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IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1579

PLANNED PARENTHOOD OF THE HEARTLAND
and JILL MEADOWS,
Petitioner-Appellants,

vs.

KIMBERLY K. REYNOLDS and IOWA BOARD OF MEDICINE,
Respondent-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. FARRELL, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Respondent-Appellees Kimberly K. Reynolds and the Iowa Board of Medicine (collectively referred to herein as “the State”) agree that this appeal should be retained by this Court. Faced with a challenge to a regulation of telemedicine abortions, this Court declined to decide whether and to what extent the Iowa constitution protects a woman’s right to an abortion because it held that the regulation could not survive the federal undue burden standard. *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252, 262 (Iowa 2015) (hereinafter “*PPH I*”). Applying the undue burden test, this statute is constitutional. As a result, this Court must determine whether the Iowa constitution provides more protection than its federal counterpart. Under rule 6.1101(2)(a), retention by this Court is appropriate.

STATEMENT OF THE CASE

Nature of the Case

Petitioner-Appellants Planned Parenthood of the Heartland and Jill Meadows (collectively referred to herein as “Planned Parenthood”) appeal from the denial of their petition for declaratory and injunctive relief challenging the constitutionality of Iowa Code section 146A.1 (2017).

Background Facts and Course of Proceedings

Protecting unborn life is a state interest of the highest order. In furtherance of this important interest, the legislature enacted a regulatory measure that requires abortion providers to obtain certification that a woman has been given information about the procedure, including an opportunity to view an ultrasound and hear her unborn child's heartbeat, at least 72 hours prior to terminating a pregnancy. Iowa Code § 146A.1 (2017). This informed choice provision is designed to provide important information to Iowa women facing one of the most important decisions they will ever make. The informed choice provision does not remove the ultimate decision from the woman. Rather, it reflects the hope of the legislature that after receiving the information and taking some time to consider it, some women will choose to continue a pregnancy that they might otherwise have terminated. Planned Parenthood seeks to permanently enjoin this provision.

Planned Parenthood operates nine clinics in Iowa. Physicians perform abortion at six of those clinics. Medication and surgical abortions are performed at clinics in Des Moines and Iowa City. Medication abortions are also provided at clinics in Ames, Bettendorf,

Cedar Falls, and Council Bluffs. Trial Tr. I P.15 L.25 – P.16 L.13. In the past year, Planned Parenthood of the Heartland performed approximately 3,000 abortions. Trial Tr. I P.18 Ls.1-2. That represents close to three quarters of the total number of abortions performed in Iowa. Trial Tr. I P.59 Ls.10-23. Five years ago, Planned Parenthood of the Heartland operated fifteen clinics in Iowa. Trial Tr. I P.75 Ls.1-5.

Before this law, physicians who perform abortions were required to certify that a woman was given the opportunity to view an ultrasound image of the unborn child and that she was provided information about the options relative to a pregnancy. Iowa Code § 146A.1 (2015). The physician would typically obtain the certification on the same day as the abortion. The new law contains an informed choice provision that requires abortion providers to give women 72 hours between receiving the information and having the opportunity to view an ultrasound before performing an abortion. It also requires that the woman be given an option to hear the fetal heartbeat and that the information provided be based on the materials developed by the Department of Public Health. Iowa Code § 146A.1 (2017).

Planned Parenthood filed a petition for declaratory and injunctive relief on May 3, 2017—two days before then-Governor Branstad signed the bill into law. Petition 05/03/17; App. 004-037. It also sought to temporarily enjoin enforcement of the law pending a decision on the merits. Motion for Temporary Injunction 05/03/17; App. 038-233. The parties appeared before the district court for a hearing on the temporary injunction the next day. The district court denied the motion. Order Denying Temporary Injunction 05/04/17; App. 245-49. Planned Parenthood requested an interlocutory appeal and a temporary injunction from this Court. Because the Iowa Department of Health had not yet developed the materials necessary to comply with the law, this Court stayed enforcement of the law pending a trial on the merits. Order 05/09/17 (Sup. Ct. No. 17-0708); App. 250-53.

Trial was held on July 17-18, 2017. The district court issued a decision denying all of Planned Parenthood's claims on September 29. Order Denying Petition 09/29/17; App. 295-342. Planned Parenthood appealed the decision and again sought a temporary injunction. The State agreed that a stay pending the outcome of the appeal was appropriate on the condition that this Court expedite the

briefing schedule. This Court agreed to expedite briefing and stayed enforcement of the law pending appeal on October 23.

ARGUMENT

I. Iowa Code Section 146A.1 Does Not Violate the Due Process Clause of the Iowa Constitution On Its Face.

Preservation of Error

The State agrees that Planned Parenthood has preserved its due process claim for appeal.

Standard of Review

Planned Parenthood's constitutional challenges to Iowa Code section 146A.1 are reviewed de novo. *PPH I*, 865 N.W.2d at 261. When crafting a rule of law based on "social, economic, political, or scientific facts," this Court does not defer to the fact-finding done by the district court based on the record before it. *See Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). The facts that relate to the parties and their particular circumstances—the "adjudicative" facts—demand deference from appellate courts on review. Except to form a judgment on a question of constitutional law, this Court cannot go beyond the trial record to review the district court's findings of fact and conclusions of law. *Id.*; *see also Alvarez v. IBP, Inc.*, 696 N.W.2d 1, 3 (Iowa 2005).

The State agrees that "constitutional facts" may be appropriately considered in order to determine the appropriate level of scrutiny under the Iowa constitution. Such a determination is not predicated on facts relating to the parties and their particular circumstances. Once that determination is made, however, resolution of the case demands application of the standard to the facts of the particular case. These "adjudicative facts" contained in the district court's findings are binding on this Court if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a).

The parties developed a factual record at trial. Planned Parenthood presented expert testimony and read into the record portions of social science research that they believed supported their petition. *See* Iowa R. Evid. 5.803(18) (Providing for admission of hearsay statements contained in learned treatises provided that they are "called to the attention of an expert witness." The rule states that the statements "may be read into evidence but may not be received as exhibits.") The State then had an opportunity to cross-examine those experts.[1] This Court should not permit the "eleventh-hour supplementation of the factual record from sources that are not

[1] Indeed, the State presented much of its case through cross examination of Planned Parenthood's experts.

subject to cross-examination or other checks on reliability." Allison Orr Larson, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757, 1764 (December, 2014).[2]

Merits

The due process clause of the Iowa constitution prohibits the State from depriving any person of life, liberty, or property without due process of law. This Court has held that the clause contains a substantive component. *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). The substantive component prevents the State from depriving Iowans of certain liberty interests regardless of the process provided. *Id.*; *see also State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). Planned Parenthood claims that the law deprives Iowa women of one such liberty interest—choosing to terminate a pregnancy. In order to apply the proper level of scrutiny, this Court

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[2] Under Planned Parenthood's view, developing a trial record in a constitutional case wastes time and judicial resources. It is also bad strategy. Why would a party call a witness who will be subject to cross examination at trial when the exact same testimony can be introduced through an affidavit or amicus brief on appeal? Indeed, many of the amicus briefs filed in this case contain facts outside the record, hearsay testimony from witnesses who did not appear at trial, and learned treatises that were excluded from the trial record pursuant to the agreement of the parties and the rules of evidence, all addressing factual disputes relating to the parties and their particular circumstances.

must examine the "nature" of the claimed liberty interest. *Seering*, 701 N.W.2d at 662 (quoting *Hernandez-Lopez*, 639 N.W.2d at 238). But first, it is important to address the burden that Planned Parenthood bears in the context of a facial challenge.

A. Planned Parenthood cannot succeed on a facial challenge to Iowa Code section 146A.1.

Planned Parenthood alleges that the law is unconstitutional on its face. By its nature, "a facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts." *F.K. v. Iowa Dist. Court for Polk County*, 630 N.W.2d 801, 805 (Iowa 2001). In order to prevail on a facial challenge in Iowa, Planned Parenthood "must demonstrate the statute is incapable of any valid application." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002); *see also War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714, 722 (Iowa 2009). It is not enough to argue that the informed choice provision is unconstitutional under a "given set of facts." Rather, this Court must determine "whether any set of facts exists under which the statute would be constitutional." *Id.*

Planned Parenthood completely ignores this legal standard in its brief. It is easy to see why; by deliberately choosing not to proceed

with a challenge as-applied to any particular plaintiff or group of plaintiffs—but presenting its case as if it had—Planned Parenthood has failed to meet its burden. Rather than attempt to show that the law is unconstitutional in all its applications, Planned Parenthood would have this Court adopt a "worst-case-scenario" standard for facial challenges under the Iowa constitution.

While the Iowa Supreme Court has been clear on the standard for a facial challenge under the Iowa constitution, the standard for prevailing on a facial challenge to a statute regulating abortion is the subject of some debate in the federal courts. *See Gonzales v. Carhart*, 550 N.W.2d 124, 167-68 (2007) ("What that burden consists of in the specific context of abortion statutes has been a subject of some question."); *cf. Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid).

The United States Supreme Court declined to resolve the dispute in *Gonzales*, though, because the complainants did not establish that the challenged law would be unconstitutional in a large fraction of relevant cases. *Gonzales*, 550 U.S. at 167-68; *see also War Eagle Village*, 775 N.W.2d at 722 n.3. The same is true in this case—Planned Parenthood did not meet its burden under either standard. As will be explained, the decision of the district court denying the petition can be affirmed on this ground.

B. Choosing to terminate a pregnancy is not a fundamental right under the Iowa constitution.

The baseline that applies to every liberty interest proscribes any law that is not rationally related to a legitimate government purpose. That baseline is commonly referred to as the "rational basis" test. For a select few of our most important rights, a law that infringes the right must pass a higher hurdle. The State cannot interfere with those "fundamental" rights unless it can show that the law is narrowly tailored to achieve a compelling interest. *Id.* While it has not set forth a clear test for determining whether a claimed liberty interest enjoys the status of a fundamental right, this Court has referred to several first principles that it uses as a guide.

In general, fundamental rights are those explicitly or implicitly enumerated in the constitution (freedom of speech and press, exercise of religion, free assembly, trial by jury, etc.). *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012). Any claimed right that is not explicitly or implicitly enumerated must at least be deeply rooted in our history and tradition and "implicit in the concept of ordered liberty." *Id.* (quoting *Hensler v. City of Davenport*, 790 N.W.2d 569, 581 (Iowa 2010)). In other words, as this Court put it, "'fundamental right' for purposes of constitutional review is not a synonym for 'important.'" *Id.* Indeed, many important liberty interests do not qualify as fundamental rights. *Id.* (citing *Seering*, 701 N.W.2d at 664; *State v. Sanchez*, 692 N.W.2d 812, 817 (Iowa 2005)). The key to applying the proper analysis is a "careful description" of the claimed right—that is, it must be identified with accuracy and specificity. *Seering*, 701 N.W.2d at 663 (citations omitted).

Planned Parenthood points to this Court's recognition of a fundamental right to procreate in *McQuistion v. City of Clinton*, 872 N.W.2d 817, 833 (Iowa 2015). It argues that if procreation—"the decision to bear a child"—merits this protection, so must "the decision not to bear a child." Appellant's Br. P.50-51. This is where

the "careful description" of the claimed right is important. Deciding not to have a child is not the same thing as deciding to terminate a pregnancy. The former refrains from some action; the latter is an affirmative act—ending the life of a developing fetus. Even Justice Blackmun recognized in *Roe v. Wade* that terminating a pregnancy is "inherently different" from the decision whether to procreate. 410 U.S. 113, 159 (1973). In his partial concurrence in *Casey*, Chief Justice Rehnquist elaborated:

> We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion involves the purposeful termination of a potential life. The abortion decision must therefore be recognized as *sui generis,* different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.

See 505 U.S. 833, 952 (Rehnquist, J., concurring in part and dissenting in part) (internal quotations and citation omitted). This Court may be unwilling to stake a position on when "life" begins—the State does not ask it to—but it cannot ignore the value that our law places on the unborn.

Iowa law is replete with recognition of the rights of unborn children. For example, a "posthumous child"—one conceived before but born after the death of a person who dies without a will—may inherit from an intestate. Iowa Code § 633.220. A child born after a person executes a will but conceived before that person's death receives the same share of the estate as if the person had died without a will. Iowa Code § 633.267. At any point in a judicial proceeding, the court may appoint a guardian *ad litem* to represent the interest of an unborn child. Iowa Code § 633A.6306. Life-sustaining medical care cannot be withheld or withdrawn from a pregnant woman so long as the unborn child can develop to birth with continued application of that care. Iowa Code §§ 144A.6, 144A.7. In light of this solicitude, it cannot be said that our law treats terminating a pregnancy no different from having never conceived a child in the first place.

Planned Parenthood claims, without citation to any decision, that this Court "already recognizes privacy as a fundamental right under the Iowa Constitution." Appellant's Br. P.55. They also cite decisions and law journal articles describing such concepts as "personal decisions in life," "personal choice in matters of family life,"

"the right to raise one's child," "reproductive choice," "a woman's autonomous charge of her full life's course," and her right to "control her body and destiny." Appellant's Br. P.50-52. The State does not dispute the importance of those principles, but as this Court has recognized, they are not unlimited. *See Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001). Moreover, they are not themselves rights. They may support a right to a certain specific choice, but such choice must be defined with specificity. *See, e.g.*, *State v. Hartog*, 440 N.W.2d 852, 855 (Iowa 1989) (In the event that the Iowa constitution recognizes a right to "privacy," it would not extend to the personal choice whether to wear a seatbelt.).

Choosing to terminate a pregnancy is not a fundamental right in Iowa. The text of our constitution does not contemplate such a choice. It is not deeply rooted in our history or tradition; when the due process clause of the Iowa constitution was adopted, abortion was a crime. *See* Act of Feb. 16, 1843, *codified at* Iowa. (Terr.) Rev. Stat. ch. 49, § 10 (1843). It remained so until it was struck down under the federal constitution following *Roe*. *See Doe v. Turner*, 361 F. Supp. 1288 (S.D. Iowa 1973).

The question that this Court must answer requires the application of a test that allows legislatures and lawyers to understand what the constitution protects. It cannot be that the due process clause protects simply "those freedoms and entitlements that this Court *really* likes." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting). Applying the principles and analysis from this Court's precedents leads to the inescapable conclusion that the right to choose an abortion—however important—is not fundamental in Iowa.

This Court has in the past followed the guidance of the United States Supreme Court to determine which rights are fundamental. *King*, 818 N.W.2d at 26; *see also Hartog*, 440 N.W.2d at 855 ("[G]iven the textual similarity between the two due process clauses, we have been inclined in the past to follow Supreme Court interpretations in these circumstances."). This path leads to the same conclusion. The United States Supreme Court has held that applying strict scrutiny to "all governmental attempts to influence a woman's decision on behalf of the potential life within her" is incompatible with the "substantial state interest in potential life throughout pregnancy." *Id.* at 876. As a result, the "undue burden" standard

emerged as the lodestar for challenges to abortion regulations under the federal constitution. *Id.* ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

C. The informed choice provision survives Planned Parenthood's facial challenge under the undue burden test.

In order to succeed on a facial challenge to the law, this Court's precedents require Planned Parenthood to prove that the informed consent provision constitutes an undue burden in every conceivable set of circumstances. *F.K.*, 630 N.W.2d at 805; *Hernandez-Lopez*, 639 N.W.2d at 237; *War Eagle Village Apartments*, 775 N.W.2d at 722. Even if this Court applies the modified federal test, Planned Parenthood must prove that it constitutes an undue burden "in a large fraction of the cases in which the law is relevant." *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) ("*PPAEO*") (quoting *Casey*, 505 U.S. at 895). At the outset, it is important to clarify what is meant by an undue burden in this context.

A "guiding principle" of the undue burden test reminds courts that "[w]hat is at stake is the woman's right to make the ultimate

decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. In other words, the undue burden standard operates as a rational basis test with an added element. The added element identifies the class of women affected by the statute and asks whether the statute is "likely to prevent a significant number of women from obtaining an abortion." *Id.* at 877, 893. If so, the burden is so severe as to remove from the pregnant woman the "ultimate decision." If not, a measure designed to persuade her to choose childbirth over abortion will be upheld if "reasonably related to that purpose"—the rational basis test. The undue burden standard provides an elegant balance between the autonomy of the pregnant woman and the interest of Iowans in expressing their profound respect for life. *See* Iowa Const. art. 1, sec. 1 (protecting the rights of "enjoying *and defending* life") (emphasis added).

i. The undue burden test does not require this Court to balance burdens against benefits.

In *PPH I*, this Court explained that the undue burden test applies differently depending on the interest advanced by the State. 865 N.W.2d at 263. Regulations that advance the State's interest in unborn life do not constitute an undue burden unless they have the purpose or effect of placing a "substantial obstacle" in the path of a

woman seeking an abortion. *Id.* An obstacle is substantial under the undue burden test if it is "likely to prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 877, 893. If a regulation advances the State's interest in ensuring women's health, on the other hand, this Court will weigh the strength of the State's justification against the burdens imposed. *PPH I*, 865 N.W.2d at 264.

Planned Parenthood disputes that statement. It argues that balancing is required even where the State asserts its interest in protecting unborn life. It relies on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), decided just one year after *PPH I*. In *Whole Woman's Health*, the United States Supreme Court struck down a series of regulations passed by the State of Texas targeting abortion providers. Because the regulations at issue advanced the State's interest in women's health, applying the *Casey* balancing accords with this Court's precedent. Planned Parenthood refers to a portion of the decision where the majority criticized the Fifth Circuit's statement of the undue burden test. The cited portion contains a bizarre and incorrect reading of *Casey* and does not actually announce any standard. This Court got it right in *PPH I*.

In the decision on appeal in *Whole Woman's Health*, the Fifth Circuit said that an abortion regulation does not constitute an undue burden if "(1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." 136 S. Ct. at 2309. For a regulation that furthers the State's interest in protecting unborn life, that standard is correct and drawn straight from *Casey*. *See PPH I*, 865 N.W.2d at 263 (quoting *Casey*, 505 U.S. at 878).

The United States Supreme Court disagreed, writing that *Casey* requires that courts "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. It then cited to the portion of *Casey* addressing the spousal and parental notification provisions and claimed in a parenthetical that the Court was "performing this balancing" test. *Id.* That statement is plainly wrong.

Examining the spousal notification provision in *Casey*, the Court first examined the findings of the district court and concluded that the provision placed a substantial obstacle in the path of married women seeking abortions who would not have otherwise notified

their spouse. 505 U.S. at 887-894. While it could have concluded the analysis there, it nevertheless proceeded to the second prong to hold that a husband's interest in the safety of a fetus is not a "sufficient predicate for state regulation." *Id.* at 894-98. In other words, the spousal notification provision was not reasonably related to a legitimate state interest. The Court did not consider the "benefits" of the spousal notification provision at all.

The statement that the Court performed some kind of balancing is even weaker with respect to the parental notification provision. The Court stated that it was upholding the parental notification provision for the same reasons as they upheld the general informed consent provision. *Id.* at 899-900. In that analysis the Court set out the test described by the Fifth Circuit perhaps better than any other. *Id.* at 881-883. In it, the Court explicitly acknowledges that, so long as it does not create a substantial obstacle, the State may require information designed to protect unborn life, even when that information has no direct relation to the woman's health. *Id.* at 882. The portion of *Whole Woman's Health* that Planned Parenthood cites was unnecessary to the holding in that case and misreads *Casey*. This Court is not bound by the United States Supreme Court's explanation

of the undue burden test should it decide it apply it under the Iowa constitution. It should instead rely on its own statement in *PPH I*—a much better reading of the *Casey* standard.

Planned Parenthood also cites five federal district court decisions from the past year that apparently follow the incorrect reading of *Casey* advanced in *Whole Woman's Health*. Three of those decisions are currently pending on appeal. *See Hopkins v. Jegley*, Case No. 4:17-cv66-00404-KGB, 2017 WL 3220445 (E.D. Ark. July 28, 2017); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-01807-TWP- DML, 2017 WL 1197308 (S.D. Ind. March 31, 2017); *Whole Woman's Health v. Hellerstedt* (*Whole Woman's Health II*), 231 F. Supp. 3d 218 (W.D. Tex. Jan. 27, 2017). The decision in *West Alabama Women's Center v. Miller*, 217 F. Supp. 3d 1313 (M.D. Ala. 2016), was appealed, but the appeal was dismissed as moot in October because the district court issued a ruling on the merits on October 26, 2017. That decision will presumably be appealed. In other words, the battle to understand whether and how *Whole Woman's Health* affects the undue burden standard in the federal courts is far from over.

In any event, it is impossible to read *Whole Woman's Health* without considering the concern described in in *Casey* that unnecessary *health* regulations "serve no purpose other than to make abortions more difficult." *Casey*, 505 U.S. at 901. When the legislature enacts a measure that is designed to protect unborn life, on the other hand, it makes no sense to describe it as "medically unnecessary." The plurality in *Casey* explained that a state is permitted "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id.* at 883. Such a measure is "reasonable" in furtherance of the State's goal and "might cause the woman to choose childbirth over abortion." *Id.* at 883.

In this case the legislature made its purpose express when it passed the law. *See* Iowa Senate File 471, Division III, Sec. 5 (the purpose of the Act is to "protect all unborn life."). The measure that the legislature took is reasonable, as the *Casey* plurality explained: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important

information become part of the background of the decision." *Casey*, 505 U.S. at 885.

ii. Applying the undue burden test in the context of a facial challenge.

Under the modified federal test for facial challenges to abortion regulations, Planned Parenthood was required to demonstrate that the informed choice provision would pose a substantial obstacle to obtaining an abortion "in a large fraction of the cases in which the law is relevant." *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) ("*PPAEO*") (quoting *Casey*, 505 U.S. at 895). The first step in that determination requires the Court to identify the "relevant denominator"—that is, "those women for whom the provision is an actual rather than an irrelevant restriction." *Casey*, 505 U.S. at 894-95.

In *Casey*, for example, the Court explained that the spousal notification provision was not a "relevant" restriction for unmarried women. *Id.* at 895. Likewise for married women seeking abortions who would have notified their spouse anyway. *Id.* Thus the denominator for the spousal notification provision was "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory

exceptions to the notice requirement." *Id.* For those women, the spousal notification provision did more than make abortions more difficult or expensive. Rather, they were "likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.*

In *PPAEO*, the challenged provision was a "contract-physician requirement" that applied to all medication abortions. Because the provision did not affect surgical abortions, the Eighth Circuit held that the relevant denominator was "women seeking medication abortions in Arkansas." 864 F.3d at 958-59. It remanded the case to the district court to make specific findings about how many of the women seeking medication abortions would be prevented from obtaining them as a result of the challenged provisions. *Id.* at 960.

In this case, the informed choice provision applies to all women seeking abortions. It is possible to narrow the denominator slightly, though. The Court in *Casey* considered the spousal notification provision irrelevant for those married women who otherwise would have notified their spouse, even though the provision technically applied to them. This law arguably does not present a relevant

restriction for those women seeking an abortion in Iowa who otherwise would have voluntarily made two trips 72 hours apart.

Planned Parenthood did not present evidence of any women who would voluntarily make two trips, but Meadows testified that "95 percent" of her patients were firm in their decision when they presented at the clinic. Trial Tr. P.25 L.21 – P.26 L.5. Planned Parenthood's expert Jason Burkheiser Reynolds testified that in his experience "almost all patients are firm" in the decision to have an abortion on the first visit. Trial Tr. P.118 L.23 – P.119 L.3. Thus the relevant denominator in this case is very nearly all women seeking an abortion in Iowa.

Once the denominator is settled, this Court must determine the numerator—that is, this Court must determine whether the number of women for whom the Act creates a "substantial obstacle" constitutes a significant fraction. What is a substantial obstacle? Recall that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. As will be explained in more detail, the State does not dispute that the law will increase the cost of the procedure. It will increase travel distances for some women. It

presents an additional challenge to those women who have difficulty explaining their whereabouts to their husbands or employers. The State also understands that these indirect effects of the law will be hardest to bear for those women with the fewest financial resources.

That said, "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Casey*, 505 U.S. at 885-86. Consider how the United States Supreme Court defined a "substantial obstacle" when it struck down Pennsylvania's spousal notification provision: "The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle." *Id.* at 893-94. To determine the numerator in this case, this Court must look beyond the argument that the law "increase[es] the cost and risk of delay of abortions." *Id.* at 886. It must conclude that the law prevents a significant fraction of women from making the ultimate decision—that it is "likely to prevent a significant number of women from obtaining an abortion." *Id.*

iii. The informed consent provision does not create a substantial obstacle for a large fraction of women seeking abortion in Iowa.

As many courts have recognized, all abortion regulations "burden" a woman's ability to obtain one to some degree, these regulations are not unconstitutional merely because they make the procedure more difficult or expensive to procure. *See Karlin v. Foust*, 188 F.3d 446, 479 (7th Cir. 1999). Mandatory waiting periods ranging from 24 to 72 hours are common across the country. Seventeen states require 24 hour waiting periods prior to obtaining an abortion: *See* A.R.S. § 36-2153 (Arizona); Ga. Code Ann., § 31-9A-3 (Georgia); I.C. § 18-609 (Idaho); K.S.A. 65-6709 (Kansas); KRS § 311.725 (Kentucky); M.C.L.A. 333.17015 (Michigan); M.S.A. § 145.4242 (Minnesota); Miss. Code Ann. § 41-41-33 (Mississippi); Neb. Rev. St. § 28-327 (Nebraska); NDCC, 14-02.1-02 (North Dakota); R.C. § 2317.56 (Ohio); 18 Pa. C.S.A. § 3205 (Pennsylvania); Code 1976 § 44-41-330 (South Carolina); V.T.C.A., Health & Safety Code § 171.012 (Texas); VA Code Ann. § 18.2-76 (Virginia); W. Va. Code, § 16-2I-2 (West Virginia); W.S.A. 253.10 (Wisconsin). Three states mandate 48 hour waiting periods. *See* Ala. Code 1975 § 26-23A-4 (Alabama); A.C.A. § 20-16-1703 (Arkansas); T.C.A. § 39-15-

202 (Tennessee). In addition to Iowa, six states require 72 hours. *See* LSA-R.S. 40:1061.17 (Louisiana); V.A.M.S. 188.027 (Missouri); N.C.G.S.A. § 90-21.82 (North Carolina); 63 Okl. St. Ann. § 1-738.2 (Oklahoma); SDCL § 34-23A-56 (South Dakota); U.C.A. 1953 § 76-7-305 (Utah).

Since the United States Supreme Court upheld a 24 hour waiting period in *Casey*, only one court has held that a waiting period of *any* length fails the undue burden test. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No, 1:16-cv-01807-TWP-DML, 2017 WL 1197308 (S.D. Ind. March 31, 2017). That decision conflicts with prior circuit precedent in *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), and is currently on appeal. By contrast, mandatory waiting periods have been upheld repeatedly by state and federal courts. *See, e.g., Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 372-74 (6th Cir. 2006); *Karlin*, 188 F.3d at 478-92; *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 530-31 (8th Cir. 1994); *Tucson Women's Center v. Arizona Medical Board*, 666 F. Supp. 2d 1091 (D. Ariz. 2009); *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.2d 685 (Mo. 2006); *Clinic*

for Women, Inc. v. Brizzi, 837 N.E.2d 973 (Ind. 2005); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998).

In order to show that the informed choice provision differs from those waiting period requirements, Planned Parenthood must show some unique harm. The evidence they presented at trial does not do so. Rather, the petitioners' evidence was a variation on a theme that has been presented in every challenge to a waiting period requirement: the delay will be substantially longer than the statute requires, the two-trip requirement will increase the travel distance and cost of the procedure, compliance will be difficult for women who do not want the pregnancy discovered by husbands or employers, and that all of these challenges will be borne most heavily by low-income women, rural women, and women who are victims of domestic violence or sexual assault. These negative effects were confronted in *Casey*, and the United States Supreme Court held that they "do not demonstrate that the waiting period constitutes an undue burden." *Casey*, 505 U.S. at 886. Nevertheless, even if this Court is inclined to take a fresh look, the evidence presented at trial does not show that the informed choice provision will impose a substantial obstacle in a significant fraction of cases.

iv. Delay substantially longer than 72 hours

Meadows testified that when the law goes into effect, she predicts that the delay between the informational visit and the procedure itself will be one to two weeks. Trial Tr. P.48 Ls.6-15. The district court found her opinion reasonable in light of the other testimony at trial. Order Denying Petition 09/29/17 P.16 (referring to Grossman testimony that 48 hour waiting period caused average delay of eight days); App. 310. That finding is essentially the same as *Casey*, where the district court found that the 24 hour waiting period would result in result in delays "rang[ing] from 48 hours to two weeks." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1351 (E. D. Pa. 1990).

Evidence gathered from studies performed after *Casey* also shows that longer delays associated with a 72 hour waiting period are not distinct from those associated with 24 hour waiting periods. Grossman testified to a study that showed that delays associated with a 24 hour waiting period in Alabama averaged 6.9 days. Trial Tr. P.180 L.10 – P.181 L.13. He also testified to a study that examined a 72 hour mandatory delay in Utah. That study showed that the delay associated with the 72 hour period averaged eight days. Trial Tr.

P.177 L.20 – P.178 L.1. The difference between 6.9 days and 8 days does not make a waiting period unconstitutional.

Planned Parenthood argues that the informed choice provision will result in increased health risks for women who are within two weeks of the cutoff for a medication abortion if they are forced to obtain a surgical abortion instead. Meadows testified that "some women" who would otherwise qualify for a medication abortion will be pushed past the cutoff. Trial Tr. P. 30 Ls.16-21. The petitioners did not make any attempt to demonstrate how many women will be pushed past the cutoff. They also did not make any attempt to quantify the "health risk" that these women would face. Meadows testified that the risks associated with abortion increase along with the gestational age of the unborn child, but she also testified that abortion in general is a "very safe medical procedure." Trial Tr. P.28 Ls.7-18, P.30 L.22 – P.31 L.5. Planned Parenthood presented no evidence that would allow the district court to determine how much the risk associated with this "very safe" procedure increases. Order Denying Petition 09/29/17 P.16; App. 310.

Meadows did testify that in the past year, Planned Parenthood saw approximately 50 patients who were within two weeks of the 20

week cutoff for abortions in Iowa. Trial Tr. P.31 Ls.21-25. Even assuming that all 50 of those women would be prevented from obtaining abortions if the Act were in effect, that represents just 1.6 percent of the 3,000 abortion patients that Planned Parenthood saw during the same time period, and just 1.25 percent of the total. That is not a significant fraction of the women who would be affected by the law. Moreover, it is highly unlikely that all of those women would in fact be prevented from obtaining an abortion, as Meadows also testified that Planned Parenthood would be able to accommodate a woman who was close to the deadline for a medication or a surgical abortion in just a couple of days if necessary. Trial Tr. P.81 L.17 – P.82 L.6. The district court concluded that the record did not show how many, if any, of those women would be prevented from having an abortion. Order Denying Petition 09/29/17 P.17; App. 311.

Meadows also testified about certain medical conditions that can arise later in pregnancy such as preeclampsia, hypertension, and ruptured membranes. Trial Tr. P.32 L.21 – P.33 L.15. Grossman testified that in some of those cases, delaying an abortion can present a medical risk that would not, in his opinion, be covered by the Act's medical emergency exception. Trial Tr. P.54 Ls.5-19. Neither could

give a number of cases for which the medical emergency exception is inadequate, but Meadows did testify that the University of Iowa Hospital performs at least 50 "medically indicated" abortions per year—about 1 percent of the state total. Trial Tr. P.34 Ls.9-12.

Grossman described a category of women for whom he felt that the Act would be especially "cruel." He included in the category those women who have serious medical problems, who became pregnant as a result of sexual assault, whose unborn children have been diagnosed with fetal anomalies or malformations, and who are victims of domestic violence or have violent partners. Trial Tr. II P.5 L.20 – P.7 L.10. He estimated the size of that category of women to be "less than 10 percent" of abortion patients on average. Trial Tr. II P.7 L.11 – P.9 L.1.

The district court in *Casey* recognized the risks attached to delaying an abortion into the second trimester: "In some cases, the delays caused by the 24-hour waiting period will push patients into the second trimester of their pregnancy substantially increasing the cost of the procedure itself and making the procedure more dangerous medically." *Casey* 744 F. Supp. at 1352. The record does not reveal how many women are dealing with the kind of condition

that Meadows and Grossman describe, but it does suggest that the number is less than 10 percent—and probably substantially less. When combined with Meadows's testimony that Planned Parenthood can accommodate patients more quickly in exigent cases, the evidence is consistent with the United States Supreme Court's statement that "*in the vast majority of cases*, a [waiting period] does not create any appreciable health risk." *Casey*, 505 U.S. at 885 (emphasis added).

v. Increased travel distance and cost

Planned Parenthood also argues that the informed choice provision will increase the distance that many women in Iowa will have to travel to obtain an abortion. Moreover, they argue that the difficulties associated with increased travel disproportionately affect women in rural Iowa. Grossman testified that the number of women who have to travel more than fifty miles to obtain an abortion exceeds the national average of 17 percent. Trial Tr. P.143 L.15 – P.144 L.16. Based on the data contained in the Iowa Termination of Pregnancy Report for 2015, Grossman calculated that 47 percent of surgical abortion patients and 44 percent of the medication abortion patients in Iowa resided more than fifty miles from the nearest clinic. Trial Tr.

P.143 L.15 – P.144 L.16. There are several problems with Grossman's calculations, however. First, Grossman included all out-of-state residents, apparently assuming that all out-of-state women who obtained an abortion in Iowa resided more than fifty miles from the nearest clinic. Petitioners' Exh. 14, ¶ 5; App. II 208.

In 2015, 234 out-of-state residents obtained surgical abortions in Iowa. Respondents' Exh. K; App. 474-77. Out-of-state residents obtained 418 medication abortions that year. *Id.* This is troubling because Grossman has no way of knowing where those women live or how far they are from the nearest clinic. Many of those women may live much closer to a clinic, such as residents of Nebraska across the border from Council Bluffs, or they may live closer to a clinic in their state but traveled to Iowa for another reason. Moreover, this action deals with an Iowa constitutional challenge to an Iowa statute. Planned Parenthood cannot assert the right of women all over the world to obtain an abortion in Iowa in order to establish the difficulty associated with increased travel distance.

The second problem with Grossman's calculation is that when he calculated the number of women that reside greater than fifty miles from the nearest clinic who obtained surgical abortions, he

measured the distance only from clinics that provide surgical abortions. Petitioners' Exh. 14, ¶ 5; App. II 208. This affects the integrity of his calculation because women who are seeking a surgical abortion do not have to travel to a clinic that provides surgical abortions for the informational visit. For example, a woman seeking a surgical abortion who resides in Council Bluffs would be included in Grossman's calculation, even though her travel distance would not increase as a result of the informed choice provision because she could have the informational visit in Council Bluffs.

The third problem with Grossman's calculation is that he excluded ITOP Region 14, which includes the city of Davenport. Petitioners' Exh. 14, ¶ 5; App. 208. While he is correct that part of Region 14 is outside a fifty mile radius from the clinic in Iowa City, Planned Parenthood still operates a clinic in Bettendorf. Trial Tr. P.16 Ls.4-13. Meadows testified that Planned Parenthood anticipates closing the Bettendorf clinic by the end of the year, but number of women are likely to be affected by the informed choice provision should not be determined based on Planned Parenthood's anticipated business decisions. Trial Tr. P.17 Ls.16-20. It is possible that they will keep the clinic open if the demand for abortions remains

sufficient, or if donations increase, or for another reason. In any event, Planned Parenthood agreed at trial that any burden imposed must be considered separately from burdens imposed by clinic closures due to financial or business decisions. Order Denying Petition 09/29/17 P.6; App. 300.

After fixing these issues, the ITOP data shows that 17 percent of surgical abortion patients and 16 percent of medication abortion patients resided in an ITOP reporting region more than fifty miles from the nearest abortion clinic in 2015. These percentages equal the national average, and pale in comparison to the record in *Casey*:

> In 1988, 58% of the women obtaining abortions in Pennsylvania resided in only five of the Commonwealth's counties. Women who live in any of the other 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider.

Casey, 744 F. Supp. at 1352. Moreover, Planned Parenthood did not present any evidence that any of those 17 percent of women who live more than fifty miles from the nearest clinic would actually be prevented from having an abortion because of the distance.

Once again, the challenges resulting from increased travel distance were the same as those presented to the Court in *Casey*. The

district court found with respect to women who had to travel to reach the nearest provider:

> The mandatory 24-hour waiting period would force women to double their travel time or stay overnight at a location near the abortion facility. This will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion. Additionally, many women may lose additional wages or other compensation as a result of the mandatory 24-hour delay, if forced to miss work on two separate occasions. Two trips to the abortion provider may cause the women to incur additional expenses for food and child care.

Casey 744 F. Supp. at 1352. Planned Parenthood's experts testified that they could not say how many women would be unable to obtain an abortion as a result of increased travel distance and cost associated with the Act. Such a record, as the United States Supreme Court explained, "do[es] not demonstrate that the waiting period constitutes an undue burden." *Casey*, 505 U.S. at 886.

vi. Victims of domestic violence and sexual assault

Planned Parenthood argues that the informed choice will burden victims of domestic violence and sexual assault who might want to conceal their pregnancy from an abusive partner or who want to have an abortion as quickly as possible to begin to recover from the

trauma of an assault. The evidence they presented at trial is similar in many ways to the record in *Casey*, including the testimony of Lenore Walker, who testified at trial in *Casey*. *See Casey*, 744 F. Supp. at 1362. Walker could not say how many victims of domestic violence or sexual assault sought abortions in Iowa.

Grossman estimated that the number would be less than 10 percent. Trial Tr. II P.7 L.11 – P.9 L.1. Walker relied on a study that found that 4 to 8 percent of pregnant women experienced physical abuse during pregnancy. Respondents' Exh. N, P.20 Ls.5-10; App. II 487. Another study suggested that the number of abortion patients in Iowa who had experienced physical or sexual abuse could be as high as 13.8 percent. Respondents' Exh. N, P.24 Ls.11-16; App. II 488.

The percentage of Iowa abortion patients who became pregnant as a result of rape is likely much smaller still. Meadows testified that Planned Parenthood sees patients who became pregnant as a result of rape about once per month. Trial Tr. P.52 Ls.16-20. Once per month is about twelve per year, which would represent about 0.3 percent of the total. Walker testified that of all pregnancies, somewhere between 1.7 and 5 percent resulted from rape. She did not have an opinion on the number of pregnancies that resulted from rape in

Iowa. Respondents' Exh. N (Lenore Walker Deposition) P.17 Ls.4-12; App. II 486. She also could not say what percentage of those women choose to terminate the pregnancy, but she relied on one study that found that approximately 50 percent of the women who became pregnant as a result of rape chose to terminate. Respondents' Exh. N (Lenore Walker Deposition) P.18 Ls.13-16; App. II 487.

Based on the testimony of the Planned Parenthood's experts, less than 10 percent of Iowa abortion patients are victims of domestic violence or became pregnant as a result of rape or sexual assault. Walker relied on a study that placed the number at closer to 14 percent, but that number did not reflect abortion patients who had experienced domestic violence or sexual assault associated with *that particular* pregnancy. The State does not intend to diminish the trauma or difficulty that these women have experienced. But Planned Parenthood is not challenging the law as applied to victims of domestic violence or sexual assault. The State is not required to argue that the informed choice provision is constitutional in every application in order to defeat a *facial challenge* to the constitutionality of the law, even under the undue burden standard. *See PPAEO*, 864 F.3d at 959 n.8 (expressing skepticism that 4.8-6.4

percent constitutes a "large fraction" of women); *see also Taft*, 468 F.3d at 374 (holding that 12 percent does not constitute a large fraction).

vii. The record does not show that Iowa women will be prevented from obtaining an abortion as a result of the informed choice provision.

The district court found that the informed choice provision would not prevent women in Iowa from obtaining abortions. It explained that the evidence presented by Planned Parenthood did not show that women were prevented from obtaining abortions as a result of waiting periods in other states. Order Denying Petition 09/29/17 P.17; App. 311. It referred specifically to Grossman's testimony, noting that in all of his research, he could identify only one woman anywhere who was unable to obtain an abortion as a result of a waiting period. Order Denying Petition 09/29/17 P.17; App. 311. The authors of the study that found one woman who was prevented concluded that—contrary to what some "advocates" argue—two-visit requirements and waiting periods do not prevent women from obtaining abortions. Trial Tr. I P.96 Ls.10-15.

On the other hand, the district court found that the evidence at trial showed that some women "change their minds" after being given

an opportunity to consider the information provided at an initial visit. Order Denying Petition 09/29/17 P.15; App. 309. While it could not say with certainty, the district court estimated that percentage to be 8 percent or higher. That finding was based on studies that showed a decline in the number of abortions performed in several states that enacted waiting periods. Planned Parenthood introduced studies from Alabama, Texas, and Utah that all showed such a decline. In only one of those studies—the Utah study—did the researchers actually find out *why* the women did not come back.

That study concluded that while only one woman was unable to have an abortion as a result of the waiting period, the most common reason given was that the woman "just couldn't do it." Trial Tr. II P.90 Ls.14-22. As one woman explained:

> It was a hard decision for me to make in the first place, and once I made the appointment, it kind of hit home. About two days after the information appointment, I cancelled the abortion appointment. I couldn't do it. Something that I have always been against. I had my reasons that I thought were good reasons, and then I re-reasoned myself out of it.

Trial Tr. II P.91 Ls.8-19. Planned Parenthood attempts to diminish the import of this evidence by claiming that it would have identified

such a conflict and encouraged those women to take more time even without the informed choice provision. Maybe so. But the record reveals that Iowa women face a unique challenge when it comes to accessing information.

Planned Parenthood claims that Iowa women cannot get the information required by the law from anyone other than Planned Parenthood—and that Planned Parenthood would not rely on ultrasounds performed by anyone else even if they were available. Its own expert from California testified that women who want the information required by the law should not have to schedule an abortion in order to get it. Trial Tr. II P.84 L.20 – P.85 L.8. But Meadows explained that in Iowa, women must schedule an abortion at Planned Parenthood in order to access the information required by the law. Trial Tr. I P.83 L.3 – P.84 L.23. Moreover, some providers may encourage women who are conflicted to go through with the procedure as quickly as possible so as not to lose the fee. The legislature is allowed to see that that does not happen.

II. Iowa Code Section 146A.1 Does Not Violate the Equal Protection Clause of the Iowa Constitution.

Preservation of Error

The State agrees that Planned Parenthood has preserved its equal protection claim for appeal.

Standard of Review

The standard of review for this claim is the same as described in Division I of the State's brief.

Merits

The equal protection clause of the Iowa constitution demands that laws "treat alike all persons who are similarly situated with respect to the legitimate purposes of the law." *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (quotation omitted). In most cases, courts apply the rational basis test to equal protection challenges. *See Id.* at 879. When a fundamental right is involved, heightened scrutiny is appropriate. *Id.* at 880. As explained above, abortion is not a fundamental right under the Iowa Constitution.

Iowa courts also recognize a "middle tier" of scrutiny that applies to statutes that classify on the basis of gender. *Id.* This intermediate scrutiny requires that the challenged classification be "substantially related to the achievement of an important

governmental objective." *Id.* Because abortions can only be performed on women, the petitioners argue that the law classifies on the basis of gender. It does not. Rather, the act "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (upholding a statutory rape statute that applied only to men); *see also King v. State*, 818 N.W.2d 1, 24 (2012) ("To allege a viable equal protection claim, plaintiffs must allege that the defendants are treating similarly situated persons differently.").

Whether Planned Parenthood's female patients are similarly situated to males with respect to the purpose of the challenged law is a threshold question. *Varnum*, 763 N.W.2d at 882. If they are not, no further analysis is necessary. *Id.* Planned Parenthood cites two Iowa cases where this Court held that classifications based on a woman's ability to get pregnant were based on gender. *See Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862 (Iowa 1978); *Cedar Rapids Community School District v. Parr*, 227 N.W.2d 486 (Iowa 1975). Those cases provide little guidance here, however, because of the *purpose* of those challenged policies. Both cases involved policies addressing the risk of absenteeism at

work due to disability. *Quaker Oats*, 268 N.W.2d at 867. Because both men and women can experience disability for a variety of reasons, they were similarly situated "*with respect to the purposes of the law*." *Varnum*, 763 N.W.2d at 883 (emphasis in original) (quotation omitted).

In this case, the purpose of the challenged law is the protection of all unborn life. *See* Iowa Senate File 471, Division III, Sec. 5. The informed choice provision serves this purpose by requiring *physicians* to provide certain information prior to performing abortions. The law actually regulates abortion providers, not women seeking abortion. These facts distinguish this law from the disability plans at issue in *Quaker Oats* and *Parr*. Because men cannot become pregnant, they are not similarly situated with respect to the *purpose* of the law—except to the extent that they provide abortions, in which case the law applies to them as well. In *Quaker Oats* and *Parr*, the key was that while men could not become pregnant, they could become disabled and thwart the purpose of the policy—reducing the risk of absenteeism—just as easily. *See Parr*, 227 N.W.2d at 493-94.

In any event, an equal protection claim requires that the plaintiff show disparate treatment, not merely disparate impact.

King, 818 N.W.2d at 24. Planned Parenthood argues that the Iowa legislature passed the law because it does not believe that Iowa women are competent decision makers. That is ridiculous. Planned Parenthood agrees that whether to terminate a pregnancy is an important and difficult decision. The legislature mandates waiting periods for other life-altering decisions relating to family life such as getting married (three days), Iowa Code section 595.4, releasing a child for adoption (72 hours), Iowa Code section 600A.4(2)(g), or dissolving a marriage (90 days), Iowa Code section 598.19. The federal government requires a three-day waiting period to purchase a home. *See* 12 C.F.R. 1026.19(f)(1)(ii)(A). None of these provisions suggest that those making the decision are less capable decision-makers as a group. Rather, they reflect the gravity of the decision and the interest of the State in ensuring that the decisions are informed and that those who stand to benefit from certain outcomes do not take advantage of the decision-makers.

Moreover, Planned Parenthood's claim is belied by its own policy. As explained above, Meadows testified that Planned Parenthood will not provide an ultrasound to confirm and date a pregnancy unless a woman schedules an abortion. Trial Tr. I P.83 L.3

– P.84 L.23. That policy creates a unique need in Iowa. Planned Parenthood's own expert testified that women who want that information should not have to schedule an abortion in order to get it. Trial Tr. II P.84 L.20 – P.85 L.8. He also testified that there exists a "proportion of women" who "*require* additional time" before they decide and that at his clinic in California, he would schedule women for an ultrasound without requiring them to come in for an abortion. Trial Tr. II P.84 Ls.13-19. The State does not think women are incompetent decision makers. Rather, the State wants to ensure that relevant and important information is available for them to consider prior to going through with the procedure—something that Planned Parenthood is otherwise unwilling to do in Iowa.

Even if intermediate scrutiny is applied, the law is substantially related to an important government interest. It is well settled that the State has an important interest in the protection of fetal life throughout a pregnancy. *Casey*, 505 U.S. at 876. The district court found that the informed consent provision will result in some women carrying pregnancies to term that they otherwise would have aborted. Order Denying Petition 09/29/17 Pp.13-15; App. 307-09. It found that the number could be eight percent or even higher. Eight percent

represents close to 320 women per year. That is 320 children whose mothers would choose to carry them to term rather than end the pregnancy. Planned Parenthood recognizes that some women require more time to decide when they present at the clinic. It assures the Court that it will provide them with that time. Maybe it will. But Planned Parenthood is not the only abortion provider in Iowa, and it is possible that some less scrupulous provider would rather encourage the women to go through with the procedure that day so as not to lose the fee. The State is allowed to see that that does not happen.

CONCLUSION

For the foregoing reasons, the denial of the petition for declaratory and injunctive relief should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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