IN THE SUPREME COURT OF IOWA
NO. 17-1579
POLK COUNTY NO. EQCE081503

PLANNED PARENTHOOD OF THE HEARTLAND
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 D. FARRELL

BRIEF AMICI CURIAE ON BEHALF OF IOWA CONSTITUTIONAL LAW PROFESSORS ANDREA CHARLOW, SALLY FRANK, PAUL GOWDER, AND MAURA STRASSBERG IN SUPPORT OF PLANNED PARENTHOOD OF THE HEARTLAND, INC. AND JILL MEADOWS, M.D.

Bob Rush
Rush & Nicholson, P.L.C.
115 First Avenue SE, Suite 201
P. O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
bob@rushnicholson.com

B. Jessie Hill
Case Western Reserve University
School of Law
11075 East Boulevard
Cleveland, OH 44106
Phone: (216) 368-0553
Fax: (216) 368-2086
Email: bjh11@case.edu

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Interest of Amici

Amici, who are constitutional law scholars and teachers in the State of Iowa, have expertise relating to the U.S. Constitution and the Iowa Constitution, as well as to the relationship between state and federal constitutional doctrine. Their understanding of the right to privacy leads them to the view that abortion is a fundamental right under both the federal and state constitutions, and that the strict scrutiny test—rather than the undue burden test—is the proper mechanism for analyzing infringements of that right. They submit this brief in order to amplify the argument raised by petitioners-appellants Planned Parenthood of the Heartland and Jill Meadows, M.D., that this Court should employ the strict scrutiny test in evaluating the Iowa abortion restriction at issue in this case.

No party's counsel authored this brief in whole or in part, and no party's counsel contributed money to fund the preparation or submission of this brief, nor has any person other than *amici* and *amici*'s counsel contributed money to fund the preparation or submission of the brief.

Introduction

The right to abortion is a fundamental right protected by the Due Process Clause of the U.S. Constitution. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). It is grounded both in the fundamental right to bodily integrity and in

the fundamental right to make autonomous decisions about procreation, childbearing, and child rearing. *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). Yet, ever since the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the federal courts have accorded that fundamental right less protection than the strict scrutiny usually applied to governmental infringements on fundamental rights. *Id.* at 874 (introducing the "undue burden" standard as a replacement for strict scrutiny). This lower level of scrutiny embodied in the undue burden test conflicts with the constitutional status of the privacy right, as well as with *Casey*'s own acknowledgement that the right to abortion partakes of two longstanding lines of precedent recognizing the fundamental nature of the right at issue here.

In interpreting the Iowa Constitution's Due Process Clause, the Iowa Supreme Court need not and should not follow the questionable path that the U.S. Supreme Court has taken with respect to the constitutional privacy right at issue here. This Court has explicitly left open the question whether the undue burden test is the proper test for governmental abortion restrictions when they are challenged under the Iowa Constitution. *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 254, 262-63 (2015); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461

n.6 (1981) (acknowledging that state courts may adopt interpretations of their own constitutional provisions that are more protective of individual rights than federal interpretations of analogous provisions in the U.S. Constitution); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (same). Therefore, in considering the constitutionality of Section 1 of Senate File 471, to be codified at Iowa Code § 146A ("Iowa Code § 146A"), it may engage in independent analysis to determine the proper level of scrutiny.

In exercising its independent judgment, this Court should join the highest courts of numerous other states in recognizing that the right to abortion remains a fundamental right and that state infringements on that right must be met with the strictest level of scrutiny. This conclusion is supported by logic and by persuasive precedent. It is also supported by the growing recognition that equality interests, as well as liberty interests, undergird the right of women to decide whether or not to carry a pregnancy to term.

I. The Iowa Supreme Court Interprets Its Constitution Independently of the Federal Constitution, Following Federal Precedent Only in Cases Where, Unlike Here, Federal Precedent Is Persuasive.

This Court has repeatedly stressed its duty to interpret the Iowa Constitution independently, recognizing that state constitutional provisions may sometimes provide greater protection for individual rights than the U.S.

Constitution. *See, e.g.*, *Callender v. Skiles*, 591 N.W.2d 182, 187 (1999) (noting that the Iowa Supreme Court is not bound by federal interpretations of constitutional provisions, even when the language of the Iowa provision is essentially identical to the federal provision) (citing *State ex rel. Kuble v. Bisignano*, 238 Iowa 1060, 1066 (1947)). Moreover, as this Court recognized in *Varnum v. Brien*, 763 N.W.2d 862 (2009), the Iowa Supreme Court's "responsibility … is to protect constitutional rights of individuals from legislative enactments that have denied those 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," *id.* at 876. This profound responsibility flows from the special role of the courts in Iowa's constitutional structure and "[t]he idea that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights." *Id.* at 875.

Indeed, as Justice William Brennan has explained, our federal system purposely reserves this vital role for state courts: "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." Willliam J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977). For this reason, the state courts must be "free and unfettered in interpreting their

constitutions." *State v. Ochoa*, 792 N.W.2d 260, 264 (Iowa 2010). This Court has therefore noted a recent trend away from following federal precedent in "lockstep" fashion, stating that it will follow a constitutional precedent, whether from the U.S. Supreme Court or another state's court, only to the extent that it proves persuasive. *Id.* at 267; *see also id.* at 275-84 (considering both U.S. Supreme Court case law and the case law from other states' courts in determining the scope and meaning of the Iowa Constitution's search and seizure provision).

The Iowa Supreme Court's long tradition of independence in interpreting the Iowa Constitution has often put it at the vanguard of protecting individual rights, as it has adopted pathbreaking interpretations of provisions in the Iowa Constitutional that were later vindicated by U.S. Supreme Court decisions interpreting the analogous federal constitutional provisions. Recently, in *Varnum*, this Court recognized that the Iowa Constitution protects the right of same-sex couples to marry—more than six years before the U.S. Supreme Court reached the same conclusion with respect to the federal constitution. *Varnum*, 763 N.W.2d at 872. But the *Varnum* case is hardly an outlier. This Court struck down racial segregation in the Iowa schools in 1868, well before *Brown v. Board of Education*, 347 U.S. 483 (1954). *Clark v. Board of School Directors*, 24 Iowa 266, 277

(1868). The Iowa Supreme Court was also the first state supreme court in the nation to admit a woman to the practice of law. *See* Library of Congress, *Women Lawyers and State Bar Admission* (citing KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 12 (1986)), available at https://memory.loc.gov/ammem/awhhtml/awlaw3/women_lawyers.html (last visited August 9, 2017). And among this Court's first acts was to recognize the humanity of slaves, declining to view them simply as property. *In re Ralph*, 1 Morris 1 (Iowa 1839). As this Court declared in *Varnum*, "[t]hese cases … reflect this court has, for the most part, been at the forefront in recognizing individuals' civil rights. The path we have taken as a state has not been by accident, but has been navigated with the compass of equality firmly in hand…." *Varnum*, 763 N.W.2d at 877 n.4.

Thus, while this Court accords due respect to the decisions of the U.S. Supreme Court defining the scope of protection accorded individual rights under the federal constitution, it need not follow those decisions in interpreting the Iowa Constitution if the U.S. Supreme Court's rationales are unpersuasive. This is true even where the "scope, import, and purpose" of the state and federal constitutional provisions are similar. *See Ochoa*, 792 N.W.2d at 265-67 (acknowledging that the Iowa and federal search and

seizure provisions had the same "scope, import, and purpose" but engaging in independent analysis of the state constitutional provision). Here, although the federal and state Due Process Clauses are similar in wording, this Court need not hew to federal law and instead should merely "look to [federal precedents] for 'such light and guidance as they may afford.'" *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015) (citing *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 593 (Iowa 1971), *superseded on other grounds by statute*, Iowa Code § 17A.19(7) (1975)).

In *Callender v. Skiles*, for example, this Court deviated from the federal precedent on substantive due process rights, looking to its own jurisprudence discussing individuals' "fundamental interests in family and parenting circumstances" to hold that a putative biological father had a fundamental liberty interest in the paternity of his daughter. *Callender*, 591 N.W.2d at 190; *see also id.* at 187 ("In many instances we have deemed the federal and state due process and equal protection clauses to be identical in scope, import, and purpose. However, it is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution" (citations omitted)). In reaching this decision, the Court deviated from the precedent set by the U.S. Supreme Court in *Michael H. v.*

Gerald D., 491 U.S. 110 (1989), finding that an unmarried father had no protected liberty interest in his relationship with his child, whom he fathered with a married woman. In reaching a different conclusion than the U.S. Supreme Court would have reached, this Court declined to shackle the concept of fundamental rights to past tradition and historical acceptance. *Callender*, 591 N.W.2d at 190. Further, this Court drew on its own tradition of providing robust due process protection in the family and parenting context to acknowledge the claim of the unmarried father. *Id.*; *see also In re Guardianship of Kennedy*, 845 N.W.2d 707, 714 (Iowa 2014) (providing strong protection for the right to procreate in requiring court authorization for sterilization of a mentally disabled dependent); *State v. Seering*, 701 N.W.2d 655, 663 (Iowa 2005).

This Court is therefore free to apply a different level of scrutiny to abortion restrictions under the Iowa Constitution than the U.S. Supreme Court currently applies under the federal Constitution. As explained below, when it decides the same question under the Iowa Constitution, this Court should not follow the U.S. Supreme Court's decision under the federal constitution abandoning the strict scrutiny standard for assessing the constitutionality of infringements on the right to choose abortion. Instead, this Court should follow the more persuasive precedent of those state

supreme courts that hold that the fundamental right to terminate a pregnancy evokes the protection of strict scrutiny review.

II. This Court Should Apply Strict Scrutiny to the Challenged Restrictions Under the Due Process Clause of the Iowa Constitution.

The right to choose abortion is a fundamental right protected by the Due Process Clause of the U.S. Constitution. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *see also* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1237 (2017); Michael C. Dorf, *Symposium: Abortion is still a fundamental right*, SCOTUSblog (Jan. 4, 2016, 11:28 AM), http://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/ (last visited Aug. 7, 2017). Yet, after applying strict scrutiny to infringements of that right for nearly twenty years, the U.S. Supreme Court deviated from the logic of its fundamental-rights jurisprudence. In *Planned Parenthood v. Casey*, that Court singled out the abortion right for *sui generis* treatment under the Due Process Clause, replacing the strict scrutiny test used for gauging federal constitutional protection of all of constitutional rights with the less protective undue burden standard for evaluating abortion restrictions.

This Court has not squarely held that the right to choose abortion is protected as a fundamental right by the Iowa Constitution, because it has not

yet been required to do so. Rather, this Court noted in *Planned Parenthood of the Heartland* that it was not required to decide this issue, because all parties in that case conceded that the Iowa Constitution provides at least as much protection for the right to abortion as the U.S. Constitution. *Planned Parenthood of the Heartland*, 865 N.W.2d at 262 n.2. However, the logic of this Court's prior case law clearly dictates that abortion is a fundamental right under the Iowa Constitution, and consequently, that infringements of that right should be subject to strict scrutiny. This Court need not follow the approach of the U.S. Supreme Court under the federal constitution when it decides this issue under the Iowa Constitution.

A. This Court Should Hold that the Right to Terminate a Pregnancy Is a Fundamental Right Under the Iowa Constitution.

This Court has strongly and repeatedly affirmed that the substantive due process protections of the Iowa Constitution extend to the constellation of private and deeply important decisions that individuals may make about procreation, childrearing, marriage, and family. *See, e.g.*, *In re Guardianship of Kennedy*, 845 N.W.2d at 714-15 (noting that allowing the sterilization of intellectually disabled persons without judicial review raises due process concerns because the right to procreate is fundamental); *Callender*, 591 N.W.2d at 190 ("We have repeatedly found fundamental interests in family

and parenting circumstances."); *Seering*, 701 N.W.2d at 663 (describing "a long line of authority confirming that the familial relationship is a fundamental liberty interest protected by" both the U.S. and Iowa Constitutions); *In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004) ("[W]e have repeatedly held parental rights are fundamental rights."); *cf. Sanchez v. State*, 692 N.W.2d 812, 820 (Iowa 2005) (noting that federal substantive due process protection includes rights to bodily integrity, marital privacy, procreation, contraception and abortion).

Indeed, the Due Process Clause of the Iowa Constitution "exists to prevent unwarranted governmental interferences with personal decisions in life." *McQuistion*, 872 N.W.2d at 832 (citing *Hensler v. City of Davenport*, 790 N.W.2d 569, 583 (Iowa 2010)). In *McQuistion v. City of Clinton*, 872 N.W.2d 817 (Iowa 2015), this Court considered whether a city's denial of an employee's request for light duty work during her pregnancy violated the employee's fundamental right to procreate, *id.* at 832. In holding that the employer's refusal to grant the request did not violate that right because it did not "substantially and directly impact" that right, this Court nonetheless declared that "[t]he right to procreate is implied in the concept of ordered liberty and qualifies for due process protection as a fundamental right," *id.* at 833.

It thus stands to reason that the right *not* to procreate is similarly protected by the Iowa Constitution. *Cf. State v. Musser*, 721 N.W.2d 734, 742 (Iowa 2006) ("[T]he First Amendment safeguards not only 'the right to speak freely,' but also 'the right to refrain from speaking at all.'") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring)). Indeed, As the Supreme Court of Montana explained, employing similar logic to this Court's logic in *McQuistion*, the right to decide whether to have a child is "so intimate and personal that people must in principle be allowed to make th[is] decision for themselves … rather than having society impose its collective decision on them." *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999) (quoting RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 106 (1994) (internal quotation marks omitted)); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 813 ("[A] pregnant woman's constitutional right of choice is 'clearly among the most intimate and fundamental of all constitutional rights,' because it implicates her "deepest philosophical, moral, and religious concerns.").

Even after the U.S. Supreme Court's decision in *Casey*, other states' highest courts have similarly recognized the fundamental nature of the right to terminate a pregnancy under their state constitutions and chose to apply

strict scrutiny to abortion restrictions. *See, e.g.*, *N. Florida Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 631 (Fla. 2003); *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000); *Armstrong*, 989 P.2d at 374; *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 341, 940 P.2d 797, 819 (1997); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995). Some of those state constitutions have explicit language protecting the right to privacy, whereas others, such as Minnesota's, do not. Thus, it is irrelevant that the Iowa Constitution does not articulate an explicit right to privacy.

In *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995), the Minnesota Supreme Court held that the right to obtain a pre-viability abortion is a fundamental right under both the state and federal constitutions, and it applied strict scrutiny to a restriction on Medicaid funding for abortions, *id*. at 19. In so doing, the Court affirmed that the right to privacy—including the protection for bodily integrity—is one of the most "sacred" and "carefully guarded" rights recognized by the common law. *Id.* at 27. As such, it is also one of the most fundamental. As that court explained: "We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed,

this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities." *Id.*

Moreover, fundamental rights are not static; instead, the Iowa Constitution's protection for constitutional rights is capable of recognizing and accommodating changing social facts and values. *Callender*, 591 N.W.2d at 190 (citing *Redmond v. Carter*, 247 N.W.2d 268, 273 (Iowa 1976)). Thus, although historically recognized fundamental rights are protected by the Due Process Clause, such protection does not "ultimately hinge upon whether the right sought to be recognized has been historically afforded." *Id.* This Court has recognized its "responsibility" to protect individual rights, whether or not those rights enjoy widespread acceptance, a long historical pedigree, or uncontroversial status. *Varnum*, 763 N.W.2d at 876. The fact that the right to abortion has not been protected since time immemorial is not, therefore, a reason to doubt its fundamental nature.

B. Because a Fundamental Right is Substantially and Directly Infringed by State-Mandated Waiting Period Requirements for Abortion, Strict Scrutiny Should Apply.

This Court uses a two-part analysis when considering a substantive due process claim. First, it determines whether the right infringed is fundamental. *State v. Groves*, 742 N.W.2d 90, 92 (Iowa 2007). Second, it

determines which level of scrutiny to apply: "if [this Court] determine[s] the right is fundamental, then [it] will apply strict scrutiny." *Id.* at 93. If a right is not fundamental, by contrast, then rational-basis scrutiny is appropriate. *Id.*; *see also McQuistion*, 872 N.W.2d at 832.

This Court should apply strict scrutiny in its constitutional analysis of Iowa Code § 146A. Both logic and precedent support the application of strict scrutiny. First, there is no warrant for deviating from the general rule that infringements upon fundamental rights are subject to the strictest review. Indeed, in this instance, the fundamental right to terminate a pregnancy arises from both the right to bodily integrity and the right to personal decision-making autonomy. Each of those two rights is, itself, protected by strict scrutiny. Moreover, the appropriateness of heightened scrutiny is further reinforced by the fact that the right to choose abortion implicates not only personal liberty but also gender equality.

1. The U.S. Supreme Court's decision to deviate under the federal constitution from the rule of strict scrutiny with respect to government restrictions on abortion is not persuasive and not binding on this Court when it interprets the Iowa Constitution.

The U.S. Supreme Court's decision to abandon strict scrutiny under the federal Constitution for laws that infringe on the right to abortion, and to replace it with the undue burden standard, has been subject to widespread

criticism and has spawned massive confusion among the lower courts. For these reasons, this Court should hold that strict scrutiny is proper when analyzing the constitutionality of abortion restrictions under the Iowa Constitution.

As Dean Erwin Chemerinsky and Professor Michele Goodwin have recently argued, the U.S. Supreme Court's decision in *Planned Parenthood v. Casey* to abandon strict scrutiny was taken without sufficient justification. Chemerinsky & Goodwin, *supra*, at 1219. The proper standard for analyzing infringements on fundamental rights has always been strict scrutiny. As Justice Blackmun explained, dissenting from *Casey*'s shift to the undue burden standard, strict scrutiny "was designed 'to ensure that the woman's right to choose [does] not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact.'" *Casey*, 505 U.S. at 929–30 (Blackmun, J., concurring in part and dissenting in part) (quoting *id.* at 872). As Justice Blackmun further explained, "application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe*." *Id.*

In addition, the *Casey* undue burden standard has been widely criticized as amorphous and manipulable. *Id.* at 930 ("[T]he *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden'

standard adopted by the joint opinion."); *id.* at 964-66 (Rehnquist, C.J., concurring in part and dissenting in part); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 16 (Tenn. 2000) ("[T]he undue burden approach is essentially no standard at all, and, in effect, allows judges to impose their own subjective views of the propriety of the legislation in question."); *see also* Chemerinsky & Goodwin, *supra*, at 1219 (noting the "lack of analytical clarity" in the undue burden standard).

Indeed, the Court's reasoning in *Casey* is, in many ways, in tension with itself. The Court acknowledged that the right to terminate a pregnancy draws on two lines of precedent—cases involving the right to bodily integrity and cases involving the right to autonomous decision making with respect to matters of family and childbearing—*both* of which receive the protection of strict scrutiny: "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule … of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." *Casey*, 505 U.S. at 857. It defies logic to treat a right that fully partakes of both of these profound liberty interests as *less* protected than either of those rights. Indeed, the high courts of other states have relied on this confluence of liberty interests to justify their application of strict scrutiny to abortion

restrictions, even in the wake of *Casey*. The Montana Supreme Court, for example, has noted that the right to privacy encompasses "the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free of government interference," *Armstrong*, 989 P.2d at 378, as well as a right to "individual dignity and personal autonomy" and a right against the state's attempts to "dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular," *id.* at 375. *See also Am. Acad. of Pediatrics v. Lungren*, 940 P.2d at 813 (explaining that the right to terminate a pregnancy implicates the rights to preserve one's health, to control one's own body, and to decide whether to parent a child, as well as the rights of conscience and religious freedom).

Moreover, the *Casey* joint opinion claimed that it was adopting the undue burden standard because *Roe*'s framework provided insufficient recognition of the state's "important and legitimate interest in protecting the potentiality of human life." *Casey*, 505 U.S. at 871 (quoting *Roe*, 410 U.S. at 162 (internal quotation marks omitted)). Yet, as Justice Blackmun pointed out, "[L]egitimate interests are not enough"; when a fundamental right is at

stake, the state's interest must be compelling. *Id.* at 932 (Blackmun, J., concurring in part and dissenting in part).[1]

Equality interests further support the application of strict scrutiny to abortion restrictions. Women—particularly poor and otherwise vulnerable women—are uniquely affected by legislative infringements on the right to terminate a pregnancy. Special scrutiny is warranted for any law that, like a statutory waiting period requirement, has the effect of both concretely and symbolically burdening or subordinating women.

Abortion restrictions uniquely burden women, not only because women alone can become pregnant, but also because they reflect traditional notions about women's role in society and reinforce the norm of compulsory motherhood. As Justice Blackmun explained:

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the

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[1] The federal undue burden framework applies to restrictions on abortion before viability. *Casey*, 505 U.S. at 872-74. *Roe*'s strict scrutiny framework acknowledges that the state's interest in potential life becomes compelling at viability, *Roe*, 410 U.S. at 164-65; therefore, as under *Casey*, the state may regulate or ban abortion after viability (with exceptions to protect the life and health of the pregnant woman). Iowa Code § 146A applies throughout pregnancy, including pre-viability.

> "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.… [T]hese assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."

Casey, 505 U.S. at 928-929 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Casey*, 505 U.S. at 897) (citations omitted). Thus, abortion restrictions are grounded on the assumption that pregnancy and motherhood are natural and proper states for women; that the state is entitled to exercise dominion over women's bodies and most intimate healthcare decisions; and that women generally cannot be trusted to reflect and make decisions about childbearing on their own, without the participation of the government in their deliberative processes. Both the federal and state constitutions, however, reject this stereotyped understanding of women's character and role in society. *Casey*, 505 U.S. at 852 (noting that the harm of forced childbearing 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"); *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992) (holding that the Iowa courts must "avoid sexual stereotypes" in deciding whether to award alimony); *cf. Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 353 (Iowa 2013) (holding that the

state of Iowa cannot deny the right of both couples in a same-sex marriage to be listed on the birth certificate of their child, noting that the refusal to do so could only be based on "stereotype or prejudice").

Indeed, access to abortion has promoted women's social and economic equality in the United States. As the U.S. Supreme Court recognized in *Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856. Forced childbearing, by contrast, commandeers women's lives and futures, decreasing their ability to thrive economically and to achieve their aspirations. *Cf. Casey*, 505 U.S. at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

Beyond gender discrimination, abortion restrictions contribute to other forms of inequality as well. In particular, poor women are disproportionately burdened by constraints on abortion access.[2] Indeed, poor women are

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[2] Because abortion is a fundamental right, governmental restrictions on abortion that discriminate against particular groups of women would also implicate equal protection guarantees under the state and federal constitutions and invoke strict scrutiny review. *See, e.g.*, *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that strict scrutiny must be applied to a law that discriminates among classes of individuals based on wealth, with respect to the exercise of the fundamental right to procreate); *Varnum*, 763 N.W.2d at 880 (Iowa 2009).

disproportionately likely to seek abortions in the first place. Jenna Jerman, *et al.*, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute, at 7 (2016), *available at* https://www.guttmacher.org/report/characteristicsus-abortion-patients-2014 (finding that seventy-five percent of abortion patients in 2014 were low-income). In addition, poor women are less able to afford long-distance travel than more affluent women. Such travel, in Iowa, may include not only transportation costs but also lodging, since there are only two cities in the entire state in which a woman can obtain an abortion past ten weeks of pregnancy. Poor women are also less likely to be in a position to miss work—and even if able to do so, will likely forgo much-needed wages for the missed time. They may have more difficulty arranging and paying for child care. If they are delayed in obtaining an abortion, they will have more difficulty paying the higher cost of later surgical abortion procedures. It is reasonable to assume, moreover, that the unique burden of abortion restrictions on poor women will also translate into a burden on other subgroups of women who are disproportionately likely to be poor, such as women belonging to ethnic and racial minorities. Women who are victims of domestic violence will likewise face unique burdens, possibly putting themselves at risk of greater harm if they are unable to conceal their travel.

Strict scrutiny is thus necessary to protect poor women and women facing intimate partner violence, who are already disproportionately impacted by abortion restrictions.

Equality concerns thus further support the need to carefully scrutinize legislation restricting abortion. The possibility that the legislature was motivated by outmoded assumptions about the role of women in society and about their decision-making capacity means that courts must look closely at the interest the legislation purports to serve and the means used to advance that interest. In this way, courts can ensure that the law is not simply motivated by overbroad generalizations. Indeed, like prohibitions on same-sex marriage, which the U.S. Supreme Court struck down in *Obergefell v. Hodges*, 576 U.S. ____, 135 S. Ct. 2584 (2015), the right to abortion protects both personal liberty and equality. *Id.* at 2602-03. As the Court observed in that case, "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other." *Id.* Like the fundamental right to marry, the right to decide whether to have a child is one of the most profound and personal decisions an individual can

make. *Id.* at 2600. And like limitations on the right to marriage, restrictions on abortion rights have often been motivated by stigmatizing assumptions about the inferiority or inequality of one group of people. *Id.* at 2603-04 (noting the race, gender, and sexual orientation discrimination reflected by longstanding marriage laws). Thus, strict scrutiny is the appropriate mechanism under the Iowa Constitution for safeguarding the profound liberty and equality interests that are threatened by government restrictions on the right to abortion.

2. State-mandated waiting period requirements infringe on both the liberty interests and the equality interests of women.

Waiting period requirements are paradigmatic of the liberty and equality concerns presented by governmental restrictions on abortion. A waiting period law, especially when combined with other requirements that necessitate at least two in-person visits to an abortion clinic, significantly burden a women's right to make her own decision whether to terminate a pregnancy. In the words of the Florida Supreme Court, waiting period laws "treat[] a woman who has chosen to terminate her pregnancy, unlike any other patient, as unable to determine for herself when she is ready to make an informed decision about her medical care." *Gainesville Woman Care, LLC v. State*, 210 S.3d 1243, 1260 (Fla. 2017).

Waiting period laws also embody the insulting assumption that women do not or cannot fully think through their decisions without state assistance and thus require a state-mandated "cooling-off" period to ensure reflection. This assumption in turn relies on the stereotype that women are less rational, more emotional, and less competent decision-makers than men and are therefore second-class citizens. *See, e.g.*, David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1902 (1995) (noting that waiting periods "reflect the assumption that a woman's proper role is to be a mother and that she must be required to rethink any decision to forgo that role," and "perpetuate[] the stereotypical notion of the indecisiveness of women, questioning a woman's ability to make decisions about the course of her life"); Susan Frelich Appleton, *Physicians, Patients, and the Constitution: A Theoretical Analysis of the Physician's Role in "Private" Reproductive Decisions*, 63 WASH. U.L.Q. 183, 233 (1985) (arguing that mandatory waiting periods "perpetuate outmoded and pernicious stereotypes of women as indecisive and incompetent health-care consumers, incapable of obtaining necessary information and time for reflection without paternalistic government intervention.").

As Justice Stevens pointed out in his dissent to *Casey*, waiting period requirements assume either that adult women are "less capable" than men "of deciding matters of gravity," or that "the decision to terminate a pregnancy is presumptively wrong"—either of which is a constitutionally illegitimate basis for a law. *Casey*, 505 U.S. at 919 (Stevens, J., dissenting); *see also id.* at 938 (Blackmun, J., dissenting) (critiquing informed-consent requirements, coupled with waiting periods, on the ground that "[t]he vast majority of women will know this information—of the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic"); *Sundquist*, 38 S.W.3d at 23 (quoting the trial court's statement that a 48-hour delay requirement "insults the intelligence and decision-making capabilities of a woman").

A statutory waiting period that applies across the board, without consideration for individual women's circumstances, magnifies the state's harmful and stigmatizing message. Mandating a delay even for women who are victims of rape or incest further insults the dignity of those women. It implies that their decision to terminate a traumatic pregnancy may be an improper one, and it forces them to delay resolution of a harrowing event.

Such a cruel measure could only be imposed by a legislature that is blind, willfully or otherwise, to the emotional plight of women who are victims of sexual assault. The law likewise applies without exception to women who are carrying fetuses with severe anomalies. The state's second-guessing of those women's decision-making and further delay of a profoundly difficult and personal choice can only be based on the assumption that women are unable to make such important decisions maturely and reflectively without state intervention. But it is not the government's role "to second-guess [the] intensely personal and difficult decision" whether to terminate a pregnancy if the fetus is diagnosed with severe disabilities. *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393, 410 (Iowa 2017) (recognizing a claim for wrongful birth).

Moreover, when it forces women to make two trips to an abortion provider, a waiting period law aggravates the difficulties faced by poor women—particularly those who live hundreds of miles from Iowa City or Des Moines, the only cities in Iowa where surgical abortions are performed. For those women, traveling such a long distance once to obtain an abortion—which includes paying for gas, lodging, and child care, as well as forgoing wages—is already uniquely burdensome. Making a return trip days later doubles the burden, and may well prove impossible. *Cf. Whole*

Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2302, 2313 (2016) (noting, in a case striking down two Texas abortion restrictions under the U.S. Constitution, the trial court's finding that the restrictions would greatly increase the distance women had to travel to obtain an abortion, and that this would particularly burden "poor, rural, or disadvantaged women").

A statutory waiting period therefore both concretely and symbolically burdens all women, while imposing particular hardships on specific subgroups of women—poor women; rural women; women who are victims of domestic violence, rape, or incest; and women who are seeking to abort due to a fetal anomaly. The combination of infringements on the equality and liberty interests of Iowa women thus requires the application of strict scrutiny to governmental restrictions on abortion, including mandatory waiting periods.

Conclusion

The right to terminate a pregnancy is a fundamental right under both the U.S. Constitution and the Iowa Constitution. In analyzing abortion restrictions under the Iowa Constitution, however, this Court need not and should not follow the federal courts' amorphous "undue burden" framework. Instead, this Court should apply the strict scrutiny test under the Iowa Constitution in analyzing the constitutionality of abortion restrictions.

Application of strict scrutiny will both maintain consistency in the doctrine pertaining to all fundamental rights and afford recognition of the important equality interests at stake when women's fundamental procreative liberty is infringed.

Respectfully submitted,

/s/ B. Jessie Hill
B. JESSIE HILL*
Case Western Reserve University School of Law
11075 East Boulevard
Cleveland, OH 44106
Phone: (216) 368-0553
Fax: (216) 368-2086
Email: bjh11@case.edu
**Application for pro hac vice pending*

/s/ Bob Rush
BOB RUSH, AT0006817
RUSH & NICHOLSON, P.L.C.
115 First Avenue SE, Suite 201
P.O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
bob@rushnicholson.com

ATTORNEYS FOR AMICI CURIAE IOWA CONSTITUTIONAL LAW PROFESSORS

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on October 27, 2017, I served this document on all other parties to this appeal electronically by EDMS to the following attorneys of record:

PAIGE FIEDLER for AMERICAN COLLEGE OF OB/GYN
JEFFREY THOMPSON for IOWA BOARD OF MEDICINE, REYNOLDS, KIMBERLY K
ROXANNE CONLIN for IOWA COALITION AGAINST DOMESTIC VIOLENCE
THOMAS OGDEN for IOWA BOARD OF MEDICINE, REYNOLDS, KIMBERLY K
SALLY FRANK for NATIONAL ABORTION FEDERATION
RITA BETTIS for PLANNED PARENTHOOD OF THE HEARTLAND, INC., MEADOWS, JILL
ALICE CLAPMAN for PLANNED PARENTHOOD OF THE HEARTLAND, INC.

and by U. S. mail to the following attorneys of record:

SHUMAKER, HEATHER DOROTHY for NATIONAL ABORTION FEDERATION
HILL, BEATRICE JESSIE for IOWA CONSTITUTIONAL LAW PROFESSORS
PARKER, KIMBERLY ARI for AMERICAN COLLEGE OF OB/GYN
FREDIN, LESLEY RAE for AMERICAN COLLEGE OF OB/GYN
NADERI, PALOMA BLANCA for AMERICAN COLLEGE OF OB/GYN

I further certify that on October 27, 2017, I have electronically filed this document with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.

/s/ Linda J. Dean

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