No. 20-1434

IN THE

Supreme Court of the United States

LITTLE ROCK FAMILY PLANNING SERVICES, *et al.*,
Petitioners,

v.

LESLIE RUTLEDGE, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS AND REPRESENTATIVES SUPPORTING PETITIONERS

THOMAS R. MCCARTHY
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

May 13, 2021

Counsel for Amici Curiae

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STATEMENT OF INTEREST[1]

Amici curiae are members of the U.S. Senate and House of Representatives (listed in the Appendix) who have a longstanding interest in protecting individuals with disabilities, including children both born and unborn. Consistent with the overarching federal policy of nondiscrimination, Arkansas's law aims to combat invidious discrimination against unborn children with disabilities by preventing doctors from performing selective abortions based on disability. *Amici* believe that the lower court erred in concluding that the Constitution flatly prohibits states from preventing such an odious and discriminatory practice. *Amici* therefore urge the Court to grant the petition and reverse the decision below.

[1] Per Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have received timely notice and have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

"'Down syndrome children, whether born or unborn, are equal in dignity and value to the rest of us.'" *Preterm-Cleveland v. McCloud*, No. 18-3329, 2021 WL 1377279, at *2 (6th Cir. Apr. 13, 2021) (en banc) (citation omitted). Congress has a profound respect for individuals with disabilities and has long recognized that having a disability is not grounds for discriminating against, targeting, or refusing someone medical care. As reflected in law after law, Congress has emphasized that individuals with disabilities are worthy of fair treatment. Discriminating against an individual because of his or her disability fails to show respect for the inherent value of human life.

Performing an abortion on the basis of a disability disregards the dignity of those with disabilities and perpetuates abortion as "a tool of modern-day eugenics." *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). Consistent with the overarching federal policy of nondiscrimination, and in light of the unfortunate history of using abortion to target children based on race, gender, and disabilities, Arkansas's law aims to combat invidious discrimination by preventing doctors from performing selective abortions based on a Down syndrome diagnosis. But the court below wrongly held that the Constitution forbids such a law.

That decision "threatens the very existence of people with Down syndrome." Pet. 2. Unfortunately,

"the grisly reality is that abortion of human beings with Down syndrome is driven by a sector of society that doesn't want disabled people to be part of society." Pet. App. 97a (quoting Decl. of Donna J. Harrison, M.D.). *Amici* roundly reject that sentiment. "Every child deserves equal protection under the law—regardless of disability." *Press Release, Inhofe Leads Senators to Re-Introduce the Protecting Individuals with Down Syndrome Act* (Jan. 28, 2021) (statement of Sen. Marsha Blackburn (R-TN)), bit.ly/3dExlOa. The Court should grant the petition and reverse the decision below.

ARGUMENT

I. Congress has long recognized that having a disability is not grounds for discriminating against, targeting, or refusing someone medical care.

America has a "national policy of protecting and respecting people with disabilities." *Preterm Cleveland,* 2021 WL at *21 (Griffin, J., concurring). Discrimination leaves an indelible mark upon its victims, and "acts of invidious discrimination ... cause unique evils that government has a compelling interest to prevent." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628. As reflected in law after law, Congress has emphasized that individuals with disabilities are worthy of fair treatment. With the American Disabilities Act (ADA), for example, Congress sought "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing

discrimination against" those individuals. 42 U.S.C. §12101(b). Indeed, Congress "invoke[d] the sweep of [its] congressional authority" to effectuate these goals. *Id.*

Congress later expanded these legal protections to guarantee that those with disabilities could participate in the workforce. After all, a "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to live independently, enjoy self-determination, make choices, contribute to society, pursue meaningful careers, and enjoy full inclusion and integration in the economic, political, social, and educational mainstream of American society." Pub. L. No. 102-569, 106 Stat. 4344, §2(a) (1992). Accordingly, with the Rehabilitation Act, Congress "develop[ed] and implement[ed] comprehensive and continuing state plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals." 29 U.S.C. §791.

Recognizing that "[i]mproving educational results for children with disabilities is an essential element of our national policy," Congress has also worked to secure educational opportunities for children with disabilities. 20 U.S.C. §1400(c). Congress passed the Individuals with Disabilities Education Act (IDEA) to help "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* IDEA seeks to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and

related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.* §1400(d).

These laws are just the tip of the iceberg. Congress has passed numerous others to combat discrimination for those with disabilities. *See e.g.*, Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000 (prohibiting disability discrimination in programs and activities that receive federal financial assistance); Affordable Care Act, 42 U.S.C. § 18116 (prohibiting discrimination in healthcare programs or activities based on disability); Fair Housing Act, 42 U.S.C. §3601 (prohibiting disability discrimination in the housing market); Genetic Information Nondiscrimination Act, 42 U.S.C. §2000ff (prohibiting employers and contractors from "fail[ing] or refus[ing] to refer for employment, or otherwise to discriminate against, any individual because of genetic information"); Air Carrier Access Act, 47 U.S.C. §41705 (ensuring that mass transportation is planned and designed to facilitate access to those with disabilities, because "individuals with disabilities have the same right as other individuals to use mass transportation service and facilities"); Architectural Barriers Act, 42 U.S.C. §4151 (building or facilities receiving federal funds must be accessible and usable by those with disabilities). Simply put, Congress is committed to rooting out discrimination against individuals with disabilities.

Moreover, Congress has demonstrated its commitment to preventing discrimination based on disability by tying federal funding to compliance with

anti-discrimination statutes. *See e.g.*, Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000 (prohibiting disability discrimination in programs and activities that receive federal financial assistance); 20 U.S.C. §1440(c)(6) (stating that "it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities"); *id.* §1411(a)(1) (making federal funding available to policy compliant states "to assist them [in] provid[ing] special education and related services to children with disabilities"); 29 U.S.C. §720(b)(1) (authorizing the release of federal funds "to assist States in meeting the costs of vocational rehabilitation services" for the disabled by establishing "statewide comprehensive plans"); *id.* §721(a)(1)(A)-(2)(B) (detailing submission requirements for the "statewide comprehensive plans" that would receive federal funding). At bottom, Congress has fostered a deep respect for those with disabilities and has encouraged states to mirror the "now-enlightened national policy of protecting and respecting people with disabilities." *Preterm Cleveland,* 2021 WL at *21 (Griffin, J., concurring).

II. Consistent with that overarching federal policy, Arkansas's law aims to prevent invidious discrimination against unborn children with disabilities.

A. There is an unfortunate history of using abortion to target children based on race, gender, and disabilities.

Arkansas's law prevents Down syndrome—an immutable characteristic—"from becoming the sole

criterion for deciding whether [a] child will live or die." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). In other words, "this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Id.* Historically, the eugenics movement has marginalized and discriminated against those with disabilities, deeming them unfit for participation in society or for life itself. And "abortion has proved to be a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics." *Id.* at 1790. Indeed, the "links between abortion and eugenics" are well established. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 285 (5th Cir. 2019) (Ho, J., concurring in the judgment).

A discredited pseudo-science, eugenics "insist[s] that human progress depend[s] on promoting reproduction by the best people in the best combinations." Adam S. Cohen, *Harvard's Eugenics Era*, Harv. Mag. (2016), bit.ly/3f47non. At its height, eugenics "encouraged or forced sterilizations of men and women deemed unfit to reproduce" and involved discourse marked by "[r]acist, sexist, and classist assumptions." *Eugenics*, Stan. Encyclopedia of Phil. (2014), stanford.io/3t0LVEc. Francis Galton, who coined the term "eugenics," proclaimed that "[w]hat Nature does blindly, slowly, and ruthlessly, man may do providently, quickly, and kindly" by "promoting reproduction between people with desirable qualities and inhibiting reproduction of the unfit." Francis Galton, Essays in Eugenics 42 (1909). Those with physical disabilities were often considered "unfit." *See*

Daniel J. Kevles, In the Name of Eugenics 116-17 (1985).

To eradicate the "unfit," eugenicists turned to abortion to perpetuate their discriminatory agenda. In the early twentieth century, "[s]upport for abortion c[ould] … be found throughout the literature on eugenics." David T. Beito & Linda Royster Beito, Black Maverick: T.R.M. Howard's Fight for Civil Rights and Economic Power 215 (2009). Indeed, the "use of abortion to achieve eugenic goals [was] not merely hypothetical," *Box,* 139 S. C.t at 1783; it "ha[d] been used to justify abortion from the start," William McGurn, *White Supremacy and Abortion*, Wall. St. J. (Sept. 2, 2019), on.wsj.com/3tL15hn.

Eugenicists "consider[ed] legalized abortion … as possible means to influence the fitness and happiness and quality of the race." Henry Harris, *Abortion in Society Russia: Has the Time Come to Legalize It Everywhere?*, 25 Eugenics Rev. 22 (1933). They viewed abortion as a way for Americans to "endeavor[] to correct, what, rightly or wrongly, they regard as social defects." 6 Havelock Ellis, Studies in the Psychology of Sex 617 (1910). Indeed, Alan Guttmacher, former president of Planned Parenthood and vice president of the American Eugenics Society, wrote that "'the quality of the parents must be taken into account,' including '[f]eeble-mindedness,' and believed that 'it should be permissible to abort any pregnancy ... in which there is a strong probability of an abnormal or malformed infant.'" *Box*, 139 S. Ct. at 1789 (Thomas, J., concurring) (quoting Alan Guttmacher, Babies by Choice or by Chance 189 (1959)). "At the same time,

eugenicists acknowledged that "th[e] birth rate [of the poorest third of the population] would fall rapidly if artificial abortion were made legal." *Population Control: Dr. Binnie Dunlop's Address to the Eugenics Society*, 25 Eugenics Rev. 251 (1934).

Abortions of the disabled unborn increased with the advent of fetal testing for disabilities in the late twentieth century.[2] In turn, abortion proponents increasingly relied on fetal disability to urge the removal of all abortion restrictions; in such cases, they argued, abortion would be "condoned by [doctors'] consciences, accepted by their peers and demanded by their patients." *Abortion Laws Condemned*, 90 Sci. News 320, 320 (1966); Jane E. Brody, *Prenatal Diagnosis Is Reducing Risk of Birth Defects*, N.Y. Times, June 3, 1971, at 41 ("As a result of [prenatal testing], the birth of many severely abnormal children has been prevented and hundreds of normal babies have been born to parents who might not otherwise have dared to have children."). Indeed, "[t]he potential for eugenic harm can be traced to the misperceptions and mischaracterizations of people with disabilities that transpire within the medical professional-patient discourse." Cara Dunne & Catherine Warren, *Lethal Autonomy: The Malfunction of the Informed Consent Mechanism within the Context of Prenatal Diagnosis*

[2] As the rate of fetal defects increased from the 1940s to the 1970s, technologies capable of identifying fetal disabilities became more advanced and widespread. *See* Mary Ziegler, *The Disability Politics of Abortion*, 2017 Utah L. Rev 587, 590, 593-94.

of Genetic Variants, 14 Issues L. & Med. 165, 168 (1998).

Sadly, abortion remains a tool of discrimination against the disabled in modern society.[3] More than two-thirds of unborn children in the United States who are prenatally diagnosed with Down Syndrome are aborted. Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates* (1995-2011), 32 Prenatal Diagnosis 142, 150 (2012).

"[I]n the United States and abroad, fetuses with Down syndrome are disproportionally targeted for abortions." *Preterm-Cleveland*, 2021 WL at *2. Since the introduction of the American College of Obstetricians and Gynecologists Practice Bulletin, which encourages screening fetal chromosomes for mutations, the abortion rate among women who opt-in to such screening is estimated at eighty-to-ninety percent. *See* Matthew Diehr, Comment, *The State of Affairs Regarding Counseling for Expectant Parents of a Child with a Disability: Do ACOG's New Practice*

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[3] Abortion remains a tool of discrimination against women too. "Sex-selective abortion is a well-known problem" due to cultural and political preferences for male children, especially in places like China and India. Anna Higgins, *Sex-Selection Abortion: The Real War on Women*, Charlotte Lozier Inst. (Apr. 13, 2016), bit.ly/3ehmABM. "In China, for example, men outnumber women to the tune of 33 million." *Id.* And a recent shows that sex-selective abortion is on the rise in the U.S. as well. See Nicholas Eberstadt & Evan Abramsky, *Has the 'Global War Against Baby Girls' Come to America?*, Inst. for Family Studies (Jan 27, 2020), bit.ly/3vGFaJs.

Guidelines Signify the Arrival of a Brave New World?, 53 St. Louis U. L.J. 1287, 1288-89 (2009). Abortion rates following a prenatal Down Syndrome diagnosis are even higher in Europe. *See, e.g.*, George F. Will, Opinion: *The Real Down Syndrome Problem: Accepting Genocide*, Wash. Post (Mar. 14, 2018), wapo.st/3lSpcYY (detailing Iceland and Denmark's near-100% abortion rate following a positive prenatal test for Down Syndrome). *See also, Box*, 139 S. Ct. at 1790-91 (Thomas, J., concurring) (discussing the high abortion rate for children diagnosed with Down syndrome in the United States and Western Europe).

Further, studies show that some doctors encourage women to abort after diagnosing a baby with Down Syndrome. This sad reality is perhaps unsurprising given that not long ago a doctor and public health administrator who would later become Surgeon General remarked that "[a]bortion has had an important, and positive, public-health effect...[by] reduc[ing] the number of children afflicted with severe defects; the number of Down's syndrome infants ... was 64 percent lower than it would have been without legal abortion." *Freedom of Choice Act of 1989: Hearings on S. 1912 Before the Sen. Comm. on Lab & Human Resources*, 101st Cong. 199 (1990) (statement of Joycelyn Elders). Today, ten percent of doctors have "flatly admitted they 'urge' aborting children with Down syndrome." Pet. at 7. And twenty-four percent of women in one study said their doctor insisted they abort their baby after diagnosing the baby with Down syndrome. *Id.* Such insistence is usually based on "false stereotypes and misinformation from doctors with little knowledge of the condition." Pet. 2.

As acknowledged by a testifying expert in this case, "the grisly reality is that abortion of human beings with Down syndrome is driven by a sector of society that doesn't want disabled people to be part of society." Pet. App. 97a (quoting Decl. of Donna J. Harrison, M.D.); *see also* Erik Parens & Adrienne Asch, *The Disability Rights Critique of Prenatal Genetic Testing*, 29 Hastings Ctr. Rep., Sept.-Oct. 1999, at S1, S2 (1999) ("[S]elective abortion expresses negative or discriminatory attitudes not merely about a disabling trait, but by those who carry it … signal[ing] an intolerance of diversity.").

Judges across the country have noted this sordid historical connection between eugenics and abortion too. *See* App. 20a (Erickson, J., concurring) (recognizing selective abortions as part of a "neo-eugenics movement"); *Preterm-Cleveland*, 2021 WL at *17 (describing Ohio's law as an "anti-eugenics statute"); *id.* at *19 (noting that "[e]ugenics was the root of the Holocaust and is a motivation for many of the selective abortions that occur today") (Griffin, J., concurring); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 311 (7th Cir. 2018) (Manion, J., concurring in part and dissenting in part) ("Surely, Indiana has a compelling interest in attempting to prevent this type of private eugenics."); *Planned Parenthood of Ind. and Ky. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from denial of reh'g en banc) (describing Indiana's law as a "eugenics statute"); *Jackson Women's Health Org.*, 945 F.3d at 285 (Ho, J., concurring in the judgment) ("among past abortion advocates were 'some

eugenicists [who] believed that abortion should be legal for the very *purpose* of promoting eugenics'"). And because "[u]sing abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes [*Planned Parenthood of Southeastern Pennsylvania v.*] *Casey* considered," the issue was ripe for state legislatures. *Planned Parenthood,* 917 F.3d at 536 (Easterbrook, J., dissenting).

B. Arkansas's law seeks to prevent abortion from becoming a tool of modern-day eugenics and to prevent discrimination based on disability.

Arkansas's law prohibits a doctor from intentionally performing an abortion or attempting to perform an abortion "with the knowledge that a pregnant woman is seeking an abortion solely on the basis of" a "test result indicating" or a "prenatal diagnosis of Down Syndrome" in an unborn child, or for "any other reason to believe that an unborn child has Down Syndrome." Ark. Code Ann. §20-16-2103 (2017). The court below held that the U.S. Constitution forbids such a law. Unfortunately, "[t]hat conclusion threatens the very existence of people with Down syndrome in this country. And it sends an unmistakable message to people with Down syndrome that the Constitution, as interpreted by this Court, is indifferent to their survival." Pet. 2.

Arkansas put forth strong evidence of its compelling interest in eradicating the "stigmatic message" that "a life with Down syndrome isn't worth living," Pet. 24, and in preventing the Down syndrome

"population from being eliminated." Pet. 2. Yet the district court declined to address Arkansas's interest in antidiscrimination, and the Eighth Circuit deemed that interest irrelevant. Pet. App. 10a, 132a. Instead, the court below held that any law that places a substantial obstacle in the path of a woman seeking a pre-viability abortion is per se invalid. That decision is mistaken. Under this Court's precedents, abortion regulations that reasonably serve a compelling state interest are constitutional.

Arkansas's law reasonably furthers its compelling interest in antidiscrimination and in preventing abortion from becoming "a tool of modern-day eugenics," *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring), "both before and after viability," Tori Gooder, Comment, *Selective Abortion Bans: The Birth of a New State Compelling Interest*, 87 U. Cin. L. Rev. 545, 562 (2018). As the Sixth Circuit recently held, "emphasis on pre-viability is misplaced" when the State expresses "valid and legitimate" interests in preventing the stigmatization of the Down Syndrome community from discriminatory abortions, protecting women from coercion to abort by physicians, and protecting the integrity and ethics of the medical profession, because "[t]he strengths of these interests is the same throughout pregnancy" and does not "turn[] on the viability of the fetus." *Preterm-Cleveland*, 2021 WL at *5,

Moreover, "the viability standard fails to adequately consider the substantial interest of the state in protecting the lives of unborn children as well as the state's 'compelling interest in preventing

abortion from becoming a tool of modern-day eugenics.'" Pet. App. 17a (Shepherd, J., concurring). While the "new eugenics movement is more subtle" than that of the 20th century "a state could nonetheless conclude that it poses a great and grave risk to its citizen." *Id.* at 19a (Erickson, J., concurring); *see also supra* Section II.A.

The "Constitution permits States to convey their interest in the dignity of all human beings in all manner of ways," and seeking to "avoid the stigma" of discrimination against unborn children "based on disability, sex, and race" is the "most basic of all." *Preterm-Cleveland*, 2021 WL at *18 (Sutton, J., concurring). Indeed, the state has a "compelling interest in prohibiting its physicians from knowingly engaging in the practice of eugenics," especially since eugenics "is a motivation for many of the selective abortions that occur today." *Id.* at *19 (Griffin, J., concurring). In particular, antidiscrimination laws like Arkansas's seek to end the propagation of the "'odious view that some lives are worth more than others' and [to] ensure that people with Down syndrome are not eliminated in America"—interests that are "wholly distinct" from the State's interest in protecting potential life. *Id.* at *22 (Bush, J., concurring).

Other states, too, have recognized and acted on these important interests. Indiana, Kentucky, Louisiana, Missouri, Mississippi, North Dakota, Ohio, Tennessee, and Utah—have all passed similar laws. 2019 Ky. Acts ch. 020, § 311.731; La. Stat. Ann. §40:1061.1.2; Miss. Code Ann. §41-41-401, -407 (the

State "maintains a 'compelling interest in preventing abortion from becoming a tool of modern-day eugenics'" and in antidiscrimination generally); Mo. Ann. Stat. §188.038 (explaining its interest in preventing the "victimiz[ation of] the disabled unborn child at his or her most vulnerable stage" and that aborting babies 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"); N.D. Cent. Code §14-02.1-04.1; Tn. Stat. §39-15-214, -217 (finding that discriminatory abortions are "antithetical to the core values [of] equality, freedom, and human dignity enshrined in both the United States and Tennessee Constitutions," and acknowledging that "[t]he historical use of abortion as a means to discriminatory ends is fundamentally objectionable and conflicts with this state's legitimate, substantial, and compelling interest in preventing discrimination and discriminatory practices"); Utah H.B. 166. And Arizona, Pennsylvania, and South Dakota are either considering passing this type of law or are in the process of doing so. Ariz. SB 1457; Pa. SB 21; S.D. HB 1110.

Congress itself has demonstrated a particular interest in preventing discrimination against unborn children with disabilities. Earlier this year, the House and the Senate introduced companion bills that would make it illegal for a doctor to perform an abortion when the doctor knows it is sought because the unborn

child has or might have Down Syndrome. Protecting Individuals with Down Syndrome Act. S. 75, 117th Cong. (2021); H.R. 532, 117th Cong. (2021). This legislation recognizes the tragic history of discrimination against individuals with disabilities and seeks "to end the unconscionable treatment and discrimination people with disabilities have faced for decades." *Lankford Joins Inhofe to Call for Greater Protections for Children with Down Syndrome*, James Lankford U.S. Sen. for Okla. (Jan. 29, 2021), bit.ly/3cb7H2y ("Lankford Press Release") (statement of Sen. Ben Sasse (R-NE)).

"Babies born with Down syndrome are often sources of joy and inspiration to their families and communities," and "[i]t is tragic to think their chance at life could be stolen away simply because of a genetic disorder." *Id.* (statement of Sen. Cindy Hyde-Smith (R-MS)). "A dwindling Down Syndrome population, which now stands at about 350,000, could mean less institutional support and reduced funds for medical research. It could also mean a lonelier world for those who remain." Amy Harmon, *Prenatal Test Puts Down Syndrome in Hard Focus*, N.Y. Times (May 9, 2007), nyti.ms/3szmU3m. Arkansas's law not only endeavors to protect discrimination against those with Down syndrome, but it also "moves us closer to a society that respects life in all forms and all stages." Lankford Press Release (statement of Sen. Tom Cotton (R-AR)). At bottom, having Down syndrome—or any other disability—"doesn't make anyone less human." *Id.* (Sasse). Arkansas recognizes that and so should this Court.

CONCLUSION

For all these reasons, this Court should grant the petition and reverse the decision below.

Respectfully submitted,

Thomas R. McCarthy
Counsel of Record
Tiffany H. Bates
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

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Counsel for Amici Curiae