IN THE SUPREME COURT OF IOWA
No. 23–1145

PLANNED PARENTHOOD OF THE HEARTLAND, INC.;
EMMA GOLDMAN CLINIC; and SARAH TRAXLER, M.D.,

Petitioners-Appellees,

vs.

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

Respondents-Appellants.

Appeal from the Iowa District Court for Polk County
Joseph Seidlin, District Judge

RESPONDENTS-APPELLANTS' REPLY BRIEF

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PPH 2022 held abortion is not a fundamental right protected by Iowa's constitution. *Planned Parenthood of the Heartland, Inc. v. Reynolds ("PPH 2022")*, 975 N.W.2d 710, 715–16 (Iowa 2022) (plurality op.). But it left for another day a ruling on what standard would replace strict scrutiny. *Id.* That day has come.

Petitioners ask this Court to evade that open question. But Petitioners offer no principled reason to depart from Iowa's established tiers of constitutional scrutiny, which require rational basis review here. The State did not waive its challenge to the *Casey* undue-burden standard. Petitioners' procedural challenges cannot rescue the improperly entered injunction.

I. The District Court Erred When It Granted a Temporary Injunction.

The district court enjoined the Fetal Heartbeat Statute even though this Court has not yet articulated the standard after *Casey*'s abrogation under which it should be reviewed. That was an abuse of discretion.

The issues here are preserved. Established law says the rational basis test should apply. There is no reason to invent a

special tier of scrutiny for laws protecting unborn life under the Iowa Constitution—especially when the U.S. Supreme Court that invented the *Casey* undue-burden test has abandoned it. And unborn lives have been lost during this injunction.

It is time for this Court to confirm that abortion policy belongs to the democratic process. Questions about protecting unborn life are best answered by the people and their elected representatives.

A. The due process question is preserved and ready for this Court's determination.

Petitioners' error-preservation argument is a red herring. This Court should answer whether the Iowa Constitution asks courts to review the Fetal Heartbeat Statute under the *Casey* undue-burden test or for a rational basis.

1. The State preserved the question of the Fetal Heartbeat Statute's constitutionality under Iowa's due-process clause.

To contend failure to preserve, Petitioners misconstrue the issue on appeal. Even as stated, their theory that the State failed to preserve its argument for a change in constitutional standard fails. An argument raised and rejected by the district court is preserved for review on appeal. *See State v. Childs*, 898 N.W.2d 177,

181 (Iowa 2017) ("[T]he district court necessarily rejected [appellant's] statutory-interpretation argument when it orally ruled the statute constitutionally applied to him."). Indeed, this Court has found preserved a purely legal issue even when it requires broadly construing an argument raised and ruled on by the district court. *See Iowa Ass'n of Bus. & Indus. v. City of Waterloo*, 961 N.W.2d 465, 476 (Iowa 2021); *see id.* (collecting cases).

When a "court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is incomplete or sparse, the issue has been preserved." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (cleaned up). Although the Parties dispute Iowa's abortion precedents' effects, the district court explained that it "does not get to declare that our Supreme Court got it wrong and then impose a different standard." (Dkt. 22 at 9, App. 203.)

Before the district court, the State identified the problem that "the Supreme Court has declined to set a specific standard of review for abortion regulations." (Dkt. 19 at 13, App. 162.) The State argued that "*PPH 2022* overruled *PPH 2018*'s holding that the Iowa

Constitution protected a fundamental right to have an abortion." (Dkt. 19 at 15, App. 164.) It explained that it was "now, without *PPH 2022* or *PPH 2023*'s procedural issues, . . . presenting the issue of which standard of relief is appropriate." (*Id.* at 17, App. 166.) And it "contend[ed] that [because] there is no fundamental right to an abortion protected by the Iowa Constitution, longstanding precedent says that this Court should review the Fetal Heartbeat Statute under rational basis review." (*Id.*; *see also* Tr. 23:19–42:14, App. 216–35.)

The district court then ruled on "the issue of which standard of relief is appropriate" and chose *Casey*. (Dkt. 19 at 15, App. 164; Dkt. 22 at 6–12, App. 200–06.) The court believed it was required to apply the *Casey* undue-burden test by *PPH 2022*—the very opinion that the State contended had overruled that requirement. (Dkt. 22 at 7–8, App. 201–02.) The district court explained it was "not at liberty to overturn a precedent of our Supreme Court" in its decision to apply *Casey*. (Dkt. 22 at 8, App. 202.) It continued, "it is the role of the supreme court to decide if case precedent should no longer be followed." (Dkt. 22 at 8, App. 202.) In so doing, that court

acknowledged that in Iowa the applicable standard had "vacillated within the last decade." (*Id.* at 6–12, App. 200–03.)

The State raised and the district court decided the issue of which standard courts should use to review laws protecting unborn life under the Iowa due-process clause. That preserved the issue for the Court's review.

Petitioners try to recast the question as whether "the standard is *already* rational basis" or "should be *changed* to rational basis," (Appellee Br. at 38–39), but that is irrelevant to whether the issue was preserved for review. Error preservation is not a magical ritual that requires precise incantation of specific words; this Court's "error preservation rules were not designed to be hypertechnical." *In re Det. of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017). The State raised, and the district court answered, whether the proper standard is undue burden or rational basis. No more is needed.

2. This Court should clarify that rational-basis review is appropriate for laws that protect unborn life.

The standard of review that applies to statutes that protect unborn life is a pure question of law. The record is therefore

sufficient for the Court to decide the question. Petitioners identify no further factual development necessary for the Court to reach the legal issue. Indeed, *PPH 2022* postponed that decision not because of an insufficient record but because the State had not yet asked the Court to adopt rational-basis review for laws protecting unborn life. 975 N.W.2d at 716 (plurality op.). It has done so now. The Court should answer.

B. *PPH 2015* does not establish undue-burden review of abortion laws under the Iowa Constitution.

1. Previous holdings that the Iowa and federal constitutions are coextensive were not holdings that the Iowa Constitution independently imposes the *Casey* undue-burden test.

PPH 2015's core holding was that "the Iowa Constitution provides a right to an abortion that is coextensive with the right available under the United States Constitution." *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.* ("*PPH 2015*"), 865 N.W.2d 252, 254 (Iowa 2015). This Court followed the Iowa Board of Medicine's alleged concession that the Iowa Constitution and federal constitution are coextensive to reach that holding. *Id.*

PPH 2015 thus did not independently decide "whether the Iowa Constitution provides such a right" to abortion. *Id.* at 262. The

Court instead acknowledged that the federal framework created a floor that the challenged statute fell below. *Id.* at 263. That is no longer the case. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300 (2022).

Even if *PPH 2022* somehow revived *PPH 2015*, the binding principle is not the now-abandoned undue-burden standard of review, but co-extensivity. And if co-extensivity is the governing principle, challenges to statutes protecting unborn life now require rational-basis review. For as the U.S. Supreme Court acknowledged in *Dobbs*, "rational-basis review is the appropriate standard for such challenges" because, as under the Iowa Constitution, "procuring an abortion is not a fundamental [federal] constitutional right." *Dobbs*, 597 U.S. at 300; *cf. PPH 2022*, 975 N.W.2d at 715.

Yet this is not the case. The statement in *PPH 2022*'s plurality opinion that *Casey*'s undue-burden test applied "for now" was not the revivification of *PPH 2015* but a recognition that *Casey* supplied the governing standard when *PPH 2022* was decided. *See PPH 2022*, 975 N.W.2d at 716 (plurality op.). Indeed, *PPH 2015* adopted *Casey*'s undue-burden standard only because it held that the Iowa

and federal constitutions were coextensive. *Id.* If that is true, and the rights are coextensive, then the Iowa Constitution does not impose an undue-burden test that the federal constitution does not; it imposes the federal constitution's rational-basis test.

2. The Court should not adopt an unworkable, extra-legal failure as the standard of review.

Nothing in *PPH 2015* suggests that the co-extensivity the Court there recognized was due to the Iowa Constitution independently enshrining the *Casey* test by happenstance—there was no analysis explaining that the Iowa Constitution imposes on abortion-regulating statutes an undue-burden test unrecognized anywhere else in Iowa law. And for good reason: the Court has never adopted an undue-burden standard under Iowa's Constitution. Doing so here would be to adopt a standard that is "inherently standardless" and "unworkable." *Dobbs*, 597 U.S. at 281, 286 (quotations omitted).

The virtues of the undue-burden test are scant, its failings, legion. As *Dobbs* pointed out, *Casey*'s undue-burden test immediately required adopting three subsidiary tests, each of

which generated its own confusion due to its own lack of intelligible standards. *Id.* at 281–82.

Despite repeated attempted refinements to the *Casey* undue-burden test to make it more administrable, that unworkability led to reversal of many precedents quickly. *Id.* at 284–85 (collecting cases), 283 (citing *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) and *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020)). Those flaws "undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'" *Id.* at 286 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

Against those shortcomings, the *Dobbs* dissenters argued that the undue-burden test permitted more abortions to go forward (a policy, rather than legal, argument); forewent rational-basis analyses (a begging of the question); and avoided consideration of other constitutional questions on their own terms (a bug, not a feature). *Id.* at 393–94 (Breyer, Sotomayor, and Kagan, dissenting).

And this is before considering that *Casey*'s undue-burden test had embedded within it a prohibition on "any restriction on pre-viability abortions," *Dobbs*, 597 U.S. at 228, a court-created doctrine

"created outside the ordinary course of litigation" that "always ha[d] been completely unreasoned, and fail[ed] to take account of state interests since recognized as legitimate." *Id.* at 351 (Roberts, C.J., concurring). Just as with the federal constitution, there is no textual or historical basis in the Iowa Constitution for *Casey*'s viability line—a line whose creation "ma[de] no sense," *id.* at 277—and this Court should not repeat the U.S. Supreme Court's now-repudiated error in adopting it.

Petitioners refer to the State's "concession"—an acknowledgment that the Fetal Heartbeat Statute is unconstitutional under *Casey*. But they misconstrue the scope of that concession. The context of the State's alleged "concession" that the Fetal Heartbeat Statute is unconstitutional relies on *Casey*. The State conceded that the statute does not satisfy the undue-burden test if that test were "applied in the exact same manner that the U.S. Supreme Court had applied it before *Dobbs* was decided" (Tr. 33:3–34:15, App. 226–27.) So the Statute cannot survive scrutiny if the Iowa Constitution completely forbade the State from restricting pre-viability abortions. The State does not concede that the Fetal

Heartbeat Statute unduly burdens the right to terminate a pregnancy in any other context.

C. Iowa law does not support intermediate scrutiny for substantive due-process cases.

Petitioners misconstrue Iowa jurisprudence governing standards of review when they ask this Court to create a new intermediate scrutiny for laws protecting unborn life. This Court should apply the established tiers of constitutional scrutiny and normal standards of review and review the Fetal Heartbeat Statute for a rational basis.

Petitioners are wrong because Iowa courts do not apply intermediate scrutiny in generally "appropriate" circumstances. (Appellee Br. at 36.) Rather, they do so in discrete, limited situations, usually concerning equal protection and the First Amendment. Those contexts do not suggest the Court should innovate new applications of that atypical standard—particularly as Petitioners disavow any request "for the application of an election law or First Amendment standard in this case." (*Id.*) This Court should apply the established tiers of constitutional scrutiny and review the Fetal Heartbeat Statute for a rational basis.

1. Abortion is not a fundamental right warranting a special level of review.

Courts apply "intermediate scrutiny" in election-law cases because election laws may affect citizens' right to vote in a way that implicates those citizens' fundamental constitutional rights. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (explaining that in election-law cases courts balance "the severity of a burden" on voters with "legitimate state interests"). Intermediate scrutiny balances voters' rights with the States' responsibility to administer fair elections with integrity.

Intermediate scrutiny for election laws balances the Constitution's requirements to hold and regulate fair elections while not infringing on the right to vote. Voting is a matter of "fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). It is against that textual and structural backdrop that the First and Fourteenth Amendments protect voting rights, *id.* at 434, including "a substantive right to participate in elections on an equal basis

with other qualified voters" shielded by the Equal Protection Clause. *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980).

Courts' obligation to balance those competing interests is rooted in text. Election regulations "invariably impose some burden upon individual voters," making strict scrutiny impractical—it would "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

So courts employ the "more flexible [intermediate scrutiny] standard" when reviewing voting laws. That intermediate scrutiny weighs "the character and magnitude of the asserted" burden on First and Fourteenth Amendment rights against the State's need to impose that burden. *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983)).

Unlike the text-based heightened scrutiny for election laws, unenumerated rights are not tied to text. So balancing voters' interests against a State's law risks substituting the court's policy preferences for what the law requires. That is especially true for nonfundamental rights. And that explains why this Court already rejected the fundamental interest equal protection analysis as a

framework for abortion rights. *PPH 2022* observed that *PPH 2018* had "applied the fundamental rights/strict scrutiny branch of equal protection review." *PPH 2022*, 975 N.W.2d at 744. But that was because *PPH 2018* "had already found that the right to an abortion was protected as a fundamental right by substantive due process." *Id.*

And this Court already rejected the idea that equal-protection concerns require that heightened scrutiny be applied to abortion regulations, noting that the attempt to link abortion rights to the equal protection clause was "an afterthought that did no real work in [*PPH 2018*'s] legal analysis." *Id.*

Unlike voting rights, there is no deep textual, historical, or structural right to an abortion. *See PPH 2022*, 975 N.W.2d at 740 ("Textually, there is no support for" the "due process clause as providing a fundamental protection for abortion."); *id.* ("Historically, there is no support for abortion as a fundamental constitutional right in Iowa."). So abortion advocates look to substantive due process where the lack of textual constraints accompanies more novel constitutional theories.

Because unenumerated rights are not constrained by text, balancing tests are less useful. Balancing tests make more sense when balancing competing rights and responsibilities written in a constitution, which protects against the temptation to impose policy preferences as law. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (courts are "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 26 (Iowa 2019) ("Our role is to decide whether constitutional lines were crossed, not to sit as a superlegislature rethinking policy choices of the elected branches."); *see also Dobbs*, 597 U.S. at 338 (Kavanaugh, J., concurring) ("Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral.").

To weigh competing values in a balancing test, "it is axiomatic that both must be . . . comparable." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 393 (2023) (Barrett, J., concurring in part) (citing *Dept. of Rev. of Ky. v. Davis*, 553 U.S. 328, 354–55 (2008)). But the competing interests here "are insusceptible to resolution by

reference to any juridical principle," and "[n]o neutral legal rule guides the way." *Id.* at 381 (majority op.). Instead, those interests are categorically different—"more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

Courts should not be "second-guessing the moral judgments of [Iowa] voters or making the kind of policy decisions reserved for politicians." *Ross*, 598 at 393 (Barrett, J., concurring in part). "In a functioning democracy, policy choices like these usually belong to the people and their elected representatives." *Id.* at 382 (majority op.). When reasonable people can disagree over competing but incommensurable interests, courts defer to the Legislature. *Id.* at 382; *AFSCME Iowa Council 61*, 928 N.W.2d at 26. Courts employ a rational basis test—not heightened scrutiny.

2. Abortion is not speech warranting elevated scrutiny.

a. Laws protecting unborn life do not impinge commercial speech.

Federal courts apply intermediate scrutiny to laws that regulate commercial speech and content-neutral speech regulations. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). But free speech, as an enumerated right under the First Amendment, is an even odder comparator for extending intermediate scrutiny to laws protecting unborn life than election law.

As in the election context, commercial-speech regulations implicate competing constitutional concerns. Commercial speech "serves the economic interest of the speaker" and is protected by the First Amendment. *Cent. Hudson,* 447 U.S. at 561–62. But the government also has an important interest in ensuring that commercial speech accurately informs the public and "may ban forms of communication more likely to deceive the public than to inform it." *Id.* at 562–63.

The U.S. Supreme Court has balanced those competing constitutional concerns by requiring that speech restrictions "serve a substantial interest" that is "narrowly drawn." *Matal v. Tam*, 582 U.S. 218, 245 (2017) (quoting *Cent. Hudson*, 447 U.S. at 557) (cleaned up). That means the regulation should "extend only as far as the interest it serves." *Id.* Commercial transactions also "occur in an area traditionally subject to government regulation." *Cent. Hudson*, 447 U.S. at 562. That is completely unlike regulation protecting a right that has no textual or historical basis.

Abortion, though, is neither a textual constitutional right nor a textual constitutional power. *PPH 2022*, 975 N.W.2d at 739–742; *cf.* Iowa Const. art. I, § 7 (freedom of speech; liability for abuse of freedom of speech). Unlike regulations on commercial speech, intermediate scrutiny for regulations that protect unborn life creates the risk that rational-basis review best avoids—that judges deciding a case will impose their will rather than reflect that of the citizens expressed through their Legislature. Judicial opinions choosing favorites among incommensurable values divided the nation for fifty years. *Dobbs*, 597 U.S. at 228–29 (the exertion of

"raw judicial power" in *Roe* "sparked a national controversy that has embittered our political culture for a half century"). The Court should not revive that division now.

b. Laws protecting unborn life are not content-based restrictions of speech.

Nor should the Court treat laws protecting unborn life as if they discriminated against speech based on its content. Petitioners suggest the Court should review the Fetal Heartbeat Law in the same manner it would a content-based regulation of speech under *State v. Musser*. 721 N.W.2d 734 (Iowa 2006). But there is no reason to do so. For one, as discussed above, free speech is protected by constitutional text and is therefore amenable to higher tiers of scrutiny. Indeed, Petitioners oddly cite *Musser* for the proposition either that intermediate scrutiny applies to commercial speech regulations despite *Musser* not applying the commercial speech doctrine, *id.* at 743, or that content-based speech restrictions are subject to strict scrutiny, *id.* at 744.

Despite that, *Musser* can help understand why this Court should apply rational basis review to laws protecting unborn life. This Court already found in *PPH 2022* that abortion is not a

fundamental right entitled to strict-scrutiny review. Applying strict scrutiny to laws protecting unborn life would create an unreasoned and unjustifiable discontinuity in Iowa law; abortion alone among the non-enumerated, non-fundamental rights Iowans enjoy would be subject to such a constricting standard of review.

And, indeed, *Musser* itself recognizes the atypicality of such a request while reinforcing the State's approach to judicial review. The Court there applied strict scrutiny in reviewing—and upholding—a law requiring HIV-positive people to disclose that status to sex partners. *Id.* at 741, 743, 748. This Court did so in a manner in stark tension with Petitioners' approach. *Musser*, in the closest the court has come to weighing human life against individual interests in privacy and sexual autonomy, decisively prioritized the former. *Id.* at 748 ("[T]he State has a compelling interest in . . . protecting human life.").

But *Musser* affirmed this Court's normal tiers-of-scrutiny-approach for that plaintiff's parallel invasion-of-privacy claim. *Id.* After all, this Court held that if "a fundamental right is not

implicated, a statute need only survive a rational basis analysis." *Id.* (quoting *State v. Seering*, 701 N.W.2d 665, 662 (Iowa 2005)).

3. Neither the federal nor State equal-protection clauses extend to laws protecting unborn life.

Petitioners do not raise the federal Equal Protection Clause to justify their request for intermediate scrutiny for good reason. *Dobbs* squarely addressed whether that clause could be "another potential home for the abortion right" and found that it is "squarely foreclosed by our precedents." 597 U.S. at 236. Indeed, neither "*Roe* nor *Casey* saw fit to invoke this theory." *Id.* That is because, with narrow exceptions applicable outside abortion, the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny." *Id.* This Court itself presaged that finding by observing that women and men are not "similarly situated" in a way related to abortion laws and that an "equal protection rationale" could not sustain a challenge to such a law. *PPH 2022*, 975 N.W.2d at 744.

Nothing justifies a jurisprudential about-face now. It is still the case that the Iowa Constitution's "well-established equal protection precedent" requires that "women [be] similarly situated

to men as it related to the purposes of the law" before finding a violation. *Id.* at 743. And it is still the case that it is biological reality, as even Petitioners then conceded, that women "undeniably are not" similarly situated to men when it comes to the "biological capacity to be pregnant." *Id.*; *see id.* at 744 (quoting Kristina M. Mentone, *When Equal Protection Fails: How the Equal Protection Justification for Abortion Undercuts the Struggle for Equality in the Workplace*, 70 Fordham L. Rev. 2657, 2659 (2002)).

Both this Court and the U.S. Supreme Court, analyzing the Iowa Constitution and its federal counterpart, agreed that the Equal Protection Clause is a poor fit to subject laws protecting unborn life "to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 597 U.S. at 236; *see PPH 2022*, 975 N.W.2d at 743–44. This Court should not reverse its earlier analysis—especially here when Petitioners did not ask it to.

4. Iowa's substantive due process jurisprudence does not include intermediate scrutiny.

PPH 2022 contended that Iowa due-process precedents involving certain family rights are reviewed under a standard that superficially resembles the undue-burden test. 975 N.W.2d at 739.

But a review of cases confirms that Iowa law uses established tiers of constitutional scrutiny, which require rational basis review here.

With one exception, the cited authorities applied the rational-basis test. *Id.* And that one exception applied a strict scrutiny standard—closer to the standard *PPH 2022* rejected than to undue burden. None of the cases apply intermediate scrutiny. And no case applied anything "like the undue burden test of *Casey*." *PPH 2022*, 975 N.W.2d at 739.

Iowa's substantive due-process analysis has two prongs. First, courts address whether the challenged "government action implicates a fundamental right." *Hensler v. City of Davenport*, 790 N.W.2d 569, 580 (Iowa 2010). Answering that question "yes" requires answering "yes" to two subsidiary questions: (1) whether a fundamental right at stake, and (2) whether government action substantially infringed it. *Id.* at 580–83. The second prong—review for strict scrutiny or rational basis—then comes into play. *Id.* Only if the first prong is answered "yes" does "a strict scrutiny analysis" then apply. *Id.* at 580. Otherwise, the challenged action does not

implicate a fundamental right, and "the statute need only survive the rational-basis test." *Id.*

It is the substantial-infringement inquiry—whether government action substantially infringed a right—that superficially resembles the undue-burden test. Unlike the undue-burden test, that inquiry does not determine a statute's constitutionality; it is part of the analysis in determining what the standard is. The most a "yes" answer can do is tell a court that the regulation should be reviewed for strict scrutiny.

Several cases this Court cited in observing that surface similarity show that the substantial-burden sub-inquiry is a component of a larger test, not a test itself. *Hensler v. City of Davenport*, for example, concerned a city ordinance governing "Parental Responsibility." 790 N.W.2d at 574, 579. The Court held under the first prong of the analysis that the ordinance did not "directly and substantially intrude into [the mother's] parental decision-making authority over her child." *Id.* at 583. It then explained that the second prong of the test instructed that "the

proper level of scrutiny to apply in [the] case [was] the rational-basis test." *Id.*

Next, *McQuistion v. City of Clinton*, 872 N.W.2d 817 (Iowa 2015), and *State v. Seering* both use Iowa substantive due process analysis and both applied rational basis. In *McQuiston*, the Court determined that a city policy of "refusing to accommodate a pregnant employee with light duties when requested due to her pregnancy," did not directly and substantially affect the plaintiffs' asserted fundamental right to procreate. *Id.* at 819, 833–35.

In *Seering*, the Court determined that the State's law against convicted sex offenders' living within 2,000 feet of certain facilities did not have "a direct and substantial impact on the familial relationship." 701 N.W.2d at 663–64. So both cases held the Court applied rational-basis review under the second prong—just as this Court held in *Hensler*. 872 N.W.2d at 835; 701 N.W.2d at 665.

Nor can *In re K.M.* support applying heightened scrutiny. 653 N.W.2d 602 (Iowa 2022). *K.M.* goes beyond the rational basis cases by finding a substantial impairment of a fundamental right under the first prong of the substantive due process analysis and shows

what happens when a court finds such a substantial impairment. In doing so it shows why any resemblance to an undue-burden test is superficial. *K.M.* involved the State's "admitted infringement of a fundamental right"—the "parent's desire for and right to 'the companionship, care, custody and management of his or her children.'" *Id.* at 607 (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

The admitted infringement of a fundamental right shifted the focus to the second prong's strict-scrutiny review. *Id.* at 607–08. But after conducting its analysis, the Court acknowledged the State's compelling interest in protecting children from harm by their parents and upheld the challenged termination-of-parental-rights statute. *Id.* at 608–09. Indeed, this Court explained that "when parents abdicate their responsibility to properly care for their children, the State has an obligation to intercede." *Id.* at 609.

Nothing in *K.M.* supports heightened scrutiny for laws protecting unborn children—and unlike here, *K.M.*'s analysis turned on the admitted infringement of a fundamental right. But because the resemblance to the undue-burden test is only

superficial, finding substantial impairment of a fundamental right meant this Court applied a strict scrutiny test—a more exacting test than an undue burden test that the State satisfied. So *K.M.* came out exactly opposite from how Petitioners argue an undue-burden test should by reinforcing the traditional tiers of scrutiny and applying strict scrutiny because of the admitted substantial burden on a fundamental right.

Nothing in *Hensler*, *McQuistion*, *Seering*, or *K.M.* suggests that the Court should adopt, or has already adopted, an undue-burden standard of review. To the extent *PPH 2022* might be read to the contrary, the Court should clarify that the relevant similarity is to a sub-inquiry of the first prong of the familiar test applied for substantive-due-process review. And, indeed, applying that standard here shows that the Court should follow the path charted by *Hensler*, *McQuiston*, and *Seering*. The Court already resolved the first prong in *PPH 2022*; there is no fundamental right at stake. It should now resolve the second prong by reviewing the Fetal Heartbeat Statute for a rational basis.

* * *

This Court has consistently applied strict scrutiny or rational basis review to substantive due process claims. There is no reason to deviate from that approach only for laws protecting the unborn. *See Dobbs*, 597 U.S. at 286–87. Neither election law nor First Amendment law supplies analytic warrant for intermediate scrutiny.

Because of the incomparable nature of the interests at stake, abortion regulation must be returned to the people and their elected representatives. And this Court's holdings coming nearest the interests involved here reinforce this: (1) the State has a compelling interest in protecting vulnerable children from harm by their parents; and (2) the State has a compelling interest in protecting human life over the individual's interest in privacy and sexual freedom.

Modern substantive due process doctrine is already far afield from the original public meaning of Iowa's due process clause. *See Planned Parenthood of the Heartland v. Reynolds ("PPH 2018")*, 915 N.W.2d 206, 247 (Iowa 2018) (Mansfield, J., dissenting) (the

Framers understood the due process clause to guarantee "a legal proceeding based upon the principles of the common law, and the constitution of the United States" rather than the "self-contradictory" notion of "substantive due process.") That weighs against further jurisprudential innovation here.

Like the U.S. Supreme Court, this Court should abandon the *Casey* undue-burden test and apply rational basis under the established tiers of constitutional scrutiny.

D. The district court abused its discretion by granting Petitioners' request for a temporary injunction.

Although courts review temporary injunction orders for abuse of discretion, this Court decides the outstanding constitutional question here de novo. *McQuistion*, 872 N.W.2d at 822. The district "court's decision rested on an error of law, [so] it constituted an abuse of discretion." *State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017). "Applying the wrong legal standard is an abuse of discretion." *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 329 (Iowa 2023). So the abuse of discretion here for a wrongly entered injunction on a pure matter of law is a far lower standard than in other contexts.

Given the unresolved state of the law, the district court should not have granted an injunction. An injunction first requires a likelihood of success on the merits. *PPH 2022*'s plurality explained it overruled *PPH 2018* without "decid[ing] what constitutional standard should replace" strict scrutiny. 975 N.W.2d at 715 (plurality op.). Although the plurality explained undue burden applied "for now," *id.* at 715–16, *Dobbs* was released one week later. And as discussed above, after *PPH 2022* held that there was no fundamental right to an abortion under the Iowa Constitution, longstanding Iowa law required rational basis review. *See* 975 N.W.2d at 740. That conflicting authority created substantial doubt over Petitioners' "likelihood of success on the merits." *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 208 (Iowa 2020).

The court could not say the Fetal Heartbeat Statute was likely unconstitutional "beyond a reasonable doubt." *PPH 2022*, 975 N.W.2d at 721. Courts must presume statutes are constitutional until shown otherwise, *id.*, so the district court should have left the

Fetal Heartbeat Statute in effect pending this Court's resolution of the dispute over the standard.

Next, the district court incorrectly dismissed the State's ongoing irreparable injury. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). And while the injunction has been in place, abortions of unborn children have continued. That loss of life is irreparable.

Through their elected representatives, Iowa voters balanced the equities and enacted a law protecting unborn life. That law chose a detectable heartbeat as the standard for when to start protecting that unborn life while allowing certain exceptions to ensure the mother's health and safety. Courts are not supposed to "substitute [their] judgment for that of the legislature on matters of policy." *State v. Johnson*, 630 N.W.2d 583, 586 (Iowa 2001) (quotation omitted). Applying the federally defunct *Casey* undue-burden test despite the significant constitutional questions was an abuse of discretion.

II. This Suit is Not Justiciable.

The assumptions on which the abortion-only standing rule was based are no longer valid. This Court should correct course and adopt a standard capable of neutral administration rather than perpetuate abortion-specific exceptions to longstanding legal doctrines. *See Hellerstedt*, 579 U.S. at 644–45 (Alito, J., dissenting); *id.* at 628–30, 640–43 (Thomas, J., dissenting). And the Court should stop litigants from challenging laws not yet enacted.

A. This Court should restore consistency to Iowa's third-party standing jurisprudence.

The "underlying justifications" for the practice of allowing abortionists to sue on the rights of unspecified women and hypothetical patients "are [now] absent." *Planned Parenthood of the Heartland, Inc. v. Reynolds ("PPH 2021")*, 962 N.W.2d 37, 56 (Iowa 2021) (quoting *Singleton v. Wulff*, 428 U.S. 106, 114 (1976)). Outdated cases allow third-party standing to abortionists. But those cases' "underlying justifications" died with *Dobbs*, *PPH 2021*, and *PPH 2022*. The Court should bring third-party standing law for abortionists back in sync with everyone else.

Indeed, *Dobbs* cited the abortion-specific warping of third-party standing doctrine as one reason for departing from stare decisis and overruling *Roe* and *Casey*. *Dobbs*, 597 U.S. at 286–87. Petitioners do not explain why this Court should ignore *Dobbs* to continue applying special rules for standing only when challenging laws protecting unborn life.

This Court has held that abortion providers have no constitutional right to provide abortions. *PPH 2021*, 962 N.W.2d at 56. Unlike the plaintiffs in *Isaacson v. Mayes*, Petitioners' economic interests do not support third-party standing here. 84 F.4th 1089, 1096–97, 1099–1101 (9th Cir. 2023). There, the abortionists' economic interests sufficed for standing on their own vagueness claim where they faced a credible threat of prosecution under a criminal statute. *Id.* at 1096–97, 1099–1101. But that is not this suit.

PPH 2021 did not protect third-party standing for abortion providers. The Court explained that its holding under the unconstitutional-conditions doctrine did not "implicate PPH's ability to bring" a derivative constitutional challenge on behalf of

women—meaning it did not need to resolve that question. 962 N.W.2d at 56. Instead, *PPH 2021* explained, "[t]hat claim would need to be analyzed under the proper constitutional framework." *Id.*

The proper framework is standard third-party standing doctrine. That includes the closeness of the relationship between the rights-holder and the third-party, whether the rights-holder is hindered in bringing her own claim, and potential conflicts of interest. Each weigh against finding third-party standing here.

Nor should Petitioners be able to assert third-party standing as derivative rights holders. Because they have no constitutional right to provide abortions, and their rights are merely derivative of the then-existing fundamental right to receive abortions, *PPH 2022*'s abrogation of the latter undermines the former. *See PPH 2021*, 962 N.W.2d at 56–57; *PPH 2022*, 975 N.W.2d at 716. With no underlying fundamental right to protect, there is nothing from which Petitioners can derive a right to proceed.

Petitioners' proffered prudential considerations merely recycle the controversial *Singleton* plurality's rationale. *Singleton*

declared the abortion-provider/patient relationship was "close" enough to warrant third-party standing in that case. 428 U.S. at 117. Justice Stevens concurred in the result because the providers' own financial interests and constitutional rights were at stake, but he questioned whether the plurality's analysis "would, or should, sustain the doctors' standing, apart from" that. *Id.* at 121–22 (Stevens, J. concurring in part).

Singleton's nonbinding plurality is on jurisprudentially shaky ground. *See*, *e.g.*, *Dobbs*, 597 U.S. at 286–87; *Russo*, 140 S. Ct. at 2168–69 (Alito, J., dissenting); *id.* at 2174 (Gorsuch, J., dissenting); *Hellerstedt*, 579 U.S. at 631–33 (Thomas, J., dissenting); (Appellant's Br. at 55–58). "The *Singleton* plurality opinion is the only opinion in which any Members of [the U.S. Supreme] Court have ever attempted to justify third-party standing for abortion providers, and judged on its own merits, the opinion is thoroughly unconvincing." *Russo*, 140 S. Ct. at 2169 (Alito, J., dissenting).

Singleton's rationale clashes with later developments in standing law. For example, third-party standing is inappropriate where there are potential conflicts of interest. *See Elk Grove*

Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). The potential conflicts of interest between abortion providers and patients "is glaring." *Russo*, 140 S. Ct. at 2166 (Alito, J., dissenting).

Petitioners relegate their acknowledgment of the conflict problem to a footnote. (Appellee Br. at 55.) But "it's pretty hard to ignore the potential for conflict here." *Russo*, 140 S. Ct. at 2174 (Gorsuch, J., dissenting). Petitioners' financial interests in staying in business can diverge from women's interest in protecting their health. *Russo*, 140 S. Ct. at 2166 (Alito, J., dissenting). "Even when a plaintiff can identify an actual and close relationship"—unlike here—courts "normally refuse third-party standing if the plaintiff has a potential conflict of interest with the person whose rights are at issue." *Id.* at 2174 (Gorsuch, J., dissenting).

Petitioners "have not brought to [this Court's] attention any other situation in which a party is allowed to invoke the right of a third party with blatantly adverse interests." *Id.* at 2170 (Alito, J.,

dissenting). This Court should abandon this "abortion-only rule" of third-party standing. *Id.*

B. Litigants should not be allowed to challenge laws before enactment.

Petitioners identify no authority that permits them to challenge laws pre-enactment. They cite prior quiescence to an earlier challenge to Senate File 471 (87th General Assembly). But unchallenged convention is not binding precedent.

Reedy v. White Consolidated Industries does not support challenges to a law before that law becomes effective. 503 N.W.2d 601, 603–04 (Iowa 1993). *Reedy* concerned the exhaustion of remedies for claims of bad-faith workers' compensation benefit denials. *Id.* Sometimes those "[c]ases [are] filed prior to the completion of the administrative process." *Id.* at 704. When that happens, courts should not "routinely dismiss[] [them] on ripeness grounds." *Id.* But the situation described in *Reedy* occurs long after a petitioner has suffered a workplace "injury in fact that is fairly traceable to the defendant's conduct." *LS Power*, 988 N.W.2d at 329. That is an exhaustion requirement. But that is unlike a challenge

to a law when Petitioners have not yet suffered "injury different from the population in general." *Id.*

This Court should clarify that future lawsuits should not precede the legislative process's completion.

CONCLUSION

The State respectfully asks this Court to clarify that rational basis is the correct test to review laws that protect unborn life. This Court should also hold that Petitioners lack standing and that they sued prematurely. This Court should dissolve the district court's injunction and render judgment for the State.

CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ *Daniel J. Johnston*
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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 Microsoft Word in 14-point Century Schoolbook font and contains 6,670 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 certify that on January 31, 2024, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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