No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H.,
STATE HEALTH OFFICER OF THE
MISSISSIPPI DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

—v.—

JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has long been committed to protecting the right of individuals to make their own decisions to shape their lives and intimate relationships, including the right to decide whether to carry a pregnancy to term, and has a long history of furthering gender and racial justice. The ACLU has participated in almost every critical case concerning reproductive rights to reach the Supreme Court. The ACLU of Mississippi is a statewide affiliate of the national ACLU. The ACLU represents clients in several states in constitutional challenges to laws that, like the Mississippi statute at issue here, would ban abortion before viability.

SUMMARY OF ARGUMENT

Amici support Respondents' arguments urging this Court to affirm the decision below and to reject Petitioners' invitation to overturn *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Amici* write to address three arguments that Petitioners erroneously claim justify overturning the right to decide to have an abortion.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or the submission of this brief.

First, Petitioners argue that the right to decide to have an abortion is untethered to the Constitution and this Court's privacy and liberty jurisprudence. Pet. Br. 2, 15–16. To the contrary, the right is firmly rooted in nearly one hundred years of this Court's precedents "recogniz[ing] that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152 (collecting cases). As the Court explained in *Casey*, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." 505 U.S. at 847. The right to decide to have an abortion is firmly grounded in, and is an indispensable part of, the liberty to make fundamental decisions about the most intimate aspects of one's own life and body. These include the rights to decide to use contraceptives, to decide whether and whom to marry, to decide whether to have children and how to raise them, and to bodily integrity.

Second, Petitioners argue that the state interest in potential life makes the decision to have an abortion categorically different from all other liberty rights, and warrants rejecting any such right at all. Pet. Br. 16–17, 28. But the existence *vel non* of a constitutional right is not determined by the State's interests in regulating it. Virtually every constitutional right, from First Amendment rights to speech and religion, to Fourth Amendment rights of privacy, coexist with often very significant countervailing state interests. The mere presence of a state interest, no matter how strong, does not justify a refusal to even recognize the constitutional right in the first place. Rather, courts weigh the constitutional right at stake against the asserted state interest,

guided by appropriate constitutional tests. That is precisely what this Court has done in the abortion context for half a century: On the one hand the Court has recognized that a woman has a fundamental constitutional right to decide to have an abortion, and, on the other hand, it has recognized that the State has important interests in regulating abortion within certain limits. In particular, it has consistently held that prior to viability, a woman must have the right to decide to terminate her pregnancy, and that after viability, the State may prohibit abortion absent a threat to her life or health. If this Court were to accept Petitioners' argument that the state interest in potential life negates altogether a woman's right to decide to have an abortion, the same argument could be invoked to restrict contraception use or to justify state intrusions in myriad other pregnancy decisions.

Third, Petitioners urge this Court to overrule *Roe* and *Casey* to avoid the need for continuing litigation over the contours of the abortion right. But even putting aside that the viability line is justified and administrable, at bottom, Petitioners' argument is nothing short of a suggestion that this Court abdicate its critical role in the protection of constitutional rights. If the existence of extensive litigation and heated public debate were enough to justify abandoning a constitutional right, countless rights—including the right to be free from racial segregation recognized in *Brown v. Board of Education*, 347 U.S. 483 (1954), the right to bear arms recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and the freedoms of conscience recognized in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943)—would fall into the same category, and this Court would have long since left

protection of those rights to the political process. Just as was true after the Court decided *Brown*, the Court's duty to protect individual rights is at its zenith when state actors attempt to frustrate constitutional protections.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO DECIDE WHETHER TO HAVE AN ABORTION IS FIRMLY ROOTED IN THE CONSTITUTION AND THIS COURT'S JURISPRUDENCE.

In urging the Court to overturn fifty years of precedent recognizing the right to decide to have an abortion, Petitioners argue that "*Roe* broke from prior cases by invoking a general 'right of privacy' unmoored from the Constitution." Pet. Br. 2; *see also* Pet. Br. 16. In fact, the opposite is true: The right to have an abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), is deeply rooted in this Court's jurisprudence recognizing that the Constitution protects privacy, bodily autonomy, and liberty rights. Together, these interconnected strands of precedent have long protected a woman's right to make fundamental decisions about her private life, her family, and her body. [2] These rights include the rights to decide whether and whom to marry, whether to use

[2] Although *amici* refer to "a woman's" constitutional rights and pregnancy decisions, *amici* recognize that people of all gender identities, including transgender men, non-binary individuals, and gender-diverse individuals, may also become pregnant and seek abortion services, and thus their right to terminate a pregnancy is also implicated by Petitioners' arguments.

contraceptives, whether to have children and how to raise them, as well as the right to bodily integrity. This Court has repeatedly recognized that the right to decide whether to continue a pregnancy flows directly from these precedents. No less than these other rights, the right to decide to have an abortion is integral to the Constitution's promise that we all have a fundamental right to make decisions about our lives, our families, and our bodies.

A. The Right to Abortion Rests Firmly on the Liberty Right to Make Fundamental Decisions About Family and Personal Life.

Roe and *Casey* rest firmly on decades of this Court's jurisprudence protecting the rights to personal and intimate decision-making necessary to chart one's own life course free from government dictates, especially in matters relating to one's family. And decisions since *Roe* and *Casey* have only cemented the understanding that the Fourteenth Amendment protects these rights, and that the right to abortion falls squarely within this Court's longstanding jurisprudence.

Beginning nearly a century ago, the Court recognized that the Fourteenth Amendment protects the right of parents to direct the upbringing of their children against unwarranted government intrusion. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (invalidating law preventing instruction in foreign language as infringing on parents' rights to direct upbringing of their children); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (invalidating law requiring attendance at public school because it conflicted with the "liberty of

parents and guardians to direct the upbringing and education of children"). The liberty right, this Court explained, includes the rights "to marry, establish a home and bring up children." *Meyer*, 262 U.S. at 399 (collecting cases).

Two decades later, the Court reaffirmed that "basic liberty" includes "marriage and procreation." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In *Skinner*, the Court struck down a law that permitted courts to order forced sterilization of persons convicted of certain crimes. *Id.* at 536. The Court's decision rested on equal protection grounds, but it recognized that forcibly sterilizing people would "forever deprive" them of a "basic liberty," namely "the right to have offspring." *Id.* at 536, 541. The Court recognized that the right to "[m]arriage and procreation are fundamental" and are "one of the basic civil rights of man." *Id.* at 541.

In *Loving v. Virginia*, this Court struck down a ban on interracial marriage under the Equal Protection and Due Process Clauses, and in doing so rejected the argument that the State's "powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment." 388 U.S. 1, 7 (1967) (citing *Meyer*, 262 U.S. 390; *Skinner*, 316 U.S. 535). The Court again noted that marriage is "one of the 'basic civil rights of man,'" and explained that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id*. at 12 (quoting *Skinner*, 316 U.S. at 541).

Around the same time, this Court invalidated a ban on contraceptive use by married persons, holding that the right of married couples to use contraception

lies "within the zone of privacy created by several fundamental constitutional guarantees," including the right to privacy. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). In so holding, the Court reaffirmed *Meyer* and *Pierce*, and pointed to a long line of cases, including *Skinner*, that "bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*

Shortly thereafter, the Court recognized that the privacy right to use contraception is not limited to married couples, but extends equally to unmarried individuals. While it acknowledged that *Griswold* dealt with this right in the context of the "marital relationship," it reasoned that "[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (emphasis added) (citing, *inter alia*, *Skinner*, 316 U.S. 535). The Court continued: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Id.* at 453 n.10 (internal quotations and citation omitted).[3]

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[3] Given *Eisenstadt*, Petitioners' attempt to suggest that the right to use contraception is founded solely on the marital relationship, Pet. Br. 16, plainly fails. *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (holding that "*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives"). And their attempt to argue that the right first recognized in *Griswold* solely "vindicated the

One year after the Court's decision in *Eisenstadt*, the Court decided *Roe v. Wade*. In holding that the Constitution protects the right to decide to have an abortion, the Court reviewed its long line of liberty and privacy cases, including *Meyer*, *Pierce*, *Skinner*, *Loving*, *Griswold*, and *Eisenstadt*, and held that the Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152. These cases "make it clear" that the right to privacy extends to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* at 152–53. The Court therefore held that the Fourteenth Amendment's guarantee of personal liberty "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. In so holding, the Court recognized the impact of the abortion decision on one's liberty:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress,

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textually and historically grounded Fourth Amendment protection against government invasion of the home," Pet. Br. 15, similarly ignore that, in recognizing the right to use contraception, the Court explicitly relied on the Court's liberty jurisprudence, *see Griswold*, 381 U.S. at 482–83.

> for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Id. at 153. In short, *Roe* followed directly from the decisions that preceded it, as all carve out an area of personal privacy within which individuals must be free to make their own decisions, and not have their life choices dictated by the State.

The Court's decisions following *Roe* confirm that the decision is an integral part of the Court's privacy and liberty jurisprudence. In the two decades following *Roe*, the Court repeatedly reaffirmed its holding. For example, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, this Court held there are "especially compelling reasons" for reaffirming *Roe*, including that "[s]ince *Roe* was decided . . . [t]he Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." 462 U.S. 416, 419 n.1 (1982) (collecting cases). In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court held that "[o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." 476 U.S. 747, 772 (1986) (citing, *inter alia*, *Eisenstadt*, *Griswold*, *Pierce*, and *Meyer*). As the Court explained, "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity

and autonomy than a woman's decision . . . whether to end her pregnancy." *Id.*[4]

Twenty years after *Roe*, this Court again reaffirmed its central premise, against an express invitation to overrule it. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court explained that:

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . . It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on the State's right to interfere with a person's most basic decisions about family and parenthood.

505 U.S. at 847–49. The Court recognized that the right to decide to have an abortion implicates the liberty to make "basic decisions about family and parenthood," *id.* at 849, in the same way as the rights the Court has recognized regarding marriage, procreation, contraception and childrearing: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851.

The *Casey* Court recognized that the right to decide whether to continue a pregnancy was not only

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[4] Although *Akron* and *Thornburgh* were overruled in part on other grounds by *Casey*, 505 U.S. at 882 (plurality), that decision also reaffirmed "the central premise of those cases," which was "an unbroken commitment by this Court to the essential holding of *Roe*," *id.* at 870.

similar in character to other liberty rights, but also that these intimate decisions are interconnected and foundational for other life decisions. Like the right to use contraception, the right to decide whether to have an abortion is critical to allow a woman to make her own decisions about her future and her role in society: The State may not "insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Id.* at 852. Moreover, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856. The Court also recognized that a woman "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* at 852; *see also Roe*, 410 U.S. at 153.[5]

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[5] "Nationwide, childbirth is 14 times more likely than abortion to result in death." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016). The United States' alarmingly high maternal mortality rate, especially for Black women, reinforces that the liberty right to make one's own decision about whether to continue a pregnancy implicates not only an individual's interest in deciding to have a child, but also the liberty interest in protecting one's health. *See* Pet. Cert. App. 46a n.22 (district court decision recognizing that Mississippi ranks as the state having the most medical challenges for women, infants, and children); *Little Rock Family Planning Servs. v. Jegley*, No. 4:21-cv-00453, 2021 WL 3073849, at *4 (E.D. Ark. July 20, 2021) (in preliminarily enjoining a ban on abortion, recognizing the impact on Black women given the disproportionately high maternal mortality rate in Arkansas), *appeal docketed* (8th Cir. Aug. 19, 2021); Donna L. Hoyert, Ctrs. for Disease Control, Nat'l Ctr. for Health Statistics, *Maternal Mortality Rates in the United States* (2019), https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/E-Stat-Maternal-Mortality-Rates-H.pdf (in 2019, the maternal mortality rate for Black women was 2.5 times the rate for white women).

Since *Casey*, the Court has repeatedly reaffirmed its liberty and privacy jurisprudence and has continued to recognize that these rights are inextricably interrelated. For example, in holding unconstitutional a law that criminalized private sexual intimacy between consenting adults of the same sex, the Court looked to *Meyer*, *Griswold*, *Eisenstadt*, *Roe*, and *Casey*. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). In its words, "[t]he *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 573–74. Furthermore, the Court noted that "*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.*; *see also Obergefell v. Hodges*, 576 U.S. 644 (2015) (relying on long line of privacy and liberty cases to strike down ban on same-sex marriage).

Just as choosing one's partner in marriage, deciding based on one's values whether to use contraception, and freely determining important aspects of parenting are essential to liberty, the Court has repeatedly recognized that the freedom to make one's own decision about whether to continue a pregnancy and bear a child, or instead have an abortion, is essential to defining one's destiny. The rights protected by the Due Process Clause ensure that individuals have the right to make decisions about the most fundamental aspects of their lives. Just as the State may not bar consenting adults from

marrying, *Obergefell*, 576 U.S. 644, so, too, it could not compel them to do so. Just as it may not forbid parents from sending their children to a particular private school, *Meyer*, 262 U.S. at 399–400, it may not compel them to do so. Just as the State may not compel one *not* to procreate, *Skinner*, 316 U.S. at 541, it cannot compel one to procreate by banning contraception or abortion. The liberty that the Due Process Clause protects is the liberty to make such fundamental life decisions oneself.

Thus, the jurisprudence that preceded *Roe* for fifty years, like the jurisprudence that has followed it in the fifty years since, sets out a consistent principle: that the Constitution protects the rights of all of us to make foundational decisions about personal and family life. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000) (plurality) (nonparental visitation statute "unconstitutionally infringes" parent's "fundamental liberty interest" protected by due process); *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (state law denying appeal from termination of parental rights because of inability to pay fees violated the fundamental "interest of parents in their relationship with their children" protected by the Fourteenth Amendment); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (state law requiring residents with child support obligations to obtain court permission to marry violated "the fundamental 'right of privacy' implicit in the Fourteenth Amendment"); *Moore v. City of East Cleveland*, 431 U.S. 494, 500–01 (1977) (plurality) (zoning ordinance prohibiting homeowner from living with her son and two grandsons violated Fourteenth Amendment by infringing "family choice"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (school policy

requiring pregnant teachers to take unpaid leave for several months prior to and after birth unconstitutionally "penalize[d] the pregnant teacher for deciding to bear a child").

B. The Right to Abortion Rests Firmly on the Fourteenth Amendment Right to Bodily Integrity.

Roe and *Casey* also rest firmly on this Court's century-old jurisprudence respecting the right to bodily integrity. As the *Casey* Court recognized, the right to abortion protects "personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." 505 U.S. at 857. The *Roe* Court relied on *Union Pacific Railroad Company v. Botsford*, 141 U.S. 250 (1891), which held that a court could not force a personal injury plaintiff to undergo a surgical examination against her will. *See Roe*, 410 U.S. at 152. In *Botsford*, the Court held that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 141 U.S. at 251; *see also Skinner*, 316 U.S. at 541 (holding that forcible sterilization causes "irreparable injury" by "forever depriv[ing the individual] of a basic liberty") (cited by *Roe*, 410 U.S. at 152; *Casey*, 505 U.S. at 849, 858–59).

In *Casey*, the Court also pointed to numerous cases that were decided before and after *Roe* that similarly protect a right to bodily integrity, including *Rochin v. California*, 342 U.S. 165 (1952) (holding that Due Process Clause prohibited forcible extraction of

stomach contents of someone suspected of swallowing illegal drugs), and *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (holding that person in prison "possess[es] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause"). The *Casey* Court concluded that the right to decide to have an abortion "touche[s] not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." 505 U.S. at 896. Moreover, the Court warned,

> If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.

Id. at 859 (collecting cases); *see also Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) ("[I]f upon a showing of slender rationality, a law outlawing voluntary birth control . . . is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid.").

Since *Casey*, courts have continued to protect the Fourteenth Amendment right to bodily integrity. *See, e.g.*, *Guertin v. Michigan*, 912 F.3d 907, 920 & n.3 (6th Cir. 2019) (citing *Casey* and holding that plaintiffs had a substantive due process claim based on right to bodily integrity in case related to toxic exposure from Flint water crisis); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062–63 (6th Cir. 1998)

(same in case involving disclosure of undercover officers' personal information that "created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives"); *Rogers v. City of Little Rock*, 152 F.3d 790, 795 (8th Cir. 1998) (same in case involving civilian raped by a police officer after traffic stop); *Wudtke v. Davis*, 128 F.3d 1057, 1062–63 (7th Cir. 1997) (same in case involving sexual assault and harassment of teacher by district superintendent); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994) (same in case involving repeated strip searches of prisoner, and finding the liberty and privacy interest at stake "firmly ensconced").

In short, far from being outliers, *Roe* and *Casey* are firmly established in a long line of cases protecting the right of personal autonomy to make fundamental decisions regarding one's body and family and protecting an individual's bodily integrity from government intrusion. The same liberty right that protects those who eschew contraception and abortion because of their personal views also protects the right to decide to use contraception and to terminate a pregnancy. These decisions are an essential part of the fabric of rights protecting individuals from government interference in their most intimate decisions. And their place in and deep connection to this established jurisprudence counsels heavily against overruling them.

II. ABORTION IS NOT CATEGORICALLY DIFFERENT FROM THE LIBERTY, PRIVACY, AND BODILY INTEGRITY RIGHTS THE COURT HAS LONG RECOGNIZED AS PROTECTED BY THE FOURTEENTH AMENDMENT.

Notwithstanding *Roe*'s central place in one hundred years of precedent, and its repeated reaffirmation over the fifty years since it was decided in 1973, Petitioners argue that abortion is categorically different from all other privacy and liberty rights protected by Due Process. They maintain that the State's interest in potential life precludes any recognition of a pregnant woman's right whatsoever, and makes this right different from all other constitutional rights. In Petitioners' view, restrictions on abortion implicate no fundamental liberty or privacy rights and, therefore, at any point in pregnancy, should be subject only to rational basis review. Pet. Br. 5, 11. Petitioners maintain that the Court can overturn *Roe* and *Casey* without undermining other liberty and privacy rights because "[n]o other right involves, as abortion does, the purposeful termination of potential life." Pet. Br. 2 (internal citations and quotation marks omitted).

This argument fundamentally misunderstands the nature of constitutional analysis. The existence *vel non* of a constitutional right does not turn on the strength of state interests in regulating particular conduct. Rather, constitutional analysis asks first whether a right is implicated, and only *then* assesses whether state interests justify the infringement. The strength of the State's interest in regulation does not determine whether the right exists in the first place. State interests are assessed as part of step two of the

inquiry: whether the State's interference with the right is justified.

This is blackletter constitutional law. For example, even where the government regulates conduct in the name of national security, public safety, or public health—all compelling state interests that implicate the protection of people's lives—its actions must comply with constitutional rights. *See, e.g.*, *Tandon v. Newsom,* 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (invalidating on free exercise grounds a public health restriction on meetings for religious purposes); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (applying heightened scrutiny to First Amendment challenge to statute making it a crime to provide material support to foreign terrorist organizations, and upholding it on national security grounds); *United States v. U.S. District Court*, 407 U.S. 297, 314–15 (1972) (rejecting warrantless wiretapping for domestic security purposes, notwithstanding asserted national security justification); *Scales v. United States*, 367 U.S. 203, 224–230 (1961) (narrowly interpreting Smith Act to require proof of specific intent to further illegal ends of Communist Party, notwithstanding national security justifications for statutory prohibition on membership). Similarly, not even the State's interest in protecting people's lives—not just *potential* life—wholly negates constitutional rights of autonomy and privacy protected by the Fourth, Fifth, and Fourteenth Amendments. *Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021) (rejecting "community caretaker" exception to Fourth Amendment rule requiring warrant to enter a home, where police entered out of concern that resident was suicidal); *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (requiring the provision of warnings in interrogations

in cases investigating murder and rejecting argument that "society's need for interrogation outweighs the privilege" against self-incrimination).

As these and countless other cases illustrate, the State's interest does not determine whether a right exists, but is instead considered in assessing whether an intrusion on the right is justified. That is exactly what *Roe* and *Casey* do. The Court has long recognized that States have significant interests in both protecting patients' health and the potential life of the fetus. But it has also recognized a woman's right to decide whether to have a child. Rather than ignoring one or the other side of the scales, it has struck a balance, allowing the State to regulate abortion within limits, and to prohibit abortion post-viability with exceptions for the life and health of the individual. It has acknowledged the state interests, and properly asked whether they justify infringement on the right in particular circumstances. It has not, as Petitioners propose, simply ignored the liberty right altogether. In fact, Petitioners cite no case in any area of constitutional law in which the Court has rejected recognition of a right altogether merely because the State has a strong countervailing interest.

Moreover, acceptance of Petitioners' argument that the state interest in potential life precludes any recognition of a liberty right to abortion could also apply to the right to use contraception. *See Casey*, 505 U.S. at 860. And Petitioners' argument would also open the door for States to exercise dominion over a person's reproductive decisions in myriad other circumstances. Some States are poised to expand fetal rights if this Court overturns *Roe* and *Casey* by defining "life" from the moment of fertilization. *See, e.g.*, Kan. Stat. Ann. § 65-6732(a)(1) ("The life of each

human being begins at fertilization."); Kentucky Human Life Protection Act, H.B. 148, § 1(1)(c), 2019 Ky. Acts 884 ("Unborn human being means an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth."); La. Stat. Ann. § 40:161(I)(3) (similar); S.B. 1457, 2021 Ariz. Sess. Laws ch. 486, § 1 (to be codified at Ariz. Rev. Stat. § 1-219(A)) (purporting to accord "on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state").

If potential life precludes recognition of any right that implicates that interest, States could criminalize or override a pregnant woman's decision to obtain (or to refuse) medical care that could affect the pregnancy. *See In re A.C.*, 573 A.2d 1235, 1243–44 (D.C. 1990) (vacating trial court decision ordering patient to undergo cesarean section to attempt to protect the life of the fetus); *Burton v. State*, 49 So. 3d 263, 265 (Fl. Dist. Ct. App. 2010) (reversing trial court decision ordering pregnant patient to submit to hospital confinement, involuntary bed rest, forced medication, and cesarean section in order to protect the "ultimate welfare" of the fetus (internal quotations and citation omitted)). Accepting Petitioners' argument could also sanction government policies that allow broad state powers to investigate, control, and even criminalize a pregnant person's behavior. *See* Br. of National Advocates for Pregnant Women. It could also enable states to interfere with a pregnant woman's decisions about a wide range of medical treatment—including treatment for an ongoing miscarriage, cancer screening and treatment, or

prescription medication necessary to treat a variety of conditions—all of which can pose risks to a pregnancy. *See, e.g.*, *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312, 1318–19 (N.D. Ga. 2020) (holding that Georgia law defining "natural person" to mean "any human being including an unborn child . . . at any stage of development" would mean "a pregnant woman with an eating disorder would be guilty of child cruelty," doctors would violate mandatory reporting laws for "failing to report a pregnant patient living with an abusive partner," and the provision of routine care to pregnant persons that poses risks to embryos and fetuses may constitute criminal "reckless conduct"), *appeal docketed* (11th Cir. Aug. 11, 2020).

Petitioners' argument would also open the door to States to give others control over a woman's reproductive health decisions. The *Casey* Court recognized that danger when it struck down a law requiring wives to notify their husbands of their abortion decisions. 505 U.S. at 897. The Court explained that if it were to sanction such a law:

> the State could require a married woman to notify her husband before she used a postfertilization contraceptive[,] . . . before engaging in risks to the fetus[,] . . . before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interests in his wife's reproductive organs.

Id. at 898; *cf. also Doe ex rel. Doe v. Hunter*, 796 F. App'x 532, 538 (10th Cir. 2019) (rejecting claim by putative father on behalf of fetus alleging that

abortion should be subject to state fetal homicide laws), *cert. denied* 141 S. Ct. 367 (2020).

In short, the State's recognized interest in protecting potential life, while appropriate to consider in assessing the validity of abortion regulations, does not justify refusing to even recognize that the pregnant woman has any rights at all at stake. Under *Roe* and *Casey,* the state interest in potential life permits even a prohibition on abortion after fetal viability except to save the life or health of the pregnant woman. But the state interest in potential life cannot entirely eliminate a woman's rights to make intimate decisions about her life and bodily integrity.

III. THE FACT THAT COURTS HAVE HAD TO ENFORCE THE CONSTITUTIONAL RIGHT TO DECIDE WHETHER TO HAVE AN ABORTION DOES NOT JUSTIFY OVERTURNING *ROE* AND *CASEY*.

Petitioners argue that the fact that this Court and lower courts have had to enforce the abortion right by invalidating numerous unconstitutional state abortion restrictions, and that the issue remains controversial, counsel in favor of overturning *Roe* and *Casey*. They claim that the continuing need for judicial enforcement shows that the right is not established. Pet. Br. 3, 23–26. But that is a non sequitur. Constitutional rights often require vigilance from the courts. The federal courts hear thousands of cases every year alleging violations of constitutional rights, including the First Amendment rights to free speech and free exercise of religion, the Second Amendment right to bear arms, the Fourth Amendment right of privacy in one's home or effects, the Fifth Amendment

right against compelled self-incrimination, and the Fifth and Fourteenth Amendment rights to due process. Far from supporting elimination of such rights, the existence of continued unconstitutional conduct only underscores the continued necessity for judicial enforcement.

It is the responsibility of the judiciary to adjudicate such disputes. When "a [constitutional] hurt or injury is inflicted . . . by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 313 (2014) (plurality). As the Court observed in *West Virginia State Board of Education v. Barnette*, "[w]e cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed." 319 U.S. 624, 640 (1943); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). It is neither unusual nor improper for individuals to look to the courts when their rights are violated; it is a sign that the system is working, not that the rights at issue should be abandoned.

Constitutional rights are often contentious. For example, the right to bear arms and the right to vote have both engendered a high volume of litigation. More than one thousand Second Amendment challenges were filed in less than eight years after *District of Columbia v. Heller*, 554 U.S. 570 (2008). Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep*

and Bear Arms After Heller, 67 Duke L.J. 1433, 1455 (2018) (cataloguing "997 opinions address[ing] 1,153 distinct Second Amendment challenges" between June 2008 and February 2016). There were more than 400 voting-related lawsuits in connection with the 2020 election cycle, more than twice as many as in the 2000 election. *See* Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History*, PBS: Frontline (Oct. 28, 2020), https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/. Extensive litigation over constitutional rights is no reason to diminish the underlying constitutional rights at issue or to abandon the Court's responsibility to protect those rights.

To countenance this argument would do grave damage to the rule of law. If the mere fact that constitutional disputes persist were sufficient to overturn constitutional decisions, those who are unhappy with a decision of the Court would have every incentive to continue to violate the right, so that they could at some point argue that the existence of so many disputes is reason to abandon the Court's ruling. By contrast, adherence to stare decisis and the rule of law sends a clear message to avoid repetitive, untenable challenges to established law.

Consider, in this light, *Brown v. Board of Education* (*Brown I*), 347 U.S. 483 (1954), and *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955). Those decisions were met with widespread and staunch opposition, including by public officials, and required extensive litigation to make progress toward their promise of ending segregation. Shortly after the Court's decision in *Brown II*, nearly one hundred members of Congress endorsed a statement read on

the congressional floor that praised "those States which have declared the intention to resist forced integration" and pledged "to use any lawful means to bring about a reversal of" the Court's decisions. Declaration of Constitutional Principles ("Southern Manifesto on Integration"), 102 Cong. Rec. 4459–60 (Mar. 12, 1956) (statement of 19 Senators and 77 House members calling *Brown* "a clear abuse of judicial power"). State resistance to desegregation required resort to United States military troops to enforce court orders. *See* Exec. Order 10,730, 22 Fed. Reg. 7,628 (Sept. 24, 1957) (ordering Arkansas National Guard under federal authority and sending federal troops in response to "willful[] obstruct[ion]" of court orders in the Eastern District of Arkansas); Exec. Order 11,111, 28 Fed. Reg. 5,709 (June 11, 1963) (similar order to enforce desegregation orders in Northern District of Alabama). And yet the courts remained steadfast in adhering to *Brown* and the rule of law. *See, e.g.*, *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (holding Prince Edward County school board's decision to close public schools and fund private segregated schools violated equal protection); *Cooper v. Aaron*, 358 U.S. 1 (1958) (rejecting attempted suspension of Little Rock School Board's integration plan and ordering integration of public schools); *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 460–64 (M.D. Ala. 1967) (ordering desegregation plan after three prior injunctions against interference with desegregation efforts had been violated by state officials), *aff'd*, *Wallace v. United States*, 389 U.S. 215 (1967).[6] This history—decades of litigation to enforce

[6] *See generally* Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit who Translated the Supreme Court's* Brown *Decision Into a Revolution for Equality*

the Constitution, often in the face of open resistance—was no basis for overruling *Brown*. The same is true of *Roe* and *Casey*.

Petitioners' attempt to paint the abortion right as somehow unique among constitutional rights because of its asserted unpopularity or "controversy" similarly fails.[7] *See* Pet. Br. 3, 23–24, 33. Many rights are controversial or unpopular; indeed, that is why they cannot be left to the political process, and why individuals must often turn to an independent judiciary for their enforcement. Consider also criminal procedure rights for those accused of murder, free exercise rights of Jehovah's Witnesses, or free speech rights of those who burn the United States flag in protest—all of which retain constitutional protection despite often intense public criticism. *See Barnette*, 319 U.S. at 638 (constitutional rights "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts"). As the Court remarked in *Brown II*, "it should go without saying that the vitality of . . . constitutional principles cannot

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(1981); Equal Justice Initiative, "Massive Resistance," *in Segregation in America* 20–39 (2018), https://segregationinamerica.eji.org/report.pdf.

[7] In addition to being immaterial, any assertion that *Roe* is unpopular is incorrect; to the contrary, the overwhelming majority of Americans oppose overturning it. *See* PBS NewsHour/NPR, *NPR/PBS NewsHour/Marist National Poll: May 31–June 4, 2019*, at 9, https://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables-on-Abortion_1906051428_FINAL.pdf#page=1 (finding 77% in favor of "keep[ing]" or "expand[ing]" *Roe*, compared to only 13% in favor of overturning it).

be allowed to yield simply because of disagreement with them." 394 U.S. at 300; *see also Thornburgh*, 476 U.S. at 771–72 ("[C]ontroversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute.").

Given the competing interests this Court has recognized—an individual's right to make personal, intimate decisions about her own life and to control her own body, on the one hand, and the State's interest in potential life on the other—no ruling by this Court will eliminate disputes and disagreements. But as this Court has repeatedly held, the viability line strikes an appropriate balance. As explained fully in Respondents' brief, the viability rule has provided a principled and clear line for half a century, one that takes seriously both a woman's liberty interests in personal autonomy and bodily integrity, and state interests in protecting potential life. Thirty years ago, the Court carefully considered but ultimately declined to abandon that line. It should not do so now.

CONCLUSION

For the reasons set forth above, and in the Brief for the Respondents, the judgment below should be affirmed.

Respectfully submitted,

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