IN THE SUPREME COURT OF IOWA

No. 23-1145

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

Petitioners-Appellees,

v.

KIM REYNOLDS EX REL. STATE OF IOWA,
and IOWA BOARD OF MEDICINE,

Respondents-Appellants.

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

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is a non-profit, public-interest legal organization providing strategic planning, training, funding, and litigation services to protect Americans' constitutional rights. Since its founding in 1994, ADF has played a key role in numerous cases before the United States Supreme Court and state and federal lower courts. In 2022, one of the ADF attorneys listed on this brief served as co-counsel alongside the State of Mississippi's attorneys in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). In *Dobbs*, the U.S. Supreme Court overruled its prior decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, correctly holding there is no fundamental right to abortion under the U.S. Constitution. 142 S. Ct. at 2261, 2266, 2270, 2274.

Since that holding, ADF attorneys have played key roles in pro-life litigation across the country, including cases arising in Arizona (multiple cases), Iowa (multiple cases), Kansas, Montana (multiple cases), Michigan (multiple cases), New Mexico, North Carolina (multiple cases), North Dakota, South Carolina, Texas, Utah, and West Virginia. ADF's involvement in these cases gives it a unique view into the issues being litigated post-*Dobbs*.

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[1] No party's counsel authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution to fund its preparation or submission.

Here in Iowa, ADF represented 60 state legislators in an amicus curiae brief filed in *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710 (Iowa 2022) (*PPH IV*), *reh'g denied* (July 5, 2022). And one of the ADF attorneys listed on this brief shared argument time with the State at oral argument.

When then-Attorney General Tom Miller indicated he would no longer defend Iowa's pro-life laws in the wake of the U.S. Supreme Court's decision in *Dobbs*, Governor Kim Reynolds retained ADF's attorneys to represent her in filing a petition for rehearing in *PPH IV* and in moving to dissolve a 2018 injunction on Iowa's fetal heartbeat law.

After Attorney General Brenna Bird was elected in 2022, ADF's attorneys served as co-counsel alongside the State's attorneys in an appeal to this Court asking the Court to reverse the district court's decision denying the State's motion to dissolve that 2018 injunction. And the same ADF attorney who shared argument time with the State in *PPH IV* argued the 2023 appeal on behalf of Governor Reynolds and the Iowa Board of Medicine.

In each of its filings in these cases, ADF has argued that rational-basis review—not the undue-burden standard—is the only test for laws regulating abortion with any basis in Iowa law. Twice in two years the Court has declined to resolve that issue. ADF has an interest in making sure the Court resolves it now.

INTRODUCTION

Almost two years ago, this Court rightly overruled its 2018 decision discovering a state constitutional right to abortion. *PPH IV*, 975 N.W.2d at 715 (overruling *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018) (*PPH II*)). Applying the text-history-and-precedent approach enunciated in *State v. Wright*,[2] the Court in *PPH IV* drew three conclusions: (1) "Textually, there is no support for *PPH II*'s reading of the due process clause as providing fundamental protection for abortion," *PPH IV*, 975 N.W.2d at 740, (2) "[h]istorically, there is no support for abortion as a fundamental constitutional right in Iowa," *id.*, and (3) *PPH II*'s endorsement of strict scrutiny was "doctrinally inconsistent with prior Iowa jurisprudence concerning family rights that followed a balancing approach," *id.* at 742.

Based on those conclusions, the Court "overrule[d] *PPH II*, and thus reject[ed] the proposition that there is a fundamental right to an abortion in Iowa's Constitution subjecting abortion regulation to strict scrutiny." *Id.* at 715. Still, a three-justice plurality declined to "decide what constitutional standard should replace it." *Id.* Meanwhile, two justices explained why they would "emphatically reject—not recycle—*Casey*'s moribund undue burden test." *Id.* at 746 (McDermott, J., dissenting in part).

[2] 961 N.W.2d 396, 412 (Iowa 2021).

More recently, the Court split 3-3 over whether a district court erred by denying the State's motion to dissolve a permanent injunction against Iowa's fetal heartbeat law. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 22-2036, 2023 WL 4635932 (Iowa June 16, 2023) (*PPH V*). Three justices read *PPH IV* as only "overruling *PPH II* to the extent it found that the right to abortion was a fundamental right 'subject to strict scrutiny.'" *Id.* at *5 (Waterman, J., nonprecedential opinion) (quoting *PPH IV*, 975 N.W.2d at 715). In their view, "[t]he undue burden test balances the state's interest in protecting unborn life and maternal health with a woman's limited liberty interest in deciding whether to terminate an unwanted pregnancy." *Id.* at *8. The remaining three justices disagreed because "[u]nder this court's controlling precedents, where there is no fundamental right at issue, statutes are subject only to rational basis review." *Id.* at *19 (McDonald, J., nonprecedential opinion).

Resolving this appeal, then, requires the Court to decide the proper test to apply to laws regulating abortion. Do this Court's cases support the notion that the Iowa Constitution offers heightened protection for quasi-fundamental "limited liberty" interests? *Id.* at *8 (Waterman, J., nonprecedential opinion). They do not. And adopting something akin to *Casey*'s now-defunct and unworkable undue-burden test would be a grave mistake.

ARGUMENT

I. The undue-burden standard has no basis in Iowa law, and the Court should not misread its parental-rights and procreation cases to suggest otherwise.

A. This Court has long held that substantive-due-process claims are analyzed under one of two tests: rational-basis review or strict scrutiny.

Under this Court's controlling precedent, "[t]here are two stages to any substantive due process inquiry." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). "The first requires a determination of 'the nature of the individual right involved,'" meaning whether the alleged right qualifies as "fundamental." *Id.* (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)).

In the second stage, "if a fundamental right is implicated, [courts] apply strict scrutiny." *PPH II*, 915 N.W.2d at 238 (cleaned up). That much the Court got right in *PPH II*. On the other hand, "[i]f a fundamental right is *not* implicated, a statute need only survive a rational basis analysis." *Seering*, 701 N.W.2d at 662 (emphasis added). Simply put, "[i]f the right at issue is fundamental, strict scrutiny applies; otherwise, the state only has to satisfy the rational basis test." *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012). This Court has made that point clear more than a half-dozen times. *PPH V*, 2023 WL 4635932, at *19 (McDonald, J., nonprecedential opinion) (collecting cases).

B. *PPH I* only applied the undue-burden standard because the State appeared to concede it applied.

In *PPH I*, this Court did *not* hold that the undue-burden test is the correct test as a matter of Iowa law; the Court did not even hold that Iowa's Constitution protects a right to abortion. *PPH I*, 865 N.W.2d at 262 (explaining why the Court thought it "need not decide whether the Iowa Constitution provides such a right").

Instead, the Court applied *Casey*'s test based on the State's apparent concession that Iowa's Constitution "provides a right to an abortion that is coextensive with" the federal right. *Id.* at 254; *accord PPH IV*, 975 N.W.2d at 745 (noting that the Court had "applied the undue burden test … based on the State's concession *for purposes of that case*") (emphasis added).

But now that *Dobbs* has rejected *Casey*'s undue-burden test under the U.S. Constitution, there is no basis for concluding that it "remains the governing standard" under Iowa's Constitution. *PPH IV*, 975 N.W.2d at 716. If anything, now that rational-basis review applies at the federal level, "the controlling standard under the Iowa Constitution, if coextensive with the federal standard, is now rational basis review." *PPH V*, 2023 WL 4635932, at *19 (McDonald, J., nonprecedential opinion). Nothing in *PPH I* undermines that conclusion.

C. *PPH II* applied Iowa law and rejected *Casey*'s inherently standardless undue-burden test.

Three years later, this Court resolved the questions it had expressly left open in *PPH I*, holding first that "implicit in the concept of ordered liberty" under the Iowa Constitution "is the ability to decide whether to continue or terminate a pregnancy," and second that "strict scrutiny is the appropriate standard to apply" for laws regulating abortion. *PPH II*, 915 N.W.2d at 237, 241, *overruled by PPH IV*, 975 N.W.2d 710.

In so holding, the Court refused to "deviate downward" by applying the undue-burden test "the Supreme Court and some states [had] seen fit" to apply. *Id.* at 238. That would have meant flouting "well settled" law requiring strict scrutiny of laws implicating a fundamental right. *Id.* It would have meant "relegat[ing] the individual rights of Iowa women to something less than fundamental." *Id.* at 240. And due to the *Casey* test's "inherently standardless nature," it would have meant inviting judges "to give effect to [their] personal preferences about abortion." *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 992 (1992) (Scalia, J., dissenting in part)). Thus, while *PPH II* was wrong to read into the Iowa Constitution an alleged right that does not exist, it was right to highlight the inherently standardless and subjective nature of the undue-burden test.

D. *PPH IV* dicta misreads this Court's prior cases, mainly by conflating the two stages of the substantive-due-process inquiry.

Then came the Court's 2022 decision in *PPH IV*. In essence, the Court issued an opinion that parted ways with *PPH II* in both key respects. First, the Court held that it had been wrong to read into the Iowa Constitution a right to abortion when there was "no support," textually or historically, "for *PPH II*'s reading of the due process clause as providing fundamental protection for abortion." *PPH IV*, 975 N.W.2d at 740. Second, though, the Court suggested in dicta that it might be willing to read into the Court's prior cases "something like the undue burden test of *Casey*." *Id.* at 739.[3]

As explained in Part II of this brief, that would be a mistake for numerous practical reasons. On the merits, though, it is simply not true that any of this Court's prior cases endorsed or applied anything "like the undue burden test of *Casey*." *Id.* The Court in *PPH IV* cited four of the Court's cases to support that claim. *Id.* But the Court misread all four cases, mainly by conflating the "two stages" of the substantive-due-process inquiry. *Seering*, 701 N.W.2d at 662.

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[3] The partial dissent makes clear that two of the justices in the majority reject this reading of the Court's caselaw. *See PPH IV*, 975 N.W.2d at 746 (McDermott, J., dissenting in part) ("Lest we forget, we already have well-established tiers of constitutional scrutiny for the type of challenge presented in this case.").

Start with the Court's description of those cases: "[W]hat we followed pre-2018 with respect to rights to family, procreation and child-rearing was something like the undue burden test of *Casey*." *PPH IV*, 975 N.W.2d at 739. "The government could not unduly burden those rights; that would trigger strict scrutiny." *Id.* "But it could take actions that affected the right without triggering strict scrutiny so long as the action did not have a direct and substantial impact." *Id.* That second sentence reveals the Court's mistake.

In the first stage of the analysis, the Court does *not* ask whether a right has been "unduly" burdened. *Id.* It asks whether a "fundamental" right has been "implicated." *Seering*, 701 N.W.2d at 663. That can include asking whether the State has imposed a "direct and substantial" burden. *Hensler v. City of Davenport*, 790 N.W.2d 569, 583 (Iowa 2010) (cleaned up); *McQuistion v. City of Clinton*, 872 N.W.2d 817, 833 (Iowa 2015) (same). But that's different from asking whether the State has "unduly" burdened the right. *PPH IV*, 975 N.W.2d at 739. That's stage two.

Asking whether a right has been "unduly" burdened before deciding the level of review puts the cart before the horse. For fundamental rights, a direct and substantial burden is "undue" if the law fails strict scrutiny. *Seering*, 701 N.W.2d at 662. For all *non*-fundamental liberty interests, even a direct and substantial burden is "undue" only if the law fails rational-basis review. *Id.*

1. This Court looks for a direct and substantial burden in the first stage of the analysis—not for an undue burden in the second.

Hensler, *McQuistion*, and *Seering* all show that the Court looks for a "direct and substantial" burden in the first stage of the analysis *before* applying the relevant level of scrutiny in the second. In *Hensler*, for example, the Court held in stage one that a juvenile-delinquency ordinance did "not intrude directly and substantially" into the plaintiff "parent's parental decision-making authority." 790 N.W.2d at 583. So the ordinance did "not trigger strict scrutiny by infringing" a fundamental right. *Id.* And in stage two, the Court applied rational-basis review. *Id.* at 583–84.

Likewise in *McQuistion*. In the first stage of the analysis, the plaintiff "asserted" a claim "built on a fundamental right," namely the right to procreate. *McQuistion*, 872 N.W.2d at 833. But she had failed to show that the right had been "implicated" by the state action she was challenging because she had failed to show a "direct and substantial impact on the fundamental right." *Id.* (cleaned up). More specifically, she had failed to show that the City's denial of her request for light duty during her pregnancy had "any specific effect … on her decision to procreate." *Id.* at 835. As a result, she had failed to "frame a claim of infringement on a fundamental right" in stage one of the analysis. *Id.* So the Court applied rational-basis review in stage two. *Id.*

Seering is more of the same. The plaintiff there—a convicted sex offender—argued that the state's residency-restriction statute violated his fundamental right to live with his family. *Seering*, 701 N.W.2d at 662. In stage one of the analysis, though, he had failed to show that the statute had "substantially and directly impacted" that interest because he and his family had "successfully lived together through much of the proceedings." *Id.* at 664.

The only interest the statute *did* substantially and directly impact was the "freedom of choice in where an offender lives and under what conditions." *Id.* But that was "not a fundamental interest" because it was not "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Id.* (cleaned up). So the Court moved to stage two of the analysis and applied rational-basis review. *Id.* at 664–65.

Finally, *PPH IV* cited *In re K.M.*, 653 N.W.2d 602 (Iowa 2002), as a case where the Court had applied "a blend of tests to uphold a statute that shifted the balance in parental termination cases." *PPH IV*, 975 N.W.2d at 739. In that case, the Court does appear to have combined two substantive-due-process tests into one. *See In re K.M.*, 653 N.W.2d at 607 (framing "the question in the present case" using strict-scrutiny *and* shocks-the-conscience terms). But neither of those tests is anything "like the undue burden test of *Casey*." *PPH IV*, 975 N.W.2d at 739.

2. Faithfully applied, this Court's cases compel the conclusion rational-basis review applies.

Faithfully applying those cases to decide this appeal is not hard. In stage one, the Court asks (1) whether the liberty interest asserted qualifies as "fundamental," *Seering*, 701 N.W.2d at 664, and (2) *if it is fundamental*, whether the fetal heartbeat law has had a "direct and substantial impact" on the right, *id.* at 663.

This Court answered part one of that analysis in *PPH IV*. Both "[t]extually" and "[h]istorically," there is "no support for abortion as a fundamental constitutional right in Iowa." *PPH IV*, 975 N.W.2d at 740. Any alleged interest in abortion is *not* "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." *Seering*, 701 N.W.2d at 664 (cleaned up). So the fact that the fetal heartbeat law will have a "direct and substantial impact" on that alleged interest does not change the level of scrutiny. *Id.* at 663. Abortion "is not a fundamental interest entitled to the highest constitutional protection." *Id.* at 664. So any alleged interest in the "choice" to end an unborn child's life "is entitled to only rational basis review. *Id.* at 665; *accord Hensler*, 790 N.W.2d at 584 ("When a fundamental right is not implicated, the ordinance need only survive the rational-basis test."); *McQuistion* 872 N.W.2d at 835 ("Without the infringement of a fundamental right, we turn to our rational-basis analysis.").

Any attempt to shoehorn "something like the undue burden test of *Casey*," *PPH IV*, 975 N.W.2d at 739, into that analysis would make a mess of the Court's caselaw. In *Seering*, for example, the Court held that, "[a]lthough freedom of choice in residence is of keen interest to any individual, it is not a fundamental interest entitled to the highest constitutional protection." 701 N.W.2d at 664. Still, the residency-restriction statute *had* imposed a "direct and substantial burden" on that interest. *Id.* at 663–64. So by the *PPH IV* dicta's logic, that interest had been "unduly" burdened, and that should have "trigger[ed] strict scrutiny." 975 N.W.2d at 739. That means the State should have had to show that the "risk of recidivism posed by sex offenders" was sufficiently "frightening and high" to satisfy strict scrutiny. *Seering*, 701 N.W.2d at 665 (cleaned up). And the State should have had to show that the law was "narrowly tailored." *Id.* at 662.

Perhaps the State could have made both showings. Or perhaps the narrow-tailoring requirement would have been its downfall. But the State didn't have to make those showings at all because the choice of residency "is not a fundamental interest entitled to the highest constitutional protection." *Id.* at 664. So rational-basis review applied. *Id.* at 665. And the law easily satisfied that level of review. *Id.* All of that is equally true here. Respondents-Appellants' Opening Br. at 48–49.

II. Adopting the undue-burden standard would create far more problems for the Court than it would solve.

As a practical matter, the federal courts' 30 years' experience trying—and failing—to faithfully apply *Casey*'s undue-burden test proves that adopting it here in Iowa would create a multitude of problems for the Court. Most of those problems can be traced back to the two main deficiencies in the so-called test: (1) its inherently subjective nature, and (2) its hopeless unworkability.

A. Adopting such a wholly subjective test would put the Court on a collision course with itself.

As *Dobbs* correctly observed, "*Roe* was on a collision course with the Constitution from the day it was decided," and *Casey* only "perpetuated its errors." 142 S. Ct. at 2265. The same is true of this Court's decision in *PPH II*. There has never been textual or historical support for a right to abortion in the Iowa Constitution. So it was only a matter of time before the Court had to make a course correction. And the Court rightly did so in *PPH IV*.

Now, though, the Court risks "perpetuat[ing]" the mistakes it made in *PPH II* by adopting a since-discarded federal test that has no basis in Iowa law. *Id.* at 2265. Strict scrutiny and rational-basis review are the only levels of scrutiny the Court has endorsed for substantive-due-process claims—and for good reason. Trying to chart some new course down the middle of that two-lane highway would only end in confusion and disaster for all involved.

The dangerously subjective nature of *Casey*'s test was clear from its creation. As Justice Scalia warned in his partial dissent, the *Casey* plurality's attempt to clarify what it meant by an "undue burden" only proved that the "standard is *inherently manipulable* and will prove hopelessly unworkable in practice." 505 U.S. at 986 (Scalia, J., dissenting in part) (emphasis added).

That's because, for any law that stops short of protecting life at a specific point in pregnancy, deciding whether a law regulating abortion imposes a "substantial obstacle" or an "undue burden" is an "inherently standardless" inquiry. *Id.* at 991–92. That means that, "[b]y finding and relying upon the right facts," a judge "can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'—subject, of course, to the possibility of being reversed by" an appellate court "that is as unconstrained in reviewing his decision as he was in making it." *Id.* at 992.

Put simply, the undue-burden test fails to "offer an objective standard by which the effect" of a law regulating abortion can be judged. *PPH II*, 915 N.W.2d at 239 (quoting *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 16 (Tenn. 2000)). As a result, "a regulation held to be an undue burden by one judge could just as easily be found to be reasonable by another judge because the gauge for what is an undue burden necessarily varies from person to person." *Id.* (quoting *Sundquist*, 38 S.W.3d at 16).

That's one reason this Court *rejected* the undue-burden test in *PPH II*. 915 N.W.2d at 239–41. And it explains why other state supreme courts have rejected it in interpreting their own state constitutions. For example, *PPH II* relied heavily on the reasoning in *Sundquist*. In that case, the Tennessee Supreme Court heeded Justice Scalia's warning in *Casey*, "agree[ing] that the undue burden approach is essentially no standard at all, and, in effect, allows judges to impose their own subjective views of the propriety of the legislation in question." *Sundquist*, 38 S.W.3d at 16. As proof, the court cited "the fact that the majority and the dissent reach[ed] diametrically opposed results when applying" the undue-burden test to the laws challenged there. *Id.* Rather than go down that road, the majority rejected the undue-burden test and—having found a fundamental right to abortion under Tennessee's state constitution—applied strict scrutiny. *Id.* at 17.

Almost five years ago, the Kansas Supreme Court reached the same result for similar reasons. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (per curiam). Relying heavily on this Court's decision in *PPH II*, that court rejected the undue-burden test because it "leav[es] judges to subjectively gauge what is an undue burden—something that varies based on a judge's own views and experiences as well as on the circumstances of each pregnant woman." *Id.* at 495.

Finally, earlier this year the Idaho Supreme Court likewise rejected the undue-burden test, this time in favor of rational-basis review. *See Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023). Based on an analysis of that state's "traditions, history, statutes, and precedent," an analysis that largely mirrors this Court's analysis in *PPH IV*, *id.* at 1191, the Idaho Supreme Court held that its constitution "does not protect an implicit fundamental right to abortion," *id.* at 1176. And because the laws Planned Parenthood challenged there, including the state's fetal heartbeat law, did "not infringe on a fundamental right," the Court applied rational-basis review and upheld them. *Id.* at 1195–97. To have done otherwise "undoubtedly" would have led the court "down the same worn path the Supreme Court of the United States traversed between *Roe* and *Dobbs*, with a never-ending cycle of legislative enactment followed by protracted litigation." *Id.* at 1195. And that was not a path the court wished to tread.

This Court should heed these warnings. Without an objective standard for judges to apply, everyone loses. "[T]he 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). And that's bad for the public, the courts, the other branches of government, and the rule of law.

"In short, constitutional interpretation should not be subject to the pendulum swing of prevailing social mores." *Great Nw.*, 522 P.3d at 1174. Nor should the results in constitutional cases swing back-and-forth from year-to-year coinciding with changes in the Court's makeup. But that's the natural result when the Court adopts a subjective legal standard. Indeed, the Idaho Supreme Court highlighted this Court's overruling of its prior decision in *PPH II* in *PPH IV* as a cautionary tale of what follows when a court goes "down an interpretive path that turns on [justices'] own sincerely held personal policy preferences," ultimately leading to "a similarly well-intended self-correction in the future." *Great Nw.*, 522 P.3d at 1173 (citing *PPH II*, 915 N.W.2d at 237–38, and *PPH IV*, 975 N.W.2d at 742).

If this Court adopts the undue-burden test now, it will set itself on a similar collision course all over again—with an endless number of "self-correction[s]" sure to follow as the Court struggles to apply a test unconstrained by anything more than the justices' "own sincerely held personal policy preferences." *Id.* "[I]f the meaning of a constitutional provision can be dismissed in favor of the policy preferences of a select few on the bench, written constitutions will be no more than useless." *Id.* at 1186 (cleaned up). This Court "need not" and "should not" go down that path. *PPH IV*, 975 N.W.2d at 749 (McDermott, J., dissenting in part).

B. Adopting such an unworkable test would mire the Court in abortion litigation indefinitely.

Because of its subjective nature, the undue-burden test has "prove[n] hopelessly unworkable in practice." *Casey*, 505 U.S. at 986 (Scalia, J., dissenting in part). For decades, it "has vexed courts trying to apply it," *PPH IV*, 975 N.W.2d at 748 (McDermott, J., dissenting in part), leaving them "unable to provide predictability, consistency, or coherence in its application," *id.* at 749. And if this Court were to adopt it now, the key feature of the Court's traditional fundamental-rights analysis—that it "avoids the need for complex balancing of competing interests in every case"—would be lost. *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997)).

As Judge Easterbrook lamented before *Dobbs* was decided, "[t]he 'undue burden' approach announced in [*Casey*] does not call on a court of appeals to interpret a text." *Planned Parenthood of Ind. & Ky. v. Box*, 949 F.3d 997, 999 (7th Cir. 2019) (per curiam) (Easterbrook, J., concurring in denial of rehearing en banc). "Nor does it produce a result through interpretation of the Supreme Court's opinions." *Id.* "How much burden is 'undue' is a matter of judgment" that requires "weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators." *Id.*

Given the standardless nature of that inquiry, "[o]nly the Justices" on the U.S. Supreme Court, the original "proprietors of the undue-burden standard, [could] apply it to a new category of statute." *Id.* But in *Dobbs*, those justices "return[ed] the power to weigh those arguments to the people and their elected representatives." 142 S. Ct. at 2259. That means that, if this Court adopts the test under state law, the justices on *this* Court will become the new "proprietors of the undue-burden standard." *Box*, 949 F.3d at 999 (Easterbrook, J., concurring in denial of rehearing en banc). And as *Dobbs* makes abundantly clear, if the Court does make that choice, the Court will have a mess on its hands.

Since its inception, "*Casey*'s 'undue burden' test has scored poorly on the workability scale." *Dobbs*, 142 S. Ct. at 2272. Trying to compensate for the "inherently standardless" nature of that inquiry, the *Casey* plurality set out "three subsidiary rules." *Id.* (quoting *Casey*, 505 U.S. at 992 (Scalia, J., dissenting in part)). "[B]ut these rules created their own problems." *Id.*

1. The first rule prohibited placing a "substantial obstacle" in the path of a woman seeking a pre-viability abortion. *Id.* "But whether a particular obstacle qualifies as 'substantial' is often open to reasonable debate." *Id.* "Huge burdens are plainly 'substantial,' and trivial ones are not, but in between these extremes, there is a wide gray area." *Id.*

2. The second rule, which applies at all stages of pregnancy, "muddies things further." *Id.* "It states that measures designed 'to ensure that the woman's choice is informed' are constitutional so long as they do not impose 'an undue burden on the right.'" *Id.* (quoting *Casey*, 505 U.S. at 878). Is that a different standard for pre-viability abortions than the "substantial obstacle" test? Is the size of the obstacle all that matters? Or are courts supposed to ask whether even an "insubstantial obstacle," however "slight," might "outweigh[] its negligible benefits," making it "undue" and thus unconstitutional? *Id.* at 2272–73. "*Casey* does not say, and this ambiguity would lead to confusion down the line." *Id.* at 2273.

Case in point: according to Chief Justice in *June Medical*, "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment). And the four dissenting justices agreed. *Id.* at 2154 (Alito, J., dissenting) ("*Casey* also rules out the balancing test adopted in *Whole Woman's Health*."). But the four justices in the lead opinion thought otherwise, doubling down on *Whole Woman's Health*'s holding that *Casey* requires courts "to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access." *Id.* at 2112 (quoting *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, __, 136 S. Ct. 2292, 2310 (2016)).

Which opinion controls? The Supreme Court has never said, and the federal courts are split. Compare *Whole Woman's Health v. Paxton*, 10 F.4th 430, 440 (5th Cir. 2021) (en banc) *(*"Under the *Marks* rule, the Chief Justice's concurrence is *June Medical*'s controlling opinion."), *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam) (same), and *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020) (same), with *Planned Parenthood of Ind. & Ky. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021) ("The split decision in *June Medical* did not overrule the precedential effect of *Whole Woman's Health* and *Casey*."). So this Court, if it adopts such an unworkable test, will have to answer that question for itself. And the legislature, litigants, and lower courts will be left in the dark until it does.

3. "The third rule complicates the picture even more." *Dobbs*, 142 S. Ct. at 2273. "Under that rule, *'[u]nnecessary health* regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right.'" *Id.* (quoting *Casey*, 505 U.S. at 878). "This rule contains no fewer than three vague terms." *Id.* "It includes the two already discussed—'undue burden' and 'substantial obstacle'—even though they are inconsistent." *Id.* And it adds a third: "*unnecessary*," which itself "has a range of meanings." *Id.* And "*Casey* did not explain" which of them it meant. *Id.*

"In addition to these problems, one more applies to all three rules." *Id.* All three "call on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons." *Id.* (listing ten of those potential reasons). And *Casey* did not make clear "which set of women [courts] should have in mind and how many of the women in this set must find that an obstacle is 'substantial'" before a law becomes an "undue burden." *Id.* Instead, *Casey* said a "regulation is unconstitutional if it imposes a substantial obstacle 'in a large fraction of cases in which [it] is relevant.'" *Id.* (quoting *Casey*, 505 U.S. at 895). "[B]ut there is obviously no clear line between a fraction that is 'large' and one that is not." *Id.* "Nor is it clear what the Court meant by 'cases in which' a regulation is 'relevant.'" *Id.* And the federal courts of appeals "have experienced particular difficulty in applying [this] large-fraction-of-relevant-cases test," criticizing "the assignment while reaching unpredictable results." *Id.* at 2274–75 (collecting cases in a footnote).

Given these inherent ambiguities, it is not surprising that "*Casey* has generated a long list of Circuit conflicts." *Id.* at 2274. In addition to those already mentioned, the courts of appeals "have disagreed on the legality of parental notification rules." *Id.* & n.54 (collecting cases). "They have disagreed about bans on certain dilation and evacuation procedures." *Id.* & n.55 (collecting

cases). "They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden." *Id.* & n.56 (collecting cases). "And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability." *Id.* & n.57 (collecting cases).

Now that the U.S. Supreme Court has removed itself from these legislative debates, *id.* at 2277, that Court will not have to resolve any of those splits. And that means that if this Court takes up the smoldering torch of the undue-burden standard and carries it forward, that "unwieldy and inappropriate task" will fall squarely on this Court. *Id.* at 2275.

In short, nearly 30 years after the *Casey* plurality created the undue-burden standard "largely out of whole cloth," the proper application of that test remains more unsettled than ever. *Casey*, 505 U.S. at 964 (Rehnquist, C.J., dissenting in part). Before *Dobbs*, the jurisprudential problems that the test had spawned were not dissolving; they were mushrooming. And courts had found themselves consumed by the impossible task of making sense of a test that, frankly, was "not built to last." *Id.* at 965.

The U.S. Supreme Court has finally abandoned that failed experiment. This Court should decline to take it up in the first place. And it should make that decision now.

CONCLUSION

"A principal share of the benefit expected from written constitutions would be lost if the rules they establish were so flexible as to bend to circumstances or be modified by public opinion." *Great Nw.*, 522 P.3d at 1163 (cleaned up). And any remaining benefit would be lost if constitutional interpretation were reduced to a "complex balancing of competing interests in every case." *Santi*, 633 N.W.2d at 317 (quoting *Glucksberg*, 521 U.S. at 722).

This Court should apply rational-basis review, hold that Iowa's fetal heartbeat law survives constitutional scrutiny, and dissolve the injunction issued below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitations of Iowa R. App. P. 6.903(1)(e), 6.903(1)(g), and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, 14-point type and contains 5,739 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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.

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