No. 17-3163

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.,
DEFENDANTS-APPELLANTS

On Appeal From The United States District Court
For The Southern District Of Indiana
Case No. 16-cv-763-TWP-DML
The Honorable Tanya Walton Pratt, Judge

BRIEF OF THE STATES OF WISCONSIN, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, THE MICHIGAN ATTORNEY GENERAL, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici curiae* are the States of Wisconsin, Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, the Michigan Attorney General, and Governor Phil Bryant of the State of Mississippi ("the States"), who file this brief under Federal Rule of Appellate Procedure 29(a). The States have a sovereign right to prohibit the discriminatory elimination of classes of human beings because of their gender, race, or disability, and to regulate the respectful disposition of human remains. The district court's permanent injunction blocking Indiana's House Enrolled Act 1337 ("HEA 1337" or "the Act") threatens the States' ability to enforce substantially similar laws that their state legislatures have already enacted or could enact in the future. *See, e.g.* Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1804; Kan. Stat. § 65-6726; La. Rev. Stat. § 40:1061.1.2; Okla. Stat. tit. 63, § 1-731.2(B); 2017 Wisconsin Assembly Bill 549 (proposed fetal-disposition law with similarity to HEA 1337).

INTRODUCTION

Indiana sought to address an invidiously discriminatory practice, which violates this Nation's most core values: the elimination of classes of human beings solely because of their disability, race, or gender. Plaintiffs do not dispute that this practice persists in Indiana and elsewhere; to the contrary, their zealous prosecution of this lawsuit leaves no doubt that they want to continue to carry out abortions justified only by invidious discrimination. Nor is Indiana alone in addressing this

problem. *See, e.g.*, Ariz. Rev. Stat. § 13-3603.02; Ark. Code § 20-16-1804; Kan. Stat. § 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(B); 18 Pa. Cons. Stat. § 3204(c); S.D. Codified Laws § 34-23A-64. So far as the States have been able to determine, the district court's decision in this case is the first decision, from any court, finally adjudicating the constitutionality of such a law. Although the plaintiffs in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), "sought declaratory and injunctive relief against a wide array of [Pennsylvania's] 1988 and 1989" abortion regulations, they did not seek to block Pennsylvania's prohibition of gender-discriminatory abortions, which Pennsylvania enacted during the same period. *See* Br. for Respondents, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006423, at *4.

The district court here invalidated Indiana's Antidiscrimination Provisions without even considering the compelling interests that the State sought to advance, based upon a significant misunderstanding of Supreme Court precedent. The district court believed that the Court had created a "categorical" right to pre-viability abortion such that the State's proffered interests were irrelevant. But as the Supreme Court has made clear, even when addressing foundational rights such as free speech and freedom from state-sponsored racial classification, the Constitution does not enshrine "categorical" rights. "[E]ven the fundamental rights of the Bill of Rights are not absolute," *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949), and there is no basis for elevating the unenumerated right to pre-viability abortion above those rights. Indeed,

the Supreme Court in *Casey* already recognized at least one state interest that can justify prohibiting some pre-viability abortions—the interest in protecting pregnant minors when an abortion would not be in the minor's best interests and her parents do not consent—and there is every reason to conclude that the State's overriding interest in prohibiting the gender-, race- or disability-based elimination of classes of human beings is a similarly powerful enough interest to justify banning invidiously discriminatory abortions. And given the recent, vivid demonstrations of the pernicious impacts of discriminatory abortions—including Icelandic citizens' widely publicized effort to eliminate all people with Down syndrome from their population via abortion—the interest sought here is particularly critical.

The district court invalidated Indiana's Respectful-Disposition Provisions, which require abortion clinics to treat the remains of unborn children with the same respect given to other human remains, based upon a similar misreading of Supreme Court precedent. The district court believed that because the Supreme Court has held that unborn children are not "person[s]" for purposes of the Fourteenth Amendment's Due Process Clause, the State could not rationally enact a law designed to give respect to unborn children. The district court's syllogism—that the Supreme Court's decisions that unborn children are not protected as "person[s]" under the Due Process Clause means that States have no power to require treating those children with respect—is simply wrong. States have ample authority to require respect for, and protection of, unborn children, as is made clear by numerous fetal-homicide laws. The Respectful-Disposition Provisions thus easily satisfy the rational-basis test that the

district court acknowledged applies to evaluating the constitutionality of these Provisions.

ARGUMENT

I. Indiana's Antidiscrimination Provisions Are Constitutional

Indiana's Antidiscrimination Provisions prohibit doctors from performing abortions sought "solely" for discriminatory reasons, based upon the unborn child's gender, race, or disability. HEA 1337, § 22. In invalidating these Provisions for pre-viability abortions, the district court held that pre-viability abortion is a "categorical" right under Supreme Court caselaw, meaning that the State's justifications for the law are irrelevant. Appellants' Short Appendix ("Short App.") 14. The district court misunderstood the Supreme Court's abortion jurisprudence. In so doing, the court overlooked Indiana's compelling interest in preventing the elimination of classes of human beings because of their gender, race, or disability, which interest is sufficiently powerful to permit a prohibition of invidiously discriminatory abortions.

A. Contrary To The District Court's View, The Supreme Court Has Not Held That Pre-Viability Abortion Is A "Categorical" Right

The district court rejected Indiana's Antidiscrimination Provisions based upon a misunderstanding of the Supreme Court's abortion caselaw. The district court believed that the Court has held that a State can never prohibit any woman from obtaining a pre-viability abortion, no matter how powerful the State's interest and no matter how carefully tailored the law to achieving that interest. As the district court put it, in its view, "[t]he woman's right to choose to terminate a pregnancy pre-viability is *categorical*." Short App. 14 (emphasis added). With this premise as the

starting point for its analysis, the district court invalidated Indiana's Antidiscrimination Provisions without even considering the State's proffered interests. The district court misinterpreted Supreme Court precedent, ascribing to the Court an extreme rule that would enshrine pre-viability abortion as an *absolute* right, a status the Court has not afforded *any* rights, including rights as core to our constitutional order as free speech or freedom from state-sponsored racial classification.

The Supreme Court has adopted a flexible, sliding-scale approach to evaluating the constitutionality of abortion regulations. In the years following *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court had subjected laws that interfered with abortion rights to "strict scrutiny." *Casey*, 505 U.S. at 875–78 (plurality op.); *see, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427, 434 (1983). Replacing *Roe*'s strict-scrutiny framework, the Supreme Court in *Casey* adopted an "undue burden" approach, requiring a sliding-scale level of inquiry—ranging from rigorous to permissive—depending upon the level of interference with a woman's abortion rights. *See Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Put another way, "*Casey*'s undue-burden test [is a] right-specific test on the spectrum between rational-basis and strict-scrutiny review." *Whole Women's Health v. Hellerstadt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting).

The district court was thus wrong to conclude that the Supreme Court in *Casey* and its progeny preemptively rejected the legality of every possible prohibition against any pre-viability abortion, no matter how powerful the State's interest

involved. The district court, for example, quoted the Supreme Court's statement from *Casey* that "[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." Short App. 14 (quoting *Casey*, 505 U.S. at 846 (plurality op.)). But this and similar passages from the Supreme Court were only addressing "the State's interests" *actually urged* before the Supreme Court, such as the State's general interest in unborn life and the health of the mother. *See Casey*, 505 U.S. at 845 (plurality op.); *Whole Women's Health*, 136 S. Ct. at 2310. It is wrong to understand the Supreme Court's language as holding that pre-viability abortion is such an absolute right that every conceivable state interest must always yield to that right—*including interests that the State did not advance in* Casey *or any other case that the Supreme Court has faced*. Indeed, *Casey* itself held that the State could prohibit a minor from obtaining an abortion where her parents did not consent and a court found that both the abortion was not in the minor's best interests and the minor was not "mature and capable of giving informed consent." *Casey*, 505 U.S. at 899 (plurality op.). Just as the State's "strong and legitimate interest in the welfare of its young citizens," *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990), is a sufficiently powerful interest to permit States to prohibit at least some pre-viability abortions, other state interests might also be compelling enough to allow for the prohibition of some other pre-viability abortions.

More generally, the district court's "categorical" understanding of pre-viability abortion rights is wrong because it ascribes to the Supreme Court the unreasonable

position that pre-viability abortion has a greater constitutional status than core rights like the freedom of speech or freedom from state-sponsored racial classification. As the Supreme Court has explained, "even the fundamental rights of the Bill of Rights are not absolute." *Kovacs*, 336 U.S. at 85. For example, the First Amendment provides in categorical terms that "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." U.S. Const. amend. I. Yet, as the Supreme Court has explained, "[t]he protections afforded by the First Amendment . . . are not absolute." *Virginia v. Black*, 538 U.S. 343, 358 (2003). The Court has, for example, recognized "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), while holding that the States can prohibit even fully protected speech where the law satisfies strict scrutiny, *see, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665–66 (2015). And moving beyond the Bill of Rights, the Fourteenth Amendment's Equal Protection Clause provides, without qualification, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Yet, the Supreme Court has explained that the State may even use racial classifications where it satisfies strict scrutiny; for example, to prevent prison riots, *see Johnson v. California*, 543 U.S. 499, 512–14 (2005), or to comply with the Voting Rights Act, *see Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017).

In all, even if one were to view pre-viability abortion as a fundamental right on par with speech or equal protection—a doubtful proposition in light of the fact that freedom of speech and equal protection are enumerated rights, core to our constitutional order—"[n]o fundamental right . . . is absolute." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3056 (2010) (Scalia, J., concurring). And because "[n]o right is absolute," "the strength of the individual's liberty interests and the State's regulatory interests must *always* be assessed and compared." *Id.* at 3101 (Stevens, J., dissenting) (emphasis added). The district court was thus wrong to reject Indiana's Antidiscrimination Provisions without considering the State's proffered interests under *Casey*'s sliding-scale, undue-burden approach.

B. States Can Constitutionally Enact Abortion Laws That Prohibit The Discriminatory Elimination Of Classes Of Human Beings

Plaintiffs are attacking an abortion law of a type that the Supreme Court has never considered, based upon a state interest the Court has never confronted: a prohibition on doctors performing abortions sought solely for a discriminatory purpose, where the State's interest is preventing the elimination of classes of human beings by gender, race, or disability. As noted above, the plaintiffs in *Casey* chose not to challenge Pennsylvania's gender antidiscrimination abortion law, and no court (other than the district court below) has held that such a law is unlawful. *See supra* p. 2. As explained below, antidiscrimination abortion laws like Indiana's are lawful under the Supreme Court's sliding-scale, undue-burden test because they advance the compelling state interest of stopping the discriminatory elimination of classes of human beings. Indeed, the State's interests at issue here are so overriding that such

laws would survive review regardless of what level of scrutiny this Court applied within the *Casey* sliding-scale continuum. And because the strength of the State's interest in stopping the discriminatory elimination of classes of human beings is not tied in any way to the unborn child's stage of development, the fact that such laws typically apply both pre- and post-viability does not change the analysis or bottom-line conclusion.

The prevalence of abortions that eliminate "undesirable" classes of human beings in the United States presents a serious social problem, which States have a compelling interest in stopping. For example, according to most estimates, 50 percent or more of pregnant women in the United States who are informed that their child will be born with Down syndrome eliminate that child by abortion. Dkt. 54-2:42; Caroline Mansfield, Suellen Hopfer & Theresa M. Marteau, *European Concerted Action, Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 Prenatal Diagnosis 808, 810 (1999) (estimating that this figure is closer to 90 percent); Julian Quinones & Arijeta Lajka, *"What Kind of Society Do You Want to Live In?": Inside the Country Where Down Syndrome Is Disappearing*, CBS News (Aug. 14, 2017), https://goo.gl/o6W1er (67 percent). These practices are partly due, no doubt, to the pressure that some women experience from doctors to abort unborn children with Down syndrome. Dkt. 54-1:6. Sex-selection abortions are also common in some communities in the United States. *See* Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 Proc. of the Nat'l Acad. of

Sci. 5861, 5861 (2008), https://goo.gl/69SJX9; Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1(2) Am. Econ. J.: Applied Econ. 1–34 (2009), https://goo.gl/MaqGxP. Plaintiffs do not deny that these practices persist in the United States. To the contrary, the *casus belli* of this lawsuit is Plaintiffs' unabashed desire to assist in these discriminatory practices.

The dire consequences of similar discriminatory abortion practices in other countries underscore the compelling state interest in stopping these practices from spreading in the United States. Iceland is a canary in the coal mine of the consequences of abortion practices that eliminate supposedly "undesirable" classes of human beings. As has been recently reported, "the vast majority of women [in Iceland]—close to 100 percent—who receive[ ] a positive test for Down syndrome terminate[ ] their pregnancy." Quinones & Lajka, *supra.* Nor is Iceland alone, as the "estimated termination rate" of unborn children with Down syndrome is 98 percent in Denmark. *Id.* And the grave consequences of discriminatory abortion practices are not confined only to Europe. Some experts have concluded that there are 100 to 160 *million* "missing" women in Asia. *See* Mara Hvistendahl, Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men 5–12 (2011). In India, for example, "[o]ver the course of several decades, 300,000 to 700,000 female fetuses were selectively aborted [ ] each year." Sital Kalantry, *How to Fix India's Sex-Selection Problem*, The New York Times (Jul. 27, 2017), https://goo.gl/Xe2JqE; *accord* Nicholas Eberstadt, *The Global War Against Baby Girls*, The New Atlantis (2011), https://goo.gl/g3CXYC (documenting similar phenomenon in China, South Korea, and

other countries); *see also* Mara Hvistendahl, *Where Have All the Girls Gone?*, Foreign Policy (June 27, 2011), https://goo.gl/qNBPce ("feminists in Asia worry that as women become scarce, they will be pressured into taking on domestic roles and becoming housewives and mothers rather than scientists and entrepreneurs").

That States have a compelling interest in stopping such discriminatory practices from continuing and spreading follows necessarily from the logic underlying this country's legal protections against private discrimination. The Supreme Court has held, for example, that States have such a "compelling interest in eliminating discrimination against women" in club admissions, even where the laws conflict with First Amendment associational values. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *see, e.g.*, Wis. Stat. § 106.52. Similarly, both Congress and the States may prohibit the "moral and social wrong" of discrimination by private parties in public accommodations. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964); *see, e.g.*, Wis. Stat. § 106.52, and in other areas, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). And both Congress and the States have legislated to forbid employment and other discrimination against disabled individuals, including by enacting laws such as the Americans With Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 284 (1987); Wis. Stat. § 111.321. Given that stopping private discrimination based upon gender, race, or disability—in areas as diverse as public accommodations, employment, and organization membership—is a "compelling"

State interest, *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988), it follows that the state interest in stopping the *elimination* of classes of people by these same characteristics is even *more* compelling. Surely a State that has the constitutional authority to protect members of the Down syndrome community from being discriminated against in employment or public accommodations can protect those in that same community from wholesale elimination.

Advancing these nondiscrimination interests also sends a powerful signal to members of minority communities that it is "inhumane" to terminate them, thereby affirming the "profound respect" that the State holds for all people, while protecting society as a whole from trends that "further coarsen [it] to the humanity of not only newborns, but all . . . human life." *See Gonzales*, 550 U.S. at 157 (citation omitted). For example, "[s]ex selection in favour of boys is a symptom of pervasive social, cultural, political and economic injustices against women, and a manifest violation of women's human rights." United Nations Population Fund Asia and Pacific Regional Office, *Sex Imbalances at Birth: Current Trends, Consequences, and Policy Implications* (Aug. 2012), https://goo.gl/8eP2XD; *Gender-Biased Sex Selection*, United Nations Population Fund, https://goo.gl/KhqUb2 (last visited Nov. 16, 2017) ("Son preference is an expression of the low value that girls are afforded in some communities."). Similarly, as Frank Stephens, a disability-rights activist who himself has Down syndrome, powerfully testified, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome. Why? Because there are pre-natal screens that will identify Down syndrome in the womb, and we can just

terminate those pregnancies." Frank Stephens, Testimony Before House Subcommittee on Labor, Health and Human Services, and Education 1 (Oct. 25, 2017), https://goo.gl/9WsqPf. Recent efforts to "eliminate" Down syndrome are nothing more than "people pushing [a] particular 'final solution' [ ] that people [with Down syndrome] should not exist. They are saying that [people with Down syndrome] have too little value to exist." *Id.* By enacting laws like Indiana's Antidiscrimination Provisions, the State affirms Mr. Stephens' poignant claim that those like him are equal human beings. *Id.* These laws thus advance the vital cause of demonstrating to society that *all* human beings—including women, racial minorities, and those with disabilities—have lives "worth living."

Finally, that Indiana's Antidiscrimination Provisions apply pre-viability in no way renders them unconstitutional because the State's nondiscrimination interests are not linked to the stage of the unborn child's development. In the traditional abortion-regulation context, the Supreme Court has held that the State's interest in protecting an unborn child's life is "not strong enough" to prohibit a pre-viability abortion. *See Casey*, 505 U.S. at 846, 860 (plurality op.). The logic here is that the more developed the unborn child, the stronger the State's interest in keeping that child alive. *Id.* This reasoning has no applicability to the non-discrimination interests at issue in this case. The social problem that laws like Indiana's Antidiscrimination Provisions address is the discriminatory elimination of classes of human beings by gender, race, or disability. It makes no difference from the point of view of those antidiscrimination interests—including the beliefs of those in the Down syndrome

community that the State should affirm through law that their lives are "worth living"—if unborn children with Down syndrome are systematically eliminated at 10 weeks or 25 weeks. Indeed, confining antidiscrimination provisions to only post-viability would thwart the attainment of these compelling interests because generic screening for purposes of eliminating those with disabilities now regularly takes place well before viability, including "as early as 10 weeks into the pregnancy." *See* Dkt. 54-1:4.

II. Indiana's Respectful-Disposition Provisions Are Constitutional

Indiana's Respectful-Disposition Provisions require an abortion clinic to provide for the "cremat[ion] or inter[nment]" of "miscarried" or "aborted fetus[es]" when in the clinic's "possession," and they prohibit the clinic from disposing of unborn children's remains as medical waste. HEA 1337, §§ 11, 21, 26. These Provisions essentially mandate that abortion clinics give equal dignity and respect to the remains of unborn children as is afforded to the remains of other human beings. *Compare with* Ind. Code §§ 23-14-54-1, -4. Given that these Provisions unquestionably do not interfere with any fundamental, constitutionally protected right, they need only survive rational basis, which is the "most lenient form of judicial review." *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 681 (7th Cir. 2017); *see, e.g.*, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488, (1955). The Provisions easily satisfy this inquiry.

Requiring abortion clinics to dispose of the remains of unborn children in a dignified and respectful manner readily passes the rational-basis test. Since time

immemorial, people have practiced the proper disposition of human remains as a sign of respect. *See* Homer, *The Iliad*, Book XXIV ("And Priam answered [Achilles], . . . 'Nine days, therefore, will we mourn Hector in my house; on the tenth day we will bury him . . . ; on the eleventh we will build a mound over his ashes . . . .'"). Performing a proper disposition of the remains has always been a duty owed to the deceased. *See* Sophocles, *Antigone*, Scene I, Line 413 ("Nevertheless, there are honors due all the dead."). A State enshrining this duty in the law as part of its police power, *see* Ind. Code §§ 23-14-54-1, -4, furthers the rational purpose of showing this type of respect, *see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.").

The district court's core reason for reaching a contrary conclusion—that the State's interests in respectful disposition of unborn children's remains is "[il]legitimate," Short App. 21, because the Supreme Court has held that unborn children are not "persons" for purposes of the Due Process Clause—is entirely inapposite. While the Supreme Court does not consider itself "in a position to speculate" on "the difficult question of when life begins," *Roe*, 410 U.S. at 159, this in no way prevents a State from reaching a considered judgment on this question and legislating appropriately, especially when its regulations do not infringe anyone's rights, *see Planned Parenthood of Minn. v. Minnesota*, 910 F.2d 479, 487–88 (8th Cir. 1990) (upholding materially identical fetal-disposition law); *accord Webster v. Reproductive Health Services*, 492 U.S. 490, 505–06 (1989). Notably, Indiana's

conclusion that unborn children are human beings, worthy of respect, is the core justification for the fetal-homicide laws that the Federal Government and 38 States, including Indiana, have enacted. *See* 18 U.S.C. § 1841; Ind. Code § 35-50-2-16; Wis. Stat. § 940.01(1)(b); *Fetal Homicide Laws*, National Conference of State Legislatures, https://goo.gl/6E719M (last visited Nov. 16, 2017). These laws have survived legal challenge time and again, with courts often rejecting arguments logically indistinguishable from the district court's wrongheaded reliance on *Roe*. *See, e.g.*, *Coleman v. DeWitt*, 282 F.3d 908, 911–13 (6th Cir. 2002); *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987); *California v. Davis*, 872 P.2d 591, 599 (Cal. 1994); *Minnesota v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990); *Pennsylvania v. Bullock*, 913 A.2d 207, 213–14 (Pa. 2006). The rationality of Indiana's respect for unborn human life is also supported by the "majority" of biologists' definition of human beings as including the unborn. Patrick Lee, *Abortion & Unborn Human Life* 71–107 (2nd ed. 2010). And the Supreme Court itself has made clear that States "remain[ ] free, of course, to enact [ ] carefully drawn regulations that further its *legitimate interest* in proper disposal of fetal remains." *See Akron*, 462 U.S. at 452 n.45 (emphasis added); *cf. Gonzales*, 550 U.S. at 160 ("the fast-developing brain of her unborn child, a child assuming the human form").

The district court similarly failed to understand the limited scope of rational-basis review when it accepted Plaintiffs' under-inclusiveness argument: "[e]ven if" Indiana's interests were "legitimate," the district court concluded, the Respectful-Disposition Provisions did not "rationally relate[ ] to" these interests because this law

"does not treat fetal tissue in the [exact] same manner that [Indiana law] treats human remains." Short App. 24; Dkt. 74:24. In particular, the Provisions "allow[ ] patients to take possession of the fetal tissue" and "choose to dispose of that tissue" how they wish, and "allow[ ] for the simultaneous cremation of fetal tissue from an unspecified number of patients." Short App. 24–25. But under-inclusiveness is not a basis to invalidate a law under rational-basis review. *See Williamson*, 348 U.S. at 487–89. "The legislature may select one phase of one field and apply a remedy there, neglecting the others," or "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* at 489.

CONCLUSION

The judgment of the district court should be reversed.

Dated, November 29, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 4,428 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: November 29, 2017

/s/Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2017, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: November 29, 2017

/s/Misha Tseytlin
MISHA TSEYTLIN