In the Supreme Court of Iowa
Supreme Court No. 17-1579

Planned Parenthood of the Heartland, Inc., and Jill Meadows, M.D.,
Petitioners-Appellants,

vs.

Kimberly K. Reynolds *ex rel*. State of Iowa and Iowa Board of Medicine,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County
The Honorable Jeffrey Farrell, Judge
Polk County No. EQCE081503

BRIEF OF *AMICUS CURIAE* THE IOWA CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENTS-APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the Iowa Catholic Conference, is the official public policy voice of the bishops of Iowa. At the state legislature, we advocate for policies that respect the life and dignity of the human person, and apply the principles of Catholic social teaching to the critical issues of the day. As appropriate, we help to defend those policies when they are challenged.

The Conference believes that, as a gift from God, every human life is sacred from conception to natural death. The life and dignity of every person must be respected and protected at every stage and in every condition. The right to life is the first and most fundamental principle of human rights that leads Catholics actively to work for a world of greater respect for human life and greater commitment to justice and peace.

Senate File 471, which requires that, except in emergencies, a woman wait seventy-two hours before undergoing an abortion, is reasonably related to the legitimate purposes of ensuring that her ultimate decision is voluntary, informed and reflective. Accordingly, it should be upheld.[*]

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[*] No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money to fund the preparation or submission of this brief. No one and no entity other than the *amicus curiae* contributed money to fund the preparation or submission of this brief. All of the parties have given their written consent to the filing of this brief.

I.

THIS COURT IS NOT REQUIRED TO RECOGNIZE A RIGHT TO ABORTION UNDER THE DUE PROCESS GUARANTEE OF THE IOWA CONSTITUTION, ART. I, § 9, MERELY BECAUSE THE UNITED STATES SUPREME COURT HAS DERIVED A RIGHT TO ABORTION FROM THE LIBERTY LANGUAGE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners submit that the due process guarantee of the Iowa Constitution, art. I, § 9, confers a right to abortion that is separate from, independent of and broader than the right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Petitioners' Br. 49-56. Article I, § 9, provides, in part, that "No person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9 (West 2013).

Amicus submits that this Court is *not* required to recognize a right to abortion under the due process guarantee of art. I, § 9, merely because the Supreme Court has derived a right to abortion from comparable language in the Due Process Clause of the Fourteenth Amendment (U.S. Const. amend. XIV, § 1). That a given right is protected by the federal constitution does not require a state court*, as a matter of state law*, to interpret the state constitution to extend protection to the same right under a similar provision, so long as the state constitution is not *applied* in a manner that would deny a

federal constitutional right (petitioners have presented no federal constitutional claims in their challenge to Senate File 471).[1]

There are two principled approaches in considering the relationship between similar state and federal constitutional guarantees. A state court may conclude, after a careful analysis of the relevant constitutional text, the history of its adoption and its judicial interpretation, that a given state constitutional guarantee should be construed consistently with the corresponding federal guarantee. Under this approach, often referred to as "lockstep" analysis, a state constitutional right would not be recognized unless there is a corresponding federal constitutional right; and, if there is such a right, the state right would be coextensive with the federal right, neither broader nor narrower. Alternatively, a state court may conclude, in light of its text, history and interpretation, that the state guarantee should be construed independently of the federal guarantee. Under this approach, known as independent state constitutionalism, whether a state right would be recognized (and its scope) would not depend upon whether there is a

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[1] Contrary to petitioners' representation, this Court has *not* "recognized that abortion is a right protected under the Iowa Constitution." Petitioners' Br. 49. *See Planned Parenthood of the Heartland*, *Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252, 262 (Iowa 2015) ("in this case, we need not decide whether the Iowa Constitution protects such a right [to abortion]").

corresponding federal right. The asserted right might not exist at all under the state constitution and, if it does, it could be broader or narrower than the federal right. What is *not* principled, however, is to *combine* the two approaches and to say, on the one hand, that federal constitutional law will be controlling in determining whether a given right is protected by the state constitution (thereby establishing, as a matter of state law, a federal "floor" of protection), but, on the other hand, that federal law will not be controlling in determining the scope of that same right (allowing for a higher state "ceiling" of protection). That hybrid approach is unprincipled in theory and unsound in practice.

> The image of federal constitutional law as a "floor" in state court litigation pervades most commentary on state constitutional law. Commentators contend that in adjudicating cases, state judges must not adopt state constitutional rules which fall below this floor; courts may, however, appeal to the relevant state constitution to establish a higher "ceiling" of rights for individuals . . . .
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> Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court; the Supremacy Clause of the Federal Constitution [U.S. Const., art. VI] clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis; principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally-created principles into their state constitutional analysis; the only requirement is that in the

> event of an irreconcilable conflict between federal law and state law principles, the federal principles must prevail.
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> [S]uch courts [that do not employ "lockstep" analysis] must undertake an independent determination of the merits of each claim based solely on principles of state constitutional law. If the state court begins its analysis with the view that the federal practice establishes a "floor," the state court is allowing a federal governmental body–the United States Supreme Court–to define, at least in part, rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a state court deciding whether to expand federally recognized rights as a matter of state law must employ a two-stage process. The court first must determine whether the federally recognized rights themselves are incorporated into the state constitution and *only then* must determine whether those protections are more expansive under state law.

Earl M. Maltz, *False Prophet–Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429, 443-44 (1988) (emphasis in original) (criticizing the article by Justice Brennan cited in the *amicus* brief of the Iowa professors of constitutional law in support of petitioners).

Other commentators have recognized that "[i]ndependent interpretation, as a matter of constitutional principle, must be a two-way street." Ronald K.L. Collins, *Reliance on State Constitutions–Away From a Reactionary Approach*, 9 Hastings Const. L. Q. 1, 10 (1981).

> [T]here is no constitutional impediment preventing state courts from granting a lesser degree of protection under state law, *provided*

> only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court. In other words, the logic of principled interpretation at the state level . . . demands that any given argument be tested on its own merits independently of what level of constitutional protection could result. In some instances, it may well be that the logical scope of a state constitutional premise does not extend so far as to afford an equivalent or greater measure of protection than that allotted under the Bill of Rights.
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> . . . . Considerations of text, logic, history and consistency may prompt [state] judges to reject [certain] federally protected "rights," but only as questions of state law. These federal "rights" would not suffer in that the same state judges would then have to yield to the dictates of federal law and acknowledge the claims presented. Accordingly, the constitutional premises upon which the state law is grounded would not be sacrificed merely because federal decisional law pointed in another direction.

Id. at 15-16 (emphasis in original). A leading expert on state constitutional law concurs:

> Using independent interpretation a court might reach the same or a different result than the federal one, using the same or different standards or theories. An independent opinion may even conclude that a state provision is "less" protective than the federal counterpart is presumed to be. The state court must then reach any federal fourteenth amendment challenges to the alleged deprivation.

Jennifer Friesen, State Constitutional Law[:] Litigating Individual Rights, Claims and Defenses (4th ed. 2008), Vol. I, at pp. 44-45.

State reviewing courts have recognized that, under an independent

state constitutional analysis (as opposed to "lockstep" analysis), *federal* constitutional rights are not necessarily incorporated into *state* constitutions. In *Sitz v. Dep't of State Police*, 506 N.W.2d 209 (Mich. 1993), the Michigan Supreme Court explained:

> Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution. It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the [federal] constitution.

Id. at 216-17 (Mich. 1993). "[A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Id*. at 217. Other courts have agreed with this conclusion. *See Serna v. Superior Court*, 707 P.2d 793, 798-800 (Cal. 1985); *Sanders v. State*, 585 A.2d 117, 147 n. 25 (Del. 1990); *Taylor v. State*, 639 N.E.2d 1052, 1053 (Ind. Ct. App. 1994); *Ex parte Tucci*, 859 S.W.2d 1, 13 (Tex. 1993) (plurality); *West v. Thompson Newspapers*, 872 P.2d 999, 1004 n. 4 (Utah 1994).

In a decision rejecting a state constitutional challenge to Ohio's

abortion informed consent statute, the Ohio Court of Appeals noted that although a state court is "not free to find constitutional a statute that violates the United States Constitution, as interpreted by *Planned Parenthood* on the basis that the [state] [c]onstitution is not violated," it need not "follow the undue burden test of *Planned Parenthood* [in construing] the [state] [c]onstitution." *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 577 n. 9 (Ohio Ct. App. 1993). "Instead, the state may use either a lesser or greater standard." *Id.* at 575 n. 5. In interpreting the Massachusetts Constitution, the Massachusetts Supreme Judicial Court refused to employ the Supreme Court's "rigid formulation" of balancing the interests at stake in the abortion debate, preferring instead a "more flexible approach to the weighing of interests that must take place." *Moe v. Sec'y of Admin. & Finance*, 417 N.E.2d 387, 402-04 (Mass. 1981). Finally, both the Mississippi Supreme Court and the Michigan Court of Appeals have conducted independent analyses of their state constitutions, the former concluding that the Mississippi Constitution confers a state right to abortion, *Pro-Choice Mississippi, v. Fordice*, 716 So.2d 645, 650-54 (Miss. 1998), the latter concluding otherwise under the Michigan Constitution. *Mahaffey v. Attorney General*, 564 N.W.2d 104, 109-11 (Mich. Ct. App. 1997).

In sum, a state court may reasonably either follow Supreme Court precedent construing a federal constitutional guarantee in construing a similar guarantee in the state constitution, with all the limitations that implies, or it may construe the state constitution independently of the federal constitution. But if it chooses the latter course, as petitioners urge, then Supreme Court precedents should not dictate the interpretation of the state constitution. Depending upon its text, history and interpretation, a right secured by the Iowa Constitution may be broader,[1] narrower[2] or the

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[1] *See*, *e.g.*, *State v. Cline*, 617 N.W.2d 277, 293 (Iowa 2000) (rejecting, as a matter of state constitutional law, the good faith exception to the exclusionary rule that had been adopted by the United States Supreme Court in interpreting the Fourth Amendment) (interpreting art. I, § 8, of the Iowa Constitution), *overruled on other grounds*, *State v. Turner*, 630 N.W.2d 601, 606 n. 2 (Iowa 2001); *State v. Ochoa*, 792 N.W.2d 260, 264-67 (Iowa 2010) (announcing that the Iowa Supreme Court would "engage in independent analysis of the content of our state search and seizure provisions").

[2] *See*, *e.g.*, *State v. Bartels*, 181 N.W. 508, 513-14 (Iowa 1921) (statute forbidding the teaching of any secular subject in a foreign language to children in public or private elementary schools did not violate either the liberty language of art. I, § 1, of the Iowa Constitution or the free exercise of religion guarantee of art. I, § 3), *rev'd*, 262 U.S. 404 (1923) (holding, on the authority of *Meyer v. Nebraska*, 262 U.S. 390 (1923), that statute violated the liberty language of § 1 of the Fourteenth Amendment); *compare* art. I, § 7, of the Iowa Constitution, which provides, in part, that truth is not a defense in a prosecution for libel unless the allegedly libelous matter "was published with good motives and for justifiable ends," *see also* Iowa Code § 737.4 (1950) (subsequently repealed), codifying defense, *with Garrison v. Louisiana*, 379 U.S. 64 (1964) (under Free Speech Clause of First

same[3] as the corresponding right secured by the United States Constitution.

II

THE DUE PROCESS GUARANTEE OF THE IOWA CONSTITUTION, ART. I, § 9, DOES NOT CONFER A RIGHT TO ABORTION.

Article I, § 9, of the Iowa Constitution provides, in pertinent part, "No person shall be deprived of life, liberty, or property, without due process of law." Section 9 has a substantive, as well as a procedural, component. *State v. Seering*, 701 N.E.2d 655, 662 (Iowa 2005). For purposes of

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Amendment, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, truth is a complete defense to a charge of criminal libel, without regard to the reasons for which the allegedly libelous statements were made, with respect to statements made about the official conduct of public officials); *compare Mercer v. City of Cedar Rapids*, 104 F. Supp.2d 1130, 1176-77 (N.D. Iowa 2000) (free speech guarantee of the Iowa Constitution, art. I, § 7, does not establish a public policy of "freedom of association"), *rev'd and remanded on other grounds*, 308 F.3d 840 (8th Cir. 2002) *with NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958) (Free Speech Clause of the First Amendment and Due Process Clause of the Fourteenth Amendment guarantee freedom of association).

[3] *See*, *e.g.*, *State v. Franzen*, 495 N.W.2d 714, 715-16 (Iowa 1993) (interpreting double jeopardy provision of state constitution, art, I, § 12, consistently with Supreme Court's interpretation of double jeopardy language of the Fifth Amendment, for purposes of determining when jeopardy attaches); *State v. Chidester*, 570 N.W.2d 78, 81 n. 1 (Iowa 1997) ("protection granted by Iowa Constitution with respect to the composition and selection of the jury panel [art. I, § 10] is consistent with that of the Sixth Amendment").

substantive due process analysis, this Court first determines the nature of the right involved. "If a fundamental right is implicated, we apply strict scrutiny analysis, which requires a determination of 'whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest.'" *Id*. (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)). "If a fundamental right is not implicated," however, then "a statute need only survive a rational basis analysis, which requires us to consider whether there is 'a reasonable fit between the government interest and the means utilized to advance that interest.'" *Id*.[4]

In determining whether an asserted liberty interest (or right) should be regarded as "fundamental," the United States Supreme Court applies a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721

[4] Although the Iowa Supreme Court has held as "[a]s a matter of privacy persons enjoy a fundamental right to seek or reject medical treatment generally," *State ex rel. Iowa Dep't of Health v. Van Wyk*, 320 N.W.2d 599, 606 (Iowa 1982), it emphasized that there is no "fundamental right to select a particular treatment or medication," *id*., which is exactly what petitioners have asserted in their challenge to Senate File 471.

(1997) (citation and internal quotation marks omitted).[5] Second, the interest, so described, must be firmly rooted in "the Nation's history, legal traditions, and practices." *Id*. at 710. This Court employs the same test in evaluating state substantive due process claims. *Seering*, 701 N.W.2d at 662–65. *See also Sanchez v. State*, 692 N.W.2d 812, 819–20 (Iowa 2005) (following *Glucksberg*); *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (same). Unlike other unenumerated rights the Court has expressly recognized as fundamental under the state due process provision,[6] a right to abortion cannot be regarded as fundamental under art. I, § 9, because such a "right" is not firmly rooted in Iowa's "history, legal traditions, and

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[5] In *Seering*, the defendant was found guilty of violating a statute proscribing convicted sex offenders from living within 2,000 feet of an elementary or secondary school or child care facility. On appeal, the defendant challenged the residency restriction, arguing that the statute interfered with an asserted "fundamental right" to "the privacy and freedom of association in one's family." 701 N.W.2d at 662 (internal quotation marks omitted). This Court rejected defendant's formulation of the interest at stake, defining the interest instead as "freedom of choice in residence," which is "not a fundamental interest entitled to the highest constitutional protection." *Id*. at 664.

[6] For example, the right of parents to the care, custody and control of their children, *Santi*, 633 N.W.2d at 317-18 (grandparent visitation statute impermissibly interfered with fundamental liberty interest in parental care taking), or the "right to procreate," *McQuistion v. City of Clinton*, 872 N.W.2d 817, 833 (Iowa 2015).

practices."[7]

Iowa enacted its first abortion prohibition in 1839, eight years before the State was admitted to the Union. The statute prohibited abortion at any stage of pregnancy for any reason. An Act defining Crimes and Punishments, Jan. 25, 1839, § 18, *reprinted in* Iowa (Terr.) Laws 153–54 (1838-39). In 1843, this statute was replaced by a statute that prohibited abortion at any stage of pregnancy unless the procedure was "necessary to preserve the life of the mother. . . ." Act of Feb. 16, 1843, *codified at* Iowa (Terr.) Rev. Stat. ch. 49, § 10 (1843). In 1851, the Legislature enacted a new code of law which repealed all statutes (including the statute prohibiting abortion) not otherwise included in the new code. Act of Feb. 5, 1851, Iowa Code Part First, tit. I, ch. 4, § 28 (1850–51). Immediately following a decision of this Court holding that, as a result of the enactment of the 1851 code, abortion was punishable only as a common law offense

[7] To the extent that this Court considers federal precedent in determining whether an asserted liberty interest (or right) is "fundamental" under the state due process guarantee, abortion would not qualify as a "fundamental" right. Although the Supreme Court characterized the right to choose abortion as "fundamental" in *Roe*, 410 U.S. at 152–53, it tacitly abandoned that characterization in *Casey*, 505 U.S. at 869–79 (Joint Op. of O'Connor, Kennedy and Souter, JJ., replacing *Roe's* "strict scrutiny" standard of review with the more relaxed "undue burden" standard, allowing for a broader measure of abortion regulation).

(after quickening) and not as a statutory offense, *see Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856), the Legislature promptly responded and enacted a new statute making abortion a crime at any stage of pregnancy unless the procedure was "necessary to preserve of the life of [the pregnant] woman." Act of March 15, 1858, *codified at* Iowa Rev. Laws § 4221 (1860), *recodified at* Iowa Code § 3864 (1873), *recodified at* McClain's Iowa Code Ann. § 5163 (1888), *recodified at* Iowa Code Ann. § 4759 (1897), *amended by* Iowa Acts 1915, ch. 45, § 1 (eliminating requirement that woman was pregnant), *codified at* Iowa Code Supplemental Supplement § 4759 (1915), *recodified at* Iowa Code § 12973 (1924), *recodified at* Iowa Code § 701.1 (1950), *repealed by* 1976 Iowa Acts 549, 774, ch. 1245, § 526. This response suggests, at a minimum, that the legislature did not believe that the due process clause of the 1846 state constitution (which was simply restated in art. I, § 9, of the 1857 constitution) precluded legislation prohibiting abortion. *See Rudd v. Ray*, 248 N.W.2d 125, 132 (Iowa 1976) (legislature that enacted statute in 1855 appointing a paid chaplain for the state penitentiary obviously did not believe that the appointment of a chaplain was barred by the establishment clause of art. I, § 3, of the 1846 state constitution). Neither petitioners nor any of their *amici* even mention

Iowa's longstanding history (pre-*Roe*) of prohibiting abortion.

In *State v. Moore*, 25 Iowa 128 (1868), the Iowa Supreme Court quoted with approval the following language from the trial judge's charge to the jury in a prosecution for second degree murder based upon the performance of an illegal abortion:

> To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother.

Id. at 131. This Court then summarized its own view of the matter:

> The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, enveloping every individual like the air he breathes, not only extends to persons actually born, but, for some purposes, to infants *in ventre sa mere*.

Id. at 135.

Prior to *Roe v. Wade*, the Iowa Supreme Court regularly affirmed the convictions of persons (including licensed physicians) for performing abortions, without any hint that the prosecutions or convictions violated the due process guarantee (or any other provision) of the Iowa Constitution.[8]

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[8] *State v. Stafford*, 123 N.W. 167 (Iowa 1909); *State v. Barrett*, 198 N.W. 36 (Iowa 1924); *State v. Rowley*, 198 N.W. 37 (Iowa 1924). This Court also affirmed second degree murder convictions for causing the death

Indeed, less than three years before *Roe* was decided, this Court rejected both state and federal vagueness and equal protection challenges to the principal state abortion statute. *State v. Abodeely*, 179 N.W.2d 347, 354–55 (Iowa 1970), *appeal dismissed*, *cert. denied*, 402 U.S. 936 (1971).

Iowa recognizes the rights of unborn children in a variety of contexts outside of abortion, including tort law, health care law, property law and guardianship law. In tort law, the Iowa Supreme Court has refused to recognize a "wrongful pregnancy" cause of action for the birth of a normal, healthy baby. *Nanke v. Napier*, 346 N.W.2d 520 (Iowa 1984).[9] Under Iowa's health care statutes, life-sustaining medical care may not be withheld or withdrawn from a pregnant woman pursuant to a living will. Iowa Code § 144A.6, ¶ 2 (West 2014). The same limitation applies to surrogate health care decision makers and, in certain instances (when the patient is terminally ill), agents acting under a durable power of attorney for health care. *Id*. § 144A.7. In property law, a child conceived before but born after

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of a pregnant woman by an illegal abortion. *State v. Moore*, 25 Iowa 128 (1868); *State v. Thurman*, 24 N.W. 511 (Iowa 1885). The defendant in *Moore* was a licensed physician.

[9] This Court, however, recently recognized a common law cause of action for the "wrongful birth" of a disabled child. *See Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393 (Iowa 2017).

the death of a person who dies without a will may inherit from that person. *Id*. § 633.220 (West 1992). And, at any point in a judicial proceeding, the court may appoint a guardian *ad litem* "to represent and approve a settlement on behalf of the interest of . . . an . . . unborn . . . person." *Id*. § 633A.6306 (West 2014).

There is no evidence that the framers of the Bill of Rights intended to recognize a right to abortion, which was a crime at common law and under territorial and state statutes. *See* 1 The Debates of the Constitutional Convention of the State of Iowa, Assembled at Iowa City, January 19, 1857 (DEBATES) 98–115, 118–140 (debate on Bill of Rights in Committee of the Whole); *id*. at 141–215, 223–26, 2 DEBATES at 651–57, 732–41, 1006–08 (debate on Bill of Rights in Convention) (Davenport, Iowa 1857).

In light of Iowa's longstanding tradition of prohibiting abortion, which goes back one hundred and thirty-five years before *Roe v. Wade* was decided and antedates Iowa's first constitution, the absence of any indication that the framers of the present constitution intended to recognize a right to abortion, and the State's interest in protecting the rights of unborn children, it cannot plausibly be said that the due process guarantee of the Iowa Constitution (or any other provision of the Bill of

Rights) secures a right to abortion.[10]

III.

THE REGULATION OF ABORTION DOES NOT VIOLATE THE REQUIREMENT OF ART. I, § 6, OF THE IOWA CONSTITUTION THAT "ALL LAWS OF A GENERAL NATURE SHALL HAVE A A UNIFORM OPERATION."

Article I, § 6, of the Iowa Constitution provides, in relevant part: "All

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[10] Every state supreme court that has recognized a right to abortion under its state constitution that is separate from, and independent of, the federal right to abortion–*i.e*., Alaska, California, Florida, Massachusetts, Minnesota, Mississippi, Montana, New Jersey and Tennessee (overturned by constitutional amendment)–has relied upon an express or implied right of privacy. The Iowa Constitution does not contain an express right of privacy. Although, on rare occasion, the Iowa Supreme Court has held that the due process provision of the state constitution (art. I, § 9), confers a right to privacy, this Court has followed Supreme Court precedent interpreting the federal constitution in defining the scope of that right. *See State v. Hartog*, 440 N.W.2d 852, 854, 855 (Iowa 1989) (refusing to give state right of privacy a broader scope than the federal right of privacy in rejecting privacy challenge to seat-belt law); *Sioux City Police Officers' Ass'n v. City of Sioux City*, *Iowa*, 495 N.W.2d 687, 695-96 (Iowa 1993) (construing state and federal due process clauses together in holding that police department's anti-nepotism policy did not violate the privacy rights of police officers). The Court has never interpreted any state right of privacy to be broader in scope than the federal right of privacy. Thus, even on the assumption that the state due process guarantee includes a right to abortion (which *amicus* disputes, for the reasons set forth above), that right is no broader than that recognized by the United States Supreme Court in interpreting the federal due process guarantee. Accordingly, the appropriate standard of review is the "undue burden" test adopted in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), not the "strict scrutiny" standard petitioners advocate. For the reasons set forth by the district court, *see* Ruling on Petitioners' Petition for Declaratory and Injunctive Relief (Ruling) at 37-45, the seventy-two hour waiting requirement satisfies that standard.

laws of a general nature shall have a uniform operation. . . ." Iowa Const. art. I, § 6 (West 2013). Although in interpreting art. I, § 6, this Court is not bound by the Supreme Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, *see State v. Simmons*, 714 N.W.2d 264, 277 (Iowa 2006), and, on occasion, has departed from them, *see Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.E.2d 1, 4–7 (Iowa 2004) (striking down disparity in taxes imposed on slot machines located at racetracks and those on river boats); *Bierkamp v. Rogers*, 293 N.W.2d 577, 580–82 (Iowa 1980) (striking down guest statute), the Court normally applies the same analysis as it does in considering federal equal protection claims. "Generally, a statute that does not offend against the equal protection guarantees in the federal constitution does not offend against a similar provision in our State constitution." *Klein v. Dep't of Revenue & Finance*, 451 N.W.2d 837, 842 (Iowa 1990). *See also Bowers v. Polk County Board of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) (provisions are "identical in scope, import, and purpose"); *Gilleland v. Armstrong Rubber*, 524 N.W.2d 404, 406 (Iowa 1994) (Iowa Constitution "puts substantially the same limitations on state legislation" as does the Equal Protection Clause of the Fourteenth Amendment); *Iowa Independent*

Bankers v. Board of Governors of the Federal Reserve System, 511 F.2d 1288, 1297 (D.C. Cir. 1975) (art. I, § 6, of the Iowa Constitution is not applied "more rigorously" than the Equal Protection Clause of the Fourteenth Amendment). Consistent with that equivalency of interpretation, this Court has recognized that "[s]tate laws are subjected to various levels of scrutiny depending on the classification the laws draw and the kind of right the laws affect." *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005).

> If a statute affects a fundamental right or classifies individuals on the basis of race, alienage, or national origin, it is subjected to strict scrutiny review. [Citation]. The State must prove [that] it is narrowly tailored to the achievement of a compelling state interest. [Citation]. If a statute classifies individuals on the basis of gender or legitimacy, it is subject to intermediate scrutiny and will only be upheld if it is substantially related to an important state interest.

Id. (citations omitted).[11] In all other cases, rational basis review applies. Under this level of scrutiny, a statute "need only be rationally related to a legitimate state interest." *Id*.

Strict scrutiny review does not apply because, for the reasons set forth

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[11] This Court has also applied "intermediate scrutiny" to classifications based upon sexual orientation. *See Varnum v. Brien*, 763 N.W.2d 862, 889-96 (Iowa 2009) (striking down statute reserving the institution of marriage to opposite-sex couples). Another term for "intermediate scrutiny" is "heightened scrutiny." The terms are used interchangeably in this argument.

in the preceding argument, the state constitution does not confer a "fundamental right" to abortion. And the regulation of abortion clearly does not classify persons on the basis of "race, alienage, or national origin." Even if abortion regulations were subject to intermediate scrutiny (because only women are capable of becoming pregnant), such regulations would satisfy this level of scrutiny because they would be "substantially related" to one or more "important state interest[s]," *e.g.*, protecting and respecting unborn human life, ensuring that a woman's decision to obtain an abortion is voluntary, informed and reflective and requiring the practice of abortion to meet minimal medical standards. Nevertheless, contrary to petitioners' argument (Petitioners' Br. 74-81), the standard applicable to gender-based discrimination should not apply to abortion regulations. The regulation of abortion does not discriminate on the basis of gender.

First, the United States Supreme Court has reviewed restrictions on abortion funding under the rational basis standard of review, *not* under the heightened scrutiny required of gender-based classifications. *Harris v. McRae*, 448 U.S. 297, 321-26 (1980). Indeed, the Court has held that "the disfavoring of abortion . . . is not *ipso facto* sex discrimination," and, citing its decisions in *Harris* and other cases addressing abortion funding, stated

that "the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex discrimination, . . . but the ordinary rationality standard." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993).[12] Several state supreme courts and individual state supreme court justices have recognized that abortion regulations and restrictions on abortion funding are not "directed at women as a class" so much as "abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method." *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 258 (Tex. 2002) (upholding funding restrictions). *See also Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 125 (Pa. 1985) ("basis for the distinction here is not sex, but abortion") (upholding funding restrictions); *Moe v. Sec'y of Admin. & Finance*, 417 N.E.2d 387, 407 (Mass. 1981) (Hennessey, C.J., dissenting) (funding restrictions were "directed at abortion as a medical procedure, not at women as a class"); *Right to Choose v. Byrne*, 450 A.2d 925, 950 (N.J. 1982) (O'Hern, J., dissenting) ("[t]he subject of the

[12] Given the Supreme Court's reliance in *Bray* on *Harris v. McRae* and other cases upholding state and federal statutes restricting public funding of abortion, *Bray* cannot be dismissed as being concerned only with the motivations of "anti-abortion protestors," and not with the validity of abortion legislation, as such, as petitioners suggest. Petitioners' Br. 78.

legislation is not the person of the recipient but the nature of the claimed medical service").[13]

Second, even assuming that an abortion prohibition differentiates between men and women on the basis of gender, and would otherwise be subject to a higher standard of review, the Supreme Court has held that biological differences between men and women may justify different treatment based on those differences. In upholding a statutory rape statute that applied only to males, the Supreme Court noted, "this Court has consistently upheld statutes where the gender classification is not invidious, but rather 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). Reviewing courts in States with equal rights provisions have consistently held that laws that differentiate between the sexes are permissible and do not violate the state guarantee of gender equality if they are based upon the unique physical characteristics of a particular sex.[14] As

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[13] Both *Moe* and *Right to Choose* were decided on other grounds. The dissenting justices were addressing *alternative* arguments raised by the plaintiffs and not discussed in the majority opinion.

[14] The cases have upheld rape statutes, *State v. Rivera*, 612 P.2d 526, 530–31 (Haw. 1980), *State v. Fletcher*, 341 So.2d 340, 348 (La. 1976), *Brooks v. State*, 330 A.2d 670, 672–73 (Md. Ct. Sp. App. 1975), *State v. Craig*, 545 P.2d 649 (Mont. 1976), *Finley v. State*, 527 S.W.2d 553, 555–56

one federal district court observed: "Abortion statutes are examples of cases in which the sexes are not biologically similarly situated" because only women are capable of becoming pregnant and having abortions. *Jane L. v. Bangerter*, 794 F. Supp. 1537, 1549 (D. Utah 1992).

A statute regulating abortion quite obviously can affect only women because only women are capable of becoming pregnant. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974) ("[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics"). Unlike laws that use women's ability to become pregnant (or pregnancy

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(Tex. Crim. App. 1975); statutory rape statutes, *People v. Salinas*, 551 P.2d 703, 705–06 (Colo. 1976), *State v. Bell*, 377 So.2d 303 (La. 1979); an aggravated incest statute, *People v. Boyer*, 349 N.E.2d 50 (Ill. 1976); statutes governing the means of establishing maternity and paternity, *A v. X, Y & Z*, 641 P.2d 1222, 1224–26 (Wyo. 1982); statutes and rules barring female nudity in bars, *Dydyn v. Dep't of Liquor Control*, 531 A.2d 170, 175 (Conn. App. Ct. 1987); *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 575 (Tex. App.-Dallas 1990, *writ denied*), *Messina v. State*, 904 S.W.2d 178, 181 (Tex. App.-Dallas 1995, *no pet.*) (following *MJR*); an ordinance prohibiting public exposure of female breasts, *City of Seattle v. Buchanan*, 584 P.2d 918, 919–22 (Wash. 1978); and, as noted in the text, limitations on public funding of abortion (*Bell*, *Fischer*). The one exception is *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998), cited by petitioners (Petitioners' Br. 54, 56, 76, 77, 78), in which the New Mexico Supreme Court struck down a state regulation restricting public funding of abortion. In applying "heightened scrutiny," the court failed to recognize that the funding regulation did not use "the unique ability of women to become pregnant and bear children" as a pretext to discriminate against them in *other* respects, *e.g.*, "imposing restrictions on [their] ability to work and participate in public life." *Id.* at 854.

itself) to discriminate against them in *other* areas (*e.g.*, employment opportunities), abortion regulations cannot fairly be said to involve a distinction between men and women that is a "mere pretext[] designed to effect an invidious discrimination against [women]." *Id.*[15]

The regulation of abortion does not infringe upon a fundamental state constitutional right and does not impermissibly classify on the basis of a suspect or quasi-suspect class. Thus, it need satisfy only the rational basis test. Under that test, the classification must be "rationally related to a legitimate state interest." *Sanchez v. State*, 692 N.W.2d at 817-18.[16] The requirement that, except in emergencies, a woman wait seventy-two hours before undergoing an abortion is "rationally related" to the "legitimate purpose[s]" of ensuring that her ultimate decision is voluntary, informed and reflective. S.F. 471 does not violate art. I, § 6, of the Iowa Constitution.

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[15] Petitioners' reliance on *Cedar Rapids Community School District v. Parr*, 227 N.W.2d 486 (Iowa 1975), and *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*, 268 N.W.2d 862 (Iowa 1978), in support of their gender equality argument, Petitioners' Br. 76, is misplaced. Neither case involved an analysis of either the state or federal constitution. The former was decided on the basis of a state statute, the latter on the basis of a municipal ordinance.

[16] Even assuming that intermediate scrutiny applies, the requirement passes constitutional muster. *See* Ruling at 45-46.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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