SUPREME COURT NO. 14-1415
POLK COUNTY CASE NO. CVCV046429

**IN THE**
**SUPREME COURT OF IOWA**

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PLANNED PARENTHOOD OF THE HEARTLAND, INC.,
AND DR. JILL MEADOWS, M.D.,
Petitioners-Appellants,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

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

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# FINAL BRIEF* OF *AMICUS CURIAE:*
AMERICAN CIVIL LIBERTIES UNION OF IOWA

**IN SUPPORT OF PLANNED PARENTHOOD OF THE HEARTLAND, INC., AND DR. JILL MEADOWS, M.D.**

***CONDITIONALLY FILED***

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## INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations work in the courts and legislature to safeguard the rights of all citizens. This case presents two questions of fundamental rights central to the interests of the ACLU of Iowa:

(1) Whether the Iowa Constitution provides an independent state constitutional basis for protecting the right of women to access abortion; and

(2) What level of scrutiny should be applied in reviewing the Board of Medicine's regulation of pre-viability abortion under the Iowa Constitution.

The ACLU of Iowa has a longstanding interest in protecting procreative and reproductive rights, and has accumulated knowledge and expertise in this area on a national and statewide basis. Because of its experience, record of dedication, and accumulated expertise in the preservation of constitutional rights, the ACLU of Iowa believes that it can materially contribute to the legal dialogue in this case, and ultimately assist the court in rendering the best possible opinion.

## ARGUMENT

### I. Introduction

In this appeal, Appellants Planned Parenthood of the Heartland, Inc., and Dr. Jill Meadows, M.D. ask the Court to overturn the district court's ruling that upheld Iowa Admin. Code r. 653—13.10 (2014) (hereinafter "the Rule"). The Rule governs the standard of practice relating to the prescription and administration of abortion medication in Iowa. *Amicus* respectfully asks this Court to overturn the district court because the Rule violates due process under the Iowa Constitution.

The Iowa Constitution robustly protects the fundamental rights of all people in Iowa. The rights of physical autonomy, privacy, procreation, and abortion are all fundamental rights protected by the Iowa Constitution's substantive due process guarantee, and laws that limit their exercise are subject to strict scrutiny analysis. In order to survive this review, the state must prove that the Rule advances a compelling interest and is narrowly tailored to avoid unnecessarily impinging upon individuals' fundamental rights. Because the Rule restricts fundamental rights, is not narrowly tailored, and impedes the state's purported interest in protecting the health of pregnant women, it violates the Iowa Constitution's due process clause.

### II. Standard of Review

The Court may grant relief from agency action if the action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." *NextEra Energy Res. LLC v. Iowa Utils.*

*Bd.*, 815 N.W.2d 30, 44 (Iowa 2012); § 17A.19(10)(*a*)(2014). The Court does not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government. *NextEra*, 815 N.W.2d at 44 (citing *ABC Disposal Sys. v. Dept. of Natural Resources,* 681 N.W.2d 596, 605 (Iowa 2004)); *see also* Iowa Code § 17A.19(11)(*b*) (2014). Accordingly, the court reviews constitutional issues in agency proceedings de novo. *NextEra*, 815 N.W.2d at 44 (citing *Swanson v. Civil Commitment Unit for Sex Offenders,* 737 N.W.2d 300, 306 (Iowa 2007)).

## III. The Rule Violates Substantive Due Process Under the Iowa Constitution.

Similar in construction to the Fourteenth Amendment to the U.S. Constitution, article I, section 9 of the Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. "The federal and state Due Process Clauses are nearly identical in scope, import, and purpose." *State v. Hernandez-Lopez*, 639 N.W.2d 226, 240 (Iowa 2002)). However, the Iowa Supreme Court has jealously guarded its constitutional independence in the protection of fundamental rights and liberties, and has on occasion interpreted state due process to be more protective of its citizens than the U.S. Constitution. *See, e.g., State v. Cox*, 781 N.W.2d 757, 761 (Iowa 2010) (holding that the Iowa Constitution provides criminal defendants greater protection against

the admission of prior bad acts evidence than the U.S. Constitution); *Callender v. Skiles*, 591 N.W.2d 182, 187, 189 (Iowa 1999) ("Although we may look upon the United States Supreme Court's interpretations of the Due Process Clause in the federal constitution for guidance, we are not bound by these interpretations.").

The Court may construe the Iowa Constitution differently than its federal counterpart, despite the provisions containing "nearly identical language" and being "generally designed with the same scope, import, and purpose." *State v. Pals*, 805 N.W.2d 767, 771–72, 781–83 (Iowa 2011) ("[N]oting our more stringent application of state constitutional provisions than federal caselaw applying nearly identical federal counterparts."); *State v. Bruegger,* 773 N.W.2d 862, 883 (Iowa 2009); *Varnum v. Brien,* 763 N.W.2d 862, 879 n.6 (Iowa 2009) ("[W]e have jealously guarded our right to employ a different analytical framework under the state equal protection clause as well as to independently apply federally formulated principles.") (internal citations omitted).

In other words, the U.S. Constitution merely sets the minimum amount of protection state constitutions must provide; it is not the final word on the rights of Iowans. *See State v. Baldon,* 829 N.W.2d 785, 791 (Iowa 2013) ("[T]he Supreme court's jurisprudence regarding the freedom from unreasonable searches and seizures under the Fourth Amendment—or any other fundamental, civil, or human right for that matter—makes for an admirable floor, but is certainly not a ceiling."). Even when there is a clear federal jurisprudential framework, this Court has found

that the U.S. Supreme Court is not entitled to the presumption that its approach is correct. *See State v. Ochoa,* 792 N.W.2d 260, 267 (Iowa 2010). In recent years, where the Iowa Constitution does not conflict with the U.S. Constitution, this Court has "tended to emphasize independence from the federal model." *Id.* at 267.

### A. The Rule regulates the exercise of fundamental rights and therefore is subject to strict scrutiny analysis under the Iowa Constitution.

#### *a. The right to make decisions about pregnancy and abortion is fundamental under the Iowa Constitution.*

As both this Court and the U.S. Supreme Court have recognized, the rights "to have children . . . to marital privacy, to use contraception, to body integrity, and to abortion" are fundamental rights, "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Sanchez v. State,* 692 N.W.2d 812, 820 (Iowa 2005) (citing *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997)) (internal citations omitted). Further, this Court recognizes the evolving nature of our state Constitution's due process clause.[1] *See Callender*, 591 N.W.2d at 190 ("Due process protections . . . should not ultimately hinge upon whether the right sought to be recognized has been historically afforded. Our constitution is not merely tied to tradition, but recognizes the changing nature of society.") (*citing Redmond v. Carter*,

[1] The U.S. Supreme Court has also recognized that society's understanding of which rights are fundamental evolves. *See Lawrence v. Texas,* 539 U.S. 558, 572 (2003) ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.").

247 N.W.2d 268, 273 (Iowa 1976) ("Constitution is not fixed.")). *See also* William Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 Harvard L. Rev. 489 (1977) ("[T]here exists in modern American society the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive that any in our ancestors' time. . . for the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America.").

Although this Court has previously only considered the fundamental right to an abortion under the federal Due Process Clause, the Iowa Supreme Court has long recognized that physical autonomy, childbearing, privacy, and reproductive rights are independently protected as fundamental rights under the Iowa Constitution. The rights of physical autonomy, privacy, procreation, and abortion are recognized throughout the Iowa Constitution and are protected by our state constitution's due process clause. Enumeration of the fundamental rights impacted by restrictions on abortion include, but are not limited to, article I, section 1 ("All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, possessing and protecting property, and pursuing and obtaining safety and happiness."); article I, section 6 ("All laws of a general nature shall have uniform operation: the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally

belong to all citizens."; article I, section 8 ("The right of the people to be secure in their persons"); and article I, section 9 ("no person shall be deprived of life, liberty, or property, without due process of law).

A woman's right to decide for oneself whether to continue or terminate a pregnancy implicates her most basic right to bodily integrity from government intrusion and her right to make decisions about family and parenthood.[2] *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846–51 (1992); *Albright v. Oliver,* 510 U.S. 266, 271–72 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."). Protected "liberty interests have their source in the United States Constitution" and "include such things as … the right to marry and raise children." *State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008)). *See also Griswold v. Connecticut*, 381 U.S. 479 (1965) (extending the fundamental right of privacy to marital sexual relationship and contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that the right to decide to use contraception must apply equally to married and single persons); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that there is fundamental right to privacy

[2] Since medicinal abortion is only an option during the first 63 days of a pregnancy, the Rule only regulates pre-viability abortions. (App. 123, 410–15, 422–29.) However, it is worthwhile to note that the right to continue or terminate a pregnancy remains fundamental throughout the pregnancy: the only thing that potentially changes post-viability is the interest of the state. *See Casey,* 505 U.S. at 860.

extending to pre-viability abortion); *Carey v. Population Servs. Int'l.*, 431 U.S. 678 (1977) (extending *Griswold* to find constitutional protection against unjustified intrusion into individual decisions about childbearing). *See also In re Kennedy*, 845 N.W.2d 707, 713 (Iowa 2014) (Construing the statute to avoid unconstitutional interpretation that would infringe upon the fundamental nature of the right to procreate under substantive due process.) ("A statutory scheme that empowered a court-appointed actor (i.e., a guardian) to have an intellectually disabled person sterilized without some form of judicial review would raise serious due process concerns.").

This Court has "repeatedly found fundamental interests in family and parenting circumstances." *Callender,* 591 N.W.2d at 190. "[F]reedom of personal choice in matter of family life is a fundamental liberty interest." *In re A.M.H.,* 516 N.W.2d 867, 870 (Iowa 1994). Thus, while in *Sanchez*, the Iowa Supreme Court applied the federal constitutional analysis—stating that "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" are "[f]undamental liberty interests" to which "strict scrutiny applies"—it is entirely appropriate for this Court to recognize and safeguard an independent state constitutional basis for these rights. *Sanchez*, 692 N.W.2d at 820.

This Court has often found itself at the forefront of those states that recognize greater protection of individual rights by our state constitutions, above and beyond the U.S. Constitution. Indeed, in its oldest recorded decision, this Court refused to

demure to the federal courts that human beings could be property. *See In re Ralph,* 1 Morris 1 (1839). Instead, 18 years before the infamous Dred Scot decision, this Court held that equal protection under the law extended "to men of all colors and conditions," and that "no man in this territory can be reduced to slavery." *Id.* at 6, 7. Nearly a century before *Brown v. Board of Education,* this Court held that a state school board could not deny a young girl access to a public school because of her race. *Clark v. Board of Directors,* 24 Iowa 266 (Iowa 1868). As Justice Brennan urged:

> State courts cannot rest when they have afforded their citizens the full protection of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law back into the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

William Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 Harvard L. Rev. 489 (1977).

When federal jurisprudence has failed to provide adequate protection of the fundamental rights of the people of Iowa, this Court has recognized an independent state constitutional basis to safeguard core liberties. Seminal state constitutional cases recognize our greater state constitutional protection for due process under article I, section 9. *See Callender,* 591 N.W.2d at 187, 189; *State v. Cox*, 781 N.W.2d 757, 761 (2010). The same is true of equal protection of the laws enjoyed by Iowans under article I, section 7 of our state constitution. *See Gartner v. Iowa Dep't. of Public Health*,

830 N.W.2d 335, 354 (Iowa 2013) (holding that the Iowa Code provision limiting marital presumption of parentage to opposite-sex couples violated the promise of equality ensured by article I, sections 1 and 6 of the Iowa Constitution); *Bierkamp v. Rogers,* 293 N.W.2d 577, 579 (Iowa 1980); *Racing Ass'n of Cent. Iowa v. Fitzgerald,* 675 N.W.2d 1, 7 (Iowa 2004); *Varnum,* 763 N.W.2d at 896. Iowans are afforded a more meaningful right to be free from cruel and unusual punishment under article I, section 17. *See Bruegger,* 773 N.W.2d at 883; *State v. Lyle,* 854 N.W.2d 378 (Iowa 2014); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013). Finally, our Iowa Constitution provides greater security against unreasonable searches and seizures by the state. *State v. Cullison,* 173 N.W.2d 533, 538-39 (Iowa 1970); *State v. Cline,* 617 N.W.2d 277 at 284–85 (Iowa 2000); *State v. Tague,* 676 N.W.2d 197, 204, 206 (Iowa 2004); *See Ochoa,* 792 N.W.2d 260, 267 (2010); *Pals,* 805 N.W.2d at 782; *Baldon,* 829 N.W.2d 785.

This Court has a proud tradition of protecting women from overreaching and inequitable state action. As this Court has recognized, tracing jurisprudential threads all the way to our founding, the fundamental rights protected by the Iowa Constitution are no less important or less worthy of protection when they are exercised by women. *See, e.g., Clark v. Board of Directors,* 24 Iowa 266 (Iowa 1868). In 1869, Iowa became the first state in the nation to admit a woman to the bar when this Court held that facially exclusive language in a state statute should be read as gender-neutral so that it did not violate the state constitution. *To Go Free: A Treasury of Iowa's*

*Legal Heritage* 132 (1986). In 1921, Iowa was one of the first states in the nation to recognize that women were eligible to serve as jurors. *State v. Walker*, 185 N.W. 619, 626 (Iowa 1921). Iowa was also an early leader in protecting the voting rights of women. *See Coggeshell v. City of Des Moines,* 117 N.W. 309 (1908).

While this Court has not yet had the opportunity to make express our constitution's protections for women to be free from state interference in decisions about pregnancy and abortion, numerous other states have already found that their state constitutions provide more protection that the floor provided by federal jurisprudence. These states include Montana, *see Armstrong v. State*, 989 P.2d 364 (Mont. 1999); Alaska, *see Valley Hosp. Ass'n v. Mat-Su Coal. for Choice,* 948 P.2d 963 (Alaska 1997), *see also State v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001); Florida, *In re T.W.,* 551 So.2d 1186 (Florida 1989); California, *see Comm. to Defend Reproductive Rights v. Meyers*, 625 P.2d 779 (Cal. 1981); New Jersey, *see Right to Choose v. Byrne,* 450 A.2d 925 (N.J. 1982); West Virginia, *see Women's Health Center of W. Va. Inc., v. Panepinto,* 446 S.E.2d 658 (W. Va. 1993); Massachusetts, *see Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); Tennessee, *see Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000); Connecticut, *see Doe v. Maher,* 515 A.2d 134 (Conn. Super. Ct. 1986); Indiana, *see Humphreys v. Clinic for Women, Inc.,* 796 N.E.2d 247 (Ind. 2003); and Minnesota, *see Women of the State of Minnesota v. Gomez,* 542 N.W.2d 17 (Minn. 1995).

Minnesota provides an insightful parallel to Iowa because, like our constitution, the Minnesota constitution contains language that is essentially identical to the U.S. Constitution, yet nonetheless provides greater protection of the fundamental rights of its citizens. *Gomez,* 542 N.W.2d at 19 (Minnesota 1995) ("In reaching our decision, we have interpreted the Minnesota Constitution to afford broader protection than the United States Constitution of a woman's fundamental right to reach a private decision on whether to obtain an abortion, and thus reject the United States Supreme Court's opinion on this issue."). The Minnesota Court began its decision by noting that, however politically and emotionally charged access to abortion might be, the legal question was quite simple: when can a state restrict fundamental rights?

> In light of the emotional and political overtones of the abortion issue in this country, we must emphasize that this case presents a very narrow legal issue. This opinion is not based upon the morality or immorality of abortion, or the ethical considerations involved in a woman's individual decision whether or not to bear a child. In this case, the Minnesota legislature has adopted certain restrictions which impact poor women who, for medical reasons or because of rape or incest, choose to have an abortion. A similar constitutional challenge would certainly arise if the Minnesota legislature funded abortions for qualified women to limit the population of the poor, but refused to provide medical care for poor women who choose childbirth. Thus, the constitutional issues in this case concern the protection of *either* choice from discriminatory governmental treatment.

*Id.* at 19 (Minn. 1995) (emphasis in original).

In *Gomez,* the Minnesota Supreme Court considered a state statute that paralleled the federal Hyde Amendment, limiting state funding for abortion services

to narrowly-defined instances of rape, incest, or where necessary to prevent the death of the mother, while at the same time providing funds for childbirth related services. *Id.* at 23. Because the rights implicated were fundamental, the court subjected the statutes to strict scrutiny review. *Id.* at 31 ("Because the challenged provisions infringe on the fundamental right of privacy, we must subject them to strict scrutiny.") Ultimately, the Minnesota Supreme Court concluded that, "[b]ecause the State has not convinced us that the statutes in question are necessary to promote a compelling governmental interest, we hold that the challenged provisions are unconstitutional."). *Id.* at 19.

Like Minnesota, several other states have found the federal "undue burden" analysis insufficient to protect the fundamental rights implicated by laws restricting access to abortion, and have instead applied strict scrutiny. *See Armstrong v. State*, 989 P.2d 364, 374 (Mont. 1999); *State v. Planned Parenthood of Alaska*, 28 P.3d 904, 909 (Alaska 2001); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 4 (Tenn. 2000). In doing so, these states have recognized that fundamental rights are no less worthy of protection when they are asserted by women. In Iowa too, it would be entirely inconsistent with our state constitutional jurisprudence to find that substantive due process is a different and less meaningful constitutional safeguard when applied to women.

### *b. The right to obtain an abortion, like all fundamental rights under the Iowa Constitution, must be afforded strict scrutiny protection.*

Fundamental rights are "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Sanchez,* 692 N.W.2d at 820 (Iowa 2005). As such, state action that infringes upon any fundamental right must survive strict scrutiny review or be stuck down as a violation of the Iowa Constitution. *See, e.g., Varnum,* 763 N.W.2d at 880. Finding that the right to make decisions regarding the continuation or termination of a pregnancy is anything less than a fundamental right would be a significant departure from this Court's jurisprudence and would deliver a crippling blow to the rights of Iowans. As the U.S. Supreme Court recognized in *Casey,* subjecting laws that infringe upon the right to an abortion to a lower level of scrutiny would necessarily subject laws *requiring* abortion to the same lower standard. *Casey,* 505 U.S. at 859 (1992)("If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example."). *Id.* at 928 (Blackmun, J., concurrence) ("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.").

Subjecting a law restricting the fundamental right to an abortion to anything less than strict scrutiny review under the Iowa Constitution would mean that, in Iowa, fundamental rights are less important when they are exercised by women. That result is untenable. Instead, our Constitution provides stalwart protection to the fundamental rights of women, recognizing that "[t]hese rights and privileges rest upon the equality of all before the law, the very foundation principle our government." *Coger v. N.W. Union Packet Co.*, 37 Iowa 145, 153 (Iowa 1873).

**B. The Rule fails to withstand strict scrutiny analysis.**

The substantive due process inquiry under our state constitution is two-step. First, the Court determines the nature of the individual right that is affected by the challenged government action. *See State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). Once the Court determines that the nature of the individual right affected by the challenged government action is fundamental, it applies strict scrutiny to the government action. *Id.* at 662 (Iowa 2005); *State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007). For government action to survive strict scrutiny, it must be narrowly tailored to further a compelling state interest. *Id.*; *State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989). In this case, the Rule in question fails strict scrutiny, both because it fails to advance the asserted state interest in protecting the health of Iowa women, and because it has not been narrowly tailored so as to avoid unnecessary encroachment upon fundamental rights.

### *a. The state has a legitimate interest in protecting women's health, but that interest is hindered, not advanced, by the Rule.*

The interest offered by the state in support of the Rule is that it seeks to protect the health of pregnant women. Federal jurisprudence has recognized that the state does have "legitimate interests from the outset of the pregnancy in protecting the health of the woman." *Casey,* 505 U.S. at 846. However, in order for the Rule to withstand strict scrutiny analysis, it must actually further the state's compelling interest.[3] *See, e.g., In re SAJB,* 679 N.W.2d 645, 649–50 (Iowa 2004).

The Rule fails to accomplish its ostensible purpose to protect the health of the pregnant woman. (Guttmacher Inst., State Facts About Abortion: Iowa, *available at* http://www.guttmacher.org/pubs/sfaa/pdf/iowa.pdf (last visited November 5, 2014). Instead, the rule has the foreseeable consequence of delaying rural women's access to a medication abortion. (App. 361–63.) Guttmacher Inst., State Facts About Abortion: Iowa, *available at* http://www.guttmacher.org/pubs/sfaa/pdf/iowa.pdf (last visited November 5, 2014). Because medical abortion is only available in the first nine weeks, this delay will inevitably and foreseeably result in some rural women instead obtaining surgical abortions when medical abortion is no longer an option, putting their health at *greater* risk. (App. 17.) National Abortion Federation, Safety of Abortion, *available at* http://prochoice.org/wp-content/uploads/safety_of_abortion.pdf (last visited

[3] Because the Rule fails to advance its purported interest, the Court need not determine whether or not the state's interest in protection the health of women is compelling.

November 5, 2014). Indeed, research has shown that the practice the Rule eliminates did itself substantially improve the health of women. (App. 361–63.) Thus, rather than protect the health of pregnant women, the Rule will expose Iowa women to greater medical risk by forestalling or foreclosing their access to abortion services. (App. 336–37). This foreseeable outcome is simply unacceptable given the state's tenuous interests in regulating abortion[4] relative to the substantial interests of a woman in her fundamental reproductive rights and physical autonomy.

### *b. The Rule is not narrowly tailored to achieve the state's interest.*

To survive strict scrutiny analysis, a regulation affecting the exercise of a fundamental right must be narrowly tailored to achieve the state's compelling interest. *See, e.g., Santi v. Santi,* 633 N.W.2d 312, 317 (Iowa 2001) (due process protection "forbids the government to infringe" upon fundamental rights protected by the Iowa Constitution unless "the infringement is narrowly tailored to serve a compelling state interest." *Citing Reno v. Flores,* 507 U.S. 292, 301–02 (1993)). This Court has stuck down regulations that achieved compelling state interests where the regulation was not narrowly tailored to achieve those interests. *See, e.g., In re N.N.E.,* 752 N.W.2d 1, 9 (Iowa 2008) (holding that a law designed to assist in the survival of Native American tribes that presumptively furthered their survival was nonetheless

[4] This case does not require the Court to determine whether the state has an increased interest in the regulation of post-viability abortions than it does in regulating pre-viability abortions.

unconstitutional because it was not narrowly tailored.)("Assuming survival of the tribe is a compelling state interest, the [regulations] violate due process because they are not narrowly tailored.").

An examination of the Rule reveals a total absence of narrow tailoring to achieve its stated goal. The Board of Medicine has used a very broad brush to ban the use of telemedicine for the provision of medical abortion services for all Iowa women in all cases. In so doing, it fails to take into account the individual medical and life circumstances of a woman seeking to terminate a pregnancy. For example, no exception is made for women who may, for medical or other reasons, be unable to travel for an in-person examination. For her, the lack of an available physician willing and able to provide abortion services locally may well mean that she is unable to access abortion services in time to have an early term abortion, a decision the Iowa Constitution demands she be allowed to make.

Because the Board failed to narrowly tailor the Rule, more than half of Iowa women will not be able to access medication abortion in their own county. Guttmacher Inst., State Facts About Abortion: Iowa, *available at* http://www.guttmacher.org/pubs/sfaa/pdf/iowa.pdf (last visited November 5, 2014). In fact, the Rule will make it impossible to access a medication abortion in nearly 90 percent of Iowa Counties. *Id.* Further, the Rule is contrary to the accepted medical advice of experts in the field it regulates. (App. 422–29). Because the Rule is not

narrowly tailored to accomplish the state's interest, it fails strict scrutiny and must be invalidated in order to protect the fundamental rights of women in our state.

## CONCLUSION

Because the Rule regulates a woman's fundamental right to obtain an abortion and impedes, rather than promotes, the compelling state interest of protecting the health of pregnant women, it violates substantive due process under the Iowa Constitution. Accordingly, *amicus curiae* the ACLU of Iowa respectfully urges this Court to overturn the district court's decision in this case.

Respectfully submitted,

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