NO. 18-483

IN THE
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA DEPARTMENT OF HEALTH, ET AL.,

Petitioner,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,

Respondents.

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

BRIEF OF ALLIANCE DEFENDING FREEDOM AND THE RADIANCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. Alliance Defending Freedom is committed to advancing legal protection for all human life, from conception to natural death, and supports efforts to end discrimination on the basis of race, sex, disability, or genetic makeup.

The Radiance Foundation is an educational, non-profit organization that, through journalism, multimedia presentations, and community outreach, is committed to empowering and motivating people to illuminate the inherent value of every human life, including racial minorities, women, and those with disabilities. The Foundation believes that every human life has purpose and is created with irreplaceable intrinsic value.

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[1] Pursuant to this Court's Rule 37.2, Amici state that counsel were timely notified of this brief. All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most Americans believe that discrimination based on race, sex, and disability is illegal in the United States. But they are wrong when it comes to unborn children. In most states, if a mother desires to have a son, she can abort her child simply for being a daughter. The same is true if the mother rejects her child because of his or her race, ethnicity, or disability.

Indiana sought put a stop to such inhumane discrimination. In 2016, it passed the Abortion Nondiscrimination Provision. The law prohibits invidious discrimination by outlawing abortion based solely on an unborn child's race, sex, disability, or genetic makeup.

Respondent Planned Parenthood sued Indiana to vindicate discrimination against unborn children. And the Seventh Circuit agreed that there is nothing wrong with such invidious discrimination, provided it occurs in utero. According to the Seventh Circuit, the right to abortion that this Court announced in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), is categorical, subject to no reasonable limits. *Planned Parenthood of Indiana and Kentucky, Inc.,* v. *Commissioner of the Indiana State Department of Health, et al.*, 888 F.3d 300, 305 (7th Cir. 2018). So, the Seventh Circuit said, a state may never prohibit a pre-viability abortion, including one predicated solely on an unborn child's race, sex, disability, or genetic makeup. That result is dangerous to women and minorities and may result

in the permanent eradication of entire populations, such as individuals with Down syndrome.

The Seventh Circuit's view of *Casey* is erroneous. This Court has already authorized limits on pre-viability abortions. *E.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007) (upholding the federal Partial-Birth Abortion Ban Act of 2003). And this Court has never suggested there is an unmitigated right to abort an unborn child because of his or her race, sex, disability, or genetic makeup.

In fact, Indiana's anti-discrimination provision is precisely the kind of law that survives *Casey*. The law does not interfere with the general right to abortion as this Court articulated it in *Casey*. The discrimination ban is narrowly tailored to target invidious discrimination against unborn children whom no one would contest would be members of protected classes if allowed to be born. And, as Judge Manion explained in his concurrence and partial dissent, "[s]urely Indiana has a compelling interest in attempting to prevent this type of private eugenics." 888 F.3d at 311.

Indiana's elimination of prenatal discrimination promotes universal human equality and places it at the forefront of those advocating for women, minorities, and the disabled. Accordingly, *Amici* urge this Court to grant certiorari, reverse the Seventh Circuit, and uphold the government's ability to outlaw discrimination at every stage of life, including before birth.

ARGUMENT

This Court has never categorically precluded pre-viability limitations on abortion. In fact, in *Gonzales* v. *Carhart*, this Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. §1531 (2003)—even as applied to abortions performed before viability. 550 U.S. 124 (2007).

The Seventh Circuit failed to fully analyze the Abortion Nondiscrimination Provision under this Court's abortion jurisprudence, effectively ignoring the State's interest in protecting unborn human life. See, *e.g., Casey*, 505 U.S. at 846 (requiring courts to determine if an abortion law furthers a valid state interest such as the protection of unborn human life or imposes an "undue burden" by placing a "substantial obstacle" in the path of a woman seeking an abortion). A proper application of *Casey* will result in Indiana's discrimination ban being upheld.

I. The State of Indiana's interest in protecting unborn human life from discriminatory abortions is supported by this Court's jurisprudence and medical advances in genetic testing.

This Court has never recognized a right to abort an unborn child because of his or her race, sex, disability, or genetic makeup. Conversely, this Court in *Casey* did recognize the State's interest in protecting unborn human life. The *Casey* Court's prescient acknowledgement of this interest is especially important here, as it could not have envisioned the technological advances that now

increasingly threaten unborn children with discrimination.

A. The Seventh Circuit ignored the State of Indiana's interest in protecting unborn human life, particularly in the context of race, sex, and disability discrimination.

This Court has never endorsed a right to a discriminatory abortion. Instead, it has repeatedly underscored that one of the "essential holdings" of *Roe v. Wade*, 410 U.S. 113 (1973), is that "the State has legitimate interests from the pregnancy's outset in … the life of the fetus that may become a child." *Carhart*, 550 U.S. at 125.

The Seventh Circuit improperly dismissed the importance of the State's interest in the life of the unborn child. Rather than evaluating the State's compelling interest, it erroneously presumed that there exists a constitutional right to abort an unborn child *because of* his or her race, sex, disability, or genetic makeup.

On the contrary, "[i]t is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a particular fetus . . . ." *See* Marsha Saxton, *Disability Rights and Selective Abortion*, Abortion Wars, A Half Century of Struggle: 1950 to 2000 (Univ. of Cal. Press, 1998) chap. 18.

Picking and choosing among particular children raises the specter of abortion as "a wedge into the

'quality control' of all humans. If a condition (like Down[] syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate – eliminate or enhance – other (presumed genetic) socially charged characteristics …?" *Id*. Taking Planned Parenthood's arguments to their logical conclusion, it would be appropriate to abort children who are too short or too tall, might someday develop scoliosis, or have a propensity for male-pattern baldness. Indeed, such selectivity reflects the beliefs of the organization's founder. Margaret Sanger, *The Eugenic Value of Birth Control Propaganda* (Oct. 1921), *available at* https://bit.ly/1RdWZpf ("the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective").

Perhaps for these reasons, this Court has never endorsed a right to abort children only because they are the undesired sex or have been diagnosed with a genetic abnormality or disability. In *Casey*, this Court, quoting approvingly from *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), declared that the abortion liberty pertained to "the decision whether to bear or beget a child," *Casey*, 505 U.S. at 851. This Court has never framed the constitutionally protected abortion decision as whether to bear or abort a *particular* child based on his or her race, sex, disability, or genetic makeup. It is difficult to imagine where such a constitutional right would even originate.

B. This Court could not have envisioned advances in genetic testing that are increasingly leading to discriminatory abortions.

At the time of the *Casey* decision, options for prenatal testing were limited. For example, sonography and other techniques for fetal imaging were not as developed as they are today, and ultrasound screening for Down syndrome was not yet a standard practice. See R. A. Kadir & D. L. Economides, *The Effect of Nuchal Translucency Measurement on Second-trimester Biochemical Screening for Down Syndrome*, 9 Ultrasound in Obstetrics and Gynecology 244–247 (1997).

Since *Casey*, prenatal genetic testing capabilities have greatly advanced, fundamentally altering the landscape of prenatal care. Innovations in sonography and magnetic resonance imaging (MRI), for instance, now enable ultrafine visualization of structural abnormalities associated with genetic disorders and congenital defects. Standard practice for prenatal testing now includes screening for genetic conditions, including Down syndrome within the first trimester. R. Akolekar et. al., *Procedure-related Risk of Miscarriage Following Amniocentesis and Chorionic villus sampling: a systematic review and meta-analysis*, 45 Ultrasound in Obstetrics & Gynecology 16–26 (2015); Practice Bulletin No. 163, 127 Obstetrics & Gynecology (2016).

A particularly significant development has been the advent of non-invasive prenatal testing (NIPT), a simple and risk-free method of screening for major genetic disorders and determining the unborn child's sex. NIPT requires a simple blood draw from the arm of the mother to derive DNA originating from the placenta. NIPT is considered reliable from as early as 10 weeks gestation. Accordingly, many medical professional societies have revised their official guidelines for genetic screening to include NIPT. *See id*.; see also Anthony R. Gregg et al., *Noninvasive prenatal screening for fetal aneuploidy, 2016 update: a position statement of the American College of Medical Genetics and Genomics,* 18 Genetics in Medicine 1056–1065 (2016).

In 2016, the American Congress of Obstetricians and Gynecologists (ACOG) began recommending that clinicians offer genetic testing, including NIPT, to all pregnant mothers, not just those at elevated risk, as per previous guidelines. Practice Bulletin No. 163, *supra.* NIPT has been offered since 2011 by a number of commercial providers and has grown into a substantial and largely unregulated industry. Megan Allyse et al., *Non-invasive prenatal testing: a review of international implementation and challenges,* 7 International Journal of Women's Health 113-26 (2015); see also Subhashini Chandrasekharan et al., *Noninvasive Prenatal Testing Goes Global*, 6 Science Translational Medicine 231 (2014).

The proliferation of NIPT makes a significant amount of genetic information available early in pregnancy. While current NIPT screening emphasizes the major trisomies as well as the unborn child's sex, emerging refinements are already allowing for a more detailed genetic analysis. In the future, NIPT might offer the potential to sequence the entire fetal genome, enabling screening not only for chromosomal abnormalities, but for genetic markers of specific inheritable traits. Ioanna Kotsopoulou et al., *Non-invasive prenatal testing (NIPT): limitations on the way to become diagnosis,* 2 Diagnosis 141–158 (2015).

This capability, coupled with the ability to terminate unborn children with undesired genetic make-ups, raises legal and ethical concerns. The State of Indiana has a legitimate interest in ensuring that such technology is not used for discrimination.

II. The Abortion Nondiscrimination Provision advances the State of Indiana's interest in preventing racial and sex discrimination.

Congress and state governments have long track records of protecting against race- and sex- based discrimination. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq*. (1964), forbids employment discrimination based upon sex, race, color, religion, or national origin. Other laws similarly protect against discrimination in education, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1972); athletics, *id*.; health insurance, Patient Protection and Affordable Care Act, Pub. L.,

124 Stat. 119, *et seq*. (2010); housing, Fair Housing Act, 42 U.S.C. § 3601, *et. seq*. (1968); pay, Equal Pay Act of 1963, 29 U.S.C. §206, *et. seq*. (1963). Each of the 50 States have also enacted laws prohibiting race- and sex-based discrimination. *See, e.g.,* IND. CODE § 22-9-1-2, *et. seq*. (2017) (prohibiting race- or sex-based employment discrimination).

This compelling interest in eradicating race- and sex-based discrimination extends to protecting unborn children in the womb, as discriminatory abortions are being practiced not just in other countries, but in the United States. Charlotte Lozier Institute, *Sex-Selection Abortion; The Real War on Women*, April 13, 2016, *available at* https://bit.ly/2zTaNE4 ("[p]renatal sex discrimination crosses cultural, ethnic, and national lines. It is practiced with impunity in many countries, including the U.S., via sex-selective abortion – choosing to abort a preborn child based solely on the child's sex.")

Even advocates of abortion rights recognize the need to protect against sex-selective abortion practices. For example, in 2013, the European Parliament, which recently declared abortion to be a "fundamental human right," adopted a report describing sex-selection abortions as instances of "ruthless sexual discrimination." Motion for a European Parliament Resolution on Progress on Equality between Men and Women in the European Union, Eur. Parl. Doc. A8-0015/2015(2015), *available at* https://bit.ly/2PpaoUx. In addition, The United Nations Entity for Gender Equality and the Empowerment of Women found prenatal sex selection to be an "act of violence against women." Platform for

Action by The United Nations Fourth World Conference on Women, Beijing, China – September 1995, *available at* https://bit.ly/1uKJWCZ.

The State of Indiana has a compelling interest in protecting against discrimination in all forms, including abortions targeting unborn children because they are girls, disabled, or members of minority races. Indiana's Nondiscrimination Provision properly advances this interest and is in the tradition of federal and state laws that prohibit discrimination.

III. Indiana's Abortion Nondiscrimination Provision advances the State's interest in preventing disability and genetic discrimination.

Sadly, discrimination against those with disabilities or genetic abnormalities—including efforts to prevent the birth of a child with a disability or genetic abnormality—has been a well-documented problem in the United States. When reviewing the Genetic Information Non-Discrimination Act of 2008, 42 U.S.C. § 2000ff-5 (2008), the Senate commented on this tragic history:

> The early science of genetics became the basis of State laws that provided for the sterilization of persons having presumed genetic 'defects' such as mental retardation, mental disease, epilepsy, blindness, and hearing loss, among other conditions. The first sterilization law was enacted by the State of Indiana in 1907. By 1981, a majority of States adopted sterilization laws to 'correct'

> apparent genetic traits or tendencies. Many of these State laws have since been repealed, and may have been modified to include essential constitutional requirements of due process and equal protection. However, the current explosion in the science of genetics, and the history of sterilization laws by the States based on early genetic science, compels Congressional action in this area. [S.Rep. No. 110-28(I).]

Importantly, with the American with Disabilities Act of 1990, 42 U.S.C. §12101, *et. seq*. (ADA) and the ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat 3553, *et. seq*. (2008), Congress has acted to prohibit discrimination against persons with physical or mental disabilities in employment, public services and accommodations, public transportation, and telecommunications. In passing the ADA, Congress found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination…" 42 U.S.C. §12101(a).

Congress later passed the Genetic Information Nondiscrimination Act of 2008. 42 U.S.C. §2000ff-5. The law's purpose was to "fully protect the public from discrimination and allay their concerns about the potential for discrimination" based upon their genetic makeup. S.Rep. 110-28(I). Congress has recognized that discrimination based upon genetic makeup is wrong. It has also recognized that the disabled have the right to "fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1). The Abortion

Nondiscrimination Provision simply extends these protections to include birth itself.

Again, even individuals who advocate for abortion rights expressed discomfort and dismay at the use of disability-selective abortion. *E.g.*, Amy Harmon, *Genetic Testing + Abortion = ???*, N.Y. Times, May 13, 2007, *available at https://nyti.ms/2z6Y3u2*. Indeed, "many [supporters of abortion rights] are finding that, while they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby." *Id*.

The disquiet is felt beyond our country's borders. For example, the United States is a signatory to the Convention on the Rights of the Child, which states that a child "needs special safeguards and care, including appropriate legal protection, *before as well as after birth*." Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

And recently, the U.N. Committee on the Rights of Persons with Disabilities declared that "[l]aws which explicitly allow for abortion on the ground of impairment violate the Convention on the Rights of Persons with Disabilities." The Convention also noted that even when a prenatal disability diagnosis is correct, allowing for disability selective abortion "perpetuates notions of stereotyping disability as incompatible with a good life." Susan Yoshihara, *Another U.N. Committee Says Abortion May be a Right, But Not on Basis of Disability,* C-FAM, Center for Family and Human Rights, Oct. 26, 2017, *available at* https://bit.ly/2z4XHUy.

IV. Discriminatory abortions are dehumanizing.

If government desires to eradicate discrimination predicated on race, sex, disability, and genetic makeup, it must ensure that this protection begins in the womb. When the government sanctions the abortion of unborn children based on their race, sex, disability, or genetic makeup, the government actively affirms a social reality in which racial minorities, women, and the disabled are marginalized and dehumanized. In other words, discriminatory abortions are sought because of perceived undesirable characteristics of the unborn child; if such discrimination is allowed for those who are inside the womb, it will be sanctioned outside the womb, too.

As Desmond Tutu wisely cautioned, "abominations such as apartheid do not start with an entire population suddenly becoming inhumane. They start here. They start with generalizing unwanted characteristics across an entire segment of a population." Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 Harv. Latino L. Rev. 35, 35 (2011). Yet the whole purpose of sex-selective and like abortions is to eliminate unwanted characteristics.

Given that reality, Indiana wisely decided not to be silent. If the law condones discrimination in utero, it will teach the same after birth:

> The question was raised in the past: how does the law engage in moral teaching? The answer was that it teaches through the laws.

> When we legislate against racial discrimination in private inns and restaurants, we remove discrimination from the domain of private tastes and treat it as a matter of moral consequence. Between 1963 and 1966, opinion in the [S]outh came to be parallel with opinion in the North, with majorities in both sections holding to the wrongness of racial discrimination. We may ask: why did the culture of the [S]outh change so strikingly in three years? Did it have something to do with the new moral lessons being taught at the top of the state and taught dramatically with the laws? [Hadley P. Arkes, *The Role of Government in Shaping Culture*, 102 Nw. U. L. Rev. 499, 500 (2008).]

By enacting the Abortion Nondiscrimination Provision, the State of Indiana has chosen to affirm its interest in eradicating discrimination and to change its law to protect those in the womb from discriminatory abortions. By doing so, it is sending a clear message to its citizens that all victims of discrimination are worthy of protection.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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