IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0804

PLANNED PARENTHOOD OF THE HEARTLAND, INC.,
Petitioner-Appellee,

vs.

KIM REYNOLDS, IOWA DEPARTMENT OF HUMAN SERVICES, KELLY GARCIA, in her official capacity as director of the Iowa Department of Human Services, IOWA DEPARTMENT OF PUBLIC HEALTH, and GERD CLABAUGH in his official capacity as director of the Iowa Department of Public health,
Respondent-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE PAUL SCOTT, JUDGE

APPELLANTS' BRIEF

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ROUTING STATEMENT

This case should be retained by this Court because it presents a substantial constitutional question as to the validity of a statute. Iowa R. App. P. 6.1101(2)(a).

STATEMENT OF THE CASE

Nature of the Case

Respondent-Appellants Kim Reynolds, the Iowa Department of Human Services and its director, Kelly Garcia, and the Iowa Department of Public Health and its director, Gerd Clabaugh,[1] (collectively referred to herein as "the State") appeal from the grant of summary judgment in favor of Planned Parenthood and the denial of their cross-motion for summary judgment.

Course of Proceedings & Facts

This case concerns eligibility for two grant programs aimed at educating Iowa teens about sex, pregnancy, and related topics. The Community Adolescent Pregnancy Prevention program, known as CAPP, is administered by the Iowa Department of Human Services

[1] Respondent-Appellant Clabaugh retired and was succeeded by Respondent-Appellant Kelly Garcia as interim director of the Iowa Department of Public Health on August 1, 2020. A motion to substitute pursuant to rules 6.109(3) and 1.226 will be filed with this brief.

and receives funding through a federal grant. Stipulated Facts ¶ 8; App. 354. The State contracts with entities through a competitive bidding process to provide state-selected evidence-based or evidence-informed comprehensive sex education and adolescent pregnancy programs. Stipulated Facts ¶ 9; App. 354. The Personal Responsibility Education Program, known as PREP, was authorized by the federal government as part of the Affordable Care Act in 2010. Stipulated Facts ¶ 10; App. 354. PREP funds are provided to states to educate young people about abstinence, contraception, and related topics. Stipulated Facts ¶ 10; App. 354. PREP contracts are awarded by the Iowa Department of Public Health for services in selected counties in Iowa. Stipulate Facts ¶ 11; App. 354. The curricula for the CAPP and PREP programs do not include materials or discussion concerning abortion, and those funds may not be used for abortions. Stipulated Facts ¶¶ 27, 32; App. 356-57.

Planned Parenthood is an abortion provider. In 2017, Planned Parenthood performed approximately 95 percent of all abortions in Iowa. Stipulated Facts ¶ 15; App. 355. In 2018, Planned Parenthood received 32 percent of its revenue from "patient services," including abortions. Stipulated Facts ¶¶ 19, 21; App. 355. In 2017, they received

almost 43 percent from "patient services." Stipulated Facts ¶¶ 20, 21; App. 355. There is only one other abortion provider in Iowa whose services are generally available to the public. Stipulated Facts ¶ 16; App. 355. That provider operates one clinic located in Iowa City. Stipulated Facts ¶ 16; App. 355. In addition to performing abortions, Planned Parenthood advocates for access to abortion and affiliates with organizations who perform or advocate for access to abortion. Stipulated Facts ¶¶ 17, 18, 22, 23; App. 355-56. Planned Parenthood has received CAPP funding since 2005 and PREP funding since 2012. Stipulated Facts ¶ 24; App. 356.

In 2019, the legislature amended the eligibility requirements for CAPP and PREP grantees to exclude:

> [A]ny applicant entity that performs abortions, promotes abortions, maintains or operates a facility where abortions are performed or promoted, contracts or subcontracts with an entity that performs or promotes abortions, becomes or continues to be an affiliate of any entity that provides or promotes abortions, or regularly makes referrals to an entity that provides or promoted abortions or maintains or operates a facility where abortions are performed.

Stipulated Facts Appendix P.264-65; App. 625-26. The law creates an exception for "a nonpublic entity that is a distinct location of a

nonprofit health care delivery system," if that location provides CAPP or PREP programming, "but does not perform abortions or maintain or operate as a facility where abortions are performed." Stipulated Facts Appendix P.264-65; App. 625-26. If the amendment is upheld, Planned Parenthood will not stop performing or promoting abortions to maintain eligibility for CAPP and PREP funding. Stipulated Facts ¶ 54; App. 360.

Planned Parenthood filed a lawsuit challenging the amendment to the eligibility requirements and obtained a temporary injunction on May 29, 2019. Stipulated Facts ¶ 38; App. 357. After the temporary injunction, Planned Parenthood obtained CAPP and PREP contracts. Stipulated Facts ¶¶ 39-43; App. 358. The parties submitted the matter to the district court on cross-motions for summary judgment and a stipulated record. After a hearing, the district court granted summary judgment in favor of Planned Parenthood and permanently enjoined the amendment to the eligibility requirements. Ruling 05/06/20; App. 915-26.

ARGUMENT

I. Excluding Abortion Providers from Eligibility for CAPP and PREP Grants Does Not Violate the Equal Protection Clause.

Preservation of Error

In its motion for summary judgment, Planned Parenthood argued that the amendment violated the equal protection clause of the Iowa constitution and that it unconstitutionally conditioned government funding on Planned Parenthood's abandonment of state constitutional rights to free speech, free association, and substantive due process. The State countered each of Planned Parenthood's arguments in its cross-motion for summary judgment and its resistance to Planned Parenthood's motion. The district court concluded that the amendment violated the equal protection clause and did not address Planned Parenthood's remaining claims. Ruling P.6; App. 920. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before [this Court] will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Because the district court decided only the equal protection challenge, it is the only claim that is properly preserved for this Court's review.

Standard of Review

Summary judgment rulings are reviewed for correction of errors at law. *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 30 (Iowa 2019). This Court reviews constitutional claims de novo. *Id.* at 31. As this Court has explained:

> We review constitutional challenges to a statute de novo. In doing so, we must remember that statutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, the challenger must refute every reasonable basis upon which the statute could be found to be constitutional. Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

Id. (cleaned up).

Merits

Article I, section 6 of the Iowa Constitution provides, "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. That section, known as the equal protection clause, "is essentially a direction that all persons similarly situated should be treated alike." *Varnum v. Brien*, 763

N.W.2d 862, 878–79 (Iowa 2009) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI)*, 675 N.W.2d 1, 7 (Iowa 2004)). As a result, to prove an equal protection violation a plaintiff must first establish that the challenged statute treats similarly situated individuals differently. *AFSCME*, 928 N.W.2d at 32.

A. Planned Parenthood and other abortion providers are not similarly situated to non-abortion providers.

The district court concluded that "legal abortion providers are similarly situated to non-abortion providers who seek a government grant that has nothing to do with abortions." Ruling P.6; App. 920. But they are not. To explain why, the State notes at the outset this Court's comment in *AFSCME* that, usually, "determining whether classifications involve similarly situated individuals is intertwined with whether the identified classification has any rational basis." *AFSCME*, 928 N.W.2d at 32.

The curricula for the CAPP and PREP programs are selected by the State and do not include material on or discussion of abortion. Stipulated Facts ¶¶ 25, 26, 27; App. 356. CAPP and PREP funds cannot be used for abortion. Stipulated Facts ¶ 32; App. 357. Those facts notwithstanding, it is not accurate to describe the grants as

having "nothing to do with abortions." Ruling P.6; App. 920. The CAPP and PREP programming is designed to provide comprehensive sex education to Iowa teens and includes discussion of topics such as abstinence, sexual activity, contraception, sexually transmitted diseases, and teen pregnancy. Stipulated Facts ¶¶ 9, 10, 11; App. 354.

Planned Parenthood is perhaps the most well-known abortion provider and advocate for access to abortion in the country. Almost all abortions in Iowa are provided by Planned Parenthood. Stipulated Facts ¶ 15; App. 355. It is incredible to conclude that the State could contract with Planned Parenthood to deliver comprehensive sex education to Iowa teens without creating a perception that it at least implicitly approves of Planned Parenthood's performance of and advocacy in favor of abortions. That perception is especially important considering the content of the CAPP and PREP curricula, and it distinguishes Planned Parenthood and other abortion providers from non-abortion providers for the purposes of the challenged law. *See Varnum*, 763 N.W.2d at 882.

There is no question that "the constitutional pledge of equal protection does not prohibit laws that impose classifications." *Varnum*, 763 N.W.2d at 882. "Many statutes impose classifications

by granting special benefits or declaring special burdens, and the equal protection clause does not require all laws to apply uniformly to all people." *Id.* (internal citations omitted). As a result, Planned Parenthood faces a "narrow threshold test" providing that "if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause." *Id.* Because Planned Parenthood and other abortion providers are not similarly situated to non-abortion providers for purposes of the challenged law, the district court erred when it granted summary judgment in their favor.

B. Planned Parenthood is ineligible for CAPP and PREP grants because the exclusion of abortion providers survives the rational basis test.

As a general matter, the State may do what it wishes with public funds, a principle that allows it to subsidize some organizations but not others and to condition receipt of public funds on compliance with certain obligations. *See Rust v. Sullivan*, 500 U.S. 173, 192–94 (1991). The challenged law excludes as eligible grant applicants the following: (1) entities that perform abortions or maintain or operate facilities where abortion is performed, (2) entities that promote

abortions or maintain or operate facilities where abortion is promoted, (3) entities that contract or subcontract with entities that perform or promote abortions, (4) entities that become affiliates of any entity that performs or promotes abortion, and (5) entities that regularly make referrals to an entity that provides or promotes abortion or maintains or operates a facility where abortions are performed or promoted. Stipulated Facts Appendix P.264-65; App. 625-26.

Planned Parenthood is excluded as an eligible grantee under all five categories. Stipulated Facts ¶¶ 14, 15, 17, 18, 22, 23. As a result, it must show that all five are unconstitutional to obtain relief. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019) (en banc). Because the exclusion of entities in the first category—abortion providers—does not violate the constitution, Planned Parenthood is ineligible and this Court need not and should not decide whether the remaining categories are constitutional. *See Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 863 (Iowa 2019) (recognizing that the "time-honored doctrine of constitutional avoidance" counsels against deciding unnecessary constitutional questions).

In most equal protection cases, the "very deferential" rational basis test applies. *Varnum*, 763 N.W.2d at 879. Classifications based on race, alienage, or national origin and those affecting fundamental rights are subject to heightened scrutiny. *Id.* at 880. Planned Parenthood is not a member of a protected class. It argued in the district court that heightened scrutiny should nevertheless apply because abortion is a fundamental right according to this Court's decision in *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 237 (Iowa 2018). But that decision has no application to this case. In that case, this Court recognized as fundamental *a woman's* "ability to decide whether to continue or terminate a pregnancy." *Id.* Neither the United States Supreme Court nor this Court have ever recognized a due process right to perform abortions. The Sixth Circuit explained recently that only one federal circuit court decision has recognized a provider's right to perform abortions, and it did so "without meaningful analysis or authority, and most importantly, it did so in a case in which the State did not challenge the existence of the right." *Hodges*, 917 F.3d at 913-15.

The challenged law does not violate a woman's right to decide whether to continue or terminate a pregnancy. It does not condition a

woman's access to CAPP or PREP programming on her refusal to obtain an abortion. In fact, the law does not impact access to abortion at all. The record is clear that Planned Parenthood will not cease performing abortions to maintain eligibility for these programs. Stipulated Facts ¶ 54; App. 360. Because the exclusion of abortion providers does not involve a suspect class or a fundamental right, the rational basis test is appropriate.

"The rational basis test defers to the legislature's prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational relationship between the classification and the policy justification." *Varnum*, 763 N.W.2d at 879. Importantly, courts will uphold classifications based on judgments the legislature could have made, without requiring proof or evidence that they actually did make them. *AFSCME Iowa Council 61*, 928 N.W.2d at 33 (quoting *King v. State*, 818 N.W.2d 1, 30 (Iowa 2012)); *see also id.* at 37 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually

motivated the legislature.... 'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.").

The State presented the district court with three plausible policy justifications for excluding abortion providers from eligibility for CAPP and PREP grants. First, the State is allowed to express a preference for childbirth over abortion. Second, the State could have concluded that it does not want to invite entities that derive significant revenue from abortions into these programs as sex educators. Third, the State could have concluded that it does not want to indirectly subsidize the efforts of abortion providers. The district court rejected all three, largely on the basis that a carve out for nonpublic entities that are distinct locations of a nonprofit health care delivery system and that do not perform abortions or maintain or operate as a facility where abortions are performed renders the law irrationally over- and under-inclusive. Ruling P.8-11; App. 922-25.

The first plausible policy justification, favoring childbirth over abortion, enjoys a rational relationship with the classification at issue—favoring entities that do not perform abortions over those that

do. The district court concluded that because the CAPP and PREP curricula do not include discussion of abortion and because the funds cannot be used for abortion, "this legislation does nothing to serve that interest." Ruling P.8; App. 922. But that conclusion is both insufficiently deferential to the legislature under the rational basis test and wrong as a matter of fact.

Employing abortion providers like Planned Parenthood to deliver the State's message on sex education and teen pregnancy sends a message to students, parents, and all Iowans that the State at least implicitly approves of Planned Parenthood's performance of and advocacy in favor of abortions. As explained elsewhere in the State's brief, Planned Parenthood is perhaps the most well-known abortion provider and advocate for abortion in the country, if not the world. While the curricula for the grant programs themselves do not include discussion of abortion, the subject matter involving sex education and teen pregnancy makes the legislature's interest in expressing a preference against abortion rationally related to the classification.

Second, the State could conclude that it does not want sex education and teen pregnancy programming provided by entities who derive a significant portion of their revenue from abortion. In 2018,

Planned Parenthood received 32 percent of its revenue from "patient services," including abortions. Stipulated Facts ¶¶ 19, 21; App. 355. In 2017, they received almost 43 percent from "patient services." Stipulated Facts ¶¶ 20, 21; App. 355. It is not irrational for the legislature to attempt to avoid subsidizing the development of educational relationships between Iowa teens and abortion providers, especially for sex education and teen pregnancy programming.

Finally, the State could conclude that it does not want to indirectly subsidize abortion providers themselves. Planned Parenthood averred in its Petition that exclusion from the CAPP and PREP grant programs will "stall some of the recent momentum" it has gained and will cause it "reputational harm." Petition ¶ 47-48; App. 16-17. But the legislature could conclude that it does not want to assist Planned Parenthood's "momentum" nor does it want to boost Planned Parenthood's reputation or the reputation of other abortion providers.

The district court also concluded that all three of the State's proposed justifications are doomed by over- and under-inclusion. Ruling P.9; App. 923. Specifically, the parties agreed that Unity Healthcare DBA Trinity Muscatine is a CAPP grantee and that it is an

affiliate of UnityPoint Health, a nonprofit health care delivery system. Stipulated Facts ¶¶ 48, 49; App. 359. UnityPoint Health performs abortions. Stipulated Facts ¶ 49; App. 359. The district court concluded that the carve out for distinct locations of a nonprofit health care delivery system "allow[s] other possible recipients of the grants to provide a vast array of abortion-related services, such as promoting abortion or even, possibly, referring patients to PPH for an abortion procedure." Ruling P.9; App. 923. But the record does not support the district court's conclusion.

This Court has held that when applying the rational basis test, only an "extreme degree[] of overinclusion and underinclusion in relation to any particular goal" crosses the line. *Racing Ass'n Of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 10 (Iowa 2004). The narrow exception for entities like Trinity Muscatine—who do not themselves perform abortions—is not an "extreme degree" of under-inclusion. Planned Parenthood performs substantially all abortions in Iowa. Stipulated Facts ¶ 15; App. 355. The record shows that there is only one other abortion provider whose services are generally available to the public. Stipulated Facts ¶ 16; App. 355. The notion that another potential grantee could provide a "vast array of abortion-related

services" is not supported by those facts. A health care delivery system like UnityPoint Health is not associated with the performance of or advocacy for abortions in the same way as Planned Parenthood, even though they may perform a small number of abortions or refer a small number of patients for them. Even less so an entity like Trinity Muscatine, who does not perform abortions at all.

The district court also held that the law is irrationally over-inclusive because Planned Parenthood could cease performing abortions and would still be ineligible because they affiliate with entities that perform abortions. Ruling P.9-11; App. 923-25. Its conclusion is wrong for several reasons. First, Planned Parenthood will not cease performing abortions to maintain eligibility for the grants. Stipulated Facts ¶ 54; App. 360. Nothing in the record suggests that any other abortion provider will cease performing abortions to remain eligible for CAPP and PREP funds. Second, any over-inclusiveness resulting from the district court's hypothetical is the result of the exclusion of entities that affiliate with abortion providers, not the exclusion of the providers themselves. Even if it were irrationally over-inclusive to prohibit entities that affiliate with

abortion providers from funding—and it is not—that prohibition is severable from the exclusion of abortion providers.

This Court has held that "[w]hen parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts are infirm, we may sever the offending portion from the enactment and leave the remainder intact." *Breeden v. Iowa Dept. of Corrections*, 887 N.W.2d 602, 608 (Iowa 2016) (internal quotation omitted). It said that it will attempt "to save as much of the statute as possible, eliminating only that which is necessary to make it constitutionally sound." *Id.* (internal quotation omitted). "Severability protects an act from total nullification if discrete portions are unconstitutional." *Id.* Indeed, the severability doctrine is enshrined in the Code:

> If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.

Iowa Code § 4.12. This Court need not reach the constitutionality of excluding entities who promote abortions or who affiliate with organizations who provide or promote abortions from eligibility for these grants because even if it determined that those provisions are

unconstitutional, the law requires that it sever only those portions from the challenged law and allow the rest—including the exclusion of abortion providers—to remain intact.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Planned Parenthood should be reversed.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

COST CERTIFICATE

We certify that the cost of printing the Appellee's Brief and Argument was the sum of $ 0.

Respectfully submitted,

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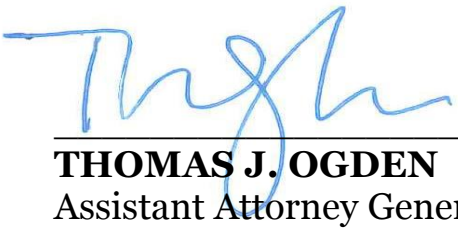

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,569** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: December 9, 2020

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