No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,
v.
KIRK COLE, COMMISSIONER,
TEXAS DEPARTMENT OF STATE
HEALTH SERVICES, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS AND SUPPORTING REVERSAL

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and policy advocacy. *Amicus* submits this brief in support of Petitioners.[1]

Amicus submits this brief to explain why laws restricting access to abortion implicate not only the Due Process Clause's liberty guarantee but also the equal protection guarantee of the Fourteenth Amendment because such laws deprive women of equal dignity, moral agency, and participation in the life of this nation. For several interrelated reasons, *Amicus* has an interest in opposing restrictions to abortion that unduly burden women.

First, the landmark cases in which this Court vindicated lesbian and gay individuals' constitutional guarantees of liberty and equality share a common doctrinal foundation with this Court's jurisprudence protecting procreative decision-making, access to contraception, and abortion. Lambda Legal participated as party counsel in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996),

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

and as counsel for *amici curiae* in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which together provide some of the most explicit recent articulation of the interconnected and mutually reinforcing nature of liberty and equality claims brought under the Due Process and Equal Protection Clauses. These landmarks addressing the constitutional rights of lesbian and gay people to be free from discrimination and to exercise their fundamental rights to marry, to family integrity and association, and to sexual intimacy demonstrate how the values and protections embodied in the Due Process and Equal Protection Clauses reinforce and inform one another. These cases also reaffirm the Constitution's protection for the principles of equal dignity and equal participation in society.

Second, women (whether lesbian, bisexual, or heterosexual) and LGBT people share a common history of discrimination and subordination in this country, including through application and enforcement of sex stereotypes—such as those that undergird laws restricting abortion. This history of discrimination and related stigma continues to pose an obstacle to equal respect and participation in society by members of both groups, and to their ability to protect themselves in the political arena against discriminatory legislative measures. *Amicus* has an interest in challenging laws that require conformity with sex stereotypes or otherwise reinforce related double standards with respect to sexuality, marriage, and parenting, especially as such laws often work to the detriment of LGBT people.

Third, *Amicus* has an interest in this case because many members of the LGBT community need and use

abortion services, and share an interest in preservation of the constitutionally protected right of each woman not to continue a pregnancy.

SUMMARY OF THE ARGUMENT

When government intrudes on a fundamental right as central to individual autonomy and dignity as marriage, sexual intimacy, contraception, or abortion, government infringes on the burdened individual's ability to participate equally in society. Equality and liberty principles are inextricably linked and reinforcing when the right at stake is the ability to control one's destiny by defining for oneself whether, with whom, and when to create a family. A woman's constitutional right to elect an abortion is essential to her dignity and integral to her autonomy to determine her life's course, including the structure of her family, her educational and career trajectory, and her economic future, especially given persistent inequality in societal gender role expectations with respect to parenting. Laws unduly restricting access to abortion therefore not only deprive women of liberty but also deny them the ability to participate equally in society relative to men, and accordingly should be reviewed with care to satisfy the dictates of both the liberty and equality guarantees.

The legislative justifications for state laws regulating abortion also warrant close scrutiny for the additional reason that women who exercise their constitutional right to have an abortion experience stigma and discrimination, which, in turn, creates a structural obstacle to their ability to advocate in the political arena against measures that unduly burden their decision to end a pregnancy. In cases involving lesbians and gay men, courts have acknowledged a

similar social dynamic—that stigma and discrimination can impede the ability of a disfavored group to participate effectively in the political process to rectify unjust laws, including those designed to coerce personal decision-making and independence. As cases involving lesbians and gay men demonstrate, when a law disadvantages a stigmatized group that historically has been the target of discrimination and moral condemnation, equality principles require courts to take particular care in scrutinizing legislative justifications to determine whether they serve their stated purposes, and whether those purposes have a basis in fact. This Court should exercise similar care here—not only because the Due Process Clause requires it, but also because the Equal Protection Clause does as well.

This Court's jurisprudence concerning abortion, pregnancy, and other aspects of a woman's reproductive autonomy has recognized that laws regulating such autonomy implicate not just a woman's liberty but also her ability to be respected fully and to participate equally in society relative to men. *Amicus* urges this Court to hold expressly that the constitutional right to choose abortion finds protection under the Equal Protection Clause as well as the Due Process Clause.

ARGUMENT

I. Government Intrusion on Fundamental Rights Central to Individual Autonomy, Dignity, and Moral Agency Burdens the Individual's Ability to Participate Equally in Society.

This Court has recognized on numerous occasions, including recently in *Obergefell*, *Windsor*, and *Lawrence*, that liberty and equality principles are linked and mutually reinforcing when the right at stake concerns choices an individual makes about marriage, sexual intimacy, and reproductive autonomy, including the decision to terminate a pregnancy. These decisions can be intimate, self-defining, and capable of changing one's life course. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.") (citation omitted) (emphasis in original). The Constitution shields such decisions from undue government interference both out of respect for individual liberty and autonomy, and also because the ability to make these decisions for oneself is central to a person's equal dignity and ability to participate in society relative to other people.

1. "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Obergefell*, 135 S. Ct. at 2602-03. Although the two Clauses are not always co-extensive, in cases

concerning intimate decision-making about family life, "the two Clauses may converge in the identification and definition of the right." *Id.* at 2603. "Each concept—liberty and equal protection—leads to a stronger understanding of the other," and the "interrelation of the two principles furthers our understanding of what freedom is and has become." *Id*.

Thus, the exclusion of same-sex couples from the fundamental right to marry implicated equality concerns because it stigmatized and demeaned lesbian and gay people, disparaged their life choices, and diminished their personhood. *Id.* at 2602; *see also* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16, 19-20, 22 (2015); Kenji Yoshino*, The Supreme Court 2014 Term—Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 Harv. L. Rev. 147, 172-75 (2015). Denying same-sex couples the right to marry, "[e]specially against a long history of disapproval of their relationships," imposed a disability on lesbian and gay people that "serve[d] to disrespect and subordinate them," violating not just due process but equal protection as well. *Obergefell*, 135 S. Ct. at 2604; *see also* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 802 (2011) (Supreme Court's "liberty-based dignity jurisprudence synthesizes both equality and liberty claims"). Key to this Court's ruling in *Obergefell* was the recognition that laws denying same-sex couples the fundamental right to marry "serve[d] to disrespect and subordinate them," which the Equal Protection Clause, like the Due Process Clause, forbids. *Obergefell*, 135 S. Ct. at 2604.

Liberty and equality principles were also mutually reinforcing in *Windsor*. That case struck down Section 3 of the "Defense of Marriage Act" ("DOMA"), which denied federal respect to the marriages of same-sex couples validly entered under state law, because DOMA violated these couples' "equal dignity." 133 S. Ct. at 2695. This Court explained that both liberty and equality values drove the result because, while the due process guarantee "withdraws from government the power to degrade or demean . . ., the equal protection guarantee . . . makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id*. By permitting same-sex couples to marry, states "conferred upon them a dignity and status of immense import." *Id.* at 2692. Denying respect to these marriages deprived couples of equality by denying them "a relationship deemed by the State worthy of dignity in the community *equal with all other marriages*," a marriage reflective of "the community's . . . evolving understanding of the meaning of equality." *Id.* at 2692-93 (emphasis added); *see also* Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 Tul. J. L. & Sexuality 17, 25 (2014); Tribe, *Equal Dignity*, *supra*, at 17. Thus, *Windsor* established that state laws respecting a couple's autonomy in determining for themselves whether to marry were central to the couple's dignity, and that a federal law denying respect for their autonomy in such matters deprived the couple not only of liberty but of equality in relation to others.

Lawrence similarly recognized the connection between liberty and equality principles, explaining that vindicating gay peoples' fundamental right to

enter intimate relationships with the individuals of their choice resolved the inequality problem created by sodomy laws. 539 U.S. at 575, 578. "[E]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. As this Court explained, laws criminalizing intimacy between people of the same sex "demean the lives" and "control the . . . destiny" of lesbian and gay people. *Id.* at 578; *see also* Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 U.C.L.A. L. Rev. 99 (2007); Nan D. Hunter, *Living with* Lawrence, 88 Minn. L. Rev. 1103 (2004). *Lawrence* "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty." Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004). Thus, the anti-subordination principle that undergirds *Obergefell*, *Windsor*, and *Lawrence* demands consideration of more than just how a challenged law restricting exercise of a fundamental right infringes liberty and autonomy, but also how the law may stigmatize burdened individuals and deprive them of full and equal membership in society.

2. *Obergefell*, *Windsor*, and *Lawrence* also acknowledge that societal understandings of liberty may evolve over time, and that the burden imposed on a person's dignity in relation to others may not be evident at first.

> The nature of injustice is that we may not always see it in our own times. The 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, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell, 135 S. Ct. at 2598; *see Windsor*, 133 S. Ct. at 2689-90, 2695; *Lawrence*, 539 U.S. at 578-79; *see also Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) ("liberty's full extent and meaning may remain yet to be discovered and affirmed").

The scope of the liberty guarantee's protections may expand in new generations as the nation comes over time to understand and respect emerging claims to equal personhood by members of minority groups formerly dismissed or unheard. Prejudice can stem from "simple want of careful, rational reflection" or from "indifference or insecurity as well as from malicious ill will," *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring), and it can take time and familiarity for society to recognize the way a law has subordinated a group of people. "[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2603. Thus, liberty and

equality principles not only reinforce each other but inform each other over time.

Indeed, over the years society has held differing and evolving views of the morality and social acceptability of individual decisions about relationships, marriage, and reproductive autonomy alike. States for generations condemned and criminalized interracial marriage. *Casey*, 505 U.S. at 847-48. Lesbian and gay people also faced condemnation and criminalization of their relationships. *Lawrence*, 539 U.S. at 570. So, too, did society disapprove of and criminalize a woman's decision not to continue with a pregnancy. *Roe v. Wade*, 410 U.S. 113, 138-40 (1973).

However, as the nation grew to understand both the significance of decisions concerning family life, intimacy, and reproduction for all individuals, and the ways in which laws interfering with individual autonomy in these arenas stigmatize people and deprive them of dignity in relation to their peers, courts stepped in to protect against such government interference, recognizing that all individuals have a fundamental liberty interest in making such decisions for themselves. Thus, this Court struck down bans on interracial marriage as "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions." *Obergefell*, 135 S. Ct. at 2603. Likewise, "[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity," laws subordinating married women also fell. *Id.* at 2595; *see also id.* at 2604 (citing cases invalidating laws imposing sex-based marriage

inequality); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 135 (1994) (rejecting barriers to women serving as jurors that had been grounded in "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'") (citations omitted).

Similarly, with respect to lesbians and gay men, although *Lawrence* invalidated laws that made same-sex intimacy a criminal act, this Court recognized in *Obergefell* that striking down laws criminalizing lesbian and gay couples' relationships did not sufficiently accord respect to these couples' equal dignity. "While *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 135 S. Ct. at 2600. To extend the full promise of constitutional guarantees of liberty and equality to lesbian and gay people, this Court afforded affirmative recognition to their fundamental right to marry. Thus, it became evident that members of interracial couples, lesbians and gay men, and women cannot participate equally in society without governmental respect for their autonomy to make decisions about the structure of their families for themselves. To recognize the equal dignity and personhood of members of these groups, it was necessary to respect their moral agency.

Such decisions recognizing the common humanity of subordinated groups were not always universally well-received at the time or over time. With respect to each of these claims for equal dignity, "reasonable and sincere people" in good faith held opposing views.

Obergefell, 135 S. Ct. at 2594. The Court's abortion rights jurisprudence, for example, has recognized from the start the diversity of religious traditions and moral views about pregnancy and women's related life interests. *See, e.g., Roe*, 410 U.S. at 160-62 (noting the contrasts among Jewish, Protestant, and Catholic beliefs, *inter alia*, about when legally cognizable life begins, morality of abortion, and proper locus of decision). Given the longstanding disagreements among those moral visions—including some that oppose abortion in all circumstances, and others that charge individuals not to bring children into the world absent capacity to parent them—the Court appropriately and consistently has recognized that government may not substitute the preferences of legislative majorities for the individual's freedom to make decisions about matters "so fundamentally affecting a person." *Casey*, 505 U.S. at 851. Majoritarian moral disapproval is never, standing alone, an adequate justification for interfering in individual autonomy in these areas. *Romer*, 517 U.S. at 633-34; *see also Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). For government to choose sides among competing moral views and constrain an individual's autonomy on that basis would be to deprive that person of equal dignity.

3. The analysis this Court described for identifying and defining the fundamental right at issue in *Obergefell* constitutes an additional, independent reason to recognize the equality values implicated by a woman's constitutional right to choose to have an abortion. *Obergefell* held that fundamental rights cannot be defined by the identity of the persons seeking to exercise those rights for the first time, because if that were permitted, "received practices

could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell*, 135 S. Ct. at 2602 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence*, 539 U.S. at 566-67). *Obergefell's* guidance for identifying fundamental rights, together with this Court's repeated recognition that the liberty guarantee protects an evolving understanding of personhood and dignity—the full parameters of which may never be seen or appreciated by any one generation—means that laws implicating fundamental liberty interests may belatedly be recognized as having subordinated certain groups, thereby infringing on the equal liberty of members of those groups.

Obergefell's fundamental rights analysis also makes clear that it is not necessarily material whether a government practice that infringes a group's fundamental right was *intended* at the time of its passage to target that particular group. The oppressive and unjustified aspects of the law may become evident over time in light of current experience and understanding. "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest." *Obergefell*, 135 S. Ct. at 2602. When courts redress infringements of fundamental rights to a historically subordinated group, courts not only remedy the deprivation of the fundamental right, but also the equality problem. Tribe, *Equal Dignity*, *supra*, at 19. In such cases—when a restriction impinges on both liberty and equality interests, stigmatizing a historically subordinated group by denying members of that group equal dignity—the Court need not determine whether purposeful intent to discriminate

against that group was present in order to conclude that the restriction violates the Equal Protection Clause. Thus, this Court could find that marriage bans infringe the Equal Protection Clause without having to perform an inquiry into whether such laws were motivated by a desire to discriminate against same-sex couples. Similarly, laws unduly restricting abortion can—and do—offend equal protection principles because they subordinate women and deprive women of dignity, even if these laws were not expressly intended to discriminate based on sex at the time they were passed.

As these and other precedents of this Court show, when burdens on a fundamental right rest heavily upon a disempowered group, "the Equal Protection Clause can help to identify and correct inequalities," thereby "vindicating precepts of liberty and equality under the Constitution." *Obergefell*, 135 S. Ct. at 2604.

II. Laws Unduly Burdening Access to Abortion Implicate the Equal Protection Guarantee Because They Deny Women Equal Participation in Society and Equal Dignity.

Laws restricting women's access to abortion implicate equality values as a result of the unequal "organization of work and family roles in American society," which continue to reflect deep and enduring differences in gender roles, and "double standards in sex and parenting." Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 Yale L. J. F. 349, 350 (2015). Control over whether and when to give birth is not only of crucial dignitary importance,

it also affects women's health and sexual freedom, ability to enter and end relationships, education and job training, and ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions and expectations—particularly for those who already are marginalized as a result of class, income, race, or marital status. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights*, 56 Emory L. J. 815 (2007). Laws infringing upon a woman's reproductive autonomy prevent her from participating in full partnership with men in the nation's social and economic life. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 Women's Rights L. Rep. 143, 143-44 (1978).

Although this Court in *Roe*, 410 U.S. at 129, located the abortion right in the due process guarantee, this Court also has recognized that laws restricting abortion or contraception, or containing pregnancy-related regulations, implicate equality values as well as due process concerns. For example, in *Casey*, equality considerations guided this Court in identifying the kinds of restrictions on abortion that violate the undue burden test. *See* 505 U.S. at 852, 856, 898. "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," *id.* at 856, and a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." *Id.* at 852. "The destiny of the woman must be shaped . . . [by] her own conception of her spiritual imperatives and her place in society." *Id.*

Similarly, in *Thornburgh*, this Court explained, "A woman's right to make [the] choice freely [to end her pregnancy] is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees *equally* to all." *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added); *see also Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; *rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature*.") (emphasis added).

The principles woven through these cases demonstrate that enforcing a woman's liberty and autonomy to make choices about terminating a pregnancy is central to women's equality in society and under the law. Regulations unduly interfering with a woman's ability to make such decisions for herself fetter a woman's access to equality in family, economic, and civic life, imposing unconstitutional burdens on her that a man need not suffer.

III. Equality Principles, as Well as Due Process Principles, Require Close Scrutiny of Legislative Justifications of Abortion Restrictions Because of the Difficulty of Rectifying by Legislative Means Laws Unduly Burdening Access to Abortion.

Cases vindicating equality claims brought by lesbian and gay litigants counsel close judicial review of the legislative justifications for abortion restrictions

for an additional and independent reason—because abortion has become a stigmatized medical procedure. This Court and many others have acknowledged and described, in the context of equality claims brought by lesbians and gay men, how stigma and discrimination can impede the ability of a stigmatized group to participate effectively in the political arena to prevent legislative passage of discriminatory measures. The obstacles posed by stigma, moral condemnation, and the history of discrimination experienced by members of a disfavored group warrant skeptical evaluation by courts of related legislation to ensure that a challenged law does not violate equality principles. An equality framework permits courts to acknowledge this dynamic and scrutinize the asserted governmental interests for an abortion restriction more closely—to ensure that these interests are sufficiently important and that the law is adequately tailored in service of those interests.

A substantial majority of women who have exercised their constitutional right to choose to end a pregnancy experience stigma, discrimination, and moral condemnation as a result. Tracy A. Weitz & Katrina Kimport, *The Discursive Production of Abortion Stigma in the Texas Ultrasound Viewing Law*, 30 Berkeley J. Gender L. & Just. 6, 8 n.8 (2015) (collecting studies).[2] This stigma results not just from the multiple and conflicting moral views about

[2] This is not to suggest that women later regret this choice or that their right to this autonomy should be diminished in any way. Research does not show evidence of a post-abortion "syndrome" of regret. *See, e.g.,* Brenda Major, Mark Appelbaum, Linda Beckman, Mary Ann Dutton, Nancy Felipe Russo, Carolyn West, *Abortion and Mental Health, Evaluating the Evidence*, 64 American Psychologist 9 (2009).

abortion in our society, but also because abortion challenges deep-seated gender norms about ideals of womanhood, including traditional stereotypes of women as mothers and self-sacrificing nurturers. *Id.* at 9-10; Paula Abrams, *Abortion Stigma: The Legacy of* Casey, 35 Women's Rights L. Rep. 299, 307 (2014); Anuradha Kumar, Leila Hessini, & Ellen M. H. Mitchell, *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625, 628 (2009). Abortion has been further stigmatized as a medical procedure through laws that separate reproductive health services from mainstream medicine. Abrams, *supra*, at 302.

Abortion and same-sex relationships share a common history of criminalization and stigmatization. In the mid-nineteenth century, states began enacting legislative restrictions on abortion. *Roe*, 410 U.S. at 129; *see also* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-82 (1992). Prior to that, abortion was governed by common law, and was not a criminal offense if performed before "quickening," the point at which a pregnant woman could perceive fetal movement—typically late in the fourth month of pregnancy. *Id.* at 282. Although statutes varied in form and severity, the cumulative effect of the new legislation was to prohibit abortion from fertilization. *Id.* The new statutes also "subjected women seeking abortions to criminal sanctions, and increased criminal penalties [for health care providers who violated state law] generally." *Id.*

Although many states removed these criminal restrictions in the years prior to *Roe*, this history of

criminalization contributed to abortion-related stigma. When government criminalizes constitutionally protected conduct, such a "declaration in and of itself is an invitation" to subject the people who engage in that conduct "to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575.

Criminal laws and other discriminatory measures that branded lesbian and gay people as immoral similarly stigmatized them and deprived them of dignity for much of our nation's history. "Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity." *Obergefell*, 135 S. Ct. at 2596. Indeed, homosexuality was treated as an illness for much of the 20th century, and classified as a mental disorder. *Obergefell*, 135 S. Ct. at 2596; William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1328-29 (2000). As is true of abortion-related stigma, many of the negative attitudes toward lesbian and gay people related directly to their failure to conform to traditional sex stereotypes. *Latta v. Otter*, 771 F.3d 456, 495 (9th Cir. 2014) (Berzon, J., concurring) ("[T]he social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations."). In the context of lesbians and gay men, the stereotypes often involved assumptions that women should enter relationships only with men, and

men only with women. *Id.* at 486; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 Wisc. L. Rev. 187, 221 (1998).

Fear of social and familial ostracism as well as the legal repercussions of "coming out" historically kept many lesbians and gay men "in the closet." *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 Colum. L. Rev. 1753, 1795 n.184 (1996); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 819 (1997); *see also* Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 882 (2014) ("Even when states began to repeal their anti-sodomy statutes and police harassment eased, the social stigma associated with homosexuality caused many individuals to continue to camouflage their sexual orientation for fear of losing their jobs, their friends, and their membership in various communities."). More than a quarter century ago, Eve Sedgwick described "the closet [a]s the defining structure for gay oppression in this century." Eve Kosofsky Sedgwick, EPISTEMOLOGY OF THE CLOSET 71 (1990). It is "a figurative space" that allows persons "to conceal their sexual orientation or gender identity to avoid the varied legal, social, and political consequences" that might result from one's sexual orientation or identity being discovered. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. Rev. 1, 11 (2013). And while the closet can provide some limited protection from discrimination until disclosure happens, it is itself "threatening" and stigmatizing because it is "always a confinement—really a badge of inferiority." William N. Eskridge, Jr., *Privacy*

Jurisprudence and the Apartheid of the Closet, 1946-1961, 24 Fla. St. U. L. Rev. 703, 705-07 (1997).

The closet poses a particular obstacle to achievement of legislative goals, as it is challenging for lesbians and gay men to advocate on their own behalf in the political arena if they cannot disclose that they are lesbian or gay. In an early case acknowledging the political costs of the closet, *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979), the California Supreme Court explained that coming "out of the closet" is essential before lesbian and gay people can associate with others to advocate in the political realm for equal rights. *Id.* at 610. Accordingly, that court held that a company's decision to refuse to hire "manifest homosexuals" is necessarily a limitation on "political freedom." *Id.* at 609, 611 (quotation marks omitted). Likewise, the Connecticut Supreme Court observed in striking down Connecticut's ban on marriage for same-sex couples, "Gay persons . . . continue to face an uphill battle in pursuing political success" because discrimination and fears of violence "undermine efforts to develop an effective gay political identity." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 452 (Conn. 2008) (citing Kenneth D. Wald, *The Context of Gay Politics, in* THE POLITICS OF GAY RIGHTS 1, 14 (Craig A. Rimmerman, Kenneth D. Wald & Clyde Wilcox eds., 2000) (quotation marks omitted)). Consequently, lesbian and gay people "are disinclined to risk retaliation by open identification with the movement, and potential allies from outside the gay [and lesbian] community may think twice about allying their fortunes with such a despised population." *Id.* (alteration in original). The Court explained that this reality is one of the reasons why

lesbian and gay people "have not enjoyed the same level of political success" as other minority groups. *Id.*

Obergefell also recognized the connection between public disclosure of stigmatized characteristics and successful public policy advocacy, describing a period of such intense discrimination against lesbian and gay people in this country that "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken." 135 S. Ct. at 2596. Only when lesbian and gay people began to live "more open and public lives" was there "a shift in public attitudes toward greater tolerance." *Id.* Thus, one of the consequences of stigma and concealment is that it impedes people's ability to associate with each other to achieve social change. *See* Yoshino, *Suspect Symbols*, *supra*, at 1756 ("[T]he closet captures the invisibility and isolation that hinder gays [and lesbians] in their political mobilization."); *see also* Erving Goffman, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY at 3, ch. 1 (1963) (stigma reduces the bearer "from a whole and usual person to a tainted, discounted one," can fundamentally define a person's social identity, and can restrict the opportunities of stigmatized groups).

The stigma associated with abortion has created for many women a "closet" of their own, causing them to be reluctant to "come out" as having had an abortion. Abrams, *supra*, at 301, 306 (it is common that women who obtain abortions perceive or experience stigma and a need for secrecy; and many women conceal they have had abortions out of fear of social opprobrium), *see also, e.g.*, Kristen M. Shellenberg & Amy O. Tsui, *Correlates of Perceived and Internalized Stigma Among Abortion Patients in*

the USA: An Exploration by Race and Hispanic Ethnicity, 118 Int'l J. Gynecology & Obstetrics (Supp. 2) S152, S152, S155 (2012); Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 Women's Health Issues (Supp. 3) S49, S50 (2011); Brenda Major & Richard H. Gramzow, *Abortion as Stigma: Cognitive Implications of Concealment*, 77 J. of Personality & Soc. Psychol. 735, 735, 739-40 (1999). Indeed, this Court has recognized the importance to women of preserving the confidentiality of their decisions to terminate a pregnancy given the potential for hostile, coercive reactions. *See Thornburgh*, 476 U.S. at 766-67.

As with the stigma experienced by lesbians and gay men, the fact of having had an abortion can be "concealable," meaning that the stigmatizing characteristic is unknown to others unless disclosed. Norris et al.*, supra*, S49, S50. The stigma experienced by women who have abortions "advances a culture of secrecy around abortion" and "perpetuates the misconception that abortion is uncommon, further marginalizing the procedure." Abrams, *supra*, at 302; *see also* Norris et al., *supra*, at S52 ("Silence is an important mechanism for individuals coping with abortion stigma; people hope that if no one knows about their relationship to abortion, they cannot be stigmatized. Nevertheless, even a concealed stigma may lead to an internal experience of stigma and health consequences."). And just as is true for lesbians and gay men, the reluctance of many women to identify themselves as having used abortion services interferes with their ability to advocate on their own behalf and participate in the political process to rectify

burdensome abortion measures by legislative means. Norris et al., *supra*, at S50 ("concealing abortion is part of a vicious cycle that reinforces the perpetuation of stigma").

These factors militate close scrutiny of the legislative justifications for abortion restrictions under an equality framework. Especially in contexts where society holds differing and conflicting moral views and legislation subordinates a stigmatized group, the Equal Protection Clause requires courts to exercise particular care in scrutinizing the expressed purpose for a law to ensure that it is grounded in fact rather than moral disapproval. *Romer*, 517 U.S. at 634-45; *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause. . . ."). *See also generally Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (elevated scrutiny is appropriate in some circumstances at least in part because laws targeting groups for discriminatory treatment using these classifications are unlikely to be rectified by legislative means). Moreover, legislative justifications for laws that subordinate women "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The equality guarantee thus informs how the undue burden standard is applied, demanding rigorous review of whether an abortion restriction in fact serves its stated purpose. In the context of abortion restrictions that purport to serve women's health needs, the Equal Protection Clause and the Due Process Clause converge to require a searching inquiry into whether the restriction actually promotes

women's health in determining whether the law unduly burdens abortion access.

CONCLUSION

The interlocking rights to due process and equal protection require careful review of the legislative justifications for the law challenged here, which operates to severely restrict women's access to abortion services and so perpetuates barriers denying women the autonomy to make such life-defining decisions for themselves. Women's equal dignity and ability to participate as full and equal members in family, educational, economic, and civic arenas hang in the balance.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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