ELECTRONICALLY FILED FEB 20, 2023 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT
No. 22-2036

PLANNED PARENTHOOD OF THE HEARTLAND, INC., EMMA GOLDMAN CLINIC, and
JILL MEADOWS, M.D.,
Petitioners-Appellees,

v.

KIM REYNOLDS ex rel. STATE OF IOWA, and
IOWA BOARD OF MEDICINE,
Respondents-Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY

THE HONORABLE CELENE GOGERTY; CASE NO. EQCE083074

BRIEF OF AMICUS CURIAE BY SIXTEEN IOWA STATE SENATORS

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STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The Iowa State Senators are sixteen members of the Iowa State Senate (Senate) who were duly elected by the citizens of their several districts. The Iowa State Senators hold a variety of leadership positions in the Senate. The Senate is a legislative body of Iowa's General Assembly as created by Article III of Iowa's Constitution. As elected Iowa State Senators, Amici have a duty under the Constitution to ensure that the General Assembly's authority in passing legislation are protected.

Amici include: **Jack Whitver**, Senate Majority Leader; **Amy Sinclair**, Senate President; **Brad Zaun**, Senate President Pro Tempore; **Chris Cournoyer**, Assistant Senate Majority Leader; **Mike Klimesh,** Assistant Majority Leader; **Carrie Koelker,** Assistant Majority Leader; **Jeff Reichman,** Assistant Majority Leader; **Waylon Brown**, Senate Majority Whip; **Mike Bousselot**, Senate Commerce Committee Vice Chair; **Dan Dawson**, Senate Ways and Means Committee Chair; **Adrian Dickey**, Senate Workforce Committee Chair; **Dawn Driscoll**, Senate Agriculture Committee Chair; **Lynn Evans**, Senate Judiciary Committee; **Julian Garrett**, Senate Judiciary Committee Vice Chair; **Annette Sweeney**, Senate Natural Resources Committee Chair; and **Dan Zumbach**, Senate Appropriations Committee Vice Chair.

ARGUMENT

I. A PERMANENT INJUNCTION DOES NOT STRIKE A STATUTE FROM THE CODE AND A CHANGE IN THE STANDARD OF REVIEW UTILIZED TO ENJOIN A STATUTE IS A SUBSTANTIAL CHANGE IN THE LAW PERMITTING COURTS TO REVISIT A PERMANENT INJUNCTION TO PROTECT THE AUTHORITY OF BOTH THE JUDICIAL AND LEGISLATIVE BRANCHES.

This Court is being asked to determine whether a permanent injunction prohibiting the administration or enforcement of statute should be dissolved. As part of this determination, the Court will decide the legal impact of a permanent injunction on a statute. In addition, the Court will decide whether a permanent injunction should be revisited when the standard of review utilized to enjoin the statute is overruled by subsequent decisions.

Amici urge the Court to find that while a permanent injunction may bar enforcement of a statute, it does not strike the law from the Code of Iowa. Amici also urge the Court to find that a subsequent change in the standard of review is a substantial change in the law permitting courts to revisit the continued application of a permanent injunction. This is especially true given the impact that a permanent injunction has on the authority of the legislative branch and also protects the inherent authority of the judicial branch.

Amici first desire to make clear to this Court that they respect the authority of the judicial branch to engage in judicial review of a statute and to issue a permanent injunction when a court determines that a statute is not constitutional. Nothing in this brief should be read as stating or implying in any manner that the judicial branch lacks such authority. As such, the General Assembly strives to enact legislation that will survive judicial scrutiny. In fact, the standard of review employed by the judicial branch in determining whether a statute is constitutional is central to this case.

As the parties will argue the appropriate standard of review in this matter, Amici avoid that discussion. Rather, this brief provides the Court with information as to the impact of a permanent injunction and why a change in the standard of review of a permanently enjoined statute are vital to the authority of the legislative branch.

A. A statute enjoined by a permanent injunction does not cease to exist.

At the district court level the parties extensively briefed the history of this litigation and will no doubt do so again in briefs for this Court. As such, Amici briefly state that it is important to note that this case arises from a permanent injunction issued in 2019 based on the standard of review utilized by this Court in *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 91 N.W.2d 206 (Iowa 2018), and the United States Supreme Court

decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). 2019 S. J. Ruling at 8. Then in 2022 as part of separate litigation, in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022), *reh'g denied* (July 5, 2022) this Court overturned the 2018 decision and the standard of review utilized in that case.

Of particular importance to Amici is how this Court views the legal existence of a statute under a permanent injunction and the interaction between the judicial and legislative branches when a law is enjoined.

Article XII, section 1 of Iowa's Constitution states:

> **Supreme law — constitutionality of acts.** This Constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this Constitution into effect.

One issue for this Court to decide is the application of the word "void" under this section. The district court cited *Sec. Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8 (Iowa 1924) that once a statute was determined to be unconstitutional, the law was "as inoperative as though it had never been passed." See 2022 Ruling at 12-13. This language reflects *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and subsequent cases declaring that legislative acts found unconstitutional were "void" or "struck down."

Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L.Rev. 933 (2018)[1] cites court decisions utilizing words such as "void" and "struck down" when courts have found statutes to be unconstitutional. *Id*. at n. 143. The article also provides numerous arguments as to why such opinions fail to reflect the reality of such rulings on the statutes or the authority of the legislative branch. "There is no procedure in American law for courts or other agencies of government – other than the legislature itself – to purge from the statute books, laws that conflict with the Constitution as interpreted by the Courts." *Id*. at n. 5 (citing *Winsness v Yocom*, 433 F.3d 727, 728 (10th Cir. 2006)).

Similarly, it may be accurate under Article XII, section 1, that an enjoined statute is void in that it cannot be enforced, but it should not mean that the law is struck from existence as if it was never enacted.

Article III is divided into two headings. The first heading is entitled "Three Separate Departments" and contains Section 1:

> **Departments of government.** The powers of the government of Iowa shall be divided into three separate departments — the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

[1] Available at SSRN: https://ssrn.com/abstract=3158038

A permanently enjoined statute remains part of the Code of Iowa[2] unless the General Assembly passes a bill to repeal the statute under the authority granted to it by Iowa's Constitution.

Article III, section 15 of Iowa's Constitution states:

> **Bills.** Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.

Article III, section 17 of Iowa's Constitution states:

> **Passage of bills.** No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal.

This is the process set out in Iowa's Constitution for a statute to be passed, repealed, or amended. A statute under a permanent injunction may not be removed from the Code of Iowa until the requirements in Article III, sections 15 and 17 have been met, the bill is then approved by the Governor under Article III, section 16, and finally deposited in the office of the Secretary of State.[3]

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[2] As used throughout, the "Code of Iowa" will be in reference to the publication of all statutes of a general and permanent nature published by the General Assembly's Legislative Services Agency under the authority of Iowa Code sections 2B.6 and 2B.12. The official cite to the "Code of Iowa" or "Iowa Code" is found in Iowa Code section 2B.17(4)(c).

[3] Under the 2nd heading in Article III "Legislative Department" section 1 "General Assembly" also requires that "the style of every law shall be '"Be it enacted by the General Assembly of the State of Iowa."'

Lawmaking authority is within the legislative branch and Amici recognize the authority of the judicial branch to enjoin the enforcement of a statute by finding the law unconstitutional. See *Hutchins v. City of Des Moines*, 157 N.W. 881 (Iowa 1916) and *State v. Thompson*, 954 N.W.2d 402 (Iowa 2021). However, such a judicial decision cannot strike the statute from existence even under the word "void" in Article XII, section 1.

When a court enters a permanent injunction, there is no writ issued mandating that the statute be removed from the Code of Iowa. There is no directive to the General Assembly to repeal or amend the statute. The Iowa Code editor is not mandated by the court to remove the statute from the Code of Iowa.[4]

Indeed, to do so would result in a separation of powers issue between the judicial and legislative branches. "The separation of powers concept, as we understand it, has to do with the distribution of governmental functions among the executive, legislative and judicial branches of the government, and recognizes the constitutional prohibition against one department's exercising another's powers…." *State v. Ronek*, 176 N.W.2d 153, 155 (Iowa 1970).

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[4] See Iowa Code sections 2B.1, 2B.6, 2B.12, and 2B.13 for the appointment and duties of the Iowa Code editor.

In a similar manner, a separation of powers issue would be created if the General Assembly passed laws mandating the standard of review the courts had to utilize when reviewing the constitutionality of a statute or how the courts should rule in legal disputes. Such laws would be found by the courts to be unconstitutional under Article III, section 1 and correctly so. See *Schwarzkopf v. Sac County Board of Supervisors*, 341 N.W.2d 1 (Iowa 1983).

If the word "void" in Article XII, section 1 truly means that the statute is treated as if it never existed, then arguably how could the legislative branch amend the law to remove the offending language? Arguably how could the legislative branch even repeal the law? If the General Assembly passed a law to repeal or amend a statute under a permanent injunction, would that new statute be subject to immediate litigation if for no other reason that there was no underlying statute to repeal or amend? Amici acknowledge that the General Assembly has previously repealed and amended statutes under an injunction and that probably answers these questions.[5] However, they do point out some potential dangers with decisions that overstate the imposition of a permanent injunction.

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[5] See for example *Johnston v. Kirkville Independent School District*, 39 N.W.2d 287 (Iowa 1949).

In any event, how the word "void" in Article XII, section 1 is interpreted and applied by this Court is very important to Amici and the legislative branch as a whole. As has been discussed, the word "void" can result in potential separation of powers issues to the significant burden of the General Assembly and encroachment on the authority of the legislative branch. Amici recognize that in avoiding this result, the corresponding authority of the judicial branch must still be respected and maintained. However, it is possible for this Court to balance the constitutional interests between the legislative and judicial branches as well as the provisions of Article III and Article XII, section 1.

In order to achieve this balance, Amici urge this Court to find that the word "void" in Article XII, section 1 is limited to meaning a statute cannot be administered or enforced while an injunction is in place, but that the statute is still in existence as part of the Code of Iowa. In addition, Amici urge this Court to find that a statute subject to a permanent injunction is capable of being revived as the statute still exists. Finally, Amici urge this Court to find that Article XII, section 1 does not bar a court from revisiting a permanent injunction when the standard of review originally utilized to enjoin the standard is overruled by a subsequent decision.

B. The decision to not dissolve a permanent injunction when the standard of review is subsequently overruled significantly burdens the legislative branch.

The parties extensively briefed before the district court the issue of whether the courts have the authority to revisit a permanent injunction and will do so again in arguments to this Court. As such, Amici do not simply restate the cases or repeat the same arguments. Rather, Amici point out to this Court that the failure to revisit a permanent injunction when the standard of review has changed significantly burdens the legislative branch.

Amici first restate that they accept and respect the judicial review authority of the judicial branch. However, it must also be recognized that the authority to issue a permanent injunction is a powerful one. See *Kent Prods., Inc. v. Hoegh*, 61 N.W.2d 711 (Iowa 1953).

The previous section of this brief discusses the constitutional authority for the continued existence of an already enacted statute despite the issuance of a permanent injunction. This section discusses the authority of the legislative branch to not pass legislation and the impact the issuance of a permanent injunction can have on that authority. In this matter, the decision of the district court to not dissolve the permanent injunction despite legal authority to do so, has a significant burden on the legislative branch that Amici urge this Court to take under consideration.

Article III, section 34 of Iowa's Constitution provides that the "senate shall be composed of not more than fifty and the house of representatives not more than one hundred members." Article III, section 17 requires that a bill cannot pass "unless by the assent of a majority of all the members elected to each branch of the general assembly" and Article III, section 16 requires approval by the Governor. As such, the Constitution requires positive action by a minimum of seventy-eight people (twenty-six Senators, fifty-one Representatives, and the Governor) to pass a bill.

Conversely, one district court judge can issue a permanent injunction resulting in the laws contained in the bill from being administered or enforced. This is the nature of judicial review and Amici accept that. However, when the standard of review upon which the permanent injunction is based is subsequently overruled, the result is a troublesome one.

Iowa's Constitution contains some prohibitions and limitations on the types of bills that the General Assembly may pass. For example, no establishment of religion; no abridgement of free speech; laws must be of general nature; and no attainders or ex post facto. Iowa Constitution, Article I, sections 3, 6, 7, and 21. The single-subject requirement for legislation in Article III, section 29 and the prohibition in Article III, section 30 on "local or special laws" in certain enumerated cases are other examples.

The 2019 injunction in this case was not based on any of the prohibited types of bills in the Constitution. Rather, the issue turned on strict scrutiny being the standard of review in *PPH II*. 915 N.W.2d at 212, 237-238, 245-246. 2019 S. J. Ruling at 8. The decision on what standard of review a court uses when a challenge is filed to a statute is a fundamental one. In some areas of the law, the standard of review a court utilizes frequently indicates a signpost or predictor of the opinion's final outcome.

In 2022, the holding in *PPH II* was overturned in *PPH IV*, 975 N.W.2d at 740. Shortly thereafter, the United States Supreme Court issued *Dobbs v. Jackson Women's health Org.*, 142 S. Ct. 2228 (2022) overturning previous U.S. Supreme Court decisions that potentially impacted the 2019 injunction. However, in 2023 the injunction is still in place.

The imposition of a permanent injunction results in the General Assembly having to choose whether to pass legislation or hope that the judicial branch eventually dissolves the injunction. Without action from this Court, the continued imposition of this permanent injunction means that the General Assembly either has to pass legislation to once again express its will through lawmaking, or have a bill it passed before be meaningless. All this, despite the fact the permanent injunction may no longer be valid.

Obviously, the legislative branch also has the authority to not pass legislation. Not every bill that gets drafted and submitted to the General Assembly for consideration is passed into law. Far from it in actual practice.

The General Assembly chose not to exercise its Article III authority and enact legislation dealing with the 2019 injunction. However, the issuance of the injunction placed the General Assembly in the position of having to make that decision. Then, despite the subsequent ruling in *PPH IV* involving the appropriate standard of review, the district court declined to dissolve the injunction. See 2022 Ruling at 16.

The district court's decision means that the legislative branch is in the same position as if the decision in *PPH IV* had never been issued. The General Assembly must still decide whether or not to pass legislation due to the imposition of the injunction. This is particularly troubling as the rationale for the appropriate standard of review in the 2019 injunction has been overruled. The same would be true for any other statute under a permanent injunction due to a standard of review that has subsequently been overturned.

This results in the will of the legislature, reflected in the passage of legislation, being nullified. Legislation was passed, the judicial branch issued a ruling preventing the enforcement and administration of that

legislation, then the judicial branch changed its mind and issued a different ruling. However, the impact on the legislative branch remains the same. Legislation that was introduced, debated, passed, and signed into law cannot be administered or enforced and the General Assembly has no choice to correct this situation except for the passage of additional legislation.

There are also questions as to what type of legislation would the General Assembly be required to pass concerning this injunction. Would the exact language need to be reenacted as was passed by the General Assembly in 2018? Would this be viewed as a curative act within the authority of the legislative branch as opposed to an impermissible encroachment of the legislature into the authority of the judicial branch? See *State ex. rel. Lankford v. Mundie*, 508 N.W.2d 462 (Iowa 1993). In the alternative, would such legislation be viewed as a curative act in which the General Assembly impermissibly invaded the powers of the courts to make judicial decisions? See *Sioux City v. Young*, 97 N.W.2d 907 (1959).

Given the change in the standard of review, and in recognition of the General Assembly's authority to pass laws and not pass laws, Amici urge this Court to order the dissolution of the permanent injunction and reflect Article XII, section 2 "All laws now in force and not inconsistent with this Constitution, shall remain in force until they shall expire or be repealed."

C. Iowa courts have the inherent authority to dissolve a permanent injunction and this matter is a significant change in the law that warrants the permanent injunction being revisited to protect the authority of both the judicial branch and legislative branch.

As previously stated, the issue of whether or not the district court has the authority to dissolve the permanent injunction was thoroughly briefed by the parties and will be done so again by the parties before this Court as this issue is a central one. Therefore, Amici will not belabor the point when discussing the issue of the district court having the authority to revisit the permanent injunction.

However, as has been discussed throughout this brief the issuance of a permanent injunction due to the standard of review has a significant impact on the legislative branch. The specific procedural matters in this case demonstrate the need to protect the inevitable intersection between duties of the judicial and legislative branches and promote the "harmonious cooperation" among the branches of government. See *State v. Hoegh*, 632 N.W.2d 885, 889 (Iowa 2001), citing *Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869 874 (Iowa 1978).

The case before this Court reflects the intersection between the duties of the judicial branch and the legislative branch as discussed in *Hoegh* and *Webster County Bd. of Supervisors*. This Court has the authority to protect

the judicial branch and the legislative branch in situations when it is possible to dissolve a permanent injunction due to a substantial change in the law.

Amici urge this Court to do so by upholding previous judicial decisions in a number of cases covering decades of Iowa case law in *Bear v. Iowa District Court of Tama County*, 540 N.W.2d 439 (Iowa 1995), *Helmkamp v. Clark Ready Mix Company*, 249 N.W.2d 655 (Iowa 1977), *Iowa Electric Light & Power Company v. Incorporated Town of Grand Junction*, 264 N.W. 84 (Iowa 1935), and *Wilcox v. Miner*, 205 N.W. 847 (Iowa 1925).

These cases all reflect a long history of this Court correctly protecting the inherent authority of courts to dissolve permanent injunctions. Yet the district court in this matter spent a number of pages in its ruling differentiating these cases and ultimately rejecting the inherent authority the court actually possesses to dissolve the 2019 permanent injunction. See 2022 Ruling at 6-13.

However, these decisions are very relevant and applicable to this matter. As such, Amici urge this Court to defend and uphold these prior decisions. By doing so, this Court protects the authority of both the judicial and legislative branches.

As this Court has already opined in the cases cited above, courts have the inherent authority to revisit and dissolve a permanent injunction regardless of timing or any rule of civil procedure. This inherent authority should not be curbed due to an appeal not being filed within a year. See 2022 Ruling at 5. An "inherent authority" is just that and is not dependent upon, or limited by, a procedural rule. This is especially true in light of this Court's decisions in *Spiker v. Spiker*, 708 N.W.2d 347 (Iowa 2006) and *Den Hartog v. City of Waterloo*, 926 N.W.2d 764 (Iowa 2019). Just as the General Assembly zealously defends its inherent authority, this Court should do the same for the judicial branch.

The 2019 injunction was based on the standard of review that had been utilized under *PPH II* at that time. See 2019 S. J. Ruling at 3-4, and 8. However, under *PPH IV*, this standard of review was deemed to be incorrect. This results in a change in the law. It is well established that the standard of review in a case is central to any ruling. A statute that fails to be constitutional under strict scrutiny, may very well survive constitutional muster under a less vigorous standard.

As Amici previously stated, if the 2019 injunction remains in place despite the fact that it is based on a standard of review that has since been overturned, the result is that a law passed by the legislature cannot be

administered or enforced without further action by the General Assembly. This results in an encroachment on the authority of the legislative branch under Article III of Iowa's constitution to pass laws as well as the authority to not pass legislation. This can be avoided by this Court continuing to exercise its decades long authority to revisit and dissolve a permanent injunction when there has been a change in the law and thereby protecting the inherent authority of the judicial branch as well.

CONCLUSION

For the reasons provided herein, Amici urge this Court to deny the motion to dismiss the State's appeal, reverse the district court's ruling denying the motion to dissolve the 2019 injunction, and remand the case to the district court with instructions as appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ W. Charles Smithson
Signature

February 20, 2023
Date

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2023, I electronically filed the forgoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, that will send notification to the parties of record.

/s/ W. Charles Smithson
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