No. 22-2036

Supreme Court of Iowa

PLANNED PARENTHOOD OF THE HEARTLAND, INC.,
EMMA GOLDMAN CLINIC, AND JILL MEADOWS,
Appellees,
v.
KIM REYNOLDS EX REL. STATE OF IOWA AND
IOWA BOARD OF MEDICINE,
Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HON. CELENE GOGERTY, PRESIDING

BRIEF OF AMERICAN COLLEGE OF PEDIATRICIANS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The American College of Pediatricians is a national organization of pediatricians and other health care professionals dedicated to the health and well-being of children. Formed in 2002, the College is committed to producing policy recommendations based on the best available research. The College currently has members in 47 states. Of particular importance to the College is the sanctity of human life from conception to natural death.

Under Iowa R. App. P. 6.906, all parties consented to the filing of this brief. *See* Addendum. No party or party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The "Iowa Constitution is silent" about abortion. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 739 (Iowa 2022) ("*PPH IV*"). Thus, like the United States Constitution, it is neutral on this contentious issue. And "[b]ecause the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring). The People of Iowa have spoken through their representatives. Planned Parenthood's demand that its preferences—its belief that pre-viability life has *no* value—be imposed on the People should be rejected.

The United States Supreme Court tried to impose a judicial vision of abortion-on-demand for nearly 50 years, to disastrous results. It struggled to identify the constitutional basis of such a right, veering from privacy in *Roe v. Wade*, 410 U.S. 113, 154 (1973), to autonomy and mysteries of life in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992). It could not decide the parameters of such a right, careening from trimesters in *Roe* to viability in *Casey*. It could not identify why viability mattered but in purely "circular" fashion. *Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring in judgment). It could not provide a workable standard to adjudicate any right to abortion, eventually recognizing that the "undue burden" test

"is inherently standardless." *Id.* at 2272 (majority opinion) (cleaned up). It adopted an abortion right that put the United States in the dubious company of a handful of countries hostile to basic human rights, "among them China and North Korea." *Id.* at 2312 (Roberts, C.J.). Its invented abortion right distorted vast swaths of the law, including "[s]tatutory interpretation, the rules of civil procedure, the standards for appellate review of legislative factfinding, and the First Amendment." *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 451 (6th Cir. 2021) (Thapar, J., concurring in judgment in part and dissenting in part). And its constitutional rule—that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability" (*Casey*, 505 U.S. at 879)—precipitated the deaths of more than 63 million unborn children in America.

Now, abortionists want this Court to make all these mistakes and more. They want this Court to take sides on one of the most contentious questions of our time: whether an unborn child deserves legal protection. And they want this Court to hold that unborn life—at least before some arbitrary point of viability, which is unknowable, circumstance-dependent, and always changing—cannot be protected. They claim that the Iowa Constitution enshrines their belief that pre-viability life deserves *no* protection.

Unsurprisingly, the abortionists' extraordinary ideological view has never prevailed in our legislative process. Abortionists will continue pressing that view in the court of public opinion. But this Court should not countenance Planned Parenthood's strained effort to invoke constitutional provisions that have nothing to do with abortion to take away the ability of the People to protect unborn life. The Iowa Constitution does not impose Planned Parenthood's moral perspective on all Iowans. The Court too should be neutral.

Fortunately, upholding Iowa's law would not require the Court to decide when life begins. The Iowa Legislature determined that unborn life is worthy of legal protection. This legislative determination is consistent with the scientific evidence now available. "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). At five weeks' gestation (just three weeks after conception), the unborn child's heart starts beating. By six weeks, brain waves are detectable. By seven weeks, the child can move and starts to develop sensory receptors. By ten weeks, multiple organs begin to function, and the child has the neural circuitry for spinal reflex, an early response to pain. By twelve weeks, the child can open and close fingers and sense stimulation from the outside

world. And medical interventions after fifteen weeks (other than abortion) use analgesia to prevent suffering. At this point of pregnancy, abortionists must rip the child "piece by piece" from the womb. *Gonzales*, 550 U.S. at 136.

To uphold the Act would not require this Court to consider the implications of these scientific facts; the People have already done so through their elected representatives, and they decided that pre-viability life is worth protecting. Accepting Planned Parenthood's theory, on the other hand, would require this Court to "impose on the [P]eople a particular theory about when the rights of personhood begin." *Dobbs*, 142 S. Ct. at 2261. It would require this Court to substitute a moral belief that pre-viability life has no value for the Iowa Legislature's scientific judgment that abortion ends "the life of an 'unborn human being.'" *Id.* at 2258. In other words, Planned Parenthood wants this Court to hold that the Iowa Constitution "*requires* the State[] to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed." *Id.* at 2261. That extraordinary demand seeks relief far beyond this Court's judicial power to say what the law is: "Courts do not pass on the policy, wisdom, advisability or justice of a statute. The remedy for those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature." *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977).

The Court should reject Planned Parenthood's radical reinterpretation of the Iowa Constitution. As with many controversial issues, the issue of abortion is not decided by the Constitution. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Dobbs*, 142 S. Ct. at 2243 (cleaned up). The People's representatives "can do what [this Court] can't: listen to the community, create fact-specific rules with appropriate exceptions, gather more evidence, and update their laws if things don't work properly." *Slatery*, 14 F.4th at 462 (Thapar, J.). This Court should reverse.

ARGUMENT

I. The People's decision to protect unborn life reflects scientific fact.

Scientific knowledge both underscores the legitimacy of the Iowa Legislature's decisions here and undermines any argument for a novel constitutional right to abortion. Medical advancements have produced scientific evidence that makes clear today what the U.S. Supreme Court in *Roe* could not understand: the human fetus is a living being from the moment of conception and can move, smile, and feel pain in the womb.

When the Court decided *Roe* in 1973, scientific knowledge about fetal development was limited, with fetology only recognized as a new field of

science that same year.[1] Indeed, the Court had been told that "in early pregnancy" "embryonic development has scarcely begun." Brief for Appellant 20, *Roe*, 1971 WL 128054. Thus, "[a]s to the question 'when life begins,' the *Roe* majority maintained that 'at that point in the development of man's knowledge,' it was 'not in a position to speculate.'" *Slatery*, 14 F.4th at 450 (Thapar, J.) (quoting *Roe*, 410 U.S. at 159). The Court purported to rely on what it considered to be "the well-known facts of fetal development" to conclude that a pre-viability "fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 156, 162. Only in the late 1970s—years after *Roe*—did the use of ultrasound machines expand.[2] Unlike the prototypes in limited use in 1973, routine ultrasounds can now provide high-definition four-dimensional images in real time that reveal the fetus to be much more developed than the Court in *Roe* could have known. Reflecting these advances in medical knowledge, ultrasound imagery available at the time of *Roe* looked much different from the imagery available today, as shown by these fifteen-week ultrasounds from 1973 and today[3]:

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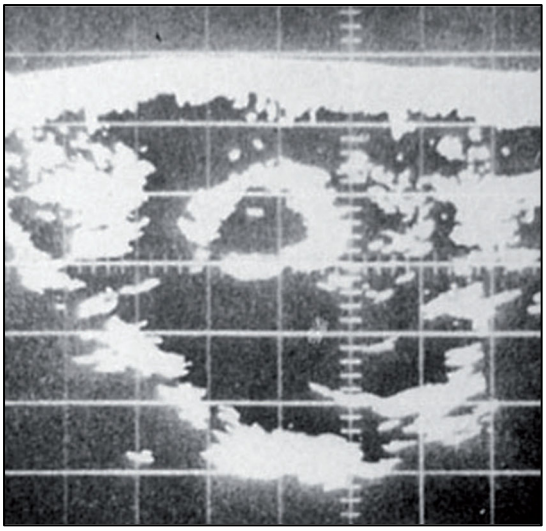
[1] Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* 113 (2011).

[2] Malcolm Nicholson & John E.E. Fleming, *Imaging and Imagining the Fetus: The Development of Obstetric Ultrasound* 232 (2013).

[3] Stuart Campbell, *A Short History of Sonography in Obstetrics and Gynaecology*, 5 FVV-ObGyn 217 (2013); Kristen J. Gough, *Second Trimester Ultrasound Pictures* (Dec. 5, 2019), https://perma.cc/J2NV-GT6M.




Now we know that "[f]rom fertilization, an embryo (and later, fetus) is alive and possesses its unique DNA."[4] The fusion of the oocyte and the sperm create the zygote "in less than a single second."[5] In a "biological sense," "the embryo or fetus is whole, separate, unique and living" from conception. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2008) (en banc). "Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is

[4] *Slatery*, 14 F.4th at 450 (Thapar, J.) (citing Enrica Bianchi et al., *Juno Is the Egg Izumo Receptor and Is Essential for Mammalian Fertilization*, 508 Nature 483, 483 (2014)).

[5] Am. Coll. of Pediatricians, *When Human Life Begins* (Mar. 2017), https://perma.cc/Z9W5-UN9T; *see also* Ulyana Vjugina & Janice P. Evans, *New Insights into the Molecular Basis of Mammalian Sperm-Egg Membrane Interactions*, 13 Frontiers Bioscience 462, 462–76 (2008); Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective* 5 (2008).

nonetheless human life." *Hamilton v. Scott*, 97 So. 3d 728, 746–47 (Ala. 2012) (Parker, J., concurring).

During the fifth week, "[t]he cardiovascular system is the first major system to function in the embryo," with the heart and vascular system appearing in the middle of the week.[6] By the end of the fifth week, "blood is circulating and the heart begins to beat on the 21st or 22nd day" after conception.[7] By six weeks, "[t]he embryonic heartbeat can be detected" via transvaginal ultrasound.[8] After detection of a fetal heartbeat—and absent an abortion—the overwhelming majority of unborn children will now survive to birth.[9] Also during the sixth week, the child's nervous system is developing, with the brain already "patterned" at this early stage.[10] The earliest neurons are generated in the region of the brain responsible for thinking, memory, and other higher functions.[11] And the child's face is developing, with cheeks, chin, and jaw

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[6] Keith L. Moore et al., *The Developing Human E-Book: Clinically Oriented Embryology* 8945 (Kindle ed. 2020).
[7] *Id.* at 2662.
[8] *Id.* at 2755; *accord* WebArchive, Planned Parenthood, *What Happens in the Second Month of Pregnancy?* (July 25, 2022), https://tinyurl.com/2jvsvh34.
[9] Joe Leigh Simpson, *Low Fetal Loss Rates After Ultrasound Proved-Viability in First Trimester*, 258 J. Am. Med. Ass'n 2555, 2555–57 (1987).
[10] Thomas W. Sadler, *Langman's Medical Embryology* 72 (14th ed. 2019); *see generally id.* at 59–95.
[11] *See, e.g.*, Irina Bystron et al., *Tangential Networks of Precocious Neurons and Early Axonal Outgrowth in the Embryonic Human Forebrain*, 25 J. Neuroscience 2781, 2788 (2005)

starting to form.[12]

At seven weeks, cutaneous sensory receptors, which permit prenatal pain perception, begin to develop.[13] The unborn child also starts to move.[14] During the seventh week, "the growth of the head exceeds that of other regions" largely because of "the rapid development of the brain" and facial features.[15] At eight weeks, essential organs and systems have started to form, including the child's kidneys, liver, and lungs.[16] The upper lip and nose can be seen.[17] At nine weeks, the child's ears, eyes, teeth, and external genitalia are forming.[18] At ten weeks, vital organs begin to function, and the child's hair and nails begin to form.[19]

Meanwhile, the peripheral pain receptors begin forming around seven weeks[20] and "the first evidence for an intact nociceptive system in the fetus

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[12] *See* Sadler, *supra* note 10, at 72–95.
[13] Kanwaljeet S. Anand & Paul R. Hickey, Special Article, *Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321, 1322 (1987).
[14] Alessandra Pionetelli, *Development of Normal Fetal Movements: The First 25 Weeks of Gestation* 98, 110 (2010).
[15] Keith L. Moore et al., *The Developing Human: Clinically Oriented Embryology* 65–84.e1 (11th ed. 2020).
[16] *See* Sadler, *supra* note 10, at 72–95.
[17] Moore et al., *supra* note 15, 1–9.e1.
[18] *See* Sadler, *supra* note 10, at 72–95.
[19] *See id.* at 106–127; Moore et al., *supra* note 15, at 65–84.e1; Johns Hopkins Med., *The First Trimester*, https://perma.cc/8N6H-M6CN.
[20] Linda A. Hatfield, *Neonatal pain: What's age got to do with it?*, Surgical Neurology International S479, S481 (2014).

emerges at about 8 weeks . . . [when] touching the perioral region will result in movement away."[21] Nociception—or the nervous system's processing of noxious stimuli—"causes physiologic stress, which in turn causes increases in catecholamines, cortisol and other stress hormones."[22] Starting around ten weeks, the earliest connections between neurons constituting the subcortical-frontal pathways—the circuitry of the brain that is involved in a wide range of psychological and emotional experiences, including pain perception—are established.[23]

At the time of *Roe*, "the medical consensus was that babies do not feel pain."[24] Only during the late 1980s and early 1990s did any of the initial scientific evidence for prenatal pain begin to emerge.[25] Today, the "evidence for the subconscious incorporation of pain into neurological development and plasticity is incontrovertible."[26] Updated reviews of prenatal pain consistently acknowledge: by ten to twelve weeks, a fetus develops neural circuitry

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[21] Stuart W. G. Derbyshire, *Foetal Pain?*, Best Practice & Research Clincal Obstetrics and Gynaecology 647 (2010).
[22] Curtis L. Lowery et al., *Neurodevelopmental Changes of Fetal Pain*, 31 Seminars Perinatology 275, 275 (2007).
[23] Lana Vasung et al., *Development of Axonal Pathways in the Human Fetal Fronto-Limbic Brain: Histochemical Characterization and Diffusion Tensor Imaging*, 217 J. Anatomy 400, 400–03 (2010).
[24] Am. Coll. of Pediatricians, *Fetal Pain: What is the Scientific Evidence?* (Jan. 2021), https://perma.cc/JM3T-XQV8.
[25] *Id.*
[26] Lowery et al., *supra* note 22, at 275.

capable of detecting and responding to pain.[27] Even more sophisticated reactions occur as the unborn child develops further.[28] And new developments—including videos of reactions—have provided still more evidence strengthening the conclusion that fetuses are capable of experiencing pain in the womb.[29]

As early as ten or eleven weeks, the fetus shows awareness of his or her environment.[30] Studies of twins, for example, show that by ten to eleven weeks, twins engage in "inter-twin contact."[31] The fetus also begins to perform "breathing movements" that "increase progressively" as he or she develops in the womb.[32]

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[27] *See, e.g.*, Carlo V. Bellieni & Giuseppe Buonocore, *Is Fetal Pain a Real Evidence?*, 25 J. Maternal-Fetal & Neonatal Med. 1203, 1203–08 (2012); Richard Rokyta, *Fetal Pain*, 29 Neuroendocrinology Letters 807, 807–14 (2008).

[28] *See* Royal Coll. of Obstetricians & Gynaecologists, *Fetal Awareness: Review of Research and Recommendations for Practice* 5, 7 (Mar. 2010), https://perma.cc/4V84-TEMC; Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. Am. Med. Ass'n 947, 948–49 (2005).

[29] *See* Lisandra Stein Bernardes et al., *Acute Pain Facial Expressions in 23-Week Fetus*, *Ultrasound Obstetrics & Gynecology* (June 2021), https://perma.cc/V8BU-PZK4. A video accompanying this article showing facial reactions can be accessed at https://obgyn.onlinelibrary.wiley.com/action/downloadSupplement?doi=10.1002%2Fuog.23709&file=uog23709-sup-0001-VideoS1.mp4.

[30] Umberto Castiello et al., *Wired to Be Social: The Ontogeny of Human Interaction*, 5 PLOS One, Oct. 2017, e13199, at 1, 9.

[31] *Id.*

[32] Pionetelli, *supra* note 14, at 40.

At eleven weeks, the unborn child's diaphragm is developing.[33] The child has hands and feet, ears, open nasal passages on the tip of the nose, and a tongue.[34] "[A]n unborn child visibly takes on the human form in all relevant aspects by 12 weeks' gestation." *Slatery*, 14 F.4th at 450 (Thapar, J.) (cleaned up). The child can open and close fingers, starts to make sucking motions, and senses stimulation.[35] The child's digestive system begins to function, white blood cells develop, and the pituitary gland produces hormones.[36] And the child's vocal cords are developing.[37]

Moreover, by twelve weeks, the parts of the central nervous system leading from peripheral nerves to the brain are sufficiently connected to permit the peripheral pain receptors to detect painful stimuli.[38] Thus, the unborn "baby develops sensitivity to external stimuli and to pain much earlier than was believed" when *Roe* and *Casey* were decided. *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (cleaned up).

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[33] *Id.* at 31.
[34] Moore et al., *supra* note 15, 1–9.e1; Prachi Jain & Manu Rathee, *Embryology, Tongue* (last updated Aug. 11, 2020), https://perma.cc/FCP4-7788.
[35] Pionetelli, *supra* note 14, at 50, 61–62; Slobodan Sekulic et al., *Appearance of Fetal Pain Could Be Associated with Maturation of the Mesodiencephalic Structures*, 9 J. Pain Rsch. 1031, 1034–35 (2016).
[36] Sadler, *supra* note 10, at 230–55.
[37] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 12*, https://perma.cc/32GP-WZYX.
[38] Sekulic et al., *supra* note 35, at 1034–35.

Unborn Child at Thirteen Weeks[39]

At thirteen weeks, the bone structure is forming in the child's arms and legs,[40] and the intestines are in place within his or her abdomen.[41] At fourteen weeks, the roof of the child's mouth has formed, and his or her eyebrows begin to fill in.[42] By fifteen weeks, "the fetus is extremely sensitive to painful stimuli," and physicians (other than those performing abortions) take this fact "into account when performing invasive medical procedures on the fetus."[43] Even more neural circuitry for pain detection and transmission develops

[39] Moore et al., *supra* note 15, at 85–98.e1.
[40] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 2nd Trimester* (June 30, 2020), https://perma.cc/M7PA-6T9A.
[41] Mayo Clinic, *Pregnancy Week by Week: Fetal Development: The 1st Trimester* (June 30, 2020), https://perma.cc/D7JW-H6YW.
[42] Peter J. Taub & John M. Mesa, *Embryology of the Head and Neck*, *in Ferraro's Fundamentals of Maxillofacial Surgery* 3, 4, 6 (Peter J. Taub et al. eds., 2d ed. 2015).
[43] Sekulic et al., *supra* note 35, at 1036.

between sixteen and twenty weeks, including spinothalamic fibers, which are responsible for the transmission of pain from the periphery to the thalamus.[44] By eighteen weeks, painful stimuli will cause the baby *in utero* to exhibit stress-induced hormonal responses.[45] Studies show that "the fetus reacts to intrahepatic vein needling with vigorous body and breathing movements."[46] The fetus also reacts to such stimuli with "hormonal stress responses," with rising hormone levels "independent of those of the mother."[47]

These recent discoveries have led scientists to conclude that "the human fetus can feel pain when it undergoes surgical interventions and direct analgesia must be provided to it."[48] For this reason, updated consensus among anesthesiologists is to "administer adequate fetal anesthesia in all invasive maternal-fetal procedures to inhibit the humoral stress response, decrease fetal movement, and blunt any perception of pain."[49] As one group of scholars

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[44] Ritu Gupta et al., *Fetal Surgery and Anesthetic Implications*, 8 Continuing Educ. Anesthesia, Critical Care & Pain 71, 74 (2008).
[45] Stuart W. G. Derbyshire, *Can Fetuses Feel Pain?*, 332 Brit. Med. J. 909, 910 (2006).
[46] Xenophon Giannakoulopoulos et al., *Fetal Plasma Cortisol and b-endorphin Response to Intrauterine Needling*, 344 Lancet 77, 77–78 (1994).
[47] Rachel Gitau et al., *Fetal Hypothalamic-Pituitary-Adrenal Stress Responses to Invasive Procedures are Independent of Maternal Responses*, 86 J. Clinical Endocrinology & Metabolism 104, 104 (2001).
[48] Carlo V. Bellieni, *Analgesia for Fetal Pain During Prenatal Surgery: 10 Years of Progress*, 89 Pediatrics Rsch. 1612, 1612 (2021).
[49] Debnath Chatterjee, *Anesthesia for Maternal-Fetal Interventions*, 132 Anesthesia & Analgesia 1164, 1167 (2021); Sekulic et al., *supra* note 35, at 1036.

explains, "the fetus is extremely sensitive to painful stimuli," and "[i]t is necessary to apply adequate analgesia to prevent the suffering of the fetus."[50] Other scholars agree with this assessment.[51]

Based on outdated evidence, some have argued that fetal perception of pain requires connections to the cerebral cortex and the need for conscious awareness.[52] Neither is true. From an anatomic standpoint, substantial evidence demonstrates that *sub*cortical structures are sufficient for pain perception.[53] Proving the point are adults with cortical injuries who can still feel pain[54] and infants whose brains are abnormal or did not form (*e.g.*, anencephaly or hydrocephalus), yet they maintain the ability react to painful stimulation.[55]

Conscious awareness as shown by the ability to verbally describe one's pain is no longer part of the updated and often quoted International

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[50] Sekulic et al., *supra* note 35, at 1036.
[51] *See, e.g.*, Carlo V. Bellieni et al., *Use of Fetal Analgesia During Prenatal Surgery*, 26 J. Maternal-Fetal Neonatal Med. 90, 94 (2013).
[52] Lee, *supra* note 28.
[53] *See* Stuart W. G. Derbyshire et al., Reconsidering Fetal Pain, 46 J. Med. Ethics 3 (2020); Lowery et al., *supra* note 22; Roland Brusseau, *Developmental Perspectives: Is the Fetus Conscious?*, 46 Int'l Anesthesiology Clinics 11 (2008); Sampsa Vanhatalo, *Fetal Pain?*, 22 Brain & Development 145 (2000).
[54] Brusseau, *supra* note 53.
[55] Sekulic et al., *supra* note 35.

Association for the Study of Pain definition of pain.[56] Adults in a coma cannot describe or complain about pain, but no one denies that painful procedures affect them. A fetus also cannot recall describe or what hurt them, but in response to painful stimulation they have measurable increases in their stress hormones[57] and documented facial changes.[58] Both before and after birth, babies much younger than 24 weeks are capable of an unreflective, yet very real response to pain.[59]

Thus, in every other medical practice at this stage of fetal development, physicians recognize the need to protect the unborn child in the womb and prioritize the child's health, even when making treatment plans for the child's mother.[60] By contrast, abortionists use no analgesia as they "dismember the fetus" "limb from limb" until the fetus "bleeds to death." *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

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[56] Srinivasa N. Raja et al., The Revised International Association for the Study of Pain Definition of Pain, 161 Pain 1976 (2020).
[57] Gitau et al., *supra* note 47.
[58] Bernardes et al., *supra* note 29.
[59] Derbyshire et al., *supra* note 53.
[60] *See, e.g.*, Ryan M. Antiel et al., *Weighing the Social and Ethical Considerations of Maternal-Fetal Surgery*, 140 Pediatrics, Dec. 2017, e20170608, at 1, 3–4.

At fifteen weeks, unborn children kick their legs, move their arms, and start curling their toes.[61] And by sixteen weeks, the child's eyes are moving side-to-side, and they can perceive light.[62] Between seventeen and eighteen weeks, the unborn child's fingers and toes each develop their own unique prints.[63] By eighteen weeks, the child can hear his or her mother's voice, and the child can yawn.[64] The nervous system is also developing the circuitry for all five senses.

At twenty weeks, the sex-specific reproductive organs have developed enough to permit identification of the child's sex by ultrasound, and girls have eggs in their ovaries.[65] Around this time, "facial expressions begin to appear consistently, including 'negative emotions.'"[66] These movements "require the involvement and coordination of more than one muscle."[67]

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[61] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 15*, https://perma.cc/62JP-CXL3.
[62] Mayo Clinic, *supra* note 40.
[63] Johns Hopkins Med., *The Second Trimester*, https://perma.cc/M7WA-6PC5.
[64] *Id.*; *see also* Cleveland Clinic, *Fetal Development: Stages of Growth* (last updated Apr. 16, 2020), https://perma.cc/YG92-KRH4.
[65] *See, e.g.*, Kavita Narang et al., *Developmental Genetics of the Female Reproductive Tract*, *in Human Reproductive and Prenatal Genetics* 129, 132, 135 (Peter C. K. Leung & Jie Qiao eds., 2019).
[66] Pionetelli, *supra* note 14, at 80.
[67] *Id.*

At twenty-one weeks, the physical and neurological development of the unborn child is sufficiently mature that, in some cases, the child can survive childbirth.[68] This is far earlier than was true in 1973 or 1992. *See Casey*, 505 U.S. at 860. At this stage of development, the child can also swallow and experience different tastes depending on what the mother eats. At twenty-two weeks, the child's senses are improving.[69] The child's ability to detect light from outside the womb (such as from a flashlight) can be observed.

According to a 2015 publication, between 23% and 60% of infants born at twenty-two weeks who receive active hospital treatment survive,[70] many without immediate or long-term neurologic impairment.[71] A 2019 publication showed that survival at some institutions increased to 78% at 22–23 weeks

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[68] *See* Kaashif A. Ahmad et al., *Two-Year Neurodevelopmental Outcome of an Infant Born at 21 Weeks' 4 Days' Gestation*, 140 Pediatrics, Dec. 2017, e20170103, at 1–2, https://perma.cc/D9UR-KHDU.

[69] Johns Hopkins All Children's Hosp., *A Week-by-Week Pregnancy Calendar: Week 22*, https://perma.cc/7VR8-2LFX.

[70] Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 New Eng. J. Med. 1801, 1804 (2015); Katrin Mehler et al., *Survival Among Infants Born at 22 or 23 Weeks' Gestation Following Active Prenatal and Postnatal Care*, 170 J. Am. Med. Ass'n Pediatrics 671, 675 (2016).

[71] *See, e.g.*, Noelle Younge et al., *Survival and Neurodevelopmental Outcomes Among Periviable Infants*, 376 New Eng. J. Med. 617, 622, 627 (2017) (describing study showing "an increase in the rate of survival without neurodevelopmental impairment from 2000 through 2011"); Antti Holsti et al., *Two-Thirds of Adolescents who Received Active Perinatal Care After Extremely Preterm Birth Had Mild or No Disabilities*, 105 Acta Paediatrica 1288, 1296 (2016) (similar).

gestation, with 64% having no or mild neurodevelopmental impairment at 18 to 22 months follow-up.[72] In a large study that combined several databases, it was shown that "[t]he birth hospital contributed equally as much to prediction of survival as gestational age."[73] Thus, imposing particular values on "viability" "create[s] facts": "A policy that limits treatment for infants born at 24 weeks' gestation will lead to [comparatively] low survival rates for those infants. Those [comparatively] low survival rates will seem to justify and validate the policy, even if the true causal relationship runs in the other direction."[74]

At twenty-three weeks, the child's skin tone changes color as his or her capillaries form and blood fills them under the skin.[75] At twenty-four weeks, the baby's face is nearly fully formed, with eyelashes, eyebrows, and hair clearly visible. The unborn child can indisputably feel substantial pain at this point. All this significant development happens before unborn children could

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[72] Patricia L. Watkins et al., *Outcomes at 18 to 22 Months of Corrected Age for Infants Born at 22 to 25 Weeks of Gestation in a Center Practicing Active Management*, 217 J. Pediatrics 52 (2019).
[73] Matthew A. Rysavy et al., *Assessment of an Updated Neonatal Research Network Extremely Preterm Birth Outcome Model in the Vermont Oxford Network*, 174 JAMA Pediatrics 1, 1 (2020).
[74] John D. Lantos & William Meadow, *Variation in the Treatment of Infants Born at the Borderline of Viability*, 123 Pediatrics 1588, 1589 (2009).
[75] Cleveland Clinic, *supra* note 64.

be considered worthy of protection under the *Roe*/*Casey* viability and undue burden rule applied by the district court and advanced by Planned Parenthood.

II. Barring the People from protecting unborn life would be a radical departure from the judicial role under the Iowa Constitution.

As shown above, the Iowa Legislature's judgment that pre-viability life deserves legal protection is amply supported by scientific fact. The question, then, is whether anything in the Iowa Constitution forbids this conclusion and *mandates* that the State permit the unlimited taking of pre-viability life. As this Court has already concluded, it does not. The long history of abortion regulation in Iowa contradicts a supposed due process right to elective abortion. The arbitrariness of using viability or some other judicially imposed line to measure abortion regulations underscores the problems with interpreting the Constitution to protect elective abortions. And because elective abortion is not a fundamental right, there is no warrant to apply any form of heightened scrutiny, including the lawless "undue burden" test.

A. The history of abortion regulation precludes a novel fundamental right to elective abortions.

In interpreting the Iowa Constitution, the Court must "look at the words employed, giving them meaning in their natural sense and as commonly understood." *Homan v. Branstad*, 812 N.W.2d 623, 629–30 (Iowa 2012) (cleaned up). Thus, for the abortionists to succeed, they must show that the

enacting public understood the Iowa Constitution's due process clause to secure a right to elective abortion. They cannot do so. As this Court has explained, the due process clause "guarantees certain procedures," *PPH IV*, 975 N.W.2d at 740 (emphasis omitted), and it is doubtful that the clause extends beyond such procedural guarantees.

Even if the due process clause includes a substantive component, that component is implicated only when "certain fundamental rights and liberty interests" are involved. *Sanchez v. State*, 692 N.W.2d 812, 819 (Iowa 2005). "Fundamental liberty interests are those that are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 820 (cleaned up) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). *Dobbs* establishes that a right to elective abortion is not "deeply rooted in the Nation's history and traditions," 142 S. Ct. at 2253, so under this Court's precedents, Iowa's due process clause does not confer such a right.

Nor is any right to elective abortion deeply rooted in Iowa history. In fact, just the opposite: "abortion became a crime in our state on March 15, 1858—just six months after the effective date of the Iowa Constitution—and remained generally illegal until *Roe v. Wade* was decided over one hundred years later." *PPH IV*, 975 N.W.2d at 740; *see Dobbs*, 142 S. Ct. at 2289. The

same was true even before Iowa became a state: "abortion *at any stage of pregnancy* had been criminalized by statute in Iowa as early as 1843." *PPH IV*, 975 N.W.2d at 741 (emphasis added); *see also* 1838–39 Terr. of Iowa Laws pp. 153–54. Of course, even if abortion had not been criminalized, that would not show a *right* to abortion, but that it was *criminalized* proves that the public did not view elective abortion as a deeply rooted right, no matter the stage of pregnancy. Given this history, Planned Parenthood cannot carry its "burden" of "demonstrat[ing] beyond a reasonable doubt the act violates the constitutional provision invoked." *Selden*, 251 N.W.2d at 508.

B. Applying an arbitrary line like viability would substitute this Court's view of unborn life for the People's.

For Planned Parenthood's constitutional claim to succeed, this Court would have to decide that, contrary to *Dobbs*, the common law, Iowa's and most States' laws for centuries, and the laws of at least 117 countries,[76] unborn life has no value, at least before some arbitrary point. Yet even *Roe* recognized that "[t]he pregnant woman cannot be isolated in her privacy" and abortion "is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation." 410 U.S. at 159. *Dobbs* confirmed the point, calling abortion "critically different": unlike *personal*

[76] At least "117 countries . . . either ban abortion outright or sharply limit its availability to narrow instances." *Slatery*, 14 F.4th at 449 (Thapar, J.).

autonomy rights, "[a]bortion destroys" "what the law" "regards as the life of an unborn human being." 142 S. Ct. at 2258, 2260 (cleaned up); *id.* at 2277, 2280.

Roe and *Casey* at least permitted protection of post-viability life. As discussed next, viability is an arbitrary line with no constitutional basis, *id.* at 2311 (Roberts, C.J.), but Planned Parenthood's overarching theory would not allow the People to protect life even then. *Cf. PPH IV*, 975 N.W.2d at 736 (noting that the strict scrutiny standard advanced by Planned Parenthood "has no discernible endpoint until childbirth"). As shown, science cannot account for Planned Parenthood's view. Science teaches that the fetus is a unique human from the moment of conception. There is no neutral way to decide that unborn life is meaningless; such a holding would constitute a sheer imposition of Planned Parenthood's and this Court's personal beliefs on the People.

Planned Parenthood does not appear to dispute that abortion always ends the life of a separate human being. The question for Planned Parenthood, then—and one this Court should ask—is at what stage could unborn life have sufficient value that the State may protect it, and why. In all likelihood, Planned Parenthood will not answer that question, even though the question is crucial to its claimed right. That is because Planned Parenthood has an interest in selling elective abortions until the moment of birth.

But perhaps Planned Parenthood will say that something changes at viability, offering the same sort of "circular" reasoning that has always been the only basis for a viability rule—even though it "never made any sense." *Dobbs*, 142 S. Ct. at 2310–11 (Roberts, C.J.) ("*Roe*'s defense of the [viability] line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb."). Viability is an irredeemably arbitrary line for courts to decide that life is worth protecting. *Id.* at 2269–70 (majority opinion). Viability depends on the technology available, the quality of medical care, and the health of the fetus and his or her mother. *Id.* A viability rule might mean that a 23-week-old boy is "worthy" of protecting but a 23-week-old girl is not, just because boys develop more quickly in utero.[77] That is not a judicially neutral line.

Last, before *PPH IV*, some opinions suggested that abortion regulations were problematic because they were based on the legislature's "moral scruples." *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 244 (Iowa 2018) ("*PPH II*"). Nonsense. *First*, Iowans enacted this law based on scientific fact, and many secular people consider abortion

[77] Johan G. Eriksson et al., *Boys Live Dangerously in the Womb*, 22 Am. J. Human Biology 330, 330 (2010).

the taking of a life. Some religious people do not. And Iowa's law is certainly "no more a 'theological' position than" would be any claim by Planned Parenthood (or a court) "that viability is the point at which the state interest becomes compelling." *Thornburgh v. ACOG*, 476 U.S. 747, 795 n.4 (1986) (White, J., dissenting); *see Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J.) ("the viability rule" "is and always has been completely unreasoned").

Second, the motivations of legislators do not make up the law. *Cf. Munn v. Indep. Sch. Dist. of Jefferson*, 176 N.W. 811, 817 (Iowa 1920) ("[T]he motives of the legislators and the reasons or arguments leading them to . . . action are not a matter into which we can properly inquire.").

Third, every law reflects the majority's views; that is how democracy works. And "*most* of the coercive laws that we hotly debate"—from endangered species laws to laws against murder—reflect society's *moral* views. Eugene Volokh, *Is It Unconstitutional for Laws to Be Based on Their Supporters' Religiously Founded Moral Beliefs?*, Volokh Conspiracy (May 10, 2022), https://perma.cc/22KC-77FT. Do laws against murder impose society's views about the value of life? Of course they do. Is that unconstitutional? Of course not. Moreover, it is constitutionally irrelevant whether society's moral views come from religion or elsewhere. "Religious people have moral views just like secular people do, and they're just as entitled as secular people to use the

political process to enact their views into law." *Id.* (cleaned up). "Would we say that opposition to slavery was illegitimate because it was mostly overtly religious?" *Id.* And "secular people's moral views" "may rest on unproven and probably unprovable metaphysical assumptions" as much as anyone else's (*id.*)—as Planned Parenthood's position shows. The judiciary may not substitute its moral or policy views for those of the People, who spoke through their representatives and chose to protect unborn life.

In sum, to hold that the Iowa Constitution secures a right to elective abortion would require this Court to substitute its own beliefs for the legislature's judgment. *Contra* Iowa Const. art. III, § 1 ("The legislative authority of this state shall be vested in a general assembly."). When it comes to legislation, questions of right and wrong are supposed to be decided by the People, not the courts. "[I]t is not the role of the court system to evaluate the wisdom or fairness of policy choices made by other branches of government. Actions of the legislative and executive branches may be highly debatable in their wisdom, but that is not a sufficient reason for the judicial branch to substitute something different." *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 6 (Iowa 2020). Instead, "it is within the province of the legislature, in enacting laws, to balance the State's interests and the public policies implicated by proposed legislation. Once the legislature has spoken, the court's role

is to give effect to the law as written, not to rewrite the law in accordance with the court's view of the preferred public policy." *State v. Wagner*, 596 N.W.2d 83, 88 (Iowa 1999).

As reflected by the fact that Iowa regulations of abortion and its Constitution have co-existed for well over a century, these regulations are fully constitutional. They accord with science. They accord with the People's views. And they may not be struck down simply because Planned Parenthood believes that unborn life is valueless.

C. Because elective abortion is not a fundamental right, abortion regulations are not subject to heightened scrutiny.

Because "the Iowa Constitution is not the source of a fundamental right to an abortion," *PPH IV*, 975 N.W.2d at 716, no heightened scrutiny applies to abortion regulations. Absent a "fundamental" "liberty interest," "the challenged statute need only satisfy the rational-basis test." *Sanchez*, 692 N.W.2d at 819–20.

This Court should no longer apply heightened scrutiny, including the undue burden test. *See Casey*, 505 U.S. at 878 (explaining that "[a]n undue burden exists" "if [a law's] purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability"). That test is a form of heightened scrutiny. *See Glucksberg*, 521 U.S. at 720.

Thus, it is improper to apply the test to regulations that are subject only to rational basis review.[78]

That test is also inherently lawless. Even when this Court incorrectly created a right to abortion, it correctly rejected the undue burden test: "the undue burden standard 'offers no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned.'" *PPH II*, 915 N.W.2d at 240 (cleaned up) (quoting *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 17 (Tenn. 2000)). Justice Appel recently explained that "Justice Scalia was right" to describe the undue burden test as "inherently manipulable" and "hopelessly unworkable in practice." *PPH IV*, 975 N.W.2d at 781 (dissenting opinion) (quoting *Casey*, 505 U.S. at 986 (Scalia, J., concurring in part and dissenting in part)). Likewise, Justice McDermott emphasized that "[t]he inherently standardless nature of the undue burden test opens wide the gate for

[78] Any historical acquiescence by the State to the undue burden test would be irrelevant to this conclusion: like the U.S. Supreme Court, this Court "reserve[s] the right" to properly and independently interpret the Constitution no matter if the "parties do not advocate" a correct interpretation. *State v. Short*, 851 N.W.2d 474, 492 (Iowa 2014); *see U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." (cleaned up)). Treating as binding a pre-*Dobbs* acquiescence to the since-abandoned undue burden test would be particularly inappropriate.

judges to inject their own policy preferences," and "[e]ven the most well-intentioned judge attempting to apply the undue burden standard will not be able to overcome the underlying fact that the concept has no principled or coherent legal basis." *Id.* at 748, 750 (cleaned up) (opinion concurring in part and dissenting in part).

CONCLUSION

"Constitutions—and courts—should not be picking sides in divisive social and political debates." *PPH IV*, 975 N.W.2d at 741–42. Imposing Planned Parenthood's desired rule—subjecting to heightened scrutiny every abortion regulation up until the moment of birth, viability, or some other unstated, unreasoned time—would not only be a grievous departure from the judiciary's proper role in our system of government and "produc[e] a make-it-up-as-you-go abortion jurisprudence,"[79] but it would also end the lives of countless unborn children. As shown, those children are unique human beings who rapidly develop, and the People's decision to protect them accords with science. This Court should reverse.

[79] *Slatery*, 14 F.4th at 438 (Thapar, J).

Respectfully submitted,

s/ *Timm Reid*

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FEBRUARY 20, 2023

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 spaced typeface using Times New Roman, 14-point type and contains 6,846 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: February 20, 2023

s/ Timm Reid
Timm Reid

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2023, I electronically filed the foregoing 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/ Timm Reid
Timm Reid

ADDENDUM

From: Chris Schandevel <CSchandevel@adflegal.org>
Sent: Tuesday, February 14, 2023 4:53 PM
To: Christopher Mills
Cc: Langholz, Sam; alan.ostergren@kirkwoodinstitute.org
Subject: RE: Planned Parenthood of the Heartland v. Reynolds, Iowa S. Ct. No. 22-2036

Hi Christopher,

Thanks for reaching out. Speaking on behalf of the appellants in this appeal, you have our consent to file your brief.

Have a great rest of the week!

- Chris

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From: Christopher Mills <cmills@spero.law>
Sent: Tuesday, February 14, 2023 4:42 PM
To: Chris Schandevel <CSchandevel@adflegal.org>
Subject: Planned Parenthood of the Heartland v. Reynolds, Iowa S. Ct. No. 22-2036

EXTERNAL

Chris,

On behalf of the American College of Pediatricians, I write to seek Appellants' consent to file an amicus brief in the above case supporting Appellants.

Thanks,

Christopher Mills

From: Im, Peter <peter.im@ppfa.org>
Sent: Thursday, February 16, 2023 10:55 AM
To: Christopher Mills
Cc: rita.bettis@aclu-ia.org; CLS@shuttleworthlaw.com
Subject: Re: Planned Parenthood of the Heartland v. Reynolds, Iowa S. Ct. No. 22-2036

Thanks for the email. Appellees consent.

Peter

On Tue, Feb 14, 2023 at 4:43 PM Christopher Mills <cmills@spero.law> wrote:

> Counsel,
>
> On behalf of the American College of Pediatricians, I write to seek Appellees' consent to file an amicus brief in the above case supporting Appellants.
>
> Thanks,
>
> Christopher Mills

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