IN THE SUPREME COURT OF IOWA
No. 23-1145

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

Appellees,

vs.

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

Appellants.

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

BRIEF OF AMICUS CURIAE FOR CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANTS

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STATEMENTS OF INTEREST[1]

Concerned Women for America (CWA) is the largest public policy women's organization in the United States, with members in all fifty states. Through its grassroots organization, CWA encourages policies that strengthen and protect women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. The protection and recognition of the sanctity of every human life is one of CWA's seven core issues. We represent thousands of the women who supported and helped pass both Senate File 359 (2018), codified at Iowa Code section 146C.2 (2023), and House File 732 (2023), codified at Iowa Code section 146E, believing it to be the best public policy for women in Iowa.

CWA believes abortion harms women, men, their families, and the nation. We actively promote legislation and public education to support women in crisis pregnancies and address the

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

harms caused by pro-abortion policies. Our members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful elite. We affirm that ordinary women are capable of extraordinary things when, inspired by the love of God, our families, and our country, we work together. CWA believes it is false to suggest women need abortion to have equality. Moreover, we affirm women are not a monolithic group assenting to a homogeneous worldview on any policy issue. This honorable Court benefits from hearing and giving value to a broad range of women voices in cases such as this one.

SUMMARY OF ARGUMENT

Appellees lack third-party standing to bring these claims. Possessing no constitutional right to perform abortions, they rely on a now-overruled, court-created constitutional right of women to obtain abortions to claim the legal requirements necessary to assert third-party standing. Since the Iowa Constitution, as the U.S. Supreme Court found in the U.S. Constitution in *Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022),* "makes no reference to abortion, and no such right is implicitly protected by

any constitutional provision," *id.* at 2242, the Court should not grant third-party standing because the required underlying justifications are not present in the context of abortion. "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives." *Id*. at 2243.

But even if the Court were to find otherwise, Appellees still lack a sufficiently close relationship to women seeking abortion in Iowa. The record shows no evidence to the contrary, and the Court should refuse to ignore this significant legal requirement they need to prove when assessing their claims on behalf of women.

Similarly, Appellees have failed to establish a record showing that Iowa women are hindered from bringing suit to vindicate their own alleged rights. Women have brought such cases with some regularity, including *Roe v. Wade*, 410 U.S. 113 (1973). Today, fifty years after that first claim brought by a woman, the resources and education on the issue are much more robust, so that women need not rely on entities such as Appellees, whose interests are not aligned and, in fact, are sometimes in direct conflict with the interests of women, to bring their claims.

ARGUMENT

I. Appellees lack third-party standing because no proper constitutional framework supports a right to abortion.

A week before the United States Supreme Court's landmark decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), this Court held in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022) (*PPH 2022*), that stare decisis did not preclude the Court from reconsidering prior decisions as it overruled *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252 (Iowa 2015), and held that the Iowa Constitution doesn't contain a fundamental right to abortion.

In *PPH 2022*, this Court took notice of the pending *Dobbs* proceeding, alerting, "That case could alter the federal constitutional landscape established by *Roe* and *Casey*." 975 N.W.2d at 716. Indeed, *Dobbs* represented a significant shift from the *Roe-Casey* landscape to which this Court had deferred in the past. Though this Court looks at matters independently, it recognized that *Dobbs* "may provide insights that we are currently lacking." *Id.* We now have those insights.

The U.S. Supreme Court in *Dobbs* overruled their previous cases that had created a right to abortion and the undue-burden standard: *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).[2] The Court said, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment." *Dobbs*, 142 S. Ct. at 2242. It said, "*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start." *Id.* at 2243. The Court concluded that the Constitution did not permit courts to take this important issue away from the people:

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most

[2] In doing so the U.S. Supreme Court abrogated numerous other cases, including, *Doe v. Bolton*, 410 U.S. 179 (1973), *Colautti v. Franklin*, 439 U.S. 379 (1979), *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), and *June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103 (2020).

> important questions in our democracy: by citizens trying to persuade one another and then voting." *Casey*, 505 U.S. at 979, 112 S.Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

Id.

When this Court deadlocked on whether to grant certiorari in *Planned Parenthood of the Heartland, Inc. v. Reynolds* ex rel. State, No. 22-2036, 2023 WL 4635932 (Iowa June 16, 2023) (*PPH 2023*), it did so with three justices reasoning that reviving a permanently enjoined statute would amount to "legislating from the bench." *Id*. The *Dobbs* court was similarly concerned about the proper role of courts. It described how the Court in *Roe* had engaged in legislating from the bench when it created an abortion right:

> When the [*Roe*] Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with," among other things, "the relative weights of the respective interests involved" and "the demands of the profound problems of the present day." *Roe*, 410 U. S., at 165. These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

Dobbs, 142 S. Ct. at 2237-38. This Court should continue to avoid the same mistake. To substitute a federal judicial concoction for a state one, in an area of policy so contentious for our citizenry, would be to further prolong the people's ire and aggravate a relationship that can be addressed more properly through the democratic process.

Amicus urges this Court to follow the insights of *Dobbs* and decline to create an abortion right or apply the undue-burden standard. If *Dobbs* is followed, abortion providers have no underlying constitutional justification to bring this suit on behalf of their patients; therefore, they lack third-party standing.

II. Original principles of the third-party standing doctrine should be restored.

One of the concerns with abortion jurisprudence for the U.S. Supreme Court in *Dobbs* was the detrimental effects of the *Roe-Casey* regime in other areas of the law, including third-party standing. *See Dobbs,* 142 S. Ct. at 2275. The Court said, "*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for

overruling those decisions." *Id.* It acknowledged, "The Court's abortion cases have diluted the strict standard for facial constitutional challenges . . . [and] have ignored the Court's third-party standing doctrine." *Id.*

Justice Kennedy acknowledged in *Gonzales v. Carhart* that the over-charged, political nature of abortion has long made courts create special rules and caveats that don't apply in other contexts:

> It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic " 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.' " [*Stenberg v. Carhart*, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting) (quoting *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 829 (1986) (O'Connor, J., dissenting))].

Gonzales v. Carhart, 550 U.S. 124, 153–54 (2007) (first alteration in original).

In *PPH 2022*, this Court said that "sometimes [constitutional law] also involves restoring original principles" when it corrected its previous abortion jurisprudence. 975 N.W.2d at 734. CWA asks

this Court to restore original principles to the third-party standing doctrine as well.

III. Abortion providers lack a sufficiently close relationship to women considering abortion to assert third-party standing.

This Court has noted it "essentially follows the federal doctrine on standing." *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008). The doctrine requires a party seeking to assert third-party standing to (1) "have suffered an 'injury in fact' …. [(2)] the litigant must have a close relation to the third party…. and [(3)] there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411, (1991) (internal citations omitted). Appellees have not demonstrated a sufficiently close relationship to women considering abortion. Therefore, they fail to meet the requirement.

Even before the explicit concerns about the application of this doctrine expressed in *Dobbs* were laid out as discussed above, the U.S. Supreme Court Justices had expressed concerns with the misapplication of the third-party standing doctrine in the abortion context. In *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103

(2020), Justice Samuel Alito wrote that "a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited." *Id.* at 2168 (Alito, J., dissenting). There, the record showed mothers "will typically meet the abortion doctor for the first time just before the procedure," where after a conversation explaining the procedure and allowing questions, the abortion is performed, which takes "two or three minutes." *Id.* Typically, no follow-up is required. *Id.*

Planned Parenthood's view of the provider-mother relationship is the opposite of close. Indeed, it has increasingly promoted the use of telemedicine to provide abortions, where a doctor spends minimal time with the mother from a monitor and dispenses her death-inducing abortion drugs by entering a computer passcode to open a drawer remotely.[3] It is plain to see why such a fleeting, impersonal relationship as telemedicine would

[3] Y. Tony Yang and Katy B. Kozhimannil, *Medication Abortion Through Telemedicine: Implications of a Ruling by the Iowa Supreme Court*, Obstetrics & Gynecology vol. 127,2 (2016): 313–6, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4780360/.

benefit abortion providers who are able to greatly increase profitability. But that fact only highlights the conflicting nature of the providers' interests which are different and potentially in conflict with those of the mother's. *See Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 29–32 (2004) (disallowing third-party standing for a parent whose interest was "potentially in conflict" with his child).[4] Justice Alito and Justice Neil Gorsuch warned about the potential conflict between abortion providers, who have "a financial interest in avoiding burdensome regulations," and the mother, who has "an interest in the preservation of regulations that protect [her] health." *June Med. Servs.,* 140 S. Ct. at 2166 (Alito, J., dissenting), *id.* at 2174 (Gorsuch, J., dissenting). The potential conflicts were seen in cases like *Casey* where the Planned Parenthood and doctors teamed up to challenge an informed consent law that the Supreme Court found placed no undue burden on women. There, the Court wrote, "In attempting to ensure that a

[4] The Court approved of this method under the old *Casey* regime in *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252 (Iowa 2015), but, following *Dobbs,* it should allow Iowans to make these policy choices freely.

woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey,* 505 U.S. at 882.

Amicus represents hundreds of thousands of women, including thousands in Iowa who are keenly aware of the physical, emotional, and even spiritual consequences of abortion on women's lives. The powerful words from Justice Anthony Kennedy in the context of late term abortion exemplify it:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Gonzales, 550 U.S. at 159–60. But the possible detrimental effects can happen at any point. Even in the first trimester, possible physical complications of surgical abortions include: hemorrhage, infection, retained pregnancy tissue, cervical damage, possible cervical incompetence leading to future premature delivery, uterine

perforation or rupture, and even death.[5] One study found that "[t]he risk of death increased exponentially by 38% for each additional week of gestation."[6] Another found that "[w]omen who had undergone an abortion experienced an 81% increased risk of mental health problems, and nearly 10% of the incidence of mental health problems was shown to be attributable to abortion."[7] Appellees downplay these concerns and declare abortion safe, which is why they have historically fought against informed consent laws, like those involved in *Casey*. These conflicting interests accentuate the separation that makes a sufficiently close relationship dubious in the context of abortion providers accurately representing the interest of Iowa women considering an abortion.

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[5] *See* Ingrid Skop, *Immediate Physical Complications of Induced Abortion*, Charlotte Lozier Inst. (2022), https://lozierinstitute.org/immediate-physical-complications-of-induced-abortion/.

[6] *See* Linda A. Bartlett, *et al.*, *Risk factors for legal induced abortion-related mortality in the United States*, *OBSTETRICS AND GYNECOLOGY* vol. 103,4 (2004): 729-37. doi:10.1097/01.AOG.0000116260.81570.60, https://pubmed.ncbi.nlm.nih.gov/15051566/.

[7] *See* Priscilla K. Coleman, *Abortion and mental health: Quantitative synthesis and analysis of research published 1995–2009*, *BRITISH J. OF PSYCHIATRY, 2011 Sep;199(3):180-6*, https://pubmed.ncbi.nlm.nih.gov/21881096/.

IV. Women are not hindered from suing to protect their own interests.

To assert third-party standing, Appellees must also demonstrate "some hindrance to the third party's ability to protect his or her own interests. *Powers*, 499 U.S. at 410–11. Nothing hinders women in Iowa from suing on their own behalf. The record simply does not support a finding to the contrary. The district court did not addressed this issue in its short discussion of third-party standing. But Appellees depend entirely on derivative standing to present their claims, possessing no constitutional right of their own (there is no constitutional right to perform abortions). Without a record supporting their assumption, they lack standing under the doctrine.

There is a high bar to prove that women are hindered from bringing their own suits. For example, in *Kowalski v. Tesmer*, the U.S. Supreme Court rejected the argument that "unsophisticated, pro se criminal defendants" could not litigate procedural claims on their own. 543 U.S. 125, 132 (2004). *Roe* itself was brought by a woman seeking to protect

her own interests in 1973. 410 U.S. 113. The issue was novel at the time, and the many resources available to women seeking help in this area were exponentially less than what is available today. Women seeking to litigate in the area of reproductive rights are even offered pro-bono services by organizations dedicated to protecting abortion today. *See, e.g.*, *Pro Bono Program*, Ctr. for Reproductive Rights, https://reproductiverights.org/about-us/pro-bono-program/.[8] Appellees cannot show that women in Iowa are hindered from bringing their own claims. They lack this necessary requirement to assert third-party standing.

CONCLUSION

For these reasons, *amicus* Concerned Women for America requests this Court to reverse the district court's grant of injunctive relief, concluding Appellees lack third-party standing to bring suits

[8] This year, in *Zurawski v. State of Texas*, Cause No. D-1-GN-23-000968 (Travis Co., Tex. Dist. Ct. Aug. 4, 2023), the Center for Reproductive Rights is representing 15 women suing Texas to clarify the scope of the state's medical emergency exception.

on behalf of women where no proper constitutional framework supports a right to abortion under the Iowa Constitution.

Respectfully submitted this 15 day of November, 2023.

By: /s/ *Mario Diaz*

MARIO DIAZ*
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(a)(d) and 6.903(a)(g)(1) because it has been prepared in a proportionally space typeface using Century Schoolbook, 14-point type and contains 3,146 words, excluding the parts of the brief that are exempted under Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Mario Diaz*

Mario Diaz
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2023, I electronically filed the foregoing brief with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will accomplish service on the parties' counsel of record.

/s/ *Mario Diaz*

Mario Diaz
Counsel for Amicus Curiae

ADDENDUM

Gmail Ryan Benn <ryan.abby.benn@gmail.com>

micus Brief in PPH v. Reynolds

essan, Eric <Eric.Wessan@ag.iowa.gov> Fri, Oct 27, 2023 at 11:21 AM
: Ryan Benn <ryan.abby.benn@gmail.com>, "Johnston, Daniel" <Daniel.Johnston@ag.iowa.gov>
c: "mdiaz@cwfa.org" <mdiaz@cwfa.org>

Dear Ryan,

Both we and the appellees have agreed to a blanket consent for amicus briefs filed in support of either (or neither) side in this case.

Thank you,

EHW

From: Ryan Benn <ryan.abby.benn@gmail.com>
Sent: Friday, October 27, 2023 11:20 AM
To: Johnston, Daniel <Daniel.Johnston@ag.iowa.gov>; Wessan, Eric <Eric.Wessan@ag.iowa.gov>
Cc: mdiaz@cwfa.org
Subject: Amicus Brief in PPH v. Reynolds

Gentlemen,

Good morning! I'm serving as local counsel for Concerned Women for America. Mario Diaz is General Counsel for CWA. He will register with the OPR, and I will resubmit the PHV application.

We intend to file an amicus brief in support of the Appellants in *Planned Parenthood of the Heartland v. Reynolds*, case No. 23-1145. Do your clients consent to CWA filing an amicus brief in this case? (I will separately email the appellees' counsel to request their written consent.)

Thanks,

Ryan Benn

515-770-9781

Statement of interest for CWA:

Concerned Women for America (CWA) is the largest public policy women's organization in the United States with members in all fifty states. Through its grassroots organization, CWA encourages policies that strengthen and protect women and families, and advocates for the traditional virtues that are central to America's cultural health and welfare. The

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micus Brief in PPH v. Reynolds

messages

yan Benn <ryan.abby.benn@gmail.com> Fri, Oct 27, 2023 at 11:34 AM
: anjali.salvador@ppfa.org, "peter.im@ppfa.org" <peter.im@ppfa.org>, "dylan.cowit@ppfa.org" <dylan.cowit@ppfa.org>, HARON@grahamlawiowa.com, RITA.BETTIS@aclu-ia.org, SEJ@shuttleworthlaw.com, CLS@shuttleworthlaw.com

Counsel,

Good morning! I'm serving as local counsel for Concerned Women for America. Mario Diaz is General Counsel for CWA. He will register with the OPR, and I will resubmit the PHV application.

We intend to file an amicus brief in support of the appellants in *Planned Parenthood of the Heartland v. Reynolds*, case No. 23-1145. Do your clients consent to CWA filing an amicus brief in this case? (I have separately emailed the appellants' counsel to request their written consent.)

Thanks,
Ryan Benn
515-770-9781

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, Peter <peter.im@ppfa.org> Fri, Oct 27, 2023 at 12:57 PM
: Ryan Benn <ryan.abby.benn@gmail.com>
c: anjali.salvador@ppfa.org, "dylan.cowit@ppfa.org" <dylan.cowit@ppfa.org>, SHARON@grahamlawiowa.com, TA.BETTIS@aclu-ia.org, SEJ@shuttleworthlaw.com, CLS@shuttleworthlaw.com

Hi Ryan,
Thanks for the email. As you can see in the attachment, the parties have agreed to consent to all amicus briefs.

Thanks,
Peter
[Quoted text hidden]

Planned Parenthood Mail - [PPH v. Reynolds] Consent for Amicus Briefs.pdf
165K

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yan Benn <ryan.abby.benn@gmail.com> Fri, Oct 27, 2023 at 3:24 PM
: "Im, Peter" <peter.im@ppfa.org>

Great, thank you!

Ryan
[Quoted text hidden]