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.	No. EQCE083074 **PETITIONERS' RESISTANCE TO SAVE THE 1'S MOTION TO INTERVENE**

COME NOW Petitioners, Planned Parenthood of the Heartland, Inc., Emma Goldman Clinic, and Jill Meadows, M.D., by and through the undersigned counsel, and in support of their Resistance to Save the 1's Motion to Intervene as Petitioner, respectfully submit this brief.

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STATEMENT OF THE CASE

Petitioners, Planned Parenthood of the Heartland, Inc., Emma Goldman Clinic, and Jill Meadows, M.D. filed a petition challenging Sections 3 and 4 of Senate File 359 (the "Ban"), to be codified at Iowa Code § 146C.1–2 (2018). On June 19, 2018, Save the 1 (hereinafter "Proposed Intervenor") filed a Motion to Intervene as Petitioner ("Motion to Intervene").

ARGUMENT

Proposed Intervenor seeks to intervene in this case to pursue an extraordinary, unprecedented and wholly improper remedy: the *extension* of the Ban to cover narrow categories of women that the legislature chose to exempt on humanitarian grounds: namely, women pregnant as a result of rape or incest or who have received a diagnosis of a fetal anomaly "incompatible with life."[1] Proposed Intervenor is not entitled to intervene as of right because it fails to assert a true legal interest in the outcome of the litigation, and even if that were not the case, any interest it has would not be impaired by resolution of the litigation. Nor is it entitled to permissive intervention; the claims it intends to make do not overlap factually or legally with Petitioners' claims, and its intervention would unduly delay Petitioners' litigation and unnecessarily increase the expenditure of time and resources for all parties hereto as well as this Court.

[1] Proposed Intervenor seeks to challenge the Ban's fetal anomaly exception, apparently on the misconception—repeated throughout their submissions—that it applies to all anomalies, whether lethal or not. That is incorrect. The Ban only contains an exception for anomalies that a physician has certified are "incompatible with life." S.F. 359, § 3(4)(d) (Iowa 2018) (to be codified at Iowa Code § 146C.1(4)(d)). And while Proposed Intervenor complains that the Ban leaves physicians free to rely on their own "best guess," Pet. for Declaratory and Inj. Relief ("Intervenor's Pet.") ¶ 15 (June 19, 2018), to the contrary the Ban uses an objective "reasonably prudent physician" standard that subjects physicians to professional discipline if the Board of Medicine disagrees with their application of the exception, S.F. 359, § 3(6) (Iowa 2018) (to be codified at Iowa Code § 146C.1(6)). While the exception itself lacks the necessary clarity to protect physicians who apply it in good faith, *see* Aff. of Jill Meadows in Supp. of Pet'rs' Mot. for Temp. Inj. Relief (May 15, 2018) ¶ 25, there is no conceivable theory—nor does Proposed Intervenor offer one—under which this extremely narrow exception for conditions "incompatible with life" somehow violates the equal protection rights of living individuals with disabilities.

That Proposed Intervenor can have no protectable interest in forcing rape and incest victims to carry to term is made crystal clear by the Iowa Supreme Court's recent decision in *Planned Parenthood of the Heartland v. Reynolds (PPH II),* No. 17-1579 (Iowa June 29, 2018),[2] recognizing the unique need these victims have to access abortion:

> [V]ictims of sexual assault and incest have unique interests in terminating a pregnancy as quickly as possible. Many rape and incest survivors are extremely distraught, and a pregnancy serves as a constant physical reminder of the assault. For many, termination is an important step in the recovery process.

PPH II, No. 17-1579, slip op. at 18; *see also id.* at 40 (noting that "[a] pregnancy that results from rape or incest is a constant reminder of the assault, which is traumatizing for victims," and faulting waiting period law for *not* including an exception for these situations).

I. Proposed Intervenor is not entitled to intervention as of right

The Iowa Rules of Civil Procedure authorize intervention of right "[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action *and* the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Iowa R. Civ. P. 1.407(1)(b) (emphasis added). Because Rule 1.407 tracks the language of Federal Rule of Civil Procedure 24, "federal authorities that construe and apply the federal rule are persuasive although not conclusive for similar construction and application of the Iowa rule." *In re K.P.*, 814 N.W.2d 623, 3 n.1 (Iowa Ct. App. 2012) (internal citations omitted).

Moreover, although courts construe these requirements liberally, "[they] must be certain that the applicant has asserted a legal right or liability that will be directly affected by the

[2] Opinion can be found at https://www.iowacourts.gov/courtcases/439/embed/SupremeCourtOpinion

litigation." *In re H.N.B.*, 619 N.W.2d 340, 343 (Iowa 2000) (citing Iowa R. Civ. P. 75) (finding former foster parents did not possess sufficient interest to intervene in parent-child termination proceedings). An indirect, speculative, or remote interest does not grant a right to intervene in litigation. *Id.*; *State ex rel. Miles v. Minar*, 540 N.W.2d 462, 465 (Iowa Ct. App. 1995) (citing Iowa R. Civ. P. 75) (upholding denial of motion to intervene filed by the spouse of a father in a child support case brought by the mother). This requirement mirrors the established federal law that, to intervene as of right and seek any additional remedy, an intervenor must establish standing, i.e., a legal interest, and injury traceable to the defendant. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right.").

A. Proposed Intervenor has not shown a true legal interest that is at stake in this case.

Proposed Intervenor claims that it has Iowa members and that these members' right to equal protection is at stake in this case because the challenged Ban contains exceptions for certain instances of rape, incest and lethal fetal anomalies. Mot. to Intervene ¶ 4–6. This claim fails for a number of reasons. To begin with, even assuming arguendo Proposed Intervenor's unsupported assertion that it has standing to assert its members' claims, it fails to specify the relevant circumstances of its Iowa members or how these circumstance would support constitutional claims against the Ban's enforcement.

To the extent Proposed Intervenor proposes to sue on behalf of Iowa members who have been pregnant as the result of rape or incest, or have received diagnoses of lethal fetal anomalies, these members have no cognizable claim. While Petitioners sympathize with any women who have suffered through these very painful situations, Proposed Intervenor has failed to articulate how their members' equal protection rights are directly, specifically and concretely violated by the state's decision not to *compel other* victims of rape or incest to carry an unwanted resulting

pregnancy to term. Proposed Intervenor's assertion that the Ban's exceptions are personally painful to these women, *see* Intervenor's Pet. ¶ 18, does not meet the legal requirement for intervention that an individual establish a specific, protectible, legal interest. *See In re H.N.B.*, 619 N.W.2d at 343 (citing Iowa R. Civ. P. 75) (indirect, speculative, or remote interests do not support intervention); *Planned Parenthood of Wis., Inc. v. Doyle,* 162 F.3d 463, 465 (7th Cir. 1998) (refusing to allow two men "passionately opposed to abortion" whose wives were pregnant but had no intentions of having abortions to intervene in case challenging abortion restrictions); *cf. Alons v. Iowa Dist. Ct. for Woodbury Cnty.,* 698 N.W.2d 858, 870–71 (Iowa 2005) (no standing for opposite-sex couples to seek certiorari in suit over same-sex unions, despite their claim that recognizing same-sex unions would dilute the value of their traditional marriages).

Similarly, to the extent Proposed Intervenor proposes to sue on behalf of Iowa members who were conceived in rape or incest, it has failed to articulate how their right to equal protection encompasses enlisting the state in compelling *other* current and future victims of rape or incest to carry their unwanted and traumatic pregnancies to term.[3] Proposed Intervenor posits that the rape and incest exceptions, rather than simply expressing the humanitarian position that women pregnant as the result of abuse must be given the bare minimal autonomy to decide whether to carry that exceptionally painful pregnancy to term, somehow devalue the lives of *individuals* whose mothers *did* decide to continue their pregnancies. Intervenor's Pet. ¶ 19. There is no evidence to support this conjecture (certainly none offered), and the contrary conjecture is equally if not more plausible: children born from these horrific circumstances are more likely to be

[3] While Proposed Intervenor repeatedly refers to the Ban's exceptions as targeting "people," it is well established that, before viability, embryos and fetuses are not considered "persons" holding constitutional rights. *Roe v. Wade*, 410 U.S. 113, 156–58 (1973); *Abrams v. Foshee,* 3 Iowa 274, 278–80 (Iowa 1856).

welcomed into the world because their mother carried to term voluntarily rather than under legal compulsion.

Moreover, conjecture alone is not sufficient to establish an interest sufficiently concrete to establish standing and a right to intervene. *U.S. v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 840–41 (8th Cir. 2009) (intervention not warranted based on "speculative beliefs" that the outcome of a case might injure proposed intervenor); *cf. Alons*, 698 N.W.2d at 870–71 (speculation that same-sex unions might undermine traditional marriage too anticipatory to support petition for certiorari by non-parties). Tellingly, Proposed Intervenor fails to cite a single case that would stand for the disturbing proposition it makes: that its Iowa members have a cognizable claim to have this Court strike the abortion ban's narrow exceptions, and force rape and incest victims to carry unwanted pregnancies to term to vindicate rights asserted by *other*, unrelated individuals.[4]

The Motion to Intervene also fails because the rules do not support "intervention by a party with no interest upon which it could seek judicial relief in a separate lawsuit." *Metro. St. Louis Sewer Dist.*, 569 F.3d at 840–41; *cf. U.S. v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 n. 3 (11th Cir. 1991) ("Denial of intervention cannot impair a nonparty's ability to protect its interests if that nonparty would have no legal protection for those interests in any event."). This requirement also stems from the requirement that, particularly where an intervenor seeks additional remedies not sought in the original litigation, she must establish standing, including a redressable injury. *See*

[4] Proposed Intervenor's proposition, moreover, is impossible to reconcile with recent Iowa precedent and decades of federal precedent recognizing that—even absent the uniquely traumatic circumstances of rape and incest—abortion is a quintessentially *private* decision and an *individual* right, *PPH II*, No. 17-1579, slip op. at 18, 40 (finding fundamental right to abortion under the Iowa Constitution, and also recognizing unique need of rape and incest victims to access abortion); *see generally* Br. in Supp. of Pet'rs' Mot. for Temp. Inj. Relief at 10–11 (May 15, 2018); *see also Wicklund v. State*, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999) (Order on Summ. J.) (parents' rights to control their children cannot trump a young woman's right to end an unwanted pregnancy).

Town of Chester, 137 S. Ct. at 1651 ("For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right."); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1999) (to establish standing, a proposed plaintiff must establish not only injury but also redressability); *Alons,* 698 N.W.2d at 869 (finding *Lujan* standard persuasive). Proposed Intervenor cannot meet this requirement.

Specifically, Proposed Intervenor seeks not to limit the Ban's effects restricting women's medical decision-making but actually to *extend* them to categories of pregnant women that the legislature expressly decided *not* to subject to the Ban. *See* Intervenor's Pet. ¶ 42(b) (requesting that the Ban's exceptions be severed and invalidated). But severance is a judicial mechanism not for *extending* a statute's reach beyond legislative intent, but rather for preserving a narrower version of a partially-constitutional statute *when doing so accords with legislative intent*. *See* Iowa Code § 4.12 (2016) (authorizing severance where an Act is valid in some *applications* and not others, but not for purposes of creating *new* applications); *Clark v. Miller*, 503 N.W.2d 422, 425 (Iowa 1993) ("We have an obligation to *preserve* as much of a statute as possible within constitutional restraints. We declare unconstitutional only that portion of the statutory section that violates constitutional provisions." (emphasis added) (citations omitted)); *State v. Blyth*, 226 N.W.2d 250, 262 (Iowa 1975) (severance only proper where "that which *remains* is complete in itself and capable of being executed in accordance with the apparent legislative intent, or purpose, wholly independent of that which was rejected, it must be sustained to that extent" (emphasis added)); *see also Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 329–31 (2006).

As Proposed Intervenor itself acknowledges, the exceptions were added "to appease politicians in the House who said they *would not approve* the bill without" these exceptions. Intervenor's Pet. ¶ 11 (emphasis added). Thus, by its own terms, its proposed solution is legislative,

not judicial, and as such is wholly improper here. "If it appears the legislature probably would not have enacted the statute at all if the invalid part had been eliminated, then the whole must fall." *State v. Monroe*, 236 N.W.2d 24, 36 (Iowa 1975).

For these reasons, whatever concern Proposed Intervenor may have about this litigation, it has "no interest upon which it could seek judicial relief in a separate lawsuit," *Metro. St. Louis Sewer Dist.*, 569 F.3d at 840, and therefore no right to intervene in this case.

B. This case does not impede Proposed Intervenor's interests

Even if Proposed Intervenor had a proper claim and proposed a proper remedy, its motion to intervene would still fail because it fails to meet the *independent* requirement of showing that its rights "may be impaired or impeded by the disposition of the action, current proceedings." *Cf. Varnum v. Brien*, No. CV 5965, 2006 WL 4826212, at *4 (Iowa Dist. Aug. 9, 2006), ("[m]ere speculation that a case may have an impact on" Proposed Intervenor's interests not sufficient to support intervention); *see also Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (intervenor must stand "to gain or lose by the direct legal operation of the district court's judgment"); *Metro St. Louis Sewer Dist.*, 569 F.3d at 840 ("A court must carefully analyze whether the proposed intervenor's asserted interest really is bound up with the subject matter of the litigation," and intervention is not warranted if intervenor's interests are "tangential" to "core issues" in the case).

Here, Proposed Intervenor cannot make that showing because resolution of Petitioners' claims—that banning abortion violates the due process, liberty, and equal protection rights of Petitioners and their patients under the Iowa Constitution—will not impair Proposed Intervenor's ability to challenge the Ban's narrow exceptions. To the contrary, the constitutionality of the Ban's exceptions is simply not at issue in this case. The Ban is enjoined pending final resolution of Petitioners' claims. If Petitioners succeed and the abortion ban is held unconstitutional, the Ban

will never take effect and the harm Proposed Intervenor claims will never materialize.[5] If, on the other hand, this Court rejects Petitioners' challenge, Proposed Intervenor will be in exactly the same position it would have been had Petitioners not brought this action, and will be equally free to challenge the Ban at that time.

Thus, the Motion to Intervene fails because, whether this Court upholds or invalidates the Ban, neither decision would impair any conceivable interest Proposed Intervenor has. *See Edgington v. Nichols*, 49 N.W.2d 555, 558 (Iowa 1951) (denying intervention where "[i]t is of no legal import to intervenor, in the trial of her cause of action, which party to the original suit may be successful"); *Akina v. Hawaii*, 835 F.3d 1003, 1012 (9th Cir. 2016) (no ground for intervention as of right where "the prospective intervenor['s] claims would raise entirely different issues from those raised by the plaintiffs, and that the proposed intervenor[] could adequately protect [its] interests in separate litigation").

II. Proposed Intervenor has failed to provide compelling reasons for permissive intervention in this case, and intervention would cause undue delay and burden.

Petitioners respectfully ask that this Court exercise its discretion against permissive intervention in this case. Permissive intervention may be granted at the judge's discretion when a proposed intervenor shares a claim or defense in the litigation that have a question of law or fact in common. Iowa R. Civ. P. 1.407(2),(4). Such is not the case here; there is no factual or legal overlap between Petitioners' claims that the Ban violates pregnant *women*'s fundamental rights and Proposed Intervenor's claims that the Ban's *exemptions* violate the equal protection rights of various *other* allegedly affected individuals.

[5] As Petitioners fully briefed, and Respondents did not bother to refute, it is likely that Petitioners will succeed on the merits of this case based on decades of unbroken precedent, including the Iowa Supreme Court's recent decision in *PPH II*.

Moreover, "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Iowa R. Civ. P. 1.407(2). "The judicial process cannot be a mere 'vehicle for the vindication of the value interests of concerned bystanders.'" *Varnum*, 2006 WL 4826212, at *5 (quoting *Alons*, 698 N.W.2d at 868 and *Valley Forge Christian Coalition v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) and *Bowers v. Bailey*, 21 N.W.2d 773, 776 (Iowa 1946) ("The law does not permit mere intermeddlers to resort to the courts where no real reason exists and no rights are affected.")).

In *Varnum*, the trial court declined to grant permissive intervention to the legislator applicants. *Varnum*, 2006 WL 4826212, at *6. It reasoned that applicants' wish to merely "weigh in" on the issues is not equivalent to a claim or defense. *Id.* Rather, the court pointed out, "in the context of permissive intervention, 'claims or defenses' must 'refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impe[n]ding law suit.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997)). Here, as in *Varnum*, Proposed Intervenor does not truly have a legal interest amounting to a claim or defense, but rather, wishes to weigh in on the matter. *See supra* Argument I.A; *cf. Alons*, 698 N.W.2d at 874 (reasoning that if groups were allowed to involve themselves in cases "simply because of ideological objections or strongly held philosophical beliefs . . . . there would be no limits to the petitions brought," and that "Iowa law has never permitted such unwarranted interference in other peoples' cases" (internal quotation marks omitted)).

Furthermore, the proposed intervention will only have the effect of delaying and complicating this case (with issues that are likely to become moot) and requiring significant resources from the parties and the Court, as well as inviting further petitions from and indefinite

number of additional state, national, and international entities who wish to weigh in, and without contributing to judicial efficiency or ability to try the facts and decide on issues of law. *See Rants v. Vilsack*, No. CV 4838, 2003 WL 25802812, at *16 (Iowa Dist. Oct. 14, 2003) (denying proposed intervention after finding it "will increase the costs and complexity of this case, the time and burdens imposed on the Court and the original parties, and will delay the prompt disposition of . . . the sole issue raised in Plaintiffs' Petition" by adding "broad and separate claims [that] raise factual and legal issues which fall outside the narrow question of law at issue"); *Edmonson v. Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967) (denying intervention where "with this intervention appellant has injected additional issues that may well complicate the resolving of the primary issues between the parties to this suit, and unduly delay the trial of the original suit"); *cf. Akina v. Hawaii*, 835 F.3d at 1012 (in context of denying intervention as of right, considering that proposed intervenor claims "would expand the suit well beyond the scope of the current action" (quotation marks omitted)); *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (in same context, noting that proposed intervenor "not permitted to inject new, unrelated issues into the pending litigation.").

Given the factors strongly weighing against permissive intervention, Petitioners respectfully request this Court deny Proposed Intervenor's Motion.

CONCLUSION

Proposed Intervenor is not entitled to, and should not be granted, intervenor status in this case. For these reasons, Petitioners respectfully request this Court to deny their motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date I served the foregoing document on all the Defendants/Respondents and Proposed Intervenor in this case through electronic means, via email, by agreement:

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