NO. 20-1434

IN THE
# Supreme Court of the United States

LESLIE RUTLEDGE, in her official capacity as Attorney General of the State of Arkansas, et al.,

*Petitioners*,

v.

LITTLE ROCK FAMILY PLANNING SERVICES, et al.,

*Respondents.*

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

## BRIEF OF THE JEROME LEJEUNE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The Jerome Lejeune Foundation USA is a nonprofit organization whose mission is to provide care and advocacy for those with Down syndrome. The Lejeune Foundation furthers the work of its namesake, the late Dr. Jérôme Lejeune, who discovered the chromosomal cause of Down syndrome and devoted his life to seeking treatments to benefit those with that condition.

Dr. Lejeune was a strong advocate for those with Down syndrome and emphasized the importance of protecting them from abortion. He was horrified that his advances in the field of genetics were perverted by some to eliminate—rather than treat—those with genetic anomalies.[2] The Lejeune Foundation is deeply committed to ensuring that States can and do protect those with Down syndrome from being targeted for extinction while *in utero*.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were notified of this brief, and all parties consented to its filing.

[2] Maj Hulten, *Obituary: Professor Jerome Lejeune*, INDEPENDENT (Apr. 11, 1994), https://perma.cc/RD2H-X499 (Lejeune "crusaded against the prenatal Down's screening programmes" that allowed "identification of foetal Down's syndrome with a view to offering termination of an affected foetus; for Lejeune this was a most unwelcome and contradictory outcome of his early and pioneering research").

## SUMMARY OF THE ARGUMENT

"I am a man with Down syndrome and my life is worth living," Frank Stephens recently testified before Congress. *Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases: Hearing Before the Subcomm. on Labor, Health & Human Servs., Educ., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (2017) ("Stephens Statement"). He felt compelled to do so because, tragically, "between 70 and 85 percent of women in the United States confronted with a prenatal diagnosis of Down syndrome choose abortion." Amy Julia Becker, *Better Prenatal Testing Does Not Mean More Abortion*, THE ATLANTIC (Feb. 21, 2013), https://perma.cc/62Q3-F9CB.[3]

And "when the decisions so overwhelmingly swing one way—to abort—it does seem to reflect . . . an entire society's judgment about the lives of people with Down syndrome." Sarah Zhang, *The Last Children of Down Syndrome*, THE ATLANTIC (Nov. 18, 2020), https://perma.cc/2BTH-9QU3. That judgment, according to Mr. Stephens, was that "people like [him] should not exist." Stephens Statement.

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[3] That number is even higher in other countries. In Denmark, between 95% and 98% of mothers who receive a prenatal diagnosis of Down syndrome opt to abort the child. Sarah Zhang, *The Last Children of Down Syndrome*, THE ATLANTIC (Nov. 18, 2020), https://perma.cc/2BTH-9QU3; *Box* v. *Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1791 (2019) (Thomas, J., concurring). With 96%, France has a similar statistic. *Preterm-Cleveland* v. *Himes*, 940 F.3d 318, 326 n.1 (6th Cir. 2019) (Batchelder, J., dissenting), *reh'g en banc sub nom. Preterm-Cleveland* v. *McCloud*, 994 F.3d 512 (6th Cir. 2021). Iceland has nearly a 100% rate. *Ibid.*

To affirm the inherent dignity and worth of those with Down syndrome, the people of Arkansas enacted an anti-eugenics statute that prohibits a doctor from performing an abortion "with the knowledge that a pregnant woman is seeking an abortion solely on the basis of" a Down syndrome diagnosis. Ark. Code Ann. § 20-16-2103(a). But the district court preliminary enjoined this statute, holding that the Constitution guarantees the right to abort an unborn child with Down syndrome before viability. Following what it believed to be this Court's precedents, the Eighth Circuit affirmed.

States have an interest in "protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 732 (1997). Yet the lower courts' erroneous—and corrosive—reading of this Court's abortion jurisprudence prevent the States from vindicating that interest. Such a reading allows selective abortions to "perpetuate[ ] notions of stereotyping disability as incompatible with a good life." Susan Yoshihara, *Another UN Committee Says Abortion May be a Right, but Not on Basis of Disability*, Center for Family & Human Rights (Oct. 26, 2017), https://perma.cc/453J-RQXV. It leaves people like Mr. Stephens to wonder, "Is there really no place for [me] in this society?" Stephens Statement.

This Court should correct course. The state of abortion jurisprudence is one of "utter entropy." *June Med. Servs. LLC* v. *Russo*, 140 S. Ct. 2103, 2152 (2020) (Thomas, J., dissenting). "Members of the Court" have continually questioned it, and it has "defied consistent application by the lower courts." *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009).

For instance, some lower courts treat abortion before viability as an absolute right and diminish or ignore the State's substantial interests in protecting unborn life. They also downplay other valid interests that the States have in regulating abortion, such as protecting those most vulnerable—like Mr. Stephens—from shame and stigma. Such decisions flaunt the Constitution and history. Whatever the contours of the abortion right, history has never recognized it as absolute, even before viability. *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512, 520 (6th Cir. 2021) (en banc). And even after *Roe*, the States have a substantial interest in protecting unborn life.

Aside from ignoring the historical evidence, the lower courts have misread the legal framework set out in *Casey* and its progeny. No decision from this Court requires treating the purported abortion right as absolute, even before viability. *Ibid.* To the contrary, the Court has evaluated pro-life laws that effectively prohibit certain previability abortions under the undue-burden standard rather than striking them down as *per se* unconstitutional. Not only that, but when evaluating these laws, this Court has expressed "increasing recognition of states' profound interest in protecting unborn children." *MKB Mgmt. Corp.* v. *Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015).

At a minimum, this Court should clarify that abortion, like any other constitutional right, is not absolute. It should also clarify that the States have an interest in protecting mothers and unborn life. Finally, the Court should take this opportunity to situate abortion within its proper historical constraints.

## ARGUMENT

### I. The lower courts' application of this Court's abortion jurisprudence is unmoored from this Nation's history and traditions.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Glucksberg*, 521 U.S. at 720. In *Roe* v. *Wade*, this Court determined that the right to abort an unborn child was one such right. 410 U.S. 113 (1973). But this Court has never precisely clarified the scope of that right. As a result, the current state of abortion law is "confusing and uncertain." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 945 (1992) (Rehnquist, C.J., concurring and dissenting in part).

To resolve the current tension, this Court should look to "history and traditions." See *Glucksberg*, 521 U.S. at 727. Only there can this Court determine the abortion right's proper scope.

#### A. History has never recognized abortion as an absolute right.

The abortion right's historical imprimatur has a precarious foundation. In *Roe*, this Court stated that its decision came after it had "inquired into, and . . . place[d] some emphasis upon, medical and medical-legal history." 410 U.S. at 117. Nearly half of the opinion, in fact, paid lip service to history. The Court particularly relied on Cyril Means, referencing his works six times. *Id.* at 132 n.21, 133 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47.

Means, who served as legal counsel to the National Association for the Repeal of Abortion Laws, understood that "only if in 1791 elective abortion was a common-law liberty, can it be a . . . right today." Cyril C. Means Jr., *The Phoenix of Abortional Freedom: Is a Penumbral Right or Ninth-Amendment Right About to Rise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L. FORUM 335, 336 (1971). So he wrote a history that purported to "reveal the story, untold now for nearly a century, of the long period which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy." *Ibid.* To underscore this point, Means's historical account concluded that the "demonstrable legislative purpose behind [pro-life statutes] was the protection of pregnant women from the danger to their lives posed by surgical or optional abortion." *Ibid.* If laws were enacted to protect women, Means concluded, then these restrictions did not displace the abortion right but supplemented it, ensuring that abortion could be exercised safely for the mother (though obviously not the child).

Following Means, this Court concluded that "a woman enjoyed a substantially broader right to terminate a pregnancy" at the Founding than she did "in most States" in 1972. *Roe*, 410 U.S. at 140–41. It was "doubtful," the Court wrote, "that abortion was ever firmly established as a common-law crime." *Id.* at 136. And when the States criminalized abortion, they did so to protect the health of mothers, not unborn life. Relying on this history, the Court held that States could not curtail the ability to end a pregnancy based on an interest in protecting unborn life. *Id.* at 162.

But that history was wrong. Means presented a "distorted doctrinal history of abortion precedents and statutes [that] ignored the larger social and technological context in which those decisions were grounded." Br. for the Am. Acad. of Med. Ethics as Amicus Curiae at 4, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992) (Nos. 91–744, 91–902). He "wrote as an advocate to make a case for legal change, not as a historian investigating the past." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY 1004 (2006). As a result, the Court in *Roe* treated "history as a grab bag of principles, to be adopted where they support[ed] the Court's theory, and ignored where they do not." See *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting).

Contrary to Means's "findings," the common law never recognized abortion as a protected liberty interest. Justin Buckley Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 108 (2013). The common law has instead always protected life, "[w]ith consistency, beautiful and undeviating . . . from its commencement to its close." 2 James Wilson, THE WORKS OF JAMES WILSON 596–97 (R.G. McCloskey ed., 1968).

In fact, there is an "unbroken legal tradition, extending over at least eight centuries of Anglo-American social life, condemning abortion[.]" Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 1055; John Keown, *Back to the Future of Abortion Law:* Roe's *Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 5 (2006) ("As early as the mid-thirteenth century the common law punished abortion after fetal formation as

homicide."); James S. Witherspoon, *Reexamining* Roe: *Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 31 (1985) ("In the earliest periods of the common law, abortion causing the death of a living fetus was considered homicide.").

As early as the 13th century, the English jurist Henry de Bracton wrote that "if one strikes a pregnant woman or gives her a potion in order to procure an abortion, if the foetus is already formed or animated," "he commits homicide." 2 Henry de Bracton, THE LAWS AND CUSTOMS OF ENGLAND 341 (George Woodbine ed., Samuel Thorne trans. 1977 & 1982). Similarly, the *Fleta* treatise reported that a man committed homicide if he "pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion . . . if the foetus is already formed and animated." 1 Fleta, ch. 33 (ca. 1290), *reprinted in* 53 Selden Soc'y 60–61 (H.G. Richardson & G.O. Sayles eds. 1953).

Unsurprisingly, cases "treated abortion as a crime . . . because it involved the killing of an unborn child." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 135–52 (collecting early cases). That remained true when the newly independent States simplified and systematized their legal codes. The States codified many of the common law's criminal prohibitions—including those against abortion. By 1860, jurist Francis Wharton said that there was "no doubt that at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder." 2 Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1220 (5th rev. ed. 1868).

Some of these early statutes made abortion "an indictable offence" only if "the mother be quick with child." *E.g.*, *State* v. *Cooper*, 22 N.J.L. 52, 53 (N.J. 1849). Based on that language, the Court in *Roe* thought that "the law continued for some time to treat less punitively an abortion procured in early pregnancy" (i.e., before "quickening"). 410 U.S. at 141. If the law punished abortion only after quickening, then the Court posited a broad right to terminate a pregnancy before quickening.

But it is quite a leap to say that if conduct is unindictable, it has constitutional protection. The "limiting of criminality to post-quickening abortions could very well have been a response to the evidentiary problems of proving both the pregnancy and that the fetus had been alive before the abortion before quickening." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 274; Witherspoon, *Reexamining* Roe, 17 ST. MARY'S L.J. at 31 (abortion convictions were hard to obtain because it was "difficult to prove that (1) the woman on whom the abortion was attempted was actually pregnant; (2) the fetus was alive at the time of the attempt; and (3) the attempt caused the death of the fetus."). Given these evidentiary issues, quickening became "a flexible standard of proof—not a substantive judgment on the value of unborn human life." Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 825 (1973).

Contemporaneous cases made this clear. The New York Court of Appeals held that, although "life exists from the first moment of conception" and "certain civil rights attach to the child from the first," "the law has fixed upon this period of gestation as the time when

the child is endowed with life." *Evans* v. *People*, 49 N.Y. 86, 89–90 (N.Y. 1872). That "fixed" period was *not* because the law recognized abortion as a right; it was because "the foetal movements are the first clearly marked and well defined *evidences* of life." *Ibid.* (emphasis added).

Even then, not every jurisdiction read the common law to criminalize abortion only after quickening. The Pennsylvania Supreme Court held that it was a "flagrant crime, at common law, to attempt to procure the miscarriage or abortion of the woman . . . at all periods after conception." *Mills* v. *Commonwealth*, 13 Pa. (1 Harris) 631, 633 (1850). Similarly, Wharton wrote:

> It has been said that it is not an indictable offence to administer a drug to a woman, and thereby to procure an abortion, unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with the result of medical experience, nor with the principles of the common law. [2 Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1220 (5th rev. ed. 1868).]

Even those jurisdictions that thought the common law punished abortions only after quickening felt that "the law should punish abortions . . . willfully produced, at *any* time during the period of gestation." *Mitchell* v. *Commonwealth*, 78 Ky. 204, 209 (Ky. 1879) (emphasis added). They described abortions as "offensive to good morals and injurious to society"—hardly language used to describe a right. *Commonwealth* v. *Parker*, 50 Mass. 263, 268 (Mass. 1845).

In no other context would one make the logical leap that conduct unindictable must be conduct constitutionally protected. Consider the common-law definition of burglary: the breaking and entering of a dwelling house at night with intent to commit a felony inside. That the common law defined burglary to prohibit conduct "at night" did not mean that people had a *right* to burgle during daylight. The law drew the "night" line for a particular purpose: "night time invasions of the home were seen as particularly threatening." Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 643 (2012). So too with abortion. That the law drew a line at quickening did not indicate a *right* to abort an unborn child before quickening. The law drew a line to facilitate prosecution of conduct that society found unacceptable.

And when that line no longer made sense, the law abandoned it. After the American Medical Association reported that a "foetus in utero is alive from the very moment of conception," Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 111, physician Horatio Storer wrote that "if the foetus be already, and from the very outset, a human being alive . . . the offence becomes, in every stage of pregnancy, MURDER," Horatio Robinson Storer & Franklin Fiske Heard, CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW 9–10 (1868).

In accord with this new understanding, many States abandoned the quickening distinction. "By 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven states had abortion statutes

on the books. Just three of these states prohibited abortion only after quickening. Twenty states punished all abortion equally regardless the stage of pregnancy." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 315–16; accord *June Med. Servs.*, 140 S. Ct. at 2151 & n.7 (Thomas, J., dissenting) (collecting statutes); *Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring and dissenting in part). In fact, just four months after Ohio ratified the Fourteenth Amendment, the State prohibited abortion from *any* point of embryonic or fetal development. Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 105–06. "It would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion"—the very conduct that many States were prohibiting. *June Med. Servs.*, 140 S. Ct. at 2151 (Thomas, J., dissenting).

### B. States historically have asserted an interest in protecting the lives of the unborn.

Means not only distorted history, he diminished the States' interest in protecting unborn life. Means concluded that pro-life statutes protected only women. But history highlights the States' "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales* v. *Carhart*, 550 U.S. 124, 145 (2007). From the beginning, common law courts "spoke unequivocally in terms of the killing of a child, and not just in terms of a crime against the mother." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 135.

What was true of the common law was equally true of the States. When States enacted abortion prohibitions in the mid-19th century, many legislatures acted "to protect *both* [mother and unborn child] from injury." *Dougherty* v. *People*, 1 Colo. 514, 523 (Colo. 1872) (emphasis added); accord *State* v. *Moore*, 25 Iowa 128, 136 (1868) ("abortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child.").

As early as 1828, "New York enacted legislation that . . . barr[ed] destruction of an unquickend fetus as well as a quick fetus." *Roe*, 410 U.S. at 138. In New Jersey, after its Supreme Court held that abortion was a crime only after quickening, *Cooper*, 22 N.J.L. at 53, the legislature enacted a statute that punished abortions before quickening with the "equally obvious purpose" to protect unborn life. *Gleitman* v. *Cosgrove*, 227 A.2d 689, 696 (N.J. 1967) (Francis, J., concurring). Similarly, after courts in Massachusetts and Iowa failed to convict an abortionist because of the quickening distinction, both States' legislatures abandoned that line and criminalized every abortion—all to strengthen legal protections for the unborn. Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING at 115–16.

Although *Roe* diminished this historical interest, "[t]he evolution in [this Court's] jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children." *MKB Mgmt. Corp.*, 795 F.3d at 771. As recently as 2007, this Court recognized that States have a "legitimate interest[ ]" in "promot[ing] respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158. This Court should reaffirm that historical interest.

## II. The lower courts have misapplied this Court's abortion jurisprudence.

"[G]ood reasons exist for the Court to reevaluate its" abortion jurisprudence. *MKB Mgmt. Corp.*, 795 F.3d at 773. But even under that jurisprudence, Arkansas's statute is constitutional. The lower courts have assigned the purported abortion right an unassailability that this Court has disavowed. In doing so, the courts have ignored the States' compelling interests in regulating the taking of life before viability.

### A. This Court has never treated the abortion right, even before viability, as absolute.

From the outset, *Roe* clarified that an abortion could not be obtained any "way," at any "time," or for any "reason." 410 U.S. at 153. For 40 years, this Court has allowed previability regulations on the "way" to obtain an abortion. In *Gonzales*, for instance, this Court held that "the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests . . . to promote respect for life, including life of the unborn." 550 U.S. at 158. That interest extended to banning certain procedures that would make previability abortions harder to obtain. *Id.* at 156 ("The abortions affected by the Act's regulation take place both previability and postviability.").

This Court has also upheld previability laws regarding the "time" for obtaining an abortion. In *Casey*, Pennsylvania enacted a statute that required a 24-hour waiting period before obtaining an abortion.

505 U.S. at 885. That waiting period could cause further delay, as it might require "two visits to the doctor." *Id.* at 886. Even though that delay might prevent some abortions before viability, the Court did not consider it an undue burden. *Ibid.*

Despite upholding previability, pro-life laws regarding the "way" and "time" an abortion can be obtained, the Court has not answered how a State can regulate the "reasons" behind a previability abortion, including whether a State can stop an abortion for discriminatory reasons. As Judge Easterbrook noted, "there is a difference between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Planned Parenthood of Ind. & Ky.* v. *Comm'r of the Ind. Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc). Given that profound difference—and where "little available evidence suggests that" the scope of the current abortion right "is correct as an original matter"—lower courts "should tread carefully before extending [this Court's] precedents." See *Garza* v. *Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting).

Yet some lower courts have done the opposite, reflexively applying *Casey*'s statement that a "State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," 505 U.S. at 879, as creating an absolute previability abortion right. Here, for instance, the district court said that "prohibitions on abortions pre-viability . . . are *per se* unconstitutional under binding Supreme Court precedent." Pet.App.118a. And on appeal, the Eighth Circuit described this "pre-

viability rule" as "categorical." Pet.App.5a. These courts are hardly alone. *E.g.*, *Preterm-Cleveland* v. *Himes*, 294 F. Supp. 3d 746, 754 (S.D. Ohio 2018) (recognizing an "*absolute* right to a pre-viability abortion." (emphasis added)); *Planned Parenthood of Ind. & Ky.* v. *Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 311 (7th Cir. 2018) (Manion, J., concurring and dissenting in part) ("*Casey* has plainly established an absolute right to have an abortion before viability.").

But they are *wrong*. See *Preterm-Cleveland*, 994 F.3d at 520 (en banc) ("The right to an abortion before viability is *not* absolute."). No other constitutional right—not even those expressly enumerated in the Constitution, such as the freedom of speech, freedom of religion, or freedom of the press—enjoys such protection. *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949) ("[E]ven the fundamental rights of the Bill of Rights are not absolute."); *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 312 (Manion, J., concurring and dissenting in part) ("[A]bortion is now a more untouchable right than even the freedom of speech."). Indeed, many enumerated constitutional rights—such as the right to bear arms—enjoy far less. See *Silvester* v. *Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the denial of certiorari) ("The Court would take these cases because abortion . . . [is one] of its favored rights. The right to keep and bear arms is apparently this Court's constitutional orphan."). Courts giving abortion most-favored, constitutional-rights status have stretched the right beyond its historical mooring and "squeeze[d] all [they] can out of every last word" in *Casey*, see *In re Plavix Marketing, Sales Practices & Prods. Liab. Litig. (No.*

*II)*, 974 F.3d 228, 235 (3d Cir. 2020), making the abortion right "more ironclad even than the rights enumerated in the Bill of Rights," *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 310 (Manion, J., concurring and dissenting in part).

*Casey* did not create a firewall around previability abortions. *Gonzales*, 550 U.S. at 146 ("To implement its holding, *Casey* rejected . . . the interpretation of *Roe* that considered all previability regulations of abortion unwarranted."). And the lower courts that have interpreted it to do so have erred. "Judicial opinions are not statutes; they resolve only the situations presented for decision." *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc). *Casey* must be read "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). And in *Casey*, this Court did not address whether someone could obtain a previability abortion in all circumstances. In particular, "*Casey* did not consider the validity of an anti-eugenics law." *Planned Parenthood of Ind. & Ky.*, 917 F.3d at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc).[4]

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[4] In fact, the *Casey* petitioners did not challenge a Pennsylvania statute that "prohibit[ed] pre-viability abortions based on the sex of the fetus." Br. for the United States as Amicus Curiae at 18 n.13, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992) (Nos. 91–744, 91–902). Presumably, those petitioners figured that, in "a free, egalitarian, and democratic society . . . no one could seriously claim that the Constitution offers the remotest protection for such a macabre act." *Ibid.*

So "[w]hatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." *Box* v. *Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring).

The Constitution gives States the latitude to protect nascent life, even before viability. That is why this Court has upheld laws that sometimes prevent a previability abortion. *Gonzales*, 550 U.S. at 147. This Court's abortion jurisprudence has always differentiated between an "outright prohibition" of abortion on the one hand and a simple "regulation" of abortion on the other. *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring and dissenting in part). And a simple "regulation" that protects only a subset of unborn babies does not transform that regulation into a total ban. That is why, in *Gonzales*, this Court considered a statute that affected both pre- and post-viability abortions and held that States can enact "regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn . . . if they are not a substantial obstacle to the woman's exercise of the right to choose." *Gonzales*, 550 U.S. at 146 (cleaned up).

*Casey* itself recognized the difference between an "outright prohibition" of previability abortions on the one hand and simple "regulations" of those abortions on the other. 505 U.S. at 944 (Rehnquist, C.J., concurring and dissenting in part). The statutes at issue there imposed restrictions that, for some, would have prevented an abortion before viability—pregnancies that were on the line of viability, those who had objecting spouses, or those who were minors,

unable to obtain parental consent. Yet the Court did not treat these laws as outright bans, nor did the Court say that the right to a previability abortion in these situations was absolute; instead the Court determined whether the regulations imposed a substantial obstacle.

More recently, a plurality of this Court concluded that a Louisiana law would prevent "thousands of Louisiana" citizens from obtaining a "safe, legal abortion" before viability. *June Med. Servs.*, 140 S. Ct. at 2130 (plurality opinion). But this Court did not treat that law as a ban either. Instead, a majority subjected it to *Casey*'s undue-burden analysis. *Id.* at 2138 (Roberts, C.J., concurring in the judgment); see also *id.* at 2182 (Kavanaugh, J., dissenting) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

Arkansas's statute is not an "outright prohibition" but a simple "regulation." *Preterm-Cleveland*, 994 F.3d at 527 (similar Ohio statute was not a "ban"); accord *id.* at 550 (Kethledge, J., concurring in part and concurring in the judgment). The lower courts erred by treating that statute as a ban rather than applying the undue-burden framework.

### B. States have significant interests in preventing discriminatory abortions.

Aside from history, States have specific interests that justify previability, pro-life laws. For one, the "State has a significant role to play in regulating the medical profession." *Gonzales*, 550 U.S. at 157. That includes protecting the profession's "integrity and ethics." *Glucksberg*, 521 U.S. at 731. Arkansas has a significant interest in preventing doctors from becom-

ing "witting accomplices to the deliberate targeting of Down Syndrome babies," as such targeting "would do deep damage to the integrity of the medical profession." *Himes*, 940 F.3d at 326 (Batchelder, J., dissenting), *reh'g en banc sub nom. Preterm-Cleveland* v. *McCloud*, 994 F.3d 512 (6th Cir. 2021) (adopting Judge Batchelder's position); *cf. Gonzales*, 550 U.S. at 160 ("It was reasonable for Congress to think that partial birth-abortion . . . undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." (cleaned up)).

That's especially true when some medical professionals think that "selective pregnancy terminations and reduced birth prevalence [of Down syndrome is] a desirable and attainable goal." *Preterm-Cleveland*, 994 F.3d at 518 (en banc) (quoting David A. Savitz, *How Far Can Prenatal Screening Go in Preventing Birth Defects*, 152 J. OF PEDIATRICS 3, 3 (2008)). The medical community should seek to eliminate ailments, not those who suffer from them. "Medicine becomes mad science when it attacks the patient instead of fighting the disease." Dr. Jerome Lejeune, *21 Thoughts*, JEROME LEJEUNE FOUND., https://perma.cc/5M7Q-LGEM. Arkansas has a compelling interest in avoiding such "mad science."

Arkansas also has a significant interest in promoting "the principle that the Down Syndrome population is equal in value and dignity to the rest of [the State's] population." *Himes*, 940 F.3d at 326 (Batchelder, J., dissenting). Allowing those "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." *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 315 (Manion, J., concurring and dissenting in part) (cleaned up).

To someone like Mr. Stephens, selective abortions signal that he and those like him should not exist. 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." Pet.App.97a. Arkansas's statute promotes a contrary principle, one cardinal to our society: "that all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Similarly, Arkansas has an interest in preventing discrimination against those with Down syndrome. Across many contexts, governments have "been zealous in vindicating the rights of people even potentially subjected to" discrimination. *Box*, 139 S. Ct. at 1792–93 (Thomas, J., concurring). But "society has tended to isolate and segregate individuals with disabilities," so that discrimination against them "continue[s] to be a serious and pervasive social problem." *Cf.* 42 U.S.C. 12101(a)(1)–(2). Tragically, "abortion has proved to be a disturbingly effective tool for implementing [these] discriminatory preferences[.]" *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring).

"As early as the 1930s, doctors who were arguing for legalized abortion used the prospect of aborting fetuses with 'deformities' as a rationale for abortion in the case of medical necessity." Becker, *Better Prenatal Testing*. "With today's prenatal screening

tests and other technologies," that trend has worsened, as now "abortion can easily be used to eliminate children with unwanted characteristics." *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring). Even abortion advocates generally find themselves "less comfortable when abortion is used by women who don't want to have a particular baby." Amy Harmon, *Genetic Testing + Abortion = ???*, N.Y. TIMES (May 13, 2017), https://perma.cc/77XB-9SKA. Arkansas thus has a "compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

Finally, there is a legitimate concern that widespread abortions of those with Down syndrome will "disincentiv[e] research that might help [those with Down syndrome] in the future." *Planned Parenthood of Ind. & Ky.*, 888 F.3d at 315 (Manion, J., concurring and dissenting in part). As Mr. Stephens testified, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome" because "we can just terminate those pregnancies." Stephens Statement. Within the last 30 years, the life expectancy of those with Down syndrome has doubled. Becker, *Better Prenatal Testing*. Changes in schools and other social settings have allowed those with Down syndrome to experience greater independence. Arkansas has a legitimate interest in ensuring that discriminatory abortions do not discourage further advancements.

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The current state of abortion law is "confusing and uncertain, indicating that a reexamination of [these] cases is in order." *Casey*, 505 U.S. at 945 (Rehnquist, C.J., concurring and dissenting in part). "Having created the constitutional right to an abortion, this Court is dutybound to address its scope." *Box*, 139 S. Ct. at 1793 (Thomas, J., concurring). It should do so based on "history and tradition" and recognize that there is no absolute right to abortion before viability, and that the States have a substantial interest in protecting unborn life.

This Court was right when it acknowledged three decades ago that it could "not see why the State's interest in protecting human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 519 (1989). This petition is an ideal vehicle to turn that acknowledgment into a holding. Accordingly, this Court should clarify that its current abortion jurisprudence under *Casey* does not bestow an absolute, previability right to abortion. The States have multiple compelling interests that justify protecting life at all stages.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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