IN THE SUPREME COURT OF IOWA

No. 23–1145

PLANNED PARENTHOOD OF THE HEARTLAND, INC.; EMMA GOLDMAN CLINIC; and SARAH TRAXLER, M.D.,
Petitioners-Appellees

v.

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

Appeal from the Iowa District Court for Polk County
Case No. EQCE089066
Joseph Seidlin, District Judge

PETITIONERS-APPELLEES' PETITION FOR REHEARING

RITA BETTIS AUSTEN
American Civil Liberties Union of Iowa Foundation
505 Fifth Ave., Ste. 808
Des Moines, IA 50309-2316
Phone: (515) 243-3988
Fax: (515) 243-8506
rita.bettis@aclu.ia.org

PETER IM*
Planned Parenthood Federation of America
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
Phone: (202) 803-4096
Fax: (202) 296-3480
peter.im@ppfa.org

CAITLIN SLESSOR
SAMUEL E. JONES
Shuttleworth & Ingersoll, P.L.C.
115 3RD St. SE Ste. 500 PO Box 2107
Cedar Rapids, Iowa 52406-2107
Phone: (319) 365-9461
Fax: (319) 365-8443

DYLAN COWIT*
ANJALI SALVADOR*
Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
Phone: (212) 541-7800

CLS@shuttleworthlaw.com
SEJ@shuttleworthlaw.com
dylan.cowit@ppfa.org
anjali.salvador@ppfa.org

* Admitted pro hac vice

ATTORNEYS FOR PETITIONERS-APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioners-Appellees seek rehearing of the Court's decision of June 28, 2024 (the "Opinion"). The Court erred by failing to address the abuse of discretion standard of review for temporary injunctions. The Court has now held that abortion restrictions are subject to rational basis scrutiny, but in granting the temporary injunction last year, the district court relied on this Court's then-binding precedent in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022) ("*PPH 2022*"), under which such restrictions were subject to an undue burden standard of review. The Opinion does not explain how the district court's reliance on then-binding precedent amounted to an abuse of discretion. On rehearing, the Court should hold that the district court did not abuse its discretion and affirm the temporary injunction, or at least clarify—for the benefit of future litigants and lower courts—whether a district court abuses its discretion when it applies binding law that is subsequently overturned on appeal.

The Court also erred by failing to leave the temporary injunction in place while the parties marshal evidence on remand, particularly as the district court may consider the constitutional inadequacies of exceptions to the abortion ban in HF 732 (the "Ban"). As the Chief Justice's dissenting opinion points out, the inadequacies of these exceptions will have a devastating effect

on Iowans. On rehearing, the Court should allow the temporary injunction to remain in place as the parties build a factual record about the constitutionality of the Ban under the new standard.

Finally, the Court erroneously held that the Iowa Constitution does not protect the ability to exercise "[a]utonomy and dominion over one's body," *PPH 2022*, 975 N.W.2d at 746, including by choosing to seek an abortion.

ARGUMENT

I. Because the district court correctly applied this Court's then-binding precedent in *PPH 2022*, the Court should have held that it did not abuse its discretion.

This case came before the Court on an appeal of a temporary injunction. It is well settled that temporary injunctions are reviewed for an abuse of discretion. *See Homan v. Branstad*, 864 N.W.2d 321, 327 (Iowa 2015) ("Review of the issuance of a temporary injunction is for an abuse of discretion."). Litigants and lower courts rely on predictable application of standards of appellate review, but the Opinion does not recite the standard or explain its application. On rehearing, the Court should hold that the district court did not abuse its discretion because it followed this Court's then-binding precedent. But even if this Court believes that *PPH 2022*'s directive to apply the undue burden standard was not binding on the district court, it should

nevertheless hold on rehearing that the unsettled nature of the law weighs against finding an abuse of discretion.

A. The district court did not abuse its discretion because it followed then-binding precedent.

The Opinion acknowledges that in granting the temporary injunction, "the district court looked principally to *PPH 2022*," and in particular to the plurality's statement that the undue burden test "remains the governing standard." Opinion at 12. This was the controlling precedent at the time, and nothing in the Court's Opinion suggests otherwise. As Plaintiffs argued in their brief, because the district court correctly applied *PPH 2022*, it did not abuse its discretion in applying the undue burden standard. Petitioners-Appellees' Final Br. at 29 n.4. In fact, had the district court *departed* from this Court's binding precedent in *PPH 2022*, that departure would have been an abuse of discretion. *See Berg v. Des Moines Gen. Hosp. Co.*, 456 N.W.2d 173, 176 (Iowa 1990) (trial court abuses its discretion when it "applie[s] an improper standard [or] fail[s] to follow established legal rules"); *see also League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 221 (Iowa 2020) (Oxley, J., dissenting) ("[T]he district court abused its discretion when it denied the temporary injunction by using the wrong legal standard.").

On rehearing, this Court should hold that the district court did not abuse its discretion and affirm the temporary injunction. In the alternative, the Court

should at least, for the benefit of future litigants and the lower courts, clarify whether a district court abuses its discretion when it applies binding precedent that this Court subsequently overrules on appeal.

B. Even if this Court believes that *PPH 2022* was not binding precedent, it should hold that the district court did not abuse its discretion.

Even if the Court does not agree that *PPH 2022* was binding on the district court, the Opinion itself states that the issue of what level of scrutiny applied was "unsettled terrain." Opinion at 12. Although this Court has not clarified how to apply the abuse of discretion standard in cases involving unsettled legal questions or issues of first impression, some courts have been reluctant to find an abuse of discretion when the lower court was faced with a legal issue involving an unsettled area of law. *See, e.g.*, *McCann v. Coughlin*, 698 F.2d 112, 127 (2d Cir. 1983) (no abuse of discretion "[g]iven the unsettled state of the law on [an] issue" on which there was a circuit split and the Second Circuit had not "clearly addressed the issue"); *S. J. Groves & Sons Co. v. State Tax Comm'n*, 360 N.E.2d 895, 898 (Mass. 1977) (no abuse of discretion in a case presenting legal issue of first impression that the appellate court "probably" would have decided differently); *cf. O'Connor v. Bd. of Educ.*, 645 F.2d 578, 581 (7th Cir. 1981) ("Were the law unsettled, we would have more difficulty finding an abuse of discretion here."). *But see Huie v.*

DeShazo, 922 S.W.2d 920, 927–28 (Tex. 1996) ("[T]he trial court's erroneous legal conclusion, even in an unsettled area of law, is an abuse of discretion.").

If the Court believes that the level of scrutiny that applies to abortion restrictions was unsettled at the time of the district court's decision, it should hold on rehearing that the earlier unsettled nature of the law weighs against finding an abuse of discretion. It should therefore affirm the temporary injunction. Even if the Court continues to hold that the district court abused its discretion, it should clarify how the abuse of discretion standard applies in cases involving unsettled or novel issues under Iowa law.

II. The Court erred by failing to leave the temporary injunction in place while litigation continues on remand.

Plaintiffs requested that, even if this Court changed the applicable standard to rational basis review, it leave the temporary injunction in place while the district court passes on the Ban's constitutionality under the new standard in the first instance. Petitioners-Appellees' Final Br. at 41–43; Oral Argument Audio at 34:40, available at https://www.youtube.com/watch?v=7YATx9F0qGQ. As counsel explained at oral argument, this would permit the development of factual evidence to show why the Ban does not survive rational basis review, particularly due to the limited scope of the Ban's exceptions.

The Ban allows for only a few narrow exceptions in situations involving rape, incest, fetal abnormalities "incompatible with life," miscarriages, and medical emergencies. Iowa Code § 146E.1(3). As set forth at length in the unrebutted factual record that Plaintiffs presented at the district court—and in Plaintiffs' briefing on appeal—these exceptions are entirely inadequate to protect the rights of some of the most vulnerable Iowans. Chief Justice Christensen explains these inadequacies in her dissent, including (1) their failure to protect victims of rape and incest by requiring reporting, even though most sexual assaults go unreported; (2) their failure to define or provide adequate clarity about key terms, including the word "rape"; (3) their failure to provide adequate guidance to providers treating patients in emergent medical situations, along with the inevitable detrimental effects this will have on maternal health; (4) the inadequacy of the provisions on fetal abnormalities, particularly the ban on abortions in pregnancies involving such conditions after twenty weeks post-fertilization; and (5) the Ban's failure adequately to protect people seeking to grow their families using in vitro fertilization. Opinion at 32–56 (Christensen, C.J., dissenting).

Counsel for the State conceded at oral argument that if an abortion ban has inadequate exceptions, it may fail rational basis scrutiny. Oral Argument Audio at 9:45, 13:02. As Chief Justice Christensen explains in her dissent, the

Ban's exceptions do not further the State interests that the Opinion recognizes as legitimate. Nonetheless, the Opinion lets the Ban, with its inadequate exceptions, go into effect.

On rehearing, the Court should leave in place the temporary injunction to preserve the status quo on remand, which would give the parties the opportunity to marshal evidence under the rational basis standard, including about the exceptions and other unconstitutional provisions in the Ban and its implementing administrative rule. This would permit the district court to pass in the first instance on the constitutionality of the Ban's exceptions under the rational basis standard. *State v. Seats*, 865 N.W.2d 545, 557–58 (Iowa 2015) (holding, in an opinion clarifying the standard with respect to sentencing of juveniles, because "the district court did not have the benefit of this decision setting forth the factors the court must use, . . . the proper remedy is to remand the case back to the district court to consider the matter consistent with our holding in this opinion."), *holding modified on other grounds by State v. Roby*, 897 N.W.2d 127 (Iowa 2017); *cf. Trump v. United States*, No. 23-939, 2024 WL 3237603, at *18 (U.S. July 1, 2024) (clarifying legal standard but, because of "the expedition of th[e] case, the lack of factual analysis by the lower courts, and the absence of pertinent briefing by the parties," remanding

for the lower court to apply it "in the first instance—with the benefit of briefing we lack").

Pre-viability abortion has been legal in Iowa for the past half-century, and leaving the temporary injunction in place would merely maintain this status quo as litigation proceeds. *See Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985) ("A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment . . . ."). Doing so would also promote judicial economy, eliminating the need for piecemeal litigation or interlocutory appeals with respect to the exceptions.

With respect to challenges to the exceptions, the parties are in a *sui generis* procedural posture because the exceptions are set forth in both the Ban—which is the sole subject of the instant lawsuit—and the Board of Medicine rule, Iowa Admin. Code r. 653-13.17 (the "Rule"), which was promulgated after this appeal was briefed and is therefore not part of this case. On rebuttal at oral argument, counsel for the State responded to a question from Justice McDonald about the possibility of separate litigation challenging the exceptions by stating that such litigation would be permitted. Oral Argument Audio at 48:53.

During the temporary injunction proceedings below, the State requested that the Court not enjoin the portion of HF 732 directing the Board

of Medicine to promulgate regulations implementing the Ban. As a result, the Board of Medicine issued the Rule, which includes more detail about various provisions of the Ban, notably including the exceptions to the Ban.

Had the Rule been promulgated before the Ban went into effect, Plaintiffs could have challenged both the Rule and the Ban in one action by bringing a petition for judicial review of the Rule that challenged the Rule as being based on an unconstitutional statute pursuant to Iowa Code § 17A.19(10)(a). *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350–54 (Iowa 2013) (addressing constitutionality of statute as part of administrative challenge). But because the Ban became effective immediately upon enactment instead of once the regulations implementing it were promulgated, Plaintiffs were compelled to bring the instant statutory challenge to the Ban in district court without the benefit of the Rule. And because the district court, at the State's request, allowed rulemaking to proceed, Plaintiffs are in the unusual position of having active litigation challenging the Ban but not the Rule.

In order to challenge the adequacy of the exceptions as set forth in both the Ban and the Rule, Plaintiffs would need to challenge the Rule under the Iowa Administrative Procedure Act, which provides the "exclusive means" for challenging agency action like the Board of Medicine's promulgation of

the Rule. Iowa Code § 17A.19; *see also Richards v. Iowa State Com. Comm'n*, 270 N.W.2d 616, 619 (Iowa 1978). Plaintiffs would need to challenge the Rule's provisions at the agency and then, if their challenge is denied, file a petition for judicial review under Iowa Code § 17A.19 at the district court, which would exercise appellate jurisdiction over that petition. *See Christiansen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 186 (Iowa 2013) ("District courts exercise appellate jurisdiction over agency actions on petitions for judicial review.").

Thus, the State's request to permit the Board of Medicine to promulgate regulations concerning an otherwise enjoined statute has created the possibility of duplicative litigation that could result in conflicting outcomes. Even if the statutory challenge to the Ban and the petition for judicial review of the administrative challenge to the Rule were before the same district court judge, they could not be consolidated because the statutory challenge would proceed to trial, whereas the challenge to the Rule would be in an appellate posture. *See Black v. Univ. of Iowa*, 362 N.W.2d 459, 462 (Iowa 1985) ("[O]ur joinder rules neither expressly nor by implication permit the bringing together in one lawsuit of a judicial review proceeding and an original law or equity action.").

On rehearing, in addition to addressing the exceptions, the Court should provide guidance to the district court in this case—and to future litigants, district courts, and agencies facing similar situations—about how the concurrent challenges to the Ban and the Rule are to proceed.

III. The Iowa Constitution protects Iowans' right to reproductive freedom.

PPH 2022 expressly limited its holding to the proposition that "the Iowa Constitution is not the source of a fundamental right to an abortion *necessitating a strict scrutiny standard of review* for regulations affecting that right." 975 N.W.2d at 716 (emphasis added). As Justice Mansfield explained in his dissent, "*PPH 2022* overturned strict scrutiny but did not go further to hold that a woman lacked any kind of fundamental right." Opinion at 62 (Mansfield, J., dissenting).

Just two years ago, this Court stated that "[a]utonomy and dominion over one's body go to the very heart of what it means to be free." *PPH 2022*, 975 N.W.2d at 746 (quoting *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018)). As Chief Justice Christensen explains, the Opinion erroneously relies on a legal tradition rooted in oppression of women and fails to recognize that "[w]omen are human beings in their own right, worthy of the same freedoms, privileges, and protections as men." Opinion at 26 (Christensen, C.J., dissenting). On

rehearing, this Court should hold that the Iowa Constitution protects a fundamental right to bodily autonomy, which includes the right to make decisions about one's pregnancy, that undue burden is the appropriate standard, and that the Ban is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioners-Appellees respectfully request rehearing.

Respectfully submitted,

/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/ Peter Im
PETER IM*
Planned Parenthood Federation of America
1110 Vermont Ave., N.W., Ste. 300
Washington, D.C. 20005
Phone: (202) 803-4096
Fax: (202) 296-3480
peter.im@ppfa.org

/s/ Dylan Cowit
DYLAN COWIT*
ANJALI SALVADOR*

Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
Phone: (212) 541-7800
dylan.cowit@ppfa.org
anjali.salvador@ppfa.org

Attorneys for Petitioners-Appellees Planned Parenthood of the Heartland, Inc., and Sarah Traxler, M.D.

/s/ Caitlin Slessor
CAITLIN SLESSOR (AT0007242)
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
CLS@shuttleworthlaw.com
SEJ@shuttleworthlaw.com

Attorneys for Petitioner-Appellee Emma Goldman Clinic

** Admitted pro hac vice*

COST CERTIFICATE

Appellees certify that they expended no funds for the printing of their response brief in this Court.

/s/ Rita Bettis Austen
Counsel for Petitioners-Appellees

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements and type-volume limitations of Iowa Rules of Appellate Procedure 6.903(1)(e) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 2547 words, excluding those portions of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Rita Bettis Austen
Counsel for Petitioners-Appellees

CERTIFICATE OF FILING AND SERVICE

I certify that on July 11, 2024, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Rita Bettis Austen
Counsel for Petitioners-Appellees

Dated: July 11, 2024