SUPREME COURT NO. 17-1579
POLK CO. NO. EQCE081503

IN THE SUPREME COURT OF IOWA

PLANNED PARENTHOOD OF THE HEARTLAND AND JILL MEADOWS, M.D.,

Petitioners-Appellants,

v.

KIMBERLY K. REYNOLDS EX REL. STATE OF IOWA AND IOWA BOARD OF MEDICINE,

Respondents-Appellees.

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

PETITIONERS'-APPELLANTS' REPLY BRIEF

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INTRODUCTION

As set forth in Petitioners'-Appellants' ("Petitioners'") Proof Brief, Section 1 of Senate File 471, to be codified at Iowa Code § 146A (the "Act"), unnecessarily singles women out and demeans their obvious ability, when faced with an unwanted pregnancy, to make a considered decision about whether or not to bear a child. Based on undisputed evidence, the Act would impose severe burdens on women who choose to have an abortion: delaying them; exposing them to medical risk, loss of strongly-preferred medical options, extreme stress, loss of confidentiality, burdensome costs, and other dangers and harms; and in some cases preventing them from obtaining an abortion.

These harms are widely recognized by medical and other experts. Numerous Iowa and national amici have filed briefs supporting the Act's invalidation, including the largest national organization of obstetricians and gynecologists; bioethicists; national and Iowa organizations that work on the issue of domestic violence; the Interfaith Alliance of Iowa; Iowa professors with expertise in constitutional law; and the national abortion federation that

credentials the only non-Planned Parenthood abortion clinic in Iowa, the Emma Goldman clinic.[1]

In response, Respondents-Appellees ("Respondents") do not dispute each of the serious burdens the Act would impose. Rather, they isolate and downplay those burdens and urge this Court to adopt a legal test that is inconsistent with binding Iowa and federal precedent. But under both Iowa and federal constitutional standards, the Act's burdens cannot be justified by the state's professed interest in showing its "respect for potential life."

ARGUMENT

I. Respondents Misstate the Record

A. There is no "unique need" for state-mandated delay in Iowa

As Petitioners' evidence showed and the district court recognized, most patients, by the time they reach the clinic, have researched and carefully considered their options and are sure in their decision. App. vol. I 311, 332. Moreover, to ensure that *every* patient finalizes her decision with

[1] Respondents first opposed the filing of these amicus briefs. Having failed at that, Respondents now argue that this court should disregard the briefs because they cite sources outside the trial record. Opp'n at 18. But this Court has not hesitated to consider such sources when they bear on general constitutional facts. See, e.g., Varnum v. Brien, 763 N.W.2d 862, 904–05 (Iowa 2009) (considering amicus brief by faith groups supporting same sex marriage as "demonstrat[ing]" the heterogeneity of religious views on the subject).

full information about her options, the standard of care among abortion providers is to always discuss these options and the risks and benefits of each. Proof Br. of Appellant ("Pet'rs' Br.") 25. The standard of care also is not to rush any patient to the procedure, but to screen carefully for uncertainty and encourage uncertain patients to take more time with their decision. Id. at 26. For this reason, the Act's requirements of an extra trip and mandatory delay are a solution in search of a problem.

Respondents conjure a "unique need" for the Act out of the fact that "Planned Parenthood will not provide an ultrasound to confirm and date a pregnancy unless a woman schedules an abortion." Appellees' Br. ("Opp'n") 54, 58–59. What is worse, Respondents insinuate, with no evidence whatsoever and in the face of overwhelming evidence to the contrary, that absent the Act Planned Parenthood of the Heartland ("PPH") is "otherwise unwilling" to "ensure that relevant and important information is available for [patients] to consider prior to going through with the procedure." Id. at 59. These statements are profoundly misleading on several levels.

To begin with, Respondents misrepresent the primary clinical purpose of an ultrasound, which is not to assist women in their decision-making (most women do not consider an ultrasound relevant to their decision) but to

screen for contraindications and ensure women have a safe, appropriate procedure. App. I vol. I 369, Tr. of Trial Proceedings (July 17, 2017) ("Tr. I") at 24:18–22. Indeed, the Act itself does not serve Respondents' "need" because it does not require women to view or hear their ultrasound. If a patient is not considering an abortion, there is no clinical purpose for an ultrasound at that time; prenatal ultrasounds are not indicated until well into the second trimester. App. vol. I 430, Tr. I at 85:11–18 (Meadows). Confirmation of a pregnancy can be performed through a routine pregnancy test. App. vol. I 455, Tr. I at 110:15–16 (Reynolds).

Respondents' assertion of a "unique need" for mandatory delay in Iowa also misrepresents the nature of the appointment patients schedule at PPH. The record clearly reflects that although patients schedule an abortion procedure at PPH because they are considering abortion, that does not mean that women will always have the abortion that day, or in some cases, at all. To the contrary, PPH provides a lengthy, non-directive education and consent process that *encourages* women to consider alternatives to abortion,

and that some women do choose to take more time or to continue their pregnancy. See generally Pet'rs' Br. at 25–31.[2]

Finally, Respondents' suggestion that there is some "unique need" in Iowa for an ultrasound and state-mandated waiting period among patients who are uncertain about whether or not to have an abortion is particularly disingenuous given the vast network of anti-abortion organizations in Iowa set up precisely *to* provide pregnant women with an ultrasound and persuade them *not* to have an abortion. Pregnancy Resource Centers, Iowa Right To Life http://www.iowartl.org/help-im-pregnant/pregnancy-centers/ (listing **sixty-four** crisis pregnancy centers, as compared to the five clinics where a woman can obtain an abortion); App. vol. I 389–391, Tr. I at 44:25–46:17 (Meadows); App. vol. I 755–757, Tr. of Trial Proceedings (July 18, 2017) ("Tr. II") at 203:17–205:15 (Lipinski) (discussing fact that crisis pregnancy centers provide ultrasounds and attempt to persuade women not to have an abortion). If an Iowa woman with an unwanted pregnancy wants to have an

[2] In addition to misrepresenting PPH's practices, Respondents strain to construe Dr. Grossman's testimony as criticizing those practices. Opp'n at 59. Dr. Grossman did nothing of the kind; he simply testified that, where he practices, patients who are considering an abortion can schedule an appointment for an ultrasound without scheduling an abortion procedure for the same day. App. vol. I. 636–637, Tr. II at 84:20–85:8 (Grossman).

ultrasound without scheduling an abortion, she is *surrounded* by facilities offering that service.[3]

Along similar lines, while Respondents admit that PPH provides most of the abortions in Iowa, they posit that "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." Opp'n at 60. This bald speculation cannot stand as a rationale for a restriction that imposes real, severe burdens on thousands of women each year, in the absence of a single shred of evidence in the record of any abortion provider in the state (or elsewhere) who is failing to obtain proper informed consent. It lends still less support to the Act because the Act itself, by imposing barriers to medically supervised care, makes it *more* likely that women, out of desperation, will attempt to self-induce on their own or with the help of others not held to standards of medical ethics. See Pet'rs' Br. at 42 (discussing evidence that barriers to care can drive women to potentially dangerous efforts at self-induction); Whole Woman's Health v. Hellerstedt ("WWH"), 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J, concurring) ("When a

[3] While Petitioners do not endorse these facilities as providing accurate information, their very existence gives the lie to Respondents' argument that women cannot obtain an ultrasound in Iowa unless they schedule an abortion appointment.

State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.")[4]

B. Respondents misrepresent the Act's inevitable burdens

In addition to inventing a need for the Act that does not exist, Respondents seriously downplay the Act's harms. First, Respondents question whether Iowa women already must travel unusual distances to access care. They do. Access to abortion is already quite limited in Iowa, with a far higher percentage of Iowa women (the majority of them low-

[4] Grasping for evidence that the Act serves any valid purpose, Respondents seize on a single anecdote of a Utah woman who cancelled her procedure two days after her state-mandated information appointment. Opp'n at 53. Even assuming any such anecdote could be sufficient to justify the Act, this one is not. While Respondents strain to interpret this woman's words as indicating it was the *wait* that changed her mind, there is no evidence that this was the case. Rather she stated "once I made the *appointment*, it kind of hit home," id. (emphasis added), suggesting that she realized before she even arrived at the clinic that she did not want to go forward with the procedure. See App. vol. I 644–645, Tr. II at 92:17–93:4 (Grossman); see also App. vol. I 643, Tr. II at 91:13–17 (Grossman) (the same woman stated that abortion "was a hard decision for me to make" and something "I have always been against"). Indeed, Petitioners' witnesses testified that some women like this do come into the clinic to learn more about their options even though they are inclined against abortion or highly ambivalent, and the clinic *already* provides non-directive information so that they can take whatever time they need and reach a decision that is right for them, including not to have an abortion. App. vol. I 635–636, Tr. II at 83:17–84:6 (Grossman); see also App. vol. I 368–370, Tr. I at 23:5–25:8 (Meadows); App. vol. I 464, Tr. I at 119:8–18 (Reynolds).

income) traveling over fifty miles to a clinic than the national average. Pet'rs' Br. at 23 (citing to statistics measuring where women of reproductive age live in Iowa and how far they are from a clinic). Thus, the Act heaps additional burdens on an already-disadvantaged population.[5]

Respondents next try to minimize the specific groups that would be especially harmed by the Act. They assert that Petitioners' expert witness Dr. Walker "could not say how many victims of domestic violence or sexual assault sought abortions in Iowa." Opp'n at 50. Not so. Dr. Walker did testify that, according to one study, 10.8% of Iowa abortion patients reported having suffered intimate partner violence within the past year (not to mention that such violence is underreported because of stigma, and also that some additional percentage are minors at risk of parental abuse). See App. vol. II 27 n.6, 38. This amounts to hundreds of Iowa women seeking abortions each year. Moreover, Dr. Walker testified that sex trafficking is a

[5] Rather than address these distance calculations, Respondents critique *another* set of calculations Dr. Grossman made at trial based on historical patient vital statistics. Opp'n at 45–48. With no record (or other) support, Respondents assert their own competing (and incorrect) statistic. Id. at 48. Petitioners responded at length in the trial court to Respondents' claims, see App. vol. I 863–865, but more importantly, Respondents' arguments are irrelevant to the reliable statistics Petitioners presented in their opening brief—which Respondents do not even attempt to grapple with. See Pet'rs' Br. at 33.

serious concern in Iowa. App. vol. II 28–29. In other words, contrary to Respondents' suggestion, the record is clear that a significant percentage of abortion patients suffer or are at risk of intimate partner violence and would be especially harmed (and in some cases prevented) by the Act's requirements.[6]

Respondents also downplay those women who would be prevented by the Act from accessing a non-surgical medication abortion. They claim that "petitioners did not make any attempt to demonstrate how many women will be pushed past the cutoff [for medication abortion]." Opp'n at 42. In fact, Petitioners presented evidence that hundreds of women every year (over 600 last year) present for care within two weeks of the cut-off for medication abortion, and that well over 100 presented within a week of the cut-off in the past three months alone. App. vol. II 122–123; see also App. vol. I 375, Tr. I at 30:12–15 (Meadows). Petitioners also presented evidence that the Act is likely to delay women an average of eight days, with a significant percentage of women delayed two or more weeks. Pet'rs' Br. at 35–36.

[6] Dr. Grossman estimated based on this personal experience (rather than Iowa-based or other studies) that the number of women in danger of intimate partner violence to be slightly lower (under 10%). Whether the rate is 10.8% or slightly lower, it still represents hundreds of women every year, women Respondents essentially ask this Court to overlook.

Thus, while it is impossible to predict precisely how many women would be denied medication abortion due to the Act, the evidence suggests that it too would be at least hundreds of Iowa women each year. Respondents also claim that Petitioners "did not make any attempt to quantify the 'health risk' that these women would face." Opp'n at 42. Actually, Petitioners explained not only that the risks associated with abortion increase measurably *by the week*, but also that second trimester abortions, which the Act would cause many women to have, *are 8-10 times riskier* than first trimester abortions. Pet'rs' Br. at 40.

Respondents similarly misstate the number of women who present for care close to the twenty-week cut-off for abortion who would be unable to obtain an abortion Iowa due to the Act. While they suggest that the number is fifty per year, Opp'n at 42–43, Dr. Meadows actually gave that number for one of several providers at the University of Iowa. In other words, fifty is just a fraction of how many such abortions occur in Iowa each year. See App. vol. I 379, Tr. I at 34:8–15 (Meadows); see also App. vol. I 376, Tr. I at 31:21–25 (Meadows) (noting that PPH also sees about fifty patients per year who are close to twenty weeks).

Respondents next claim that Petitioners failed to present any evidence that the Act would prevent some women from obtaining a safe and legal abortion. While, as discussed in Section II.B below, whether women are prevented entirely from having an abortion is not the legal standard under which the Act is adjudged, Petitioners' five expert witnesses—qualified as experts in obstetrics and gynecology, the informed consent process, the social impact of abortion restrictions, poverty, and domestic violence—unanimously opined that the Act *is* likely to prevent some women from accessing abortion altogether. App. vol. I 474, Tr. I at 129:15–21 (Reynolds); App. vol. I 507, Tr. 1 at 162:2–15 (Grossman); App. vol. I 702, Tr. II at 150:3–12 (Collins); App. vol. I 759, Tr. II at 207:3–8 (Lipinski); App. vol. II 40; see generally Pet'rs' Br. at 38–40.

Having failed to refute that testimony, Respondents now seize on a single line from one small-scale study that concluded that, in *that* study, there was no evidence that Utah's law was preventing a significant number of the women who managed to come for their first appointment from returning for the second appointment. Opp'n at 52. But, as Dr. Grossman explained (in unrebutted testimony), the study was not set up to measure prevention because of its scale and because it only enrolled patients who

presented at a clinic *despite* the extra trip requirement. App. vol. I 513–514, Tr. I at 168:3–169:17 (Grossman). Dr. Grossman further testified that other studies from Utah, Mississippi, and Texas, which do set out to measure prevention by looking at abortion rates more generally, indicate that extra trip requirements prevent some women from accessing care, App. vol. I 514–517, Tr. I at 169:17–172:20 (Grossman), and that based on his expertise, he anticipated that the Act was likely to prevent some women from accessing an abortion. App. vol. I 522, Tr. I at 177:18–19 (Grossman). Thus, notwithstanding Respondents' bare assertions, the Act is likely to force some women to carry an unwanted pregnancy to term, search for an abortion out of state, or resort to self-induction. Indeed, Respondents themselves acknowledge that some women who present for care close to the twenty-week cut off would be prevented. Opp'n at 43 (arguing that "it is unlikely that" *all* of these women would be prevented).

Respondents are similarly cavalier about the harm posed by the Act to all women, and particularly those seeking an abortion, by "insult[ing]" their "intelligence and decision-making capabilities." Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 23 (Tenn. 2000), superseded by constitutional amendment by art. I, sec. 36 of the Tennessee Constitution

(2014); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833,918–19 (1992) (Stevens, J., concurring in part and dissenting in part) (delay requirement reflects "the notion that a woman is less capable of deciding matters of gravity"); see generally Pet'rs' Br. at 43, 77–79. Dismissing this concern as "ridiculous," Respondents suggest mandatory delays are nothing special. They cite three other mandatory delays—out of the whole of Iowa's statutory law—for marriage, waivers of parental rights, and divorce. Opp'n at 58. But there is no evidence that these waiting periods impede access to rights or cause any of the health risks or other harms present here.

Respondents' assertions notwithstanding, the Act singles out and would severely harm women seeking an abortion.

II. Respondents' Legal Arguments Fail

In imposing the harms discussed above, the Act violates Petitioners' patients' due process and equal protection rights under the heightened scrutiny standard supported by Iowa constitutional law or, alternatively, under the "undue burden" standard set forth in federal law. For these reasons, both state and federal courts have invalidated waiting period laws. See Gainesville Woman Care, LLC v. State, 210 So.3d 1243 (Fla. 2017) (invalidating 24-hour mandatory delay law under Florida Constitution's

privacy right); Planned Parenthood of Missoula v. State, 1999 Mont. Dist. LEXIS 1117, *9 (striking down 24-hour abortion delay law under Montana's privacy right because "telling a woman that she cannot exercise a fundamental constitutional right for a 24-hour period" clearly "infringe[s] on a woman's right to privacy"); 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) (enjoining 18-hour mandatory delay law under federal standard); Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048 (D. S.D. 2011), claim dismissed on other grounds (preliminarily enjoining 72-hour delay law under federal standard).

Rather than engaging with this precedent, Respondents cite case law upholding mandatory delay laws that are less burdensome than the Act and claim that mandatory delay laws like the Act are "common." Opp'n at 38–40. None of these cases involve, let alone uphold, a law that requires two trips to the health center and a three-day wait. Indeed, while Respondents claim that there are six other state laws that require a 72-hour delay, Opp'n at 39, only two of these (Missouri's and South Dakota's) require two trips to

the health center and are in effect.[7] One other (Louisiana's) is enjoined. And in South Dakota, a challenge to the 72-hour delay was dismissed, but prior to that, the court found that it likely imposed an undue burden. Daugaard, 799 F. Supp. 2d at 1065–66 (by forcing predominantly low-income women to make and extra trip to the clinic and by making medication abortion substantially harder to access, law likely imposed multiple undue burdens).

Thus, what is "unique" about this case is that the Iowa has chosen to impose more severe burdens on women who choose abortion than almost all other states in violation of both the Iowa Constitution and federal law.

A. Respondents state an incorrect legal standard for facial relief

As an initial matter, Respondents incorrectly suggest that, to prevail, Petitioners "'must show no conceivable set of circumstances exist under which the statute would be valid.'" Opp'n at 19–21.

As set forth in Petitioners' opening brief, the Act violates due process and equal protection rights guaranteed by the Iowa Constitution because it fails heightened scrutiny, which requires that restrictions on rights be narrowly (or at least substantially) tailored to compelling (or at least

[7] The Missouri case Respondents' cite upheld a 24-hour requirement, not a 72-hour requirement. Missouri's 72-hour requirement has never been challenged.

important) state interests. Pet'rs' Br. at 56–63. The proper remedy for such a violation is facial invalidation, not case-by-case litigation. See generally Varnum, 763 N.W.2d. at 880 (under heightened scrutiny, the challenged act is presumed unconstitutional and facial invalidation appropriate if challenged law is overinclusive, even if some of its individual applications might be permissible); Gartner v. Iowa Dep't of Pub. Health, 830 N.W.2d 335, 353 (Iowa 2013) (extending presumption of parentage to all same-sex couples, even though for some couples that presumption might be rebutted).

In the alternative, should this Court adopt the federal "undue burden" standard as adequate under the Iowa Constitution, the Act violates that standard because it imposes on women harms (far) in excess of any potential benefits. Pet'rs' Br. at 63–74. The proper remedy for such a violation is facial invalidation. Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med. ("PPH I"), 865 N.W.2d 252, 267 (Iowa 2015) (providing facial relief even when many women in the state (those in areas where abortion providers could continue to provide under the restriction) were not affected by challenged restriction); see also Casey, 505 U.S. at 942, 895 (holding that in the abortion context "no set of circumstances" is not the relevant test for facial relief); WWH, 136 S. Ct. at 2320.

The cases Respondents cite are not to the contrary. War Eagle Village Apartments v. Plummer, 775 N.W.2d 714 (Iowa 2009) actually undermines Respondents' argument. While the Court found that "[t]here is no set of facts under which the. . . statutory notice scheme could be found to provide adequate notice," it invalidated the statute not on the ground that plaintiffs had demonstrated in advance that it would always be inadequate in the case of each tenant (after all, in many cases tenants would timely receive notice) but rather on the ground that the text of the statute, on its face, was "unlikely" to ensure recipients would be provided with adequate notice. Id. at 722. The case, which is a procedural rather than substantive due process case, also appropriately puts the burden squarely on the respondent, not the challenger, once a challenger shows a protected liberty or property interest is at stake. Id. at 720.

As for Respondents' reliance on dicta in F.K. v. Iowa Dist. Ct. for Polk Cty., 630 N.W.2d 801 (Iowa 2001), that case was also a procedural due process claim (weighing the adequacy of procedures used to deprive a mother of her fundamental liberty interest to raise her child), not a substantive due process claim. Id. at 808. That case therefore does not support Respondents' contention that Petitioners bear the burden of showing

that in every single case, women in Iowa would be entirely prevented from obtaining an abortion. Likewise, in State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002), this Court merely held that, in a facial challenge, the statute should be narrowly construed if possible to avoid unconstitutionality, id. at 239, an approach Respondents have never advocated here.

Here, Petitioners are entitled to have the Act enjoined on its face, both because it fails the heightened scrutiny required by the Iowa Constitution and because it unduly burdens a significant number of women seeking abortion in Iowa.

B. Respondents misstate both federal and state due process law

1. This Court should apply heightened scrutiny, which the Act fails

The decision to terminate an unwanted pregnancy is among the most intimate and privacy personal decisions protected by the due process clause, as well as other aspects of the Iowa Constitution, making it subject to strict or at least heightened scrutiny. Pet'rs' Br. at 49–56. Respondents do not even suggest, let alone argue, that the Act passes strict scrutiny.[8] Instead,

[8] In response to Petitioners' equal protection claim, Respondents briefly attempt to demonstrate that the Act passes intermediate scrutiny. Opp'n at 59.

they urge this Court to reject enhanced constitutional protection for this most personal of decisions.

First, Respondents question whether privacy is protected under the Iowa Constitution's due process clause as a fundamental right. It is. See State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (striking down sodomy law, and holding that "[b]efore the state can encroach into recognized areas of fundamental rights, such as the personal right of privacy, there must exist a subordinating interest which is compelling and necessary, not merely related, to the accomplishment of a permissible state policy"); State v. Heemstra, 721 N.W.2d 549, 561 (Iowa 2006) (quoting with approval federal case law characterizing "individual's right of privacy. . . [as] a fundamental tenet of the American legal tradition" (internal quotation marks omitted)); Howard v. Des Moines Reg. and Trib. Co., 283 N.W.2d 289, 301 (Iowa 1979) (citing Roe v. Wade, 410 U.S. 113, 152 (1973) and stating that "[t]he right of privacy is a fundamental social value which is also constitutionally protected"); State v. Cashen, 789 N.W.2d 400, 412 (Iowa 2010) (Cady, J, dissenting), superseded by statute (right to privacy "one of the most fundamental tenets of all law. . .with roots found in our constitution"); cf. State v. Sanchez, 692 N.W.2d 812, 820 (Iowa 2005) (citing with approval

federal case law that fundamental liberty interests include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion" (internal quotation marks omitted)).

Next, Respondents argue that even if privacy is a fundamental right under this Court's precedent, abortion should not be recognized as part of that right because it ends a potential life. To support this argument, they lift out of context Justice Blackmun's statement in Roe, 410 U.S. at 159 that abortion is "inherently different" from procreation because of the existence of the embryo or fetus. Opp'n at 23.[9] But Justice Blackmun's phrase must be read together with Roe's recognition that abortion is a fundamental right and warrants strict scrutiny protection, 410 U.S. at 153–155, and also its holding that the state may not infringe on a woman's privacy rights in the interest of her fetus until *viability*. Id. at 163. Thus, Roe plainly supports, rather than undermines, Petitioners' position because it concludes that, while terminating an unwanted pregnancy is different from procreating, it is an equally important and fundamental privacy right. Cf. Plowman v. Fort

[9] They also cite to language in Justice Rehnquist's partial *dissent* in Casey that the Court's plurality declined to adopt, arguing for a rational basis standard that the U.S. Supreme Court has never adopted.

Madison Comm. Hosp. 896 N.W.2d 393, 410 (Iowa 2017) (in the context of recognizing wrongful birth claim for failure to diagnose a fetal anomaly, stating that "[i]t is not this court's role to second-guess that intensely personal and difficult decision").[10]

Similarly, Respondents argue that abortion cannot be a fundamental right because, until forty years ago, it was illegal in Iowa. Opp'n at 25. But, as this Court has recognized, courts have a responsibility to protect individual rights "even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time." Varnum, 763 N.W.2d at 876; id. at 877 ("[E]qual protection can only be defined by the standards of each generation."); see also Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999) (citing Redmond v. Carter, 247 N.W.2d 268, 273 (Iowa 1976)) ("Due process protections, however, should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution

[10] Respondents also argue that abortion is different from procreation because one involves an affirmative act and the other does not. Opp'n at 22–23. This argument is puzzling, given that procreation certainly requires an affirmative act. Moreover, the continuation of an unwanted pregnancy cannot seriously be characterized as akin to other forms of inaction given its enormous consequences for the pregnant woman. See Pet'rs' Br. at 42 (describing medical and social consequences of involuntary childbearing).

is not merely tied to tradition, but recognizes the changing nature of society."); cf. Casey, 505 U.S. at 852 (pregnancy and childbirth entails "suffering [that] is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

As set forth in Petitioners' opening brief, reproductive autonomy is critical not only to women's health but also to their ability to participate in society as equals, in a way that past generations did not allow. See Pet'rs' Br. at 51–52 (quoting Justice Ginsburg's statement that "in the balance is a woman's autonomous charge of her full life's course— . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen"). And as this Court has stated in the equal protection context, it is the courts' role to recognize, "free from the influences that tend to make society's understanding of equal protection resistant to change," when "a particular grouping results in inequality" and therefore merits closer scrutiny. Varnum, 763 N.W.2d at 877. Such is the case here.

Finally, Respondents argue that this Court should apply the undue standard rather than strict or heightened scrutiny because 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." Opp'n at 28. But allowing already-disadvantaged women to be harmed in the service of merely "expressing" supposed majoritarian values would be fundamentally at odds with this Court's recognition of "the 'absolute equality of all' persons before the law as 'the very foundation principle of our government.'" Varnum, 763 N.W.2d at 877 (quoting Coger v. Northwestern Union Packet Co, 37 Iowa 145 (Iowa 1873).

For these reasons, Respondents have failed to counter Petitioners' arguments for strict or, in the alternative, intermediate scrutiny.

2. The Act also fails the undue burden standard

After urging this Court to adopt the federal undue burden standard, Respondents then misstate that standard. Specifically, Respondents ask this Court to adopt a standard under which the Act must only pass rational basis review and not prevent a large quantifiable number of women from accessing abortions, regardless of how unjustifiable and significant the hurdles it puts in their way. But Respondents' proposed undue burden standard is wholly inconsistent with the Supreme Court's decisions in both WWH and Casey.

The undue burden standard "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." WWH, 136 S. Ct. at 2309. Indeed, Respondents initially conceded as much, telling the trial court it should "weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation." Compare App. vol. I 240, with Opp'n at 27–28. Respondents were right in their first brief, and are wrong now.

As explained in Petitioners' opening brief, the United States Supreme Court recently made crystal clear in WWH that the undue burden standard is a balancing test that applies regardless of the state's interest. See WWH, 136 S. Ct. at 2309 (holding that Fifth Circuit hard erred in "equat[ing] the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue"). Numerous lower federal courts have understood this, applying balancing to laws advanced as furthering potential life. Pet'rs' Br. at 64–67.

Stuck with this clear precedent, Respondents claim that not only the lower courts who followed this precedent but also the WWH Court itself misunderstood its own decision in Casey. Opp'n at 29–31. Indeed,

Respondents go so far as to criticize WWH as "bizarre" and "plainly wrong." Id. at 29. But, in fact, the Court fully understood its own Casey opinion which balanced the strength of the state's interest in fetal life against the burdens that Pennsylvania's parental and spousal involvement laws, finding one failed that balance and the other did not. See Casey, 505 U.S.at 877, 887–901; WWH 136 S. Ct. at 2309; Planned Parenthood of Ariz. v. Humble, 753 F.3d 905, 913 (9th Cir. 2014). Thus, should this Court adopt the federal undue burden standard as adequate under the Iowa Constitution, that standard unquestionably requires an evidence-based balancing of the Act's benefits and burdens.

Besides claiming that the Supreme Court's own articulation of the undue burden standard is "plainly wrong," Respondents seize on a recent decision of the Eighth Circuit Court of Appeals, Planned Parenthood of Ark. and E. Okla. v. Jegley, 864 F.3d 953 (8th Cir. 2017). As an initial matter, Respondents' reliance on Jegley is contrary to their own arguments because in that case, the court was considering a restriction that was justified on the ground of women's *health*, not potential life. Opp'n at 34–35 (citing Jegley, 864 F.3d at 958). Moreover, courts faithfully applying federal precedent—including the Supreme Court itself—have never required the sort of

numerical analysis or quantification that Respondents urge and Jegley requires.[11]

In both Casey and WWH, the Supreme Court declared that the restrictions at issue imposed an undue burden based on district court findings that a "significant" and even a "significant, but ultimately unknowable" number of women would be unduly burdened. Casey, 505 U.S. at 893; Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 686 (W.D. Tex. 2014) (enjoining restrictions that would "reduce or eliminate meaningful access to safe abortion care for a significant, but ultimately unknowable, number of women" (ultimately upheld in WWH)). This Court, too, did not require this sort of quantification, invalidating Iowa's ban on telemedicine abortion because it would unduly burden "many women" seeking abortion. PPH I, 865 N.W.2d at 268; see also Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 912 (7th Cir. 2015); Humble, 753 F.3d at 915–17; Planned Parenthood of Ind. & Ky., 2017 WL 1197308 at *20–21. Thus, the facts that Petitioners proved about the number of women who will be unduly

[11] The Arkansas restriction challenged in that case remains preliminarily enjoined, pending the plaintiffs' petition for a writ certiorari. Order, Jegley, No. 16-2234 (8th Cir. Oct. 13, 2017.

burdened by the Act are more than sufficient for facial invalidation. See Section I.B, above; see also Pet'rs' Br. at 31–48.

Finally, and importantly, the undue burden standard is not limited to whether restriction *prevents* women from accessing abortion entirely. Rather, that standard requires the consideration of *all* of the burdens imposed on women, regardless of whether they can ultimately access abortion. And that consideration includes the ways in which a challenged restriction interacts with and compounds the other obstacles women face. See, e.g., WWH, 136 S. Ct. at 2302 (relying on district court's findings that the challenged requirements "erect a particularly high barrier for poor, rural, or disadvantaged women" (internal quotation omitted)); also Casey, 505 U.S. at 886 (considering burdens on women who have the fewest financial resources); see also Schimel, 806 F.3d at 918; Humble, 753 F.3d at 915.

Because the Act would impose significant and unjustifiable burdens on Iowa women seeking an abortion, the Act fails the undue burden standard. See Pet'rs' Br. at 67–69; App. vol. I. 787–789.[12]

[12] Petitioners never "agreed at trial that"—as a legal matter, under the undue burden standard— "any burden imposed must be considered separately from burdens imposed by clinic closures due to financial or business decisions." Opp'n at 48. Nor were recent clinical closures the result of routine "business decisions." Petitioners provided unrebutted testimony that they occurred

C. Respondents' equal protection arguments fail

As Petitioners argued in their opening brief, the Act also discriminates on the basis of sex by singling out a procedure only women need and by demeaning women's decision-making capacity. Pet'rs' Br. at 76–77.

In their response, Respondents argue that women seeking an abortion are not similarly situated to other patients because of the state's interest in potential life. But because it is undisputed that women have a constitutionally protected right to terminate an unwanted pregnancy, the state's asserted interest in opposing that right is better considered in the analysis of whether the law is sufficiently tailored to a constitutionally sufficient goal than as part of a *threshold* test of whether the equal protection clause applies *at all*. See New Mexico Right to Choose/NARAL v. Johnson, 975 P.2d 841, 855 (N.M. 1998) ("[C]lassifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry."); Doe v. Maher, 515 A.2d 134, 444–45 (Conn. 1986) (same); cf. Women's Health Ctr. of W. Va., Inc. v. Panepinto, 191 W.Va. 436 (W. Va. 1993) (in due process context, holding that protected

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because of other state legislation targeting abortion providers and excluding them from participating in non-abortion public health programs. App. vol. I 361–362, Tr. I at 16:14–17:6 (Meadows).

status of abortion requires state neutrality in funding medical care for low-income residents, including for medically indicated abortions); Committee To Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (same).

Indeed, as the Connecticut Supreme Court recognized in Doe v. Maher, any other approach would ignore "'the biological reality that sometimes requires [women], but never requires their male counterparts, to resort to abortion procedures if they are to avoid pregnancy and childbearing.'" 515 A.2d at 159–60 (internal quotation marks omitted)); New Mexico Right to Choose/NARAL, 975 P.2d at 854 ("[T]o determine whether a classification based on a physical characteristic unique to one sex results in the denial of equality of rights under law. . . we must ascertain whether the classification operates to the disadvantage of persons so classified." (internal quotation marks omitted)); Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 33 (1992) ("The question at hand is whether government has the power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage."); Laurence H. Tribe, American Constitutional Law § 16–29, at 1584 (2d ed.

1988) ("[T]he fundamental problem is [the] willingness to transmute woman's 'real' biological difference to woman's disadvantage.").

Respondents also argue that the Act cannot violate patients' equal protection rights because it regulates physicians' behavior, not patients'. They offer no support for this novel proposition, nor any explanation of how it can be squared with this Court's holding in PPH I that a restriction on the *provision* of abortion (enforced against the *provider*) violated the due process rights of women seeking an abortion, or with the vast body of federal and state decisions applying that same analysis. See generally Pet'rs' Br. at 49–81. As these courts all have recognized, governmental measures penalizing doctors for providing abortion services are nothing other than a backdoor method of deterring women from exercising *their* right to a safe legal abortion.

Finally, Respondents rely on the district court's suggestion that the Act might persuade some women to carry to term to assert that it would satisfy intermediate scrutiny. Opp'n at 59–60. But as Petitioners have explained, there was simply no evidence presented at trial or otherwise that supported the district court's conclusion. See Pet'rs' Br. at 27 n.3, 29 n.5. Moreover, and importantly, even if it was true that a mandatory delay would

satisfy the state's interest in persuading women to choose not to have an abortion, Respondents wholly fail to address the substantial tailoring requirement and explain why less stringent mandatory delay laws—which only require one visit and/or one-third of the delay of the Act—are insufficient.

Respondents' arguments notwithstanding, the Act singles women out and restricts their reproductive autonomy in ways that perpetuate sex-based stereotypes and seriously impede women's ability to participate in society as equals. In so doing, it violates the Iowa Constitution's guarantee of equal protection.

CONCLUSION

At bottom, Respondents' advance a version of both federal and Iowa constitutional law in which it is irrelevant that the Act would impose significant physical, logistical, financial, and emotional burdens on thousands of women each year, including measurable health and safety risks. It is also irrelevant that the Act would prevent some women from accessing an abortion altogether, and that it could place dozens of women each year into medically hazardous situations, Opp'n at 43–44, because these women do not comprise the *majority* of women seeking an abortion. Id. All of these

concrete, demonstrated harms are simply, in Respondents' view, unfortunate but unavoidable "incidental" effects of the state's justified expression of "respect" for potential life.

But under both Iowa and federal constitutional law, the thousands of women who seek an abortion every year in Iowa have rights that also must be respected. These women already make careful decisions. They already contend with massive obstacles in carrying out their decision, obstacles the Act would make far worse. Not only does the Act (and Respondents' proposed standard for assessing the Act) profoundly disrespect these women, who express an unambiguous and overwhelming preference for prompt care, but it is fundamentally at odds with the principles of autonomy and equality embodied in the Iowa Constitution and unduly burdens women seeking an abortion. It should not stand.

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