No. 15-274

IN THE
Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES,

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 PETITIONERS

ELIZABETH B. WYDRA*
DAVID H. GANS
BRIANNE J. GOROD
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

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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 our 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 the scope of the protections of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourteenth Amendment's guarantee of substantive liberty, together with its guarantee of equal protection for all persons, protects fundamental rights central to individual dignity and autonomy for all persons, broadly securing equal citizenship stature to men and women of all classes and races. As the Fourteenth Amendment's text and history show, the Amendment's protection of liberty and equality for all are "connected in a profound way," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015), ensuring that government cannot take fundamental rights away from any group of persons or force individuals to con-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. 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.

form to a state-mandated role. Since the framing of the Fourteenth Amendment, courts have played an essential role in safeguarding the Amendment's promise of liberty for all, insisting on "careful scrutiny of the state needs asserted to justify . . . abridgement" of the Amendment's protections, *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), in order to ensure 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).

The Fifth Circuit in this case abdicated its responsibility under the Constitution to meaningfully scrutinize state laws that abridge the Fourteenth Amendment's guarantee of liberty, upholding state laws that would force more than 75 percent of the abortion clinics in Texas to close on the flimsiest of justifications. The Fifth Circuit's analysis cannot be squared with the text or history of the Fourteenth Amendment, the constitutionally-mandated role of the courts in securing the Constitution's promise of liberty for all, or this Court's precedents.

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 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[ed] 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 dignity and autonomy for all persons, allowing men and women 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." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

History shows that the Framers of the Fourteenth Amendment wrote the Amendment to provide broad protection of substantive liberty—not limited to the specific guarantees enumerated elsewhere in the Constitution—to broadly 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 to all "equal dignity in the eyes of the law." *Obergefell*, 135 S. Ct. at 2608. 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, parents were denied the right to marry and often separated, and children were taken from them—and they wrote the Fourteenth Amendment to protect the full scope of liberty, guaranteeing basic rights of personal liberty and bodily integrity to all.

Consistent with this text and history, this Court's cases have both affirmed the broad reach of the liberty guaranteed by the Fourteenth Amendment, including a woman's right to end her pregnancy prior to viability, *see, e.g.*, *Obergefell*, 135 S. Ct. at 2597-02; *Lawrence v. Texas*, 539 U.S. 558, 564-66, 573-74 (2003); *Casey*, 505 U.S. at 846-53, and insisted on careful review of state legislation in order to give "real substance," *id.* at 869, to individual liberty and prevent states from imposing "substantial arbitrary impositions and purposeless restraints," *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). As *Casey* established, "[u]nnecessary health regulations" that "serve no purpose other than to make abortions more difficult" violate the Constitution. *Casey*, 505 U.S. at 878, 901; Pet'rs' Br. at 2, 33-34. Critically, *Casey* reaffirmed that "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

Rather than enforcing these fundamental constitutional principles, the Fifth Circuit abandoned them. In its decision, the Court of Appeals eliminated the "real substance" of individual liberty and dignity *Casey* protects, rubberstamping onerous laws designed to shutter abortion clinics throughout the state and leaving women without any real means of exercising the liberty the Constitution guarantees them.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT PROTECT PERSONAL, INDIVIDUAL RIGHTS ESSENTIAL TO LIBERTY, DIGNITY AND AUTONOMY.

A. Section 1 of the Fourteenth Amendment Ensures the Full Promise of Liberty and Equal Dignity 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), and to secure for the nation the "new birth of freedom" that President Abraham Lincoln had promised at Gettysburg. 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. These guarantees, as this Court has often recognized, "are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different pre-

cepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other." *Obergefell*, 135 S. Ct. at 2603. History shows that 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, giving to the courts a vital role in ensuring that states respected basic constitutional principles of equal liberty, dignity, and autonomy.

The original meaning of Section 1's overlapping guarantees was 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." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). "The great object of the first section of th[e] amendment," Senator Jacob Howard explained, is "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; *see also* Jack M. Balkin, *Living Originalism* 198 (2011) (explaining that the overlapping guarantees of Section 1 "together . . . were designed to serve the structural goals of equal citizenship and equality before the law").

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, 1833; *see also 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"). Both personal liberty and personal 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'").

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." Cong. Globe, 39th Cong., 1st Sess. 2539 (1866). The Fourteenth Amendment's twin protections of liberty and equality were two sides of the same coin, both integral to secure to all "equal dignity in the eyes of the law." *Obergefell*, 135 S. Ct. at 2608; *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"

which "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 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."); Randy 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. As this Court explained, 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, Rep. Thaddeus Stevens quoted Section 1 and explained that its guarantees "are all asserted, in some form or another, in our DECLARATION or organic law." Cong. Globe, 39th

Cong., 1st Sess. 2459 (1866); *see also 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 it"). In the Senate debates, Sen. 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." *See* Hon. Schuyler Colfax, "My Policy' Revisited: Necessity of the Constitutional Amendment" (Aug. 7, 1866), *in* Cincinnati Commercial, Aug 9, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

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 . . . . These are the demands; these the securities required." Madison, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866.

In writing Section 1, the Framers provided sweeping protections for liberty—not limited to rights enumerated elsewhere in the Constitution—reflecting the teachings of the Ninth Amendment that no enu-

meration 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*, 135 S. Ct. at 2598 (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 Sen. 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 the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of—"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 in the specifications should have been 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." 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. at 1072; *see also* 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]

The broad scope of the liberty guaranteed to all by the Fourteenth Amendment reflected not only constitutional principle, but experience as well. The Framers wrote the Fourteenth Amendment to contain broad protections for individual liberty against the backdrop of a long history of state abridgement of

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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 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 analogs, which, like the Ninth Amendment, 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,* 135 S. Ct. at 2598.

fundamental rights. As Rep. Jehu Baker made the point during the debates over the Fourteenth Amendment, "[t]his 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, 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. Fundamental aspects of personal liberty and bodily integrity were denied to the slaves 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 the slaves led.

The Framers railed against the denial of these basic rights of heart and home, *see* Cong. Globe, 39th Cong., 1st Sess. 504 (1866) ("He 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."), observing 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. *Id.* (explaining that 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.* at 42 (demanding that African Americans "be protected in their homes and family"); *id.* at 343 ("[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[.]"); Speech of Gov. Oliver Morton at Anderson, Madison Cnty., Indiana (Sept. 22, 1866), *in* Cincinnati Commercial, Nov. 23, 1866, *reprinted in Speeches of the Campaign of 1866*, *supra*, at 35 ("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 men and women alike "a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847.

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

Court precedent for nearly a century has enforced the original meaning of Section 1, interpreting the Fourteenth Amendment's Due Process Clause to provide broad protections for substantive liberty. Five years ago, in *McDonald*, this Court reviewed at length the text and history of the Fourteenth Amendment, recognizing that the protection of substantive fundamental rights was deeply rooted in the

text and history of the Fourteenth Amendment. *McDonald*, 561 U.S. at 762 n.9, 770-780. In light of that history, the lead opinion concluded that a robust interpretation should be given to the liberty protected by the Due Process Clause, explaining that "[f]or many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment." *Id.* at 758. *McDonald* affirms the role of the courts 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 the 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 Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons.").

An unbroken line of this Court's cases holds that the Fourteenth Amendment's protection of substantive liberty "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," *Obergefell*, 135 S. Ct. at 2597, allowing women and men to shape their "destiny" in accord with their own "conception of [their] spiritual imperatives and . . . place in society." *Casey*, 505 U.S. at 852; *Lawrence*, 539 U.S. at 565. This Court's cases safeguard "the right to marry," *Obergefell*, 135 S. Ct. at 2598, "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 and 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, 251-52 (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, 221-22, 229 (1990), 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*, 539 U.S. at 564-67, and abortion, *see Casey*, 505 U.S. at 852.

In *Planned Parenthood v. Casey*, more than two decades ago, this Court reaffirmed that the Constitution guarantees a woman the right to end her pregnancy prior to viability, observing that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.* at 852; *id.* at 896 (explaining that state abortion regulation is "doubly deserving of scrutiny . . . as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman"). Recognizing that the Constitution's promise of dignity and autonomy 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, reaffirming "a woman's autonomy to determine her life course, and thus to enjoy equal citizenship stature." *Carhart*, 550 U.S. at 172 (Ginsburg, J., dissenting). *Casey* made clear that both principles of liberty and equality contained in the Fourteenth Amendment prohibited the government from dictat-

ing "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").

In the instant case, the Fifth Circuit failed to protect the full scope of the liberty guaranteed by the Fourteenth Amendment, upholding Texas statutes that would close the vast majority of the state's abortion clinics without any meaningful review of whether the statutes furthered legitimate governmental interests. As the next sections demonstrate, the Fifth Circuit's judgment cannot be squared with the role of the courts envisioned by the Framers of the Fourteenth Amendment or this Court's precedents.

II. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT REQUIRE COURTS TO CAREFULLY REVIEW STATE LEGISLATION IMPINGING ON INDIVIDUAL LIBERTY.

To ensure the full promise of liberty for all, the federal judiciary has an obligation to carefully review challenged state legislation to ensure its consistency with the Constitution. The Framers of the Fourteenth Amendment, like their counterparts at the Founding, understood that courts were the bulwarks against government infringement of personal, individual rights, requiring courts to ensure that state governments respected the fundamental constitutional principles inscribed in Section 1. "[T]he greatest safeguard of liberty and of private rights," the Framers of the Fourteenth Amendment understood, is to be found in the "fundamental law that secures those private rights, administered by an independent

and fearless judiciary." Cong. Globe, 41st Cong. 2d Sess. 94 (1869).

The Framers viewed judicial review as essential to ensure that the Fourteenth Amendment's constitutional protections "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. Like their counterparts at the Founding, they understood that the "object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority." *Id.*; *cf. The Federalist No. 10*, at 49 (James Madison) (Clinton Rossiter ed., 1961) (discussing the need to ensure "the majority" would be "unable to concert and carry into effect schemes of oppression"). Thus, it was vital to the Framers of the Fourteenth Amendment that "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter," *Obergefell*, 135 S. Ct. at 2605, and that they be obliged to enforce constitutional protections against majorities in the states. *Id.* at 2605-06 ("The idea of the Constitution 'was to 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.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943))).

The Framers understood that the full promise of liberty for all guaranteed by the Fourteenth Amendment could easily be subverted unless courts took care to ensure that state legislation comported with the Amendment's guarantees. Indeed, with state governments in the South seeking to subordinate African Americans and strip them of their newly won freedom, it was critical that Article III courts contin-

ue to play their historic role of preventing abuse of power by the government and ensure that states did not use their broad regulatory powers to flout the Fourteenth Amendment's new guarantees of liberty and equality. *See McDonald*, 561 U.S. at 771. Not surprisingly, the Framers of the Fourteenth Amendment viewed the "right to enforce rights in the courts" as one of the "great fundamental rights" possessed by all citizens. Cong. Globe, 39th Cong., 1st Sess. 475 (1866).

Consistent with the text and history of the Fourteenth Amendment, it has also long been firmly established that courts have an obligation to carefully review challenged state legislation to ensure its consistency with the Amendment's guarantees. "[T]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But 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." *Slaughterhouse Cases*, 83 U.S. 36, 114 (1872) (Bradley, J., dissenting). That principle—which has been a consistent thread in decades of Supreme Court precedent—requires courts to carefully review challenged state legislation to ensure it comports with the Fourteenth Amendment's guarantee of liberty for all, paying close attention to the state needs asserted to justify a deprivation of liberty.

When a statute impinges on a fundamental right, courts must assess whether the statute serves essential legislative purposes, or is simply an overbroad, and hence unjustified, restraint on liberty. *See, e.g.*, *Meyer*, 262 U.S. at 403 (invalidating statute forbidding teaching of the German language as "arbitrary and without reasonable relation to any end within

the competency of the state"); *Doe v. Bolton*, 410 U.S. 179, 195 (1973) (holding unconstitutional a requirement that abortions be performed in an accredited hospital because the state failed "to prove that only the full resources of a licensed hospital . . . satisfy [its] health interests"); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (insisting that a reviewing court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation"); *id.* at 520 (Stevens, J., concurring) (observing that the "city has failed totally to explain the need" for its restriction); *Carey v. Population Servs. Intl.*, 431 U.S. 678, 690 (1977) (holding invalid a requirement that contraceptives be prescribed by a licensed pharmacist as "bear[ing] no relation to the State's interest in protecting health"); *Turner v. Safley*, 482 U.S. 78, 98 (1987) (striking down limitation on the right to marry by prisoners as an "exaggerated response to . . . security objectives"); *Hodgson v. Minnesota*, 497 U.S. 417, 454-55 (1990) (invalidating two-parent notification statute as "an oddity among state and federal consent provisions" and noting "the unreasonableness of the Minnesota two-parent notification requirement" and "the ease with which the State can adopt less burdensome means to protect the minor's welfare"); *id.* at 459 (O'Connor, J., concurring) (agreeing that the state "has offered no sufficient justification for its interference with the family's decisionmaking processes"); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (reversing conviction of defendant who had been drugged against his will because "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness"); *Lawrence*, 539 U.S. at 578 (invalidating sodomy law on the ground that "the Texas statute

furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

As this long line of cases makes clear, the full promise of liberty secured by the Fourteenth Amendment would be an empty one if courts were permitted to rubber-stamp state laws that restrict individual liberty, and fail to enforce the Fourteenth Amendment's prohibition on "substantial arbitrary impositions and purposeless restraints." *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). As the next part shows, *Casey* drew on—not repudiated—this basic constitutional principle.

III. THE FIFTH CIRCUIT ABDICATED ITS RESPONSIBILITY TO PROTECT FUNDAMENTAL RIGHTS CENTRAL TO DIGNITY AND AUTONOMY AS REQUIRED BY *CASEY*.

Consistent with the text and history of the Fourteenth Amendment and decades of precedents, this Court in *Casey* sought to "give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term," insisting that "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function." *Casey*, 505 U.S. at 869. As *Casey* makes clear, the undue burden standard requires a reviewing court to carefully review state laws restricting access to abortion to ensure that the "ultimate decision" remains the woman's. *Id.* at 877. While states retain the authority to "create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn," *id.*, or to "bar certain procedures and substitute others," *Carhart*, 550 U.S. at 158, states cannot,

under the guise of furthering their own legitimate interests, subvert a woman's right to control her body and destiny. To ensure this protection of liberty, courts have "an independent constitutional duty to review factual findings where constitutional rights are at stake." *Id.* at 165; *see* Pet'rs' Br. at 33-34, 47.

As this Court has recognized, "*Casey* . . . struck a balance. . . . [that] was central to its holding," *id.* at 146, both reaffirming a woman's right to obtain an abortion prior to viability as a "component of liberty we cannot renounce," *Casey*, 505 U.S. at 871, and making clear that states may act to "promote the State's profound interest in potential life, throughout pregnancy" in order to "inform the woman's free choice, not hinder it." *Id.* at 878, 877. *Casey* did not, as the Fifth Circuit suggested, repudiate well-established Fourteenth Amendment principles that require courts to carefully review state legislation to ensure that states do not impose arbitrary and unjustified restraints on liberty. To the contrary, *Casey* was quite explicit that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden," *id.* at 878, requiring courts to separate permissible legislation advancing women's health from impermissible laws that "serve no purpose other than to make abortions more difficult." *Id.* at 901; *see also Carhart*, 550 U.S. at 161 (explaining that the Act's "furtherance of legitimate government interests bears upon . . . whether the Act has the effect of imposing an unconstitutional burden on the abortion right"); Pet'rs' Br. at 2, 33-34, 36-38, 44-45, 47.

The Fifth Circuit here abandoned its obligation to protect a woman's liberty as spelled out in *Casey*, upholding state laws that would close nearly three-

quarters of the state's abortion clinics without any meaningful inquiry into whether the laws served any legitimate government interest in protecting women's health. The Fifth Circuit's judgment and rationale leave only a shell of the "real substance" of individual liberty *Casey* sought to protect, allowing states to subvert core principles of equal liberty, dignity, and autonomy without any meaningful review of state ends and means. That cannot be squared with the vital Fourteenth Amendment principles *Casey* sought to safeguard or the historic role of courts in vindicating fundamental freedoms and preventing abuse of power by the government.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA*
DAVID H. GANS
BRIANNE J. GOROD
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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