No. 23-1145

IN THE SUPREME COURT OF IOWA

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

Appellees,

v.

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

Appellants.

On Appeal from the Iowa District Court for Johnson County
Case No. EQCV081855
Mitchell E. Turner, District Judge

BRIEF OF *AMICI CURIAE* FOUNDATION FOR MORAL LAW AND LUTHERANS FOR LIFE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus Foundation for Moral Law (FML) is an Alabama nonprofit corporation located in Montgomery, Alabama, which defends religious liberty, the strict interpretation of the Constitution as intended by its Framers, and the sanctity of life.

Amicus Lutherans for Life (LFL), composed of Lutherans of many different Lutheran synods and associations, is an Iowa nonprofit corporation located in Nevada, Iowa, with state federations and local chapters in Iowa and many other states. The mission of LFL is to equip Lutherans and their neighbors to be Gospel-motivated voices for life. LFL believes that the Church is compelled by God's Word to speak and act on behalf of those who are vulnerable and defenseless.

John Eidsmoe, the primary author of this brief, was raised in Sioux City, Iowa, graduated from the University of Iowa College of Law in 1970, owns farmland in Woodbury and Monona Counties, is admitted to practice before the Iowa Supreme Court, is a 53-year member of the Iowa State Bar Association, is Professor of Constitutional Law for the Oak Brook College of

[1] Pursuant to Iowa R. App. P. 6.906(1), this brief is filed "accompanied by the written consent of all parties." *See* Addendum. No party's counsel authored this brief in whole or in part, and no person other than *Amici* and its counsel made any monetary contribution to fund the preparation or submission of this brief.

Law & Government Policy, and serves as Senior Counsel for *Amicus* Foundation for Moral Law and as a Board of Directors member of *Amicus* Lutherans for Life.

Amici have an interest in this case because they believe the ruling in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE083074, 2019 WL 312027 (Polk Cty. Dist. Ct., Jan. 22, 2019), and subsequent decisions of the Iowa courts are contrary to the 1857 Iowa Constitution and violate the right to life of preborn children.

ARGUMENT

Our rights as Americans and as Iowans are only as secure as the rights of our most vulnerable citizens. Our most vulnerable and helpless citizens are our preborn children.

In this brief, *Amici* will demonstrate that the 1857 Iowa Constitution was adopted at precisely the time in history when medical science had come to recognize that life begins at conception, and the preborn child is therefore a human person. As medical science came to this conclusion, states across the nation adopted laws to protect the life of the preborn child, as did Iowa in its Act for the Punishment of Foeticide. Iowa Gen. Stat. (1860) ch. 165 art. 2.

In light of this history, it is inconceivable that the framers of the 1857 Iowa Constitution, when they drafted provisions to protect due process of law and the equal rights of all, intended by these provisions to deny Iowa's most vulnerable citizens the most basic of all rights, the right to life (or to allow the wanton taking of that life).

I. History reveals that the Iowa Constitution does not guarantee a right to abortion.

A. Relevant Iowa Constitutional and Legislative History

The 1846 Constitution contained a bill of rights but no due process clause or equal protection clause, although Article II provided specific rights related to criminal and civil process and Section 6 provided that "All laws of

a general nature shall have a uniform operation." Iowa Const. (1846) art. 2, § 6. Article III Section 1 limited suffrage to "white male citizens." Iowa Const. (1846) art. 3, § 1.

The current Iowa Constitution was drafted in 1857, was narrowly approved in a referendum, and became effective September 3, 1857. Article I, the Bill of Rights, contained a due process clause similar to those of the U.S. Constitution, Amendments 5 and 14. Iowa Const. art. 1, § 9.[2]

The Fourteenth Amendment to the U.S. Constitution with its Equal Protection Clause was ratified in 1968. U.S. Const. amend. XIV. During the same time period, medical science and state laws were increasingly recognizing the personhood of the preborn child. The phrase "equal protection" is not found in the Iowa Constitution, but Article I Section 1 declares that "All men [and women][3] are, by nature, free and equal, and have certain inalienable rights." Iowa Const. art. 1, § 1. Article I Section 6 provides that "All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any Citizen, or class of Citizens, privileges or immunities, which, upon the same terms shall not equally belong to all

[2] *See* the original 1857 Constitution of the State of Iowa, available at https://www.legis.iowa.gov/docs/publications/ICP/1125187.pdf.
[3] This and other provisions of the Iowa Constitution were amended in 1998 to include "and women."

citizens." Iowa Const. art. 1, § 6. Section 24 protects resident aliens and Section 25 prohibits slavery (Iowa Const. art. 1, §§ 24–25), but Article II Section 1 retained the language of the 1846 Constitution that limited suffrage to white male citizens (Iowa Const. art. 2, § 1).

In some ways, Iowa was a leader in recognizing the rights of women and minorities. However, a proposal to extend suffrage to blacks was presented to the voters in 1857 and was rejected 8,479 to 49,267. But voter sentiment shifted during the War, and in 1868, 57% of voters approved amendments to remove the word "white" from the suffrage clause, the census enumerations, senate appointments, house appointments, and military service.[4] Nevertheless, women's suffrage did not come to Iowa until the Nineteenth Amendment to the U.S. Constitution was ratified in 1920. A bill to allow women to vote in presidential elections was only adopted by the Iowa Legislature in 1919. In 1866, a women's suffrage bill died in the Iowa Senate, and in 1916, a women's suffrage amendment was defeated by Iowa voters.[5]

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[4] Iowa Chief Justice Mark S. Cody, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, Iowa Constitution Lecture Series 1133, 1139–40 (Mar. 8, 2012), https://lawreviewdrake.files.wordpress.com/2015/06/irvol60-4_cady1.pdf.

[5] Iowa State University, *Women's Suffrage in Iowa*, Carrie Chapman Catt Center for Women and Politics, https://cattcenter.iastate.edu/timeline/.

This history casts serious doubt on the assertion that either the 1846 Constitution, the 1857 Constitution, or the 1866 amendments demonstrate a commitment to equality for women in voting rights, much less for the right to abort a child.

B. Concurrent Developments in Medicine and Science

In early times, under the common law, "quickening" was the test for homicide prosecutions. Quickening is different from viability; quickening occurs when a mother first feels her child move within her. One could be convicted of homicide for the killing of a preborn child only if quickening had already taken place.

This common law rule did not mean that a child became a person only at quickening, or that there was a right to abortion before quickening. Rather, it was a procedural matter of proof. One can be guilty of homicide only if the homicide victim was alive at the time of the alleged killing, and at that stage in the development of the common law, medical science had no way of proving a child was alive until the mother had felt the child move within her.[6]

[6] William Blackstone, I *Commentaries on the Laws of England* 125-26 (U. Chi. Fascsimile ed. 1979) (1765); *see also Hicks v. State*, No. 1110620, 2014 WL 1508698 (Ala. Apr. 18, 2014) (Moore, C.J., concurring); *see also* John Eidsmoe, *Historical & Theological Foundations of Law* III:1197, n.110 (2012).

As medical science advanced, so did protection for preborn children. In the 1800s, when medical science was able to determine that a preborn child was in fact alive from the time of conception, laws were enacted in England and in the United States to prohibit abortion from being performed at any time after conception. For example, Lord Ellenborough's Act of 1803 prohibited abortion after quickening as a capital offense and punished abortion prior to quickening with fines, imprisonment, pillory, whipping, or banishment for up to fourteen years.[7] In 1837, Lord Ellenborough's Act of 1803 was amended to abolish the distinction between pre-quickening and post-quickening and make abortion a crime regardless of when performed.[8] For a thorough refutation of the myth that abortion was a "right" historically and that laws prohibiting abortion developed in the 1800s as protection for the mother rather than the child, see Villanova University Law Professor Joseph W. Dellapenna's 1,300-paged, meticulously documented work, *Dispelling the Myths of Abortion History*.[9]

In 1857—the same year the current Iowa Constitution was drafted—the American Medical Association issued a report stating, "[t]he independent and

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[7] Lord Ellenborough's Act 1803, Pickering's Statutes at Large, Act 43 Geo.3 c. 58 (1804 ed.).
[8] Charles L. Lugosi, *When Abortion Was a Crime: A Historical Perspective*, 83 U. Det. Mercy L. Rev. 51, 60 (2006).
[9] Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (2006).

actual existence of the child before birth as a living being is a matter of objective science."[10] In the 1860s, American medical doctors led a movement to criminalize abortion at all stages of pregnancy, and this movement led to the passage of laws prohibiting abortion in all 50 states.[11] Since that time, medical science has advanced further in its understanding of the preborn child: from the discovery of chromosomes (1879–83)[12] to the location of genetic material within chromosomes of a cell (1902),[13] the components of DNA (1929),[14] and much more.

II. In 1857 and thereafter, Iowa joined other states in affirming this growing respect for the life of the preborn child.

In 1858, when states across the nation were banning abortion because they recognized the personhood of the preborn child, Iowa followed by enacting Chapter 165 Article 2 of the Iowa Code:

> Section 4221. (1.) *Be It enacted by the General Assembly of the State of Iowa,* that every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of

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[10] *See Roe v. Wade*, 410 U.S. 113, 141 (1973).
[11] Amy Lind & Stephanie Brzuzy, *Battleground: Women, Gender, and Sexuality* I:3 (2008).
[12] *See* National Human Genome Research Institute, Genetic Timeline, http://www.genome.gov/pages/education/genetictimeline.pdf.
[13] *See* Robert Snedden, *DNA and Genetic Engineering* 44 (2007).
[14] *See* Charles H. Calisher, *Sequences vs. viruses: Producer vs. Product, Cause and Effect*, Croatian Medical Journal (2007), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080495/.

> any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and shall be fined in a sum not exceeding one thousand dollars.[15]

Of equal significance—and usually overlooked today—is the title of the Act: "An Act for the punishment of Foeticide." The term "Foeticide" comes from the Latin words "cedo" (to kill) and "foetus" (preborn child). The first known use of this word was in 1842, the very year in which science began to recognize the personhood of the preborn child.[16]

The framers of this Act recognized that abortion is not just a medical procedure performed on a woman; it is an act of killing a preborn child.[17] If the Framers of the 1857 Iowa Constitution had intended to protect the right to abortion by the Due Process Clause of Article I Section 1 or the Equal Application Clause of Section 6, it is highly unlikely that the Legislature would have enacted, and the Governor would have signed, an "Act for the

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[15] "An Act for the punishment of Foeticide," Iowa Gen. Stat. (1860) ch. 165 art. 2, 723–724, https://www.legis.iowa.gov/docs/shelves/code/ocr/1860%20Iowa%20Code.pdf.

[16] *Feticide*, Mirriam Webster, https://www.merriam-webster.com/dictionary/feticide.

[17] This also refutes the myth that abortion was prohibited because it was dangerous to the mother. All surgery was dangerous in those days. But there were no laws prohibiting appendectomies or hysterectomies; only laws prohibiting abortion.

punishment of Foeticide" the next year.[18]

No, these provisions of the Iowa Constitution, the amendments of 1868, and the later advances toward women's suffrage, were intended to protect the rights of all adults to do those things that were previously only extended to white males. Any suggestion that abortion was previously a right extended only to white males is clearly absurd. These provisions were most definitely not intended to create a "right" to take the life of a preborn child at a time when the American Medical Association and most state legislatures, including Iowa's, were coming to recognize that the preborn child is a living human person.

III. The laws of this Nation have a foundation in scripture and church tradition.

Much of our Western legal tradition has been shaped by the Bible. On October 4, 1982, Congress passed a Joint Resolution declaring 1983 the "Year of the Bible," and the President signed the bill into law. One clause of the bill states: "Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States."[19]

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[18] The "Act for the punishment of Foeticide" passed on March 15,1858, and took effect on July 4, 1858. *See* Iowa Gen. Stat. ch. 165 art. 2, at 723, https://www.legis.iowa.gov/docs/shelves/code/ocr/1860%20Iowa%20Code.pdf.

[19] Joint Resolution, Pub. L. No. 97-280, 96 Stat. 1211 (1982),

Although many today no longer believe the Bible is an authoritative source of law, the evidence establishes that most of those who framed our Constitution and our civil institutions did regard the Bible as an authoritative source of law, as did most of the jurists and legal philosophers the framers quoted and relied upon.[20] Joshua Berman, Senior Editor at Bar-Ilan University, in his 2008 book *Created Equal: How the Bible Broke with Ancient Political Thought,* contends that the Pentateuch is the world's first model of a society in which politics and economics embrace egalitarian ideals. Berman states flatly:

> If there was one truth the ancients held to be self-evident it was that all men were not created equal. If we maintain today that, in fact, they are endowed by their Creator with certain inalienable rights, then it is because we have inherited as part of our cultural heritage notions of equality that were deeply entrenched in the ancient passages of the Pentateuch.[21]

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https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1211.pdf.

[20] *See* Daniel L. Driesbach & Mark David Hall, *Great Jurists in American History* (2018); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 American Political Science Review 189 (1984); Charles S. Hyneman & Donald S. Lutz, *American Political Writing During the Founding Era* Vols. I & II (1983); John Eidsmoe, *Historical and Theological Foundations of Law* Vols. I, II, & III (2017); John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (1987).

[21] Joshua Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* 175 (2008). *See also* John Marshall Gest, *The Influence of Biblical Texts Upon English Law,* an address delivered before the Phi Beta Kappa and Sigma xi Societies of the University of Pennsylvania on June 14, 1910, at 16

Chief Justice John Marshall wrote,

> The American population is entirely Christian, and with us, Christianity and Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations with it.[22]

A. The Bible on Preborn Children

The Bible treats the preborn child as a living human being. When Elizabeth, the mother of John the Baptist, came into the presence of Mary (who was carrying Jesus in her womb), Elizabeth declared that "the babe leaped in my womb for joy." *Luke* 1:44 (King James). That doesn't sound like a fetus or fertilized egg; that sounds like a child! It reminds us of Rebekah, of whom we read, "the children struggled within her." *Genesis* 25:21–26 (King James). These preborn children displayed traits that would follow them most of their lives.

The original languages used in these accounts make no distinction between born and preborn children.[23] Of all Greek words used for child,

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(transcript available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7211&context=penn_law_review) ("The law of England is not taken out of Amadis de Gaul, nor the Book of Palmerin, but out of the Scripture, of the laws of the Romans and the Grecians") (quoting Sir Francis Bacon).

[22] Univ. of N.C. Press, *The Papers of John Marshall* 278 (Charles F. Hobson ed., 2006).

[23] An interlinear version of the Bible displaying the original Greek version of the scriptures alongside a direct translation can be found online at https://biblehub.com/interlinear.

brephos connotes a baby or very small child. That's the word attributed to Elizabeth: "The babe *[brephos]* leaped in my womb for joy." *Luke* 1:44. We see the same word in the next chapter: "Ye shall find the babe *[brephos]* wrapped in swaddling clothes, lying in a manger." *Luke* 2:12 (King James). And in *II Timothy* 3:15, Paul uses the same word: "From a child *[brephous]* thou hast known the holy Scriptures." (King James) The same word is used for a child in the womb, a child newly born, and a child sometime after birth.

Another Greek word used for "son" is *huios.* In *Luke* 1:36, the angel tells Mary, "And, behold, thy cousin, Elizabeth, she hath also conceived a son *[huios]*." (King James) And the angel tells Mary in *Luke* 1:31, "Thou shalt conceive in thy womb, and bring forth a son *[huios]*." (King James) Two verbs, "conceive" and "bring forth," with the same direct object, a "son" or *huios.* And years later, when Jesus is a young man, God the Father says to Him, "Thou art my beloved son *[huios]*." *Luke* 5:22 (King James). Again, the same Greek word used for a preborn child, a newborn child, and a young man.

The same is true of the Old Testament Hebrew.[24] The same word used for the preborn children in Rebekah's womb, *bne,* is also used for Ishmael when he is 13 years old (*Genesis* 17:25) and for Noah's adult sons (*Genesis*

[24] The interlineal Bible online also provides the original Hebrew text of Old Testament passages: https://biblehub.com/interlinear.

9:18). And Job says in his anguish, “Let the day perish wherein I was born, and the night in which it was said, There is a man child *[gehver]* conceived” *Job* 3:3 (King James). The Old Testament uses *gehver* 65 times, and usually it is simply translated “man.” *Job* 3:3 could be accurately translated, “There is a man conceived.”

The biblical authors identify themselves with the preborn child. In *Psalm* 139:13 (King James) David says, “Thou hast covered *me* in my mother’s womb.” Isaiah says, “The Lord hath called *me* from the womb” (*Isaiah* 49:1 (King James)), and in *Jeremiah* 1:5 (King James) we read, “before *thou* camest forth out of the womb I sanctified *thee*, and I ordained *thee* a prophet unto the nations.” They don’t say “the fetus that became me”; that person in the womb is “me.”

Job wishes he could have died before he was born: “Wherefore then hast thou brought me forth out of the womb? Oh that I had given up the ghost, and no eye had seen me!” *Job* 10:18 (King James). How can the preborn child die if he or she is not alive?

And David says, “Behold, I was shapen in iniquity, and in sin did my mother conceive me.” *Psalm* 51:5 (King James). There was nothing sinful about the act of David’s conception; this passage establishes that the preborn child has a sinful nature. How can a non-person have a sinful nature? And

while other verses establish the child's personhood before birth, this passage shows his or her humanity all the way back to conception.

Clearly the Bible, especially in its original languages, treats the preborn child the same as a child already born. The Bible knows nothing about "potential human beings;" to the authors of Scripture, there are only human beings with potential.

Some will argue that, because *Genesis* 2:7 (King James) says, "God breathed into his nostrils the breath of life; and man became a living soul," man does not really become human until he takes his first breath. *Amici* believe this is a mistaken interpretation of Scripture for two reasons:

(1) *Genesis* 2:7 is not normative about how and when human life begins. Adam was never a preborn child; he was formed out of the dust of the ground as a mature adult human being. No one else was formed out of the dust of the ground; even Eve was formed out of Adam's rib, and we never read that God breathed the breath of life into her nostrils or those of anyone else.

(2) Even if we were to conclude that without the "breath of life" we are not fully human, the preborn child takes in oxygen through a placenta. Birth constitutes a change of environment that forces the baby to breathe for themselves; but other than that, birth is simply one more step on the road to maturity.

So, the Bible, taken as a whole, teaches that the preborn child is a living human being. Viability is not a factor in determining the beginning of personhood.

B. Church Tradition on Preborn Children

Church tradition has also been instrumental in the formation of Western law.[25] For this reason, and because Justice Blackmun in *Roe v. Wade*, 410 U.S. 113, 130 (1973), and Justice Stevens in his *Webster v. Reproductive Health Services* dissent, 492 U.S. 490, 567–69 (1989), cited Catholic Church teaching to justify *Roe v. Wade*, *Amici* will briefly survey church history and its effect on Western law.

The *Didache*, or *Teaching of the Twelve Apostles*, a manual of instruction dating possibly as early as 50 A.D.,[26] commanded, "You shall not murder a child by abortion nor kill that which is born."[27] The Church Father Tertullian, writing around 197 A.D., cited extensively from Old Testament and New Testament Scriptures.[28] He declared firmly, "It is not permissible for

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[25] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); John Eidsmoe, *Historical and Theological Foundations of Law* (2017).

[26] *Didache*, Early Christian Writings, www.earlychristianwritings.com/didache.html.

[27] *Didache*, Roberts-Donaldson English Translation, https://www.earlychristianwritings.com/text/didache-roberts.html.

[28] *See* Julian Andrew Barr, *Tertullian's Attitude towards the Human Foetus and Embryo*, Theses submitted for the degree of Doctor of Philosophy at the

us to destroy the seed by means of illicit manslaughter once it has been conceived in the womb, so long as blood remains in the person."[29] St. Hippolytus, writing around 228 A.D., condemned those who resorted to drugs "so to expel what was being conceived on account of their not wishing to have a child," declaring them guilty of "adultery and murder at the same time."[30] And St. Basil wrote in his *First Canonical Letter*,

> The woman who purposely destroys her unborn child is guilty of murder. With us there is no nice enquiry as to its being formed or unformed. In this case it is not only the being about to be born who is vindicated, but the woman in her attack upon herself, because in most cases women who make such attempts die. The destruction of the embryo is an additional crime, a second murder, at all events, if we regard it as done with intent.[31]

The Canon Law of the Roman Catholic Church provides, "A person who procures a completed abortion incurs a *latae sententiae* [automatic] excommunication."[32] The Canon Law developed in the early centuries of the Christian Church out of early Church documents such as the *Didache* and was

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University of Queensland, Australia (2014), https://core.ac.uk/download/pdf/43359605.pdf.

[29] Tertullian, *Apologia*, chap. 25, line 4.

[30] Hyppolytus (228 A.D.), *reprinted in The Ante-Nicene Fathers: The Writings of the Fathers Down to A.D. 325* V:131 (Alexander Roberts & Sir James Donaldson eds., 1903).

[31] St. Basil, *First Canonical Letter* (330-379 A.D.), *reprinted in A Select Library of Post-Nicene Fathers of the Christian Church, Second Series* VIII:225 (Philip Schaff & Henry Wace eds., 1895).

[32] Code of Canon Law, Title VI, Delicts Against Human Life and Freedom, Canon 1398, www.vatican.va/archive/ENG1104/_P57.HTM.

based on and interacted with the Scriptures, Roman and Greek Law, Byzantine Law, the Justinian Code, the decrees of emperors, and other sacred and secular legal documents.[33] The above citation from the *Didache* is evidence that the prohibition against abortion was part of the Canon Law from the beginning and consistently thereafter.

No wonder Orthodox scholar Alexander F.C. Webster wrote that abortion "is one of only several moral issues on which not one dissenting opinion has ever been expressed by the Church Fathers."[34]

Nor was this view limited to the Church Fathers or to the Roman Catholic Tradition. Martin Luther stated his position forcefully: "For those who have no regard for pregnant women and who do not spare the tender fruit

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[33] *See* Kenneth Pennington, *A Short History of the Canon Law from Apostolic Times to 1917*, 2, 3, 7, 10, 16, 19, 21, 25–26, 32, 33–37, 41, 44, 59, 61, http://legalhistorysources.com/Canon%20Law/ShortHistoryCanonLaw.htm (as Pennington notes at 74, although Martin Luther initially rejected the Canon Law, as his thinking developed, he came to appreciate the value of Roman Catholic Canon Law legal scholarship and concluded that that scholarship should be applied to the civil law and the common law); John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* 55–85 (2002); John Eidsmoe, *Historical & Theological Foundations of Law* III:983–84 (2012).

[34] James Lamb, *Abortion and the Message of the Church: Sin or Salvation?*, LutheransforLife.org (Jun. 30, 2004), http://www.lutheransforlife.org/article/abortion-and-the-message-of-the-church-sin-or-salvation/ (quoting Alexander F.C. Webster, *An Orthodox Word on Abortion* at 8–9 (Paper delivered at the Consultation on The Church and Abortion, Princeton, 1992)).

are murderers and infanticides."[35] John Calvin was just as clear: "If it seems more horrible to kill a man in his own house than in a field, because a man's house is his most secure refuge, it ought surely to be deemed more atrocious to destroy the unborn in the womb before it has come to light."[36] And Pennington notes that when King Henry VIII (1491–1547 A.D.) separated the Church of England from the Roman Catholic Church, he proclaimed that "he, not the pope, was the source of all canon law henceforward."[37] Pennington adds, "[c]onsequently, the Anglican Church preserved the entire body of medieval canon law and converted it into a national legal system."[38]

Amici Lutherans for Life and the Foundation for Moral Law urge the Court to consider the Biblical heritage and church tradition in determining whether, in and around 1857, the framers of the Iowa Constitution intended to create a "right" to abortion.

IV. Where does this leave us?

The latest decision of this Court, *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37 (Iowa 2021) (*Planned Parenthood II*), leaves

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[35] Lamb, *supra* note 34 (quoting Ewald M. Plass, *What Luther Says: An anthology* II:905 (1959)).
[36] Lamb, *supra* note 34 (quoting John Calvin, *Commentaries on the Four Last Books of Moses* III:41–42 (Charles William Bingham trans., 1950)).
[37] Pennington, *supra* note 33, at 64.
[38] *Id.*

us floundering as to the future prospects for fetal life. At the federal level, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), has overruled the strict scrutiny test of *Roe v. Wade* and the undue burden test of *Planned Parenthood v. Casey*.[39] *Planned Parenthood I* left us with the strict scrutiny test based on a misreading of the Iowa Constitution. *Planned Parenthood II* overruled *Planned Parenthood I* but left us in the dark as to what replaces it. If abortion is no longer a fundamental right entitled to strict scrutiny, and if the undue burden test no longer applies, where do we stand? More importantly, where does the life of the preborn child stand? Are we left with viability as the test as to when the State's interest becomes compelling?

We hope not. Viability is a very subjective and unreliable test of personhood, let alone of the State's interest in a child. The point of viability varies from one child to another; some become viable at earlier ages than others. It also varies based upon technology and advancements in medical science. Children are considered viable at a much earlier age today than they

[39] The rational basis test applies to infringements upon those rights which the courts have classified as ordinary or nonfundamental. If there is no right to abortion under either the U.S. Constitution or the Iowa Constitution, then certainly the rational basis test is the highest-level test that the courts would use to evaluate restrictions on abortion. The State of Iowa will have no difficulty demonstrating that a rational basis exists, such as protecting the life of the preborn child, the state's interest in the preborn child, the regulation of a dangerous practice, and/or the integrity of the medical profession.

were when *Roe v. Wade* placed viability at the end of the second trimester, and they might be considered viable at an earlier age in nations with advanced medical technology than in less developed nations.

So far as *Amici* can determine, the viability test is not applied as a means of determining when life begins or when the state's interest begins in any field of law other than formerly in abortion law.

Furthermore, the question of viability by its very nature is subjective in that it calls for an opinion. The question is whether, in the opinion of a doctor, the child is viable. One doctor might think the child is viable while another thinks otherwise. The opinion might vary depending upon the subjective beliefs of the doctors.

In contrast, the heartbeat test is rock-hard science: Either doctors can detect a heartbeat, or they cannot. This is the test the Iowa Legislature has chosen to employ, and it makes far more sense to rely on this test than some court-created test based on a supposed right the framers of the Iowa Constitution never intended to create or protect.[40]

[40] *Amici* Foundation for Moral Law and Lutherans for Life believe human personhood begins at conception/fertilization and therefore oppose abortion at all stages of pregnancy. However, we support the Iowa heartbeat statute because it brings the protection closer to the point at which human life begins and because it is a far more objective test than viability.

In *Planned Parenthood II*, this Court said it would wait for the Legislature to act. The Legislature has acted—again.

In *Planned Parenthood II*, this Court noted that the U.S. Supreme Court was in the process of deciding an important abortion case, *Dobbs v. Jackson Women's Health Organization*. The U.S. Supreme Court has decided—at last.[41]

CONCLUSION

Amici believe the time has come for the Iowa Supreme Court to recognize that neither the United States Constitution nor the Iowa Constitution creates or protects a right to abortion. We urge this Court to affirm the constitutionality of the Iowa statute.

Respectfully submitted,

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[41] *Amici* respectfully ask this Court to note that on October 24, 2023, in a 6-1 decision, the Georgia Supreme Court upheld as constitutional the Georgia Living Infants Fairness and Equality Act ("LIFE Act") which prohibits abortion after a heartbeat can be detected, with certain exceptions. *State of Georgia v. Sistersong Women of Color Reproductive Justice Collective*, No. S23A0421 (Ga., Oct. 24, 2023). The Court reversed a court ruling that the LIFE Act was unconstitutional *ab initio* because it was enacted in 2019 while *Roe* and *Casey* were still in effect, but the Court said "[t]he holdings of United States Supreme Court cases interpreting the United States Constitution that have since been overruled cannot establish that a law was unconstitutional when enacted and therefore cannot render a law void *ab initio*." *Id.* at *2.

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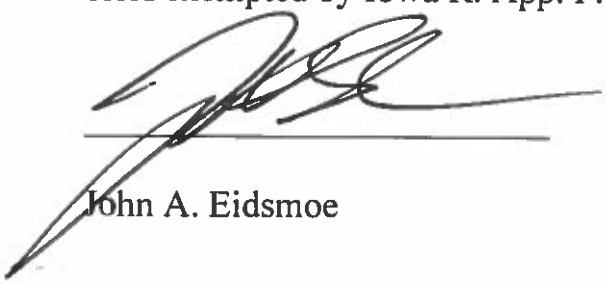

John A. Eidsmoe

13 Nov 2023

Date