No. 18-483

In The Supreme Court of the United States

KRISTINA BOX, 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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Indiana's House Enrolled Act 1337 ("Enrolled Act" or "the challenged statute") requires that, after an abortion or miscarriage occurring at a medical facility, health care providers must dispose of the embryonic or fetal tissue by cremation or interment. Ind. Code §§ 16-21-11-6 (miscarriages), 16-34-3-4 (abortions). But if the patient elects to take custody of the tissue, she can dispose of it in any manner she chooses. Another provision prohibits a woman from obtaining a pre-viability abortion if her decision to terminate her pregnancy is based on one of a number of proscribed grounds, including concerns that the fetus has a diagnosis or "potential diagnosis" of Down syndrome or "any other disability." Ind. Code § 16-34-4-1, *et seq*. The questions presented are:

1. Whether the court of appeals' holding that Indiana's requirements for the disposal of embryonic and fetal tissue fails rational basis review under the Due Process Clause warrants this Court's review, where there is no meaningful circuit conflict, where a decision by this Court would provide no guidance to the lower courts currently considering more expansive challenges to similar statutes, and where the court of appeals properly applied well-established legal principles in concluding that Indiana's statutory scheme does not rationally further its asserted interest.

QUESTIONS PRESENTED – Continued

2. Whether the court of appeals' decision striking down a prohibition on a woman obtaining a pre-viability abortion where Indiana disapproves of her reason for doing so warrants review by this Court, where there is no conflict or even any other decision on the issue among courts of appeals and where the court below applied settled precedent from this Court that bars states from prohibiting women from terminating a pregnancy before viability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners are Dr. Kristina Box, 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. The respondents are Planned Parenthood of Indiana and Kentucky, Inc., and Dr. Carol Dellinger, M.D.

Planned Parenthood of Indiana and Kentucky, Inc., is a nonprofit domestic corporation. It is not publicly held and has no parent corporation.

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STATEMENT OF THE CASE

Planned Parenthood of Indiana and Kentucky, Inc. ("PPINK") provides reproductive health services and education to thousands of men, women, and teens each year in Indiana and in Kentucky. At three of its many Indiana health centers, PPINK provides surgical abortions during the first trimester of pregnancy, until fourteen weeks after the first day of a woman's last menstrual period. At these health centers and one other, PPINK also provides medication abortions to women who are no more than ten weeks pregnant. In a medication abortion, the woman takes one medication at the health center and a second medication twenty-four to forty-eight hours later at a location of her choosing, so that the abortion is completed outside of the health center. In addition, if upon examination PPINK determines that a woman has miscarried, it will complete the miscarriage, either using medications alone, or surgically in a manner that is identical to a medication or surgical abortion.[1]

Women who seek abortions do so for a variety of medical, psychological, emotional, familial, economic, and other personal reasons. Almost 60% of women nationwide who have abortions are already

[1] PPINK does not provide abortions beyond the first trimester. Indiana law limits the provision of second trimester abortion to hospitals or ambulatory surgical centers and generally bans abortion entirely after twenty weeks of post-fertilization age. Ind. Code § 16-34-2-1.

mothers.[2] Women faced with a diagnosis of a fetal anomaly do carefully consider whether to carry a potentially disabled child to term. Br. of Amici Curiae, Disability Advocates in Support of Plaintiffs-Appellees and Affirmance, 7th Cir. Case No. 17-3163, Doc. 34 at 7-8 (filed Jan. 3, 2018). Allowing women and their families the freedom to make that decision for themselves is the best way to ensure that the mother and her family will be able to create and maintain an environment in which a disabled child is likely to thrive. *See id.* at 4.

Indiana law generally gives the woman having an abortion "the right to determine the final disposition of" the embryonic or fetal tissue that is removed in a first trimester surgical abortion or surgical completion of a miscarriage. Ind. Code § 16-34-3-2(a). Prior to the Enrolled Act, if the woman decided to let a health care provider such as PPINK dispose of the tissue, Indiana law required that it be disposed of in specified sanitary ways, just as with all other tissue retained by medical facilities following surgeries. Ind. Code §§ 16-41-16-3, 16-41-16-4(b) (amended eff. July 1, 2016), 16-41-16-5 (amended eff. July 1, 2016). Under this scheme, PPINK transferred the material to a medical waste removal company that incinerated and disposed of the tissue in accordance with law.

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[2] Jenna Jerman, et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, New York: Guttmacher Institute, 2016, at https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014 (last visited Nov. 28, 2018).

In 2016, Indiana enacted House Enrolled Act 1337. Three provisions are at issue in this case.

a. The first challenged provision alters the way medical facilities must dispose of embryonic and fetal tissue, requiring that it be interred or cremated. Ind. Code §§ 16-21-11-6 (miscarriages), 16-34-3-4 (abortions). Notably, however, the new law does not apply if a woman who has had an abortion or miscarriage elects to take control of the tissue from the medical facility; she is allowed to dispose of the tissue in any way she wishes. Ind. Code §§ 16-21-11-6(a) (miscarriages), 16-34-3-2 (abortions). And although Indiana has sought to justify the new law as providing "the same dignity" to fetuses as to deceased persons (Pet. 5), the new law also permits medical facilities to cremate or inter embryonic and fetal tissue from multiple pregnancies together, a procedure that is not generally permissible for deceased persons. Ind. Code §§ 16-34-3-4, 23-14-31-39.

b. The second provision prohibits a woman from having a pre-viability abortion if she is doing so for certain reasons of which Indiana disapproves. In particular, the statute makes it a crime for a doctor to perform an abortion if the woman is seeking the abortion solely because of the race, color, national origin, ancestry, or sex of the fetus, or because the fetus has been diagnosed with Down syndrome or "any other disability" or has "a potential diagnosis" of Down syndrome or "any other disability." Ind. Code § 16-34-4-1, *et seq*.

The term "any other disability" is defined expansively as "any disease, defect or disorder that is genetically inherited." Ind. Code § 16-34-4-1(a). The only exception is if the disability will, with reasonable medical certainty, result in death within three months of birth. Ind. Code §§ 16-34-4-1(b), 35-46-5-3(a). Thus, this provision categorically bans a woman from obtaining an abortion on the basis of a diagnosis that the child would be born with a genetic disorder that is likely to cause death in early childhood but not within the first three months, including, for example, Tay-Sachs disease, Edward syndrome (Trisomy 18), Krabbe disease, or Niemann-Pick type A.[3]

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[3] "Tay-Sachs disease is a rare inherited disorder that progressively destroys nerve cells (neurons) in the brain and spinal cord. The most common form of Tay-Sachs disease becomes apparent in infancy. Infants with this disorder typically appear normal until the age of 3 to 6 months, when their development slows and muscles used for movement weaken. . . . Children with this severe infantile form of Tay-Sachs disease usually live only into early childhood." NIH—U.S. National Library of Medicine, Genetics Home Reference—Your Guide to Understanding Genetic Conditions, *Tay-Sachs disease; Description*, at https://ghr.nlm.nih.gov/condition/tay-sachs-disease#resources (last visited Oct. 23, 2018).

Trisomy 18 is a condition caused by a chromosomal abnormality that may be inherited or may be the result of a random event during cell division. U.S. National Library of Medicine, *Trisomy 18—Causes*, at https://ghr.nlm.nih.gov/condition/trisomy-18#genes (last visited Nov. 2, 2018). Although many individuals with Trisomy 18 will die within the first month of birth, 5-10% will live past their first years, but will often have severe intellectual disabilities. U.S. National Library of Medicine, *Trisomy 18—Description*, at https://ghr.nlm.nih.gov/condition/trisomy-18#genes (last visited Nov. 2, 2018).

The statute's prohibition on abortions triggered by a "potential diagnosis" of a disability applies if the woman acts because of "the presence of some risk factors that indicate a health problem may occur." Ind. Code § 16-34-4-3. The law does not require that a medical professional determine that there is such a risk factor. It is enough that a woman is aware that the fetus has the potential for a genetically inherited disease or disorder and is seeking an abortion for that reason. For example, a woman who wanted an abortion because she has a serious disease that significantly affects life expectancy that can be inherited, such as cystic fibrosis, would be required by law to continue her pregnancy. Similarly, a woman over the age of thirty-five who decides to have an abortion because of the higher statistical risk of a disability from a chromosomal anomaly associated with advanced maternal age would be prohibited from having one.[4]

Krabbe disease is an incurable inherited disorder "that destroys the protective coating (myelin) of nerve cells in the brain and throughout the nervous system" and is generally fatal by the age of two. Mayo Clinic, *Krabbe disease*, at https://www.mayoclinic.org/diseases-conditions/krabbe-disease/symptoms-causes/syc-20374178 (last visited Nov. 2, 2018).

Niemann-Pick type A is an inherited disease caused by mutations in genes that metabolize fat and causes severe and progressive brain disease that is generally fatal within a few years of birth. Mayo Clinic, *Niemann-Pick*, at https://www.mayoclinic.org/diseases-conditions/niemann-pick/symptoms-causes/syc-20355887 (last visited Nov. 2, 2018).

[4] *See, e.g.*, ACOG (The American College of Obstetricians and Gynecologists), *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy – Frequently Asked Questions*, at https://www.acog.org/Patients/FAQs/Having-a-Baby-After-Age-35-How-

c. The third challenged provision requires that abortion providers inform women seeking abortion services that Indiana law prohibits them from obtaining an abortion on the above bases. Ind. Code § 16-34-2-1.1(a)(1)(K). PPINK objected to providing this information and objected to its patients having to receive this information. App. 95a. Indiana has conceded that, if the ban is invalid, so too is the requirement that women be informed of the ban. App. 14a.

PPINK filed suit prior to the effective date of the statute. After first issuing a preliminary injunction against the three challenged provisions, the district court ultimately granted summary judgment to PPINK and entered a permanent injunction. App. 74a, 113a. The district court concluded that the prohibition on pre-viability abortions for the disapproved reasons violated a woman's right to choose to have an abortion prior to viability; by banning certain pre-viability abortions, the court concluded, the law seeks to accomplish "precisely what the Supreme Court has held is impermissible." App. 61a. Because it concluded that the abortion ban was unconstitutional, the district court also enjoined the statute's requirement that women be informed of the ban. App. 66a-67a. The district court found that the provisions regarding disposition of embryonic and fetal tissue violated due process by imposing obligations on respondents that were not rationally related to a legitimate state interest. App. 69a-73a. PPINK did not argue that this provision of the statute

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Aging-Affects-Fertility-and-Pregnancy#does (last visited Oct. 26, 2018).

unduly burdened a woman's fundamental right to abortion, and therefore maintained that only rational basis review should be applied to the statute.

On appeal, a unanimous panel of the Seventh Circuit concluded that the ban on pre-viability abortions violated the privacy rights recognized in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (plurality), and their progeny. App. 8a-14a. As the court found, "[t]he Supreme Court has been clear: the State may inform a woman's decision before viability, but it cannot prohibit it." App. 14a. In addition, the court reasoned that it is "entirely inconsistent to hold that a woman's right of privacy to terminate a pregnancy exists if a woman decides before she becomes pregnant that she does not want to bear a child, but that the State can eliminate this privacy right if a woman later decides she wants to terminate her pregnancy for a particular purpose." App. 12a. The court explained that "[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." App. 13a.

By a 2-1 vote, with Judge Manion dissenting, the court also declared unconstitutional the tissue disposition provision. Indiana maintained that this provision served its interest in "the humane and dignified disposal of human remains," predicated on its determination "*that a fetus is a human being*." App. 15a (quoting Indiana brief) (emphasis added by court). The court

rejected this interest, noting that this Court has refused to treat fetuses as persons. App. 15a-18a. But it also concluded that the statutory scheme is irrational, even assuming the State's interest was legitimate. App. 18a. First, it permits the woman to dispose of embryonic or fetal tissue in any way she chooses—except that she may not leave it with the medical facility to incinerate according to its protocol for all other medical material. *Id.* Second, it permits the medical facility to cremate embryonic and fetal tissue from multiple pregnancies together. App. 19a. The panel noted that neither option (self-disposal or simultaneous cremation) is generally permitted by state law for deceased persons. App. 18a-19a. It concluded, therefore, that the new restrictions for embryonic and fetal tissue do not rationally further the State's asserted interest in treating fetal remains like the remains of a deceased person. App. 19a. (*See also* Pet. i).

Indiana sought *en banc* review only of the panel's decision to invalidate the tissue disposal provision. The court of appeals denied rehearing *en banc*.[5] Judge Wood (joined by Judges Rovner and Hamilton) concurred in that decision, agreeing that one must "wonder how, if respect for the humanity of fetal remains after a miscarriage or abortion is the state's goal, this statute rationally achieves that goal when it simultaneously allows any form of disposal whatsoever if the mother elects to handle the remains herself." App.

[5] The court initially granted *en banc* review, but after one of the judges had to recuse there were insufficient votes for *en banc* review, and the petition was denied. App. 114a-115a.

117a. Judge Easterbrook dissented (joined by Judges Sykes, Barrett, and Brennan). App. 121a-126a.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS NOT WARRANTED TO REVIEW THE CONSTITUTIONALITY OF THE EMBRYONIC AND FETAL TISSUE DISPOSAL STATUTE

The panel's decision invalidating the tissue disposal provisions does not warrant this Court's review. The decision below applies the well-settled principles of rational basis review to a statute different from all others and to a unique set of underlying facts. The only purportedly conflicting decision Indiana cites is nearly three decades old, is distinguishable, and is likely to be re-examined by the circuit in another pending case. Moreover, because the decision below rests solely on rational basis grounds, this case presents an inadequate vehicle for this Court to provide guidance to lower courts that are currently addressing different challenges to tissue disposal laws, including whether they impose an undue burden on a woman's constitutional right to abortion. With no actual split in the circuits and no guidance to be provided to the lower courts, Indiana's petition is in reality a request for this Court to correct what the State perceives to be an error in applying a basic, and properly stated, legal standard.

A. No circuit split justifies this Court's review

Indiana suggests that this Court's review of the tissue disposal provision is necessitated because a single court of appeals, nearly 30 years ago in *Planned Parenthood of Minnesota v. Minnesota*, 910 F.2d 479 (8th Cir. 1990), upheld a tissue disposal statute. There is, in fact, no circuit split because, as the court of appeals properly held, *Minnesota* is easily distinguishable from this case.

First, whereas in *Minnesota* the statute regulated the disposal of fetal tissue following *all* abortions or miscarriages occurring at a health facility, *see* 910 F.2d at 481 & n.2, here women may elect to assume control over the tissue and may then dispose of it in any manner whatsoever. *See* Ind. Code §§ 16-21-11-4, 6(a) (miscarriages); Ind. Code §§ 16-34-3-2(a), 3 (abortions). This exception, absent from the Minnesota law, was a critical reason for the court of appeals' conclusion that the Indiana scheme did not rationally further the State's asserted interest, as "[i]t is not hard to hypothesize disposal methods that would be far less respectful than those presently used for biological materials in clinics." (App. 117a [Wood, C.J., concurring in the denial of rehearing *en banc*]). Such a wholesale exception undercuts Indiana's asserted interest in treating fetal remains "in the same manner as other human

remains" (Pet. i), and distinguishes this case from the statute at issue in *Minnesota*.[6]

Second, the legal background against which the Minnesota statute was adopted was dramatically different from the statute challenged here. Prior to the adoption of the Minnesota statute there were no constraints on tissue disposal whatsoever, so that disposal could occur "through the sewer system or indifferent dumping of remains in landfills." 910 F.2d at 484; *see also id.* at 487 & n.16. In Indiana, by contrast, pre-existing regulations already required sanitary disposal of tissue. Perhaps because of the deficiencies in the pre-existing law, the plaintiff in *Minnesota*, as noted by the panel decision below, conceded that "the state ha[d] a legitimate interest in protecting public sensibilities." (App. 17a [quoting *Minnesota*, 910 F.2d at 488]). But this "public sensibilities" justification was not divorced from the method of disposal that the challenged statute sought to rectify: "disposal through the sewer system or the indifferent dumping of remains in landfills." 910 F.2d at 483-84. The concession that formed the basis of the Eighth Circuit's decision in *Minnesota* is absent from this case, where Indiana's pre-existing legal regime requiring sanitary incineration is markedly different, as is Indiana's asserted

[6] Indiana claims that the Minnesota law is "[l]ike the Indiana law," because it "exempted women who have miscarriages at home and choose to dispose of the fetal remains at home." (Pet. 15). Both laws exempt miscarriages in the home. But, unlike the Minnesota law, the Indiana law also exempts women who have abortions or complete their miscarriages in a health center and choose to take the fetal remains with them.

interest. Rather than identifying a circuit split, Indiana has instead described the common-sense notion that different results may issue when parties in different cases adopt different litigation strategies when challenging a different statute in different factual circumstances.

In addition, the assertion that review is mandated by a circuit split is, at best, premature, for the Eighth Circuit has an appeal pending before it involving an embryonic and fetal tissue disposal statute that will likely take up the continuing validity of *Minnesota*. *See Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), *appeal pending*, No. 17-2879 (8th Cir.). In *Hopkins*, a district court recently invalidated another tissue disposal statute, and determined that *Minnesota* is "not controlling" insofar as it was decided prior to *Casey* and *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S. Ct. 2292 (2016). *Hopkins,* 267 F. Supp. 3d at 1098. The Eighth Circuit thus now has before it a fully briefed opportunity to settle the continuing vitality of *Minnesota*, and any circuit split may therefore be ephemeral at best.

In any event, to the extent that a conflict exists between this case and *Minnesota*, it is a conflict only in the application of well-established, and agreed, legal standards as the Court in *Minnesota*, like the court of appeals here, asked whether the statute was rationally related to a legitimate governmental interest. *Minnesota*, 910 F.2d at 487-88. Certiorari is not appropriate to review the application of this well-established test to the particular facts presented here. Sup. Ct. R. 10

("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

B. This case presents a poor vehicle for considering the constitutionality of a tissue disposal law

The only question presented in this case concerning the tissue disposal statute is whether Indiana's statutory scheme is a rational means to advance the State's asserted interest in ensuring that embryonic and fetal tissue are disposed of "in the same manner as other human remains." (Pet. i). However, the two district courts other than the court in this case that have addressed embryonic and fetal tissue disposal statutes after *Minnesota* have done so by using *Casey*'s heightened "undue burden" standard. *See Whole Woman's Health v. Smith*, __ F. Supp. 3d __, 2018 WL 4225048, at *22 (W.D. Tex. Sept. 5, 2018), *appeal pending*, No. 18-50730 (5th Cir.); *Hopkins*, 267 F. Supp. 3d at 1105. Given this state of affairs, further percolation is plainly warranted. It would be premature to take up a fetal and embryonic tissue disposal case, particularly as this case, limited to the rational basis question, cannot address the "undue burden" challenges also presented in the other pending cases.

C. Certiorari is not warranted because the decision below is correct

The decision below is also correct. Certainly, this Court has repeatedly recognized that states possess an interest in "'protecting the potentiality of human life.'" *Casey*, 505 U.S. at 876 (quoting *Roe*, 410 U.S. at 162); *see also Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("[T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child."). But this Court has never extended that interest to embryonic or fetal tissue following an abortion or miscarriage, when the potential human life can no longer be realized. In fact, as the panel below observed, the Court has declined to recognize the fetus as a human being. *See Roe,* 410 U.S. at 159 ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [concerning when life begins], the judiciary . . . is not in a position to speculate as to the answer."); *see also id.* at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

In any event, the court of appeals correctly decided that Indiana's regime is not rationally related to the State's asserted interest. Indiana claimed that it sought to treat embryonic and fetal tissue like human remains. App. 15a. But the challenged statute permits a woman to dispose of the tissue in whatever way she chooses, so long as she takes it from the medical facility when she departs. It regulates disposal only if she decides to leave the embryonic and fetal tissue with the

facility. And that regulation, assertedly designed to ensure that the tissue is disposed of "in the same manner as human remains" (Pet. i), allows the medical facility to dispose of the tissue from multiple pregnancies together, something that Indiana law does not allow for deceased persons. App. 19a.[7] Indiana cannot propound an interest in treating embryonic and fetal tissue as if it were human remains while not treating it "in the same manner as other human remains." (Pet. i).

Admittedly, rational basis review does not mandate mathematical precision between ends and means, *see, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 484 (1970), but it also does not tolerate a statutory scheme that entirely undercuts the government's asserted justification. App. 13a. The challenged statute was properly found to be irrational.

Accordingly, there is no split in the circuits, granting certiorari would provide no guidance to the courts of appeals currently deciding broader legal challenges to tissue disposal statutes, and the decision below was correct. Certiorari is unwarranted.

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[7] In addition, nearly one-third of all non-hospital abortions are effectuated by medication, a process in which no embryonic or fetal tissue is left at the health care facility at all. Rachel K. Jones, *et al.*, *Abortion Incidence and Serv. Availability in the U. S., 2014*, 49 Persp. on Sexual and Reprod. Health 17, 21-22 (2017). Under Indiana's law, none of the tissue from these abortions need be treated "in the same manner as human remains."

II. CERTIORARI IS NOT WARRANTED TO REVIEW THE CONSTITUTIONALITY OF INDIANA'S PRE-VIABILITY ABORTION BAN

The panel's unanimous decision declaring unconstitutional the statute barring a woman from obtaining an abortion if her decision is based on certain disfavored reasons also does not warrant this Court's review. There is no circuit split; indeed, there are no other appellate decisions at all on the constitutionality of such a law. Moreover, no court has ever accepted Indiana's argument that the right to privacy countenances official interrogation of a woman's reasons for ending a pre-viability pregnancy much less a prohibition on her effectuating that decision if a state disapproves of her reasons. The court below correctly applied this Court's repeated holding that a state may not prohibit a woman from making her own decision to terminate a pregnancy before viability. Certiorari is unwarranted.

A. There is no circuit split or unsettled question of law justifying review by this Court

The decision below is the only appellate decision to address the constitutionality of a statute that prohibits a woman from obtaining an abortion for officially disapproved reasons. In the absence of any split, Indiana nonetheless urges the Court to grant certiorari to provide guidance on what it alleges "is already

a burning national issue." (Pet. 22). Yet the absence of a single other appellate decision belies this claim.

In fact, only two other states in the nation prohibit a woman from having an abortion for reasons related to disability. *See* N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2910.10.[8] The Indiana statute is much broader than either the Ohio or North Dakota statutes as it applies to virtually all disabilities, and applies regardless of any diagnosis; there need only be "the presence of some risk factors that indicate a health problem may occur." Ind. Code § 16-34-4-3. The Ohio statute is concerned only with Down syndrome and the North Dakota statute requires that there be an actual or potential diagnosis of a genetic abnormality. Ohio Rev. Code § 2919.10(B); N.D. Cent. Code § 14-02.1-04.1.

Of these two other states, only the Ohio law is the subject of litigation. A preliminary injunction has been entered against it and the state's appeal is pending in the Sixth Circuit. *See Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018), *appeal pending*, No.

[8] Louisiana also has such a ban, La. Rev. Stat. § 40:1061.1.2, but it is functionally meaningless because it applies only to abortions performed at a point in pregnancy when the state already bars all abortions absent a medical emergency or the presence of a medically futile pregnancy. La. Rev. Stat. § 40:1061.1(E)(1). *See June Medical Services LLC v. Gee*, 280 F. Supp. 3d 849, 863-64 (M.D. La. 2017) (concluding that plaintiff did not have standing to challenge the ban because Louisiana law already prohibits abortion at that point in pregnancy).

18-3329 (6th Cir.).[9] It would be premature to take up this case before the Sixth Circuit has even decided the case before it, and where not a single other appellate court has even weighed in on the question. And, although a total of eight states ban abortion if the woman's decision is related to the race or sex of the fetus, none of those laws has been challenged on substantive due process grounds.[10]

Two cases on the merits throughout the entire country hardly suggest a "proliferat[ion]" that "heightens the urgency of Supreme Court review now rather than later" (Pet. 26). Given that there is no circuit split, no burning question, and no unsettled area of law, certiorari should be denied.

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[9] The North Dakota ban was initially challenged, but the claim was subsequently dismissed by the plaintiff. *See MKB Mgmt. Corp. v. Burdick*, No. 1:13-cv-00071 (D.N.D. Sept. 9, 2013).

[10] *See* Ariz. Rev. Stat. Ann. § 13-3603.02 (prohibiting sex- and race-selective abortions); Ark. Code Ann. § 20-16-1904 (prohibiting sex-selective abortions); Kan. Stat. Ann. § 65-6726 (prohibiting sex-selective abortions); N.C. Gen. Stat. Ann. § 90-21.121 (prohibiting sex-selective abortions); N.D. Cent. Code § 14-02.1-04.1 (prohibiting sex-selective abortions and abortions because of genetic abnormality); Okla. Stat. tit. 63 § 1-731.2(B) (prohibiting sex-selective abortion); 18 Pa. Cons. Stat. Ann. § 3204(c) (prohibiting sex-selective abortion); S.D. Codified Laws § 34-23A-64 (prohibiting sex-selective abortion). Of these laws, only Arizona's statute has been challenged, more than five years ago, and the challenge, which was on equal protection grounds, was dismissed for lack of standing. *See NAACP v. Horne*, No. CV13-01079-PHX-DGC, 2013 WL 5519514 (D. Ariz. Oct. 3, 2013), *aff'd*, 626 Fed. App'x 200 (9th Cir. 2015).

B. Certiorari is not warranted because the decision below was correct

The decision below was also correct. It is fully in keeping with this Court's central holding regarding a woman's constitutional right to abortion, as well as the rationale underlying that right.

For more than 45 years, this Court has recognized that the right to privacy rooted in the Fourteenth Amendment "encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 153. *Casey* reaffirmed *Roe*'s essential holding that a pregnant woman has "the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846. This is because "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* This Court has never wavered from this essential holding. *See Whole Woman's Health*, 136 S. Ct. at 2309 (reiterating that an "undue burden" exists when a state imposes "a substantial obstacle in the path of a woman's choice" [quoting *Casey*, 505 U.S. at 877]); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (reciting the "established principle[ ] [that] . . . before 'viability . . . the woman has a right to choose to terminate her pregnancy.' " [quoting *Casey*, 505 U.S. at 870]).[11] Therefore, as the court of appeals properly

[11] Indiana relies on *Gonzales v. Carhart*, *supra*, to argue that the Court has already approved "a ban on one particular 'type of abortion.' " (Pet. 29). But the law upheld in *Gonzales* did not

recognized, this Court has made clear that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (as cited at App. 10a).

Indiana ignores the clarity of this precedent and argues instead that a woman's right to make the decision whether to terminate a pregnancy, recognized in *Roe*, *Casey,* and their progeny, protects only the "binary choice" either to bear a child or not, and that the constitutional right is therefore contingent upon the woman's particular reason for making the decision. Some reasons are acceptable; others are not, and the question of which reasons fall on which side of the line is, according to Indiana, a question for the State to decide. Therefore, if Indiana deems the reason to be unacceptable, the right of a woman to determine previability whether or not to have an abortion simply does not exist.

This cramped understanding is antithetical to the actual right described in *Casey*, which stressed that the decision as to whether to obtain an abortion or bear a child is a product not of a binary choice but of a personal decision influenced by "intimate views with

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prohibit any woman from obtaining an abortion. Rather, it prohibited one rarely used *method* of abortion, leaving women free to obtain abortions using alternative methods. Indeed, it was precisely because the partial-birth abortion ban left "availab[le] other procedures that are considered to be safe alternatives" that the Court upheld the ban. 550 at 167; *see also id.* at 165 ("Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.").

infinite variation." *Casey*, 505 U.S. at 853. *Casey* recognized that this is a highly personal decision that must be left to women to make based on their own values and beliefs. *See id.* (explaining that the right to privacy involves "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it" and recognizing that individuals hold competing views with some believing that "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent").[12]

It is precisely this "dimension of personal liberty" that Indiana's binary-choice theory ignores.[13]

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[12] Indiana wrongly claims (Pet. 14) that the fact that some women and families may choose abortion in the face of a diagnosis of a fetal abnormality they feel unequipped to handle was "a choice not contemplated at the time of" *Roe* and *Casey*. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 389 n.8 (1979) ("The plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus is afflicted with such disorders as Tay-Sachs disease and Down's syndrome. . . ."); *see also Harris v. McRae*, 448 U.S. 297, 340 (1980) (Marshall, J., dissenting) ("Finally, federal funding is unavailable in cases in which it is known that the fetus will be unable to survive. In a number of situations it is possible to determine that the fetus will suffer an early death if carried to term."); *Doe v. Bolton*, 410 U.S. 179, 207 (1973) (considering a statute that banned abortion with certain exceptions including that "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect").

[13] Indiana's novel binary-choice formulation does not even save its own statute. As noted above, women may decide that they will have an abortion if they ever become pregnant because their age, disability, or genetic factors indicate that any pregnancy may have a "potential diagnosis" of disability. Under the challenged

Regardless of the perceived importance of a particular state interest prior to viability, this Court has held that a state's interest in fetal life does not become strong enough to allow it to prohibit the abortion until viability. *Roe*, 410 U.S. at 164. *Casey* recognizes that a state may have interests in encouraging all fetal life, 505 U.S. at 846, but pre-viability the "interests are not strong enough to support a prohibition of abortion." *Id.* Instead, there is a "'private realm'" from which the state is barred. *Id.* at 851 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

Were states permitted to prohibit abortions for what they deemed to be a sufficiently important interest, it would invite impermissibly intrusive government inquiries into individuals' most private decisions. A woman could be required to demonstrate that she was not seeking her abortion for "incorrect" reasons, and the sincerity of her explanation could become subject to governmental investigation. As the court of appeals concluded, "[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.

Moreover, to uphold Indiana's view would lead to perverse results. It would mean that even though states cannot compel a woman to continue a healthy

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law these women are denied the ability to obtain an abortion despite having made the "binary choice" to obtain one in the event of any pregnancy.

pregnancy, it could compel her against her will to continue a pregnancy where it is virtually certain that the child will die in infancy. This cannot be reconciled with the "deep, personal character" of the right here. *Casey*, 505 U.S. at 853.[14]

Indiana's argument that the right to an abortion protects only a binary choice is antithetical to this Court's specific and repeated holdings that prior to viability a woman has a constitutional right to decide whether or not to continue her pregnancy and to the underlying right of privacy. No court has held otherwise. The decision below, correctly applying this well-settled precedent, does not warrant certiorari.

[14] Additionally, as noted by the American Congress of Obstetricians and Gynecologists, a statute like the challenged statute might very well force women to "withhold information or outright lie," thus preventing women from discussing their health care choices openly with their doctor at a time when "honest, empathetic health counseling is in order." ACOG Statement on Abortion Reason Bans, Mar. 10, 2016, at https://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Abortion-Reason-Bans?IsMobileSet=false (last visited Nov. 28, 2018).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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