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' FINAL BRIEF

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1) **Whether the district court abused its discretion by following this Court's holding that the undue burden test "remains the governing standard" for abortion restrictions and concluding that a six-week abortion ban likely violates the Iowa Constitution.**

   Planned Parenthood of the Heartland, Inc. v. Reynolds, 975 N.W.2d 710 (Iowa 2022)

2) **Whether the district court erred by following this Court's precedents to conclude that abortion providers have standing to assert the constitutional rights of their patients.**

   Lewis v. Iowa Dist. Ct. for Des Moines Cnty., 555 N.W.2d 216 (Iowa 1996)

   Iowa Movers & Warehousemen's Ass'n v. Briggs, 237 N.W.2d 759, 772 (Iowa 1976)

3) **Whether the district court erred by concluding that Petitioners-Appellees' claims were ripe after the Governor announced her intent to sign a bill into law on a date certain.**

   Iowa Coal Mining Co. v. Monroe Cnty., 555 N.W.2d 418, 432 (Iowa 1996)

ROUTING STATEMENT

The Court should retain this appeal rather than direct it to the Court of Appeals because this case presents substantial questions pertaining to Petitioners-Appellees' patients' constitutional rights, and it raises fundamental and urgent issues of broad public importance. *See* Iowa R. App. P. 6.1101(2)(a), (d).

STATEMENT OF THE CASE

House File 732 prohibits abortions upon the detection of embryonic or fetal cardiac activity, which occurs at approximately six weeks of gestational age as measured from the first day of the last menstrual period ("LMP"), before many people know they are pregnant. *See* House File 732 § 2(2)(a), 90th Gen. Assemb. (Iowa 2023) ("HF 732," the "Six-Week Ban," or the "Ban"). The Six-Week Ban is virtually identical to Iowa Code § 146C (2018) (the "2018 Ban"), the abortion ban that this Court left permanently enjoined last year, *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, No. 22-2036, 2023 WL 4635932 (Iowa June 16, 2023) ("*PPH 2023*"). Like the 2018 Ban, HF 732 would prohibit the vast majority of abortions in Iowa, forcing Iowans to undergo the hardships of traveling out of state to access abortion—often delaying their care to do so—or to carry their pregnancies to term against their will.

This case comes before this Court on interlocutory appeal of a temporary injunction, and thus the parties have not yet developed a complete factual record. In a measured and thorough written opinion, the district court properly applied this Court's holding in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710 (Iowa 2022) ("*PPH 2022*"), that the undue burden test "remains the governing standard" that applies to

abortion restrictions under the Iowa Constitution, *id.* at 716, to conclude that the Six-Week Ban likely violates the Iowa Constitution and grant Petitioners-Appellees' ("Petitioners") motion for a temporary injunction. At this preliminary stage, the only issue before this Court is whether the district court erred by granting Petitioners' request for a temporary injunction. The applicable standard of review—which Respondents-Appellants (collectively, the "State") do not so much as mention in their brief—is for abuse of discretion, *see Homan v. Branstad*, 864 N.W.2d 321, 327 (Iowa 2015). The district court did not abuse its discretion in this case. Rather, it faithfully applied the controlling three-justice plurality opinion in *PPH 2022*, which left the undue burden standard in place.

Notably, the State conceded at the hearing on Petitioners' request for a temporary injunction that the Six-Week Ban does not satisfy the undue burden standard, and it does not argue otherwise on appeal. And other than a cursory and conclusory allusion, it also does not challenge the district court's findings that Petitioners demonstrated irreparable injury and that the balance of harms favors relief. Thus, with respect to the merits, the State's only preserved argument is its challenge to the district court's holding that precedent requires the application of the undue burden standard.

The State argues that *PPH 2022* requires application of the rational basis standard. This Court should reject this argument, as it misreads the clear language of the *PPH 2022* plurality opinion. Further, although not precedential, Justice Waterman's opinion in *PPH 2023*—which was joined by Justice Mansfield, the author of the *PPH 2022* plurality opinion—makes clear that the justices in the *PPH 2022* plurality meant to leave the undue burden standard in place. *See PPH 2023*, 2023 WL 4635932, at *2 ("[T]he undue burden test remains the governing standard.").

The State also appears to argue that this Court should *change* the standard of review from undue burden to rational basis. It contends for the first time in this case on appeal that the undue burden test is "unworkable" and has "no reasonable foundation, no clear application, and no majority support." Because these arguments were not raised below, they are not preserved; but even if they were, this Court should reject them and reaffirm the undue burden standard. As Justice Waterman explained in *PPH 2023*, "[t]he undue burden test balances the state's interest in protecting unborn life and maternal health with a woman's limited liberty interest in deciding whether to terminate an unwanted pregnancy." *Id.* at *8 (Waterman, J., non-precedential op.). Moreover, as the State has conceded, the result of the undue

burden test in this case is clear: courts applying the undue burden test have uniformly rejected pre-viability gestational age bans like the Six-Week Ban.

Further, this Court should not reconsider the constitutional standard on the appeal of a temporary injunction because the parties have not had an opportunity to fully develop the record. In *PPH 2022*, this Court contemplated the possibility that the parties would litigate the standard on remand, stating that they "should marshal and present evidence under [the undue burden] test, although the legal standard may also be litigated further." 975 N.W.2d at 716. This reflects the importance of permitting the parties to develop a complete, fulsome record before this Court changes a standard governing Iowans' constitutional rights. The record in this case is far from fully developed: the parties' briefs below were filed in a forty-eight-hour span and address only what the governing standard is, not what it should be. Moreover, the district court ruled only on one of Petitioners' three claims. And as of the time of the filing of this brief, the Iowa Board of Medicine has not yet adopted a final rule implementing the Six-Week Ban; its proposed rule has just undergone public comment.

Pre-viability abortion has been legal in Iowa for the last fifty years. The temporary injunction merely keeps this status quo in place pending a final judgment, as the parties develop and litigate their arguments. *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 . . . ."). This Court should affirm the district court's temporary injunction.

STATEMENT OF THE FACTS

I. This Court's Precedent

This Court has addressed the status of abortion restrictions under the Iowa Constitution five times since 2015, but the applicable level of scrutiny is clear: as Justice Waterman explained in *PPH 2023* earlier this year, under *PPH 2022*, "the undue burden test remains the governing standard." 2023 WL 4635932, at *2 (Waterman, J., non-precedential op.).

In 2015, this Court applied the undue burden standard from *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), to hold that a ban on telemedicine medication abortions violated the Iowa Constitution. *See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252 (Iowa 2015) ("*PPH 2015*"). In 2018, this Court held that abortion restrictions should be reviewed under strict scrutiny. *See Planned Parenthood of the Heartland, Inc. v. Reynolds*, 915 N.W.2d 206 (Iowa 2018) ("*PPH 2018*").

In 2022, the Court overturned *PPH 2018*'s holding that strict scrutiny

applies, but it explicitly held that the undue burden standard articulated in *PPH 2015* remains the "governing standard." *PPH 2022*, 975 N.W.2d at 716. The three-justice plurality opinion explained, "[A]ll we hold today is 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." *Id.* (emphasis added). The Court reaffirmed its statements in *PPH 2018* that "[a]utonomy and dominion over one's body go to the very heart of what it means to be free" and that the "life-altering obligation" of parenthood "falls unevenly on women." *Id.* at 746 (quoting *PPH 2018*, 915 N.W.2d at 237 (majority opinion), 249 (Mansfield, J., dissenting)). The opinion also reiterated that this Court "zealously guard[s] [its] ability to interpret the Iowa Constitution independently of the Supreme Court's interpretations of the Federal Constitution." *Id.* at 716.

PPH 2022 expressly declined to hold that the rational basis standard applied, even though an amicus curiae requested that it do so. *Id.* at 745. Two justices specifically *dissented* on this point, stating that they would direct the trial court on remand to apply rational basis. *Id.* at 746 (McDermott, J., concurring in part and dissenting in part).

After the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the State petitioned the

Court for rehearing, asking the Court to establish rational basis as the standard. State Pet. for Reh'g, *PPH 2022* (No. 21-0856). This Court summarily rejected the State's petition. Order on Pet. for Reh'g, *PPH 2022* (No. 21-0856).

In 2023, the Court affirmed by operation of law a permanent injunction against the 2018 Ban. *See generally PPH 2023*. Because the Court deadlocked, it did not issue a new precedential decision, and *PPH 2022* controls. Justice Waterman wrote an opinion explaining that *PPH 2022* left in place the undue burden standard. He noted that *PPH 2022* "overrul[ed] *PPH* [*2018*] to the extent it found that the right to abortion was a fundamental right 'subject to strict scrutiny,'" but it "did not adopt a rational basis test." *PPH 2023*, 2023 WL 4635932, at *5 (Waterman, J., non-precedential op.) (quoting *PPH 2022*, 975 N.W.2d at 715). Rather, under *PPH 2022*, "the undue burden standard . . . remains in place." *Id.* at *6. Further, Justice Waterman explained that *Dobbs* "does not control the meaning of the Iowa Constitution." *Id.* at *7. Declining the State's "attempt at a shortcut to adopting *Dobbs*," he reiterated that this Court has an "independent duty to interpret the Iowa Constitution." *Id.* Justice Mansfield joined Justice Waterman's *PPH 2023* opinion.

II. The Six-Week Ban

On July 5, 2023, less than three weeks after *PPH 2023*, Governor Reynolds issued a proclamation calling the Iowa General Assembly into a

special session to enact a new ban on abortion. *See* Governor Kim Reynolds, Proclamation of Special Session (July 5, 2023). During the special session on July 11, debate in each chamber lasted less than seven hours. Before debate on the floor of the Senate was complete, proponents of the bill forced a vote at around 11:00 p.m., in the dead of night. The entire session, from convening of the special session to passage of the Six-Week Ban by both chambers of the General Assembly, took less than a day—less than the twenty-four hours that Iowa law requires patients to wait before having an abortion, *see* Iowa Code § 146A.1 (2023).

Like the 2018 Ban, the newly passed Ban prohibits abortions when there is a "detectable fetal heartbeat." HF 732 § 2(2)(a). When a pregnant person seeks an abortion, the Six-Week Ban requires the abortion provider to perform an abdominal ultrasound to detect whether there is cardiac activity and to inform the patient in writing both (1) whether cardiac activity was detected; and (2) that if cardiac activity was detected, the patient cannot have an abortion. *Id.* § 2(1)(a)–(b). The patient must then sign a form acknowledging that they received this information. *Id.* § 2(1)(c). The specific details of how the ultrasound requirement will be implemented are the subject of an Iowa Board of Medicine rule that has not yet been finalized.[1]

[1] The Board of Medicine proposed a rule implementing the Six-Week Ban on

The Six-Week Ban's references to a "fetal heartbeat" are inaccurate and misleading. The statute defines "fetal heartbeat" as "cardiac activity, the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac" and bans abortions if a "fetal heartbeat" is detected via ultrasound. *Id.* § 1(2). Cardiac activity may be detected via abdominal ultrasound as early as six weeks LMP. *See* App. 36–37 ¶13. At this very early stage of pregnancy, cardiac activity is merely an electrical pulse; nothing that could be considered a "heart" has yet formed. *See id.* Further, despite the Ban's use of the term "fetal heartbeat," a pregnancy is still an embryo when cardiac activity may first be detected, not a fetus; the developing pregnancy is an embryo until at least ten weeks LMP—the term "fetus" is used only after this point. *See* App. 36 ¶12.

Because embryonic or fetal cardiac activity can be detected as early as six weeks LMP, the Ban prohibits abortions starting at approximately six weeks LMP. *See* App. 36–37 ¶13. By banning abortions so early in pregnancy, it will prevent the vast majority of people from having an abortion in Iowa. *See* App. 37–38 ¶16. Although most patients get an abortion as soon as they are able, nearly 92% of the abortions Planned Parenthood of the Heartland,

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December 13, 2023. *See* 146 Iowa Admin. Bull. 4036–4040 (Dec. 13, 2023). As of the time this brief is filed, the rule has undergone the public comment process, but has not yet been adopted.

Inc., ("PPH") provided in Iowa during the first half of 2023—and 99% of the ones the Emma Goldman Clinic ("EGC") provided between October 2022 and May 2023—took place after six weeks LMP. *See* App. 39 ¶20; *id.* at 73 ¶16. Even for patients with regular four-week menstrual cycles, six weeks LMP is only two weeks past the first missed period. *See* App. 41 ¶26. Many people do not know that they are pregnant by six weeks LMP for a wide variety of reasons, including because of irregular menstrual cycles as a result of common medical conditions, contraceptive use, age, and breastfeeding; because implantation of a fertilized egg can cause light bleeding, which is often mistaken for a period; and because pregnancy is not always easy to detect. *See* App. 41–42 ¶¶27–28. And even those who do know they are pregnant by six weeks LMP will face substantial logistical and financial obstacles in arranging to have an abortion in Iowa before their time runs out, including raising money for the abortion and arranging time off work, transportation, childcare, and care for other family members. *See* App. 42–44 ¶¶29–32.

The Six-Week Ban allows for only a few narrow exceptions, under which either a provider need not test for cardiac activity or a patient can have an abortion despite the detection of cardiac activity. One exception applies if the provider determines in their "reasonable medical judgment" that there is a "medical emergency." HF 732 §§ 1(4), 2(2)(a); Iowa Code § 146A.1(6)(a)

(2023). Another exception applies if the pregnancy resulted from rape or incest *and* the patient reports the rape or incest within a limited time window (45 days for rape and 140 days for incest). HF 732 §§ 1(3)(a)–(b), 2(2)(a). This exception is no longer available once the pregnancy reaches a "postfertilization age" of "twenty or more weeks"—approximately twenty-two weeks LMP or later. *Id.* § 2(2)(b). A third exception applies if the provider certifies that the fetus has a "fetal abnormality" that is "incompatible with life" in the provider's "reasonable medical judgment." *Id.* §§ 1(3)(d), 2(2)(a). As with the exception for reported rape and incest, the fetal abnormality exception is no longer available once the pregnancy reaches approximately twenty-two weeks LMP, *id.* § 2(2)(b), even though many fetal anomalies cannot be identified until eighteen to twenty weeks LMP or even later, App. 58 ¶68.

Further, the Six-Week Ban includes several unclear provisions that will cause needless confusion for Petitioners and their patients. The General Assembly rushed to pass the Ban in less than one day, without making changes to the enjoined 2018 law necessary to avoid uncertainty.[2] Notably, the rape

[2] For example, for abortions "necessary to preserve the life of an unborn child"—which appears to refer to abortions necessary to preserve the life of a twin fetus—the Six-Week Ban nonsensically includes these among the abortions allowed after twenty weeks post-fertilization, HF 732 § 2(2)(b), but

and incest exceptions in the Ban require that the incident be reported "to a law enforcement agency or to a public or private health agency which may include a family physician." HF 732 § 1(3)(a)–(b). Reporting rape or incest, even to a medical provider, can be retraumatizing for survivors. App. 113 ¶24. The Six-Week Ban makes it extremely difficult for survivors to access abortion care. The details of how these exceptions will be implemented are also the subject of the rule proposed by the Board of Medicine, which has not yet been finalized.

Shortly after midnight on July 12, 2023, less than an hour after the General Assembly passed the Ban, Governor Reynolds announced she would sign it into law on July 14. *See* Press Release, Kim Reynolds, Gov. Reynolds Statement on Special Session to Protect Life.

III. District Court Proceedings

On July 12, 2023, after the Governor's announcement, Petitioners filed a lawsuit in the district court for Polk County, seeking a temporary injunction. They brought claims under the due process, inalienable rights, and equal protection clauses of the Iowa Constitution and sought a temporary injunction on the first two of these claims.

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not those allowed from six weeks LMP up to twenty weeks post-fertilization, *id*. § 2(2)(a).

The district court held a hearing on Petitioners' motion on July 14, 2023, the same day that Governor Reynolds signed the bill. The district court denied Petitioners' request for an oral ruling from the bench, stating, "[t]his request requires my strong and lengthy attention." Tr. at 58:4–5, App. 243.

The district court subsequently issued a measured, detailed written opinion temporarily enjoining the State from enforcing HF 732's ban on abortions after the detection of embryonic or fetal cardiac activity. *See* App. 195–209. After holding that Petitioners' claims were ripe and that Petitioners had standing, the court held that Petitioners had met all three factors required to order a temporary injunction: that Petitioners were likely to succeed on the merits, that Petitioners' patients would suffer irreparable harm in the absence of a temporary injunction, and that the balance of the harms weighed in favor of granting temporary injunctive relief, App. 198–207.

As to the merits, the district court carefully examined this Court's precedents under the Iowa Constitution, in particular *PPH 2022*. The district court explained that "the controlling opinion in *PPH 2022*, which this court is bound to follow, is that [the] *Casey* undue burden test applied in *PPH 2015* remains the governing standard." App. 204. And bolstered by a concession by counsel for the State at oral argument that the Six-Week Ban does not satisfy the undue burden standard outlined by this Court, the court concluded that

Petitioners had shown they are likely to prevail on the merits of their due process claim. App. 206; Tr. at 34:2–6, App. 227 ("If that undue burden test was applied in the exact same manner that the U.S. Supreme Court had applied it before *Dobbs* was decided . . . then [HF 732] wouldn't [pass the undue burden test]."). Exercising judicial restraint, the district court declined to rule on Petitioners' separate claim under the Inalienable Rights Clause. *See* App. 206. The district court also did not enjoin the provision of the Six-Week Ban requiring the Iowa Board of Medicine to adopt rules to administer the statute; the rulemaking process is currently underway.

The district court next concluded that the Six-Week Ban would cause Petitioners' patients irreparable harm that could not be compensated by monetary damages because of "the irreparable loss of isolated and unique opportunities (individual patients seeking abortion services from Iowa providers) should the temporary injunction not be granted." App. 206–207 (quoting *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 338 (Iowa 2023), *reh'g denied* (Apr. 26, 2023) ("These sorts of injuries, i.e., deprivations of temporally isolated opportunities, are exactly what preliminary injunctions are intended to relieve.")). The court also noted that the constitutional violation itself constitutes irreparable harm. App. 207. With respect to the final temporary injunction factor, balance of the harms, the district court noted

the interests on both sides, but ultimately held that the balance favors Petitioners because the State has no interest in enforcing an unconstitutional statute. *Id*.

IV. Abortion in Iowa

Petitioners PPH and EGC provide a wide range of health care in Iowa, including cancer screenings, human papillomavirus vaccines, annual gynecological exams, pregnancy care, contraception, adoption referral, miscarriage management, gender-affirming care, and abortion. App. 38 ¶17; *id*. at 68–69 ¶3. PPH and EGC are the only abortion providers that operate health centers in Iowa. App. 39 ¶21. They each provide both medication abortion, which uses medication alone to end a pregnancy, and procedural abortion, in which the uterus is emptied using aspiration or by a dilation and evacuation procedure. App. 38 ¶¶17–18; *id*. at 69 ¶4. In accordance with Iowa law, PPH and EGC provide only pre-viability abortions. App. 38–39 ¶19; *id*. at 69 ¶4.

About one in four women will have an abortion in their lifetime. App. 39–40 ¶22. People seek abortions for medical, familial, economic, and personal reasons. App. 40 ¶23. Some are already parents who decide to seek an abortion after considering their own welfare and the welfare of their families, while others decide they are not yet ready to become parents. *Id*.

Some patients suffer from complications in their pregnancy or from medical conditions caused or exacerbated by pregnancy and seek to protect their own health, while others get abortions to terminate pregnancies that are severely compromised. *Id*.[3] The Six-Week Ban would force many Iowans to leave the state to get an abortion, which may force them to delay their abortions. And it could force people—particularly low-income pregnant people and victims of intimate partner violence—to carry their unwanted pregnancies to term, with all of the attendant medical risks that would entail. App. 37–38, 45–58 ¶¶16, 38–70.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONCLUDING THAT PETITIONERS SATISFIED THE THREE-PRONG TEST FOR TEMPORARY INJUNCTIVE RELIEF.

Standard of Review. "The issuance or refusal to issue a temporary injunction rests largely in the sound discretion of the trial court, and [this Court] will not ordinarily interfere with such ruling unless there is an abuse of discretion or a violation of some principle of equity." *Kleman*, 373 N.W.2d

[3] Under the Ban's exception for medical emergencies, a physician cannot terminate a pregnancy unless they certify that the fetus has a condition "incompatible with life." Iowa Code § 146C.1(4)(d) (2018). A physician may not be certain whether they are permitted to terminate a pregnancy that, if carried to term, would most likely result in a short, incapacitated, and painful life for the child. App. 58 ¶69.

at 96; *see also Homan*, 864 N.W.2d at 327 ("Review of the issuance of a temporary injunction is for an abuse of discretion.").[4] An error of law is an abuse of discretion. *See State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017), *holding modified on other grounds by State v. Lilly*, 930 N.W.2d 293 (Iowa 2019).

Iowa Rule of Civil Procedure 1.1502 authorizes district courts to grant temporary injunctive relief. "The standards considered in granting temporary injunctions are similar to those for permanent injunctions, except temporary injunctions require a showing of the likelihood of success on the merits instead of actual success." *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001). Courts also must consider whether in the absence of the injunction, a movant would suffer irreparable injury and "balance the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Id.*

Preservation of Error. The State's argument that under *PPH 2022*, the

[4] The State does not mention that abuse of discretion is the governing standard. Instead, it makes much of this Court's prior statements that statutes are presumed constitutional. Appellants' Br. at 26–27. But it conceded at oral argument that the Six-Week Ban fails the undue burden test. Tr. at 34:2–6, App. 227. In light of this concession, the Ban is not entitled to a further presumption of constitutionality. Rather, this Court should hold that because *PPH 2022* left in place the undue burden standard, the district court did not abuse its discretion in concluding that the Six-Week Ban is likely unconstitutional.

applicable standard of review is rational basis was raised below and is preserved for review. But its arguments that this Court should *change* the applicable standard of review to rational basis—and particularly its arguments that the undue burden standard is unworkable—were not raised below, were not addressed by the district court, and therefore are not preserved on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").[5]

With respect to the district court's findings that Petitioners established irreparable injury and that the balance of the harms favored granting relief, the State devotes a single paragraph on one page of its brief. It baldly asserts that the State has suffered irreparable injury by having one of its laws temporarily enjoined and that the district court "collaps[ed]" its analysis of the balance of the harms and the merits. *See* Appellants' Br. at 13. The State has failed to brief these issues adequately and has therefore waived any challenges to the district court's findings. *See Pierce v. Stanley*, 587 N.W.2d 484, 486 (Iowa 1998) ("When a party, in an appellate brief, fails to state,

[5] Even if the State had preserved the issue, if the district court had failed to rule on it, it would have needed to file a motion to enlarge under Iowa R. Civ. P. 1.904 to preserve the issue for appeal before this Court. *See Meier*, 641 N.W.2d at 538.

argue, or cite authority in support of an issue, the issue may be deemed waived."); *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001) (declining to consider an issue when a party made only "categorical generalizations" that "fill[ed] a little more than half of a page in its brief").

A. The district court properly concluded that Petitioners are likely to succeed on the merits of their due process claim.

i. *PPH 2022* left the undue burden standard in place.

The *PPH 2022* plurality unequivocally stated that "the *Casey* undue burden test we applied in *PPH* [*2015*] remains the governing standard." 975 N.W.2d at 716. It overruled *PPH 2018*, but qualified its holding, stating, "[A]ll we hold today is 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." *Id.* (emphasis added). The Court expressly declined to consider whether the rational basis standard applied, even though an amicus curiae requested that it do so. *Id.* at 745.

In fact, two justices specifically *dissented* on this point, stating that they would direct the trial court on remand to apply rational basis. *Id.* at 746 (McDermott, J., concurring in part and dissenting in part). It cannot be the case, therefore, that after *PPH 2022*, a rational basis standard applies. The State admits as much: it states that the Court did not "take th[e] final step" of imposing the rational basis standard but rather "remanded to the district court

to apply [the] undue burden test." Appellants' Br. at 33 (internal quotation marks and citation omitted); *see also id.* at 40 ("[T]he *PPH 2022* plurality employed the Casey undue-burden test as a stopgap."). It also states that *PPH 2022* only addressed the "first step" of the constitutional due process analysis and that this Court "should now complete the second step and hold that rational-basis review applies," *id.* at 29, in effect conceding that *PPH 2022* did not so hold.

Despite these concessions, the State continues to insist that because of *PPH 2022*, the standard is rational basis. Its position is inconsistent with this Court's treatment of *PPH 2022* both before and after the Supreme Court's decision in *Dobbs*, which confirms that this Court was not adopting the rational basis test. The Court chose not to wait for the Supreme Court's *Dobbs* opinion before issuing its decision reiterating the undue burden standard although Mississippi had argued for overruling *Casey* many months before—not to mention that Justice Alito's draft opinion had already been leaked.

After *Dobbs*, the State petitioned the Court for rehearing in an effort to convince the Court to establish rational basis as the new standard of review in abortion rights cases. State Pet. for Reh'g, *PPH 2022* (No. 21-0856). This Court summarily rejected this invitation to set a new and lower standard of review than the federal undue burden standard applied in *PPH 2015*. Order on

Pet. for Reh'g, *PPH 2022* (No. 21-0856); *see also PPH 2023*, 2023 WL 4635932, at *7 (Waterman, J., non-precedential op.) (describing the petition for rehearing as an "attempt at a shortcut to adopting *Dobbs*"). Although the decision on a petition for rehearing is discretionary, *see* Iowa R. App. P. 6.1205, the fact that the State believed such a petition was necessary shows that—contrary to its position now—it understood then that *PPH 2022* did not adopt a rational basis standard. Indeed, the State understood what this Court clearly stated: that following *PPH 2022*, an abortion restriction that imposes an undue burden under *Casey* violates the Iowa Constitution. As Justice Waterman noted in his non-precedential *PPH 2023* opinion, "not a single state supreme court that previously recognized protection for abortion under its state's constitution has overruled its precedent in light of *Dobbs* to adopt rational basis review." *PPH 2023*, 2023 WL 4635932, at *7 (Waterman, J., non-precedential op.).

Because the opinions of the evenly divided Iowa Supreme Court in *PPH 2023* are non-precedential, the undue burden standard that this Court left in place in *PPH 2022* remains the governing standard. *See id.* at *2 (Waterman, J., non-precedential op.) ("[T]he undue burden test remains the governing standard . . . .").

The State argues that because *PPH 2022* held that there is no fundamental right to abortion subject to strict scrutiny, rational basis necessarily must be the standard. It suggests that there are no intermediate levels of constitutional scrutiny between rational basis and strict scrutiny, as though the undue burden standard does not exist. This is meritless. The federal constitutional test was the undue burden standard—just such an intermediate level of scrutiny—for thirty years following *Casey*. This Court applied the undue burden standard in *PPH 2015* and directed the district court to apply it in *PPH 2022*.[6]

Certainly, in due process challenges in some contexts, this Court has concluded that because no fundamental right is implicated, rational basis applies. *See, e.g.*, *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012). But in numerous other contexts, this Court has rejected strict scrutiny but adopted a standard of review higher than rational basis. In the context of elections, the

[6] As the State notes, Appellants' Br. at 33, in the *PPH 2022* dissent, two justices stated that they would not apply undue burden and instead hold that because there is no fundamental right to abortion, rational basis applies. *PPH 2022*, 975 N.W.2d at 749, (McDermott, J., concurring in part and dissenting in part). But of course, their dissent is not precedential.

The State also raises discussion of *PPH 2022* by other courts and by legal commentators. Appellants' Br. at 34–36. It does not explain why this Court would look to outside sources to understand *PPH 2022*. The members of this Court—in particular, the justices who were in the *PPH 2022* plurality—are in the best position to explain the import of that decision.

Court applies a balancing approach because despite the importance of the constitutional right to vote, "[e]lection laws will invariably impose some burden upon individual voters" and "subject[ing] every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently," *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 7 (Iowa 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). Similarly, in the First Amendment context, intermediate scrutiny applies to commercial speech and content-neutral speech regulations. *State v. Musser*, 721 N.W.2d 734, 743 (Iowa 2006) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). As the U.S. Supreme Court has explained, despite the importance of free-speech rights, content-neutral regulations typically "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue," *Turner Broad. Sys. Inc.*, 512 U.S. at 642, and commercial speech "occurs in an area traditionally subject to government regulation," *Cent. Hudson*, 447 U.S. at 562 (citation omitted).

To be clear, Petitioners are not asking for the application of an election-law or First Amendment standard in this case; nor are they suggesting that this Court did or should apply the undue burden standard in these contexts. Rather,

they raise these as examples to show that, contrary to the State's argument, this Court applies a degree of scrutiny more searching than rational basis but less stringent than strict scrutiny in the appropriate circumstances. An intermediate level of scrutiny is appropriate in the abortion context because of the importance of balancing the different interests at stake. *See PPH 2023*, 2023 WL 4635932 at *8 (Waterman, J., non-precedential op.); *PPH 2018*, 915 N.W. 2d at 249–50 (Mansfield, J., dissenting).

ii. The Six-Week Ban fails the undue burden test.

At oral argument, the State conceded that the Six-Week Ban fails the undue burden test. Tr. at 34: 2–6, App. 227.[7] And for good reason. The Ban puts in place not just a substantial—but a complete—obstacle in the path of Iowans seeking pre-viability abortions after all but the earliest stages of pregnancy. The Ban provides an extremely narrow window for Iowans to confirm a pregnancy; decide whether to have an abortion; secure an appointment at one of the few available health centers in Iowa that provide abortions, which do not provide abortions every day of the week; take time off from work and arrange transportation, childcare, and care for other family

[7] It made the same concession at oral argument before this Court last year. *See PPH 2023*, 2023 WL 4635932, at *5 (Waterman, J., non-precedential op.) (noting it is "clear and indeed conceded by the State at oral argument" that the 2018 Ban does not satisfy the undue burden standard).

members; obtain an ultrasound and state-mandated counseling materials; wait twenty-four hours; and have an abortion. The Six-Week Ban will prevent the vast majority of Iowans from having access to abortion. There can be no doubt, therefore, that it imposes an undue burden.

Moreover, every single court that has considered a pre-viability abortion ban under an undue burden standard has concluded that the ban is unconstitutional. *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (6-week ban); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (12-week ban); *Isaacson v. Horne*, 716 F.3d 1213, 1227 (9th Cir. 2013) (20-week ban); *Jane L. v. Bangerter*, 102 F.3d 1112, 1117–18 (10th Cir. 1996) (20-week ban); *Sojourner T. v. Edwards*, 974 F.2d 27, 31 (5th Cir. 1992) (total ban); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1371–72 (9th Cir. 1992) (total ban); *Planned Parenthood S. Atl. v. Wilson*, 527 F. Supp. 3d 801, 810 (D.S.C. 2021) (6-week ban); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 3:20-CV-00501, 2020 WL 4274198, at *15 (M.D. Tenn. July 24, 2020) (6-week ban); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297, 1312 (N.D. Ga. 2020) (6-week ban); *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1057–58 (M.D. Ala. 2019) (total ban); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796,

800–04 (S.D. Ohio 2019) (6-week ban); *Bryant v. Woodall*, 363 F. Supp. 3d 611, 630–32 (M.D.N.C. 2019) (20-week ban).[8]

iii. This Court should reject the State's invitation to reconsider the standard.

The legal analysis should end here: the district court correctly concluded that undue burden is the standard, and the Six-Week Ban fails the undue burden test. Therefore, the district court did not abuse its discretion in concluding that Petitioners have established a likelihood of success on the merits of their due process claim.

But the State muddies the waters with a panoply of policy arguments about the undue burden standard, which it raises for the first time on appeal. To the extent that the State asks the Court to hold not that the standard is *already* rational basis, but rather that it should be *changed* to rational basis, this Court should reject this latter position, as the State failed to preserve it at the district court. In fact, at the district court, it argued that after *PPH 2022*, Iowa courts "did not revert to reviewing abortion statutes under undue-burden," App. 169–170, but it argues on appeal that "the *PPH 2022* plurality employed the Casey undue-burden test as a stopgap," Appellants' Br. at 40; Resp'ts' Appl. for Interlocutory Appeal at 3–4, 20, 25 (repeatedly stating that

[8] Because these cases were decided under the federal undue burden standard, they were abrogated by *Dobbs*.

this Court should use this appeal to "clarify" the proper standard of review). This change in tactic makes clear that the State did not preserve for appeal a request to ask this Court to change the standard.

Further, the State's arguments about the undue burden standard are without merit. The State argues that the undue burden standard is "unworkable" and has "no clear application," pointing to the development of the standard in the federal courts as proof that the standard led to irremediable confusion. Appellants' Br. at 39–47.[9] But even it concedes that it understands how the test applies here. *Casey* itself was clear that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. Far from being unworkable, the undue burden test plainly dictates that the Six-Week Ban is unconstitutional. *Cf. PPH 2018*, 915 N.W.2d at 251–53 (Mansfield, J., dissenting) (finding significant other courts' holdings under the undue burden standard on statutes similar to the one challenged). By conceding that the Ban fails the undue burden test, the state effectively concedes its workability in this case.

The State points out that the *PPH 2018* majority made statements about

[9] Any legal standard that is not a bright-line rule leads to differences of opinion at the margins. *Cf. Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (rejecting bright-line rule in Fourth Amendment context because "no single set of legal rules can capture the ever-changing complexity of human life").

the undue burden standard to justify its holding that strict scrutiny should be the standard. It suggests that these statements—clearly dicta—were somehow "left undisturbed" by *PPH 2022*. Appellants' Br. at 22. As an initial matter, statements made in dictum are not binding, *see Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 391 (Iowa 2009), much less left intact after the holding of a case has been overruled. And it defies common sense that statements made by the *PPH 2018* majority to justify heightening the standard to strict scrutiny could somehow require this Court to lower the standard to rational basis.

The State also contends that the undue burden standard is arbitrary and does not account for the State's interest in protecting potential life. Appellants' Br. at 45–46. Not so. Unlike the rational basis test that the State promotes, the undue burden standard accounts for the competing interests at stake in the abortion context. As Justice Waterman has explained, "[t]he undue burden test balances the state's interest in protecting unborn life and maternal health with a woman's limited liberty interest in deciding whether to terminate an unwanted pregnancy." *PPH 2023*, 2023 WL 4635932 at *8 (Waterman, J., non-precedential op.). And Justice Mansfield has stated,

> The fact that there are *two* profound concerns—a woman's autonomy over her body and human life—has to drive any fair-minded constitutional analysis of the problem. . . . *Casey*'s undue burden standard . . . was an effort to recognize the unique status of

> this particular constitutional conflict between a woman's autonomy and respect for human life.

PPH 2018, 915 N.W. 2d at 249–50 (Mansfield, J., dissenting).

This Court should reject the State's arguments and reaffirm the undue burden standard. But to the extent the Court wishes to reconsider the standard, it is premature to do so in this interlocutory appeal. The State's arguments about the standard are not preserved, and the parties have not had an opportunity to develop a record at this preliminary stage. Because of the urgent nature of the case, the parties filed their briefs at the district court within forty-eight hours of the General Assembly's passing HF 732. The affidavits attached to Petitioners' complaint primarily address the harms that the Six-Week Ban would cause; the State presented no evidence at all. Although the State makes assertions about the history of the undue burden standard in its briefing at this Court, neither side presented briefing or expert testimony on that topic below. Rather, the parties litigated only about what the governing standard *is*, not what it *should be*.

Moreover, the district court ruled only on Petitioners' due process claim. Petitioners also brought a claim under the Iowa Constitution's Inalienable Rights Clause[10] and an equal protection claim. When this Court

[10] Because Article I, § 1 was amended to expressly include women in 1998, Iowa Const. amend. 45 (approved Nov. 3, 1998), Petitioners argue that the

considers changing the governing standard to rational basis, it should consider all possible constitutional sources for a right to abortion. And before it does that, it should permit the district court to pass on all of Petitioners' claims in the first instance.

Further, the Board of Medicine is in the process of promulgating a rule intended to administer the Six-Week Ban. The proposed rule, while not final, relates to a number of issues that Petitioners have raised in this case, and it is possible it could narrow or alter the issues in the case. The Court should allow

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constitutional amendment incorporates the conception of equality between the sexes at that time, when abortion was unquestionably protected. *Cf. PPH 2018*, 915 N.W.2d at 254 (Mansfield, J., dissenting) (finding significant the timing of adoption of constitutional guarantees, noting that among states with "explicit guarantees of privacy in their constitutions" that have adopted strict scrutiny, "for the most part, those privacy guarantees have been adopted only recently").

Petitioners sought temporary injunctive relief on this claim, but the district court declined to rule on it. The State incorrectly argues that, as a result, this issue is not preserved on appeal. Appellants' Br. at 26. Although "a party *seeking to appeal* an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue," *Meier*, 641 N.W.2d at 540 (emphasis added), "the preservation requirement ordinarily should apply only to an unsuccessful party." *Johnston Equip. Corp. of Iowa v. Indus. Indem.*, 489 N.W.2d 13, 17 (Iowa 1992). Indeed, this Court can affirm "on a ground not relied upon by the district court provided the ground was urged in that court and is also urged on appeal." *Veatch v. City of Waverly*, 858 N.W.2d 1, 7 (Iowa 2015).

Nonetheless, the parties have not developed a record about Petitioners' Inalienable Rights claim. This Court should allow the district court to rule on this claim before considering the State's arguments regarding its historical and textual analysis of the Iowa Constitution, Appellants' Br. at 30–31.

the parties to litigate all of the issues related to the Ban and its implementing regulations, and the district court should be permitted to pass in the first instance on those issues.

In *PPH 2022*, this Court indicated that "[o]n remand, the parties should marshal and present evidence under [the undue burden] test, although the legal standard may also be litigated further." *PPH 2022*, 975 N.W.2d at 716. This reflects the importance of allowing the parties to develop a complete, fulsome record before this Court considers the State's argument that rational basis should be the standard. This Court should reject the State's request to change the standard governing abortion restrictions to rational basis.

B. Petitioners have shown that the Six-Week Ban would cause them, their staff, and their patients irreparable harm.

The district court also correctly found that the Six-Week Ban would cause irreparable harm if it were not temporarily enjoined. *See* App. 206–207. The State barely contests the district court's finding of irreparable harm in its opening brief, asserting only that the State has also suffered irreparable injury by having one of its laws temporarily enjoined. *See* Appellants' Br. at 13. The State has waived any challenges to the district court's finding of irreparable injury by making only this conclusory assertion. *See Pierce*, 587 N.W.2d at 486; *Channon*, 629 N.W.2d at 866.

The district court concluded that the Six-Week Ban would cause irreparable harm because Petitioners demonstrated that they are "likely to succeed in showing a constitutional violation," *see* App. 207, which itself constitutes irreparable harm. *See LS Power Midcontinent,* 988 N.W.2d at 338. The district court also found that the Six-Week Ban would cause irreparable harm because it would result in harms that could not be remedied by monetary damages. *See IES Utilities Inc. v. Iowa Dep't of Revenue and Fin.*, 545 N.W.2d 536, 541 (Iowa 1996). Those non-monetary harms fall on three groups of people: (1) Petitioners' patients forced to carry their pregnancies to term, (2) Petitioners' patients forced to travel out of state to have an abortion, and (3) Petitioners and their staff.

First, the Six-Week Ban would force Petitioners to turn away the vast majority of patients seeking abortions, forcing many Iowans to carry their pregnancies to term against their will. *See* App. 39, 47–54 ¶¶20, 43–58; *id*. at 73 ¶16. Carrying a pregnancy to term entails enormous physical, emotional, and financial costs. Even an uncomplicated pregnancy challenges a person's entire physiology. App. 47–48 ¶44; *id*. at 71 ¶10. Many pregnant people who carry to term and deliver experience complications. App. 49–51 ¶¶49–52. Pregnancy can also cause new and serious health conditions or aggravate pre-existing health conditions. App. 48 ¶46. It can also induce or exacerbate

mental health conditions, which are explicitly excluded from the Six-Week Ban's "medical emergency" exception. App. 48–49, 56–57 ¶¶47, 66; Senate File 1223 § 1(4), 90th Gen. Assemb. (Iowa 2023); Iowa Code § 146A.1(6)(a) (2023). Some patients also face an increased risk of intimate partner violence, with the severity sometimes escalating during or after pregnancy. App. 49 ¶48. Separate from pregnancy, labor and childbirth are themselves significant medical events with many risks. App. 49–51 ¶49–51; *id*. at 71 ¶10.

The socioeconomic impact of forced pregnancy, childbirth, and parenting will also have severe negative effects on Iowa families. More than half of Petitioners' abortion patients already have one or more children. App. 40 ¶23; *id*. at 69 ¶5. Women who seek but are denied an abortion are, when compared to those who are able to access abortion, more likely to moderate their future goals and less likely to be able to exit abusive relationships. App. 53–54 ¶58; *id*. at 72 ¶12. As compared to those who received an abortion, women denied an abortion are also less likely to be employed full-time, more likely to be raising children alone, more likely to receive public assistance, and more likely to not have enough money to meet basic living needs. App. 53–54 ¶58.

Second, even Iowans who are ultimately able to obtain an abortion by traveling out of state will suffer irreparable harm. App. 47–58 ¶¶43–70.

People will be forced to remain pregnant against their will, with all the attendant risks and medical consequences, until they can obtain out-of-state abortion care, likely later in pregnancy and at greater expense than if they had had abortion access in Iowa. App. 47 ¶42. Although abortion is extremely safe and is much safer than carrying a pregnancy to term, the medical risks associated with abortion increase incrementally as the pregnancy progresses. *Id.* Forcing people to remain pregnant while they save money or arrange logistics to travel out of state exposes them to entirely unnecessary medical risk. *Id.* It could also mean that a patient who would have been eligible for a medication abortion may have to undergo a procedural abortion by aspiration, or a patient who would have been eligible for an aspiration abortion may have to have a dilation and evacuation procedure.

These Iowans will also suffer the additional burdens and costs associated with substantial travel. From Des Moines, for example, the nearest abortion providers outside of Iowa are in Omaha, Nebraska, around 140 miles away.[11] App. 46 ¶40. The closest clinics in Kansas and Minnesota are over 200 miles away from Des Moines. *Id.* These burdens will have the greatest impact on Iowans who do not own a car, those with disabilities for whom

[11] Nebraska has enacted a ban on abortion after twelve weeks LMP, meaning that Iowa patients past that point in pregnancy would have to travel even further. Neb. Rev. Stat. § 71-6915(2)(b) (2023).

long-distance travel is especially onerous, and low-income Iowans for whom the cost of gas and childcare could be prohibitive. Some patients may also be forced to compromise the confidentiality of their decision to have an abortion in order to obtain transportation or childcare for their travel to an appointment out of state. App. 46 ¶41. This could jeopardize the safety of patients whose families and social networks may strongly disapprove of their decision to get an abortion.

Third, Petitioners and their staff would also suffer harms that cannot be compensated by monetary damages. The Six-Week Ban interferes with Petitioners' ability to provide medical care consistent with their medical judgment and in support of patient wellbeing. *See Koelling v. Bd. of Trs. of Mary Frances Skiff Mem'l Hosp.*, 146 N.W.2d 284, 291 (Iowa 1966) (recognizing the "right to practice medicine"). The Six-Week Ban would also threaten Petitioners and their staff with reputational harm and severe civil penalties, including license revocation. These harms too are irreparable. *See Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (loss of reputation can constitute irreparable injury). The threat to Petitioners is particularly grave because of the risk that the Board of Medicine might disagree with decisions they make to provide care under the Six-Week Ban's exceptions. App. 55 ¶63; *id*. at 72 ¶14.

C. Petitioners have shown that the balancing of the harms weighs in favor of the temporary injunction.

The district court also properly found that the balance of the harms favored Petitioners because they were likely to succeed on the merits of their claims that the Six-Week Ban is unconstitutional and because the State's interests have "no right to protection from an unconstitutional statute." *See* App. 207 (quoting *LS Power Midcontinent*, 988 N.W.2d at 339). Again, the State barely contests this finding in its opening brief, asserting only that the State has suffered irreparable injury by having one of its laws temporarily enjoined and that the district court should not have found that one of the harms to Petitioners was the enforcement of a likely unconstitutional law. *See* Appellants' Br. at 13. The State has waived any challenges to the balancing of the harms by making only this conclusory assertion. *See Pierce*, 587 N.W.2d at 486; *Channon*, 629 N.W.2d at 866. And in any event, the very case that the State cites makes clear that the State is not irreparably injured "by not being allowed to enforce its duly enacted law" when "*the law in question is unconstitutional*." *Law v. Gast*, 643 F. Supp. 3d 914, 921 (S.D. Iowa 2022) (emphasis added).

There is no question that the harms to Petitioners and their patients that have been prevented by the temporary injunction are far greater than any harms to the State. As the district court explained, Petitioners are likely to

succeed on the merits of their claims that the Six-Week Ban violates Petitioners' patients' right to privacy. All but a few Iowans who seek abortions will be impacted by this unconstitutional law: the vast majority of Petitioners' patients have abortions at six weeks LMP or later. App. 39 ¶20; *id*. at 73 ¶16. In contrast, the State has faced little, if any, injury from the temporary injunction. The temporary injunction has merely preserved the status quo, under which pre-viability abortions have been legal for over half a century. *See Kleman*, 373 N.W.2d at 95 (holding the purpose of a temporary injunction is "to maintain the status quo of the parties prior to final judgment"). Additionally, allowing the temporary injunction to remain in effect would impose no affirmative obligation, administrative burden, or cost on the State; in fact, the temporary injunction specifically allowed the Board of Medicine to proceed with its rulemaking, which is under way.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT PETITIONERS HAVE STANDING TO SUE ON BEHALF OF THEIR PATIENTS.

Standard of Review. This Court "review[s] questions of standing for correction of errors at law." *Homan*, 864 N.W.2d at 327.

Preservation of Error. Error has been preserved because the issue was "both raised and decided by the district court." *Meier*, 641 N.W.2d at 537.

The district court correctly held that Petitioners have standing to sue on

behalf of their patients. The State insists that abortion providers are poorly suited to sue on behalf of patients, but longstanding precedents of both the U.S. Supreme Court and this Court clearly establish that abortion providers have third-party standing to sue in precisely these circumstances. *See June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103 (2020); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976); *Lewis v. Iowa Dist. Ct. for Des Moines Cnty.*, 555 N.W.2d 216, 218–19 (Iowa 1996); *Iowa Movers & Warehousemen's Ass'n v. Briggs*, 237 N.W.2d 759, 772 (Iowa 1976).

To determine whether a litigant has standing to sue on behalf of a third party, this Court asks whether the litigant "suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement" and whether "prudential considerations . . . point to permitting the litigant to advance the claim." *Lewis*, 555 N.W.2d at 218–19 (alteration in original) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989)). This Court has outlined several prudential factors that weigh in favor of allowing third-party standing, including (1) "where a peculiar relationship between the party and the rightholder makes such allowance appropriate"; (2) "where the rightholder has difficulty asserting his own rights"; and (3) when "unless assertion of the third person's rights were permitted, those rights would be diluted and adversely affected." *Iowa Movers & Warehousemen's Ass'n*, 237

N.W.2d at 772. In doing so, this Court has cited *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which reproductive health care providers similarly asserted rights on behalf of their patients.[12]

First, Petitioners have suffered an injury-in-fact because the Six-Week Ban threatens them with the revocation of their medical licenses and fines of up to ten thousand dollars for providing health care. *See* Iowa Code §§ 148.6(1), (2)(c) (2021); Iowa Code §§ 272C.3(2) (2023). The State argues that Petitioners cannot suffer an injury-in-fact because they "possess no constitutional right of their own to vindicate," but this argument confuses

[12] The State insists that *Dobbs* "charted" a "path" to overturn this Court's third-party standing precedents, *see* Appellants' Br. at 50, but *Dobbs* did not disturb even the U.S. Supreme Court's *own* third-party standing precedents, let alone this Court's precedents. Under the U.S. Supreme Court's longstanding precedents, abortion providers may sue on behalf of their patients. *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2118 (2020), *abrogated on other grounds by Dobbs*, 597 U.S. 215 (2022) ("We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations"). In *Dobbs*, the U.S. Supreme Court specifically denied certiorari on the question of whether to overturn these precedents. *See* Pet. for a Writ of Cert. at i, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (No. 19-1392), 2020 WL 3317135 (filed June 15, 2020) (asking the Court to consider "[w]hether abortion providers have third-party standing" to sue on behalf of their patients); *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (granting petition for writ of certiorari solely on the merits question). And in any event, as this Court has explained, Iowa's "standing jurisprudence is *more permissive than federal law*." *LS Power Midcontinent*, 988 N.W.2d at 331 (emphasis added) (citation omitted).

standing with the merits. *See* Appellants' Br. at 53. Even if providers had no constitutional right to provide abortions, they would still suffer an injury-in-fact when a statute forbids them from providing this care. *See Singleton*, 428 U.S. at 112–13 (holding that there is "no doubt" that abortion providers have standing to sue on behalf of their patients, even while declining to address the separate question of whether the providers had a "constitutional rights to practice medicine"). An injury-in-fact need not "be sustained while engaging in an activity separately protected by the Constitution"; rather, an injury-in-fact "can arise when plaintiffs are simply prevented from conducting normal business activities." *Isaacson v. Mayes*, 84 F.4th 1089, 1096 (9th Cir. 2023). This logic applies here in full force—the Six-Week Ban prevents Petitioners from providing abortions after six weeks LMP, a part of their normal health care activities, and threatens them with fines and license revocation if they do not comply. Such an injury squarely qualifies as an injury-in-fact.[13]

The State also cites this Court's opinion in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37 (Iowa 2021) ("*PPH 2021*") to

[13] This Court has also long recognized that the "doctrine of standing in Iowa is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government." *Godfrey v. State*, 752 N.W.2d 413, 425 (Iowa 2008). Even if Petitioners had not suffered an injury-in-fact, this case certainly presents an issue "of great public importance and interest" that should counsel towards finding standing.

argue that providers lack standing, again confusing standing with the merits. As the State notes, this Court held in *PPH 2021* that "any possible right a provider may have by way of performing the [abortion] procedure is no more than derivative of a woman's personal rights." *Id.* at 56. But *PPH 2021* dealt not with abortion providers' third-party standing to file a claim on behalf of their patients but rather with a separate merits question—whether abortion providers had a "freestanding due process right to provide an abortion" such that they could file their *own* claim under the unconstitutional conditions doctrine. *Id.* This Court made clear that its holding did "*not* implicate PPH's ability to bring a derivative constitutional challenge asserting a woman's rights," which would be analyzed under a separate "constitutional framework." *Id.* (emphasis added).

Several prudential considerations also weigh in favor of third-party standing—namely, the closeness of the provider-patient relationship and hindrances to patients bringing their own suits. The closeness of the provider-patient relationship is "patent" because a patient "cannot safely secure an abortion without the aid of a physician," and the decision to have an abortion is "one in which the physician is intimately involved." *Singleton*, 428 U.S. at 117. Of course, as with "'any general rule,' allowing an abortion provider to claim standing to vindicate the constitutional rights of a third party 'should

not be applied where its underlying justifications are absent.'" *PPH 2021*, 962 N.W.2d at 56 (quoting *id.* at 114). But contrary to the State's suggestions, the mere fact that an abortion is not a complex procedure and rarely results in complications that would require a follow-up appointment—a testament to the safety and routineness of the procedure—does not mean that providers and patients lack a close relationship. *See* Appellants' Br. at 56. Rather, as this Court explained in *PPH 2021*, the question is whether patients' right to an abortion is "inextricably bound up with the activity the litigant wishes to pursue." *PPH 2021*, 962 N.W.2d at 57 (quoting *Singleton*, 428 U.S. at 114); *see also Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (noting that the U.S. Supreme Court "has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights" (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975) (emphasis in original)). This is undoubtedly the case here, where Iowans rely for care on Petitioners, the only two abortion providers who operate health centers in the state. *See* App. 39 ¶21.[14]

[14] The State also insists that a conflict of interest exists between abortion providers and their patients because providers ostensibly "have financial interests in avoiding regulations and staying in business" that "can diverge from women's interest in protecting their health." Appellants' Br. at 59. Of course, nothing could be further from the truth. Petitioners and their patients share the same exact interest—ensuring "[a]ccess to safe and legal abortions." App. 13 ¶40.

Patients also face hindrances to bringing their own suits, which weighs in favor of third-party standing. The State blithely asserts that "[w]omen face no obstacle to bringing their own lawsuits." Appellants' Br. at 57. But neither the U.S. Supreme Court nor this Court has ever held that a patient must be prohibited *entirely* from bringing a suit for a provider to have third-party standing. Rather, this Court has made clear that patients can be "either *unlikely or* unable to assert their rights." *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008) (emphasis added); *see also Singleton*, 428 U.S. at 117 (allowing abortion providers to sue on behalf of their patients while recognizing that the "obstacles" to patients bringing their own suits "are not insurmountable").

In any event, pregnant Iowans seeking abortions face many obstacles to filing their own lawsuits. Abortions are time-sensitive health care, for which a delay of even a day or two could mean having to undergo a different type of procedure or forgo care altogether. When an Iowan learns that a law prohibits them from seeking care in the state, they may prefer to try to seek care in another state rather than work with a lawyer to file a lawsuit and risk missing the opportunity to have care elsewhere. Pregnant patients should be allowed to prioritize their own health over a potential lawsuit. Many Iowans may also wish to keep their decision to have an abortion private, whether because they face intimate partner violence or for any other reason. Once a

lawsuit is filed, anonymity can never be guaranteed; even if a patient can file under a pseudonym, allegations about their pregnancy could reveal their identity, especially to those from whom they most need to keep their decision private.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT PETITIONERS' CLAIMS ARE RIPE.

Standard of Review. This Court reviews a district court's holding that a claim is ripe for the correction of errors at law. *See State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 430 (Iowa 2021).

Preservation of Error. Error has been preserved because the issue was "both raised and decided by the district court." *Meier*, 641 N.W.2d at 537.

The State insists that Petitioners' claims were not ripe when the case was filed because the Governor signed the Six-Week Ban two days after Petitioners filed this case. In doing so, however, the State largely ignores this Court's precedent on ripeness, instead citing repeatedly case law about standing. *See* Appellants' Br. at 60–61; *see also Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 217 n.7 (Iowa 2012) (rejecting the State's ripeness argument when "[t]he State has advanced at most an argument as to why certain Producers may lack *standing*" (emphasis in original)). Under the proper doctrine, the district court correctly held that Petitioners' claims are ripe because they present an actual, present

controversy.

A claim is ripe "when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Wade*, 757 N.W.2d 618, 627 (Iowa 2008) (quoting *State v. Iowa Dist. Ct. for Black Hawk Cnty.*, 616 N.W.2d 575, 578 (Iowa 2000)). As this Court has explained, "[t]he basic rationale for the ripeness doctrine" is to prevent courts "from entangling themselves in abstract disagreements." *Iowa Dist. Court for Black Hawk Cnty.*, 616 N.W.2d at 578 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). To determine whether a claim is ripe, courts "must generally address two factors": (1) whether "the relevant issues [are] sufficiently focused so as to permit judicial resolution without further factual development", and (2) whether "the parties [would] suffer any hardship by the postponement of judicial action." *Iowa Coal Mining Co. v. Monroe Cnty.*, 555 N.W.2d 418, 432 (Iowa 1996); *see also Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636, 646 (Iowa 2013).

Petitioners' claims satisfy both of these factors. First, at the time Petitioners filed this case, the relevant issues were sufficiently focused to permit judicial resolution. When Petitioners filed this case, the Legislature had already passed the Six-Week Ban and the Governor had announced that she would sign it in two days. *See* App. 10 ¶¶28–30. The State insists that

Petitioners "swung before the pitch," Appellants' Br. at 61, and yet it has never suggested that any of the facts or arguments in this case would be any different had Petitioners waited two days to file. And by the time the district court issued the temporary injunction, the Governor had, in fact, signed the law. *See* App. 197. The district court thus has not "entangl[ed]" itself in an "abstract disagreement[]"—rather, it decided a concrete dispute between two parties. *Iowa Dist. Ct. for Black Hawk Cnty.*, 616 N.W.2d at 578.

Second, Petitioners would have suffered hardship by the postponement of judicial action. The Six-Week Ban's immediate effective date meant that, at the moment it was signed, it transformed health care that had been legal in Iowa for decades into unlawful conduct, threatening Petitioners' staff with the revocation of their medical licenses and fines of up to ten thousand dollars. During the few days that the Ban was in effect—before the district court issued a temporary injunction—Petitioners' patients lost access to critical health care. To maintain continuity of care and to avoid irreparable harm, Petitioners filed this case soon after the Governor announced that she would sign the law. Had they waited until the Governor had signed before filing suit, they and their patients would have suffered even further hardship from the resulting denial of abortion access.

This is consistent with how this Court has treated past challenges to

statutes with immediate effective dates. In 2017, the General Assembly passed a bill imposing abortion restrictions that also had an immediate effective date. *See* Senate File 471, 87th Gen. Assemb. (Iowa 2017). Governor Terry Branstad announced he would sign the bill into law on May 5, 2017. Because of the immediate effective date and because the Governor had announced a specific date when he would sign the bill, PPH filed suit and sought a temporary injunction on May 3, 2017, two days before the bill was to be signed. Pet. for Declaratory J. & Injunctive Relief, ¶ 1, *Planned Parenthood of the Heartland, Inc. v. Reynolds* (Polk Cnty. Dist. Ct. May 3, 2017) (No. EQCE081503) (filed as *Planned Parenthood of the Heartland v. Branstad*). On May 4, the day before the announced signing date, the district court held a hearing and ruled against PPH, stating its ruling would "become effective immediately upon the governor signing the bill." Ruling on Pls.' Pet. for Temp. Inj. at 4, *id.* On May 5, the day the law was to be signed, PPH sought an interlocutory appeal or alternatively a temporary injunction at this Court; it also sought a stay of the district court's order. Appl. for Interlocutory Appeal, *Planned Parenthood of the Heartland v. Branstad* (Iowa Sup. Ct. May 5, 2017) (No. 17–0708). The same day, a single justice of this Court issued a ruling staying the district court order and granting PPH's temporary injunction request. Order, *id.*; *see also PPH 2018*, 915 N.W.2d at 213–14

(describing procedural history). At no point during the appeal of the temporary injunction or the appeal on the merits did this Court or the district court hold that PPH's claims were unripe. In short, even though PPH filed suit before Governor Branstad signed the legislation—and even though the district court ruled before he signed—its claims were ripe when it filed because the Governor had announced the date when he would sign the bill at issue.

In any event, even if the case was not ripe when filed, the district court in this case *did* wait until the Governor signed the law before issuing the temporary injunction, curing any alleged deficiency. As this Court has noted in the context of an administrative process, courts should not "routinely dismiss[]" a case that was filed "prior to the completion of the administrative process" for a lack of ripeness—rather, courts should be encouraged, "whenever it is feasible to do so, to permit the case to remain on the docket while awaiting the administrative determination." *Reedy v. White Consol. Indus., Inc.*, 503 N.W.2d 601, 604 (Iowa 1993). The same logic applies here; the case remained on the district court's docket while awaiting the Governor's signature. Neither Petitioners nor the State would have been aided by dismissal of a case presenting an actual, present controversy.

CONCLUSION

For the foregoing reasons, Petitioners-Appellees request that this Court

affirm the district court's preliminary injunction.

REQUEST FOR ORAL SUBMISSION

Petitioners-Appellees request oral argument.

Respectfully submitted,

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COST CERTIFICATE

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

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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 11,855 words, excluding those portions of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 14, 2024, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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Dated: February 14, 2024