IN THE SUPREME COURT OF IOWA

No. 21-0856

PLANNED PARENTHOOD OF THE HEARTLAND, INC., AND JILL MEADOWS, M.D.,

Appellees,

v.

KIM REYNOLDS EX REL. STATE OF IOWA, AND IOWA BOARD OF MEDICINE,

Appellants.

On appeal from the Iowa District Court for Johnson County
Case No. EQCV081855
The Honorable Mitchell E. Turner

BRIEF OF AMICI CURIAE 60 MEMBERS OF THE IOWA LEGISLATURE IN SUPPORT OF APPELLANTS

Kevin H. Theriot*
Elissa Graves*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@adflegal.org
egraves@adflegal.org

*PHV applications pending

Chuck Hurley
THE FAMILY LEADER
P.O. Box 42245
Urbandale, IA 50323
(515) 238-9167
chuck@thefamilyleader.com

Christopher P. Schandevel*
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
(571) 707-4655
cschandevel@adflegal.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICI CURIAE[1]

The Iowa General Assembly is the lawmaking body for the State of Iowa. Iowa Const. art. III, § 1. Like this Court's members, Iowa legislators take an oath to support Iowa's Constitution. Iowa Const. art. III, § 32. Accordingly, amici legislators have an interest in any proceeding implicating the faithful application of Iowa's Constitution.[2] That interest is heightened here because amici seek to vindicate their support of a modest waiting period to give women time to reflect before making the grave choice to end a life.

[1] All parties have consented in writing to the filing of this brief (see attached addendum). No party's counsel authored it in whole or part, and no person other than amici and their counsel made any monetary contribution to fund its preparation or submission.
[2] The full list of amici legislators is attached in the addendum.

INTRODUCTION

In an unprecedented decision, a majority of this Court declared abortion a fundamental right under Iowa's Constitution, able to override the State's immense interest in safeguarding society's most vulnerable individuals—unborn children. *Planned Parenthood of the Heartland, Inc. v. Reynolds* ("*Reynolds I*"), 915 N.W.2d 206, 237 (Iowa 2018). As a result, any legislative attempt to protect unborn lives or mothers—or to guard against the coarsening of society and the medical profession—faces strict scrutiny.

This Court must overturn "clearly erroneous" precedent. *State v. Williams*, 895 N.W.2d 856, 859 (Iowa 2017). And *Reynolds I* rests on erroneous and indefensible reasoning. Nothing in Iowa's Constitution's text, structure, history, or tradition suggests abortion is a fundamental right. *Reynolds I* "proceeds upon a wrong principle, [is] built upon a false premise, and arrives at an erroneous conclusion," *Stuart v. Pilgrim*, 74 N.W.2d 212, 216 (Iowa 1956), and it has led to undesirable results. This Court should overrule it and reverse the decision below.

ARGUMENT

I. Especially in constitutional cases, this Court has a duty to correct demonstrably wrong prior decisions.

Stare decisis "reflects a judgment" that it is usually more important that the law "be settled than that it be settled right." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177 (2019) (cleaned up). But *stare decisis* is "at its weakest" when a court interprets a constitution. *Id.* As a result, the United States Supreme Court "has been increasingly willing to reexamine its precedents in constitutional cases." William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

The reasons are both practical and principled. Practically, "only [the Supreme] Court or a constitutional amendment can alter" the Supreme Court's constitutional holdings. *Knick*, 139 S. Ct. at 2177 (cleaned up). And it is an "all-but-Sisyphean task to propose and ratify a federal constitutional amendment," Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 355 (2016), making the Supreme Court the "only effective resort for changing" wrongly decided constitutional rulings, Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. at 1362.

On principle, justices swear to "support and defend" the Constitution, "not the gloss which [their] predecessors may have put on it." Amy Coney Barrett, *Originalism and Stare Decisis*, 92

NOTRE DAME L. REV. 1921, 1925 (2017) (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)). Thus, "stare decisis ought to be relatively weak in constitutional cases . . . out of respect for the Constitution." *Id.*

"The state high courts take the same approach when they are construing their own constitutions." Garner, JUDICIAL PRECEDENT 352. At the state level too, then, "[s]tare decisis has limited application in constitutional matters." *Goodwin v. Iowa Dist. Ct. for Davis Cnty.*, 936 N.W.2d 634, 649 (Iowa 2019) (McDonald, J., concurring specially).

Again, the reasons are practical and principled. "Constitutional cases tend to invoke a weak or less strict form of stare decisis, on the theory that only the courts can correct bad constitutional precedent, absent constitutional amendments." Tyler J. Buller & Kelli A. Huser, *Stare Decisis in Iowa*, 67 DRAKE L. REV. 317, 322 (2019). "[C]ourts must be free to correct their own mistakes when no one else can." *Id.*

And that freedom is especially important in Iowa, which requires approval of "legislature-proposed constitutional amendments in two successive sessions." Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward A State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1677 (2010). In one study, "Iowa's constitutional

amendment rate of .36 amendments per year [was] tied with Rhode Island as the fifth lowest of all states." *Id.* So this Court is best positioned to correct its own constitutional mistakes.

Like their federal counterparts, state courts also are bound by state constitutions. For example, the Iowa Constitution states it "shall be the supreme law of the state, and any law inconsistent therewith, shall be void." Iowa Const. art. XII, § 1. Importantly, that clause "does not distinguish between legislative, executive, and judicial acts." *Goodwin*, 936 N.W.2d at 649 (McDonald, J., concurring specially). It makes void "any law—without regard to its source—inconsistent" with the Constitution. *Id.* That includes the Court's prior "demonstrably erroneous interpretations of the Iowa Constitution." *Id.*

Relatedly, while an originalist approach sometimes requires overturning precedent, "originalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text." Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. at 1924. "Originalism thus places a premium on precedent," so when courts prioritize "historically-settled meaning" over recently decided cases, they apply a "view of precedent [that] is particularly strong." *Id.* at 1923.

Even outside constitutional cases, "stare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest." *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 306 (Iowa 2000). Thus, the Court will overturn "precedent if found to be clearly erroneous." *Williams*, 895 N.W.2d at 859. Indeed, courts are "obligated" to do so when past cases "were erroneously decided." *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 849 (Iowa 2014).

That approach has a well-established pedigree. "In earlier eras, people often suggested that [the] presumption" against overruling precedent "did not apply if the past decision, in the view of the court's current members, was demonstrably erroneous." Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). Instead, once "convinced that a precedent was erroneous," courts agreed it "should be overruled unless there was some special reason to adhere to it." *Id.* at 5.

For example, James Madison believed an interpreter could resolve ambiguities "within a range of possibilities." *Id.* at 13. But if a prior construction went beyond that range, subsequent interpreters did "not have to treat it as a valid gloss on the law." *Id.* at 14. "If a past decision [is] demonstrably erroneous—if it alter[s] the determinate law rather than expounding an ambiguity—it lack[s] the binding force" of settled precedent. *Id.* (cleaned up).

Thus, it is possible to "recognize a rebuttable presumption against overruling decisions that are not demonstrably erroneous while simultaneously recognizing a rebuttable presumption in favor of overruling decisions that are." *Id.* at 8. And this Court has taken that approach. *See, e.g.*, *State v. Johnson*, 135 N.W.2d 518, 521 (Iowa 1965) (affirming that "high courts have not only the right but the duty to change a past decision if it is erroneous").

Finally, "[i]t is especially critical that stare decisis not shield court-created error from correction when the error is related to a matter of continuing concern to the community." *Miller*, 606 N.W.2d at 306. The same is true when the erroneous precedent "leads to undesirable results." *Youngblut v. Youngblut*, 945 N.W.2d 25, 39 (Iowa 2020). And any time a precedent "proceeds upon a wrong principle, [is] built upon a false premise, and arrives at an erroneous conclusion," this Court can fairly conclude that "more mischief will be done" by keeping it "than by overruling it." *Stuart*, 74 N.W.2d at 216.

II. *Reynolds I* is demonstrably wrong on multiple levels, and this Court should overrule it.

A. *Reynolds I* either ignored or misapplied four fundamental legal standards that should have governed the entire analysis.

1. Plaintiff's burden to prove unconstitutionality beyond a reasonable doubt

When a plaintiff challenges a state statute on constitutional grounds, the statute is "cloaked with a presumption of constitutionality," and the "challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt." *State v. Kilby*, 961 N.W.2d 374, 377 (Iowa 2021) (cleaned up). That means refuting "every reasonable basis upon which the statute could be found to be constitutional." *State v. Hernandez–Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) (cleaned up). If the challenger "fail[s] to meet [that] burden," the challenge fails. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 40 (Iowa 2019).

This requirement is not new in Iowa. An early version of it first appeared in 1849: "The [constitutional] violation should be clear and apparent before the act should be declared void." *Reed v. Wright*, 2 Greene 15, 21 (Iowa 1849). The "modern" version debuted in 1870: Courts can "declare a legislative act unconstitutional and void, only when it violates that instrument *clearly, palpably, plainly,* and in such a manner as to leave no reasonable doubt." *Stewart v. Bd. of Supervisors of Polk Cnty.*, 30 Iowa 9, 15 (1870).

Requiring proof beyond a reasonable doubt is also not unique. "Every state has articulated a clarity requirement for judicial review at some point, and no state has ever repudiated such a requirement." Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 176 (2015). And "every state, except Alaska, has also embraced a reasonable-doubt-style formulation of the presumption of constitutionality." *Id.* at 179.

Finally, the requirement applies in full force to statutes regulating abortion and abortion providers. *See Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 44–45 (Iowa 2021) (*Reynolds II*) (applying the requirement and rejecting Planned Parenthood's challenge to the constitutionality of funding conditions prohibiting abortion providers from participating in federally funded programs).

And yet, *Reynolds I* never mentioned the requirement before striking down the statute challenged there. Instead, the majority briefly mentioned the State's right to "reasonably regulate" abortion before "reflecting on the role of the judiciary within our venerable system of government." *Reynolds I*, 915 N.W.2d at 212. The majority thought its role could not be "undervalue[d]" because it includes the ability to protect "the humblest individual" from the legislature by throwing a "shield" of protection around her. *Id.*

From the outset, then, the *Reynolds I* majority ignored its duty to afford "a presumption of constitutionality" to a statute duly enacted by the people's representatives, relieving Planned Parenthood of its "heavy burden" to prove the statute's "unconstitutionality beyond a reasonable doubt." *Kilby*, 961 N.W.2d at 377. And that error paved the way for every error that followed.

2. Original intent and original public meaning

"Under our constitutional interpretation framework, we first look to the words used by our framers to ascertain intent and the meaning of our constitution and to the common understanding of those words." *Chiodo*, 846 N.W.2d at 851.

This has long been the law in Iowa. *See Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004) (purpose "is to ascertain the intent of the framers," looking "first at the words employed") (cleaned up); *Redmond v. Ray*, 268 N.W.2d 849, 853 (Iowa 1978) (giving words "meaning in their natural sense and as commonly understood"); *State v. Executive Council*, 223 N.W. 737, 740 (Iowa 1929) (considering "intent of the framers" as "clearly expressed"); *Dist. Twp. of Dubuque v. City of Dubuque*, 7 Iowa 262, 275 (1858) ("the great object and office of all rules or maxims of interpretation is to discover the true intention of the law or constitution").

This has also long been the law in most states. "Looking across two centuries of case law, there is a consistent invocation of originalism (both original intent and original meaning) across the vast majority of the states." Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 357 (2017) (collecting cases showing "this canon of originalism is the supermajority rule").

"Originalism rests on two basic claims." Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. at 1924. "First, the meaning of constitutional text is fixed at the time of its ratification." *Id.* "Second, the original meaning of the text controls because it and it alone is law." *Id.* (cleaned up). *See also Kilby*, 961 N.W.2d at 383 (McDonald, J., concurring specially) (rejecting arguments "not supported by the original public meaning of the Iowa Constitution or the most relevant precedents shedding light on the original public meaning of the Iowa Constitution").

In *Reynolds I*, though, the majority eschewed this canon of constitutional construction for an "evolving" constitution: "Our constitution recognizes the ever-evolving nature of society, and thus, our inquiry cannot be cabined within the limited vantage point of the past." *Reynolds I*, 915 N.W.2d at 233. To support its ahistorical approach, the majority mostly relied on dicta in *Obergefell v. Hodges*, 576 U.S. 644 (2015). *Id.* (quoting *Obergefell*'s

claim that interpretation unmoored from "history and tradition" still "respects our history and learns from it without allowing the past alone to rule the present"). The majority also quoted and cited three of this Court's cases for its assertion that Iowa's Constitution "is a living and vital instrument." *Id.* at 236 (cleaned up).

But those cases don't endorse a "living constitution." *Id.* at 248 (Mansfield, J., dissenting). In all three, this Court recognized Iowa's Constitution is "living in the sense that it [can] adapt to *legislative enactments* reflecting new societal needs." *Id.* But that is "quite different" from "erecting a strict scrutiny barrier to legislative action without reference to the constitutional text or history." *Id.* That approach finds *no* support in this Court's caselaw.

3. The facial-challenge standard

Two more threshold errors infecting *Reynolds I* are worth mentioning. First, the majority badly botched the legal standard for assessing facial challenges based on its mistaken belief that, for "abortion statutes, the proper scope of a facial challenge is subject to debate." *Reynolds I*, 915 N.W.2d at 232. Citing *Casey*, the majority claimed the Supreme Court had "impliedly rejected" the "no-set-of-circumstances standard in the abortion context," limiting review to "'the group for whom the law is a restriction, not for whom the law is irrelevant.'" *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992)).

With that as its jumping-off point, the majority took a large logical leap—inferring that it could exclude "[w]omen of means" who are "better positioned to weather . . . waiting-period requirements." *Id.* In so doing, by excluding from its analysis all women for whom the statute was *not* an unconstitutional burden, the majority ensured from the outset that Planned Parenthood's facial challenge would prevail.

That cannot be the law. Nor is it. Six years ago, the Supreme Court explained what it meant in *Casey* when it said that "[l]egislation is measured . . . by its impact on those whose conduct it affects." 505 U.S. at 894. In *City of Los Angeles v. Patel*, the Court explained that, for a facial challenge, it "consider[s] only applications of the statute in which it actually authorizes or prohibits conduct." 576 U.S. 409, 418 (2015). So in *Casey*, the Court did not consider "women [who] voluntarily notify their husbands about a planned abortion" because, for those women, "'the law is irrelevant.'" *Id.* (quoting *Casey*, 505 U.S. at 894). And in *Patel*, it excluded people who consent to warrantless searches from its analysis of a "statute authorizing warrantless searches." *Id.* at 418–19. Again, for those people, "[s]tatutes authorizing warrantless searches . . . do no work." *Id.* at 419.

Not so for "[w]omen of means" seeking abortions, even assuming they are "better positioned" to obtain them notwithstanding any restrictions the law imposes. *Reynolds I*, 915 N.W.2d at 232. Unless these women would voluntarily wait the entire required time between visits before obtaining an abortion, waiting-period requirements like those challenged in *Reynolds I* and in this case are not "irrelevant" even for them. *Patel*, 576 U.S. at 418. And it was clearly erroneous for the *Reynolds I* majority to refuse to consider these women before striking down the waiting-period requirement challenged there on its face.

4. Deference to district court's fact-finding

Relatedly, even when reviewing constitutional claims, this Court normally "give[s] deference to the district court's fact findings because of that court's ability to assess the credibility of the witnesses." *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). In *Reynolds I*, though, the majority did not even mention this standard of review—much less apply it. Instead, the majority repeatedly overruled the district court's factual findings and credited Planned Parenthood's witnesses and their own self-interested readings of the available evidence.

For example, the district court had considered the evidence and had "found the percentage of Iowa women who may change their minds and decide to continue their pregnancies due to the waiting period 'may be at least eight percent' or higher." *Reynolds I*, 915 N.W.2d at 231. And based on multiple studies, the district court had "ultimately found that a 'measurable number of women' may change their minds." *Id.*

On appeal, though, the majority held that its own "review of the evidence" revealed that "women do *not* change their decision to have an abortion due to a waiting period." *Id.* at 241 (emphasis added). In the majority's view, the district court had misread "several studies," *id.*, especially by considering women in one study who had not made a firm decision to abort before deciding not to during the waiting period, *id.* at 241–42. These women apparently should not have counted because "[a] decision must first be made before it can be changed." *Id.* at 242.

But that's not the best reading of the evidence. *Reynolds I*, 915 N.W.2d at 256 (Mansfield, J., dissenting) ("To quote the study itself, 'Eight percent of women reported changing their minds.'"). And it is certainly not a reading that "give[s] deference to the district court's fact findings." *Carter*, 696 N.W.2d at 36. After it failed to even cite the appropriate standard, though, it is not surprising that the majority did not make any effort to apply it.

B. *Reynolds I*'s holding that Iowa's due process clause protects a fundamental right to abortion is demonstrably wrong and should be overruled.

1. Only rights deeply rooted in history and tradition can be said to be implicitly protected by due process guarantees.

In the first part of its merits analysis, the *Reynolds I* majority held, "under the Iowa Constitution, that implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy." 915 N.W.2d at 237.

The majority reached that conclusion after first observing, "No clear test exists for determining whether a claimed right is fundamental." *Id.* at 233. And that much finds support in the Court's precedent. *See State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005). "However, *only* fundamental rights and liberties which are deeply rooted in this Nation's history and tradition *and* implicit in the concept of ordered liberty qualify for such protection." *Id.* (emphasis added) (cleaned up). *See also Hensler v. City of Davenport*, 790 N.W.2d 569, 581 (Iowa 2010) (same).

To the *Reynolds I* majority, though, the deeply-rooted requirement so clearly enunciated in *Seering* is just one of several "guiding principles." 915 N.W.2d at 233. And given the "ever-evolving nature of society," the constitutional "inquiry cannot be cabined within the limited vantage point of the past." *Id.*

As support for that deviation from precedent, the majority borrowed two lines from *Obergefell*: "'[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.'" *Id.* (quoting *Obergefell*, 576 U.S. at 664). "This review 'respects our history and learns from it without allowing the past alone to rule the present.'" *Id.* (quoting *Obergefell*, 576 U.S. at 664).

Yet despite its soaring rhetoric, *Obergefell* grounded its ruling in the "right to marry," which *Obergefell* recognized is "fundamental as a matter of history and tradition." 576 U.S. at 671. The question *Obergefell* answered was *not* whether the right to marry is fundamental, but whether "there was a sufficient justification for excluding" same-sex couples, "from [that] right." *Id.*

By contrast, the *Reynolds I* majority *did* have to decide whether abortion is a fundamental right. The 72-hour waiting period applied across-the-board. It did *not* apply only to a certain class of women seeking abortions. So *Obergefell*'s invitation to look beyond "history and tradition" to decide whether "new groups" should be allowed to "invoke rights once denied" has no relevance here. The question is not *who* may exercise a fundamental right to abortion. It is whether the right exists in the first place. To answer *that* question, the Court must ask whether the right is "deeply rooted in this Nation's history and tradition." *Seering*, 701 N.W.2d at 664. And the answer to that question is a resounding, "No."

2. The right to abortion is not deeply rooted in Iowa's—or the nation's—history or tradition.

As *Reynolds I* seemed to recognize, a right to abortion is *not* deeply rooted in Iowa's history or tradition. 915 N.W.2d at 235. Abortion was unlawful at common law, reflecting the common law's "stand[] as a general guardian holding its ægis to protect the life of all." *State v. Moore*, 25 Iowa 128, 136 (1868). In Iowa, abortion was criminalized by statute as early as 1843. *Reynolds I*, 915 N.W.2d at 235. And while there was a seven-year period where it dropped off the books, possibly by oversight, *see Abrams v. Foshee*, 3 Iowa 274, 278 (1856), the legislature moved quickly to rectify that omission when it became apparent.

As a result, six months after Iowa's Constitution became effective, "the general assembly adopted a law making abortion a crime under all circumstances, 'unless . . . necessary to preserve the life of [the] woman.'" *Reynolds I*, 915 N.W.2d at 247 (Mansfield, J., dissenting) (quoting 1858 Iowa Acts ch. 58 § 1). And abortion "remained a crime" in Iowa "until the *Roe* decision" in 1973. *Id.* at 235 (citing *Doe v. Turner*, 361 F. Supp. 1288, 1292 (S.D. Iowa 1973)). *See also State v. Abodeely*, 179 N.W.2d 347, 354 (Iowa 1970) (holding that Iowa's life-of-the-mother exception had "been clear enough for satisfactory use for over 100 years"). Given that historical backdrop, no 1857 Iowan would have thought that

the word "liberty" in Iowa's due process clause implicitly constitutionalized a right to abortion.[3]

Other States' laws would have confirmed that no such right exists. Writing in 1857—the same year Iowa's Constitution became effective—one jurist observed that "at common law the destruction of an infant unborn is a high misdemeanor, and at an early period it seems to have been deemed murder." 2 Francis Wharton, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES § 1220 (4th rev. ed. 1857). The common law criminalized abortion "because it involved the killing of an unborn child." Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY 135 (2006). And that remained true when States codified common-law prohibitions—including those against abortion. *Id.* at 268–75.

"By 1868, when the Fourteenth Amendment was ratified, thirty of the thirty-seven states had abortion statutes on the books." *Id.* at 315–16; *accord June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2151 & n.7 (2020) (Thomas, J., dissenting) (collecting statutes). *See also* Justin Buckley Dyer, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 105–32 (2013). "It

---

[3] *Accord Mahaffey v. Att'y Gen.*, 564 N.W.2d 104, 109–110 (Mich. App. 1997) (per curiam) (reaching the same conclusion where "essentially the same electorate" that had approved Michigan's constitution had rejected a proposal to amend its criminal abortion statute less than ten years later).

would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion"—the very conduct that many States were prohibiting. *June Med. Servs.*, 140 S. Ct. at 2151 (Thomas, J., dissenting). Iowans would have been equally shocked to learn the same about their own Constitution.

3. Abortion is a unique act, so a right to abortion does not flow from the right to privacy or to make personal decisions.

Rather than deny any of that, the *Reynolds I* majority attacked the "framing." 915 N.W.2d at 235. By pointing out that the right to abortion "is not deeply rooted in Iowa's history and traditions," the majority thought the State had "misconstrue[d] the true nature of the due process inquiry." *Id.* For proof, the majority turned to *Bowers v. Hardwick* and *Lawrence v. Texas*. *Id.*

In *Lawrence*, the Supreme Court had "explained that the *Bowers* Court's narrow framing of the issue 'disclose[d] the Court's own failure to appreciate the extent of the liberty at stake.'" *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)). As the *Reynolds I* majority summarized, "the actual liberty interest at stake was not the limited right of homosexuals to engage in sodomy, but the fundamental right of consenting adults to engage in private, consensual conduct without government intervention." *Id.*

From that, the *Reynolds I* majority extrapolated that the State had "fail[ed] to appreciate the extent of the liberty interest at stake when the government impermissibly invades a woman's ability to decide whether to terminate a pregnancy." *Id.* at 236. Thus, it apparently did not matter whether the right to abortion is "deeply rooted in Iowa's history and traditions." *Id.* at 235.

But that doesn't follow. Abortion is a "unique act." *Casey*, 505 U.S. at 852. "It is an act fraught with consequences for others," including "for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life," and for "the life or potential life that is aborted." *Id.* Abortion is thus "different in kind from" other interests "the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting).

In *Obergefell*, for example, the Supreme Court emphasized that its decision "involve[d] only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties." 576 U.S. at 679. Not so for abortion. Abortion "involves the destruction" of an innocent third party: the unborn child. *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting).

Indeed, 150 years before *Reynolds I*, this Court delivered a "clear[] statement that the abortion statutes" then being enacted "were designed to protect fetal life." Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY at 287. "[A]bortion is an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *Moore*, 25 Iowa at 136. It is thus "abhorrent to all our notions of sound morality." *Id.*

Abortion is just as fatal to the unborn child today. And for that reason, many Iowans continue to believe it is "nothing short of an act of violence against innocent human life." *Casey*, 505 U.S. at 852. Given that, the *Reynolds I* majority's decision to extend cases protecting the personal privacy rights of consenting adults to also include a right to destroy the lives of unconsenting unborn children was demonstrably wrong. This Court should overrule it.

4. Inventing a right to abortion based on the right to shape one's "identity" and "destiny" tramples on the legislature's authority.

"The division of the powers of government into three different departments—legislative, executive, and judicial—lies at the very foundation of our constitutional system." *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021). Under the separation-of-powers doctrine, "one department of the government" is prohibited "from exercising powers granted by the constitution to another branch."

Id. (cleaned up). "Stated differently, one department of the government cannot impair another in the performance of its constitutional duties." *Id.* (cleaned up).

Separation of powers and "judicial self-restraint" require the Court to "exercise the utmost care whenever [it is] asked to break new ground in the field of substantive due process." *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012) (cleaned up). Courts should always "tread carefully before extending" precedents with "little available evidence" that they are "correct as an original matter." *Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting).

"The Supreme Court has repeatedly applied this principle when confronted with the choice between fidelity to the Constitution and an otherwise logical extension of its own precedent." *Texas v. Rettig*, 993 F.3d 408, 417 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc) (collecting cases). In *Roe* and *Casey*, though, the Court flaunted that principle with gusto.

For example, the *Casey* plurality reaffirmed a right to abortion based on the plurality's breathtakingly broad concept of liberty: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. at 851.

That line became known—and disparaged—as the "famed sweet-mystery-of-life passage." *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting). And rightly so. None of our laws "restrict one's 'right to define' certain concepts." *Id.* "[A]nd if the passage calls into question the government's power to regulate *actions based on* one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law." *Id.* What could be safe to regulate without infringing on someone's "own concept" of existence and meaning?

This line from *Reynolds I* begs the same question: "At stake in this case is the right to shape, for oneself, without unwarranted governmental intrusion, one's own identity, destiny, and place in the world." 915 N.W.2d at 237. The majority thought "[n]othing could be more fundamental to the notion of liberty." *Id.* But again, prohibiting the legislature from regulating *beliefs* is quite different from prohibiting it from regulating *actions*. Nothing could be more foreign to the rule of law—or to the separation of powers.

Indeed, 13 years after Iowa's Constitution became effective, this Court rejected the argument that judges "are at liberty to refuse to execute a statute, on the ground that it is not in harmony with their notions of morality and justice." *Stewart*, 30 Iowa at 15–16. To grant them that power would grant them a share in the "power of legislation," which the "very words of the constitution" grant only to "the general assembly." *Id.* at 15.

"The right of construction, the right of applying constitutional restrictions, are vast powers, which it will always require great sagacity and intelligence to exercise." *Id.* at 16 (citation omitted). Given that, the Court should be "content[] with its acknowledged prerogatives." *Id.* It should not "arrogate an authority so vague and so dangerous as the power to define and declare the doctrines of natural law and abstract right." *Id.*

Almost 150 years later, the *Reynolds I* majority failed to heed that timeless warning. It certainly failed to "exercise the utmost care" before "break[ing] new ground in the field of substantive due process." *King*, 818 N.W.2d at 31 (cleaned up). And this Court should correct those mistakes.

C. Because abortion is not a fundamental right, Iowa's 24-hour waiting period only needs to survive rational-basis review—and it does.

"With a substantive due process claim," this Court "follow[s] a two-stage analysis." *King*, 818 N.W.2d at 31. First, it "determine[s] the nature of the individual right involved, then the appropriate level of scrutiny." *Id.* "If the right at issue is fundamental, strict scrutiny applies; otherwise, the state only has to satisfy the rational basis test." *Id.*[4]

[4] *Accord Reno v. Flores*, 507 U.S. 292, 305 (1993) ("narrow tailoring is required only when fundamental rights are involved," and rational basis applies in cases involving "a lesser interest").

Abortion is not a fundamental right under Iowa's Constitution, so rational basis applies. Under that test, "there need only be a reasonable fit between the legislature's purpose and the means chosen to advance that purpose." *King*, 818 N.W.2d at 31 (cleaned up). And the Court should overrule *Reynolds I* now and make clear that rational basis applies on remand for two reasons.

First, the district court already held *Reynolds I* is controlling. MSJ Ruling at 21–26. So a "remand for the district court to rule again" on that issue "would serve no purpose." *King*, 818 N.W.2d at 11. Relatedly, waiting to decide whether rational basis applies risks yet *another* remand for the district court to apply the correct standard. *See State v. Showens*, 845 N.W.2d 436, 449–50 (Iowa 2014) (remanding for court to apply new standard this Court articulated for the first time on appeal).

Second, holding now that rational basis applies will save the parties and the district court from wasting valuable resources on a lengthy trial under the wrong test. Rational-basis review "does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required . . . to survive heightened scrutiny." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). "To the contrary, the plaintiff must negate every reasonable basis upon which" the challenged law "may be sustained." *King*, 818 N.W.2d at 28 (cleaned up).

For that reason, the *Heller* Court thought it would have been "imprudent and unfair to inject" a heightened standard that had not been argued below when the parties had been litigating "for years on the theory of rational-basis review." 509 U.S. at 319.

The flipside is equally true here: it would be "imprudent and unfair" to both parties to wait to inject a *lower* standard in a later appeal after forcing them to litigate under a heightened standard on remand. Under any heightened standard, the State would have to make the "extensive evidentiary showing" required to survive that level of scrutiny. *Heller*, 509 U.S. at 319. Meanwhile, Planned Parenthood likely would *not* feel compelled to try to "negate every reasonable basis upon which" the 24-hour waiting period "may be sustained." *King*, 818 N.W.2d at 28.

If instead the Court makes clear that rational basis applies, the parties ought to be able to avoid trial altogether because the 24-hour-waiting-period requirement survives rational-basis review as a matter of law. Requiring women to wait 24 hours before an abortion reasonably advances the legislature's dual goals of protecting life and ensuring women are fully informed before they abort.

The "idea that important decisions will be more informed and deliberate if they follow some period of reflection [is not] unreasonable." *Casey*, 505 U.S. at 885. *Casey* upheld a 24-hour waiting period as a "reasonable measure to implement the State's interest in protecting the life of the unborn." *Id.* And the Sixth Circuit recently held "Tennessee had (as a matter of law) a rational basis for enacting its [48-hour] waiting period." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, No. 20-6267, 2021 WL 3412741, at *3 (6th Cir. Aug. 5, 2021). The district court should hold the same. But this Court first must make clear that rational basis applies.

D. *Reynolds I*'s equal-protection holding also is demonstrably wrong and should be overruled.

1. *Reynolds I*'s equal-protection holding hinges on its holding that abortion is a fundamental right, so both holdings fail.

At the threshold, *Reynolds I*'s holding that Iowa's "seventy-two hour waiting requirement . . . violates the right to equal protection under the Iowa Constitution," 915 N.W.2d at 246 (cleaned up), fails because its due-process holding fails. That's because the majority premised its equal-protection holding on its due-process holding: "*When a state action infringes upon a fundamental right*, the guarantee of equal protection of the law requires the state to demonstrate the action is narrowly tailored to serve a compelling government interest." *Id.* at 245–46 (emphasis added).

Thus, the majority only held that equal protection applied because it had already held that the waiting period "infringe[d] upon a fundamental right." *Id.* at 245. That due-process holding was demonstrably wrong, so this Court should overrule it. And if the Court does, it necessarily should overrule the equal-protection holding, too. Without the former, the latter likewise fails.

2. Iowa's waiting-period requirements do not treat similarly situated groups differently—which *Reynolds I* failed even to consider.

In cases that do *not* involve a classification affecting fundamental rights, plaintiffs must allege defendants are "treating similarly situated persons differently" to allege an equal protection claim. *State v. Doe*, 927 N.W.2d 656, 662 (Iowa 2019) (quoting *King*, 818 N.W.2d at 24). "If the two groups are not similarly situated," the Court does not need to "scrutinize the legislature's differing treatment." *In re Det. of Hennings*, 744 N.W.2d 333, 339 (Iowa 2008).

Tellingly, the *Reynolds I* majority never analyzed whether Iowa's waiting-period requirement treated similarly situated people differently. Instead, it held that "reproductive autonomy" is required for women to participate equally in society, thereby implicating equal-protection concerns. 915 N.W.2d a 245.

But that ignores that the right to equal protection does not require the State to make the sexes equal; it only requires it to treat similarly situated people similarly. *Id.* at 258 (Mansfield, J., dissenting). The "very gist" of the majority's argument was "that women are situated *differently* from men" because only they "bear the burdens of pregnancy." *Id.* But the majority cited no authority for the proposition that the State violates equal protection when it treats *differently* situated groups differently. *Id.* Nor could it. The majority's reasoning turns equal protection on its head, and this Court should overrule it.

III. *Reynolds I* already has had undesirable results: it has made regulating abortion practically impossible and has likely contributed to Iowa's rising abortion rates.

Finally, this Court's usual "reluctance to overturn precedent" has "less force" when "the precedent . . . leads to undesirable results." *Youngblut*, 945 N.W.2d at 39. *Reynolds I*'s holding that abortion is a fundamental right—and that any laws regulating abortion must satisfy strict scrutiny—has already led to at least two such results. First, it has made it practically impossible for the legislature to regulate abortion. And second, it has likely contributed to Iowa's rising abortion rates.

On the first point, *Reynolds I* seems to require any abortion regulation intended to protect unborn life must contain various exceptions based on "the patient's decisional certainty, income, distance from the clinic, and status as a domestic violence or rape victim." 915 N.W.2d at 243. The only way to enforce a set of exceptions like that would be to let the provider decide whether they apply. But the State might reasonably worry that, given that kind of power, Planned Parenthood would look out for its own interests over the State's interest in protecting life. *See Reynolds II*, 962 N.W.2d at 49 (reasoning the State could be "concerned that using abortion providers to deliver sex education programs to teenage students would create relationships . . . the State does not wish to foster in light of its policy preference for childbirth over abortion").

Indeed, this case demonstrates just how difficult *Reynolds I* makes it to impose any reasonable regulations on abortion. The district court found *Reynolds I* forbids *any* requirement that a woman come to an abortion clinic twice, which effectively prohibits requiring *any* waiting period before an abortion. MSJ Ruling at 21–22, 25. That result makes abortion an extreme outlier in Iowa law—and for no justifiable reason.

Waiting periods are otherwise common in Iowa. For example, Iowa requires a three-day waiting period before marriage, Iowa Code § 595.4, a three-day waiting period following the birth of a baby before adoption, *id.* § 600A.4(2)(g), and a ninety-day waiting period before divorce, *id.* § 598.19. These waiting periods implicate the fundamental rights of marriage and parenting. And yet, "[n]o one can reasonably question the legislature's power to impose [them] before Iowans begin or end a marriage or give up a newborn baby for adoption." *Reynolds I*, 915 N.W. 2d at 251 (Mansfield, J., dissenting). "So why can't the legislature impose a waiting period before an abortion?" *Id.*

On the second point, *Reynolds I* likely has contributed to Iowa's rising abortion rates. Before the decision, abortions had declined by 56% from 2008 to 2018.[5] But since then, abortions have shot up by 25% in 2019 and by 14% in 2020."[6] Regardless of which societal factors are mostly to blame for those increases, *Reynolds I* has made it practically impossible for the people's representatives to counteract them in any meaningful way.

---

[5] *Number of abortions in Iowa continues to increase, reversing long decline*, Associated Press (July 16, 2021), perma.cc/8XR7-D5DK.
[6] *Id.*

Based on Iowa's 2018 numbers and "a scholarly study of actual experience," the waiting period the *Reynolds I* majority invalidated could have saved 200–280 unborn lives *per year*. *Reynolds I*, 915 N.W.2d at 256 (Mansfield, J., dissenting). And as the number of abortions has risen, so has the number of lives that could have been saved but for *Reynolds I*. As one commentator has observed, "When you create a fundamental right, that means you can't regulate abortions in any way."[7] Practically speaking—as this case shows—that seems to be Iowa's current reality.

CONCLUSION

Reynolds I is demonstrably wrong, so this Court has a "duty" to overrule it. *Johnson*, 135 N.W.2d at 521. *Reynolds I* relies on mistaken reasoning and an indefensible interpretation of Iowa's Constitution. It has led to undesirable results by forbidding the legislature from enacting common-sense abortion regulations, and it likely has contributed to a sharp increase in abortions.

Amici thus urge the Court to overrule the clearly erroneous *Reynolds I* decision, to hold that rational basis applies to laws regulating abortion, to reverse the district court's order, and to remand for rational-basis review.

---

[7] *Number of abortions in Iowa,* perma.cc/8XR7-D5DK.

Respectfully submitted this 30th day of August, 2021.

By: */s/ Chuck Hurley*

Kevin H. Theriot*
Elissa Graves*
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
ktheriot@adflegal.org
egraves@adflegal.org

*PHV applications pending

Chuck Hurley
THE FAMILY LEADER
P.O. Box 42245
Urbandale, IA 50323
(515) 238-9167
chuck@thefamilyleader.com

Christopher P. Schandevel*
ALLIANCE DEFENDING FREEDOM
20116 Ashbrook Place, Suite 250
Ashburn, VA 20147
(571) 707-4655
cschandevel@adflegal.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(a)(d) and 6.903(a)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, 14-point type and contains 6,998 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Chuck Hurley
Chuck Hurley
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2021, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will accomplish service on the parties' counsel of record.

/s/ Chuck Hurley
Chuck Hurley
Counsel for Amici Curiae

ADDENDUM

Written Consent of the Parties

From: Langholz, Sam
To: Chris Schandevel
Cc: John Bursch; Kevin Theriot; Elissa Graves; Ogden, Thomas [AG]; Chuck Hurley
Subject: RE: Seeking Written Consent to File Amicus Brief in PPH v. Reynolds
Date: Monday, August 9, 2021 5:18:11 PM
Attachments: image001.png
image002.png

EXTERNAL

Chris,

Appellants consent to the filing of your amicus curiae brief.

Sincere regards,

Sam

Sam Langholz
Assistant Attorney General
Office of the Attorney General of Iowa
1305 E. Walnut St.
Des Moines, Iowa 50319
Main: (515) 281-5164 | Direct (515) 281-8583
Email: Sam.Langholz@ag.iowa.gov | www.iowaattorneygeneral.gov

From: Chris Schandevel <CSchandevel@adflegal.org>
Sent: Monday, August 9, 2021 11:21 AM
To: Ogden, Thomas |AG| <Thomas.Ogden@ag.iowa.gov>; Langholz, Sam <Sam.Langholz@ag.iowa.gov>
Cc: John Bursch <jbursch@adflegal.org>; Kevin Theriot <ktheriot@adflegal.org>; Elissa Graves <egraves@adflegal.org>; Chuck Hurley <chuck@thefamilyleader.com>
Subject: Seeking Written Consent to File Amicus Brief in PPH v. Reynolds

Mr. Ogden and Mr. Langholz,

Good afternoon. I'm writing to request written consent to file an amicus brief in support of respondents-appellants on behalf of a number of Iowa state legislators in the Iowa Supreme Court in *Planned Parenthood of the Heartland v. Reynolds*, Record No. 21-0856. (It always makes me feel better to have that consent in writing.)

Our understanding is that obtaining consent from the parties obviates the need to file a motion for leave to file the brief. So we're also reaching out to Planned Parenthood's attorneys to request consent.

Thanks!

- Chris

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE

Chris Schandevel
Legal Counsel
+1 571 707 4655 (Office)
+1 571 707 4735 (Direct Dial)
571 707 4656 (Fax)
CSchandevel@adflegal.org
ADFlegal.org

From: Rita Bettis Austen
To: Chris Schandevel
Cc: alice.clapman@ppfa.org; christine.clarke@ppfa.org; John Bursch; Kevin Theriot; Elissa Graves; Chuck Hurley
Subject: Re: Seeking Consent to File Amicus Brief in Iowa Supreme Court in PPH v. Reynolds - Record No. 21-0856
Date: Tuesday, August 10, 2021 10:27:19 AM
Attachments: logo_abdfb0ec-e06e-407a-a721-cd0e4f742400.png

EXTERNAL

Chris:
Thank you for your email. Plaintiffs consent to your filing an amicus brief in this case.
Sincerely,

Rita Bettis Austen
Legal Director
ACLU of Iowa
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317

pronouns: she/her/hers

www.aclu-ia.org

On Mon, Aug 9, 2021 at 11:09 AM Chris Schandevel <CSchandevel@adflegal.org> wrote:

> Counsel,
>
> Good afternoon. I'm writing to request consent to file an amicus brief on behalf of a number of Iowa state legislators in the Iowa Supreme Court in *Planned Parenthood of the Heartland v. Reynolds*, Record No. 21-0856.
>
> Under Rule 6.906(a), written consent from the parties obviates the need to file a motion for leave to file the brief (which motions we understand are routinely granted).
>
> Please let me know at your earliest convenience whether you consent to this filing.
>
> Thanks!
>
> - Chris
>
> ---
>
> Chris Schandevel
> Legal Counsel
> +1 571 707 4655 (Office)

***Amici* State Senators**

Senate President Jake Chapman

President Pro Tempore Brad Zaun

Majority Whip Amy Sinclair

Sen. Jim Carlin

Sen. Mark Costello

Sen. Adrian Dickey

Sen. Dawn Driscoll

Senator Jeff Edler

Sen. Julian Garrett

Sen. Jesse Green

Sen. Dennis Guth

Sen. Craig Johnson

Sen. Tim Kraayenbrink

Sen. Mark Lofgren

Sen. Zach Nunn

Sen. Jeff Reichman

Sen. Ken Rozenboom

Sen. Jason Schultz

Sen. Annette Sweeney

Sen. Jeff Taylor

Sen. Zach Whiting

Sen. Craig Williams

***Amici* State Representatives**

Majority Leader Matt Windschitl

Speaker Pro Tempore John Wills

Rep. Eddie Andrews

Rep. Rob Bacon

Rep. Terry Baxter

Rep. Brian Best

Rep. Brooke Boden

Rep. Steve Bradley

Rep. Dennis Bush

Rep. Mark Cisneros

Rep. Cecil Dolecheck

Rep. Dean Fisher

Rep. Joel Fry

Rep. Tom Gerhold

Rep. Martin Graber

Rep. Stan Gustafson

Rep. Steven Holt

Rep. Chad Ingels

Rep. Jon Jacobsen

Rep. Tom Jeneary

Rep. Bobby Kaufmann

Rep. David Kerr

Rep. Shannon Latham

Rep. Charlie McClintock

Rep. Joe Mitchell

Rep. Norlin Mommsen

Rep. Carter Nordman

Rep. Anne Osmundson

Rep. Sandy Salmon

Rep. Mike Sexton

Rep. Jeff Shipley

Rep. Ray Sorensen

Rep. Henry Stone

Rep. Phil Thompson

Rep. Jon Thorup

Rep. Cherielynn Westrich

Rep. Skyler Wheeler

Rep. Gary Worthan