No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may require health care facilities to dispose of fetal remains in the same manner as other human remains, *i.e.*, by burial or cremation.

2. Whether a State may prohibit abortions motivated solely by the race, sex, or disability of the fetus and require abortion doctors to inform patients of the prohibition.

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PETITION FOR WRIT OF CERTIORARI

The Commissioner of the Indiana State Department of Health, the Prosecutors of Marion, Lake, Monroe, and Tippecanoe Counties, and the Individual Members of the Medical Licensing Board of Indiana respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit panel opinion, App. 1a, is reported at 888 F.3d 300 (7th Cir. 2018). The order of the United States District Court for the Southern District of Indiana granting Planned Parenthood's motion for summary judgment, App. 48a, is reported at 265 F. Supp. 3d 859 (S.D. Ind. 2017). The district court order granting Planned Parenthood's motion for preliminary injunction, App. 76a, is reported at 194 F. Supp. 3d 818 (S.D. Ind. 2016).

JURISDICTION

A panel of the Seventh Circuit entered judgment on April 19, 2018. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which the Court of Appeals granted on June 8, 2018. App. 127a. On June 25, 2018, however, the Court of Appeals, owing to the recusal of a judge who had voted for *en banc* rehearing, issued an order vacating *en banc* rehearing and reinstating the panel opinion and judgment. App. 114a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions at issue are reprinted in the appendix. App. 131a.

INTRODUCTION AND STATEMENT OF THE CASE

In early 2016, the Indiana General Assembly passed a bill regulating abortion and its aftermath. At issue here are provisions outlawing discriminatory abortions (and requiring that abortion patients be told of that prohibition) and mandating that fetal remains be disposed of the same way as other human remains, *i.e.,* through burial or cremation rather than with medical waste.

The district court enjoined each of these laws, and a panel of the Seventh Circuit affirmed over a partial dissent by Judge Manion, who would have permitted to law governing disposition of fetal remains to go into effect. Because the panel opinion created a circuit conflict on the disposition issue, the defendants asked for *en banc* rehearing, which the Seventh Circuit granted. Several weeks later, however, the court vacated rehearing and reinstated the panel opinion when Judge Scudder, who had voted for *en banc* rehearing, recused himself, leaving the court equally divided.

Notably, the Seventh Circuit's ultimate order denying *en banc* review was accompanied by opinions from two separate minority factions of the court—opinions that help illuminate the cert-worthiness of the issues presented.

First, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that she, too, would vote to invalidate the fetal remains provision, but on grounds

other than those given by the panel majority. Where the panel majority thought requiring fetal remains to be treated like other human remains fails the rational-basis test because a fetus is not a person for purposes of the Fourteenth Amendment, Chief Judge Wood would have declared it an undue burden on the right to abortion.

Second, Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, would have upheld the fetal remains provision because—as the Eighth Circuit has previously held—the State may act to preserve the human dignity of the fetus notwithstanding its Fourteenth Amendment status. Judge Easterbrook further disagreed that the fetal remains provision imposed an undue burden on the right to abortion. Judge Easterbrook also expressed skepticism that Indiana's "anti-eugenics law" is invalid, as "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a. Indeed, "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a. Judge Easterbrook concluded, however, that "[o]nly the Supreme Court can determine the answer." App. 122a–23a.

This extraordinary procedural saga, the multiplicity of irreconcilable judicial opinions the case has generated, the inescapable conflict with the Eighth Circuit that now exists, and the overall national importance of the issues presented all justify Supreme Court review.

I. The Fetal Disposition Provision

The first provision of House Enrolled Act (HEA) 1337 at issue here is the requirement that fetal remains be disposed of the same as the remains of any other human being. The premise of that regulation is that an aborted or miscarried fetus is nothing less than the remains of a partially gestated human and should be treated with the same dignity. When in 2015 an Indiana medical waste disposal company was caught disposing of fetal remains it received from abortion clinics, the legislature decided it was time to ensure that health care facilities treated fetal remains with human dignity. Tony Cook, *Indiana Medical Waste Firm Fined for Handling Fetal Tissue*, Indianapolis Star, Feb. 17, 2016, https://bit.ly/2OnYkCJ.

Accordingly, HEA 1337 alters how health care professionals must handle fetal remains, whether due to abortion or miscarriage. It requires that an abortion clinic or other healthcare facility "having possession of an aborted fetus shall provide for the final disposition of the aborted fetus." Ind. Code § 16-34-3-4(a). The remains "must be interred or cremated," which can include "simultaneous cremation" of aborted fetuses. *Id*. Similar provisions are in place for the disposition of miscarried fetal remains. Indiana Code section 16-21-11-6 provides that "[a] health care facility having possession of a miscarried fetus shall provide for the final disposition of the miscarried fetus. . . . which must be cremated or interred." Alternatively, the pregnant woman may choose to handle the disposition of the fetus herself. *Id.* § 16-34-3-2(a).

II. The Non-Discrimination Provision

The other provision of HEA 1337 at issue here provides that "[a] person may not intentionally perform or attempt to perform an abortion . . . if the person knows that the pregnant woman is seeking" an abortion solely on the basis of the race, sex, or disability of the child. Ind. Code §§ 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8. It requires doctors to inform their patients "[t]hat Indiana does not allow a fetus to be aborted solely because of the fetus's race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability." *Id.* § 16-34-2-1.1(a)(1)(K). The statute exempts cases of lethal fetal anomalies, *id.* § 16-34-4-1(b), defined as "a fetal condition diagnosed before birth that, if the pregnancy results in a live birth, will with reasonable certainty result in the death of the child not more than three (3) months after the child's birth." *Id.* § 16-25-4.5-2.

Over the past decade, technological advances have improved both the accuracy and availability of prenatal testing that screens for Down syndrome and other fetal abnormalities. The use of cell-free DNA testing has greatly expanded the availability of prenatal testing during the first trimester. Today, due to these advances in non-invasive testing, the American Congress of Obstetricians and Gynecologists (ACOG) recommends that *every* pregnant woman undergo testing for Down syndrome regardless of her age. Many women rely on screening tests to make decisions about abortion, and the general consensus is that the abortion rate for fetuses with Down syndrome is very

high. *See* Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995–2011)*, 32 Prenatal Diagnosis 142, 150 (Feb. 2012) (reviewing the published literature on termination of pregnancies after a diagnosis of Down syndrome and finding 67% termination rate in population-based studies, 85% in hospital-based studies, and 50% in anomaly-based studies).

Moreover, physician pressure to abort an abnormal fetus is common. One Indiana woman described feeling "bullied" by her doctor when informed that her baby was at high risk for several genetic conditions, with the doctor telling her that "the baby is in pain and dying," that she "should get an abortion," and that "the best thing that [she] could do as a mother was abort." Appellants' App. 93. Another Indiana woman was pressured to have amniocentesis in her 19th week of pregnancy after an ultrasound showed that one of the twins she was carrying had an enlarged head. She "realized that the doctor was really saying that our baby had a disability and we need[ed] the amniocentesis that day so we could terminate our pregnancy before I reached the 20th week of pregnancy." Appellants' App. 97.

The Indiana legislature responded to the alarming trend of disability-selective abortions by enacting the fetal disposition provision, which prohibits such discriminatory abortions. The primary enforcement mechanism is the requirement that doctors inform women that Indiana does not allow abortions performed solely on the basis of the race, sex, or disability of the fetus. *See* Ind. Code § 16-34-2-1.1(a)(1)(K).

III. The Decisions Below

1. Planned Parenthood brought suit in the Southern District of Indiana seeking a declaratory judgment that HEA 1337 is unconstitutional. After first issuing a preliminary injunction against both the fetal remains disposition statute and the discriminatory abortion statute, App. 113a, the district court, on cross-motions for summary judgment, issued a permanent injunction "prohibiting the State from enforcing the following provisions of HEA 1337: the anti-discrimination provisions, Indiana Code §§ 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8, the information dissemination provision, Indiana Code § 16-34-2-1.1(a)(1)(K), and the fetal tissue disposition provisions." App. 74a.

The district court invalidated the fetal tissue disposition provision under the rational-basis test, concluding that the State's asserted interest in treating fetal remains the same as other human remains was not legitimate because the Supreme Court has held that, for purposes of the Fourteenth Amendment, a fetus is not a person. App. 69a. It also invalidated both the anti-discrimination provision and related physician-disclosure provision in view of "well-established law that precludes a state from prohibiting a woman from electing to terminate a pregnancy prior to fetal viability." App. 74a. "Given the categorical nature" of the abortion right, "any type of outright ban

on pre-viability abortions is unconstitutional." App. 60a–61a.[1]

2. The Seventh Circuit affirmed 2–1 on the fetal remains statute and 3–0 on the anti-discrimination statute.

As to the fetal disposition provisions, the majority opinion acknowledged that the provisions do not affect a fundamental right, but concluded that they are nevertheless unconstitutional for essentially the same reason articulated by the district court—because a fetus is not a person under the Fourteenth Amendment. It said that under *Roe v. Wade*, 410 U.S. 113 (1973), "the law does not recognize that an aborted fetus is a person," such that "the State's interest in requiring abortion providers to dispose of aborted fetuses in the same manner as human remains is not legitimate." App. 16a. The panel distinguished *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), because "while Minnesota focused on the interest of the *public*, Indiana focuses on the interest of the *fetus*." App. 18a (emphasis in original). The majority also considered it un-

[1] Following the district court's initial entry of final judgment, the parties filed a Joint Motion to Alter or Amend Judgment urging the court to clarify whether it intended also to enjoin enforcement of the fetal tissue disposition provisions pertaining to miscarriages and requesting that the Court clarify that its judgment and injunction apply only to *pre-viability* abortions and miscarriages. Appellants' App. 310–14. The district court granted the motion, *id.* at 315–16, so that the final judgment enjoined all of the fetal tissue disposition provisions as applied to pre-viability abortions and miscarriages only.

constitutionally irrational for the State to impose fetal-disposition regulations on healthcare providers while affording the mother of an aborted or miscarried fetus the right to dispose of the fetal remains without restriction. App. 18a–19a. Finally, it concluded that permitting simultaneous cremation of fetal remains, but not the remains of born-alive humans, is an unconstitutionally irrational means of advancing the government's stated interest. App. 19a.

With respect to the non-discrimination provision, the majority said that the statute violates a woman's Fourteenth Amendment right to terminate her pregnancy prior to viability. Because the non-discrimination provision is an "absolute prohibition[] on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State," it is "therefore, unconstitutional." App. 11a. The court rejected the State's theory that *Casey* protects only a woman's binary choice whether or not to have a child (not a choice of which child to have) because "[n]othing in the Fourteenth Amendment or Supreme Court precedent allows the State to invade this privacy realm to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability." App. 13a.

In a separate opinion, Judge Manion concurred in the judgment with respect to the non-discrimination provisions because "Supreme Court precedent compels us to invalidate Indiana's attempt to protect unborn children from being aborted solely because of their race, sex, or disability." App. 21a. But he argued that this "absurd result" "reveals two major flaws of

the *Casey* analysis." App. 24a. First, Judge Manion argued, "*Casey* treats abortion as a super-right, more sacrosanct even than the enumerated rights in the Bill of Rights." App. 24a. Second, *Casey* "replaced strict scrutiny with an effects-based test that is actually *more difficult* to satisfy in many cases." App. 24a (emphasis in original). For these reasons, Judge Manion "reluctantly concur[red] in the court's judgment" because he had "no choice but to follow Supreme Court precedent," App. 36a, yet urged the Court to ameliorate this extreme outcome dictated by its precedents, App. 24a.

However, Judge Manion dissented from the decision that the fetal disposition provision also violates the Constitution. In his view, the remains-disposition statute "rationally advances Indiana's interests in protecting public sensibilities and recognizing the dignity and humanity of the unborn." App. 22a. Judge Manion argued that "[t]he court err[ed] in several respects." App. 37a. First, the panel's decision conflicts with the Eighth Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), which "upheld a substantially similar Minnesota law." App. 37a. Second, "the court adopts Planned Parenthood's red herring argument that Indiana cannot require fetal remains be disposed with dignity because unborn children are not persons under the Fourteenth Amendment." App. 37a–38a. Third, "the court departs from traditional rational basis review and requires far too close a fit between means and ends." App. 38a. Finally, Judge Manion

concluded that the panel's errors combined to "produce a result that would never happen in any context but abortion." App. 38a.

3. In view of the conflict with the Eighth Circuit, the State petitioned for rehearing *en banc* on the remains-disposition issue, which the Seventh Circuit granted on June 8, 2018. But two weeks later the court reversed itself and denied the petition when Judge Scudder recused himself and the votes for rehearing *en banc* were no longer present. App. 114a–15a. The result is that the panel decision was reinstated by an equally divided court, with Judges Easterbrook, Kanne, Sykes, Barrett, and Brennan voting to grant rehearing *en banc*.

Chief Judge Wood, joined by Judges Rovner and Hamilton, issued an opinion concurring with the court's decision to deny the petition, arguing that the undue-burden test, rather than the rational-basis test, should have been applied to the fetal disposition provision, even though Planned Parenthood conceded that rational-basis review was applicable. App. 117a. Because "[t]he disposal of an aborted (or miscarried) fetus is just the final step in the overall process of terminating (or losing) a pregnancy," Chief Judge Wood argued, "[i]t thus implicates an interest with heightened constitutional protection." *Id.* Under the undue burden test, she said, the court would need to explore the costs imposed by the fetal disposition provision on women. These costs include "not only a higher out-of-pocket dollar price for the procedure," but also "psychological trauma that chills women from seeking abortions or medical care in relation to miscarriages

because of the potential stigmatizing impact of these measures" and "how the disposal statute might work in tandem with other regulations in a way that unduly burdens the right to choose." App. 120a. Without further development of the record, Chief Judge Wood concluded, it would be "a waste of this court's resources to accept a case for *en banc* review." *Id.*

Judge Easterbrook, joined by Judges Sykes, Barrett, and Brennan, issued an opinion dissenting from the denial of rehearing *en banc*, arguing in support of full-court review of the fetal disposition provision and recommending cert on the discriminatory abortion ban. App. 121a. With respect to the latter, Judge Easterbrook expressed skepticism with the panel's conclusion "because *Casey* did not consider the validity of an anti-eugenics law." App. 121a. Because "[w]e ought not impute to the Justices decisions they have not made about problems they have not faced[,] . . . [o]nly the Supreme Court can determine the answer." App. 122a–23a.

Turning to the fetal-disposition issue, Judge Easterbrook opined that "[t]he panel has held invalid a statute that would be sustained had it concerned the remains of cats or gerbils." App. 123a. He also underscored the conflict with the Eight Circuit's decision in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). App. 124a. In Judge Easterbrook's view, "rehearing en banc is preferable to a constitutional decision preventing Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation." App. 125a.

REASONS FOR GRANTING THE PETITION

This case concerns the ability of the State to prevent prenatal discrimination on the basis of race, sex, and disability and to preserve the dignity of fetal remains by ensuring that they are disposed of in the same manner as other human remains. The fetal disposition provision expands on long-established legal and cultural traditions of recognizing the dignity and humanity of the fetus. The non-discrimination provision, on the other hand, is a qualitatively new type of abortion statute that responds to new technological developments allowing women to make a choice not contemplated at the time of *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992): the choice of *which* child to bear. Indiana urges the Court to determine whether it may so advance these interests consistent with the Fourteenth Amendment.

I. The Court Should Resolve the Circuit Conflict over the Nationally Important Question Whether States May Require Fetal Remains To Be Handled the Same as Other Human Remains

A. The decision below conflicts with the Eighth Circuit's decision upholding an identical requirement in Minnesota

1. As the dissenting opinions of both Judge Manion and Judge Easterbrook (joined by Judges Sykes, Barrett, and Brennan) recognized, the Seventh Cir-

cuit panel majority, in striking down the fetal disposition provision, created a conflict with the Eighth Circuit's holding in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990). *See* App. 39a-40a & n. 11 (Manion, J., concurring in the judgment in part and dissenting in part); App. 124a (Easterbrook, J., dissenting from denial of rehearing *en banc*).

There, the Eighth Circuit upheld a fetal disposition statute "substantially similar in every material respect" to the Indiana law struck down by the Seventh Circuit here. App. 39a (Manion, J., dissenting). Like the Indiana law, the Minnesota law required healthcare providers either to cremate or bury aborted and miscarried fetal remains and exempted women who have miscarriages at home and choose to dispose of the fetal remains themselves. *See Planned Parenthood of Minn.*, 910 F.2d at 488; *see also* Minn. Stat. § 145.1621(3) (applying only to abortions or miscarriages occurring "at a hospital, clinic, or medical facility"). Also like the Indiana law, Minnesota allows for simultaneous cremation of multiple fetuses. *See Planned Parenthood of Minn.*, 910 F.2d at 484; *see also* Minn. Stat. § 145.1621 (making no restriction on group disposal methods).

Applying the rational-basis test, the Eighth Circuit held that requiring that fetal remains be treated the same as human remains is valid. *Planned Parenthood of Minn.*, 910 F.2d at 487. While the Seventh Circuit held that "the State's interest in requiring abortion providers to dispose of aborted fetuses in

the same manner as human remains is not legitimate," App. 16a, the Eighth Circuit said that, even assuming the statute's purpose was to equate fetal remains with human remains, "we do not find it to be an invalid purpose," *Planned Parenthood of Minn.*, 910 F.2d at 487.

And where the Seventh Circuit held that it was irrational for Indiana to exclude individual women from the burial/cremation requirement, the Eighth Circuit held that "given the privacy concerns implicit in activity in one's home," the State had not acted irrationally by regulating the disposal of fetal remains by hospitals and clinics but not by women who miscarry at home. *Id.* at 488.

The five dissenting votes below underscore how these decisions are fundamentally irreconcilable. Judge Manion pointed out in his dissent that "[t]he Indiana and Minnesota laws are substantially similar in every material respect," and "the same state interest is involved in both cases." App. 39a–40a. Similarly, Judge Easterbrook argued that the panel's attempt to distinguish *Planned Parenthood of Minnesota* is unconvincing because "the intent behind a law does not affect rational-basis analysis." App. 124a. He also observed that "to deny that public sensibilities can matter (as the panel did) creates a conflict with decisions in many circuits, on subjects ranging from animal welfare to aesthetic zoning to obscenity." App. 124a.

On the issue of fetal remains alone, Indiana and Minnesota are far from the only States with regulations requiring humane treatment. At least six other States have fetal disposition regulations. *See* Ark. Code Ann. § 20-17-801; La. Rev. Stat. Ann. § 1191.2; N.C. Gen. Stat. § 130A-131.10; Ohio Rev. Code Ann. § 3701.341; Okla. Stat. tit. 63, § 1-301.10; Tex. Health & Safety § 697.004. Accordingly, not only does the panel's decision "prevent Indiana from implementing a law materially the same as one that has been held valid, and operates daily, elsewhere in the nation," App. 125a, but it also crystalizes for the Court an issue that is important across the country.

2. The Seventh Circuit itself is sharply divided over the fetal remains issue. Even the Seventh Circuit judges supporting the panel majority's conclusion disagree as to why the fetal disposition statute is invalid. And while intra-circuit fragmentation may not justify certiorari in many cases, where, as here, it has led to facial invalidation of an important state law, under circumstances where a fully constituted en banc court is unlikely ever to have a chance to resolve internal tensions, the Court should exercise its discretion to provide a forum for final review of a sovereign State's constitutional defenses.

As described above, the panel majority, consisting of Senior Judge Bauer and Judge Flaum, invalidated the Indiana law using the rational-basis test. App. 19a. Critically, however, in her opinion concurring in the denial of *en banc* review, Chief Judge Wood, joined by Judges Rovner and Hamilton, wrote that the fetal disposition provision should instead be held to the

more exacting undue burden test that applies to regulations of the abortion procedure itself. *See* App. 117a. In her opinion, "[t]his case involves a fundamental right" even though "the disposal statute operates at the end of the procedure." App. 117a–18a.

So as things stand, Indiana is barred from enforcing the fetal disposition provision because it supposedly violates the rational-basis test, even though perhaps a majority of Seventh Circuit judges in regular active service, plus Judge Manion, may disagree with that holding, and indeed, only one judge in regular active service—Judge Flaum—is on record supporting both the use of that legal standard and the outcome the panel majority reached. Furthermore, given that Indiana is barred by a final judgment and injunction from enforcing the fetal disposition provision, it will be unable to litigate the validity of the statute in another case where Judge Scudder will not be recused.

In short, on this issue, Indiana is dead in the water with substantial doubt about what the full Seventh Circuit thinks. Under these circumstances, only this Court can ensure that Indiana is afforded a full and fair opportunity to make its case. The conflict with the Eighth Circuit, the equal division of the Seventh Circuit on the outcome of the case, and the additional factions even among those supporting the outcome, amply justify Supreme Court review.

B. The fetal remains provision is valid

The panel majority held the State cannot "mak[e] a moral and scientific judgment *that a fetus is a human being*," App. 15a (internal quotation marks omitted) (emphasis by the Court), because in *Roe* this Court "concluded that 'the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,'" App. 15a (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)). And, "[s]ince the law does not recognize the fetus as a person that is simply not a legitimate interest." App. 18a.

This conclusion is a patent *non sequitur*; simply because a fetus is not a person within the meaning of the Fourteenth Amendment does not mean that a fetus is not morally and scientifically human. And because the Indiana legislature reasonably concluded that a fetus is morally and scientifically human, the State is well within its power to ensure that aborted and miscarried fetuses are treated with human dignity, as long as the State does not infringe upon the right to abortion. *See* App. 40a–41a (Manion, J., dissenting).

The government has important interests in protecting fetal life. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) ("The *Roe* Court recognized the State's 'important and legitimate interest in protecting the potentiality of human life.'" (quoting *Roe*, 410 U.S. at 162)); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("[A central premise of *Casey* is] that the government has a legitimate and substantial interest in preserving and promoting fetal life.").

These interests arise because a human fetus alone has the potential to become a unique and independent human person. The same concern for the dignity of what was once a human life underlies the Fetal Disposition Provision. Only fetal remains once had the potential to grow into a fully formed, mature person. Requiring distinctive treatment of fetal remains is therefore a legitimate judgment that the State may carry into effect, so long as it does not interfere with the right to abortion.

Moreover, even disposition of non-human remains are within the regulatory authority of the State. *See* App. 123a (Easterbrook, J., dissenting). Courts routinely uphold statutes aimed at protecting public sensibilities by protecting animal welfare. *Id.* For instance, in *Cavel International, Inc. v. Madigan*, 500 F.3d 551 (7th Cir.), the Seventh Circuit upheld, on animal welfare grounds, an Illinois statute prohibiting the slaughter of horses for human consumption. App. 123a. If "reducing dismay at poor treatment" of horses is a legitimate government interest, *see* 500 F.3d at 557, then so too is respecting the dignity of fetal remains—or (put another way) reducing dismay at the lack of such respect. App. 123a.

Nor is any imperfect fit between the statute's means and ends fatal. The panel majority held that the Fetal Disposition Provision fails to advance the cause of protecting human dignity because: (1) "it allows a woman full liberty to dispose of the fetus without restriction," and (2) it "continues to allow for mass cremation of fetuses." App. 19a. That reasoning is deeply flawed. As Judge Manion put it, the panel in

effect "objects that the provision is irrational because it doesn't treat unborn children as human enough." App. 42a (Manion, J., dissenting). However, grading the homework of the Indiana General Assembly in this manner "is not how rational basis review works." *Id.*

The Indiana legislature could rationally conclude that fetal remains should be buried or cremated separately from mere medical waste because they are distinct human beings, yet also conclude that differences from adult human remains justify mass cremation. It could also rationally conclude that the sensitive nature of abortion and miscarriage justifies releasing fetal remains to the mother upon request. Needless to say, by permitting aggregation of fetal remains for cremation, the statute moderates the costs it might otherwise impose on abortion providers. It would be odd to say that the statute is unconstitutional because it does not burden Planned Parenthood enough. In any event, the State may pursue like treatment of fetal and other human remains without achieving that perfect result in all ways or in all circumstances.

In concluding that the fetal disposition provision fails rational basis because it does not line up precisely with cremation and burial requirements for adult humans, *see* App. 18a–19a, the panel majority "departs from traditional rational basis review" by "requir[ing] far too close a fit between means and ends." App. 38a (Manion, J., dissenting). Critically, as Judge Manion recognized, the Seventh Circuit has "produce[d] a result that would never happen in any

context but abortion." App. 38a (Manion, J., dissenting).

II. Whether States May Preclude Discriminatory Abortion Based on the Race, Sex, or Disability of the Fetus (Including Down Syndrome) Is a Nationally Important Question Worthy of Immediate Consideration

In his dissent from denial of rehearing *en banc*, Judge Easterbrook expressed substantial skepticism that the fate of Indiana's non-discrimination statute is controlled by *Roe* and *Casey*. Yet he was "content to leave [the non-discrimination issue] to the Supreme Court" because only "the Justices can speak authoritatively." App. 123a. The Court should accept this invitation to provide guidance on what is already a burning national issue.

A. States need to address the newly emergent threat of abortions targeting the race, sex, and disability of the fetus, and the stakes are too high to await further percolation

Estimates show that at least 30% of fetuses diagnosed with Down syndrome were aborted even before the development of non-invasive genetic screening in 2011. Gert de Graaf et al., *Estimates of the Live Births, Natural Losses, and Elective Terminations with Down Syndrome in the United States*, 167A Am. J. Med. Ethics 756, 758 (2015). With new technological developments such as cell-free DNA testing, the

number of fetuses even possibly having Down syndrome that are aborted will likely rise even more. Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear?,* 94 Disease in Childhood 823, 824 (2009). According to Planned Parenthood's own medical director, Dr. John Stutsman, approximately half of all babies with Down syndrome are aborted. Appellants' App. 70. And positive DNA screens frequently lead doctors to encourage or even pressure women to terminate the pregnancy. Brian G. Skotko, *supra*, at 825.

As Judge Manion stated in dissent, "Nobody would dispute that Indiana has a compelling interest in protecting mixed-race children, women, and disabled individuals from discrimination. That the developing human lives Indiana seeks to protect are pre-born shouldn't change that." App. 31a. Yet "[p]ermitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others." App. 32a–33a (Manion, J., dissenting).

As genetic testing becomes more widely available and selective terminations of fetuses with disability diagnoses become more common, individuals already living with these same disabilities will no doubt receive the demeaning and stigmatizing message that they are not valued as productive members of society with equal human dignity. Recently, a man with Down syndrome testified on this issue before the House Subcommittee on Labor, Health, and Human

Services, saying that "the people pushing that particular 'final solution' are saying that people like me should not exist." *Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases Hearing Before Subcomm. on Labor, Health and Human Servs., and Educ. of the H. Comm. on Appropriations*, 163rd Cong. (2017) (statement of Frank Stephens, Quincy Jones Advocate, Global Down Syndrome Foundation, Board Member, Special Olympics Virginia), *available at* https://bit.ly/2QKIpLg.

Even some who support broad abortion rights have recognized the problem of using widely available genetic testing to abort babies with undesirable characteristics. One article noted the potential conflict between abortion rights and disability rights, acknowledging that "[i]t's also easy to be firmly pro-choice, and also unsettled by the termination numbers and the language of eradication." *See* Ruth Graham, *Choosing Life with Down Syndrome*, Slate, May 31, 2018, https://bit.ly/2A7n3Ct. Another author argued that while abortion should remain legal for any reason, disability-selective abortions are not "any different from leaving deformed children to the wolves[.]" Tim J. McGuire, *Aborting Fetuses with Down Syndrome Should Be Legal. But It's Still Wrong.*, The Washington Post, Mar. 30, 2018, https://wapo.st/2yH5zLl.

Sex-selective abortions, too, are becoming a greater concern. In the United States, the male-to-female birth ratio has climbed sharply in the last twenty years for some demographic groups. Kelsey

Harkness, *Sex Selection Abortions Are Rife in the U.S.*, Newsweek, Apr. 14, 2016, https://bit.ly/2IQ0AfK. And in the UK, a recent investigation found thousands of British women in an online forum discussing how to use genetic testing to abort a fetus of the "wrong" sex. Amber Haque, *Labour Calls for Ban on Early Foetus Sex Test*, BBC News, Sept. 17, 2018, https://bbc.in/2QMHgD7.

HEA 1337 responds to these growing concerns and advances the interests in protecting human life articulated in *Roe* and *Casey* by protecting children with Down syndrome and other disfavored characteristics from invidious discrimination.

This concern is resonating across the country. As Judge Manion pointed out, "[o]ther states have followed Indiana's lead, so this particular issue is not going away." App. 31a n.4. Eight additional States currently have sex-selective abortion bans on the books. *See* Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. Arizona's law also bans abortions on the basis of race. *See* Ariz. Rev. Stat. Ann. § 13-3603.02. Three States ban abortions on the basis on genetic abnormality. *See* La. Rev. Stat. Ann. § 40:1061.1.2; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10. Ohio's Down syndrome abortion ban is currently pending at the Sixth Circuit. *See Preterm-Cleveland v. Himes*, No. 18-3329 (6th Cir. filed Apr. 12, 2018).

Laws banning discriminatory abortion proliferate as the genetic-testing technology that necessitates them becomes cheaper and more widely available. That same dynamic heightens the urgency of Supreme Court review now rather than later. If the Court demurs, perhaps to wait years and years for a circuit conflict that may never come, then long before the Court takes up the matter the Nation may go the way of many European countries, where fewer and fewer babies with Down syndrome make it to term each year. In Iceland, the abortion rate for Down syndrome babies approaches 100%, with only one or two born each year—and those few only because, as an Icelandic prenatal physician observed, "we didn't find them in our screening." Dave Maclean, *Iceland Close to Becoming First Country Where No Down's Syndrome Children Are Born*, Independent, Aug. 16, 2017, https://ind.pn/2OnbGis. Reportedly, the abortion rate for Down syndrome babies is 98% in Denmark, 90% in the UK, and 77% in France. George Will, *The Real Down Syndrome 'Problem'*, National Review, Mar. 15, 2018, https://bit.ly/2tRXnZm.

The Court should act now, so that States willing to stop such eugenic manipulation will know whether they have leeway to do so.

B. The non-discrimination provision does not interfere with the right protected by *Roe* and *Casey*

The decision below held that the non-discrimination provision violates *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as

a pre-viability prohibition on the decision of women who wish to have discriminatory abortions to make the ultimate decision whether to terminate their pregnancies. The panel majority and Chief Judge Wood's concurrence to the court's denial of rehearing *en banc* share this view. *See* App. 10a–11a ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional."); App. 116a ("The state has not asked for rehearing *en banc* of the panel's ruling on the Sex Selective and Disability Abortion Ban . . . and the reason why is obvious: only the U.S. Supreme Court has the power to decide whether to change the rule of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.").

But the Court has not defined the abortion right that broadly. In *Casey*, the Court upheld what it considered to be the central premise of *Roe*: the woman's right, before viability, to make the choice whether or not to have a child. 505 U.S. at 871. Critically, it spoke of the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child*." *Id.* at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)). In other words, "th[e] dimension of personal liberty that *Roe* sought to protect" was a woman's ability to choose to have an abortion "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant." *Id.* at 853.

Thus, the right protected by *Roe* and *Casey* is dualistic: a woman may choose, free of governmental coercion, to bear, or not to bear, a child. Courts have, therefore, invalidated laws targeting that *binary* choice prior to fetal viability. *See, e.g.*, *MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (statute prohibiting abortion where the fetus has a detectable heartbeat); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (statute prohibiting abortions of fetuses of at least 20 weeks gestational age, regardless of fetal viability); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (statute prohibiting abortions after 12 weeks of gestation if a heartbeat has been detected); *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013) (statute prohibiting non-emergency abortions of fetus of at least 20 weeks of gestational age); *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996) (statute limiting abortions after 20 weeks gestational age); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371–74 (9th Cir. 1992) (statute prohibiting non-emergency abortions).

But until this case no court has ever extended *Roe* and *Casey* to the decision of a woman otherwise willing to bear a child to terminate her pregnancy because she finds a *particular* child unacceptable—*i.e.*, to the decision of *which* child to bear. *See* App. 122a (Easterbrook, J., dissenting). Indeed, *Roe* specifically disavows "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason* she alone chooses." 410 U.S. at 153 (emphasis added). Ac-

cordingly, it was entirely reasonable for Judge Easterbrook to point out that "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." App. 122a (Easterbrook, J., dissenting). More particularly, Judge Easterbook observed, "[n]one of the Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." App. 122a.

To the contrary, in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007), the Court already permitted a ban on one particular "type of abortion" that "implicates additional ethical and moral concerns that justify a special prohibition." Whereas *Gonzales* approved banning a particular *method* of abortion, Indiana's anti-discrimination law bans particular *reasons* for abortion. Indiana's anti-eugenics law does not attempt to replace viability with some other temporal re-definition of the right not "to bear or beget a child." Instead, it bans abortion based on ancillary overriding justifications not considered in *Roe* or *Casey*, just like the ban on partial-birth abortion upheld in *Gonzales*. To put it another way—in Judge Manion's words—Indiana "has a compelling interest in prohibiting [abortions] performed simply because the unborn child is of the wrong sex the wrong race or has a genetic disability. And it is hard to imagine legislation more narrowly tailored to promote this interest." App. 35a.

The non-discrimination provision is a qualitatively new type of abortion regulation, one that neither implicates the concerns underlying *Roe* and *Casey* nor

burdens the right those cases ultimately protect. It regulates women who have *already* made the decision "to bear or beget a child," but simply do not want to bear a *particular* child. Only this Court can correct the lower court's misperception that *Roe* and *Casey* bar this law. Accordingly, the Court should grant certiorari and uphold Indiana's authority to put an end to eugenic abortions.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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