality is so severe as to remove the state's interest in potential human life would require this court to engage in line-drawing of the most non-judicial and daunting nature. This we will not do. . . . It is not the role of courts to draw lines as to which fetal abnormalities or birth defects are so severe as to negate the state's otherwise legitimate interest in the fetus's potential life. . . .

Id. at 1383.

As *Britell* explicitly recognized, Indiana likewise has an interest in protecting the lives of children identified to have disabilities or genetic variations – an interest that is different from the interests addressed in *Roe* and *Casey*. Further, the rationale in *Britell*

---

[10] This Court has since abandoned its former use of the phrase "potential human life," in light of the science of human embryology. In *Gonzales v. Carhart,* the majority frequently referred to "fetal life," or the "life of the fetus." 550 U.S. 124 (2007).

logically extends to the protection of unborn children targeted for abortion based on their race or sex.

Indiana's interest in preventing disability and other discrimination is distinct, compelling and consistent with established societal norms as embodied in federal and state statutes. Under the Americans with Disabilities Act of 1990 ("ADA"),[11] the United States prohibits discrimination against persons with physical or mental disabilities in various circumstances, including employment, public services and accommodations, public transportation, and telecommunications. State laws provide similar protections. *See, e.g.*, IND. CODE §§ 22-9-5, *et seq*. (Employment Discrimination Against Disabled Persons). Reflecting these non-discriminatory principles, North Dakota became the first state to ban pre-viability abortions based solely on an unborn child's disability. N.D. CENT. CODE § 14-02.1-04.1 (2018) (ban enacted in 2013). Nondiscrimination laws that likewise protect unborn human beings with disabilities or other immutable traits from the beginning of their lives were enacted in Indiana in 2016, HEA 1337 (2016), followed by Ohio in 2017, OHIO REV. CODE §§ 2919.10, 2919.101 and 3701.79 (2017).[12]

---

[11] 42 U.S.C. §§ 12101, *et seq.* and the ADA Amendments Act of 2008, Pub.L. 110-325, 122 Stat. 3553, *et seq.* (2008).

[12] For an outstanding analysis of the distinct state interests outside of *Roe* and *Casey*, embodied in the Ohio statute and by extension the Indiana statute, *see* Reply Brief of Defendants-Appellants Lance Himes, Kim G. Rothermel, and Bruce R. Saferin, *Pre-Term Cleveland v. Himes*, No. 18-3329, Document 45 (6th Cir. 2018) (filed 9/19/2018).

Over the last century, we have witnessed a dramatic shift in attitudes toward individuals with disabilities. For instance, there is a sharp contrast between Justice Holmes's notorious dictum in *Buck v. Bell*, 274 U.S. 200 (1927), and the Congressional findings in the Preface to the ADA, 42 U.S.C. § 12101. In *Buck v. Bell*, this Court approved, by an 8-1 vote, the compulsory sterilization of a "feeble minded" woman who had been adjudged "the probable potential parent of socially inadequate offspring." *Id.* at 205, 207 (Holmes, J.). In so doing, the Court shamefully declared, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough." *Id.* at 207.

Sixty-three years later, in a dramatic reversal of societal mores, the U.S. Congress, in the ADA, found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination . . . ," 42 U.S.C. § 12101(a). No longer viewed as "imbeciles" who are "manifestly unfit," 274 U.S. at 207, people with mental and physical disabilities have the right to "fully participate in all aspects of society" – including birth itself. 42 U.S.C. § 12101(a)(1).

Even individuals who advocate for abortion rights have expressed discomfort and dismay at the use of

"disability selective" abortion.[13] Indeed, "many [supporters of abortion rights] are finding that, while they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby."[14]

Recognition of the equal dignity of the people with disabilities has led to an emerging sense of disquiet about the widespread practice of disability selective abortion. Alert commentators have raised serious questions about the practice of prenatal screening for fetal disabilities and subsequent abortion. *See* Harmon, *Genetic Testing + Abortion = ???*, *supra*; Saxton, *Disability Rights and Selective Abortion*, *supra*. In particular, giving constitutional protection to this practice risks eliminating entire communities of people with disabilities, despite the fact that our nation recognizes that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1).

Growing legal consensus condemns both sex-selection and disability selective abortions and acknowledges that legal safeguards must be enacted to protect children – born and unborn. For example, the United States is a signatory to the Convention on the Rights of the Child, which states that a child "needs

---

[13] Amy Harmon, *Genetic Testing + Abortion = ???*, NY TIMES, May 13, 2007, *available at* http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?_r=0 (last visited Nov. 13, 2018).

[14] *Id.*

special safeguards and care, including appropriate legal protection, *before as well as after birth*." Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

More recently, the U.N. Committee on the Rights of Persons with Disabilities (CRPD), declared that "[l]aws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities." CRPD also rejected the "incompatible with life" label often used to describe prenatal diagnoses of genetic abnormalities or disabilities, noting "experience shows that assessments on impairment conditions are often false,"[15] and that, even if the diagnosis is correct, the label "perpetuates notions of stereotyping disability as incompatible with a good life."[16]

II. ERADICATING DISCRIMINATION IS A STATE INTEREST THAT IS MEANINGFUL ONLY IF IT EXISTS FROM THE OUTSET OF PREGNANCY

The government interest in prohibiting discrimination based on disabilities or other immutable traits must logically exist from the outset of that individual's life or not at all. In other words, Indiana's interest

---

[15] *See, e.g.,* Susan Yoshihara, *Another U.N. Committee Says Abortion May Be a Right, But Not on Basis of Disability*, C-FAM, Center for Family and Human Rights, Oct. 26, 2017, *available at* https://c-fam.org/friday_fax/another-un-committee-says-abortion-may-right-not-basis-disability/ (last visited Nov. 13, 2018).

[16] *Id*.

against disability discrimination is meaningful only if it exists as strongly from the outset of pregnancy as it does after birth and into the ongoing life of the individual human being. This logic is consistent with other state interests recognized as existing from pregnancy's outset, such as the state's interest in the ethics and integrity of the medical profession discussed in *Gonzales v. Carhart*, where this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, even as applied to abortions performed before viability. 550 U.S. 124 (2007).

Carefully read, *Gonzales* stands for the proposition that governments have varying interests even *before viability* and that different interests implicate different durational points – with some interests beginning at the outset of pregnancy, and others being implicated upon a determination of fetal viability.[17]

Yet, the Seventh Circuit failed to recognize that this Court's *Gonzales* decision upheld the ban on partial birth abortion even *before* fetal viability. The reasoning of the *Gonzales* decision gives strong support for the argument that Indiana's Nondiscrimination Law embodies its significant "governmental interest in eradicating disability discrimination" from the outset of pregnancy.[18]

---

[17] Randy Beck, *State Interests and the Duration of Abortion Rights,* 44 McGeorge Law Rev. 31 (2013).

[18] Messner, TM, *The Constitutional Viability of Five Month Abortion Laws,* 9 Charlotte Lozier Institute: On Point 4 (2015) (citing Beck, *supra*, n. 17).

If left standing, the Seventh Circuit's broadened characterization of the abortion right as "categorical" before viability erodes both the government interest in preventing disability discrimination, as well as eroding the state's recognized interests in the ethics and integrity of the medical profession.

This point emphasizes that this petition presents a federal question of the highest importance. Indeed, such legislation and the duration of its competing interests is outside the paradigm contemplated by the Court when it issued its abortion decisions decades ago.

The paradigm assumed by this Court's abortion jurisprudence is that the woman is experiencing an unwelcomed pregnancy, *i.e.*, that she does not desire to be pregnant under any circumstances. In fact, this Court's case law speaks of a decision "whether to bear or beget a child" – not a *particular* child. *Roe v. Wade*, 410 U.S. 113, 169 (1973). Likewise, this Court's *Casey* decision addressed a woman's decision "whether to terminate her *pregnancy*," and not whether to terminate the life of a particular *child* with particular traits. *Planned Parenthood v. Casey*, 505 U.S. 833, 875 (1992).

How different the situation when a pregnancy is desired until prenatal testing determines that the child has a genetic condition such as Down syndrome. The unborn child, who was initially welcomed and celebrated, is now marked for abortion (in some cases due to pressure from physicians) because he or she has a disability.

This practice amounts to disability discrimination, and crosses a line into eugenics. The State's interest against disability discrimination and eugenics were never contemplated by *Roe* and *Casey*, yet the lower court stretched those decisions beyond recognition to override the state's interests against discrimination with no guidance from this Court.

If left standing, our nation's professed government interest in the inherent value of individuals with disabilities, expressed in instruments such as the Americans with Disabilities Act, *infra*, n. 11, will be betrayed and belied. Targeting a class of human beings for death simply because they have been discovered to have Down syndrome or another immutable characteristic before birth or after birth goes against all that civilized society should stand for. The Indiana bill embodies the overriding and compelling government interest from the outset of an individual's life in disfavoring the eugenic elimination of an entire class of human beings.

III. THE ABORTION NONDISCRIMINATION LAW PROMOTES INDIANA'S INTEREST IN DRAWING A CLEAR BOUNDARY AGAINST THE PRACTICE OF POSTNATAL EUGENICS.

The Abortion Nondiscrimination Act also serves the legitimate interest of drawing a clear boundary against the practice of postnatal eugenic infanticide. "This Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life . . . *Glucksberg* found reasonable the

State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.'" *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 732-735 (1997)).

The concern about the advent of eugenic infanticide is not merely hypothetical. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, has offered a public justification for infanticide, based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, Practical Ethics 169 (2d ed., CAMBRIDGE UNIV. PRESS 1997); *see also, e.g.*, H. Kuhse & P. Singer, Should the Baby Live? The Problem of Handicapped Infants (OXFORD UNIV. PRESS 1985).

Similar proposals have been advanced by like-minded thinkers, including open advocacy for infanticide of children with Down syndrome. Alberto Giubilini & Francesca Minerva, *After-birth abortion: why should the baby live?*, JOURNAL OF MEDICAL ETHICS (Feb. 23, 2012), *available at* https://jme.bmj.com/content/39/5/261 (last visited Nov. 13, 2018) (arguing that parents of infants with disabilities such as Down syndrome should be allowed to terminate the lives of those born children, since "the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn").

And beyond our nation's borders, a form of this abhorrent practice is not merely promoted by academics, but is currently being practiced on juveniles with disabilities as sanctioned by the government of Belgium. Henry Samuel, *Belgium authorized euthanasia of a terminally ill nine and 11-year-old in youngest cases worldwide*, THE TELEGRAPH, Aug. 7, 2018. While the article indicates that the nine-year-old had a brain tumor, and the 11-year-old had cystic fibrosis, the Belgium report did not indicate the prognosis if the children were given medical treatment. The article also reported on a 17-year-old who "chose to die" because of his muscular dystrophy.

The State of Indiana has every right to choose to draw a clear boundary against the adoption of such practices. The Abortion Nondiscrimination Act "draw[s] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," such as discriminatory abortion and eugenics. *Gonzales v. Carhart*, 550 U.S. at 158.

CONCLUSION

For these reasons, *Amici* Down syndrome organizations urge this Court to grant Indiana's petition for writ of certiorari.

Respectfully submitted,

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
Counsel of Record
MADELINE MOREIRA
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234
(504) 454-7175 (fax)
dbordlee@bdfund.org

November 15, 2018