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.	No. EQCE 83074 **REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO DISSOLVE PERMANENT INJUNCTION ISSUED JANUARY 22, 2019** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

SUMMARY OF REPLY

This Court's 2019 permanent injunction preventing the State from enforcing Iowa's fetal heartbeat law rests entirely on *Planned Parenthood of the Heartland v. Reynolds, ex rel. State*, 915 N.W.2d 206 (Iowa 2018) (*PPH II*), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). All three cases have been overruled. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246–48, 2283 (2022); *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 715–16, 740 (Iowa 2022) (*PPH IV*), *reh'g denied* (July 5, 2022). So the injunction is now "founded on superseded law." *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) (cleaned up). And this Court has the inherent authority—and duty—to dissolve it. *Bear v. Iowa Dist. Ct. of Tama Cnty.*, 540 N.W.2d 439, 441 (Iowa 1995).

Planned Parenthood resists that conclusion on three bases, but all of them fail. It says Iowa rules don't allow for the State's motion. But that's irrelevant because the Court's authority over its own injunctions is inherent. It asserts Iowa caselaw does not provide a basis for the State's motion. But that overlooks at least three cases on point. And it insists the State has not met its burden on the merits. But that argument badly misreads *PPH IV*. This Court can—and should—dissolve its injunction now.

ARGUMENT

I. Like all courts, this Court has the inherent authority to modify or vacate an injunction based on a substantial change in the law.

As the State explained in its opening brief, and as the Iowa Supreme Court has made clear, "[i]t has long been the law in Iowa that '[t]he court which rendered [an] injunction may modify or vacate the injunction if, over time, there has been a substantial change in the facts *or law*.'" Br. in Supp. of Mot. to Dissolve Permanent Inj. 13 (quoting *Bear*, 540 N.W.2d at 441) (emphasis added).

Despite that clear statement from the Iowa Supreme Court, Planned Parenthood feigns "surpris[e]" that the State would argue "that a substantial change in the law justifies dissolution of a permanent injunction." Opp'n to Mot. to Dissolve Permanent Inj. 8. According to Planned Parenthood, "*Bear*'s statement to this effect is clearly dictum," the case *Bear* cites only involved a change in facts, *id.* at 8, and "no Iowa court has held that it has the power to vacate a permanent injunction based on a change in law," *id.* at 5. That's wrong. *See infra* 8–13. And Planned Parenthood does not explain why it would make sense for courts to have the authority to vacate an injunction based on a change in *facts* but not based on a change in *law*. For the reasons set out below, any attempt to defend that distinction would fail.

A. The Iowa Supreme Court has affirmed lower court decisions to modify or vacate injunctions based on a substantial change in the law.

Contrary to Planned Parenthood's claim, the Iowa Supreme Court *has* long held that the court that "rendered [an] injunction may modify or vacate" it based on "a substantial change in the . . . law." *Bear*, 540 N.W.2d at 441. Three cases make that clear.

1. *Wilcox v. Miner* (1925)

First, almost 100 years ago, the Iowa Supreme Court affirmed a district court's ruling modifying a permanent injunction after the Iowa legislature passed a statute legalizing the levy of a tax the district court had enjoined as invalid. *Wilcox v. Miner*, 205 N.W. 847, 847–48 (Iowa 1925). "No appeal was taken from [the original] judgment." *Id.* at 847. But after the new statute was enacted, the defendant "filed a motion to modify" the injunction. *Id.* The plaintiffs moved to strike the motion "upon the ground that it was a mere attempt to relitigate the matters involved and already disposed of by final decree, and that the court was without jurisdiction to entertain the motion or to modify the decree." *Id.*

"The motion to strike was overruled," and the Iowa Supreme Court affirmed, explaining that "the modification," which had "practically dissolved the injunction," had merely "conform[ed] the decree to the [new] statute" legalizing the challenged taxes "notwithstanding the decree previously entered." *Id.* at 847–48.

"[A]fter the curative act was passed, the reasons upon which the decree was rendered no longer existed." *Id.* at 848. And so "not only [was it] within the power of the court to modify its previous holding to conform to a valid legalizing act, but it would have been its duty in any subsequent proceeding to give full effect thereto, notwithstanding its previous decree." *Id.*

So too here. Echoing the *Wilcox* plaintiffs, Planned Parenthood argues that "[a] prior final judgment bars the relief the State seeks," this Court "lacks jurisdiction . . . to entertain this Motion," and if the State wants "to relitigate the constitutionality" of a fetal heartbeat law, "it may do so through a newly enacted statute." Opp'n to Mot. to Dissolve Permanent Inj. 5.

The Iowa Supreme Court rejected those very arguments in *Wilcox*. 205 N.W. at 847–48. And so should this Court. After *PPH IV* and *Dobbs*, "the reasons upon which [this Court's] decree was rendered no longer exist[]." *Id.* at 848. So it is "within the power of the court to modify its previous holding to conform" to those decisions. *Id.* And it would be the Court's "duty" in any future cases "to give [them] full effect . . . notwithstanding [the Court's] previous decree." *Id.* Planned Parenthood concedes the State can "relitigate the constitutionality" of a fetal heartbeat law "through a newly enacted statute." Opp'n to Mot. to Dissolve Permanent Inj. 5. But *Wilcox* proves the State doesn't have to wait.

2. *Iowa Electric* (1935)

Ten years after *Wilcox*, the Iowa Supreme Court issued a *second* decision affirming a district court decision modifying a previously issued permanent injunction based on a change in the law. *Iowa Elec. Light & Power Co. v. Inc. Town of Grand Junction*, 264 N.W. 84, 84–85, 91 (Iowa 1935). In *Iowa Electric*, the Iowa Supreme Court quoted approvingly from the U.S. Supreme Court's decision in *Utter v. Franklin*, 172 U.S. 416 (1899). *Utter* involved "county bonds" the Supreme Court had previously held "invalid because there was no power to issue them." *Iowa Elec.*, 264 N.W. at 90 (quoting *Utter*, 172 U.S. at 424). Congress had passed a curative statute making the bonds "valid." *Id.* (quoting *Utter*, 172 U.S. at 424). And the Supreme Court held that it made "no possible difference that they had been declared to be void under the power originally given." *Id.* (quoting *Utter*, 172 U.S. at 424). "The judgment in that case was res adjudicata only of the issues then presented, of the facts as they then appeared, and of the legislation then existing." *Id.* (quoting *Utter*, 172 U.S. at 424).

Similarly here, "it makes no possible difference" that this Court previously declared Iowa's fetal heartbeat law to be void under the law "then existing." *Iowa Elec.*, 264 N.W. at 90 (quoting *Utter*, 172 U.S. at 424). And Planned Parenthood is wrong to insist otherwise. Opp'n to Mot. to Dissolve Permanent Inj. 10–11.

Indeed, that's even more true here because *PPH IV* and *Dobbs* did not change the state and federal constitutions the way the state legislature changed the law in *Wilcox* and *Iowa Electric*. *PPH IV* did not amend Iowa's Constitution. Nor did *Dobbs* amend the U.S. Constitution. Instead, both cases clarified that neither constitution has *ever* protected a fundamental right to abortion. *Dobbs*, 142 S. Ct. at 2283 ("[P]rocuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."); *PPH IV*, 975 N.W.2d at 740 (finding "no support," textually or historically, "for abortion as a fundamental constitutional right in Iowa").

Thus, Planned Parenthood's claim that "[t]here can be no dispute" that Iowa's fetal heartbeat law "was unconstitutional when [it was] enacted" misreads *PPH IV* and *Dobbs*. Opp'n to Mot. to Dissolve Permanent Inj. 11. Those cases show that Iowa's fetal heartbeat law was *not* unconstitutional when it was enacted in 2018. *PPH II*, *Roe*, and *Casey* all led this Court to conclude that it was, as the State showed in its opening brief. Br. in Supp. of Mot. to Dissolve Permanent Inj. 9–11. But all three cases have since been overturned because all three were wrong the day they were decided. *PPH IV*, 975 N.W.2d at 715–16, 740; *Dobbs*, 142 S. Ct. at 2246–48, 2283. Accordingly, the case for dissolving the injunction is even stronger here than in *Wilcox* and *Iowa Electric*.

3. *Spiker v. Spiker* (2006)

More recently, the Iowa Supreme Court reaffirmed in *Spiker v. Spiker* that "[w]hen judgments concerning continuing relief are involved and 'a change of circumstances makes the judgment . . . inapposite as a regulation of ongoing conduct,'" the burdened party usually can "'apply to the rendering court for a modification of the terms of the judgment.'" 708 N.W.2d 347, 355 (Iowa 2006) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. c, at 133). In that case the "change in circumstances" was also a change in decisional law, namely "that the statute upon which the [challenged] visitation order was based [had] been declared unconstitutional" by the Iowa Supreme Court. 708 N.W.2d at 358.

The question on appeal was whether that holding allowed a parent "to modify a grandparent visitation order [entered more than two years earlier] from which she did not appeal." *Id.* at 352. The Iowa Supreme Court held that it did because "the initial grandparent visitation order . . . was a judgment granting continuing relief." *Id.* at 354. So even though the case involved a "petition to modify, vacate, or stay" a visitation order—not an injunction—the Iowa Supreme Court applied caselaw governing motions to modify an injunction based on a change in the law, including the U.S. Supreme Court's decision in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). *Spiker*, 708 N.W.2d at 354, 357–58.

Quoting approvingly from *System Federation*, the Iowa Supreme Court recognized that there is "no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, *whether of law or fact,* obtaining at the time of its issuance have changed, or new ones have since arisen." *Id.* at 357 (quoting *Sys. Fed'n*, 364 U.S. at 647). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Id.* (quoting *Sys. Fed'n*, 364 U.S. at 647).

The U.S. Supreme Court in *System Federation* "ultimately concluded that the decree" at issue there "could be modified due to [a statutory] change in the law." *Id.* at 358. "The Court explained that '[t]he parties have no power to require of the court continuing enforcement of rights the statute no longer gives.'" *Id.* (quoting *Sys. Fed'n*, 364 U.S. at 652). The Iowa Supreme Court held the same principle applied "with equal, if not greater, force to the visitation order at issue" in *Spiker*. *Id.* And that's equally true here, too. Planned Parenthood has "'no power to require of the court continuing enforcement of rights the [Iowa Constitution] no longer gives,'" *id.* (quoting *Sys. Fed'n*, 364 U.S. at 652), especially since no such right ever existed, *PPH IV*, 975 N.W.2d at 740.

B. The power to modify an injunction is inherent in the nature of injunctive relief; it doesn't depend on the existence of a rule codifying that power.

As *Spiker* and *System Federation* make clear, the "source" of a court's "power to modify" an injunction is "the fact that an injunction often requires continuing supervision by the issuing court." *Spiker*, 708 N.W.2d at 357 (quoting *Sys. Fed'n*, 364 U.S. at 647). "This continuing responsibility . . . has its roots in the historic power of chancery to modify or vacate its decrees 'as events may shape the need.'" WRIGHT & MILLER, MODIFICATION OF INJUNCTIONS, 11A Fed. Prac. & Proc. Civ. § 2961 (3d ed. 2013) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)).

For that reason, "Mr. Justice Frankfurter once said that a permanent injunction is "permanent' only for the temporary period for which it may last.'" *VII. Modification and Dissolution*, 78 HARV. L. REV. 1080, 1080 (1965) (quoting *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298 (1941)). That's because "[i]njunctions do not give rise to vested rights; they enforce only rights existing under current law and conditions." *Id.* at 1081. And so "it has uniformly been held" that even an injunction that "purport[s] on its face to be permanent" is "always subject, upon a proper showing, to modification or dissolution by the court which rendered it." *Sontag Chain Stores Co. v. Superior Ct. in & for Los Angeles Cnty.*, 113 P.2d 689, 690 (Cal. 1941).

"The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law." WRIGHT & MILLER, § 2961. There was a time long ago when some courts were reluctant to modify based on changed decisional law, but courts "wisely" began to "grant modification regularly in such cases" in the 1940s. *Dissolution*, 78 HARV. L. REV. at 1082 (citing *Sontag*, 113 P.2d 689; *Santa Rita Oil Co. v. State Bd. of Equalization*, 116 P.2d 1012 (Mont. 1941)). And by now that authority is well accepted. BRYAN A. GARNER, ET AL., THE LAW OF JUDICIAL PRECEDENT 331–32 (2016) (discussing *Coca-Cola Co. v. Standard Bottling Co.*, 138 F.2d 788 (10th Cir. 1943); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437–38 (1976)).

Against that backdrop, Planned Parenthood misses the point in arguing the Court can't modify or vacate its injunction because the rules of civil procedure don't explicitly allow for it. Opp'n to Mot. to Dissolve Permanent Inj. 5–7. The Iowa Supreme Court rejected that argument in *Spiker*: "This argument fails because Sherry's failure to comply with our rule governing modifications of final judgments does not deprive the court of its common-law power to modify judgments granting continuing relief and regulating future conduct upon a substantial change in circumstances." *Spiker*, 708 N.W.2d at 360. And this Court should reject it here.

Similarly, under the federal rules, Rule 60(b) "is little more than a *codification* of the universally recognized principle that a court has continuing power to modify or vacate a final decree." WRIGHT & MILLER, § 2961 (emphasis added). So contrary to Planned Parenthood's claim, Rule 60(b) does not "empower[]" courts to modify or vacate a judgment. Opp'n to Mot. to Dissolve Permanent Inj. 7. "The court's power in this respect is an inherent one." *Sontag*, 113 P.2d at 690. *Accord Swift*, 286 U.S. at 114 (reaffirming court's "power" to modify injunctions is "inherent in the jurisdiction of the chancery").

And that power is inherent for state and federal courts alike. *City & Cnty. of Denver v. Denver Tramway Corp.*, 187 F.2d 410, 417 (10th Cir. 1951) (collecting state and federal cases showing courts have "inherent power to vacate" permanent injunctions if "the law has been so changed" that continuing the injunction is "unjust, inequitable, or unwarranted"). And especially where, as here, "a change in the law authorizes what had previously been forbidden, it is an *abuse of discretion* for a court to refuse to modify an injunction founded on superseded law." *Toussaint*, 801 F.2d at 1090 (emphasis added, cleaned up). *Accord Cal. by & through Becerra v. U.S. Env't Prot. Agency*, 978 F.3d 708, 713–14 (9th Cir. 2020) (discussing the "unbroken line of Supreme Court cases" establishing the same point).

II. *PPH IV* and *Dobbs* qualify as substantial changes in the law justifying dissolution of this Court's prior injunction.

A. Following *PPH IV* and *Dobbs*, no constitutional right to an abortion exists, strict scrutiny is no longer the test, and the viability line is no more.

As the State showed in its opening brief, this Court's injunction against Iowa's fetal heartbeat law relied heavily on the Iowa Supreme Court's decision finding a state right to abortion in *PPH II*, and the U.S. Supreme Court's decisions in *Roe* and *Casey*. Br. in Supp. of Mot. to Dissolve Permanent Inj. 6, 9–11.

Specifically, the Court based its injunction on (1) *PPH II*'s holding that abortion is a fundamental right under Iowa's Constitution, *id.* at 15; (2) *PPH II*'s endorsement of strict scrutiny for laws regulating abortion, *id.* at 17; and (3) this Court's belief that "the previability versus postviability dichotomy from *Roe* and its progeny" was "inherent" in *PPH II*'s adoption of strict scrutiny, *id.* at 25–26 (quoting Summ. J. Ruling at 6). Now that *PPH II*, *Roe*, and *Casey* have been overruled, that injunction is "founded on superseded law." *Toussaint*, 801 F.2d at 1090 (cleaned up). And that change easily qualifies as "substantial." *Bear*, 540 N.W.2d at 441. *Accord* Br. in Supp. of Mot. to Dissolve Permanent Inj. 15–26. In response, Planned Parenthood badly misreads *PPH IV*. Opp'n to Mot. to Dissolve Permanent Inj. 4, 12–13.

B. *PPH IV* did not decide what standard applies to laws regulating abortion—it explicitly invited further litigation on that question.

Without quoting from the Iowa Supreme Court's opinion in *PPH IV*, Planned Parenthood claims the court "indicated" in its opinion that the Iowa Constitution "still provides protection for abortion," and that the court "stated" that *Casey*'s undue-burden test is "now the proper test for abortion restrictions." Opp'n to Mot. to Dissolve Permanent Inj. 4. Neither claim is true.

First, nowhere in the opinion did the Iowa Supreme Court "indicate" that the Iowa Constitution protects a right to abortion. To the contrary, the court expressly stated that it could find "no support," textually or historically, "for abortion as a fundamental constitutional right in Iowa." *PPH IV*, 975 N.W.2d at 740. And while the court declined to decide what standard "should replace" strict scrutiny, the court left open the possibility that rational-basis review might be the correct test. *Id.* at 715–16, 745.

So if by "protection for abortion" Planned Parenthood only means that the court "indicated" the state constitution at least protects against laws lacking any conceivable rational basis, Planned Parenthood may be right. But that still would require dissolution of this Court's prior injunction because Iowa's fetal heartbeat law easily satisfies rational-basis review. Br. in Supp. of Mot. to Dissolve Permanent Inj. 23–25.

Second, Planned Parenthood's insistence that *Casey*'s undue-burden test is "now the proper test" rests entirely on a portion of a single sentence in *PPH IV*. Opp'n to Mot. to Dissolve Permanent Inj. 4, 12. And Planned Parenthood misreads that (partial) sentence. Planned Parenthood asserts the Iowa Supreme Court "held clearly" in *PPH IV* that "'the *Casey* undue burden test [it had] applied in *PPH I* remains the governing standard.'" *Id.* at 12 (quoting, *PPH IV*, 975 N.W.2d at 716). From that snippet, Planned Parenthood claims the court decided that "the undue burden test remains the appropriate test" and "is now the proper test" to apply in Iowa. *Id.* at 4, 12. But that's wrong for multiple reasons.

1. For one thing, Planned Parenthood skips over the Iowa Supreme Court's statement two paragraphs earlier that it would "not at this time decide what constitutional standard should replace" strict scrutiny. *PPH IV*, 975 N.W.2d at 715.

2. For another, Planned Parenthood omits the first part of the sentence it quotes: "*For now*, this means that the *Casey* undue burden test we applied in *PPH I* remains the governing standard." *Id.* at 716 (emphasis added). And that two-word qualifier matters. *Dobbs* was then "now pending" in the U.S. Supreme Court, *id.*, and the Iowa Supreme Court knew that it "could decide whether the undue burden test continues to govern federal constitutional analysis of abortion rights," *id.* at 745.

While not binding on the issue, the Iowa Supreme Court recognized *Dobbs* could have great persuasive value for Iowa courts deciding the proper test to apply to abortion restrictions under Iowa's Constitution. *Id.* So by saying the undue-burden test the court had applied in *PPH I* remained the governing test "[f]or now," the court only meant at least until *Dobbs* was decided.

3. The Iowa Supreme Court made that clear in the very next line in its opinion, which Planned Parenthood also ignores: "On remand, the parties should marshal and present evidence under that test, although the legal standard *may also be litigated further*." *Id.* at 716 (emphasis added). Only by ignoring that line—and the court's statement that it would "not at this time decide what constitutional standard should replace" strict scrutiny, *id.* at 715—can Planned Parenthood claim the court "stated that the undue burden test is now the proper test," Opp'n to Mot. to Dissolve Permanent Inj. 4. The Iowa Supreme Court expressly did *not* decide that question; it *did* expressly invite further litigation to resolve it in the lower courts. And that is all the State is doing here: litigating further and asking this Court to decide the open question of what standard applies to laws regulating abortion under the Iowa Constitution. *Dobbs*'s rejection of *Casey*'s "arbitrary" and "unworkable" undue-burden test, 142 S. Ct. at 2266, 2275, should persuade this Court to reject it, too.

4. In addition to its persuasive value, *Dobbs* matters here for a second important reason. That's because in *PPH I*, the Iowa Supreme Court did *not* hold that *Casey*'s undue-burden test is the proper test for challenges to laws regulating abortion under Iowa's Constitution. Instead, the Court applied the test there based on an apparent attorney concession at oral argument that the Iowa Constitution "provides a right to an abortion that is coextensive with the right available under the United States Constitution." *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 254 (Iowa 2015) (*PPH I*).

The State and the Iowa Board of Medicine have long since disavowed that perceived concession. And now that *Dobbs* has overruled *Roe* and *Casey* and rational-basis review applies under the U.S. Constitution, the *Casey* undue-burden test the Iowa Supreme Court applied in *PPH I* cannot "remain[] the governing standard" under Iowa law. *PPH IV*, 975 N.W.2d at 716. That test is no more under federal law. And it only ever applied under Iowa law based on an alleged attorney concession that federal law controls the state constitutional question. *PPH I*, 865 N.W.2d at 254. So now that rational-basis review applies at the federal level, *PPH I*'s assumption that the state and federal rights are "coextensive," *id.*, supports the conclusion that *rational-basis* review is the governing test under Iowa's Constitution.

5. Seeking to avoid that conclusion, Planned Parenthood urges the Court to read a merits decision into the Iowa Supreme Court's denial of the State's petition for rehearing. Opp'n to Mot. to Dissolve Permanent Inj. 2, 4, 13. But Planned Parenthood cites no authority for its assertion that this Court should read into that discretionary decision. And for good reason. "While granting discretionary review weakens a lower court's decision, *denying* review should have no effect at all." GARNER, JUDICIAL PRECEDENT at 261 (emphasis added). That's because "denial of discretionary review neither approves nor disapproves the decision below." *Id.*

At the U.S. Supreme Court, for example, "[t]hat 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case' has been confirmed repeatedly." *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 296 (1989)). As Justice Frankfurter explained in *Maryland v. Baltimore Radio Show*, the decision to deny the writ "simply means that fewer than four members of the Court deemed it desirable to review a decision . . . as a matter of sound judicial discretion." 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.) (cleaned up). "A variety of considerations underlie denials of the writ," including "considerations of judicial policy" such as the desirability of having "different aspects of an issue further illumined by the lower courts." *Id.* at 917–18. "Wise adjudication has its own time for ripening." *Id.* at 918.

"The same rule has been applied in state courts with discretionary review." GARNER, JUDICIAL PRECEDENT at 262 & n.13 (collecting cases). "When the state's high court has discretion to review a case, its decision not to do so cannot be read to imply approval or adoption of the lower court's judgment or opinion." *Id.* at 262. "Courts correctly reject *any* implication from the denial of review." *Id.* (emphasis added).

All of that applies equally here. Whether to grant rehearing is discretionary. Iowa R. App. P. 6.1205. The court had invited further litigation in the lower courts. *PPH IV*, 975 N.W.2d at 716. And *Dobbs* had been decided only a week earlier. So it may have been "desirable to have different aspects of [the] issue further illumined by the lower courts." *Baltimore Radio*, 338 U.S. at 918.

The court also had determined the State had not previously argued "the rational basis test applies" and had "simply ask[ed] that *PPH II* be overruled." *PPH IV*, 975 N.W.2d at 715–16. It is well settled that a rehearing petition on a question not presented to or decided by the trial court nor on the former hearing will be denied. *See, e.g.*, *McNabb v. Juergens*, 185 N.W. 581 (Iowa 1921) (per curiam); *Hamilton v. Hamilton*, 118 N.W. 375 (Iowa 1908) (per curiam); *Austin v. Wilson*, 3 N.W. 130, 130–31 (Iowa 1879). So this Court should "reject *any* implication from [that] denial of review." GARNER, JUDICIAL PRECEDENT at 262 (emphasis added).

6. Even setting *Dobbs* aside, Planned Parenthood overlooks that *PPH IV* only states that "the *Casey* undue burden test" the Iowa Supreme Court "*applied* in *PPH I* remain[ed] the governing standard." 975 N.W.2d at (emphasis added). And as the State argued in its opening brief, the version of *Casey*'s undue-burden test the court actually applied in *PPH I* "is not and cannot be the test for a *prohibition* on abortion that 'advance[s] the state's interest in advancing fetal life.'" Br. in Supp. of Mot. to Dissolve Permanent Inj. 23 (quoting *PPH I*, 865 N.W.2d at 264).

"The Iowa Supreme Court has never said what level of review applies for laws that prohibit elective abortions after a certain point in pregnancy like Iowa's fetal heartbeat law." *Id.* So this Court can and should apply the well-settled principle that where, as here, "a fundamental right is not implicated, a statute need only survive a rational basis analysis." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). *Accord King v. State*, 818 N.W.2d 1, 31 (Iowa 2012). Planned Parenthood offers no principled reason for departing from that well-settled rule to create an exception for abortion regulations. Accordingly, cases like *Seering* and *King* are controlling. And this Court should hold that rational-basis review applies and that Iowa's fetal heartbeat law satisfies that standard, and then dissolve the Court's injunction against it.

III. At a minimum, the Court should dissolve the injunction temporarily if the Court requires more factual development under a different test.

If the Court agrees that rational-basis review applies, no factual development is needed to resolve this case, and the State's motion to dissolve the permanent injunction must be granted. Planned Parenthood has not argued that Iowa's fetal heartbeat law fails rational-basis review, nor can it. Moreover, now that *PPH II*, *Roe*, and *Casey* have been overruled, rational-basis review is the only standard for laws regulating abortion that has any principled basis in Iowa or federal law.

If the Court disagrees, though, and concludes more factual development is required under some version of the now-discarded undue-burden test, it still should dissolve the injunction while that occurs. Br. in Supp. of Mot. to Dissolve Permanent Inj. 27–28.

When this case was last before this Court, the State argued that the law should be upheld because the State's expert evidence showed that, using the "abdominal ultrasound as required by the Iowa Heartbeat Bill, the earliest [point] at which the heartbeat of an unborn child is detectable is not until about seven to eight weeks gestation," and for many children not "until nine weeks gestation, or even later." Br. in Resistance to Summ. J. at 5. So the law still provides women a "significant opportunity to obtain an abortion before the detectable heartbeat." *Id.* at 17.

This Court rejected the State's "window of opportunity" argument as "nothing more than an attempt to repackage the undue burden standard rejected by the Iowa Supreme Court in *PPH II*." Ruling on Mot. for Summ. J. at 7. But *PPH IV* overruled *PPH II*. And in *Dobbs*, while Chief Justice Roberts declined to join the majority, he voted to uphold the previability, 15-weeks law at issue there based on his belief that it still provided women "an adequate opportunity to exercise the right *Roe* protect[ed]." *Dobbs*, 142 S. Ct. at 2315 (Roberts, C.J., concurring in the judgment).

Such a standard has no legal basis. But if the Court stops short of holding rational basis applies, the Court still can uphold Iowa's fetal heartbeat law under an "adequate opportunity" version of the undue-burden test. *See id.* ("Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation."). Upholding the law on that basis would require factual development.[1] But if the Court chooses that route, the Court still should dissolve the injunction while that occurs. *Iowa State Dep't of Health v. Hertko*, 282 N.W.2d 744, 752 (Iowa 1979) (affirming denial of temporary injunction in case with "disputed questions of law about which there was doubt").

[1] Planned Parenthood still ignores that the law only requires an *abdominal* ultrasound, mislabeling it "a 6-week abortion ban" for that reason. Opp'n to Mot. to Dissolve Permanent Inj. 1, 3, 10, 14.

CONCLUSION

The Iowa Supreme Court's decision in *PPH IV* and the U.S. Supreme Court's decision in *Dobbs* mean this Court's January 22, 2019 permanent injunction is founded on superseded law. This Court has the inherent authority to dissolve and dismiss that injunction immediately, and the Court should do so. At a bare minimum, the Court should dissolve the injunction temporarily while the parties litigate the motion to dissolve it permanently.

September 26, 2022

s/ Alan R. Ostergren
Alan R. Ostergren
PIN AT0005950
THE KIRKWOOD INSTITUTE, INC.
500 Locust Street, Suite 199
Des Moines, IA 50309
(515) 207-0134
alan.ostergren@kirkwoodinstitute.org

*PHV granted

John J. Bursch*
Christopher P. Schandevel*
ALLIANCE DEFENDING FREEDOM
44180 Riverside Parkway
Lansdowne, VA 20176
(571) 707-4655
jbursch@adflegal.org
cschandevel@adflegal.org

Denise M. Harle*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D1100
Lawrenceville, GA 30043
(770) 339-0774
dharle@adflegal.org

Counsel for Respondents