No. 21-3

In the Supreme Court of the United States

ERIC S. SCHMITT, ATTORNEY GENERAL OF MISSOURI, ET AL.

Petitioners,

v.

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC.

Respondent.

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

BRIEF FOR THE PETITIONERS

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Question Presented

Whether a Missouri Law that prohibits medical providers from performing abortions when the provider knows that the sole reason for the abortion is a screening or test that indicates the unborn child has Down's Syndrome (the Down's Syndrome provision) is facially invalid under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* or whether it is a valid, reasonable regulation of abortion.

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Opinions Below

The opinion of the Court of Appeals is reported at 1 F.4th 552 (8th Cir. 2021). The opinions of the District Court are reported at 389 F. Sup. 3d 631 (W.D. Mo. 2019) (denying motion for preliminary injunction without prejudice as to the reason ban) and 408 F. Sup. 3d 1049 (W.D. Mo. 2019) (preliminarily enjoining enforcement of the reason ban).

Jurisdiction

The judgment of the Court of Appeals was entered on June 9, 2021. The petition for a writ of certiorari was filed on June 30, 2021, and was granted on September 1, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Statement of the Case

On May 17, 2019, the Missouri General Assembly passed House Bill 126 (HB 126). Journal of the House of Representatives of the State of Missouri, 100th General Assembly, at 2800. HB 126 includes a provision that prohibits doctors from performing abortions when they know that the unborn child's Down's Syndrome is the sole reason for the abortion. Doctors who violate the prohibition are subject to civil penalties, including professional discipline.

Pursuant to state law, certain members of the Missouri House of Representatives objected to the constitutionality of HB 126. *Id.* at 2798-800. A majority of their colleagues, however, believed the bill to be constitutional. The governor agreed and signed the bill into law on May 24, 2019. *Id.* at 2825-6.

On July 30, 2019, Reproductive Health Services (RHS) brought this case in the U.S. District Court for the Western District of Missouri. RHS moved for a preliminary injunction to stop the enforcement of the reason ban. The District Court initially denied the motion because RHS had not demonstrated that it was likely that any woman would seek an abortion solely because of a Down's Syndrome diagnosis while the case was pending. But after RHS submitted a declaration which convinced the court that some RHS patients would likely be unable to obtain abortions because of the reason ban, the court preliminarily enjoined enforcement of the ban.

The state defendants appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the preliminary injunction because it understood this Court's precedents to have established that pre-viability bans on categories of abortions are *per se* unconstitutional. 1 F.4th at 561.

Summary of the Argument

Roe v. Wade searched the "penumbras" of the Bill of Rights and found a substantive due process right to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113, 152 (1973). It then held that this right is "fundamental," such that laws which burden it are subject to strict scrutiny. *Id.* at 155. There are good reasons to question both of these holdings.

But this Court need not reconsider *Roe* or *Casey* to uphold Missouri's prohibition on terminating a pregnancy solely because the unborn child has Down Syndrome. Under this Court's precedents, abortion bans are subject to strict scrutiny—a high bar, but not an insurmountable one. Bans that are narrowly tailored to advance a compelling state interest are constitutional, even if they substantially burden the right to terminate a pregnancy.

Missouri's reason ban clears this high bar. Like more than a dozen other states, Missouri has prohibited doctors from performing abortions sought solely because of certain protected characteristics of the unborn child. These so-called "reason bans" build on *Roe's* recognition that a woman does not have a right to have a pre-viability abortion "for whatever reason she alone chooses." *Id.* at 153. As this Court recently noted, it has never before ruled on whether these bans on "sex-, race-, and disability-selective abortions" are constitutional. *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S.Ct. 1780, 1792 (2019).

They are. While *Roe* and *Casey* do not require women to offer any reason for seeking an abortion, it does not follow that a woman may have an abortion "for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. There are many areas of law where somebody is free to take an action for any reason except based on a protected characteristic. An employer can lay off an employee for no reason, but cannot lay off an employee because she becomes pregnant. A restaurant owner can serve or refuse to serve whoever they like, but they cannot refuse to serve people on account of their race. Similarly, a woman can choose to terminate her pregnancy prior to viability for no reason at all or for almost any reason; but, in Missouri, she cannot choose to abort an unborn child solely because of that child's sex, race, or Down Syndrome diagnosis.

The Eighth Circuit's holding that pre-viability abortion bans are *per se* unconstitutional under this Court's precedents is wrong. It rests on a single sentence of dicta from a minority opinion in *Casey*, and ignores the clear reasoning of both *Casey* and *Roe* Were it correct, the right to abortion would enjoy greater constitutional protection than the right to free speech

or the right to the equal protection of the law. This result is absurd, and this Court must not permit the Eighth Circuit's judgment to stand.

Instead, this Court should uphold Missouri's reason ban against RHS's facial challenge. Missouri has a compelling interest in eradicating invidious discrimination against people with Down's Syndrome, and each abortion motivated *solely* by a Down's Syndrome diagnosis is an instance of invidious discrimination. Missouri's reason ban does not prohibit all pre-viability abortions, all pre-viability abortions of unborn children with Down's Syndrome, or even all pre-viability abortions motivated solely by a Down's Syndrome diagnosis. Instead, it only makes doctors liable if they perform any abortion that they know was motivated solely by a Down's Syndrome diagnosis.

As explained below, the strict scrutiny analysis considers applications of the statute to a particular set of facts. Any given application of a statute is invalid if there is a less restrictive means of advancing the state's compelling interests, but the entire statute is only invalid if there is no conceivable set of facts under which its application would be the least restrictive means of advancing the state's interests. *United States v. Salerno*, 481 U.S. 739, 745 (1987). RHS has the burden of proving that the reason ban is facially invalid, and it has not carried that burden here.

Finally, if the Court holds that Missouri's reason ban cannot withstand strict scrutiny in any of its potential applications, the Court should nonetheless uphold the ban. In our federal system, courts must respect duly-enacted state legislation and may only strike down state laws that violate the Constitution. Even assuming that it is proper to read a right to terminate a pregnancy into the Due Process Clause, it does not follow that laws which

burden that right must be subjected to strict scrutiny. Missouri has a rational basis for its reason ban and, under a proper construction of the Fourteenth Amendment, that is enough for the ban to be constitutional.

Argument

A. Bans on specific categories of pre-viability abortions are constitutional if they can withstand strict scrutiny.

Both *Roe* and *Casey* discussed the right to terminate a pregnancy as a fundamental right, and both subjected limitations on that right to strict scrutiny. *Roe*, 410 U.S. at 155; *Casey*, 505 U.S. at 847. Both cases then considered two particular interests that states had in banning abortions generally: (1) protecting the health of pregnant women and (2) protecting the 'potential life' of unborn children. *Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 846. *Roe* held, and *Casey* assumed, that neither interest could support a ban on pre-viability abortions. *Roe*, 410 U.S. at 162-3; *Casey*, 505 U.S. at 857.

Neither *Roe* nor *Casey* held that restrictions on abortion could be unconstitutional despite being narrowly tailored to advance compelling state interests. On the contrary, both affirmed that after viability, when the state has a compelling interest in protecting fetal life, states can ban nontherapeutic abortions entirely. *Id.* at 860. The limits that *Roe* and *Casey* found on states' power to regulate and prohibit abortion before viability were grounded in the Court's decision 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." *Id.* at 846. This is strict scrutiny. Nothing less, but nothing more either.

Of course, in *Roe* and *Casey*, the Court only ruled on the two state interests that were before it. Neither case claimed to dispose of all possible state interests that could be raised in any future litigation at any future time. Since *Roe* and *Casey*, this Court has not yet had occasion to consider whether other state interests in banning specific categories of pre-viability abortions are compelling, but it has never indicated that this inquiry would be foreclosed by *Roe* or *Casey*. On the contrary, this Court recently recognized that the constitutionality of reason bans remains an open question. *Box*, 139 S.Ct. at 1792.

The Eight Circuit did not subject Missouri's abortion ban to strict scrutiny. Instead, it held that bans on categories of pre-viability abortions are *per se* unconstitutional. *Parson*, 1 F.4th at 561. That holding, like the respondents' argument, rests almost entirely on a single sentence from *Casey* which says "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (O'Connor, Kennedy, Souter, JJ., joint opinion).

There are three major problems with the Eighth Circuit's opinion. First, *Casey* did not address bans on pre-viability abortions at all. The Pennsylvania statute at issue in *Casey* did contain a reason ban, but the *Casey* plaintiffs did not challenge it. *See* Brief of Respondents in *Planned Parenthood of Southeastern Pa.* v. *Casey*, O. T. 1991, Nos. 91–744, 91–902, p. 4, 1992 WL 12006423 (noting that there was no challenge to reason ban). Because there was

no partial ban on pre-viability abortions before the Court in *Casey*, anything the Court may have said about those bans was dicta.

Second, and relatedly, the sentence from *Casey* that the Eighth Circuit relied on is not from the opinion of the Court. It is from Section IV of the Joint Opinion of Justices O'Connor, Kennedy, and Souter, which no other justice joined. In *Gonzalez*, this Court assumed, without deciding, that the Joint Opinion's statement accurately reflected the law, but it did so in dicta while upholding a ban on a partial-birth abortion procedure. *Gonzalez v. Carhart*, 550 U.S. 124, 146 (2007). The Eight Circuit cited *Casey* and *Gonzalez* as binding precedent establishing that bans which prevent *any* woman from deciding to terminate her pregnancy before viability are unconstitutional, but neither case supports that proposition.

Third, the Eighth Circuit's holding leads to absurd results. According the Eighth Circuit, bans on categories of abortions are in a weaker constitutional position than content-based bans on categories of speech. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding content-based ban on speech that withstood strict scrutiny). The Eighth Circuit treated bans on abortion as *per se* violations of the Fourteenth Amendment, but race discrimination by state agencies is only subject to strict scrutiny. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding a state university's racially discriminatory policy because it withstood strict scrutiny). Whatever basis there may be for finding an implicit right to abortion in the Fourteenth Amendment, there is no possible basis for placing that right above the Fourteenth Amendment's primary goal of eradicating the racial caste system that prevailed at its adoption. *Roe* and *Casey* subjected bans on nontherapeutic pre-viability abortions to strict scrutiny, and the Eighth Circuit should have done the same.

B. Missouri's reason ban withstands strict scrutiny.

Because the District Court and Eighth Circuit accepted RHS's argument that reason bans are *per se* unconstitutional, RHS did not develop a record on which this Court could apply strict scrutiny and sustain a facial challenge. This alone is a sufficient reason for the Court to vacate the Eighth Circuit's judgment and remand this case for further proceedings to determine whether Missouri's statute withstands strict scrutiny. But the Court should go further and uphold Missouri's reason ban because it is narrowly tailored to advance a compelling state interest.

1. The reason ban is valid if any potential application of the ban would withstand strict scrutiny.

This case arises in the context of a pre-enforcement facial challenge to a state statute. This Court has observed that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. When that facial challenge is also brought prior to the enforcement of the act, those circumstances will necessarily be hypothetical.

In assessing whether a statute is narrowly tailored, then, the unit of analysis is the application of that statute to a particular set of facts. Any given application of the statute is invalid if there is a less restrictive means of advancing the state's compelling interests, but the entire statute is only invalid if there is no conceivable set of facts under which its application would be the least restrictive means of advancing the state's interests. *Id.*

It is the challenger's burden to prove facial invalidity. *Id.* RHS has not carried that burden here, and it will not be able to do so on remand because the reason ban is narrowly tailored to advance a compelling state interest.

2. Missouri has a compelling interest in eradicating invidious discrimination against people living with Down's Syndrome.

In other contexts, this Court has recognized that states have a compelling interest in eradicating invidious discrimination and remedying the effects of past discrimination. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 610 (1984) (eradicating gender discrimination); *Shaw v. Hunt*, 517 U.S. 899 (1996) (remedying the effects of past race discrimination).

Missouri has a compelling interest in eradicating invidious discrimination against people living with Down's Syndrome. People living with Down's Syndrome have long faced significant invidious discrimination. They have been stigmatized, institutionalized, and even sterilized, and actors at all levels of government have been directly involved in their oppression.

That oppression persists. For example, in 2016, Carl DeBrodie, a Missourian with Down's Syndrome, was found dead in the home of two state contractors who worked at a residential facility for the disabled. One of the contractors, Sherry Paulo, admitted to bringing Carl to her home, confining him in a makeshift "jail cell" in her unfinished basement, depriving him of medicine he had been prescribed, and failing to intervene as he died. United States v. Sherry Paulo, Case 2:19-CR-04090-BCW, Plea Agreement, ECF 14 (W.D. Mo. 2019). She and her family then concealed Carl's death for months by encasing his corpse in cement and hiding it in a storage locker. *Id.* at 2-4. The county later settled a

wrongful death lawsuit which alleged that Ms. Paulo forced Carl and another intellectually disabled resident to "physically fight each other for the benefit and amusement of Defendant Paulo and her family." Summers v. Second Chance Homes of Fulton, LLC et al., 2:18-cv-04044-MDH, First Amended Complaint, ECF 53 (W.D. Mo. 2018); Summers v. Second Chance Homes of Fulton, LLC et al., 2:18-cv-04044-MDH, Judgment Approving Wrongful Death Settlement, ECF 177 (W.D. Mo. 2018). Carl allegedly broke six ribs in these fights. Summers Complaint.

This is an extreme example, but it represents a broader issue. Since 1998, the U.S. Department of Justice has been required to track and report statistics about crimes against people with disabilities. Crime Victims with Disabilities Awareness Act, 112 Stat 2838. According to the most recent data, people living with cognitive disabilities are more than 350% more likely to be victims of violent crime than people who are not disabled. U.S. Department of Justice, Bureau of Justice Statistics, Crime Against Persons with Disabilities, 2009-2015: Statistical Tables, Pg. 4. The FBI's most recent Uniform Crime Reports also show that the agency received more than 100 reports of hate crimes motivated by mental disability in 2019. U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Report Hate Crime Statistics 2019.

And of course, invidious discrimination does not always take the form of a hate crime or an act of physical violence. People living with Down's Syndrome also experience social prejudice and discrimination. This Court has long recognized a compelling state interest in preventing invidious discrimination by private parties. *See, e.g.*, *Bob Jones University v. United States*, 461 U. S. 574, 602 (1983); *Roberts*, 468 U.S. at 610.

3. The reason ban is narrowly tailored to advance Missouri's compelling state interest.

Each abortion that is performed solely because of a Down's Syndrome diagnosis is an instance of invidious discrimination that the state has a compelling interest in eradicating. When the state permits licensed medical professionals to perform abortions premised solely on the idea that people with Down's Syndrome should not be born, it stigmatizes Missourians living with Down's Syndrome. As the legislature concluded, aborting "unborn children with Down['s] 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." Mo. Ann. Stat. § 188.038.

Consequently, Missouri could constitutionally prohibit all abortions motivated solely by a Down's Syndrome diagnosis. But the ban Missouri adopted is narrower than that. If a woman seeks an abortion, and knows in her heart that a Down's Syndrome diagnosis is the sole reason she is seeking that abortion, her doctor can still perform the procedure without incurring liability unless the doctor knows the patient's motivations. Missouri's reason ban also does not create any criminal liability, and it does not create any liability at all for the women who seek and obtain the prohibited abortions.

There is no way for Missouri to vindicate its legitimate interests without prohibiting at least some abortions motivated solely by a Down's Syndrome diagnosis. The reason ban is therefore sufficiently narrowly tailored to survive a pre-enforcement facial challenge.

C. Alternatively, this Court should apply rational basis review and uphold the reason ban.

If the Court decides that there is no potential application of Missouri's reason ban that could survive strict scrutiny, it should still uphold the ban. Even assuming that it is proper to read a right to terminate a pregnancy into the Due Process Clause, it does not follow that laws which burden that right must be subjected to strict scrutiny. Missouri has a rational basis for its reason ban and, under a proper construction of the Fourteenth Amendment, that is enough for the ban to be constitutional.

Nothing in the text, history, or structure of the Constitution guarantees an individual right to abortion. "The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis original).

Our Constitution gives the courts an important role in our system of government, but it is not the starring role. The people, acting through their elected representatives, play the starring role in our great constitutional drama. When the people create new rights, either by statute or through constitutional amendments, the Court promotes and enables democratic self-government by enforcing those rights. When the Court creates new rights, it undermines representative self-government and assumes for itself the role of deciding what laws we ought to live by.

These concerns are especially acute when federal courts invalidate state laws. The states are different from one another in innumerable ways, and they are allowed to govern

themselves differently, subject to specific limitations prescribed in the Constitution. Because there is no such prescribed limitation on states' power to regulate abortion, the people of each state are free to weigh the costs and benefits of abortion regulations and make their own policy judgments. Courts must respected those judgments if there is a rational basis for them. *See generally Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955).

Casey acknowledged that the state interest in protecting fetal life is legitimate, though not compelling, at all stages of pregnancy. *Id.* at 883. There can be no question that pre-viability bans on abortion are rationally related to the legitimate interest in protecting fetal life. That is all that rational basis review requires. *See generally Williamson*.

Each time this Court invalidates a state law that the Constitution permits, it violates our social compact and undermines the foundations of our democracy. *Stare decisis* is no justification for this kind of usurpation. Democratic self-government is a fundamental value. Federalism is a fundamental value. The rule of law is a fundamental value. Abortion? That is for the people to decide.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed or, in the alternative, the judgment should be vacated and this case remanded with instructions to consider whether Missouri's reason ban withstands strict scrutiny.

Respectfully submitted.

/s/

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October 2021

Note: This brief was formatted and typeset using LegalPad. LegalPad is a software program that I have been developing in my free time to help lawyers create better-looking documents. Users can write without worrying about formatting or blue booking, and the software automatically formats the document in a way that both complies with the applicable court rules and reflects principles of good typography and page layout. The software also formats citations, generates the tables of contents and authorities, and completes any necessary certificates of compliance or service. There is not yet a publicly available version of the software, but it is far enough along that I decided to use it to format this brief. I hope that is not a problem!