No. 19-2882

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., ON BEHALF OF ITSELF, ITS PHYSICIANS, ITS STAFF, AND ITS PATIENTS AND DO, MSCI, FACOG COLLEEN P. MCNICHOLAS, ON BEHALF OF HERSELF AND HER PATIENTS,

Appellees,

v.

MICHAEL L. PARSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSOURI AND ERIC STEPHEN SCHMITT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSOURI,

Appellants,

KIMBERLY GARDNER, IN HER OFFICIAL CAPACITY AS THE CIRCUIT ATTORNEY FOR THE CITY OF ST. LOUIS,

MD JADE D. JAMES, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE MISSOURI STATE BOARD OF REGISTRATION FOR THE HEALING ARTS, ET AL.,

Appellants.

No. 19-3134

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., ON BEHALF OF ITSELF, ITS PHYSICIANS, ITS STAFF, AND ITS PATIENTS AND DO, MSCI, FACOG COLLEEN P. MCNICHOLAS, ON BEHALF OF HERSELF AND HER PATIENTS,

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v.

MICHAEL L. PARSON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MISSOURI AND ERIC STEPHEN SCHMITT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSOURI,
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Appellants.

Appeal from the United States District Court
for the Western District of Missouri – Jefferson City
Case No. 2:19-cv-04155-BP

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE SUPPORTING DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), AUL has dedicated nearly 50 years to advocating for comprehensive legal protections for human life from conception to natural death. AUL attorneys are highly-regarded experts on the Constitution and pro-life policy, and regularly evaluate various bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including model bills aimed at protecting the health and safety of women and girls who choose abortion. *See* Ams. United for Life, DEFENDING LIFE 2021 (2021 ed.) (state policy guide providing model bills that protect women's health).

[1] No party's counsel authored any part of this brief. No person other than *Amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice.

ARGUMENT

The Eighth Circuit panel's decision has unnecessarily intensified the discord among the circuits over the constitutionality of Down syndrome prenatal nondiscrimination laws. Review of Missouri's appeal by the en banc Court presents an important opportunity for the Court to clarify the state of the law and promote resolution among the circuits over whether the compelling government interest in protecting individuals with disabilities from implicit eugenics policies, stigma, and prejudice extends to the womb—where they are most vulnerable—and to the abortion context which definitively determines whether such individuals may continue to exist at all.

I. The Panel Decision Unnecessarily Exacerbates a Circuit Conflict Over the Constitutionality of Prenatal Nondiscrimination Laws.

The Sixth, Seventh, and Eighth Circuits are at odds over whether Down syndrome prenatal nondiscrimination regulations are constitutional. The en banc Sixth Circuit upheld a prenatal nondiscrimination statute that prohibited abortions based on the unborn

child's Down syndrome diagnosis.[2] 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.'"[3] The Sixth Circuit also 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."[4] The State had identified valid interests in protecting the Down syndrome community from stigma, protecting pregnant women from coercion by doctors, and protecting the integrity of the medical profession which the law appropriately promoted.[5] According to the Sixth Circuit, the case was "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.[6] Rather, the statute "bars a doctor from aborting a pregnancy when that doctor knows the woman's specific

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[2] *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (en banc).
[3] *Id.* at 520 (quoting *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003)) (alteration in original).
[4] *Id.* at 521.
[5] *Id.*
[6] *Id.*

reason and that her reason is: the forthcoming child will have Down syndrome and, because of that, she does not want it."[7]

Drawing the opposite conclusion, the Seventh Circuit held unconstitutional a broader prenatal nondiscrimination statute that prohibited abortions for reason of sex, race, or disability.[8] 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."[9]

To date, two panels of the Eighth Circuit have invalidated prenatal nondiscrimination laws because the laws were interpreted as complete prohibitions on abortions for reason of Down syndrome. When the Eighth Circuit first took up the issue and struck down Arkansas' Down Syndrome Discrimination by Abortion Act, the court concluded, "Before

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[7] *Id.* at 521–522.
[8] *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) [hereinafter *PPINK*], *rev'd in part on other grounds sub nom.*, *Box v. Planned Parenthood of Ind. and Ky., Inc.,* 139 S. Ct. 1780 (2019).
[9] *Id.* at 306.

viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"[10]

And now, an Eighth Circuit panel has again concluded that Missouri's Down Syndrome Provision "bans access to an abortion entirely" because it "completely prohibit[s]" abortion for a person who wants a pre-viability abortion solely because the unborn child may have Down syndrome.[11] The court determined that because "the Down Syndrome Provision would prevent certain patients from getting a pre-viability abortion at all," it "is a ban, not a regulation," and thus "categorically unconstitutional."[12]

The divide among the circuits over the Constitutionality of these prenatal civil rights laws has been intensified by this Court's latest panel decision, but this conflict can be resolved without Supreme Court review.

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[10] *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 689 (8th Cir. 2021), (quoting *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)), *petition for cert. filed*, No. 20-1434 (Apr. 9, 2021).

[11] *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 1 F.4th 552, 561 (8th Cir. 2021).

[12] *Id.*

II. Missouri's Prenatal Nondiscrimination Law Reflects and Reinforces an Array of Federal Civil Rights Legislation that Protects Persons with Disabilities.

By its legislative action, Missouri is augmenting the legacy of federal civil rights legislation. Legislation is an effective tool in preventing disability stigma and prejudice. As the Supreme Court has 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." [13]

The federal government and, almost uniformly, the States have enacted disability rights statutes protecting persons with disabilities as a class. As the Individuals with Disabilities Education Act recognizes, "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."[14] The Americans with Disabilities Acts of 1990 (ADA) "is one of America's most comprehensive pieces of civil rights legislation that

[13] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–443 (1985).
[14] 20 U.S.C. § 1400(c)(1).

prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life."[15] However, these statutes do not cover the fundamental right for Americans with Down syndrome (or any other disability) to remain free from targeted elimination on the basis of immutable characteristics associated with their condition.

In a reflection of federal recognition of the value of persons with disabilities, the Missouri General Assembly passed H.B. 126. In its legislative findings, the General Assembly explained that the "[g]overnment has a legitimate interest in preventing the abortion of unborn children with Down Syndrome because it is a form of bias or disability discrimination and victimizes the disabled unborn child at his or her most vulnerable stage."[16]

The nondiscrimination provision is "narrowly tailored to target invidious discrimination against people whom nobody would deny would be members of protected classes were they allowed to be born."[17] Its

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[15] *Introduction to the ADA*, ADA.gov, https://www.ada.gov/ada_intro.htm (last visited July 21, 2021).
[16] Mo. Rev. Stat. § 188.038.1(6).
[17] *PPINK,* 888 F.3d at 311 (Manion, J., concurring in the judgment in part and dissenting in part).

application is limited to cases in which an abortion is based solely on the possibility of Down syndrome in the unborn child.[18] The law specifies that "[n]o person shall perform or induce an abortion on a woman *if the person knows* that the woman is seeking the abortion solely because of a prenatal diagnosis, test, or screening indicating Down Syndrome or the potential of Down Syndrome in an unborn child."[19] Like the Down syndrome provision at issue in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*, Missouri's law

> appl[ies] only to very specific situations and carefully avoid[s] targeting the purported general right to pre-viability abortion. [It] will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, [it] will not even affect women who consider the protected characteristics along with other considerations.[20]

At least twelve states have passed laws to protect individuals with Down syndrome and other disabilities from eugenic abortion.[21] In light of

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[18] Mo. Rev. Stat. § 188.038.
[19] Mo. Rev. Stat. § 188.038.2 (emphasis added).
[20] 888 F.3d at 316.
[21] *See* S.B. 1457, 55th Leg. 1st Sess. (Ariz. 2021) (amending Ariz. Rev. Stat. § 13-3603.02); Ark. Code Ann. §§ 20-16-2102 to 2107; Ind. Code § 16-34-4-6; Ky. Rev. Stat. § 311.731(2)(c); La. Rev. Stat. § 40:1061.1.2;

societal prejudice against individuals with medical or intellectual disabilities, these states, including Missouri, have decided that "the risk posed by such practices presents a greater risk to humanity than a burden placed on a woman's right to choose to terminate her pregnancy,"[22] but some courts have been interpreting precedent to disallow these protective legal efforts.

The States' legitimate interest in preventing discrimination against persons with disabilities ought to extend to the context of abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) did not address whether the Constitution permits individuals to exercise control over a child's genetic makeup by aborting any child who is suspected of having Down syndrome.[23] For these reasons, the full Court of Appeals should take this opportunity to align with the Sixth Circuit

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Miss. Code Ann. § 41-41-407; Mo. Rev. Stat. § 188.038; N.D. Cent. Code § 14-02.1-04.1; Ohio Rev. Code § 2919.10(B); H.B. 1110, 96th Leg. Sess. (S.D. 2021) (codified at S.D. Codified Laws § 34-23A-90 (eff. July 1, 2021)); Tenn. Code Ann. § 39-15-217; Utah Code § 76-7-302.4.

[22] *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694.

[23] *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health,* 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J, dissenting from the denial of rehearing en banc).

and hold that the States have constitutional authority to forbid intrauterine discrimination against persons with Down syndrome.

III. The States Have an Important, Compelling Interest in Preventing Abortion from Becoming a Tool of Eugenics.

Eugenics poses "a question that is different in both degree and kind from the interest of the state in nascent life."[24] Prenatal nondiscrimination laws like Missouri's H.B. 126 "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[25] Technological advances such as prenatal screening and diagnostic testing are being weaponized against those who do not meet society's standards for perfection and do not yet have voices to challenge those standards. The eugenic theory undergirding this phenomenon is "the notion that diversity in the human population should be reduced to maximize and eventually realize the 'ideal' of a 'more perfect person.'"[26] In response, states like Missouri have embraced an advocacy role to safeguard the rights of their citizens with disabilities, born and preborn. Whereas eugenicists were concerned about "reckless

[24] *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694.
[25] *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).
[26] *Little Rock Fam. Plan. Servs.*, 984 F.3d at 694.

spawning [that] carries with it the seeds of destruction,"[27] States have taken an interest now that the fruits of curated reproduction can entail the destruction of human beings with disabilities through abortion.

Casey does not impede that interest because it "did not consider the validity of an anti-eugenics law."[28] There, the Court considered the constitutionality of particular provisions of the Pennsylvania Abortion Control Act of 1982, none of which prohibited abortion based solely on disability.[29] And though *Casey* did not contemplate a regulation comparable to H.B. 126, it did reject *Roe*'s and its progeny's treatment of all governmental attempts "to influence a woman's decision on behalf of the potential life within her" as unwarranted because it was "incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy."[30] Indeed, "Not all burdens on the right to decide whether to terminate a pregnancy will be undue."[31] Moreover, "using abortion to promote eugenic goals is morally

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[27] *Box,* 139 S. Ct. at 1787.
[28] *Planned Parenthood of Ind. & Ky., Inc.,* 917 F.3d at 536 (Easterbrook, J., dissenting).
[29] *Casey,* 505 U.S. 833 (1992).
[30] *Id*. at 876.
[31] *Id*.

and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered."[32]

Casey affirmed that the *Roe* Court "recognized the State's 'important and legitimate interest in protecting the potentiality of human life.'"[33] The State interest underlying a Down syndrome abortion regulation carries deeper significance than the usual interest in protecting the potentiality of human life. The regulation signifies an interest in the realities that these preborn lives will inevitably exit the womb with Down syndrome—a disability that currently garners special support and protection outside the womb—and that this fact uniquely exposes them as targets for termination while *in* the womb. The right described in *Roe* and *Casey* "is only the right to decide *whether* to have a child, not the right to decide *which* child to have."[34] The eugenic nature of the societal ill the State aims to correct marks H.B. 126 as unique in that it remedies disability discrimination through the means of restricting abortion based exclusively on disability. It cannot be easily

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[32] *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 536 (Easterbrook, J., dissenting).
[33] *Casey,* 505 U.S. at 871, quoting *Roe,* 410 U.S. at 162.
[34] *PPINK,* 888 F.3d at 311 (Manion, J., concurring in the judgment in part and dissenting in part).

dismissed as previability abortion regulations are, where no separate social or humanitarian concerns exist beyond State interest in protecting women's health or fetal life. Here, however, a policy has been enjoined that is otherwise in perfect alignment with existing laws such as the ADA.

Prenatal nondiscrimination laws are necessary to combat stigma and prejudice and to preserve the dignity and well-being of the Down syndrome community. The elimination of disabled members of the human family through abortion begets more widespread rejection of these members both *in utero* and *ex utero*. American society and law has properly repudiated and sought to correct its past inhumane treatment of individuals with disabilities. *Buck v. Bell* condoned forced sterilization to avoid "socially inadequate offspring" and described disabled individuals as "those who already sap the strength of the State."[35] The Court had then argued it was better to prevent the conception of individuals with disabilities through involuntary sterilization "instead of waiting to execute degenerate offspring for crime."[36] Now, these

[35] 274 U.S. 200, 207 (1927).
[36] *Id.*

individuals are being executed preemptively, as innocents. Abortion of unborn children on the basis of the possibility of Down syndrome carries assumptions that they are of lesser value than other human beings and weigh down society rather than enrich it.

Thankfully, some courts have begun to challenge these assumptions. They have insisted on the truth that "The human person has immense creative powers, a range of emotional responses that astound the observant, and a capacity to love and be loved that is at the core of human existence."[37] They have declared that "[E]ach human being is priceless beyond measure" and that "Children with Down syndrome share in each of these fundamental attributes of humanity."[38] By the consent of the people, Missouri and other states are seeking to protect individuals with disabilities against erroneous assumptions and to affirm the truths about their inherent dignity and worth.

However, abortion is still too often presented as a "solution" to the "problem" of a prenatal diagnosis. Parents of children with Down syndrome "have consistently reported that the initial information

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[37] *Little Rock Fam. Plan. Servs.*, 984 F.3d at 693.
[38] *Id.*

received from their healthcare providers [about a prenatal Down syndrome diagnosis] was often inaccurate, incomplete, or offensive."[39] The American College of Obstetricians and Gynecologists' 2007 revised policy "and the publicity it garnered has given Down syndrome an unfortunate notoriety; high-lighting it in the minds of expectant parents as the disability to universally consider avoiding."[40] Abortions based on Down syndrome are fueled by disability prejudice because, by definition, the abortion is solely based upon a disability diagnosis.

Without protection from eugenic abortion, which Missouri aims to provide, this country gives mere lip service in its commitment to individuals with disabilities. Review of H.B. 126 provides an opportunity for states to begin to honor an ongoing nationwide commitment to a particular group of Americans that invites their fellow citizens to higher virtue as it offers fresh perspective on the good life and what it means to be human.

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[39] Brian G. Skotko et al., *Self-Perceptions from People With Down Syndrome*, 155 Am. J. Med. Genetics Part A 2360, 2366 (2011).

[40] Kruti Acharya, *Prenatal Testing for Intellectual Disability: Misperceptions and Reality With Lessons from Down Syndrome*, 17 Developmental Disabilities Rsch. Revs. 27, 28 (2011).

Despite Down syndrome being the most common genetic condition diagnosed in the United States, just 1 in 700 babies, far less than one percent, is born with it.[41] The number would be higher if not for the fact that 67% of children with a prenatal diagnosis are aborted.[42] The Down syndrome community is smaller than it was before prenatal screening became available, and will remain small and potentially dwindle further should it follow European trends.[43] Intentional or not, the limitation of genetic diversity through abortion serves to further the eugenic aim

> to create a super race: one that is deemed to be healthier, smarter, stronger, and more beautiful. The creation of such a cadre of people would undoubtedly lead to greater discrimination against people who are deemed to be "inferior," resulting in a broad attack on diversity of the human population.

Little Rock Fam. Plan. Servs., 984 F.3d at 694. This would naturally correspond to less support and fewer resources for families who do welcome a child with Down syndrome, as well as less funding for, and attention in, research. In a world with fewer and fewer individuals giving

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[41] *Down Syndrome,* March of Dimes (last reviewed Feb. 2020), https://www.marchofdimes.org/complications/down-syndrome.aspx.
[42] *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring).
[43] In some European countries, the rate of abortion when Down syndrome is diagnosed is higher, ranging from 77% in France to almost 100% in Iceland. *Id.* at 1790–1791.

personal witness, by experience or association, to the deep beauty and meaning of a life with Down syndrome, more Americans fearful of the unknown will recommend to others, or themselves choose, abortion for children diagnosed prenatally.

In *Gonzales v. Carhart*, the Court "confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned."[44] "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.'"[45]

Missouri's nondiscrimination law is a valid, reasonable regulation of abortion that seeks to prevent the elimination of children with Down syndrome through eugenic abortion. To conclude otherwise would "constitutionalize the views of the 20th-century eugenics movement."[46]

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[44] 550 U.S. at 128.
[45] *Preterm-Cleveland*, 994 F.3d at 520 (quoting *Women's Med. Prof'l Corp. v. Taft*, 353 F.3d 436, 443 (6th Cir. 2003)) (alteration in original).
[46] *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring).

CONCLUSION

For the reasons discussed herein, the Court's *Amicus* urges this *en banc* court to vacate the panel decision and direct entry of judgment in favor of Appellants.

Respectfully submitted,

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CERTFICATE OF SERVICE

I certify that on July 23, 2021, I electronically filed the foregoing brief with the Clerk of Court throughout the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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