THE SUPREME COURT OF IOWA

NO. 14-1415

**PLANNED PARENTHOOD OF THE HEARTLAND, INC.
And DR. JILL MEADOWS, M.D.,**

Petitioners/Appellants,

vs.

IOWA BOARD OF MEDICINE,

Respondent/Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE JEFFREY FARRELL, JUDGE**

RESPONDENT/APPELLEE IOWA BOARD OF MEDICINE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Because the issues presented in this case present substantial constitutional questions and issues of first impression, it is appropriate for this case to be retained by the Supreme Court. Iowa R. App. P. 6.903 and 6.1101.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from the district court's denial of Planned Parenthood of the Heartland, Inc. and Dr. Jill Meadow's (PPH) judicial review action seeking invalidation of 653 IAC 13.10 promulgated by the Iowa Board of Medicine (Board).

Course of Proceedings: On June 25, 2013, the Board received a Petition for Rulemaking requesting the Board promulgate rules regulating practice standards for abortion-inducing drugs. (App. at 292). The Petition was signed by fourteen physicians and nurses. (App. at 298-99). The Board accepted the Petition and initiated the rulemaking process on June 28, 2013. (App. at 290).

The Board filed a Notice of Intended Action and set public hearing for August 28, 2013. (App. at 290). The public hearing lasted over three hours. The Board heard from twenty-eight people and received written comment from over two hundred people. (C.R. at 98-510 and audio recording). At its

next meeting, the Board discussed the rule and each Board members' position on the rule. (App. at 364-66). The Board then voted to adopt the proposed rules by a vote of 8-2. (App. at 291, 366). The rule as adopted provides:

> **653 –13.10 (147, 148, 272C) Standards of practice – physicians who prescribe or administer abortion-inducing drugs.**
>
> 13.10(1) *Definition*. As used in this rule:
>
> "Abortion-inducing drug" means a drug, medicine, mixture, or preparation, when it is prescribed or administered with the intent to terminate the pregnancy of a woman known to be pregnant.
>
> 13.10(2) *Physical examination required*. A physician shall not induce an abortion by providing an abortion-inducing drug unless the physician has first performed a physical examination of the woman to determine, and document in the woman's medical record, the gestational age and intrauterine location of the pregnancy.
>
> 13.10(3) *Physician's physical presence required*. When inducing an abortion by providing an abortion-inducing drug, a physician must be physically present at the time the abortion-inducing drug is provided.
>
> 13.10(4) *Follow-up appointment required*. If an abortion is induced by an abortion-inducing drug, the physician inducing the abortion must schedule a follow-up appointment with the woman at the same facility where the abortion-inducing drug was provided, 12 to 18 days after the woman's use of an abortion-inducing drug to confirm the termination of the pregnancy and evaluate the woman's medical condition. The physician shall use all reasonable efforts to ensure that the

> woman is aware of the follow-up appointment and that she returns for the appointment.
>
> 13.10(5) *Parental notification regarding pregnant minors*. A physician shall not induce an abortion by providing an abortion-inducing drug to a pregnant minor prior to compliance with the requirements of Iowa Code chapter 135L and rules 641 – 89.12(135L) and 641 –89.21(135L) adopted by the public health department.

(App. at 288-89). The Board then issued its Concise Statement, as required under 653 IAC 1.8(2), stating the specific reasons it adopted the rule. (App. at 316-20).

On September 30, 2013, PPH sought judicial review of the Board's rulemaking.[1] (Petition for Judicial Review). PPH also filed a motion to stay the Board's rule pending judicial review. (Motion for Stay). The stay was granted on November 5, 2013. (App. at 6).

On August 18, 2014, the district court denied PPH's Petition for Judicial Review and affirmed the Board's rulemaking. (App. at 245). PPH filed its notice of appeal on August 28, 2014.

[1] The judicial review petition also contained original causes of action including a 42 U.S.C. § 1983 claim, a claim for injunctive relief, and a declaratory order. The district court bifurcated and stayed these claims. (Ruling on Motion to Dismiss). This Court continued the stay on the original actions. (Order on Stay). The district court also removed individual board members as defendants in the judicial review action. For the purposes of this appeal, the Board will only address the merits of PPH's 17A claim.

(App. at 285). PPH also filed a motion for stay. (Motion for Stay). This Court granted the motion on September 16, 2014, staying implementation of the rule pending resolution of this appeal. (Order on Stay).

STATEMENT OF THE FACTS

The Iowa Board of Medicine is the state agency responsible for the licensing, discipline, and regulation of physicians practicing in the State of Iowa. *See* Iowa Code chapters 147, 148, and 272C. The Board is comprised of ten members appointed by the governor and confirmed by the Senate; seven are licensed physicians and three are public members. *See* Iowa Code § 147.14(1). The mission of the Board is protecting the public by ensuring physicians who practice in Iowa do so in a competent and ethical manner. The Board is expressly granted the authority to "adopt all necessary and proper rules to administer and interpret" Iowa Code chapters 147 and 148. Iowa Code § 147.76. While the Board's authority over physicians is broad, the Board has no authority over other licensed professionals, including nurses or physician assistants, unlicensed individuals, or clinics including PPH. *See* Iowa Code ch. 147, 148.

Unlike most medical procedures, performance of abortions in Iowa is limited to physicians only.[2] Iowa Code § 707.7(3). Abortion performed through abortion-inducing drugs is called medication or medical abortion (the other type being surgical abortion).[3] (App. at 339-50). Abortion-inducing drugs cannot be obtained via prescription through a pharmacy and may only be dispensed by physicians in Iowa. No other facility in the country is performing medical abortion via telemedicine. (App. at 245).

The Board's rule sets practice standards for the provision of medical abortions. The requirements at issue include a physical examination, in-person dispensing,[4] and a follow-up appointment.[5] (App. at 314-15). The

[2] Thirty-nine states require abortions to be performed by a licensed physician. Guttmacher Institute, *State Policies in Brief: An Overview of Abortion Laws*, (Nov. 17, 2014) available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

[3] The district court accurately set forth the facts regarding use of abortion-inducing drugs, medical abortion, and the contraindications. (App. at 247). These factual findings have not been challenged on appeal.

[4] Sixteen states require physicians to be physically present during a medical abortion. Guttmacher Institute, *State Policies in Brief: Medication Abortion*, (Nov. 25, 2014) available at http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf.

[5] The rule only requires that the physician use reasonable efforts to schedule the appointment; it does not mandate that the appointment actually occur.

rule does not limit the location of abortion clinics, impose a waiting period, or limit medical abortion to FDA-approved protocols. (App. at 314-15).

The follow-up visit "is very important to confirm by clinical examination or ultrasonographic scan that a complete termination of pregnancy has occurred. (App. at 324). And physical examination is necessary. PPH's own website indicates a physical examination is necessary prior to a medical abortion. *The Abortion Pill (Medication Abortion)* (May 1, 2014), available at http://www.plannedparenthood.org/health-topics/abortion/abortion-pill-medication-abortion-4354.asp. International Planned Parenthood Federation's own handbook mandates a physical examination as well. *First Trimester Abortion Guidelines and Protocols: Surgical and Medical Procedures* (May 1, 2014), available at http://www.ippf.org/sites/default/files/abortion_guidelines_and_protocol_english.pdf, at 6-7. According to IPPF, the clinical assessment includes a general physical examination and a gynecological examination. *Id*. at 7. The National Institute of Health confirms that a physical examination must be conducted prior to a medical abortion including a pelvic examination and blood tests and sometimes an ultrasound. Abortion-Medical (April 29, 2014), available at

http://www.nlm.nih.gov/medlineplus/ency/article/007382.htm. The World Health Organization ("WHO") distributes the *Clinical Practice Handbook for Safe Abortion Care* (May 1, 2014), available at http://apps.who.int/iris/bitstream/ 10665/97415/1/ 9789241548717 eng.pdf "While legal, regulatory, policy and service-delivery contexts may vary from country to country, the recommendations and best practices described … enable evidence-based decision-making with respect to safe abortion care." *Id*. at 4. WHO indicates that a physical examination is necessary to "evaluate for any medical conditions that require management or may influence the choice of abortion procedure." *Id*. at 9. The physical examination should include a general health assessment including vitals, and abdominal examination, and a pelvic examination. *Id*. at 16. And, the American College of Obstetricians and Gynecologists ("ACOG") published *FAQ403 Induced Abortion* (May 1, 2014) available at http://www.acog.org/~/media/For%20Patients/faq043.pdf?dmc=1&ts=20140502T1031089320. ACOG indicates that prior to an abortion, a physician must perform a health history, physical examination, blood tests, and in some cases an ultrasound. *Id*.

The Board determined the rule was necessary to ensure the health and safety of Iowans. (App. at 316). It determined a physical examination was

required to screen for contraindications and exclusionary conditions. (App. at 318-19). Further, the Board reasoned that physical presence would allow for a more informed decision between medical and surgical abortion based on "multiple factors including patient preference, medical and psychological status of the patient, and the patient's access to medical services." (App. at 317).

Additional facts will be discussed below as necessary.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DETERMINED THE RECORD ON JUDICIAL REVIEW.[6]

Standard of Review: This Court reviews district court's decisions on admissible evidence for abuse of discretion. *Officer of Consumer Advocate v. Iowa Utilities Bd.*, 770 N.W.2d 334, 343 (Iowa 2009).

[6] PPH's first issue on appeal challenged the district court's "meaningful review" of the rules. While the Board certainly disagrees with this allegation, the substance of the allegation and claimed errors are subsumed within PPH's other arguments. PPH cites no independent basis for this "meaningful review" but relies on its general disdain with the district court's decision. The alleged errors will be addressed in response to PPH's later arguments.

Preservation of Error: Whether the district court properly excluded evidence on judicial review was properly preserved. (Motion to Strike; Resistance to Motion to Strike; Ruling on Motion to Strike; App. at 131-156).

Argument: PPH makes several claims regarding the judicial review record. First, it claims the Court erred in refusing to admit evidence under Iowa Code section 17A.19(7). Second, it claims the Court erred in refusing to consider the evidence as legislative facts. Third, PPH claims the district court erred in refusing to allow time for additional discovery. Each claim will be discussed separately below.

A. The district court did not abuse its discretion in refusing to admit evidence under Iowa Code section 17A.19(7).

The Board submitted a 551-page certified record of the agency's record on rulemaking. PPH filed an additional 287 pages with their judicial review brief.[7] The appendix contained draft telemedicine documents, emailed newspaper editorial articles, affidavits, and filings from other

[7] PPH sought to have the documents added to the adjudicatory record. (App. at 137). PPH later claimed the documents were "legislative facts" but did not make such a claim to the district court during the motion to strike proceedings. (Petition for Interlocutory Appeal and App. at 137).

abortion litigation. (Proposed Appendix (PA)). The Board filed a motion to strike. (App. at 131). After full briefing and oral argument, the district court excluded a portion of PPH's Appendix.[8] (App. at 150). The district court excluded documents that the board members were not aware of because they were not considered when adopting the rule and would not highlight what occurred at the agency level. (App. at 153-54). The district court refused to impute knowledge of former board members or staff to the board members. (App. at 153-54). Thereafter, PPH petitioned the district court for additional time to conduct discovery, including depositions of current and former board members. PPH argued it needed additional time to depose board members to see if they were aware of the excluded information. (Motion for Additional Time). The Board resisted. (Resistance to Additional Time). The district court denied Petitioner's request, finding that PPH had an opportunity to conduct discovery and there was little likelihood the stricken evidence was at all relevant even if the Board members had been aware of its existence.[9] (App. at 186-89).

PPH claims that the district court erred when it excluded portions of the proposed appendix. PPH claims the district court improperly excluded

[8] PPH sought interlocutory review of this decision but it was denied.

[9] PPH also sought interlocutory review of this decision but was denied.

portions of its appendix based on an improperly narrow view of admissible evidence under Iowa Code section 17A.19(7). Iowa Code section 17A.19(7) governs the limited ability to introduce additional evidence in a judicial review action. Under section 17A.19(7), a district court "*may* hear and consider such *evidence as it deems appropriate*" in challenges to rulemaking and other agency action. Iowa Code § 17A.19(7) (emphasis added). This Court has clarified that additional evidence may be taken in judicial review proceedings, other than contested cases, for the limited purpose of "highlighting what actually occurred in the agency so as to facilitate the court's search for errors of law or unreasonable arbitrary or capricious action." *Iowa Power & Light Co. v. Iowa State Utilities Bd.*, 448 N.W2d 468, 470 (Iowa 1989). The offer of such additional evidence, however, "is not to be utilized as a springboard for trying issues of fact de novo in the district court." *Krause v. State ex rel. Iowa Dep't of Human Servs.*, 426 N.W.2d 161, 165 (Iowa 1988).

The district court excluded pages 1-7, 9-16, 24-29, 98, 100-103, 156-161, and 187-282.[10] (App. at 150-56). The district court correctly recognized that the board members, and not board staff, are tasked with

[10] PPH does not challenge the exclusion of pages 100-03, 158-61 or 187-282 in its brief. (Proof Brief at 39-40).

adopting rules and deciding petitions for rulemaking. (App. at 152). And, PPH has cited to no authority that would allow the court to impute knowledge or beliefs of agency staff to the board members who voted on the rule. The district court's order demonstrates thoughtful consideration of each item in question and a reasonable exercise of the district court's discretion regarding admissibility, materiality, and reliability. The district court did not abuse its discretion in excluding portions of PPH's proposed appendix.

The district court correctly excluded draft telemedicine documents from 2010 and 2013. (App. at 23-28, 101-02). The 2010 draft was created for committee discussions, but was never adopted or approved by the committee and was never sent to the full Board for review, consideration, or adoption. Similarly, the 2013 draft was created by a staff member but was never submitted to a committee or the board for review, consideration, or adoption. The State argued that these *unapproved*, *unadopted*, *drafts* were in no way relevant or material to this challenge. There is absolutely no evidence in the record to support a conclusion that the documents were adopted or approved by the Board.[11] The district court excluded the draft

[11] Given the drafts were never approved by the Board, the documents just as likely indicate the positions were expressly rejected. The drafts prove nothing other than they were drafted at some point. This certainly is not

reports because there was no showing that the drafts were ever presented or approved as the Board's position. (App. at 153). No current board members were a part of the committee discussions on the draft policy. (App. at 153). The district court appropriately determined that evidence the Board was never given and never saw could not shed light on the members' motives. (App. at 153). And, the district court correctly determined that unadopted, draft documents did not constitute board policy. *(*App. at 153). The district court's decision was not an abuse of discretion.

PPH also challenges the exclusion of several emails. (App. at 30-37). PPH claimed they were admissible to show that the Board ignored important "material facts" in violation of Iowa Code section 17A.19(10)(j). (App. at 141).[12] The emails were from various board staff. One email confirmed the Board had not yet adopted any overarching standards on telemedicine and reviews each case individually to determine what is required to meet the standard of care. (App. at 30).[13] Other emails were forwards of newspaper

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evidence of the Board's official position or policy.

[12] PPH made no claim that these articles were relevant to its constitutional claims before the district court. (App. at 141).

[13] The email also instructs, "Generally, the treating physician shall perform an in-person history and physical examination. However, the patient evaluation need not be in-person if the telemedicine technology is sufficient to provide the same information to the physician as if the

editorials written about the Board and telemedicine abortion.[14] (App. at 31-37, 41-46).

The Board sought to exclude the editorials, arguing that PPH made no showing as to the reliability or accuracy of the opinion pieces and made no showing of relevancy under Iowa Code section 17A.19(7). The district court found that the evidence was not relevant to show that the Board ignored "material facts" because there was no evidence the Board members were actually provided with the editorials or emails.[15] Refusing to allow opinion pieces and emails the Board never even saw was not an abuse of discretion. This is not the type of evidence that would highlight what occurred during the rulemaking process.

PPH also challenged the district court's exclusion of an email between citizens and the governor's office. (App. at 47). The email was apparently obtained by the Des Moines Register through an open records request of the

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evaluation had been performed face-to-face." (App. at 30).

[14] One of the editorials was written by PPH's executive director.

[15] The district court was very generous in its analysis. For instance, the district court allowed Des Moines Register editorials that were forwarded to Board members *after* the Board's final vote on the rulemaking over the Board's objection. Although it is unclear what *evidentiary value* editorials have in general and it is unclear what relevance editorials written *after* the Board's adoption of the rules would have, the district court allowed them because the Board received them.

Governor's Office. (App. at 47). PPH claimed the email was relevant because it showed the petition for rulemaking was organized by anti-abortion individuals and coordinated with the Governor's office and therefore evidence of improper motive.[16] The district court correctly excluded the email noting that it could not highlight what occurred at the agency because there was no evidence that the Board was aware of it. (App. at 154). The district court's determination was not an abuse of discretion. *See also Mazurek v. Armstrong*, 520 U.S. 968, 972-73 (1997) (refusing to assume improper motive even when legislation was drafted by an anti-abortion group because "that says nothing significant about the legislature's purpose in passing it"). The record is completely devoid of any evidence that the email was forwarded to Board members or that the Board members had any involvement with the alleged "orchestration" by an anti-abortion group.

Lastly, PPH argues the district court erred in its exclusion of an affidavit from Dr. Daniel Grossman and his study. (App. at 105-120). However, PPH admitted the affidavit was "mainly a distillation of Dr. Grossman's testimony to the Board" during the public hearing on the rules. (App. at 145). The district court found that Dr. Grossman's testimony was

[16] Again, Petitioners made no argument at the district court that this

already in the record so there was no need for the duplicative information. (App. at 154). The district court's determination to exclude Dr. Grossman's affidavit as duplicative was not an abuse of discretion.

The standard for additional evidence in a judicial review is clear. The standard is not an unfettered right to introduce any evidence a party wishes, no matter the materiality, reliability or relevance. The district court's thoughtful decision balanced reliability and relevance with Iowa Code section 17A.19(7) and correctly excluded portions of PPH's appendix. The district court did not abuse its discretion.

B. The district court did not err in refusing to consider the evidence as legislative facts.

PPH argues that the district court refused to consider the evidence as legislative facts. (Proof brief at 36). However, the record is very clear that PPH did not ask the district court to consider the evidence as legislative facts. (App. at 137). Nevertheless, this argument is mostly academic because this Court has made it clear that it can consider legislative facts concerning constitutional issues even if a district court improperly excluded them. While in a different context, a similar issue was presented to the

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email was in any way related to their constitutional claims against the Board.

Court in *Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). In *Varnum*, this Court determined remand to the district court to consider the rejected legislative facts on a constitutional issue was unnecessary due to this Court's de novo reviewing standard. *Id.* If this Court ultimately disagrees with the district court's evidentiary rulings as discussed above, it could still consider the evidence solely on the constitutional claims. Remand would be unnecessary.

C. The district court's denial of PPH's request to reopen discovery was reasonable.

PPH also challenges the district court's denial of its request for more time to conduct discovery. However, it has offered no explanation or argument relating to its appeal of this order. The district court's refusal to reopen discovery after briefing was reasonable.

This Court affords the district court wide latitude on district court's ruling on discovery matters. *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc*., 690 N.W.2d 38, 43 (Iowa 2004). "'A reversal of a discovery ruling is warranted when the grounds underlying a district court order are clearly unreasonable or untenable.'" *Id*. (*quoting Exotica Botanicals, Inc. v. Terra Intern., Inc*., 612 N.W.2d 801, 804 (Iowa 2000)). PPH had months to

conduct discovery prior to submission of its judicial review brief. At no time during these months did PPH ever indicate it needed more time for discovery or that they intended to depose individual board members despite having all of the "evidence" it later attempted to introduce. PPH's counsel was aware of the nature of the draft telemedicine policies well before the deadlines. And, the emails clearly delineate the recipients. PPH should have conducted discovery during the discovery period if they intended to somehow link the documents to the Board members. PPH offered the district court no reason for its failure to conduct desired discovery within the time period already provided.

The district court found PPH had the chance to conduct discovery and failed to uncover any connection between the excluded evidence and the Board members. (App. at 187). This was a situation of PPH's own creation. The district court did not err when it refused to allow PPH to go back and revive the time for discovery after briefing. The district court's denial of more time for discovery was not unreasonable or untenable.

II. THE BOARD'S PROMULGATION OF IOWA ADMINISTRATIVE RULE 653—13.10 IS VALID.

Standard of Review: In judicial review of agency rulemaking, this Court reviews the district court's decision for errors at law. *Iowa Medical*

Soc. v. Iowa Bd. of Nursing, 831 N.W.2d 826, 838 (Iowa 2013). The legislature clearly vested rulemaking authority with the Board. *See Id*. (*citing* Iowa Code section 147.76 granting boards authority to adopt rules necessary to administer and interpret chapter 147 and each practice act). "'An agency rule is presumed valid and the party challenging the rule has the burden to demonstrate that a 'rational agency' could not conclude the rule was within its delegated authority.'" *Id*. at 839 (*quoting City of Sioux City v. GME, Ltd*., 584 N.W.2d 322, 325 (Iowa 1998)).

Preservation of Error: To the extent that PPH is challenging that the Board's rule was supported by substantial evidence in violation of Iowa Code section 17A.19(10)(f), this ground was not properly preserved. (Amended and Recast Petition at 11-12; Brief on Judicial Review). The district court did not rule on PPH's claimed errors under Iowa Code section 17A.19(10)(i) and (n) therefore these issues were not properly preserved. (Ruling on Judicial Review; App. at 245). The remaining alleged violations were preserved. (Amended and Recast Petition; Brief on Judicial Review; Resistance to Petition for Judicial Review).

Argument: Significantly, PPH does not identify one specific instance where the district court allegedly committed an error of law. Instead, PPH basically ignores the district court's review in total and continues to argue

the Board's alleged failures. PPH is apparently challenging the Board's ability to regulate medical abortion as a whole. Rarely does PPH discuss the actual language of the rule or acknowledge the actual standards of practice set forth. Instead, PPH attempts to confuse the issues by discussing telemedicine as a whole and medical abortion in general. PPH's arguments are based on the false premise that the rule would ban medical abortion in all of their rural clinics. This is simply not true. The rule does not ban medical abortion. It requires the most basic of medical care, a physical examination. The Court must consider what the rule actually requires and not fall into the narrative PPH is trying to spin.

The Board's rule does five things. First, the rule sets a definition of abortion-inducing drug. Second, the rule requires a physical examination. Third, the rule mandates that a physician be physically present. Fourth, the rule requires that a physician make reasonable efforts for follow-up examination. Fifth, the rule reminds physicians that they must comply with Iowa Code chapter 135L and corresponding rules regarding parental notification when minors seek abortions. PPH has made no argument that the definition of abortion-inducing drug in any way violates Iowa Code chapter 17A. Likewise, PPH makes no challenge to the requirements of Iowa Code chapter 135L and corresponding rules. And, PPH apparently

already recognizes the importance of a follow-up examination in its practice. (App. at 332). What remains is whether the physical examination and physical presence requirements are in violation of Iowa Code section 17A.19. And, if the physical examination requirement is valid, then the physical presence requirement imposes no additional requirement or burden whatsoever because the doctor will already be present in performance of the physical examination. When considered within this framework, it is clear that the district court did not err when it found the Board's rule was not arbitrary, capricious, unreasonable, or an abuse of discretion.

A. The District Court Correctly Determined that the Board Considered all Relevant and Important Matters Relating to the Propriety or Desirability of the Rule during its Rulemaking Process.

PPH claims that the Board's rule violates Iowa Code section 17A.19(10)(j) because the rulemaking process was rushed and inadequate and because the Board overlooked important matters. The district court correctly reviewed PPH's claims under Iowa Code section 17A.19(10)(j) for agency action that was "unreasonable, arbitrary, capricious, or an abuse of discretion." *Zieckler v. Ampride*, 743 N.W.2d 530, 532-33 (Iowa 2007) (noting the standard of review for challenges to agency rulemaking under 17A.19(10)(h)-(n) because the provisions are specific examples of actions

that are unreasonable, arbitrary, capricious, or an abuse of discretion). For the reasons discussed below, PPH's claims are without merit.

i. The District Court Correctly Determined the Rulemaking Process was Adequate.

First, PPH argues the Board's rules should be invalidated because the process was rushed. Interestingly, PPH does not claim the Board's rulemaking process was in violation of Iowa Code section 17A.19(10)(d), the legislatively provided remedy for improperly promulgated rules. And for good reason –the rulemaking process completely complied with the rulemaking requirements set forth in Iowa Code section 17A.4. PPH asked the district court to essentially create and add rule-making requirements to Iowa Code section 17A.4. PPH argued that because sometimes the Board holds more hearings before promulgating rules, it is legally required to do so now. The district court refused to do so. The district court noted that the Board's process "invited scrutiny" but noted that the time spent on the rulemaking was within the times set forth for rulemaking by statute. The district court held:

> Even if the board usually takes more time when adopting rules concerning standards of practice, the board's compliance with the statute demonstrates that the process was reasonable from a notice and opportunity-to-be-heard standpoint…

(App. at 263). The district court did not err in its decision.

In support of its claim, PPH cites to the Iowa Medical Society's commentary and staff's commentary on the Board's usual processes before proposing rulemaking.[17] However, PPH's argument and the comments ignore the unique nature of this rule-making. This rule did not originate from the Board's normal internal processes for rulemaking. Instead, the Board received a Petition for Rulemaking pursuant to Iowa Code section 17A.7 and Board rules 653 IAC 1.7. The Board acted on the petition as required by Iowa Code section 17A.7 and 653 IAC 1.7(4)(d). Following acceptance of the petition, the Board sought external input including input from professionals, professional societies, and the general public as required by statute and rule and as urged by the Iowa Medical Society. *See* 653 IAC 1.8 (setting forth requirements for public hearing and receipt of written comment).

The Board did not violate Iowa Code section 17A.19(10)(j) with its rulemaking procedure. The Board expressly followed the rulemaking requirements set forth in Iowa Code section 17A.4 and the requirements for

[17] None of the comments challenged the content of the rule or advocated against the merits of the rule itself. (App. at 261).

petitions for rulemaking set forth in Iowa Code section 17A.7 and 653 IAC 1.7 and 1.8. PPH cites to no authority that would mandate additional rule-making procedures. The Board's express adherence to the Iowa Code and its own rules cannot be considered arbitrary, capricious, unreasonable, or an abuse of discretion. The district court's decision does not constitute an error at law.

ii. The District Court Correctly Determined the Board Considered all Important Matters.

PPH next claims the Board's rulemaking process was in violation of Iowa Code section 17A.19(10)(j) because the Board "overlooked important information that any rational decision-maker would have considered important." (Proof Brief at 47). In support of its argument, PPH claims the Board overlooked the health risks and burdens imposed by the rule, failed to consider its previous investigation and policies favoring telemedicine, failed to consider PPH's telemedicine program and the role of physicians, and overlooked that medical abortion is safe.

PPH seems to equate "overlooking important evidence" with the Board not doing what PPH wanted. The certified record contains hundreds of pages of information the Board considered. The Board listened to hours of public comment. The Board read through several studies. Ultimately, they enacted the rule based on the reasons set forth in its Concise Statement.

(App. at 316-20). The Concise Statement clearly shows the Board considered each and every one of PPH's arguments. (App. at 316-20). Failing to agree with PPH does not equate to overlooking important information. This is simply not the standard set forth in Iowa Code section 17A.19(10)(j).

PPH claims the Board overlooked the health risks and burdens the rule would impose. (Proof Brief at 47). PPH claims the rule will cause women to have travel, face other logistical obstacles, and may force them into back alleys. (Proof Brief at 48). PPH's entire argument is based on the faulty premise that the Board's rule requires closure of its clinics. The rule requires a basic physical examination. Regardless, the administrative record is devoid of any evidence that would allow this Court to conclude a physical examination causes unnecessary delay, additional travel, or expense. This Court has no evidence showing that the rule would actually require PPH to stop offering medical abortions at any location. This Court has no evidence that doctors will be unavailable to perform physical examinations as required by the rule. In fact, physicians were physically present prior to 2008 when PPH started its telemedicine program. In fact, the number of abortions is down significantly since 2008. *Compare* Iowa Dept. of Public Health, *2012 Vital Statistics of Iowa,* (November 11, 2014) available at:

http://www.idph.state.ia.us/apl/common/pdf/health_statistics/2012/vital_stats_2012.pdf (reporting 2324 surgical abortions and 2314 medical abortions); Iowa Dept. of Public Health, *2007 Vital Statistics of Iowa*, (November 11, 2014) available at: http://www.idph.state.ia.us/apl/common/pdf/health_statistics/2007/vital_stats_2007.pdf (reporting 4443 surgical abortions and 2206 medical abortions). There is no evidence in the record that physicians would not be available to perform the reduced number of abortions.

The Board clearly considered the arguments made by PPH. (App. at 317). The Board considered the arguments and rejected them, finding that women in rural areas were entitled to the same level of health care as women in urban areas. The Board determined that the decision on whether to have a medical or surgical abortion should be made based on a full examination of the patient, patient preference, and access to emergency medical services. *Id*. The Board did not believe that medical abortion should be the *de facto* choice solely because a doctor is not available on site or it might take longer to travel to a different facility if surgical abortion is a more medically sound choice for the woman. *Id*. PPH's claim that the Board failed to consider travel, delay, or medical conditions is not supported by the record. *See Hagen v. Iowa Dental Bd.*, 839 N.W.2d 676 (Iowa Ct. App. 2013) (finding no violation of Iowa Code section 17A.19(10)(j) where a close reading of

the Board's decision showed the Board considered, but rejected the proffered arguments). The district court did not commit an error of law.

Next, PPH claims the Board failed to consider its previous investigation and overlooked its (Proof Brief at 49.) The district court found this argument to be without merit because the Board's concise statement shows the Board did consider the past investigation and because the previous investigation did not constitute "policy". (App. at 263-64). The court also found that even if the board had a previous policy or rule, that nothing in the law would prevent the Board from reconsidering or amending a rule. (App. at 264).

PPH does not specifically claim any of the district court findings to be in error. Instead, PPH continues to mischaracterize and mislead this Court regarding the Board's past policy on abortion-inducing drugs. In 2010, the Board had no rules defining the standards of practice in the use of abortion-inducing drugs or on the use of telemedicine. (App. at 317). The rule challenged in the judicial review petition is the Board's first attempt to set standards of practice relating to the use of abortion-inducing drugs.

PPH urges this Court to consider a confidential investigation of two physicians as a wholehearted stamp of approval on its telemedicine system. However, Iowa Code sections 148.6 and 148.7 authorize the board to initiate

licensee discipline -- that is discipline against a person holding a license to practice medicine in Iowa. The Board has discretion to initiate license discipline against individual physicians if the Board believes a licensed physician has violated standards of practice or a board rule. Iowa Code §§ 148.6(2)(g), 148.6(2)(i). The Board does not have authority to investigate PPH as an entity or to approve an entity's practices or protocols. PPH's continued claim that the Board previously approved its program is simply false.

PPH has cited to no law or case that would prevent an agency from initiating rulemaking after dismissing a case on the same practice. Such a reading of Iowa Code section 17A.19(10)(j) would infringe on the Board's express authority to promulgate rules to set the standards of practice. *See* Iowa Code § 147.76; 148.6. The Board recognized an area of medicine that it determined did not meet the standards of practice. It adopted rules to put all physicians on notice of the standards of practice applicable.

Further, the record shows that the Board was aware of the investigation. (App. at 358). The Board addressed it in its Concise Statement. (App. at 317). The record is clear that the Board did consider the "important evidence" PPH claims the Board overlooked. The district court

did not err when it determined the Board considered its past investigation but was not bound by its results.

PPH also argues that the Board failed to consider its own policies on telemedicine. (Proof Brief at 49). For the same reasons as discussed above, this argument is without merit. The Board did not previously have any rule or policy on telemedicine. And, the Board did consider the rule's impact on telemedicine. (App. at 317-18). Further, even if the Board's past guidance on telemedicine could somehow bind it in the future, the advice is consistent with the rule. As PPH indicates, Board staff has communicated that the Board considers some general principles when evaluating telemedicine. (App. at 30). However, PPH omitted some of the general principle:

> [a] physician utilizing telemedicine shall perform and document an appropriate patient evaluation adequate to establish a diagnosis prior to treating a patient, including prescribing medications. Generally, the treating physician shall perform an in-person history and physical examination. However, the patient evaluation need not be in-person if the telemedicine technology is sufficient to provide the same information to the physician as if the evaluation had been performed face-to-face.

(App. at 30). This principle is certainly in line with the Board's determination that, for this specific condition and treatment, the standard of care requires an in-person history and physical examination. Further, as the district court recognized, the Board requires in-person histories and physical

examinations in other contexts. (App. at 265); *see also* 653 IAC 13.2(4) (requiring a physician to perform a medical history and clinical exam in the treatment of acute pain); 653 IAC 13.2(5)(a) (requiring a physician to perform a "physical examination and a comprehensive medical history … [including] an assessment of the pain, physical and psychological function, diagnostic studies, previous interventions, including medication history, substance abuse history and any underlying or coexisting conditions.)

The district court rejected PPH's argument that the Board failed to consider telemedicine as a whole, finding the Board was not unreasonable "for not considering all possible uses of telemedicine." (App. at 265). PPH has cited no authority that would prohibit the Board from regulating individual specialties through rulemaking. And, the Board regularly sets individual practice standards for specialties. *See* 653 IAC ch. 13 (establishing standards of practice for individual segments of medicine including pain management, collaborative drug therapy management, chelation therapy, automated dispensing systems, medical directors of medical spas, and interventional chronic pain management); *see also* 653 IAC 11.4(d)-(e) (setting forth continuing education requirements for certain specialty areas). For these reasons, PPH's argument is without merit.

Next, PPH argues that the Board failed to consider the role of

physicians within its program. (Proof Brief at 50). Although the argument is vague, it appears PPH is contending that a physical examination is not necessary. This is not supported by the evidence and ultimately a decision well within the Board's discretion. You must still go see your doctor for a physical examination prior to diagnosis of something as simple as an ear infection and prior to the prescription of antibiotics. Even when you have a years-long established relationship, you cannot simply call up your doctor with complaints of acute pain and get a prescription without a physical examination. *See* 653 IAC 13.2(4). While telemedicine, and therefore a medical encounter without a physical examination, may be appropriate for some forms of doctor-patient encounters, it is not appropriate for all doctor-patient encounters. The physical examination is not dead. As noted in the Board's Concise Statement, it determined a physical examination is crucial to providing abortion-inducing drugs within the standard of care.[18] (App. at 318).

[18] PPH also claims that its telemedicine program does not differ in any way from its in-person program. While this may be true, the logical conclusion of this argument is that PPH's in-person program does not meet the standards of practice either. It is clear that the Board found that dispensing the drugs in question prior to a physician-conducted examination below the standard of care.

The Board's physical examination requirement is not unreasonable, arbitrary, or capricious. A study reviewed by the Board investigated the use of an ultrasound prior to medical abortion. (App. at 300-13). The study concluded that an ultrasound may not be necessary prior to a medical abortion but apparently assumed an adequate physical examination was done prior to an abortion. (*See* App. at 301)(finding that if "staff are inexperienced in clinical examination, if there are symptoms suggesting an abnormal or ectopic pregnancy, or there is a discrepancy between last menstrual period (LMP) and uterine size, use of ultrasound is indicated…"). And, as set forth above, the medical literature clearly requires a physical examination prior to medical abortion. The comments submitted by PPH shows individuals doing vitals and ultrasounds are not necessarily licensed medical professionals. (*See* App. at 325, 333, 359). The Board determined that ultrasounds by unregulated, unknown individuals that were beyond the Board's authority to regulate coupled with no physical examination by the physician did not meet the standard of care. (App. at 318-19). PPH's argument ignores that the Board does not have authority over other licensed medical professionals or weekend-trained secretaries. The Board does, however, have exclusive authority to set the standards of practice by which physicians must practice to meet the standard of care. *See* Iowa Code

§§ 147.76, 148.6(2)(g). The United States Supreme Court was faced with a similar argument in *Mazurek v. Armstrong*, 520 U.S. 968 (1997). In *Mazurek*, the challenged regulation prohibited physician assistants from performing abortions. *Id*. at 973. Challengers claimed that medical studies found no significant safety difference between abortions performed by physicians and those performed by physician assistants. *Id.* The Court rejected the claim, finding that *Casey* made it clear that, "'[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.'" *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (*quoting Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 885 (1992)).

The district court reviewed the record and concluded, "the record shows that the board understood PPH 's protocol and reviewed studies submitted, but disagreed with PPH when setting the standard of practice." (App. at 266). The district court's decision was not an error of law.

PPH also claims the Board ignored that medical abortion is safe. (Proof Brief at 51). Related, PPH claims that the Board ignored that its program is safe. (Proof Brief at 51). PPH argues that the Board is singling

out medical abortion even though medical abortions have a much lower incidence of serious complications than many commonly prescribed medications. The issue in this case is not whether medical abortion is safe. Medical abortion remains legal in Iowa. The issue is whether requiring a physical examination before dispensing abortion inducing drugs is reasonable. The relative safety of a particular procedure or medication does not determine whether physicians need to meet the standard of care when performing a procedure or prescribing a medication. Additionally, the overall safety of certain procedures or medications does not determine the Board's ability to regulate those procedures or medications. Unless and until the FDA chooses to make abortion-inducing drugs available over the counter, they must be dispensed by a doctor. A physician must properly examine the patient prior to rendering care, including dispensing abortion-inducing drugs. Doing so will ensure the woman is an appropriate candidate for a medical abortion.

Further, evidence does not support PPH's claim the Board is treating unidentified "riskier medications" differently. Interestingly, PPH claims that abortion-inducing drugs are as safe as commonly prescribed antibiotics. (Proof Brief at 51, citing to fn. 3). However, a physical exam prior to prescribing antibiotics is routine and the standard of care. Further, there is

no evidence in the record that the Board has said a physical examination is not necessary prior to prescribing these other medications. In fact, a review of Board rules will lead this Court to the opposite conclusion. Doctors are required to conduct and document a physical exam prior to the treatment of acute pain. 653 IAC 13.2(4) (requiring a physician to perform a medical history and clinical exam in the treatment of acute pain). Physicians are also required to conduct and document a physical exam prior to the treatment of chronic pain. 653 IAC 13.2(5)(a) (requiring a physician to perform a "physical examination and a comprehensive medical history … [including] an assessment of the pain, physical and psychological function, diagnostic studies, previous interventions, including medication history, substance abuse history and any underlying or coexisting conditions".) And, physicians are required to perform a physical examination prior to the use of interventional chronic pain management techniques. 653 IAC 13.9(2).

The Board has not unlawfully singled out PPH, medical abortion, or the use of telemedicine for the provision of medical abortion.[19] The Board

[19] "There is no requirement, moreover, that a state legislature address all surgical procedures if it chooses to address one. States 'may select one phase of one field and apply a remedy there, neglecting the others.'" *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott,* 748 F.3d 583, 596 (5th Cir. March 27, 2014) (*quoting Williamson v. Lee Optical of Okla. Inc.,* 348 U.S. 483, 489 (1955)); *see also Harris v. McRae,* 448 U.S. 297, 325-26 (1980) (finding that treating abortion differently for purposes of

considered and rejected these arguments and affirmed its belief that a physician must physically examine a woman prior to dispensing an abortion-inducing drug. (App. at 316-20). The Board's determination was not a failure to consider PPH's position, but rather a rejection of its contention. This is not a violation of Iowa Code section 17A.19(10)(j). Even a cursory review of the Board's Concise Statement shows that the Board recognized PPH's arguments, considered each and every one, and rejected them. Not agreeing with PPH does not equate to a violation of Iowa Code section 17A.19(10)(j). The Board is specifically employed with the task of creating rules regarding the practice of medicine in Iowa. *See* Iowa Code § 272C.4(6) (establishing that the Board has the duty to define by rule acts or omissions that are grounds for discipline); *see also* Iowa Code § 147.76 (granting the Board exclusive authority to promulgate rules to interpret its practice act); Iowa Code § 148.6 (setting forth the grounds for licensee discipline including failure to meet the standard of care). The rule was a proper exercise of the rulemaking authority granted to the Board by the Iowa Code. The Board considered all relevant and important matters as

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reimbursements under Medicaid was rationally related to a legitimate governmental purpose and therefore did not violate equal protection. The Court noted, "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life").

evidenced by its discussions, public hearing, and Concise Statement. The Board's rule was not arbitrary, capricious, unreasonable, or an abuse of discretion. The district court did not err in affirming the Board's rule.

B. The Board's Rule Did Not Violate Iowa Code Section 17A.19(10)(k), (i), or (n).[20]

PPH also argues that the Board's rule violates Iowa Code sections 17A.19(10) (k), (i), and (n). Once again, PPH identifies no error of law committed by the district court in its analysis of these issues. The district court correctly reviewed the Board's rule to determine whether it was "unreasonable, arbitrary, capricious, or an abuse of discretion." *Zieckler v. Ampride*, 743 N.W.2d 530, 532-33 (Iowa 2007) (noting the standard of review for challenges to agency rulemaking under 17A.19(10)(h)-(n) because the provisions are specific examples of actions that are unreasonable, arbitrary, capricious, or an abuse of discretion).

PPH claims the rule is grossly disproportionate to any benefit it

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[20] The district court did not make a ruling on PPH's arguments under Iowa Code section 17A.19(10)(i) or (n). To preserve error, the district court must have first been decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002).

affords in violation of Iowa Code section 17A.19(10)(k) because it would deprive hundreds of women from access to abortions. As discussed above, there is no evidence in the record that would support this conclusion. Once again, PPH's argument equates any regulation of medical abortion to a complete prohibition. And, the argument assumes that any regulation, no matter how small, amounts to a "grossly disproportionate" impingement. PPH's argument would require this Court to determine the Board has no authority to set any standards of practice regulating abortion. Such an argument is unsupported by the record and unsupported by authority. The regulation at issue, a physical examination, is minimal, reasonable, and supported by the World Health Organization, the National Institute of Health, ACOG, International Federation of Planned Parenthood, and PPH's own website.

The Board's rule affords benefits to the public by ensuring that the healthcare the public receives is provided within the standard of care. And, the Supreme Court has consistently said that states have a legitimate interest in preserving and protecting the health of a pregnant woman within the context of abortion regulation. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (recognizing a woman has a right to an abortion without undue interference from the State but also

recognizing that a State has legitimate interest in protecting the health of the woman). The medical literature clearly requires a physical examination as a necessary precursor to medical abortion. (*See Facts supra*, pp. 7-8.) The Board's rule would not impinge on private rights in any manner, let alone a manner that this Court could conclude was "grossly disproportionate." There is no private right to medical care that is below the standard of care. The district court agreed and concluded that the Board's conclusion that the benefits of setting a standard of care outweighed the convenience factor even if it may cost more money due to driving distance. (App. at 270). The district court correctly concluded the Board's rule did not violate Iowa Code section 17A.19(10)(k).

C. The Board's Rule Was Not Motivated by an Improper Purpose.

PPH claims that the Board's rule was motivated by the improper purpose of restricting access to abortion. In support of its claim, PPH argues that the Petition for Rulemaking was submitted by individuals against abortion. (Proof Brief at 54). PPH claims four of the fourteen signatories were affiliated with a pro-life health organization. There is no evidence that the Board members were aware of the origin of the petition. The district court correctly refused to consider the intent of the individuals submitting

the petition for rulemaking when considering the Board's purpose. (App. at 274).

Even if petitioners are anti-abortion, this goes to the motivation of the petitioners and not to motivation of the Board members. The United States Supreme Court has cautioned that without actual evidence of improper purpose, Court should not infer one. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (holding, "We do not assume unconstitutional legislative intent even when statutes produce harmful results; much less do we assume it when the results are harmless."). In fact, the Court in *Mazurek* was faced with a similar scenario when it considered a law drafted by an anti-abortion group. The Court rejected the same argument, finding that even if the legislation was drafted by anti-abortion groups, "that says nothing significant about the legislature's purpose in passing it." *Id*. at 973. If this Court were to accept PPH's arguments, the Board would never be able to accept a petition for rulemaking from any organization with a specific stance on any issue because origin would equal motive. This would include any rulemaking request from PPH. The legislature put no such restriction on petitions for rulemaking. *See* Iowa Code § 17A.7. The origin of the petition provides no evidence of improper motive on the part of the Board. The district court correctly refused to find improper motives on the part of the

board based on the alleged motives of the petitioners.

PPH also points to Monsignor Frank Bognanno as proof of an improper motive. PPH claims that because Monsignor Bognanno is pro-life, he must have been motivated by an improper purpose. The district court correctly analyzed the issue under *Iowa Farm Bureau Federation v. Environmental Protection Commission*, 850 N.W.2d 403 (Iowa 2014). In *Farm Bureau*, this Court held, "a district court may vacate a rulemaking on the ground of bias upon no less than a showing by clear and convincing evidence that the administrator has undertaken the agency action with an 'unalterably closed mind,' thereby making their action 'motivated by an improper purpose."' *Id*. at 420. The district court found, based on this high standard, the record did not support a finding that Monsignor Bognanno's participation constituted an improper purpose. (App. at 274).

This Court's decision in *Farm Bureau* recognizes board members may not come to the table with clean slates. They come with their own personal beliefs and experiences. That alone cannot automatically disqualify a board member. There must be evidence that Monsignor Bognanno had an "unalterably closed mind." The district court's determination that there was not clear and convincing evidence of an unalterably closed mind was not in error.

PPH also claims Monsignor Bognanno "actively lobbied" other Board members. This is a mischaracterization of the evidence in this case. The evidence indicates that Monsignor Bognanno sent a packet of information he received to other Board members. This is hardly evidence of "active lobbying." And, even if PPH could provide this Court with actual evidence of "active lobbying," PPH has cited to no case, rule, or law that would equate Monsignor Bognanno's behavior with improper motive or an unalterably closed mind. In fact, this Court found in *Farm Bureau* that drafting of a substantially similar rule, actively lobbying for adoption during the rulemaking process, and job duties that included paid advocacy were not clear and convincing evidence of an unalterably closed mind. *Iowa Farm Bureau Federation v. Environmental Protection Commission*, 850 N.W.2d at 421-22. Bognanno's actions were much more benign that the conduct found acceptable in *Farm Bureau*.

PPH also claims that Monsignor Bognanno was motivated by an improper purpose because he helped board member, Allison Schoenfelder, with the wording for the motion to accept the Petition for Rulemaking. (Proof Brief at 56.) Again, PPH can cite to no case, rule, or law that helping a fellow board member with wording for a motion equates to "improper motive." And, as specifically stated by Dr. Schoenfelder, Monsignor

Bognanno helped her because she was a new board member and new to the process. (App. at 375). There is no evidence of improper influence over Dr. Schoenfelder's vote, nor is there any indication Monsignor Bognanno somehow forced Dr. Schoenfelder to make a motion she did not want to make. In fact, Dr. Schoenfelder specifically indicated she believed the physical examination was necessary to determine whether surgical or medical abortion was a better option for a woman. (App. at 365). She noted physician presence was important so that a woman has a real choice – a choice between surgical and medical abortion – not just medical abortion because it was the only option available. *Id*. There is no indication from her comments that she was voting for the rule because she felt some sort of improper pressure from Monsignor Bognanno. Monsignor Bognanno indicated he supported the rule because he believed a physician-conducted physical examination was required to meet the standard of care. *Id*. The reasons given by the Board, and specifically by Dr. Schoenfelder and Monsignor Bognanno, were not improper. The Iowa Supreme Court noted in *Bluffs Development Co. v. Board of Adjustment*, 499 N.W.2d 12, 15 (Iowa 1993) that a decision-maker's interest "must be 'direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical.'" (*quoting* 1 Am. Jur. 2d *Administrative Law* § 64,

at 861 (1962)). PPH presents this Court with nothing more than speculation. The district correctly concluded PPH's claim of improper motive was without merit.

Even if this Court determines that the Monsignor Bognanno should have recused himself, reversal of the Board's decision is not warranted. Reversal is only necessary where "the substantial rights of the person seeking judicial relief have been prejudiced." Iowa Code § 17A.19(10). The Board's decision was 8-2. Monsignor Bognanno's participation did not dictate the Board's result. (App. at 366). Even if Monsignor Bognanno recused himself from the decision, the rule would still have passed 7-2. *See Turnis v. Bd. of Educ*., 109 N.W.2d 198, 203 (Iowa 1961) (finding no prejudice or violation of due process when impermissible individuals sat in an administrative or quasi-judicial capacity where "their votes were not decisive").

PPH also asserts that motive can be inferred because the Board's rule lacks a sufficient relationship to the asserted legitimate interests. (Proof Brief at 56.) The Board has fully addressed the Board's legitimate interests in relation to PPH's other arguments. Additionally, PPH's argument improperly attempts to shift the burden of proof to the Board. If this Court were to accept its argument, PPH would not have to prove improper

motive. Instead, the Board would have to prove proper motive. This is not the standard in judicial review.

In support of its claim, PPH cites this Court to several cases with "analogous abortion restrictions," claiming they support an inference of impermissible purpose. Even a cursory review of the cases show that the abortion restrictions at issue in those cases are significantly different, imposing restrictions such as restricting medical abortion to only the FDA protocol, restricting practice unless the physician has admitting privileges within 30 miles, and prohibiting abortion if a heartbeat is detectable (generally six weeks into pregnancy). *See e.g., Cline v. Okla. Coalition For Reproductive Justice*, 313 P.3d 253, 257-258 (Okla. 2013) (detailing that the law in question would restrict abortions to FDA protocol only); *MKB Mgmt Corp. v. Burdick*, 954 F. Supp. 2d 900, 903 (D. N. Dak. 2013) (detailing that law restricts abortion after heartbeat is detected). Once again, PPH attempts to lump the Board's rule in with all other abortion regulations, no matter their similarities or, in this case, differences. Requiring a physical examination prior to the dispensing of abortion-inducing drugs is directly related to the Board's interest in protecting the health, safety, and welfare of Iowans. The district court's refusal to

invalidate the rule based on claims of improper motive was not an error of law.

III. THE BOARD'S RULE DOES NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF PETITIONER'S PATIENTS.

Standard of Review: The Court's review is *de novo*. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004) (*citing Rosen v. Bd. of Med. Exam'rs*, 539 N.W.2d 345, 348 (Iowa 1995). However, the Iowa Supreme Court "traditionally exercises great caution in declaring legislation unconstitutional." Callender v. Skiles, 591 N.W.2d 182, 187 (Iowa 1999) *citing State v. Rivera*, 260 Iowa 320, 322–23, 149 N.W.2d 127, 129 (1967); *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 1323, 78 N.W.2d 843, 847 (1956). Administrative rules are treated with similar caution. "An agency rule is presumed valid and the burden is on the party challenging it to demonstrate that a 'rational agency' could not conclude the rule was within the agency's delegated authority." *Teleconnect Co. v. Iowa State Commerce Comm'n*, 404 N.W.2d 158, 162 (Iowa 1987) (*citing Iowa-Illinois Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 334 N.W.2d 748, 751-51 (Iowa 1983)). Further, the "expertise of an administrative agency" must be recognized by a court reviewing an agency rule, "resulting in a reasonable range of informed discretion." *Id.*

Iowa Code section 147.76 expressly grants the Board authority to "adopt all necessary and proper rules to administer and interpret" chapter 147 and 148…." The Iowa Supreme Court has held that this delegation of interpretive authority "requires deferential review of the agency's interpretation of the statute and its application of law to fact." *Iowa Medical Society v. Iowa Board of Nursing*, 831 N.W.2d 826, 827 (Iowa 2013). The party attacking the constitutionality of a statute or rule must overcome a presumption of constitutionality by negating every reasonable basis upon which the statute or rule can be maintained. *Dubuque Ret. Cmty. v. Iowa Dep't of Inspections & Appeals*, 829 N.W.2d 190 (Iowa Ct. App. 2013) (*citing Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 236 (Iowa 1991)).

Preservation of Error: To the extent that PPH is challenging that the Board's rule is unconstitutional based on sex, this ground was not properly preserved. (Brief on Judicial Review; App. at 157). General due process and equal protection claims were preserved. (Brief on Judicial Review; Resistance to Petition for Judicial Review; App. at 157, 190).

A. The Court Should Adopt the Undue Burden Standard.

Substantive Due Process regarding abortion began with the case of *Roe v. Wade*, in which the Supreme Court held that the "penumbras" of the

Fourteenth Amendment encompass a fundamental right to abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Nineteen years later, in the landmark case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992), the Court reaffirmed what it regarded as *Roe's* "essential holding," the right to abort before viability, the point at which the unborn life can survive outside of the womb. *Id*., 505 U.S. at 870, 878. *Casey* became the standard under which all abortion regulations are analyzed, imposing the "undue burden" standard and specifically rejecting a strict scrutiny analysis. *Casey*, 505 U.S. at 879. *Casey* recognized states could impose a variety of restrictions on abortion, so long as the restrictions are not "undue burdens" on the right to abort before viability. *Id.* at 875. "A finding of *undue burden* is a shorthand for the conclusion a state regulation has the purpose or effect of creating a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877 (emphasis added). The Court held:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the

heart of the liberty protected by the Due Process Clause.

Id. at 874. Nearly seven years ago, the Supreme Court decided *Gonzales v. Carhart*, 550 U.S. 124, 166-67 (2007), upholding the federal partial-birth abortion statute. In *Gonzales*, the Court added to *Casey's* analytical framework that abortion restrictions must also pass rational-basis review. *Gonzales*, 550 U.S. at 158; *Planned Parenhood of Greater Texas v. Abbott*, 748 F.3d 583, 590 (5th Cir. 2014). The *Gonzales* court stated that even before viability ("from the inception of the pregnancy"), "the State may use its regulatory power to bar certain [abortion] procedures and substitute others," provided "it has a rational basis to act, and it does not impose an undue burden." 550 U.S. at 158.

PPH urges this Court to adopt an independent analysis of abortion-related regulations under the Iowa Constitution. It justifies this request seemingly based solely on the handful of states which have done so and because the right to choose or right to privacy is fundamental.[21] While the

[21] This Court has not held that a woman's right to choose or right to privacy is a fundamental right under the Iowa Constitution. However, even if the Court determines it is a fundamental right, the inquiry does not end there. For PPH this is the end of the discussion. The Board believes, however, that this is merely the start of the analysis as to the level of scrutiny the Court should apply. *See Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 577 (Ohio 1993) (nothing in state constitution commands departure from the undue burden test); *Wood v. Univ. of Utah Med. Ctr.*, 67 P.3d 436

Board does not challenge the *ability* of the Court to craft a unique standard under the Iowa Constitution, the Board does question the *wisdom* of doing so. This Court has adopted independent interpretations under the Iowa Constitution in the areas of search and seizure, cruel and unusual punishment, and equal protection.[22] *See, e.g.*, *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010) (search and seizure), *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009) (cruel and unusual punishment), *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (equal protection). This Court has not, however, generally extended that more robust analysis to Iowa's Due Process Clause. Additionally, even in the areas where this Court has carved its own path, it has done so by applying the federal standard more robustly, or with more bite. *Racing Ass'n of Cen. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6–7 (Iowa 2004). This Court has generally declined to adopt its own unique test, as PPH is advocating.

(Utah 2002) (same).

[22] Planned Parenthood raises both a substantive due process claim and an equal protection claim. Analysis of the fundamental right, however, should be the same under both clauses. For the first time on appeal, Planned Parenthood argues that heighten scrutiny should apply as the rule is a gender-based regulation. At the district court, however, Planned Parenthood argued only that the Board treated this rule involving telemedicine for abortion differently than telemedicine regulations generally. As a result, Planned Parenthood's latest equal protection argument is not properly before the Court because it was not preserved at the district court.

PPH urges this Court to abandon the undue burden standard and instead adopt a strict scrutiny standard for abortion-related regulations. This overly-simplistic approach ignores the complicated realities of this area of law. First, PPH's argument is based on the erroneous assumption that the undue burden test is the equivalent to rational basis review, and, as such strict scrutiny is a more exacting standard of the same test. The undue burden standard can better be understood as a purposeful abandonment of the tripartite test for constitutional review and a creation of a wholly separate test. *See Planned Parenthood v. Casey*, 505 U.S. 833, 877–87 (1992). Second, PPH's argument erroneously assumes the undue burden test somehow fails to treat a woman's right to privacy or right to choose as a fundamental right. This assumption is contrary to the explicit language in *Casey*. *Id*. at 851–52, 923 (Blackmun, J., concurring in part, dissenting in part). Third, PPH's argument is based on the erroneous assumption that the *only* interest or constitutional right at stake is that of the woman. It is well-settled that both the woman and the state have recognized, legitimate interests in the pregnancy. It has further been recognized that at some point, generally viability, the fetus or the state has a constitutional interest in the pregnancy.

Application of the strict scrutiny test does not sufficiently address

these competing concerns. Even assuming it could be applied to *some* abortion-related regulation, could it really be applied to *all* such regulations? In other words, is Planned Parenthood advocating for application of this standard throughout the entire pregnancy, during the first trimester, or before viability? Is Planned Parenthood advocating for application of this standard for all abortion-related regulations from outright bans to generally applicable regulations that have an incidental impact on abortion? That answer is not clear in their brief. It appears that Planned Parenthood is advocating for strict scrutiny in all applications, or in essence a return to pre-*Casey* jurisprudence.

The unacknowledged reality of abortion jurisprudence is that it is difficult. While the undue burden standard has certainly been subject to criticism, there is a reason why another test has not emerged in the last two decades. The undue burden test is the best developed framework for addressing this multifaceted area of law. As the United States Supreme Court recognized in *Casey*, application of the strict scrutiny standard to pre-viability regulation does not fully appreciate the state's interest in protecting fetal life or potential life. *Roe* and subsequent cases treated all government attempts to regulate abortion, both directly and incidentally, unwarranted. *Casey*, 505 U.S. at 876. "The very notion that the State has a substantial

interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Id.; see Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645, 655 (Miss. 1998) ("We find [the Supreme Court's] reasoning to be sound. While we have previously analyzed cases involving the state constitutional right to privacy under a strict scrutiny standard requiring the State to prove a compelling interest, we are not bound to apply that standard in all privacy cases. The abortion issue is much more complex than most cases involving privacy rights."). The undue burden standard is not a mere caricature, moreover, as Planned Parenthood assumes, designed to tip the scale in favor of the government. "A finding of *undue burden* is shorthand for the conclusion a state regulation has the purpose or effect of creating a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

The case law from other jurisdictions is not clear or as easily imputed to the Iowa Constitution as Planned Parenthood suggests. For example, *Planned Parenthood v. Farmer*, 762 A.2d 620 (N.J. 2000), is not a due process case. Instead, the court in *Farmer* determined that a parental notification statute violated the State's equal protection clause. The court applied "the most exacting scrutiny" to invalid the law based upon New Jersey's unique constitutional language and its pre-*Roe* right-to-choose

precedent. Planned Parenthood has not suggested Iowa shares this similar history. *Women of Minnesota by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), reached a similar result based on the unique language of the Minnesota Constitution on privacy. Contrary to Planned Parenthood's parenthetical, however, the Minnesota Supreme Court did not even cite to *Casey*, let alone overrule it on state constitutional grounds. Instead the Minnesota court diverged from a 1980 United States Supreme Court opinion on public funding for abortion. *See also Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (adopting *Roe* not *Casey* plurality standard based on explicit right to privacy in Alaska Constitution and its unique precedent which originated in 1972).

Armstrong v. State, 989 P.2d 364 (Mont. 1999), is an interesting case. While it too was based on the unique language of the Montana Constitution and the debates of the constitution, the issue in Armstrong is the most telling. In *Armstrong*, medical providers challenged a state law requiring pre-viability abortions to be performed by physicians. The Montana court struck down this law based in large part on the Montana Board of Medicine's approval of non-physicians performing pre-viability abortions. The Montana court chose not to second-guess the medical expertise of the Montana board. Iowa requires abortions to be performed by physicians.

That law is not challenged here. It stands to reason that if Iowa can limit the performance of abortions to physicians, the standards for performing abortions, like all medical procedures, should be left to the Iowa Board of Medicine.

As noted above, the majority of these state cases turn on two factors (1) whether the state constitution recognizes a right to privacy, and (2) whether there is longstanding precedent in the state on either abortion or privacy. The Iowa Constitution does not recognize an explicit right to privacy. Nor does Iowa have longstanding precedent on either abortion or a right to privacy. Both of these factors favor rejection of an independent analysis under the Iowa Constitution. Further examination of Iowa case law supports this rejection. This Court has long recognized a "right to privacy"[23] in an individual's medical records. *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 758 (Iowa 1993). That right, however, has never been absolute. *Id.* at 759. This Court has balanced an individual's right to privacy against "the societal need for information," *id.*, "society's interest in securing information vital to the fair and effective administration of criminal justice," *Chidester v. Needles*, 353 N.W.2d 849, 853 (Iowa 1984), and the

[23] It is not always apparent where this right emanates from in each of these cases. At times, the Court has recognized the right both from the United States Constitution and Iowa statutes.

"defendants' constitutional right to present a defense," *State v. Heemstra*, 721 N.W.2d 549, 562 (Iowa 2006). *See also Ashenfelter v. Mulligan*, 792 N.W.2d 665, 673 (Iowa 2010). PPH has not explained why this Court should abandon application of a balancing test to cases involving an individual's right to privacy. The undue burden standard is simply the best balancing test developed in the area of abortion-related regulation. For these reasons, this Court should adopt the undue burden standard set forth in *Casey*.

B. The Board's Rule is Not an Undue Burden.

In support of its claim that the rule is an undue burden, PPH cites back to the information it provided in the facts section of its brief. However, for the reasons already discussed, the Court should look closely at the facts alleged. The parade of hypotheticals set forth by PPH has little to do with the rule's requirement of a physical examination or the necessity of a follow-up visit. The claimed undue burdens would be applicable for any type of abortion regulation in Iowa given that PPH has not tailored their claims to the actual requirements of the rule.

PPH's argument is once again based on the faulty premise that the Board's rule mandates closure of its facilities. PPH may ultimately choose to close clinics because it does not want to comply, but the rule requires a

basic physical examination prior to the provision of medical care. Further, the lack of providers willing to perform abortions has nothing to do with the Board's rule. PPH does not acknowledge that this "burden" is not unique to abortion. Not all medical procedures or specialties are available in all corners of our state. Similarly, not all medical procedures or specialties will be appropriate for telemedicine in the same way.

PPH provides no argument, evidence or authority that the actual requirements of the Board's rule constitute an undue burden, places a substantial obstacle in the path of a woman seeking an abortion, or that it lacks a rational basis. The burden of proving the unconstitutionality of abortion regulations falls squarely on the Petitioners. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (reversing appellate court for enjoining abortion restriction where plaintiffs had not proven that the requirement imposed an undue burden). The Petitioners have not met their heavy burden.

Under *Casey*, it is clear that a regulation may not prohibit abortion outright before viability. *Id*. at 875. However, it is equally clear that "it is an overstatement to describe it as a right to decide whether to have an abortion 'without interference from the State.'" *Id*. The Board's rule does not prohibit abortion outright. It does not even prohibit a type of abortion

procedure or limit abortions to specific locations. Both surgical and medical abortions remain permitted under the rule. The regulation involved in this case, specifically requiring a physical examination prior to dispensing the abortion inducing drug, is a minimal burden, if a burden at all.[24] The Board may constitutionally impose a variety of restrictions on abortion, so long as the restrictions are not "undue burdens" on the right to abort before viability. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. at 875. And, under *Gonzales*, "the State may use its regulatory power to bar certain procedures" provided "it has a rational basis to act, and it does not impose an undue burden." *Gonzales v. Carhart*, 550 U.S. at 158. An examination of these cases show the Board's rule is constitutional.

Even if PPH would have produced actual evidence that the Board's rule would cause certain facilities to close or would cause women to have to wait longer for an abortion, this is not automatically rise to the level of "undue burden." PPH's argument asks this Court to ignore two decades of precedent and declare that any regulation of abortion is automatically an undue burden. However, both *Casey* and *Gonzalez* make it clear that

[24] As set forth fully above, the other sections of the rule impose no additional requirements if the physical examination requirement is constitutional. The physician will already be present. And, Planned Parenthood's brief does not challenge the subparts relating to follow-up appointment, definitions, or parental notification.

regulations enacted to promote the health of a woman are not an undue burden. "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. at 878. The Court has clearly stated it is not a constitutional violation to restrict performance of abortions only to physicians. *See Mazurek v. Armstrong*, 520 U.S. at 973 (allowing requirement that only licensed physicians perform abortions despite challengers' contention that "all health evidence contradicts the claim that there is any health basis for the law"). In abortion-related decisions before *Casey*, under the strict-scrutiny regimen of *Roe v. Wade*, the Court did not require all types of surgeries to be subjected to the same types of restrictions as those to which abortion was subjected. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 66-67 (1976) (constitutionally permissible to require written acknowledgement of informed consent, even though state did not require such informed consent in other types of surgery). The Court also found no constitutional violation where presentation of consent materials is restricted to only physicians. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. at 882-85. A State has "broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that

those same tasks could be performed by others." *Id*. at 885. Not all regulations are unwarranted and "not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id*. at 876.

The United States Supreme Court addressed complaints regarding increased travel and expense in *Gonzales v. Carhart*, and found the concerns to be inadequate to invalidate an abortion restriction: "'The fact that a law which serves a valid purpose, one not designed to strike at the right [to abortion] itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.' This was not an idle assertion." *Gonzales v. Carhart*, 550 U.S. at 157-58, (*quoting Casey*, 505 U.S. at 874). As recently as March 28, 2014, the Fifth Circuit Court of Appeals addressed nearly the same complaint PPH raises here and dismissed it. The court noted that in *Casey*, "women in 62 of Pennsylvania's 67 counties were required to 'travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the nearest provider'" and "the 24-hour waiting period would require some women to make two trips over these distances." *Abbott*, 748 F.3d at 498. However, the *Abbott* court held "*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions." *Abbott*, 748 F.3d at 598. Twenty-six states impose a waiting period, varying

between 24 hours and 72 hours, between counseling and the actual abortion. Guttmacher Institute, *State Policies in Brief: An Overview of Abortion Law*, Guttmacher Institute (May 1, 2014) available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. Waiting periods mandate two visits prior to dispensing the drug. The Board's rule does not impose a waiting period. The record is devoid of any evidence a physical exam would create additional costs, travel, or time let alone evidence that would indicate an increase constituting an undue burden.

The Board found, "a thorough medical history and physical examination [is] the cornerstone of good medical care. On this foundation an accurate diagnosis can be made and the most appropriate treatment plan offered to the patient." (App. at 318). The Board recognized that the requirement provides for the health of the woman by allowing the physician to screen for contraindications and an opportunity for a pelvic examination to correlate findings if necessary in the physician's judgment. (App. at 318-19). It is not this Court's role to become an *ex officio* medical board, second-guessing the Board's decision. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 518–519 (1989) (criticizing *Roe v. Wade* because it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and

standards….") Yet that is where PPH attempts to lead this Court. Requiring that a physician perform a physical examination before dispensing abortion-inducing drugs is not an undue burden and furthers the health and safety of women seeking abortions. Unless and until abortion-inducing drugs become over-the-counter medications, they must be dispensed by physicians in Iowa. Requiring physicians to do so in compliance with the standard of care is not an undue burden. Accordingly, the Board's rule does not violate due process.

C. The Rule is Narrowly Tailored to Achieve a Compelling State Interest.

Even if this Court determines the Iowa Constitution requires strict scrutiny analysis, the Board's rule is constitutional. For the same reasons the rule is not an undue burden, it is narrowly tailored to achieve a compelling state interest. The Board is the sole entity authorized to set the standards of practice for physicians in Iowa. It has a compelling state interest in doing so and in protecting the health, safety and welfare of Iowans. It narrowly tailored the rule requiring physical examination and follow-up to achieve its compelling state interests. These requirements are supported by the medical literature, including PPH's own protocols. In fact, there is no more minimal of a requirement than a physical examination to confirm suitability and rule

out contraindications. If a basic physical examination cannot survive, this Court will be holding that the Board cannot regulate abortion in Iowa at all. Because the Board's rule is narrowly tailored to achieve its compelling interests, it survives strict scrutiny.

CONCLUSION

For the reasons set forth above, the Board respectfully requests that the Court affirm the district court's decision denying PPH's Petition for Judicial Review.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests, pursuant to Iowa Rules of Appellate Procedure 6.908, to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,673 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface

using Microsoft Office Word 2010 in 14-point, Times New Roman.

/s/ Julie J. Bussanmas Date: December 22, 2014

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