No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, M.D., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,
Respondents.

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

Brief of Governor Henry McMaster And Eleven Additional Governors as *Amici Curiae* in Support of Petitioners

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INTEREST OF *AMICI CURIAE*

Henry McMaster is Governor of the State of South Carolina.[1] Governor McMaster has sworn to "preserve, protect, and defend" both the South Carolina Constitution and the United States Constitution. S.C. Const. art. VI, § 5. As Governor, he is responsible for ensuring that South Carolina law is "faithfully executed." *Id.* art. IV, § 15. This oath and obligation compel Governor McMaster to stand up for the constitutional principles on which our Republic is founded, particularly the relationship between the States and the Federal Government, and to assert South Carolina's sovereign interests and authority to adopt and enforce its laws.

Earlier this year, Governor McMaster signed into law the South Carolina Fetal Heartbeat and Protection from Abortion Act. *See* 2021 S.C. Acts No. 1. After several abortionists challenged the constitutionality of that law in federal court and the United States District Court for the District of South Carolina restrained the State from enforcing it, Governor McMaster intervened to defend the Act. The role of federal courts in passing upon the constitutionality of state laws regulating abortion is thus of particular importance to Governor McMaster.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing via blanket consents filed with the Clerk's Office on June 1, 2021 (Respondents) and June 9, 2021 (Petitioners).

Other Governors (see Appendix for full list of *amici curiae*) have taken similar oaths. And they have supported similar prolife legislation. Like Governor McMaster, they have a strong interest in seeing the Constitution faithfully interpreted and the proper roles of the Federal Government and the States upheld.

SUMMARY OF ARGUMENT

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Every schoolchild may learn this fundamental principle, but unfortunately, the Federal Government does not always abide by it. Although intrusions into State sovereignty typically come from the Federal Government's political branches, they have at times come from the Federal Judiciary (including this Court), too.

In perhaps no area of law is that judicial intrusion into State sovereignty greater than abortion. Justices on this Court and circuit court judges have consistently recognized that the original understanding of the Fourteenth Amendment's Due Process Clause does not include any right to terminate the life of an unborn child. Indeed, none of this Court's major abortion decisions—including *Roe v. Wade*, 414 U.S. 113 (1973), and *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992)—claims otherwise. Nevertheless, half a century ago, this Court (without any consideration of the original meaning of the Fourteenth Amendment) found a constitutional right to abortion somewhere in the Constitution.

The judicial constitutionalization of abortion represents an unwarranted intrusion into the sovereign sphere of the States. Returning to the States the plenary authority to regulate abortion without federal interference would restore the proper (i.e., constitutional) relationship between the States and the Federal Government. It also would produce positive results, including letting the democratic process work as intended, deescalating tensions on this divisive topic, and allowing the States to serve as laboratories of democracy for establishing and implementing suitable abortion regulations based on the latest scientific knowledge.

ARGUMENT

I. As originally understood, the Fourteenth Amendment does not include the right to terminate the life of an unborn child.

1. This Court has repeatedly made clear that constitutional provisions must be given the meaning they were understood to have at the time they were ratified. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (Sixth Amendment right to jury trial); *Gamble v. United States*, 139 S. Ct. 1960 (2019) (Fifth Amendment protection from double jeopardy); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (Eighth Amendment protection from cruel and unusual punishments); *Florida v. Jardines*, 569 U.S. 1 (2013) (Fourth Amendment right to be free from unreasonable searches); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (First Amendment right to free speech); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Second Amendment right to keep and bear arms). This approach to constitutional interpretation requires

reviewing the text and historical context to determine how a constitutional provision was originally understood. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894, 1898 (2021) (Alito, J., concurring in the judgment) (examining the original understanding of the Free Exercise Clause).

2. The Court in *Casey* admittedly did not apply this approach to the Fourteenth Amendment. The plurality in that case expressly rejected the idea that the Fourteenth Amendment must be interpreted based on its original public meaning, insisting such an approach was "inconsistent" with this Court's case law.[2] *Casey*, 505 U.S. at 847 (plurality opinion). Such an explicit rejection of the Court's now well-accepted interpretive theory cannot stand. The Court should therefore reexamine *Casey*'s central tenet that the Fourteenth Amendment's Due Process Clause protects a "woman's decision to terminate her pregnancy" under the proper interpretive framework. *Id.* at 846.

The argument that *Casey* is inconsistent with the original understanding of the Due Process Clause has already been laid out by Justices of this Court and

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[2] The Court in *Roe* consciously did not specify whether the right to an abortion was found in—or more accurately, inferred from—the Fourteenth Amendment or the Ninth Amendment. *See* 410 U.S. at 153. Given this lack of a clearly identified constitutional anchor, it is no surprise that *Roe*, like *Casey*, lacked any meaningful analysis of the original understanding of the Constitution. Given the *Casey* plurality's unwillingness to engage with the text or original understanding of the Fourteenth Amendment in that case, it is also not surprising that the plurality did not defend *Roe* as being "correct as an original matter." *Casey*, 505 U.S. at 953 (Rehnquist, C.J., concurring in part and dissenting in part).

lower court judges (as well as Petitioners and presumably will be by other *amici* too). Thus, Governor McMaster and the other Governors only briefly address this issue.

a. Start with the text. The Due Process Clause provides, "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause is a mere seventeen words, and it "says absolutely nothing about" abortion. *Casey*, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935 (1973) (a right to abortion "is not inferable from the language of the Constitution").

b. Turn now to historical context. A review of the legal landscape from the late nineteenth century leads to the same conclusion that the Due Process Clause does not create or protect a right to abortion. Between the statutes cited by then-Justice Rehnquist in *Roe* and Justice Thomas in *June Medical*, at least thirty-six States (some of which were still territories or, in the case of Hawaii, not yet even part of the United States) had statutes that limited, if not completely outlawed, abortion when the Fourteenth Amendment was ratified.[3] *See June Med. Servs. L.L.C. v. Russo*,

[3] *See* Ala. Rev. Code § 3605 (1867); Terr. of Ariz., Howell Code, ch. 10, § 45 (1865); Ark. Rev. Stat., ch. 44, div. III, Art. II, § 6 (1838); Cal. Stat., ch. 521, § 45, p. 588 (1861); Colo. (Terr.) Rev. Stat. § 42 (1868); Conn. Gen. Stat., Tit. 12, §§ 22–24 (1861); Fla. Acts 1st Sess., ch. 1637, subch. III, §§ 10, 11, ch. 8, §§ 9, 10 (1868); Ga. Pen. Code, 4th Div., § 20 (1833); Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850); Terr. of Idaho Laws, Crimes & Punishments § 42 (1864); Ill. Stat., ch. 30, § 47 (1868); Ind. Laws ch.

140 S. Ct. 2103, 2151 n.7 (2020) (Thomas, J., dissenting) (collecting statutes); *Roe*, 410 U.S. at 175 n.1 (Rehnquist, J., dissenting) (same).

In addition to these three-quarters of States with statutory abortion regulations in effect in 1868, other States adopted similar laws shortly after the Fourteenth Amendment's ratification. South Carolina provides a good example. South Carolina criminalized abortion in 1883, making it a felony to use any drug or instrument "to cause or procure the miscarriage or abortion or premature labor" of a pregnant woman, unless "necessary to preserve her life." 1883 S.C. Acts No. 354, § 1 (codified at S.C. Criminal Code § 122 (1893)). Thus, a decade and a half after the Fourteenth Amendment was ratified, South Carolina made it illegal to perform virtually all abortions. Had the original understanding of the Fourteenth Amendment

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LXXXI, § 2 (1859); Iowa Rev. Gen. Stat., ch. 165, § 4221 (1860); Kan. Gen. Stat., ch. 31, §§ 14, 15, 44 (1868); La. Rev. Stat., Crimes & Offenses § 24 (1856); Me. Rev. Stat., Tit. XI, ch. 124, § 8 (1857); Md. Laws ch. 179, § 2, p. 315 (1868); Mass. Gen. Stat., ch. 165, § 9 (1860); Mich. Rev. Stat., Tit. XXX, ch. 153, §§ 32, 33, 34 (1846); Terr. of Minn. Rev. Stat., ch. 100, §§ 10, 11 (1851); Miss. Rev. Code, ch. LXIV, Arts. 172, 173 (1857); Mo. Rev. Stat., Art. II, §§ 9, 10, 36 (1835); Terr. of Mont. Laws, Criminal Practice Acts § 41 (1864); Terr. of Neb. Rev. Stat., Crim. Code § 42 (1866); Terr. of Nev. Laws ch. 28, § 42 (1861); N.H. Laws ch. 743, §§ 1, 2, p. 708 (1848); N.J. Laws, pp. 266–267 (1849); Terr. of N.M. Laws ch. 3, §§ 10, 11, p. 88 (1854); N.Y. Laws ch. 22, § 1, p. 19 (1846); Ohio Laws § 2, pp. 135–36 (1867); Ore. Gen. Laws, Crim. Code, ch. XLIII, § 509 (1845–1864); Pa. Laws no. 374, §§ 87, 88, 89, pp. 404–05 (1860); Tex. Gen. Stat. Dig., Penal Code, ch. VII, Arts. 531–36 (1859); Vt. Acts & Resolves no. 57, §§ 1, 3, pp. 64–66 (1867); Va. Acts, Tit. II, ch. 3, § 9, p. 96 (1848); Terr. of Wash. Stat., ch. II, §§ 37, 38 (1854); Wis. Rev. Stat., ch. 164, §§ 10, 11, ch. 169, §§ 58, 59 (1858).

been that abortion was generally constitutionally protected, South Carolina would not have enacted, almost contemporaneously with the Amendment's ratification, a law directly contrary to that understanding.

Based on this historical record, multiple Justices have concluded that no one in 1868 could have reasonably believed the Fourteenth Amendment enshrined a right to abortion. Then-Justice Rehnquist observed that the idea that the Fourteenth Amendment protected abortion was "completely unknown to the drafters of the Amendment." *Roe*, 410 U.S. at 174. Just last year, Justice Thomas called "the idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion" "farcical." *June Med.*, 140 S. Ct. at 2151.

Circuit court judges have also noted the disconnect between this Court's abortion jurisprudence and the original understanding of the Due Process Clause. *See, e.g.*, *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 546 (6th Cir. 2021) (en banc) (Bush, J., concurring) ("history also raises serious questions as to the correctness of the Supreme Court's abortion jurisprudence more generally as a matter of the Constitution's original meaning"); Pet.App. 20a (Ho., J., concurring in the judgment) ("Nothing in the text or original understanding of the Constitution establishes a right to an abortion. Rather, what distinguishes abortion from other matters of health care policy in America—and uniquely removes abortion from the democratic process established by our Founders—is Supreme Court precedent."); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1330 (11th Cir. 2018) (Dubina, J., concurring specially) (agreeing with Justice

Thomas that the Court's "abortion jurisprudence . . . has no basis in the Constitution"); *Whole Woman's Health v. Smith*, 896 F.3d 362, 376 (5th Cir. 2018) (Ho, J., concurring) ("It is hard to imagine a better example of how far we have strayed from the text and original understanding of the Constitution than this [abortion] case."); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) ("good reasons exist for the Court to reevaluate its [abortion] jurisprudence").

II. In *Roe* and *Casey*, the Court upset the constitutional balance between States and the Federal Government.

The misapplication of the Fourteenth Amendment in *Roe* and *Casey* is, to be sure, reason enough to overrule those decisions and return to the original understanding of the Fourteenth Amendment. But the flaws in those cases have resulted in more than merely an error in this one area of jurisprudence. These flaws have also upended the careful balance that the Constitution strikes between the Federal Government and the States.

A. The Constitution creates a system of dual sovereignty.

The Constitution forms "a happy combination" of the Federal Government and the States. *The Federalist No. 10*, p. 77 (J. Madison) (C. Rossiter & C. Kelser eds. 2003). In this scheme, "the States [are to] retain . . . a very extensive portion of active sovereignty" and "have the advantage of the federal government" because the powers which "remain in the State governments are numerous and indefinite," while powers in the Federal Government are "few and defined." *The*

Federalist No. 45, pp. 286–89 (J. Madison); *see also The Federalist No. 39*, p. 242 (J. Madison) (the Federal Government's "jurisdiction extends to certain enumerated objects only," and the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects").

To that end, the Constitution provides numerous protections for States, in addition to delegating only specific authority to the Federal Government. *See, e.g.*, U.S. Const. art. I, § 8 (listing powers granted to Congress). Consider just a few examples. Every State "shall have at Least one Representative" in the House. *Id.* art. I, § 2. Each State's acts, records, and judicial decisions are entitled to "Full Faith and Credit" in other States. *Id.* art. IV, § 1. No State is required to give up any of its territory to form any new State without consent. *Id.* art. IV, § 3. No State may be "deprived of its equal Suffrage in the Senate" without consent. *Id.* art. V. If these structural protections left any doubt, the Tenth Amendment removes it: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

This Court's decisions have consistently acknowledged States' sovereignty. "The Constitution," the Court has explained, "specifically recognizes the States as sovereign entities." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1996). In other words, "the States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). An "essential attribute" of Sates' sovereignty is "that they remain

independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997); *see also Texas v. White*, 74 U.S. 700, 725 (1868) (discussing the sovereignty that the States retained).

This resulted in "a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. This system is "a defining feature"—not a vice—"of our Nation's constitutional blueprint." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002).

B. The political branches of the Federal Government have too often infringed on the States' sovereignty.

Sadly, the Constitution's balance between the power of the Federal Government and the States has not always held, and the Federal Government has encroached repeatedly on the sovereignty of the States. Certainly, and unsurprisingly, Congress and the Executive (primarily Congress, as Executive overreach against the States through regulation typically follows legislation) have been the most common culprits on this front. *Cf. The Federalist No. 78*, p. 464 (A. Hamilton) (describing the Judiciary as the "least dangerous" branch).

Congress has often relied on the Commerce Clause to pass sweeping legislation. Yet even with this Court having taken a broad[4] view of that power, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress

[4] Too broad, in fact. But the scope of congressional power under the Commerce Clause is a question for another day.

nevertheless still goes too far, reaching into areas that belong to the States. For example, this Court struck down the Gun-Free School Zones Act because, under the Federal Government's argument that crime impacted the economy, "it is difficult to perceive any limitation on federal power, even in areas . . . where States have historically been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). The Court did the same with the Violence Against Women Act because, whatever the aggregate effect of domestic violence on the economy, allowing Congress to legislate in that area would permit Congress to control "other areas of traditional state regulation." *See United States v. Morrison*, 529 U.S. 598, 615 (2000). More recently, a majority of the Court rejected the Federal Government's defense of the Affordable Care Act's individual mandate as a valid exercise of the commerce power. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552–61 (2012) (opinion of Roberts, C.J.); *id.* at 649–60 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.); *see also* Br. of Pet'rs 21–52, No. 11-398, *Dep't of Health and Human Servs. v. Florida* (U.S. Jan. 6, 2012) (raising the Commerce Clause as the primary argument in defense of the Affordable Care Act).

Beyond the Commerce Clause, Congress has also overstepped its constitutional boundaries by trying to commandeer State officials to carry out specific federal laws—something "provocative of federal-state conflict." *See Printz*, 521 U.S. at 920 (discussing commandeering and the Brady Handgun Violence Prevention Act). Congress has even tried to commandeer State legislatures and force them to regulate certain areas, despite the fact that "the Framers explicitly chose a Constitution that confers upon Congress the

power to regulate individuals, not States." *See New York v. United States*, 505 U.S. 144, 166 (1992) (discussing commandeering and the Low-Level Radioactive Waste Policy Amendments Act of 1985).

C. The Court has, occasionally, converted subjects the Constitution commits to the States into matters of federal constitutional law.

Although the Federal Government's political branches are typically the ones infringing upon States' sovereignty, this Court is not immune from such mistakes. Indeed, the Court's decisions in *Roe* and *Casey* are prime examples of invading an area that has not been committed to the Federal Government and remains reserved to the States.

As discussed already, *see supra* Part I, the central tenet of the Court's abortion jurisprudence is inconsistent with the original understanding of the Fourteenth Amendment. The Fourteenth Amendment has nothing to do with abortion. Therefore, regulating abortion is constitutionally committed to the States (as no other constitutional provision speaks to abortion either).

By holding that the Due Process Clause includes an implicit right to "terminate [a] pregnancy," *Casey*, 505 U.S. at 846 (plurality opinion), the Court took an issue that had belonged exclusively to the States for two centuries and judicially created, conferred, and effectively ratified a new constitutional right. No longer can States regulate abortion as they, through their peoples' representatives, deem appropriate. Instead, their regulation of abortion must fit within the narrow

confines that the Court left open to them in *Casey*. Just as Congress has gone beyond its constitutional limits in legislating, the Court strayed beyond the Constitution in *Casey* and upset the delicate balance the Constitution strikes between those issues that are committed to the Federal Government and those issues that remain reserved to the States.

III. Leaving abortion regulations to the States has benefits in addition to being faithful to the Fourteenth Amendment's original understanding.

That the framers and ratifiers of the Fourteenth Amendment did not understand the Due Process Clause to create or protect a right to abortion should be enough to end the analysis: *Casey*'s central holding should be overturned, and the authority to regulate abortion should be returned to the States. Doing so would be a proper exercise of this Court's "judicial Power" to resolve this "Case[]," U.S. Const. art. III, § 2, and consistent with its "duty . . . to say what the [Fourteenth Amendment] is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Nevertheless, it is worth a brief discussion of why returning abortion regulation to the States is a good thing (beyond accurately interpreting the Constitution). Abortion has been one of this country's most divisive issues for the past half century. It was that way in 1973. This Court in *Roe* recognized "the sensitive and emotional nature of the abortion controversy," "the vigorous opposing views" on abortion, and "the deep and seemingly absolute convictions" people held on the topic. 410 U.S. at 116 (majority opinion). It was that way in 1992, when this Court in *Casey* observed

that "[m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage." 505 U.S. at 850. And it remains that way today. Leaving this divisive issue to the States provides at least three benefits.

First, by de-constitutionalizing abortion, the Court can let democracy work again on this issue. A State may permit abortion. A State may ban abortion. A State may chart a middle ground. Whatever a State decides, that decision will be made "like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Id.* at 979 (Scalia, J., concurring in part and dissenting in part). Once voters cast their ballots, it is up to a State legislature to decide how the State will regulate abortion (assuming the State does not address abortion through constitutional amendment or referendum). *Cf. Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality opinion) ("in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people" (cleaned up)). And if voters do not like what a legislature does, then they have democracy's ultimate check: the ballot box. After all, majority rule is the bedrock of civil society (at least on any issue not put beyond the ballot box by the people in a constitution, which abortion has not been). *See* John Locke, *Second Treatise of Government*, § 96, p. 310 *reprinted in Political Writings* (David Wootton ed., Hackett Publishing Co. 1993) (1681) ("For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power

to act as one body, which is only by the will and determination of the majority.").

There is nothing wrong with giving this issue back to the people. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette v. BAMN*, 572 U.S. 291, 313 (2014). Keeping the issue from the people is nothing more than judicial paternalism that "[s]teal[s] the issue from the people." *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting).

Second, de-constitutionalizing abortion should lower the proverbial temperature in these debates. No longer would abortion define the confirmation process for Justices. No longer would the issue dominate presidential campaigns. America is "a heterogeneous society," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015), and allowing decisions about abortion regulations to be made at the State level better allows those differing voices to be heard and to shape policy.

Third, de-constitutionalizing abortion would allow States to explore different approaches to abortion. This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). Giving the States freedom to enact different ideas allows States to see what may work (or not work) for them and for States to learn from each other, as scientific knowledge of fetal development advances. *See Ariz. State Legislature*, 576 U.S. at 817; *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

* * *

For too long, the Federal Government has dived (not just waded) into issues reserved to the States under the Constitution. Although those forays usually come from the political branches, they have, on occasion, come from this Court as well. *Roe* and *Casey* are quintessential examples of such misadventures. The Court should take this opportunity to correct the mistakes in its abortion jurisprudence and recognize that the text and original understanding of the Fourteenth Amendment have nothing to do with abortion. Rather than creating a federal constitutional right, the Court should leave regulating abortion to the States, where the people may act through the democratic process. This Court should hold as much—and in the process, help restore the constitutional (but currently disrupted) balance between the Federal Government and the States.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

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