Nos. 19-2882 & 19-3134

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al.,

Plaintiffs-Appellees,

v.

Governor Michael L. Parson, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Missouri
The Honorable Howard F. Sachs
Case No. 2:19-cv-4155-HFS

BRIEF FOR ALLIANCE DEFENDING FREEDOM AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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Corporate Disclosure Statement

Under Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Amicus Curiae Alliance Defending Freedom, a nonprofit entity, states that it has no parent corporation and that it does not issue stock.

Dated: November 21, 2019.

Respectfully submitted,

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Interest of Amicus Curiae

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 invidious discrimination on the basis of race, sex, disability, or genetic makeup.

Under Federal Rule of Appellate Procedure 29(a)(2), Alliance Defending Freedom files this amicus curiae brief with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Alliance Defending Freedom and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Introduction

Just two years ago, Frank Stephens emphatically declared before Congress: "I am a man with Down syndrome and my life is worth living."[1] Mr. Stephens felt compelled to make this self-evident point because of the disturbing movement to eradicate those with Down syndrome by aborting them.[2] As Mr. Stephens put it,

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[1] *See Down Syndrome: Update on the State of the Science and Potential for Discoveries Across Other Major Diseases: Hearing Before the Subcomm. on Labor, Health & Human Servs., Educ., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. (2017) (statement of Frank Stephens), *available at* https://bit.ly/2rBls5Z (emphasis omitted) [hereinafter *Stephens Testimony*].

[2] *Id.*

"people pushing that particular 'final solution' are saying that people like me should not exist. They are saying that we have too little value to exist."[3] So he had to ask members of Congress: "Is there really no place for us in this society?"[4]

Now, this Court must answer that very question. It must decide whether the Constitution guarantees the right to kill a child *in utero* simply because she has or may have Down syndrome. It does not. And to decide otherwise, as the district court did, creates disturbing results. The flawed belief that states must allow doctors to abort a child for *any* reason if she cannot yet survive outside her mother's womb allows the most perverse discrimination in its most severe form. It means that doctors can end the life of an unborn child because she's a girl, because her genetic makeup is unique, or because her parents are biracial.

Missouri chose to prohibit such blatant sex, race, and disability discrimination. The State had compelling reasons to act, and it was free to do so. Those with Down syndrome and other vulnerable members of society deserve protection from invidious and fatal discrimination based on their immutable characteristics. To constitutionalize the ability to destroy them *in utero* based on attributes some disfavor coarsens society, undermines the medical profession's integrity, creates perverse incentives to eliminate rather than help those with

[3] *Id.*

[4] *Id.*

unique struggles, and stigmatizes those now living with characteristics that the eugenic-minded wish to eliminate. This Court should reject each and every one of these harmful results and uphold Missouri's discrimination ban.

Argument

This brief addresses the constitutionality of Missouri's law prohibiting any person from performing an abortion for certain discriminatory reasons, i.e., "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." Mo. Rev. Stat. § 188.038.2 (emphasis added). This carefully tailored law applies only to those who terminate a child's life *knowing* that the *only* reason for the child's death is the belief that the child has or may have Down syndrome. In these extreme circumstances of invidious discrimination, the State has ample justification to intervene and protect its most vulnerable members. And no binding precedent prevents it from banning such discrimination.

I. Missouri's efforts to prevent invidious discrimination against unborn children are constitutional.

The district court struck down Missouri's law protecting those with Down syndrome because it believed that binding Supreme Court precedent compelled that result. The district court was mistaken.

A. The Supreme Court has never precluded states from protecting unborn children from invidious discrimination.

"Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). Justice Thomas made this pronouncement after a three-judge panel of the Seventh Circuit struck down an Indiana law that, much like Missouri's, prohibited eugenic abortion. *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health* (*Planned Parenthood I*), 888 F.3d 300, 303, 305-06 (7th Cir. 2018).

Judge Manion concurred in the panel's decision, opining that striking such laws is, "sadly," mandated by the Supreme Court's *Casey* decision. *Id.* at 311, 320-21 (Manion, J., concurring in part). Judge Easterbrook thought otherwise. Joined by Judges Sykes, Barrett, and Brennan in a dissent from denial of rehearing en banc, Judge Easterbrook explained that "[n]one of the [Supreme] Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health* (*Planned Parenthood II*), 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of rehearing en banc).

Between these competing views about the scope of the Supreme Court's abortion precedent, "Judge Easterbrook was correct." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring). *Casey* "did not decide whether the Constitution requires States to allow eugenic abortions." *Id.* In fact, the abortion advocates in *Casey* wisely chose not to challenge Pennsylvania's ban on sex-selective abortions. *Id.* Doubtless, that was a strategic decision; challenging the law would be too steep a hill to climb. This Court should reject the suggestion that *Casey* somehow held, *sub silentio*, that the unchallenged ban on discriminatory abortion was unconstitutional.

Accordingly, whether a state may prevent eugenic abortion is a question of "first impression," and the Supreme Court would benefit from "further percolation" on the matter. *Id.* at 1784, 1792. This view, made explicit by Justice Thomas, was implied in the majority's denial of certiorari regarding Indiana's law. The Court explained that it was denying review of the government's ability to protect against eugenic abortion because the question had "not been considered by additional Courts of Appeals." *Id.* at 1782 (opinion of the Court).

If Supreme Court precedent already precluded *every* prohibition on pre-viability abortion—no matter how limited or critical—the Court would have simply adopted the Seventh Circuit's decision without comment (just as it reversed a separate issue in that case without argument). And the Court would have had no

reason to ask Courts of Appeals to address the issue. Instead, by waiting for percolation, the Court made clear that it has *not* decided the question and wishes to see how other learned judges confront the novel issue. Accordingly, this Court should decide the validity of Missouri's anti-disability-discrimination law as an issue of first impression.

B. The government can prohibit specific types of particularly troubling abortions without substantially interfering with the ability to procure pre-viability abortions generally.

Supreme Court Justices have criticized that Court's abortion jurisprudence. *E.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("[T]he Court's abortion jurisprudence, including *Casey* and *Roe* . . . , has no basis in the Constitution."). "[G]ood reasons exist for the Court to reevaluate [that] jurisprudence." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015). But even the Supreme Court's murky abortion jurisprudence does not preclude bans on pre-viability abortions under certain conditions. Quite the contrary. In upholding a ban on partial-birth abortions that applied "both previability and postviability" in *Gonzales*, the Court showed that the government can ban pre-viability abortions under particularly troubling conditions without violating the Constitution. *Gonzales*, 550 U.S. at 147.

Missouri's law prohibiting abortions targeting those with Down syndrome does address a particularly troubling situation. Unlike all other abortion laws that

this Court and the Supreme Court have reviewed, Missouri's law addresses whether a doctor can abort a specific child *because of* a specific immutable characteristic—a genetic anomaly. The law does not impact a woman's general ability to determine whether to continue a pregnancy without regard to her child's particular attributes. So, the interests that the Supreme Court's abortion jurisprudence seeks to protect remain intact. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (plurality) ("[T]he right recognized by *Roe* is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" (citation omitted)).[5]

Indeed, courts can ensure that women are generally "entitled to decide whether to bear a child" pre-viability while still recognizing that "there is a difference between 'I don't want a child' and 'I want a child, but only a male' or 'I want only children whose genes predict success in life.'" *Planned Parenthood II*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing en banc). These latter rationales involve "[u]sing abortion to promote eugenic goals," a matter that is "morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered." *Id.* In fact, even many who support a

[5] Still, even *Casey* allowed post-viability abortion bans that include health and life exceptions. *Casey*, 505 U.S. at 846.

woman's ability "to have an abortion if she does not want to have a baby" find themselves "less comfortable when abortion is used by women who don't want to have a particular baby." Amy Harmon, *Genetic Testing + Abortion = ???*, N.Y. TIMES (May 13, 2017), https://nyti.ms/32LIILe.

The type of abortion Missouri prohibits here—targeting a child because of her immutable characteristic—implicates more than the government's general "interest in fetal life." *Casey*, 505 U.S. at 860. It involves "additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158. And states are permitted to "draw[] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned." *Id.* Discriminatorily targeting individuals based on their immutable characteristics falls within the realm of action society justly condemns.

As here, *Gonzales* did not address a ban on pre-viability abortions in general. It upheld a ban on pre-viability abortions involving particularly despicable circumstances. *See Preterm-Cleveland v. Himes*, 940 F.3d 318, 327 (6th Cir. 2019) (Batchelder, J., dissenting) (explaining that a ban on aborting children because of Down syndrome, like *Gonzales*, is "not with a *total ban* against abortion" but "a regulation that prohibit[s] physicians from performing abortions under certain conditions"). And just as the government can ban pre-viability abortions employing a particularly barbaric technique, a state can and should ban abortions

procured for a particularly atrocious reason, including when the child's immutable characteristics do not satisfy someone's subjective standard for the "ideal" child. Such a prohibition will "not affect the vast majority of women who choose to have an abortion without respect to" their child's immutable characteristics. *Planned Parenthood I*, 888 F.3d at 311 (Manion, J., concurring). But, as explained below, it will do much for those with Down syndrome, other vulnerable populations, the medical profession, and a civilized society.

II. Compelling interests exist to halt fatal discrimination against unborn children with unique genetics.

The Missouri Legislature declared that it "has a legitimate interest in preventing abortion of unborn children with Down Syndrome." Mo. Rev. Stat. § 188.038.1(6). Because Missouri's law furthers that legitimate interest, Missouri needs nothing more to justify the discrimination ban. *Gonzales*, 550 U.S. at 146 ("[W]e must determine whether the Act furthers the legitimate interest of the Government . . . ."). But as many jurists have recognized, laws like Missouri's do more than further a *legitimate* interest; such laws promote the government's *compelling* interest in preventing discriminatory abortions. *E.g.*, *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring) (laws like Missouri's "promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics); *Planned Parenthood I*, 888 F.3d at 311 (Manion, J., concurring) (explaining that the state "has a compelling interest in attempting to prevent this type of private

eugenics" and that its prohibition could survive "strict scrutiny"); *Himes*, 940 F.3d at 325 (Batchelder, J., dissenting) (concluding that the state has a compelling interest to ban abortions based on a Down syndrome diagnosis). As discussed below, the justifications for Missouri's law are many.

A. Missouri's interests in preventing discrimination here are at least as strong as those that federal courts and legislation have long recognized.

In many contexts, the Supreme Court "has been zealous in vindicating the rights of people even potentially subjected to race, sex, and disability discrimination." *See Box*, 139 S. Ct. at 1792-93 (Thomas, J., concurring) (collecting cases). And Congress has been similarly solicitous about preventing discrimination. For instance, federal laws prohibit discrimination in employment, *see, e.g.*, 42 U.S.C. § 2000e-2; education, 20 U.S.C. § 1681; housing, 42 U.S.C. § 3601, *et seq.*; and many other contexts. But while Congress has recognized that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society," "society has tended to isolate and segregate individuals with disabilities" and discrimination against them "continue[s] to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(1)-(2).

The result of the discrimination Missouri chose to ban is the most severe possible: death. And while many victims of discrimination can mitigate harm by seeking housing, lodging, employment, goods, or services from those who do not

discriminate, the unborn child has no such opportunity. Discrimination against the child in the womb is final, irreversible, and unavoidable without outside protection. Missouri has a compelling interest to provide that protection, even more so than in other discriminatory contexts.

B. Abortion is used to accomplish eugenic aims.

Tragically, "[t]he use of abortion to achieve eugenic goals is not merely hypothetical." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). Rather, "abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics." *Id.* at 1790. And "[t]echnological advances" for detecting a child's immutable characteristics *in utero* "have only heightened the eugenic potential for abortion . . . . [W]ith today's prenatal screening tests and other technologies, abortion can easily be used to eliminate children with unwanted characteristics." *Id.* at 1784, 1790.

Iceland "was one of the first countries to normalize widespread prenatal testing, in an effort to identify fetal abnormalities and eliminate them through abortion—but it is far from alone." Alexandra DeSanctis, *Iceland Eliminates People with Down Syndrome*, NATIONAL REVIEW (Aug. 16, 2017), https://bit.ly/353ptP6. In 2016, the American Congress of Obstetricians and Gynecologists (ACOG) began recommending that doctors offer genetic testing to *all* pregnant mothers, not just those at elevated risk as per previous guidelines.

ACOG, *Practice Bulletin No. 163: Screening for Fetal Aneuploidy*, 127 OBSTETRICS & GYNECOLOGY (May 2016), *available at* https://bit.ly/2Ocku7R.

The potential for abortion to serve eugenic aims has long been known and even praised in some quarters. Dr. Alan Guttmacher (a former Planned Parenthood president), along with other abortion advocates, "endorsed abortion for eugenic reasons and promoted it as a means of controlling the population and improving its quality." *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring). In fact, some eugenicists horrifyingly "believed that abortion should be legal for the very *purpose* of promoting eugenics." *Id.* at 1789.

Missouri need not turn a blind eye to the use of abortion to further eugenic aims. The State has a compelling interest to stop it. *See, e.g.*, *id.* at 1783.

C. Targeting those with Down syndrome for fatal discrimination *in utero* is a pervasive problem.

In "many countries," people "celebrate the use of abortion to cleanse their populations of babies" with Down syndrome. *Himes*, 940 F.3d at 326 (Batchelder, J., dissenting). Iceland terminates nearly 100% of unborn children diagnosed with Down syndrome. *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring). The rate is 98% in Denmark. *Id.* at 1790-91. In the United Kingdom, it is 90%. *Id.* The United States is not far behind in this widespread eugenic cleansing; its medical professionals abort at least 67% of those diagnosed with Down syndrome. *Id.*; DeSanctis, *supra* (noting that the rate is between 67% and 90%).

Given this reality, Missouri must be allowed to advance its "compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). And courts should not perversely transform the Fourteenth Amendment—with its cherished guarantees of equal protection and due process—to become the very thing that thwarts Missouri from acting to remedy this grave harm.

If this Court prohibits Missouri's protective action, the harm will be great and extend far beyond those with Down syndrome—a genetic variation that is now "the canary in the eugenics coal mine." *Stephens Testimony*, *supra* note 1. For example, Planned Parenthood originally also sought a preliminary injunction against Missouri's ban on abortions procured because of a child's race or sex. Mercifully, Planned Parenthood was unable (or perhaps unwilling) to identify situations in which abortions were obtained on those grounds or to predict future occurrences, so the district court found the issue moot.[6] But those questions still lurk. And the answers are bound with those the Court provides here.

If the bias against having girls were as strong in the United States as in parts of Asia, a blank check for pre-viability abortions—whatever the reason—means that a vast imbalance of males and females is a harm the government must simply

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[6] *See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 2:19-cv-4155-HFS, 2019 WL 4740511, at *1 (W.D. Mo. Sept. 27, 2019).

accept. *See Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (noting that "widespread sex-selective abortions have led to as many as 160 million 'missing' women" in Asia, and that "there are about 50 million more men than women" in India alone). Domestic concern for protecting girls from sex-selective abortions is hardly theoretical. "[R]ecent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States . . . ." *Id.*

The use of abortion to target certain races is also of grave concern. Nationally, the unborn child of a black woman is nearly *3.5 times* more likely to be aborted than the unborn child of a white woman. *Id.* In some areas, "black children are more likely to be aborted than they are to be born alive." *Id.* And while it may be unlikely for a woman to abort her child because the child shares her race, some may choose abortion based on the father's race. This Court should not tolerate such invidious discrimination. *Cf. Loving v. Virginia*, 388 U.S. 1, 11 (1967) (the Supreme Court "has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality'" (citation omitted)).

Whatever can be said of race, sex, and other forms of discrimination *in utero*, one thing is painfully evident: those with Down syndrome are being targeted for destruction in the womb at overwhelming rates. And if Missouri cannot protect them, it can protect no one.

D. Doctors aborting children for discriminatory reasons undermines trust in the medical profession and the provision of care.

The "State has a significant role to play in regulating the medical profession." *Gonzales*, 550 U.S. at 157. And "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

States like Missouri may reasonably conclude that "permitting physicians to become witting accomplices to the deliberate targeting of Down Syndrome babies . . . would do deep damage to the integrity of the medical profession." *See Himes*, 940 F.3d at 326 (Batchelder, J., dissenting); *cf. Gonzales*, 550 U.S. at 160 ("It was reasonable for Congress to think that partial-birth abortion . . . 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'" (citation omitted)). Preventing medical professionals from knowingly participating in discriminatory abortions furthers the state's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

Down syndrome individuals should not have to wonder whether their doctor encourages mothers to abort children because of the misguided belief that a life with Down syndrome is a life not worth living. What level of care can those with genetic differences expect if the medical profession is actively participating in the

eugenic killing and eradication of those who share their characteristics? States have a strong interest in ensuring that their medical professionals are perceived as—and are—healers, not killers.

There is also a legitimate concern that widespread destruction of those with Down syndrome *in utero* stigmatizes not only the children and adults living with Down syndrome today, but "disincentivizes research that might help them in the future." *Planned Parenthood I*, 888 F.3d at 315 (Manion, J., concurring in part). As one man with Down syndrome testified before Congress, "a notion is being sold that maybe we don't need to continue to do research concerning Down syndrome" because "we can just terminate those pregnancies." *Stephens Testimony*, *supra* note 1.

The government has compelling interests in ensuring that the medical community seeks to eliminate medical ailments, not the people who suffer from them. As the geneticist who discovered the chromosomal anomaly associated with Down syndrome put it: "Again and again we see this absolute misconception of trying to defeat a disease by eliminating the patient! . . . Medicine becomes mad science when it attacks the patient instead of fighting the disease." Dr. Jérôme

Lejeune, *21 Thoughts*, *available at* https://bit.ly/2OcOZuf.[7] Missouri has a compelling interest in eliminating such mad science.

E. Constitutionalizing the killing of unborn human beings based on their immutable characteristics will coarsen society and stigmatize those living with the targeted attributes.

"Enshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child . . . would constitutionalize the views of the 20th-century eugenics movement." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring). It would mean that the Constitution supplies a right to abort any child simply because genetic testing shows "a likelihood that the child will be short, or nearsighted, or intellectually average, or lack perfect pitch—or be the 'wrong' sex or race." *Planned Parenthood II*, 917 F.3d at 536 (Easterbrook, J., dissenting from denial of rehearing en banc). It would teach, as one eugenicist suggested, the perverse view that a "eugenic killing" of a human is the moral equivalent of a dog "that kills her misshapen puppies." *See Box*, 139 S. Ct. at 1789 (Thomas, J., concurring) (quoting G. Williams, *Sanctity of Life and the Criminal Law* 20 (1957)). This would have devastating consequences.

[7] *See also* Maj Hulten, *Obituary: Professor Jerome Lejeune*, INDEPENDENT (April 12, 1994), https://bit.ly/33PFHec (Lejeune "crusaded against the prenatal Down's screening programmes" that allowed "identification of foetal Down's syndrome with a view to offering termination of an affected foetus; for Lejeune this was a most unwelcome and contradictory outcome of his early and pioneering research").

"Permitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome perpetuates the odious view that some lives are worth more than others and increases the 'stigma associated with having a genetic disorder.'" *Planned Parenthood I*, 888 F.3d at 315 (Manion, J., concurring in part); *see also* Mo. Rev. Stat. § 188.038.1(6) ("Eliminating unborn children with Down Syndrome . . . is likely to increase the stigma associated with disability.") Praising and promoting the *in utero* elimination of those with Down syndrome "devalues the lives of those living with Down syndrome." *See Planned Parenthood I*, 888 F.3d at 315 (Manion, J., concurring in part).

Constitutionalizing the killing of unborn children because they have Down syndrome will also affect how society thinks and acts. *Cf. Gonzales*, 550 U.S. at 157 (noting Congress's finding that implicitly approving partial-birth abortion "will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life" (citation omitted)). Rather than show compassion and a desire to help those struggling to overcome obstacles that most do not face, society will look on these individuals with regret; regret not that they face difficulties, but that the window of opportunity to kill them has passed. Mo. Rev. Stat. § 188.038.1(6) (eliminating those with Down syndrome "sends a message of dwindling support for their unique challenges" and "fosters a false sense that disability is something that could have

been avoidable"). And their mothers may be viewed as irresponsible and selfish for failing to kill a child with perceived deficiencies, and—in the eyes of the misguided—choosing to "sap the strength of the State." *Buck v. Bell*, 274 U.S. 200, 207 (1927); *see also Himes*, 940 F.3d at 326 (Batchelder, J., dissenting) ("Today, many countries celebrate the use of abortion to cleanse their populations of babies whom some would view—ignorantly—as sapping the strength of society.").

Constitutionalizing eugenics will not only affect the way society views those targeted, it will impact how the targeted view society—and likely themselves. As one man with Down syndrome sadly explained, "I completely understand" that those seeking to eliminate Down syndrome through targeted abortions "are saying that people like me should not exist. They are saying that we have too little value to exist." *Stephens Testimony*, *supra* note 1.

No American should have to experience such a horrific attack on their personhood. When doctors, parents, and interest groups seek to destroy those with disfavored genetic characteristics, it is entirely within a state's prerogative to stand against those forces and alongside those—born and unborn—who share those targeted characteristics.

Conclusion

States have a compelling interest to protect those with Down syndrome from eugenics and discrimination—whether in the classroom, the boardroom, or the

womb. And while this appeal only specifically addresses Missouri's constitutional and governmental authority to protect babies with Down syndrome, the same principles apply to protect unborn children from fatal discrimination based on sex, race, or other immutable characteristics. In other words, this Court is not deciding simply the weighty question of whether there is a constitutional right to kill unborn children based on their genetic disability. The Court is also deciding whether there is a constitutional right to kill unborn children because they are girls, or a disfavored race, or conceived by a biracial couple.

The Supreme Court created the right to abortion out of silence. *Box*, 139 S. Ct. at 1793 (Thomas, J., concurring) ("The Constitution itself is silent on abortion."). This Court must now determine the scope of that judicially created right. The Court can expand it to a new extreme that many abortion supporters find troubling and the Supreme Court has never sanctioned. Or the Court can decide this question of first impression consistent with the Supreme Court's long tradition of protecting against invidious discrimination based on immutable characteristics. The Court should choose the latter course.

Just as *Buck v. Bell* "gave the eugenics movement added legitimacy and considerable momentum," injecting into the Constitution's silence the unfettered right to kill unborn children because they possess an extra chromosome will fan the eugenic flames that have consumed parts of Europe and now burn in the United

States. *Id.* at 1786. The Constitution and Supreme Court precedent allow Missouri's effort to douse those flames.

Dated: November 21, 2019

Respectfully submitted,

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This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 4615 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Word 2013 using a proportionally spaced typeface, 14-point Times New Roman.

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Dated: November 21, 2019

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Certificate of Service

I hereby certify that on November 21, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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