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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, IOWA DEPARTMENT OF PUBLIC HEALTH, and KELLY GARCIA, in her official capacity as director of the Iowa Department of Human Services and Interim Director of the Iowa Department of Public Health,
Respondent-Appellants.

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

APPELLANT'S REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

JEFFREY S. THOMPSON
Solicitor General of Iowa

THOMAS J. OGDEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
thomas.ogden@ag.iowa.gov

ATTORNEYS FOR APPELLANTS

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Derive, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/derive

REPLY TO APPELLEE'S ARGUMENT

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

Planned Parenthood argues that, should this Court conclude that the exclusion of abortion providers as eligible grantees does not violate the equal protection clause when applying the deferential rational basis test, it should go on to apply the heightened scrutiny that is appropriate for laws that infringe on fundamental rights. Planned Parenthood claims that the challenged law affects its fundamental right to free speech and association, and it argues that it possesses a fundamental due process right to perform abortions. Appellee's Br. P.40. The State does not concede that the challenged law affects Planned Parenthood's right to free speech or association, but this Court need not reach that question.

Planned Parenthood argues that this Court must determine the level of scrutiny by examining "the 'challenged statutory scheme' as a whole." Appellee's Br. P.41 (quoting *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004). In other words, since the challenged law creates a list of entities who are ineligible based on distinct conduct, strict scrutiny should apply to the entire list if it applies to any item on the

list. But the legal authority it cites, *In re S.A.J.B*, says no such thing. *In re S.A.J.B*. involved an equal protection challenge to the State's failure to provide counsel to indigent parents facing termination proceedings under chapter 600A when it provided counsel to indigent parents facing termination under chapter 232. *In re S.A.J.B.*, 679 N.W.2d at 647-48. It is true that the decision used the phrase "challenged statutory scheme," but it is otherwise totally inapposite.

In Planned Parenthood's second attempt, it argues that the "relevant classification" created by the challenged law places entities that provide or promote abortion on one side of the line and entities that do not on the other. Appellee's Br. P.41-42. If any fundamental right is affected by an entity's placement on one side of the line or the other, Planned Parenthood would have this Court apply strict scrutiny to all the relevant conduct creating the classification. But that argument ignores the doctrine of severability. Iowa law states that if *any* provision of an act or statute or *any application to any person or circumstance* is unconstitutional, it does not affect other provisions or applications that can be given affect. Iowa Code § 4.12.

If the right to speech or association prohibits the State from excluding entities that promote abortion or affiliate with entities that

promote or perform abortion, that invalidity does not affect the exclusion of entities that perform abortions and the law requires that those provisions be severed, leaving in place all constitutional applications. For that reason this Court must consider the constitutionality of each category of excluded entity individually.

Planned Parenthood's statement that the severability doctrine "pertains to the appropriate scope of relief, not to the prerequisite merits question of whether a law, or any portion thereof, is constitutional" doesn't even make sense. It quotes *Breeden*—"[s]everability protects an act from total nullification if discrete portions are unconstitutional"—but that is precisely the State's argument. *Breeden v. Iowa Dept. of Corr.*, 887 N.W.2d 602, 608 (Iowa 2016). The doctrine protects parts of a statute that can be constitutionally applied—like the exclusion of abortion providers—even if "discrete portions"—like the exclusion of abortion promotors—are unconstitutional for reasons that do not apply to the rest of the law—like article 1 section 7 of the Iowa constitution. If the legislature passed a law that says, "you must pay taxes, and you must not complain about it," this Court would not apply strict scrutiny to the

requirement to pay taxes just because it would apply it to the prohibition against complaining about it.

II. The Unconstitutional Conditions Doctrine Does Not Prohibit the State from Declining to Enlist Abortion Providers to Teach Sex Education to Iowa Teens.

In appeals from a grant of summary judgment, this Court has held that it "may affirm the ruling on a proper ground urged but not relied upon by the trial court." *Krohn v. Judicial Magistrate Appointing Comm'n*, 239 N.W.2d 562, 563 (Iowa 1976). In its brief, Planned Parenthood argues that even if the district court erred when it held that the challenged law violates the equal protection clause, this Court can affirm on the ground that the law creates an unconstitutional condition. But it does not.

A. The challenged law neither coerces Planned Parenthood to give up its constitutional rights nor penalizes it for exercising them.

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). But it may not deny an individual a benefit on a basis that infringes his constitutional rights. *Agency for Int'l Dev. v. All. for*

Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013). The unconstitutional conditions doctrine "prevents the government from awarding or withholding a public benefit for the purpose of coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012). The United States Supreme Court has repeatedly upheld abortion-related conditions on government funding under the unconstitutional-conditions doctrine. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Harris v. McRae*, 448 U.S. 297, 314-15 (1980); *Maher v. Roe*, 432 U.S. 464, 474 (1977).

"Courts often struggle with when to apply the unconstitutional conditions doctrine, and the doctrine's contours remain unclear despite its long history." *Planned Parenthood Ass'n of Hidalgo Cty. Texas, Inc. v. Suehs*, 692 F.3d 343, 349 (5th Cir. 2012). Iowa decisions applying the doctrine are rare. But several principles have emerged from the federal courts. Most important, the doctrine "only applies if the government places a condition on the exercise of a constitutionally protected right." *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015).

In 2019, the Sixth Circuit issued an *en banc* decision on similar facts; it explained the doctrine as follows:

> First a word or two about unconstitutional conditions. The United States Constitution does not contain an Unconstitutional Conditions Clause [nor does the Iowa constitution]. What it does contain is a series of individual rights guarantees, most prominently those in the first eight provisions of the Bill of Rights and those in the Fourteenth Amendment. Governments generally may do what they wish with public funds, a principle that allows them to subsidize some organizations but not others and to condition receipt of public funds on compliance with certain obligations. What makes a condition unconstitutional turns not on a freestanding prohibition against restricting public funds but on a pre-existing obligation not to violate constitutional rights. The government may not deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights. Otherwise, the government could leverage its spending authority to limit, if not eliminate, the exercise of this or that constitutional right. In the words of the Supreme Court, the principle "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."

Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908, 911 (6th Cir. 2019). As in *Hodges*, Planned Parenthood in this case argues that the challenged law imposes an unconstitutional condition on its exercise of the right to speech and association and on its exercise of

an alleged due process right to perform abortions. The *Hodges* court did not consider the free speech claim because it held that Ohio could exclude entities that perform abortions without violating the due process clause. *Hodges*, 917 F.3d at 911.

The unconstitutional conditions doctrine does not apply unless the government is "awarding or withholding a public benefit *for the purpose of* coercing the beneficiary to give up a constitutional right or to penalize his exercise of a constitutional right." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d at 986 (emphasis added). In the words of the United States Supreme Court, the unconstitutional conditions doctrine "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606. There is an important difference between the government choosing with whom it wants to contract to deliver its message and the government attempting to influence behavior through funding conditions or to penalize constitutionally protected activity.

Some examples from federal unconstitutional conditions cases are instructive. In *Perry v. Sindermann*, the Unites States Supreme Court explained that the state cannot "penalize and inhibit[]"

constitutionally protected rights by denying benefits. 408 U.S. 593, 597 (1972). That case involved a junior college professor who was not rehired based on his public criticism of the college. *Id.* at 595. *Regan v. Taxation With Representation of Washington* involved an organization that challenged its inability to obtain a tax exemption to subsidize its lobbying activity. 461 U.S. 540, 545 (1983). *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, involved a threat by the federal government to remove *all* funding from institutions of higher education unless they permitted military recruiters to access students on the same basis as other employers. 547 U.S. 47, 55 (2006). In each case, the *object* of the legislation was not to deny benefits, but to change behavior. The government did not want the professor to criticize the college. It did not want 501(c)(3) corporations to lobby. It did not want institutions of higher education to deny access to military recruiters. That is not this case.

This case is about the state of Iowa choosing with whom it contracts to deliver its message. "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). With the challenged law, the

State is not seeking to coerce Planned Parenthood to cease providing or promoting abortions. The total amount of the grants at issue in this case is approximately $548,450 over two years. Stipulated Facts ¶ 42-43; App. 358. That would be about 1% of Planned Parenthood's revenue on a per year basis. Stipulated Facts ¶ 21; App. 355. Planned Parenthood received more than ten times that amount from "patient services," including abortions, in 2018 alone. Stipulated Facts ¶ 19; App. 355.

Planned Parenthood argues that through the exclusion of abortion providers from eligibility for these grants, "the State is attempting to leverage its funding control to pressure those who speak and work in favor of safe and lawful abortion to abandon their efforts." Appellee's Br. P.45. The record shows that is not the case. The State could not hope to "pressure" Planned Parenthood to cease performing or advocating for abortion by withholding a relatively small sex education grant. Rather, the challenged provisions reflect the State's unwillingness to contract with abortion providers to deliver its messaging about sex education and teen pregnancy prevention. The portions of the legislative debates to which Planned Parenthood cites—although the State disputes the relevance of any

individual legislator's statement to a determination of the purpose of a statute—are to that effect. *See* Appellee's Br. P.30-31. Other courts have held that a state should not be "forced to enlist organizations as health care providers and message-bearers that were also abortion advocates." *Suehs*, 692 F.3d at 350.

Planned Parenthood cites the *Open Society* case for the proposition that the "'relevant distinction … is between conditions that define the limits of the government spending program … and conditions that seek to leverage funding to regulate' the exercise of constitutional rights 'outside the contours of the program itself.'" Appellee's Br. P.54 (quoting *Agency for Int'l Dev. v. All. for Open Society Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). But the challenged law does not seek to regulate the exercise of constitutionally protected activity any more than a sign at a carnival proclaiming that "you must be THIS TALL to ride the rollercoaster" seeks to drive up demand for platform shoes or stilts. Rather, the law merely expresses the legislature's unwillingness to enlist abortion providers as sex educators under the CAPP and PREP grant programs. Under these circumstances, it is not necessary to examine the law within the framework of the unconstitutional conditions doctrine. *Id*. But even if

the Court does apply the doctrine, Planned Parenthood cannot prevail because it does not have a constitutionally protected right to perform abortions.

B. Planned Parenthood does not possess a due process right to perform abortions.

Recognizing a due process right to perform abortions is inconsistent with this Court's decision in *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018), and with federal precedent. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), the plurality opinion examined a claim that the informed consent requirement violated the right to an abortion. It held that it did not, explaining that, "[t]he doctor-patient relation *does not underlie* or override the two more general rights under which the abortion right is justified: *the right to make family decisions and the right to physical autonomy*." *Id.* (emphasis added). In *Planned Parenthood of the Heartland v. Reynolds*, this Court recognized as fundamental *a woman's* "ability to decide whether to continue or terminate a pregnancy," and grounded that decision in the importance of "[a]utonomy and dominion over one's body." 915 N.W.2d 206, 237 (Iowa 2018).

“Never has it been suggested,” the Ninth Circuit has stated, “that if there were no burden on a woman's right to obtain an abortion, medical providers could nonetheless assert an independent right to provide the service for pay.” *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 689 (9th Cir. 2017). Indeed, the weight of federal circuit authority suggests that no such independent right to perform abortions exists. *See Hodges*, 917 F.3d at 913-15; *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986–88 (7th Cir. 2012); *but see Planned Parenthood Ass'n of Utah v. Herbert,* 828 F.3d 1245, 1260 (10th Cir. 2016).

Planned Parenthood nevertheless suggests that it has a due process right that is “coextensive” with a woman’s right to choose to terminate a pregnancy because she cannot do so without the assistance of a physician. Appellee’s Br. P.55. It claims, citing *Planned Parenthood of the Heartland v. Reynolds*, that this Court has “observed” that, “abortion providers play an intimate and often necessary role with respect to a patient’s ‘deeply personal’ decision to have an abortion.” Appellee’s Br. P.55. The State is unable to locate any such “observation” in that decision, but more importantly, the challenged law does not interfere at all with a woman’s decision

whether to terminate a pregnancy, nor will it impact her ability to do so if upheld. Stipulated Facts ¶ 54; App. 360; *see also Hodges*, 917 F.3d at 916 (no reason to conclude that exclusion of abortion providers from grant funding would affect access to abortion where evidence showed that Planned Parenthood would not cease performing abortions in order to maintain eligibility).

Any "constitutional status" afforded to Planned Parenthood's performance of abortions is not "coextensive" with a woman's right to choose, it is "derivative" of it. *See Casey*, 505 U.S. at 884. That is a critical difference. To "coexist" means "to exist together or at the same time." *Coexist, Merriam-Webster*, https://www.merriam-webster.com/dictionary/coexist. To "derive" means "to take, receive, or obtain especially from a specified source." *Derive*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/derive. For purposes of the due process clause, Planned Parenthood must derive constitutional protection for its performance of abortion from a woman's right to choose. It cannot do so in this case. As the *Hodges* decision put it:

> To have an unconstitutional condition, the State must impose the condition on the individual (or entity) with the constitutional right. If there's no right, there's no

> unconstitutional condition. And the providers have no such constitutional right. The point of the doctrine is to protect the underlying right: a woman's right of access to abortion services without an undue burden. It is not to leverage a constitutional condition into an unconstitutional one while freeing the provider from either asserting a valid right of its own or showing any undue burden on anyone.

Hodges, 917 F.3d at 916.

C. Because the challenged law can be constitutionally applied to Planned Parenthood as an abortion provider, this Court need not consider whether the exclusion of entities who promote abortions imposes an unconstitutional condition. But if it does reach that claim, the challenged law survives.

As an initial matter, this Court need not decide Planned Parenthood's unconstitutional conditions claim related to the right to free speech and association if it concludes that the due process claim fails. In other words, if the State can constitutionally exclude abortion providers from the CAPP and PREP grant programs, Planned Parenthood cannot participate even if the State cannot constitutionally exclude entities that promote abortions or affiliate with abortion providers. "[I]t is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is

some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (citation omitted); *accord Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 863 (Iowa 2019). Under "the fundamental principle of judicial restraint, … courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted); *Pearson v. Callahan*, 555 U.S. 223, 241 (2009).

If the Court does consider the free speech and association claims, they do not offer a viable alternative ground to affirm the district court's ruling. A case dealing with very similar facts from the Fifth Circuit holds that states may choose with whom they contract to deliver the government's message. *Suehs*, 692 F.3d at 349-50. In that case, Texas passed a law requiring that organizations who participate in a Medicaid-like program "must not perform or promote elective abortions or be affiliates of entities that perform or promote elective abortions." *Id.* The Fifth Circuit held that excluding organizations

that promote elective abortions from the state program operates as a direct regulation of the content of the program. It explained:

> The policy expressed in the WHP is for public funds to subsidize non-abortion family planning speech to the exclusion of abortion speech. ... Texas's authority to promote that policy would be meaningless if it were forced to enlist organizations as health care providers and message-bearers that were also abortion advocates. The authority of Texas to disfavor abortion within its own subsidized program is not violative of the First Amendment right, as interpreted by *Rust v. Sullivan*. Consequently, Texas's choice to disfavor abortion does not unconstitutionally penalize the appellees' speech.

Id. at 350. The facts of this case are materially identical except that the scope of the CAPP and PREP programs is narrower; they are focused primarily on sex education and teen pregnancy prevention, making the State's case for its ability to exclude organizations that promote elective abortions as government speakers even stronger.

Planned Parenthood relies on the *Open Society* decision for the proposition that, when choosing a messenger, the government crosses a constitutional line when it attempts to regulate the messenger's speech outside the government program. Appellee's Br. P.48. It claims that the United States Supreme Court rejected the government's argument that it should not have to contract with

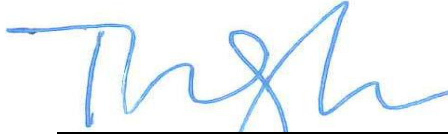
entities whose private, non-funded speech would undermine or confuse the government's message. Appellee's Br. P.48. But they misstate the holding. The Court did not reject the government's justification, but it recognized that the government had "go[ne] beyond preventing recipients from using private funds in a way that would undermine the federal program" by requiring recipients to "pledge allegiance" to the government message by adopting a specific policy. *AOSI*, 570 U.S. 220-21. That is not this case. CAPP and PREP grantees do not have to adopt a policy opposing abortion. But the State is rightfully concerned that its message on sex education and teen pregnancy prevention will be undermined or confused if it is forced to hire abortion advocates to deliver that message. *See Suehs*, 692 F.3d at 349-50.

CONCLUSION

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

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



THOMAS J. OGDEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
thomas.ogden@ag.iowa.gov

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:

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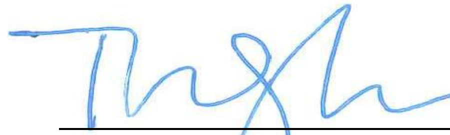

THOMAS J. OGDEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
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thomas.ogden@ag.iowa.gov