IN THE SUPREME COURT OF IOWA
No. 21–0856

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

Appellees,

vs.

KIM REYNOLDS ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE,

Appellants.

Appeal from the Iowa District Court for Johnson County
Mitchell E. Turner, District Judge

APPELLANTS' FINAL BRIEF

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I. Does a legislative Act regulating both the performance of abortion procedures and the withdrawal of life-sustaining procedures from a minor child over the objection of the parent or guardian embrace "one subject, and matters properly connected therewith" as required by article III, section 29, of the Iowa Constitution?

Long v. Bd. of Sup'rs of Benton Cty.,
142 N.W.2d 378 (Iowa 1966)
State ex rel. Weir v. County Judge of Davis Cty.,
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Miller v. Blair, 444 N.W.2d 487, 489 (Iowa 1989)

II. Does this Court's 2018 ruling that Iowa's 72-hour-waiting-period statute violates the equal-protection and due-process protections of the Iowa Constitution preclude the State from defending this challenge to a new 24-hour-waiting-period statute and seeking to overrule that 2018 ruling because it wrongly decided that the Iowa Constitution requires strict scrutiny of abortion regulations?

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018)
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505 U.S. 833 (1992)

ROUTING STATEMENT

This case should be retained by the Supreme Court. The district court permanently enjoined a statute as violating the single-subject requirement and the equal-protection and due-process protections of the Iowa Constitution. *See* Iowa R. App. P. 6.1101(2)(a). The court's single-subject ruling also presents a fundamental and urgent issue of broad public importance requiring prompt determination by the Supreme Court. *See* Iowa R. App. P. 6.1101(2)(d). If that ruling stands, it casts doubt on regular legislative practices and could require the Legislature to significantly alter how it enacts legislation. In addition, the court's equal-protection and due-process ruling based on issue preclusion presents a substantial issue of first impression as to whether issue preclusion can apply in the context of constitutional challenges to similar—but not identical—statutes. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Planned Parenthood of the Heartland, Inc., and Jill Meadows (collectively, "Planned Parenthood") sued Governor Kim Reynolds ex rel. State of Iowa and the Iowa Board of Medicine (collectively, "the State") to challenge section 2 of the Act of June 29, 2020 (House File 594), ch. 1110, 2020 Iowa Acts 298. That provision requires a physician performing an abortion to obtain informed consent from the pregnant woman at least 24 hours before performing the abortion. *See id.* The Act also contains a second provision regulating when a court may order withdrawal of life-sustaining procedures from a minor child over the objection of the child's parent or guardian. *See id.* § 1. In its suit, Planned Parenthood argues that the Act violates several provisions of the Iowa Constitution and sought to permanently enjoin the State from enforcing section 2 of the Act. *See* App. 23–26 ¶¶ 81–98.

Before the parties engaged in any significant discovery, Planned Parenthood filed a motion for summary judgment. App. 40–46. It sought a permanent injunction as a matter of law for two reasons. First, Planned Parenthood argued that the Act violates the

single-subject requirement of article III, section 29, of the Iowa Constitution because the Act included one provision regulating abortion and another regulating other medical procedures. App. 43–44 ¶¶ 8–10. Second, it contended that issue preclusion compels the conclusion that the Act violates the equal-protection and due-process protections of the Iowa Constitution because this Court held in 2018 that a different statute—imposing a 72-hour waiting period—violated those provisions. App. 44–46 ¶¶ 11–17. *See Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018).

The State agreed that the single-subject claim could be resolved on summary judgment because there is no dispute of any fact material to that claim. But because the Act embraces one subject and matters properly connected to that subject—and thus does not violate the Iowa Constitution—the State filed its own cross-motion for partial summary judgment arguing that the claim should instead be dismissed. App. 462–63. The State also resisted Planned Parenthood's motion for summary judgment based on issue preclusion because the constitutionality of the 24-hour-

waiting-period statute at issue here is not identical to the issue decided by this Court in its 2018 ruling on the constitutionality of a 72-hour-waiting-period statute. App. 517–22. The State also argued that even if the issues are identical, it would not be precluded from arguing to this Court on appeal that its 2018 ruling was wrongly decided. App. 519 n.6, 521 n.9.

The district court rejected the State's arguments. On June 21, 2021, it granted Planned Parenthood's motion for summary judgment and denied the State's cross-motion for partial summary judgment. App. 570. The court held that the Act violates the single-subject requirement of the Iowa Constitution. It also held that the Act violates the Constitution's equal-protection and due-process protections because this Court's 2018 ruling on the constitutionality of the 72-hour-waiting-period statute precludes the State from defending the new 24-hour waiting period in the Act. *Id.*

The next day, the State filed this timely appeal of the summary judgment ruling. App. 572.

STATEMENT OF THE FACTS

In 2017, the Legislature and Governor enacted a statute requiring a physician performing an abortion to obtain informed consent from the pregnant woman at least 72 hours before performing the abortion. *See* Act of May 5, 2017 (Senate File 471), ch. 108, § 1, 2017 Iowa Acts 246, 246 (codified at Iowa Code § 146A.1).

The Act requires a woman seeking an abortion to (1) undergo an ultrasound; (2) be given the chance to view the ultrasound image of her unborn child, to hear a description of the child, and to hear the heartbeat of the child; and (3) be provided certain information about abortion procedures and alternatives to abortion. *See id.* These requirements don't apply to abortions performed to save the life of the woman or in a medical emergency. *Id.* But otherwise, the Act requires the physician to obtain a written certification from the pregnant woman that these requirements have been satisfied at least 72 hours before performing the abortion. *Id.* And these requirements are enforced solely against the physician through

license discipline and do not impose civil or criminal liability on a woman receiving an abortion.[1] *Id.*

The Act was quickly challenged.[2] Planned Parenthood argued that the Act's informed consent requirements, including the 72-hour waiting period, violate the equal-protection and due-process protections of the Iowa Constitution. *Planned Parenthood*, 915 N.W.2d at 214. After a two-day bench trial, the district court held that the Act did not violate the Iowa Constitution. *Id.* As this Court had in *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252 (Iowa 2015), the district court applied the undue-burden standard set out in *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992). Because *Casey* considered and upheld the constitutionality of a similar

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[1] The Act also prohibits abortions after twenty weeks post-fertilization. *See* Act of May 5, 2017 (Senate File 471), ch. 108, §§ 2–5, 2017 Iowa Acts 246, 247–49 (codified at Iowa Code ch. 146B). These provisions were not challenged in the 2017 litigation and have been effective since enactment.

[2] Indeed, Planned Parenthood filed its challenged before the Governor even signed the bill. The district court denied a preliminary injunction request also made before enactment. But on interlocutory appeal, this Court stayed enforcement of the Act pending a trial on the merits. *See Planned Parenthood*, 915 N.W.2d, at 213–14.

informed-consent statute with a 24-hour waiting period, the district court focused its analysis on whether any differences between the two statutes or other circumstances provided "grounds to reach a different result" than *Casey*. *See Planned Parenthood of the Heartland v. Reynolds ex rel. State*, Polk County Case No. EQCE081503, at 35–44 (Iowa D. Ct. Sep. 29, 2017), *rev'd*, 915 N.W.2d 206 (2018). The district court concluded they did not. And it thus upheld the Act. *Id.*

But this Court reversed. On appeal in 2018, the Court held for the first time that the Iowa Constitution protects a fundamental right "to decide whether to continue or terminate a pregnancy" and that statutes regulating that right are subject to strict scrutiny. *Planned Parenthood*, 915 N.W.2d at 237, 241. The Court reasoned that the Iowa Constitution is "living" and must be interpreted with "flexibility" and "in accordance with the public interest"—"freed . . . from the private views of the constitution's framers." *Id.* at 236. The Court thus found it unconvincing that the text and history offered no support for such a right. *See id.* at 236–37. And it concluded that since "nothing could be more fundamental to the notion of liberty,"

the right was "implicit in the concept of ordered liberty." *Id.* at 237 (cleaned up).

Given this fundamental right, the Court rejected the undue-burden standard as "standardless" and "subjective." *Id.* at 240–41 (cleaned up). Applying strict scrutiny instead, the Court held that "[t]he language in Iowa Code section 146A.1(1) requiring physicians to wait 'at least seventy-two hours' between obtaining written certification and performing an abortion" violated the equal-protection and due-process protections of the Iowa Constitution and "is stricken from the statute." *Id.* at 246.

Justices Mansfield and Waterman dissented, analyzing the evidentiary record and "the text, original meaning, and subsequent interpretation" of the Iowa Constitution to conclude that the Act was constitutional. *Id.* at 246 (Mansfield, J., dissenting). They would have applied the *Casey* undue-burden standard "at least until the Supreme Court offers a different legal standard for our consideration." *Id.* at 254. And like the Supreme Court in *Casey*—and most courts to consider waiting periods since—they reasoned

the 72-hour waiting period does not violate the undue-burden standard. *Id.* at 255–59.

Despite the Court's directive to strike the language declared unconstitutional from the text of the statute,[3] it remained in the Iowa Code until the end of the 2020 legislative session when the Legislature decided to address the issue again.

On the afternoon of June 13, the Iowa Senate took up House File 594. *See* S. Journal, 2020 Reg. Sess., 88th Gen. Assemb., at 811 (Iowa 2020), *available at* https://perma.cc/A2Q7-ULXE. That bill—which had already passed the House by a vote of 58 to 36—contained a provision regulating when a court may order withdrawal of life-sustaining procedures from a minor child over

[3] While this Court no doubt has the power to declare application of a statute to be unconstitutional, it doesn't have "authority to 'strike down' statutory text." *Borden v. United States*, 141 S. Ct. 1817, 1836 (2021) (Thomas, J., concurring) (cleaned up); *see also Scott Cty. v. Johnson*, 222 N.W. 378, 383 (Iowa 1928) ("[T]he power to revoke or repeal a statute is not judicial in its character."); *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006) ("There is no procedure in American law for courts or other agencies of government—other than the legislature itself—to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts."); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 & n.5 (2018).

the objection of the child's parent or guardian. *See* H. Journal, 2019 Reg. Sess., 88th Gen. Assemb., at 492 (Iowa 2019), *available at* https://perma.cc/5V3J-K98S; *see also* H.F. 594, 88th Gen. Assemb. (Iowa 2019), *available at* https://perma.cc/VK48-X4MW. Consistent with that subject, it was entitled "an Act relating to limitations regarding the withdrawal of a life-sustaining procedure for a minor child." H.F. 594, 88th Gen. Assemb.

A senator offered an amendment that made minor technical changes to the bill. *See* S. Journal, 2020 Reg. Sess., at 811–12, 1133–34. Several senators raised concerns that adopting the technical amendment would send the bill back to the House where it could be amended further rather than on to the Governor's desk for signature. App. 550. One senator—the Democratic Leader—even predicted that the bill would "be a vehicle to use to send an abortion bill back to this chamber." App. 59 ¶ 40. Yet a majority of the Senate still adopted the amendment and passed the amended bill by a vote of 32 to 17. App. 550; S. Journal, 2020 Reg. Sess., at 812–13.

Back in the House, seven representatives filed an amendment to the Senate amendment. *See* App. 498, 503–04 (H. Journal, 2020 Reg. Sess., 88th Gen. Assemb., at 758, 1391–92 (Iowa 2020)). As predicted, it addressed abortion. The amendment proposed adding one new section to the bill that would replace the 72-hour waiting period that had been declared unconstitutional with a 24-hour waiting period. App. 503–04 (H. Journal, 2020 Reg. Sess., at 1391–92). It did so by striking "seventy-two" and inserting "twenty-four" in section 146A.1(1) of the Iowa Code that had been adopted back in 2017. The amendment also proposed amending the bill's title so that it would read "an Act relating to medical procedures including abortion and limitations regarding the withdrawal of a life-sustaining procedure for a minor child." *Id.*

At least one legislator who opposed the amendment was surprised by its filing. App. 563. But even she learned of it, perhaps before it was officially filed, sometime that afternoon. App. 77 ¶ 8. And she began notifying constituents and interested parties. *Id.* ¶ 9. Because the proposal was offered as an amendment for consideration by the full House, it was not the subject of a

subcommittee or committee meeting as a standalone bill would have typically been. App. 563.

Around 10:00 p.m. that evening, the House began debate on the bill and the Senate's technical amendment. App. 550; *see also* App. 498 (H. Journal, 2020 Reg. Sess., at 758). When the 24-hour-waiting-period amendment was offered, a representative raised a point of order that the amendment was not germane. *See* App. 498 (H. Journal, 2020 Reg. Sess., at 758). The Speaker of the House agreed, ruling that the amendment was not germane to the Senate amendment. The amendment's sponsor then moved to the suspend the rules to consider her amendment. And by a vote of 52 to 43, a majority of the House agreed to suspend the rules. App. 498–49 (H. Journal, 2020 Reg. Sess., at 758–59). After further debate over the amendment, the House adopted the amendment by a vote of 53 to 42. App. 550; *see also* App. 499–500 (H. Journal, 2020 Reg. Sess., at 759–60). The amended bill was then passed by an identical vote. *See* App. 501–02 (H. Journal, 2020 Reg. Sess., at 761–62).

The bill returned to the Senate, which resumed consideration a few hours later—now early on the morning of June 14. *See* App.

550; App. 506 (S. Journal, 2020 Reg. Sess., at 841). The Senate agreed to accept the House amendment—adding the 24-hour-waiting-period language and amending the title—by a voice vote, with no senator requesting a recorded roll call vote. The Senate then passed the amended bill by a vote of 31 to 16 about 5:30 a.m. App. 551; *see also* App. 506–07 (S. Journal, 2020 Reg. Sess., at 841–42). This bill was the next-to-last bill passed by the Senate in the session. *See* S. Journal, 2020 Reg. Sess., at 842–47, 850–52. Later that afternoon, the Legislature adjourned its 2020 session sine die.[4] *Id.* at 852. And Governor Reynolds signed the bill a couple weeks later, enacting it into law. *See* App. 495–96 (Act of June 29, 2020 (House File 594), ch. 1110, 2020 Iowa Acts 298).

[4] Because of the COVID-19 pandemic, the 2020 session was compressed and expedited. The Legislature suspended its session on March 16, 2021, before its funnel deadline for completing its normal consideration of new bills in committee. *See* S. Journal, 2020 Reg. Sess., at 620–22. Session resumed on June 3, 2021, to complete all legislative business over ten session days. *See id.* at 633–852; *see also* Proclamation of Disaster Emergency (Iowa Mar. 17, 2020), *available at* https://perma.cc/QG53-WXQV (declaring public health disaster emergency the day after the Legislature suspended session); Proclamation of Disaster Emergency (Iowa June 10, 2020), *available at* https://perma.cc/3D62-DXJX (recognizing the emergency continued during the ten-day session).

Again, the new 24-hour-waiting-period statute was quickly challenged. Planned Parenthood sued arguing that the Act violates the Iowa Constitution's single-subject requirement and its equal-protection, due-process, and inalienable-rights protections.[5] *See* App. 23–26 ¶¶ 81–98. Planned Parenthood sought, and was granted, a temporary injunction prohibiting the State from enforcing the Act's new 24-hour waiting period. App. 551. The State did not appeal that order. And a three-day bench trial was set for January 2022. App. 547.

Nearly a year before trial—and before the parties had engaged in any discovery except for initial disclosures—Planned Parenthood filed for summary judgment seeking a permanent injunction based on two grounds. App. 40–46. First, Planned Parenthood argued that the Act violates the single-subject requirement of article III, section 29, of the Iowa Constitution

[5] *See* Iowa Const. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."). Planned Parenthood did not file for summary judgment on this claim. So it is not at issue in this appeal.

because the Act included one provision regulating abortion and another regulating other medical procedures. App. 43–44 ¶¶ 8–10. Second, it contended that issue preclusion compels the conclusion that the Act violates the equal-protection and due-process protections of the Iowa Constitution because this Court held in *Planned Parenthood of the Heartland v. Reynolds ex rel. State,* 915 N.W.2d 206 (Iowa 2018), that a 72-hour waiting period violated those provisions. App. 44–46 ¶¶ 11–17.

The State cross-moved for partial summary judgment on the single-subject claim, agreeing there is no material factual dispute but arguing the claim should be dismissed because the Act embraces one subject and matters properly connected to that subject as required by the Iowa Constitution. App. 463. And the State resisted Planned Parenthood's motion for summary judgment on issue-preclusion grounds because the constitutionality of the 24-hour-waiting-period statute at issue here is not identical to the issue decided by this Court in its 2018 ruling on the constitutionality of a 72-hour-waiting-period statute. App. 517–22. The State also argued that even if the issues are identical, it would

not be precluded from arguing to this Court on appeal that its 2018 ruling was wrongly decided. App. 519 n.6, 521 n.9.

The district court granted Planned Parenthood's motion and denied the State's cross-motion. App. 570. On the single-subject claim, the court held that regulating the withdrawal of life-sustaining medical procedures from a minor child over the objection of the parent or guardian "is clearly a different subject than a 24-hour waiting period for an abortion." App. 563. And the court thus "wholeheartedly agree[d] with" Planned Parenthood that this was "an extreme case" that violates article III, section 29 of the Iowa Constitution. App. 561, 564.

The court reasoned that its holding was supported by the Speaker of the House's ruling that the amendment adding the waiting-period provision to the bill was not germane to the bill. App. 562. And the court noted that it was "giving deference" to the Speaker rather than "embarrass[ing] legislation" or "hamper[ing] the Iowa Legislature." App. 562 n.5.

The court also relied on its assessment that the "highly unusual circumstances" of the Act's passage were "exactly such

'tricks in legislation' and 'mischiefs' that the single-subject rule exists to prevent." App. 563–64. The court reasoned that the waiting period provision "was clearly logrolled" because it "was attached to a non-controversial provision." App. 563. It objected to the speed of the bill's passage—calculating that it took just over twelve hours from when the Senate first took up the bill until it had passed both chambers in amended form—and the amount of debate and public input that occurred before its passage. *Id.* And the court noted that at least one legislator "was surprised by the Amendment." *Id.*

After concluding that the Act violates the single-subject requirement, the court held that Planned Parenthood had also established that it was entitled to "a permanent injunction to prohibit the Amendment's enforcement." App. 565. The court recognized that because of this holding, "it is not necessary to address [Planned Parenthood's] Due Process and Equal Protection claims." *Id.* But the court did so anyway.

On those claims, the district court held that the 24-hour-waiting-period provision "is unconstitutional under *PPHI*, and

Respondents are barred from relitigating that case" App. 566. The district court reasoned that this Court decided "identical issues" in its 2018 ruling on the 72-hour-waiting-period statute. App. 567. The district court explained its view that this Court had held that "mandatory delay laws of various lengths . . . do not benefit individuals seeking an abortion or change their minds about the decisions" and had relied significantly on the burden making two trips imposes on women. App. 567–68. And the district court held that because the delay length doesn't affect these conclusions, "issue preclusion bars" the State from relitigating them. App. 568.

The district court thus held that Planned Parenthood was entitled to a permanent injunction on its due-process and equal-protection claims as well. And it declared that the 24-hour-waiting-period provision violates the Iowa Constitution and permanently enjoined the State "from implementing, effectuating or enforcing Section 2 of HF 594, regarding the requirement that women seeking an abortion first receive an ultrasound and certain state-mandated information, and then wait at least 24 hours before returning to a health center to have an abortion." App. 570. This appeal followed.

ARGUMENT

I. The challenged Act—regulating both the performance of abortion procedures and the withdrawal of life-sustaining procedures from a minor child over the objection of the parent or guardian—doesn't violate the single-subject requirement of the Iowa Constitution because it embraces one subject and matters properly related to that subject.

The district court held that the challenged Act violates the single-subject requirement of the Iowa Constitution because it regulates both the performance of abortion procedures and the withdrawal of life-sustaining procedures from a minor child over the objection of the child's parent or guardian. App. 560–64. In doing so, the court rejected the State's argument that the Act is constitutional because it embraces one subject and matters properly related to that subject. App. 463, 512–16. The district court erred in granting summary judgment to Planned Parenthood on this claim and denying the State's cross-motion.

This court "review[s] constitutional claims de novo," remembering that a "challenger bears a heavy burden" to overcome the "presumption of constitutionality" by proving "unconstitutionality beyond a reasonable doubt." *Planned Parenthood of the*

Heartland, Inc. v. Reynolds, 962 N.W.2d 37, 45–46 (2021). Planned Parenthood has not met that burden. The district court's ruling should be reversed.

Article III, section 29 of the Iowa Constitution provides, as relevant here: "Every Act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title." Iowa Const. art. III, § 29. This provision includes two separate requirements for legislation: a single-subject requirement and a title requirement. Planned Parenthood relies on only the first, claiming that House File 594, Act of June 29, 2020, ch. 1110, 2020 Iowa Acts 298, violates the single-subject requirement of article III, section 29.

Despite its common usage, the term "single-subject requirement" is a bit of a misnomer. The constitutional clause permits not just "one subject" but also "matters properly connected therewith" Iowa Const. art. III, § 29; *see also Miller v. Blair*, 444 N.W.2d 487, 489 (Iowa 1989); *Christie v. Life Indem. & Inv. Co.*, 48 N.W. 94, 96 (1891) ("It is not true that an act may not embrace more than one subject."). This Court has thus long held that article III,

section 29, "should be liberally construed so one act may embrace all matters reasonably connected with the subject expressed in the title and not utterly incongruous thereto." *Long v. Bd. of Sup'rs of Benton Cty.*, 142 N.W.2d 378, 381 (Iowa 1966).

In one of the first cases interpreting an earlier version of the single-subject clause,[6] the Court adopted this deferential interpretation, explaining that a contrary approach would "render null a large portion of the legislation of the state, and render future legislation so inconvenient as to make it nearly impracticable." *State ex rel. Weir v. County Judge of Davis Cty.*, 2 Iowa 280, 285 (1855). And the Court did so even though the clause in effect at the time was narrower, providing bluntly: "Every law shall embrace but one object, which shall be expressed in the title." Iowa Const. of 1846, art. III, § 26.

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[6] Both *Weir* and *Santo v. State*, 2 Iowa 165, 209-10 (Iowa 1855) rejected single-subject challenges in December Term 1855. And each opinion cites the other. *See Weir*, 2 Iowa at 284; *Santo*, 2 Iowa at 210. But *Weir* contains more extensive analysis and has been repeatedly cited as the foundational case in Iowa's single-subject jurisprudence.

A couple of years later, the drafters of the 1857 Constitution doubled down on this deference, enshrining the *Weir* court's broad view into the text of the clause itself. They added the current language permitting acts to embrace "matters properly connected therewith" the single subject. They also replaced the word "object" with "subject," and added a second sentence to the clause mitigating the consequences of a title violation so that only the portion of the bill not expressed in the title is void. *See* Iowa Const. art. III, § 29.[7]

[7] Only the replacement of "object" with "subject" generated any debate in the constitutional convention. *See* 1 *The Debates of the Constitutional Convention of the State of Iowa* 530–31 (W. Blair Lord, rep., 1857), *available at* http://publications.iowa.gov/7313. A delegate proposed retaining "object" to "confine the action of the legislature within some more limited range." *Id.* at 530. Another argued that "'subject' is a broader word, and more extensive in its application" and urged the convention to use "subject" to remove any doubt about the proper interpretation of the clause. *Id.* at 530–31. This debate is somewhat curious because the Court in *Weir* suggested the opposite—that subject is "a narrower signification than the word 'object.'" *Weir*, 2 Iowa at 285. But it appears the terms have since been treated interchangeably and that aspect of the revision has thus had little effect. *See Patterson v. Iowa Bonus Bd.*, 71 N.W.2d 1, 8 (Iowa 1955) (discussing how *Weir* and *Santo* "obviously treat the word 'object' as meaning 'subject'" and suggesting that "may account for the change in words when the constitution of 1857 was drawn").

The Court has recognized that this constitutional history supports its deferential approach. *See Neb. Light & Power Co. v. City of Villisca*, 261 N.W. 423, 425 (Iowa 1935) (examining "the development of the provision" and finding it "obvious" that the current version "shows an intention on the part of the framers of the Constitution to give it a liberal construction, so as to embrace all matters reasonably connected with the title and which are not incongruous thereto"); *Cook v. Marshall Cty.*, 93 N.W. 372, 377 (Iowa 1903) (reasoning that the constitutional revisions were "[s]eemingly to avoid the embarrassments which might arise from a narrow construction" and "clearly indicate the intention that the rule shall be liberally interpreted"); *see also* Todd E. Pettys, *The Iowa State Constitution* 172 (G. Alan Tarr, ed., 2d ed. 2018) (noting the constitutional delegates approving the revised clause gave "the General Assembly somewhat greater latitude").

And so, to satisfy article III, section 29, the provisions of an act need only "fall under some one general idea and be so connected with or related to each other, either logically or in popular understanding, as to be part of or germane to one general subject."

Long, 142 N.W. 2d at 381. "It is unimportant that matters within the single subject might more logically be classified as separate subjects if they are nevertheless germane to a single subject." *Western Int'l v. Kirkpatrick*, 396 N.W.2d 359, 364 (Iowa 1986). When two or more provisions may at first appear dissimilar, a court must "search for (or to eliminate the presence of) a single purpose toward which the several dissimilar parts of the bill relate." *Miller*, 444 N.W.2d at 490.[8]

To violate the requirement, "an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection with or relation to each other." *Long*, 142 N.W. 2d at 381. If the violation is "fairly debatable," the act must still be upheld because courts should only act "in extreme cases" where legislation is "clearly, plainly and

[8] The level of generality of a constitutionally compliant subject has a broad range, as recognized by the sliding scale this Court uses to judge the propriety of a given title. *See State, v. Iowa Dist. Court*, 410 N.W.2d 684, 687–88 (Iowa 1987) ("[A]s an act's provisions become more disjointed and less obviously related to each other, the legislature's obligation to provide greater specificity in the act's title necessarily increases," particularly where an Act covers "topics only tangentially related to a broad general subject.").

palpably" unconstitutional. *Utilicorp United Inc. v. Iowa Utils. Bd.*, 570 N.W.2d 451, 454 (Iowa 1997). This is not such an extreme case.

A. The Act embraces and relates to the subject of medical procedures or other single subjects.

The challenged Act includes two sections, both amending the Iowa Code. The first prohibits a court from ordering "the withdrawal of life-sustaining procedures from a minor child over the objection of the minor child's parent or guardian, unless there is conclusive medical evidence that the minor child has died." App. 495–96 (Act of June 29, 2020 § 1, ch. 1110, 2020 Iowa Acts 298 (codified at Iowa Code § 144F.1 (2021))). The second requires a physician performing an abortion to obtain informed consent from the pregnant woman at least 24 hours before performing an abortion, replacing the 72-hour-waiting-period requirement that had been declared unconstitutional. *See id.* § 2 (codified at Iowa Code § 146A.1(1) (2021)). The title of the Act describes its subject as "relating to medical procedures, including abortion and limitations regarding the withdrawal of a life-sustaining procedure from a minor child." *Id.*

Both sections of the Act fall under this expressly identified general subject of "medical procedures." One regulates the conditions under which certain life-sustaining medical procedures may be ordered withdrawn by a court. And the other regulates the conditions under which a medical procedure—abortion—may be performed by a physician. This connection to the same general subject satisfies the single-subject requirement.

But searching beyond the subject identified in the title, the Legislature could have also viewed both provisions to embrace and relate to healthcare in general; the parent-child relationship; the protection of the health and safety of Iowans; or the protection of human life.[9] Any of these subjects would also satisfy the Constitution.

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[9] Recognizing that an act embraces a particular subject intended by the Legislature does not require this Court to agree with the policy choices embedded in the Legislature's decision. *See State v. Social Hygiene, Inc.*, 156 N.W.2d 288, 289–91 (Iowa 1968) (agreeing that the Legislature could include "any article or thing designed or intended for prevention of conception" within the subject of suppressing "the circulation, advertising, and vending of obscene and immoral literature and articles of indecent and immoral use" while making clear "[n]either the wisdom of the statute nor the authority of the legislature" was involved in a single-subject challenge).

The State presented all these potential subjects to the district court to aid in the court's "search for . . . a single purpose toward which" the Act's provisions relate. *Miller*, 444 N.W.2d at 490; *see also* App. 513–14. But the court implicitly rejected them,[10] instead summarily holding that the two provisions were "clearly a different subject" and were "not germane to the 'one general idea' of the bill." App. 561.

Yet this Court has rejected such a narrow view of the proper single-subject analysis and has repeatedly found a "single purpose toward which the several dissimilar parts of the bill relate." *Miller*, 444 N.W.2d at 490 (looking past a detailed 27-line, 300-word title describing widely varied provisions that in isolation were dissimilar to identify a "common purpose" of "a multifaceted effort to promote economic development"). Thus, the omnibus nonsubstantive code corrections act, touching on vast swaths of the Iowa Code, relates to a single subject of making code corrections. *See Western Int'l*, 396 N.W.2d at 364–65 (but still holding unconstitutional the inclusion

[10] The district court's decision does not discuss any of these potential subjects except for "medical procedures," which it notes only in recounting the parties' arguments. *See* App. 554.

of an unrelated substantive provision providing a new direct appeal to the Supreme Court in workers compensation proceedings). And provisions governing appellate procedure in the Supreme Court and others setting qualifications to be admitted to practice law in Iowa were both "clearly" matters "connected with the subject of procedure in the Supreme Court." *Rains v. First Nat'l Bank of Fairfield*, 206 N.W. 821, 822 (Iowa 1926).

Even an act (1) adding new alcohol-related criminal offenses; (2) adjusting when licensees could sell alcohol on Sunday; (3) mandating court notification to parents when their child appears for certain alcohol offenses; and (4) amending magistrate jurisdiction to add new alcohol offenses and remove first-offense OWIs has a single subject. *See Iowa Dist. Court*, 410 N.W.2d at 684. All these provisions were "rationally related to the regulation of alcohol and its consumption or possession." *Id.* So too does an act recodifying the entire criminal code, while also adding a new "mulct tax" penalty on trafficking cigarettes. *See Cook*, 93 N.W. at 377–78.

In the end, this Court has rarely struck down statutes as violating the requirement. *See* Pettys, *The Iowa State Constitution*,

at 173 (observing that "the court has rejected most of the Section 29 attacks" and that it is the *title requirement* rather than single-subject requirement that has the most "teeth"); *Long*, 142 N.W. 2d at 381 (citing William Yost, Note, *Before a Bill Becomes a Law—Constitutional Form*, 8 Drake L. Rev. 66, 67 (1958), to show that there had been "about ninety such cases involving [single-subject or title challenges] before our court and, in all but nine, statutes have been held valid"). This is not the rare case.

The Act embraces "one subject, and matters properly connected therewith." Iowa Const. art. III, § 29. And concluding otherwise would be such a deviation from this historically deferential approach that it would hinder the Legislature's ability to legislate in any kind of efficient manner and raise serious concerns of violating the separation of powers.

B. The district court improperly relied on the legislative process leading to the enactment of the Act.

In reaching the contrary conclusion, the district court accepted Planned Parenthood's invitation to focus its analysis instead on the legislative process leading to the enactment of the

Act. App. 561–64; *see also* App. 451–52, 453–55. The court relied heavily on—and claimed it was deferring to—the Speaker of the House's ruling that the amendment adding the waiting-period provision to the bill was not germane to the bill. App. 562 & n.5. It also reasoned that the "highly unusual circumstances" of the Act's passage, including clear "logrolling," were "exactly such 'tricks in legislation' and 'mischiefs' that the single-subject rule exists to prevent." App. 563–64.

But the district court erred in detouring from the proper search for a single subject on the face of the Act. And even if exploring the legislative process has any relevance, the history of this Act negates any single-subject concerns rather than raising them.[11]

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[11] This improper focus on the legislative process can also be seen in the court's language throughout the decision accepting Planned Parenthood's framing of the challenge as against "the Amendment," which was merely a part of the legislative process, rather than the Act that became law. *See, e.g.*, App. 561 ("The Court finds Amendment H–8314 to HF 594 violates the single-subject requirement of the Iowa Constitution."); App. 566 ("The Court finds Amendment H–8314 to HF 594 is unconstitutional under *PPHI*, and Respondents are barred from relitigating the case."); App. 570 ("Amendment H–8314 . . . is declared unconstitutional, as it violates the Iowa Constitution.").

The district court found it practically dispositive that the waiting-period provision was added in an amendment on the House floor that was ruled nongermane by the Speaker of the House under House Rule 38. App. 561–64. That rule requires that "[a]n amendment must be germane to the subject matter of the bill it seeks to amend" and that "[a]n amendment to an amendment must be germane both to the amendment and the bill it seeks to amend." 88th Gen. Assemb. H. Rule 38, https://perma.cc/LQ72-4NVL. And it reflects the House's internal procedure that the scope of a bill should ordinarily not be changed on the House floor, without the support of a constitutional majority to suspend that rule. *See* 88th Gen. Assemb. H. Rule 69A(1)(d) (requiring a constitutional majority for approval of a motion to suspend house rules).[12]

[12] The district court also found significance in the identity of the Speaker making the germaneness ruling. *See* App. 550 ¶ 25 ("Upon the Court's information and belief, the Speaker of the House is Patrick Grassley."); App. 553; App. 562 & n.5 (noting that it was "giving deference to Speaker Grassley," who is "a member of the same political party as the representatives who introduced the Amendment"). Neither the identity nor the ruling should have any relevance. But if this Court disagrees, it should take judicial notice that the person presiding in the chair during the germaneness ruling was Speaker Pro Tempore John H. Wills rather than Speaker Grassley. *See* H. Journal, 2020 Reg. Sess., at 754.

But the enforcement or suspension of this internal rule is not subject to judicial review. *See Carlton v. Grimes*, 23 N.W.2d 883, 889 (Iowa 1946) ("Whether either chamber strictly observes these rules or waives or suspends them is a matter entirely within its own control or discretion, so long as it observes the mandatory requirements of the Constitution."). The courts are not experts on the intricacies of legislative procedure. And attempting to rely on an interpretation of a procedural ruling of the Speaker to invalidate a law is not showing deference, *see* App. 562 n.5—it's an invasion of the sort that the separation of powers is designed to prevent.

This case shows the perils of going down that path. Contrary to the district court's view that the Speaker ruled on whether the 24-hour-waiting-period amendment was germane to the rest of the bill, *see* App. 553, 562 & n.5, the Speaker actually ruled only on whether it was germane to the Senate Amendment. *See* App 498 (H. Journal, 2020 Reg. Sess., at 758) ("The Speaker ruled the point well taken and amendment H–8314 not germane, to the Senate amendment H–8312."); 88th Gen. Assemb. H. Rule 38. That Senate amendment made only technical changes to the bill, including

adding a paragraph number and definitions for "minor" and "life-sustaining procedure." *See* H. Journal, 2020 Reg. Sess., at 1384. And it's not a close call whether the waiting-period amendment could be considered germane to that narrower scope. That ruling thus doesn't mean the Speaker would have ruled the same way if the question had been germaneness to the underlying bill—as the district court found he had ruled. But even looking past this error, it doesn't follow that just because an amendment exceeds the scope of the underlying bill that the amended bill does not have a new broader single subject.

Take the county officer compensation statute held to be constitutional in *Long* even though it contained a seemingly unrelated provision mandating courthouses remain open on Saturdays. 142 N.W. 2d at 380. If it had originally been introduced as a bill only setting courthouse hours, an amendment to add the remaining provisions about the compensation and other duties of county officers would have almost certainly been nongermane on the House floor. Yet if that amendment were passed after suspending the germaneness rule or a ruling of the Speaker that it

was germane, the new bill would have a different, broader subject. And if this broader bill were then enacted—identical in substance to the statute upheld in *Long*—wouldn't the result be the same as in that case?

In fact, the courthouse-hours provision *wasn't* in the compensation statute as originally introduced in 1965. It was offered as an amendment that *failed* in the House. *See* H. Journal, 1965 Reg. Sess., 61st Gen. Assemb., at 453–54 (Iowa 1965), *available at* https://www.legis.iowa.gov/docs/publications/YHJL/855085.pdf. It was offered again in the Senate and adopted—over the objection of an opponent that it wasn't germane. *See* S. Journal, 1965 Reg. Sess., 61st Gen. Assemb., at 562–64 (Iowa 1965), *available at* https://www.legis.iowa.gov/docs/publications/YSJL/855258.pdf. When the bill returned to the House with this and other amendments, the House concurred with the Senate amendment and passed the act then challenged in *Long*. *See* H. Journal, 1965 Reg. Sess., at 713–14. Yet the Court in *Long* didn't find it significant that the provision was added in an amendment—or recount any of this legislative history. *See Long*, 142 N.W. 2d at 380–85. Instead,

the Court analyzed the subject of the act based on the enacted text, just as the Court has in all its single-subject decisions. *Id.* at 380–83.[13]

Nothing in the text of the Constitution or prior cases suggests that the subject of an act should be analyzed differently depending on whether it was introduced with a broad subject or broadened by amendments in committee or—as occurred with the Act here—on the House floor. And the Legislature regularly—16 times over the last four years—suspends its rules to permit nongermane amendments for legislation both controversial and routine. *See, e.g.*, H. Journal, 2019 Reg. Sess., 88th Gen. Assemb., at 987–89 (Iowa 2019), *available at* https://perma.cc/5V3J-K98S (suspending rules to consider nongermane amendment to a physician-assistant licensure bill that passed 97 to 3); *id.* at 1064–65 (suspending rules

[13] As the district court noted, App. 562, *Long* does include dicta stating that one of the purposes served by the single-subject requirement is "orderly legislative procedure," meaning that "extraneous matters may not be introduced into consideration of the bill by proposing amendments not germane to the subject under consideration." *Long*, 142 N.W.2d at 382. But this discussion of *purpose* was not a part of the court's analysis—which ultimately determined there *wasn't* a single subject violation even though the case involved an arguably "extraneous" amendment.

to consider nongermane amendment to the HHS appropriations bill that narrowly passed 52 to 47).[14]

States that *have* chosen to prohibit changes in the subject of a bill during the legislative process have done so expressly by adopting *different* constitutional language. *See, e.g.*, La. Const. art. 3, § 15(C) ("No bill shall be amended in either house to make a change not germane to the bill as introduced."); Mich. Const. art. IV, § 24 ("No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title."); Mo. Const. art. III, § 21 ("[N]o bill shall be so amended in its passage through either house as to change its original purpose."); *see also*

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[14] Besides the Act challenged here and the two 2019 bills cited above, the House has suspended its rules to permit a nongermane amendment to 13 other bills since 2018: House File 802, House File 868, House File 847, and House File 813 in 2021. *See* H. Journal, 2021 Reg. Sess., 89th Gen. Assemb., at 734, 808–09, 1070–71, 1188-89 (Iowa 2021). House File 2589 and House File 2643 in 2020. *See* H. Journal, 2020 Reg. Sess., at 562–63, 737–38 (Iowa 2020), *available at* https://perma.cc/RVP3-ZBFL. Senate File 638 in 2019. *See* H. Journal, 2019 Reg. Sess., at 1061-62. House File 2280, Senate File 220, House Fil 2234, Senate File 2311, Senate File 359, and House File 2502 in 2018. *See* H. Journal, 2018 Reg. Sess., 87th Gen. Assemb., at 470–71, 583–85, 740–41, 872–73, 879–80, 896–97, 978 (Iowa 2018), *available at* https://perma.cc/X3AM-X76F.

Ala Const. art. IV, § 61; Ark. Const. art. 5, § 21; Colo. Const. art. 5, § 17; Miss. Const. art. IV, § 60; Mont. Const. art. V, § 11(1); Penn. Const. art. III, § 1; Tex. Const. art. III, § 30; Wyo. Const. art. 3, § 20. The framers of the Iowa Constitution did not do so.

And despite the district court's conclusion that "logrolling clearly occurred," App. 564, the process here was not logrolling. Indeed, it raises less of a policy concern than if the bill had been introduced in its final form originally. This Court has described "log-rolling" as "the practice of several minorities combining their several proposals as different provisions of a single bill, and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately." *Long*, 142 N.W.2d at 382. Or in a slight variation, it prevents "riders from being attached to bills that are popular and so certain of adoption that the riders will secure adoption, not on their own merits, but on the merits of the measure to which they are attached." *Id.*

Neither of those things happened here. All legislators had a chance to vote up or down on whether to broaden the subject of the

bill and add the 24-hour waiting period when they voted on the amendment. The House approved the amendment by a vote of 53 to 42. *See* App. 499–500 (H. Journal, 2020 Reg. Sess., at 759–60). The Senate adopted the amendment by a voice vote, and no senator felt strongly enough about the matter to request a recorded roll call vote. *See* App. 506–07 (S. Journal, 2020 Reg. Sess., at 841–42).

The waiting period was the only provision in that amendment. App. 508–09. So adoption of the amendment needed the same majority support as if it had been introduced and passed as a standalone bill. And we thus know majorities in both the House and Senate supported doing so. If majorities of the House and Senate hadn't favored adopting the amendment, it couldn't have been amended onto the Act.

This is the opposite of logrolling, which turns on two provisions being linked together to force legislators to support both or neither, thus securing passage of a provision incapable of passing alone. One might be able to make that claim if both of the Act's provisions had been included in the originally introduced bill, and the legislators had no opportunity to vote to separate them. *Then*

we might wonder if each provision could obtain a majority on its own.

But we don't have to wonder here because there was a standalone vote on the amendment. And there is no evidence in the record—and no reason to believe—that any legislator voted for final passage of the Act only because it included both provisions. *See* App. 502 (H. Journal, 2020 Reg. Sess., at 762) (recording final passage of the Act by a 53 to 42 vote identical to the vote on the amendment); App. 506–07 (S. Journal, 2020 Reg. Sess., at 841–42) (recording final passage of the Act by a vote of 31 to 16). In fact, the passage of the Act in the House was slightly closer than the 58 to 36 vote by which the earlier version of the bill—without the waiting period—had originally passed the House. *Compare* App. 502 (H. Journal, 2020 Reg. Sess., at 762) *with* H. Journal, 2019 Reg. Sess., 88th Gen. Assemb., at 492, *available at* https://perma.cc/5V3J-K98S.

To be sure, the legislative process moved swiftly once the Senate took up the House bill that had lingered without action for a year. And as is often the case at the end of a legislative session, legislators and lobbyists not involved in final negotiations and

decision-making about what bills will be considered are surprised by some policies debated. But they weren't confused or surprised about what this amendment or bill did. *See Rush v. Reynolds*, No. 19-1109, 2020 WL 825953, at *13 (Iowa Ct. App. Feb. 19, 2020) (rejecting argument of legislator's surprise where "alleged surprise was the timing of the introduction of [the amendment], not the failure to adequately disclose its content"). And opponents had the chance to debate and attempt to persuade their colleagues to defeat it at several junctures. App. 549–51 ¶¶ 20, 23, 27, 31.

At bottom, this journey through the legislative terrain is irrelevant to the required constitutional analysis of whether the Act embraces one subject. The single-subject clause does not prohibit bills from being amended to broaden—or even change entirely—their subject during the legislative process. Nor does it regulate the notice provided before debating and voting on amendments. It doesn't guarantee the right to offer additional amendments on bills bouncing between chambers. It does not mandate public hearings or committee meetings. And it does not prevent the Legislature from working around the clock and into the morning hours as it

seeks to quickly complete a compressed legislative session in the middle of a pandemic. These are matters governed by the internal rules and practices of the House and Senate—not Article III, section 29 of the Iowa Constitution.

Planned Parenthood and others who opposed passage of the Act are understandably disappointed that majorities of the House and Senate managed to pass it. And those who believe that the process used to do so lacked sufficient fairness or transparency may make that political case to legislators and the voters who elect them. In this lawsuit, however, the question is whether the Act that was enacted by the Legislature and Governor "embraces but one subject, and matters properly connected therewith." Iowa Const. art. III, § 29. Because the Act complies with this requirement, Planned Parenthood's single-subject claim fails as a matter of law. The district court erred in concluding otherwise. And this Court should reverse and dismiss the claim.

II. This Court's 2018 ruling that a 72-hour-waiting-period statute violates the equal-protection and due-process protections of the Iowa Constitution doesn't bar the State from defending a new 24-hour-waiting-period statute.

As an alternative basis for granting Planned Parenthood summary judgment, the district court held that the 24-hour-waiting-period provision in the Act "is unconstitutional under *PPHI*, and Respondents are barred from relitigating that case." App. 566. The court rejected the State's argument that issue preclusion cannot apply because the issues are not identical. App. 567–70. It also considered and criticized the State's argument that issue preclusion cannot prevent the State from asking this Court on appeal to overrule its 2018 ruling in *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018), because it was wrongly decided. App. 567 & n.8, 569 & n.9; *see also* App. 519 n.6, 521 n.9.

These constitutional claims—like the single-subject claim—are reviewed "de novo." *Planned Parenthood*, 962 N.W.2d at 45–46; *State v. Seager*, 571 N.W.2d 204, 207 (1997). And again, Planned Parenthood has not met its "heavy burden" to prove

"unconstitutionality beyond a reasonable doubt." *Id.* The district court's ruling should be reversed.

Planned Parenthood must establish four elements to invoke issue preclusion based on a determination against the State in prior litigation:

> (1) the issue in the present case must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior case; and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Employers Mut. Cas. Co. v. Van Haaften, 815 N.W.2d 17, 22 (Iowa 2012). And because Planned Parenthood seeks to use issue preclusion offensively to establish the elements of its due-process and equal-protection claims, the standard is heightened. *Id.* It must also show that the State "was afforded a full and fair opportunity to litigate the issues" and "whether any other circumstances are present that would justify granting . . . [the State] occasion to relitigate the issues." *Id.*

The first requirement of identical issues is critical—and fatal to Planned Parenthood's attempt to rely on issue preclusion here. "Similarity of issues is not sufficient; the issue must be precisely

the same." *Estate of Leonard, ex rel., Palmer v. Swift*, 656 N.W.2d 132, 147 (Iowa 2003) (cleaned up). Thus, for example, an order suppressing a murder weapon based on an invalid warrant was not preclusive in a second prosecution of the same Defendant after the same weapon was obtained with a new warrant. *See Seager*, 571 N.W.2d at 207–09 (reversing district court that had applied issue preclusion and reasoning "the suppression order in 1996 dealt with a search warrant and many facts that were not in existence in July 1979"); *see also Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 136–38 (Iowa 1988) (giving no preclusive effect to a ruling that failure to return a child was not contempt in a second contempt action over failure to return the child as ordered by a new court order). This makes sense because one of the justifications for issue preclusion is to prevent "two authoritative but conflicting answers being given to *the very same question*." *Employers Mut. Cas. Co.*, 815 N.W.2d at 22 (emphasis added).

Courts should be particularly cautious in applying issue preclusion in constitutional adjudication. *See Montana v. United States*, 440 U.S. 147, 163 (1979) ("Unreflective invocation of

collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical"); *Yeoman v. Commonwealth*, 983 S.W.2d 459, 466 (Ky. 1998) (noting in a close case, "given the magnitude of the constitutional issues involved, we should err on the side of caution by resolving the issue on the merits"); *Gold v. DiCarlo*, 235 F. Supp. 817, 820 (S.D.N.Y. 1964) ("At least in the constitutional area, the considerations of finality that stand behind the res judicata doctrine must be balanced against and ofttimes give way to the government's need to regulate abuses that change with the passage of time.").

And so, even where an identical constitutional issue is decided, issue preclusion does not bar a party from arguing to a court with authority to overrule the prior decision that its original decision was decided using the wrong legal standard. *See Montana*, 440 U.S. at 163; *Gold*, 235 F. Supp. at 820. As explained in the Second Restatement of Judgments, "A rule of law declared in an action between two parties should not be binding on them for all

time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected." Restatement (Second) Judgments § 28 cmt. b.[15]

A. The constitutional issues decided in the 2018 ruling are not identical to those at issue in this challenge to the constitutionality of a 24-hour-waiting-period statute.

In *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, this Court considered the constitutionality of the 72-hour-waiting-period statute enacted by the Legislature and Governor in 2017. 915 N.W.2d at 213; Act of May 5, 2017, ch. 108, 2017 Iowa Acts 246. The Court held that the 72-hour waiting period "violates due process under the Iowa Constitution" because "it cannot satisfy strict scrutiny." *Planned Parenthood*, 915 N.W.2d at 244. Likewise, the Court held that the 72-hour waiting period "violates the right to equal protection under the Iowa Constitution" for the same

[15] This Court has repeatedly relied on other portions of the Second Restatement of Judgments when analyzing issue preclusion. *See, e.g.*, *Clark v. State*, 955 N.W.2d 459, 469 (Iowa 2021); *Stender v. Blessum*, 897 N.W.2d 491, 513 (Iowa 2017); *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 572 (Iowa 2006); *Grant v. Iowa Dep't of Hum. Servs.*, 722 N.W.2d 160, 174, 177 (Iowa 2006).

reason. *Id.* at 246. The Court thus reversed the judgment of the district court and ordered the 72-hour waiting period "stricken from the statute." *Id.* at 246.

Two years after that decision, the Legislature and Governor did so. Recognizing that the 72-hour waiting period had been declared unconstitutional, they enacted a new law that struck that requirement and replaced it with a 24-hour waiting period. *See* App. 495–96 (Act of June 29, 2020 § 2, ch. 1110, 2020 Iowa Acts 298 (codified at Iowa Code § 146A.1(1) (2021))). Planned Parenthood now seeks to use the Supreme Court's ruling that the 2017 statute was unconstitutional to preclude this Court from determining whether the 2020 statute is constitutional.

But these are not identical issues. This case involves a statute not even in existence at the time of this Court's 2018 ruling. That statute requires a waiting period of 24 hours instead of 72. And it

imposes the requirement on a fluid abortion industry that is not necessarily affected in the same way in 2021 as it was in 2017.[16]

While the questions of whether each statute violates the Iowa Constitution's equal-protection and due-process protections are certainly similar, they are not the very same. To paraphrase *Seager* and *Amro*, this case deals with a statute and many facts that were not in existence in 2017 and 2018. *See Seager*, 571 N.W.2d at 209 (quoting and paraphrasing *Amro*, 429 N.W.2d at 140). Planned Parenthood's attempt at issue preclusion must therefore fail.

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[16] The passage of time, year-long pandemic, and change in federal Administrations make this observation self-evident. But the Court may also take judicial notice of public sources describing the fluid nature of the industry. *See, e.g.*, Tim Hynds, *Planned Parenthood North Central States to reopen limited services in Sioux City*, Sioux City J., July 2, 2020, https://perma.cc/5SPA-TH2F; Abigail Abrams, *Planned Parenthood Is Expanding Telehealth to All 50 States Amid the Coronavirus Pandemic*, Time, April 14, 2020, https://perma.cc/JX9W-JLTH; Prop. Dep't of Health & Human Servs. Rule, *Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, 86 Fed. Reg. 19812 (Apr. 15, 2021), https://perma.cc/Z4SU-HY2P (proposing new rules to rescind the 2019 Trump Administration rules that had restricted Title X family-planning funding related to abortion counseling and abortion providers). Because Planned Parenthood's summary judgment motion based on issue preclusion was filed before the parties had a chance to engage in any discovery, the State has not yet had the chance to develop a full factual record of the potential effects of the *current* statute in the *current* time.

The Montana Supreme Court recently rejected a similar attempt to rely on issue preclusion by Planned Parenthood of Montana. *See Planned Parenthood of Montana v. State*, 342 P.3d 684 (Mont. 2015). In that case, a Montana court had previously declared unconstitutional a statute requiring parental notification before providing an abortion to a minor under the age of 18. *Id.* at 686. Montana later enacted a different parental notification requirement applying only to minors under the age of 16. *Id.* The second statute also removed a heightened clear-and-convincing-evidence standard for the judicial bypass procedure used to exempt minors from the notification requirement that had been in the original statute. *Id.* at 687. The Montana Supreme Court recognized that the two statutes "are indeed similar," but reasoned that "[i]ssue preclusion requires more than similarity, however, it requires that the issues be identical." *Id.* at 688. The court suggested that the difference in age ranges protected by the statute might lead to a different result under the constitutional analysis, yet declined to reach the merits of that issue, explaining, "That this

issue should be addressed on the merits, however, is precisely why issue preclusion does not apply." *Id.*

The court also clarified that a difference between two statutes need not be one that makes it likely that the challenge to the new statute would reach a different result. *See id.* at 687–88 ("Whether, or to what extent those differences make the [new statute] more or less apt to pass constitutional muster as opposed to [the first statute] is not the question before us. The question before us is only whether the issues in the two cases are identical.").

Thus, when Planned Parenthood of Montana sought to use the prior ruling on the parental notification statute to preclude relitigating the constitutionality of a third statute—a parental *consent* requirement that was clearly more restrictive than the prior requirement of mere notification—the court rejected that attempt as well. *Id.* at 687 ("The fact that the 2013 Parental Consent Act is more restrictive highlights that the two laws are not identical."). The court explained:

> Whether a parental consent law can pass constitutional muster when the [prior] court held that a parental notification law could not is no doubt an argument that will be made to the District Court when this matter is

> resolved on its merits. It is, however, just that—an argument on the merits. The distinction does not serve to bar the argument entirely on grounds of issue preclusion.

Id. at 688.

Courts from other states also agree—the constitutionality of one statute is not an identical issue that precludes consideration of the constitutionality of a different, later-enacted statute. *See Yeoman*, 983 S.W.2d at 465–66 (holding that prior ruling on constitutionality of a health care provider tax was preclusive in a challenge to a similar tax enacted a year later because two "minor differences" were "sufficient to avoid issue preclusion and to permit a second trial on the merits"); *Am. Trucking Ass'ns v. Conway*, 566 A.2d 1323, 1327–28 (Vt. 1989) (holding that prior ruling on constitutionality of a tax on certain out-of-state trucks was not preclusive of a similar tax enacted the next year because "[a]lthough minimal, the changes between the two provisions are significant enough to render them outside the scope of issue preclusion's requirement of *identical* issues"); *Bushco v. Shurtleff*, 729 F.3d 1294, 1301–02 (10th Cir. 2013) (holding that prior ruling on constitutionality of sexual solicitation statute was not preclusive

in a challenge to a similar statute because they "were put into place by separate legislative enactments, and they serve distinct purposes" and "are different in their effect"); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 479 (5th Cir. 2002) (holding that prior ruling that ordinance regulating sexually oriented businesses violated First Amendment was not preclusive in a challenge to an *identical* later enacted ordinance where the current factual circumstances surrounding its enactment were relevant to the merits of the constitutional issue).

But the district court disagreed. That this case involved a different statute, passed by a different Legislature, with a different waiting period—a third of the length of the 72-hour period held unconstitutional in 2018—didn't matter. Because rather than compare the issue to be decided here with the issue actually decided in the 2018 ruling to determine whether they are identical, the district court looked to the embedded legal principles used to reach that ultimate decision. And in those principles, the district court found commonality. *See* App. 567–68.

Following the lead of Planned Parenthood, the district court reasoned that this Court held that "'mandatory waiting periods' (whether it is 72-hour, 24-hour, or any time frame contrary to 'PPH's current same-day regime')" do not "impact patient decision-making" and substantially burden women, and thus all fail strict scrutiny. App. 568. Explaining that "case law holdings do not exist in a bubble," *id.*, the court disagreed with the State's argument that no such broad pronouncement is in the 2018 ruling and, even if it could be constructed from the reasoning, such overbroad dicta would not have "have been essential to the resulting judgment" as required for issue preclusion to apply. *Employers Mut. Cas. Co.*, 815 N.W.2d at 22.

The district court went astray, however, by applying its normal methods of analyzing prior precedent for application in a new case instead of the different methods of issue preclusion. Of course, there are many legal principles to be drawn from the 2018 ruling that Planned Parenthood may use as arguments to invalidate this new statute. But this Court did not consider the constitutionality of a 24-hour-waiting period in its 2018 decision.

Such a statute was not challenged in that lawsuit. And no statement or principle about a 24-hour waiting period could be an essential holding to this Court's judgment on a 72-hour-waiting-period statute. *Cf. Planned Parenthood of Montana*, 342 P.3.d at 688 (explaining that the prior ruling did not decide "whether the State's asserted compelling interest could ever justify *any* infringement on a minor's right to an abortion" but "only whether the State's asserted compelling interest could justify a law requiring minors under 18 to notify their parents").[17]

The district court erred in holding that the constitutional issues decided in the 2018 ruling are identical to those at issue in this challenge to the constitutionality of a 24-hour waiting period.

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[17] The district court found *Planned Parenthood of Montana* unpersuasive, concluding that "the two statutes and issues in *Montana* were clearly dissimilar" while "the issues here are precisely the same." App. 570. And it reasoned the differences "went straight to the heart of the constitutional question." *Id.* But reducing the burden of a parental notification statute by reducing the ages it applies to is just as dissimilar as reducing the burden of a waiting-period statute by shortening the waiting period. And the "heart" of the constitutional question is irrelevant, as the Montana Supreme Court explained when holding the State was not precluded from defending a stricter consent requirement that didn't differ in any way likely to reach a different result. *Planned Parenthood of Montana*, 342 P.3.d at 687–88.

By stretching to find identity of issues in the reasoning, rather than the necessary holding it also exercised no "caution" due "given the magnitude of the constitutional issues involved." *Yeoman*, 983 S.W.2d at 466. The district court's grant of summary judgment to Planned Parenthood based on issue preclusion should be reversed.

B. Even if the issues are identical, issue preclusion doesn't bar the State from asking this Court to overrule its 2018 ruling because the Iowa Constitution doesn't require strict scrutiny of abortion regulations.

Even if the district court is correct that there are identical issues that preclude the State from defending the constitutionality of this new 24-hour-waiting-period statute in the district court, issue preclusion still doesn't bar the State from asking *this* Court to reconsider the level of scrutiny required by the Iowa Constitution. *See* Restatement (Second) Judgments § 28 cmt. b.; *Montana*, 440 U.S. at 163; *Gold*, 235 F. Supp. at 820. While governing precedent is binding on a district court, on appeal, this Court has the chance to correct constitutional legal errors that

could otherwise remain frozen, impeding the Legislature's ability to legislate and the Executive's authority to enforce the law.[18]

Of course, that issue preclusion doesn't *bar* the State from seeking reconsideration of a prior constitutional issue doesn't mean that the State will succeed. The Court could still decide to reaffirm the prior holding on the merits or as a matter of stare decisis. But here, the Court *should* reconsider its 2018 decision in *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018).[19]

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[18] "Unreflective invocation" of issue preclusion, *Montana*, 440 U.S. at 163, would be particularly problematic in the context of abortion regulation in Iowa, where Planned Parenthood performs about 95% of Iowa abortions, *see Planned Parenthood*, 962 N.W.2d at 45, and the State is generally the regulating entity. So the same parties are likely to often be involved in similar litigation risking litigation and the proper development of the law being complicated by offensive or defensive preclusion.

[19] In the interest of judicial economy, this Court should reconsider its 2018 ruling now even if it agrees with the State's first argument that the issues decided in that ruling are not identical to those here. Providing guidance now on the proper standard for considering the merits of the constitutional due-process and equal-protection challenges will aid the district court and the parties in efficiently conducting discovery, considering summary judgment, and trying the case. And it will allow the district court to apply the correct standard in the first instance without a second remand as

That decision is demonstrably erroneous, it's too recent to have generated significant reliance interests, and the principle of stare decisis has limited application in constitutional cases. Whether the Iowa constitution protects a right to abortion with is a legal question that this Court should answer now, so that the district court can apply the proper legal standard to Planned Parenthood's claims at trial.

In 2018, this Court held for the first time that the Iowa Constitution protects a fundamental right "to decide whether to continue or terminate a pregnancy." *Planned Parenthood*, 915 N.W.2d at 237, 241. It based its decision on article I, sections 6 and 9 of the Iowa Constitution, even though—as the dissent pointed out—"[n]either provision as worded or as originally understood supports a right—let alone a fundamental right—to terminate a pregnancy." *Id.* at 247 (Mansfield, J., dissenting). Indeed, shortly after the adoption of the Iowa Constitution, the Legislature passed

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would be the general practice if this Court waited to reconsider the standard until after a trial applying strict scrutiny. *See Schmidt v. State*, 909 N.W.2d 778, 799 (Iowa 2018); *State v. Ary*, 877 N.W.2d 686, 707 (Iowa 2016); *McQuistion v. City of Clinton*, 872 N.W.2d 817, 819–20 (Iowa 2015).

a law prohibiting all abortions unless necessary to save the mother's life. *Id.* Abortion remained illegal in Iowa for more than one hundred years. *Id.*

The Court reasoned that the Iowa Constitution is "living" and must be interpreted with "flexibility" and "in accordance with the public interest"—"freed . . . from the private views of the constitution's framers." *Id.* at 236 (majority opinion). But instead of employing the "living constitution" as a means of adapting to legislative enactments—as was the case in the decisions the Court cited as support for the principle—it "erect[ed] a strict scrutiny barrier to legislative action without reference to the constitutional history or text." *Id.* at 248 (Mansfield, J., dissenting).

The decision recognized that to qualify as fundamental, a right must be "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* at 233 (majority opinion) (cleaned up). Yet it dismissed this bedrock principle because, in the majority's view, "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* (quoting *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015)). It also

chose not to rely on its traditional practice of "follow[ing] the U.S. Supreme Court's guidance in determining which rights are fundamental." *King v. State*, 818 N.W.2d 1, 26 (Iowa 2012). As a result, the Court made the same error that the United States Supreme Court denounced in *Casey*, to wit: applying strict scrutiny to "all governmental attempts to influence a woman's decision on behalf of the potential life within her" is incompatible with the "substantial state interest in potential life throughout pregnancy" recognized in *Roe*. *Casey*, 505 U.S. at 876; *see also Planned Parenthood*¸ 915 N.W.2d at 249 (Mansfield, J., dissenting).

As the dissent to the 2018 ruling recognized, while a reading of this Court's substantive-due-process decisions on parenting and procreation could lead to the conclusion that abortion implicates substantive due process as well, there is a "crucial difference." *Planned Parenthood*, 915 N.W.2d at 249 (Mansfield, J., dissenting). "In none of those other areas was there a fundamental interest on the other side of the ledger. The fact that there are *two* profound concerns—a woman's autonomy over her body and human life—has to drive any fair-minded constitutional analysis of the problem." *Id.*

This point was not lost on the United States Supreme Court in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; 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, depending on one's beliefs, for the life or potential life that is aborted.

Id. (quoting *Casey*, 505 U.S. at 852). As the *Casey* Court explained when it upheld, among other things, a mandatory 24-hour waiting period for abortions, "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Id.* (quoting *Casey*, 505 U.S. at 873).

Several members of this Court have agreed that the doctrine of stare decisis has limited application in constitutional cases. *State v. Kilby*, 961 N.W.2d 374, 386 (Iowa 2021) (McDonald, J., concurring joined by Oxley, J.); *Goodwin v. Iowa Dist. Ct. for Davis Cty.*, 936 N.W.2d 634, 649 (Iowa 2019) (McDonald, J., concurring joined by Christensen, C.J.). The Constitution is "the supreme law

of the state, and any law inconsistent therewith shall be void." Iowa Const. art. XII, § 1. "Notably, the Iowa Constitution does not distinguish between legislative, executive, and judicial acts." *Kilby*, 961 N.W.2d at 386 (McDonald, J., concurring); *Goodwin*, 936 N.W.2d at 649 (McDonald, J., concurring). In other words, there is "no legitimate reason why a court may privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself." *Goodwin*, 936 N.W.2d at 649 (McDonald, J., concurring) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019)).

For the reasons explained in the dissent in *Planned Parenthood*, the decision relied on an interpretation of the Iowa Constitution that is demonstrably erroneous. Nothing in the text, structure, history, or tradition of the Iowa Constitution makes abortion a fundamental right. Because abortion involves "the purposeful termination of a potential human life," *Harris v. McRae*, 448 U.S. 297, 325 (1980), it is distinct from the privacy or liberty interests that this Court has recognized in its substantive-due-process jurisprudence. *Planned Parenthood*, 915 N.W.2d at 249 (Mansfield, J., dissenting). The majority in *Planned Parenthood*

effectively ignored this distinction, instead treating opposition to abortion as a matter of "moral scruples" and "equat[ing] opposition to abortion with opposition to gambling." *Id.*

Moreover, strict scrutiny is an unworkable mechanism for adequately accommodating the important state interests in regulating abortions. As the dissent explained, "[t]he majority's requirement of 'strict scrutiny' and 'narrow tailoring'—combined with its rejection of *Casey*'s undue burden standard—would make any abortion restriction very difficult to sustain." *Id.* at 254–55. The strict scrutiny standard is inconsistent with the "substantial state interest in potential life throughout pregnancy" recognized in *Roe*. *Casey*, 505 U.S. at 876.

Where strict scrutiny is not appropriate, the Iowa Constitution typically requires that a statute "need only survive the rational-basis test." *Hensler v. City of Davenport*, 790 N.W.2d 569, 580–81 (Iowa 2010). But several other states have chosen to follow *Casey* and the undue-burden standard under their own constitutions. *Planned Parenthood*, 915 N.W.2d at 253–54 (Mansfield, J., dissenting). As the dissent in *Planned Parenthood*

suggested, this Court could choose to follow *Casey*, "at least until the Supreme Court offers a different legal standard for our consideration." *Id.* at 254. The undue-burden test could provide an "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Casey*, 505 U.S. at 876.

The 2018 *Planned Parenthood* decision is fewer than four years old, which is another reason why it is entitled to less stare decisis weight. *See Montejo v. Louisiana*, 556 U.S. 778, 793 (2009). Stare decisis exists as a "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillary*, 474 U.S. 254, 265 (1986). The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* at 265–66.

"Forgoing accepted methods of constitutional interpretation," the majority in *Planned Parenthood* declared that abortion, which was "continuously illegal in Iowa from the time our constitution was

adopted until the United States Supreme Court overrode our law" in *Roe*, is a fundamental right. *See Planned Parenthood,* 915 N.W.2d at 246 (Mansfield, J., dissenting). It also rejected years of federal precedent developing the contours of the constitutional right to abortion under the United States constitution. The decision is the definition of an "erratic" change in the law, untethered from the "principled and intelligible" development that the doctrine of stare decisis seeks to preserve. It should be overruled.

CONCLUSION

For these reasons, the district court's order granting summary judgment to Planned Parenthood and denying partial summary judgment to the State should be reversed. This Court should overrule *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018), and this case should be remanded to the district court for discovery and further consideration of the merits of Planned Parenthood's equal-protection and due-process claims.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 12,805 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I, Samuel P. Langholz, hereby certify that on the 26th day of October, 2021, I, or a person acting on my behalf, filed this brief and served it on counsel of record to this appeal with via EDMS.

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