Brief urges Supreme Court to reconsider Roe v. Wade

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WASHINGTON (BP)—The Southern Baptist Ethics & Religious Liberty Commission, the National Association of Evangelicals and allies have urged the U.S. Supreme Court to reconsider its landmark Roe v. Wade ruling that legalized abortion.

A spotlight on Roe could come in the Supreme Court's review of a lower court opinion nullifying a state law that bars discrimination against certain classes of unborn children, such as sex, race and disability, according to a brief filed Nov. 15.

In a friend-of-the-court brief, the ERLC and four other organizations called for the high court to grant the appeal request by the state of Indiana in defense of its 2016 law that prohibits abortion in various categories. The case is Commissioner of the Indiana State Department of Health v. Planned Parenthood of Indiana and Kentucky.

The brief also asked the justices to contemplate whether they should overrule the 1973 Roe v. Wade decision that invalidated state restrictions on abortion and a 1992 opinion that affirmed Roe.

First abortion case after Kavanaugh's arrival

The case offers the Supreme Court an early opportunity to rule on a state restriction and revisit its Roe ruling after adding a new justice whom abortion rights advocates fear would be a fifth vote to reverse its controversial decision from 45 years ago. The justices could find Indiana's

law is constitutional without reversing part or all of the Roe opinion.

Brett Kavanaugh—who narrowly received Senate confirmation in October after a bitter battle —replaced Anthony Kennedy, who affirmed Roe in the 1992 Planned Parenthood v. Casey opinion. Nearly all pro-life organizations have given favorable reviews to Kavanaugh's record as a federal appeals court judge.

ERLC President Russell Moore said he prays the high court will uphold Indiana's law.

"This country will one day shudder at the thought of a child being snuffed out in the womb simply because that child had an extra chromosome," Moore said in written comments. "The abortion industry's defense of abortions based on sex, race and disability exposes their thirst for profit."

The case involves a 2016 law signed by then-Gov. Mike Pence, now the nation's vice president, requiring doctors to inform their patients that Indiana does not permit an unborn child to be aborted only because of his or her "race, color, national origin, ancestry, sex, or diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability."

Planned Parenthood of Indiana and Kentucky challenged the law, and a federal judge permanently blocked the state from enforcing it. In April, a three-judge panel of the Seventh Circuit Court of Appeals in Chicago affirmed the ruling against the law, which also includes a section requiring humane disposal of fetal remains.

'Compelling interest' in prohibiting discrimination

The brief filed by the ERLC addresses only the nondiscrimination provisions and urges the Supreme Court to review the Seventh Circuit decision

because the justices have yet to rule on the legality of barring discrimination on the basis of sex, race and disability in abortion. States have a "compelling interest" in prohibiting discrimination in such categories, the brief asserts.

The Seventh Circuit decided the Supreme Court's "abortion precedent, even though that precedent has never directly addressed the issue presented by the statute under review, holds that the abortion right overrides all others," the brief says. "That grievous error, which allows unborn children to be killed because of their sex or race or disability, should be corrected as soon as possible."

The brief points to what it describes as the irony of the Seventh Circuit's interpretation of the 14th Amendment, "which was passed in large part to stamp out racial discrimination, being in conflict with itself. It has ruled that the right to abort, which this Court has found springs implicitly from the 14th Amendment, always trumps a right against racial discrimination which directly flows from it."

Regarding Roe, the brief says "the historical and logical deficiencies" of that opinion and the Casey decision that affirmed it while permitting some restrictions on abortion have long been exposed. The Indiana law "provides an appropriate vehicle to consider whether overruling them, in whole or in part, is the better course of action," the brief asserts.

Rick Claybrook, a Washington, D.C., lawyer who wrote the brief, said the case offers the justices an intersection of two branches of law it has not dealt with before—"the abortion license" as outlined by the high court and "the very strong principles with respect to nondiscrimination on the basis of categories which are inherited, that one can't do anything about."

While the justices could reverse the Seventh Circuit without touching Roe and Casey, they also could say: "This law seems to be in tension with other

law, so what is causing the tension? Maybe an over-expansive view of the abortion license as we have interpreted it," Claybrook said in a phone interview. "The court could fix it by cutting back on Roe or Casey."

Eight states—Arizona, Arkansas, Kansas, North Carolina, North Dakota, Oklahoma, Pennsylvania and South Dakota—had sex-selection abortion bans in effect as of Nov. 1, according to the Guttmacher Institute, a research organization allied with the abortion rights movement. Only Arizona has a ban on race-based abortions in effect, while North Dakota is the only state with a prohibition in effect on disability-based abortions. Courts have temporarily or permanently prevented enforcement of bans by other states.

A review published in 2012 reported an 85 percent rate of abortion after a Down syndrome diagnosis in hospital-based studies.