IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and JILL MEADOWS. M.D., Petitioners, v. KIMBERLY K. REYNOLDS and IOWA BOARD OF MEDICINE, Respondents.	Equity Case No. EQCE081503 **RESPONDENTS' POST-TRIAL BRIEF**

RESPONDENTS' POST-TRIAL BRIEF

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STATEMENT OF THE CASE

Protecting unborn life is a state interest of the highest order. In furtherance of this important interest, the legislature enacted a regulatory measure that requires abortion providers to obtain certification that a woman has been given information about the procedure, including an opportunity to view an ultrasound and hear her unborn child's heartbeat, at least 72 hours prior to terminating a pregnancy ("the Act"). The Act's informed choice provision is designed to provide important information to Iowa women—much of which would be otherwise unavailable—to help them with one of the most important decisions they will ever face. The informed choice provision does not remove the ultimate decision from the woman. Rather, it reflects the hope of the legislature that after receiving the information and taking some time to consider it, some women will choose to continue a pregnancy that they otherwise would have terminated. Petitioners Planned Parenthood of the Heartland and Jill Meadows seek to permanently enjoin this provision.

Planned Parenthood of the Heartland operates nine clinics in Iowa. Physicians perform abortion at six of those clinics. Medication and surgical abortions are performed at clinics in Des Moines and Iowa City. Medication abortions are also provided at clinics in Ames, Bettendorf, Cedar Falls, and Council Bluffs. In the past year, Planned Parenthood of the Heartland performed approximately 3,000 abortions. That represents close to three quarters of the total number of abortions performed in Iowa. Five years ago, Planned Parenthood of the Heartland operated fifteen clinics in Iowa. Steadily decreasing demand for abortions in the last decade led Planned Parenthood of the Heartland to close several of those clinics prior to the enactment of the informed choice

provision. Jill Meadows is the medical director of Planned Parenthood of the Heartland. Meadows testified that they plan to close the Bettendorf clinic at some point in the future.

Before the Act, physicians who perform abortions were required to certify that a woman was given the opportunity to view an ultrasound image of the unborn child and that she was provided information about the options relative to a pregnancy before the procedure. The physician would typically obtain the certification on the same day as the abortion. Unless a woman schedules an appointment for an abortion, Planned Parenthood of the Heartland will not perform an ultrasound to confirm and date the pregnancy. That means that in most cases, women are given an opportunity to view the ultrasound, told how far along they are into the pregnancy, and are provided with information about the risks of abortion and the options relative to pregnancy—possibly for the first time—just minutes before the abortion is performed. The Act contains an informed choice provision that requires abortion providers to give women 72 hours between receiving the information and having the opportunity to view an ultrasound and going through with an abortion. It also requires that the woman be given an option to hear the fetal heartbeat and that the information provided be based on the materials developed by the Department of Public Health.

Shortly before the Act went into effect, Planned Parenthood and Meadows filed the instant petition along with a request for a temporary injunction. This Court denied a temporary injunction, concluding that the petitioners had not demonstrated a likelihood of success on the merits. It noted that similar waiting periods had been upheld against constitutional challenges despite testimony that such laws burden women with "additional travel, need to take time off, the difficulty explaining whereabouts to family,

employers, and others, hardship to lower income women, and being subject to harassment from protesters." Order 05/04/17 P.3. The petitioners raised the same issues in their evidence supporting a temporary injunction. In its order, this Court allowed for the possibility that the petitioners would be able to prove a distinct burden resulting from the informed choice provision at trial. They did not.

PETITIONERS' DUE PROCESS CLAIM

The petitioners claim that the Act violates their patients' right to an abortion under article I, section 9 of the Iowa Constitution. They are asking this Court to enjoin Governor Reynolds and the Iowa Board of Medicine from enforcing the Act on this basis. In its order denying the temporary injunction, this Court noted that the Iowa Supreme Court applied the federal undue burden test to the first challenge to an abortion regulation under the Iowa constitution. It also noted that the opinion left open the possibility that another standard might apply. *See* Order 05/04/17 P.3. The respondents believe that when the Iowa Supreme Court ultimately decides the level of scrutiny that is appropriate for state constitutional challenges to abortion regulations, the "rational basis" test will apply. Either way, it is important at the outset to comment on the burden that petitioners bore at trial.

1. Petitioners facial challenge to Iowa Code section 146A.1

The petition alleges that the Act is unconstitutional on its face. By its nature, "a facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts." *F.K. v. Iowa Dist. Court for Polk County*, 630 N.W.2d 801, 805 (Iowa 2001). In order to prevail on a facial challenge in Iowa, the petitioners "must demonstrate the statute is incapable of any valid application." *State v.*

Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002); *see also War Eagle Village Apartments v. Plummer*, 775 N.W.2d 714, 722 (Iowa 2009). As the Iowa Supreme Court has recognized, "[c]laims of facial invalidity often rest on speculation." *War Eagle Village*, 775 N.W.2d at 722 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008)). It is not enough for the petitioners to argue that the informed consent provision is unconstitutional under a "given set of facts." Rather, this Court must determine "whether any set of facts exists under which the statute would be constitutional." *Id.*

The petitioners do not even seriously attempt to demonstrate that the informed choice provision is unconstitutional in every application. The provision does not prohibit any abortion, nor does it directly affect any woman's ability to make the "ultimate decision" as regards her pregnancy. For most women, the informed choice provision will operate as a minor inconvenience. For some, it will make an abortion more difficult to obtain for financial or other reasons. For others, it will perhaps spark a change of heart and a child carried to term. As will be explained, the evidence presented at trial showed that the informed choice provision will not operate as a substantial obstacle to an abortion in the vast majority of cases. The petitioners chose not to proceed with an as-applied challenge to any particular plaintiff or group of plaintiffs, and they have failed to meet their burden on a facial challenge under the Iowa constitution.

While the Iowa Supreme Court has been clear on the standard for a facial challenge under the Iowa constitution, the standard for prevailing on a facial challenge to a statute regulating abortion is the subject of some debate in the federal courts. *See Gonzales v. Carhart*, 550 N.W.2d 124, 167-68 (2007) ("What that burden consists of in

the specific context of abortion statutes has been a subject of some question."); *cf. Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)); *Casey*, 505 U.S., at 895 (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid). The United States Supreme Court declined to resolve the dispute in *Gonzales*, though, because the complainants did not establish that the challenged law would be unconstitutional in a large fraction of relevant cases. *Gonzales*, 550 U.S. at 167-68; *see also War Eagle Village*, 775 N.W.2d at 722 n.3. The same is true in this case—the petitioners did not meet their burden under either standard. The Petition should be denied as a matter of law.

2. The informed choice provision survives the petitioners' facial challenge under the rational basis test

The due process clause of the Iowa Constitution includes a substantive component. *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). When a statute is said to infringe a liberty interest protected by this component of our constitution, there are two levels of scrutiny that Iowa courts apply depending on the nature of the interest. The baseline that applies to every liberty interest proscribes any law that is not rationally related to a legitimate government purpose. That baseline is commonly referred to as the "rational basis" test. For a select few of our most important rights, a law that infringes the right must pass a higher hurdle.

The Iowa Supreme Court has adopted a two-step analysis to determine the proper level of scrutiny under the due process clause. Step one requires the Court to determine whether the right at issue qualifies as "fundamental." That is, a right which, after a "careful description," is "firmly rooted" in the State's "history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997); *see also Seering*, 701 N.W.2d at 664-65 (Iowa 2005) (following *Glucksberg*); *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) (same). Strict scrutiny applies to statutes that *directly and substantially interfere* with a fundamental right. *Seering*, 701 N.W.2d at 663. If a fundamental right is not involved, or if the statute does not substantially interfere with a fundamental right that is involved, the rational basis test applies. *McQuistion v. City of Clinton*¸ 872 N.W.2d 817, 832-33 (Iowa 2015).

The Court has not decided whether abortion qualifies as a fundamental right under the Iowa Constitution. *See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Medicine*¸ 865 N.W.2d 252 (Iowa 2015) (*PPH I*) (Parties agreed to proceed under the federal undue burden test, so Court "need[ed] not decide whether the Iowa Constitution provides [a right to an abortion], and if so, whether regulations affecting that right must pass strict scrutiny."). It does not. A right to an abortion is not firmly rooted in the State's history, legal traditions, and practices. Iowa first criminalized abortion in 1839. *See* Iowa (Terr.) Laws 153-54 (1838-39). Shortly after the adoption of the Iowa Constitution, the legislature passed a statute criminalizing abortions at any stage of a pregnancy unless necessary to save the mother's life. Iowa Rev. Laws § 4221 (1860). This statute remained nearly unchanged until it was struck down under the federal

constitution following *Roe v. Wade*, 410 U.S. 113 (1973). *See Doe v. Turner*, 361 F. Supp. 1288 (S.D. Iowa 1973).

Even if abortion qualified as a fundamental right, strict scrutiny is still inappropriate for the petitioners' due process claim. The challenged portion of the Act does not directly and substantially interfere with the right to an abortion. *McQuistion*, 872 N.W.2d at 833 (Even where a fundamental right is at issue, "[r]easonable regulations that do not directly and substantially interfere with the right may be imposed."). Like the challenged government action in *McQuistion*, the informed choice provision does not substantially interfere with a woman's right to choose to terminate her pregnancy. *Id.* at 835. There, the Iowa Supreme Court held that refusing light duty to a pregnant woman did not substantially interfere with her right to procreate despite "financial burdens and resulting difficult decisions imposed on women and families by the loss of income associated with the inability to work throughout pregnancy." *Id.* The denial of her request for light duty "did not change any of the viable choices available to her." *Id.* Moreover, the "financial obstacle" she identified was not created by the City's decision to deny relief. *Id.* Likewise in this case. The informed choice provision does not remove any choice from a woman seeking an abortion, and the indirect obstacles identified by the petitioners are not created by the Act.

Applying the rational basis test to the petitioners' request for relief, the Petition should be denied. The rational basis analysis requires the Court to determine whether there is "a reasonable fit between the government interest and the means utilized to advance that interest." *Seering*, 701 N.W.2d at 662. The stated purpose of the Act is to protect all unborn life. *See* Iowa Senate File 471, Division III, Sec. 5. As the United

States Supreme Court has recognized, a "waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn." *Planned Parenthood of Southeastern Pa. v. Casey*¸ 505 U.S. 833, 885 (1992). As a result, the petitioners' due process claim fails as a matter of law.

3. The informed choice provision survives the petitioners' facial challenge under the undue burden test

The United States constitution protects a woman's right to choose whether to terminate a pregnancy. *Plowman v. Fort Madison Community Hospital*, 896 N.W.2d 393, 400-01 (Iowa 2017). *Roe* also established the State's "important and legitimate interest in potential life." *Casey*, 505 U.S. at 871 (quoting *Roe*, 410 U.S. 113, 163 (1973)). Abortion "requires a difficult and painful moral decision." *Gonzales*, 550 U.S. at 159. The State has an interest in "ensuring so grave a choice is well informed." *Id.* Justice O'Conner expressed the interest this way in *Casey*:

> Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.
> …
> It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with Roe's central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

Casey, 505 U.S. at 872-73. For this reason, the Court abandoned the trimester framework developed in *Roe*. *Id.* at 873 (the trimester framework "undervalues the State's interest in potential life."). In other words, it is an "overstatement" to describe the right to an abortion under the federal constitution as "a right to decide whether to have an abortion without interference from the State." *Id.* at 875 (internal quotation omitted).

Indeed, all abortion regulations "interfere to some degree" with the decision to have the procedure. *Id*. The Court in *Casey* overruled several decisions that struck down such regulations; those decisions went "too far" because they "in no real sense deprived women of the ultimate decision." *Id.* Applying strict scrutiny to "all governmental attempts to influence a woman's decision on behalf of the potential life within her" is incompatible with the "substantial state interest in potential life throughout pregnancy." *Id*. at 876. The "undue burden" standard emerged as the lodestar for challenges to abortion regulations under the United States Constitution. *Id.* ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

A "guiding principle" of the undue burden test reminds courts that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. In other words, the undue burden standard operates as a rational basis test with an added element. The added element identifies the class of women affected by the statute and asks whether the statute is "likely to prevent a significant number of women from obtaining an abortion." *Id*. at 877, 893. If not, "a state measure designed to persuade [a pregnant woman] to choose

childbirth over abortion will be upheld if reasonably related to that purpose"—the rational basis test.

a. Applying the undue burden test to the Act

Under the modified test for a facial challenge to an abortion regulation, the petitioners are required to demonstrate that the Act will pose a substantial obstacle to obtaining an abortion "in a large fraction of the cases in which the law is relevant." *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017) ("*PPAEO*") (quoting *Casey*, 505 U.S. at 895). The first step in that determination requires this Court to identify the "relevant denominator"—that is, "those women for whom the provision is an actual rather than an irrelevant restriction." *Casey*, 505 U.S. at 894-95. In *Casey*, for example, the Court explained that the spousal notification provision was not a "relevant" restriction for unmarried women. *Id.* at 895. Likewise for married women seeking abortions who would have notified their spouse anyway. *Id.* Thus the denominator for the spousal notification provision was "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* For those women, the spousal notification provision did more than make abortions more difficult or expensive. Rather, they were "likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.* In *PPAEO*, the challenged provision was a "contract-physician requirement" that applied to all medication abortions. Because the provision did not affect surgical abortions, the Eighth Circuit held that the relevant denominator was "women seeking medication abortions in Arkansas." 864 F.3d at 958-59.

In this case, the Act applies to all women seeking abortions. It is possible to narrow the denominator slightly, though. The Court in *Casey* considered the spousal notification provision irrelevant for those married women who otherwise would have notified their spouse, even though the provision technically applied to them. The Act arguably does not present a relevant restriction for those women seeking an abortion in Iowa who otherwise would have voluntarily made two trips 72 hours apart. The petitioners did not present evidence of any women who would voluntarily make two trips, but Meadows testified that "95 percent" of her patients were firm in their decision when they presented at the clinic. Trial Tr. P.25 L.21 – P.26 L.5. The petitioners' expert Jason Burkheiser Reynolds testified that in his experience "almost all patients are firm" in the decision to have an abortion on the first visit. Trial Tr. P.118 L.23 – P.119 L.3. Thus the relevant denominator in this case is very nearly all women seeking an abortion in Iowa.

Once the denominator is settled, this Court must determine the numerator—that is, this Court must determine whether the number of women for whom the Act creates a "substantial obstacle" constitutes a significant fraction. What is a substantial obstacle? Recall that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. As will be explained in more detail, the respondents do not dispute that the Act will increase the cost of the procedure. They do not dispute that it will increase travel distances for some women. It presents an additional challenge to those women who have difficulty explaining their whereabouts to their husbands or employers. The respondents also understand that these indirect effects of the Act will be hardest to bear for those women with the fewest financial resources.

That said, "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Casey*, 505 U.S. at 885-86. Consider how the United States Supreme Court defined a "substantial obstacle" when it struck down Pennsylvania's spousal notification provision: "The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle." *Id.* at 893-94. To determine the numerator in this case, this Court must find more than that the Act "increase[es] the cost and risk of delay of abortions." *Id.* at 886. It must find that the Act prevents a significant fraction of women from making the ultimate decision—that the Act is "likely to prevent a significant number of women from obtaining an abortion." *Id.*

b. The petitioners' evidence does not establish that the Act will impose a substantial obstacle for a significant fraction of women

As many courts have recognized, all abortion regulations "burden" a woman's ability to obtain one to some degree, these regulations are not unconstitutional merely because they make the procedure more difficult or expensive to procure. *See Karlin v. Foust*, 188 F.3d 446, 479 (7th Cir. 1999). Mandatory waiting periods ranging from 24 to 72 hours are common across the country. Seventeen states require 24 hour waiting periods prior to obtaining an abortion: *See* A.R.S. § 36-2153 (Arizona); Ga. Code Ann., § 31-9A-3 (Georgia); I.C. § 18-609 (Idaho); K.S.A. 65-6709 (Kansas); KRS § 311.725 (Kentucky); M.C.L.A. 333.17015 (Michigan); M.S.A. § 145.4242 (Minnesota); Miss. Code Ann. § 41-41-33 (Mississippi); Neb. Rev. St. § 28-327 (Nebraska); NDCC, 14-02.1-02 (North Dakota); R.C. § 2317.56 (Ohio); 18 Pa. C.S.A. § 3205 (Pennsylvania);

Code 1976 § 44-41-330 (South Carolina); V.T.C.A., Health & Safety Code § 171.012 (Texas); VA Code Ann. § 18.2-76 (Virginia); W. Va. Code, § 16-2I-2 (West Virginia); W.S.A. 253.10 (Wisconsin). Three states mandate 48 hour waiting periods. *See* Ala. Code 1975 § 26-23A-4 (Alabama); A.C.A. § 20-16-1703 (Arkansas); T.C.A. § 39-15-202 (Tennessee). In addition to Iowa, six states require 72 hours. *See* LSA-R.S. 40:1061.17 (Louisiana); V.A.M.S. 188.027 (Missouri); N.C.G.S.A. § 90-21.82 (North Carolina); 63 Okl. St. Ann. § 1-738.2 (Oklahoma); SDCL § 34-23A-56 (South Dakota); U.C.A. 1953 § 76-7-305 (Utah).

Since the United States Supreme Court upheld a 24 hour waiting period in *Casey*, only one court has held that a waiting period of *any* length fails the undue burden test. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No, 1:16-cv-01807-TWP-DML, 2017 WL 1197308 (S.D. Ind. March 31, 2017). That decision conflicts with prior circuit precedent in *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002), and is currently on appeal. By contrast, mandatory waiting periods have been upheld repeatedly by state and federal courts. *See, e.g., Cincinnati Women's Services, Inc. v. Taft*, 468 F.3d 361, 372-74 (6th Cir. 2006); *Karlin*, 188 F.3d at 478-92; *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 530-31 (8th Cir. 1994); *Tucson Women's Center v. Arizona Medical Board*, 666 F. Supp. 2d 1091 (D. Ariz. 2009); *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.2d 685 (Mo. 2006); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998).

In order to show that the Act differs from those waiting period requirements that have been repeatedly upheld since *Casey*, the petitioners must show some distinct harm caused by the Act. The evidence they presented at trial does not do so. Rather, the petitioners' evidence was a variation on a theme that has been presented in nearly every challenge to a waiting period requirement: the delay will be substantially longer than the statute requires, the two-trip requirement will increase the travel distance and cost of the procedure, compliance will be difficult for women who do not want the pregnancy discovered by husbands or employers, and that all of these challenges will be borne most heavily by low-income women, rural women, and women who are victims of domestic violence or sexual assault. These negative effects were confronted in *Casey*, and the United States Supreme Court held that they "do not demonstrate that the waiting period constitutes an undue burden." *Casey*, 505 U.S. at 886. Nevertheless, even if this Court is inclined to take a fresh look, the evidence presented at trial does not show that the Act will impose a substantial obstacle in a significant fraction of cases.

i. Delay substantially longer than 72 hours

Meadows testified that when the Act goes into effect, she predicts that the delay between the informational visit and the procedure itself will be one to two weeks. Trial Tr. P.48 Ls.6-15. Even if this Court credits that testimony, it does not distinguish the Act from the record presented in *Casey*, where the district court found that the 24 hour waiting period would result in result in delays "rang[ing] from 48 hours to two weeks." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1351 (E. D. Pa. 1990). Evidence gathered from studies performed after *Casey* also shows that longer delays associated with a 72 hour waiting period are not distinct from those

associated with 24 hour waiting periods. Dr. Grossman testified to a study that showed that delays associated with a 24 hour waiting period in Alabama averaged 6.9 days. Trial Tr. P.180 L.10 – P.181 L.13. He also testified to a study that examined a 72 hour mandatory delay in Utah. That study showed that the delay associated with the 72 hour period averaged eight days. Trial Tr. P.177 L.20 – P.178 L.1. Even if that evidence is accurate, the difference between 6.9 days and 8 days does not make a waiting period unconstitutional.

The petitioners argue that the Act will result in increased health risks for women who are within two weeks of the cutoff for a medication abortion if they are forced to obtain a surgical abortion instead. Meadows testified that "some women" who would otherwise qualify for a medication abortion will be pushed past the cutoff. Trial Tr. P. 30 Ls.16-21. The petitioners did not make any attempt to demonstrate how many women will be pushed past the cutoff. They also did not make any attempt to quantify the "health risk" that these women would face. Meadows testified that the risks associated with abortion increase along with the gestational age of the unborn child, but she also testified that abortion in general is a "very safe medical procedure." Trial Tr. P.28 Ls.7-18, P.30 L.22 – P.31 L.5. The petitioners presented no evidence that would allow this Court to determine how much the risk associated with this "very safe" procedure increases.

Meadows did testify that in the past year, Planned Parenthood of the Heartland saw approximately 50 patients who were within two weeks of the 20 week cutoff for abortions in Iowa. Trial Tr. P.31 Ls.21-25. Even assuming that all 50 of those women would be prevented from obtaining abortions if the Act were in effect, that represents just

1.6 percent of the 3,000 abortion patients that Planned Parenthood of the Heartland saw during the same time period, and just 1.25 percent of the total. That is not a significant fraction of the women who would be affected by the Act. Moreover, it is highly unlikely that all of those women would in fact be prevented from obtaining an abortion, as Meadows also testified that Planned Parenthood of the Heartland would be able to accommodate a woman who was close to the deadline for a medication or a surgical abortion in just a couple of days if necessary. Trial Tr. P.81 L.17 – P.82 L.6.

Meadows also testified about certain medical conditions that can arise later in pregnancy such as preeclampsia, hypertension, and ruptured membranes. Trial Tr. P.32 L.21 – P.33 L.15. Dr. Grossman testified that in some of those cases, delaying an abortion can present a medical risk that would not, in his opinion, be covered by the Act's medical emergency exception. Trial Tr. P.54 Ls.5-19. Neither could give a number of cases for which the medical emergency exception is inadequate, but Meadows did testify that the University of Iowa Hospital performs at least 50 "medically indicated" abortions per year—about 1 percent of the state total. Trial Tr. P.34 Ls.9-12. Dr. Grossman described a category of women for whom he felt that the Act would be especially "cruel." He included in the category those women who have serious medical problems, who became pregnant as a result of sexual assault, whose unborn children have been diagnosed with fetal anomalies or malformations, and who are victims of domestic violence or have violent partners. Trial Tr. II P.5 L.20 – P.7 L.10. He estimated the size of that category of women to be "less than 10 percent" of abortion patients on average. Trial Tr. II P.7 L.11 – P.9 L.1.

The district court in *Casey* recognized the risks attached to delaying an abortion into the second trimester: "In some cases, the delays caused by the 24-hour waiting period will push patients into the second trimester of their pregnancy substantially increasing the cost of the procedure itself and making the procedure more dangerous medically." *Casey* 744 F. Supp. at 1352. We do not know how many women are dealing with the kind of condition that Meadows and Dr. Grossman describe, but the evidence presented at trial suggests that the number is less than 10 percent—and probably substantially less. When combined with Meadows's testimony that Planned Parenthood of the Heartland can accommodate patients more quickly in exigent cases, the petitioners' evidence is consistent with the United States Supreme Court's statement that "*in the vast majority of cases*, a [waiting period] does not create any appreciable health risk." *Casey*, 505 U.S. at 885 (emphasis added).

ii. Increased travel distance and cost

The petitioners also argue that the Act will increase the distance that many women in Iowa will have to travel to obtain an abortion. Moreover, they argue that the difficulties associated with increased travel disproportionately affect women in rural Iowa. Dr. Grossman testified that Iowa exceeds the national average of 17 percent of women who travel more than 50 miles to obtain an abortion. Trial Tr. P.143 L.15 – P.144 L.16. Based on the data contained in the Iowa Termination of Pregnancy Report for 2015, Dr. Grossman calculated that 47 percent of surgical abortion patients and 44 percent of the medication abortion patients in Iowa resided more than 50 miles from the nearest clinic. Trial Tr. P.143 L.15 – P.144 L.16. There are several problems with Dr. Grossman's calculations, however. First, Dr. Grossman included all out-of-state

residents, apparently assuming that all out-of-state women who obtained an abortion in Iowa resided more than 50 miles from the nearest clinic. Petitioners' Exh. 14, ¶ 5. In 2015, 234 out-of-state residents obtained surgical abortions in Iowa. Respondents' Exh. K. Out-of-state residents obtained 418 medication abortions that year. *Id.* This is troubling because Dr. Grossman has no way of knowing where those women live or how far they are from the nearest clinic. Thus, he cannot say whether they had to travel more than 50 miles. Moreover, this action deals with an Iowa constitutional challenge to an Iowa statute. The petitioners cannot assert the right of women all over the world to obtain an abortion in Iowa in order to establish the difficulty associated with increased travel distance.

The second problem with Dr. Grossman's calculation is that he refuses to include clinics that do not provide surgical abortions when he calculated the number of women who obtained surgical abortions in 2015 that reside greater than 50 miles from the nearest clinic. Petitioners' Exh. 14, ¶ 5. This affects the integrity of his calculation because women who are seeking a surgical abortion do not have to travel to a clinic that provides surgical abortions for the informational visit. For example, a woman seeking a surgical abortion who resides in Council Bluffs would be included in Dr. Grossman's calculation, even though her travel distance would not increase as a result of the Act because she could have the informational visit in Council Bluffs.

The third problem with Dr. Grossman's calculation is that he excluded ITOP Region 14, which includes the city of Davenport. Petitioners' Exh. 14, ¶ 5. While he is correct that part of Region 14 is outside a 50 mile radius from the clinic in Iowa City, Planned Parenthood of the Heartland still operates a clinic in Bettendorf. Trial Tr. P.16

Ls.4-13. Meadows testified that Planned Parenthood of the Heartland anticipates closing the Bettendorf clinic by the end of the year, but this Court should not determine how many women are likely to be affected by the Act based on Planned Parenthood's anticipated business decisions. Trial Tr. P.17 Ls.16-20. It is possible that they will keep the clinic open if the demand for abortions remains sufficient, or if donations increase, or for another reason.

After fixing these issues, the ITOP data shows that 17 percent of surgical abortion patients and 16 percent of medication abortion patients resided in an ITOP reporting region more than 50 miles from the nearest abortion clinic in 2015. These percentages equal the national average, and pale in comparison to the record in *Casey*:

> In 1988, 58% of the women obtaining abortions in Pennsylvania resided in only five of the Commonwealth's counties. Women who live in any of the other 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider.

Casey, 744 F. Supp. at 1352. Moreover, the petitioners did not present any evidence that any of those 17 percent of women who live more than 50 miles from the nearest clinic would actually be prevented from having an abortion because of the distance.

The petitioners' expert Jane Collins testified about the burden of travel for women in Ottumwa or Sioux City. She concluded that women traveling to the nearest clinic from those cities would be forced to stay overnight, would have to pay for transportation, could lose wages, and would incur additional expenses for food and childcare. She also conceded that she did not know whether any of those women would actually be prevented from having an abortion as a result of those additional challenges. Trial Tr. P.177 L.25 – P.178 L.11. Even so, women who reside in the ITOP reporting region that includes

Ottumwa obtained 55 surgical abortions and 41 medication abortions in 2015. Respondents' Exhibit K. Those account for only 2.8 percent of abortions performed on Iowa residents that year. Sioux City residents account for 2.5 percent of the abortions in 2015. Collins and Meadows both testified that low income women represent 50 percent of Planned Parenthood of the Heartland's patients. That means that low income women made up 1.4 percent in Ottumwa and 1.3 percent in Sioux City. While it is almost certainly not the case, even if this Court were to find that the Act would effectively bar all low income women from Ottumwa or Sioux City from obtaining an abortion, those percentages still do not constitute a significant fraction. *See PPAEO*, 864 F.3d at 959 n.8 (expressing skepticism that 4.8-6.4 percent constitutes a "large fraction" of women); *see also Taft*, 468 F.3d at 374 (holding that 12 percent does not constitute a large fraction).

Once again, the challenges that Collins identified were the same as those presented to the Court in *Casey*. The district court found with respect to women who had to travel to reach the nearest provider:

> The mandatory 24-hour waiting period would force women to double their travel time or stay overnight at a location near the abortion facility. This will necessarily add either the costs of transportation or overnight lodging or both to the overall cost of her abortion. Additionally, many women may lose additional wages or other compensation as a result of the mandatory 24-hour delay, if forced to miss work on two separate occasions. Two trips to the abortion provider may cause the women to incur additional expenses for food and child care.

Casey 744 F. Supp. at 1352. Collins testified that she could not say how many women would be unable to obtain an abortion as a result of increased travel distance and cost associated with the Act. While Collins focused on a small percentage of women in Sioux City and Ottumwa, a study from Utah found that a 72-hour waiting period increased the

cost of an abortion by just 10 percent as a statewide average. Trial Tr. P.96 Ls.7-21. Such a record, as the United States Supreme Court explained, "do[es] not demonstrate that the waiting period constitutes an undue burden." *Casey*, 505 U.S. at 886.

iii. Victims of domestic violence and sexual assault

The petitioners argue that the Act will burden victims of domestic violence and sexual assault who might want to conceal their pregnancy from an abusive partner or who want to have an abortion as quickly as possible to begin to recover from the trauma of an assault. The evidence they presented at trial is similar in many ways to the record in *Casey*, including the testimony of Dr. Lenore Walker, who testified in the district court in *Casey*. *See Casey*, 744 F. Supp. at 1362. Dr. Walker could not say how many victims of domestic violence or sexual assault sought abortions in Iowa. Dr. Grossman estimated that the number would be less than 10 percent. Trial Tr. II P.7 L.11 – P.9 L.1. Dr. Walker relied on a study that found that 4 to 8 percent of pregnant women experienced physical abuse during pregnancy. Respondents' Exh. N, P.20 Ls.5-10. Another study suggested that the number of abortion patients in Iowa who had experienced physical or sexual abuse could be as high as 13.8 percent. Respondents' Exh. N, P.24 Ls.11-16. The percentage of Iowa abortion patients who became pregnant as a result of rape is likely much smaller still. Meadows testified that Planned Parenthood of the Heartland sees patients who became pregnant as a result of rape about once per month. Trial Tr. P.52 Ls.16-20. Once per month is about twelve per year, which would represent about 0.3 percent of the total.

Based on the testimony of the petitioners' experts, the percentage of Iowa abortion patients who are victims of domestic violence or sexual assault is likely less than

10 percent. Dr. Walker relied on a study that placed the number at closer to 14 percent, but that number did not reflect abortion patients who had experienced domestic violence or sexual assault associated with that pregnancy. Moreover, none of the evidence that petitioners presented at trial showed that victims of domestic violence or sexual assault would actually be prevented from obtaining an abortion by the Act. The respondents are sympathetic to the challenges faced by victims of domestic violence or sexual assault, but those challenges are not sufficient to sustain a facial challenge to the constitutionality of the Act, even under the undue burden standard.

c. This Court is not required to balance the burdens imposed by the Act with the benefits it confers

In their pre-trial brief, the petitioners claim that the undue burden test requires this Court to balance the burdens imposed by the Act against the benefits they confer. They claim that this balancing is required by the recent United States Supreme Court decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). However, this balancing is only required where the provision furthers the health or interest of a woman seeking an abortion. When the legislature asserts its interest in the life of the unborn, such balancing is not necessary. *See Casey*, 505 U.S. at 886 ("Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."). The Iowa Supreme Court made this very clear in the telemedicine case:

> The Court applies the undue burden test differently depending on the state's interest advanced by a statute or regulation. If the state's interest is to advance fetal life, an undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial

> obstacle in the path of a woman seeking an abortion before the fetus attains viability.
>
> On the other hand, if the state's interest is to further the health or interest of a woman seeking to terminate her pregnancy, unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
>
> …
>
> [W]e believe the "unnecessary health regulations" language used in *Casey* requires us to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman.

See PPH I, 865 N.W.2d at 263-64.

Whole Woman's Health involved a statute that sought to further women's health. 126 S. Ct. at 2310. The Court held that the Fifth Circuit's articulation of the test was wrong because it implied that the district court need not consider "the existence or nonexistence of *medical* benefits" where the "constitutionally acceptable objective" of the regulation is "protecting women's health." *Id.* at 2309 (emphasis added). It is impossible to read *Whole Woman's Health* without considering the concern described in in *Casey* that the regulations at issue "serve no purpose other than to make abortions more difficult." *Casey*, 505 U.S. at 901. When the legislature enacts a measure that is designed to protect unborn life, on the other hand, it makes no sense to describe it as "medically unnecessary." The plurality in *Casey* explained that a state is permitted "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Id*. at 883.

When it considered the informed consent provision in *Casey*, the plurality noted that the requirement that a woman seeking an abortion be informed of consequences to the fetus, "even when those consequences have no direct relation to her health." *Id.* at 882. Such a measure was "reasonable" in furtherance of the State's "legitimate goal of protecting the life of the unborn," and "*might* cause the woman to choose childbirth over abortion." *Id.* at 883 (emphasis added). The Court did no more "balancing" than that. In this case the legislature made its purpose express in the Act. *See* Iowa Senate File 471, Division III, Sec. 5 (the purpose of the Act is to "protect all unborn life."). The measure that the legislature took is reasonable: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Casey*, 505 U.S. at 885.

Even if this Court were inclined to "balance" the benefits of the Act against the harms it imposes, how would it do so? For whom will it judge the benefits? For the child of a woman who decided to carry to term during the waiting period the benefit is life over death. For a woman who goes into a clinic seeking abortion and changes her mind, the benefit would be substantial as well. *See Gonzales*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."). The evidence presented at trial suggests that some women will change their mind as a result. The Utah study quoted a woman who went to an abortion clinic for the informational appointment. Two days into the 72-hour waiting period, she cancelled the appointment:

> It was a hard decision for me to make in the first place, and once I made the appointment, it kind of hit home. About two days after the information appointment, I cancelled the abortion appointment. I couldn't do it. Something that I have always been against. I had my reasons that I thought were good reasons, and then I re-reasoned myself out of it.

Trial Tr. II P.91 Ls.8-19.

Dr. Grossman testified that he could not say whether the 72-hour waiting period had any effect on the woman because the clinic "might have identified the conflict" and sent her home to take more time to think about it. Trial Tr. II P.91 L.20 – P.92 L.10. Maybe they would have. In the Utah study, the most common reason given by the women who were still pregnant at the follow up conversation was that they "just couldn't do it." Trial Tr. II P.84 Ls.14-22. Maybe Planned Parenthood of the Heartland would give those women more time as well. Planned Parenthood of the Heartland is not the only abortion provider in Iowa, and it is possible that some less scrupulous provider exists who would sense the conflict and encourage the women to go through with the procedure that day so as not to lose the fee. The legislature is allowed to see that that does not happen.

The Act is especially important in Iowa because Planned Parenthood of the Heartland refuses to provide ultrasounds and information to pregnant women unless they schedule an abortion. Trial Tr. I P.83 Ls.3-18. The petitioners own expert testified that women who want that information should not have to schedule an abortion in order to get it. Trial Tr. II P.84 L.20 – P.85 L.8. Moreover, Dr. Grossman testified that there is a "proportion of women" who "*require* additional time" before they decide. Trial Tr. II P.84 Ls.13-19. The legislature is permitted to see that they receive it. Meadows admitted that the Act does not take away a woman's ability to make the "ultimate decision" about

her pregnancy. Trial Tr. I P.97 Ls.12-15. The only evidence that was presented that dealt with a 72-hour waiting period specifically found that it did not prevent women from obtaining abortions. Trial Tr. I P.95 L.18 – P.96 L.15. This Court is thus left with the argument that the Act "place[s] barriers in the way of abortion on demand. Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand." *Casey*, 505 U.S. at 887.

PETITIONERS' EQUAL PROTECTION CLAIM

The petitioners also challenge the Act under the equal protection clause—article I, section 6—of the Iowa Constitution. This clause "is essentially a direction that all persons similarly situated should be treated alike." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (internal quotation omitted). In most cases, courts apply the rational basis test to equal protection challenges. *See Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009). When a fundamental right is involved, heightened scrutiny is appropriate. *Id.* at 880. As explained above, abortion is not a fundamental right under the Iowa Constitution.

If the right at issue is not fundamental, in most cases the rational basis test applies. Iowa courts also recognize a "middle tier" of scrutiny that applies to statutes that classify on the basis of gender. *Id.* This intermediate scrutiny requires that the challenged classification be "substantially related to the achievement of an important governmental objective." *Id.* Because abortions can only be performed on women, the petitioners argue that the Act discriminates on the basis of gender. It does not. Rather, the act "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (upholding a

statutory rape statute that applied only to men); *see also King v. State*, 818 N.W.2d 1, 24 (2012) ("To allege a viable equal protection claim, plaintiffs must allege that the defendants are treating similarly situated persons differently."). In any event, "any equal protection claim … requires an allegation of disparate treatment, not merely disparate impact." *King*, 818 N.W.2d at 24.

The United States Supreme Court has recognized that "the disfavoring of abortion … is not *ipso facto* sex discrimination." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993). In two cases dealing with government funding of abortions, that Court held that the applicable constitutional test "is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard." *Id.* (citing *Maher v. Roe*, 432 U.S. 464, 470-71 (1977), and *Harris v. McRae*, 448 U.S. 297, 322-24 (1980)). Unlike laws that use a woman's ability to become pregnant to discriminate against them in other areas, such as the disability income plan excluding "disabilities due to pregnancy" at issue in *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*¸ 268 N.W.2d 862 (Iowa 1978), challenges to abortion statutes are normally "examples of cases in which the sexes are not biologically similarly situated." *Jane L. v. Bangerter*¸ 794 F. Supp. 1537, 1549 (D. Utah 1992). For this reason, the rational basis standard is appropriate for assessing Petitioners' equal protection claim.

Nevertheless, even under intermediate scrutiny the Act does not violate the equal protection clause. The petitioners' claim that the Act "singles out women" and suggests that they are "not reasonable, competent decision-makers" is outrageous. The petitioners agree that whether to terminate a pregnancy is an important and difficult decision. The

legislature mandates waiting periods for other life-altering decisions relating to family life such as getting married (three days), Iowa Code section 595.4, releasing a child for adoption (72 hours), Iowa Code section 600A.4(2)(g), or dissolving a marriage (90 days), Iowa Code section 598.19. The federal government requires a three-day waiting period to purchase a home. *See* 12 C.F.R. 1026.19(f)(1)(ii)(A). None of these provisions suggest that those making the decision are less capable decision-makers as a group. Rather, they reflect the gravity of the decision and the interest of the State in ensuring that the decisions are informed and that those who stand to benefit from certain outcomes do not take advantage of the decision-makers.

Abortion is unique among medical procedures; it is the only procedure that involves a "purposeful termination of a potential life." *Casey*, 505 U.S. at 952 (Rehnquist, J., concurring in part and dissenting in part). Both *Roe* and *Casey* describe the State's interest in "protecting the potentiality of human life" as important. *Id.* at 871 (citing *Roe*, 410 U.S. at 162-63). The petitioners' own expert recognized the importance of taking time to make the decision—and that some women *require* additional time even after they have scheduled an abortion appointment. Trial Tr. II P.84 Ls.13-19. It is clear that taking time to reflect on the decision, especially after receiving information that would be otherwise unavailable to women at Planned Parenthood of the Heartland, is substantially related to an important government interest. When combined with the medical emergency exception, which is nearly identical to the one held to meet constitutional requirements in *Casey*, the Act is sufficiently tailored to pass muster under intermediate scrutiny.

CONCLUSION

Certain aspects of this case are not in serious dispute. The decision whether to terminate a pregnancy is an important one. Indeed, the choice lasts a lifetime. The ultimate decision rests with the pregnant women, even after the Act. Finally, at least some women who present to an abortion clinic require more time to reflect on their decision. The dispute begins with the legislature requiring abortion providers to make sure that those women are provided the opportunity to view an ultrasound, listen to a heartbeat, and weigh their options relative to the pregnancy. The petitioners deeply disagree with the wisdom, advisability, and justice of that requirement. In a suit against the Governor and the Iowa Board of Medicine, they have petitioned this Court for relief. But courts "do not pass on the policy, wisdom, advisability or justice of a statute. The remedy for those who contend legislation which is within constitutional bounds is unwise or oppressive is with the legislature." *Miller v. Iowa Real Estate Commission*, 274 N.W.2d 288, 291 (Iowa 1979).

As this Court well knows, a strong presumption of validity protects statutes from constitutional challenges. *Id.* Overcoming that presumption is only the beginning in a facial challenge to the constitutionality of the Act. The petitioners were required to demonstrate that the Act is unconstitutional in every conceivable application. They did not come close. Indeed, they did not even demonstrate that the Act is unconstitutional in a significant fraction of cases. That failure alone decides this case. To choose to terminate a pregnancy is, without a doubt, to exercise a personal liberty interest. The Iowa constitution protects all such interests from irrational or arbitrary interference from the State. For the State to act rationally there must be "a reasonable fit between the

government interest and the means utilized to advance that interest." *Seering*, 701 N.W.2d at 662. There is little doubt that the informed choice provision meets that requirement. *See Casey*, 505 U.S. at 885 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.").

The petitioners claim that women in Iowa have a fundamental right to choose to terminate a pregnancy. Fundamental rights—deeply rooted in our history and tradition—deserve closer scrutiny when they are the subject of government regulation. Terminating a pregnancy except to save the life of the mother was a crime from the adoption of Iowa's constitution until *Roe* was decided in 1973—more than one hundred years later. For purposes of the federal constitution, abortion is not a fundamental right. No line of jurisprudence exists suggesting that the decision to terminate a pregnancy is deserving of greater protection under the Iowa constitution. On the contrary, the Iowa constitution protects the inalienable right of "enjoying and defending life." Iowa Const. art. 1 § 1. As the Iowa Supreme Court has recognized, the State may exercise its regulatory authority "in the furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *PPH I*, 865 N.W.2d at 263 (quoting *Gonzales*, 550 U.S. at 158).

Not all government intrusion involving abortion is of necessity unwarranted. Under the federal undue burden standard, "a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health risk." *Casey*, 505 U.S. at 886. Because it is a reasonable measure designed to

ensure that such a difficult choice is well-informed, the legislature is allowed to require that a waiting period follow the required information—even if by doing so, the State puts its thumb on the scale in favor of life. The State is not permitted to erect a substantial obstacle in the path of a woman who seeks to terminate a pregnancy. A substantial obstacle means that a measure is likely to prevent a woman from obtaining an abortion. In a facial challenge to an abortion regulation under the undue burden standard, the petitioner must prove that the measure erects a substantial obstacle in a significant fraction of the relevant cases. The petitioners did not prove that anyone would be unable to obtain an abortion as a result of the Act. The ultimate decision still rests with women, even those who have the fewest resources, who must travel long distances, who have medical conditions that make delayed abortion more dangerous, whose unborn children have been diagnosed with fetal anomalies, or who are victims of domestic violence or sexual abuse. The Petition for Declaratory and Injunctive Relief should be denied.

Respectfully submitted,

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/_____
JEFFREY S. THOMPSON
Solicitor General of Iowa

/s/_____
THOMAS J. OGDEN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Bldg., 2nd Fl.
1305 East Walnut Street

Des Moines, Iowa50319
Phone: (515) 281-5976
Fax: (515) 281-4902
Email: Jeffrey.Thompson@iowa.gov
Email: Thomas.Ogden@iowa.gov