IN THE SUPREME COURT OF IOWA

No. 21-0856

PLANNED PARENTHOOD OF THE HEARTLAND, INC., AND JILL MEADOWS, M.D.,

Appellees,

v.

KIM REYNOLDS EX REL. STATE OF IOWA, AND IOWA BOARD OF MEDICINE,

Appellants.

On appeal from the Iowa District Court for Johnson County
Case No. EQCV081855
The Honorable Mitchell E. Turner

APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

Two weeks ago, this Court correctly held that "there is no support," textually or historically, "for abortion as a fundamental constitutional right in Iowa." *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State* ("*PPH IV*"), No. 21-0856, slip op. at 55 (Iowa June 17, 2022). Accordingly, the Court overruled its 2018 decision in which it had held that laws regulating abortion are subject to strict-scrutiny review. *Id.* at 7.

A controlling, three-justice plurality, though, declined to decide which standard applies to review laws regulating abortion: rational-basis review or *Planned Parenthood v. Casey*'s undue-burden test. *Id.* at 63–66. The plurality noted the United States Supreme Court was about to decide an "important abortion case" that could "impart a great deal of wisdom" in how it treated *Casey*'s undue-burden test. *Id.* at 66. Two members of that plurality wrote previously they would apply *Casey*'s undue-burden test "at least until the Supreme Court offers a different legal standard." *Planned Parenthood of the Heartland v. Reynolds ex rel. State* ("*PPH II*"), 915 N.W.2d 206, 254 (Iowa 2018) (Mansfield, J., dissenting, joined by Justice Waterman). Lacking any such new guidance, though, this Court instructed that, "[f]or now," *Casey*'s undue-burden test "remains the governing standard," subject to its being "litigated further." *PPH IV*, slip op. at 8, 8–9 n.2.

One week later (and one week ago), the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). The Supreme Court held "that *Roe* and *Casey* must be overruled" and that—echoing this Court's similar ruling under the Iowa Constitution—the federal "Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision." *Id.* at *7. As a result, "rational-basis review is the appropriate standard" for assessing laws regulating abortion. *Id.* at *42.

In adopting the rational-basis standard, the Supreme Court disavowed *Casey*'s "arbitrary" and "unworkable" undue-burden test. *Id.* at *27, *35. "Continued adherence to that standard would undermine, not advance, the evenhanded, predictable, and consistent development of legal principles." *Id.* at *35 (cleaned up). So the Court rightly discarded it.

With the benefit of the Supreme Court's reasoning, this Court now should do the same. Specifically, the Court should grant this petition, hold that rational-basis review is the correct standard for assessing the constitutionality of abortion regulations under the Iowa Constitution, and instruct the district court to apply that standard on remand. Confusion and a substantial waste of time and resources will result if the Court leaves for another day the question of which standard to apply.

ARGUMENT

Casey's undue-burden standard has never had any basis in Iowa law, it no longer has any basis in federal law, and this Court should reject it now.

A. While this Court has applied *Casey*'s undue-burden standard, it has never before held that it's the correct test under the Iowa Constitution.

From its inception, "the basis for [*Casey*'s undue-burden] test was obscure." *Dobbs*, 2022 WL 2276808, at *32. The three justices in the *Casey* plurality tried to justify the test mainly by citing their own prior concurrences and dissents. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). But as the *Dobbs* Court explained, the plurality's "new and problematic test [had] no firm grounding in constitutional text, history, or precedent." 2022 WL 2276808, at *32.

The same is true under Iowa law. *Casey*'s undue-burden test made its first appearance in this Court's caselaw in 2015. *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.* ("*PPH I*"), 865 N.W.2d 252, 254 (Iowa 2015). But the Court never held that it is the appropriate test for resolving challenges to laws regulating abortion under Iowa's Constitution. Instead, due to the posture of that case and statements at oral argument, the Court merely applied the test there based on an assumption that the Iowa Constitution "provides a right to an abortion that is coextensive with the right available under the United States Constitution." *Id.*

But this Court has never held that the assumption made "for purposes of that case," *PPH IV*, slip op. at 64, controls in other cases, nor could it. And now that the Supreme Court has adopted rational-basis review under the federal Constitution, any assumption the rights are "coextensive" would mean the same test applies under Iowa's Constitution. After *Dobbs*, the undue-burden test is not "the governing standard" under either. *PPH IV*, slip op. at 8.

B. Under Iowa law, rational-basis review applies for laws that do not implicate fundamental rights.

Endorsing *Casey*'s undue-burden test despite this Court's holding that abortion is not a fundamental right would be a stark departure from this Court's usual approach to such claims. This Court already has "well-established tiers of constitutional scrutiny for the type of challenge presented in this case." *PPH IV*, slip op. at 68 (McDermott, J., concurring and dissenting in part). "With a substantive due process claim," this Court "follow[s] a two-stage analysis." *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012). First, it "determine[s] the nature of the individual right involved, then the appropriate level of scrutiny." *Id.* "If the right at issue is fundamental, strict scrutiny applies; otherwise, the state only has to satisfy the rational basis test." *Id.* Abortion is not a fundamental right. *PPH IV*, slip op. at 7–8, 55; *id.* at 69–70 (McDermott, J., concurring and dissenting in part). So rational basis applies.

C. *Dobbs* proves rational-basis review is a workable test for challenges to laws regulating abortion.

The United States Supreme Court applied the same analysis in *Dobbs*. Under federal law (as in Iowa), "rational-basis review is the appropriate standard" for constitutional challenges to laws that do not implicate fundamental rights. *Dobbs*, 2022 WL 2276808, at *42. "It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the [federal] Constitution, courts cannot substitute their social and economic beliefs for the judgment of legislative bodies." *Id.* (cleaned up). "That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." *Id.* (collecting cases).

Under rational-basis review, a "law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity." *Id.* (cleaned up). "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id. Accord Sanchez v. State*, 692 N.W.2d 812, 817–18 (Iowa 2005) (same).

In the abortion context, "[t]hese legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the

preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs*, 2022 WL 2276808, at *42 (citations omitted).

In *Dobbs*, the Supreme Court had no trouble concluding that "[t]hese legitimate interests justify" the 15-weeks law challenged there. *Id.* And the district court on remand should have no trouble concluding that the same interests justify Iowa's law here.

D. *Casey*'s undue-burden standard is arbitrary and unworkable. Requiring its use on remand would waste considerable time and resources.

In contrast to rational-basis review, *Casey*'s undue-burden test "is full of ambiguities and is difficult to apply." *Dobbs*, 2022 WL 2276808, at *32. Indeed, the "difficulty of applying *Casey*'s new rules surfaced in that very case." *Id.* at *33. The *Casey* plurality held that "Pennsylvania's 24-hour waiting period requirement and its informed-consent provision did not impose undue burdens." *Id.* (cleaned up). "[B]ut Justice Stevens, applying the same test, reached the opposite result." *Id.* (citation omitted). As then-Chief Justice Rehnquist "aptly observed," *Casey*'s undue-burden test "presents nothing more workable than the trimester framework." *Id.* (cleaned up).

There are strong arguments that the *Casey* plurality was right concerning Pennsylvania's 24-hour waiting period. And the State will make them on remand if put to that task. But Planned Parenthood will argue Justice Stevens had the better argument, and both parties will be forced to present evidence and expert testimony to satisfy *Casey*'s nebulous test. As the dissent here concedes, "[t]here are several ways to interpret the amorphous undue burden test." *PPH IV*, slip op. at 133 (Appel, J., dissenting). What one judge "consider[s] to be an 'undue burden' is different from what [another judge] considers to be an 'undue burden,'—a conclusion that cannot be demonstrated true or false by factual inquiry or legal reasoning." *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting). Deciding "whether a burden is 'due' or 'undue' is inherently standardless." *Dobbs*, 2022 WL 2276808, at *32 (cleaned up). Thus, it becomes largely a "value judgment." *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting).

That's not to blame the lower courts that have tried valiantly to apply *Casey*'s "unworkable" test. *Dobbs*, 2022 WL 2276808, at *35. As *Dobbs* explained, the "*Casey* plurality tried to put meaning into the 'undue burden' test by setting out three subsidiary rules." *Id.* at *32. "[B]ut these rules created their own problems," injecting ambiguities, "vague terms," and unresolved questions to which "*Casey* provided no clear answer." *Id.* at *32–33.

Such ambiguities "produced disagreement" in the Supreme Court's later cases, *id.* at *33, and "generated a long list of Circuit conflicts" in the lower courts, *id.* at *34, providing "further evidence that *Casey*'s line between permissible and unconstitutional restrictions has proved to be impossible to draw with precision," *id.* (cleaned up).

"Plucked from nowhere," *Casey*'s undue-burden standard "seems calculated to perpetuate give-it-a-try litigation before judges assigned an unwieldy and inappropriate task." *Id.* at *35 (cleaned up). In *Dobbs*, the Supreme Court relieved the federal courts of that impossible burden. With the benefit of that "great deal of wisdom," which this Court "[did] not have" two weeks ago, *PPH IV*, slip op. at 66 (plurality), the Court should decide now not to foist the same "unwieldy and inappropriate task" on Iowa's lower courts, *Dobbs*, 2022 WL 2276808, at *35.

If this Court waits, it will force the parties and the district court to waste valuable time and resources on a lengthy trial under the wrong test. Rational-basis review does "not require the State to place any evidence in the record." *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). *Accord, e.g., Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). "To the contrary, the plaintiff must negate every reasonable basis upon which" the law "may be sustained." *King*, 818 N.W.2d at 28 (cleaned up).

For that reason, the *Heller* Court thought it would have been "imprudent and unfair to inject" a heightened standard on appeal when the parties had been litigating "for years on the theory of rational-basis review." 509 U.S. at 319. And the flipside is true here—it would be unfair to wait to inject a *lower* standard in a later appeal after forcing the parties to litigate under a nebulous and inappropriate undue-burden standard on remand.

Under that "amorphous" test, *PPH IV*, slip op. at 133 (Appel, J., dissenting), the State may feel compelled "to make an extensive evidentiary showing that the statute places a 'due' measure of burden on abortion," just to be safe, *id.* at 75 (McDermott, J., concurring and dissenting in part), while Planned Parenthood may feel compelled "to make an extensive evidentiary showing that the statute's waiting period crosses some unfixed threshold into the realm of the 'undue,'" *id.*

At the end of all that, the losing party inevitably will appeal, risking *another* remand for the district court to apply the correct standard after the Court finally identifies it. *See State v. Showens*, 845 N.W.2d 436, 449–50 (Iowa 2014) (remanding for court to apply new standard this Court articulated for the first time on appeal); *Nehring v. Smith*, 49 N.W.2d 831, 837 (Iowa 1951) ("Litigants should not unnecessarily be put to the expense and delay of two appeals to ascertain our view upon a vital issue.").

All this is made easier "with a remand to apply the rational basis test, under which the plaintiffs would need to prove that the law doesn't serve any conceivable legitimate state interest or isn't a reasonable way to advance that interest." *PPH IV*, slip op. at 75 (McDermott, J., concurring and dissenting in part). If the Court makes clear now that rational-basis review applies, the parties ought to be able to avoid trial altogether because a 24-hour waiting period survives that test as a matter of law.

E. Nothing prevents this Court from holding that rational-basis review applies to laws regulating abortion right now.

In the opinion issued two weeks ago, a plurality of three justices declined to decide which standard is the right standard for assessing challenges to laws regulating abortion: *Casey*'s undue-burden standard or rational-basis review. *PPH IV*, slip op. at 63–66 (plurality). The plurality acknowledged that "an amicus curiae" had asked the Court "to specifically hold that the 24-hour waiting period is subject to rational basis review." *Id.* at 65. But the plurality declined, citing its normal practice of "not allow[ing] amici curiae to raise new issues." *Id.*

In its opening brief, though, the State *did* ask for "guidance *now* on the proper standard for considering the merits of [Planned Parenthood's] constitutional due-process and equal-protection

challenges [to] aid the district court and the parties in efficiently conducting discovery, considering summary judgment, and trying the case." Opening Br. 66 n.19 (emphasis added). Deciding that issue now would "allow the district court to apply the correct standard in the first instance without a second remand." *Id.*

Although the State did not take a position on *which* standard to adopt, it noted that, "[w]here strict scrutiny is not appropriate, the Iowa Constitution typically requires that a statute 'need only survive the rational-basis test.'" *Id.* at 72 (quoting *Hensler v. City of Davenport*, 790 N.W.2d 569, 580–81 (Iowa 2010)). The State offered *Casey*'s undue-burden test as a possible option only "until the Supreme Court offers a different legal standard for our consideration." *Id.* at 72–73 (quoting *PPH II*, 915 N.W.2d at 254 (Mansfield, J., dissenting)). And the State clearly asked the Court to identify the "correct standard" now so the district court can apply it on remand. Opening Br. 66 n.19. *Accord* Reply Br. 18 (asking for "clarity on the proper standard to apply on remand").

To avoid any misunderstanding, the State is now unequivocally asking this Court to hold that rational-basis review governs Iowa constitutional challenges to laws regulating abortion. That holding is consistent with the sound logic of *Dobbs*. And this Court can—and should—decide the issue now with the benefit of the wisdom from that decision. *PPH IV*, slip op. at 66 (plurality).

Finally, Planned Parenthood's decision not to address the rational-basis standard in its earlier briefing does not prevent the Court from deciding whether that test applies now.[1] An appellee cannot take an issue raised by the appellant away from the Court merely by not addressing it. And the Court can and should invite Planned Parenthood to address the issue now by filing a response to this petition. At that point, the Court either could decide the issue immediately or order supplemental merits briefing on the issue and a supplemental oral argument for early next Term.

In no event should the Court leave the parties and the lower courts without clear guidance about the proper test to apply when assessing laws regulating abortion, especially now that *Dobbs* provides such instructive wisdom about *Casey*'s discredited and now discarded undue-burden test.

CONCLUSION

This Court should grant the petition for rehearing, hold that under Iowa's Constitution rational-basis review applies to constitutional challenges to laws regulating abortion, and remand to the district court for application of that standard.

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[1] Planned Parenthood's counsel *did* address the rational-basis standard at oral argument in response to a question from Justice McDermott. Oral Argument Audio at 31:48–32:50.

Respectfully submitted this 1st day of July, 2022.

By: */s/ Christopher P. Schandevel*

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CERTIFICATE OF COMPLIANCE

This petition complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*)(1), 6.903(1)(*g*)(1), and 6.1205(5) because this petition has been prepared in a proportionally spaced typeface using Century Schoolbook, 14-point type and contains 2,667 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Christopher P. Schandevel
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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will accomplish service on the parties' counsel of record.

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