No. _____

In the Supreme Court of the United States

ERIC S. SCHMITT, in His Official Capacity as Attorney General of Missouri, *et al.*,

Petitioners,

v.

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

ERIC S. SCHMITT
Missouri Attorney General
D. JOHN SAUER
Solicitor General
Counsel of Record
JUSTIN D. SMITH
Deputy Attorney General
JESUS A. OSETE
Deputy Solicitor General
OFFICE OF THE MISSOURI ATTORNEY GENERAL
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov

Counsel for Petitioners

QUESTIONS PRESENTED

Missouri's House Bill 126 ("HB 126"), enacted in 2019, prohibits medical providers from performing abortions when the provider knows that the sole reason for the abortion is a pretrial diagnosis or screening indicating that the unborn child does, or may, have Down syndrome (the "Down Syndrome Provision"). The same bill prohibits abortion providers from performing abortions after eight weeks, fourteen weeks, eighteen weeks, and twenty weeks of gestational age, alternatively (the "Gestational Age Restrictions"). The Eighth Circuit invalidated both the Down Syndrome Provision and the Gestational Age Restrictions as "categorically unconstitutional" under *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992). The questions presented are:

1. Whether Missouri's restriction on abortions performed solely because the unborn child may have Down syndrome is categorically invalid under *Casey* and *Roe* v. *Wade*, 410 U.S. 113 (1973), or whether it is a valid, reasonable regulation of abortion that seeks to prevent the elimination of children with Down syndrome through eugenic abortion?

2. Whether Missouri's restrictions on abortions performed after eight, fourteen, eighteen, and twenty weeks of gestational age are categorically invalid, or whether they are valid, reasonable regulations of abortion that advance important state interests?

3. Whether the "penumbral" right to abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973), and partially reaffirmed in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), should be overruled?

PARTIES TO THE PROCEEDING

Petitioners are Eric S. Schmitt, in his official capacity as Attorney General of Missouri; Michael L. Parson, in his official capacity as Governor of Missouri; Jade D. James, in her official capacity as President of the Missouri State Board of Registration for the Healing Arts; Sarah Martin, in her official capacity as Secretary of the Missouri Board of Registration for the Healing Arts; Sammy L. Alexander, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; James A. DiRenna, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; Jeffrey S. Glaser, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; Katherine J. Matthews, in her official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; Naveed Razzaque, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; David E. Tannehill, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; Marc K. Taormina, in his official capacity as a Member of the Missouri State Board of Registration for the Healing Arts; and Robert Knodell, in his official capacity as acting Director of the Department of Health & Senior Services of the State of Missouri.

Respondents are Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., on behalf of itself, its physicians, its staff, and its patients; Dr. Colleen McNicholas, on behalf of herself and her patients; and Kimberly Gardner, in her official capacity as the Circuit Attorney for the City of St. Louis.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Reproductive Health Services of Planned Parenthood of the St. Louis Region* v. *Parson*, Nos. 19-2882, 19-3134 (8th Cir.) (opinion affirming the orders of the district court, issued June 9, 2021); and
- *Reproductive Health Services of Planned Parenthood of the St. Louis Region* v. *Parson*, No. 2:19-cv-4155-HFS (W.D. Mo.) (orders granting preliminary injunctions entered on August 27, 2019, and September 27, 2019).

There are no other proceedings in state or federal court or this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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In 1982, Dr. Walter L. Owens, an obstetrician in Bloomington, Indiana, delivered "Baby Doe," an infant with Down syndrome and a trachea-esophageal fistula. Dr. Owens recommended that Baby Doe should be denied routine surgery to correct the fistula and left to die of starvation and thirst. In sworn testimony, Dr. Owens stated:

> I insisted upon telling the parents … that if this surgery were performed and it were successful and the child survived, that this would still not be a normal child. That it would still be a mongoloid, a Down's syndrome child with all of the problems that even the best of them have. … Some of these children, as I indicated in my testimony to Judge Baker, are *mere blobs*. … [Their] talk consists of a single word or something of this sort at best. … These children are quite incapable of telling us what they feel, and what they sense, and so on.

C.A. App. 515–16 (emphasis added); *see also* Pet., *Infant Doe* v. *Bloomington Hosp.*, at 8 (No. 83-437), *denied* 104 S. Ct. 394 (Nov. 7, 1983).

Thirty-eight years later, on November 7, 2020, Chris Nikic became the first person with Down syndrome to complete an Ironman triathlon. Kate Santich, *Maitland Triathlete Chris Nikic 1st Person with Down Syndrome to Finish Ironman*, ORLANDO SENTINEL (Nov. 9, 2020). Chris's father said, "From the time he was born, we were told by everyone that he'd never do anything or amount to anything or be able to accomplish anything [beyond] being able to tie his own shoes." *Id.* (alteration in original). "The doctors and experts said I couldn't do anything," Chris told a reporter after his triumph. "So I said, 'Doctor!

Experts! You need to stop doing this to me. You're wrong!'" *Id.*

At mile 10 of the marathon, the final leg of Chris's Ironman, he almost gave up due to weakness and extreme pain. At that point, "Nik Nikic clutched his son, drew him close and whispered in his ear: 'Are you going to let your pain win, or let your dreams win?' … 'My dreams,' he told his father, 'are going to win.'" Kurt Streeter, *Chris Nikic, You Are an Ironman. And Your Journey Is Remarkable*, N.Y. TIMES (Nov. 16, 2020), https://nyti.ms/3y3geh8.

Our society has come a long way in 39 years, since doctors viewed people like Chris Nikic as "mere blobs" who "are quite incapable of telling us what they feel, and what they sense." C.A. App. 516. (Chris now has 113,000 followers on Instagram.) But despite these advances, deeply entrenched forces within our medical establishment continue to treat unborn children with Down syndrome as "mere blobs." Unborn children with Down syndrome are aborted at epidemic rates. Medicalized discrimination and directive counseling contribute heavily to their elimination. "When it comes to testing for Down syndrome, the impact of genetic testing and counseling is clear—abortions." Arthur L. Caplan, *Chloe's Law: A Powerful Legislative Movement Challenging a Core Ethical Norm of Genetic Testing*, PLOS BIOLOGY 13(8) (Aug. 2015).

In the United States, "abortion rates for Down syndrome infants … are at least 67% after a prenatal diagnosis," and may be as high as 93 percent. C.A. App. 526, 434–35. "In Iceland, the abortion rate for children diagnosed with Down syndrome in utero approaches 100%," and the rate is "98% in Denmark,

90% in the United Kingdom, 77% in France, and 67% in the United States." *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1790–91 (2019) (Thomas, J., concurring). "[A]bortion is an act rife with the potential for eugenic manipulation," *id.* at 1787, and it is used to eliminate people with Down syndrome solely because of their disability. They are now one generation away from complete elimination.

In the face of this genocidal crisis, Missouri and at least 11 other States have enacted laws restricting the eugenic abortion of the disabled, especially those with Down syndrome. In 2019, this Court declined to review the Seventh Circuit's decision invalidating one of these laws—Indiana's—because no Circuit split yet existed. *Box*, 139 S. Ct. at 1782 (Thomas, J., concurring). Since then, a clear and well-developed split of authority has emerged. Two more Circuits—the Sixth and Eighth—have addressed the validity of laws restricting the abortion of children with Down syndrome enacted by three more States—Missouri, Arkansas, and Ohio. The en banc Sixth Circuit has upheld Ohio's law, while the Eighth Circuit has followed the Seventh Circuit in invalidating Missouri's and Arkansas's laws.[1] There are now "compelling reasons" for this Court to review the question. Sup. Ct. R. 10.

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[1] Arkansas recently filed a petition for writ of certiorari seeking review of the Eighth Circuit's decision invalidating its law, raising similar issues to this petition. *See Rutledge* v. *Little Rock Family Planning*, No. 20-1434 (Petition filed Apr. 9, 2021); *see also* Br. of Missouri and 21 Other States as *Amici Curiae* Supporting Petitioner *in* No. 20-1434 (filed May 13, 2021).

And the question is one of tremendous urgency. Eugenic abortion of children with Down syndrome at genocidal levels is decimating the Down syndrome community in America on a daily basis. Children with Down syndrome contribute unique beauty, joy, and diversity to their families and society. Yet the entire Down syndrome community may, in upcoming years, simply dwindle away. This Court should not delay in resolving this issue of critical importance.

Just one month ago, in *Dobbs* v. *Jackson Women's Health Organization*, No. 19-1392 (U.S.) (order dated May 17, 2021), this Court granted certiorari to review the question "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." The validity of Missouri's Down Syndrome Provision presents the Court with an additional, critical dimension of that very question. The Circuits that have invalidated restrictions on abortions of children with Down syndrome, like the Eighth Circuit below, have all relied on the mistaken notion that any prohibition on pre-viability elective abortions is categorically unconstitutional—the very proposition to be reviewed in *Dobbs*. This disturbing outcome—*i.e.*, holding that States may not act to prevent the eugenic elimination of an entire disabled community—demonstrates the absurdity of giving a positive answer to the question presented in *Dobbs*. Considering the validity of Missouri's Down Syndrome Provision in parallel with Mississippi's 15-week gestational-age restriction at issue in *Dobbs* will permit the Court to consider two important dimensions of the same question—*i.e.*, "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."

OPINIONS BELOW

The district court's opinion granting a preliminary injunction against Missouri's Gestational Age Restrictions, Mo. Rev. Stat. §§ 188.056, 188.057, 188.058, and 188.375, is reported at 389 F. Supp. 3d 631 (W.D. Mo. Aug. 27, 2019), and reprinted at 38a–54a of the Appendix.

The district court's opinion granting a preliminary injunction against Missouri's Down Syndrome Provision, Mo. Rev. Stat. § 188.038.2, is reported at 408 F. Supp. 3d 1049 (Sept. 27, 2019), and reprinted at 31a–37a of the Appendix.

The Eighth Circuit's opinion affirming both of the district court's orders is not yet reported in the Federal Reporter. It is available at -- F.4th --, 2021 WL 2345256 (8th Cir. June 9, 2021), and reprinted at 1a–30a of the Appendix.

JURISDICTION

The Court of Appeals issued its judgment on June 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution is reproduced at App. 55a–56a. Sections 188.026, 188.038, 188.056, 188.057, 188.058, and 188.375 of the Missouri Revised Statutes are reproduced at App. 57a–82a.

STATEMENT OF THE CASE

A. The Medical Establishment's History of Treating Children with Down Syndrome Has Been "Dominated by Discrimination."

Our Nation has a recent, shameful, and continuing history of medicalized discrimination against people with Down syndrome. "[T]he history of the medical establishment's approach to Down syndrome over the last century has been dominated by discrimination." C.A. App. 513. This discrimination was rooted in the early twentieth-century eugenic movement's rejection of the "feeble-minded" as "unfit" and worthy of "elimination." *Box*, 139 S. Ct. at 1784–86 (Thomas, J., concurring). Until the 1980s, "forced sterilization programs, the routine recommendation of institutionalization, and the denial of medical care to those with complications related to Down syndrome were the rule." C.A. App. 513. "Sterilization, lobotomies, experimental 'treatments' and physical abuse were common at these facilities." C.A. App. 514. "[T]he care provided the disabled in institutions" was "horrific," and the facilities were "characterized as 'hardly more than dying bins.'" C.A. App. 514. Children with Down syndrome were prime targets for sub-human treatment. As noted above, in court testimony in 1982, the obstetrician in the infamous "Baby Doe" case in Indiana described children with Down syndrome as "mere blobs." C.A. App. 516.

This medicalized discrimination was lethal for persons with Down syndrome. "The mean life expectancy for individuals with Down syndrome in 1960 was 10 years. It had progressed to 47 years in 2007," C.A. App. 513—and it now has advanced to 60 years. George Will, *The Real Down Syndrome*

Problem: Accepting Genocide, WASH. POST (Mar. 14, 2018). Why did the life expectancy for children with Down syndrome increase so dramatically? "It was not until well into the 1980s that the medical profession uniformly abandoned recommendations for institutionalization," and that "institutions in which Down syndrome individuals were neglected socially, nutritionally and medically" were closed. C.A. App. 513. "It was also not until well into the later 1980s that the medical community began to universally consider cardiac and other interventions and surgeries for infants with Down syndrome, and abandoned recommendations for institutionalization." C.A. App. 513.

This institutionalization, abuse, and neglect of children with Down syndrome came to an end, but its demise was imposed on the medical establishment from outside. "[P]olitical action spearheaded by parent and disability rights groups, not physicians … forced the medical community to extend commonly accepted medical interventions to Down syndrome patients." C.A. App. 513. "It was the determination of families and advocacy groups," not physicians, "that led to the reversal of most of the obvious discriminatory medical practices suffered by the Down syndrome community for decades." C.A. App. 515.

This medicalized discrimination was not eradicated, however. Pervasive biases against people with Down syndrome persist in the medical profession, and they are reflected in widespread practice of eugenic abortion of unborn children with Down syndrome. "[A]bortion is an act rife with the potential for eugenic manipulation," and "a growing body of evidence suggests that eugenic goals are

already being realized through abortion." *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring). "The eugenicist impulse on display in *Buck* [v. *Bell*], and amplified in its aftermath, is no mere relic of history. 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." *Preterm-Cleveland* v. *Himes*, 940 F.3d 318, 326 (6th Cir. 2019) (Batchelder, J., dissenting), *opinion vacated by en banc court*, 944 F.3d 630 (6th Cir. Dec. 13, 2019).

The entrenched biases of the medical profession influence parents of children with Down syndrome at their point of greatest vulnerability—*i.e.*, immediately upon learning of a prenatal screening or diagnosis indicating Down syndrome. *See* C.A. App. 520; *see also Am. College of Obstetricians and Gynecologists, Committee Opinion No. 393: Newborn Screening* (2007). When it comes to Down syndrome, "[u]nlike all other screening programs for a host of disorders, these prenatal genetic screenings offer no corrective intervention or earlier introduction of therapies to deal with a condition." C.A. App. 524. All too often, in the medical mind, "[t]he 'cure' for Down syndrome is the elimination of the infant." C.A. App. 524.

Thus, when screening or diagnostic tests report the possibility of Down syndrome, the counseling process is heavily tilted toward abortion. "While non-directive counseling is a stated aim for prenatal counseling, the prejudices of providers and educational materials invariably impact the provision of information supplied to mothers and families." C.A. App. 521. Several studies indicate that the counseling received by parents at their vulnerable moment of first diagnosis heavily favors abortion. One survey found that, among women receiving genetic counseling,

"83% reported they did not receive balanced counseling regarding the quality of life for children with disabilities." C.A. App. 521. Another survey of prenatal screening pamphlets found that "[n]early one half of the statements portrayed a negative message pertaining to Down syndrome, while only 2.4% of the statements conveyed a positive image of Down syndrome." C.A. App. 521. Another survey of medical professionals found that "[f]or Down syndrome, 60% of obstetricians and 40% of geneticists reported counseling for termination of the pregnancy in a directive manner." C.A. App. 522. Yet another survey found that "[g]enetic counselors were more likely to emphasize clinical information and negative aspects of the diagnosis, while parents valued information regarding the abilities and potential of individuals with Down syndrome." Linda L. McCabe & Edward R.B. McCabe, *Call for Change in Prenatal Counseling for Down Syndrome*, 158A AM. J. OF MED. GENETICS 482, 482 (Feb. 7, 2012). Likewise, in Iceland, a genetic counselor admitted that parents receive "'heavy-handed genetic counseling' that is influencing 'decisions that are not medical.'" Will, *The Real Down Syndrome Problem*, *supra*.

In short, "many women report feeling pressured by their doctors … to choose abortion if the test reveals Down syndrome or other abnormalities. It is taken for granted in the medical community that no woman would carry a Down-syndrome pregnancy to term." Alexandra DeSanctis, *Iceland Eliminates People with Down Syndrome*, NATIONAL REVIEW (Aug. 16, 2017). And the practical outcome of such medicalized bias is undeniable: "When it comes to testing for Down syndrome, the impact of genetic testing and

counseling is clear—abortions." Caplan, *Chloe's Law*, *supra*.

In this case, Plaintiffs' expert filed his initial declaration emphasizing that Down syndrome is marked by intellectual disability, congenital heart disease, shortened life expectancy, and significant care into adulthood—without saying anything positive about the lives of people with Down syndrome. C.A. App. 135 (Bebbington Decl. ¶ 13). As Missouri's expert noted, this negative focus "is consistent with the judgmental terminology offered by physicians who consciously or not, perpetuate the subtle discrimination that diminishes the value of lives of those with Down syndrome." C.A. App. 512. Tellingly, Plaintiffs' expert failed "to mention anything positive about the impact of the lives of Down syndrome individuals." C.A. App. 519. Such views provide "a glimpse into the biases and negativism of many obstetrical providers that provides fuel for the epidemic of Down syndrome abortions." C.A. App. 520. This "focus[] on difference, deficiencies, illness, and burden to others" is "out-dated and lacks appreciation for established strengths of this population of individuals [and] the joy they bring to their families." C.A. App. 433.

And this negative focus is wholly divorced from reality. Surveys demonstrate "that the overwhelming majority of people with Down syndrome they surveyed indicate they live happy and fulfilling lives," and that "the overwhelming majority of parents surveyed are happy with their decision to have their child with Down syndrome and indicate that their sons and daughters are great sources of love and pride." C.A. App. 518. "[M]edical literature and parent reports clearly show that families with a Down syndrome

member believe they are better for it," at rates as high as 97 and 99 percent. C.A. App. 526; *see also Planned Parenthood of Indiana and Kentucky, Inc.* v. *Comm'r of Indiana State Dep't of Health*, 888 F.3d 300, 315–16 (7th Cir. 2018) ("*PPINK*") (Manion, J., concurring in the judgment in part and dissenting in part). Empirical research shows that "mothers, fathers, brothers, sisters, and people with [Down syndrome] were overwhelmingly content and satisfied with their lives." C.A. App. 438. In a typical reaction, one parent of a child with Down syndrome stated: "It is the most beautiful experience of my life. I have no regret and would not change anything if it was possible." C.A. App. 439.

The negative attitudes of the medical profession lag behind those of society as a whole, which has come to accept and celebrate people with Down syndrome. Indeed, "[m]any families are eager to adopt children with Down syndrome," and there are long wait lists to do so. Heidi Lindh et al., *Characteristics and Perspectives of Families Waiting to Adopt a Child with Down Syndrome*, 9 GENETICS IN MED. 235, 235 (Apr. 2007).

Notwithstanding the beauty and happiness associated with Down syndrome in real life, medicalized biases persistently favor eugenic abortion. Among other factors, "prenatal testing which targets the identification of Down syndrome infants," "counseling which offers little humanity and focuses on intellectual impairment and medical conditions," and "a bias in the obstetrical community to personally consider abortion for their own child with Down syndrome," have created "an environment which produces abortion rates for Down syndrome infants at epidemic proportions." C.A. App. 524.

In sum, the "intolerance and subtle discrimination of a culture toward those with intellectual impairment," C.A. App. 523, results in the abortion of children with Down syndrome at genocidal levels—at rates between 67 to 93 percent in the United States. C.A. App. 526, 434. The rates in other Western countries are even higher—approaching 100 percent. *Box*, 139 S. Ct. at 1790–91 (Thomas, J., concurring); *see also* C.A. App. 435. Iceland and similar countries "celebrate the use of abortion to cleanse their populations of babies" with Down syndrome. *Preterm-Cleveland*, 940 F.3d at 326 (Batchelder, J., dissenting). Thus, in certain nations, the entire community of Down syndrome people is on the brink of elimination, and the United States is rapidly following that trend. In the face of this imminent crisis, Missouri enacted its Down Syndrome Provision.

B. Missouri's Down Syndrome Provision.

On May 17, 2019, the Missouri General Assembly enacted House Bill 126 ("HB 126"), which Governor Parson signed into law on May 24, 2019. C.A. App. 241–270.

HB 126 includes a restriction on abortions based solely on the possibility of Down syndrome in the unborn child. App. 72a; Mo. Rev. Stat. § 188.038. The General Assembly provided 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." App. 72a; Mo. Rev. Stat. § 188.038.2.

In support of this provision, the Missouri General Assembly made specific legislative findings. It found that "[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." App. 72a; Mo. Rev. Stat. § 188.038.1(6). It found that "[e]liminating unborn children with Down Syndrome raises grave concerns for the lives of those who do live with disabilities." *Id.* And it found that "[e]liminating unborn children with Down Syndrome … sends a message of dwindling support for their unique challenges, fosters a false sense that disability is something that could have been avoidable, and is likely to increase the stigma associated with disability." *Id.*

Missouri is one of at least twelve States that have enacted restrictions to protect persons with Down syndrome and other disabled communities from eugenic abortion. *See* Mo. Rev. Stat. § 188.038.2; 2021 Ariz. Sess. Laws ch. 286, § 2 (amending Ariz. Rev. Stat. § 13-3603.02); Ark. Code Ann. 20-16-2102 to 2107; Ind. Code § 16-34-4-6; N.D. Cent. Code § 14-02.1-04; Ohio Rev. Code § 2919.10(B); Ky. Rev. Stat. § 311.731(2)(c); La. Rev. Stat. § 40:1061.1.2; Miss. Code Ann. § 41-41-407; HB 1110, 96th Leg. Sess. (S.D. 2021) (enacted and codified at SD Stat. § 34-23A-90 (eff. July 1, 2021)); Tenn. Code Ann. § 39-15-217; Utah Code § 76-7-302.4. *See also Box*, 139 S. Ct. at 1783 n.2 (Thomas, J., concurring) (citing state statutes). Similar legislation is under consideration in many other States. Guttmacher Institute, *State Legislation Tracker: Abortion Due to Genetic Anomaly Banned* (visited June 29, 2021), *at*

https://www.guttmacher.org/state-policy (noting that legislation to ban abortions due to genetic anomaly has been introduced in 21 more States).

C. Missouri's Gestational Age Restrictions.

HB 126 also restricted abortions based on the unborn child's gestational age. Section 188.056 of the statute provides that "no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency." App. 74a; Mo. Rev. Stat. § 188.056.1. Section 188.057 provides that "no abortion shall be performed or induced upon a woman at fourteen weeks gestational age or later, except in cases of medical emergency." App. 76a; Mo. Rev. Stat. § 188.057.1. Section 188.058 provides that "no abortion shall be performed or induced upon a woman at eighteen weeks gestational age or later, except cases of medical emergency." App. 78a; Mo. Rev. Stat. § 188.058.1. And Section 188.375 provides that "no abortion shall be performed or induced upon a woman carrying a late-term pain-capable unborn child, except in cases of medical emergency," where "the phrase 'late-term pain-capable unborn child' shall mean an unborn child at twenty weeks gestational age or later." App. 80a; Mo. Rev. Stat. § 188.375 (collectively, the "Gestational Age Restrictions").

To support these provisions, the Missouri General Assembly made fifty detailed factual findings. C.A. App. 246–251, 263–264. Among many others, the General Assembly made findings about the development of the unborn child's capability to feel pain, including scientific findings regarding the neurophysical basis of pain-capability between 14 weeks and 20 weeks' gestation. App. 61a–63a; Mo.

Rev. Stat. § 188.026.2(17)–(23). The General Assembly found that the predominant method of second-trimester abortion in Missouri is dilation and evacuation ("D&E"), which "includes the dismemberment, disarticulation, and exsanguination of the unborn child" while still alive, and that this method of abortion is "brutal." App. 63a; Mo. Rev. Stat. § 188.026.2(24)–(25). In addition, the General Assembly found that "[a]bortion procedures performed later in pregnancy have a higher medical risk for women," and that "the relative risk increases exponentially at later gestational ages" after eight weeks' gestation, including both "physical and psychological consequences." App.65a–66a; Mo. Rev. Stat. § 188.026.2(33)(a)–(d), (34). The legislature also found that the vast majority of Missouri women seeking abortions do so before 18 weeks and 20 weeks of gestational age. App. 66a; Mo. Rev. Stat. § 188.026.2(35). Missouri found that HB 126 serves critical state interests, including its sovereign interest in "[p]reserving the integrity of the medical profession" by "regulating and restricting practices that might cause the medical profession or society as a whole to become insensitive, even disdainful, to life." App. 69a; Mo. Rev. Stat. § 188.026.5(5).

In enacting HB 126, Missouri joined at least 21 other States in prohibiting abortion of unborn children at or near 18 to 20 weeks' gestational age. C.A. App. 681 (citing 22 state statutes).

D. Lower Court Proceedings.

On July 30, 2019, Respondents Reproductive Health Services of Planned Parenthood of the St. Louis Region and Dr. Colleen McNicholas filed facial challenges to the Down Syndrome Provision and the

Gestational Age Restrictions. C.A. App. 25–55. Respondents moved for a preliminary injunction. C.A. App. 71-75. In support of their motion, however, Plaintiffs did not submit evidence to dispute most of the State's detailed legislative findings that set forth its justification for HB 126. See C.A. App. 76–177.

Missouri opposed Plaintiffs' request for preliminary injunction. C.A. App. 195–240. Missouri submitted one factual and six expert declarations supporting its legislative findings and its opposition to injunctive relief. C.A. App. 271–539. Missouri's expert declarations included two affidavits addressing the validity of the Down syndrome provision in detail, as well as an affidavit addressing the impact of aborting disabled children on the medical profession. C.A. App. 370–73 (Curlin Decl.); C.A. App. 432–41 (Coleman Decl.); C.A. App. 509–27 (McCaffrey Decl.).

On August 27, 2019, the district court granted a preliminary injunction against the enforcement of the Gestational Age Restrictions. App. 53a. On September 27, 2019, the district court granted a preliminary injunction against the enforcement of the Down Syndrome Provision. App. 37a. The district court held that the Gestational Age Restrictions and the Down Syndrome Provision constituted pre-viability prohibitions on abortion that were "categorical[ly]" invalid under *Casey* and *Roe*. App. 43a; 389 F. Supp. 3d at 635; *see also id.* at 634 n.3.

Missouri appealed both decisions to the U.S. Court of Appeals for the Eighth Circuit. On June 9, 2021, the Eighth Circuit affirmed the district court's orders in a 2-1 decision. App. 2a, *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region* v. *Parson*, -- F.4th --, 2021 WL 2345256, at *1 (8th Cir. June 9,

2021). The Eighth Circuit held that Missouri's Gestational Age Restrictions constituted "bans" on pre-viability abortions, and that such "[b]ans on pre-viability abortions are categorically unconstitutional." *Id.* at *3–4, App. 8a. Likewise, the Court held that the Down Syndrome Provision "bans access to 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. *Id.* at *4, App. 11a. Because "the Down Syndrome Provision would prevent certain patients from getting a pre-viability abortion at all," the Eighth Circuit reasoned, it "is a ban, not a regulation," and thus "categorically unconstitutional." *Id.*, App. 11a.

Judge Stras concurred in the judgment in part and dissented in part. *Id.* at *6, App. 17a. He disagreed with the majority that Respondents had made a sufficient showing of irreparable injury from the Down Syndrome Provision to warrant a preliminary injunction. App. 20a-26a, *id.* at *8–9. On the merits, Judge Stras concluded that he was bound by Eighth Circuit precedent to invalidate the Down Syndrome Provision, but "if [he] were writing on a blank slate," he would uphold it. *Id.* at *11, App. 28a. He noted that prohibiting abortions for a single discriminatory *reason* does not "ban" abortions or deprive women of the "ultimate decision" to have an abortion: "Just like Title VII does not 'ban' employers from firing employees, neither does Missouri's law 'ban' women from terminating their pregnancies." *Id.* at *12, App. 29a.

Missouri then filed this timely petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Circuit Split on Whether a State May Restrict Abortions Obtained Solely Because the Unborn Child May Have Down Syndrome.

The Court should grant certiorari to review the validity of Missouri's Down Syndrome Provision, because the Eighth Circuit erroneously decided a question of great urgency and importance that is the subject of a well-developed Circuit split.

A. There are compelling reasons to review this question, and this case presents an ideal vehicle to do so.

In *Box*, this Court "expresse[d] no view on the merits of … whether Indiana may prohibit the knowing provision of … disability-selective abortions by abortion providers." *Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019). At that time, "[o]nly the Seventh Circuit ha[d] thus far addressed this kind of law," and the Court followed its "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Id.* (citing this Court's Rule 10).

The Circuit split that was lacking at the time of *Box* has now arisen. Since the Seventh Circuit's decision in *Box* invalidating Indiana's prohibition against disability-selective abortions, the Sixth and Eighth Circuits have addressed the validity of similar laws in Ohio, Arkansas, and Missouri. The laws of three States (Indiana, Arkansas, and Missouri) have been invalidated, while Ohio's law has been upheld, all in thoroughly reasoned, published opinions.

Compare Preterm-Cleveland v. *McCloud*, 994 F.3d 512 (6th Cir. Apr. 13, 2021) (en banc) (upholding Ohio's law), *with* App. 16a (invalidating Missouri's law); *Little Rock Fam. Plan. Servs.* v. *Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021), *cert. pet'n filed*, No. 20-1434 (U.S. Apr. 9, 2021); (invalidating Arkansas's law); *Planned Parenthood of Indiana & Kentucky, Inc.* v. *Comm'r of Indiana State Dep't of Health*, 888 F.3d 300, 306 (7th Cir. 2018), *rev'd in part on other grounds sub nom. Box* v. *Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019) (invalidating Indiana's law). Moreover, these cases have produced a wealth of separate concurring and dissenting opinions analyzing the issues presented from every side. *See, e.g.,* App. 17a (Stras, J., concurring in the judgment in part and dissenting in part); *Pre-Term Cleveland* v. *McCloud*, 994 F.3d 512, 535 (6th Cir. 2021) (en banc) (Sutton, J., concurring); *id.* at 538 (Griffin, J., concurring); *id.* at 540 (Bush, J., concurring); *id.* at 550 (Cole, C.J., dissenting); *id.* at 551 (Moore, J., dissenting); *id.* at 563 (Clay, J., dissenting); *id.* at 568 (Gibbons, J., dissenting); *id.* at 569 (Donald, J., dissenting); *Preterm-Cleveland*, 940 F.3d at 318 (Batchelder, J., dissenting); *PPINK*, 888 F.3d at 311 (Manion, J., concurring in the judgment); *PPINK*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc). No further percolation is needed; this is a well-developed, thoroughly considered split of authority.

This Circuit split, moreover, implicates the laws of many other States as well. At least 12 States have enacted such laws, and many other States are actively considering them. *See supra.* Thus, there is a clear, well-developed Circuit split on an "important matter,"

which provides a "compelling reason[]" to review the question. Sup. Ct. R. 10(a).

Moreover, this Term presents a uniquely appropriate juncture for the Court to address this important issue. In *Dobbs* v. *Jackson Women's Health Organization*, No. 19-1392 (May 17, 2021), this Court granted certiorari to review the question "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional," in the context of Mississippi's statute prohibiting abortions after 15 weeks' gestation. *See id.* The dispute over Missouri's Down Syndrome Provision presents another face of the same coin. All three circuit-court decisions invalidating state restrictions on abortions targeted at Down syndrome rest on the proposition that *all* pre-viability prohibitions on elective abortions are categorically unconstitutional. App. 8a ("Bans on pre-viability abortions are categorically unconstitutional."); *Rutledge*, 984 F.3d at 687 (holding that the "pre-viability rule is categorical" and must be "applied … categorically"); *PPINK*, 888 F.3d at 305 (stating that the "holding that a woman has the right to terminate her pregnancy prior to viability is categorical" and "unambiguous"). The validity of state restrictions on Down syndrome abortions presents an important dimension of the same question that this Court has already granted certiorari to review in *Dobbs*.

Further, addressing this question presents a matter of great urgency. As noted above, the abortion rate for children with Down syndrome in America is between 67 and 93 percent. That presents an existential crisis for the entire Down syndrome community, which is already on the verge of elimination in other Western countries.

Finally, Missouri's case presents an ideal vehicle to review this issue. The parties created a robust record on the validity of the Down Syndrome Provision, including expert declarations that address the issue in great detail. *See, e.g.,* C.A. App. 370–73, 432–41, 509–27. This evidence includes historical analysis, contemporary studies, empirical evidence regarding the frequency of Down syndrome abortions, and testimony about the impact of medicalized prejudice on the epidemic of abortions of children with Down syndrome. *See id.* The validity of Missouri's Down Syndrome Provision was the principal focus of briefing in the Court of Appeals, and the Eighth Circuit's majority and dissenting opinions address the issue in significant detail. App. 1a–30a.

B. The Eighth Circuit's resolution of this question was erroneous.

The Court should also grant review because Eighth Circuit's decision invalidating Missouri's Down Syndrome Provision was gravely erroneous.

1. *Casey* did not decide this issue.

"Whatever else might be said about *Casey*, it did not decide whether the Constitution requires States to allow eugenic abortions." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring). On the contrary, "the very first paragraph of the respondents' brief in *Casey* made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was 'not [being] challenged.'" *Id.* (alteration in original). When an issue "was not … raised in briefs or argument nor discussed in the opinion of the Court," then "the case is not a binding precedent on this point." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *see also, e.g.*, *Steel Co.* v. *Citizens for a Better*

Env't, 523 U.S. 83, 91 (1998); *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996); *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *see also Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1140 (2019) (Breyer, J., dissenting) (quoting *Illinois* v. *Lidster*, 540 U.S. 419, 424 (2004)).

In fact, *Roe* v. *Wade* explicitly rejected the argument that a woman's right to abortion "is absolute and that she is entitled to terminate her pregnancy … *for whatever reason* she alone chooses." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (emphasis added). *Roe* stated: "With this we do not agree." *Id.*

Nor should *Casey* be interpreted as implying, in dicta, that all pre-viability restrictions on abortion are "categorically unconstitutional." App. 8a. One of *Casey*'s central conclusions was that the strict scrutiny that had applied to abortion restrictions since *Roe* was too stringent, because it gave "too little acknowledgement" to valid state interests in fetal life and women's health. 505 U.S. at 871. *Casey*'s adoption of the undue-burden standard was designed to *relax* the level of scrutiny on abortion restrictions, not heighten it. *Id.* The "categorical" rule followed by the Seventh and Eighth Circuits would subject restrictions on pre-viability abortion to the only level of scrutiny that is *more* exacting scrutiny than strict scrutiny. This interpretation turns *Casey* on its head.

It also yields absurd results. The rule of "categorical" invalidity of restrictions on pre-viability abortion has the perverse result of elevating the "penumbral" right to abortion above enumerated rights such as freedom of speech, freedom of religion, and freedom from state-imposed racial segregation. This Court has held that "even the fundamental rights

of the Bill of Rights are not absolute," *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949), and it has held that rights enumerated in the Bill of Rights may be sometimes restricted by government policies that are narrowly tailored to advance compelling governmental interests. *See, e.g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800–02 (2017); *Fisher* v. *University of Texas*, 136 S. Ct. 2198, 2208 (2016); *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015); *Johnson* v. *California*, 543 U.S. 499, 512–14 (2005); *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 571–73 (1942). Yet the Eighth Circuit's rule immunizes pre-viability abortion even from regulations that satisfy strict scrutiny. It elevates the "penumbral" right to pre-viability abortion above the Constitution's enumerated rights, which is "absurd." *PPINK*, 888 F.3d at 311 (Manion, J., concurring in the judgment in part and dissenting in part).

Further, *Casey* is a logical misfit with an anti-discrimination provision like Missouri's Down Syndrome Provision. *Casey*'s viability framework rested on its holding that the State's interests in protecting fetal life and promoting women's health become increasingly compelling as gestational age increases. *See* 505 U.S. at 860, 870–71. But the State's anti-discrimination interest in preventing the eugenic abortion of people with Down syndrome is equally compelling at any gestational age. Children with Down syndrome are eliminated with equal permanence regardless of whether the fetus was viable at the time of the abortion, and regardless of the gestational age at which the abortion occurs. *Casey*'s viability framework, therefore, has no logical application to an anti-discrimination provision like the Down Syndrome Provision.

2. The Down Syndrome Provision satisfies any level of scrutiny.

Missouri's Down Syndrome Provision satisfies strict scrutiny or any other level of scrutiny, because it is precisely tailored to advance at least eight compelling state interests.

First, Missouri's law advances the State's compelling interest in protecting an entire class of persons from being targeted for elimination solely because of disability. As Justice Thomas noted in *Box*, "this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). In other contexts, the Court has recognized that the States have a "compelling interest in eliminating discrimination" that justifies some restrictions on rights. *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). Both Congress and the States may prohibit the "moral and social wrong" of invidious discrimination by private parties. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 257 (1964); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983); *see also* 42 U.S.C. § 12132; 29 U.S.C. § 794. Here, the disability-based discrimination is the most severe form imaginable—it targets people for elimination based solely on an immutable characteristic.

Second, Missouri's law advances the State's compelling interest in eradicating historical animus and bias against persons with Down syndrome. The history of medicalized discrimination against persons with Down syndrome is both recent and appalling,

and the Down Syndrome Provision serves to eradicate the ongoing vestiges of that history. *See supra* Statement of the Case, Part A. In enacting the Down Syndrome Provision, Missouri's legislature found that "[r]emoving vestiges of any past bias or discrimination against … unborn children, is an important task for those in the legal, medical, social services, and human services professions," and that "the abortion of unborn children with Down Syndrome … is a form of bias or disability discrimination and victimizes the disabled unborn child at his or her most vulnerable stage." App. 71a, 72a; Mo. Rev. Stat. § 188.038.1(1), (6). Missouri has a compelling interest in eradicating the medical establishment's historic bias against persons with Down syndrome, which persists in the practice of eugenic abortion.

Third, Missouri's law safeguards the integrity of the medical profession by preventing doctors from abandoning their traditional role as healers to become the knowing killers of disabled populations. "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales* v. *Carhart*, 550 U.S. 124, 157 (2004) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997)). The Hippocratic tradition of "complete separation between killing and curing" in the medical profession is a "priceless possession which we cannot afford to tarnish." Margaret Mead, *quoted in* Rita L. Marker et al., *Euthanasia: A Historical Overview*, MD. J. CONTEMP. LEGAL ISSUES 2(2) 257–298 (1991); C.A. App. 370. Permitting the medical profession to become complicit in eliminating disabled people undermines this "priceless possession." *Id.* Eugenic abortion "contradicts medicine's historical opposition to killing," and as a result, "the profession

of medicine has been rapidly losing moral coherence and becoming rudderless." C.A. App. 373. Abandoning this role undermines public trust and confidence in the medical profession. "As long as discriminatory abortions continue, physicians cannot be trusted to care for us when we too are weak and frail and dependent to care for ourselves." C.A. App. 373. Indeed, recent history illustrates the medical profession's susceptibility to corruption through the medicalized killing of the disabled. *See* Michael A. Grodin et al., *The Nazi Physicians as Leaders in Eugenics and "Euthanasia": Lessons for Today*, 108 AM. J. PUB. HEALTH 53–57 (Jan. 2018).

Fourth, Missouri's law draws a clear boundary against additional eugenic practices targeted at disabled persons and others. This Court "has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," such as infanticide and euthanasia. *Gonzales*, 550 U.S. at 158. Sex-selective abortion already occurs in the United States under the euphemism "family balancing." *See, e.g.*, Harry J. Lieman, M.D. & Andrzej K. Breborowicz, M.D., Ph.D., *Sex Selection for Family Balancing*, 16 AMA JOURNAL OF ETHICS 797 (Oct. 2014); *see also* Sujatha Jesudason & Anat Shenker-Osorio, *Sex Selection in America: Why It Persists and How We Can Change It*, THE ATLANTIC (May 31, 2012). And prominent ethicists have sought to justify not just abortion, but outright infanticide, of disabled children. C.A. App. 371–72. "This attitude has led to figures such as Peter Singer arguing that some infants with congenital abnormalities might be reasonably killed, and in the Netherlands to actually killing those infants under the pretense that doing so

puts an end to 'hopeless and unbearable suffering.'" C.A. App. 372; *see also* A. Guibilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 J. OF MED. ETHICS 261–63 (2013) (arguing that infanticide of children with Down syndrome, among others, is justified). Missouri's Down Syndrome Provision "help[s] to defend against a further slide toward medicalized eugenics," including infanticide and euthanasia of the disabled. C.A. App. 372.

Fifth, Missouri's Down Syndrome Provision counters the stigma that eugenic abortion currently imposes on living persons with Down syndrome and other disabilities. As the Missouri General Assembly found in enacting the law, "[e]liminating unborn children with Down Syndrome raises grave concerns for the lives of those who do live with disabilities. It … fosters a false sense that disability is something that could have been avoidable, and is likely to increase the stigma associated with disability." App. 72a, Mo. Rev. Stat. § 188.038.1(6). "Permitting women who otherwise want to bear a child to choose abortion because the child has Down syndrome … increases the 'stigma associated with having a genetic disorder.'" *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment) (quoting Peter A. Benn & Audrey R. Chapman, *Practical and Ethical Considerations of Noninvasive Prenatal Diagnosis*, 301 J. AM. MED. ASS'N 2154, 2155 (2009)). Missouri's law reinforces the positive, anti-stigmatic message of people like Down syndrome advocate Frank Stephens: "I AM A MAN WITH DOWN SYNDROME AND MY LIFE IS WORTH LIVING." Testimony of Frank Stephens, *Down Syndrome: Update on the State of the Science & Potential for Discoveries Across Other Major*

Diseases Before the H. Subcomm. on Labor, Health and Human Servs., and Ed. Comm. on Appropriations, at 2 (Oct. 25, 2017), *at* https://bit.ly/33AYHPk.

Sixth, Missouri's law helps ensure that the existing Down syndrome community does not become starved of resources for research and care for individuals with Down syndrome. "Across the world, 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." *Id.* at 1. As abortion decimates the Down syndrome community, resources and support for existing individuals with Down syndrome will inevitably dwindle away. *See* App. 72a, Mo. Rev. Stat. § 188.038.6 (finding that Down syndrome abortions "send[] a message of dwindling support" for people with Down syndrome). "[S]ome countries are now celebrating the 'eradication' of Down syndrome through abortion," and this eradication "disincentivizes research that might help [people with Down syndrome] in the future." *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment).

Seventh, Missouri's law protects against the devaluation of *all* human life inherent in any decision to target a person for elimination based on an immutable characteristic. Targeting the disabled for elimination "further coarsen[s] society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Gonzales*, 550 U.S. at 157 (quoting Congressional Findings ¶ (14)(N)). Missouri's law "expresses respect for the dignity of

human life." *Id.* The epidemic of Down syndrome abortions "perpetuates the odious view that some lives are worth more than others." *PPINK*, 888 F.3d at 315 (Manion, J., concurring in the judgment).

Eighth, Missouri's law fosters the beauty, joy, and diversity of society and protects society from the incalculable loss that would occur if people with Down syndrome were eliminated. As the stories of people like Chris Nikic and countless others attest, people with Down syndrome provide an irreplaceable beauty, joy, and inspiration to their communities and our society. They make us better people. "Human beings 'of difference' … have much to share with all of us about what it means to be human." Marsha Saxton, *Disability Rights and Selective Abortion*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE: 1950 TO 2000 (1998). This is especially true of persons with Down syndrome, as the experience of one St. Louis, Missouri suburb illustrates. *See* Lauren Knight, *On Her Way: Grace's Bus Stop*, ST. LOUIS MAG. (Mar. 21, 2014). Our society would be incalculably diminished if persons with Down syndrome were eliminated—and we now stand on the brink of that genocidal outcome.

3. Missouri's law is narrowly tailored.

Missouri's Down Syndrome Provision advances these compelling interests in the narrowest possible fashion. The law prohibits performing an abortion only if the discriminatory purpose is the *sole* reason for the abortion, and only if the abortion provider has actual knowledge of that discriminatory purpose: "No 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." App. 72a; Mo. Rev. Stat. § 188.038.2 (emphases added).

Thus, "it is hard to imagine legislation more narrowly tailored to promote this interest than" Missouri's Down Syndrome Provision. *PPINK*, 888 F.3d at 316 (Manion, J., concurring). Missouri's law "only prohibit[s] abortions performed *solely* because of the … disability of the unborn child. The doctor also must know that the woman has sought the abortion solely for that purpose." *Id.* (emphasis in original). "These are provisions that apply only to very specific situations and carefully avoid targeting the purported general right to pre-viability abortion." *Id.* "They will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, they will not even affect women who consider the protected characteristics along with other considerations." *Id.* "If it is at all possible to narrowly tailor abortion regulations, [Missouri] has done so." *Id.*

Because it is narrowly tailored to advance many compelling interests Missouri's law satisfies strict scrutiny. *A fortiori*, it satisfies any less stringent form of scrutiny, including *Casey*'s undue-burden test and rational-basis scrutiny—the latter of which is the standard that should apply here.

In sum, Missouri's Down Syndrome Provision is not "categorically" invalid under *Casey*, because *Casey* said nothing about it. And the right to abort children with Down syndrome is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997) (quotations omitted). On the contrary, our society has repudiated

the medicalized biases against disabled people that terminated the lives of people Down syndrome for decades and now fuel the epidemic of Down syndrome abortions. Thus, Missouri's law is subject to rational-basis scrutiny, and it is valid so long as it reasonably "furthers the legitimate interest of the Government," *Gonzales*, 550 U.S. at 146—which it plainly does.

In the alternative, if the Court does not grant certiorari to review the validity of Missouri's Down Syndrome Provision, the Court should hold this petition pending the resolution of *Dobbs* v. *Jackson Women's Health Organization*, No. 19-1392.

II. The Court Should Review the Validity of Missouri's Gestational Age Restrictions or Hold That Question for *Dobbs*.

The Court should also grant certiorari to review the validity of Missouri's Gestational Age Restrictions, which prohibit abortions performed after eight, fourteen, eighteen, and twenty weeks of gestation. App. 74a, 76a, 78a, 80a; Mo. Rev. Stat. § 188.056, 188.057, 188.058, 188.375. In the alternative, the Court should hold that question pending the Court's resolution of *Dobbs* v. *Jackson Women's Health Organization*, No. 19-1392, which addresses the validity of Mississippi's restriction on abortions performed after 15 weeks' gestational age.

Missouri's petition presents a well-developed record to consider the many important aspects of the validity of such gestational age restrictions. It includes expert testimony on the questions of (1) fetal development at all gestational stages, C.A. App. 334–43 (Aultman Decl. ¶¶ 10–83); (2) the capacity of second-trimester fetuses to experience pain, C.A. App. 282–97 (Condic Decl. ¶¶ 8–48); (3) the excruciating

nature of second-trimester abortion procedures, C.A. App. 348–49 (Aultman Decl. ¶¶ 105–07); (4) the physical and psychological impact on women's health of abortions performed at later stages of gestation, C.A. App. 399–403, 412–27 (Coleman Decl. ¶¶ 9–19, 45–74); (5) the impact of late-term abortion on the integrity, public reputation, and ethics of the medical profession, C.A. App. 370–73 (Curlin Decl. ¶¶ 43–53); (6) the global consensus against the barbaric practice of second-trimester abortion, including in Western democracies, C.A. App. 484–86, 500–05 (Dyer Decl. ¶¶ 9–14 & tbl. 1); and (7) the very low rates at which women in Missouri actually seek abortions at later gestational ages, such as 18 weeks and 20 weeks, C.A. App. 273–74 (Crumbliss Decl. ¶¶ 10–15).

The validity of Missouri's Gestational Age Restrictions presents an urgent, important question that warrants this Court's review. In the alternative, the Court should hold this question pending the resolution of *Dobbs*.

III. The "Penumbral" Right to Abortion Recognized in *Roe* and *Casey* Should Be Overruled.

In the alternative, if the right to abortion recognized in *Roe* and *Casey* casts any doubt on Missouri's Down Syndrome Provision or its Gestational Age Restrictions, then those cases should be overruled. The Court should reject the long-discredited notion that the U.S. Constitution contains a "penumbral" right to terminate an unborn child's life by abortion.

From the outset of this case, Missouri has urged that the right to abortion recognized in *Roe* and *Casey* should be overruled. *See* Mo. C.A. Br. 37 n.7; C.A.

App. 235 (Mo. D.Ct. Br. 33 n.3). As Missouri's evidence demonstrates, *Roe*'s deficiencies included demonstrable errors in the areas of science, C.A. App. 334–43, 346–48 (Aultman Decl. ¶¶ 10–83, 91–104); jurisprudential history, C.A. App. 487–99 (Dyer Decl. ¶¶ 15–31); and ethics, C.A. App. 360–66 (Curlin Decl. ¶¶ 10–29). Further, *Roe* rested on a discredited theory of constitutional interpretation that cited "the penumbras of the Bill of Rights" and declined to root its holding in any specific provision in the Constitution's text. *Roe*, 410 U.S. at 152–53. *Casey*'s reaffirmation of the "central holding" in *Roe* focused on the self-contradictory "viability" standard, which many have observed "is clearly on a collision course with itself." *City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). Both cases, therefore, are mired in jurisprudential confusion. It is wholly unsurprising that *Roe* and *Casey* have engendered ongoing constitutional and political controversy. *See Casey*, 505 U.S. at 995–96 (Scalia, J., concurring in the judgment in part and dissenting in part).

If *Roe* and *Casey* dictate that Missouri cannot prohibit the barbaric practice of dismembering pain-capable fetuses in the second trimester, those cases are absurd and should be overruled. Indeed, abortion law has wandered far from its moorings on this point. "Both Justice Blackmun and Justice Stevens have thought 'it obvious that the State's interest in the protection of an embryo ... increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day.'" *Jackson Women's Health Org.* v. *Dobbs*, 945 F.3d 265, 280 (5th Cir. 2019) (Ho, J., concurring in the judgment)

(quoting *Webster* v. *Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part), and *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring)).

Missouri's General Assembly made detailed factual findings about the development of the unborn child's pain receptivity and capability to experience pain. App. 61a–63a, Mo. Rev. Stat. § 188.026.2(17)–(23). These findings rest on solid scientific evidence. The neurophysical apparatus for experiencing pain start developing at 14 weeks' gestation, and they are typically fully developed by 20 weeks' gestation. C.A. App. 282, 285–87 (Condic Decl. ¶¶ 7, 20–21). Outside the abortion context, fetal anesthesia is recommended for second-trimester fetuses, to address the concern that the fetus experiences pain during the operation. C.A. App. 294–96 (Condic Decl. ¶¶ 40–44). The "predominant method" of abortion after 14 weeks' gestation in Missouri—living dismemberment by D&E—inflicts horrible pain on unborn children that civilized persons would not inflict on reptiles. App. 64a–65a, Mo. Rev. Stat. § 188.026.2(29)(b) (citing Mo. Rev. Stat. Chapters 273, 578); C.A. App. 680–81.

Likewise, the notion that Missouri cannot act to prevent the entire class of people with Down syndrome from being targeted for elimination solely because of their immutable characteristics is absurd. *See supra* Part I. If these are the logical consequences of the right to abortion recognized in *Roe* and *Casey*, then those cases should be cast onto the ash heap of history.

"*Roe* was plainly wrong." *Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and

dissenting in part). "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since." *Id.* at 995–96. "[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish." *Id.* at 1002. The Court "should get out of this area, where [it has] no right to be." *Id.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC S. SCHMITT
Missouri Attorney General

D. JOHN SAUER
Solicitor General
Counsel of Record
JUSTIN D. SMITH
Deputy Attorney General
JEFF P. JOHNSON
JESUS A. OSETE
MICHAEL E. TALENT
Deputy Solicitors General
OFFICE OF THE MISSOURI
ATTORNEY GENERAL
Supreme Court Building
207 West High Street
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 19-2882, 19-3134

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 United States District Court
for the Western District of Missouri

Submitted: September 24, 2020
Filed: June 9, 2021

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

KELLY, Circuit Judge.

Missouri Governor Michael L. Parson and various other state officials (collectively, Missouri) appeal the

district court's[1] grant of a preliminary injunction enjoining the enforcement of several abortion-related provisions of Missouri House Bill 126 (HB 126). We affirm.

I.

Reproductive Health Services of Planned Parenthood of the St. Louis Region and its Chief Medical Officer Dr. Colleen P. McNicholas (together, RHS) provide reproductive healthcare—including pre-viability abortions—in St. Louis, Missouri. On July 30, 2019, RHS filed suit on behalf of themselves, as well as their patients, physicians, and staff, challenging the constitutionality of several provisions of HB 126. At issue here are the "Gestational Age Provisions," Mo. Rev. Stat. §§ 188.056–.058, .375, and the "Down Syndrome Provision," *id.* § 188.038, all of which were scheduled to go into effect on August 28, 2019.

The first Gestational Age Provision provides, in relevant part, that "no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency." *Id.* § 188.056.1. Sections 188.057, 188.058, and 188.375 are nearly identical to this first provision, except that they apply to abortions performed at or after 14, 18, and 20 weeks gestational age, respectively. *See id.* §§ 188.057–.058, .375. A provider who violates any of the Gestational Age Provisions faces criminal prosecution and professional discipline. *Id.* §§ 188.056–.058, .375.

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[1] The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

The Down Syndrome Provision prohibits abortions if the provider "knows that the woman is seeking the abortion solely because of a prenatal diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome in an unborn child." *Id.* § 188.038.2.[2] A provider who violates the Down Syndrome Provision is subject to a number of civil penalties, including professional discipline. *Id.* § 188.038.4.

RHS filed a motion for preliminary injunction, asserting that these provisions would effectively prohibit RHS from providing pre-viability abortion care in Missouri. The district court determined that both the Gestational Age Provisions and the Down Syndrome Provision banned—rather than merely regulated—pre-viability abortions and found that RHS was "highly likely" to succeed on the merits as to all these provisions.

The district court then found that the balance of equities favored a preliminary injunction as to the Gestational Age Provisions, but not the Down Syndrome Provision. The court explained that, in contrast to the Gestational Age Provisions, the record did not show that enforcement of the Down Syndrome Provision would actually harm anyone in the months

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[2] A different section of HB 126 requires "the physician who performed or induced the abortion" to complete "[a]n individual report for each abortion performed or induced upon a woman," which "shall include … a certification that the physician does not have any knowledge that the woman sought the abortion solely because of a prenatal diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome in the unborn child … ." *Id.* § 188.052.1.

leading up to final judgment. Missouri appealed.[3] In the meantime, RHS filed a motion for reconsideration (or in the alternative, a renewed motion for preliminary injunction) of the district court's denial of injunctive relief as to the Down Syndrome Provision. In support, RHS submitted additional evidence—namely, a supplemental declaration from Dr. McNicholas discussing, in part, three patients she treated in the preceding 12 months who sought abortions after receiving a fetal diagnosis of Down syndrome.

The district court granted RHS's motion for reconsideration and modified its preliminary injunction to include the Down Syndrome Provision. Both orders granting preliminary injunctive relief are now before this court. *See Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc.* v. *Parson* (*RHS I*), 389 F. Supp. 3d 631 (W.D. Mo. 2019); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc.* v. *Parson* (*RHS II*), 408 F. Supp. 3d 1049 (W.D. Mo. 2019).

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[3] Missouri also sought a partial stay of the district court's order—insofar as the order temporarily protects abortions performed at 20 weeks gestational age or later—pending appeal. The district court denied Missouri's request. Finding that the requested partial stay would effectively bar about two abortions per week pending litigation, the district court determined that it would "gravely affect[] the lives and family situation of a few pregnant women, who would be choosing abortions during the last available week or two before viability." *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc.* v. *Parson*, 2019 WL 4467658, at *2 (W.D. Mo. Sept. 18, 2019). The district court's order denying Missouri a partial stay is not on appeal here.

II.

A.

As a preliminary matter, Missouri argues that RHS lacks both individual and third-party standing. To establish standing under Article III of the U.S. Constitution, a plaintiff must show "(1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." *Young Am. Corp.* v. *Affiliated Comput. Servs. (ACS), Inc.*, 424 F.3d 840, 843 (8th Cir. 2005) (citing *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). But as RHS points out, "[e]ven in cases in which the plaintiff sues to enforce another person's rights, the injury-in-fact requirement turns on *the plaintiff*'s personal stake in the controversy." This is because Article III requires plaintiffs to have a "sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984) (alteration in original) (quoting *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976)). Generally, physicians have Article III standing to challenge abortion laws that subject them to governmental sanctions. *See, e.g.*, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 903–04 (1992) (plurality opinion); *Doe* v. *Bolton*, 410 U.S. 179, 188 (1973).

Here, the Gestational Age Provisions and the Down Syndrome Provision directly target physician conduct. Because these provisions put physicians at risk of civil and criminal sanctions, RHS has the requisite personal stake to establish individual standing under Article III. Moreover, RHS also has standing to sue on behalf of its patients. *See June*

Med. Servs. L.L.C. v. *Russo*, 140 S. Ct. 2103, 2118–19 (2020) (plurality opinion). The Supreme Court has "generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Id.* (cleaned up). This is in part because the "'threatened imposition of governmental sanctions' for noncompliance … assures us that the plaintiffs have every incentive to 'resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.'" *Id.* at 2119 (quoting *Craig* v. *Boren*, 429 U.S. 190, 195 (1976)); *see also Singleton*, 428 U.S. at 117 (explaining that abortion providers can also show third-party standing based on the "closeness of [their] relationship" with their patients, as well as on the risk of "imminent mootness" that might pose an obstacle to pregnant patients bringing their own claims). Indeed, the Supreme Court has recently reminded us that it has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs.*, 140 S. Ct. at 2118 (plurality opinion); *see Planned Parenthood of Minn., Inc.* v. *Citizens for Cmty. Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977).[4] RHS has standing, and we proceed to the merits.

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[4] Missouri's argument that RHS may not file a § 1983 action is premised on its position that RHS merely asserts the rights of third parties. Given our ruling on standing, this argument also fails. *See Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 324–31 (2006) (evaluating preliminary injunction of an abortion statute on the merits in lawsuit filed under 42 U.S.C. § 1983); *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Hum. Servs.*, 293 F.3d 472, 478 (8th Cir. 2002) (affirming district court's holding that the physician plaintiffs "properly asserted a

III.

In deciding whether to issue a preliminary injunction, a district court considers "(1) the threat of irreparable harm to the moving party, (2) the balance between this harm and the injury that granting the injunction will inflict on the non-moving party, (3) the probability that the moving party will succeed on the merits, and (4) the public interest." *Planned Parenthood of Ark. & E. Okla.* v. *Jegley*, 864 F.3d 953, 957 (8th Cir. 2017) (citing *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). Here, the district court properly required RHS to "make a more rigorous showing that it is likely to prevail on the merits," a standard required "[w]here a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute." *Id.* at 957–58 (cleaned up).

We review the district court's "ultimate decision to grant an injunction … for abuse of discretion, with factual findings examined for clear error and legal conclusions considered *de novo*." *Brakebill* v. *Jaeger*, 932 F.3d 671, 676 (8th Cir. 2019). An abuse of discretion occurs "when the district court relies on clearly erroneous factual findings or an error of law." *Dixon* v. *City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020). "An abuse of discretion also occurs when a relevant factor that should have been given significant weight is not considered; when an

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federal right enforceable in a § 1983 action," including on behalf of their patients); *Planned Parenthood of Wis., Inc.* v. *Van Hollen*, 738 F.3d 786, 794–95 (7th Cir. 2013) (affirming availability of third-party standing based on the unquestionable "justiciability" of precedent cases "filed pursuant to section 1983" and "in which doctors and abortion clinics were found to have had standing").

irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Id.* (cleaned up).

A.

In *Casey*, the Supreme Court reaffirmed the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." 505 U.S. at 846. "Before 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." *Id.* Missouri does not dispute that fetuses are considered nonviable at or before 20 weeks gestational age. Thus, the Gestational Age Provisions prohibiting abortions performed at or after 8, 14, 18, and 20 weeks gestational age[5] apply to pre-viability abortions.

Nevertheless, Missouri argues that the Gestational Age Provisions do not ban pre-viability abortions, but merely regulate them. This distinction is significant. Bans on pre-viability abortions are categorically unconstitutional. *See id.* at 879; *Little Rock Fam. Plan. Servs.* v. *Rutledge*, 984 F.3d 682, 687 (8th Cir. 2021). A restriction, on the other hand, is permissible so long as it does not impose "a substantial obstacle" to the right to an abortion. *See Casey*, 505 U.S. at 877. According to Missouri, because the Provisions still permit pre-viability abortions before 8 weeks gestational age, they do not constitute categorical bans.

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[5] This is measured as 8, 14, 18, and 20 weeks from the first day of a patient's last menstrual cycle.

We have already rejected a similar argument in a nearly identical statute. In *Edwards* v. *Beck*, the Arkansas statute at issue prohibited doctors from performing abortions at 12 weeks' gestation (or later) where the fetus has a detectable heartbeat. 786 F.3d 1113, 1115–16 (8th Cir. 2015) (per curiam), *cert. denied*, 577 U.S. 1102 (2016). It was undisputed that "a fetus is generally not viable under 24 weeks' gestation, is never viable at 12 weeks, and, in all normally-progressing pregnancies, has a detectable heartbeat by 12 weeks." *Id.* at 1116. Like Missouri does now, the State of Arkansas "trie[d] to frame the law as a regulation, not a ban, on pre-viability abortions because they are available during the first 12 weeks (and thereafter if within the exceptions)." *Id.* at 1117. But because the Arkansas law "prohibit[ed] women from making the ultimate decision to terminate a pregnancy at a point before viability," it constituted a ban, not a regulation. *Id.*; *see also MKB Mgmt. Corp.* v. *Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015) (invalidating a North Dakota fetal-heartbeat restriction for the same reasons articulated in *Edwards*), *cert. denied*, 136 S. Ct. 981 (2016).

Relying on *Casey*, however, Missouri nonetheless contends that the Supreme Court has previously "upheld prohibitions on certain classes of pre-viability abortions." This argument lacks merit. *Casey* upheld, in part, requirements for informed consent and for a 24-hour waiting period—it did not uphold a ban on all abortions performed at certain points of a pre-viability pregnancy. 505 U.S. at 881–87. Under those requirements, patients could still obtain an abortion at any point before fetal viability so long as they received certain information 24 hours before undergoing the procedure. *See id.* at 881. Here, by

contrast, there is nothing an individual in Missouri could lawfully do to obtain an abortion at or after the applicable gestational age cut-off.[6] *See id.* at 894–95 (explaining that an abortion statute "must be judged by reference to those for whom it is an actual rather than an irrelevant restriction"). These provisions do not merely have "the incidental effect of making it more difficult or more expensive to procure an abortion" before viability. *Gonzales* v. *Carhart*, 550 U.S. 124, 158 (2007) (quoting *Casey*, 505 U.S. at 874); *see also id.* at 157–58 (reaffirming *Casey*'s distinction between laws that merely make it more difficult or expensive to get an abortion and those designed to impermissibly "strike at the right itself" (quoting *Casey*, 505 U.S. at 874)). Instead, the Gestational Age Provisions are bans, and we agree with the district court that RHS is likely to succeed on the merits of this claim.

B.

Missouri also characterizes the Down Syndrome Provision as a regulation of pre-viability abortions. But a person who wants a pre-viability abortion "solely because of a prenatal diagnosis, test, or screening indicating Down [s]yndrome or the potential of Down [s]yndrome" in the fetus is

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[6] Missouri makes the same argument with respect to *Gonzales* v. *Carhart*, 550 U.S. 124 (2007). As in *Casey*, the statute at issue in *Gonzales* did not ban pre- viability abortions; rather, it outlawed one of several medical *techniques* used for performing abortions. *Gonzales*, 550 U.S. at 164–65. The Court concluded that "[t]he Act [was] not invalid on its face where there [was] uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, *given the availability of other abortion procedures that are considered to be safe alternatives*." *Id.* at 166–67 (emphasis added).

completely prohibited from getting one. Mo. Rev. Stat. § 188.038.2. Unlike a regulation, the Down Syndrome Provision does not set a condition that—upon compliance—makes the performance of a pre-viability abortion lawful, thus preserving the constitutional right to elect the procedure. Rather, it bans access to an abortion entirely.

Missouri contends that the word "solely" in the statute performs a regulatory function because it permits pre-viability abortions when the Down syndrome diagnosis is only part of the patient's motivation. But it is well-established that "[w]hether or not 'exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.'" *Edwards*, 786 F.3d at 1117 (quoting *Casey*, 505 U.S. at 879); *see also Stenehjem*, 795 F.3d at 772 (explaining that regulations are permissible when they "do no more than create a structural mechanism by which the State … may express profound respect for the life of the unborn" (quoting *Gonzales*, 550 U.S. at 146)). Regulations on pre-viability abortions are permissible provided they do not constitute an undue burden, *see, e.g.*, *Casey*, 505 U.S. at 887–94 (rejecting a spousal notification regulation that posed an undue burden), but bans on pre-viability abortions are not, *see Edwards*, 786 F.3d at 1117. Here, the Down Syndrome Provision would prevent certain patients from getting a pre-viability abortion at all. That is a ban, not a regulation.[7] We agree that RHS is likely to

[7] Missouri insists that the Supreme Court, by rejecting the argument in *Roe* that a woman has an absolute right "to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses," *Roe* v. *Wade*, 410 U.S.

succeed on the merits of its challenge to the Down Syndrome Provision as well.

C.

We turn now to the remaining *Dataphase* factors. *See Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase*, 640 F.2d at 113.

1.

Missouri argues that the threat of irreparable harm from allowing the Gestational Age Provisions to go into effect is minimal because "the vast majority of women already obtain abortions prior to the later benchmarks, and many of the remaining women undoubtedly could do so by seeking abortions earlier in pregnancy." The accuracy of this claim aside, Missouri's focus on the number of women *un*affected by the Gestational Age Provisions is misplaced. The irreparable harm analysis turns on the nature of the injury likely to result from the challenged action, not the number of people who would be injured. *See Hinz* v. *Neuroscience, Inc.*, 538 F.3d 979, 986 (8th Cir. 2008) (defining an irreparable injury as an injury "of such a nature that money damages alone do not provide adequate relief"); *see also Kroupa* v. *Nielsen*, 731 F.3d

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113, 153 (1973), left open the possibility that states may ban pre-viability abortions sought for prohibited reasons. This argument is unavailing if only because it ignores "*Roe*'s central holding," reaffirmed in *Casey*, "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." 505 U.S. at 860.

813, 820–21 (8th Cir. 2013) (finding the threat of reputational harm to a single individual to be irreparable). Missouri does not dispute that the 20-week Gestational Age Provision would prohibit about 100 abortions each year in Missouri, or that the 8-week Provision would prohibit approximately half of all reported abortions in the state—and for purposes of the irreparable-harm inquiry, the prohibition of even a single pre-viability abortion would suffice. The district court concluded that this was "a significant interference with plaintiffs' service and the rights of its prospective patients," *RHS I*, 389 F. Supp. 3d at 638, and Missouri offers nothing to counter that conclusion.

The threat of irreparable harm posed by the Down Syndrome Provision is a closer call, but nevertheless weighs in favor of RHS. After receiving a supplemental declaration from Dr. McNicholas, the district court found that "at least a small number of women" would be affected by this provision. On appeal, Missouri argues that RHS failed to show that any patients seek abortions based "solely" on prenatal diagnoses, or potential diagnoses, of Down syndrome.[8] But RHS is not required to prove with certainty the threat of irreparable harm. The standard merely requires "plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Missouri has offered no evidence to rebut the district court's finding that "the facts reviewed show a very high likelihood"

[8] This argument is curious, as it suggests that the Missouri legislature passed a statute to ban abortions for a category of patients that may not, or at least may not currently, exist.

of a "Down [s]yndrome motivated abortion request during litigation." *RHS II*, 408 F. Supp. 3d at 1052.

Moreover, Dr. McNicholas said that if the Down Syndrome Provision takes effect, (1) she and other physicians in Missouri would "face unjustifiable risk in providing abortion care to patients if [they] know that a patient has had" a prenatal diagnosis, or a potential diagnosis, of Down [s]yndrome, and (2) as a result, "[i]f a patient with a Down [s]yndrome diagnosis seeks services … [they would] be forced to turn her away and advise her that she cannot get this care in Missouri." The district court did not clearly err in finding that "the most likely scenario, from plaintiffs' filings, would be the provider's declining a requested abortion, *in terrorem*." *Id.* at 1053.[9] And

[9] The dissent characterizes RHS's claimed harm as a self-inflicted response to a "speculative risk of sanctions" and disputes the district court's finding of irreparable harm on that basis. But the district court did not rely on a "speculative risk." Rather, after hearing argument and considering the evidence, the district court made a factual finding that the Down Syndrome Provision would likely be enforced against RHS even where the medical provider knows only of "a Down syndrome diagnosis (or even a strong suspicion based on testing)"—that is, even absent certain knowledge that the patient is seeking an abortion "solely" because of Down Syndrome. *RHS II*, 408 F. Supp. 3d at 1052; *cf. Alexis Bailly Vineyard, Inc.* v. *Harrington*, 931 F.3d 774, 778 (8th Cir. 2019) (conducting injury-in-fact inquiry for purposes of standing and distinguishing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013), from cases where the plaintiffs "are themselves the objects of a challenged statute" and thus, "must merely allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, [where] there exists a credible threat of prosecution thereunder." (cleaned up)). RHS's inability to provide pre- viability abortions to patients with a fetal diagnosis (or suspected diagnosis) of Down Syndrome due to a real threat of prosecution results in a likelihood of irreparable harm to those

while the Down Syndrome Provision might impact fewer people than the Gestational Age Provisions, the nature of the harm—the inability to obtain an abortion before fetal viability—is at least equally significant. Thus, the district court concluded that absent a preliminary injunction, RHS would be unable to provide pre-viability abortions both to the patients who would otherwise obtain one "solely" on the basis of a fetal diagnosis of Down [s]yndrome, and to the patients for whom the diagnosis is only part of the motivation, causing both types of patients to lose "the Constitutional right to which [they are] currently entitled." *Id.* Because the district court's carefully considered "finding … is plausible in light of the full record," it "must govern." *June Med. Servs.*, 140 S. Ct. at 2128 (plurality opinion) (cleaned up) (quoting *Cooper* v. *Harris*, 137 S. Ct. 1455, 1465 (2017)).

2.

The remaining two factors—the balance of hardships and the public interest—also weigh in favor of RHS as to the Down Syndrome Provision and the Gestational Age Provisions.

Missouri contends that "the harms inflicted on the State and innocent third parties from enjoining the enforcement of HB 126 would be extremely severe" because an injunction would prevent the State from advancing "compelling state interests," including "the loss of innocent human life." As the district court appropriately acknowledged, "federal courts should generally be very cautious before delaying the effect of

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patients. Though the dissent may "have weighed the evidence differently," that is not enough to make the district court's finding clearly erroneous. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985).

State laws." *RHS I*, 389 F. Supp. 3d at 637. Nonetheless, Missouri has failed to demonstrate that its policy priorities outweigh (1) the public interest in access to pre-viability abortions, or (2) the significant interference with RHS's business and the harm to pregnant individuals who might seek a pre-viability abortion before final judgment in this case. *See RHS II*, 408 F. Supp. 3d at 1052 ("[T]he State Defendants have not and are unlikely to belittle the significance of even a few abortions during litigation "); *cf. Brady* v. *Nat'l Football League*, 640 F.3d 785, 792–94 (8th Cir. 2011) (granting stay of district's order pending appeal even where both parties were "likely to suffer some degree of irreparable harm" because the movant made a "strong showing that it is likely to succeed on the merits"); *Little Rock Fam. Plan. Servs.* v. *Rutledge*, 397 F. Supp. 3d 1213, 1322 (E.D. Ark. 2019) (finding that enjoining abortion regulations would not irreparably harm State because "the State has no interest in enforcing laws that are unconstitutional" (citing *Hisp. Int. Coal. of Ala.* v. *Governor of Ala.*, 691 F.3d 1236, 1249 (11th Cir. 2012))), *aff'd in relevant part*, 984 F.3d 682 (8th Cir. 2021).

For these reasons, we find no error in the district court's conclusion that the balance of the equities favors injunctive relief.

IV.

Because the district court did not abuse its discretion in granting preliminary injunctions enjoining enforcement of the Gestational Age Provisions and the Down Syndrome Provision, we affirm.

STRAS, Circuit Judge, concurring in the judgment in part and dissenting in part.

A preliminary injunction is hard to get, all the more so when the target is a democratically enacted state law. *See Planned Parenthood Minn., N.D., S.D.* v. *Rounds*, 530 F.3d 724, 732–33 (8th Cir. 2008) (en banc). The court makes it easy, however, by relaxing the rules to let Reproductive Health Services[10] have one, despite its failure to show a "threat of irreparable harm" from Missouri's Down Syndrome Provision. *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). I would apply the usual rules and vacate the injunction.

I.

Under Missouri's Down Syndrome Provision, no one may perform an abortion with "*know[ledge]* that the woman is seeking [one] *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). Even before the law took effect, Reproductive Health Services challenged it and requested a preliminary injunction to prevent state officials from enforcing it against anyone. *See Rodgers* v. *Bryant*, 942 F.3d 451, 460–65 (8th Cir. 2019) (Stras, J., concurring in part and dissenting in part) (highlighting the problems with universal injunctions).

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[10] "Reproductive Health Services" refers collectively to the plaintiffs in this case: Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., which claims to be "the only generally available source of abortion care in Missouri," and Dr. Colleen P. McNicholas, the facility's chief medical officer and an abortion provider.

The district court initially refused to grant one because Reproductive Health Services had not shown that "the inability to schedule 'Down [S]yndrome abortions' would be likely to interfere with the abortion rights of real-life women." In plain English, the court was saying that there was no evidence that the law would create any real-world harm, or even a threat of it. It left the door open, however, if the clinic could come up with something more.

The more came in the form of a supplemental declaration by the clinic's chief medical officer, Dr. Colleen McNicholas, who said:

> [W]ithin approximately the last 12 months, I do specifically recall that three of the patients that I treated in Missouri had received a fetal diagnosis of Down [S]yndrome.
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> …
>
> I also recall that I provided abortion care to numerous other patients that had received a fetal diagnosis—I would estimate approximately one to four cases per week over the past year—but cannot recall whether that diagnosis was Down [S]yndrome or another genetic or structural anomaly, if I had that information at the time. Because Down [S]yndrome is the most common fetal aneuploidy, it is likely that some of these other instances did involve such a diagnosis.

(Footnote omitted). This declaration was enough for the district court to have a change of heart. Combining the declaration with its own "[c]ommon understanding," and taking "judicial notice" of the fact that a woman would "often" receive "a Down [S]yndrome diagnosis" with "dismay," the court

"suppose[d] that" some of these women requested an abortion because of it. If so, the court said, others likely would too, and the law would threaten the ability of real-life women to get one, creating the threat of irreparable harm that was missing before. Whether more is required to grant a preliminary injunction is the question posed to us today. *See Rounds*, 530 F.3d at 732 n.5.

II.

"A preliminary injunction is an extraordinary remedy …." *Watkins Inc.* v. *Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). In deciding whether one is appropriate, there are four factors to consider: "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest." *Id.* The problem for Reproductive Health Services is that it never established a "threat of irreparable harm. … an independently sufficient ground upon which to deny a preliminary injunction." *Id.*

A threat of irreparable harm is exactly what it sounds like: "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski* v. *All-Am. Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (quotation marks omitted). This is no small task. At a minimum, Reproductive Health Services had to show that the law was likely to prevent a woman from getting an abortion she otherwise would have lawfully received. *See Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (explaining that "*likely*" harm is enough).

The Down Syndrome Provision itself tells us how the harm would have to occur. *See* Mo. Rev. Stat. § 188.038.2. It is not enough for a woman to receive a prenatal diagnosis, test, or screening of Down Syndrome (or the potential for it) in an unborn child and then seek an abortion. Rather, for the statute to apply, (1) the abortion must be "solely because of" it; and (2) the provider must actually "know[]" of that fact. *Id.* Even when providers are aware of a positive Down Syndrome diagnosis, for example, nothing prevents them from performing an abortion if they know nothing more. Nor is there any restriction when providers know that the diagnosis is *one* reason for the abortion but remain in the dark about whether there are others.

Contrast these requirements with what Dr. McNicholas said in her declaration. According to her, she treated three women who "had received a fetal diagnosis of Down [S]yndrome" over "the last 12 months," and it was "likely" that there had been others too. The declaration is conspicuous for what it does not say. Nowhere does it mention whether any of these women sought an abortion "solely because of" their prenatal diagnoses, much less whether she knew it at the time. *Id.* Both are required for Missouri's Down Syndrome Provision to apply. *See id.*

A.

Causation poses the biggest hurdle for Reproductive Health Services. No matter how many of Dr. McNicholas's patients have received a positive Down Syndrome diagnosis—three, three hundred, or three thousand—nothing in her declaration establishes that any of them sought an abortion *solely because of* it. *See id.*

The burden of establishing entitlement to a preliminary injunction always rests with the party seeking one. *See Watkins Inc.*, 346 F.3d at 844. There may well be women in Missouri who terminate their pregnancies solely because of a positive Down Syndrome diagnosis, test, or screening, but the problem is that Reproductive Health Services has not identified any of them. It instead asks us to fill in the gaps—basically, guess—that there are women out there who do so, despite the variety of "health, family, financial, [and] other personal reasons" that can factor into a decision to terminate a pregnancy. *Preterm-Cleveland* v. *McCloud*, 994 F.3d 512, 526 (6th Cir. 2021) (en banc) (plurality opinion). Courts are not supposed to grant injunctions based on guesses.

The district court decided to guess anyway. When Dr. McNicholas failed to say whether any of the women she treated had sought an abortion solely because of a positive diagnosis, the court used its imagination:

> [c]ommon understanding and judicial notice would conclude that a Down [S]yndrome diagnosis (or even a strong suspicion based on testing) would often be received with dismay by a pregnant woman and any family members. If an abortion were sought thereafter, most of us, including an abortion provider, would *suppose* that the diagnosis was the principal cause of the request, and that a jury or licensing agency would have little trouble with the "sole cause" requirement for a violation. As the Chief Justice recently observed, quoting Judge Friendly, "we are not required to exhibit a naiveté from which ordinary citizens are free." *Dept. of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019).

(Emphasis added)

These "[c]ommon[ly] underst[ood]" facts are ones that Dr. McNicholas, who performs hundreds of abortions a year, apparently could not say herself. I find it hard to believe that the district court knows more about the motivations of her patients than she does. And this "[c]ommon understanding" is remarkable for another reason: it assumes that children with Down Syndrome are unwanted. The irony is not lost on me, for this is the very discrimination that Missouri seeks to prevent.

Nor does "judicial notice" advance the ball. It applies to obvious facts—those that are "capable of … instant and unquestionable demonstration." *United States* v. *Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (quoting 9 John Henry Wigmore, *Evidence* § 2571, at 548 (1940)). A court may well be able to take judicial notice of a straightforward fact like the total number of women who live in Missouri, but not the reasons why some of them have abortions. It is neither obvious nor "unquestionable," *id.*, despite what the district court may have believed, that a woman would receive a positive Down Syndrome diagnosis "with dismay" and then abort her unborn child *solely* because of it. These are facts that must be proven, not "suppose[d]."

B.

Missouri's Down Syndrome Provision requires more than just an ultra-strict causal link. The provider actually has to *know* that the link is present. *See* Mo. Rev. Stat. § 188.038.2. Absent knowledge that a Down Syndrome diagnosis is the sole reason for an abortion, the statute does not apply. *See id.*

Dr. McNicholas all but admits in her declaration that she has no idea how many women, if any, seek an abortion solely for that reason. *See id.* Consider her words carefully. In addition to never identifying any women who sought abortions "solely because of" a Down Syndrome diagnosis, she goes on to say that "there is generally no medical need for [her], or any other physician providing abortion care at [the clinic,] to know a patient's reason for seeking an abortion or to distinguish between one particular fetal diagnosis or another in order to provide compassionate, safe abortion care." If there is no medical reason to ask, and no evidence that the reason for seeking an abortion is routinely volunteered, then the statute *itself* cannot create the "threat of irreparable harm." *Dataphase Sys., Inc.*, 640 F.2d at 114.

Rather, the harm comes from Dr. McNicholas herself, or at least her view of the law. She claims that, if she learns of any fetal anomaly, then she will have to ask whether it is Down Syndrome, just because of the "legal risk" involved. If a woman then admits that her unborn child has a positive Down Syndrome diagnosis, Dr. McNicholas will "turn her away and advise her that she cannot get this care in Missouri." This statute-made-me-do-it theory would make sense if the statute made her do it. But it does not.

Nothing in the Down Syndrome Provision requires Dr. McNicholas to ask about fetal diagnoses or "turn … away" women who reveal one. *See* Mo. Rev. Stat. § 188.038.2. And with no medical reason to inquire, it is her choice to ask the question. Then, if a woman answers by saying she has received a positive Down Syndrome diagnosis, it is again Dr. McNicholas's choice not to perform the abortion,

assuming the woman has not told her that the diagnosis is the sole reason she is seeking it. We cannot enjoin a law based on what someone *thinks* it says, rather than what it *actually* says. *Cf. Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (explaining that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

Perhaps what Dr. McNicholas is really trying to say is that the statute will "chill" her practice, based on the potential legal risk involved, even if she cannot identify anyone who would be directly affected by it. *Cf. Republican Party of Minn., Third Cong. Dist.* v. *Klobuchar*, 381 F.3d 785, 791–93 (8th Cir. 2004). The court seems persuaded:

> The district court did not clearly err in finding that "the most likely scenario, from plaintiffs' filings, would be *the provider's declining* a requested abortion, *in terrorem*." … Thus, the district court concluded that absent a preliminary injunction, [the plaintiffs] would be unable to provide pre-viability abortions both to the patients who would otherwise obtain one "solely" on the basis of a fetal diagnosis of Down [S]yndrome, and to the patients for whom the diagnosis is only part of the motivation, causing both types of patients to lose "the Constitutional right to which [they are] currently entitled."

Ante at 12–13 (emphasis added) (second and third brackets in original).

Even if this reasoning sounds plausible, there are obvious problems with it. A chilling effect can only support a claim if a statute is vague or overbroad, and

even then, only when the challenge is brought under the First Amendment. *See* 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* §§ 6:4, 6:14 (2021); *see also Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 255 (2002) (overbreadth); *Reno* v. *Am. Civ. Liberties Union*, 521 U.S. 844, 871–74 (1997) (vagueness). It is tied to an exceptionally narrow doctrine that allows a party to establish an injury through the "deterrent effect" a law has on protected expression, but only if the chill is "objectively reasonable." *Republican Party of Minn.*, 381 F.3d at 792 (quotation marks omitted); *see Balogh* v. *Lombardi*, 816 F.3d 536, 541–42 (8th Cir. 2016). The problem is that abortions are not protected expression, Missouri's Down Syndrome Provision is not vague or overbroad (nor is there any claim that it is), and the chill is not an objectively reasonable response to the statute. The point is that Dr. McNicholas cannot threaten to cause the harm herself by overcorrecting her own behavior to avoid the speculative risk of sanctions. *See Salt Lake Trib. Publ'g Co.* v. *AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable … ."); *Caplan* v. *Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("If the harm complained of is self-inflicted, it does not qualify as irreparable.").

The court's response brings to mind the classic game of telephone. Dr. McNicholas said *only* that some of her patients have had abortions after receiving a Down Syndrome diagnosis. The district court then put its own gloss on her statement when it used its "[c]ommon understanding and judicial notice" to announce that "a jury or licensing agency would have little trouble with the 'sole cause' requirement

for a violation" if a woman sought an abortion in those circumstances. Today, the court adds yet another gloss by declaring that the district court *found* "that the Down Syndrome Provision would likely be enforced against [Reproductive Health Services] … even absent certain knowledge that the patient is seeking an abortion 'solely' because of Down Syndrome." *Ante* at 13 n.9. Just like in the telephone game, the message in the end bears little resemblance to the message at the start. Dr. McNicholas did not say any of these things, and the district court did not actually make a factual finding. Indeed, the district court relied on "[c]ommon understanding and judicial notice" precisely because there was no evidence on these points.[11] *See* Fed. R. Civ. P. 52(a)(6) (providing that the clear-error standard applies to findings "based on oral or other *evidence*" (emphasis added)); *see also Am. Prairie Constr. Co.* v. *Hoich*, 560 F.3d 780, 796 (8th Cir. 2009) (reviewing a "decision to take judicial notice [of a fact] for abuse of discretion").

Reproductive Health Services wants us to fill in the gaps on causation and knowledge through guesswork. That is not how preliminary injunctions work. It had the burden to connect all the dots for us, and its failure to do so provides reason enough to vacate the preliminary injunction. *See Watkins Inc.*, 346 F.3d at 844 (explaining that failure to establish a threat of irreparable harm "is an independently sufficient ground upon which to deny a preliminary injunction").

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[11] As for the district court's *actual* findings, I agree that not a single one of them is clearly erroneous. They simply fall short of justifying a preliminary injunction.

III.

Nothing in *Little Rock Family Planning Services* v. *Rutledge*, 984 F.3d 682 (8th Cir. 2021), is to the contrary. In *Rutledge*, a panel of this court concluded that the plaintiffs were likely to succeed on the merits of a challenge to a similar Arkansas statute. *See id.* at 688–90. Even if *Rutledge* creates a likelihood of success on the merits here, Reproductive Health Services is still not entitled to a preliminary injunction without showing a threat of irreparable harm. *See Dataphase Sys., Inc.*, 640 F.2d at 114 n.9.

In any event, I think there is reason to doubt whether *Rutledge* was correctly decided, even if this panel has to follow it. *See Mader* v. *United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel." (quotation marks omitted)); *see also Preterm-Cleveland*, 994 F.3d at 516, 535 (concluding that a challenge to a similar, but even more restrictive, law was not likely to succeed on the merits). It treated Arkansas's Down Syndrome Provision as a "complete prohibition o[n] abortions"—a "ban," so to speak—not just a "regulation." *Rutledge*, 984 F.3d at 688–90. This distinction is critical because, under our precedent, a pre-viability ban is *categorically* unconstitutional. *See id.* at 687–88; *MKB Mgmt. Corp.* v. *Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015); *Edwards* v. *Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam). A pre-viability regulation, on the other hand, is only unconstitutional if it has the "purpose or effect" of "plac[ing] a substantial obstacle in the path of a woman seeking an abortion." *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

We have not made it easy to tell the difference between the two. In *Edwards*, we explained that a ban "prohibits women from making the ultimate decision to terminate a pregnancy." 786 F.3d at 1117. A regulation, by contrast, has only an "incidental effect" on the decision by "making it more difficult or more expensive to procure an abortion." *Gonzales*, 550 U.S. at 158 (quoting *Casey*, 505 U.S. at 874 (plurality opinion)). The distinction is only complicated by the fact that a regulation can easily be reframed as a ban: if its requirements are not met, then a woman will be "completely prohibited" from having an abortion. *Ante* at 9.

As slippery as the dividing line seems to be, if I were writing on a blank slate, I would conclude that Missouri's Down Syndrome Provision is a regulation. Recall that it says 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." Mo. Rev. Stat. § 188.038.2. Interpreting the statute as an ordinary person would, *see Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070 (2018), all it does is limit the reasons for an abortion in certain narrow circumstances. As long as a woman has at least two reasons for seeking an abortion, or her provider never knows that a positive Down Syndrome diagnosis, test, or screening is her sole reason for getting one, "the ultimate decision" still lies with her. *Edwards*, 786 F.3d at 1117 (quoting *Casey*, 505 U.S. at 879 (plurality opinion)). The statute is, in other words, a regulation, not a ban. *See id.*

An example may help. Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer … to discharge any individual … because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). No one would suggest that Title VII is a *ban* on firing employees. Even under Title VII's broad language, which requires the reason to be nondiscriminatory, "the ultimate decision" to terminate someone still rests with the employer. *Edwards*, 786 F.3d at 1117 (quoting *Casey*, 505 U.S. at 879 (plurality opinion)); *see Berg* v. *Norand Corp.*, 169 F.3d 1140, 1146 (8th Cir. 1999) (noting that "[t]he employment-at-will doctrine, allowing an employer to terminate an employee for any lawful reason, is [still] alive and well").

The same is true of Missouri's Down Syndrome Provision. Women remain free to terminate their pregnancies for nondiscriminatory reasons. Indeed, Missouri's law is even more permissive than Title VII in at least two respects: an abortion is still available, even after a positive diagnosis, test, or screening, as long as (1) the provider does not know why a woman is seeking an abortion; *or* (2) the discriminatory reason is accompanied by at least one nondiscriminatory reason. *Compare* Mo. Rev. Stat. § 188.038.2 (setting out the "solely because of" requirement), *with* 42 U.S.C. § 2000e-2(m) (prohibiting discriminatory employment practices "even [when] other factors also motivated the practice"). Just like Title VII does not "ban" employers from firing employees, neither does Missouri's law "ban" women from terminating their pregnancies. *Rutledge*, unfortunately, seems to foreclose this common-sense analysis.

IV.

I would accordingly vacate the preliminary injunction against Missouri's Down Syndrome Provision.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

No. 2:19-cv-4155-HFS

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., on behalf of itself, its physicians, and its patients, and COLLEEN P. MCNICHOLAS, D.O., M.S.C.I., F.A.C.O.G, on behalf of herself and her patients, Plaintiffs

v.

MICHAEL L. PARSON, in his official capacity as Governor of the State of Missouri, et. al., Defendants.

SUPPLEMENTAL ORDER REGARDING DOWN SYNDROME

(Doc. 69) Filed September 27, 2019

The State Defendants were recently enjoined pending litigation from enforcing legislation prohibiting abortions at various weekly stages of fetal development prior to viability. This ruling is on appeal.

A preliminary injunction was denied, however, concerning statutory prohibitions of "discriminatory" abortions of non-viable fetuses, where the sole reason for the abortion was the sex or race of the fetus. Defendant providers disclaimed any knowledge of such abortions at their facilities, and none could be predicted, so the issue was deemed moot. Those prohibitions remain on the statutebooks.

Similarly denied, but without prejudice, was a preliminary injunction motion against prohibiting

abortions motivated by testing indicating Down Syndrome. The prohibition of such abortions is prescribed by Mo. Rev. Stat. § 188.038.2. This subsection is the subject matter of a new motion for reconsideration, or, in the alternative, for a preliminary injunction. Doc. 59.[1]

The earlier ruling on "Down Syndrome abortions" stated that abortions of non-viable fetuses have been protected under Federal case-law, based on Supreme Court decisions, and that plaintiff providers are clearly "likely to prevail in striking down the prohibited reasons law, insofar as it applies to non-viable fetuses." Doc. 51; *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc.* v. *Parson*, 389 F. Supp. 3d 631, 636 (W.D. Mo. 2019). Injunctive relief could not be entered, however, in the absence of a showing that "the inability to schedule 'Down syndrome abortions' would likely interfere with the abortion rights of real-life women during the time-frame of this law suit." *Id.* at 638. I suggested further consideration of "an adequately supported renewed motion on this narrow issue." Such a motion was promptly filed, with additional information from co-plaintiff McNicholas, apparently the best informed person.[2]

Before turning to the current factual situation and the legal contentions of the parties, a practical consideration may place this part of the dispute in context. If a preliminary injunction continues to be

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[1] The parties agree, as do I, that this is a collateral issue on which I retain jurisdiction.

[2] The State Defendants do not question the information supplied, and offer nothing further – but do contend that the plaintiffs' material remains insufficient to authorize relief.

denied, because of a deficiency in proof regarding women likely to be seeking abortions because of Down syndrome testing of a fetus, there is a distinct possibility that such an abortion patient may report to plaintiff providers any day or week during litigation. Without injunctive protection in place, it is predictable that a legal emergency would ensue; that is, a temporary restraining order would be sought to allow the abortion to take place. The likelihood of granting a TRO would be strong. There would then likely ensue hectic back-and-forth litigation like that which occurred from October 18–26, 2017, as described in *Azar* v. *Garza*, 138 S. Ct. 1790 (2018). While the courts may be disciplined to handle such situations, it would be most difficult to have the sort of orderly and thorough appellate consideration ofthe ultimate merits that was invited by the Supreme Court on this very issue. *Box* v. *Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019). I confess some relief that my appraisal of the factual situation here is consistent with an orderly processing of the controversy.

The facts do support injunctive relief now, as outlined below, although the Down Syndrome condition in the population is quite rare, thus suggesting rather infrequent abortion requests. A "Down Syndrome Center" brochure, submitted by plaintiffs, suggests that "one in every 800–1000 children" has been so diagnosed. Doc. 47-4, Ex. B. See comparable figures in Doc. 60-1 Ex. 1, p.4.[3] But the McNicholas Supplemental Declaration (Doc. 60-1) indicates that, even without inquiry by providers

[3] This would relate to living children, thus failing to include the significant number of fetal abortions.

before performing abortions, she specifically recalls that three patients she treated in the last 12 months had received "a fetal diagnosis of Down Syndrome." ¶ 9. She also estimated she had "approximately one to four cases per week" reporting a "genetic or structural anomaly," and that Down syndrome is "the most common fetal aneuploidy." (abnormal number of chromosomes in a cell). ¶ 10.

The only available information that might tend to reduce the number of such patients was a review of medical records identifying only four patients in 13 months where Down Syndrome may have been present. Doc. 60-1, ¶ 11. But those records were referred to as "underinclusive," a characterization not questioned by the State Defendants. The absence of information and records is explained by plaintiffs' view prior to the new statute that abortion decisions are for the patients to make, without any special inquiries by the providers – thus, any information that is available was inadvertently received.

With the high level of "genetic or structural anomal[ies]" and Down Syndrome being the most common abnormality of numbers of chromosomes in a cell, it should fairly be concluded that Dr. McNicholas' personal dealing with one identified Down Syndrome abortion at about four-month intervals considerably understates the abortions of that nature at plaintiff's facility. If I would now project eight more months of litigation before judgment (perhaps by summary judgment) I must conclude that at least a small number of women would predictably need protection

during litigation, if the statutory prohibition is invalid.[4]

For reasons mentioned earlier (Doc. 65, p. 3) the State Defendants have not and are unlikely to belittle the significance of even a few abortions during litigation, and I conclude that the requested protection of the abortion rights of a few women during litigation should suffice to authorize short-term anticipatory injunctive protection. I adopt but do not repeat legal discussion of standing issues and the like dealt with in the prior ruling, now in print, and in the denial of a stay. Doc. 65. These issues are on appeal and should probably not be elaborated on or re-articulated while the Circuit Court has jurisdiction.

The State Defendants' most current procedural objection relies on two aspects of the circumstances at bar. They repeatedly refer to the statutory requirement that the forbidden motive be the "sole" cause of the abortion and they argue that there is an absence of the necessary "certainty" in the prediction of likely requests for the forbidden "Down syndrome abortions," citing *Clapper* v. *Amnesty Int'l. USA*, 568 U.S. 398, 409 (2013).

Common understanding and judicial notice would conclude that a Down syndrome diagnosis (oreven a strong suspicion based on testing) would often be received with dismay by a pregnant woman and any family members. If an abortion were sought thereafter, most of us, including an abortion provider, would suppose that the diagnosis was the principal

[4] I agree with plaintiffs that the appeal, and the stay of procedures on the motion to dismiss (because they duplicate, in part, issues before the Court of Appeals) makes this litigation more protracted than I had anticipated.

cause of the request, and that a jury or licensing agency would have little trouble with the "sole cause" requirement for a violation. As the Chief Justice recently observed, quoting Judge Friendly, "'we are not required to exhibit a naiveté from which ordinary citizens are free.'" *Dept. of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019).

On the issue of "certainty" of a Down Syndrome motivated abortion request during litigation, the facts reviewed show a very high likelihood of such an occurrence, if litigation continues for aconsiderable period. And where the plaintiff providers are "themselves the objects of a challenged statute" the Circuit quite recently noted that *Clapper* does not set the standard of likely danger that the courts use before entertaining a challenge. *Alexis Bailly Vineyard, Inc.* v. *Harrington*, 931 F.3d 774, 778–79 (8th Cir. 2019).

Clapper itself, with relatively uninvolved parties, noted that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." 568 U.S. at 414 n. 5. In our case, the most likely scenario, from plaintiffs' filings, would be the provider's declining a requested abortion, *in terrorem*. Absent a hurried TRO or a preliminary injunction, the prospective patient would lose the Constitutional right to which she is currently entitled. That right needs protection here—and no discernible legal harm would occur from granting the preliminary injunction as requested, which simply supplements the restriction now in place.[5]

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[5] The appellate panel would doubtless retain the right to ask counsel for a report, immediately before argument on appeal or

The order entered on August 27 (Doc. 51; 389 F. Supp. 3d at 640) is hereby MODIFIED to prohibit the Missouri official defendants, their employees, agents and successors in office from enforcing, pending litigation, Mo. Rev. Stat. § 188.038.2. insofar as it relates to non-viable fetuses. SO ORDERED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

September 27, 2019
Kansas City, Missouri

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before handing down an opinion, regarding Down Syndrome abortion experience of plaintiffs pending litigation. The provider is required to certify knowledge of such abortions under a statutory provision not involved in litigation. Mo. Rev. Stat. § 188.052.1. Thus, if the panel later determined that lack of experience under the prohibition demonstrates there is a moot issue, an appellate ruling on the merits could be declined and this phase of the proceeding would be rendered harmless.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

No. 2:19-cv-4155-HFS

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., on behalf of itself, its physicians, and its patients, and COLLEEN P. MCNICHOLAS, D.O., M.S.C.I., F.A.C.O.G, on behalf of herself and her patients, Plaintiffs

v.

MICHAEL L. PARSON, in his official capacity as Governor of the State of Missouri, et. al., Defendants.

CORRECTED
MEMORANDUM AND ORDER
(Doc. 51) Filed August 27, 2019

Plaintiffs, as abortion providers with facilities in St Louis ("RHS"), and on behalf of prospective patients, seek a preliminary injunction stopping several restrictive provisions of Missouri House Bill 126 from going into effect this Wednesday, August 28. Four sections would prohibit abortions in Missouri after various weekly dates, all prior to fetal viability.[1] Another section would prohibit abortions of all fetuses, viable and non-viable, where the pregnant woman's reason to abort is solely based on

[1] Mo. Rev. Stat. §§ 188.056, 188.057, 188.058, and 188.375.

sex, race, or prospective Down Syndrome of an expected infant.[2]

The defendant Missouri officials offer procedural challenges before dealing with the merits. Doc. 35. They challenge "third-party standing" to assert interests of patients, assert absence of a cause of action under 42 U.S.C. § 1983, lack of Article III standing and ripeness to challenge the anti-discrimination provisions. All except the ripeness issue (relating to imminence of actual harm) may be readily rejected, at least for preliminary injunction purposes, for reasons noted by Judge Sutton in *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908 (6th Cir. en banc 2019). While the Sutton majority opinion rejected a Planned Parenthood constitutional claim of public funding discrimination, hewrote:

> Third-party standing cases (are distinguishable). In those cases, the Supreme Court held that abortion providers have standing to bring the due process challenges on behalf of their patients. See, e.g., *Singleton* v. *Wulff*, 428 U.S. 106, 118 (1976) (plurality); see also *Diamond* v. *Charles*, 476 U.S. 54, 65–66 (1986). But these decisions do not establishthat the providers themselves have due process rights. Much to the contrary. The premise of these challenges is that the providers have *no* constitutional rights of their own in this setting. Why else go through the rigamarole of granting the provider third- party standing to file the claim?

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[2] Mo. Rev. Stat. § 188.038.

A provider's standing to assert and litigate rights of anticipated future abortion patients was assumed by all members of the Supreme Court in *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320, 324 (2006). It was not questioned by present counsel in *Comprehensive Health of Planned Parenthood Great Plains* v. *Hawley*, 903 F.3d 750 (8th Cir. 2018) where footnote 7 indicates a limited challenge to standing, and the panel observed that "this is a third-party facial challenge." That is true here, except that the challenge to barring specified discriminatory reasons is an as-applied challenge, limited to prospective patients who might seek abortions of non-viable fetuses. I defer the limited ripeness issue and conclude that settled law supports this case procedurally.

On August 6, District Judge Baker in Arkansas dealt with almost identical questions and granted the requested preliminary relief as to non-viable fetuses. *Little Rock Family Planning Services* v. *Rutledge*, 2019 WL 3679623 (E.D. Ark.). Both the time limitations on abortions and the anti-discrimination provisions for non-viable fetuses have been uniformly rejected by federal courts, according to the *Little Rock* opinion and briefing here. Granting this motion in large part is required by law, as further explained below, there being no pertinent factual disputes.[3]

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[3] As stated in defendants' disclosure summarizing the contents of their exhibits, filed in opposition to plaintiffs' motion (Doc. 31), their declarants support legislative findings that might justify prohibitions on abortions before fetal viability. They deal with contentions (now contested) as to fetal pain, harmful impacts of abortion on the women involved,

I. Prohibited Reasons for Abortion of Non-viable Fetuses

The most challenging and novel of the issues in this case is the State's attempt to prohibit all abortions (including those of non-viable fetuses) for special reasons that are deemed contrary to public policy. Mo. Rev. Stat. § 188.038, effective August 28, 2019. The State would prohibit a pregnant woman's favoritism of males, for instance, or apparently healthy prospective infants while choosing to abort fetuses with disfavored characteristics. For present purposes I assume that almost everyone in our culture would be appalled by a pregnant woman's abortion of a fetus identified as female because the woman or the family preferred that she give birth to a boy. The legal issue is whether the public, through legislation, has a right to intervene and prohibit such a discriminatory or "selective" abortion of a fetus before viability. Plaintiffs do not challenge the validity of the prohibitions after viability, which

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heartbeat timing, ethical considerations, worldwide restrictions earlier than viability, progress in evaluating early development, etc.. While these considerations might be considered pertinent by the Supreme Court in reevaluating abortion jurisprudence, they do not free the lower federal courts from standards previously established by that Court. A panel of the Eighth Circuit that advocated reconsideration by the Supreme Court of its abortion jurisprudence nevertheless acknowledged it was compelled to reject such reasons for changing pertinent law. *MKB Management Corp. v Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015). As discussed below, the current ruling turns on two questions of law announced by a majority of the Supreme Court, as it was constituted when Justice Kennedy retired – that is, the viability test and the categorical right of women seeking abortions of non-viable fetuses.

duplicated existing law. Under existing Missouri law, no viable fetuses can be aborted, unless required by the woman's health. Mo. Rev. Stat. § 188.030.

The Supreme Court has not dealt with the merits of this question. Earlier this year, however, it declined to review a Seventh Circuit ruling that did prevent Indiana from restricting a discriminatory choice by pregnant women in that State. *Box* v. *Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019). The Court described the legislation as "barring the knowing provision of sex-, race-, or disability-selective abortions by abortion providers." *Id.* at 1781. The denial of certiorari was explained by the novelty of the legal issues, which "have not been considered by additional Courts of Appeals." *Id.* at 1782. The concurrence by Justice Thomas demonstrated great interest in the ultimate question of a State's authority, in his phrasing, to prevent "abortion from becoming a tool of modern-day eugenics," citing the recent State laws seeking to prevent abortions motivated by race, sex, genetic abnormality, and Down Syndrome. *Id.* at 1783.[4]

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[4] There is apparently much popular interest in this phase of the new legislation. See frontpage article in the *Kansas City Star* of August 4, 2019, with the sub-head, "Missouri law denies abortion for fatal ("fetal"?) disorders." But the record here suggests that the proposed prohibition of certain controversial abortions affects only a small number of non-viable fetus abortions. Opening up the subject for legislation could, however, logically reach more common reasons for early abortions, such as the prospective illegitimacy of babies born to unmarried girls and women. Illegitimacy being a frequently disfavored status, perhaps it may be treated as comparable to health issues or disfavored sex or race characteristics. While there is no known legislation to protect the prospectively

The panel opinion in the Indiana case that was denied certiorari stated simply that "the non-discriminatory provisions clearly violate well-established Supreme Court precedent holding that a woman may terminate her pregnancy prior to viability, and that the State may not prohibit a womanfrom exercising that right *for any reason*." *Planned Parenthood of Indiana and Kentucky, Inc.* v. *Commissioner of the Indiana State Dep't of Health*, 888 F.3d 300, 302 (7th Cir. 2018) (emphasis added). Judge Manion, expressing dissatisfaction, agreed that Supreme Court precedent invalidated the abortion motivation prohibition that Indiana sought to impose, but only "[b]ecause I have no choice but to follow Supreme Court precedent." *Id.* at 316.

The recent Arkansas decision reaches the same conclusion, for the same reason. That is the result reached by other federal court judges who have ruled the question. In the district court case affirmed by the Seventh Circuit, the ruling stated that under existing law, as established by theSupreme Court, a "woman's right to choose to terminate a pregnancy pre-viability is categorical." *Planned Parenthood of Ind. & Ky., Inc.* v. *Comm'r, Indiana State Dep't of Health*, 265 F. Supp. 3d 859, 866 (S.D. Ind. 2017). In *Preterm-Cleveland* v. *Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018), the Indiana case was relied on to reach the same result. *Preterm* has been appealed and was argued in the Sixth Circuit in January,

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illegitimate, such legislation for non-viable fetuses could be legally evaluated similarly to the issues here. We are thus dealing with a potentially large problem, numerically as well as intrinsically important.

2019. *Little Rock Family Services*, supra, at p. 36. Significant rulings on this issue may be imminent.

Although other Supreme Court language is relied on to invalidate any prohibition of pre-viability abortions, the "essential holding" most quoted is from the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 846 (1992), containing the rule 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." It was repeated, "a Statemay not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Id.* at 879. Thus, cases to date have accepted the woman's "ultimate decision" and have rejected prohibitions of certain reasons for the decision.

Dissatisfaction has been voiced, as noted, perhaps most meaningfully by Judge Easterbrook in dissenting from the Seventh Circuit's close vote denying a rehearing en banc in the Indiana case. *Planned Parenthood of Indiana and Kentucky Inc.* v. *Commissioner of the Indiana State Dept of Health*, 917 F.3d 532 (2018). He argued that "Judges often said that employers could fire workers for any or no reason," and thereafter "regularly created exceptions when the discharge was based on race, sex, or disability." *Id.* at 536. Of course Supreme Court justices sometimes overstate principles, and then reword the rules. But an appellate court that modifies a rule is appropriately the court that announced the rule. Lower court judges do not often "correct" the language of the Supreme Court. While

it can be speculated that the Supreme Court's language in *Box* implicitly invited appellate judges to review the merits of prohibitions of discriminatory abortions, any such invitation was not addressed to district judges.

There are no pertinent factual disputes on this aspect of the case. For present purposes I assume, in accordance with declarations offered by the Missouri defendants, that there are adequate public policy reasons to adopt the prohibitions against aborting fetuses because they are disfavored by the pregnant woman on grounds of sex, race or Down Syndrome likelihood. I recognize that a Down Syndrome abortion is a very debatable subject, but it would likely be a legislative issue rather than a judicial issue if abortion jurisprudence, as established by the Supreme Court, permitted a legislative override of any aspect of a woman's right to abort a non-viable fetus. All judicial rulings so far preclude such a legislative override in this context. It is clear today that plaintiffs are likely to prevail in striking down the prohibited reasons law, insofar as it applies to non-viable fetuses.

Another legal point remains. The Missouri defendants argue that relief from a regulation of abortion cannot be obtained unless the statute imposes an undue burden on a large fraction of women seeking an abortion. *E.g.*, *Planned Parenthood of Arkansas & Eastern Oklahoma* v. *Jegley*, 864 F.3d 953 (8th Cir. 2017). The courts that have dealt with such an issue in cases like the present one, however, have limited that test to statutes that "regulate" abortion practice, not cases

like this one that impose a complete prohibition of certain classes of abortions for non-viable fetuses. *Edwards* v. *Beck*, 786 F.3d 1113 (8th Cir. 2015), ruled that the State cannot recharacterize a ban as a regulation, and thus lighten its obligation to respect the rights of pregnant women, as represented by providers. *Id.* at 1117. See also the same rationale in *Isaacson* v. *Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013). In any event, at the preliminary injunction stage, the issue is whether plaintiffs are likely to prevail. With existing law as reviewed above, plaintiffs easily pass that test. But, as discussed below, that is not the only factor to be considered in exercising judicial discretion to grant or withhold a preliminary injunction.

II. Prohibition of Abortions after 20 or Fewer Weeks

House Bill 126 attempts to make a second major change in abortion law—it limits abortions after 8 weeks from the patient's last menstrual period ("LMP"). If this is deemed constitutionallyforbidden, the weeks are extended to 14, then 18, and finally 20. Because viability has never occurred that early, so it is understood,[5] the effect of the legislation is to

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[5] Plaintiff Reproductive Health Services of Planned Parenthood of the St Louis Region ("RHS") uses 21 weeks and 6 days LMP as its guideline for providing pre-viability surgical abortions. McNicholas Decl. § 25. Doc. 3. This is consistent with the cases cited by the Eighth Circuit, where the current records of newborn infant survival have not reached below 21 or 22 weeks. *MKB Management Corp.* v. *Stenehjem*, 795 F.3d 768, 773 (8th Cir 2015). The Missouri authorities have not asserted that RHS has been violating the current prohibition of abortions of viable fetuses.

cut back the viability test, as adopted by the Supreme Court in *Casey*. The *Little Rock* ruling on August 6 prohibits enforcement during litigation of very similar legislation in that State, although Arkansas stops at 18 rather than 20 weeks. However formulated, the legislation on its face conflicts with the Supreme Court ruling that neither legislative nor judicial limits on abortion can be measured by specified weeks of development of a fetus; instead, "viability" is the sole test for a State's authority to prohibit abortions where there is no maternal health issue. That is the lesson of *Casey*, previously quoted, as widely recognized by the lower courts, including the Eighth Circuit. *See also,* the concurrence of Justice O'Connor in *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 528 (1989) (where *testing* at 20 weeks was permissibly required), repeating the language of *Colautti* v. *Franklin*, 439 U.S. 379, 388–89 (1979), that "'neither the legislature nor the courts may proclaim one of the elements entering into the assessment of viability—*be it weeks of gestation* … or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the crucial point.'" (emphasis added). The Missouri General Assembly has just done what Justice O'Connor declared is impermissible.

The Supreme Court's prohibition on a State's selecting a specific fetal age where abortion couldbe prohibited has been enforced in many cases, including the *Little Rock* case. A 20-week limit has been struck down in several. *Bryant* v. *Woodall*, 363 F. Supp. 3d 611 (M.D.N.Car. 2019) (appealed 6/26/2019); *McCormack* v. *Herzog*, 788 F.3d 1017

(9th Cir. 2015) (Idaho statute); *Isaacson* v. *Horne*, 716 F.3d 1213 (9th Cir. 2013) (Arizona statute); *Jane L.* v. *Bangerter*, 809 F. Supp. 865 (D. Utah. 1992) (appealed on other issues).

It is thus highly likely that the listed weekly time limits on abortions will be ruled invalid in the final judgment in this case.

III. Preliminary Injunction Evaluation Issues.

In addition to evaluating likelihood of success in obtaining a permanent injunction, I must consider the threat of irreparable harm to plaintiffs and patients if the challenged provisions of Bill 126 go into effect this week, the balance of harm to the parties if preliminary relief is granted, and the public interest. *Dataphase Sys. Inc.* v. *C L Sys. Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). I need also consider whether preservation of the status quo would be served by granting interim relief.

Enjoining new legislation pending litigation and before the effective date seems to be a method of preserving the status quo during the pendency of the lawsuit. *Association of Equipment Manufacturers* v. *Burgum*, 2017 WL 8791104 (D.N.Dak.). While federal courts should generally be very cautious before delaying the effect of State laws, the sense of caution may be mitigated when the legislation seems designed, as here, as a protest against Supreme Court decisions.

The hostility to, and refusal to comply with, the Supreme Court's abortion jurisprudence is most obviously demonstrated in the attempt to push "viability" protection downward in various weekly

stages to 8 weeks LMP. This is contrary to repeated, clear language of the Court. The anti-discrimination section seeks to create novel exceptions to some plain but general language. That is a less questionable legislative practice. It does seem so likely wrong, however, that it should not be permitted to go into operation, unless the relief sought offers minimal demonstrable practical benefit – or, in other words, the denial of immediate relief is not demonstrably harmful.

The greatest impact of House Bill 126 would be to prohibit abortions in Missouri after 8 weeks LMP. This would prohibit more than two thirds of plaintiff RHS's patients from obtaining abortions and about half the reported abortions in Missouri. McNicholas Decl. ¶ 52. Crumbliss Decl. ¶ 14. Docs. 3 & 35. The impact of the 20-week rule seems likely to prohibit about 100 abortions performed each year. McNicholas Decl. § 52. I classify that as a significant interference with plaintiffs' service and the rightsof its prospective patients, so it should be considered quite adequate as harm to justify immediate relief from the defective provisions of House Bill 126. The least impact would result from prohibiting the sexor race reasons for an abortion, the occurrence of which is unknown to the Chief Medical Officer of RHS. McNicholas Decl. § 59. An abortion before viability motivated by a Down Syndrome test would also be somewhat rare, given the window of time needed for adequate testing and consultation. Bebbington Decl. §§ 9, 22–24, 43. And we do not know the frequency of those abortions in Missouri, where the testing rate might be greater or below testing elsewhere.

There is an absence of any information from RHS that would allow me to assess whether, if final judgment is possible in several months, the inability to schedule "Down syndrome abortions" would be likely to interfere with the abortion rights of real-life women. I asked counsel early in the morning of argument, "Why is there neither a disclaimer nor an estimate of 'Down Syndrome abortions' at RHS?" This issue remains entirely speculative after argument, perhaps because no estimate is possible, since Down Syndrome is rarely mentioned by patients. If so, there could be no sanctions, since the law requires knowledge before a provider is in violation.[6] Caution suggests I withhold a preliminary injunction against the anti-discrimination section, but remain open to an adequately supported renewed motion on this narrow issue.[7]

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[6] Plaintiffs complain that this provision will, if ultimately validated by the courts, cause them to engage in inappropriate, intrusive discussions with women seeking abortions. But one can imagine that if there is a legally validated prohibition, providers would protect themselves by adding to medical paperwork a question such as "Is this procedure being sought because of race, sex or Down syndrome?" One would guess this would lead to the effective discontinuance of "Down syndrome abortions" at RHS. Until there is finality on the legal issue, which currently tilts in favor of plaintiffs, one might suppose fewer questions would be asked, since they are not required, and that the status quo could be preserved without court order. At least this may be true for the next several months, which would diminish the likelihood of harm from denial of a preliminary injunction. If my supposition is mistaken, a further motion can be filed.

[7] The related issue of ripeness will apparently be the subject of further briefing. Doc. 33,p 12.

In plaintiffs' reply brief (Doc. 47) they candidly change the emphasis to perceived harm that compliance might cause RHS and its officials and medical personnel. They suggest criminal penalties or loss of licenses. Prosecutions seem even more speculative or unlikely than the possible loss of an abortion opportunity during the next several months by some pregnant woman and her family. The St. Louis Circuit Attorney, a named defendant, does not oppose plaintiffs' request for a preliminary injunction. Doc. 42, noted in Doc. 47, p. 1. License controversies on this subject also seem entirely unlikely. Both this court and the State Courts are open to RHS or any other target of a license cancellation. Unlike many individuals who seek abortions, legal assistance seems available, and the views expressed here should reduce the likelihood of harassment issues concerning the anti-discrimination section.

The public interest in this case at this time seems dominated by the analysis of which party is likely to prevail, which overwhelmingly favors plaintiffs, and seems unlikely to change dramatically in the next several months; that is, before final judgment can be entered.[8] A

[8] The apparent absence of material facts that are in dispute suggests that summary judgment may be the most expeditious way to advance this case toward an appeal.

In offering this procedural suggestion I am aware that the Missouri brief proposes slowing the case for development and consideration of a factual record, advising that last Monday it submitted extensive newly developed evidence. Doc. 35. Missouri has offered material for the record (and perhaps appellate or Supreme Court consideration) regarding the "discrimination" issues. There is also a good deal of material

preliminary injunction in favor of plaintiffs is appropriate here, except as to § 188.038, the anti-discrimination section.

IV. Severability and Conditions

The Missouri General Assembly has made clear that it wishes to preserve as much of House Bill 126 as can be saved under current law. The various sections specifying prohibitions on abortions at various weeks prior to viability cannot be allowed to go into effect on August 28, as scheduled. The existing prohibition against abortion of viable fetuses remains in effect, and is not challenged, so a preliminary injunction leaves Missouri with a

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relating to fetus development and other issues outlined in Doc. 31. But the two basic issues regarding (1) restricting reasons for exercising abortion rights before viability and (2) banning abortions at various weekly stages before viability seemingly present pure legal questions. Both prohibitions very likely conflict with current abortion jurisprudence. Because I was the district judge in the *Hawley* case, supra, and because the Missouri defendants seek to equate the need for factual development in that case with this one, I note that the "factual issues" here and there are unrelated. Here I express the view, with other judges, that certain Supreme Court legal rulings are binding. In *Hawley*, on the "factual issues" I was of the view that certain Supreme Court factual rulings on "legislative facts" or "social facts" were binding, and could not be relitigated at the district court. See Doc. 113 in Case 16-4313. For illustration, I quoted Judge Easterbrook that "after a majority of the Supreme Court has concluded that photo ID requirements promote confidence, a single district judge cannot say as a 'fact' that they do not even if 20 political scientists disagree with the Supreme Court." Avoidance of facts here is thus in a different context, that is, whether a *legal* principle established by the Supreme Court can be rebutted by factual material offered in the lower courts.

public policy against abortions to the extent permitted by Constitutional law.

The statutory prohibition of discriminatory or selective abortions is unqualified, thus applying to both viable and non-viable fetuses. If it were possible to sever the language to limit the coverage to viable fetuses I would do so, but that cannot be done without judicial re-writing of the section, a practice to be avoided when possible. The desired result could be achieved, however, by using an as applied rather than a comprehensive injunction. A full facial challenge is not appropriate here because RHS limits its practice to non-viable fetus abortions (21 weeks, 6 days, LMP).

As is customary in cases of this nature, and consistently with Rule 65 (c), Fed. R. Civ. Proc.,no bond will be required from plaintiffs in this case. *Little Rock Family Planning Services*, supra, 2019 WL 3679623, at * 90.

It is therefore ORDERED that the Missouri official defendants, their employees, agents, and successors in office are hereby PROHIBITED, pending litigation or further order of the court, from enforcing certain pre-viability bans on abortions, pursuant to H.B. 126; specifically, Mo. Rev. Stat. §§ 188.056, 188.057, 188.058, 188.375. The motion for preliminary injunction is DENIED without prejudiceas to § 188.038.

Jurisdiction is retained to modify this order pending litigation, on motion or to make certain corrections.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

August 27, 2019
Kansas City, Missouri

APPENDIX D

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a

member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

§ 188.026, Revised Statutes of Missouri

188.026. Missouri Stands for the Unborn Act — findings of general assembly — interests of the state of Missouri. — 1. This section and sections 188.056, 188.057, and 188.058 shall be known and may be cited as the "Missouri Stands for the Unborn Act".

2. In *Roe* v. *Wade*, 410 U.S. 113 (1973), certain information about the development of the unborn child, human pregnancy, and the effects of abortion was either not part of the record or was not available at the time. Since 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life and the effects of abortion on women. The general assembly of this state finds:

(1) At conception, a new genetically distinct human being is formed;

(2) The fact that the life of an individual human being begins at conception has long been recognized in Missouri law: "[T]he child is, in truth, alive from the moment of conception". *State* v. *Emerich*, 13 Mo. App. 492, 495 (1883), affirmed, 87 Mo. 110 (1885). Under section 1.205, the general assembly has recognized that the life of each human being begins at conception and that unborn children have protectable interests in life, health, and well-being;

(3) The first prohibition of abortion in Missouri was enacted in 1825. Since then, the repeal and reenactment of prohibitions of abortion have made distinctions with respect to penalties for performing or inducing abortion on the basis of "quickening";

however, the unborn child was still protected from conception onward;

(4) In ruling that Missouri's prohibition on abortion was constitutional in 1972, the Missouri supreme court accepted as a stipulation of the parties that "'[i]nfant Doe, Intervenor Defendant in this case, and all other unborn children have all the qualities and attributes of adult human persons differing only in age or maturity. Medically, human life is a continuum from conception to death.'" *Rodgers* v. *Danforth*, 486 S.W.2d 258, 259 (1972);

(5) In *Webster* v. *Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court, while considering the "preamble" that set forth "findings" in section 1.205, stated: "We think the extent to which the preamble's language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide. State law has offered protections to unborn children in tort and probate law". Id. at 506. Since Webster, Missouri courts have construed section 1.205 and have consistently found that an unborn child is a person for purposes of Missouri's homicide and assault laws when the unborn child's mother was killed or assaulted by another person. Section 1.205 has even been found applicable to the manslaughter of an unborn child who was eight weeks gestational age or earlier. *State* v. *Harrison*, 390 S.W.3d 927 (Mo. Ct. App. 2013);

(6) In medicine, a special emphasis is placed on the heartbeat. The heartbeat is a discernible sign of life at every stage of human existence. During the fifth week of gestational age, an unborn child's heart

begins to beat and blood flow begins during the sixth week;

(7) Depending on the ultrasound equipment being used, the unborn child's heartbeat can be visually detected as early as six to eight weeks gestational age. By about twelve weeks gestational age, the unborn child's heartbeat can consistently be made audible through the use of a handheld Doppler fetal heart rate device;

(8) Confirmation of a pregnancy can be indicated through the detection of the unborn child's heartbeat, while the absence of a heartbeat can be an indicator of the death of the unborn child if the child has reached the point of development when a heartbeat should be detectable;

(9) Heart rate monitoring during pregnancy and labor is utilized to measure the heart rate and rhythm of the unborn child, at an average rate between one hundred ten and one hundred sixty beats per minute, and helps determine the health of the unborn child;

(10) The Supreme Court in Roe discussed "the difficult question of when life begins" and wrote: "[p]hysicians and their scientific colleagues have regarded [quickening] with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable', that is, potentially able to live outside the mother's womb, albeit with artificial aid". *Roe*, 410 U.S. at 160. Today, however, physicians' and scientists' interests on life in the womb also focus on other markers of development in the unborn child, including, but not limited to, presence of a heartbeat, brain development, a viable pregnancy or viable

intrauterine pregnancy during the first trimester of pregnancy, and the ability to experience pain;

(11) In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Supreme Court noted that "we recognized in Roe that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term". Id. at 64. Due to advances in medical technology and diagnoses, present-day physicians and scientists now describe the viability of an unborn child in an additional manner, by determining whether there is a viable pregnancy or viable intrauterine pregnancy during the first trimester of pregnancy;

(12) While the overall risk of miscarriage after clinical recognition of pregnancy is twelve to fifteen percent, the incidence decreases significantly if cardiac activity in the unborn child has been confirmed. The detection of a heartbeat in an unborn child is a reliable indicator of a viable pregnancy and that the unborn child will likely survive to birth, especially if presenting for a prenatal visit at eight weeks gestational age or later. For asymptomatic women attending a first prenatal visit between six and eleven weeks gestational age where a heartbeat was confirmed through an ultrasound, the subsequent risk of miscarriage is one and six-tenths percent. Although the risk is higher at six weeks gestational age at nine and four-tenths percent, it declines rapidly to one and five-tenths percent at eight weeks gestational age, and less than one percent at nine weeks gestational age or later;

(13) The presence of a heartbeat in an unborn child represents a more definable point of ascertaining survivability than the ambiguous

concept of viability that has been adopted by the Supreme Court, especially since if a heartbeat is detected at eight weeks gestational age or later in a normal pregnancy, there is likely to be a viable pregnancy and there is a high probability that the unborn child will survive to birth;

(14) The placenta begins developing during the early first trimester of pregnancy and performs a respiratory function by making oxygen supply to and carbon dioxide removal from the unborn child possible later in the first trimester and throughout the second and third trimesters of pregnancy;

(15) By the fifth week of gestation, the development of the brain of the unborn child is underway. Brain waves have been measured and recorded as early as the eighth week of gestational age in children who were removed during an ectopic pregnancy or hysterectomy. Fetal magnetic resonance imaging (MRI) of an unborn child's brain is used during the second and third trimesters of pregnancy and brain activity has been observed using MRI;

(16) Missouri law identifies the presence of circulation, respiration, and brain function as indicia of life under section 194.005, as the presence of circulation, respiration, and brain function indicates that such person is not legally dead, but is legally alive;

(17) Unborn children at eight weeks gestational age show spontaneous movements, such as a twitching of the trunk and developing limbs. It has been reported that unborn children at this stage show reflex responses to touch. The perioral area is the first part of the unborn child's body to respond to

touch at about eight weeks gestational age and by fourteen weeks gestational age most of the unborn child's body is responsive to touch;

(18) Peripheral cutaneous sensory receptors, the receptors that feel pain, develop early in the unborn child. They appear in the perioral cutaneous area at around seven to eight weeks gestational age, in the palmar regions at ten to ten and a half weeks gestational age, the abdominal wall at fifteen weeks gestational age, and over all of the unborn child's body at sixteen weeks gestational age;

(19) Substance P, a peptide that functions as a neurotransmitter, especially in the transmission of pain, is present in the dorsal horn of the spinal cord of the unborn child at eight to ten weeks gestational age. Enkephalins, peptides that play a role in neurotransmission and pain modulation, are present in the dorsal horn at twelve to fourteen weeks gestational age;

(20) When intrauterine needling is performed on an unborn child at sixteen weeks gestational age or later, the reaction to this invasive stimulus is blood flow redistribution to the brain. Increased blood flow to the brain is the same type of stress response seen in a born child and an adult;

(21) By sixteen weeks gestational age, pain transmission from a peripheral receptor to the cortex is possible in the unborn child;

(22) Physicians provide anesthesia during in utero treatment of unborn children as early as sixteen weeks gestational age for certain procedures, including those to correct fetal urinary tract obstruction. Anesthesia is administered by

ultrasound-guided injection into the arm or leg of the unborn child;

(23) A leading textbook on prenatal development of the human brain states, "It may be concluded that, although nociperception (the actual perception of pain) awaits the appearance of consciousness, nociception (the experience of pain) is present some time before birth. In the absence of disproof, it is merely prudent to assume that pain can be experienced even early in prenatal life (Dr. J. Wisser, Zürich): the fetus should be given the benefit of the doubt". Ronan O'Rahilly & Fabiola Müller. The Embryonic Human Brain: An Atlas of Developmental Stages (3d ed. 2005);

(24) By fourteen or fifteen weeks gestational age or later, the predominant abortion method in Missouri is dilation and evacuation (D&E). The D&E abortion method includes the dismemberment, disarticulation, and exsanguination of the unborn child, causing the unborn child's death;

(25) The Supreme Court acknowledged in *Gonzales* v. *Carhart*, 550 U.S. 124, 160 (2007), that "the standard D&E is in some respects as brutal, if not more, than the intact D&E" partial birth abortion method banned by Congress and upheld as facially constitutional by the Supreme Court, even though the federal ban was applicable both before and after viability and had no exception for the health of the mother;

(26) Missouri's ban on the partial birth abortion method, section 565.300, is in effect because of *Gonzales* v. *Carhart* and the Supreme Court's subsequent decision in *Nixon* v. *Reproductive Health Services of Planned Parenthood of the St. Louis*

Region, Inc., 550 U.S. 901 (2007), to vacate and remand to the appellate court the prior invalidation of section 565.300. Since section 565.300, like Congress' ban on partial birth abortion, is applicable both before and after viability, there is ample precedent for the general assembly to constitutionally prohibit the brutal D&E abortion method at fourteen weeks gestational age or later, even before the unborn child is viable, with a medical emergency exception;

(27) In *Roper* v. *Simmons*, 543 U.S. 551 (2005), the Supreme Court determined that "evolving standards of decency" dictated that a Missouri statute allowing the death penalty for a conviction of murder in the first degree for a person under eighteen years of age when the crime was committed was unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because it violated the prohibition against "cruel and unusual punishments";

(28) In *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123 (2019), the Supreme Court noted that "'[d]isgusting' practices" like disemboweling and quartering "readily qualified as 'cruel and unusual', as a reader at the time of the Eighth Amendment's adoption would have understood those words";

(29) Evolving standards of decency dictate that Missouri should prohibit the brutal and painful D&E abortion method at fourteen weeks gestational age or later, with a medical emergency exception, because if a comparable method of killing was used on:

(a) A person convicted of murder in the first degree, it would be cruel and unusual punishment; or

(b) An animal, it would be unlawful under state law because it would not be a humane method, humane euthanasia, or humane killing of certain animals under chapters 273 and 578;

(30) In *Roper*, the Supreme Court also found that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions". *Roper*, 543 U.S. at 578. In its opinion, the Supreme Court was instructed by "international covenants prohibiting the juvenile death penalty", such as the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171. Id. at 577;

(31) The opinion of the world community, reflected in the laws of the United Nation's 193-member states and six other entities, is that in most countries, most abortions are prohibited after twelve weeks gestational age or later;

(32) The opinion of the world community is also shared by most Americans, who believe that most abortions in the second and third trimesters of pregnancy should be illegal, based on polling that has remained consistent since 1996;

(33) Abortion procedures performed later in pregnancy have a higher medical risk for women. Compared to an abortion at eight weeks gestational age or earlier, the relative risk increases exponentially at later gestational ages. The relative risk of death for a pregnant woman who had an abortion performed or induced upon her at:

(a) Eleven to twelve weeks gestational age is between three and four times higher than an abortion at eight weeks gestational age or earlier;

(b) Thirteen to fifteen weeks gestational age is almost fifteen times higher than an abortion at eight weeks gestational age or earlier;

(c) Sixteen to twenty weeks gestational age is almost thirty times higher than an abortion at eight weeks gestational age or earlier; and

(d) Twenty-one weeks gestational age or later is more than seventy-five times higher than an abortion at eight weeks gestational age or earlier;

(34) In addition to the short-term risks of an abortion, studies have found that the long-term physical and psychological consequences of abortion for women include, but are not limited to, an increased risk of preterm birth, low birthweight babies, and placenta previa in subsequent pregnancies, as well as serious behavioral health issues. These risks increase as abortions are performed or induced at later gestational ages. These consequences of an abortion have a detrimental effect not only on women, their children, and their families, but also on an already burdened health care system, taxpayers, and the workforce;

(35) A large percentage of women who have an abortion performed or induced upon them in Missouri each year are at less than eight weeks gestational age, a large majority are at less than fourteen weeks gestational age, a larger majority are at less than eighteen weeks gestational age, and an even larger majority are at less than twenty weeks gestational age. A prohibition on performing or inducing an

abortion at eight weeks gestational age or later, with a medical emergency exception, does not amount to a substantial obstacle to a large fraction of women for whom the prohibition is relevant, which is pregnant women in Missouri who are seeking an abortion while not experiencing a medical emergency. The burden that a prohibition on performing or inducing an abortion at eight, fourteen, eighteen, or twenty weeks gestational age or later, with a medical emergency exception, might impose on abortion access, is outweighed by the benefits conferred upon the following:

(a) Women more advanced in pregnancy who are at greater risk of harm from abortion;

(b) Unborn children at later stages of development;

(c) The medical profession, by preserving its integrity and fulfilling its commitment to do no harm; and

(d) Society, by fostering respect for human life, born and unborn, at all stages of development, and by lessening societal tolerance of violence against innocent human life;

(36) In *Webster*, the Supreme Court noted, in upholding a Missouri statute, "that there may be a 4-week error in estimating gestational age". *Webster*, 492 U.S. at 516. Thus, an unborn child thought to be eight weeks gestational age might in fact be twelve weeks gestational age, when an abortion poses a greater risk to the woman and the unborn child is considerably more developed. An unborn child at fourteen weeks gestational age might be eighteen weeks gestational age and an unborn child at eighteen

weeks gestational age might be twenty-two weeks gestational age, when an abortion poses a greater risk to the woman, the unborn child is considerably more developed, the abortion method likely to be employed is more brutal, and the risk of pain experienced by the unborn child is greater. An unborn child at twenty weeks gestational age might be twenty-four weeks gestational age, when an abortion poses a greater risk to the woman, the unborn child is considerably more developed, the abortion method likely to be employed is more brutal, the risk of pain experienced by the unborn child is greater, and the unborn child may be viable.

3. The state of Missouri is bound by Article VI, Clause 2 of the Constitution of the United States that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land". One such treaty is the International Covenant on Civil and Political Rights, entered into force on March 23, 1976, and adopted by the United States on September 8, 1992. In ratifying the Covenant, the United States declared that while the provisions of Articles 1 through 27 of the Covenant are not self-executing, the United States' understanding is that state governments share responsibility with the federal government in implementing the Covenant.

4. Article 6, Paragraph 1, U.N.T.S. at 174, of the International Covenant on Civil and Political Rights states, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". The state of Missouri takes seriously its obligation to comply with the Covenant and to implement this paragraph as it relates to the inherent right to life of unborn human

beings, protecting the rights of unborn human beings by law, and ensuring that such unborn human beings are not arbitrarily deprived of life. The state of Missouri hereby implements Article 6, Paragraph 1 of the Covenant by the regulation of abortion in this state.

5. The state of Missouri has interests that include, but are not limited to:

(1) Protecting unborn children throughout pregnancy and preserving and promoting their lives from conception to birth;

(2) Encouraging childbirth over abortion;

(3) Ensuring respect for all human life from conception to natural death;

(4) Safeguarding an unborn child from the serious harm of pain by an abortion method that would cause the unborn child to experience pain while she or he is being killed;

(5) Preserving the integrity of the medical profession and regulating and restricting practices that might cause the medical profession or society as a whole to become insensitive, even disdainful, to life. This includes regulating and restricting abortion methods that are not only brutal and painful, but if allowed to continue, will further coarsen society to the humanity of not only unborn children, but all vulnerable and innocent human life, making it increasingly difficult to protect such life;

(6) Ending the incongruities in state law by permitting some unborn children to be killed by abortion, while requiring that unborn children be protected in nonabortion circumstances through, including, but not limited to, homicide, assault, self-

defense, and defense of another statutes; laws guaranteeing prenatal health care, emergency care, and testing; state-sponsored health insurance for unborn children; the prohibition of restraints in correctional institutions to protect pregnant offenders and their unborn children; and protecting the interests of unborn children by the appointment of conservators, guardians, and representatives;

(7) Reducing the risks of harm to pregnant women who obtain abortions later in pregnancy; and

(8) Avoiding burdens on the health care system, taxpayers, and the workforce because of increased preterm births, low birthweight babies, compromised pregnancies, extended postpartum recoveries, and behavioral health problems caused by the long-term effects of abortions performed or induced later in the pregnancy.

APPENDIX F

§ 188.038, Revised Statutes of Missouri

188.038. Pregnant women, bias or discrimination against — findings of general assembly — limitations on performing an abortion, when. — 1. The general assembly of this state finds that:

(1) Removing vestiges of any past bias or discrimination against pregnant women, their partners, and their family members, including their unborn children, is an important task for those in the legal, medical, social services, and human services professions;

(2) Ending any current bias or discrimination against pregnant women, their partners, and their family members, including their unborn children, is a legitimate purpose of government in order to guarantee that those who "are endowed by their Creator with certain unalienable Rights" can enjoy "Life, Liberty and the pursuit of Happiness";

(3) The historical relationship of bias or discrimination by some family planning programs and policies towards poor and minority populations, including, but not limited to, the nonconsensual sterilization of mentally ill, poor, minority, and immigrant women and other coercive family planning programs and policies, must be rejected;

(4) Among Missouri residents, the rate of black or African-American women who undergo abortions is significantly higher, about three and one-half* times higher, than the rate of white women who undergo abortions. Among Missouri residents, the rate of black or African-American women who undergo

repeat abortions is significantly higher, about one and one-half* times higher, than the rate of white women who undergo repeat abortions;

(5) Performing or inducing an abortion because of the sex of the unborn child is repugnant to the values of equality of females and males and the same opportunities for girls and boys, and furthers a false mindset of female inferiority;

(6) Government 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. Eliminating unborn children with Down Syndrome raises grave concerns for the lives of those who do live with disabilities. It sends a message of dwindling support for their unique challenges, fosters a false sense that disability is something that could have been avoidable, and is likely to increase the stigma associated with disability.

2. No 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.

3. No person shall perform or induce an abortion on a woman if the person knows that the woman is seeking the abortion solely because of the sex or race of the unborn child.

4. Any physician or other person who performs or induces or attempts to perform or induce an abortion prohibited by this section shall be subject to all applicable civil penalties under this chapter

including, but not limited to, sections 188.065 and 188.085.

*Words "a half" appear in original rolls.

APPENDIX G

§ 188.056, Revised Statutes of Missouri

188.056. Abortion prohibited after eight weeks gestational age, exception for medical emergency — violation, penalty — severability clause. — 1. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eight weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this section.

2. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 1 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.

3. Prosecution under this section shall bar prosecution under section* 188.057, 188.058, or 188.375 if prosecution under such sections would violate the provisions of Amendment V to the Constitution of the United States or Article I, Section 19 of the Constitution of Missouri.

4. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or

period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*Word "sections" appears in original rolls.

APPENDIX H

§ 188.057, Revised Statutes of Missouri

188.057. Abortion prohibited after fourteen weeks gestational age, exception for medical emergency — violation, penalty — severability clause. — 1. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at fourteen weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this section.

2. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 1 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.

3. Prosecution under this section shall bar prosecution under section* 188.056, 188.058, or 188.375 if prosecution under such sections would violate the provisions of Amendment V to the Constitution of the United States or Article I, Section 19 of the Constitution of Missouri.

4. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or

period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*Word "sections" appears in original rolls.

APPENDIX I

§ 188.058, Revised Statutes of Missouri

188.058. Abortion prohibited after eighteen weeks gestational age, exception for medical emergency — violation, penalty — severability clause. — 1. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman at eighteen weeks gestational age or later, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this section shall not be prosecuted for a conspiracy to violate the provisions of this section.

2. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 1 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.

3. Prosecution under this section shall bar prosecution under section*188.056, 188.057, or 188.375 if prosecution under such sections would violate the provisions of Amendment V to the Constitution of the United States or Article I, Section 19 of the Constitution of Missouri.

4. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or

period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*Word "sections" appears in original rolls.

APPENDIX J

§ 188.375, Revised Statutes of Missouri

188.375. Citation of act — definition — limitation on abortion, when — violation, penalty — method or technique to be utilized — severability clause. — 1. This section shall be known and may be cited as the "Late-Term Pain-Capable Unborn Child Protection Act".

2. As used in this section, the phrase "**late-term pain-capable unborn child**" shall mean an unborn child at twenty weeks gestational age or later.

3. Notwithstanding any other provision of law to the contrary, no abortion shall be performed or induced upon a woman carrying a late-term pain-capable unborn child, except in cases of medical emergency. Any person who knowingly performs or induces an abortion of a late-term pain-capable unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection.

4. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 3 of this section that the person performed or induced an abortion because of a medical emergency. The defendant shall have the burden of persuasion that the defense is more probably true than not.

5. Prosecution under subsection 3 of this section shall bar prosecution under section* 188.056, 188.057, or 188.058 if prosecution under such sections would

violate the provisions of Amendment V to the Constitution of the United States or Article I, Section 19 of the Constitution of Missouri.

6. When in cases of medical emergency a physician performs or induces an abortion upon a woman in her third trimester carrying a late-term pain-capable unborn child, the physician shall utilize the available method or technique of abortion most likely to preserve the life or health of the unborn child. In cases where the method or technique of abortion most likely to preserve the life or health of the unborn child would present a greater risk to the life or health of the woman than another legally permitted and available method or technique, the physician may utilize such other method or technique. In all cases where the physician performs or induces an abortion upon a woman during her third trimester carrying a late-term pain-capable unborn child, the physician shall certify in writing the available method or techniques considered and the reasons for choosing the method or technique employed.

7. When in cases of medical emergency a physician performs or induces an abortion upon a woman during her third trimester carrying a late-term pain-capable unborn child, there shall be in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion.

8. Any physician who knowingly violates any of the provisions of subsection** 6 or 7 of this section shall be guilty of a class D felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. A

woman upon whom an abortion is performed or induced in violation of subsection** 6 or 7 of this section shall not be prosecuted for a conspiracy to violate the provisions of those subsections.

9. If any one or more provisions, subsections, sentences, clauses, phrases, or words of this section or the application thereof to any person, circumstance, or period of gestational age is found to be unenforceable, unconstitutional, or invalid by a court of competent jurisdiction, the same is hereby declared to be severable and the balance of the section shall remain effective notwithstanding such unenforceability, unconstitutionality, or invalidity. The general assembly hereby declares that it would have passed this section, and each provision, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, subsections, sentences, clauses, phrases, or words of the section, or the application of the section to any person, circumstance, or period of gestational age, would be declared unenforceable, unconstitutional, or invalid.

*Word "sections" appears in original rolls.

**Word "subsections" appears in original rolls.