IN THE SUPREME COURT OF IOWA
No. 20-0804

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

v.

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,
Respondents-Appellants.

On Appeal from the Iowa District Court for Polk County
Case No. EQCE084508
The Honorable Paul D. Scott

FINAL BRIEF FOR PETITIONER-APPELLEE

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AUTHORITIES

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Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)

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* * *

(2) Whether the Act imposes an unconstitutional condition under the Iowa Constitution's free-speech, free-association, and due-process guarantees by requiring organizations to abandon the right—on their own time and dime—to advocate for access to legal abortion, affiliate with other entities that engage in abortion-related activities, and perform and refer for abortions.

AUTHORITIES—Free Speech

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Bierman v. Weier, 826 N.W.2d 436 (Iowa 2013)

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NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)

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AUTHORITIES—Due Process

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Planned Parenthood of Sw. & Cent. Fla. v. Philip, 194 F. Supp. 3d 1213 (N.D. Fla. 2016)

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018)

Singleton v. Wulff, 428 U.S. 106 (1976)

U.S. Const. amend. XIV

Iowa Const. art. I, § 9

ROUTING STATEMENT

Petitioner-Appellee respectfully requests that the Court retain this appeal because the case involves substantial constitutional questions regarding the validity of a state law and raises issues of broad public importance that will ultimately require this Court's resolution. *See* Iowa R. App. P. 6.1101(a), (d).

STATEMENT OF THE CASE

For many years, Petitioner-Appellee Planned Parenthood of the Heartland, Inc. ("PPH") has participated in two grant programs to provide sexual education and teen pregnancy prevention services in communities throughout Iowa. These programs—the Community Adolescent Pregnancy Prevention and Services Program ("CAPP") and the Personal Responsibility Education Program ("PREP")—are funded with federal dollars but administered, respectively, by Iowa's Department of Human Services ("IDHS") and Department of Public Health ("IDPH"). These state agencies require PPH and other grantees to use state-selected curricula when providing services funded by the grants, to adhere to detailed restrictions on the use of those grants, and to submit to comprehensive monitoring and review.

In April 2019, the Iowa Legislature passed Sections 99 and 100 of House File 766 (hereinafter, "the Act"), which bar CAPP and PREP funding to PPH and any other grant applicant that performs or refers for abortion, advocates for access to abortion, or affiliates with other organizations that engage in certain abortion-related activities. The Act threatens to harm not only PPH, but also youth who depend on CAPP and PREP programming and who, without PPH, would not receive services.

The district court's grant of summary judgment in PPH's favor should

be affirmed.

1. The district court correctly held that the Act violates the Iowa Constitution's equal-protection guarantee. The Act was passed for the sole and bare purpose of penalizing PPH for its abortion-related activities, and the grant programs here have "nothing to do with abortion." App. 920. A law based on sheer animus cannot survive any level of review, much less the strict scrutiny appropriate in light of the Act's related burdens on other fundamental rights at issue in this case.

2. PPH's other constitutional claims not reached by the district court provide independent bases for affirming the judgment, and under "well-settled law," they are within the scope of this Court's review. *In re M.W.*, 876 N.W.2d 212, 221 (Iowa 2016) (quoting *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 893 (Iowa 2011)); *Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 (Iowa 1993). In addition to violating Iowa's equal-protection guarantee, the Act impermissibly conditions PPH's participation in government programs on its abandonment of the right—wholly apart from those programs—to advocate for safe and lawful abortion access, to associate with other Planned Parenthood entities that engage in abortion-related activities covered by the Act, and to perform and refer for abortions. The Act's use of leverage over government funds violates the Iowa

Constitution's protections for free speech, free association, and substantive due process. The question here is whether the State may force a choice between participating in a government program and engaging in unrelated and constitutionally protected activity. This Court's precedent makes clear that it may not.

STATEMENT OF THE FACTS

A. THE GRANT PROGRAMS AND PPH'S SERVICES

CAPP is a federal grant program administered by IDHS through a competitive bidding process. App. 354, 916. After that process, IDHS contracts with awardees in Iowa to provide evidence-based or evidence-informed comprehensive sex education and adolescent pregnancy prevention programs. *Id*. PREP, the other grant program at issue in this case, is also funded by federal dollars and is administered in Iowa through IDPH. *Id*. After a competitive bidding process, IDPH awards PREP funding to community-based organizations and agencies to deliver programming regarding abstinence, contraception, and other topics that prepare youth for success in adulthood, with the goal of reducing teen pregnancy and sexually transmitted infections ("STIs"), *id*.

Petitioner-Appellee PPH is a not-for-profit corporation operating in Iowa and Nebraska. App. 353, 355, 916. In Iowa, PPH delivers educational

programs in reproductive health, human development, and sexuality throughout the communities in which it serves. App. 355, 916. In 2018, PPH provided educational services to more than 25,000 Iowans. App. 367.

PPH has received funding in Iowa through CAPP since at least 2005, and through PREP since 2012. App. 917. In each program, PPH—like all grantees—is required to rely on existing curricula selected by the respective state agency administering the program. App. 356. For CAPP, the curricula include, for example, a program for older youth regarding healthy relationships and the prevention of dating violence, App. 414, and another program designed for students grades six to eight that focuses on prevention of HIV and other STIs, as well as pregnancy. *Id*. IDPH has approved only two PREP curricula, one targeting youth in at-risk communities, and the other designed for adolescent boys. App. 507–09.

PPH complies with significant reporting and other documentation requirements for the CAPP and PREP programs. App. 356, 916. It prepares quarterly reports, implementation plans, and fidelity logs that ensure the curriculum is delivered as intended. *See* App. 656–60. PPH also submits to external performance evaluations and site visits and participates in regular meetings for awardees. *See id.*

In addition to its educational work, PPH provides comprehensive reproductive health services at its health centers in Iowa and Nebraska. These health services are wholly separate from and do not use or rely on CAPP or PREP funding. In Iowa, the services include well-patient exams, cancer screening, STI testing and treatment, a range of birth control options including long-acting reversible contraceptives, and transgender healthcare. App. 355. Contraceptive care makes up forty percent of PPH's clinical services, accounting for more than 60,000 patient visits per year. App. 368. As part of its clinical services, PPH also provides medication and surgical abortion in Iowa and Nebraska. App. 355, 916. Upon patient request, all PPH health centers refer patients for abortion. App. 916.

To ensure that patients are aware of and able to exercise their rights, PPH also engages in advocacy intended to protect and expand access to safe and legal abortion. App. 355, 916. Again, this advocacy is wholly separate from and does not use or rely on any CAPP or PREP funding. PPH operates as an ancillary organization of Planned Parenthood North Central States ("PPNCS"), one of the largest Planned Parenthood affiliates in the country. App. 356, 916. Like PPH, PPNCS advocates for access to expert, comprehensive reproductive health care, including abortion. App. 356, 916–17.

Respondents-Appellants do not assert that PPH or any other CAPP or PREP grantee in Iowa has improperly used CAPP or PREP funding for abortion services or that PPH or another grantee has discussed abortion as part of the educational services provided under these programs. App. 357.

B. THE CHALLENGED ACT

In May 2019, Respondent-Appellant Governor Reynolds signed the Act, which provides that:

> [a]ny contract entered into on or after July 1, 2019 [for CAPP or PREP funding] . . . shall exclude as an eligible applicant, any 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 performs or promotes abortions, or regularly makes referrals to an entity that provides or promotes abortions or maintains or operates a facility where abortions are performed.

App. 917 (quoting App. 624–26 (House File 766 §§ 99, 100, 88th Gen. Assemb., 2019 Iowa Acts ch. 85, pp. 47–48)).

Although the Act is written in general terms such that it seems to apply to groups other than PPH, the Iowa Legislature crafted an exception for the only other entity recognized in the legislative record as one that would be subject to the Act's funding bar. Specifically, at the time of the Act's adoption, Unity Healthcare DBA Trinity Muscatine was a CAPP grantee and was affiliated with UnityPoint, a hospital system that provides abortions. App.

359. The legislature thus exempted from the funding bar any CAPP and PREP applicants affiliated with a "nonprofit health care delivery system," which the Act defined as a nonprofit that controls hospital facilities or certain other locations offering "primary, secondary, and tertiary inpatient, outpatient, and physician services." App. 624–27 (House File 766 § 99(1)–(3); § 100(2)–(4), 88th Gen. Assemb., 2019 Iowa Acts ch. 85, pp. 47–48). This exception had the effect of permitting Unity Healthcare DBA Trinity Muscatine to continue in the CAPP program, App. 359, while leaving the funding prohibition on PPH in place.

At the time of the Act's adoption, IDHS and IDPH were overseeing competitive bid processes to award a new round of CAPP and PREP funding, with contracts for project periods to begin on July 1 and August 1, 2019, respectively. App. 918. PPH had applications pending for funding in both programs in order to continue to serve youth in several counties throughout Iowa, as it had done for years. *Id.*

C. THIS LAWSUIT AND SUBSEQUENT FUNDING DECISIONS

To ensure it could continue offering services to Iowan youth under the CAPP and PREP programs, PPH filed a lawsuit in the District Court for Polk County against government officials responsible for enforcing the Act (collectively, "the State"). It argued that the Act violates the Iowa

Constitution's guarantees of equal protection, freedom of speech and association, and substantive due process. *See generally* App. 17–18, 919–20. In May 2019, the district court issued a temporary injunction, finding that PPH was likely to prevail on its equal-protection claim. App. 337. It therefore did not consider PPH's other claims.

IDHS subsequently awarded CAPP funding to PPH for a three-year project period to run from July 1, 2019, through June 30, 2022. *See* App. 358; *see also* App. 643–46. Pursuant to that award, PPH signed initial two-year CAPP contracts to provide services in five Iowa counties. App. 358; *see also* App. 650–797. PPH also received a PREP award from IDPH for a four-year project period, which runs from August 1, 2019, through July 31, 2023. App. 358; *see also* App. 647–49. Pursuant to that award, PPH signed an initial one-year PREP contract to provide services in three Iowa counties. App. 358; *see also* App. 798–828. At the agencies' option, the CAPP and PREP contracts may be renewed for additional years, without a new competitive bidding process, during the three- and four-year project periods, respectively.

In May 2020, the district court granted summary judgment to PPH on its equal-protection claim. The 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," App. 920, and that the Act could not

survive even rational-basis review, App. 920–21. In so holding, the district court rejected as not "realistically conceivable" the State's contention that the Act furthers interests in (1) favoring childbirth over abortion, (2) prohibiting grants to abortion providers that receive a significant revenue stream from abortion, and (3) not boosting the reputation of abortion providers or advocates. App. 924–25 (quoting *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019)). The district court also emphasized that the Act is under- and overinclusive to an extreme degree, further underscoring the Act's irrationality. App. 922–25.

Because the district court applied rational-basis review on PPH's equal-protection claim, it had no need to consider whether strict scrutiny should instead have applied because the Act impinges on other fundamental rights. For the same reason, the district court did not reach PPH's unconstitutional-condition claims. App. 919–20.

In June 2020, the Iowa Legislature adopted House File 2643, which continues most appropriations, including funding for CAPP and PREP, through Fiscal Year 2020–2021. That legislation keeps in place all existing "duties, limitations, [and] requirements" applicable to the CAPP and PREP programs, such that the Act's original exclusion of PPH will remain in place

until at least June 30, 2021. *See* House File 2643, § 1(4), 88th Gen. Assemb., 2020 Iowa Acts ch. 1121, p. 1 (referring to 2019 Iowa Acts, ch. 85).

Also in Summer 2020, IDPH renewed PPH's PREP contract for another year (to run from July 1, 2020, to June 30, 2021), marking the second of the four-year project period for which PREP funds may be awarded to PPH without further competitive bidding. Both the CAPP and PREP contracts that PPH currently has in place will be subject to renewal, without a bidding process, in Summer 2021.

ARGUMENT

I. THE ACT VIOLATES PPH'S STATE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION

A. Standard of Review, Preservation of Error, and Scope of Review

PPH agrees with the State that the equal-protection claim has been preserved for review. It also agrees with the standard and scope of review applicable to PPH's equal-protection claim as described in the State's opening brief, to the extent that this Court resolves that claim in PPH's favor using rational-basis review. However, because the Act impinges on fundamental rights to free speech, free association, and substantive due process, *see Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018); *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009),

this Court could not reverse the lower court's judgment in favor of PPH on the equal-protection claim without first considering whether the Act could also survive heightened scrutiny. *See In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004) (holding that strict scrutiny applies to laws challenged on equal-protection grounds if those laws burden other fundamental rights). A law subject to strict scrutiny is presumptively unconstitutional. *Id.* To justify the Act under this standard, the government, not PPH, bears the burden of showing that the law is "narrowly tailored to serve a compelling state interest." *Id.* (quoting *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001)).

B. PPH and Entities Not Engaged in Speech and Other Activities Covered by the Act Are Similarly Situated for Purposes of the Act

The Iowa Constitution guarantees equal protection of the law. *See* Iowa Const. art. I, §§ 1, 6. This guarantee generally "requires that laws treat all those who are similarly situated *with respect to the purposes of the law* alike." *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013) (quoting *Varnum*, 763 N.W.2d at 883), *as amended* (May 23, 2013); *see also Varnum*, 763 N.W.2d at 882; *Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

As the district court correctly concluded, for purposes of the Act, PPH, like any abortion provider, advocate for abortion, or entity engaged in referrals

for abortion, is "similarly situated to non-abortion providers who seek a government grant that has nothing to do with abortions." App. 920. PPH and applicants unaffected by the Act are the same in all legally relevant ways: Each "must rely on existing curricula that ha[ve] been selected by the state agencies administering the programs, as well as follow all documentation and reporting requirements," and each is forbidden from using CAPP and PREP funds for "[p]romoting or performing abortions." App. 921.

These facts notwithstanding, the State argues that PPH is not similarly situated to those who remain eligible for CAPP and PREP funding because the grant programming "includes discussion of topics such as abstinence, sexual activity, contraception, sexually transmitted diseases, and teen pregnancy." Appellants' Br. at 11–12. Notably missing from the State's list of topics, however, is *any* mention of abortion, or even alternatives to abortion, such as the process of placing a child for adoption. CAPP and PREP programming help youth *avoid* pregnancy; the curricula do not address the options available to individuals who nevertheless *do* become pregnant.

The State also argues that PPH and non-abortion providers are not similarly situated because PPH is "well-known" for its provision of abortion and abortion-related advocacy. *Id.* at 12. That assertion likewise misses the mark. Under this Court's precedent, the question is not whether PPH

"mirrors" other applicants in every respect, *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 859 (Iowa 2015), but whether the two classes are similarly situated "with respect to the [Act's] purposes," *Gartner*, 830 N.W.2d at 351. The State cannot point to any basis for concluding that PPH's abortion-related speech and other activities are in any way relevant to the services it offers through sexual education and pregnancy prevention grant programs, which all parties agree do not fund abortion or include discussion of abortion.[1]

C. The Act Cannot Survive Rational-Basis Review

Rational-basis review, the least stringent form of scrutiny applicable to equal-protection claims, is "deferential to legislative judgment," but "'it is not a toothless one' in Iowa." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004) ("*RACI*") (quoting *Mathews v. de Castro*, 429 U.S. 181, 185 (1976)). Courts use "a three-part analysis" when reviewing equal-protection challenges to a statute. *AFSCME Iowa Council 61*, 928 N.W.2d at

[1] The State's speculation that a contract with PPH would "creat[e] a perception that [the State] at least implicitly approves of Planned Parenthood's performance of and advocacy in favor of abortions," Appellants' Br. at 12, is a merits argument as to whether there is a plausible policy justification for the Act. In any event, it does not provide a basis for determining that PPH is not similarly situated to entities unaffected by the Act. *See LSCP, LLLP*, 861 N.W.2d at 860 (cautioning "against making intricate distinctions between purported classes of similarly situated individuals" because if courts did so, "almost every equal protection claim could be resolved against the plaintiffs on the 'similarly situated' requirement").

32–33. First, they determine whether the law had "a valid, 'realistically conceivable' purpose that served a legitimate government interest." *Id.* at 32 (quoting *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016)). "To be realistically conceivable, the statute cannot be so overinclusive and underinclusive as to be irrational." *Id.* (internal quotation marks and alteration omitted). Second, courts "evaluate whether the 'reason has a basis in fact.'" *Id.* (quoting *McQuistion v. City of Clinton*, 872 N.W.2d 817, 831 (Iowa 2015)). Although they do not require "actual proof of an asserted justification," they will "not simply accept it at face value" and will instead "examine it to determine whether it [i]s credible as opposed to specious." *Id.* (quoting *Qwest Corp. v. Iowa State Bd. of Tax Rev.*, 829 N.W.2d 550, 560 (Iowa 2013)). Finally, courts determine whether the "relationship of the classification to its goal" is "so attenuated as to render the distinction arbitrary or irrational," *Varnum*, 763 N.W.2d at 879 (quoting *RACI*, 675 N.W.2d at 7), or to evince a basis in some other form of "invidious discrimination," *id.* at 887; *see also*, *e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

1. *The State's post hoc justifications for the Act are not "realistically conceivable," "valid," or "credible."*

The Act contains no statement of purpose, and the legislative record, though clearly demonstrating that the Act was intended to target PPH, does

not shed light on any other legislative goal. *See, e.g.*, Iowa Sen. Debate of Apr. 26, 2019, 4:02:28–32 (statement of Sen. Costello) ("We are not targeting [Planned Parenthood] by name, but the fact that they provide abortions is the criteria that we're setting up to not be able to participate in this program."); *id.* at 4:01:11–28 (responding to a question about the Act's exclusion of PPH alongside an exemption for Unity Healthcare by saying "that the people of Iowa should [not] be required to do business with people that provide abortions").[2]

Accordingly, the State tries to defend the Act based only on unsupported judgments the "legislature could have made." Appellants' Br. at 16 (citing *AFSCME Iowa Council 61*, 928 N.W.2d at 33. The district court was correct that each of the State's three post hoc justifications is not a "realistically conceivable" basis for the Act, as required by this Court's precedent. App. 925. Even if they were, they would still not be "valid" because a bare desire to harm a group of which the government disapproves is precisely the type of invidious discrimination prohibited by the equal-protection guarantee.[3]

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[2] A video record of the Senate debate is available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26.

[3] This Court should reject the assertions of amicus in support of the State regarding the Act's rationale. The amicus relies only on evidence that does

First, the State argues that the Legislature could have had an interest in "favoring childbirth over abortion," and that this interest is rationally related to the Act's classification excluding PPH because the grant programming "involv[es] sex education and teen pregnancy." Appellants' Br. at 17–18. As the district court concluded, however, the "grants hav[e] nothing to do" with this asserted interest. App. 922–23. CAPP and PREP programming, selected by the state and monitored for compliance, involve teaching youth about sexuality, relationships, and the *prevention* of pregnancy, e.g., through contraceptive use and abstinence. The programs' message is not one that favors childbirth over abortion, but one that teaches youth how to avoid unintended pregnancy in the first place.

The State resists this conclusion, arguing that "students, parents, and all Iowans" will nevertheless *know* that PPH provides abortions and advocates for abortion access, and will assume that if PPH participates, the State "implicitly approves" of PPH's activities. Appellants' Br. at 18. But if this argument were sufficient to satisfy rational-basis review, it would justify

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not pertain to Iowa (and which is outside the parties' stipulated record, appendix, and the legislative history). Moreover, amicus's assertion that PPH might be an ineffective grantee is clearly contradicted by PPH's repeated selection through a merits-based competitive bidding process to offer CAPP and PREP programming in Iowa. The State notably does not join in this argument.

excluding PPH from all government programs, no matter how unrelated. For example, even if PPH used state-selected curricula to educate youth about a healthy diet, the physical benefits of exercise, or money management skills, some students, parents, and community members would still presumably be aware of PPH's abortion-related activities. Under the State's view, that is all that would matter to satisfy the Iowa Constitution. That is not the law: The government's bare desire to harm a group of which it disapproves is precisely the type of "invidious discrimination" that cannot survive even rational-basis review. *Varnum*, 763 N.W.2d at 879, 887; *see also, e.g.*, *Moreno*, 413 U.S. at 534.

Second, the State argues that the Iowa Legislature could have concluded that it did not want "entities who derive a significant portion of their revenue from abortion" to provide CAPP and PREP programming because the funding, in the State's view, could "subsidiz[e] the development of educational relationships between Iowa teens and abortion providers." Appellants' Br. at 18–19. The State's argument in this respect appears to be a reprise of a similar one made in district court, in which the State argued that abortion providers who are "less scrupulous" than PPH might rely on relationships with youth to increase demand for their abortion services. App. 68. This argument is unconvincing, no matter how framed.

As an initial matter, although the State suggests that PPH receives a substantial share of its revenue from abortion, it highlights only the share of PPH's funding that comes from patient services. *See* Appellants' Br. at 18–19. That funding includes many types of care beyond abortion, which accounts for only three percent of PPH's patient services. App. 368. In comparison, contraceptive services are the single largest category of clinical care at PPH, resulting in more than 60,000 patient visits per year. *Id.* Through these services, of course, "Planned Parenthood prevents abortions." Iowa Sen. Debate of Apr. 26, 2019, at 3:58:45–4:00:06 (statement of Sen. Peterson).

Even if abortion accounted for an undefined, "significant" share of PPH's funding, barring PPH from eligibility to receive grants on that basis is neither a "plausible" nor "credible" justification for the Act. *RACI*, 675 N.W.2d at 7 & n.3. The State has expressly disavowed asserting that PPH uses its relationships with youth involved in CAPP and PREP programming to encourage abortion. *See, e.g.*, Tr. of Summ. J. Hr'g at 29:1–10. And this specious theory, even as applied to some *other* theoretical grantee, makes no sense. Under the State's view, a grantee would aim to provide more abortions, yet believe that it could do so by accepting grant funds to teach youth about how to avoid unintended pregnancies. Moreover, that theoretical grantee would have to believe it could accomplish these goals by participating in a

program where—as the State concedes—the grantee could not talk about abortion, including its provision of abortion, in any way. *See* App. 356–57. That theory defies common sense.

Third, the State contends that the Act could further the Iowa Legislature's interest in not "boost[ing]" the reputation of PPH or other entities engaged in abortion-related activities, an impact the State equates with "indirectly subsidiz[ing] abortion providers." Appellants' Br. at 19. This argument is meritless. The State does not contend that PPH or any other grantee has ever used CAPP or PREP funds to provide abortions or to promote access to abortion care, App. 357. That is, it does not contend these funds have ever been used to "subsidize the exercise of a fundamental right" in a way objectionable to the State. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983); *cf. Maher v. Roe*, 432 U.S. 464, 474 (1977) (acknowledging that a state may choose not to pay for abortions). In addition, although PPH has stated that barring CAPP and PREP funding for PPH would harm PPH's reputation and stall its momentum as an organization working to prevent teen pregnancy, *see* App. 16–17, 139–41, the State errs in relying on that statement for the very different proposition that continuing CAPP and PREP funding would bolster PPH's reputation more generally or as an organization providing abortion. There is simply no evidence or logic to

support that latter proposition.

In any event, a funding condition meant to damage Planned Parenthood's reputation evinces "invidious discrimination" that is necessarily irrational and thus unconstitutional. *Varnum*, 763 N.W.2d at 879, 887; *see also, e.g.*, *Moreno*, 413 U.S. at 534. *Cf. Qwest Corp.*, 829 N.W.2d at 564 ("We do not hold here that the State can simply justify the different tax treatment of [certain entities] as a way to promote one group of companies over another . . . . "). Were it otherwise, a state agency might, for example, fire a government worker who volunteers for Planned Parenthood on her personal time because continued employment will burnish her credentials in the community. A state university's medical school might deny admission to applicants willing to someday perform legal abortions on the ground that it does not want to confer a degree that would make these individuals more effective in their professional endeavors. There is no telling where this justification would end if accepted by the Court as a rational basis for the Act.

2. *The Act is under- and overinclusive to an extreme degree, further confirming that it is arbitrary and irrational.*

Under rational-basis review, "a classification involv[ing] extreme degrees of overinclusion and underinclusion in relation to any particular goal . . . cannot be said to reasonably further that goal." *RACI*, 675 N.W.2d at 10 (quoting *Bierkamp v. Rogers*, 293 N.W.2d 577, 584 (Iowa 1980)); *see also*

Varnum, 763 N.W.2d at 899. As the district court correctly concluded, the Act bears precisely this hallmark of an arbitrary law, further confirming that the Act fails rational-basis review.

First and foremost, the Act would bar funding to entities that do not provide abortion in Iowa at all, but instead provide referrals for abortion, engage in advocacy to protect and expand abortion access, or associate with abortion providers or advocates. PPH would be excluded from funding under the Act based on its performance of and referral for abortion in Nebraska, even if PPH did not provide *any* abortions in Iowa (or engage in any abortion-related activities in the state whatsoever). As these examples demonstrate, the Act is not remotely tailored to an interest in barring grants to abortion providers that are well-known for their abortion-related activities in the community or that receive significant funding from abortion.

The State responds to these examples of overinclusion by emphasizing that PPH will not, in fact, stop providing abortions, *see* Appellants' Br. at 8, but that assertion is irrelevant under the applicable constitutional test. When determining whether the Act is so overinclusive as to be arbitrary and irrational, this Court must necessarily look at the Act's possible applications, not just its application to the particular plaintiff in this case. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 801 (1989) (stating in First Amendment

case involving the fit of a challenged regulation that the rule's validity "depend[ed] on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case").

The Act is also woefully underinclusive given the nonprofit health care delivery system exception, which applies so long as grantees relying on the exception operate from a "distinct location" where abortions are not performed. App. 623, 625–26 (House File 766 §§ 99(1)–(2), 100(1)–(2), 2019 Iowa Acts ch. 85, p. 47). The exception would permit entities to participate in CAPP and PREP even if they belong to a health care delivery system that routinely provides abortion-related services, is well-known in the community for that service, garners significant revenue from abortion, and promotes and refers patients for abortions in Iowa. *See* App. 923.

The State suggests that this example is inapposite because UnityPoint Healthcare does not provide "a vast array of abortion-related services." Appellants' Br. at 20–21. Again, the State errs in suggesting that this Court look only to the Act's application to specific, known entities. In assessing the fit of a statute for equal-protection purposes, this Court should review the law's overall scope as is clear from its plain text. *See Rock Against Racism*, 491 U.S. 801. Moreover, even if the Act's application to UnityPoint were the

only relevant consideration in assessing whether the exception renders the Act extremely underinclusive, the State has no evidence to suggest that UnityPoint performs only a "small number of abortions or refer[s] a small number of patients for them." Appellants' Br. at 21.

The State also urges the Court, in analyzing the Act's fit relative to the state's asserted interests, to consider the Act's bar on funding to abortion *providers* but ignore the bar as it applies to entities that refer for abortion, advocate for abortion access, or affiliate with other organizations that engage in covered, abortion-related activities. *See generally id.* at 21–23. This Court should reject the invitation to slice and dice the Act this way. The State's reliance on the severability doctrine for support is particularly misplaced. "Severability protects an act from total nullification if discrete portions are unconstitutional." *Breeden v. Iowa Dep't of Corr.*, 887 N.W.2d 602, 608 (Iowa 2016) (citing Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L. J. 341, 384 (2010)). Put another way, it pertains to the appropriate scope of relief, not to the prerequisite merits question of whether a law, or any portion thereof, is unconstitutional.

D. The Act Cannot Survive the Heightened Scrutiny That Applies Given Its Burden on Other Fundamental Rights

Because the Act does not survive rational-basis review, this Court—like the district court—need not consider whether a more stringent level of

scrutiny applies. Should it do so, however, this Court's precedent requires the application of strict scrutiny, a standard the Act cannot possibly meet.

Specifically, as discussed below in Part II, by barring funding to PPH because it "promotes" abortion access, "refer[s]" for abortion, and "affiliate[s]" with entities that "perform[]" or "promote[]" abortion, the Act burdens PPH's right under the Iowa Constitution to engage in speech and associational conduct. *See State v. Hardin*, 498 N.W.2d 677, 679 (Iowa 1993) (recognizing a right to free speech under the Iowa Constitution); *Iowans for Tax Relief v. Campaign Fin. Disclosure Comm'n*, 331 N.W.2d 862, 868 (Iowa 1983) (recognizing rights to free speech and association under the Iowa Constitution). Moreover, by barring PPH from grant funding because it "perform[s]" abortions, the Act burdens the fundamental right to abortion under the Iowa Constitution's guarantee of due process. *See Planned Parenthood of the Heartland*, 915 N.W.2d at 237.

A law that impinges on fundamental rights is subject to strict scrutiny for the purpose of an equal-protection challenge and presumptively invalid. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998); *In re S.A.J.B.*, 679 N.W.2d at 649. Accordingly, to justify the Act, the State bears the burden of establishing that the law is "narrowly tailored to serve a compelling state interest." *In re S.A.J.B.*, 679 N.W.2d at 649 (quoting *Santi*, 633 N.W.2d at

318).

The State makes no attempt to demonstrate that the Act could survive strict scrutiny, instead relying on post hoc justifications for judgments that the Iowa Legislature could have made. However, "[t]o be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'" for the challenged classification, "and the legislature must have had a strong basis in evidence to support that justification before it implement[ed] the classification." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 & n.16 (1982)); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (holding that the "State must specifically identify an 'actual problem' in need of solving" for a challenged law to withstand strict scrutiny (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000))). The State has not made such a showing.

Instead, the State again urges the Court to focus only on the Act's application to abortion *providers*, not the Act's prohibition on funding to entities that engage in speech and other activities related to abortion. *See* Appellants' Br. at 15–16. With the Act cabined in this way, the State contends that it does not burden a fundamental constitutional right or warrant heightened scrutiny. Again, the State is simply incorrect in this respect. This Court should examine the "challenged statutory scheme" as a whole to

determine whether it impinges on fundamental rights. *In re S.A.J.B.*, 679 N.W.2d at 649. Here, the relevant classification distinguishes between an applicant that provides or "promotes" abortion, "refer[s]" for abortion, or "affiliate[s]" with other organizations that provide or advocate for abortion access, and an applicant that does none of those things. Because the Act's relevant classification unquestionably "affect[s] fundamental rights," strict scrutiny applies and the Act is unconstitutional. *Sherman*, 576 N.W.2d at 317; *accord Varnum*, 763 N.W.2d at 880.[4]

In any event, as discussed below in Part III, the Act's bar on CAPP and PREP funding to abortion providers *does* impinge on the right of PPH patients to obtain abortions, which the State agrees is fundamental under the Iowa Constitution, *see* Appellants' Br. at 15, and the related right of PPH to provide abortions. This portion of the Act thus independently requires heightened scrutiny, and as the State effectively concedes, the Act cannot satisfy this

[4] Indeed, even under a form of heightened review less stringent than strict scrutiny, the Act would still be unconstitutional. *See State v. Aschbrenner*, 926 N.W.2d 240, 251 (Iowa 2019) (applying intermediate scrutiny in an unrelated First Amendment context while noting that such scrutiny requires that a law be "narrowly tailored to serve a significant governmental interest" (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017))); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016) (recognizing that the federal undue burden standard applicable to abortion restrictions is more stringent than rational-basis review).

stringent standard.[5]

II. THE ACT UNCONSTITUTIONALLY CONDITIONS FUNDING ON THE ABANDONMENT OF STATE RIGHTS TO FREE SPEECH, FREE ASSOCIATION, AND DUE PROCESS

A. Standard of Review, Preservation of Error, and Scope of Review

The State's opening brief did not address the standard and scope of review for appeals from summary judgment on claims involving the right to free speech, free association, and due process. Review of constitutional claims is de novo. *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 15 (Iowa 2019). This Court reviews grants of summary judgment to correct errors of law. *Id.*

PPH disagrees with the State's contention that claims involving free speech, free association, and due process are not "properly preserved for this Court's review" and thus outside the scope of the appeal. Appellant's Br. at 9. The State misunderstands the preservation-of-error doctrine, which applies to "the party seeking the appeal," not the party resisting it, as PPH does here. *Teamsters Loc. Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005) (citing *In re Marriage of Okland*, 699 N.W.2d 260, 266 (Iowa 2005)). Under "well-settled law," this Court may affirm the district court's

[5] *See* Iowa Rs. App. P. 6.903(3), 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *see also Baker v. City of Iowa City*, 750 N.W.2d 93, 102–03 (Iowa 1982) (appellants' failure to cite authority for their argument rendered it "waived").

grant of summary judgment on any of the alternative claims pressed by PPH in district court. *In re M.W.*, 876 N.W.2d at 221 (quoting *Duck Creek Tire Serv., Inc.*, 796 N.W.2d at 893); *accord Moyer*, 505 N.W.2d at 193; *see also* App. 853–61.

B. Merits

This Court has recognized that although the government need not subsidize an organization's constitutionally protected activity, it "may not deny a benefit to an organization" that—without resort to the benefit—"decides to exercise its constitutional rights" under the Iowa Constitution. *Hearst Corp. v. Iowa Dep't of Revenue & Fin.*, 461 N.W.2d 295, 304 (Iowa 1990) (citing *Regan*, 461 U.S. at 545). Put another way, although the State may reasonably place funding conditions on "a particular program or service," it may not place such conditions on the "recipient of the subsidy," "thus effectively prohibiting the recipient from engaging in . . . protected conduct outside the scope" of the government program. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

Here, the State has declared in the Act that anyone who engages in certain activity protected by the Iowa Constitution—including advocacy in favor of a patient's right to terminate a pregnancy, the provision of and referral for safe and legal abortion, or association with entities supporting abortion

rights and providing that service—must be excluded from CAPP and PREP funding, even though those programs have nothing to do with abortion and the grantee does not use program funds to subsidize its constitutionally protected activity. In so doing, 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. That is prohibited by the Iowa Constitution.

The unconstitutional conditions doctrine applies in a "variety of contexts," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013), including in cases raising free speech, *Hearst*, 461 N.W.2d at 304, and due process claims, *see, e.g.*, *Koontz*, 570 U.S. 595. *See also State v. Cullison*, 173 N.W.2d 533, 540 (Iowa 1970) (applying the doctrine with respect to the Iowa Constitution's right to be free of unreasonable searches and seizures as a condition of parole). Moreover, federal law, upon which the Iowa Supreme Court has relied where persuasive, holds that the unconstitutional-conditions doctrine applies even if a person "has no entitlement to th[e] benefit." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("*AOSI*") (quoting *Rumsfeld v. F. for Acad. & Inst. Rights*, 547 U.S. 47, 59 (2006)); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399–401 (1984); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Were it otherwise, the exercise of constitutionally protected "freedoms would in effect

be penalized and inhibited," thus allowing "the government to 'produce a result which [it] could not command directly.'" *Perry*, 408 U.S. at 597 (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Federal precedent also makes clear that the unconstitutional-conditions doctrine does not require acceding to the government's conditions, but protects those targeted from having to make that choice in the first place. *See, e.g.*, *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 672 (1996) (contractor alleged that county government terminated his contract in retaliation for past criticism of the county and its board of commissioners); *Elrod v. Burns*, 427 U.S. 347, 350 (1976) (in challenge to patronage hiring, public employees gave no indication that they were willing to change political parties); *Perry*, 408 U.S. at 595 (state college professor's contract not renewed in retaliation for his public criticism of the college administration's policies); *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963) (former government employee denied unemployment compensation due to religious prohibition against working on the Sabbath). Accordingly, it is legally irrelevant that PPH would not stop performing abortions or promoting access to abortion services in order to maintain eligibility as a CAPP and PREP grantee. *See* App. 360.

1. *The Act violates the free-speech guarantee afforded by the Iowa Constitution.*

Article I, section 7, of the Iowa Constitution provides in pertinent part

that "[n]o law shall be passed to restrain or abridge the liberty of speech." This provision "generally imposes the same restrictions on the regulation of speech as does the federal constitution," *Bierman v. Weier*, 826 N.W.2d 436, 451 (Iowa 2013) (quoting *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997)), but is still interpreted independently, *see City of W. Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002).

The Iowa Constitution unquestionably bars the State from commanding directly that PPH refrain from "promoting" or referring for abortions. *See Hardin*, 498 N.W.2d at 679 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992)); *see also Bigelow v. Virginia*, 421 U.S. 809 (1975) (holding that a criminal law infringed constitutionally protected speech by making it unlawful to prompt the procuring of an abortion). Such a restriction would bar PPH's speech based on its content: abortion. The restriction would also bar PPH's speech based on its viewpoint, forbidding only speech *for* access to safe and lawful abortion. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)). The Act's content-based and viewpoint-based

restriction on speech is "presumptively invalid," *Hardin*, 498 N.W.2d at 679 (citing *R.A.V.*, 505 U.S. at 382), and "may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests," *Reed*, 135 S. Ct. at 2226 (citing *R.A.V.*, 505 U.S. at 395).

The State may not use its spending powers to accomplish the same result *outside* the grant program here. *See Hearst*, 461 N.W.2d at 304. The U.S. Supreme Court's decision in *Alliance for Open Society International* offers persuasive authority as to why that is so. At issue in that case was a federal law that denied HIV/AIDS funding to any organization that did not have a policy opposing prostitution and sex trafficking. *AOSI*, 570 U.S. at 208. The government maintained that the funding condition was consistent with the First Amendment because it had an interest in ensuring that its "message opposing prostitution and sex trafficking" not be "undermine[d]" or "confuse[d]" by providing HIV/AIDS funding to organizations that did not conform to the government's anti-prostitution position. *Id.* at 220. The U.S. Supreme Court rejected that argument, stressing that the government had crossed the constitutional line when it attempted to regulate the grantee's speech *outside* the confines of the HIV/AIDS program.

As the Court explained, recipients of government funding are free under the First Amendment to express their own views "when participating in

activities on [their] own time and dime." *Id.* at 218. Hence, the Court emphasized that "the relevant distinction" is "between [permissible] conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and [impermissible] conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15; *see also id.* at 218 (stating that the government may not adopt a funding condition that "goes beyond defining the limits" of a program "to defining the recipient").

Likewise, in *Rust v. Sullivan*, 500 U.S. 173, the U.S. Supreme Court upheld a restriction on family planning funding that barred grantees from providing counseling or referrals for abortion as a method of family planning within government-subsidized family planning projects. *Id.* at 179, 196. In so doing, it asked whether grantees remained "unfettered" in activities outside of those projects. *Id.* at 196. As in *AOSI*, the U.S. Supreme Court explained that its "unconstitutional conditions cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service." *Id.* at 197. Because the Court determined that family planning grantees remained free to "continue to perform abortions, provide abortion-related services, and engage in abortion advocacy" with separate, non-federal funding, it upheld the funding restrictions as

constitutional. *Id.* at 196.

Under the Act, the State has forbade PPH—on its own time and dime—from advocating for abortion access, affiliating with other organizations that engage in abortion-related activities, and performing and referring for abortion, all entirely outside the CAPP and PREP programs. *AOSI*, 570 U.S. at 218; *see also* App. 625 (House File 766 §§ 99, 100, 88th Gen. Assemb., 2019 Iowa Acts ch. 85, p. 47) (Act's express provision "exclud[ing] as an eligible applicant, any applicant entity that performs abortions, promotes abortions, . . . [or] becomes or continues to be an affiliate of any entity that performs or promotes abortions"). The actual services paid for by CAPP and PREP grants, in contrast, have nothing to do with abortion. *See* App. 354, 356. Because the Act requires PPH, as a condition of eligibility for CAPP and PREP, to abandon its advocacy for abortion rights *outside* the scope of any government program, the statute "goes beyond defining the limits of the . . . program" and imposes an unconstitutional condition on PPH's right to free speech. *AOSI*, 570 U.S. at 218.

An extensive line of analogous authority holds that exclusion of Planned Parenthood affiliates from participating in government programs because of advocacy in favor of safe and lawful abortion violates the First Amendment. *See Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d

1245, 1259 (10th Cir. 2016) ("*PPAU*") (exclusion of Planned Parenthood from state programs likely violated First Amendment); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 944–45 (9th Cir. 1983) (state may not deny funding to otherwise eligible entities "merely because they engage in abortion-related activities [including speech activities] disfavored by the state"); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 319–21 (M.D.N.C. 2012) (statute excluding Planned Parenthood from state-administered programs violated First Amendment); *Planned Parenthood of Kan., Inc. v. City of Wichita*, 729 F. Supp. 1282, 1289 (D. Kan. 1990) (denying funding to plaintiff based on its stance on abortion would likely violate First Amendment). Because there is no basis to distinguish the Iowa Constitution from the U.S. Constitution in the protection of free speech, this Court should do the same. *See Bierman*, 826 N.W.2d at 451 (Iowa Constitution's protection of free speech generally coextensive with First Amendment).

2. *The Act violates PPH's right to free association under the Iowa Constitution.*

The Act also conditions CAPP and PREP participation on recipients' willingness to abandon affiliation with organizations that perform abortions or promote abortion access. Although the Act does not define the term "affiliate," it appears to target PPH's relationship as an ancillary organization

of PPNCS, a regional Planned Parenthood affiliate covering Iowa and four other states. App. 355–56, 374. This provision of the Act would bar PPH from participating in government grant programs based on its association with PPNCS alone—even if PPH stopped providing and promoting access to abortion in Iowa and Nebraska entirely.

This Court has recognized that the right to association under article I, section 7, of the Iowa Constitution is at least coextensive with the analogous federal constitutional right. *See Formaro v. Polk Cnty.*, 773 N.W.2d 834, 840 (Iowa 2009) (holding that the right to association under the state constitution was not violated by a residency requirement for sex offenders); *Iowans for Tax Relief*, 331 N.W.2d at 868 (addressing a challenge based on rights of free speech and association under the First Amendment and article I, section 7, of the Iowa Constitution and stating that "the applicable [F]irst [A]mendment standard" was "the same" as that for the state constitutional challenge). The Iowa Constitution, therefore, protects a "fundamental right" to "engage in associations for the advancement of economic, religious, or cultural matters." *City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958)). By conditioning funding on PPH's agreement not to exercise that right, the Act functions as an unconstitutional condition on the right to freedom of

association under the Iowa Constitution.

3. *The Act imposes an unconstitutional condition on PPH's right to provide abortions and on patients' related right to obtain them.*

The Act violates the due process right to abortion protected by the Iowa Constitution for much the same reason that it violates the free-speech and free-association guarantees. Iowa indisputably could not ban PPH from providing abortions that its patients seek to obtain because the right to abortion is fundamental under article I, section 9's protection for substantive due process. *Planned Parenthood of the Heartland*, 915 N.W.2d at 237. Accordingly, the State may not use its leverage over public funds to demand that PPH stop engaging in that same constitutionally protected activity. *See Hearst*, 461 N.W.2d at 304; *see also, e.g.*, *PPAU*, 828 F.3d at 1262 ("depriv[ing] [a Planned Parenthood affiliate] of pass-through federal funding" to "punish" it for its exercise of "Fourteenth Amendment rights" likely amounts to an unconstitutional condition); *Planned Parenthood of Sw. & Cent. Fla. v. Philip*, 194 F. Supp. 3d 1213, 1216 (N.D. Fla. 2016) (holding a Florida statute similar to the Act likely imposed an unconstitutional condition because "as a condition of receiving state or local funds for unrelated services, the plaintiffs must stop providing abortions that women are constitutionally entitled to obtain"); *Planned Parenthood of Cent. N.C.*, 877 F. Supp. 2d at 319–20

(applying unconstitutional-conditions doctrine to hold that a statute barring Planned Parenthood from receiving state funds not used for abortion violated the organization's constitutional rights under the Fourteenth Amendment).

The State resists this conclusion on the ground that PPH will not stop providing abortions to maintain eligibility for CAPP and PREP funding, so the Act will not impede patients' right to abortion. As PPH has made clear, that is not how the unconstitutional-conditions doctrine works. A condition on government funding may be unconstitutional even if it is not "actually coercive, in the sense of an offer that cannot be refused." *AOSI*, 570 U.S. at 214; *see also, e.g.*, *PPAU*, 828 F.3d at 1258 (recognizing that the "unconstitutional-conditions doctrine has been applied when the condition acts retrospectively . . . in retaliation for prior" constitutionally protected activity (citation omitted)). Instead, 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." *AOSI*, 570 U.S. at 214–15. Here, the Act seeks to regulate PPH's activities outside the CAPP and PREP programs, forbidding PPH—as a condition of funding—from providing abortions on its own "time and dime." *Id.* at 218. That is precisely the type of condition that runs afoul of the Iowa Constitution,

regardless whether PPH has the fortitude to withstand the State's pressure campaign.

Moreover, the State is simply wrong that no due process right to *provide* abortion exists. As this Court has observed, abortion providers play an intimate and often necessary role with respect to a patient's "deeply personal" decision to have an abortion. *Planned Parenthood of the Heartland*, 915 N.W.2d at 234; *see also*, *e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976); *PPAU*, 828 F.3d at 1260. A patient often "cannot safely secure an abortion without the aid of a physician." *Singleton*, 428 U.S. at 117. Accordingly, the due-process right of an abortion provider is necessarily coextensive with the patient's due-process right to have an abortion.

This Court should reject the rationale of *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 916 (6th Cir. 2019) (en banc), on which the State relies. *See* Appellants' Br. at 14–15. That case held under federal constitutional law that providers did not have a due-process right to provide abortion, but it acknowledged that another federal court of appeals had reached the opposite view. *Hodges*, 917 F.3d at 913 (citing *PPAU*, 828 F.3d at 1260). Particularly given that *Hodges* does not control the interpretation of Iowa law, *see Planned Parenthood of the Heartland*, 915 N.W.2d at 233, this Court should reject its rationale. Because the fulfillment

of the due process right to abortion involves not just a patient, but also a provider, both share in the right's protections under the Iowa Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

REQUEST FOR ORAL SUBMISSION

PPH requests to be heard in oral argument.

COST CERTIFICATE

PPH certifies that it expended no funds for the printing of its response brief in this Court.

Respectfully submitted,

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Dated: December 18, 2020

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 9,091 words, excluding those portions of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

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