IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., EMMA GOLDMAN CLINIC, and JILL MEADOWS, M.D., Petitioners, v. KIM REYNOLDS ex rel. STATE OF IOWA and IOWA BOARD OF MEDICINE, Respondents.	Case No. EQCE083074 **RESISTANCE TO MOTION TO DISMISS**

COME NOW Petitioners, Planned Parenthood of the Heartland, Inc. ("PPH"), Emma Goldman Clinic ("EGC"), and Jill Meadows, M.D., by and through the undersigned counsel, and in support of their Resistance to Respondents' Motion to Dismiss[1], state:

INTRODUCTION

Petitioners, Iowa health care providers, are seeking injunctive and declaratory relief against an Iowa statute that would ban abortion six weeks into pregnancy, before many women even realize they are pregnant. *See* Pet. for Declaratory J. & Inj. Relief ("Pet."); Section 4 of Senate File 359 ("the Ban"), to be codified at Iowa Code § 146C.2 (2018). Petitioners brought their claims under the Iowa Constitution.

[1] On July 25, 2018, Martin Cannon, counsel for the Defendants, indicated he would be withdrawing the Defendants' Motion to Dismiss and filing an Answer. As no Withdrawal has yet been filed, Plaintiffs are filing this Resistance in compliance with the Parties' Joint Mot. for a Sched. Order of June 21, 2018.

Respondents have moved to dismiss this action, arguing that Petitioners have failed to state a claim because, they primarily contend, the Iowa Supreme Court has never recognized a right to abortion under the Iowa Constitution. While that motion was pending, however, the Iowa Supreme Court decided another abortion rights case, *Planned Parenthood of the Heartland v. Reynolds* (*PPH II*), No. 17-1579, 2018 WL 3192941 (Iowa June 29, 2018), under the due process and equal protection guarantees of the Iowa Constitution—resoundingly rejecting Defendants' arguments and removing any remaining doubt that the Iowa Constitution protects access to abortion as a fundamental right. Moreover, in that case the court applied strict scrutiny under both the due process and equal protection guarantees of the Iowa Constitution to invalidate a *restriction* on abortion: a statute requiring women to make an additional trip to the clinic to have an ultrasound and receive state-mandated information at least seventy-two hours before having an abortion. *PPH II*, 2018 WL 3192941.

In light of this decision, Respondents' arguments are patently meritless: because the Iowa Constitution prohibits Respondents from imposing unwarranted pre-viability *barriers* to abortion, there is no question that it prohibits them from *banning* abortions altogether after six weeks. Therefore, there is no conceivable ground for dismissing Petitioners' claims.

ARGUMENT

In their motion to dismiss, Respondents argue: 1) the Petition improperly seeks an advisory opinion from this Court because Petitioners could have brought federal claims instead of state claims; 2) there is no fundamental right to abortion under the Iowa Constitution; and 3) Petitioners have failed to state an equal protection claim under the

Iowa Constitution. Most of Respondents' arguments are squarely foreclosed by *PPH II*'s holdings and analysis. The remainder are foreclosed by the reasoning in that decision, and are, at any rate, meritless.

I. *PPH II* Forecloses Respondents' Arguments.

PPH II squarely holds that women have a fundamental right to end an unwanted pregnancy. 2018 WL 3192941, at *25 (recognizing that "[a]utonomy and dominion over one's body go to the very heart of what it means to be free," and held that "under the Iowa Constitution . . . implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy.").[2] *PPH II* further holds that "[t]he guarantee of substantive due process requires nothing less" than strict scrutiny when reviewing legislative restrictions on a fundamental right, including the right to abortion access. *Id.* at *27. Finally, *PPH II* holds that mandatory delay laws violate the Iowa Constitution's equal protection guarantee because unwarranted restrictions on abortion deprive women of the right "to be equal participants in society," *Id.* at *32, by denying them the "ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen." *Id.* (quoting Justice Ruth B. Ginsburg). *PPH II* expressly forecloses Respondents' arguments: 1) that abortion is not a fundamental right under the Iowa Constitution; and 2) that abortion restrictions cannot violate women's equal

[2] Even before *PPH II*, the Iowa Supreme Court had already decided that the Iowa Constitution protected the right to abortion when it struck down another restriction under the Iowa Constitution (not under the federal Constitution). *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med. (PPH I)*, 865 N.W.2d 252, 254 (Iowa 2015). Contrary to Respondents' representations, *PPH I* did not reserve the question of whether the Iowa Constitution protects reproductive autonomy, but merely whether it did so to a *greater* degree than the federal Constitution. *Id.* at 254.

protection rights because women and men are not similarly situated with respect to pregnancy.

The logic of *PPH II* forecloses the remainder of Respondents' arguments as well. Respondents' novel argument that Petitioners are seeking an "advisory opinion" or bringing unnecessary claims simply because they *could* also have brought federal claims cannot survive *PPH II*; given the holdings in *PPH II*, there is no way for Respondents to continue arguing that Petitioners' claims break new legal ground. Moreover, the Iowa Supreme Court clearly did not consider the challenge in *PPH II* "academic" or "advisory"; it decided that challenge, even though the petitioners there (who are also Petitioners here) could have challenged the mandatory delay law under the federal Constitution. *See id.* at *41 (Mansfield, J., dissenting) (noting that "two abortion waiting periods have been enjoined by federal district courts under the undue burden test"). Similarly, the Iowa Supreme Court's decision to reach and grant Petitioners' equal protection claim critically undermines Respondents' argument that standing requirements are somehow higher for equal protection claims than for other constitutional claims.[3]

Thus, this Court should deny Respondents' Motion to Dismiss under *PPH II*.

II. Respondents' Argument that Petitioners Should Have Brought Federal Claims is Meritless.

Even if *PPH II* did not foreclose Respondents' argument that Petitioners were seeking an improper "advisory opinion," that argument is baseless. Respondents'

[3] This Court has already decided against the Respondents on this precise claim. Respondents raised this same argument in *PPH II*, and it was rejected by the district court. Ruling on Pet'rs' Pet. for Declaratory & Inj. Relief at 3–4 n.2, *PPH II*, Case No. EQCE081503 (Iowa Dist. Ct. Sep. 29, 2017) ("[T]he court denies the sovereign immunity and standing claims for reasons stated in the resistance."). Respondents chose not to appeal that holding.

argument not only ignores Petitioners' right to be the master of their complaint and decide what claims to bring,[4] but also fundamentally misunderstands the role of the Iowa courts in protecting Iowa citizens' rights, as well as the significance of federal precedent to that process. Specifically, and contrary to Respondents' assertions, the Iowa Supreme Court has been clear: 1) that the Iowa Constitution protects Iowa citizens independently of the federal Constitution (not simply as some adjunct to the federal Constitution); and 2) that it will consider federal cases interpreting analogous federal constitutional provisions for their persuasive, rather than precedential, value. *See generally State v. Baldon*, 829 N.W.2d 785 (Iowa 2013).

As the Iowa Supreme Court has taken pains to explain, the "Iowa Constitution, like other state constitutions, was designed to be the *primary* defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection . . . " *Id.* at 809 (emphasis added) (quoting Mark S. Cady, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 Drake L. Rev. 1133, 1145 (2012)). Even after the adoption of the Constitution and the Bill of Rights, state constitutions continued to be "independent source[s] of law." *Id.* at 834. "[I]t is the responsibility of [the Iowa Supreme Court], not the United States Supreme Court, to say what the Iowa Constitution means," *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601 (Iowa 2001), and the

[4] "The [well-pleaded complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also Grimm v. US W. Commc'ns, Inc.*, 644 N.W.2d 8, 14 (Iowa 2002) ("...a plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.").

court "jealously guard[s] [its] right and duty" to interpret its constitution independently. *Id*. quoting *State v. Olsen*, 213 N.W.2d 216, 220 (Iowa 1980).

For this reason, Iowa courts do not shy away from deciding state constitutional claims, even when those claims arguably resemble federal claims. *See PPH I*, 865 N.W.2d 252 (applying Iowa Constitution to strike down abortion restriction, and using federal standard as guidance on the minimum standard for protecting abortion rights under the Iowa Constitution); *see also Baldon*, 829 N.W.2d at 822 (even in cases where a plaintiff brings both federal and state constitutional claims, the court is "free to consider either state or federal constitutional provisions first"). At any rate, as set forth above, it is now abundantly clear that the Iowa Constitution affords even stronger protection to the right to abortion than the federal standard. *PPH II* also reaffirms that when Iowans challenge an act of the legislature that they believe violates the Iowa Constitution, "[t]he obligation to resolve this grievance and interpret the constitution lies with this court." 2018 WL 3192941 at *2.

In framing their novel and ahistorical argument that Petitioners must bring their claims under the federal Constitution, Respondents rely on cases that are wildly off-point. *See State v. Seering*, 701 N.W.2d 655, 663 (Iowa 2005) (the "duty to avoid constitutional questions" arose because "claims involving fundamental rights must identify the claimed right with accuracy and specificity," which plaintiff failed to do); *Iowa Hotel Ass'n v. State Bd. of Regents*, 114 N.W.2d 539, 545 (Iowa 1962) (it was not necessary to decide the constitutional question because the plaintiff failed to allege that he was injured by the unconstitutional feature of the statute); *State v. Washington*, 832 N.W.2d 650 (Iowa 2013) (not necessary to reach state claims after granting federal claims); *Mitchell Cty. v.*

Zimmerman, 810 N.W.2d 1 (Iowa 2012) (same); *L.F. Noll Inc. v. Eviglo*, 816 N.W.2d 391 (Iowa 2012) (relief afforded under statutory grounds). These cases stand for the propositions that: 1) claims must be well-pled; and 2) when plaintiffs put forth multiple claims under which the case could be resolved, courts generally evaluate other claims first, only turning to the constitutional claims if necessary.[5] They do not support the proposition that a court should dismiss a plaintiff's constitutional claims simply because the defendant would prefer the case be decided on other hypothetical grounds not before the court.[6]

Clearly, Petitioners have properly brought claims under the Iowa Constitution.

III. Petitioners Have Standing to Assert Equal Protection Claims.

Respondents also argue that Petitioners lack standing to assert an equal protection claim. Mot. to Dismiss ¶ 5–18. That very argument was considered and rejected by the district court in *PPH II*, a decision Respondents declined to appeal. See Ruling on Pet'rs' Pet. for Declaratory & Inj. Relief at 3–4 n.2, *PPH II*, Case No. EQCE081503 (Iowa Dist. Ct. Sep. 29, 2017). Respondents' argument fails.

Respondents rest their argument on one sentence, taken out of context from *Iowa Movers & Warehousemen's Ass'n v. Briggs*, 237 N.W.2d 759, 773 (Iowa 1976): "This

[5] This second principle is far from absolute. See *PPH I*, 865 N.W.2d 252 (reaching constitutional claims rather than resolve statutory claims).

[6] Respondents also argue that this case requires the Court to issue an advisory opinion. Their argument is without merit and is unsupported by the cases they cite. *Nitta v. Kuda*, 89 N.W.2d 149, 151 (Iowa 1958), refused to issue an opinion in a contract dispute because the matter was moot, and issuing an opinion simply because it "might affect other litigation...would amount to an advisory opinion." *Schmidt v. State*, 909 N.W.2d 778, 800 (Iowa 2018), set a new standard for post-conviction relief claims but remanded to the district court to apply the standard, to afford the parties their "day in court" to argue under the new standard and to avoid issuing an advisory opinion. The impermissible advisory opinions described in these cases are in no way relevant to this case, which involves live issues being presented at the trial level.

court has held in a number of cases that only a member of the class subjected to discrimination may raise an equal protection claim." While the court in *Iowa Movers* noted a "general rule" against third-party standing, it explicitly acknowledged that "courts have however developed several exceptions to that rule." *Id.* at 772. These exceptions include cases (1) where there is "a peculiar relationship between the party and the rightholder" that justifies third-party standing; (2) "where the rightholder has difficulty asserting his own rights," and (3) where disallowing an assertion of third-party rights would render those rights "diluted and adversely affected." *Id.*

The exceptions to the prohibition on third-party standing enumerated in *Iowa Movers* plainly apply here and are the very reasons why courts have uniformly allowed abortion providers to generally assert the rights of their patients against governmental interference with the right to seek an abortion. Indeed, a plurality of the United States Supreme Court in *Singleton v. Wulff*, 428 U.S. 106, 114–18 (1976), applied the same exceptions discussed in *Iowa Movers* and held that abortion providers may assert their patients' rights—including rights guaranteed by equal protection of the law.

Specifically, the plurality recognized that the relationship between a woman seeking an abortion and her healthcare provider is necessarily close: the woman cannot have a safe abortion without the doctor and the doctor is "intimately involved" in the patient's abortion decision. *Id.* at 117. Furthermore, a woman's ability to assert her own claims may be chilled by the highly sensitive and personal nature of reproductive health care decisions, and additionally hindered by issues of mootness. *Id.* These considerations apply without regard to whether the claim asserted sounds in substantive due process or

in equal protection.[7] See *Planned Parenthood of The Great Nw. v. State*, 375 P.3d 1122 (Alaska 2016) (allowing Planned Parenthood affiliate and physicians to raise equal protection challenge under state constitution on behalf of minor patients' rights); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000) (same); *Wicklund v. State*, Cause No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (1st Jud. Dist. Feb. 11, 1999) (same).[8]

CONCLUSION

WHEREFORE, for all the reasons stated above Petitioners respectfully request this Court deny Respondents' Motion to Dismiss.

Respectfully submitted,

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[7] The claims advanced by the *Singleton* physician plaintiffs on behalf of their patients included both substantive due process and equal protection rights. *See Singleton*, 428 U.S. at 110. ("A number of grounds were stated [in the complaint], among them that the statute . . . deprives plaintiffs' patients of the fundamental right of a woman to determine for herself whether to bear children; infringes upon plaintiffs' right to render and their patients' right to receive safe and adequate medical advice and treatment; and deprives plaintiffs and their patients, each in their own classification, of the equal protection of the laws.") (internal quotation and alteration omitted).

[8] Respondents' argument further ignores the equal protection argument that Dr. Meadows advances on her own behalf: by singling out abortion providers like her for licensure penalties, simply for providing critical and constitutionally protected medical care, Respondents deny her the equal protection of the laws. *See* Pet. at ¶ 42.

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