IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., on behalf of itself and its patients, Petitioner, v. KIM REYNOLDS ex rel. STATE OF IOWA, et al., Respondents.	Equity Case No. EQCE084508 **REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In their resistance, Respondents primarily advance arguments already refuted in previous summary judgment submissions by Petitioner Planned Parenthood of the Heartland (PPH). The new points that Respondents advance are based on a misreading of case law, illogical premises, or both. For these reasons, and those described in PPH's motion for summary judgment and its resistance to Respondents' cross-motion, this Court should grant summary judgment to PPH, declare the Act unconstitutional under the Iowa Constitution, and enjoin the Act's enforcement.

ARGUMENT

I. The Act Violates PPH's Right to Equal Protection Under the Iowa Constitution.

A. As PPH has explained, Respondents attempt to defend the Act's consistency with the Iowa Constitution's equal-protection guarantee by asserting three state interests served by the Act, none of which passes muster. Pet'r's Resistance to Resp'ts' Cross-Mot. for Summ. J. ("Pet'r's Resistance") at 11–14 (Jan. 21, 2020). Respondents now contend that PPH and this Court in its temporary injunction ruling misunderstood one of those state interests. Specifically, Respondents state that they have not questioned whether abortion providers are "less scrupulous" than other potential grantees, but that the legislature could reasonably have concluded that an "abortion provider who is 'less scrupulous' than Planned Parenthood might exploit relationships developed through CAPP and PREP programming to encourage abortion over childbirth outside the scope of the programs—especially if abortion represents a significant revenue stream for that provider." Resp'ts' Resistance to Pet'r's Mot. for Summ. J. ("Resp'ts' Resistance") at 3 (Jan. 21, 2020).

Respondents' latest description of the State's asserted interest is even more constitutionally indefensible than its earlier one. First, Respondents' contention that the Act was intended to prevent grantees "less scrupulous" than PPH from leveraging CAPP and PREP funding to promote

their abortion services is at odds with the stipulated record in this case, which demonstrates that there are only two grantees affected by the Act's prohibition on funding to abortion providers (PPH and Unity Healthcare DBA Trinity Muscatine), and that the legislature knew it. Respondents have now made clear they are not arguing that PPH is the supposed "unscrupulous" provider the Legislature might have had in mind when it adopted the Act. And Unity Healthcare, far from being the target of the Act, received from the Iowa Legislature an express exemption so that it could continue receiving CAPP and PREP funding. *See* Stipulated Statement of Facts ("SUF") ¶¶ 48–49. Even under rational-basis review, the law's differential treatment of PPH from Unity Healthcare and all other grantees must at least be based on some "plausible policy justification," and the relationship between that "classification and the policy justification" must be "rational." Ruling on Mot. for Temporary Injunctive Relief at 10 (May 29, 2019) (citing *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009)). Given the stipulated record, Respondents have not put forward a rationale for the Act that is in any way plausible.

Moreover, Respondents' argument that the Legislature was concerned with an unidentified "unscrupulous" abortion provider, not PPH, is expressly contradicted by the legislative record. Legislative opponents and supporters alike expected that PPH was the only current grantee who would be excluded from funding. As Senator Costello, the Senate floor manager for the bill, explained, "We are not targeting [Planned Parenthood] by name, but the fact that *they* provide abortions is the criteria that we're setting up to not be able to participate in this program." Iowa Sen. Debate of Apr. 26, 2019, 4:02:28–32 (emphasis added). After being asked to explain the Act's exclusion of PPH alongside an exemption for Unity Point, Senator Costello answered: "We don't feel that the people of Iowa should be required to do business with people that provide abortions." *Id.* at 4:01:11–28; Mem. of Authorities in Supp. of Pet'r's Mot. for Summ. J. ("Pet'r's Summ. J.

Br.") at 13 (collecting other record cites demonstrating legislators' knowledge that the Act would target PPH).

Under rational-basis review, Respondents may defend the Act based on a judgment the "legislature *could* have made," without supporting that judgment with actual proof. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 33 (Iowa 2019) (internal quotation marks omitted). But where, as here, Respondents assert that the Act was adopted to serve an asserted state interest that is contradicted by the legislative record itself, the purpose purportedly served by the challenged classification lacks "any basis in fact." *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016). Accordingly, it cannot be a "realistically conceivable" basis for the challenged law, even assuming that the least stringent form of constitutional review applies. *Id.* And as PPH has explained, the Legislature's targeting of PPH demonstrates the kind of "invidious discrimination" that is necessarily irrational. *Varnum*, 763 N.W.2d at 879, 887 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)); *see also, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Finally, the "unscrupulous" provider conjured by Respondents is a fiction. Under Respondents' theory, some theoretical grantee would aim to provide *more* abortions, yet believe that it could do so by accepting grant funds to teach youth about how to *avoid* unintended pregnancies, many of which would otherwise end in abortion. Moreover, that theoretical grantee would have to believe it could accomplish these goals by participating in a program where—as Respondents concede—the grantee could not talk about abortion, including its provision of abortion, in any way. *See* SUF ¶¶ 27, 32. That theory defies common sense and is an affront to real providers of comprehensive reproductive health care like PPH, which honors its patients' decisions about what is best for them, including the decision to have a child or to end a pregnancy.

B. Respondents acknowledge that a challenged law's over- or under-inclusiveness is relevant to evaluating whether the law violates the Iowa Constitution's equal-protection guarantee, even under rational-basis review. *See* Resp'ts' Resistance at 3. However, they argue that the Act is appropriately tailored with respect to its exclusion of abortion providers from funding, and that alone is sufficient to justify denying CAPP and PREP grants to PPH.

Respondents are incorrect: Even if this Court looks only at the Act's tailoring with respect to its exclusion of abortion providers, it is still wildly over- and under-inclusive. For example, the Act would exclude from funding a grantee that performed zero abortions in Iowa and performed abortions—even a small number of them provided for free—in one or more other states. *See* SUF ¶ 14 (showing that PPH performs abortions in Nebraska). In this respect, the Act is not remotely tailored to grantees that get a significant share of their funds from abortion services, and its application to entities that provide abortions *anywhere* does not serve Iowa's asserted interest in promoting childbirth over abortion in Iowa.

C. Respondents argue that this Court should not reach PPH's equal-protection claim as it applies to portions of the Act that impinge on PPH's rights to free speech and association because PPH's ineligibility for CAPP and PREP funding is nevertheless justified based on its performance of abortions. Respondents' argument rests on two errors. First, as discussed in Part I.A and I.B, the Act's bar on CAPP and PREP funding to abortion providers is *not* constitutional.

Second, where a law "involves a fundamental right," the "challenged statutory scheme" as a whole is subject to strict scrutiny, *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004), not just bits of it, as Respondents urge. Accordingly, if this Court determines that the Act involves PPH's rights to free speech and free association, it should apply strict scrutiny to the *entire* Act to analyze whether the Act violates PPH's right to equal protection. And if the Court does so, there is simply

no basis for Respondents' claim that the Act is constitutional; indeed, in their resistance, Respondents do not argue that *any* portion of the Act could survive strict scrutiny. For these reasons, and all those PPH has previously identified, *see* Pet'r's Summ. J. Br. at 10–14; Pet'r's Resistance at 2–7, the Act violates PPH's right to equal protection under the Iowa Constitution and should be enjoined.

II. The Act Imposes an Unconstitutional Condition on the Rights of PPH and Its Patients.

Respondents' arguments regarding PPH's unconstitutional-conditions claims are largely a reprise of those they advanced in their motion for summary judgment, which PPH has already rebutted. *See, e.g.*, Pet'r's Resistance at 7–11 (explaining why PPH need not show that the Act will result in effective coercion to prevail on its unconstitutional-conditions claims); *id.* at 11 (addressing how the Act's plain language evinces an intent to coerce PPH and other grantees not to engage in constitutionally protected activity); *id.* at 12 (explaining why *Planned Parenthood Ass'n of Hidalgo County Texas, Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012), does not support Respondents' position in this case); *id.* at 8–9 (addressing *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018), and why the standard for federal substantive-due process claims does not apply under Iowa law); *id.* at 8 n.2 (addressing the need for this Court to resolve PPH's free-speech and free-association claims). However, a few points warrant additional response:

A. Respondents inaccurately claim that *Agency for International Development v Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013) ("*AOSI*"), on which PPH relies for its unconstitutional-conditions claims, is inapplicable here. In Respondents' view, the law in that case, which was challenged on First Amendment grounds, is distinguishable because it required grantees to adopt a policy explicitly opposing prostitution and sex trafficking. Resp'ts'

Resistance at 7. Respondents contend that the Act here is constitutional because PPH does "not have to adopt a policy opposing abortion" in order to maintain CAPP and PREP eligibility. *Id.*

Respondents' asserted factual distinction between this case and *AOSI* is legally irrelevant. *AOSI* made clear that the "distinction drawn" in unconstitutional-conditions cases is "between conditions that define the federal program and those that reach outside it" to define the recipient. *AOSI*, 570 U.S. at 217. That case recognized that one way the government may "go[] beyond defining the limits of [a] federally funded program to defining the recipient" is "[b]y requiring recipients to profess a specific belief" outside the federal program. *Id.* at 218. But *AOSI* nowhere suggested that this was the *only* way the government could have imposed an unconstitutional condition on the plaintiffs' First Amendment rights in that case. After all, "the First Amendment safeguards not only the right to speak freely, but also the right to refrain from speaking at all." *State v. Musser*, 721 N.W.2d 734, 742 (Iowa 2006) (internal quotation marks omitted).

In any event, to maintain funding eligibility, PPH must effectively adopt a policy of not providing abortions, not advocating for abortion access, and not affiliating with organizations that do the same. All of these activities are constitutionally protected, and none would affect PPH's activities under the CAPP and PREP programs in any event. Respondents' resistance now appears to concede as much. *See* Resp'ts' Resistance at 3 (arguing that an abortion provider might use "relationships developed through CAPP and PREP programming to encourage abortion over childbirth *outside the scope of the programs*" (emphasis added)). Accordingly, Respondents' flawed reading of *AOSI* is of no help to them on the facts of this case because the Act, if PPH acquiesced to it, would require PPH to change its policies affecting activities wholly outside the CAPP and PREP programs.

B. As PPH has explained, abortion providers have a right under the Iowa Constitution's substantive due-process guarantee to provide abortion. *See* Pet'r's Summ. J. Br. at 14–16; Pet'r's Resistance at 8–11. Respondents disagree, pointing to three federal courts of appeals decisions that they describe as rejecting the view that a right to provide abortion exists under the federal constitution's Fourteenth Amendment. Resp'ts' Resistance at 4–5. PPH has already explained why one of those cases, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 916 (6th Cir. 2019) (en banc), wrongly decided the question whether there is a Fourteenth Amendment right to provide abortion and why *Hodges* does not, in any event, control the interpretation of Iowa law. *See* Pet'r's Resistance at 16; *see also Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1260 (10th Cir. 2016) (adopting a position contrary to *Hodges*).

The other two cases on which Respondents rely are inapposite. Both hold that any federal "constitutional right of [providers] to provide abortion services . . . is derived directly from women's constitutional right to choose abortion." *Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Dempsey*, 167 F.3d 458, 462 (8th Cir. 1999); *see also Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't Health*, 699 F.3d 962, 968 (7th Cir. 2012) ("[A]ny protection for Planned Parenthood as an abortion provider is derivative of the woman's position" (internal quotation marks omitted)). As PPH has explained, even if federal courts' analysis of the federal equal-protection clause controlled here, a right that is derivative necessarily still *exists*.

CONCLUSION

WHEREFORE, Petitioner prays that this Court deny Respondents' Motion for Summary Judgment, grant Petitioner's Motion for Summary Judgment, declare the Act unconstitutional, enjoin Respondents from implementing and enforcing the Act, and order the release of Petitioner's bond.

Respectfully submitted,

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