No. 20-1434

IN THE

Supreme Court of the United States

LESLIE RUTLEDGE, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF ARKANSAS, ET AL.,
Petitioners,

v.

LITTLE ROCK FAMILY PLANNING SERVICES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Americans United for Life (AUL) was founded in 1971, two years before this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). AUL attorneys are highly-regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including a model bill similar to Arkansas' aimed at protecting preborn human beings from discriminatory abortion. See AUL, DEFENDING LIFE (2021 ed.) (state policy guide providing model bills).

SUMMARY OF ARGUMENT

The Eighth Circuit's decision below has exacerbated a growing circuit conflict over the standard of review used to determine the constitutionality of abortion regulations generally, as well as over the constitutionality of prenatal nondiscrimination provisions designed to safeguard persons with disabilities from being singled out for abortion. Review in this case would enable the Court to address whether the important governmental

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties were provided notice of the filing of this *amicus* brief pursuant to Sup. Ct. R. 37.2(a), and have granted written consent to its filing.

interest in protecting persons with disabilities from stigma and prejudice extends to protecting them when they are most vulnerable—in the womb.

ARGUMENT

I. THE EIGHTH CIRCUIT'S DECISION HAS EXACERBATED A CONFLICT AMONG THE CIRCUITS OVER THE PROPER STANDARD OF REVIEW FOR ABORTION REGULATIONS FOLLOWING *JUNE MEDICAL SERVICES* AND THE CONSTITUTIONALITY OF PRENATAL NONDISCRIMINATION PROVISIONS.

A. This Court Should Grant *Certiorari* to Clarify the Urgent Question of the Standard of Review for Abortion Regulations Following *June Medical Services*.

In *June Medical Services v. Russo*, the Supreme Court held unconstitutional Louisiana's Act 620, a law which required abortion providers to hold active hospital admitting privileges within thirty miles of where the provider performs an abortion. 140 S. Ct. 2103, 2112 (2020) (plurality opinion). The *June Medical* plurality analyzed the statute under *Casey*'s undue burden test, which (the plurality said) explains that "a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id*. at 2120 (alteration in original) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion)). The Court elaborated that

"[*u*]*nnecessary* health regulations impose an unconstitutional undue burden if they have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Casey*, 505 U.S. at 878). However, the *June Medical* plurality then applied *Hellerstedt*'s balancing test, which "consider[s] the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016)). Under the *Hellerstedt* test, the *June Medical* plurality found Act 620 would place a substantial obstacle in the path of women seeking an abortion in Louisiana with "no significant health-related problem that the new law helped to cure." *Id.* at 2130 (quoting *Hellerstedt*, 136 S. Ct. at 2311).

Chief Justice Roberts concurred in the judgment in *June Medical*, and recognized *Casey* only prohibits the state from "impos[ing] an undue burden on the woman's ability to obtain an abortion." *Id.* at 2135. Under *Casey*, "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (quoting *Casey*, 505 U.S. at 877). Conversely, according to Chief Justice Roberts, "Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are 'reasonably related' to a legitimate state interest." *Id.* (quoting *Casey*, 505 U.S. at 878).

The Chief Justice also rejected *Hellerstedt*'s balancing test, noting "such an inquiry could invite a

grand 'balancing test in which unweighted factors mysteriously are weighed.'" *Id.* (citing *Marrs v. Motorola, Inc.*, 577 F.3d 783, 788 (7th Cir. 2009)). Under *Hellerstedt*'s balancing test, "courts . . . would be asked in essence to weigh the State's interests in 'protecting the potentiality of human life' and the health of the woman, on the one hand, against the woman's liberty interest in defining her 'own concept of existence, of meaning, of the universe, and of the mystery of human life' on the other." *Id.* at 2136 (quoting *Casey*, 505 U.S. at 851). As Chief Justice Roberts noted, such a balancing test is subjective, with "no meaningful way to compare" these "imponderable values." *Id.*

Four dissenting justices joined Chief Justice Roberts in rejecting *Hellerstedt*'s balancing test. Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, "agree[d] that *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test." *Id.* at 2154 (Alito, J., with Gorsuch, Thomas, and Kavanaugh, JJ., dissenting). Justice Gorsuch noted "The benefits and burdens [of *Hellerstedt*'s balancing test] are incommensurable, and they do not teach such things in law school." *Id.* at 2180 (Gorsuch, J., dissenting). In total, "five Members of the [*June Medical*] Court reject[ed] the *Whole Woman's Health* cost-benefit standard." *Id.* at 2182 (Kavanaugh, J., dissenting).

This fragmented decision created confusion for lower courts about which *June Medical* opinion is controlling. Under the *Marks* rule, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of

five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The *Marks* rule "is more easily stated than applied" and "has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745–746 (1994). In *June Medical*, Chief Justice Roberts' concurrence supplied the determining vote on the narrowest grounds; the Chief Justice held Act 620 unconstitutional under *Casey*'s undue burden standard. 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment).

The circuit courts have split over whether Chief Justice Roberts' concurrence is controlling under the *Marks* rule. Following *June Medical*, the Sixth and Eighth Circuits found the Chief Justice's concurrence was controlling and, thus, analyzed abortion cases under *Casey*'s undue burden standard. See, *e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 432 (6th Cir. 2020); *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020).

In contrast, the Fifth and Seventh Circuits held Chief Justice Roberts' concurrence did not reestablish *Casey*'s undue burden test. *Whole Woman's Health v. Paxton*, 972 F.3d 649, 652–653 (5th Cir. 2020); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 748 (7th Cir. 2021). The Fifth Circuit noted "the only common denominator between the [*June Medical*] plurality and the concurrence is their shared

conclusion that the challenged Louisiana law constituted an undue burden." *Paxton*, 972 F.3d at 652. The *June Medical* plurality and concurrence "obviously disagreed on . . . the proper test for conducting the undue-burden analysis." *Id*. at 653. As such, "The decision does not furnish a new controlling rule as to how to perform the undue-burden test." *Id*. The Seventh Circuit similarly found there "[wa]s one critical sliver of common ground between the plurality and the concurrence: *Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts." *Box*, 991 F.3d at 748. In turn, according to the Seventh Circuit, the *Marks* rule "applies *only* to that common ground . . . [and] offers no direct guidance for applying the undue burden standard more generally." *Id*.

Yet the Supreme Court has adopted litigation tests from fragmented decisions under the *Marks* rule. The undue burden test, for example, emerged from a plurality opinion in *Casey*. 505 U.S. at 876–877 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.). Chief Justice Roberts recognized this fact in *June Medical*, noting, "Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States* . . . as the narrowest position supporting the judgment." *June Med.*, 140 S. Ct. at 2135 n.1 (Roberts, C.J., concurring) (internal citation omitted); see also *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) (noting that under the *Marks* rule, "the *Casey* joint opinion represents the holding of the Court in that case.").

Even if the plurality opinion does not agree with the concurrence's test, the concurrence's test is controlling. In *Missouri v. Seibert*, for example, the plurality proposed a multi-factor test that examined "whether *Miranda* warnings delivered midstream [during interrogation] could be effective enough to accomplish their object" and protect the defendant's privilege against self-incrimination. 542 U.S. 600, 615 (2004) (plurality opinion). Concurring in the judgment, Justice Kennedy rejected the plurality's multifactor test. *Id.* at 622 (Kennedy, J., concurring in the judgment). If an officer deliberately conducted this type of interrogation, Justice Kennedy proposed suppressing the defendant's post-warning statements "absent specific, curative steps." *Id.* at 621. Notably, neither the plurality nor the dissenting justices endorsed Justice Kennedy's test. *Id.* at 616 n.6 (plurality opinion); *id.* at 624 (O'Connor, J., with Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting).

Yet, "in a somewhat lopsided circuit split" as the Sixth Circuit noted, "Seven [Circuits] have concluded that Kennedy's concurrence is the controlling opinion" in *Seibert* under the *Marks* rule. *United States v. Wooten*, 602 F. App'x. 267, 271 (6th Cir. 2015) (citing cases). Only the Seventh and Tenth Circuits questioned whether Justice Kennedy's concurrence was controlling law. The Seventh Circuit noted "Justice Kennedy's intent-based test was rejected by both the plurality opinion and the dissent in *Seibert*." *United States v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009). Similarly, the Tenth Circuit described, "Determining the proper application of the *Marks* rule to *Seibert* is not easy, because arguably Justice

Kennedy's proposed holding in his concurrence was rejected by a majority of the Court." *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006). Unlike the concurrence in *Seibert*, Chief Justice Roberts' *June Medical* concurrence had the support of the four dissenting justices in rejecting *Hellerstedt*'s balancing test. *June Med.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting). Accordingly, as *Casey* and *Seibert* demonstrate, the Eighth Circuit properly recognized that, under the *Marks* rule and Chief Justice Roberts' *June Medical* concurrence, *Casey*'s undue burden standard is the proper abortion litigation test.

B. This Court Should Grant *Certiorari* to Settle the Conflict Between the Sixth, Seventh, and Eighth Circuits Over Whether Down Syndrome Prenatal Nondiscrimination Regulations are Constitutional.

The Sixth, Seventh, and Eighth Circuits have split over whether Down syndrome prenatal nondiscrimination regulations are constitutional. The Sixth Circuit upheld a prenatal nondiscrimination statute that prohibited abortions based on the unborn child's Down syndrome diagnosis. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (en banc). The Sixth Circuit noted, "The right to an abortion before viability is *not* absolute. The '[S]tate may regulate abortion *before viability* as long as it does not impose an undue burden on a woman's right to terminate her pregnancy.'" *Id.* at 520 (quoting *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003)) (alteration in original). Similarly, the Sixth Circuit noted viability was not "germane" to the

court's analysis because it "does not change the purpose, legitimacy, or weight of the three interests the State proffers here." *Id.* at 521. For its part, the State identified interests in protecting the Down syndrome community from stigma, protecting pregnant women from coercion by doctors, and protecting the integrity of the medical profession. *Id.* According to the Sixth Circuit, the case "is not really about a woman's right or ability merely to obtain an abortion" since a pregnant woman could obtain an abortion after receiving, and even because of, a prenatal diagnosis of Down syndrome. *Id.* Rather, the statute "bars a doctor from aborting a pregnancy when that doctor *knows* the woman's specific reason and that her reason is: the forthcoming child will have Down syndrome and, because of that, she does not want it." *Id.* at 521–522.

Conversely, the Seventh Circuit held unconstitutional a broader prenatal nondiscrimination statute that prohibited abortions for reason of sex, race, or disability. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300, 307 (7th Cir. 2018), rev'd in part on other grounds sub nom., *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019). According to the Seventh Circuit, "These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State." *Id.* at 306. Likewise, below, the Eighth Circuit struck down the Arkansas Down Syndrome Discrimination by Abortion Act ("Act 619") because the court interpreted Act 619 as a complete prohibition on abortions for reason of Down

syndrome. *Little Rock Family Planning Servs.*, 984 F.3d at 690. As the Eighth Circuit noted, "Before viability, a state 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" *Id*. at 689 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), quoting *Casey*, 505 U.S. at 879).

Accepting *certiorari* would also allow the Court to clarify how prenatal nondiscrimination acts fit within *Casey* and *Gonzales*. Under *Casey*, "a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" before viability. *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879). *Casey* upheld a law that required minors to obtain parental consent, or follow a judicial bypass procedure, before obtaining an abortion, 505 U.S. at 899, while *Gonzales* upheld a prohibition on partial-birth abortions. 550 U.S. at 156. As the Eighth Circuit described, "These decisions did not uphold complete bans on pre-viability abortions." *Little Rock Family Planning Servs.*, 984 F.3d at 689.

The Eighth Circuit rejected Petitioners' argument that Act 619 is similar to the pre-viability restrictions the Supreme Court upheld in *Casey* and *Gonzales*. *Id*. at 689. According to the Eighth Circuit, *Casey*'s parental consent law allowed a judicial bypass for minors and *Gonzales* only prohibited "a particularly brutal *method* of abortion." *Id*. (first citing *Casey*, 505 U.S. at 899; and then *Gonzales*, 550 U.S. at 165). In contrast, the Eighth Circuit considered Act 619 "a complete prohibition of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability." *Id*. at 690.

Yet the Eighth Circuit changed its analysis from whether the law is a "complete ban[] on pre-viability abortions" when discussing *Casey* and *Gonzales*, to whether it "is a complete prohibition of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability." *Id.* at 689–690. By limiting the affected class of women to a narrowly drawn group—women who are seeking an abortion because of a prenatal Down syndrome diagnosis—the Eighth Circuit's circular analysis will always end up with a "fraction of one." As Justice Alito noted in his *Hellerstedt* dissent, by changing the denominator in the large fraction test to "those [women] for whom [the provision] is an actual rather than an irrelevant restriction," courts must "use the same figure (women actually burdened) as both the numerator and the denominator." *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., with Roberts, C.J., and Thomas, J., dissenting) (alteration in original). Under this analysis, "that fraction is always '1,' which is pretty large as fractions go," Justice Alito wryly observed. *Id*. Similarly, under the Eighth Circuit's analysis, Act 619 presents a substantial obstacle because the test uses "women actually burdened" as both the numerator and denominator—a "heads-I-win-tails-you-lose" standard which is impossible for the State to overcome.

If the issue is whether Act 619 presents a complete ban on pre-viability abortions, then Act 619 passes constitutional muster. Under Act 619,

> (a) A physician shall not intentionally perform or attempt to perform an abortion with the

> knowledge that a pregnant woman is seeking an abortion solely on the basis of
>
> > (1) A test result indicating Down Syndrome in an unborn child;
> >
> > (2) A prenatal diagnosis of Down Syndrome in an unborn child; or
> >
> > (3) Any other reason to believe that an unborn child has Down Syndrome.

Ark. Code Ann. § 20-16-2103. Act 619 does not present a complete ban to pre-viability abortions. Pregnant women may obtain an abortion for a multiplicity of other reasons, such as financial concerns, lack of partner support, and/or unreadiness to parent. See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Repro. Health 110, 117 (2005). Likewise, women typically seek abortion for "diverse, interrelated reasons" which may emerge from "multiple dimensions of complicated life situations." *Id*. Even if a woman seeks an abortion because of an unborn child's Down syndrome diagnosis, the women can obtain the abortion if she includes the prenatal diagnosis among her other reasons to terminate the pregnancy, not as the only reason. See Ark. Code Ann § 20-16-2103. Finally, the statute turns on the physician's knowledge. *Id*. A doctor is not subject to liability if he or she "perform[ed] such abortions when they do not know that Down syndrome is the reason." *Cf. Preterm-Cleveland*, 994 F.3d at 518.

As discussed below, Arkansas has a legitimate interest in preventing discrimination and stigma against the Down syndrome community, both unborn and born. Disability discrimination is a pressing concern in society, and the Down syndrome community has received heightened protections under statutory law.

In sum, the circuit courts have split over whether *June Medical* overruled *Hellerstedt*'s balancing test. Yet, the *Marks* rule permits litigation tests to emerge from fragmented decisions. The circuit courts have also split over whether prenatal nondiscrimination regulations are constitutional under the undue burden test. Act 619, however, is not a complete bar to pre-viability abortions; it allows pre-viability abortions for other reasons and when the doctor does not know the abortion is due to a prenatal Down syndrome diagnosis.

II. Review in This Case Would Allow the Court to Recognize That States Have a Legitimate Interest in Protecting the Down Syndrome Community Against Stigma and Disability Prejudice Through Prenatal Nondiscrimination Laws.

The United States has a "'lengthy and tragic history' . . . of segregation and discrimination [against persons with disabilities] that can only be called grotesque." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985) (Marshall, J., with Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citation

omitted). As Justice Marshall notes in his partial dissent in *City of Cleburne*, in the latter nineteenth century,

> leading medical authorities and others began to portray the "feebleminded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."

Id. at 462–463 (citations omitted). Disability discrimination is systematic, and "until the twentieth century our legal system was more likely to be used to legitimize discrimination than to prevent it." RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION 1 (8th ed. 2013). In United States history, "court decisions [have] reflected the worst forms of animus, stereotypes, and fears concerning persons with psychiatric and intellectual disabilities, resulting in state sponsored segregation, institutionalization and worse with little or no due process." *Id*.; see, *e.g.*, *Buck v. Bell*, 274 U.S. 200, 208 (1927) (upholding Virginia's forced sterilization of a

"feeble-minded" woman because "[t]hree generations of imbeciles are enough.").

Disability discrimination remains a pressing issue in society today. In recent history, persons with disabilities have suffered civil rights violations, such as voter disenfranchisement, COLKER, THE LAW OF DISABILITY DISCRIMINATION, at 214–216, and unjustified institutionalization. See*, e.g., Olmstead v. L.C.*, 527 U.S. 581, 587 (1999) (holding states must allow persons with mental disabilities to live in community settings rather than in institutions if it is medically appropriate). In some instances, prisoners with disabilities have not received accommodations during confinement. See, *e.g.*, *United States v. Georgia*, 546 U.S. 151 (2006) (inmate with paraplegia alleging total restraint because of an inability to move his wheelchair in the cell and lack of reasonable toileting accommodations which caused him to sit in his own bodily waste). State treatment facilities have restrained and secluded persons with disabilities.[2] Last year, the U.S. Food and Drug Administration banned schools from using electric shock devices on students after a school used the devices to condition the behavior of students with disabilities.[3]

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[2] Minn. Dep't of Hum. Servs., *Person-Centered Practices, Positive Supports and the Jensen Settlement Agreement* (last updated Jan. 4, 2021), https://mn.gov/dhs/general-public/featured-programs-initiatives/jensen-settlement/.

[3] Press Release, U.S. Food and Drug Admin., *FDA Takes Rare Step to Ban Electrical Stimulation Devices for Self-Injurious or Aggressive Behavior* (Mar. 4, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-rare-step-ban-electrical-stimulation-devices-self-injurious-or-aggressive-behavior.

Legislation is an effective tool in preventing disability stigma and prejudice. As the Supreme Court recognized, "How this large and diversified group [of persons with disabilities] is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *City of Cleburne*, 473 U.S. at 442–443. Unfortunately, "the distinctive legislative response, both national and state, to the plight of those [with disabilities] demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice." *Id*. at 443.

Disability rights legislation covers many facets of society. Beginning in 1968, Congress has passed disability rights protections relating to building architecture (Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4157), employment (Rehabilitation Act of 1973, 29 U.S.C. §§ 701–718), education (Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1409) and housing (Fair Housing Act, 42 U.S.C. §§ 3601–3619). In 1990, Congress passed the landmark Americans with Disabilities Act (ADA), a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). For their part, states have passed civil rights statutes protecting persons with disabilities as a class, see, *e.g.*, Arkansas Civil Rights Act of 1993, Ark. Code Ann. § 16-123-105, and instituted *Olmstead* Plans to provide persons with disabilities the opportunity to

live and work in integrated settings. See, *e.g.*, Minn. Olmstead Implementation Off., *About the Plan*, https://mn.gov/olmstead/mn-olmstead-plan/about-mn-olmstead-plan/.[4]

As these statutes recognize, "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society." IDEA, 20 U.S.C. § 1400(c)(1). Even though "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society . . . many people with physical or mental disabilities have been precluded from doing so because of discrimination." ADA, 42 U.S.C. § 12101(a)(1).

Down syndrome is a chromosomal condition that does not impact an individual's ability to lead a happy and fulfilling life. Down syndrome occurs when an individual has an extra copy of chromosome twenty-one, which changes how a baby's body and brain develop.[5] Down syndrome is the most common

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[4] *Olmstead* plans are named after the Supreme Court case, *Olmstead v. L.C.*, 527 U.S. 581 (1999). In *Olmstead*, two women with disabilities sued the state for violating the ADA when the state refused to transfer the women from an institution to a community care residential program. The Court held that "unjustified institutional isolation of persons with disabilities is a form of discrimination" and persons with disabilities have the right to community-based treatment if it is medically appropriate and the state can reasonably accommodate the placement. *Id*. at 600, 607.

[5] *Facts About Down Syndrome*, Centers for Disease Control & Prevention (last reviewed Apr. 6, 2021), https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html.

chromosomal disorder in the United States, with about one in every 700 babies born with the condition.[6] As the Centers for Disease Control and Prevention (CDC) describes, "Each person with Down syndrome has different talents and the ability to thrive."[7] In a study that asked individuals with Down syndrome about their self-perception, nearly ninety-nine percent of individuals with Down syndrome indicated they were happy with their lives. Brian G. Skotko et al., *Self-Perceptions from People With Down Syndrome*, 155 Am. J. Med. Genetics Part A 2360 (2011). An "overwhelming majority of people with [Down syndrome] like who they are and how they look." *Id*. at 2368.

The abortion industry has targeted the Down syndrome community. In the United States, the abortion rate for unborn children diagnosed with Down syndrome is 67%. *Box*, 139 S. Ct. at 1791 (Thomas, J., concurring). In some European countries, this rate is higher, ranging from 77% in France to an almost 100% abortion rate of unborn children with Down syndrome in Iceland. *Id*. at 1790–1791. Unfortunately, parents of children with Down syndrome "have consistently reported that the initial information received from their healthcare providers [about a prenatal Down syndrome diagnosis] was often inaccurate, incomplete, or offensive." Skotko, *Self-Perceptions from People With Down Syndrome*, at 2366. The American College of Obstetricians and Gynecologists' 2007 revised policy "and the publicity it garnered has given Down syndrome an unfortunate

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[6] *Id*.
[7] *Id*.

notoriety; high-lighting it in the minds of expectant parents as the disability to universally consider avoiding." Kruti Acharya, *Prenatal Testing for Intellectual Disability: Misperceptions and Reality With Lessons from Down Syndrome*, 17 Developmental Disabilities Rsch. Revs. 27, 28 (2011). Abortions based solely on Down syndrome send a stigmatizing message to the Down syndrome community that "a life with Down syndrome is not worth living." Pet. for a Writ of Cert. at 3, *Rutledge v. Little Rock Fam. Planning Servs.*, No. 20-1434 (Apr. 9, 2021). Similarly, these abortions are fueled by disability prejudice, because, by definition, the abortion is solely based upon a disability diagnosis. Ark. Code Ann. § 20-16-2103(a).

As stated in *Gonzales v. Carhart*, the Supreme Court "has confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned." 550 U.S. at 128. State laws regulating abortions based solely on Down syndrome diagnosis are valid boundaries that prevent prejudice and stigma against the Down syndrome community, and the greater community of individuals with disabilities.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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