No. 19-1392

IN THE
Supreme Court of the United States

THOMAS E. DOBBS, 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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mississippi concedes that its ban on almost all abortions after fifteen weeks of pregnancy is unconstitutional under this Court's holdings over the last five decades that the right to pre-viability abortion is protected from state infringement by the Fourteenth Amendment. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Mississippi thus urges this Court to overturn *Roe* and *Casey*—rulings repeatedly reaffirmed by this Court—claiming that "*Roe* and *Casey* are egregiously wrong" and that their holdings have "no basis in text, structure, history, or tradition." Pet'rs Br. 1-2. In Mississippi's view, a state may ban abortions before viability so long as it has a rational basis for doing so—a standard that would sustain even the most restrictive

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

bans on abortion. The State's argument turns a blind eye to the text and history of the Fourteenth Amendment and its broad protections for substantive fundamental rights for all persons. If adopted, it would rob millions of Americans of the basic fundamental rights to control their bodies, choose whether and when to start a family, determine their life course, and participate as equals in American life.

Nearly 150 years ago, in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality and limiting state governments in order to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xxi (1866), and to keep "whatever sovereignty [a state] may have in harmony with a republican form of government and the Constitution of the country," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

Crafted against the backdrop of the suppression of rights in the South, the Fourteenth Amendment was designed to protect the full range of substantive rights inherent in liberty and to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees," *id.* at 2766, entrusting to the courts the responsibility to ensure that states respected the Amendment's vital safeguards. Together with its guarantee of equal protection, which "secur[es] an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502, the Fourteenth Amendment ensures equal liberty for all persons, allowing people to determine their place in society rather than have their roles

dictated by the government. As this Court has recognized, "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey*, 505 U.S. at 851.

The Framers of the Fourteenth Amendment thus wrote the Amendment to provide broad protection of substantive liberty—not limited to the specific guarantees enumerated elsewhere in the Constitution—and to secure equal citizenship stature for individuals of all groups and classes. Drawing on the Declaration of Independence's promise of inalienable rights and the Ninth Amendment's affirmation of individual rights not specifically enumerated in the text, the Fourteenth Amendment ensures the full promise of liberty, guaranteeing the protection of basic personal rights inherent in liberty to all persons.

Many of the rights at the core of the debates over the Fourteenth Amendment were aspects of individual liberty not traceable to any specific guarantee found in the Bill of Rights. The Framers of the Fourteenth Amendment recoiled at the treatment of enslaved families—women were forced to bear children against their will, parents were denied the right to marry and often separated, and children were taken from their parents—and they wrote the Fourteenth Amendment to protect the full scope of liberty, guaranteeing basic rights of personal liberty and bodily integrity to all.

The State's insistence that constitutional protection for the right to abortion is unmoored from "anything in the Constitution," Pet'rs Br. 2, simply ignores the Fourteenth Amendment's explicit textual commitment to protecting fundamental personal rights. Without the protection of these fundamental rights, the Fourteenth Amendment's promise of freedom and equal citizenship would be illusory.

Rather than grappling with the text and history of the Fourteenth Amendment, Mississippi emphasizes state practice, noting that at the time of the Fourteenth Amendment's ratification, many states had enacted strict limits on abortion. Pet'rs Br. 12-13. But state practice around 1868 has never been a measure of what fundamental, personal rights are guaranteed against state infringement by the Fourteenth Amendment. *Casey*, 505 U.S. at 848 (rejecting the view that "the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects"). Otherwise, many of our most fundamental rights would no longer be secure. In *Loving v. Virginia,* 388 U.S. 1 (1967), for example, this Court struck down anti-miscegenation statutes, concluding that they were incompatible with the fundamental right to marry, even though "[p]enalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period." *Id.* at 6.

This Court has never recognized—and then taken away—a fundamental right that millions of Americans have relied on to determine the course of their lives and participate as equals in American life. It should not start now. Rather, consistent with five decades of precedent safeguarding the fundamental right to abortion, this Court should reaffirm, once again, that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U. S. at 879. Because Mississippi's fifteen week ban on abortion is unconstitutional under any fair reading of this Court's precedents and is inconsistent with constitutional text and history, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Protect Personal, Individual Rights Essential to Liberty.

A. Section 1 of the Fourteenth Amendment Ensures the Full Promise of Liberty and Equality for All.

Drafted in 1866 and ratified in 1868, the Fourteenth Amendment "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring in part and concurring in the judgment), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg, 7 *Collected Works of Abraham Lincoln* 23 (Roy P. Basler ed., 1953). Central to that task was the protection of the full range of personal, individual rights essential to liberty.

To achieve these ends, the Framers of Section 1 of the Fourteenth Amendment chose sweeping language specifically intended to protect the full panoply of fundamental rights for all:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The Framers of the Fourteenth Amendment wrote Section 1's overlapping guarantees to ensure the full promise of liberty and broadly secure equal rights for all, and they gave the

courts a vital role in ensuring that its guarantees "cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation," Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).

Section 1's overlapping guarantees were adopted to "forever disable" the states "from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction." *Id.* at 2766. "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* The Fourteenth Amendment wrote into the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." *Id.* at 1255. In this way, Section 1 gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766. The Amendment "made the liberty and the rights of every citizen in every State a matter of national concern," making the United States into a "republic of equal citizens." Cong. Globe, 41st Cong., 2d Sess. 3608 (1870).

Erasing the stain of slavery—the ultimate violation of personal liberty and bodily integrity—from the Constitution, the Framers affirmed that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property." Cong. Globe, 39th Cong., 1st Sess. 1832-33 (1866); *see id.* at 1757 (affirming protection of "'[t]he right of personal

security, the right of personal liberty, and the right to acquire and enjoy property'" and explaining that "these are declared to be inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be" (quoting Chancellor Kent)). Both personal liberty and control over one's person and body—a basic aspect of personal security—were understood by the Framers to be inalienable rights. *See id.* at 1118 (defining "personal security" to include "'a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation'" (citation omitted)).

The Framers who wrote the Fourteenth Amendment appreciated the close connections between liberty and equality, recognizing that protections for both would help ensure the full promise of liberty for all and end subordination and state-sponsored discrimination. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539. The Fourteenth Amendment's twin protections of liberty and equality were two sides of the same coin, both integral to securing equal rights under law "to all persons." *Id.* at 2766; *see, e.g.*, Cong. Globe, 37th Cong., 2d Sess. 1638 (1862) (describing the Fifth Amendment's guarantee of due process as a "new Magna Carta to mankind" that "declares the rights of all to life and liberty and property are equal before the law").

B. The Fourteenth Amendment Protects the Full Scope of Liberty, Not Merely Rights Enumerated Elsewhere in the Constitution.

The Fourteenth Amendment's broad protection of substantive liberty for all—not limited to the specific

rights enumerated elsewhere in the Constitution—drew specifically on the inalienable rights proclaimed by the Declaration of Independence as well as the Ninth Amendment's textual recognition that the Constitution protects individual rights not specifically enumerated in the Constitution's text. *See* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 167 (Jonathan Elliott ed., 1836) ("Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." (statement of James Iredell)); *see generally* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006).

The principles at the heart of the Declaration were repeatedly cited as forming the core of the Fourteenth Amendment's design. The Framers understood that "slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure." *McDonald*, 561 U.S. at 807 (Thomas, J., concurring).

In the House debates, Representative Thaddeus Stevens quoted Section 1 and explained that its guarantees "are all asserted, in some form or other, in our DECLARATION or organic law." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866); *see id.* at 2510 (explaining that the Due Process and Equal Protection Clauses are "so clearly within the spirit of the Declaration of Independence" that "no member of this House can seriously object to [them]"). In the Senate debates, Senator Luke Poland pointed out that the twin guarantees of due process and equal protection represented "the very spirit and inspiration of our system of government," explaining that they were "essentially declared in the

Declaration of Independence." *Id.* at 2961. In short, the Fourteenth Amendment would be "the gem of the Constitution" because "it is the Declaration of Independence placed immutably and forever in our Constitution." Rep. Schuyler Colfax, Speech at Indianapolis, Ind. (Aug. 7, 1866), *in* 2 *The Reconstruction Amendments: The Essential Documents* 257 (Kurt T. Lash ed., 2021).

Discussion of the Amendment in the press confirmed this point, stressing the need to restore to all the full protection of liberty promised in the Declaration. The people of the nation—as one author writing in *The New York Times* explained—"demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness." Madison, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, *reprinted in* 2 *The Reconstruction Amendments: The Essential Documents*, *supra*, at 297.

In writing Section 1, the Framers provided sweeping protections for liberty—not limited to rights enumerated elsewhere in the Constitution—reflecting the Ninth Amendment's recognition that no enumeration of specific rights could possibly be exhaustive. *See* Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* 158 (2012) (observing that "any textual mention of . . . the Bill of Rights would have fallen far short of the Reconstruction Republicans' goal of ensuring state obedience to *all* fundamental rights, freedoms, privileges, and immunities of Americans"); *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (observing that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the

extent of freedom in all of its dimensions"). As Senator Jacob Howard explained, the fundamental rights of Americans "cannot be fully defined in their entire extent and precise nature." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

In keeping with the Ninth Amendment, the Fourteenth Amendment's protection of liberty sweeps broadly. As one member of Congress observed during the debates, in "enumerati[ng the] natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of." *Id.* at 1072. They specified "'life,' 'liberty,' 'property,' 'freedom of speech,' 'freedom of the press,' 'freedom in the exercise of religion,' 'security of person,' &c.; and then, lest something essential . . . [be] overlooked, it was provided in the ninth amendment that 'the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated.'" *Id.* He went on: "This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law." *Id.*; *see* Cong. Globe, 42d Cong., 2d Sess. 843 (1872) (observing that the Bill of Rights "do not define all the rights of American citizens. They define some of them. The Constitution itself amply secures some of the rights of American citizens, but the ninth amendment expressly provides that—'[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people'").[2]

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[2] The Framers were not alone in looking to the Declaration and the Ninth Amendment for guidance. By 1868, when the Fourteenth Amendment was ratified, twenty-seven states (of the thirty-seven states then in the Union) had inserted into their own

The broad scope of the liberty that the Fourteenth Amendment guaranteed to all reflected not only constitutional principle, but also experience. The Framers wrote the Fourteenth Amendment against the backdrop of a long history of state abridgement of fundamental rights. As Representative Jehu Baker made the point, "[t]his [Amendment] declares particularly that no *State* shall do it—a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." Cong. Globe, 39th Cong., 1st Sess. app. 256 (1866). The Framers were keenly aware that during slavery and in the aftermath of the Civil War—when southern state legislatures wrote Black Codes to deny basic rights to African Americans—a number of states were suppressing a whole host of fundamental freedoms. *Id.* at 2542 (noting that "many instances of State injustice and oppression have already occurred in the State legislation of this Union"); *Report of the Joint Committee on Reconstruction*,

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state constitutions provisions that guaranteed the protection of fundamental, inalienable rights, many tracking the words of the Declaration. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 88 (2008); *see also* Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1303 (2015) ("[I]n 1868, approximately 67% of all Americans then living resided in states that constitutionally protected unenumerated individual liberty rights."). Likewise, by 1868, eighteen states had inserted into their state constitutions Ninth Amendment analogues, which provided that the enumeration of certain rights should not be construed to deny others retained by the people. Calabresi & Agudo, *supra*, at 89. For good reason, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell,* 576 U.S. at 663.

at the First Session Thirty-Ninth Congress, *supra*, Pt. II at 4 (testimony that "[a]ll of the people . . . are extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property").

Many of the rights at the core of the Fourteenth Amendment were not specifically enumerated in the Constitution, but rather were basic rights essential to individual liberty and dignity. As the Reconstruction Framers were well aware, fundamental aspects of personal liberty and bodily integrity were denied to enslaved people on a daily basis. Whippings, forced separation of husbands and wives and of parents and children, rape, and compulsory childbearing were all a central part of the lives that enslaved persons led. *See* Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925*, at 318 (1976) ("[O]ne in six (or seven) slave marriages were ended by force or sale"); Anthony Gene Carey, *Sold Down the River: Slavery in the Lower Chattahoochee Valley of Alabama and Georgia* 51 (2011) ("About one-quarter of slaves traded across regions were between eight and fifteen years of age, and about one-half of all slaves enmeshed in the interstate trade were separated from spouses or parents."); Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* 24 (2d ed. 2017) ("The essence of Black women's experience during slavery was the brutal denial of autonomy over reproduction."); Melissa Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2034 (2021) (describing the "absence of sexual autonomy" enjoyed by enslaved persons and their "knowledge that their children were not their own and could be sold away from them"). The brutal treatment of enslaved persons illustrated the horrible consequences that resulted

when people were denied bodily integrity, the rights to marry and establish a family, and reproductive liberty.

The Framers railed against the denial of these basic rights of heart and home. As Senator Jacob Howard observed, an enslaved person "had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend." Cong. Globe, 39th Cong., 1st Sess. 504 (1866). The Fourteenth Amendment sought to redress those denials of fundamental rights.

The Framers recognized that the right to marry, to establish a home, and to choose to bear and raise children were all rights universally understood to be a core part of liberty. As Howard stressed, the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home." *Id.*; *id.* at 42 (1865) (demanding that African Americans "be protected in their homes and family"); *id.* at 343 (1866) ("[T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land[.]"); Governor Oliver Morton, Speech at Anderson, Madison County, Ind. (Sept. 22, 1866), *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana and Kentucky* 35 (1866) ("We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has."). To secure these rights and others essential to individual liberty and dignity, the Framers wrote the Fourteenth Amendment to include a broad, sweeping guarantee of freedom, ensuring to all people "a realm of personal liberty

which the government may not enter." *Casey*, 505 U.S. at 847.[3]

C. This Court's Precedents Establish Broad Protections for Substantive Liberty and Equality.

Court precedent for nearly a century has adhered to the original meaning of Section 1, interpreting the Fourteenth Amendment's Due Process Clause to provide broad protections for substantive liberty. More than a decade ago, in *McDonald*, this Court reviewed at length the text and history of the Fourteenth Amendment. *McDonald*, 561 U.S. at 762 n.9, 770-80. In light of that history, this Court adopted a robust interpretation of the liberty protected by the Due Process Clause, *id.* at 758, and also recognized that the courts play a vital role in vindicating "those fundamental rights necessary to our system of ordered liberty," *id.* at 778. Indeed, both the Justices in the majority and those in dissent agreed with the proposition that the Fourteenth Amendment protects substantive fundamental rights. *See id.* at 864 (Stevens, J., dissenting) ("[I]t is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field. It is the liberty clause that enacts the

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[3] Professor Kurt Lash insists that the Fourteenth Amendment only protects substantive fundamental rights enumerated elsewhere in the Constitution. *See* Lash *Amicus* Br. 13-32. Professor Lash, however, ignores important historical context that is critical to understanding the Amendment's scope, such as the Fourteenth Amendment's roots in the Declaration of Independence and the 39th Congress's affirmation that the Ninth Amendment protects unenumerated rights. Lash's narrow reading would leave unprotected many fundamental rights that had been brutally denied to enslaved persons and that were repeatedly invoked during the debates over the Amendment, including rights to bodily integrity, to marry, to raise a home, and to decide whether or not to bear children.

Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons."); *cf. Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (agreeing that "regardless of the precise vehicle" the Fourteenth Amendment protects substantive fundamental rights).

This Court's cases safeguard "the right to marry," *Obergefell*, 576 U.S. at 664; *Loving*, 388 U.S. at 12, "the right . . . [to] establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (protection of "liberty of parents and guardians to direct the upbringing and education of children under their control"), the right to bodily integrity, *see Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ."); *Washington v. Harper*, 494 U.S. 210, 221-23, 229-30 (1990); *Winston v. Lee*, 470 U.S. 753, 765 (1985) (observing that government-mandated surgery "involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin"), and the right to make personal decisions concerning procreation, *see Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), contraception, *see Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), intimate sexual conduct, *see Lawrence v. Texas*, 539 U.S. 558, 564-67 (2003), and abortion, *see Roe*, 410 U.S. at 152-53; *Casey*, 505 U.S. at 852.

In *Planned Parenthood v. Casey*, nearly three decades ago, this Court reaffirmed that the Constitution guarantees the right to end a pregnancy prior to viability, concluding that the right to control one's body demanded constitutional protection. State abortion

regulation, the Court explained, is "doubly deserving of scrutiny" because "the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." *Id.* at 896. Recognizing that the Court's obligation was to "define the liberty of all," *id.* at 850, and that the Constitution's promise of liberty extends to women as well as men, *Casey* concluded that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society," *id.* at 852, guaranteeing "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature," *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). *Casey* made clear that both principles of liberty and equality contained in the Fourteenth Amendment prohibited the government from dictating "its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Casey*, 505 U.S. 852; *id.* at 897 (rejecting stereotypical notions of women's proper roles that "precluded full and independent legal status under the Constitution").

II. This Court Should Reaffirm *Roe v. Wade* and *Planned Parenthood v. Casey*.

Mississippi argues that "[t]he *stare decisis* case for overruling *Roe* and *Casey* is overwhelming." Pet'rs Br. 1. But the case it makes for overruling these precedents relies on a flawed form of originalism and fails to meaningfully grapple with the *stare decisis* principles that compel reaffirmance of those precedents. The State's argument should be rejected.

A. The State's Arguments for Overruling *Roe* and *Casey* Are Based on a Fundamentally Flawed Form of Originalism.

Mississippi's brief promises an analysis of the text, history, and structure of the Fourteenth Amendment, but fails to actually deliver one. The State neglects to examine the Fourteenth Amendment's sweeping text that was added to the Constitution to broadly protect fundamental rights and prevent the government from subordinating marginalized persons. It turns a blind eye to the historical context that led the Framers of the Fourteenth Amendment to protect substantive fundamental personal rights, including many nowhere to be found elsewhere in the Constitution's four corners. It does not reckon with the structural constitutional transformation the Fourteenth Amendment helped bring about, which "fundamentally altered our country's federal system," *McDonald*, 561 U.S. at 754, to ensure that states respect the fundamental rights and equal citizenship stature of all Americans. And it ignores that one of the brutal denials of liberty under slavery that the Fourteenth Amendment redressed was the "official denial of reproductive liberty." Roberts, *supra*, at 23.

Instead, the State makes two claims. First, it says, "the Constitution's text says nothing about abortion." Pet'rs Br. 12. That is true, but irrelevant. The Constitution is equally silent on the right to marry a loved one, the right to bodily integrity, or the right to start a family and raise children. But those are all fundamental rights deeply rooted in the text and history of the Fourteenth Amendment and protected by decisions of this Court. Indeed, the whole point of the Ninth Amendment's rule of construction is that some personal rights are fundamental and inhere in liberty,

even though they are not explicitly enumerated in the four corners of the Constitution's text. *See* Barnett, *supra*, at 2 (arguing that the text of the Ninth Amendment "seems explicitly to affirm that persons have other constitutional rights beyond those enumerated in the first eight Amendments"); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.").

Second, the State relies heavily on state practice at the time of the ratification of the Fourteenth Amendment. According to the State, because "many States restricted abortion broadly" in 1868, the "public would have understood that, consistent with the Fourteenth Amendment, States could restrict abortion to pursue legitimate interests." Pet'rs Br. 12, 13. This is a fundamentally flawed method of analysis.

As a written charter establishing fundamental principles of government, the proper interpretation of the Constitution turns on the meaning of the text, *see, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), not the particular subjective expectations of the people who ratified the document. "What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . [I]t is the text of the Fourteenth Amendment that was ratified in 1868." Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663, 669 (2009).

That text was written in the broadest possible terms. As this Court observed in one of its first decisions interpreting the Amendment, "[t]he Fourteenth Amendment makes no attempt to enumerate the

rights it [is] designed to protect. It speaks in general terms, and those are as comprehensive as possible." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880). The Fourteenth Amendment's majestic guarantees in Section 1 constrain the acts of state governments and transformed our federal system against the backdrop of a long history of suppression of fundamental rights. It makes little sense to make state practice at the time of ratification determinative of the Amendment's sweeping protections for substantive fundamental rights. Otherwise, "received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell*, 576 U.S. at 671; *Ill. State Emps. Council 34 v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972) (Stevens, J.) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would . . . have been doomed to failure.").

Importantly, this Court has never accepted state practice circa 1868 as a definitive measure of what fundamental, personal rights are guaranteed against state infringement by the Fourteenth Amendment. *Cf. Brown v. Bd. of Educ.,* 347 U.S. 483, 492 (1954) ("[W]e cannot turn the clock back to 1868."). Rather, it has repeatedly strived to enforce the Fourteenth Amendment's promise of liberty for all, taking care "to examine and reexamine past and present practices against the basic principles embodied in the Constitution." *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 92 (1990) (Stevens, J., concurring). Mississippi's argument is inconsistent with the analysis this Court has used to identify fundamental rights protected by the Fourteenth Amendment.

In *Loving v. Virginia*, 388 U.S. 1 (1967), for example, this Court held that "[u]nder our Constitution, the

freedom to marry or not marry, a person of another race resides with the individual." *Id.* at 12. It did not matter that "[p]enalties for miscegenation . . . have been common in Virginia since the colonial period," *id.* at 6, because, under the Fourteenth Amendment, the right to marry "cannot be infringed by the State," *id.* at 12. *Loving*'s enduring lesson is that "'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'" *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

The fact that state laws at the time of the ratification of the Fourteenth Amendment forbade interracial marriage was of no relevance because the right to marry is deeply rooted in constitutional text and history. The same is true of the individual right to control one's body, decide whether or not to bear children, and shape one's destiny vindicated in *Roe* and *Casey*.

Loving hardly stands alone in this regard. This Court's cases vindicating the Constitution's promise of a "realm of personal liberty which the government may not enter," *Casey*, 505 U.S. at 847, have repeatedly struck down state laws for infringing on fundamental rights inherent in individual dignity and autonomy, notwithstanding the longstanding nature of those prohibitions, some going back much further than 1868. *See, e.g.*, *Griswold*, 381 U.S. at 485 (striking down Connecticut law banning the use of contraceptives, which was first enacted in 1879); *Lawrence*, 539 U.S. at 571 (striking down Texas law prohibiting sexual intimacy by two persons of the same sex despite the fact "that for centuries there have been powerful voices to

condemn homosexual conduct as immoral"); *Obergefell*, 576 U.S. at 657 (holding that same-sex couples have a fundamental right to marry, while noting the centuries-old "understanding that marriage is a union between two persons of the opposite sex"). In sum, to look to state practice in 1868 as the touchstone for the protection of fundamental rights, as Mississippi urges, is to say that many of our most cherished rights are not fundamental at all. The radical approach Mississippi urges would destabilize a central part of this Court's Fourteenth Amendment jurisprudence.[4]

B. *Roe* and *Casey* Establish a Workable Framework for Enforcing Fundamental Rights Guaranteed by the Fourteenth Amendment.

Roe v. Wade—perhaps more than any other case in history—has engendered repeated efforts to overrule its central holding. Indeed, this case marks the fifth time that litigants have urged this Court to overrule *Roe*. *See City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reprod. Health Servs.,* 492 U.S. 490 (1989); *Casey*, 505 U.S. at 870 ("*Roe* was a reasoned

[4] Mississippi relies heavily on this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), which rejected a claimed right of physician-assisted suicide because of a "consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today," *id.* at 723. But *Glucksberg* discussed *Casey* and found it distinguishable, *id.* at 728, and later cases have rejected the broad reading Mississippi urges. *See, e.g.*, *Obergefell*, 576 U.S. at 671 ("[W]hile th[e] approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.").

statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. . . . [T]hose cases represent[] an unbroken commitment by this Court to the essential holding of *Roe*."). Resuscitating arguments made in those past attempts, Mississippi now urges this Court to do what it has repeatedly declined to do in the past: overrule *Roe* and *Casey* and take away from millions of Americans the fundamental right recognized in those cases. The State has utterly failed to justify the radical step it proposes. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (explaining that respect for precedent "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government").

Mississippi contends that this Court's abortion jurisprudence is hopelessly unworkable and has failed to promote "administrability, clarity, or predictability—core features of a workable legal standard." Pet'rs Br. 19. But its real complaint is that *Casey* recognized "the woman's right to make the ultimate decision," *Casey*, 505 U.S. at 877, and did not simply give the state carte blanche to severely restrict access to abortion or ban it outright prior to viability, as Mississippi's ban on abortion after fifteen weeks does. Mississippi cannot and does not show that the core holding of *Roe* and *Casey*—the protection of the individual's right to abortion before viability—is unworkable in any meaningful sense.

Casey held that, before viability, states may not deny or obstruct the fundamental right to control one's body and make the "ultimate decision" whether to carry one's pregnancy to term. *Id.* While states retain the authority to regulate abortion throughout all stages of pregnancy, before viability, the individual

must "retain the ultimate control over her destiny and her body," *Casey*, 505 U.S. at 869; *see also id.* at 897 (striking down husband notification provision that "enables the husband to wield an effective veto over his wife's decision"); *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292, 2313 (2016) (striking down admitting privileges requirement that "led to the closure of half of Texas' clinics" without "any health benefit"); *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2130 (2020) (striking down admitting privileges requirement that would "leave thousands of Louisiana women with no practical means of obtaining a safe, legal abortion").

Casey's framework is simply an application of the fundamental idea that while "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, . . . there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves." *Slaughter-House Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting). Far from being unworkable, observing this distinction is critical to enforcing the Fourteenth Amendment's promise of fundamental liberty for all persons.

Indeed, many areas of constitutional law employ a framework similar to *Casey*'s to ensure that state laws do not infringe on constitutional rights. *See Raymond Motor Transp. v. Rice*, 434 U.S. 429, 447 (1978) (dormant Commerce Clause); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (ballot access); *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 198 (2008) (right to vote); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011) (free speech). If *Casey* is unworkable, so is much of constitutional law.

Mississippi also contends that the governing framework is an "unworkable mechanism for

accommodating state interests in the abortion context" because it broadly diminishes a state's pre-viability interests in "protecting unborn life, women's health, and the medical profession's integrity." Pet'rs Br. 20, 21. But *Casey* plainly gives states the power to vindicate these interests. *Casey*, 505 U.S. at 878; *Carhart*, 550 U.S. at 145-46. It simply denies states the power to enact overly restrictive laws, such as Mississippi's fifteen-week ban, that deprive the individual of "the ultimate control over her destiny and her body" prior to viability. *Casey*, 505 U.S. at 869. Mississippi's real complaint, then, is that *Casey* held that "the woman's right to choose" should not be treated as "so subordinate to the State's interest . . . that her choice exists in theory but not in fact." *Id.* at 872. But this Court has never recognized a compelling state interest that allows the government to completely extinguish a personal, fundamental right. *Cf. Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972) ("[H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."). If accepted, Mississippi's argument would permit all manner of deprivations of fundamental rights based on an unbounded interest with no clear limiting principle or stopping point—precisely what this Court has refused to countenance. *United States v. Alvarez*, 567 U.S. 709, 723 (2012); *Citizens United v. FEC,* 558 U.S. 310, 359 (2010); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 498 (1989).

C. The Viability Line Established in *Roe* and Reaffirmed in *Casey* Should Be Reaffirmed Once Again.

In *Casey*, this Court explained that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*," recognizing

that "there is no line other than viability which is more workable." *Casey*, 505 U.S. at 871, 870.

As a fallback position, Mississippi argues that this Court should reject the viability line, which according to the State, has "no constitutional or principled basis." Pet'rs Br. 39. But the State offers no workable substitute for that line and no mechanism to strike a balance between the individual's personal, fundamental rights and the interests of the government. Without any clear limiting principle, this approach would seemingly apply not only to Mississippi's fifteen-week ban, but also to a ten-week ban or one even earlier in pregnancy. In other words, this approach would completely eviscerate *Roe* and *Casey*.

It would be inconsistent with any notion of principled constitutional decision-making to jettison the clear, workable viability line established in this Court's precedents and adopt instead the State's *ad hoc* approach, which would sanction all manner of severe intrusions on fundamental liberties.

This Court has drawn the line at viability because that line does a better job than any other approach of striking an appropriate constitutional balance between the fundamental personal rights of the individual and the interests of the government. The Court's repeated recognition that, before viability, the state's interest in potential life is "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," *Casey*, 505 U.S. at 846, reflects that the government's interest in potential life is not static but increases and becomes compelling only when "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now

overrides the rights of the woman," *id.* at 870. Until that time, one's interest in controlling one's own body and destiny must take precedence. This accords with the common law's treatment of abortion—which permitted abortions Mississippi now seeks to ban outright, *see Roe*, 410 U.S. at 132, 138-39, 140-41—and the fact, that historically, "[t]he fetus was not given any rights independent of its mother; rather, it was only after the fetus became a person at birth that it acquired legal rights as a separate entity," Dawn E. Johnson, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599, 601 (1986).

Even apart from the viability line set forth in this Court's longstanding precedent, Mississippi's fifteen-week ban cannot stand. Mississippi's ban does not protect pre-viability fetuses across the board, but instead contains a number of exceptions, such as for fetal anomalies and medical emergencies. These exceptions fatally undercut any claim that the State is pursuing an interest it views as truly compelling. *See Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1882 (2021) ("The creation of a system of exceptions . . . undermines the City's contention that its non-discrimination policies can brook no departures."); *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) (explaining that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited" (citation omitted)). Rather, the State seeks to override the personal right to control one's own body and dignity and make the choice—one of "the most intimate and personal choices a person may make in a lifetime," *Casey*, 505 U.S. at 851—for oneself. The Constitution does not permit this severe

denial of liberty, dignity, and autonomy. Any other result "would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Thornburg*, 476 U.S. at 772.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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