IN THE IOWA SUPREME COURT
No. 22-2036

PLANNED PARENTHOOD OF THE HEARTLAND, et al.,

Appellees,

v.

STATE OF IOWA, et al.,

Appellants.

Appeal from the Iowa District Court for Polk County
The Honorable Celene Gogerty, Case No. EQCE083074

AMENDED BRIEF OF INDIANA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Appellants.[1] *Amici* States are committed to the rule of law, upon which our nation's democratic system of government relies, and urge the Court to reject the lower court's attempt to shirk its duty to apply the law. Despite U.S. Supreme Court precedent permitting enforcement of an enjoined Iowa abortion statute, the district court declined to dissolve its injunction, citing previous—but now overruled—federal and state abortion doctrine. While this case concerns S.F. 359, Iowa's "Fetal Heartbeat" law, which furthers the State's paramount interest in protecting unborn children

[1] In compliance with Iowa R. App. P. 6.906(4), the State confirms that no party or party's counsel authored any portion of this brief, nor was the preparation or submission of this brief funded in any way by a party to this litigation, and no other person or entity contributed funding or assistance to the completion of this brief.

from intentional destruction, the lower court's reasoning could apply in a host of other contexts, threatening the uniform application of U.S. Supreme Court constitutional decisions among all States. *Amici* States have a strong interest in defending against judicial overreach and ensuring all state courts uphold their constitutional obligations to follow U.S. Supreme Court precedents on federal constitutional issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he Constitution does not confer a right to abortion." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022). The U.S. Supreme Court issued this holding last year, "return[ing] to the people and their elected representatives" "the authority to regulate abortion." *Id.* The Iowa General Assembly, through its Fetal Heartbeat law enacted in 2019, has chosen to prohibit most abortions. *See* Iowa Code § 146C (2018). At the time the Fetal Heartbeat law was passed, the Iowa and U.S. Supreme Courts recognized a fundamental right to an abortion. *See Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 865 N.W.2d 252, 268–69 (Iowa

2015). But in 2022, the Iowa Supreme Court "overrule[d]" its earlier decision, concluding that "there is no support for abortion as a fundamental constitutional right in Iowa." *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 740, 744 (Iowa 2022). Exactly one week later, the U.S. Supreme Court held that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Dobbs* 142 S. Ct. at 2242.

Citing these substantial changes in federal and state abortion law, the State of Iowa moved the district court to dissolve the injunction and restore the Fetal Heartbeat law. One would have thought that *Dobbs* directs a straightforward dissolution of the injunction in this case. After all, state courts are bound to follow the U.S. Supreme Court's federal constitutional decisions when deciding federal constitutional issues. *See, e.g.*, *James v. City of Boise*, 577 U.S. 306, 307 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."). The Iowa district court, however, denied this request,

declaring that "[t]here is no caselaw to support . . . that a permanent injunction being issued based on a finding that a statute was unconstitutional and void at the time it was passed may later be modified or vacated . . . based on a change in the law." *Planned Parenthood of the Heartland, Inc., et al., v. State of Iowa, et al.*, No. EQCE083074, at *13 (Iowa Dist. Ct. 2022) (Ruling).

This holding is incorrect. Just because a statute "was unconstitutional and void" under precedent in effect "at the time it was passed" does not mean that it must be void after that precedent has been overruled. *Id.* The district court's reasoning in this regard repudiates the idea that constitutional texts have fixed (even if occasionally misinterpreted) meanings and puts Iowa on unequal footing with all other States unburdened by such a doctrine.

Iowa's brief explains in detail why the Court has authority under Iowa law, procedural rules, and principles of equity to dissolve the injunction based on a substantial change in law, *see* Appellant's Brief at 29–64, and its view is supported by the way judicial review ordinarily operates in Anglo-American jurisdictions.

The *Amici* States address a single issue: whether currently operative, not outdated, precedent should dictate the constitutional enforceability of duly enacted statutes, even those previously declared unconstitutional under precedents that have been overturned.

The district court proceeded from a fundamental misunderstanding of the nature of judicial review and courts' equitable powers. Properly understood in the American tradition, the judicial power does not enable courts to repeal statutes or enjoin legislatures from enacting legislation that conflicts with constitutional decisions. Judges, lawyers, and commentators often say that courts "strike down," "set aside," and "invalidate" federal and state statutes when they hold them unconstitutional. But courts do not "void" statutes; they interpret statutes and the Constitution, refuse to apply unconstitutional statutes, and enjoin individuals from enforcing them. Ordinarily, imprecise language about the judicial function is harmless, but this case demonstrates its danger. The judiciary's powers of review and equity do not allow courts to repeal statutes.

The district court was therefore wrong to hold that the Fetal Heartbeat law is unenforceable now because it "was unconstitutional and void at the time it was passed." Ruling at 13.

ARGUMENT

I. Constitutional decisions govern future cases as a matter of precedent, not by rendering statutes technically "void"

Court decisions cannot veto or repeal statutes; they functionally bind legislators only as a matter of precedential control, which can make it futile to enact a statute materially identical to one already held unconstitutional. But unless it is formally repealed by the legislature that enacted it, the functional vitality of a statute declared unconstitutional by the judiciary depends entirely on whether the relevant controlling judicial decision itself remains good law.

As noted, however, courts frequently purport to "invalidate," "strike down," and declare "void" duly enacted statutes. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 935

& nn.1–3 (2018) (citing cases). Even Chief Justice Marshall's foundational *Marbury v. Madison* opinion made similar statements. 5 U.S. (1 Cranch) 137, 177–78 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void."). Yet this language does not reflect the reality of what courts do (including in *Marbury* itself): The judicial power does not include the ability to make or repeal statutes.

In the American tradition, the power to enact and repeal statutes is a legislative function not shared by courts. "In medieval England, when the legislative and judicial powers were commingled, judges did exercise both" law-making and law-interpreting powers. Antonin Scalia & Bryan A. Garner, *Reading Law* 23 (2012); William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum. L. Rev. 990, 996 (2001). But "[d]espite an occasional judicial opinion recalling bygone glories, our system of separated powers never gave courts a part in either the drafting or the revision of legislation." Scalia & Garner, *supra*, at 24; John F. Manning, *Textualism and*

the Equity of the Statute, 101 Colum. L. Rev. 1, 29–30, 86–105 (2001) (explaining the historical rejection of courts' ability to "adjust the positive law" in the American judicial system); *see, e.g.*, *The Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) ("In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it.").

Article III of the U.S. Constitution is an example of these principles in action. The U.S. Constitution's separation of the branches—in particular, its "complete separation of the judicial from the legislative power" through life tenure and salary protection, The Federalist No. 79, at 408 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *see* The Federalist No. 78, at 401 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)—"undercuts any judicial claim to derivative lawmaking authority," Manning, *supra*, at 58–59; *see Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (Marshall, C.J., as Circuit Justice) ("To

[the legislative] department is confided, without revision, the power of deciding on the justice as well as wisdom of measures relative to subjects on which they have the constitutional power to act.").

At the Constitutional Convention, delegates proposed—but ultimately rejected—authorizing the judiciary to veto a proposed law and thereby prevent it from ever taking effect. Mitchell, *supra*, at 957–60. While some uncertainty persisted early on as to the precise function of judicial review, *see id.* at 961–62, the American tradition is that "only the legislature has the power both to enact and to disenact statutes." Scalia & Garner, *supra*, at 339.

The judicial branch—like the other branches—is bound to follow the Constitution, the supreme law of the land. U.S. Const. art. VI; *Marbury*, 5 U.S. (1 Cranch) at 177–78 (Marshall, C.J.); *see* Federalist No. 78, at 405 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."). To do so, Chief Justice Marshall established judicial review, by which courts

refuse to enforce statutes under their obligation to uphold the Constitution as supreme to all other law. *Marbury*, 5 U.S. (1 Cranch) at 177–78 (Marshall, C.J.); *see also Osborn v. Bank of the U.S.*, 22 U.S. 738, 866 (1824) (Marshall, C.J.) ("When [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.").

Thus, in *Marbury*, Chief Justice Marshall explained that, while the Jefferson Administration was *wrong* not to give Madison the commission, the Court could not order any relief because the Judiciary Act—under which Marbury filed his writ of mandamus directly with the Supreme Court—did not comport with the Constitution's limited enumeration of the Court's original jurisdiction. 5 U.S. (1 Cranch) at 170–71 (Marshall, C.J.).

The legislature can make laws, amend laws, and repeal laws—so long as it does so through the constitutionally prescribed process. Courts have none of that power. Instead, they interpret the law, apply it to a case, and, if merited, enjoin parties from acting in

accordance with or giving effect to unconstitutional laws. The judicial power "to review and annul acts of Congress" is "little more than the negative power to disregard an unconstitutional enactment." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Even where courts have so spoken, state and federal statutes remain law until the legislature amends or repeals them. Consequently, after the U.S. Supreme Court has held a statute unconstitutional, that (or a materially identical) statute later may be susceptible of enforcement for either of two reasons. First, Congress and the States can amend the Constitution to override the Supreme Court decision that provides the precedential barrier to enforcement. U.S. Const. art. V. Should the Constitution be so amended, the statute would once again be enforceable without the need to be reenacted. Second, courts may overrule their own decisions holding the statute unconstitutional. When they do so, the previously enjoined statutes become generally enforceable again without reenactment by the legislature. For example, although the Supreme

Court held the Legal Tender Act of 1862 unconstitutional in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), the Court soon after reversed course in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870). Overruling *Hepburn*, the Court enforced the Legal Tender Act without requiring its reenactment. *Id.* at 553–54.

More recently, in 1966 and 1974, Congress amended the Fair Labor Standards Act to cover "state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533–34, 555–56 (1985) (citing Fair Labor Standards Amendments of 1966, §§ 102(a), (b), 80 Stat. 831; Fair Labor Standards Amendments of 1974, §§ 6(a)(1), (6), 88 Stat. 58). In *National League of Cities v. Usery*, 426 U.S. 833, 838, 851–52 (1976), however, the Court held that these provisions were unconstitutional as to "public agenc[ies]" because they interfered with the agencies' "integral governmental functions" and therefore exceeded Congress's Commerce Clause

power. Public entities naturally stopped complying with the FLSA, but Congress never reinstated their exemptions via statute, so when the Court reversed course in *Garcia*, that decision had the effect of removing any barrier to full FLSA enforcement against state and local governments, without need of congressional action. *See* 469 U.S. at 528.

Courts regularly use the power of judicial review to hold that laws are unconstitutional. But an unrepealed (or newly enacted) statute affected by that decision remains law (or becomes law, if newly enacted) and as such becomes enforceable once the legal impediment dissolves.

II. In the American system, courts enjoin those who enforce unconstitutional laws, not the laws themselves or the legislatures that enact them

Courts are also limited in how they grant relief, which sheds further light on the district court's errors in this case. Courts cannot enjoin laws or command a legislature or governor to repeal or veto laws inconsistent with constitutional case law. The district court's reasoning here presupposed such a power when the court asserted

in 2022 that the Iowa heartbeat law "was unconstitutional and void at the time it was passed." Ruling at 12–13. This radical directive sweeps far beyond any traditional understanding of judicial power.

Courts have authority only over the parties before them. At the nation's founding, "[c]ourts would 'take care to make no decree [that would] affect' the rights of nonparties." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 427 (quoting *Joy v. Wirtz*, 13 F. Cas. 1172, 1174 (C.C.D. Pa. 1806) (No. 7554) (Washington, J.)). That limit on equitable judicial powers persists today. *See id.* at 457. Accordingly, when a court concludes a statute does not comport with the Constitution, "the court enjoins . . . not the execution of the statute, but the acts of the official." *Mellon*, 262 U.S. at 488; *see also* Mitchell, *supra*, at 1015 ("[E]ven after a court renders a final judgment declaring the statute unconstitutional, and any injunction entered by that court merely blocks the statute's *enforcement* by the named defendants rather than 'setting aside' or canceling the statute itself.").

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court explained the limits of federal judicial review of state statutes. Although sovereign immunity bars suits against the States as such, state officers charged with the enforcement of statutes are appropriate defendants. *See id.* at 163. State officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." *Id.* at 156. *Young* thus contemplates a carefully limited exercise of judicial power to enjoining an official's actions, not the statute itself.

Similarly, the doctrine of legislative immunity, which prevents courts from holding legislators liable for legislative acts, prevents direct judicial interference with legislative affairs. "The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). Both federal and state legislators benefit from this doctrine. *See, e.g.*, *United*

States v. Brewster, 408 U.S. 501, 512 (1972) (holding Members of Congress immune for any "legislative act" under the federal Speech or Debate Clause); *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732–33 (1980) ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts . . . ."). No understanding of the judicial power allows a court to order legislators to forgo or repeal a law that a court deems unconstitutional, and so it is exceedingly unlikely—within this longstanding tradition—that Iowa courts possess that authority.

A helpful contrast arises in the agency action context. Courts review "final federal agency action[s]" under the Administrative Procedure Act. 5 U.S.C. § 704. If a court concludes that the challenged agency action is unlawful, it will "hold unlawful and set aside" the action, *id.* § 706(2), nullifying it "*even if* a later-enacted statute or Supreme Court ruling undercuts or repudiates the rationale that the earlier court had relied upon." Mitchell, *supra*, at 1015. Should a later-enacted statute or court ruling change the basis for a court's set-aside of an agency action, that action does not

immediately become operational or enforceable. *No one* may rely on or utilize that agency action until the agency either moves to vacate the set-aside order or enacts a new rule. *See, e.g.*, *Chamber of Commerce of U.S.A. v. U.S. Dep't of Lab.*, 885 F.3d 360, 388 (5th Cir. 2018) ("[v]acat[ing] the [challenged] Rule *in toto*" under 5 U.S.C. § 706(2)). Without one of those formal actions, the rule, having been "set aside," has no formal operative vitality.

Courts do not have any similar power to "set aside" statutes, which means that the statutes themselves retain operative potential in the event the judicial precedent undermining their enforcement is removed. To be sure, an official directly enjoined from enforcing the statute will need to move to vacate the injunction to avoid contempt, as was done here. *See* Ruling at 16 (denying motion to dissolve injunction); *see, e.g.*, *Planned Parenthood of Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-00763, ECF No. 149 (S.D. Ind. 2022) (granting State's Rule 60(b) motion to vacate declaratory judgment and injunction because "the *Dobbs* decision, overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned*

Parenthood of Southeast [sic] *Pennsylvania v. Casey*, 505 U.S. 833 (1992) is a significant change in the law which justifies vacating the declaratory judgment and injunction"). But that is a function of respect for the judiciary's *in personam* authority, not a function of its lawmaking authority. Anyone authorized to enforce the statute and not bound by an injunction would be free to enforce it. No legislature or judicial officer needs to take formal action for an existing statute to become operational when a constitutional barrier is removed.

These doctrines and principles demonstrate that the district court clearly misunderstood the limits of judicial authority, particularly where legislative action is concerned. No court can bar a state's executive from enforcing a law that the court at one time "found unconstitutional and void" under overruled precedent. Ruling at 10. This Court should reject the district court's remarkably broad and manifestly incorrect conception of the judicial power.

CONCLUSION

The district court's order granting a preliminary injunction should be reversed.

Respectfully submitted,

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/s/ *Thomas M. Fisher* — March 3, 2023

Signature — Date

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2023, I electronically filed the foregoing with the Clerk of the Court for the Iowa Supreme Court by using the CM/ECF system, which will send notification of such filing to all counsel of record.

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