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 **RESISTANCE TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Respondents' summary judgment brief does not even attempt to wrestle with this Court's previous decision temporarily enjoining enforcement of the Act on equal-protection grounds. Respondents contend that the Act survives rational-basis review under the Iowa Constitution's equal-protection clause, but this Court already rejected two of the three asserted state interests on which Respondents rely, and Respondents provide no basis for reconsidering that conclusion. Respondents' argument as to the Act's furtherance of a third asserted state interest is fundamentally irrational and unsupported by the record. In any event, even if this Court held that the Act could survive rational-basis review, Respondents effectively concede that the Act cannot survive the heightened scrutiny that should, in fact, apply, given the impact that the Act has on fundamental rights held by Planned Parenthood of the Heartland ("PPH") and its patients. Accordingly, as this Court's temporary injunction decision predicted, Petitioner is entitled to summary judgment on the ground that the Act violates PPH's right to equal protection under the Iowa Constitution.

The Act should also be declared unlawful because it imposes unconstitutional conditions on the right to substantive due process held by PPH and its patients and on PPH's rights to free speech and association. Respondents' arguments to the contrary are based on a fundamental misunderstanding of the unconstitutional-conditions doctrine. That doctrine does not require a party to acquiesce to the unconstitutional condition before challenging the condition in court. Nor does the State have a roving right to refuse to contract with anyone who engages in disfavored but constitutionally protected activities unrelated to that contract. Because the Act attempts to leverage funding to control whether PPH provides abortion, what PPH says, and with whom it can associate

on its "own time and dime," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013) ("*AOSI*"), it is unconstitutional.[1]

ARGUMENT

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

A. The Act cannot survive rational-basis review.

As this Court has recognized, Iowa's equal-protection guarantee "is essentially a direction that all persons similarly situated should be treated alike." Ruling on Mot. for Temporary Injunctive Relief ("TI Order") at 8 (May 29, 2019) (quoting *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 31 (Iowa 2019)); *see also, e.g.*, *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013); *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009). At the temporary injunction stage, this Court held that PPH was likely to prevail on its equal-protection claim, even if rational-basis review—the least stringent form of constitutional scrutiny—applied.

Under rational-basis review, there must be a "plausible policy reason" to justify the Act's differential treatment of PPH and all other grantees. *Varnum*, 763 N.W.2d at 879 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) ("*RACI*")). Respondents' summary judgment brief does not address the Court's earlier conclusion that there is no such plausible justification here, much less explain why the Court should jettison that conclusion based on a stipulated record that in all ways relevant to the equal-protection claim closely hews to the facts available at the temporary injunction stage.

First, Respondents contend that the State is entitled to make "a value judgment favoring childbirth over abortion." Mem. of Authorities in Supp. of Resp'ts' Cross-Mot. for Summ. J.

[1] PPH no longer pursues the bill-of-attainder claim raised in its complaint, and therefore does not address Respondents' arguments regarding that claim here.

("Resp'ts' Summ. J. Br.") at 11 (Dec. 19, 2019). However, as this Court recognized, even assuming that interest is legitimate, it "would be completely unserved by this legislation." TI Order at 11. PPH—like all CAPP and PREP grantees—is required to rely on existing curricula selected by the state agencies administering the programs. Statement of Undisputed Facts ("SUF") ¶ 26 (Nov. 13, 2019). And CAPP and PREP funding may not be used to provide abortion care. *Id.* ¶ 32.

Respondents also ignore this Court's earlier conclusion that a preference for childbirth over abortion is not a "realistically conceivable" purpose served by the Act because the Act is both under- and over-inclusive. TI Order at 11. As this Court made clear, "[e]ffectively singling out PPH, while permitting other potential grantees to provide extensive abortion related services (including, perhaps, referring patients to PPH for abortions), is antithetical to a value judgment favoring childbirth over abortion." *Id*. at 12. Respondents make *no* attempt to justify the Legislature's decision in this respect, that is, to exclude PPH from funding, while permitting Unity Healthcare DBA Trinity Muscatine to continue as a grantee, despite its affiliation with an abortion provider. SUF ¶¶ 48–49. Nor do Respondents have any rebuttal to this Court's conclusion that the classification "is also likely irrationally overinclusive" because it would exclude PPH from funding even if PPH "discontinue[d] all abortion related activities in the State of Iowa" while continuing to associate with entities outside of Iowa that promote abortion access or perform abortions. TI Order at 12. While courts may generally reconsider before final judgment any findings and conclusions made at the temporary injunction stage, Respondents provide this Court with absolutely no reason to do so here.

Second, Respondents contend—in a reprise of their temporary injunction papers—that the Legislature was entitled to "conclude that it does not want Iowa teens to receive sex education and teen pregnancy prevention programming from entities for whom abortion represents a significant

revenue stream." Resp'ts' Summ. J. Br. at 11. Again, this Court concluded that this government interest "would likely be found not to be a valid, realistically conceivable purpose of th[e] legislation," TI Order at 13, and Respondents point to nothing in the full record to upset that view. Although Respondents highlight the share of PPH's funding that comes from patient services, *see* SUF ¶¶ 19–20, that funding includes many services beyond abortion. In fact, abortion accounts for only three percent of PPH's patient services. *See* App. 0007 (showing that, *e.g.*, contraception accounts for more than forty percent of PPH patient visits).

Even if abortion accounted for an undefined, "significant" share of PPH's funding, the State's second asserted interest is not a plausible justification for the law. Respondents suggest that abortion providers are somehow less scrupulous than other grantees because they have a financial interest in providing abortion services, but as this Court previously observed, "what basis in fact could there be" for that proposition? TI Order at 13. Respondents certainly do not point to one in the record. In fact, after this Court issued its temporary injunction, they expressly disavowed any assertion that "PPH or any other CAPP or PREP grantee in Iowa has improperly used CAPP or PREP funding for abortion," or that "PPH or any other CAPP or PREP grantee has discussed abortion as part of the services provided under these grant programs." SUF ¶¶ 33–34.

Moreover, Respondents fail to address the Court's earlier concerns about the Act's under- and overinclusiveness with respect to this second asserted state interest. Specifically, they do not explain why

> an eligible nonprofit healthcare delivery system facility that under this legislation is allowed to receive grants while also performing abortions; contracting, subcontracting or affiliating with an entity that performs or promotes abortions; and/or regularly making referrals to an entity that provides or promotes abortions would be any more scrupulous than the intended target of this legislation.

TI Order at 13. Nor do they contend with the Act's overinclusivity, in that it excludes from funding

even grantees that receive *zero* dollars from providing abortion services and instead merely advocate for abortion access or associate with other groups that do so. *See id.* Under these circumstances, the relationship of the Act's classification to the Respondents' stated goal is "so attenuated as to render the distinction arbitrary [and] irrational." *Varnum*, 763 N.W.2d at 879 (quoting *RACI*, 675 N.W.2d at 7).

Third, Respondents contend that the Legislature could reasonably have decided that it did not want to "boost Planned Parenthood's reputation or assist in generating or maintaining Planned Parenthood's recent momentum" by providing PPH with funding. Resp'ts' Summ. J. Br. at 11. The State equates this impact with "indirectly subsidiz[ing] abortion providers." *Id.* This argument is meritless.

Respondents do not argue that PPH or any other grantee has ever used CAPP or PREP funds to provide abortions or to promote access to abortion care, SUF ¶¶ 33–34, that is, they do not contend these funds have ever been used to "subsidize the exercise of a fundamental right" in a way objectionable to the State, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983). And although PPH has stated that barring CAPP and PREP funding for PPH would harm PPH's reputation and stall its momentum *as an organization working to prevent teen pregnancy*, *see* Resp'ts' Summ. J. Br. at 11 (citing Pet. for Declaratory & Injunctive Relief ¶¶ 47–48), Respondents err in relying on that statement for the very different proposition that continuing CAPP and PREP funding would bolster PPH's reputation *more generally or as an organization providing abortion services*. There is simply no evidence or logic to support that latter proposition. In any event, a funding condition meant to damage Planned Parenthood's reputation evinces precisely the type of "invidious discrimination" that cannot survive even rational-basis review. *Varnum*, 763 N.W.2d at 879, 887 (quoting *RACI*, 675 N.W.2d at 7); *see also, e.g.*, *U.S. Dep't of*

Agric. v. Moreno, 413 U.S. 528, 534 (1973).

The State also does not contend with the Act's clear under-inclusiveness in this respect. Under the exception for nonprofit healthcare delivery systems, the Act permits Unity Healthcare to receive funding despite its affiliation with an abortion provider, so long as it operates from a "distinct location" where abortions are not performed. App. 0262, 0264 (2019 Iowa Acts, House File 766 §§ 99, 100 (pp. 90–93). But there is no reason to believe that UnityPoint's reputation, any more than PPH's, is limited to a single physical location. Accordingly, it is simply not plausible that the Act was intended to address an asserted interest in preventing state subsidization of Planned Parenthood's reputation as an abortion provider. As a result, this Court should declare the Act unlawful on the ground that it violates PPH's right to equal protection, even under the least stringent form of constitutional review.

B. Respondents effectively concede that the Act cannot survive strict scrutiny.

A law that treats two classes differently and bears on fundamental rights under the Iowa Constitution, including rights to due process, free speech, and free association, is subject to strict scrutiny. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998); *accord Varnum*, 763 N.W.2d at 880. Here, the relevant classification distinguishes between an applicant that provides or "promotes" abortion, "refers" for abortion, or "affiliates" with other organizations that provide or advocate for abortion access, and an applicant that does none of those things (or one that qualifies for the nonprofit health care delivery system exception). As discussed in more detail in Part II, the Act unquestionably "involves a fundamental right," *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004), and is subject to strict scrutiny as a result. The Act is, therefore, presumptively invalid under Iowa's equal-protection guarantee as well. *Id.*

To overcome that presumptive invalidity, the State bears the burden of establishing that it

has a "compelling government interest" in the Act, and that the Act is "narrowly tailored to serve" that interest. *Id.* (quoting *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001)). Respondents do not meet this burden. They make no attempt to demonstrate that the Act could survive strict scrutiny, instead relying on post hoc justifications for judgments that the Legislature "could have made." Resp'ts' Summ. J. Br. at 10–11. However, "[t]o be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'" for the challenged classification, "and the legislature must have had a strong basis in evidence to support that justification before it implement[ed] the classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (holding that the "State must specifically identify an 'actual problem' in need of solving" for a challenged law to withstand strict scrutiny (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822–23 (2000))). Accordingly, if this Court determines that the Act restricts any of the fundamental rights at issue in this case, the "challenged statutory scheme" as a whole should be subject to strict scrutiny for purposes of PPH's equal-protection claim, *In re S.A.J.B.*, 679 N.W.2d at 649, and as the State effectively concedes, the Act cannot satisfy this stringent standard.

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

In addition to violating PPH's equal-protection right, the Act imposes an unconstitutional condition on the substantive due-process rights of PPH and its patients, and on PPH's free-speech and free-association rights. Respondents concede that the State cannot "withhold[] a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." Resp'ts' Summ. J. Br. at 4 (quoting *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012)). On this much, the parties agree. Although the State may reasonably place funding conditions on "a particular

program or service," it may not place such conditions on the "*recipient* of the subsidy," "thus effectively prohibiting the recipient from engaging in . . . protected conduct outside the scope" of the government program. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

Respondents nevertheless argue that the Act does not impose an unconstitutional condition because (1) it was not intended to, and will not, force PPH to stop performing abortions, and therefore does not violate the substantive-due process rights of PPH's patients; (2) the State has an unfettered right to choose with whom it contracts, so it may permissibly refuse to provide grants to entities that provide abortion, promote abortion access, or associate with other organizations that do the same; and (3) PPH has no substantive due-process right under the Iowa Constitution to perform abortions. These arguments rest on a misunderstanding of the law and a mischaracterization of the CAPP and PREP programs. Properly understood, the Act is plainly unconstitutional.[2]

A. PPH need not show that it will stop performing abortions, or that the Act was intended to coerce it to do so, in order to prevail on its substantive due-process claim on behalf of patients.

Under the Iowa Constitution's substantive due-process guarantee, patients have a fundamental right to terminate a pregnancy, *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018) ("*PPH v. Reynolds*"), and PPH may bring an unconstitutional conditions claim on their behalf where a law would impinge on that right, *see*

[2] Respondents urge this Court not to decide PPH's free-speech and free-association claims. Resp'ts' Summ. J. Br. at 8. However, the Court could avoid ruling on them only if it holds that the Act violates PPH's right to equal protection, or that the entire Act falls based on its violation of substantive due-process rights. Otherwise, resolution of PPH's speech and association claims is necessary to afford PPH full relief. Moreover, were the Act to survive rational-basis review for purposes of the equal-protection claim, this Court would still need to assess the Act's impact on other fundamental rights at issue—including PPH's rights to free speech and association—to decide whether to apply strict scrutiny when resolving the equal-protection claim. *See supra* pp. 7–8.

Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245 (10th Cir. 2016) (resolving unconstitutional conditions claim in a third-party standing case); *accord, e.g.*, *Lewis v. Eufaula City Bd. of Educ.*, 922 F. Supp. 2d 1291, 1303 (M.D. Ala. 2012); *Agostino v. Simpson*, No. 08-CV-5760 (CS), 2008 WL 4906140, at *5 (S.D.N.Y. Nov. 17, 2008); *Serena H. v. Kovarie*, 209 F. Supp. 2d 453, 458 (E.D. Pa. 2002).

Respondents do not assert otherwise. Instead, they claim that the Act does not impose an unconstitutional condition on patients' due-process rights because PPH will not acquiesce to the condition that it stop providing abortion care. But that is not how the unconstitutional conditions doctrine works. Here, as Respondents concede, the State indisputably could not pass a law banning abortion. Resp'ts' Summ. J. Br. at 8; *PPH v. Reynolds*, 915 N.W.2d at 237; *cf. Roe v. Wade*, 410 U.S. 113 (1973). A funding condition that strips PPH of grants for the very same reason—providing abortion care—is likewise unconstitutional. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013).

Indeed, Respondents' contention that actual "*coercion* is the key" to distinguishing an unconstitutional condition from a constitutional one, Resp'ts' Summ. J. Br. at 5, is belied by their own brief. As Respondents recognize, the State may not "coerc[e] [a] beneficiary to give up a constitutional right *or* . . . penalize his exercise of a constitutional right.'" *Id*. at 4 (emphasis added) (quoting *Planned Parenthood of Ind.*, 699 F.3d at 986). The Act unquestionably "penalize[s]" PPH for performing abortions, regardless of whether PPH has the fortitude to withstand the State's pressure campaign.

Moreover, in *AOSI*, 570 U.S. 205 (2013), the U.S. Supreme Court expressly rejected the view that a funding condition is unconstitutional only if "[it] is actually coercive, in the sense of an offer that cannot be refused." *Id.* at 214. Instead, it explained that "the relevant distinction . . .

is between conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate" speech or the exercise of other constitutional rights "outside the contours of the program itself." *Id.* at 214–15. Here, the Act seeks to regulate PPH's activities *outside* the CAPP and PREP programs, forbidding PPH—as a condition on funding—from providing abortions on its own "time and dime." *Id.* at 218. That is precisely the type of condition that runs afoul of the Iowa Constitution. *See Hearst Corp. v. Iowa Dep't of Revenue & Fin.,* 461 N.W.2d 295 (Iowa 1990); *see also* Br. in Supp. of Pet'r's Mot. for Summ. J. ("Pet'r's Summ. J. Br.") at 15 (collecting cases).

Respondents also wrongly contend that the unconstitutional conditions doctrine applies only where a law's *intent* is to coerce—*i.e.*, to "change behavior"—but not where a law is designed "to deny benefits." Resp'ts' Summ. J. Br. at 6. This artificial distinction should be rejected. It is at odds, for example, with cases that involve retaliatory discharge or benefit terminations based on an individual's *previous* exercise of a constitutional right. In those cases, including *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (on which Respondents rely), the government necessarily intends to deny the benefit of future employment and meanwhile has no way to coerce the employee's behavior going forward. Yet the termination unquestionably "penalize[s]" the exercise of a constitutional right, *id.*, and is unconstitutional for that reason. *See also, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (holding that patronage dismissals were unconstitutional as applied to employees already terminated and those still threatened with dismissal). In addition, Respondents' intend-based distinction would lead to absurd results. If the State were correct, it could, for example, deny public benefits to individuals who have had abortions in the past on the theory that a backward-looking law cannot be *intended* to change behavior. And, so long as the State is certain

that its victims will resist coercion, it could deny public employment or cut off pensions to individuals who advocate for abortion access, or espouse any other position with which the State disagrees. As these examples make clear, the standard urged by Respondents is not workable for adjudicating constitutional claims.

Even if this Court were to accept Respondents' intent-based standard, it would not help Respondents here. The Act's express terms condition grant eligibility on whether an entity continues to engage in speech or activities prohibited by the Act at the time of its application. *See, e.g.*, App. 0262, 0264 (§§ 99, 100) (prohibiting funding to an applicant that "*becomes or continues* to be an affiliate" of an entity that performs or "promotes" abortion (emphasis added)). When the plain language of a statute is clear, the Court does "not 'search for meaning beyond [the statute's] express terms.'" *State v. Iowa Dist. Ct. for Johnson Cty.*, 730 N.W.2d 677, 679 (Iowa 2007) (quoting *State v. Knowles*, 602 N.W.2d 800, 801 (Iowa 1999) (alteration in original)). In this case, those terms make plain that the Act is intended to coerce, not just penalize, constitutionally protected activity.

B. The State cannot leverage its funding to prohibit constitutionally protected activity outside the program that it is funding.

Respondents repeatedly assert that "states are allowed to choose with whom they contract to deliver the government's message." Resp'ts' Summ. J. Br. at 9. They argue that the State's asserted prerogative in this respect justifies the Act's prohibition on funding to abortion providers, *see id.* at 6, 11, and to organizations that advocate for abortion access or associate with other organizations that do the same, *see id.* at 9. This position is at odds with bedrock unconstitutional conditions precedent. As the U.S. Supreme Court has repeatedly made clear, the government may not adopt a funding condition that "goes beyond defining the limits" of a program, such as CAPP or PREP, "to defining the recipient." *AOSI*, 570 U.S. at 218; *see also id.* at 217 (distinguishing

between funding conditions "that define the [government] program and those that reach outside it").

So, for example, in *Rust v. Sullivan*, 500 U.S. 173, the U.S. Supreme Court upheld a restriction on family planning funding that barred grantees from providing counseling or referrals for abortion as a method of family planning within government-subsidized family planning projects. *Id.* at 179, 196. It emphasized, however, that grantees "remained unfettered" in activities outside of those projects. *Id.* at 196. As the court explained, "our 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service." *Id.* at 197. That is precisely what Iowa has done here by forbidding PPH from providing abortion, advocating for abortion access, or affiliating with other organizations that do so, all entirely outside the CAPP and PREP programs.

Nothing in *Planned Parenthood Association of Hidalgo County Texas, Inc. v. Suehs*, 692 F.3d 343, 349–50 (5th Cir. 2012), on which Respondents rely, is to the contrary. That case involved a federal constitutional challenge to a Texas regulation that eliminated Women's Health Program ("WHP") funding to organizations that "promote[d]" abortion or were "affiliates of entities that perform[ed] or promote[d]" abortion, as those terms were defined in the regulation. *Id.* at 347. The Fifth Circuit reversed the grant of a preliminary injunction against the prohibition on "promoting" abortion. In the court's view, the WHP "expressed" a "policy" directly related to abortion—"for public funds to subsidize non-abortion family planning speech to the exclusion of abortion speech." *Id.* at 350. Accordingly, it concluded that the funding prohibition on "promot[ing]" abortion functioned not as a condition on conduct outside the program, but rather "as a direct regulation of the content of [the] state program," *id.* at 349, and was therefore permissible under the rationale set forth in the U.S. Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. at 178. In

another portion of the decision more on-point with this case, *Suehs* recognized that the challenged regulation's separate restriction on *affiliation* with other abortion advocates and providers—similar to the Act's challenged restriction on funding to grantees that affiliate with entities that promote abortion access—was "problematic" because it was "not a direct regulation of the content of a government program." 692 F.3d at 351.

As just discussed, the rationale in *Rust* and its progeny, which distinguish between funding conditions that regulate the content of a government program, and those that reach outside of it, is fatal to the Act. Even without the Act, CAPP and PREP funding may not be used for abortion. SUF ¶ 32. And unlike the program at issue in *Suehs*, the CAPP and PREP programs do not involve an abortion-related message.[3] Instead, CAPP and PREP programming is based exclusively on curricula selected by the State, and grantees are required to implement those curricula "with fidelity." *Id.* ¶¶ 25–26. The curricula "do not include material on or discussion of abortion," *id.* ¶ 27, so there is no possibility that PPH's activities outside of CAPP and PREP could "garbl[e]" that message. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

Accordingly, far from acting as a "direct regulation of the content" of CAPP and PREP programming, *Suehs*, 692 F.3d at 349, the Act serves no function other than "defining the recipient" to exclude those who engage in unrelated yet constitutionally protected activity "on their own time and dime," *AOSI*, 570 U.S. at 218; *see also* App. 0263–66 (§§ 99, 100) (Act's express provision "exclud[ing] as an eligible applicant, any applicant entity that performs abortions, promotes abortions, . . . [or] becomes or continues to be an affiliate of any entity that performs or

[3] In this respect, PPH agrees with Respondents that the CAPP and PREP programs are "narrower" than the WHP at issue in *Suehs*, Resp'ts' Summ. J. Br. at 9, but this narrowness supports rather than undermines PPH's position. It demonstrates that the Act's funding criteria are unrelated to the limited scope of the CAPP and PREP programs, which focus on "sexual education and teen pregnancy prevention," *id.*, not abortion.

promotes abortions). For these reasons, the Act serves as an unconstitutional condition on the right to substantive due-process held by PPH and its patients and on PPH's rights to free speech and association under the Iowa Constitution.

C. Respondents err in arguing that PPH has no due-process right under the Iowa Constitution to perform abortions.

Respondents contend that PPH's substantive due-process claim on its own behalf must fail because PPH, the entity directly subject to the funding condition, does not have a freestanding due-process right to provide an abortion. This argument ignores the fact that a patient "cannot safely secure an abortion without the aid of a physician." *Singleton v. Wulff*, 428 U.S. 106, 107, 117 (1976). As numerous courts have recognized, the "constitutionally protected abortion decision is one in which the physician is intimately involved." *Id.* at 117; *see also, e.g.*, *Planned Parenthood Ass'n of Utah*, 828 F.3d at 1263. Accordingly, the due-process right of an abortion provider is necessarily coextensive with the patient's due-process right to have an abortion.

Respondents cite three U.S. Supreme Court cases as "suggest[ing]" that "no due process right to perform abortions exists under the federal constitution." Resp'ts' Summ. J. Br. at 7. However, PPH brings its claims under the Iowa Constitution, not the federal one. The Iowa Supreme Court has rejected the "undue burden" standard used under the federal constitution to assess whether a law violates the substantive due process right to abortion. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992). That standard considers whether the regulation imposes an "undue burden" on a patient's right to obtain an abortion, and would—outside of the unconstitutional conditions context—consider the effect of PPH's discontinuance of abortion services on Iowa women. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), *as revised* (June 27, 2016). The undue burden standard does *not* apply to substantive due-process claims under the Iowa Constitution. Rather, the Iowa Supreme Court has made clear

that restrictions on abortion are subject to strict scrutiny, such that the government must demonstrate the regulation is narrowly tailored to achieve a compelling government interest. *PPH v. Reynolds*, 915 N.W.2d at 241. It has also recognized the critical role that abortion providers play in their patients' decision-making. *Id.* at 217. At the outset, then, these cases apply a standard that is not applicable to substantive due-process claims under Iowa law.

Moreover, as Respondents impliedly concede, none of the three cases actually holds what Respondents urge here. The *Casey* plurality stated in the context of a challenge to an "informed-consent" requirement that the constitutional status of the doctor-patient relationship was "derivative of the woman's position." 505 U.S. at 884. Even assuming the Iowa Supreme Court would accept that rationale as a *limitation* on a provider's right to provide abortion in the context of this case, a right that is "derivative" nonetheless exists.

Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam), and *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997), are even further afield. These cases stand for the unremarkable proposition that despite a patient's federal substantive due process right to an abortion, states retain a valid interest in ensuring that abortions be performed "by medically competent personnel." *Menillo*, 423 U.S. at 11; *Mazurek*, 520 U.S. at 974 (holding, based on the particular state law at issue in that case, that the "performance of abortions may be restricted to physicians"). These two cases do not address whether the Iowa Constitution (or the federal one, for that matter) extends a due-process right to an abortion provider, not just her patients, to be free from regulations of abortion that are unrelated to demonstrated health-and-safety interests. For the same reason, the fact that Iowa prohibits non-physicians from performing abortions, *see* Resp'ts' Summ. J. Br. at 8 (citing Iowa Code § 707.7), is legally irrelevant to PPH's claims, even assuming that restriction is otherwise valid as applied to non-physicians.

Nor should this Court follow *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 916 (6th Cir. 2019) (en banc). Like the U.S. Supreme Court cases just discussed, *Hodges* dealt with the federal standard for analyzing whether restrictions on abortion violate the substantive due-process guarantee. In addition, although *Hodges* wrongly decided the question whether there is a Fourteenth Amendment right to provide abortions, the court recognized that another court of appeals has reached the opposite conclusion. *Hodges*, 917 F.3d at 913 (citing *Planned Parenthood Ass'n of Utah*, 828 F.3d at 1260). And *Hodges* does not, in any event, control the interpretation of Iowa law. As the Supreme Court of Iowa has observed, abortion providers play an intimate—and often necessary—role with respect to a patient's "deeply personal" decision to have an abortion. *PPH v. Reynolds*, 915 N.W.2d at 237. The "ability to decide whether to continue or terminate a pregnancy" is "implicit in the concept of ordered liberty," *id.*, and among those fundamental rights jealously protected by the Iowa Constitution. Because the fulfillment of that right involves not just a patient, but also a provider, both share in the right's protections.

CONCLUSION

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

Respectfully submitted,

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