No. 20-1434

In the Supreme Court of the United States

LESLIE RUTLEDGE, ET AL.,
Petitioners,

v.

LITTLE ROCK FAMILY PLANNING SERVICES, ET AL.,
Respondents.

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

BRIEF OF THE STATE OF MISSOURI AND TWENTY-ONE OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

On November 7, 2020, Chris Nikic became the first person with Down syndrome to complete an Ironman triathlon. The Ironman is a punishing test of physical endurance, involving a 2.4-mile swim, 112-mile bike ride, and a full marathon, completed consecutively within a limited time. Jenny McCoy, *Chris Nikic Wants to Be the First Ironman Finisher with Down Syndrome*, RUNNER'S WORLD (updated Nov. 7, 2020). Chris's father said, "From the time he was born, we were told by everyone that he'd never do anything or amount to anything or be able to accomplish anything beyond being able to tie his own shoes." Kate Santich, *Maitland Triathlete Chris Nikic 1st Person With Down Syndrome to Finish Ironman*, ORLANDO SENTINEL (Nov. 9, 2020). "The doctors and experts said I couldn't do anything," Chris told a reporter after his triumph. "So I said, 'Doctor! Experts! You need to stop doing this to me. You're wrong!'" *Id.*

In 2018, Amy Bockerstette became the first person with Down syndrome to receive an athletic scholarship to college. A golfer from Arizona, she rose to international fame when she played alongside Gary Woodland at a Special Olympics event. Before sinking a putt for par on one of the most famed holes in golf, hole 16 at TPC Scottsdale, Amy said, "yeah, I got this." The video of her putt and optimistic demeanor garnered over 43 million views on social media platforms. On May 10, 2021, Amy "will make history … as she becomes the first person with Down syndrome to compete in a national collegiate athletic

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[1] All counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

championship, the NJCAA golf national championship." Gabriel Fernandez, *Amy Bockerstette to Become First Person with Down Syndrome to Compete in College National Championship*, CBS SPORTS.COM (May 5, 2021).

The inspiration Chris Nikic and Amy Bockerstette provides is irreplaceable. People with Down syndrome add unique joy, beauty, and diversity to our society. Yet the abortion of children with Down syndrome approaches genocidal levels, threatening the Down syndrome community with complete elimination. "[A]bortion is an act rife with the potential for eugenic manipulation." *Box* v. *Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring). All States share Arkansas's compelling interest in preventing the eradication of people with Down syndrome through the practice of eugenic abortion.

Amici curiae are the States of Missouri, Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia. *Amici* have a strong interest in protecting their own Down syndrome populations and preventing the extermination of people with Down syndrome from society. At least eleven States have enacted laws similar to Arkansas's law to protect disabled communities from eugenic abortion. *See* Mo. Rev. Stat. § 188.038.2; 2021 Ariz. Sess. Laws ch. 286, § 2 (amending Ariz. Rev. Stat. § 13-3603.02); Ind. Code § 16-34-4-6; N.D. Cent. Code § 14-02.1-04; Ohio Rev. Code § 2919.10(B); Ky. Rev. Stat. § 311.731(2)(c); La. Rev. Stat. § 40:1061.1.2; Miss. Code Ann. § 41-41-407; HB 1110, 96th Leg. Sess. (S.D. 2021) (enacted

and codified at SD Stat. § 34-23A-90 (eff. July 1, 2021)); Tenn. Code Ann. § 39-15-217; Utah Code § 76-7-302.4. Similar legislation is under consideration in many other states. Guttmacher Institute, *State Legislation Tracker: Abortion Due to Genetic Anomaly Banned* (visited May 5, 2021).[2] Since Arkansas's petition was filed, a three-circuit split on the validity of such laws has emerged. *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512 (6th Cir. April 13, 2021) (en banc) (upholding Ohio's law); *Little Rock Fam. Plan. Servs.* v. *Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (invalidating Arkansas's law); *Planned Parenthood of Indiana & Kentucky, Inc.* v. *Comm'r of Indiana State Dep't of Health*, 888 F.3d 300, 306 (7th Cir.), *rev'd in part on other grounds sub nom. Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019) (invalidating Indiana's law). A suit challenging Missouri's law is on appeal in the Eighth Circuit. *Reproductive Health Services* v. *Parson*, Nos. 19-2882, 19-3134 (8th Cir. argued Sept. 24, 2020). The outcome of the current petition could control the validity of all such laws. *Amici* with such laws have a strong interest in defending their validity, and all *amici* have a strong interest in retaining their sovereign authority to enact such laws as they see fit.

ARGUMENT

I. Arkansas's Prohibition Against Aborting Unborn Children Solely Because They May Have Down Syndrome Satisfies Any Level of Constitutional Scrutiny.

Arkansas's Down Syndrome Discrimination by Abortion Prohibition Act, Ark. Code Ann. 20-16-2102

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[2] https://www.guttmacher.org/state-policy.

to 2107, is carefully tailored to advance at least eight compelling state interests. Thus, it satisfies strict scrutiny or any other level of scrutiny, including *Planned Parenthood of Southeastern Pennsylvania* v. *Casey's* less stringent "undue burden" standard. 505 U.S. 833, 876 (1992).

A. Arkansas's law advances at least eight compelling state interests.

First, as Arkansas contends, its law advances the State's compelling interest in protecting an entire class of persons from being targeted for elimination solely because of disability. *See* Pet. 25–27. As Justice Thomas noted in *Box*: "[T]his law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box* v. *Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). In other contexts, the Court has recognized that the States have a "compelling interest in eliminating discrimination" that justifies some restrictions on rights, even those that are actually enumerated in the Constitution. *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984). Both Congress and the States may prohibit the "moral and social wrong" of invidious discrimination by private parties. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 257 (1964); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). Eliminating invidious discrimination against the disabled is a compelling state interest. *See* 42 U.S.C. § 12132; 29 U.S.C. § 794.

Second, Arkansas's law advances the State's compelling interest in eradicating historical animus

and bias against persons with Down syndrome. The history of medicalized discrimination against persons with Down syndrome is both recent and appalling, and the Down syndrome provision serves to eradicate the ongoing vestiges of that history.

"Before the 1980s, the overwhelming majority of people with Down syndrome in the United States were placed in institutions, often times as infants or young children." Michelle Sie Whitten, *The Story of Two Syndromes*, Global Down Syndrome Foundation (available at https://bit.ly/3vOaXIs). "[M]ost professionals considered it impossible for people with Down syndrome to learn how to speak properly, let alone read and write," and "most Americans believed they should not be allowed in public spaces such as movie theaters, malls or parks." *Id.* This discrimination was rooted in the eugenic movement's rejection of the "feeble-minded" as "unfit" and worthy of "elimination." *Box*, 139 S. Ct. at 1785–86 (Thomas, J., concurring).

These prejudices against the disabled were deeply entrenched in the medical profession. In 1973, a study reported that Yale University NICU routinely deprived disabled infants of simple, life-saving treatments, leaving them to die. Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 N. ENG. J. MED. 89 (Oct. 1973). Dr. Walter L. Owens, the obstetrician in the infamous "Baby Doe" case from Indiana, in court testimony described children with Down syndrome as "mere blobs." Pet., *Infant Doe* v. *Bloomington Hosp.*, *et al.*, at 8 (No. 83-437), *denied* 104 S. Ct. 394 (Nov. 7, 1983).

This medicalized discrimination was literally fatal for persons with Down syndrome. "Pictures of these

institutions and their 'inmates' show us bedlam – cruel and unusual punishment for innocents whose only crime is to have been born differently-abled." Whitten, *supra.* "Because of neglect, abuse, and lack of access to education and medical care, people with Down syndrome would die an early death." *Id.* In 1960, the life expectancy for a person with Down syndrome was ***10 years***. Pet. 4. Today that has increased to 60 years. Whitten, *supra.* It was not until well into the 1980s that the medical profession uniformly abandoned recommendations for institutionalization of people with Down syndrome—institutionalization that led to early death. Martin J. McCaffery, *Trisomy 13 and 18: Selecting the road not previously taken,* 172 AM. J. OF MED. GENETICS, COMMENTARY, SEMINARS IN MEDICAL GENETICS (Aug. 13, 2016). Political action spearheaded by parent and disability rights groups, not physicians, forced the medical community to extend commonly accepted medical interventions to Down syndrome patients. *Id.*

Despite radical changes in both treatment and societal acceptance, this historical animus was not eradicated from the medical profession. The persistent medicalized biases against Down syndrome continue in the widespread practice of eugenic abortion. As Arkansas compellingly describes, Pet. 5–7, the medical profession's biases continue to influence parents of Down syndrome children at their point of greatest vulnerability—*i.e.*, immediately upon learning of a prenatal screening or diagnosis of Down syndrome. "When it comes to testing for Down syndrome, the impact of genetic testing and counseling is clear—abortions." Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement*

Challenging a Core Ethical Norm of Genetic Testing, PLOS BIOLOGY 13(8) (Aug. 2015).

The institutionalized medical pessimism which surrounds Down syndrome begins with ACOG recommendations for universal prenatal genetic screening. McCaffrey, *supra*; *see also* AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 393: NEWBORN SCREENING (2007). Because Down syndrome has no prenatal treatment, such screening may serve to create the opportunity to abort the disabled. Unlike screening programs for a host of disorders, when it comes to Down syndrome, these prenatal genetic screenings offer no corrective intervention or earlier introduction of therapies. The "cure" for Down syndrome is the elimination of the infant. Prenatal genetic-screening techniques, when applied to Down syndrome, have thus been described as "search-and-destroy technologies." George Will, *The Real Down Syndrome Problem: Accepting Genocide*, WASH. POST (March 14, 2018).

When screening or diagnostic tests report the possibility of Down syndrome, the counseling process heavily favors abortion. Although non-directive counseling is a stated aim for prenatal counseling, medical anthropologists have found that these practices include "the 'collective fiction' that screening can improve fetuses' health and a 'collective silence' regarding the fact that a positive screening result could eventually lead to a decision to abort." J. Johnston, et al., *Supporting Women's Autonomy in Prenatal Testing*, N. ENG. J. MED. 505–507 (Aug. 2017). One survey found that, among women receiving genetic counseling, "83% reported they did not receive balanced counseling regarding the quality of life for children with disabilities." CD Roberts, et

al., *The Role of Genetic Counseling in the Elective Termination of Pregnancies Involving Fetuses with Disabilities,* 36 J. SPECIAL EDUC. 48–55 (Spring 2002). Another survey of prenatal screening pamphlets found that nearly one half of the statements portrayed a negative message pertaining to Down syndrome, while only 2.4% of the statements conveyed a positive image of Down syndrome. KL Lawson, et al., *The Portrayal of Down Syndrome in Prenatal Screening Information Pamphlets*, 34 J. OBST. & GYN. CANADA 760–768 (Aug. 2012). Another survey of medical professionals found that "[f]or Down syndrome, 60% of obstetricians and 40% of geneticists reported counseling for termination of pregnancy in a directive manner." T. Marteau, et al., *Counseling Following Diagnosis of a Fetal Abnormality: the Differing Approaches of Obstetricians, Clinical Geneticists, and Genetic Nurses*, 31 J. MED. GENETICS 864–867 (Nov. 1994). Yet another survey found that "[g]enetic counselors were more likely to emphasize clinical information and negative aspects of the diagnosis, while parents valued information regarding the abilities and potential of individuals with Down syndrome." Linda McCabe, et al., *Call for Change in Prenatal Counseling for Down Syndrome*, 158A AM. J. OF MED. GENETICS 482, 482 (Feb. 7, 2012). Iceland, where the elimination rate for Down syndrome is virtually 100 percent, reportedly relies on "heavy-handed genetic counseling" to achieve that goal. Will, *The Real Down Syndrome Problem*, *supra*.

In short, "women report feeling pressured by their doctors . . . to choose abortion if the test reveals Down syndrome or other abnormalities. It is taken for granted in the medical community that no woman would carry a Down-syndrome pregnancy to term."

Alexandra DeSanctis, *Iceland Eliminates People with Down Syndrome*, NATIONAL REVIEW (Aug. 16, 2017), https://bit.ly/3w013TU. And "the impact of genetic testing and counseling is clear—abortions." Caplan, *supra.* These negative attitudes of the medical profession lag far behind those of society as a whole, which has come to accept and celebrate people with Down syndrome. Indeed, "[m]any families are eager to adopt children with Down syndrome," and there are long wait lists to do so. Heidi Lindh et al., *Characteristics and Perspectives of Families Waiting to Adopt a Child with Down Syndrome*, GENETICS IN MED. (April 2007).

Further, the negative focus of genetic counseling has no basis in reality. As Arkansas notes, Pet. 4–5, studies find overwhelming evidence of happiness, joy, and personal satisfaction in the lives of people with Down syndrome and their families. These surveys demonstrate "that the overwhelming majority of people with Down syndrome they surveyed indicate they live happy and fulfilling lives," and that "the overwhelming majority of parents surveyed are happy with their decision to have their child with Down syndrome and indicate that their sons and daughters are sources of great love and pride." LD Bryant, et al., *Descriptive Information About Down Syndrome: a Content Analysis of Serum Screening Leaflets*, PRENATAL DIAGNOSIS 1057–63 (Dec. 2001). Medical literature and parent reports clearly show that families with a Down syndrome member believe they are better for it, at rates as high as 97 to 99 percent. Brian Skotko, et al., *Family Perspectives about Down Syndrome,* AM. J. MED. GENETICS ANNUAL 930–41 (Apr. 2016); *see also Planned Parenthood of Ind. and Ky., Inc.* v. *Comm'r of Ind. State Dep't of Health*, 888

F.3d 300, 315–16 (7th Cir. 2018) ("*PPINK*") (Manion, J., concurring in the judgment in part and dissenting in part). A study in France reported the following typical reaction from a parent of a child with Down syndrome: "It is the most beautiful experience of my life. I have no regret and would not change anything if it was possible." Remi Bertrand, *Parents' Perspective on Having a Child with Down Syndrome in France*, 179A AM. J. MED. GENET. 770, 781 (2019).

Yet, notwithstanding the beauty and happiness associated with Down syndrome in real life, medicalized bias results in the abortion of children with Down syndrome at genocidal levels. In the United States, abortion rates for Down syndrome infants are at least 67 percent after a prenatal diagnosis, and may be as high as 93 percent. Pet. 8. "In Iceland, the abortion rate for children diagnosed with Down syndrome in utero approaches 100%," and the rate is "98% in Denmark, 90% in the United Kingdom, 77% in France, and 67% in the United States." *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring). These staggering numbers are the latest vestige of deeply entrenched, historical animus against people with Down syndrome that persists in the medical profession, and Arkansas has a compelling interest in eradicating this animus.

Third, Arkansas's law safeguards the integrity of the medical profession by preventing doctors from abandoning their traditional role as healers to become the killers of disabled populations. "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales* v. *Carhart*, 550 U.S. 124, 157 (2004) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997)). The Hippocratic tradition of "complete separation

between killing and curing" in the medical profession is a "priceless possession which we cannot afford to tarnish." Margaret Mead, *quoted in* Rita L. Marker et al., *Euthanasia: a Historical Overview*, MD. J. CONTEMP. LEGAL ISSUES 2(2) 257–298 (1991). Permitting the medical profession to become complicit in targeting disabled people for elimination undermines this "priceless possession." *Id.* Recent history illustrates the medical profession's susceptibility to corruption through the medicalized killing of the disabled. *See* Michael A. Grodin, et al., *The Nazi Physicians as Leaders in Eugenics and "Euthanasia": Lessons for Today*, 108 AM. J. PUB. HEALTH 53–57 (Jan. 2018). All citizens should be deeply uncomfortable with physicians' complicity in killing disabled populations, and all States have a compelling interest in preserving the integrity and ethics of the medical profession.

Fourth, Arkansas's law draws a clear boundary against additional eugenic practices targeted at disabled persons and others. This Court "has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," such as infanticide and euthanasia. *Gonzales*, 550 U.S. at 158. Sex-selective abortion already occurs in the United States under the euphemism "family balancing." *See, e.g.*, Harry J. Lieman, M.D., et al., *Sex Selection for Family Balancing*, AMA JOURNAL OF ETHICS (2014); *see also* Sujatha Jesudason et al., *Sex Selection in America: Why It Persists and How We Can Change It*, THE ATLANTIC (May 31, 2012). Prominent ethicists have sought to justify not just abortion, but also infanticide of disabled children, and such infanticide is already practiced in the Netherlands in

some instances. Peter Singer, *Pulling Back the Curtain on the Mercy Killing of Newborns*, L.A. TIMES (Mar. 11, 2005); A. Guibilini, et al., *After-Birth Abortion: Why Should the Baby Live?*, 39 J. OF MED. ETHICS 261-63 (2013) (arguing that infanticide of children with Down syndrome, among others, is justified). As one man with Down syndrome testified before Congress, "we are the canary in the eugenics coal mine. Genomic research isn't going to stop at screening for Down syndrome. It won't be long before we can identify all manner of potentially expensive medical or personality 'deviations' in the womb." Testimony of Frank Stephens, *Down Syndrome: Update on the State of the Science & Potential for Discoveries Across Other Major Diseases Before the H. Subcomm. on Labor, Health and Human Servs., and Ed. Comm. on Appropriations*, at 2 (Oct. 25, 2017) ("Frank Stephens' Testimony"), https://bit.ly/33AYHPk.

Fifth, as Arkansas emphasizes, its law counters the stigma that eugenic abortion currently imposes on living persons with Down syndrome and other disabilities. Pet. 27–29. As the Missouri General Assembly found in passing a similar Down syndrome provision: "Eliminating unborn children with Down Syndrome raises grave concerns for the lives of those who do live with disabilities. It … fosters a false sense that disability is something that could have been avoidable, and is likely to increase the stigma associated with disability." Mo. Rev. Stat. § 188.038.1(6). "Permitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome … increases the 'stigma associated with having a genetic disorder.'" *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the

judgment) (quoting Peter A. Benn & Audrey R. Chapman, *Practical and Ethical Considerations of Noninvasive Prenatal Diagnosis*, 301 J. AM. MED. ASS'N 2154, 2155 (2009)). Arkansas's law both provides and reinforces the contrary, positive, anti-stigmatic message of people like Frank Stephens: "I AM A MAN WITH DOWN SYNDROME AND MY LIFE IS WORTH LIVING." Frank Stephens' Testimony, at 1 (emphasis in original).

Sixth, Arkansas's law ensures that the existing Down syndrome community does not become starved of resources for research and care for individuals with Down syndrome. "Across the world, 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." *Id.* at 1. As abortion decimates the Down syndrome community, resources and support for existing individuals with Down syndrome will inevitably dwindle away. *See* Mo. Rev. Stat. § 188.038.6 (finding that Down syndrome abortions "send a message of dwindling support" for people with Down syndrome). "[S]ome countries are now celebrating the 'eradication' of Down syndrome through abortion," and this eradication "disincentivizes research that might help [people with Down syndrome] in the future." *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment).

Seventh, Arkansas's law protects against the devaluation of *all* human life inherent in any decision to target a person for elimination based on an immutable characteristic. Targeting the disabled for elimination "further coarsen[s] society to the humanity of not only newborns, but all vulnerable and

innocent human life, making it increasingly difficult to protect such life." *Gonzales*, 550 U.S. at 157 (quoting Congressional Findings ¶ (14)(N)). Arkansas's law "expresses respect for the dignity of human life." *Id.* The epidemic of Down syndrome abortions "perpetuates the odious view that some lives are worth more than others." *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment). Arkansas counteracts the eugenic message that some people "have too little value to exist." Frank Stephens' Testimony, at 1.

Eighth, Arkansas's law fosters the diversity of society and protects society from the incalculable loss that would occur if people with Down syndrome were eliminated. As the stories of Down syndrome heroes like Chris Nikic, Amy Bockerstette, and countless others attest, people with Down syndrome provide an irreplaceable beauty, joy, and inspiration to their communities and our society. They inspire us and make us better people. "Human beings 'of difference' . . . have much to share with all of us about what it means to be human." Marsha Saxton, *Disability Rights and Selective Abortion*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE: 1950 TO 2000 (1998). This is especially true of persons with Down syndrome, as the experience of one St. Louis, Missouri suburb illustrates. *See* Lauren Knight, *On Her Way: Grace's Bus Stop*, ST. LOUIS MAGAZINE (March 21, 2014). Our society would be incalculably diminished if persons with Down syndrome were eliminated—and we now stand on the brink of that genocidal outcome.

B. Arkansas's law is narrowly tailored.

Arkansas's law advances these many compelling interests in the narrowest possible fashion. The law

prohibits abortions only if the discriminatory purpose is the *sole* reason for the abortion: "A physician shall not intentionally perform or attempt to perform an abortion with the knowledge that a pregnant woman is seeking an abortion solely on the basis of" a test result, prenatal diagnosis, or other reason indicating the child has Down syndrome. Ark. Code Ann. § 20-16-2103(a). The law also requires the abortion provider to have actual knowledge of that discriminatory purpose, after reasonable inquiry. *Id.* § 20-16-2103(a), (b).

Thus, "it is hard to imagine legislation more narrowly tailored to promote this interest than" Arkansas's law. *PPINK*, 888 F.3d at 316 (Manion, J., concurring). Arkansas "only prohibit[s] abortions performed solely because of the … disability of the unborn child. The doctor also must know that the woman has sought the abortion *solely* for that purpose." *Id.* (emphasis in original). "These are provisions that apply only to very specific situations and carefully avoid targeting the purported general right to pre-viability abortion." *Id.* "They will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, they will not even affect women who consider the protected characteristics along with other considerations." *Id.* "If it is at all possible to narrowly tailor abortion regulations, [Arkansas] has done so." *Id.*

Because it is narrowly tailored to advance many compelling interests, Arkansas's law satisfies strict scrutiny. *A fortiori*, it satisfies any less stringent form of scrutiny, including *Casey*'s undue-burden test and rational-basis scrutiny—the latter of which is the

standard that actually applies here. *See* Pet. 18–22; *see also infra* Part II.

II. Arkansas's Prohibition Against Down Syndrome Abortions Is Not *Per Se* Invalid Under *Casey*.

Despite the overwhelmingly powerful justification for Arkansas's law, the Eighth Circuit held that it is "categorical[ly]" invalid under *Casey* because it constitutes a pre-viability restriction of abortion. Pet. App. 5a (citing *Casey* to conclude that the Supreme Court's "pre-viability rule is categorical"). This holding was in error. *Casey* does not dictate the outcome of this case for at least seven reasons.

First, *Casey* did not consider or address the validity of a Down syndrome provision, or any similar anti-discrimination provision. On the contrary, "the very first paragraph of the respondents' brief in *Casey* made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was not being challenged." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring). "Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." *Id.* "[T]he constitutionality of other laws like [Arkansas's] thus remains an open question." *Id.* "*Casey* did not consider the validity of an anti-eugenics law. Judicial opinions are not statutes; they resolve only the situations presented for decision." *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 denial of rehearing en banc). When 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); *see also, e.g., Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

This Court "often read[s] general language in judicial opinions" as "referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004). *Casey* should be no exception to this rule. Any broad language in *Casey* was "not referring to quite different circumstances that the Court was not then considering," *id.*—such as a restriction on abortions performed for the sole purpose of eliminating an unborn child who may have Down syndrome.

Second, prohibiting abortions for discriminatory reasons is consistent with the plain language of both *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Casey*. *Roe* explicitly rejected the argument that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy … *for whatever reason* she alone chooses." 410 U.S. at 153 (emphasis added). *Roe* emphasized: "With this we do not agree." *Id.* Thus, *Roe* left open the possibility that a State may restrict abortion for prohibited reasons. *Id.* Citing this very language from *Roe*, *Casey* stated only that a State may not prohibit a woman from making the "ultimate decision" to terminate a pre-viability pregnancy, and it held that prior decisions "striking down of some abortion regulations which in no real sense deprived women of the ultimate decision" had gone "too far." *Casey*, 505 U.S. at 875. *Casey* protected the mother's autonomy in "the decision

whether to bear or beget a child," but it never protected the decision to bear only a child with pre-selected *favored characteristics*. *Id.* at 851. Here, Arkansas's law "in no real sense deprive[s] women of the ultimate decision" whether to terminate a pregnancy, *id.* at 875—it restricts only one of the many reasons one might seek an abortion. All other reasons are unaffected.

Third, both *Casey* and *Gonzales* upheld prohibitions against certain kinds of pre-viability abortions that were at least as restrictive as Arkansas's law. *Casey* upheld a complete restriction on pre-viability abortions where the patient is a minor who does not obtain parental consent or judicial bypass. 505 U.S. at 899. *Gonzales* upheld a complete prohibition on pre-viability abortions performed through the gruesome "partial-birth abortion" procedure. 550 U.S. at 135–38. *Gonzales* noted that *Casey* had "rejected … the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Id.* at 146. *Gonzales* applied *Casey*'s undue-burden standard to this restriction—it did not hold that all pre-viability prohibitions of abortion are categorically invalid. *Id.* at 150, 156. "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 abortion under certain conditions." *Preterm-Cleveland* v. *Himes,* 940 F.3d 318, 327 (6th Cir. 2019) (Batchelder, J., dissenting). Under *Gonzales*, "pre-viability abortions are subject to restriction, as that is precisely what *Gonzales* upheld." *Id.*

Fourth, one of *Casey*'s central conclusions was that the strict scrutiny that had applied to abortion restrictions after *Roe* was too stringent, because it

gave "too little acknowledgement" to valid state interests in fetal life and women's health. 505 U.S. at 871. *Casey*'s adoption of the undue-burden standard was designed to *relax* the level of scrutiny on abortion restrictions, not heighten it. *Id.* Yet the Eighth Circuit's rule of "categorical" invalidity does the opposite—it makes the right to a pre-viability abortion inviolable. This flips *Casey* on its head.

Fifth, the lower court's interpretation of Casey has the perverse result of elevating the "penumbral" right to pre-viability abortion above enumerated rights, such as freedom of speech and equal protection of the law. "[E]ven the fundamental rights of the Bill of Rights are not absolute." *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949). This Court has held that fundamental rights recognized in its case law may be restricted by government policies that are narrowly tailored to advance compelling governmental interests. *See, e.g., Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017); *Fisher* v. *University of Texas*, 136 S. Ct. 2198, 2208 (2016); *Williams-Yulee* v. *Florida Bar*, 575 U.S 433, 444 (2015); *Johnson* v. *California*, 543 U.S. 499, 512–14 (2005); *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 571–73 (1942). Yet the lower court's holding protects pre-viability abortion even from regulations that satisfy strict scrutiny. It thus elevates the "penumbral" right to pre-viability abortion above the Constitution's most fundamental enumerated rights. To treat "abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights," is an "absurd result." *PPINK*, 888 F.3d at 311 (Manion, J., concurring in the judgment).

Sixth, in rejecting *Roe*'s trimester framework completely, *Casey* itself recognized that "time ha[d]

overtaken some of *Roe*'s factual assumptions." 505 U.S. at 860. Likewise, *Casey* did not consider, and could not have considered, critical factual developments relevant to Down syndrome, because they were still occurring at the time. *Casey* was decided as the transformation of societal attitudes toward persons with disabilities, including Down syndrome, was still ongoing, as reflected in the near-contemporaneous passage of the Americans with Disabilities Act. Likewise, the adverse impact of abortion on the integrity of the medical profession—which became evident to the Court later, at the time of *Gonzales*—was neither mentioned nor considered in *Roe* and *Casey*.

Seventh, Casey's viability framework rested explicitly on its holding that the State's interests in protecting fetal life and women's health become increasingly compelling as gestational age increases. *See* 505 U.S. at 860, 870–71. For better or worse, the Court determined that viability was the point in pregnancy at which those interests, which increase over time, became compelling enough to justify a complete ban on abortion. *See id.* By contrast, Arkansas's anti-discrimination interest in protecting children with Down syndrome from elimination is equally compelling at any gestational age. Children with Down syndrome are eliminated with equal permanence regardless of whether the fetus was viable at the time of the abortion, and regardless of the gestational age at which the abortion occurs. *Casey*'s viability framework, therefore, has no logical application to an anti-discrimination provision like Arkansas's law.

In short, Arkansas's law is not "categorically" invalid under *Casey*, because *Casey* said nothing

about it. And the right to abort children with Down syndrome is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotations omitted). On the contrary, our society has repudiated the despicable medicalized biases against disabled people that terminated the lives of people Down syndrome for decades and now fuel the epidemic of Down syndrome abortions. Thus, Arkansas's law is subject to rational-basis scrutiny, and it is valid so long as it reasonably "furthers the legitimate interest of the Government," *Gonzales*, 550 U.S. at 146—which it plainly does. *See* Pet. 12–24.

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"Chris's dad, Nik Nikic, can rattle off a list of obstacles his son faced in life: Open heart surgery at five months old. Not being able to walk until age 4 or eat solid food until age 5. Four major ear operations at age 17. And struggling still, as a young adult, with balance, slow reaction time, and low muscle tone." Jenny McCoy, *Chris Nikic Wants to Be the First Ironman Finisher with Down Syndrome*, RUNNER'S WORLD (Oct. 8, 2020). Chris and his dad faced "negative perceptions and negative advice throughout his first 18 years of Chris's life, by all the professionals." *Id.* "I think of all the other parents like me when their child is first born with Down syndrome and they're barraged with all kinds of negative information ... Nobody talks to them about what they could do if they set their mind to it." *Id.* "At every turn, experts spoke of Nikic in terms of limits instead of possibilities." Kurt Streeter, *Chris Nikic, You Are an Ironman. And Your Journey Is*

Remarkable, N.Y. TIMES (Nov. 16, 2020), https://nyti.ms/3y3geh8.

At mile 10 of the marathon, the final leg of Chris's Ironman, he almost gave up due to weakness and extreme pain. "At that point, Nik Nikic clutched his son, drew him close and whispered in his ear: 'Are you going to let your pain win, or let your dreams win?' … 'My dreams,' he told his father, 'are going to win.'" *Id.*

The inspiration provided by people like Chris Nikic is virtually impossible in Iceland, which has "cured" Down syndrome by eliminating the children who have it. Such inspiration is rapidly approaching extinction in America, too. Arkansas's law is narrowly tailored to prevent this genocidal tragedy. The notion that *Casey* prevents States from taking any action to stop this tragedy reduces this Court's abortion jurisprudence to absurdity.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

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