IN THE SUPREME COURT OF IOWA
No. 22–2036

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

Appellees,

vs.

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

Appellants.

Appeal from the Iowa District Court for Polk County
Celene Gogerty, District Judge

BRIEF OF AMICUS CURIAE 62 MEMBERS OF THE IOWA LEGISLATURE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE[1]

The Iowa General Assembly is the lawmaking body for the State of Iowa. Iowa Const. art. III, § 1. Like this Court's members, Iowa legislators take an oath to support Iowa's Constitution. *See* Iowa Const. art. III, § 32. Accordingly, amici legislators[2] have an interest in any proceeding implicating the faithful application of Iowa's Constitution. That interest is heightened here for at least two reasons. First, amici seek to vindicate their support of legislation that protects innocent, unborn life by prohibiting elective abortions following detection of a fetal heartbeat. Second, the standard of review that is applied to regulations of abortion implicates significant separation-of-powers principles.

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[1] All parties consented in writing to the filing of this brief (see addendum). No party's counsel authored this brief in part or in whole, and no person other than amici and their counsel made any monetary contribution to fund its preparation or submission.

[2] A complete list of the amici legislators is included in the addendum.

INTRODUCTION

In *Planned Parenthood of the Heartland, Inc. v. Reynolds* (*PPH IV*), 975 N.W.2d 710 (Iowa 2022), this Court overruled its precedent that had erroneously found abortion to be a fundamental right under the Iowa Constitution and had required the application of strict scrutiny to laws regulating abortion. But the Court declined to set a new standard to replace strict scrutiny because (1) the issue had not been argued by the parties and (2) the U.S. Supreme Court was expected to provide an insightful opinion on the issue in the near future. *Id.* at 745–46. Now, a year later, the issue of what standard Iowa courts will use to review the constitutionality of abortion legislation is squarely before this Court.

When the District Court in this case was presented with this question, it reverted back to the borrowed undue burden standard set out in the now-overruled case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This decision must be reversed. The undue burden standard is fraught with problems. Aside from its lack of textual or historical support,

it suffers from severe unworkability. Its nebulous nature invites judicial policy making and an endless battle between the judicial branch and the elected branches of government. Therefore, this Court should reverse the District Court and clarify that, as in all other contexts where a fundamental constitutional right is not at issue, the applicable standard is rational basis review.

ARGUMENT[3]

I. The undue burden test is unworkable and unpredictable.

The undue burden test was first articulated by a plurality in *Casey*, and it represented a major doctrinal departure. *Roe v. Wade*, the predecessor to *Casey*, purported to balance an individual's liberty interest in privacy against the state's interest in protecting prenatal life by coupling the strength of the state's interest to the trimester progression of a pregnancy—the later in time, the stronger the interest. 410 U.S. 113, 162–63 (1973). *Casey* abandoned that conceptually flawed and controversial framework altogether. In its place, *Casey* substituted an amorphous undue burden standard—one unknown to other areas of law. It proved to be utterly unworkable, and, partly for that reason, the U.S. Supreme Court has since abandoned it. This Court should do the same.

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[3] Full disclosure: This brief borrows heavily from a brief filed in *Dobbs*. *See* Amicus Brief of Senators Josh Hawley, Mike Lee, and Ted Cruz in Support of Petitioners at 9–23, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022). The authors of that brief granted us permission to do so.

a. The undue burden test was unworkable and inconsistent from the beginning.

As originally conceptualized by the *Casey* plurality, the undue burden test posits that "[o]nly where state regulation imposes an undue burden on a woman's ability to make [an abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." 505 U.S. at 874. This gave rise to a jurisprudential minefield, producing confusing and conflicting outcomes in the lower courts.

Ironically, *Casey* itself provided the first evidence of its unworkability: it was proposed by the plurality opinion of a highly fractured court after failing to garner a majority. *Cf. Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) ("A decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of a plurality.' " (cleaned up) (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996))). Notably, four Justices would have applied rational basis review, *Casey*, 505 U.S. at 981 (Scalia, J., concurring in the judgment in part and dissenting in part), while only three advocated the undue burden standard, a novel test

without roots in either the Constitution's text or precedent. Two Justices proposed the familiar strict scrutiny test. *See id.* at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 929 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Having announced the new rule, the *Casey* plurality quickly demonstrated its unworkability and lack of a meaningful anchor. The plurality could not command assent among those Justices in the majority on how the new rule should be applied, or even what precisely it meant. The plurality, for example, upheld an informed consent provision, *id*. at 881–87, while Justice Stevens, part of the majority, posited that such provisions constitute an "undue burden." *Id*. at 920 (Stevens, J., concurring in part and dissenting in part). Justice Stevens insisted that his opinion featured the "correct application of the 'undue burden' standard." *Id*.

Unsurprisingly, then, the dissenting Justices and contemporaneous observers had little trouble predicting the standard would continue to prove unworkable. Chief Justice Rehnquist concluded that "the undue burden standard presents

nothing more workable than the trimester framework which it discards." *Id.* at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). As such, it "will not result in the sort of 'simple limitation,' easily applied, which the joint opinion anticipates. In sum, it is a standard which is not built to last."[4] *Id.* at 964–65. Justice Scalia called the undue burden standard "ultimately standardless" and "inherently manipulable," with the result that it "will prove hopelessly unworkable in practice." *Id.* at 986–87 (Scalia, J., concurring in the judgment in part and dissenting in part).

Even proponents of abortion rights were mostly puzzled. For example, two days after the decision, Janet Benshoof, president of the Center of Reproductive Law and Policy, said, "When push comes to shove, we're left with a legal standard I can't figure out. It looks like we're going to have to relitigate every restriction we've had struck down." Tamar Lewin, *The Supreme Court: Clinics Eager to Learn Impact of Abortion Ruling*, N.Y. Times, July 1, 1992, at A1.

[4] Turns out, it lasted for thirty years under various permutations and forms before finally being discarded altogether.

b. The undue burden test has proven unworkable in operation.

Since the undue burden test was announced, it has produced a string of logically untethered outcomes, one frequently following another in quick succession. Neither the U.S. Supreme Court's precedent nor other federal or state courts provide anything resembling a cohesive through-line in interpreting and applying *Casey*. And that failure is not for lack of trying. The U.S. Supreme Court has attempted to revise and clarify the *Casey* rule multiple times in cases regarding, for example, partial-birth abortion bans and hospital admitting-privileges requirements for abortion clinics—and yet these efforts have ultimately done no more than demonstrate *Casey*'s unworkability.

Consider, first, the twin *Carhart* cases involving partial-birth abortion bans. In 2000, the U.S. Supreme Court invoked the undue burden standard to invalidate a Nebraska law banning partial-birth abortions. *Stenberg v. Carhart* (*Carhart I*), 530 U.S. 914, 922, 938 (2000). According to the *Carhart I* Court, the Nebraska law imposed an undue burden because the statutory prohibition extended both to abortions "where a foot or arm is drawn through

the cervix" (standard dilation and extraction) as well as "where the body up to the head is drawn through the cervix" (intact dilation and evacuation). *Id*. at 939, 948. Any attempt to prohibit the former would violate *Casey*'s undue burden standard because that method was "the most commonly used method for performing previability second trimester abortions." *Id*. at 945.

Seven years later, however, the U.S. Supreme Court upheld a *federal* law banning partial-birth abortions. The difference? The Court said the federal law identified "specific anatomical landmarks" to distinguish different types of abortions and adopted a somewhat narrower definition of "delivering" a baby. *Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 152 (2007). So modified, such a law did not impose an undue burden on the right to obtain an abortion. *Id*. at 150.

While the Court reached the correct conclusion in *Carhart II*, the switch from *Carhart I* to *Carhart II* and its attempt to make the conclusion consistent with *Casey* seems incoherent. Attempts to regulate categories of abortions based on the presence or absence of "specific anatomical landmarks," whatever that means, are

altogether indistinguishable from legislation—the prerogative of legislative branches—and are entirely devoid of any "judicially discernible and manageable standard." *Vieth v. Jubelirer*, 541 U.S. 267, 304 (2004).[5] For instance, what "anatomical landmarks" are dispositive? How common must an abortion procedure be such that attempts to ban it amount to "undue burdens?" Why did the "respect for fetal life" justification go virtually unmentioned in *Carhart I*, but prove so central to the analysis of *Carhart II*? The answers to these questions are not clear and likely vary from judge to judge.

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[5] It is also worth noting that because *Casey* ostensibly requires a balancing analysis, the critical question, as articulated by the majority, is "whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." *Carhart II*, 550 U.S. at 146. Recall, however, that the distinction between the Nebraska partial-birth ban and the federal one, according to the U.S. Supreme Court, was essentially that the Nebraska ban applied to both standard and intact delivery and extraction, while the federal ban applied only to the latter. *Id.* at 151–53. But while this distinction may indeed lessen—perhaps even remove—the "burden" on the ability to procure an abortion, it necessarily also means that the interest in protecting preborn human life is not being advanced. After all, if doctors must simply use a different method to end the baby's life, there is no real protection. *See id.* at 181 (Ginsburg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a method of performing abortion.").

In the end, while *Carhart I* and *Carhart II* paid lip service to *Casey*, *Casey* did not predictably dictate—nor logically require—the result. Indeed, none of the Justices who joined the majority in *Carhart I* joined the majority in *Carhart II*. This strongly suggests that *Casey*'s malleable undue burden standard, in practice, is an open door for judges to—inadvertently or otherwise—dress up their own policy preferences as constitutional law. It is not a standard conducive to doctrinal stability over time. *See PPH IV*, 975 N.W.2d at 748–49 (McDermott, J., concurring in part and dissenting in part) (criticizing the "inherently standardless nature" of *Casey*'s undue burden standard because it "opens wide the gate for judges to inject their own policy preferences in deciding whether a particular restriction creates an undue burden to getting an abortion") (citations omitted).

It does not end with the *Carhart* cases. Further evidence of *Casey*'s unworkability and jurisprudential incoherence can be seen in cases addressing safety standards for abortion clinics. *See id*. at 748 (citing, as an example of *Casey*'s unworkability, the divergent outcomes of courts addressing licensing and safety requirements in

Greenville Women's Clinic v. Bryant, 222 F.3d 157, 171 (4th Cir. 2000) and *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016)). In 2016, the U.S. Supreme Court imposed a significant overhaul of *Casey*'s essential underpinnings. In *Whole Woman's Health v. Hellerstedt*, a five-Justice majority held that a pair of Texas statutes requiring abortion clinic doctors to have admitting privileges at local hospitals and requiring that abortion clinics meet the health and safety standards of ambulatory surgical centers imposed undue burdens on abortion access. 136 S.Ct. at 2300, as revised (June 27, 2016).

While purporting to apply *Casey*, the Court essentially rewrote it, holding that "[t]he rule announced in *Casey* requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S.Ct. at 2309. Recall that, in *Casey*, a regulation constituted an "undue burden" if it placed a "substantial obstacle" on the ability to procure an abortion. 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle

in the path of a woman seeking an abortion of a nonviable fetus."). If not, then abortion regulations are permissible so long as they are "reasonably related" to a legitimate state interest. *Id*. at 878. And the Court upheld several of the regulations at issue notwithstanding there was no evidence of the "benefits" they advanced, while the spousal notification requirement was struck down without any discussion of the benefits it may or may not have advanced. *See June Med. Servs., LLC v. Russo*, 140 S.Ct. 2103, 2136–37 (2020) (Roberts, C.J., concurring in the judgment). *Whole Woman's Health*'s reimagination of *Casey* as a cost-benefit analysis was a stark admission of the quintessentially legislative function that courts have usurped—a function more commonly associated with regulatory agencies.

This recasting of *Casey*'s undue burden standard raised more questions than it answered. For one thing, the opinion "reveal[ed] little about how balancing would work if the government's interest in fetal life were more directly at stake." Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After* Casey/Hellerstedt, 52 Harv. C.R.-C.L. L. Rev. 421, 463 (2017). That

was precisely the concern identified in *Carhart II*, yet *Whole Woman's Health* brought the Court no closer to addressing it. More fundamentally, asking whether a state interest in protecting preborn human life or ensuring informed decisions about abortion outweighs any burdens on the abortion decision is like asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). A court cannot "objectively weig[h]" or "meaningful[ly] compare" the "imponderable values" involved. *June Med. Servs.*, 140 S.Ct. at 2136 (Roberts, C.J., concurring in judgment). Alternatively, it is like asking whether the state's interest in providing governmental services outweighs the interest of individuals in keeping the fruits of their labor. Analyzing the tradeoffs involved and striking a balance between competing interests is a task best left to the legislative branch.

Nor could the cost-benefit approach credibly appeal to prior practice for its justification: The U.S. Supreme Court's evolution was immediately criticized as a "free-form balancing test" that was "contrary to *Casey*." *Whole Woman's Health*, 136 S.Ct. at 2324

(Thomas, J., dissenting). Justice Thomas pointed out, at length, that the *Casey* line of cases did not address or even imply any such standard—the Court simply invented it out of whole cloth. *Id.* at 2324–25 (citing *Mazurek v. Armstrong*, 520 U.S. 968 (1997)).

Unsurprisingly, this new sub-standard has spawned additional confusion: *Whole Woman's Health* explained that *Casey*'s "large fraction" should be calculated by looking only to "those [women] for whom [the provision] is an actual rather than an irrelevant restriction," 136 S.Ct. at 2320 (quoting *Casey*, 505 U.S. at 895).[6] But as Justice Alito and others have observed, by this accounting, "we are supposed to use the same figure (women actually burdened) as both the numerator and denominator"—which will always equal 100%, meaning that all burdens are undue. *Id.* at 2343 n.11 (Alito, J. dissenting). Obviously, this is nonsensical, and so "[t]he proper standard for facial challenges is unsettled in

[6] *Casey* had found a spousal notification requirement to be an undue burden and had noted in passing that in a "large fraction" of the instances where it would be relevant—married women who did not wish to tell their spouse they were seeking an abortion—it would be "a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895.

the abortion context." *Id*. Lower courts have found it difficult to know how to apply this new directive: "The Court has not been clear about how to define the numerator and denominator for the fraction, about what qualifies as a fraction that is 'large,' or about whether it is a percentage or a fractional number possibly larger than one." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 534 (6th Cir. 2021).

c. If maintained in Iowa, the undue burden test would continue to be unworkable and uncertain.

As unstable and conflicting as the U.S. Supreme Court's—and lower courts'—interpretations and applications of the undue burden test have already proven to be, there is ample evidence that the unpredictability and judicial splintering *Casey* caused would continue apace if maintained in Iowa. This is because the precise contours of the undue burden analysis remain undefined to this day. Of course, for virtually all other courts, that no longer matters after *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). But should this Court maintain the standard in Iowa, it will continue to prove unworkable.

In 2020, the U.S. Supreme Court decided *June Medical Services, LLC*, which involved a challenge to a Louisiana statute that was nearly "word-for-word identical" to the statute held invalid in *Whole Woman's Health*. *June Med. Servs.*, 140 S.Ct. at 2112. *June Medical* produced a four-Justice plurality opinion finding that the Louisiana statute—like the Texas statute—imposed an undue burden on the right to obtain an abortion and thus fell within the ambit of *Whole Woman's Health*—and by extension *Casey*. *Id.* at 2112–13. The plurality reaffirmed its cost-benefit reinterpretation of *Casey* outlined in *Whole Woman's Health*, stating that *Casey* "requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's 'asserted benefits against the burdens it imposes on abortion access." *Id.* at 2112 (quoting *Whole Woman's Health*, 136 S.Ct. at 2310).

Most important for our purposes, however, is the opinion from Chief Justice Roberts, who concurred with the judgment on stare decisis grounds, but disagreed with the undue burden standard as recast by *Whole Woman's Health*, reasoning that "[n]othing about

Casey suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.* at 2136 (Roberts, C.J., concurring in the judgment). For their parts, the four dissenting Justices similarly rejected the cost-benefit analysis. *Id*. at 2149–53 (Thomas, J., dissenting), 2154–55 (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., dissenting); *id.* at 2178–80 (Gorsuch, J., dissenting).

So where did that leave the undue burden test? Nobody knows. Given the divisions between the majority in *June Medical*, the current state of the undue burden standard would be entirely unclear if preserved. As this Court has observed, "under the narrowest grounds doctrine, the holding of a fragmented Supreme Court decision with no majority opinion may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *State v. Iowa Dist. Court*, 801 N.W.2d 513, 522 (Iowa 2011) (cleaned up). Since the Chief Justice rejected the reasoning both of *Whole Woman's Health* and the *June Medical* plurality, while concurring in its judgment, this rule suggests the

Chief Justice's interpretation of *Casey* controls, and the cost-benefit addendum to the undue burden test would no longer be operable.

But that conclusion is not universally shared, as the issue quickly caused a circuit split in lower federal courts. *Compare Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) ("Chief Justice Roberts's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling."), *and EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 437 (6th Cir. 2020) (same), *with Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 752 (7th Cir. 2021) ("The split decision in *June Medical* did not overrule the precedential effect of *Whole Woman's Health* and *Casey*."), *and Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020) ("*Whole Woman's Health*'s articulation of the undue burden test as requiring balancing a law's benefits against its burdens retains its precedential force.").

So if the undue burden test is maintained in Iowa, which one? The original *Casey* undue burden formulation (whatever it actually

was)? The *Whole Woman's Health* reformulation? Chief Justice Robert's re-reformulation in *June Medical*? Of course, this Court could, in theory, pick one. But the undue burden standard is irredeemably unstable. And simply picking one of the competing approaches would not permanently stabilize it. If the Chief Justice's *June Medical* formulation controls, then this Court would be selecting the second major U-turn by the U.S. Supreme Court in interpreting the undue burden standard in the space of four years. If this Court instead were to select the *Whole Woman's Health*'s re-interpretation of the undue burden test, then the Court would be selecting a substantially revised version of the *Casey* standard, indicating once again that the undue burden test is not stable. And to simply "go back" to the original *Casey* conceptualization of the undue burden test would fare no better, given that, as the cases discussed herein demonstrate, nobody knows what that standard actually *is*. It is, frankly, impossible to sanctify the undue burden standard and transform it into something that is workable and coherent.

Indeed, prior to *Dobbs*, courts across the country lamented the unworkable nature of the undue burden standard. For example, as Judge Easterbrook put it:

> [A] court of appeals cannot decide whether requiring a mature minor to notify her parents of an impending abortion, when she cannot persuade a court that avoiding notification is in her best interests, is an "undue burden" on abortion. The "undue burden" approach announced in [*Casey*] does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. How much burden is "undue" is a matter of judgment, which depends on what the burden would be and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators). Only the Justices, the proprietors of the undue burden standard, can apply it to a new category of statute . . . .

Planned Parenthood of Ind. & Ky. v. Box, 949 F.3d 997, 998–99 (2019) (Easterbrook, J., concurring in denial of rehearing en banc). The same would be true if the undue burden standard is maintained in Iowa. Because "how much burden is 'undue' is a matter of judgment" and any given judge is apt to come to a different policy judgment than another (or the legislative branch),

this Court ultimately would be the "proprietors" of this policy judgment. *Id.* And when courts cannot consistently apply—or even understand—a standard after nearly thirty years of development, something is clearly wrong.

Litigants have always been more than willing to exploit this uncertainty. The failure to provide adequate guidance for state legislatures has led national abortion rights organizations to immediately file for an injunction any time a law protecting prenatal life is enacted—if only to "give it a try." *See, e.g.*, *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 218–19 (6th Cir. 1997) (Boggs, J., dissenting) ("The post-*Casey* history of abortion litigation in the lower courts is reminiscent of the classic recurring football drama of Charlie Brown and Lucy in the Peanuts comic strip. . . . I doubt that the lawyers and litigants will ever stop this game [unless] the Supreme Court [does] so."). And this makes sense: If the survivability of abortion legislation depends on the peculiarities of a given judge applying an inherently standardless test, why not take a shot? There is no reason to believe it would be any different in Iowa if the undue burden test is maintained.

In short, nearly thirty years after *Casey*, the meaning of the undue burden standard is more unsettled than ever. Prior to *Dobbs*, jurisprudential problems were not dissolving; they were mushrooming. Courts found themselves consumed by interpretations of interpretations of *Casey*'s undue burden test. None of this should have been surprising considering "[n]othing in the text or original understanding of the Constitution establishes a right to an abortion." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring); *see also PPH IV*, 975 N.W.2d at 742 (concluding that a right to abortion in the Iowa Constitution "lack[ed] textual and historical support"). *Casey*'s trajectory of failure provides powerful evidence that the undue burden test was fatally flawed from the start. There is no reason to continue that trajectory in Iowa.

d. The undue burden test's unworkability is, inter alia, the reason the U.S. Supreme Court retreated from it in *Dobbs*.

Finally, it is worth noting that the unworkability of the undue burden test one of the main reasons the U.S. Supreme Court was willing to override stare decisis and overturn *Casey*.

After observing that a critical "consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner[,]" the U.S. Supreme Court noted that the workability problems with *Casey* were fundamental: "Problems begin with the very concept of an 'undue burden.' " *Dobbs*, 142 S.Ct. at 2272. This is further muddled by the fact that *Casey* interchangeably referred to undue burdens and substantial obstacles. *Id*. An insubstantial obstacle that serves no purpose would presumably be undue but not substantial—so which controls? *Casey* does not say, and courts have never really known.

Next, the Court noted that, as discussed herein, the unworkability of the undue burden standard surfaced in *Casey* itself. *Id*. at 2273–74. To avoid repeating points made in this brief, suffice it to say that the majority's analysis overlaps with ours.

Finally, the Court observed the many circuit splits *Casey* caused, further evidence of its nebulous and unworkable nature:

> *Casey* has generated a long list of Circuit conflicts. . . . They have disagreed on the

> legality of parental notification rules. They have disagreed about bans on certain dilation and evacuation procedures. They have disagreed about when an increase in the time needed to reach a clinic constitutes an undue burden. And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability.
>
> The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching unpredictable results. And they have candidly outlined *Casey*'s many other problems.

Id. at 2274–75.

Last year, this Court retreated from the "strict scrutiny" standard because it was unworkable. *PPH IV*, 975 N.W.2d at 735–36. Respectfully, there is no reason to switch from one unworkable standard to one that is likely even less workable.

CONCLUSION

Casey imposed an unworkable, incoherent, and inherently malleable undue burden standard for analyzing abortion-related regulations. As lower courts struggled to understand what the standard meant or how it should be applied, its application appeared to simply track the policy preferences of individual judges and panels. The U.S. Supreme Court eventually recognized this trend and attempted to fix it. But in the end, the Court ditched the undue burden standard altogether in *Dobbs*.

This Court should learn from the path federal courts have trod. As the U.S. Supreme Court recently held in *Dobbs*, abortion-related regulations, such as the fetal heartbeat law at issue here, should be subject to rational basis review.

Respectfully submitted this 20th day of February, 2023.

By: */s/ Chuck Hurley*

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(a)(d) and 6.903(a)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, 14-point type and contains 5,068 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Chuck Hurley
Chuck Hurley
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2023, 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.

/s/ Chuck Hurley
Chuck Hurley
Counsel for Amici Curiae

ADDENDUM

Written Consent of the Parties

From: Chris Schandevel
To: Jacob Phillips; sam.langholz@ag.iowa.gov; thomas.ogden@ag.iowa.gov; alan.ostergren@kirkwoodinstitute.org; John Bursch; Denise Harle
Subject: RE: amicus brief in PPH v. Reynolds
Date: Tuesday, February 14, 2023 11:24:21 AM
Attachments: logo_abdfb0ec-e06e-407a-a721-cd0e4f742400.png

Hi Jake,

Thanks for reaching out. Speaking on behalf of the appellants in this appeal, you have our consent to file your brief.

Have a great rest of the week!

- Chris

ALLIANCE DEFENDING FREEDOM

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Subject: amicus brief in PPH v. Reynolds

EXTERNAL

Counsel,

Good morning! I'm representing a number of Iowa state legislators and am emailing to request written consent to file an amicus brief in support of the Appellants in *Planned Parenthood of the Heartland v. Reynolds*, Case No. 22-2036. My understanding is that we can seek written consent from the Parties in lieu of filing a Motion for Leave. (I'm separately emailing counsel for PPH seeking their written consent.)

Please let me know if you consent to the filing of this amicus brief. Thanks!

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From: Im, Peter
To: Jacob Phillips
Cc: rita.bettis@aclu-ia.org; CLS@shuttleworthlaw.com; SEJ@shuttleworthlaw.com; Chuck Hurley
Subject: Re: Amicus brief in PPV v. Reynolds
Date: Thursday, February 16, 2023 10:54:28 AM

Jake,

Thanks for the email. Appellees consent.

Thanks,
Peter

On Tue, Feb 14, 2023 at 11:16 AM Jacob Phillips <jacob.phillips@normandpllc.com> wrote:

> Counsel,
>
> Good morning! I'm representing a number of Iowa state legislators and am emailing to request written consent to file an amicus brief in support of the Appellants in *Planned Parenthood of the Heartland v. Reynolds*, Case No. 22-2036. My understanding is that we can seek written consent from the Parties in lieu of filing a Motion for Leave. (I'm separately emailing counsel for the Appellants seeking their written consent.)
>
> Please let me know if you consent to the filing of this amicus brief. Thanks!
>
> Jake Phillips
>
> Normand PLLC
>
> 407.603.6031
>
> -Sent via my mobile device

--
Peter Im (he/him)
Staff Attorney
Public Policy Litigation & Law
Planned Parenthood Federation of America
peter.im@ppfa.org
(646) 398-1453

***Amici* State Senators**

Sen. Kevin Alons

Sen. Mark Costello

Sen. Rocky De Witt

Sen. Jeff Edler

Sen. Jesse Green

Sen. Dennis Guth

Sen. Tim Kraayenbrink

Sen. Dave Rowley

Sen. Ken Rozenboom

Sen. Sandy Salmon

Sen. Tom Shipley

Sen. Jeff Taylor

Sen. Cherielynn Westrich

***Amici* State Representatives**

Speaker Pat Grassley

Speaker Pro Tempore John H. Wills

Majority Leader Matt W. Windschitl

Majority Whip Henry Stone

Assistant Majority Leader Jon Dunwell

Assistant Majority Leader Craig P. Johnson

Assistant Majority Leader Brent Siegrist

Assistant Majority Leader David Young

Rep. Eddie Andrews

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Rep. Taylor R. Collins

Rep. Dave Deyoe

Rep. Zach Dieken

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