IN THE SUPREME COURT OF IOWA

PLANNED PARENTHOOD OF THE HEARTLAND, INC.; EMMA GOLDMAN CLINIC; and SARAH TRAXLER, M.D.,
Petitioners-Appellees,
v.
KIM REYNOLDS ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE,
Defendants-Appellants.

No. 23-1145

AMICUS BRIEF OF THE KIRKWOOD INSTITUTE, INC.

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

Case No. EQCE089066

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TABLE OF CONTENTS

Table of Authorities

Statutes

Constitutional Provisions

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Kirkwood Institute is a nonprofit corporation formed under the laws of the State of Iowa. Its mission is, in part, to advance constitutional governance in Iowa by advocating for the enforcement of rights guaranteed to all Iowans by the Constitution of the State of Iowa and the Constitution of the United States. A particular area of concern of the Kirkwood Institute is the separation of powers, an issue directly affected by the proper standard of review of Acts of the Iowa Legislature when challenged in a judicial proceeding.

ARGUMENT

I. Because the Court has determined there is no fundamental right to abortion under the Iowa Constitution, it should apply rational basis review to the fetal heartbeat law challenged here.

A. The dissenting Justices in the 2018 decision thoroughly explained the errors of the majority's analysis that found a right to abortion in the Iowa Constitution.

The Court held in *Planned Parenthood of the Heartland, Inc.* v. *Reynolds*, 915 N.W.2d 206 (Iowa 2018) ("*PPH 2018*") that the Iowa Constitution protected a fundamental right to abortion. It explained that the constitution's guarantee of due process required abortion regulations to be examined under a strict scrutiny framework. This required the statute to be "narrowly tailored to serve a compelling state interest." *Id.* at 241. It adopted the same standard under the constitution's equal protection clause. *Id.* at 245-46. The Court rejected the undue burden standard from *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992) as being impossible to apply in a principled manner. *Id.* at 240. The Court went beyond its holding in *Planned Parenthood of the Heartland, Inc.* v. *Iowa Bd. of Med.*, 865 N.W.2d 252 (Iowa 2015) (*PPH 2015*) where the State had agreed to the application of the *Casey* undue burden standard in the review of regulations about dispensing abortifacients by telemedicine. *Id.* at 269.

Two Justices dissented. Writing for himself and Justice Waterman, Justice Mansfield criticized the majority for lacking a "sense of balance and perspective." *PPH 2018* at 247. The dissenters picked apart the majority opinion for

its lack of faithful textual analysis. Noting the "self-contradictory" proposition that a duly enacted statute could violate an individual's right to due process, the dissenters rejected that it was a source of substantive rights. *Id.* The dissent then explained how the history of the equal protection clause did not support the expansive reading given it by the majority. *Id.* (citing Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution*, 66 Drake L. Rev. 147 (2018)).

The dissenters also noted that just six months after the ratification of the Iowa Constitution, the legislature adopted a criminal statute that prohibited all abortions unless necessary to save the life of the mother. *Id.* (citing 1858 Iowa Acts ch 58, § 1). "Given this timing…it is difficult to conceive that a legislatively mandated waiting period for abortion would have violated the original understanding of [the due process or equal protection clauses]."

The dissenters called out the majority for using the concept of a "living constitution" to "erect[] a strict scrutiny barrier to legislative action without reference to the constitutional text or history." *Id.* at 248. They distinguished three cases relied on by the majority that had purportedly adopted such a framework for adapting the meaning of the constitution over time. These cases, the dissenters explained, simply reflected the application of constitutional principles to "*legislative enactments* reflecting new societal needs." *Id.* (emphasis original.) But this case was different, because it was the Court blocking new legislative responses to changing society out of a belief the legislature was taking things in the wrong direction. *Id.* "We may not personally

agree with the legislature's judgments…In the end, though, that's irrelevant." *Id.* at 248-49.

Turning to the regulation at issue, the dissenters explained how such waiting periods had been upheld by "[a] clear majority of courts since *Casey*…" *Id.* at 251-53. The challengers claimed the Iowa statute was unconstitutional because it required a woman to make two trips to obtain an abortion. "I do not discount this argument. However, this precise argument was made and rejected in *Casey*." *Id.* at 253. "In the end, I don't think one can distinguish it. The majority simply says it is not the test under the Iowa Constitution." *Id.* Recognizing the *Casey* standard was binding on them as a matter of federal constitutional law, the dissenting justices faithfully applied its holding that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such a profound and lasting meaning." *Id.* at 246 (citing *Casey*, 505 U.S. at 873).

The dissenters turned to rejecting the majority's holding that a waiting period statute violated the equal protection rights of women. "Equal protection requires treating *similarly* situated people alike…yet the very gist of the majority's argument is that women are situated *differently* from men." *Id.* at 258. "The majority cites no other court that has accepted this line of thinking…" *Id.* The dissenters explained that this equal protection holding, unnecessary to the resolution of the case, portended a future potential ruling that the constitution required the state to pay for abortions for indigent women. *Id.* at 259.

The dissenters finished by returning to the theme that the majority had stepped out of its judicial role. "In lieu of citing supportive caselaw, the majority asserts that without the benefit of the majority's ruling, women may 'never fully assume a position in society equal to men, who face no such similar constraints for comparable sexual activity.'" *Id.* The dissenters succinctly explained that the majority was not performing legal analysis with this statement which "epitomizes the difficulties with the majority opinion. I am confident that many Iowans wholeheartedly agree with the court's statement. However, I am equally confident many Iowans are offended by it. Is it really the basis on which the court wishes to render an enduring constitutional decision?" *Id.*

The majority opinion in *PPH 2018*, receiving the votes of five Justices, held that the Iowa Constitution's due process and equal protection clauses provided a fundamental right to abortion that required an abortion regulation to be reviewed under a strict scrutiny/narrow tailoring standard. The dissenting opinion, receiving the votes of two Justices, held the Iowa Constitution did not provide any right to abortion and that the waiting period was constitutional under the *Casey* undue burden standard. This would be the state of Iowa case law until abortion regulation returned to the Court's docket in 2022.

B. The Court overruled its 2018 decision in a 2022 case that considered a shorter waiting period.

In 2020 the Iowa legislature amended the waiting period statute litigated in *PPH 2018* to reduce the waiting period from 72 to 24 hours. After the district court issued an injunction against this statute, the State appealed again. *Planned Parenthood of the Heartland, Inc.* v. *Reynolds*, 975 N.W.2d 710 (Iowa 2022) (*PPH 2022*). The case produced four opinions: a plurality written by Justice Mansfield and joined by Justices Waterman and Oxley; an opinion concurring in part and dissenting in part by Justice McDermott joined by Justice McDonald; an opinion concurring in part and dissenting in part by Chief Justice Christensen and joined by Justice Appel; and a dissent by Justice Appel.

The plurality considered whether the principle of stare decisis should prevent the Court from reconsidering *PPH 2018*. Noting that the doctrine is not an "inexorable command" the plurality said, "we are obligated to depart from past cases when they were erroneously decided." *Id.* at 733. Stare decisis has "less force here than it might in other contexts." *Id.* "Constitutional cases tend to invoke a weak or less strict form of stare decisis, on the theory that only the courts can correct bad constitutional precedent, absent constitutional amendments." *Id.*

The plurality pointed to the weakness of *PPH 2018*'s status as a precedent. "Stare decisis should be less of an obstacle when the decision to be overruled is recent and itself overruled other precedent." *Id.* And the *PPH 2018* majority's reliance on living constitutionalism undermined the doctrine. "To the

extent [*PPH 2018*] viewed constitutional interpretation as an evolutionary process rather than a search for fixed meaning, it is hard now to argue that the evolutionary process had to end as soon as [it] was decided." *Id.* at 734.

On the core question[1], the plurality opinion largely tracked the analysis of Justice Mansfield's dissent in *PPH 2018*. The plurality described how the strict scrutiny/narrow tailoring standard left "any abortion regulation…facially unconstitutional for all purposes unless as drafted it contains every conceivable necessary exception that the court can think of." *Id.* at 736. "That's rational basis deference in reverse." *Id.* Plus, the 2018 decision "has no discernible endpoint until childbirth…Any burden on abortion—even very late in the pregnancy—must be narrowly tailored to promote a compelling state interest." *Id.*

"Constitutional interpretation should begin with the constitutional text itself…We note that on the specific topic of abortion, the Iowa Constitution is silent…" *Id.* at 739. "Beyond its textual and historical flaws, [*PPH 2018*] is also flawed in its core reasoning. Constitutions—and courts—should not be picking sides in divisive social and political debates unless some universal principle of justice stands on only one side of that debate. Abortion isn't one of those issues." *Id.* at 741-42.

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[1] The case presented two issues collateral to the proper standard of review of abortion regulations: whether the 24-hour waiting period was passed contrary to the single subject and title requirements of the Iowa Constitution and whether the State was prevented on issue preclusion grounds from litigating the constitutionality of the waiting period anew. All Justices agreed the State should prevail on these issues.

The plurality opinion then turned to the proper disposition of the appeal. The case had reached the Court after Planned Parenthood had received summary judgment on all its claims. The State had only sought summary judgment on the single subject and title claim. Because of this procedural posture, the State (which didn't have a favorable summary judgment ruling in hand to be affirmed) simply asked the Court to remand to the district court. *Id.* at 744. And the State hadn't yet briefed in the district court what standard should apply to the 24-hour waiting period. *Id.* at 744-45.

Looming over all of this was the pending decision in the United States Supreme Court in *Dobbs*. *Id.* at 745 (citing *Dobbs* v. *Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (cert. granted in part)). "That case could decide whether the undue burden test continues to govern federal constitutional analysis of abortion rights." *Id.* Although the Court has an independent duty to interpret the Iowa Constitution, "often our independent interpretations draw on and contain exhaustive discussions of both majority and dissenting opinions of the United States Supreme Court." *Id.* at 746.

Because of the case's posture and the expected *Dobbs* decision, "all we hold today is that the Iowa Constitution is not the source of a fundamental right to an abortion necessitating a strict scrutiny standard of review for regulations affecting that right. For now, this means that the *Casey* undue burden test we applied in [*PPH 2015*] remains the governing standard." *Id.* at 716.

Justices McDermott and McDonald would have gone further. They agreed that *PPH 2018* should be reversed. They parted ways with the instruction to

remand to the district court for further proceedings on the appropriate standard of review. Because "we already have coherent, well-established tiers of review that we routinely apply" and abortion "is not a fundamental right" the Court's precedents required the application of "the rational basis test." *Id.* at 749.

Chief Justice Christensen dissented from the decision to overrule *PPH 2018*. She analyzed the considerable precedent and scholarship on stare decisis and argued that it "requires us, absent special circumstances, to treat like cases alike." *Id.* at 755 (citing *June Med. Servs. L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment)). Because *PPH 2018* was a recent precedent and the circumstances did not justify overruling it, she wrote that the Court should affirm the district court's finding that the waiting period was unconstitutional because it was not narrowly tailored. Justice Appel dissented, arguing at length that the Court's decision in *PPH 2018* was substantively correct.

C. The *Casey* undue-burden standard no longer exists.

PPH 2022 was handed down on June 17, 2022. A week later, the United States Supreme Court decided *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The Court overruled its decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Casey*. The Court explained that "*Roe*'s reasoning was exceedingly weak" and that when "*Casey* revisited *Roe* almost 20 years later, very little of *Roe*'s reasoning was defended or preserved." *Dobbs*, 142 S. Ct. at 2271.

Discussing the creation of the undue burden test in *Casey*, the *Dobbs* Court noted the prior case "either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning…and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent." *Id.* at 2272.

The Court explained why stare decisis considerations did not prevent it from overruling its abortion precedents. Because the undue burden test was unworkable, "inherently standardless," and ambiguous, it had led to a body of inconsistent lower court decisions. *Id.* at 2272-76. "*Casey* has generated a long list of Circuit conflicts…and [those Circuits] have candidly outlined *Casey*'s many other problems." *Id.* at 2274-75.

Casey's weakness spilled over into other areas such as "the strict standard for facial constitutional challenges," "the Court's third-party standing doctrine," and caused courts to "disregard[] standard *res judicata* principles." *Id.* at 2275-76. The Court noted the repeated complaint of many Justices that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Id.* at 2275. "When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine has failed to deliver the principled and intelligible development of the law that stare decisis purports to secure." *Id.* at 2276 (cleaned up).

Having rejected the *Casey* undue-burden standard, "[u]nder our precedents, rational-basis review is the appropriate standard for such challenges."

Id. at 2283. "A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Id.* at 2284 (citing *Heller* v. *Doe*, 509 U.S. 312, 319 (1993)). "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.*

These interests abound. They "include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Id.* (citations omitted). "These legitimate interests provide a rational basis for the [Mississippi law], and it follows that respondents' constitutional challenge must fail." *Id.*

The Court was not blind to the argument that "the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision such as *Roe*." *Id.* at 2278. But while the Court "should make every effort to achieve" the public perception "that our decisions are based on principle…we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work." *Id.* "We do not pretend to know how our political system or society will respond to today's decision…even if we could foresee what will

happen, we would have no authority to let that knowledge influence our decision." *Id.* at 2279.

With the result in *Dobbs* now known, the State moved on July 1, 2022, for rehearing of the Court's decision in *PPH 2022*. The State argued that with the *Casey* undue burden standard no more, the Court should remand to the district court for application of the rational basis test. The Court denied the State's motion without explanation on July 5. Procedendo issued July 11. Planned Parenthood dismissed its case on August 5, 2022, denying the parties the opportunity to litigate further the appropriate legal standard.

D. The fetal heartbeat law and the Court's nonprecedential 2023 decision.

Six days after Planned Parenthood dismissed its challenge to the 24-hour waiting period, the State filed a motion in Polk County District Court asking for an injunction against the enforcement of Iowa Code § 146C.1 to be dissolved. That statute generally prevented physicians from performing an abortion after a fetal heartbeat could be detected. The law contained exceptions for rape and incest along with medical necessity. When the district court denied the State's motion, it appealed.

Because one Justice was recused, and the remaining Justices split evenly on the proper outcome, the district court's decision was affirmed by operation of law. *Planned Parenthood of the Heartland, Inc.* v. *Reynolds*, 2023 WL 4635932 (Iowa) (*PPH 2023*). The Justices produced three nonprecedential opinions. Justice Waterman, joined by the Chief Justice and Justice Mansfield, held that

the State's appeal should be denied. Justice McDonald, writing for himself and Justices McDermott and May held the appeal should be granted and the injunction dissolved. Justice McDermott, writing for himself and Justices McDonald and May, agreed.

Justice Waterman's opinion began by noting the "case is extraordinary. It involves the polarizing issue of abortion, and specifically an unprecedented effort to judicially revive a statute that was declared unconstitutional in a never-appealed final judgment four years ago." *PPH 2023* at *1. The Waterman opinion said when the legislature enacted the heartbeat law it was, "[t]o put it politely…a hypothetical law." *Id.* at *4. He explained there has been "significant turnover of membership" in the legislature since the law was enacted in 2018, it had not moved forward on a constitutional amendment to say there is no right to abortion under the Iowa Constitution, and it had not reenacted the heartbeat law after the district court refused to dissolve the injunction. *Id.* Justice Waterman also pointed to the amicus support from legislators and the fact that fewer than a majority of the House of Representatives had joined an amicus brief urging reversal of the district court. *Id.*

He then described the value of the case of this importance being decided by all Justices. "One of our members is recused and cannot participate in this specific case. The incredibly consequential constitutional issues relating to abortion should understandably be decided by a full court if at all possible." *Id.* at *5. Justice Waterman noted a path forward, however. "The

unprecedented jurisdictional and procedural issues presented in this case fall away if the legislature enacts a new abortion law." *Id.*

Justice Waterman ended his opinion with a rhetorical flourish. His words require context. Just two years earlier, the Court had reversed the district court in a case involving the search by police of a garbage can. *State* v. *Wright*, 961 N.W.2d 396 (Iowa 2021). The case was decided 4-3, with Justice McDonald writing the plurality opinion joined by Justices Oxley and McDermott. Justice Appel joined the substance of the opinion, but concurred to explain in detail that he, unlike Justice McDonald, was not an originalist. *Id.* at 420-29. Chief Justice Christensen and Justices Waterman and Mansfield dissented. Each wrote separately and joined the dissents of the other two. They faulted the plurality for departing from precedents of the U.S. Supreme Court and other states which had generally upheld warrantless searches of trash.

Back to *PPH 2023*. Justice Waterman pointed out the inconsistency he saw in Justice McDonald's decision in *Wright* to independently construe the meaning of the Iowa Constitution's search and seizure protections and his adherence, in Justice Waterman's view, to the decision of the U.S. Supreme Court in *Dobbs*. Although the three dissenters in *Wright* said they "strongly disagreed…giving constitutional protection to discarded trash" they all supported the view that the Iowa Supreme Court has an independent duty to interpret the Iowa Constitution. *PPH 2023* at *8. This duty, they argued, required the Court to stick with what *PPH 2022* meant "as a whole." *Id.* The undue burden standard was the "current law… not rational basis review. In

future cases involving new abortion laws, the parties are free to argue for a change in the current undue burden standard, and this court will consider it." *Id.*

Justice Waterman ended his opinion with a bang. "We return to *Wright* to highlight one more point. It would be ironic and troubling for our court to become the first state supreme court in the nation to hold that trash set out in a garbage can for collection is entitled to more constitutional protection than a woman's interest in autonomy and dominion over her own body. That would be untenable." *Id.*

E. Justice Waterman's opinion in *PPH 2023* departed from this Court's precedents, including those he had authored.

Justice Waterman called the request to revive an unconstitutional statute "unprecedented." *Id.* at *1. Yet one does not have to look back far in this Court's decisions to find such a precedent. Just a year before, Justice Waterman wrote the majority opinion in *Garrison* v. *New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022). He was joined in the majority by Chief Justice Christensen and Justices Mansfield and McDermott.

Garrison involved a constitutional challenge to Iowa's "right-to-farm" legislation, Iowa Code § 657.11. The statute gives protections to agricultural producers from nuisance claims from operation of their animal feeding operations when they follow certain management practices. In a prior case, *Gacke* v. *Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), the Court held the statute was

unconstitutional under the inalienable rights clause of the Iowa Constitution. Iowa Const. Art. I, § 1. The Court created a three-part test to adjudicate constitutional challenges to the immunity. *Gacke*, 684 N.W.2d at 177-79. In *Garrison*, the owners of a feeding operation sued for causing a nuisance asked the Court to overrule *Gacke*.

The Court remarked that the *Gacke* test was unsuccessfully challenged in a more recent case, *Honomichl* v. *Valley View Swine, L.L.C.*, 914 N.W.2d 223 (Iowa 2018). Although the test had been recently upheld "[n]either *Gacke* nor *Honomichl* cited any authority for adopting the three-part test. No other court in any jurisdiction has adopted or used the test." *Garrison*, 977 N.W.2d at 78. Justice Waterman noted that he and Justice Mansfield dissented in *Honomichl* because they believed *Gacke* should be overruled. *Id.*

Honomichl was only four years old. But by 2022 the views on the Court had shifted. "*Gacke* was wrongly decided in that it failed to apply rational basis review to a challenge under [the inalienable rights clause] to section 657.11(2)." *Id.* at 81. The Court was prepared to overrule *Gacke* despite stare decisis. That doctrine "does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest." *Id.* at 83 (cleaned up). The rule "has limited application in constitutional matters…thus when faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it." *Id.* (cleaned up).

The Court cited a string of cases where "we have correctly applied the rational basis test to adjudicate constitutional challenges to social and regulatory

statutes under the inalienable rights clause." *Id.* at 83-84 (citing *Planned Parenthood of the Heartland, Inc.* v. *Reynolds*, 962 N.W.2d 37, 46 (Iowa 2021), *Gray* v. *Oliver*, 943 N.W.2d 617, 629-32 (Iowa 2020), *Clark* v. *Ins. Co. State of Pa.*, 927 N.W.2d 180, 190-91 (Iowa 2019), *City of Sioux City* v. *Jacobsma*, 862 N.W.2d 335, 352-53 (Iowa 2015), *Midwest Check Cashing, Inc.* v. *Richey*, 728 N.W.2d 396, 403 (Iowa 2007), *Atwood* v. *Vilsack*, 725 N.W.2d 641, 651-52 (Iowa 2006)). This standard is attuned to the fact it is not the Court's role "to second-guess the legislature's policy choices." *Id.* at 85 (citing *AFSCME Iowa Council 61* v. *State*, 928 N.W.2d 21, 26 (Iowa 2019)). "We must remember that statutes are cloaked with a presumption of constitutionality." *Id.* (citing *State* v. *Kilby* 961 N.W.2d 374, 377 (Iowa 2021)). The Court's review, "while not toothless," is based on a "very deferential standard." *Id.* at 86 (citing *AFSCME Iowa Council 61*, 921 N.W.2d at 32 and *NextEra Energy Res. LLC* v. *Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012)).

Garrison, and the considerable body of case law it cites, shows convincingly that in the ordinary course, a litigant challenging legislation on constitutional grounds faces a heavy burden. And the *Garrison* Court did not hesitate to find the statutory immunity for animal feeding operations constitutional *even though the legislature had not reenacted it*. The Court had repeatedly called the statute unconstitutional yet there it remained: available for any litigant to ask for the Court to reconsider. And once the views of the members of this Court had shifted sufficiently, that's just what happened.

Let's go back to Justice Waterman's comparison in *PPH 2023* to the result in *Wright*. He, along with Chief Justice Christensen and Justice Mansfield, were troubled by the public perception that garbage cans would get more legal protection than women. And when it is phrased that way, who wouldn't be?

But the trouble with phrasing the issue that way is that the same thing can be said about *any* decision of this Court. Every decision has a winner and a loser. And, more often than not, the description of the losing side can be phrased to make it seem like the outcome was wrong, especially if it is compared to another case where the winner seems unsympathetic. Yet our system of jurisprudence is based on facts and law, not the emotional appeal of just comparing the result of one case to another.

Perhaps an example will make the point better. Imagine if these words appeared in an opinion:

"We return to *Garrison* to highlight one more point. It would be ironic and troubling for our court to become the first state supreme court in the nation to reverse itself to hold that the owners of confined animal feeding operations are entitled to more constitutional protection than an unborn child's right to simply live. That would be untenable."

Would this be a legal argument?

F. The fetal heartbeat law is constitutional.

The Iowa legislature took seriously Justice Waterman's suggestion that the procedural concerns present in *PPH 2023* would disappear with reenactment. The correct standard to apply now is rational basis review. This is the inescapable conclusion of the Court's determination in *PPH 2022* that there is no fundamental right to abortion under the Iowa Constitution. Planned Parenthood never argued below that the fetal heartbeat law could survive rational basis review. Their argument was solely that a heightened standard should be applied, notwithstanding the Court's *PPH 2022* holding. Because it is wrong about the standard, the district court's grant of an injunction must be reversed.

CONCLUSION

Regulation of abortion is not going away. Adoption of an undue-burden test will not settle anything. The lessons of U.S. Supreme Court jurisprudence should be clear. "*Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to the Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." *Casey*, 505 U.S. at 995-96 (Scalia, J., concurring in part).

Because it invites judges to make value judgments, the undue-burden standard does nothing but bring pressure on the Court. "As long as this Court

thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone." *Id.* at 1000. "But if in reality our process of constitutional adjudication consists primarily of making *value judgements*…[t]he people know that their value judgments are quite as good as those taught in any law school—maybe better." *Id.* at 1000-01 (emphasis original). "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining." *Id.* at 1002.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **4756** words, excluding parts of the brief exempted by that rule.

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No party, their counsel, or other individual has authored this brief in whole or in part. No party, their counsel, or other individual has contributed funds to the preparation of this brief.

/s/ Alan R. Ostergren
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