IN THE IOWA SUPREME COURT

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

BRIEF OF AMICI CURIAE UNIVERSITY OF IOWA AND DRAKE UNIVERSITY LAW PROFESSORS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are current and retired legal scholars, teachers, and clinicians who hold or have held faculty positions in law at the University of Iowa and Drake University and who have expertise in subjects relevant to the stare decisis questions presented in this case. Professor Burton, in particular, is the author of *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication,* 35 Cardozo L. Rev. 1687 (2014).

The amici submit this brief to provide additional insight regarding the relationship between stare decisis and overruling and how that relationship applies in this appeal. They believe adhering to precedent is a vital legal value and, for the reasons presented below, request that this Court follow its decision in *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018) ("*Planned Parenthood of the Heartland*") should it reach that issue.

The amici include the following individuals: (University of Iowa College of Law) John S. Allen, Herschel G. Langdon Clinical Professor of Law; Arthur E. Bonfield, Allan D. Vestal Chair in Law and Associate Dean Emeritus; Steven J. Burton, John F. Murray Professor of Law Emeritus; Jonathan C. Carlson, Professor of Law and International Studies, Victor & Carol Alvarez Fellow in Law; Bram Elias, Clinical Professor of Law; Ann

Laquer Estin, Associate Dean for Faculty, Aliber Family Chair in Law; N. William Hines, F. Rosenfield Professor and Dean Emeritus; Sheldon F. Kurtz, David H. Vernon Professor of Law Emeritus; John C. Reitz, Edward Carmody Professor of Law; Leonard A. Sandler, Clinical Professor of Law; Barbara A. Schwartz, Clinical Professor of Law Emeritus; Lea VanderVelde, Josephine R. Witte Chair in Law; John Whiston, Herschel G. Langdon Clinical Professor of Law Emeritus; Stella Burch Elias, Professor of Law and Chancellor William Gardiner Hammond Fellow in Law; Carolyn Jones, Dean Emerita and Orville L. and Ermina D. Dykstra Chair in Income Tax Law Emerita (Drake University Law School) Sally Frank, Professor of Law; Mark S. Kendle, James Madison Chair Professor in Constitutional Law; Maura Strassberg, Professor in Law; and David S. Walker, Dwight D. Opperman Distinguished Professor of Law Emeritus.

The affiliations with the University of Iowa and Drake University are supplied for identification purposes only. The views articulated in this brief are solely those of the amici and not the opinions of the University of Iowa or the University of Iowa College of Law or of Drake University or Drake University Law School.

The amici have no personal stake in this case. Rather, they have a professional interest in seeing Iowa law be maintained in a way that preserves

the integrity of its laws and the nonpolitical character of the Court. The rule of law requires no less.

This brief was not authored, in whole or in part, by counsel for any party; no party or party's counsel, or any other person, contributed money to fund the preparation or submission of this brief.

BACKGROUND

This appeal involves Appellant State of Iowa's challenge to a district court ruling striking down a 24-hour waiting period for an abortion the Iowa General Assembly enacted during its last legislative session. This legislation amended the 72-hour waiting period this Court struck down in *Planned Parenthood of the Heartland* in 2018 as contrary to the due process and equal protection clauses of the Iowa Constitution.

The district court held the 24-hour waiting period was invalid for two reasons: First, the district court held the 24-hour waiting period was improperly added as an amendment to a bill of a different subject. Second, the district court found that even if the amendment and the bill pertained to the same subject, the State was nonetheless collaterally estopped from relitigating the validity of the notice provision under the equal protection and due process clauses of the Iowa Constitution because this Court resolved identical issues against it in *Planned Parenthood of the Heartland*.

The State argues that each of the district court's reasons for invalidating the 24-hour notice provision was wrong as a matter of law. Regarding the second reason, the State argues in the alternative that even if the district court correctly concluded *Planned Parenthood of the Heartland* precluded it from litigating the 24-hour notice period, "issue preclusion still does not bar the

State from asking this Court to reconsider the level of scrutiny required by the Iowa Constitution." (Appellant's Brief, p. 66). It is through that narrow crevasse that stare decisis may seep into this appeal.

ARGUMENT

I. This Court Has Followed Precedent Presumptively

From its "very beginnings," this Court has "guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." *Bd. of Waterworks Trustees of City of Des Moines v. Sac Cty. Bd. of Supervisors*, 890 N.W.2d 50, 60-61 (Iowa 2017) (quoting *McElroy v. State*, 703 N.W.2d 385, 392 (Iowa 2005)). This Court's strong propensity to follow the "holdings of past rulings" is rooted in the need to "imbue the law" with the "predictability and continuity" necessary to "maintain the stability essential to society." Id. Or, stated more expansively,

> [I]t is of critical importance that the law should be settled. Fairness to the trial courts, to the legal profession, and above all to citizens generally demands that interpretations once made should be overturned only [for] the most cogent of reasons…Legal authority must be respected; not because it is venerable with age, but because it is important that courts, and lawyers and their clients, may know what the law is and order their affairs accordingly.

State v. Liddell, 672 N.W.2d 805, 813 (Iowa 2003) (alteration in the original) (quoting *Stuart v. Pilgrim,* 247 Iowa 709, 714, 74 N.W.2d 212, 215-16 (1956)).

There is, therefore, a strong presumption that the Court will follow precedent, and for good reason. The "values fostered by state decisis," as recognized by at least one of this Court's members, are essentially threefold:

> First, as in other contexts, stare decisis fosters Rule of Law values. These include consistency and equal treatment, stability, and predictability at any one time and over time. Following precedent, moreover, saves lawyers and judges from having to rethink every legal question from the ground up whenever a question arises. And precedent affords lawyers and lower court judges common points of reference from which to engage productively.
>
> Second, in the present context, stare decisis fosters constitutionalism. It constrains the exercise of arbitrary power by the Court. It denies the Court freedom to pick and choose the precedents it will follow. It also tends to bring unity to the Constitution as it is practiced over time, and the Court's composition changes.
>
> Third, stare decisis fosters legitimacy, which requires the Court to have, and be perceived as having, adequate legal justifications for its decisions. Justifications flowing from the Court's precedents tend, at the least, to be so perceived. Even when the Justices disagree, the disagreement will be perceived to be one about the law when all of them reason from the same starting points. To the extent possible, the Constitution and precedents interpreting it should form a coherent corpus of law, widely perceived and practiced as such.

State v. Gaskin, 866 N.W.2d 1, 39 (Iowa 2015) (Waterman J, dissenting) (quoting Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 Cardozo L. Rev. 1687, 1696-97 (2014)).

Stare decisis constrains a supreme court's exercise of power, as laws constrain every legal institution's power. Stare decisis is especially important when a supreme court's composition recently has changed. In that circumstance, when followed, it refutes the cynical view that a supreme court is a political institution guided by the justices' personal values, rather than the law.

In any case before it, a supreme court has the power to disregard stare decisis and overrule a precedent. This Court has done so sparingly, recognizing that it "may overrule a decision found to be clearly erroneous" only when "compelling reasons exist to do so." *Schmidt v. State*, 909 N.W.2d 778, 804 (Iowa 2018); *State v. Williams*, 895 N.W.2d 856, 859-60 (Iowa 2017). *See also McElroy,* 703 N.W.2d at 394 (Iowa 2005) (holding this Court may overrule prior decisions "when error is manifest, including error in the interpretation of statutory enactments."); *Miller v. Westfield Ins. Co*. 606 N.W.2d 301,306 (Iowa 2000) (stating "stare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements where error is manifest, including error in the interpretation

of statutory enactments."); *Book v. Doublestar Dongfeng Tyre Co*., 860 N.W.2d 576, 594 (Iowa 2015) ("Stare decisis alone dictates continued adherence to our precedent absent a compelling reason to change the law.")

II. Reconciling Stare Decisis and Overruling: A Two-Step Analysis

On appropriate occasions, a supreme court may overrule a prior case to bring the law up to date. It should do so cautiously because, in the abstract, stare decisis and overruling are in conflict: A supreme court must follow its precedents but, in any particular case, it can overrule them. That is, a supreme court must follow precedent except that it need not.

This conflict, if left unreconciled, leaves a supreme court free to pick and choose the precedents it likes, calling into question the court's integrity and legitimacy, making the Court's decisions unpredictable, and disrespecting the rule of law. Iowa law reconciles the conflict by presuming stare decisis, requiring that, to overrule a precedent, the Court must find, as indicated in Part I above, that the precedent was clearly and manifestly wrong, not just wrong, and that there are compelling reasons to do so, not just reasons to do so. The prior decision must have "proved unworkable in practice, do violence to legal doctrine, or has been so undermined by subsequent factual and legal development that continued adherence to the precedent is no longer tenable." *Youngblut v. Youngblut, 945 N.W.2d 25, 44 (Iowa 2020)* (dissenting opinion

of MacDonald, J.), citing *Janus v. AFSCME, Council 31*, ___ U.S. __, 138 S.Ct. 2448, 2478-79 (2018).)

Iowa law, thus understood, satisfies the requirement of due process. A woman's right to choose to terminate a pregnancy is a fundamental liberty interests that cannot be extinguished without procedural and substantive due process of law. Procedural and substantive due process require strict scrutiny be applied to any law attempting to limit or curtail this fundamental liberty interest, as this Court correctly held in *Planned Parenthood of the Heartland*. The U.S. Constitution's Fourteenth Amendment contains a Due Process Clause applicable to the State of Iowa: "nor shall any state deprive any person of life, liberty, or property, without due process of law." The Iowa Constitution contains a Due Process Clause in essentially the same terms: "no person shall be deprived of life, liberty, or property, without due process of law." I.C.A. Const. Art. 1, § 9.

The emphasis here is on the "law" in "due process of law." The clause rules out judicial decisions that are products of a justice's or a court majority's values or convictions unless they coincide with the law. Without more, the Supreme Court's disagreement with a precedent like *Planned Parenthood of the Heartland* is not a sufficient reason to overrule it. As Justice Anthony Kennedy wrote for the US. Supreme Court, "[t]he Due Process Clause . . . is

a central limitation on the exercise of judicial power." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot*., 560 U.S. 702, 735, 130 S.Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

To give full effect to Iowa law and satisfy due process, the Court should continue to presume stare decisis and consequently proceed in two steps. First, as the Court has recognized, stare decisis has two purposes: it fosters the law's "predictability and continuity" as necessary to "maintain the stability essential to society." *Bd. of Waterworks Trustees of City of Des Moines v. Sac Cty. Bd. of Supervisors*, 890 N.W.2d 50, 60-61 (Iowa 2017) (quoting *McElroy v. State*, 703 N.W.2d 385, 392 (Iowa 2005)). Second, the presumption should be overcome--stare decisis should lapse for a precedent--when, and only when, following precedent would not serve these purposes. If stare decisis has not lapsed, the Court need not reach the second step. If, and only if, stare decisis has lapsed, the Court should consider overruling when, in addition to the lapse of stare decisis, the precedent in question was manifestly wrongly decided, the relevant factors listed above indicate a compelling reason to overrule, and there is a better alternative.

III. The Court Should Follow Precedent Here

The State fails to identify, as required by law, manifest error or a "compelling reason" or a "highest possible reason" for overruling the application of strict scrutiny to any limitation on a woman's fundamental right to an abortion as held in *Planned Parenthood of the Heartland*. Disagreement with a precedent—even strong disagreement—is not a sufficient justification for overruling it. Complete agreement with a dissenting opinion, which is essentially the only argument the State advances, is equally unavailing.

A. With Respect to *Planned Parenthood of the Heartland*, Stare Decisis Has Not Lapsed

In *Planned Parenthood of the Heartland,* this Court held, consistent with *Roe v. Wade, 410 U.S. 114, 93 S.Ct. 705 (1992) (Roe*), that any limitation on a woman's right to an abortion must satisfy scrutiny to pass constitutional muster. *Planned Parenthood of the Heartland* was decided in 2018. This amici brief is being written a mere three years later, in 2021. It would be surprising if anything has changed that would justify overruling *Planned Parenthood of the Heartland.* Overruling so soon after that case was decided would set a bad precedent. And it would suggest that this Court had not deliberated adequately in 2018.

One of the purposes of stare decisis is to foster the law's predictability. Retaining *Planned Parenthood of the Heartland* furthers this stabilizing goal;

overruling it would have a disruptive impact. Lower courts would worry that other recent supreme court precedents might be overruled. Lawyers, in turn, would find it more hazardous to advise and advocate for clients. Due to its recency, all precedents would become less reliable. Citizens, male and female, would find it harder to rely on the law as they plan their lives. For these reasons, stare decisis has not lapsed.

A second purpose of stare decisis is to ensure continuity, at any one time and over time. *Planned Parenthood of the Heartland* and similar cases have a salutary effect in equalizing the lives of men and women. With *Planned Parenthood of the Heartland* and similar cases, young women can plan their lives, educations, and careers more confident that they will not be disrupted by an unwanted pregnancy and years of unwanted child-rearing. Under *Planned Parenthood of the Heartland*, women, in most circumstances, can preserve their ambitions and preferred life choices should contraception fail and *Roe* be narrowed even further or overturned. Overruling *Planned Parenthood of the Heartland* would deprive women of a right their elder sisters, mothers, aunts, grandmothers, and generations of women previously held. For these reasons, too, stare decisis has not lapsed.[1]

[1] Stare decisis carries less weight when the United States Supreme Court considers overruling a constitutional precedent. Its constitutional decisions can be checked only by the arduous process of amending the U.S.

B. Even if Stare Decisis Had Lapsed, *Planned Parenthood of the Heartland* is not Manifestly Erroneous and There Is No Compelling Reason to Overrule It.

Had stare decisis lapsed for *Planned Parenthood of the Heartland*, overruling the application of strict scrutiny to restrictions on a woman's right to an abortion would still not be justified. *Planned Parenthood of the Heartland* was not "clearly erroneous" or "manifestly wrong," the relevant considerations do not indicate a compelling reason to overrule, and there is no better alternative. Here, it is important to re-emphasize that mere disagreement with a precedent—even strong disagreement—is not a sufficient reason to overrule it. The reasoning in *Planned* Parenthood is as good or better than the reasoning in many cases.

Now consider whether there is a compelling reason to overrule *Planned Parenthood of the Heartland's* application of strict scrutiny because that holding has "proved unworkable in practice, does violence to legal doctrine, or has been so undermined by subsequent factual and legal development that

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Constitution. Amending the Iowa Constitution is much less difficult and the process of amending the Iowa Constitution to effectively reverse *Planned Parenthood of the Heartland* is in progress. This Court has applied stare decisis in many cases involving constitutional issues and the notion that stare decisis has "limited application in constitutional cases" has never been adopted by a majority of this Court, as the State acknowledges. Appellant Brief, p. 71.

continued adherence to the precedent is no longer tenable." *Youngblut,* at 44. (dissenting opinion of MacDonald, J.) See *Janus v. AFSCME, Council,* 31, 585 U.S. __, 138 S. Ct. 2448, 2478-79 (2018).

These considerations suggest the Court should not overrule *Planned Parenthood*, a merely three-year old precedent. The quality of the Court's reasoning in *Planned Parenthood* was not "manifestly" or "clearly erroneous" and, even if it were, there is no "compelling reason" to overrule. Related principles of law have scarcely changed; *Planned Parenthood of the Heartland* is not a "remnant of abandoned doctrine." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 125 S.Ct. 1791, 2808 (1992). Relevant facts since *Planned Parenthood of the Heartland* was decided have been likewise static. Nothing in the record, so far as these amici know, shows *Planned Parenthood of the Heartland* to be unworkable. As indicated above, Iowa women, whether or not pregnant, have relied on *Planned Parenthood of the Heartland*, at least as a fallback should *Roe* be overturned or cut back, as they plan their careers and lives.

The State argues it is too recent to have generated significant reliance interests, Appellant's Brief, p. 68. It may appear so if you consider only pregnant women. It is not so if you consider all women, whether or not pregnant. *Planned Parenthood of the Heartland* remains a vital part of Iowa

jurisprudence. Further, although *Planned Parenthood* "is fewer than four years old" as the State points out, Appellant's Brief, p. 75, this Court did not recognize a new constitutional right in *Planned Parenthood of the Heartland*. Instead, it acknowledged and fortified a principle of equality between men and woman that is larger than the right to physical autonomy. Iowa Woman have had the right to control their reproductive health since the United States Supreme Court decided *Roe,* and the women of this state have relied on that right for almost fifty years. "Reliance is often the strongest factor favoring the retention of a challenged precedent." *Fulton v. City of Philadelphia, Pa.,* ___ U.S. ___,141 S.Ct. 1868, 1923 (2021) (concurring opinion of Barrett, J.)

There is no better alternative to the application of strict scrutiny in *Planned Parenthood of the Heartland.* Should the U.S. Supreme Court overrule *Roe,* and this court overrule *Planned Parenthood of the Heartland*, the main consequence would be to vest complete freedom in the Iowa legislature to enact a stiff ban on abortions. That would be a drastic change for women. Others will argue the virtues of *Planned Parenthood of the Heartland* thoroughly, showing that it was not "clearly erroneous." Here, however, briefly consider the question of who should decide the abortion question, a pregnant woman or the state? Leaving it to the state deprives pregnant women of moral agency—the distinctly human capacity to make

moral judgments. Few women decide to abort lightly. There is a well-recognized moral question here. But it should be a pregnant woman's answer that counts. By supplanting a woman's moral judgment with the state's, overruling on such a profound and intimate question would affront women's humanity.

Conclusion

For the reasons stated above, these Amici Curiae request the Court to follow *Planned Parenthood of the Heartland* and reject the State's request that it overrule that decision.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.906(4), 6.903(1)(d) and 6.903(1)(g)(1) because:

This brief has been prepared in proportionally spaced typeface using Times New Roman font in 14-point font size and contains 3,409 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By: */s/Laura Schultes*
Laura Schultes, AT0011712

CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on November 1, 2021, the attached Amicus Brief was e-filed with the Clerk of the Iowa Supreme Court through EDMS pursuant to Iowa Rules of Appellate Procedure and served by Iowa EDMS upon all registered filers of the abovementioned matter. A review of the filers in this matter indicates all necessary parties have been served.

By: */s/ Laura Schultes*
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