IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., EMMA GOLDMAN CLINIC, and JILL MEADOWS, M.D., Petitioners, v. KIM REYNOLDS ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE083074 **BRIEF IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

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COME NOW Petitioners, Planned Parenthood of the Heartland, Inc. ("PPH"), the Emma Goldman Clinic ("EGC"), and Jill Meadows, M.D., and for their Motion for Summary Judgment, pursuant to Iowa R. Civ. P. Rule 1.981, state:

INTRODUCTION

Thousands of Iowa women each year, and one in four women nationally, are faced with an unintended pregnancy, or medical complications during their pregnancy, and decide to end that pregnancy. As the Iowa Supreme Court recently affirmed in *Planned Parenthood of the Heartland v. Reynolds* (*PPH II*), 915 N.W.2d 206 (Iowa 2018), the Iowa Constitution guarantees women a fundamental right to make that decision free from governmental intrusion because "[a]utonomy and dominion over one's body go to the very heart of what it means to be free." *PPH II*, 915 N.W.2d at 237. Access to abortion is also critical to women's health, as has been confirmed by numerous medical and health organizations, such as the American College of Obstetricians and Gynecologists, the American Medical Association, the American Academy of Family Physicians, the American Osteopathic Association, the American Academy of Pediatrics, and the American Psychiatric Association.

Section 4 of Senate File 359 ("the Ban") flagrantly violates that fundamental right to autonomy and knowingly endangers women. The Ban outlaws abortion from the moment embryonic cardiac tones are detectable by ultrasound, which occurs in the earliest weeks of pregnancy before many women even know that they are pregnant. In practical effect, the Ban would prohibit virtually all abortions in the state. In the forty-five years since *Roe v. Wade*, 410 U.S. 113 (1973) was decided, no court, federal or state, has upheld such an inhumane law. In *PPH II*, the Iowa Supreme Court held that a law that restricts women's access to abortion is subject to strict scrutiny, and is invalid unless the state demonstrates that it is narrowly tailored to a

compelling state interest. The Ban—which does not just restrict, but outlaws abortion virtually entirely—unquestionably, and as a matter of law, violates this standard.

FACTUAL BACKGROUND

I. Material Facts

Under the Ban, when a woman comes to her provider seeking an abortion, the provider must first perform an ultrasound to detect embryonic or fetal cardiac activity. S.F. 359, § 4(1) (2018) (to be codified at Iowa Code § 146C.2(1)). If any such activity is detected, the provider is prohibited from proceeding with the abortion, except in certain cases of rape, incest, or medical emergency.[1] A provider who violates the Ban may lose her license. S.F. 359, § 4(5) (2018) (to be codified at Iowa Code § 146C.2(5)); Iowa Code § 148.6(2)(c).

This prohibition is unconstitutional as a matter of law based on two indisputable facts: 1) embryonic or fetal cardiac activity is detectable as early as six weeks into a pregnancy, measured from the first day of the last menstrual period (lmp); and 2) a six-week embryo is not capable of sustained survival outside of the pregnant woman's uterus. *See* Statement of Undisputed Facts. Based on these facts alone, the Ban is plainly unconstitutional and this Court should enter summary judgment.

[1] The Act contains exceedingly narrow exceptions for certain cases of reported rape, incest, medical emergency or fatal fetal anomaly. *See* S.F. 359 § 2(6) (2018) (to be codified at Iowa Code § 146A.1(6)) (exception for *physical* conditions that are life-threatening or pose a "serious risk of substantial and irreversible impairment of a major bodily function"); S.F. 359, § 3(4)(a) (2018) (to be codified at Iowa Code § 146C.1(4)(a)) (exception for pregnancy resulting from rape that was reported within 45 days of the incident); S.F. 359, § 3(4)(b) (2018) (to be codified at Iowa Code § 146C.1(4)(b)) (exception for pregnancy resulting from incest reported within one hundred and forty days); S.F. 359, § 3(4)(d) (2018) (to be codified at Iowa Code § 146C.1(4)(d)) (exception for anomalies certified as "incompatible with life").

II. Background Facts

In *PPH II*, the Iowa Supreme Court made a number of factual findings about abortion based on a full trial record. While these findings are not material to the narrow legal issue presented here—whether the legislature can constitutionally *ban* abortion—Petitioners briefly summarize them here because they provide relevant context and help to crystalize why the Ban is so *egregiously* unconstitutional.

Abortion is a common medical procedure that women choose for personal reasons related to their own and their family's health and welfare:

> Between 25% and 35% of women in the United States have an abortion during their lifetime . . . Sixty percent of abortion patients already have at least one child and many feel they cannot adequately care for another child. Other women feel they are currently unable to be the type of parent they feel a child deserves. Patients frequently identify financial, physical, psychological, or situational reasons for deciding to terminate an unplanned pregnancy . . . Sometimes, women discover fetal anomalies later in their pregnancies and make the choice to terminate.

PPH II, 915 N.W.2d at 214–15.[2] Without access to the procedure, "women may need to place their educations on hold, pause or abandon their careers, and never fully assume a position in society equal to men." *Id*. at 245.

[2] The Court further found that women have only limited control over the timing of when they can obtain an abortion:

> [M]ost women do not discover a pregnancy until at least five weeks after their last menstrual period. Other women cannot discover a pregnancy until later due to their contraception masking the symptoms of pregnancy. Women take the necessary time to research their options, talk to their loved ones, and make the decision whether to continue with their pregnancy. If a woman decides to seek an abortion, she must then raise the funds to travel to and pay for . . . [treatment]. If a woman does not have money to put gasoline in her car, she cannot go to the appointment. Women therefore cannot simply schedule their initial appointment earlier.

Id. at 243. While these facts are not material to the constitutionality of the Ban (because, as explained below, any ban on pre-viability abortion is per se unconstitutional), they make plain why the Ban's six-week cut-off, in practice, would effectively eliminate abortion access in Iowa.

For many women (and their families), access to abortion is also a matter of physical and emotional health and safety. Abortion is more than ten times safer than carrying to term, and some women have health conditions that place them at particular risk if they carry to term. *Id.* at 215. A significant percentage of women seeking an abortion—10.8% in one Iowa study—are suffering intimate partner violence. *Id.* at 231. Indeed, many of these women become pregnant because of reproductive coercion by an abusive partner, a common form of abuse used to maintain control. *Id.* at 220–21. For these women, accessing abortion is critical to their safety and that of their family, and often instrumental to their escaping abuse. *Id.* Abortion is also a mental health imperative for "victims of sexual assault and incest," many of whom "are extremely distraught," experience pregnancy "as a constant physical reminder of the assault," and seek "termination [as] an important step in the recovery process." *Id*. at 220.

Not only do these compelling reasons underlie women's decisions to seek clinical abortion care but, when that care becomes difficult or impossible for them to access, these same reasons drive some women to "attempt to take matters into their own hands to terminate their pregnancy, at great risk to their own health and safety." *Id*. at 230.

ARGUMENT

I. Standard for Summary Judgment

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 235 (Iowa 2015). Courts "can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013).

II. Petitioners are Entitled to Summary Judgment

The Ban is plainly unconstitutional under the Iowa Supreme Court's recent decision in *PPH II*. In that case, the Court struck down a law that required women seeking an abortion to receive certain state-mandated information and then wait at least seventy-two hours before returning to the clinic for the procedure. *PPH II*, 915 N.W.2d 206.Specifically, the Court held that this law violated both the Due Process and Equal Protection guarantees of the Iowa Constitution. *Id.* at 212. Given that the Iowa Constitution bars the state from imposing *delay* on women seeking an abortion, it plainly bars the state from *prohibiting* pre-viability abortions altogether, as the Ban does. *See also Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.* (*PPH I*), 865 N.W.2d 252 (Iowa 2015) (invalidating ban of the use of telemedicine to provide medication abortion).

PPH II squarely holds that abortion is a fundamental right under the Iowa Constitution, for a number of reasons. First, at a general level, whether to carry a pregnancy to term is among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *PPH II*, 915 N.W.2d at 236 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Second, more specifically, pregnancy and childbirth are a unique bodily "sacrifice" because they entail "physical constraints," "pain" and "suffering," and laws *imposing* that sacrifice on women deprive them of bodily autonomy. *PPH II*, 915 N.W.2d at 236 (quoting *Casey*, 505 U.S. at 852). And finally, individuals have a fundamental liberty interest in deciding for themselves whether to undertake the "life-altering obligations and expectations" of parenthood. *PPH II*, 915 N.W.2d at 237.

As the Court recognized, this constellation of interests in bodily and decisional autonomy "go to the very heart of what it means to be free" and "to shape, for oneself . . . one's own identity, destiny, and place in the world." *Id.* And as the Court also recognized, these interests are also protected by the Constitution's Equal Protection guarantee because they are "[p]rofoundly linked

to . . . [a woman's] 'ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.'" *PPH II*, N.W.2d at 245 (quoting Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985)); *PPH II*, N.W.2d at 237 (recognizing that societal expectations related to parenthood "continue[] to fall disproportionately upon the child's mother").

After holding that women have a fundamental right to access abortion, the Court next considered whether the proper standard for enforcing that right was "strict scrutiny," under which restrictions are presumptively invalid, *see Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998), and a state can only rebut that presumption by showing that the classification is narrowly tailored to serve a compelling government interest, *In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001), or the less protective federal "undue burden standard," under which the state must merely demonstrate that the benefits of a law outweigh its burdens, *see Whole Woman's Health v. Hellerstedt (WWH)*, 136 S. Ct. 2292 (2016). The Court held that strict scrutiny was necessary because anything less would "relegate the individual rights of Iowa women to something less than fundamental. It would allow the legislature to intrude upon the profoundly personal realms of family and reproductive autonomy, virtually unchecked, so long as it stopped just short of requiring women to move heaven and earth." *PPH II*, 915 N.W.2d at 240.

The Ban cannot begin to survive strict scrutiny. Given that women have a fundamental right to end an unwanted pregnancy, the state cannot possibly have a compelling interest in preventing women from doing so at the earliest stage of their pregnancy, as the Ban does. Indeed, the Ban would fail even the less protective federal standard.

Federal precedent could not be more clear or unanimous that, before viability, the state may not prevent a woman from ending an unwanted pregnancy. This straightforward rule was

announced in *Roe*, 410 U.S. at 113, and has been reaffirmed repeatedly and consistently in the more than four decades since. *See, e.g.*, *WWH*, 136 S. Ct. at 2300 (reaffirming that state may not enact a law where the "purpose or effect" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Casey*, 505 U.S. at 871 (reaffirming "[t]he woman's right to terminate her pregnancy before viability"); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), *cert denied*, 136 S. Ct. 981 (2016) (striking down six-week ban); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016) (striking down twelve-week ban); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (striking down twenty-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), *cert denied*, 117 S. Ct. 2453 (1997) (striking down twenty-week ban); *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-00171-CWR-FKB, 2018 WL 1567867 (S.D. Miss. Mar. 20, 2018) (granting temporary restraining order against fifteen-week ban).

The Ban is even harsher than virtually all of the laws invalidated in the precedent cited above. It is far harsher than the abortion restrictions recently invalidated under the more protective Iowa Constitution in *PPH II* and *PPH I*. As a matter of law, it violates both the Due Process and the Equal Protection guarantees of the Iowa Constitution.

CONCLUSION

WHEREFORE, Petitioners pray this Court grant their Motion for Summary Judgment and permanently enjoin Respondents from enforcing the Act.

Respectfully submitted,

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