
In the Supreme Court of Iowa

No. 23-1145



PLANNED PARENTHOOD OF THE HEARTLAND, INC.,
EMMA GOLDMAN CLINIC, and SARAH TRAXLER M.D.,

Petitioners-Appellees,

—v.—

KIM REYNOLDS ex rel. STATE OF IOWA, and IOWA BOARD OF MEDICINE,

Respondents-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
CASE NO. EQCE089066
HONORABLE JOSEPH W. SEIDLIN, DISTRICT JUDGE

BRIEF OF RESOLVE: THE NATIONAL INFERTILITY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The National Infertility Association (“RESOLVE”), established in 1974, is a non-profit organization of patient advocates who work to provide legal protections for infertile persons and increase access to all family building options. RESOLVE also provides information, online and in-person support communities, and a nationwide professional resources directory for individuals and couples seeking to build a family. RESOLVE is the only organization with a nationwide network and a mandate to promote reproductive health and to ensure equal access to all family building options for men and women experiencing infertility or other reproductive disorders. RESOLVE’s constituents and professional members reside in every state, and it has served individuals nationwide—including in Iowa. RESOLVE believes that its extensive experience serving families using assisted reproductive technology in family formation can assist this Court in considering the potential impact of this case on the thousands of families formed through assisted reproduction in Iowa.

¹ Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amicus* or its counsel made a monetary contribution to fund its preparation and submission. All parties have consented to the filing of this brief.

INTRODUCTION

Six months ago, the Iowa Legislature passed the abortion ban at issue in this case in a single-day special session.² And in their rush to pass that ban, lawmakers in Iowa evidently failed to consider its impact on Iowans who desperately *want* to have families of their own.

The devastating story of Anya and Derick Cook, a couple struggling with infertility in Florida, sheds light on the fate Iowans will likely face if the Legislature’s ban is allowed to take effect. After years of infertility and miscarriages, and months filled with fertility drugs, egg retrievals, and the implantation of a healthy embryo, Anya and her husband Derick were finally—finally—having a baby.³ Then, months too early, Anya’s water broke. The couple rushed to the hospital, where doctors confirmed the Cooks’ worst fear: Anya had lost her amniotic fluid. Though a fluttering heartbeat

² *Iowa House, Senate Pass Bill Limiting Abortion*, ABC-KCRG (Jul. 11, 2023), <https://www.kcrg.com/2023/07/12/iowa-house-passes-new-bill-limiting-abortion/>.

³ Details about the Cooks’ experience under the Florida abortion ban are drawn from the Washington Post article detailing their experience and their interview with Diane Sawyer. See Caroline Kitchener, *Two Friends Were Denied Care After Florida Banned Abortion. One Almost Died*, WASH. POST (April 10, 2023), <https://www.washingtonpost.com/politics/2023/04/10/pprom-florida-abortion-ban/>; IMPACT x Nightline, *On the Brink*, ABC News Studio and Hulu (Dec. 14, 2023), <https://www.hulu.com/series/impact-x-nightline-on-the-brink-6908932d-1ba7-46ec-84d9-499cfcdf8e28>.

was still detected, their fetus almost certainly would not survive. The Cooks were heartbroken.

But the doctors had worse news to share: although Anya was at risk of developing sepsis (a potentially lethal infection) or other serious, even deadly, complications while the fetus remained in her uterus, the doctors did not think that they were legally allowed to provide her an abortion—at least, not until her life was imminently at risk or she was actively miscarrying. All because of Florida’s newly enacted abortion ban.

The next day, Anya miscarried in a public bathroom—not in a hospital surrounded by doctors. And then she began to hemorrhage. She was rushed to the hospital by ambulance, where her doctors were finally legally permitted to intervene. By that point she was “critically ill” and had to be rushed into surgery. Over the next several hours, she lost half of her blood volume. She was put on a ventilator. The doctors reported to Derick that Anya could die on the operating table—in large part because the abortion ban had forced them to wait to act to save her life.

Anya awoke from sedation the next day. But the bad news was not over. Though the doctors had been able to save her uterus, the procedure that saved Anya might have permanently damaged it. As a result, Anya may struggle even more to carry a healthy pregnancy to term. Two months later, after

visiting her fertility doctor, Anya heard more devastating news. Additional procedures would be necessary to remove remnants of the miscarriage from her uterus. These procedures, too, would negatively affect her future fertility.

Anya and Derick still desperately want a child of their own, and, despite their ordeal, they intend to try again. But they understand what it means to try again in a state with an abortion ban like the one in Iowa: “Getting pregnant now feels like a death sentence.” The Legislature should not be allowed to force Iowans to make that devastating choice.

SUMMARY OF ARGUMENT

In a rushed attempt to restrict abortion access within the state, the Iowa Legislature enacted a sweeping abortion ban that severely limits the reproductive choices of Iowans. In doing so, the Legislature failed to consider the impact that the new ban would have on families who want to have children but need to utilize assisted reproductive technologies (like in vitro fertilization or “IVF”) to fulfill that dream. For starters, the law defines “postfertilization age” in a way that fails to account for the potential delays between the fertilization and implantation that are typical in IVF pregnancies. That glaring oversight leaves Iowan women who use IVF to get pregnant without some of the important protections afforded under the law to address early pregnancy complications.

In addition, the ban fails to take into account the elevated health risks associated with pregnancies that are the result of assisted reproductive technologies, and the narrow exceptions under the law will inevitably lead to delays and denials of care for Iowans struggling with fertility issues. That is true for several reasons. *First*, the ban, as drafted, would deny abortions to certain IVF patients in all but the most dramatic, life-threatening circumstances. *Second*, and compounding the first issue, these individuals are older on average than those who get pregnant without assisted reproductive technology, in part because they have been trying to get pregnant for longer, making them more susceptible to serious and even deadly complications during their pregnancies. IVF itself increases their risk of ectopic pregnancies. And due to their age, these individuals are also more susceptible to conditions like cancer that can be incompatible with carrying a fetus to term. *Finally*, this ban will likely make further fertility treatment even less accessible to Iowan families by driving away the skilled physicians capable of providing the care they need and driving up the cost of receiving the treatments that could expand their families.

Examples from other states with similar bans confirm that these fears are far from hypothetical. They are real, and patient stories show that women in Iowa will face devastating delays and denials in care for their dangerous

health conditions because of this ban. Those delays and denials, in turn, will have long-term negative effects on their fertility and their lives.

The Iowa Legislature clearly did not consider these would-be parents when drafting its ban. Rather than repeat that fatal mistake, this Court should consider them now and strike down Iowa’s unlawful and overbroad abortion ban.

ARGUMENT

Approximately sixty-three thousand men and seventy-seven thousand women across the state of Iowa struggle with infertility.⁴ In 2021, the last year

⁴ Approximately 9% of men and 11% of women of reproductive age in the United States are infertile, and in couples struggling with infertility, one third can be explained by the woman, one third by the man, and one third is either a combination or unexplained. *How Common is Infertility?*, EUNICE KENNEDY SHRIVER NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common#:~:text=About%209%25%20of%20men%20and,States%20have%20experienced%20fertility%20problems.&text=In%20one%2Dthird%20of%20infertile,both%20the%20man%20and%20woman> (last visited Jan. 11, 2024) . There are approximately 1.4 million Iowans ages 19-54 in Iowa—half women and half men. *2022 Population Distribution by Age*, KKF, <https://www.kff.org/other/state-indicator/distribution-by-age/?dataView=1¤tTimeframe=0&selectedDistributions=adults-19-25--adults-26-34--adults-35-54&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Jan. 11, 2024); *2022 Population Distribution by Sex*, KKF, <https://www.kff.org/other/state-indicator/distribution-by-sex/?dataView=1¤tTimeframe=0&selectedRows=%7B%22states%22>

for which this data was reported, these Iowa families underwent almost 2,300 cycles of IVF or other assisted reproduction⁵—all in an effort to have children of their own.⁶ At an average cost of \$23,000 per cycle,⁷ that amounts to approximately \$52.9 million invested in the dream of having children. Despite the time, effort, and resources these families have dedicated to that dream,

:%7B%22iowa%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Dec. 21, 2023).

⁵ The term “assisted reproductive technology” (“ART”) includes “all fertility treatments in which either eggs or embryos are handled.” *What is Assisted Reproductive Technology*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/art/whatis.html> (last visited Dec. 27, 2023). “In general, ART procedures involve surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to the woman’s body or donating them to another woman.” *Id.* IVF is the most commonly utilized form of ART. Meaghan Jain & Manvinder Singh, *Assisted Reproductive Technology (ART) Techniques*, NAT’L LIBRARY OF MEDICINE (June 7, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK576409/#:~:text=In%20vitro%20fertilization%20is%20the,resulting%20embryo%20into%20a%20uterus>.

⁶ *Mid-Iowa Fertility, PC*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&ClinicId=37&ShowNational=0&isCycleTypes=T002 (last visited Jan. 11, 2024); *University of Iowa Hospitals and Clinics, Center for Advanced Reproductive Care*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&ClinicId=255&ShowNational=0&isCycleTypes=T002 (last visited Jan. 11, 2024).

⁷ Sydney Halleman *et al.*, “*I Don’t Feel Safe.*” *Abortion Bans Add New Uncertainty to Fertility Treatment*, HEALTHCARE DIVE (Oct. 24, 2022), <https://www.healthcaredive.com/news/ivf-roe-v-wade-abortion-bans-fertility-treatments-i-dont-feel-safe/634540/>.

Iowa legislators overlooked them when crafting the new abortion ban. That oversight will endanger these families' health and fertility.

I. Iowa Rushes to Pass an Abortion Ban Containing Only Extremely Narrow Exceptions.

Last July, the ban at issue was passed in a flurry. Governor Reynolds called the Iowa General Assembly into a special session “for the sole and single purpose” of enacting a new ban on abortion.⁸ In a single day, both chambers debated and approved the ban; by 9:00 p.m., the House had passed its version, and the Senate followed suit two hours later.⁹ Three days later, the Governor signed the ban into law.¹⁰

By its terms, the ban prohibits abortions starting at approximately six weeks. Like similar bans in other states,¹¹ it contains only very limited

⁸ Proclamation of Special Session (July 5, 2023), *available at* <https://governor.iowa.gov/media/220/download?inline=>.

⁹ *Iowa House, Senate Pass Bill Limiting Abortion*, ABC-KCRG (Jul. 11, 2023), <https://www.kcrg.com/2023/07/12/iowa-house-passes-new-bill-limiting-abortion/>.

¹⁰ Katarina Sostaric & Clay Masters, *Iowa Governor Signs Law Immediately Banning Abortions Around 6 Weeks of Pregnancy*, IOWA PUBLIC RADIO (July 14, 2023) <https://www.iowapublicradio.org/state-government-news/2023-07-14/iowa-governor-signs-law-6-week-abortion-fetal-heartbeat-ban-kim-reynolds>.

¹¹ See Mabel Felix, Laurie Sobel, & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/>.

exceptions. *See* Iowa Code Ann. § 146E.2(2)(a). Doctors who violate the ban are subject to professional discipline by the state’s Board of Medicine. *See id.* § 146E.2(5) (empowering the board of medicine to adopt rules to administer this section). Discipline could include civil penalties of up to \$10,000 and the revocation of medical licenses. *See* Iowa Code Ann. §§ 148.6(1), (2)(c); *id.* § 272C.3(2).

A. The ban would prohibit abortions after a “fetal heartbeat” is detected.

The Iowa ban’s baseline rule prohibits a doctor from performing an abortion “when it has been determined that the unborn child has a detectable fetal heartbeat,” meaning “cardiac activity, the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.” Iowa Code Ann. §§ 146E.2(2)(a), 146E.1(2). This “cardiac activity” can be detected by ultrasound as early as six weeks after the first day of the pregnant woman’s last menstrual period. Traxler Aff. at 3-4.¹²

¹² This means an abortion could be prohibited just two weeks after the first day of a woman’s first missed period. Traxler Aff. at ¶ 26. For a woman with a longer-than-average cycle, the window could be even shorter. *See id.* at ¶ 27. Before the first day of a woman’s first missed period, over-the-counter pregnancy tests will still regularly give false negative results. *Id.* at ¶ 26; *see also* *Pregnancy Tests*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diagnostics/9703-pregnancy-tests> (last visited Jan. 11, 2024). Each of these factors helps to explain why women often

The ban provides a few exceedingly narrow exceptions to this baseline rule. It permits a doctor to perform an abortion after a “fetal heartbeat” has been detected only if, in the doctor’s “reasonable medical judgment,” 1) the woman is experiencing a “medical emergency” or 2) a “fetal heartbeat exception exists.” Iowa Code Ann. § 146E.2(2)(a).

When defining a “medical emergency,” the law does not provide clear guidance or diagnostic criteria, instead using terms such as “impairment of a major bodily function” and “life-endangering” condition to describe the scope of the exception, while leaving those key terms undefined. *See id.* § 146E.1(4). And the four heartbeat exceptions similarly contain undefined and vague terms. *See* Iowa Code Ann. § 146E.1(3). The first two exceptions involve pregnancies conceived via rape or incest (and reported as such within a specific number of days). *Id.* § 146E.1(3)(a)-(b). The latter two make exceptions for “[a]ny spontaneous abortion, commonly known as a miscarriage, if not all of the products of conception are expelled” and where “[t]he attending physician certifies that the fetus has a fetal abnormality that in the physician’s reasonable medical judgment is incompatible with life.” *Id.* § 146E.1(3)(c)-(d). But once again, the ban does not define or provide specific

do not realize they are pregnant until shortly before or even after six weeks have passed. Traxler Aff. ¶¶ 16, 26-28.

diagnostic criteria for several significant terms, leaving “spontaneous abortion” and “fetal abnormality” undefined. And though the law *appears* to permit an abortion for a miscarrying woman while her fetus continues to show cardiac activity (specifically, by referring to miscarriage as an “exception” to the fetal heartbeat rule), it does not say so explicitly.

This law also sets an objective, rather than subjective, standard for evaluating whether a doctor has exercised their medical judgment in compliance with the law: the ban defines “reasonable medical judgment” as one “made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.” *Id.* § 146E.1(6).

Though the exact parameters of these exceptions remain fuzzy, it is obvious, even without additional clarity, that very few pregnant women will qualify for an abortion under this ban. *Traxler Aff.* ¶ 16.

B. Even the limited exceptions to the ban are dramatically reduced 20 weeks post-fertilization.

The ban leaves even fewer exceptions available once a pregnancy progresses midway into the second trimester. If a doctor determines that a fetus’s “probable postfertilization age” is 20 weeks or more, the ban prohibits an abortion in all but two circumstances (again determined based on “reasonable medical judgment”): 1) in a medical emergency, and 2) to save

the life of an unborn child (for example, in the case of twins, where one twin’s deadly fetal abnormality might endanger the life of the other). Iowa Code Ann. § 146E.2(2)(b).

The 20-week provision defines “fertilization” as “fusion of a human spermatozoon with a human ovum”; “postfertilization age” as the “age of the unborn child as calculated from fertilization”; and “probable postfertilization age” as “what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is to be performed.” *Id.* § 146E.2(2)(b).¹³ The definition of “reasonable medical judgment” remains the same as in the above-referenced provisions, *compare id.* § 146E.1(6) *with id.* § 146B.1(12), and its definition of “medical emergency” is substantively identical, *compare id.* § 146A.1(6)(a) *with id.* § 146B.1(6).¹⁴ However, the 20-week provision does include a different, explicit definition of “major bodily function.” *Id.* § 146B.1(5).

¹³ These terms are defined by cross-reference to definitions in an unenforced 2017 abortion ban found at Iowa Code Ann. § 146B.1.

¹⁴ While the earlier definition of “medical emergency” explicitly excluded “psychological conditions, emotional conditions, familial conditions, or the woman’s age,” Iowa Code Ann. § 146E.1(6)(a), in the later version, those conditions—other than age, arguably—are only implicitly excluded by the definition’s repeated emphasis on “physical” conditions, *id.* § 146B.1(6).

Conspicuously absent from these exceptions and definitions, though, are allowances for fetal abnormalities or miscarriages (or rape and incest), all of which were available before 20 weeks. *Id.* § 146E.1(3). Thus, beyond this point, only those virtually at death’s door will qualify for an abortion. The pool of eligible patients will shrink from very, very few to almost none.

C. Key terms in this ban are left up to legal—not medical—interpretation.

Possibly the most critical term for understanding the practical effects of this ban is “reasonable.” The term appears throughout both the heartbeat and 20-week provisions. Iowa Code Ann. §§ 146E.2(2)(a)-(b). And it is key because, as used in these provisions, “reasonable” is not a medical term—it is a legal one. A doctor might determine subjectively, in the moment, in her medical judgment, that a risk is sufficiently “serious,” that a bodily function is truly “major,” or that an impairment would indeed be “substantial and irreversible” enough to qualify for an abortion under the law. *See id.* § 146E.1(4) (cross referencing § 146A.1(6)(a)). But that doctor’s subjective medical judgment is not sufficient to resolve the issue. Her ability to act could instead depend on the legal judgment of her hospital’s lawyers and what *they* think the Board of Medicine *might* think a reasonable doctor would do. If they decide the decision to act is too legally risky, the doctor’s hands could be tied, even if she personally believes her decision is reasonable.

And the stakes of these legal decisions can be life-altering for the patient and doctor alike. Failing to provide a necessary abortion quickly can endanger the life of the woman or permanently impair her fertility. And “[w]hen these women get sick, they get sick fast,” and doctors have “minutes” or, at most, “a couple of hours before women get radically ill.”¹⁵ It is therefore essential to the patient to receive care as quickly as possible. But providing an abortion that is later deemed illegal under the ban could mean the doctor loses her license to practice medicine. Because doctors (and their lawyers) lack clear guidance from lawmakers or the Board of Medicine, and because the potential consequences to the doctors themselves are so severe, some doctors—or, at the least, their hospital administrations—will almost certainly err on the side of caution. And, as we know from other states with similar bans already in place, pregnant patients will suffer, and possibly even die, because of those delays.¹⁶

¹⁵ Stephania Taladrid, *In the Post-Roe Era, Letting Pregnant Patients Get Sicker By Design*, NEW YORKER (May 6, 2023), <https://www.newyorker.com/news/dispatch/in-the-post-roe-era-letting-pregnant-patients-get-sicker-by-design>.

¹⁶ *Id.*

II. The Ban Overlooks Families Dealing with Infertility Issues.

If this ban is enforced, the suffering it causes will almost certainly affect Iowans who are actively trying to have children—in ways that legislators could not possibly have intended. For example, the ban does not seem to account for the unique timelines and elevated health risks associated with certain types of assisted reproductive technology, like IVF. And it does not fully account for the risk to Iowans’ future fertility if necessary care is delayed. Finally, it is likely to push already-costly fertility care further out of reach for many Iowa families.

A. The ban does not account for delays between fertilization and implantation.

When drafting the ban, the legislature failed to address how the 20-week provision should apply to embryos implanted via IVF more than 20 weeks after fertilization. As drafted, the plain terms of the provision would effectively ban abortions for embryos implanted via IVF more than 20 weeks after fertilization—no matter how early in the *actual* pregnancy. That is because the ban defines “postfertilization age” as the “fusion of a human spermatozoon with a human ovum” to make an embryo, Iowa Code Ann. § 146E.2(2)(b), and dramatically limits important exceptions to the ban when that “postfertilization age” passes 20 weeks. But for patients pregnant with an embryo or fetus conceived through IVF, the moment of fertilization can occur

long before the embryo is ever implanted: fertilized embryos can be safely preserved for 10 years or longer and still result in healthy pregnancies once implanted.¹⁷ Hence, the “postfertilization age” for these IVF pregnancies could exceed the 20-week threshold before the woman is even pregnant.

If applied as written, the ban would prohibit all abortions except in medical emergencies from the moment a woman becomes pregnant with an embryo that was fertilized long before implantation. *See* Iowa Code Ann. § 146E.2(2)(b) (allowing abortions after 20 weeks only in a medical emergency or to save the life of an unborn child). Even if “fetal abnormalities” inconsistent with life were detected early in the *actual pregnancy*, the “fetal heartbeat exception” that otherwise would allow an abortion would not apply because the postfertilization age of the IVF embryo would exceed 20 weeks. *Compare id.* § 146E.2(2)(a) *with id.* § 146E.2(2)(b). Thus, the plain terms of the law would dramatically limit the options available to families deciding whether to implant previously frozen embryos.

This outcome may not be what the Legislature intended, but it is what it wrote. It illustrates in stark relief how little thought legislators gave to

¹⁷ *Freezing Embryos*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos> (last visited Dec. 21, 2023).

Iowans relying on IVF and other assisted reproductive technologies to grow their families. Intentionally or not, the terms of the ban leave them—and their doctors—in a legally and medically vulnerable position.

B. Families fighting infertility are more likely to experience severe, life- and fertility-changing health issues when they do get pregnant—and these complications may not qualify for exceptions under the ban.

For several reasons, individuals struggling with infertility are more likely to experience significant medical complications in their pregnancies. Several of these complications can threaten their future fertility and even their lives. These individuals are also at higher risk of developing health conditions that are incompatible with safely carrying a pregnancy to term. Thus, the ban's strict limits on abortions will not only endanger their health but also devastate their dreams of having children of their own.

1. Families using assisted reproductive technology are more likely to face complications during pregnancy.

First, families using assisted reproductive technology are at higher risk for pregnancy complications in general because they are more likely to get pregnant later in life after years of trying unsuccessfully to get pregnant. This risk makes these families more likely to require medical intervention during their pregnancies to protect both their lives and their future reproductive health. Yet under the ban, that care would likely be delayed or even denied.

According to the CDC’s most recent national data (from 2020), the average age of patients using assisted reproductive technology was 36.2 years.¹⁸ Pregnant women above the age of 35 “are more at risk for complications” than their younger counterparts.¹⁹ These complications include preeclampsia, gestational diabetes, premature birth or low birthweight, miscarriage, genetic disorders, mandatory c-sections, and stillbirths.²⁰

Several of these complications can be life-threatening to the pregnant woman, the fetus, or both. For example, preeclampsia can damage vital organs like the heart, liver, and kidneys.²¹ The condition can lead to preterm labor and, if untreated, death.²² Miscarriages, too, can be deadly: if the fetus or other products of conception remain in the womb, they can cause a severe infection

¹⁸ *2020 Assisted Reproductive Technology Fertility Clinic and National Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, at 14 (2022), <https://www.cdc.gov/art/reports/2020/pdf/Report-ART-Fertility-Clinic-National-Summary-H.pdf>.

¹⁹ *Advanced Maternal Age*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/22438-advanced-maternal-age> (last visited Dec. 21, 2023).

²⁰ *Id.*

²¹ *Preeclampsia*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/17952-preeclampsia> (last visited Dec. 21, 2023).

²² *Id.*

called sepsis.²³ Unless addressed immediately, this infection can spread rapidly throughout the body, leading to tissue damage, organ failure, and mortality.²⁴ And genetic disorders like Trisomy 18 are not only lethal to the fetus but can also cause severe pain in the woman forced to carry such a pregnancy to term.²⁵

Experience in other states shows that abortion bans like Iowa's can delay necessary care in extenuating circumstances like these.²⁶ Providers in other states, like the doctors who treated Anya Cook in Florida, have struggled

²³ *Miscarriage*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/diagnosis-treatment/drc-20354304> (last visited Dec. 21, 2023).

²⁴ *Sepsis*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/sepsis/what-is-sepsis.html> (last visited Dec. 21, 2023).

²⁵ *See, e.g.*, J. David Goodman, *Texas Judge Grants Woman's Request for Abortion, in Rare Post-Roe Case*, N.Y. TIMES (Dec. 7, 2023), <https://www.nytimes.com/2023/12/07/us/texas-abortion-ruling-exception.html> (describing how a woman whose fetus was diagnosed with Trisomy 18 required four emergency room visits in a month due to complications associated with the pregnancy).

²⁶ Like Iowa, “[m]ost states with bans that contain a health exception permit abortion care when there is a serious risk of substantial and irreversible impairment of a major bodily function. These exceptions are limited by the lack of specific clinical definitions of the conditions qualifying for the exception.” Mabel Felix, Laurie Sobel, & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/>. Like Iowa, these states also generally lack clear guidance on miscarriage care. *Id.*

to address probable miscarriages in which a “fetal heartbeat” could still be detected.²⁷ As a result, patients have experienced septic miscarriages, including miscarriages that compromised their future fertility—which can be especially devastating for families who have spent time and resources trying to grow their families.

For example, Amanda Zurawski, of Austin, Texas, recalls “cruising” through the second trimester of her first pregnancy after 18 long months of fertility treatment before her water broke prematurely at 18 weeks. Because a fetal heartbeat could still be detected, she was denied care under Texas’s abortion ban, which had taken effect just days earlier. Like Anya Cook, she was sent home to wait for a miscarriage. Three days later, “in a matter of minutes,” she went from being relatively healthy to deathly ill. Her husband rushed her to the hospital, where she was diagnosed with sepsis. She delivered their stillborn daughter before she crashed again. For the next three days, she fought for her life in the Intensive Care Unit. And though she has now recovered, the infection caused one of her fallopian tubes to collapse

²⁷ See Caroline Kitchener, *Two Friends Were Denied Care After Florida Banned Abortion. One Almost Died*, WASH. POST (April 10, 2023), <https://www.washingtonpost.com/politics/2023/04/10/pprom-florida-abortion-ban/>; see also Taladrid, *supra* n.15.

permanently, affecting her already-tenuous fertility.²⁸ IVF is now her only hope to have another child—in large part because she was denied an abortion under a law with exceptions that resemble those in Iowa’s ban.²⁹ Anna Zargarian, also from Austin, Texas, was likewise denied care when her water broke at 19 weeks.³⁰ Rather than face the risk of sepsis or hemorrhage that plagued Anya Cook or Amanda Zurawski, she fled the state, seeking an abortion in Colorado, and feared for the whole flight that she might go into labor.

²⁸ *Testimony of Amanda Zurawski, Hearing Before the Sen. Jud. Comm. On The Assault on Reproductive Rights in a Post-Dobbs America* (April 26, 2023) available at <https://www.judiciary.senate.gov/imo/media/doc/2023-04-26%20-%20Testimony%20-%20Zurawski.pdf>; see also *The Plaintiffs and Their Stories: Zurawski v. State of Texas, CTR. FOR REPROD. RIGHTS* (Nov. 14, 2023) <https://reproductiverights.org/zurawski-v-texas-plaintiffs-stories-remarks/>.

²⁹ Texas’s ban permits abortions when in the physician’s “reasonable medical judgment” there is “a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function.” Tex. Health & Safety Code Ann. § 170A.002(b)(2). Texas uses a substantially similar definition of “reasonable medical judgment” to that used in Iowa’s ban. Compare Iowa Code Ann. § 146E.1(6) and *id.* § 146B.1(12) with Tex. Health & Safety Code Ann. § 170A.001(4).

³⁰ Jordan Smith, “*Sick and Twisted*”: *Women Sue Texas Over Harrowing Medical Episodes Caused by Abortion Bans*, THE INTERCEPT (March 8, 2023) <https://theintercept.com/2023/03/08/texas-abortion-ban-lawsuit/>; see also *The Plaintiffs and Their Stories*, *supra* n. 28.

Under similar bans, women have also been forced to continue carrying non-viable pregnancies, despite knowing that their child likely will not be born alive or will live only minutes, hours, or days. For example, Kate Cox recently made headlines by suing Texas for the right to terminate her 20-week pregnancy after she was denied an abortion by multiple hospitals despite the fact that her fetus was diagnosed with Trisomy 18.³¹ A state trial court initially granted her request, but just a week later—after Texas Attorney General Ken Paxton threatened prosecution and sanctions against any doctor or hospital who provided her an abortion³²—the Texas Supreme Court reversed. It held that the determination of “whether a pregnant woman ‘has a life-threatening physical condition’” is reserved for her doctor alone but refused to defer to that determination in the case of Ms. Cox because, in the court’s judgment, her doctor had not adequately demonstrated that her medical needs warranted

³¹ J. David Goodman, *Texas Supreme Court Rules Against Woman Who Sought Court-Approved Abortion*, N.Y. TIMES (Dec. 11, 2023), <https://www.nytimes.com/2023/12/11/us/texas-abortion-kate-cox.html>.

³² Ava Sasani, *Texas Attorney General Says He Will Sue Doctor Who Gives Abortion to Kate Cox*, THE GUARDIAN (Dec. 8, 2023), <https://www.theguardian.com/us-news/2023/dec/08/ken-paxton-texas-abortion-kate-cox>

such an exception.³³ Hours before the court announced its decision, Ms. Cox left the state to receive the care she could not legally obtain at home.³⁴

Because of their age, many individuals pursuing assisted reproduction, like the families RESOLVE represents, would be at higher risk of similar outcomes under Iowa's ban.

2. Families using IVF are at higher risk of ectopic pregnancies.

Second, families undergoing IVF are more susceptible to developing dangerous, non-viable ectopic pregnancies. Yet care for ectopic pregnancies too will likely be delayed under Iowa's new ban, leading to devastating health and reproductive outcomes for these families.

Ectopic pregnancy occurs when an embryo implants and grows outside of the uterus.³⁵ The only treatment for an ectopic pregnancy is to end the pregnancy—in other words, to have an abortion.³⁶ Over ninety percent of ectopic pregnancies occur in the fallopian tube.³⁷ If the embryo is not removed

³³ *In re State*, No. 23-0994, --- S.W.3d ---, 2023 WL 8540008, at *1 (Tex. Dec. 11, 2023).

³⁴ J. David Goodman, *Texas Supreme Court Rules Against Woman*, *supra* n.31.

³⁵ *Ectopic Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/ectopic-pregnancy> (last visited Jan. 10, 2024).

³⁶ *Id.*

³⁷ *Id.*

in time, the tube will burst, causing major internal bleeding and requiring immediate surgery to save the patient's life.³⁸ The rare ectopic pregnancies that occur along a scar (like a c-section scar) partially within the uterus can be equally disastrous and harder to detect and confirm.³⁹ Regardless of where the embryo improperly implants, an ectopic pregnancy is a serious, urgent medical condition that can affect a patient's life and future fertility. And though the incidence of ectopic pregnancy in any pregnancy is relatively low, patients who get pregnant following IVF are up to four times more likely to experience ectopic pregnancies than those who conceive without IVF or other assisted reproductive technology.⁴⁰

As with preterm ruptures and fetal abnormalities, experience from other states regarding ectopic pregnancies shows that women will endure delays in care as their doctors grapple with what treatment is permitted under the law. One study has documented examples of delayed or denied care for women

³⁸ *Id.*

³⁹ Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (Jul. 16, 2022), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/>.

⁴⁰ Simona Anzhel *et al.*, *Top-Quality Embryo Transfer Is Associated with Lower Odds of Ectopic Pregnancy*, 101 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 779, 779 (2022), <https://obgyn.onlinelibrary.wiley.com/doi/epdf/10.1111/aogs.14375>.

with ectopic or presumed-ectopic pregnancies as a result of legal uncertainties stemming from state abortion bans.⁴¹ These doctors reported compromises in care—and sometimes outright confusion. One obstetrician reported that she had diagnosed her patient with a probable ectopic pregnancy and determined that a medication abortion using the medication methotrexate was necessary.⁴² But when the patient went to the hospital’s emergency department, which was in charge of administering the medication, “the physician there question[ed] whether he was permitted to give the methotrexate given the ‘new legal climate.’”⁴³ The obstetrician and the on-call physician both noted that previous patients with similar test results had experienced potentially deadly ruptures—yet legal uncertainty held her treatment in limbo.⁴⁴

In another example, a patient was experiencing an ectopic pregnancy on a c-section scar.⁴⁵ The patient was in her second trimester, and the fetus continued to show signs of cardiac activity.⁴⁶ Her doctors recommended a

⁴¹ Daniel Grossman *et al.*, ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH (ANSIRH), UNIV. OF CAL., S.F., *Care Post-Roe Documenting Cases of Poor-Quality Care Since the Dobbs Decision* (May 2023), <https://www.ansirh.org/sites/default/files/2023-05/Care%20Post-Roe%20Preliminary%20Findings.pdf>.

⁴² *Id.* at 10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 11.

⁴⁶ *Id.*

procedural abortion with “uterine artery embolization” to control the risk of bleeding that could require a full hysterectomy.⁴⁷ But the surgical team responsible for the embolization refused to perform it while the fetus continued to show cardiac activity, fearing legal repercussions.⁴⁸ The patient’s doctors referred her to an out-of-state provider, but she lacked the means to travel.⁴⁹ She continued the pregnancy, despite the high risk of a catastrophic health outcome, and at 17-19 weeks pregnant, she showed a placenta percreta—in lay terms, a placenta that had grown through the uterus and could attach to other organs, causing severe hemorrhaging upon delivery.⁵⁰ All she—and her doctors—could do was wait for her pregnancy to cause an active emergency.

3. Families relying on assisted reproductive technology are at higher risk of health issues incompatible with pregnancy.

Finally, because individuals facing fertility issues are typically older than other pregnant individuals, they are also at higher risk for developing age-correlated health conditions, like cancer, that are incompatible with safely

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; Danyon J. Anderson *et al*, *Placenta Percreta Complications*, 13 CUREUS, NO. 10 (2021), <https://www.cureus.com/articles/72834-placenta-percreta-complications#!/> (explaining the risks of placenta percreta, including severe hemorrhaging).

carrying a pregnancy to term. This risk again makes these families more likely to require specific medical treatment during their pregnancies—or even to require an abortion to make that treatment possible. Yet under Iowa’s new ban, that care would likely be delayed or even denied.

As noted above, individuals struggling with fertility are on average significantly older than the average pregnant woman, increasing their health risks while pregnant. That increased age also correlates with other conditions that are not caused by pregnancy but are incompatible with safely completing one. For example, “[a]dvancing age is the most important risk factor for cancer,”⁵¹ and cancer affects approximately one in every thousand pregnant individuals.⁵² But common cancer treatments are unavailable to pregnant women: chemotherapy is not safe in the first trimester; radiation is unsafe anywhere near the fetus and, when used, must be kept to low doses; and

⁵¹ *Age and Cancer Risk*, NAT’L CANCER INST., <https://www.cancer.gov/about-cancer/causes-prevention/risk/age> (last updated Mar. 5, 2021). And even younger women can experience fertility-altering cancers. For example, in 2023, a 32-year-old Iowa resident and mother of two required a radical hysterectomy to treat her stage 1 cervical cancer. *Cervivor Stories: Athena*, CERVIVOR, <https://cervivor.org/stories/athena/> (last visited Jan. 10, 2024).

⁵² See Melissa Suran, *Treating Cancer in Pregnant Patients After Roe v. Wade Overturned*, 328 JAMA 1674, 1674 (2022), <https://jamanetwork.com/journals/jama/fullarticle/2797062>.

hormone and targeted drug therapy are wholly unavailable during pregnancy.⁵³

In practical terms, this means that pregnant women diagnosed with cancer must either delay cancer care to carry the pregnancy to term or terminate the pregnancy to pursue life-saving treatment. Given that a 2020 study found that each month of delayed cancer treatment is associated with a 13% increase in mortality risk, such delays can have a significant impact.⁵⁴ And because older pregnant patients, including those who desperately want to have a baby, are more susceptible to cancer, they are almost certain to face the heartbreaking decision of whether to delay potentially life-saving treatment to carry a wanted pregnancy to term or to begin treatment promptly by ending their pregnancy.

But even if these women make the agonizing choice to end their—by definition, highly desired—pregnancy, Iowa’s law allows abortions of this kind only if a doctor determines that the cancer has become “life-

⁵³ *Cancer During Pregnancy*, AM. CANCER SOC., <https://www.cancer.org/cancer/managing-cancer/making-treatment-decisions/cancer-during-pregnancy.html> (last updated Nov. 17, 2022).

⁵⁴ See Suran, *supra* note 52 (citing Timothy P. Hanna *et al.*, *Mortality Due to Cancer Treatment Delay: Systematic Review and Meta-Analysis*, 371 BRIT. MED. J., no. 8269, 2020, <https://www.bmj.com/content/bmj/371/bmj.m4087.full.pdf>).

endangering” or creates “a serious risk of substantial and irreversible impairment of a major bodily function.” Iowa Code Ann. § 146E.2(2)(a)-(b). This requirement allows the patient’s care to be delayed, as doctors evaluate the legality of providing the requested abortion, or even denied, if they do not feel comfortable providing an abortion within the ambiguities of the ban.

And again, there is no need to speculate about whether a ban like Iowa’s will lead to these devastating delays in patient care and impose heavy costs on pregnant cancer patients: it has already happened. In states like Ohio and Oklahoma, before their bans with similar exceptions were struck down and narrowed, respectively,⁵⁵ doctors withheld cancer treatment from pregnant cancer patients until those patients had traveled to receive legal, out-of-state

⁵⁵ Ohio’s six-week ban has been blocked since September 14, 2022. Associated Press, *A Judge Temporarily Blocks an Ohio Law Banning Most Abortions*, NAT’L PUB. RADIO (Sept. 14, 2022), <https://www.npr.org/2022/09/14/1123054970/ohio-abortion-ban-law-blocked-judge>. The Ohio Supreme Court recently dismissed an appeal challenging that injunction, allowing it to stand. Associated Press, *An Order Blocking Enforcement of Ohio’s Abortion Ban Stands After the High Court Dismissed an Appeal*, ASSOCIATED PRESS (Dec. 16, 2023), <https://apnews.com/article/abortion-ban-ohio-constitution-9d8f9e75aecb1ce2dc98d2e9ff9b4071>. In March 2023, Oklahoma’s Supreme Court clarified that its state’s constitution requires that abortions to preserve the mother’s life be permitted, even if there is no immediate medical emergency. Brendan Pierson, *Oklahoma Top Court Finds Right to Abortion to Preserve Mother’s Life*, REUTERS (March 21, 2023), <https://www.reuters.com/world/us/oklahoma-top-court-finds-right-abortion-preserve-mothers-life-2023-03-21/>.

abortions.⁵⁶ For example, when a pregnant 37-year old Ohio woman was diagnosed with Stage III melanoma in June 2022, her doctors informed her that they could not treat her cancer while she remained pregnant.⁵⁷ But because an ultrasound detected “fetal heart tones,” she was denied an abortion in Ohio, despite her diagnosis.⁵⁸ As a result, the patient had to travel out of state to receive an abortion, delaying her cancer treatment.⁵⁹

Under Iowa’s ban, pregnant women who have previously struggled with infertility, because of their age, would be at risk of enduring these delays and costs—and the negative health outcomes they would create.

C. The ban will also make it harder for families fighting infertility to receive the expert reproductive care they need to have children.

⁵⁶ Shefali Luthra, *State Abortion Bans Are Preventing Cancer Patients from Getting Chemotherapy*, 19TH (Oct. 7, 2022), <https://19thnews.org/2022/10/state-abortion-bans-prevent-cancer-patients-chemotherapy/>; Selena Simmons-Duffin, *In Oklahoma, a Woman was Told to Wait Until She’s ‘Crashing’ for Abortion Care*, NAT’L PUB. RADIO (Apr. 25, 2023), <https://www.npr.org/sections/health-shots/2023/04/25/1171851775/oklahoma-woman-abortion-ban-study-shows-confusion-at-hospitals>.

⁵⁷ Aff. of Aeran Trick in Supp. of Pls.’ Mot. for TRO Followed by Permanent Inj. ¶ 6, *Pre-term Cleveland v. Yost*, No. A2203203 (Ohio Ct. Comm. Pl., Hamilton Cnty, Sept. 2, 2022).

⁵⁸ *Id.*

⁵⁹ *Id.*

Finally, if permitted to take effect, this ban could decrease the already-limited fertility resources available to Iowa families. Only two fertility clinics serve all of Iowa,⁶⁰ and the state has the fewest OB/GYN specialists per capita of any in the country.⁶¹ The costs of fertility treatment are already incredibly high: IVF costs, on average, \$23,000 per cycle.⁶² And this average does not include the cost of travel to and from the state's fertility clinics, which can be several hours away. It is already too hard for families to receive the treatment they need in Iowa.

Allowing this ban to take effect would only increase the significant obstacles Iowa families face when seeking fertility treatment in Iowa. Nationwide, states with abortion bans have struggled to retain and recruit obstetrical doctors and medical students.⁶³ And while applications for

⁶⁰ *Iowa Clinics*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicsList&SubTopic=&State=IA&Zip=&Distance=50 (last visited Jan. 10, 2024).

⁶¹ Emily Nyberg, *Iowa Has the Fewest OB-GYN Specialists Per Capita Nationwide, Regent Report Reveals*, DAILY IOWAN (Nov. 9, 2022), <https://dailyiowan.com/2022/11/09/iowa-has-the-fewest-ob-gyn-specialists-per-capita-nationwide-regent-report-reveals/>.

⁶² Sydney Halleman *et al.*, *'I Don't Feel Safe.' Abortion Bans Add Uncertainty to Fertility Treatment*, HEALTHCARE DIVE (Oct. 24, 2022), <https://www.healthcarediver.com/news/ivf-roe-v-wade-abortion-bans-fertility-treatments-i-dont-feel-safe/634540/>.

⁶³ Arielle Dreher & Oriana González, *New Doctors Avoid Residencies in States with Abortion Bans*, AXIOS (APR. 18, 2023),

OB/GYN residencies have declined nationwide, “the decrease in states with complete abortion bans was more than twice as large as those with no restrictions (10.5% vs. 5.2%).”⁶⁴

If Iowa joins these states by permitting the ban to take effect and sees the same results—and there is no reason to think it would not—the resulting resource constraints will likely put IVF and other specialized treatments out of reach for most Iowa families, ending their hope of having biological children of their own.

For all of these reasons, Iowa’s abortion ban would have devastating consequences for families actively trying to have children. It is clear both from the text and the implications of the ban that the Legislature failed to consider these consequences when it passed the law. We respectfully urge this Court to consider them now and strike down this ban.

<https://www.axios.com/2023/04/18/abortion-ban-states-drop-student-residents>; Hardy-Fairbanks Aff. ¶ 11 (“Abortion bans cause OB/GYNs to move elsewhere and make it harder to recruit quality medical students.”).

⁶⁴ Julie Rovner, *Abortion Bans Drive Off Doctors and Close Clinics, Putting Other Health Care at Risk*, NAT’L PUB. RADIO (May 23, 2023), <https://www.npr.org/sections/health-shots/2023/05/23/1177542605/abortion-bans-drive-off-doctors-and-put-other-health-care-at-risk>.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that this Court uphold the district court's temporary injunction.

Dated: January 16, 2024

Respectfully Submitted,

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No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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I hereby certify that on January 16, 2024, I electronically filed this document with the Clerk of the Supreme Court of Iowa using the EDMS system, which will serve it on the appropriate parties electronically.

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