IN THE SUPREME COURT OF IOWA
Supreme Court No. 14-1415

PLANNED PARENTHOOD OF THE HEARTLAND, INC., and
DR. JILL MEADOWS. M.D.,
Petitioners/Appellants,
v.
IOWA BOARD OF MEDICINE,
Respondent/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT, POLK COUNTY
HONORABLE JEFFREY D. FARRELL

BRIEF OF AMICUS CURIAE:
CATHOLIC MEDICAL ASSOCIATION
CATHOLIC MEDICAL ASSOCIATION, DES MOINES AND QUAD CITIES GUILDS
IOWANS FOR LIFE
WOMEN'S CHOICE CENTER, QUAD CITIES

IN SUPPORT OF THE IOWA BOARD OF MEDICINE
(CONDITIONALLY FILED)

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I. STATEMENT OF INTEREST OF *AMICI CURIAE* AND REASONS THIS AMICUS BRIEF WOULD ASSIST THE COURT

Pursuant to ICA Rule 6.906(1), the *amici curiae* state as follows:

Amicus curiae Catholic Medical Association is the largest nonprofit association of Catholic physicians and healthcare professionals in the United States, representing over 75 medical specialties. Catholic Medical Association helps educate the medical profession and society at large about issues in medical ethics, including abortion and maternal health, through its annual conferences and quarterly bioethics journal. Founded in 1932, it has grown to include local organizations in cities throughout the United States.

Amici curiae Catholic Medical Association, Des Moines Guild, and Catholic Medical Association, St. Thomas Aquinas Guild of the Quad Cities, are two of these local organizations, associated with the national entity but separate from it. All Catholic Medical Association entities promote ethical and compassionate medical care that respects the great value of all human life.

Amicus curiae Iowans for Life is a non-profit organization whose mission is to educate and to advocate in Iowa concerning the sanctity of human life, from

conception to natural death. Founded in 1972, Iowans for Life is headquartered in Des Moines, with local affiliates and board members throughout Iowa.

Amicus curiae Women's Choice Center, Quad Cities is a non-profit organization located in Bettendorf, Iowa, providing pregnancy testing, counseling services and education concerning pregnancy, promoting the value of human life. It serves all regardless of race, gender, socioeconomic status, religious affiliation or disability. Its services are provided under the supervision of a licensed physician, in accordance with all applicable laws and medical standards.

The matters before this Court fall squarely within the advocacy interests of all of these *amici curiae*.

Also pursuant to ICA Rule 6.906(1), the *amici curiae* state the reasons this *amicus curiae* brief would assist the Court is that it particularly addresses the following issues raised by the Appellants and their *amici* dealing with constitutional interpretation, issues generally within the expertise on which the *amici curiae*'s counsel, the Thomas More Society, regularly appears before the courts:

1. Providing an in-depth historical analysis of Iowa's legal prohibition on abortion from Iowa's days as a territory through current statutory restrictions;

2. Analyzing whether abortion is a fundamental right under various other state constitutions; and
3. Providing undue-burden analysis, particularly as it relates to Iowa precedent, and rational-basis review.

II. ARGUMENT

The Appellants, Planned Parenthood and one of its abortion doctors, Dr. Jill Meadows (hereinafter, "Planned Parenthood"), allege the rule promulgated by the Iowa Board of Medicine ("Board") should be found unconstitutional, alleging it violates the due process provision of the Iowa constitution. App. Brief 58. Planned Parenthood is not appealing the part of the district court's order finding there was no federal due process violation pursuant to the district court's application of undue-burden analysis. *Id.*

A. Methodology: Substantive Due Process Analysis.

When a substantive due process claim is alleged, this Court follows a two-stage analysis. *Hensler v. City of Davenport*, 790 N.W.2d 569, 580 (Iowa 2010). First, the Court determines the nature of the individual right involved. *Id.* In this case, Planned Parenthood has framed the nature of the right as whether abortion is

a fundamental right solely under the Iowa constitution. *Id.* Planned Parenthood has provided no basis particular to Iowa or its constitution for determining abortion to be a fundamental right under the Iowa constitution, and principled analysis shows resoundingly it is not an Iowa fundamental right. (Part B, below).

After determining whether a fundamental right is involved, the Court must then decide the appropriate level of scrutiny. *Id.* If the Iowa Supreme Court finds there is no fundamental right to abortion under the Iowa constitution, it then would analyze the Board's regulation under rational-basis review. (Part D below.)

If this Court determines the Iowa constitution provides a fundamental right to abortion, the Court may analyze the Board's regulation using undue-burden analysis, following Iowa precedent and the federal analysis. (Part C below). There also is Iowa authority for applying strict scrutiny in analyzing the Board's regulation. If this Court applies undue-burden analysis under the Iowa constitution, it is hard to see how that analysis could lead to a different result than the federal undue-burden analysis already conducted by the district court, which was not appealed. If the Court finds no undue-burden violation, rational basis review then would follow. (Part D.)

B. Abortion is Not a Fundamental Right Established Independently Under the Iowa Constitution.

Planned Parenthood has requested this Court to declare abortion to be a fundamental right under the Iowa constitution, App. Brief 58, something which has never been considered in the more than century and a half since the enactment of the Iowa constitution. (*Cf.* ACLU amicus brief, 6, 11, emphasizing this is a matter of first impression for this Court.) Yet despite this monumental request, Planned Parenthood conspicuously failed to give any reasons for doing so particular to Iowa or the Iowa constitution: it did not address the language of the Iowa constitution, the constitutional convention or even contemporaneous or subsequent Iowa appellate decisions. Planned Parenthood devoted a mere two pages of its appellate brief to its reasons for requesting such a change, but never got beyond pointing out that this Court has the authority to do so and that a handful of other states have done so under their own constitutional provisions.

This brief will address below what Planned Parenthood and its *amici* did not.

1. Methodology for Determining Whether Abortion is a Fundamental Right Under the Iowa Constitution.

In *King v. State*, 818 N.W.2d 1, 26 (Iowa 2012), this Court reiterated:

[N]either this court nor the Supreme Court has created a clear test for determining whether the claimed right is a fundamental right.... [O]nly rights

and liberties that are objectively 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' qualify as fundamental.

Hensler,, 790 N.W.2d at 581 quoting *Chavez v. Martinez*, 538 U.S. 760, 775 (2003).

This Court in *King* then proceeded to establish a methodology for analyzing whether a claimed right is a fundamental right under the Iowa constitution, examining the following: the language of the Iowa constitution, *King*, 818 N.W.2d at 13-15; the constitutional convention debates, *id.* at 15-16; the contemporaneous Iowa decisions before and after the constitutional enactment, *id.* at 14-15; continuing Iowa precedents since the time of the enactment of the constitution, *id.* at 16; other states with provisions similar to Iowa's. *id.* at 18-21.

2. Abortion is not Mentioned in the Language of the Iowa Constitution or Constitutional Debates.

The obvious first step should be examination of the language of the Iowa constitution itself. "Fundamental rights are generally those explicitly or implicitly contained in the Constitution." *Id.* citing *Plyler v. Doe*, 457 U.S. 202, 218 n. 15 (1982); *Sanchez v. State*, 692 N.W.2d 812, 817 (2005). A reading of the text of the

Iowa constitution gives no basis for declaring abortion to be a fundamental right. Abortion was never mentioned in the text.

Nonetheless, Amicus ACLU made the curious declaration, "The rights of physical autonomy, privacy, procreation, and *abortion are recognized throughout the Iowa Constitution* and are protected by our state constitution's due process clause." ACLU Br. 6 (emphasis added). That simply is not accurate: none of those terms are mentioned anywhere in the Iowa constitution.

Another resource common to any constitutional analysis is the transcript of the constitutional debates leading up to the enactment of the constitution. If abortion were a fundamental right, explicit or implicit in the constitution, it is reasonable to expect it at least would have been discussed during the constitutional convention – perhaps hotly debated. Yet instead, there is a resounding silence about abortion in the records of the convention leading to the enactment of the Iowa constitution. Abortion was never mentioned. *See The Debates of the Constitutional Convention of the State of Iowa* (W. Blair Lord reporter, 1857), *available at* http://www.state libraryofiowa.org/services/law-library/iaconst.

3. Historical Analysis: Neither the Iowa Legislature nor the Iowa Courts Ever Have Recognized a Right to Abortion Under the Iowa Constitution Before or After the Drafting of the Constitution.

There is a painfully obvious reason both the Iowa constitution and the constitutional debates were so overwhelmingly silent about abortion: not only was abortion not a *fundamental* right, it was not considered a right at all. In fact, it was thoroughly and repeatedly repudiated by the Iowa courts and by the Iowa legislature (that is, the elected voice of the people of Iowa).

To determine whether abortion is a fundamental right under the Iowa constitution, it must be "'deeply rooted in this Nation's history and tradition'." *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005) (holding sex offender's freedom of choice of residence is not a fundamental right) quoting *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (holding assisted suicide is not a fundamental right). Neither of these cases pointed out precisely how a court determines pertinent "history and tradition" on a principled basis, without devolving into conjecture and platitudes. The most defensible sources, though, as this Court has indicated, are the contemporaneous views of this Court and of the Iowa legislature "at a time when the 1857 constitution was quite fresh in people's minds." *King*, 818 N.W.2d at 14.

Analysis of these sources leads to the overwhelming conclusion that abortion was not rooted in Iowa's history, legal traditions and practices. In fact, it was consistently prohibited. While Iowa was still a territory, it enacted in 1839 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 law 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,* (2d Ed. 2012). Iowa's prohibition of 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.

Abortion was so contrary to Iowa's history, legal traditions and practices that until *Roe v. Wade*, the Iowa Supreme Court regularly affirmed convictions for

performing abortions, without any hint that the convictions violated any provisions of the Iowa constitution. *State v. Stafford*, 145 Iowa 285, 123 N.W. 167 (Iowa 1909); *State v. Barrett*, 197 Iowa 169, 198 N.W. 36 (1924); *State v. Rowley*, 198 Iowa 613, 198 N.W. 37 (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*, 66 Iowa 693, 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. *State v. Abodeely*, 179 N.W.2d 347, 354-55 (Iowa 1970), *appeal dismissed, cert. denied*, 402 U.S. 936 (1971).

Even Iowa's current statutes permit significant restrictions on abortion. Iowa statutorily prohibits partial-birth abortion, further emphasizing, "This section shall not be construed to create a right to an abortion." Iowa Code §707.8A. Only doctors may perform abortions, making it a Class C felony for anyone else who does. Iowa Code §707.7(3).

It may be true that " 'history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.' " *In re Det. of Cubbage*, 671 N.W.2d 442, 447 (Iowa 2003) quoting *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). Perhaps "not in all cases" are history and tradition the ending point in the analysis, but in this case they should be. Iowa's legislative and judicial

history are so overwhelmingly stacked against abortion as a fundamental right, that such evidence only reasonably could be overcome if Planned Parenthood provided some equally overwhelming countervailing evidence of Iowa's preference of abortion as a fundamental right.

Yet Planned Parenthood provided nothing.

4. Planned Parenthood's Reliance on Four Other States' Constitutions -- and Even Some Federal Constitutional Cases – While Disregarding Many Other States' Jurisprudence, Provides no Reasons Particular to Iowa why Iowa Should Follow.

The Iowa Supreme Court's decision in *King* stated, "Lastly, we consider how other state courts have treated provisions in their state constitutions similar to Iowa's" constitutional provision. 818 N.W.2d at 18.

a. The State Supreme Court Decisions Relied on by Planned Parenthood and its *Amicus* Provide Dubious Authority For Iowa's Decision.

Planned Parenthood provided four examples in which "state Supreme Courts have concluded that abortion is a protected fundamental right": Minnesota, Alaska, New Jersey and Montana. App. Brf. 58-59.

It appears, however, Planned Parenthood lost sight of *King's* requirement of considering whether other states' constitutional provisions are "*similar* to Iowa's." For instance, neither Montana's nor Alaska's right to abortion were established

under those states' due process clauses, as is advocated in this case. Rather, the abortion rights in both were established solely under explicit privacy clauses in those states' constitutions. *Armstrong v. State*, 989 P.2d 364, 373, 376, 379 (Montana 1999) (construing "right of individual privacy," Article II, §10 of the Montana constitution); *Valley Hospital Association, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (construing "right of the people to privacy," Article I, §22 of the Alaska constitution). Nothing similar is found in Iowa's constitution.

It also should be noted that both states' courts relied (and Montana relied heavily) on references in the transcripts of their constitutional conventions concerning the intended scope of their states' explicit rights to privacy. *Armstrong,* 989 P.2d at 372-74, 377-79; *Valley Hospital Association,* 948 P.2d at 969. As discussed above, there is nothing in the transcripts of Iowa's constitutional convention that would lend support to a right to abortion.

Likewise, Planned Parenthood cited the examples of New Jersey and Minnesota, yet any similarity between their constitutional provisions and Iowa's is not readily apparent. The New Jersey opinion cited by Planned Parenthood, App.Br. 59, carries the additional anomaly in that it was decided in 1982, ten full years before *Casey*. *Right to Choose v. Byrne*, 450 A2d 925 (N.J. 1982). So it hardly can be used to show the New Jersey supreme court's determination to

provide more extensive abortion privileges than allowed under the undue-burden standard.

Amicus curiae ACLU submitted additional cases in an attempt to buttress the claim that "other states have already found that their state constitutions provide more protection than the floor provided by federal jurisprudence." ACLU Br. 11-12. Yet these additional offerings suffer from the same and additional defects. ACLU did not point out whether any of these additional constitutional provisions are "similar to Iowa's." One certainly is not: California's independent abortion right was based on an express state constitutional right of privacy. *Comm. to Defend Reproductive Rights,* 625 P.2d 779, 784 (Cal.981). Four of the six listed by ACLU were decided before *Casey: In re TW,* 551 So.2d 1186 (Fla. 1989); *Doe v. Maher,* 515 A.2d 134 (Conn. Super. Ct. 1986); *Comm. to Defend Reproductive Rights v. Myers,* 625 P.2d 779 (Cal. 1981); *Moe v. Sec'y of Admin. & Fin.,* 417 N.E.2d 387 (Mass. 1981). The West Virginia court declined to decide even whether there is an independent fundamental right to abortion in that state. *Women's Health Center of W.Va. Inc., v. Panepinto*, 446 S.E.2d 658, 664 (W.Va. 1993) ("Because there is a federally created right of privacy that we are required to enforce in a non-discriminatory manner," it did not matter that West Virginia has no analogous right). The Connecticut case was authored by a Superior Court, which is that state's trial court of general jurisdiction not its highest court, and

therefore it is questionable whether it serves as significant binding precedent. *Doe v. Maher,* 515 A.2d 134 (Conn. Super. Ct. 1986).

b. There is Stronger Authority From State Supreme Courts That Have Refused to Broaden Abortion Privileges or to Broaden Their Substantive Due Process Clauses.

While Planned Parenthood listed four state courts that have broadened their abortion rights, it failed to inform this Court of the rest of the story – that as many states have decided their state abortion privileges are *not* broader than the federal provision:

- Michigan: *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997) ("Michigan constitution does not guarantee a right to abortion that is separate and distinct from the federal right");
- Ohio: *Preterm Cleveland v. Voinovich,* 627 N.E.2d 570, 577 (Ohio 1993) (state constitution does not require departure from the undue burden test concerning abortion restriction);
- Mississippi: *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 655 (Miss. 1998) ("We find [the Supreme Court's] reasoning [regarding the virtue of the undue burden test] to be sound. While we have previously analyzed cases involving the state constitutional right to privacy under a strict scrutiny standard requiring the State to prove a compelling interest, we are not bound to apply

that standard in all privacy cases. The abortion issue is much more complex than most cases involving privacy rights");

- Utah: *Wood v. Univ. of Utah Med. Ctr.*, 67 P.3d 436, 447–48 (Utah 2002) (Utah due process clause does not require different analysis than federal due process clause).

In addition to the four states above, three additional states have concluded that substantive due process under their state constitutional clauses should be interpreted in the same way or no broader than that afforded by the federal due process clause. Although not considered in the abortion context, presumably these holdings would apply as well to abortion:

- Delaware: *Blinder, Robinson & Co., Inc. v. Bruton*, 552 A.2d 466, 472 (Del. 1989) ("The due process clause of the Delaware Constitution is considered to be coextensive with the due process protection of the United States Constitution");
- Maine: *Carroll F. Look Construction Co., Inc. v. Town of Beals*, 802 A.2d 994, 999 (Me. 2002) ("state and federal due process rights are coextensive");
- Oklahoma: *Barzellone v. Presley*, 126 P.3d 588, 593 n. 26 (Okla. 2005). ("Due process protections encompassed within the two constitutions [Oklahoma and federal] are coextensive."); *see also McKeever Drilling Co. v. Egbert*, 40 P.2d 32, 35 (Oka. 1934). ("Due process of law under our State

Constitution...is the same thing as due process of law under the Federal Constitution").

c. Federal Cases Provide Little Authority to Establish an Allegedly Distinct Iowa Right.

Planned Parenthood also relied on *federal* cases in an attempt to prove abortion is a fundamental right under the *Iowa* constitution. App. Br. 59. This is a curious way to demonstrate that the alleged Iowa constitutional right is different and broader than the federal right. Admittedly, the Iowa Supreme Court has stated, "We have traditionally followed the U.S. Supreme Court's guidance in determining which rights are deemed fundamental." *Seering,* 701 N.W.2d at 664; *In re Det. of Cubbage*, 671 N.W.2d 442, 447 (Iowa 2003). Yet it is one thing to look to federal guidance concerning the fundamental nature of a right when a party also is willing, correspondingly, to follow the federal standard of review (undue-burden analysis). It is a bit jarring, though, for Planned Parenthood to rely on federal authority to argue for an Iowa right and then, *in the very next sentence*, exhort this Court to "not be bound by federal standards for adjudicating restrictions" of that right. App. Br. 59.

In a similar example of Planned Parenthood's confounding love-hate relationship with federal case law, Planned Parenthood also cited an Iowa case, *Sanchez v. State*, 692 N.W.2d 812 (Iowa 2005) for the proposition, "this Court has

already indicated that abortion is a fundamental right." App. Br. 60, n.28. If that were a true statement, the *Sanchez* case would have been expected to be Planned Parenthood's lead authority, front and center. Instead, Planned Parenthood's treatment of *Sanchez* in a footnote apparently is a tacit acknowledgement that *Sanchez* did not truly rule on abortion at all and said nothing about abortion's status under the Iowa constitution. Rather, *Sanchez* held that an alien does not have a substantive due process right to a driver's license. 692 N.W.2d at 820. The facts in *Sanchez* had nothing whatsoever to do with abortion. Rather, in *dicta*, *Sanchez* quoted *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), a United States Supreme Court case which itself merely enumerated examples of fundamental rights that had been recognized under the federal constitution, including abortion of course. *Id.*

B. If Abortion is Found Somehow to be a Fundamental Right in Iowa, This Court Should Apply Undue-Burden Constitutional Analysis to Decide if the Right has Been Violated by the Board's Rule.

If this Court determines there is no separate fundamental right to abortion under the Iowa constitution, it then must analyze the Board's regulation under rational-basis review. (Part D below.)

1. The Iowa Supreme Court has Indicated it Would Select Undue-Burden Analysis in this Context.

If this Court should determine the Iowa constitution somehow provides a fundamental right to abortion, the Court should analyze the Board's rule using undue-burden analysis. Planned Parenthood stated that when "laws impinge on fundamental rights, this Court has *consistently* applied strict scrutiny." App. Br. 60 (emphasis added).

This Court has not been quite as consistent on this point as Planned Parenthood alleged.

In *Sanchez v. State,* this Court stated,

> Because the parties have not articulated any basis for distinguishing the state due process analysis from the federal due process analysis, the federal analysis shall apply equally to appellants' claim under article I, section 9. *See Pfister v. Iowa Dist. Ct. for Polk County,* 688 N.W.2d 790 (Iowa 2004) ("Because the parties have articulated no basis for distinguishing these clauses for purposes of determining a parolee's right to counsel, our discussion of the federal due process claim applies equally to the claim made under the Iowa Constitution." (Citations omitted.)); *Racing Ass'n of Cent. Iowa v Fitzerald,* 675 N.W.2d 1 (Iowa 2004) ("Despite this court's right to fashion its own test for examining claims brought under our state constitution, we do not think *this case* is the proper forum to consider an analysis that might be more compatible with Iowa's constitutional language.... [I]t is prudent to delay any consideration of whether a different analysis is appropriate to a case in which this issue was thoroughly briefed and explored." (Citations omitted.)).

692 N.W.2d at 819.

Thus in the substantive due process area, this Court *consistently* has directed that federal due-process analysis should be followed, unless a sufficient reason has been articulated not to do so. As discussed above, Planned Parenthood has not

articulated any reason not to follow the federal analysis. Since the case quoted above, *Sanchez,* did not deal with abortion, that court correctly applied strict-scrutiny analysis in that case, following the federal lead for that type of case. In a case dealing with abortion, however, federal substantive due process analysis requires the undue-burden standard to be applied, not strict scrutiny. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 895 (1992).

2. Under the Appellate Posture of This Case, the Board's Rule Could not Violate the Undue Burden Standard.

The district court held that the Board's rule did not violate the undue-burden standard under the federal constitution. Slip. Op. 31-35. Planned Parenthood did not appeal that aspect of the district court's ruling.

When this Court analyzes the Board's regulation applying undue-burden analysis under the Iowa constitution, it is hard to see how that undue-burden analysis would be different than the same undue-burden analysis already conducted by the district court, applying it under the federal substantive due process clause. Planned Parenthood provided no Iowa-specific undue-burden analysis. In fact, it relied on federal undue-burden cases. App. Br. 64-65.

Undue-burden analysis squarely supports the type of abortion regulations imposed by the Board. In the 1992 decision of *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the United States Supreme Court discarded

the strict-scrutiny standard of *Roe v. Wade,* 410 U.S. at 155, and replaced it with the "undue burden" standard. *Casey* at 878, 879. The *Casey* court defined "undue burden" to mean a "substantial obstacle" to abortion (of a nonviable fetus). *Id.* at 877. *Casey* emphasized that a burden may be placed on previability abortion, so long as it is not an *undue* burden. After viability, the Supreme Court gave the state a great deal of latitude in restricting abortion, even to the point of prohibiting it. *Id.* at 846, 878.

Planned Parenthood's repeated demand that the Board's regulation must be "narrowly tailored to the achievement of a compelling state interest," App. Br. 62-63, would not apply since that requirement is part of the strict-scrutiny standard of *Roe v. Wade,* which was rejected by *Casey*. *See e.g., Planned Parenthood of Greater Texas v. Abbott,* 748 F.3d 583, 590 (5th Cir. 2014) ("*Akron's* application of strict scrutiny was replaced by *Casey*'s undue burden balancing test").

Planned Parenthood bears the burden of proving the Board's rule is unconstitutional. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The district court's opinion as well as the brief filed by the Iowa Attorney General on behalf of the Board analyzes at some length what sort of abortion regulations rise to the level of undue burdens on abortion. The regulations instituted by the Board are well within what is allowed under the reported case law. Therefore, the

Board's undue-burden analysis will not be reiterated here. Rather, this *amicus* brief turns to matters affecting rational-basis review.

D. The Iowa Rule is Rationally Related to Protecting Patients from Significant Dangers, Which Were Described Extensively in the Administrative Record.

> For the rational basis test to be met, there need only be a reasonable fit between the governmental interest and the means utilized to advance that interest. The legislature need not employ the best means of achieving that interest. *Hensler*, 790 N.W.2d at 584. The plaintiff by contrast must negate every reasonable basis upon which the government's act may be sustained. *Zaber*, 789 N.W.2d at 640"

King, 818 N.W.2d at 28.

Planned Parenthood made statements about the administrative record that are spectacularly inaccurate, including: "there is no evidence of *any* public health benefit," App. Br. at 53; the Rule is "so illogical as to render it wholly irrational," *id.* at 7, 54; and the "evidence does not show any safety benefit," *id.* at 53. The only way for Planned Parenthood to make such egregious misstatements is for it to ignore, wholesale, the large sections of the administrative record that dealt with complications of drug-induced abortions and the deleterious effects on women's health caused by the absence of an abortion doctor.

1. The Administrative Record Shows Drug-Induced Abortion is Not Safe.

Planned Parenthood repeatedly in its brief glossed over what actually occurs in a drug-induced abortion: chemicals cause the uterine lining to disintegrate and the uterus then expels its contents, including a human fetus. It is not a mere routine check-up. Presumably, even Planned Parenthood would not allege abortion is an insignificant medical event, whether it be spontaneous, drug-induced or surgical.

Planned Parenthood's statements ignored the extensive evidence received by the Board concerning the dangers of drug-induced abortion. These dangers are extensively noted in the record received by the Board. They are documented extensively as well in the *amici curae* briefs filed conditionally by Americans United for Life and Alliance Defending Freedom.

Planned Parenthood's safety claims also ignore evidence coming to light relatively recently in a widely anticipated case in which another Planned Parenthood affiliate was involved: "medical research has shown that drug-induced abortions present more medical complications and adverse events than surgical abortions, with six percent of medication abortions eventually requiring surgery to complete the abortion, often on an emergency basis." *Planned Parenthood of Greater Texas, et al. v. Abbott,* 748 F.3d 583, 602 (5th Cir. March 27, 2014).

In *Abbott,* a large Texas affiliate in the Planned Parenthood network faced the same type of provisions as involved in the case before this Court. The Texas law included (1) "before the physician may dispense or administer an abortion-inducing drug, he or she must examine the pregnant woman ..." and (2)

> the physician [must] schedule a follow-up visit for a woman who has received an abortion-inducing drug not more than 14 days after the administration of the drug and the requirement that at that follow-up visit, the physician must determine whether the pregnancy is completely terminated and assess the degree of bleeding.

Id. at 605, n. 16. The *Abbott* court expressly noted that Planned Parenthood never even challenged these requirements in Texas, *id.* at 15, which are nearly the same as those before this Court. Apparently the Planned Parenthood affiliate in Texas recognized these requirements are reasonably related to protecting a woman's health.

2. The Administrative Record Shows Telemed Abortions Present Significant Additional Dangers.

Planned Parenthood proclaimed, "there have been no patient complaints." App. Br. 13. Planned Parenthood appears to be engaging in some sleight of hand with the use of the word, "complaints."

There undeniably have been medical *complications* caused by telemed drug-induced abortions, whether or not injured patients registered what could be characterized as "complaints" about these complications. Planned Parenthood itself

stated its Iowa telemed abortion program had a "low incidence of complications ... as compared to its drug-induced abortions in sites where the physician is physically present." *Id.* at 14. Thus, Planned Parenthood acknowledged complications caused by telemed drug-induced abortions. Presumably Planned Parenthood did not mean the presence of an abortion doctor actually increases complications. Therefore, this statement can only be read to confirm there are more complications in telemed abortions than in drug-induced abortions at which doctors are present.

Planned Parenthood's statement that "there have been no *patient* complaints," App. Br. 13 (emphasis added), deftly evades the part of the administrative record that demonstrates Planned Parenthood is well aware of the existence of complaints about the dangers of telemed abortion -- specifically occurring in Iowa -- whether or not Planned Parenthood received the complaints directly from the patients themselves. A significant complaint about the dangers of Iowa telemed abortions came from Planned Parenthood's own management. (Certified Record 144.) The Iowa Board of Medicine was presented with information that a former Iowa Planned Parenthood clinic manager, turned-whistleblower, complained as follows: Appellant Planned Parenthood instructed its patients that if they experienced bleeding or other complications, since there was no physician on site at the Iowa Planned Parenthood clinic involved, the

patient should report to her local hospital emergency room and falsely report she was experiencing a miscarriage. (*Id.*)

One of the Board's primary functions is to protect the health and safety of patients. The studies and facts presented above raise significant issues that would have to be considered by any board charged with protecting the health and safety of Iowan citizenry.

3. This Court Should not Attempt to Resolve Medical Disputes, as Planned Parenthood Demands.

The Board made medical determinations committed to the expertise of the Board and then decided upon the rule at issue. Planned Parenthood is insistent the Board should have made a different rule.

Both Planned Parenthood and opponents of telemed abortion produced evidence at the hearing before the Board, much of it contradictory. The contradictory evidence discussed above "demonstrates both sides have medical support for their position." *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007). That does not mean the Board was restrained from regulating telemed drug-induced abortions, simply because there existed contradictory evidence.

> The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. ... Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.

Id. at 163, 164 (internal citations omitted). In fact, *Gonzales* confirmed that such medical uncertainty, in itself, provides a reason for upholding the rule under consideration here: "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id.* at 164.

Appellant Dr. Jill Meadows, as well as other abortion doctors presented by Planned Parenthood, indicated they are in favor of broad, apparently unrestricted discretion to engage in telemed abortion. Yet "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Id.* at 163.

This Court has acknowledged it is important to defer to appropriate spheres of expertise: "courts are fundamentally underequipped to formulate [state] policies or develop standards for matters not legal in nature." *King*, 818 N.W.2d at 26 (Iowa 2012) (political question doctrine).

A court reviewing rulemaking by an administrative agency should not be placed in the position of having to referee a dispute between opposing medical experts. The power to establish medical practices and standards already has been committed to the Board. The Board appropriately has considered the contending points of the dispute and has arrived at a Rule within its competence to act.

It should be left at that.

CONCLUSION

The district court conducted a remarkably thorough, well-reasoned analysis of the Appellants' contentions and properly found them to be without merit. For the reasons stated above, *amici curiae* request this Court to affirm the district court.

Amici Curiae Catholic Medical Association, Catholic Medical Association--Des Moines Guild, Catholic Medical Association--St. Thomas Aquinas Guild of the Quad Cities, Iowans for Life, and Women's Choice Center, Quad Cities, in Support of the Iowa Board of Medicine

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 903(1)(g)(1) because this brief contains 5,603 words, excluding the parts of the brief exempted by Iowa R.App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

/s/
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The undersigned hereby certifies that a true and correct copy of the above was electronically filed this 25th day of November, 2014, with the Clerk of the Iowa Supreme Court using the EDMS system. Service on all parties will be accomplished through EDMS.

/s/
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