The Iowa Heartbill Law Briefs Polk County Case #EQCE083074

Judge Romano <> Prolife lead attorney : Mark Cannon <> with analysis & summaries by Dave Leach

Contents

Summary of the Briefs

Planned Barrenhood's first argument, p. 17-18 of this document: Banned Parenthood's first brief claims that two UNDISPUTED facts make the Heartbeat Law so obviously unconstitutional that no trial is needed:

(1) Ultrasound can detect a heartbeat by the time a woman even knows if she is pregnant. As the Iowa Supreme Court said, "Most women do not discover a pregnancy until at least five weeks after their last menstrual period. Other women cannot discover a pregnancy until later due to their contraception masking the symptoms of pregnancy." And

(2) a baby that young can't live outside the womb - the baby isn't "viable" (Roe had said states can restrict abortion only after "viability").

Courts say "summary judgment" is appropriate when "the record reveals a conflict concerning only the legal consequences of undisputed facts."

p. 21: the Iowa Supreme Court said a 72 hour delay in getting an abortion was unconstitutional; so certainly the Court would consider it unconstitutional to ban abortions altogether! The Court also said that the right to murder your very own baby "goes to the very heart of what it means to be free".

Prolife Response: p. 26 shows the text of the law. It says an abortionist has to do an abdominal ultrasound, not transvaginal.

The "72 hour ruling", July 2018, overturned Iowa's 20-week abortion ban, declaring FOR THE FIRST TIME that abortion is a "fundamental right", which requires regulations to be "narrowly tailored" to serve a "compelling government interest". (Background: Roe had declared abortion a "fundamental right", but Casey, in 1992 abandoned that level of scrutiny

P. 27: the prolife attorney doesn't dispute that six-week embryos are not "viable" (able to live outside the womb), but that is irrelevant. Because in the "72 hour ruling" the Iowa Court completely ignored viability as being a standard for Iowa babies. (Continued on page 42)

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.

2 Equity Case No. EQCE083074

REPLY IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

As Petitioners set forth in their opening brief, Section 4 of Senate File 359 ("the Ban") is blatantly unconstitutional under clear Iowa law. This very year, in a case against these same Respondents, the Iowa Supreme Court held that women have a fundamental right under the Iowa Constitution to end an unwanted pregnancy because that decision "go[es] to the very heart of what it means to be free" and "to shape, for oneself . . . one's own identity, destiny, and place in the world," and also because reproductive autonomy is "[p]rofoundly linked to . . . '[a woman's] ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.'" *Planned Parenthood of the Heartland v. Reynolds (PPH II)*.[1] 915 N.W.2d 206, 237, 245 (Iowa 2018) (quoting Ruth

law.

Respondents' Brief in Resistance to Summary Judgment ("Resistance"), which is nothing more than a sustained effort to erase women and their fundamental rights from the picture, does nothing to undercut Petitioners' summary judgment motion. As the Resistance concedes, the Ban applies (long) before viability. Resistance at 4. For this

---

[1] Respondents find the shorthand *PPH II* "misleading" because that case challenged a different abortion restriction than the Ban. Resp'ts' Br. in Resistance to Summ. J. ("Resistance") at 4 n.1. *But see*, Ruling on Pet'rs' Pet. for Declaratory & Injunctive Relief, *PPH II*, No. EQCE081503 (Iowa Dist. Ct. for Polk Cty. Sept. 29, 2017) at 23 *et seq.* (Judge Farrell, using this same shorthand in his decision denying a preliminary injunction).

of unbroken federal precedent applying a *less* protective constitutional standard to strike down bans starting at equal or *later* gestational ages than the Iowa Ban.

ARGUMENT

I. Respondents Fail to Raise a Material Factual Dispute

As set forth in Petitioners' opening brief, the critical fact needed to grant summary judgment in their favor is that the Ban applies pre-viability—a fact that Respondents concede. Respondents nonetheless attempt, but fail, to raise a disputed factual issue about whether women have a "significant opportunity" to access an abortion before cardiac activity[2] is detected. Resistance at 16–17. This factual issue is not material. Indeed, it is legally irrelevant; the Iowa Constitution prohibits Respondents from banning abortion before viability, whether that ban takes effect at six weeks as measured from the last menstrual period (lmp), as Petitioners demonstrated, or at eight weeks lmp, as Respondents maintain. At any rate, none of Respondents' assertions actually indicate any "significant opportunity" to access abortion under the Ban.

First, Respondents irrelevantly stress that *abdominal* ultrasounds do not detect cardiac activity at six weeks lmp, but they concede that *transvaginal* ultrasound can detect cardiac activity as early as six weeks lmp (roughly equivalent to four weeks post-

---

[2] Respondents accuse Petitioners of "go[ing] to great lengths to avoid saying the word, 'heartbeat,'" and assert that medical professionals "typically" use that term. Resistance at 4 n.2. While *Respondents'* affiants may typically use that term, Petitioners use the more medically accurate term "embryonic or fetal cardiac activity," which describes what the ultrasound would actually be detecting at this extremely early stage of pregnancy: activity in embryonic cells that have not yet formed a heart. Williams Obstetrics 185–86 (F. Gary Cunningham, Kenneth J. Leveno, Steven L. Bloom, Jodi S. Dashe, Barbara L. Hoffman, Brian M. Casey & Catherine Y. Spong eds., 25th ed. 2018).

conception). Aff. of Kathi Aultman, M.D. ("Aultman Aff.") at 3. For patients who come in at that early stage, Petitioners use *transvaginal* ultrasound for the medical purpose of confirming an ongoing intrauterine pregnancy before proceeding with a termination, Ex. 2 to Mot. for Temporary Injunctive Relief, Aff. of Jill Meadows, M.D. in Supp. of Pet'rs' Mot. for Temporary Injunctive Relief ("Meadows Aff.") at ¶¶ 7–8, and the Ban would prohibit Petitioners from proceeding if that transvaginal ultrasound detected cardiac activity. S.F. 359, § 4(1) (2018) (to be codified at Iowa Code § 146C.2(1)).[3] Thus, Respondents have failed to raise any dispute as to whether the Ban applies at six weeks or at eight weeks (even were this distinction legally relevant, which it is not).

Second, Respondents suggest that some women might be able to detect their pregnancy before six weeks lmp (that is, four weeks post-conception) with a home pregnancy test. Resistance at 6. Again, this is irrelevant to the question of whether Respondents can ban abortion at six weeks. Respondents offer no evidence, nor could they, that women typically suspect that they are pregnant in time to schedule an abortion before six weeks.[4] Moreover, Respondents' proposed "solution" that women take a monthly pregnancy test and rush to an abortion clinic within days of a positive result is particularly baffling given that earlier this year they unsuccessfully defended a 72-hour mandatory

[3] Respondents argue that the Ban requires physicians to perform an abdominal ultrasound, Resistance at 5, but they do not assert, nor could they, that the Ban prohibits providers from using their best medical judgment in performing the more sensitive transvaginal ultrasound in the earliest weeks of pregnancy when that test is more likely to confirm an ongoing intrauterine pregnancy. They also do not contest that under the plain language of the Ban, *see* S.F. 359, § 4(1)(b) (2018), if a transvaginal ultrasound detects cardiac activity, the physician may not proceed with the abortion.

[4] Absurdly, Respondents offer a study among women attempting to conceive (who obviously are far more attentive to potential symptoms than the general population). Aultman Aff. at ¶ 4. Even among that population, forty percent reported no symptoms before six weeks.

delay law on the theory that women should be forced to *delay* their decision to ensure that they adequately deliberate before proceeding. Appellees' Br., *PPH II*, No. 17-1579 (Iowa Nov. 22, 2017).[5]

Contrary to Respondents' unsupported and implausible speculation, *ninety-eight percent* of Petitioners' patients are more than six weeks lmp pregnant by the time they: discover or suspect they are pregnant, make the decision to terminate their pregnancy, pull together the necessary financial resources, arrange for an appointment with Petitioners, and arrive for their appointment. Meadows Aff. at ¶¶ 6–9; Ex. 4 to Mot. for Temporary Injunctive Relief, Aff. of Abbey Hardy-Fairbanks, M.D. ("Hardy-Fairbanks Aff.") at ¶ 4. Indeed, many of these patients do not even realize they may be pregnant until after six weeks lmp. Meadows Aff. at ¶ 6.[6] For these ninety-eight percent, the Ban would eliminate safe, legal abortion in Iowa (with some exceedingly narrow medical exceptions). *See* Br.

---

[5] With no factual support, Respondents also seek to question general facts about abortion recently found by the Iowa Supreme Court in *PPH II* based on a full 3-day trial record (or what Respondents refer to as a "limited factual presentation"). Resistance at 5–7. Respondents creatively dismiss these findings as mere "discuss[ion]" by "certain justices," when plainly the *Court* set these findings out as *integral* to its holding that abortion is a fundamental right and that Respondents harm women in numerous ways when they attempt to unnecessarily restrict that right. Resistance at 7. These facts are not open to relitigation less than a year later. *See Grant v. Iowa Dept. of Human Servs.*, 722 N.W.2d 169, 174 (Iowa 2006) ("We have said 'where a particular issue or fact is litigated and decided, the judgment estops both parties from later litigating the same issue. The entire premise of issue preclusion is that once an issue has been resolved, there is no further fact-finding function to be performed.'" (quoting *Colvin v. Story Cty. Bd. of Review*, 653 N.W.2d 345, 348–49 (Iowa 2002))). At any rate, none of these facts—which Petitioners set forth as background—are material to Petitioners' claims because the Ban is unconstitutional as a matter of law.

[6] Moreover, in the rare case where a patient presents at the clinic before cardiac activity is detectable, that may indicate that the woman has miscarried (miscarriage is common at this point in pregnancy), and some women in these circumstances strongly prefer to wait until a later point where an ongoing pregnancy can be confirmed. Meadows Aff. at 8.

in Supp. of Pet'rs' Mot. for Temporary Injunctive Relief ("Opening Br."). Respondents' declarations do not and cannot call these basic facts into question.

Thus, based on facts not subject to serious dispute, the Ban would virtually eliminate safe, legal pre-viability abortion care in Iowa.[7]

II. Under *PPH II*, Respondents May Not Ban Pre-viability Abortion

In addition to interjecting factual assertions that are irrelevant and stunningly inconsistent with their recent position in *PPH II*, Respondents argue that the Ban survives the strict scrutiny standard described in *PPH II* because it is narrowly tailored to a compelling state interest in protecting potential life. This argument ignores forty-five years of precedent, *see* Opening Br. at 7–8. It also fundamentally misunderstands *PPH II*, and turns on its head the Court's holding that women have a fundamental right to end an unwanted pregnancy.[8]

---

[7] Respondents also assert that some embryonic brain activity and coordinated movement of the fetus begin at six to eight weeks. These assertions are immaterial to the fact that the Ban applies to extremely early, pre-viability abortion. However, were Respondents' assertions material, Petitioners would certainly dispute them. And to the degree Respondents are implying that the embryo is *conscious* at this point, that assertion would be indefensible. *See* Susan J. Lee, Henry J. Peter Ralston & Eleanor A. Drey, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA, no. 8, 2005 at 950 (electroencephalograms (EEGs) cannot reliably be performed in-utero, and EEG activity has not been measured on fetuses born prematurely before 24 weeks); *id.* (EEG activity alone does not demonstrate functionality); *id.*; Royal College of Obstetricians and Gynaecologists, Fetal Awareness: Review of Research and Recommendations for Practice (2010) (scientific consensus understands brain function, and "coordinated" as opposed to reflexive movement, to rely on a working cerebral cortex, the structures of which are not fully formed until the end of the second trimester).

[8] Respondents devote much of their brief to cataloging various other state laws that, in their interpretation, express a similar interest in potential life (even though several of these laws refer to infants rather than fetuses). Resistance at 10–16. At most, (some of) these laws (which have never been taken to court) show that the state has taken various measures to promote fetal life, not that it has the constitutional authority to do so by forcing women to carry an unwanted pregnancy to term. If the Iowa legislature could override a fundamental right simply by papering it over with conflicting statutes, the Iowa

Respondents argue that *PPH II*'s strict scrutiny standard allows them to ban abortion—even starting in the earliest weeks of pregnancy—as long as the Ban is "narrowly tailored" to their interest in forcing women to continue their pregnancies to term. That reading would make the strict scrutiny test both circular and nonsensical, and would also make that test *less* protective than the federal standard that *PPH II* rejected as *insufficiently* protective. Simply put, no court could coherently hold that women have a fundamental right to end an unwanted pregnancy *and* that the state's interest in fetal life allows it to directly prohibit women from exercising that right—much less to do so in the early stages of pregnancy.

Nor is the Supreme Court's analysis in striking down a 72-hour mandatory delay law to the contrary. First, *PPH II* did name as compelling the state's interest in "*promoting* potential life," but it did so in the context of a law that purported to advance that interest by ensuring that, when women decide to end a pregnancy, they do so with full information and deliberation—not by banning abortion. *PPH II*, 915 N.W.2d at 241 (considering the challenged restriction as "an 'informed choice' provision designed to provide important information to Iowa women in the hope that, after taking some time to consider the

terminated," and concluding the evidence showed "that purpose is not advanced" by the delay provision). Indeed, the Court cited evidence that the law at issue prevented some women from accessing abortion as showing that it *failed* strict scrutiny because it was not narrowly tailored to the valid goal of informing women's decisions. *Id.* at 242–43.

Second, in declaring that abortion is among "the most intimate and personal choices

---

Constitution would be meaningless.

a person may make in a lifetime," and that the freedom to make that choice is "central to personal dignity and autonomy" and "go[es] to the very heart of what it means to be free" and "to shape, for oneself . . . one's own identity, destiny, and place in the world." *Id.* at 236 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)), the Court necessarily rejected the notion that that the state can ban pre-viability abortion and thus take this "most intimate" and consequential decision out of women's hands.[9]

Third, in discussing the state's interest in "promoting potential life," *PPH II* cited *Roe* and *Casey*, both of which draw a distinction at *viability* and clearly hold that the state's interest in fetal life cannot support a ban on abortion prior to that point. As *Roe* explains, this is because at viability "the fetus then presumably has the capability of meaningful life outside the mother's womb" and can be afforded protection without essentially conscripting the woman as an involuntary surrogate. *Roe v. Wade*, 410 U.S. 113, 163 (1973). See also *Casey*, 505 U.S. at 846 (reaffirming *Roe*'s viability line); *id.* at 877 (holding that while the state may have an interest in promoting potential life before viability, it must further that goal without "hinder[ing]" women from exercising their right to choose). While *PPH II* does not discuss the significance of viability explicitly, that is only because the law challenged in that case, unlike the one here, *did not ban pre-viability abortion*.

Thus, *PPH II* cannot be read to support Respondents' position that the state can block ninety-eight percent of abortions in the name of promoting potential life. To the

---

[9] In reaching this conclusion, the Court considered and rejected Respondents' argument that this right could not be fundamental because it was banned in Iowa for much of the 19th and 20th centuries. *PPH II*, 915 N.W.2d at 236. This Court should reject Respondents' transparent effort to relitigate this issue by recasting it as a question of whether Iowa's legal history shows a tradition of recognizing a compelling state interest in banning abortion, Resistance at 12–13.

contrary, that case [illegible]s the highest level of protection to women's reproductive freedom, recognizing that this freedom "go[es] to the very heart of what it means to be free" and "to shape, for oneself . . . one's own identity, destiny, and place in the world," *PPH II*, 915 N.W.2d at 237, as "an independent, self-sustaining, equal citizen,'" *id.* at 245 (quoting Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375, 383 (1985)). This Court should reject Respondents' effort, less than a year later, to erase that freedom.

CONCLUSION

WHEREFORE, Petitioners pray this Court grant their Motion for Summary Judgment and permanently enjoin Respondents from enforcing the Ban.

Respectfully submitted,

/s/ Alice Clapman
ALICE CLAPMAN*
Planned Parenthood Federation of America
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
Phone: (202) 973-4862
alice.clapman@ppfa.org

/s/ Rita Bettis Austen
RITA BETTIS AUSTEN (AT0011558)
American Civil Liberties Union of Iowa Foundation
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Phone: (515)243-3988
Fax: (515)243-8506
rita.bettis@aclu-ia.org

/s/ Caitlin Slessor
CAITLIN SLESSOR (AT0007242)
SHUTTLEWORTH & INGERSOLL, PLC

115 3RD St. SE Ste. 500 PO Box 2107
Cedar Rapids, Iowa 52406-2107
Phone: (319) 365-9461
Fax (319) 365-8443
Email: CLS@shuttleworthlaw.com

/s/ Samuel E. Jones
SAMUEL E. JONES (AT0009821)
SHUTTLEWORTH & INGERSOLL, PLC
115 3RD St. SE Ste. 500; PO Box 2107
Cedar Rapids, Iowa 52406-2107
Phone: (319) 365-9461
Fax (319) 365-8443
Email: SEJ@shuttleworthlaw.com

ATTORNEYS FOR PETITIONERS

*Admitted PHV

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.	Equity Case No. 05771 EQCE083074 AFFIDAVIT OF DAVID FRANCO, MD

The undersigned David Franco, MD, being first duly sworn and upon oath, attests to the following:

1. I am a board-certified neurologist. My curriculum vitae, marked Exhibit 1, is attached. I have personal or expert knowledge of all things to which I attest herein.
2. As early as 1964, neuronal electrical activity was detectable in the brain of the unborn child via electroencephalogram (EEG) at 40-43 days (six weeks) post fertilization.

   (H. Hamlin, "Life or Death by EEG," JAMA, Oct. 12, 1964, p. 120.)
3. Later studies, from 1968 through 1982 found that brain function, likewise measured by gestation, or six weeks after conception.

   (J. Goldenring, "Development of the Fetal Brain," New England Jour. of Med., Aug. 26, 1982, p. 564)

Hellegers A. Fetal development. In: Beauchamp TL, ed. Contemporary issues in bioethics. Encino, CA: Dickenson, 1978:194-9
Bergstrom, RM. Development of EEG and unit electrical activity of the brain during ontogeny. In: Jilek LJ, Stanislav T, eds. Ontogenesis of the brain. Praha, Czech: University of Karlova Press, 1968:61-71

Ellingson RJ, Guenter HR. Ontogenesis of the electroencephalogram. In: Himwich WA, ed. Developmental neurology. Springfield, Ill.:Charles C Thomas, 1970:441-74

Hellegers A. Fetal development. In: Beauchamp TL, ed. Contemporary issues in bioethics. Encino, CA: Dickenson, 1978:194-9
Bergstrom, RM. Development of EEG and unit electrical activity of the brain during ontogeny. In: Jilek LJ, Stanislav T, eds. Ontogenesis of the brain. Praha, Czech: University of Karlova Press, 1968:61-71

Ellingson RJ, Guenter HR. Ontogenesis of the electroencephalogram. In: Himwich WA, ed. Developmental neurology. Springfield, Ill.:Charles C Thomas, 1970:441-74

13

4. Additionally, the embryology text Review of Medical Embryology by Ben Pansky, MD, PhD 1982 refers to brain waves beginning at about 40 days or 6 weeks which is also referenced on LifeMap (https://discovery.lifemapsc.com/library/bibliography).

5. Entirely apart from these findings, but consistent with them, brain activity in the unborn child is strongly suggested around 6-8 weeks by the coordinated movements of the fetus at that stage. Coordinated movements require the involvement of a spontaneously functioning brain.

6. Scientific evidence thus indicates that spontaneous electrical activity in the fetal brain begins at approximately 6 weeks post fertilization.

10-29-18
Dated

David Franco, MD

County of Douglas)

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.	Equity Case No. 05771 EQCE083074 ORDER GRANTING PETITIONERS' MOTION FOR EXTENSION OF DISCOVERY DEADLINES PENDING RULING ON SUMMARY JUDGMENT MOTION

The Court has before it Petitioners' Motion to Extend Discovery Deadlines filed October 12, 2018. The time for filing a resistance has expired, and no resistance has been filed. The Motion is sustained.

Petitioners are granted an extension of their deadline to make expert disclosures and serve expert reports until 30 days following this Court's Order on Petitioners' Motion for Summary Judgment, if applicable.

IT IS SO ORDERED.

/s/ Martin Cannon
Senior Counsel
Thomas More Society
19 South LaSalle Street, Ste. 603
Chicago, Illinois 60603
312-782-1680
712-545-9433 Direct
mcannonlaw@gmail.com

/s/ Matthew Heffron AT0003463
Senior Counsel
Thomas More Society
2027 Dodge Street #501
P.O. Box 40
Omaha, Nebraska 68101-0040
1-402-346-5010
mheffron@bblaw.us

/s/ Ken Munro AT0005581
Munro Law Office, P.C.
4844 Urbandale Avenue, Suite B
Des Moines, Iowa 50310
515-279-0443
Ken.munro@munrolawoffice.com

E-FILED 2018 SEP 24 2:07 PM POLK - CLERK OF DISTRICT COURT

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.	Equity Case No. EQCE083074 BRIEF IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

COME NOW Petitioners, Planned Parenthood of the Heartland, Inc. ("PPH"), the Emma Goldman Clinic ("EGC"), and Jill Meadows, M.D., and for their Motion for Summary Judgment, pursuant to Iowa R. Civ. P. Rule 1.981, state:

INTRODUCTION

Thousands of Iowa women each year, and one in four women nationally, are faced with an unintended pregnancy, or medical complications during their pregnancy, and decide to end that pregnancy. As the Iowa Supreme Court recently affirmed in *Planned Parenthood of the Heartland v. Reynolds* (*PPH II*), 915 N.W.2d 206 (Iowa 2018), the Iowa Constitution guarantees women a fundamental right to make that decision free from governmental intrusion because "[a]utonomy and dominion over one's body go to the very heart of what it means to be free." *PPH II*, 915 N.W.2d at 237. Access to abortion is also critical to women's health, as has been confirmed by numerous medical and health organizations, such as the American College of Obstetricians and Gynecologists, the American Medical Association, the American Academy of Family Physicians, the American Osteopathic Association, the American Academy of Pediatrics, and the American Psychiatric Association.

Section 4 of Senate File 359 ("the Ban") flagrantly violates that fundamental right to autonomy and knowingly endangers women. The Ban outlaws abortion from the moment embryonic cardiac tones are detectable by ultrasound, which occurs in the earliest weeks of pregnancy before many women even know that they are pregnant. In practical effect, the Ban would prohibit virtually all abortions in the state. In the forty-five years since *Roe v. Wade*, 410 U.S. 113 (1973) was decided, no court, federal or state, has upheld such an inhumane law. In *PPH II*, the Iowa Supreme Court held that a law that restricts women's access to abortion is subject to strict scrutiny, and is invalid unless the state demonstrates that it is narrowly tailored to a

compelling state interest. The Ban—which does not just restrict, but outlaws abortion virtually entirely—unquestionably, and as a matter of law, violates this standard.

18

FACTUAL BACKGROUND

I. Material Facts

Under the Ban, when a woman comes to her provider seeking an abortion, the provider must first perform an ultrasound to detect embryonic or fetal cardiac activity. S.F. 359, § 4(1) (2018) (to be codified at Iowa Code § 146C.2(1)). If any such activity is detected, the provider is prohibited from proceeding with the abortion, except in certain cases of rape, incest, or medical emergency.[1] A provider who violates the Ban may lose her license. S.F. 359, § 4(5) (2018) (to be codified at Iowa Code § 146C.2(5)); Iowa Code § 148.6(2)(c).

This prohibition is unconstitutional as a matter of law based on two indisputable facts: 1) embryonic or fetal cardiac activity is detectable as early as six weeks into a pregnancy, measured from the first day of the last menstrual period (lmp); and 2) a six-week embryo is not capable of sustained survival outside of the pregnant woman's uterus. *See* Statement of Undisputed Facts. Based on these facts alone, the Ban is plainly unconstitutional and this Court should enter summary judgment.

---

[1] The Act contains exceedingly narrow exceptions for certain cases of reported rape, incest, medical emergency or fatal fetal anomaly. *See* S.F. 359 § 2(6) (2018) (to be codified at Iowa Code § 146A.1(6)) (exception for *physical* conditions that are life-threatening or pose a "serious risk of substantial and irreversible impairment of a major bodily function"); S.F. 359, § 3(4)(a) (2018) (to be codified at Iowa Code § 146C.1(4)(a)) (exception for pregnancy resulting from rape that was reported within 45 days of the incident); S.F. 359, § 3(4)(b) (2018) (to be codified at Iowa Code § 146C.1(4)(b)) (exception for pregnancy resulting from incest reported within one hundred and forty days); S.F. 359, § 3(4)(d) (2018) (to be codified at Iowa Code § 146C.1(4)(d)) (exception for anomalies certified as "incompatible with life").

II. Background Facts

In *PPH II*, the Iowa Supreme Court made a number of factual findings about abortion based on a full trial record. While these findings are not material to the narrow legal issue presented here—whether the legislature can constitutionally *ban* abortion—Petitioners briefly summarize them here because they provide relevant context and help to crystalize why the Ban is so *egregiously* unconstitutional.

Abortion is a common medical procedure that women choose for personal reasons related to their own and their family's health and welfare:

> Between 25% and 35% of women in the United States have an abortion during their lifetime . . . Sixty percent of abortion patients already have at least one child and many feel they cannot adequately care for another child. Other women feel they are currently unable to be the type of parent they feel a child deserves. Patients frequently identify financial, physical, psychological, or situational reasons for deciding to terminate an unplanned pregnancy . . . Sometimes, women discover fetal anomalies later in their pregnancies and make the choice to terminate.

PPH II, 915 N.W.2d at 214–15.[2] Without access to the procedure, "women may need to place their educations on hold, pause or abandon their careers, and never fully assume a position in society equal to men." *Id.* at 245.

---

[2] The Court further found that women have only limited control over the timing of when they can obtain an abortion:

> [M]ost women do not discover a pregnancy until at least five weeks after their last menstrual period. Other women cannot discover a pregnancy until later due to their contraception masking the symptoms of pregnancy. Women take the necessary time to research their options, talk to their loved ones, and make the decision whether to continue with their pregnancy. If a woman decides to seek an abortion, she must then raise the funds to travel to and pay for . . . [treatment]. If a woman does not have money to put gasoline in her car, she cannot go to the appointment. Women therefore cannot simply schedule their initial appointment earlier.

Id. at 243. While these facts are not material to the constitutionality of the Ban (because, as explained below, any ban on pre-viability abortion is per se unconstitutional), they make plain why the Ban's six-week cut-off, in practice, would effectively eliminate abortion access in Iowa.

For many women (and their families), access to abortion is also a matter of physical and emotional health and safety. Abortion is more than ten times safer than carrying to term, and some women have health conditions that place them at particular risk if they carry to term. *Id.* at 215. A significant percentage of women seeking an abortion—10.8% in one Iowa study—are suffering intimate partner violence. *Id.* at 231. Indeed, many of these women become pregnant because of reproductive coercion by an abusive partner, a common form of abuse used to maintain control. *Id.* at 220–21. For these women, accessing abortion is critical to their safety and that of their family, and often instrumental to their escaping abuse. *Id.* Abortion is also a mental health imperative for "victims of sexual assault and incest," many of whom "are extremely distraught," experience pregnancy "as a constant physical reminder of the assault," and seek "termination [as] an important step in the recovery process." *Id.* at 220.

Not only do these compelling reasons underlie women's decisions to seek clinical abortion care but, when that care becomes difficult or impossible for them to access, these same reasons drive some women to "attempt to take matters into their own hands to terminate their pregnancy, at great risk to their own health and safety." *Id.* at 230.

ARGUMENT

I. Standard for Summary Judgment

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 235 (Iowa 2015). Courts "can resolve a matter on summary judgment if the record reveals a conflict concerning only the legal consequences of undisputed facts." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013).

II. Petitioners are Entitled to Summary Judgment

The Ban is plainly unconstitutional under the Iowa Supreme Court's recent decision in *PPH II*. In that case, the Court struck down a law that required women seeking an abortion to receive certain state-mandated information and then wait at least seventy-two hours before returning to the clinic for the procedure. *PPH II*, 915 N.W.2d 206.Specifically, the Court held that this law violated both the Due Process and Equal Protection guarantees of the Iowa Constitution. *Id.* at 212. Given that the Iowa Constitution bars the state from imposing *delay* on women seeking an abortion, it plainly bars the state from *prohibiting* pre-viability abortions altogether, as the Ban does. *See also Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.* (*PPH I*), 865 N.W.2d 252 (Iowa 2015) (invalidating ban of the use of telemedicine to provide medication abortion).

PPH II squarely holds that abortion is a fundamental right under the Iowa Constitution, for a number of reasons. First, at a general level, whether to carry a pregnancy to term is among "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *PPH II*, 915 N.W.2d at 236 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). Second, more specifically, pregnancy and childbirth are a unique bodily "sacrifice" because they entail "physical constraints," "pain" and "suffering," and laws *imposing* that sacrifice on women deprive them of bodily autonomy. *PPH II*, 915 N.W.2d at 236 (quoting *Casey*, 505 U.S. at 852). And finally, individuals have a fundamental liberty interest in deciding for themselves whether to undertake the "life-altering obligations and expectations" of parenthood. *PPH II*, 915 N.W.2d at 237.

As the Court recognized, this constellation of interests in bodily and decisional autonomy "go to the very heart of what it means to be free" and "to shape, for oneself . . . one's own identity, destiny, and place in the world." *Id.* And as the Court also recognized, these interests are also protected by the Constitution's Equal Protection guarantee because they are "[p]rofoundly linked

to . . . [a woman's] 'ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal ci[illegible]'" *PPH II*, N.W.2d at 245 (quoting Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985)); *PPH II*, N.W.2d at 237 (recognizing that societal expectations related to parenthood "continue[] to fall disproportionately upon the child's mother").

After holding that women have a fundamental right to access abortion, the Court next considered whether the proper standard for enforcing that right was "strict scrutiny," under which restrictions are presumptively invalid, *see Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998), and a state can only rebut that presumption by showing that the classification is narrowly tailored to serve a compelling government interest, *In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001), or the less protective federal "undue burden standard," under which the state must merely demonstrate that the benefits of a law outweigh its burdens, *see Whole Woman's Health v. Hellerstedt (WWH)*, 136 S. Ct. 2292 (2016). The Court held that strict scrutiny was necessary because anything less would "relegate the individual rights of Iowa women to something less than fundamental. It would allow the legislature to intrude upon the profoundly personal realms of family and reproductive autonomy, virtually unchecked, so long as it stopped just short of requiring women to move heaven and earth." *PPH II*, 915 N.W.2d at 240.

The Ban cannot begin to survive strict scrutiny. Given that women have a fundamental right to end an unwanted pregnancy, the state cannot possibly have a compelling interest in preventing women from doing so at the earliest stage of their pregnancy, as the Ban does. Indeed, the Ban would fail even the less protective federal standard.

Federal precedent could not be more clear or unanimous that, before viability, the state may not prevent a woman from ending an unwanted pregnancy. This straightforward rule was

announced in *Roe*, 410 U.S. at 113, and has been reaffirmed repeatedly and consistently in the more than four decades since. *See, e.g., WWH*, 136 S. Ct. at 2300 (reaffirming that state may not enact a law where the "purpose or effect" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); *Casey*, 505 U.S. at 871 (reaffirming "[t]he woman's right to terminate her pregnancy before viability"); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015), *cert denied*, 136 S. Ct. 981 (2016) (striking down six-week ban); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016) (striking down twelve-week ban); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 905 (2014) (striking down twenty-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), *cert denied*, 117 S. Ct. 2453 (1997) (striking down twenty-week ban); *Jackson Women's Health Org. v. Currier*, No. 3:18-cv-00171-CWR-FKB, 2018 WL 1567867 (S.D. Miss. Mar. 20, 2018) (granting temporary restraining order against fifteen-week ban).

The Ban is even harsher than virtually all of the laws invalidated in the precedent cited above. It is far harsher than the abortion restrictions recently invalidated under the more protective Iowa Constitution in *PPH II* and *PPH I*. As a matter of law, it violates both the Due Process and the Equal Protection guarantees of the Iowa Constitution.

CONCLUSION

WHEREFORE, Petitioners pray this Court grant their Motion for Summary Judgment and permanently enjoin Respondents from enforcing the Act.

Respectfully submitted,

/s/ Alice Clapman
ALICE CLAPMAN*
Planned Parenthood Federation of America

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.	Equity Case No. 05771 EQCE083074 RESPONDENTS' BRIEF IN RESISTANCE TO SUMMARY JUDGMENT

Respondents Iowa Governor Kimberly K. Reynolds, ex rel. State of Iowa, and the Iowa Board of Medicine, request the Court to deny Petitioners Planned Parenthood of the Heartland and Jill Meadows' Motion for Summary Judgment on the following grounds:

- there exist a number of genuine issues of material fact; and
- the Iowa Heartbeat Bill is narrowly tailored to further the State of Iowa's compelling interest in the life of a child in the womb with a measurable heartbeat.

TABLE OF CONTENTS

I. STATEMENT OF FACTS

Petitioners make a somewhat astounding claim that "no issues of material fact exist." (Motion for Summary Judgment, ¶3.) This is an abortion case -- it would be highly unlikely opposing parties in such a case ever would be without any disputes. This case is no different. There are a great number of genuine issues of material fact in dispute in this case, and it is unlikely the Petitioners are willing to concede many of them, if any.

A. Statement of Undisputed Facts

Two matters are undisputed: the language of Senate File 359 ("the Heartbeat Bill") and the language of *Planned Parenthood of the Heartland and Jill Meadows v. Kimberly K. Reynolds, ex rel. State of Iowa and the Iowa Board of Medicine*, 915 N.W. 2d 206 (June 26, 2018).

The Heartbeat Bill amends Iowa's abortion statutes. At issue in this law suit is Section 146C.2, which provides in pertinent part:

> 1. Except in the case of medical emergency or when the abortion is medically necessary, a physician shall not perform an abortion unless the physician has first complied with the prerequisites of Chapter 146A and has tested the pregnant woman as specified in this subsection, to determine if a fetal heartbeat is detectable.
>
> a. In testing for a detectable fetal heartbeat, the physician shall perform an abdominal ultrasound, necessary to detect a fetal heartbeat according to standard medical practice….
>
> 2. a. A physician shall not perform an abortion upon a pregnant woman when it has been determined that the unborn child has a detectable fetal heartbeat, unless in the physician's reasonable medical judgment, a medical emergency exists, or when the abortion is medically necessary. …

After this act was passed by the legislature and signed into law, the Iowa Supreme Court issued a ruling declaring the unconstitutionality, under the Iowa Constitution, of the

72-hour waiting period in Iowa's previously enacted 20-week abortion bill. *Planned Parenthood of the Heartland and Jill Meadows v. Kimberly K. Reynolds, ex rel. State of Iowa and the Iowa Board of Medicine,* 915 NW2d 206 (2018) (hereinafter, "*72 Hour Ruling*").[1] That ruling has two key components:

1. For the first time, abortion was declared to be a fundamental right under the Iowa Constitution. Regulation of it is subject to strict scrutiny, which requires a compelling interest and narrow tailoring.
2. The 72-hour waiting period fails for lack of narrow tailoring.

B. Statement of Disputed Facts

1. Dispute Concerning Petitioners' Statement of Undisputed Facts.

Petitioners filed a Statement of Undisputed Facts, listing only three such facts. Two of them are immaterial to Petitioners' Motion for Summary Judgment. Fact No. 1 states that Petitioners provide abortions, which is not disputed. This presumably would be important as to standing, but Respondents have not challenged Petitioners' standing. Fact No. 3 deals with lack of viability of a six-week embryo, which is not disputed. However, neither viability nor a six-week embryo are material to this case, as shown below.

Petitioners listed only one other material fact in their Statement of Undisputed Facts, and it is disputed. Petitioners assert, "Embryonic or fetal cardiac activity[2] is detectable as

---

[1] This ruling is referred to by petitioners as *PPH II*. This is a misleading acronym, since such a designation typically is used to indicate the second case in a series, following up on the same facts and same dispute as in the first case of the series. There is no previous case involving the Iowa Heartbeat Bill. Rather, the earlier case referred to by the Petitioners was decided in 2015, also involving Planned Parenthood of the Heartland, but had no relationship whatsoever to the facts in the recent case also involving Planned Parenthood of the Heartland and some of the same parties.

[2] Planned Parenthood goes to great lengths to avoid saying the word, "heartbeat," which typically is used by medical professionals, as it is used in the affidavit of Dr. Aultman.

early as six weeks into a pregnancy, measured from the first day of the last menstrual period (lmp)."

Respondents' expert disagrees. Using the abdominal ultrasound as required by the Iowa Heartbeat Bill, the earliest at which the heartbeat of an unborn child is detectable is not until about seven to eight weeks gestation. Many children will not have a heartbeat detectable by abdominal ultrasound until nine weeks gestation, or even later. (Affidavit of Kathi Aultman, M.D.)

In addition, Respondents' expert stated that spontaneous brain function arises in the unborn child at about eight weeks gestation. This brain function has been for many years detectable via electroencephalogram (EEG). It is also indicated by coordinated movements of the child. (Affidavit of David Franco, M.D.) It is unknown whether Petitioners will concede these facts.

2. Disputed Facts Stated in the Brief in Support of Petitioners' Motion for Summary Judgment.

Petitioners make a great number of factual allegations in the first four pages of their Brief in Support of Petitioners' Motion for Summary Judgment ("Brief"). These factual statements comprise more than half of the entire Brief. Yet many, if not most, of them are disputed in this case.

Significantly, Petitioners claim the Heartbeat Bill "would prohibit virtually all abortions in the state." (Brief, 2.) The Petitioners use this as the basis for their entire argument for summary judgment. (*Id.* 6.) Yet it is in dispute. (See Part II, F, below.)

Petitioners state, "Thousands of Iowa women each year, and one in four women nationally, are faced with an unintended pregnancy, or medical complications during their

pregnancy, and decide to end that pregnancy." (*Id.* 2.) This bald claim is tellingly imprecise and prone to manipulation. It is highly unlikely each year one in four women nationally face unintended or complicated pregnancies and abort for those reasons. Yet that is what the statement says. It is disputed.

Petitioners claim the Iowa Heartbeat Bill "knowingly endangers women" and is "inhumane." (*Id.*) This cites no authority. It is disputed. To the contrary, the Heartbeat Bill would save children in the womb, some of whom are females. That is hardly inhumane. It also saves from the practice of abortion many women who later would regret that decision, as confirmed by numerous studies.

Petitioners claim, "Access to abortion is also critical to women's health … ." This is a question subject to much debate currently, nationally and locally. It also is disputed.

Strikingly, Petitioners attempt to shoehorn a great number of facts from the *72-Hour Ruling*. The Petitioners list these facts under the heading in their Brief labeled as "Background Facts." (*Id.* 4.) Petitioners then make the head-scratching assertion concerning these *72-Hour Ruling* facts that "While these findings are not material to the narrow legal issue presented here … they provide relevant context. …" (Id.) That simply makes no sense: if these facts are admittedly "not material," they could not possibly be relevant.

Nearly two full pages of the seven pages comprising the Petitioners' brief are devoted to these *72-Hour Ruling* "facts." It is obvious the Petitioners want this Court to consider these alleged "facts" in coming to a decision in the case at bar. Therefore, these facts must be undisputed, or summary judgment cannot be granted.

Yet nearly all of these "facts" extracted from the *72-Hour Ruling* would be disputed at

trial, with an extensive challenge made by the Respondents in the case at bar, due to a different factual scenario in this case and a different set of attorneys.

The facts Petitioners extracted from the *72-Hour Ruling* were subject to the limited factual presentation in that particular case. They were discussed in the *72-Hour Ruling* by certain justices of the Iowa Supreme Court in an effort to support their holding in that case. They are not to be endowed henceforth as an unchallengeable creed that must be acknowledged as established forever after.

II. ARGUMENT

A. Standard of Review

Summary judgment is only appropriate where there truly exists no genuine issue of material fact exists, and where the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Stueckrath v. Bankers Trust Co.*, 728 N.W.2d 852 (Iowa App. 2007).

Summary judgment is a drastic remedy that must be exercised with extreme care. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990). Summary judgment should be sparingly used and is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Franklin v. Local 2 of the Street Metal Workers Int'l Ass'n*, 565 F.3d 508, 521 (8th Cir. 2009).[3]

In the context of a motion for summary judgment, all facts must be viewed in the light most favorable to the nonmoving party, and the nonmoving party must be given the benefit

[3] The Iowa rule is, for all practical purposes, the same as the federal rule on summary judgment. Thus, the federal cases interpreting the federal rule should be persuasive. *Sherwood v. Nissen*, 179 N.W.2d 336, 339 (Iowa 1970).

of all reasonable inferences that can be drawn from the facts. *Mason v. Vision Iowa Board*, 700 NW 2d 349, 353 (Iowa 2005); *Rifkin v. McDonald Douglas Corp.*, 78 Fed 1277, 1279 -80 (8th Cir. 1996).

B. Genuine Issues of Material Fact Preclude Summary Judgment

As highlighted in the Statement of Facts above, there exist a number of disputed material facts that must be determined at trial. Perhaps the only facts not disputed are the language of the Heartbeat Bill and that the Iowa Supreme Court issued a decision in the *72-Hour Ruling*. The facts in the case before this Court, however, are not the facts in that case.

The factual disputes in this case need to be further developed by evidence. Summary judgment is not appropriate.

C. Plaintiffs Erroneously Presume *72-Hour Ruling* Controls Summary Judgment

The Petitioners' entire case is premised on the erroneous presumption that because the 72-hour waiting period before abortions was struck down in the *72-Hour Ruling*, the Heartbeat Bill, which would prohibit some abortions prior to viability, must fail as a matter of law.

The Petitioners fundamentally misunderstand the *72-Hour Ruling*. In that ruling, the Iowa Supreme Court rejected the federal undue-burden standard established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Instead, the Iowa Supreme Court established a naked fundamental right to abortion under Iowa law, to be evaluated using the strict scrutiny standard. In rejecting the *Casey* undue-burden standard, the Iowa Supreme Court also rejected viability as a consideration, which had been retained

by *Casey* as part of the undue-burden standard. Thus, there is no viability standard under the new Iowa abortion law.

The traditional strict-scrutiny standard does not prohibit regulation of a fundamental right. Rather, it prohibits regulation that is poorly crafted. The standard presupposes regulation and constitutes a two-part recipe for doing it correctly: first, the state must demonstrate a compelling interest in the subject of the regulation; second, the statute must be narrowly tailored to serve that interest.

A bill imposing mere delay on abortions – such as that struck down in the *72-Hour Ruling* -- might fail for lack of narrow tailoring, while a prohibition on some of the same abortions might very well stand if it is narrowly tailored.

That is the situation presented here. The 72-hour provision in the prior statute failed due to narrow tailoring issues that do not appear in the Heartbeat Bill. The Heartbeat Bill satisfies both the compelling interest and the narrow tailoring requirements of strict scrutiny.

D. Iowa has a Compelling Interest in Preserving the Life of a Child with a Beating Heart

1. In its Recent *72-Hour* Ruling, the Iowa Supreme Court Expressly Confirmed the Compelling Nature of Iowa's Interest

In the *72-Hour Ruling*, the Iowa Supreme Court acknowledged the State's compelling interest in the unborn child: "[T]he state has a compelling interest in promoting potential life." *72-Hour Ruling*, 915 N.W. 2d at 239, citing *Roe v. Wade*, 410 U.S. at 164 and *Casey*, 505 U.S. at 871.

Iowa's compelling interest, as acknowledged by the Iowa Supreme Court, is in the

unborn child generally. [redacted] not predicated on her having reached any particular stage of development, or even on having a heartbeat. Although in the passage above, the Iowa Supreme Court cited *Roe* v. *Wade* for its acknowledgment of a state's compelling interest and right to regulate on behalf of the child after viability, the Iowa Supreme Court did not adopt viability as a threshold for the state's compelling interest or for any other purpose. The Iowa court also cited *Casey* in the passage above for its recognition of the state's interest in "protection of potential life" and referred to it elsewhere for the proposition that the state's compelling interest arises prior to viability: "Under the undue burden standard, the state may enact previability abortion restrictions in furtherance of its interest in promoting potential life. *72-Hour Ruling*, 915 N.W. 2d at 238.

2. Iowa's Compelling Interest in the Life of the Child *in Utero* is Reinforced by Iowa Statutes Specifically Protecting Her Throughout the Pregnancy.

Iowa long has asserted it compelling interest in the child in the womb, even before the time of the heartbeat. Some of these statutes are listed below.

a. Iowa Life Sustaining Procedures Act

Iowa's Life Sustaining Procedures Act addresses the right of an individual to formally declare ahead of time his or her wishes with respect to end-of-life medical care and particularly the withdrawal of life support. However, withdrawal of life support may not be permitted if the person is known to be pregnant: "The declaration of a qualified patient known to the attending physician to be pregnant shall not be in effect as long as the fetus could develop to the point of live birth with continued application of life-sustaining procedures." Iowa Code §144A.6(2); *see also*, Iowa Code §144A.7(3) (same).

The state's interest here in protecting the unborn child is not limited to any particular stage of development.

b. Iowa's Uniform Anatomical Gift Act

The Anatomical Gift Act incorporates the definition of "person" as an "individual." Under Section 4.1, it provides that when a body or part of it may be obtained from an individual, such an "individual" includes a stillborn infant, and that a part obtained from such an individual is the tissue of a human being: " '*Decedent*' means a deceased individual whose body or part is or may be the source of an anatomical gift and includes a stillborn infant." Iowa Code § 142C.2(4).

c. Iowa's Nonconsensual Termination Act and Partial-Birth Abortion Act

It is a criminal violation in Iowa to cause serious injury to a child *in utero*, in various listed scenarios, including felonies, at any time during the pregnancy. Iowa Code §§707.8, parts 4,6,8-11 and 707.8A.

d. Other Criminal Statutes

Iowa has asserted its compelling interest to protect the child in the womb in numerous other statutes as well: *see, e.g.*, Iowa Code §§ 146B.2 (prohibiting most abortions after twenty weeks' gestation); 217.41B (prohibiting the distribution of family planning services program funds to abortion providers); 707.7 (criminalizing feticide); 707.9 (criminalizing the intentional killing of a "viable fetus aborted alive"); 707.10 (criminalizing the failure to exercise "professional skill, care, and diligence . . . to preserve the life and health of a viable fetus" born after abortion).

3. Iowa's Compelling Interest in the Life of the Child in the Womb has Been Protected by Iowa Courts Consistently and Uniformly Throughout the Entire History of Iowa's Jurisprudence

Prior to the U.S. Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), abortion was consistently prohibited in Iowa. In 1839—while Iowa was still a territory—it enacted its first abortion statute, prohibiting all abortions, no matter the reason. An Act Defining Crimes and Punishments, Jan. 25, 1839, §18, reprinted in Iowa (Terr.) Laws 153-54 (1838-39). After statehood, in 1858, the Iowa Legislature enacted a new statute making abortion a crime at any stage of pregnancy. Act of March 15, 1858, codified at Iowa Revised Laws, §4221 (1860).

This prohibition against abortion remained in the Iowa statutes, consistent with the Iowa Constitution, for nearly 120 years. Recodified at Iowa Code § 3864 (1873); recodified at McClain's Iowa Code Ann., § 5163 (1888); recodified at Iowa Code Ann. § 4759 (1897); amended by Iowa Acts 1915, ch. 45, § 1; recodified at Iowa Code Supplemental Supplement § 4759 (1915); recodified at Iowa Code § 12973 (1924); recodified at Iowa Code § 701.1 (1950); *see* Paul B. Linton, ABORTION UNDER STATE CONSTITUTIONS, A STATE-BY-STATE ANALYSIS 193-203 (2d ed. 2012). Iowa's prohibition against abortion was finally struck down, but only on federal grounds, following the United States Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), and was repealed in 1976 Iowa Acts 549, 774, ch. 1245, § 526.

Prior to *Roe v. Wade*, abortion was so plainly contrary to Iowa's history, legal traditions, and practices that the Iowa Supreme Court regularly affirmed convictions for performing abortions. *See, e.g., State v. Stafford*, 123 N.W. 167 (Iowa 1909); *State v. Barrett*, 198 N.W. 36 (Iowa 1924); *State v. Rowley*, 198 N.W. 37 (Iowa 1924); *see also*

State v. Moore, 25 Iowa 128 (1868) (second-degree murder convictions affirmed for causing death of pregnant woman by illegal abortion); *State v. Thurman*, 24 N.W. 511 (1885) (same). In fact, less than three years before *Roe v. Wade* was decided, the Iowa Supreme Court rejected vagueness and equal protection challenges to the principal Iowa abortion statute. *See State v. Abodeely*, 179 N.W.2d 347, 354-55 (Iowa 1970), *appeal dismissed, cert. denied*, 402 U.S. 936 (1971).

E. The Heartbeat Bill is Narrowly Tailored to Protect Iowa's Compelling Interest in the Life of the Child.

Having acknowledged the compelling interest in all unborn children, the Iowa Supreme Court in the *72-Hour Ruling* directed its attention to what it considered the real issue in the case, narrow tailoring: "However, in giving the state its due recognition that its interests are compelling, we must also hold the state to its convictions under the constitution. A regulation must further the identified state interest that motivated the regulation not merely in theory, but in fact." *72-Hour Ruling*, 915 N.W. 2d at 239-40.

1. Narrow Tailoring Addressed in the *72-Hour Ruling*

In rejecting the federal undue burden standard in favor of strict scrutiny, the *72-Hour* court stated:

> Narrow tailoring, conversely, replaces a *judge's subjective understandings* as to what obstacles women can conceivably withstand in pursuit of exercising a fundamental right with a *well-established framework that measures* the relationship between the government's objective and its chosen means. Narrow tailoring, while undoubtedly constraining the government's capacity to act in furtherance of its compelling interests, ensures all state forays into constitutionally protected spheres are judiciously fashioned and commit no greater intrusion than necessary.

72-Hour Ruling, 915 N.W. 2d at 240 (emphasis added).

The court recognized the rationale for narrow tailoring: the state cannot impose more

broadly upon a fundamental right than what is necessary to serve its compelling interest. The court did not prohibit restrictions on abortion. It struck down one restriction that was not narrowly tailored. In doing so, it created a framework in which more significant restrictions might stand, so long as they are narrowly tailored.

2. The Heartbeat Bill is Narrowly Tailored to a Measurable Heartbeat.

The Heartbeat statute before this Court follows the rule stated in the *72-Hour Ruling*. It asserts the state's compelling interest in a child only at the point when it has a measurable, independent heartbeat. Thus, it avoids submission to "a judge's subjective understandings as to what obstacles women can conceivably withstand in pursuit of" abortion and relies on the establishment framework that precisely measures a heartbeat. *See id.*

If the state were generally to ban abortions at some point early enough to encompass any child that *might* have a heartbeat (at five weeks, for example), that prohibition would sometimes prevent an abortion on a child not possessing one. Such an overbreadth would be a failure of narrow tailoring. Even if the state were to ban abortions at a later but still specific age, where *most* children would possess a heartbeat (perhaps seven weeks), there would be a better connection to the state's interest in a child with a heartbeat, but the bill could still prohibit abortions on the occasional child without one.

In the case at bar, the prohibition is not tied to an age at which a heartbeat is expected. Rather, it is tied to actual possession of an independent heartbeat by the actual child being considered for abortion. There is no broad sweep. The state's compelling interest is narrowly tailored to a measurable heartbeat.

3. Similar Narrow Tailoring is Reflected in Other Iowa Life/Death Statutes.

The Heartbeat Bill's narrowly tailored, medically precise measurement follows Iowa's 38 statutory scheme, thus supporting the narrow tailoring of the statute in question. The Heartbeat Bill is narrowly tailored to be consistent with Iowa's determination of life and death as set out in the longstanding determination-of-death act, under which a dying person crosses the threshold from life to death when his or her heartbeat stops. Under the Heartbeat Bill, a person in the process of being born crosses the same threshold when his or her heartbeat begins.

In addition, just as the determination of death is made on the actual person in question, the determination of life is made on the baby in question, with an objective, bright-line standard.

Iowa's statute on determination of death uses medically precise measurements similar to the Heartbeat Bill to determine when life ceases:

> A person will be considered dead if … that person has experienced an irreversible cessation of *spontaneous respiratory and circulatory functions*. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead … that person has experienced an irreversible *cessation of spontaneous brain functions*. Death will have occurred *at the time when the relevant functions ceased.*

ICA § 702.8 (emphasis added).

Consistent with this statute, by the time a child's heartbeat is detectable at around eight weeks, she very likely also has detectable brain functions (Affidavit David Franco, MD) and could not be considered dead under either measure set forth in this statute. If they can be, respiratory and circulatory functions are evaluated first, and a person must have lost both to satisfy the statute. As a person with spontaneous circulatory function, a child with a heartbeat could not be considered dead under this statute. An unborn child

it is defined as the irreversible cessation of spontaneous respiratory *and* circulatory functions, or, where an alternative is necessary, the irreversible cessation of spontaneous brain functions. A definition of death necessarily constitutes a definition of life. An unborn child with a heartbeat is a living human being.

39

F. The Heartbeat Bill Does Not Ban Abortion

The Heartbeat Bill does not ban all or nearly all abortions. It simply requires those abortions to be performed during a multi-week period at the beginning of the pregnancy, rather than stretching out that period throughout the pregnancy.

The affidavit of Dr. Kathi Aultman lays out an important timeline. Around two weeks after the start of her last menstrual period, a woman ovulates and may become pregnant. Six to eight days after that (about three weeks after her last menstrual period), implantation occurs, and hCG appears in the maternal blood. This is important, because it is this substance in the blood or urine that makes the pregnancy detectable by laboratory or over-the-counter pregnancy tests. On the first day a pregnant woman misses her menstrual period about two weeks after ovulation, her chance of a positive pregnancy test at a clinic or with the more sensitive over-the-counter tests is about 98%. The hCG in her blood also increases rapidly, so that if she does not test positive on that first day, she will within the following few days.

From the time implantation occurs -- approximately three weeks after her last menstrual period -- until the baby's heartbeat is detected – approximately 7-9 weeks after her last

menstrual period – every pregnant woman in Iowa has the right to an abortion. There is significant opportunity to obtain an abortion before the detectable heartbeat would prohibit it.

For the forgoing reasons, summary judgment should be denied.

Respondents, by:

/s/ Martin Cannon
Martin A. Cannon
Senior Counsel
Thomas More Society
309 W. Washington Street, Suite 1250
Chicago, IL 60606
and
20374 Magnolia Road
Crescent, IA 51526
(712) 545-9433
mcannonlaw@gmail.com

/s/ Matthew F. Heffron AT0003463
Matthew F. Heffron
Senior Counsel
Thomas More Society
and
Brown & Brown LLC
2027 Dodge Street, Suite 501
Omaha, NE 68102
(402) 346-5010
mheffron@bblaw.us

/s/ Ken Munro AT0005581
Ken Munro
Munro Law Office
4844 Urbandale Avenue, Suite B
Des Moines, IA 50310
(515) 979-6269
Ken.munro@munrolawoffice.com

CERTIFICATE OF SERVICE

The forgoing has been served by electronic means upon the following:

Rita Bettis (AT0011558)
American Civil Liberties Union of Iowa Foundation
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515.243.3988
Fax: 515.243.8506
rita.bettis@aclu-ia.org

Alice Clapman
Planned Parenthood Federation of America
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
Phone: (202) 973-4862
alice.clapman@ppfa.org

Caitlin Slessor AT0007242
SHUTTLEWORTH & INGERSOLL, PLC
115 3RD St. SE Ste. 500; PO Box 2107
Cedar Rapids, Iowa 52406-2107
Tel: (319) 365-9461; Fax (319) 365-8443
Email: CLS@shuttleworthlaw.com

Samuel E. Jones AT0009821
SHUTTLEWORTH & INGERSOLL, PLC
115 3RD St. SE Ste. 500; PO Box 2107
Cedar Rapids, Iowa 52406-2107

p. 28 An abdominal ultrasound can't detect a heartbeat unto 7-9 weeks or even later, as Dr. Franco's affidavit shows. PP says this law will ban most abortions; we disagree.

We disagree that one in 4 pregnancies are unintended or complicated. We disagree that our law "knowingly endangers women" or is "inhumane". It is not inhumane to women to save the lives of baby women, or to save moms from later regret.

P. 30, besides, the facts cited by the Iowa Court are based on the limited facts presented in that case, and must not be assumed to be "an unchallengable creed that must be acknowledged as established forever after." Besides, the facts in this case are different from the facts in that case.

p. 31: the U.S. Supreme Court, in Casey, rejected Roe's ruling that abortion is a "fundamental right", scaling scrutiny down to deciding if a restriction is merely an "undue burden". But the Iowa Court, this summer, rejected the U.S. Supreme Court's rejection, and declared abortion still a "fundamental right". But the Court at the same time rejected Roe's "viability" standard, which had been part of Casey's "undue burden" standard. The prolife attorney writes, “In that ruling, the Iowa Supreme Court rejected the federal undue-burden standard established in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Instead, the Iowa Supreme Court established a naked undamental right to abortion under Iowa law, to be evaluated using the strict scrutiny standard.”

p. 32: "Strict scrutiny" doesn't prohibit any regulation of a fundamental right, but presupposes regulation, only requiring that it reach as purpose with as little disruption as possible.

That same "72 hour ruling" said "the state has a compelling interest in promoting potential life." In fact, the Court specifically said "the state may enact previability abortion restrictions in furtherance of its interest in promoting potential life."

p. 33: Iowa law already protects previability babies: Iowa Code 144A.6 says if a pregnant woman is dying, her declaration that she doesn't want to remain on life support "shall not be in effect so long as the fetus could develop to the point of live birth with continued application of life-sustaining procedures."

When tissue is given from a stillborn baby to help another, the tissue is defined in Iowa law as from a human being. Another Iowa law makes it a felony to injure an unborn baby.

p. 35, interesting history of Iowa laws against abortion, and their enforcement by courts, until Roe.

p. 37-38 Our law is as "narrowly tailored" as laws measuring when someone is dead; when a heartbeat cessation is measured. P. 39: "A definition of death necessarily constitutes a definition of life."

p. 39 This law does not stop ANY abortion but only requires women to learn quickly whether they are pregnant and to act before there is a detectable heartbeat. The time from detecting pregnancy to detecting a heartbeat can give a woman 4-7 weeks to act.

Banned Parenthood's final brief, November 9:

Well, the prolifers admit that the ban applies pre-viability. It is irrelevant whether women have an opportunity to murder their babies before a heartbeat is detected; there can be no ban pre-viability. [But BP does not address the prolife argument that the Iowa Court rejected viability as a limit.]

P. 5 The fact that an abdominal ultrasound can't detect a heartbeat until 7-9 weeks is irrelevant because doctors using their best judgment may use a transvaginal ultrasound which detects at 6 weeks. p. 6 98% of women are more than 6 weeks when they detect their pregnancy. save their money, schedule an appointment, and get to the murder mill.

P. 6 the facts asserted in the "72 hour ruling" can't be so lightly dismissed. The Court has elsewhere said "where a particular issure or fact is litigated and decided, the judgment estops both parties from later litigating the same issue. ...once an issue has been resolved, there is no further fact-finding function to be performed."

Besides, the lack of a detectable heartbeat doesn't always mean there is a baby that can be legally murdered; it may merely indicate that there is no baby, because the baby miscarried. Therefore, many women would rather wait until a heartbeat is detectable before having an abortion, just to be sure there is still a baby there to murder. It makes no sense to pay for a murder when there is no one to murder.

P. 7: “Thus, based on facts not SERIOUSLY in dispute, the Ban would virtually eliminate safe, legal pre-viability” murder in Iowa.

p. 8 PB Yes, the Iowa ruling said Iowa had a compelling interest in promoting potential life, but that was limited to giving information; it was too much intrusion on the right to murder, to ban murder for a whole 72 hours.

P. 9 Well, maybe the 72 Hour Ruling didn't mention viability directly, but it relied on Roe and Casey, which said viability is where a baby can live without “essentially conscripting the woman as an involuntary surrogate”. The Ruling “does not discuss the significance of viability explicitly...only because the law challenged in that case...did not ban pre-viability abortion.”

You Be the Judge!

Put yourself in the judge’s shoes. After hearing all these arguments, and supposing you were too stupid to recognize that we are talking about murdering baby humans from fertilization, how would YOU rule? This is Dave Leach’s rating of the strength of the arguments, as viewed through dumb-colored glasses. (Actually, the prolife attorney, Mr. Cannon, never declares that unborn babies are humans/persons from conception, and judges are not supposed to rule on arguments not brought by either party to a case.)

VIABILITY. I think Banned Parenthood's argument is strong, that the U.S. Supreme Court may permit "narrowly tailored" or "the minimum necessary" restrictions on abortion before "viability" but not an outright ban.

The prolife response is that maybe the U.S. Supreme Court doesn't permit a ban before viability, but the Iowa Supreme Court, this summer, while overturning Iowa's abortion ban after 20 weeks, didn't even mention viability; therefore viability is not a legal standard in Iowa.

That is an "argument from silence", since the Court did not directly say viability no longer mattered; and I think BP disposed of the defense by pointing out that the obvious reason the Iowa Court didn't mention viability, was because a previability ban was not the subject of the ruling.

TIME TO MURDER BETWEEN ESTABLISHING PREGNANCY AND ESTABLISHING HEARTBEAT? I think "the jury is still out" on this. PB quotes the Iowa Supreme Court saying most women don't know they are pregnant until at least 5 weeks, and many don't know till later.

Prolifers respond that the law will motivate women to find out earlier, and tests are pretty effective after only 3 weeks.

But PB points out that if the test is negative, that may indicate a miscarriage - there is no baby to murder - not necessarily that the baby is still there so without a heartbeat the baby may still be legally murdered. So women prefer to wait until there is a detectable heartbeat before murdering their very own baby, just to make sure they aren't paying for an "abortion" of an empty womb. There is no prolife response to this point.

But PB's point was refuted, that an abortionist might "in his best medical judgment" prefer a transvaginal ultrasound, which detects at 6 weeks, rather than the abdominal ultrasound specified in the law which detects at 7-9 weeks, so the law bans all abortions after 6 weeks. The point wasn't refuted in the briefs, but in oral arguments at the hearing, the prolife attorney pointed out that according to the plain text of the law, a heartbeat detected at 6 weeks by a transvaginal ultrasound does NOT trigger the abortion ban; only the abdominal ultrasound does.

Unresolved - unaddressed - was PB's point that a doctor may choose to substitute a different ultrasound for the one specified in Iowa law. The prolife attorney didn't address that. Really? Can a doctor do that? But between these lines I see an opportunity for murderers that wasn't brought up either: a baby killer could use his transvaginal ultrasound to detect a heartbeat at 6 weeks, to assure mom that there is a real human

being inside her just ripe for murdering, and then use the abdominal ultrasound which wouldn't detect the heartbeat yet, to assure mom that murder is still legal!

PB's complaint that a baby killer would PREFER to use a transvaginal ultrasound because his "best medical judgment" trumps the law defies belief for two reasons: first because to the extent doctors can get away with ignoring law when that is their "best medical judgment", then doctors are above every law. Second because we are supposed to believe a baby killer would CHOOSE a measure that would eliminate 90% of his business?! C'mon!

But PB points out that if any ban on previability murder is "unconstitutional" altogether, it is irrelevant how much opportunity to murder remains before the ban kicks in. The length of the opportunity may be disputed, but it is not a "material" dispute - it is not a fact relevant to whether the Heartbeat Law has any chance of being "constitutional".

This is a strong argument. Logically, to the extent there can be no ban on previability murder, there can be no limit to murdering all unborn babies with heartbeats.

HARM TO WOMEN. The prolifer attorney said We disagree that one in 4 pregnancies are unintended or complicated. We disagree that our law "knowingly endangers women" or is "inhumane". It is not inhumane to women to save the lives of baby women, or to save moms from later regret.

These are disputed facts, and "summary judgment" is inappropriate, courts say, when the facts are disputed which affect how the law should be decided. But are these facts relevant to whether the Heartbeat Law is "constutional" in the warped view of the U.S. Supreme Court? PB says they are not relevant, yet PB asserted them with all the enthusiasm of someone who thought they were.

This point was not made, but I think the point COULD be made that the whole premise of Roe, 1973, and Casey, 1992, was that abortion is a "fundamental right" that women need to have for their own benefit. But what if the facts show murdering your very own baby doesn't benefit anybody? Does the Constitution protect a right to terrorize others in a way that terrorizes yourself nearly as much?

ABORTION: A FUNDAMENTAL RIGHT? SERIOUSLY? The prolife attorney pointed out that the "72 hour ruling", July 2018, overturned Iowa's 20-week abortion ban, declaring FOR THE FIRST TIME that abortion is a "fundamental right". He further noted that the Iowa Court, in so declaring, defied the U.S. Supreme Court!

Here's how he said it: "In that ruling, the Iowa Supreme Court **rejected** the federal undue-burden standard established in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Instead, the Iowa Supreme Court established a **naked** fundamental right to abortion under Iowa law, to be evaluated using the strict scrutiny standard."

This is like deer hunters wearing bright orange to alert other hunters, which the deer don't notice because deer are colorblind. The lawyer's language is a polite accusation that the Iowa Supreme Court has no authority to declare abortion a "fundamental right" in defiance of the U.S. Supreme Court which had backed down from its own defiance of all U.S. historical legal precedent - but average readers may not notice for two reasons:

(1) first, because average readers are beside themselves, observing courts, to find any limit at all to what any judge may do; and

(2) the prolife lawyer didn't develop his assault on the Iowa Court's usurpation. For example, neither in his brief, nor in his subsequent oral argument, did he explicitly challenge PB's claim that the Heartbeat Law must survive "strict scrutiny" analysis, but the opposite: he very scrupulously argued that the law should stand because it DOES meet that standard.

See how polite the prolife attorney was? He didn't say "the Iowa Supreme Court violated U.S. Supreme Court precedent". He merely said "the Iowa Supreme Court rejected the federal...standard". But as if in repentance for being too polite, he added not just that "the Iowa Supreme Court established a fundamental right to abortion", but "the Iowa Supreme Court established a **naked** fundamental right to abortion..."!

The prolife attorney is absolutely right, that Casey scaled back from regarding abortion as a "fundamental right". Here's how Justice Scalia documented the fact:

"We have since rejected Roe' s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see Planned Parenthood v. Casey, 505 U.S., at 876,....-and thus, by logical implication, Roe' s holding that the right to abort an unborn child is a 'fundamental right.' " Justice Scalia's dissent in *Lawrence v. Texas* 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003).

For these reasons, I am surprised at the absence of any clear prolife challenge to baby murder being a "fundamental right", restrictions of which must survive "strict scrutiny".

However important it may be to insist on correct terminology, though, the effect may not be dramatic, because of another, more recent U.S. Supreme Court abortion case mentioned in PB's first brief, p. 22 in this document. *Whole Woman's Health v. Hellerstedt,* 579 U.S. ___ (2016). BP acknowledges that *Hellerstedt* is a "less protective" standard than what the Iowa court this summer created. That should be enough basis for prolifers to object.

But *Hellerstedt* utterly confused the historical distinctions between court standards for whether a law infringes too much on our constitutional rights.

[Explanation of terms: before 1973, "fundamental rights" did not include the right to murder your very own baby. They included things like free speech, freedom of religion, the right to vote, the right to life and liberty, etc.

[The 14th Amendment, in order to outlaw the slavery that southern states loved, gave federal courts jurisdiction to overturn state laws that violated fundamental rights. The court standared is called "strict scrutiny". A law that restricts any fundamental right must be "narrowly tailored" to reach its goal by the least restrictive means possible, and its goal must be a "compelling government interest", and there has to be evidence that it really does benefit the government, and that the law really would achieve that benefit, and that there is no less restrictive way to achieve it.

[Rights that are not "fundamental" might include a right to go to college or to own a dog. They can also be overturned by federal courts, by authority of the 14th Amendment, if they do not give everyone "equal protection of the laws". But the court standard is only that there must be a "reasonable basis" for the laws.

["Undue Burden" was a brand new standared created by Casey, 1992, especially for abortion cases. It floats somewhere between the two standards, and Hellerstedt pulled it up closer to "strict scrutiny". According to Justice Thomas this floating standard is exclusively for abortion cases. A floating standard of course makes precedent a thing of wax in the nimble fingers of a judge, making what is "legal" unpredictable for the rest of us, as Thomas, in the following quote, points out.]

The majority opinion doesn't include the phrases "fundamental right", "strict scrutiny", or "narrowly tailored", in connection with abortion, yet as dissents explain,

> "This case also underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. What-ever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833 (1992) , and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that Casey repudiated.
>
> "Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predict-ability nor the promise of a judiciary bound by the rule of law....even if a law imposes no 'substantial obstacle' to women's access to abortions, the law now must have more than a 'reasonabl[e] relat[ion] to . . . a legitimate state interest.'....These precepts are nowhere to be found in Casey or its successors, and transform the undue-burden test to something much more akin to strict scrutiny." (Dissent by Justice Thomas)

Notes on the December 7 Hearing

(where both lawyers took turns arguing before the judge while the judge asked questions) by Dave Leach

The baby killer lawyer argued first.

She said it is an undisputed fact that 6-week-old babies can't live outside their womb, [they aren't "viable"], and it is the law that there can be no ban on previability murder. Therefore there is no need for a trial to regurgitate what everyone already knows. The judge should rule the Heartbeat Law invalid today.

She said the law bans murders before anyone can even be sure there is someone to murder. And long before "viability".

The prolife lawyer took his turn. He said "summary judgment" (a judge ruling without bothering with a trial) is inappropriate when the facts upon which the case hinges are disputed; a trial is needed to cross examine expert witnesses to establish facts. And the Planned Barrenhood briefs assert 45 facts, half of which are disputed.

For example, that 6-week babies can't be murdered. Sure they can! Why, the type of ultrasound specified in the law only begins to detect heartbeats at 7 weeks, and often fails even after 9 weeks!

Judge Romano asked for clarification of the timeline of ultrasound heartbeat detection. Mr. Cannon explained how careless terminology makes detection seem a week earlier than it is. For example, "a baby at six weeks" means a baby after six full weeks have passed, but "a baby in his sixth week" means a baby after five full weeks have passed and a fraction of the sixth week. To say a heartbeat may be detected "at six weeks" means a heartbeat MIGHT be detected in the seventh.

Mr. Cannon said a heartbeat is evidence of a living child.

Judge Romano asked if there is any support for that rhetoric?

Mr. Cannon answered that no law is needed to tell people that a baby with a heartbeat is a person. That is a determination that legislatures must be free to make. [I wish I had a transcript to tell me Cannon's exect words on this point. He seemed to mean that determining that babies with heartbeats is something obvious to people, yet intuitive rather than objective.]

Cannon said the law does not ban one single murder: to tell mothers they need to murder their babies earlier is not to tell them they can't murder their babies. (Or words to that effect.)

Cannon said mothers have time to find out when there is a baby to murder, and then to do the deed. He said pregnancy tests are accurate "at 4 weeks", meaning beginning in the 5th. And even in the 7th week it is rare to detect a heartbeat. Only 23% of heartbeats are detected even in the 9th week, and 56% in the 10th. So all pregnant women have three weeks to murder after they find someone to murder, and half have six weeks.

Cannon said "viability" is not a standard in Iowa, since this year's "72 Hour Ruling". He repeated the point that that ruling conflicts with the U.S. Supreme Court in Casey, 1992. And that ruling asserted that Iowa has a "compelling interest" in "potential life".

Judge Romano asked how that can be logical, to rely on the ruling that Iowa has a compelling interest in potential life, while denying that the ruling is unconcerned with viability?

[I missed part of Cannon's answer. It was something about how Roe dealt with both viability and potential life.]

Cannon said the 20 week ban failed strict scrutiny, but not because strict scrutiny prohibits us from regulating baby killing. Strict scrutiny only prohibits doing it carelessly.

Cannon said an example of this law's narrow tailoring is that it does not state a flat age beyond which babies may not be legally murdered, as the 20 week bill did. It does not ban murder at the age by which heartbeats are normally detectable, but requires that a heartbeat be actually detected.

Cannon said right before the Iowa law that defines death as when circulation stops, or if circulation is artifically maintained, after brain activity stops, the law says this standard must apply to all other relevant Iowa laws unless otherwise indicated.

Judge Romano asked if this law is rushing mothers to murder their babies?

Cannon answered that it is not asking too much, to ask mothers to determine promptly if they are pregnant, and then if they want to murder their very own babies, to do it quickly.

The baby killer lawyer took another turn.

She repeated her claim that there can be no limit to previability murders. “Courts can’t give women this freedom, and then let states take it away....That’s why summary judgment is granted in case after case.”

She disagreed with Cannon; she said the law does NOT require abdominal ultrasounds. Neither does it require that heartbeats be actually detected; only that a heartbeat be “detectable”.

Judge Romano corrected her, saying that Section 1 of the law does specify “abdominal”.

She answered as she did in her brief, that a doctor may ignore that if that is his “best medical judgment”. [But why would he?!]

She repeated her brief’s claim that a lack of a heartbeat at 5 weeks could indicate a miscarriage, so women need more time to know

Cannon, the prolife lawyer, took a turn. He insisted that the plain reading of the law is that an abdominal ultrasound is required. And that if indeed a doctor uses the more sensitive transvaginal ultrasound and actually detects a heartbeat, that does not make the murder illegal. Even after detecting a heartbeat, he may then do the abdominal ultrasound, and if that does not detect a heartbeat, the murder may proceed.

Cannon repeated the claim in his brief that the “72 hour ruling” does not mention viability; he assumes from this “argument from silence” that viability is not a legal standard in Iowa.

The hearing ended. Judge Romano said Iowa law allows him 60 days to rule. He will try not to take that long.

Questions for the Prolife Defense

(Emailed December 11 to Martin Cannon, Matthew Heffron, and Ken Munro)

Sirs:

I read the briefs in our heartbeat case (where I got your email address) and have gone over my notes on last Friday's hearing. There is much to admire in your arguments. But may I ask a couple of questions?

1. I see that you protested politely that the"72 hour ruling" had protected baby killing with "strict scrutiny" as a "fundamental right" in disregard of U.S. Supreme Court precedent in Casey, which had scaled back to "undue burden" from Roe's "strict scrutiny" (which in turn had been in disregard of all U.S. precedent). I am curious why you did not follow that up with an explicit objection to Planned Barrenhood's demand that you meet "strict scrutiny"?

I realize that the Hellerstedt case cited by PB has moved "undue burden" closer to "strict scrutiny", as Justice Thomas explained in his dissent. Still, the majority opinion never uttered the words "fundamental right", "strict scrutiny", or "narrow tailoring", and Thomas described Hellerstedt's updated "undue burden" as still "less protective" than "strict scrutiny", so I would have thought that reason enough for a prolife objection, even though the practical difference may not be dramatic, and even though the ad hoc nature of the difference makes it unpredictable.

Here is how Justice Scalia agreed with you that Casey capsized Roe's "fundamental right" categorization of baby killing:

> “We have since rejected Roe' s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see Planned Parenthood v. Casey, 505 U.S., at 876,....-and thus, by logical implication, Roe' s holding that the right to abort an unborn child is a ‘fundamental right.’ ” Justice Scalia’s dissent in Lawrence v. Texas 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003).

2. When the judge asked for your "support" for your "rhetoric" that a baby with a heartbeat is a "living child", I wish I had a record of your exact words, but it seemed something like a matter of intuition concerning objectively undefinable things which legislatures ought to be free to decide. Your actual verbiage seemed more compelling than that - I wish I could have written faster and gotten all of it.

But wouldn't a much stronger argument have been, not what strikes ordinary people as obvious, (which is not ordinarily admissible in court), but that every court-recognized fact finder which has taken a position on when protectable life begins has established that it begins at fertilization - "at every stage of gestation"?

(This includes all the juries in the earliest "rescue" cases before judges started censoring the "life" element of the Necessity Defense from their knowledge, the thousands of expert witnesses in rescue cases who said it begins at fertilization and were never refuted, the 38 states with unborn victims of violence protection - 28 of which explicitly declare the babies humans/persons, Congress in 2004 (18 USC 1841(d)), and a few individual judges; not one American legal authority has positively asserted that "life begins" any later.)

If you have already thought of that defense, to offer "alternatively", what is the weakness in it that kept you from making it?

This overwhelming consensus makes the fact that the Heartbeat Law protects living children not "merely" true according to the latest science, or supported by intuition, or supported by the Bible (Heaven forbid THAT should be taken as relevant), but LEGALLY COGNIZABLE fact and law - a fact which Roe said would be dispositive, and would be even if Roe had not said so.

In a world which rejects the Bible as a reliable authority on facts, cultures have had conflicting views on when people are "recognizably human, or in terms of when a 'person' came into being" to use Roe's terminology. Christians, Jews, blacks, poor folks, old folks, crippled folks, children, babies, immigrants, women, have all taken their turn at dehumanization.

Science can only tell us about the uninterrupted progression of physical development, although that can include brain wave activity, an indication of consciousness, although that does not quite rise to the level of establishing a "soul". However, when expert witnesses present their evidence in court, who aren't as qualified as the Bible to assure us these humans have souls, but are more qualified than anyone else, their testimony is court-recognized, and held by judges to be greater in fact-finding authority than their own. Expert witnesses have already testified by the thousands in abortion prevention trials and have never been refuted. Why not cite them?

You claimed intuition for your support, in your oral arguments, and Family Leader appears to appeal to the collective intuition of millions of everyday Americans, through petitions to the court saying "that's a baby". Yet I strain to see how that formalizes the claim into an objective finding of fact admissible in court. But juries already do precisely that: formalize that claim into an established fact admissible in court - and many juries in abortion prevention cases have already done that. Why not cite them too?

If judges are still "in no position to speculate" (Roe's excuse) about when protectable "life begins" even after he is told by all court-recognized fact finding authorities that have taken a position, in every court-recognized category of fact-finding authorities, it is impossible for any judge to know anything.

Should you present this uncontested evidence that protectable human life begins at fertilization, which covers babies with heartbeats, then you don't have to deal with "strict scrutiny" or an "undue burden", because as Roe said would "of course" be obvious even if Roe had not said it, once we know those are humans/persons in there, the 14th Amendment obligation of states shifts to PROTECTING ALL those babies by outlawing ALL baby killing again.