IN THE SUPREME COURT OF IOWA
No. 22–2036

PLANNED PARENTHOOD OF THE HEARTLAND, INC., EMMA GOLDMAN CLINIC, and JILL MEADOWS, M.D.,

Appellees,

vs.

KIM REYNOLDS EX REL. STATE OF IOWA and IOWA BOARD OF MEDICINE,

Appellants.

Appeal from the Iowa District Court for Polk County
Celene Gogerty, District Judge

APPELLANTS' REPLY BRIEF

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**Pro hac vice* granted by order entered January 19, 2023

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In January 2019, the district court enjoined Iowa's fetal heartbeat law based on this Court's 2018 holding that the right to "terminate a pregnancy is a fundamental right under the Iowa Constitution," meaning any "governmental limits on that right are to be analyzed using strict scrutiny." App. 137–38 (citing *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 237, 241 (Iowa 2018) (*PPH II*)).

In June 2022, this Court overruled *PPH II*, "reject[ing] the proposition that there is a fundamental right to an abortion in Iowa's Constitution subjecting abortion regulation to strict scrutiny." *Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710, 715 (Iowa 2022) (*PPH IV*), *reh'g denied* (July 5, 2022). One week later in *Dobbs*, the U.S. Supreme Court overruled *Roe* and *Casey*, including *Roe*'s "central holding" that a state "may not constitutionally protect fetal life before 'viability.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241 (2022) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992)).

Accordingly, abortion is not a fundamental right under either constitution, and rational-basis review necessarily applies. And because the 2019 injunction is now founded on superseded law, equity requires that it be dissolved so Iowa's validly enacted fetal heartbeat law can take effect.

Unable to rebut any of that, Planned Parenthood urges the Court not to reach the merits. Appellees' Br. 29–61. But accepting Planned Parenthood's arguments would make a hash of the Court's caselaw. And nothing in the Court's cases justifies rewriting them. So the Court should apply them instead and reach the merits.

Deciding the merits requires deciding what standard to apply. In *PPH IV*, the plurality wrote that *Casey*'s undue-burden test "remain[ed] the governing standard" because the Court applied it in *PPH I* "when the State conceded that it applied," and the State did not ask the Court to apply rational-basis review in *PPH IV*. 975 N.W.2d at 715–16. But the plurality invited "the legal standard" to be "litigated further." *Id.* at 716. And the State now asks the Court to hold that rational-basis review applies. Opening Br. 57–64.

Planned Parenthood offers no defense of *Casey*'s "ambiguous," "arbitrary," and "unworkable," test. *Dobbs*, 142 S. Ct. at 2266, 2273, 2275. That test never had any basis in federal or Iowa law. Instead, Iowa law requires rational-basis review in cases where, as here, "a fundamental right is not implicated." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). And this Court can conduct that review even if the district court applied a higher bar. *See id.* at 665.

In sum, the Court should hold that rational-basis review applies, the fetal heartbeat law satisfies that standard, and the district court abused its discretion by not vacating its injunction.

I. The Court should reject Planned Parenthood's attempt to rewrite the Court's caselaw governing motions to modify or vacate permanent injunctions.

A. *Bear*'s holding that courts have the authority to vacate an injunction based on a change in the law is not dictum, nor is it clearly erroneous.

This Court's holding in *Bear* that "[t]he court which rendered [an] injunction may modify or vacate the injunction if, over time, there has been a substantial change in the facts or law," *Bear v. Iowa Dist. Ct.*, 540 N.W.2d 439, 441 (Iowa 1995), is dispositive of the question whether the district court had the authority to dissolve its injunction, Opening Br. 29–35.

The district court characterized that holding as dicta. App. 299. But this Court recently declared it a "holding." *Den Hartog v. City of Waterloo*, 926 N.W.2d 764, 769–70 (Iowa 2019) (quoting *Bear*'s "holding that the court had the authority to vacate an injunction 'if, over time, there has been a substantial change in the facts or law'"). And that description is correct. Opening Br. 34.

Planned Parenthood claims the statement is "clearly dictum." Appellees' Br. 57. And it quotes a case defining "*obiter dictum*" as "passing expressions of the court, wholly unnecessary to the decision." *Id.* (quoting *Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942)). But it offers no response to the State's argument that the statement was not dicta because, "[h]ad the relevant law changed, the outcome of the case might have been different." Opening Br. 34.

Without any principled reason for relabeling *Bear*'s holding as non-binding "dictum," accepting Planned Parenthood's argument would mean writing the Court's holding right out of its opinion. The Court should reject that invitation for two reasons.

1. First, *stare decisis* does not allow it. *See State v. Brown*, 930 N.W.2d 840, 854 (Iowa 2019) (discussing importance of "adhering to [the Court's] prior holdings"). The holding is not "clearly erroneous." *Id.* "[C]ourts have long recognized that modification should be granted as a matter of right" in cases involving changes in statutory or regulatory law. Opening Br. 35 (quoting *VII. Modification and Dissolution*, 78 Harv. L. Rev. 1080, 1081 (1965)). And for more than 80 years now, courts have "grant[ed] modification regularly" based on substantial changes in decisional law. *Id.* (quoting *Modification and Dissolution*, 78 Harv. L. Rev. at 1082). "Iowa is hardly alone in recognizing this authority and its breadth." Br. of *Amicus Curiae* Professor Derek T. Muller at 7–8 n.2 (collecting cases).

That is not to say that a change in decisional law literally changes the statute or the constitutional text. *See Bell* v. *Maryland*, 378 U.S. 226, 288 (1964) (Goldberg, J., concurring) (explaining that a court's "constitutional duty is to construe, not to rewrite or amend, the Constitution") (cleaned up).

But as *Spiker* proves, a substantial change in the caselaw interpreting the law can justify modifying or vacating past grants of continuing relief. Opening Br. 40–43 (citing *Spiker v. Spiker*, 708 N.W.2d 347, 354–55, 357–61 (Iowa 2006)). Indeed, a court "errs when it refuses to modify an injunction . . . in light of such changes." *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

2. Second, distinguishing between changes in law and fact makes no sense when a court sits in equity. Opening Br. 34–35. Holding a party "in bondage of a court order no longer having" a legal basis is as inequitable as enforcing an injunction "no longer having a factual basis." *Id.* at 35 (quoting *Helmkamp v. Clark Ready Mix Co.*, 249 N.W.2d 655, 656 (Iowa 1977)). Despite that, the district court thought that distinction made cases like *Helmkamp* distinguishable. App. 298. And Planned Parenthood doubles down on that distinction on appeal. Appellees' Br. 58–59. But neither the district court nor Planned Parenthood explains why treating changes in law differently from changes in fact makes sense. Nor have they cited any authority that supports the alleged distinction. This Court should reject it.

B. *Wilcox* and *Iowa Electric* involved changes in law—not changes in fact—and they confirm *Bear* stated the rule correctly.

Significantly, this Court has affirmed lower court decisions vacating an injunction based on a substantial change in the law—twice. *Wilcox v. Miner*, 205 N.W. 847, 848 (Iowa 1925); *Iowa Elec. Light & Power Co. v. Inc. Town of Grand Junction*, 264 N.W. 84, 85, 91 (Iowa 1935). The district court tried to distinguish *Wilcox* and *Iowa Electric* because they predate the Iowa Rules of Civil Procedure and the motions filed in both would have been timely if the Rules had been in effect. App. 299–300.

But that does not follow because versions of the current rules the district court invoked existed at the time—just in statute form. Opening Br. 38–39 (citing Iowa Code § 12787 (1924); Iowa Code §§ 12787–800 (1935)). And like the current rules, the statutes' texts did not explicitly allow for a motion to vacate or modify a judgment based on a substantial change in the law. *See* Iowa Code § 12787 (1924); Iowa Code § 12787 (1935).

Thus, unsurprisingly, this Court did not cite those statutes to justify its holding that the district court in each case properly vacated the challenged injunction based on a new law legalizing actions that previously were illegal. Opening Br. 38. That makes sense given that "a court's power to modify its own injunctions does not depend on a rule or statute." *Id.* at 39.

On appeal, Planned Parenthood repeats the claim that *Wilcox* and *Iowa Electric* are distinguishable because they were decided "before the Iowa Rules of Civil Procedure." Appellees' Br. 51. And it cites a case for the proposition that this "Court has declined to give weight to interpretations of the Code that predate the Rules." *Id.* (citing *Windus v. Great Plains Gas*, 122 N.W.2d 901, 909 (Iowa 1963)). But *Windus* involved differences between two *different* sets of rules and statutes—one set for setting aside default judgments and the other for vacating judgments. *Id.* at 52.

And the other two cases Planned Parenthood cites show that the Court regularly applies caselaw that predates the rules where, as here, the rules and the statutes that predate them are materially the same. *See Swift v. Swift*, 29 N.W.2d 535, 538 (Iowa 1947) ("While the cited cases arose under the statutes superseded by rule 60, the rule does not differ materially from the statutes, . . . and its predecessors, on the point now considered."); *Shaw v. Addison*, 18 N.W.2d 796, 799 (Iowa 1945) ("The matter is of little or no importance as the code sections and the rules noted are, in substance and effect, the same."). So *Wilcox* and *Iowa Electric* are no less applicable today than they were when this Court first decided them.

Undeterred, Planned Parenthood argues neither case "stand[s] for the broad proposition that courts have inherent authority to modify an injunction based on a change in law" because neither uses the word "inherent" to describe the courts' authority. Appellees' Br. 52. In *Wilcox*, though, this Court held that it was "within the power of the court to modify its previous holding to conform to a valid legalizing act." 205 N.W. at 848. And again, the Court declined to cite any rule or statute as the source of that power. And as the Court's citations in *Johnston* prove, the Court has long understood "that such authority is inherent." Opening Br. 39 (citing *Johnston v. Kirkville Indep. Sch. Dist.*, 39 N.W.2d 287, 288 (Iowa 1949)).

The district court's express retention of jurisdiction in *Wilcox* is similarly irrelevant. Appellees' Br. 53 & 53 n.19. "If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *Id.*

Finally, Planned Parenthood cannot make *Wilcox* and *Iowa Electric* distinguishable simply by relabeling the statutory changes in both as "factual change[s] that did not change the governing law." Appellees' Br. 54. Planned Parenthood cites no authority for its

claim that "the enactment of a 'curative statute'" is really just a "*factual* change that resulted from a legislative enactment." *Id.* at 52–53. Nor can it. The new statute in *Iowa Electric*, for example, declared that a contract that previously had been enjoined would be "legal and valid notwithstanding any irregularity, omission or defect in connection therewith." 264 N.W. at 85.

Applying Planned Parenthood's logic, the State's claim that Iowa's fetal heartbeat law is legal and valid post-*PPH IV* and *Dobbs* could be labeled a "*factual* change that resulted from [two judicial pronouncements]." Appellees' Br. 52. That would be an odd way to describe the legal effect of those decisions—but no less odd than describing the legal effect of a new statute as a "*factual* change that resulted from a legislative enactment." Appellees' Br. 52–53.

Planned Parenthood's attempt to distinguish between changes in statutory law and changes in decisional law also does not work. Indeed, "[t]here are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction." *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 650 n.6 (1961) (collecting cases). And the State cited three such cases in its opening brief. Opening Br. 40 (citing *Santa Rita Oil Co. v. State Bd. of Equalization*, 116 P.2d 1012, 1017 (Mont. 1941); *Agostini*, 521 U.S. at 215; *Spiker*, 708 N.W.2d at 359, 361).

Moreover, Planned Parenthood's selective discussion of the Restatement leaves out the full story. Appellees' Br. 55. Planned Parenthood claims the Restatement takes the position that "modifying or vacating an injunction in 'a situation where a subsequent judicial decision changes the law that was applied in reaching an earlier judgment' would be 'a very unsound policy.'" *Id.* (quoting *Restatement (Second) of Judgments* § 73 cmt. c (1982)). But that portion of the Restatement discusses the rule for reopening final "judgments" more broadly—not for "modifying or vacating an injunction" in particular. *Id.*

And Planned Parenthood omits that comment's conclusion: "On the other hand, when a change of law occurs following a judgment regulating future conduct, that may be a circumstance justifying relief from the judgment." *Restatement (Second) of Judgments* § 73 cmt. c. The illustration that follows makes clear that the availability of relief in such cases is the same regardless of whether the change in law occurs through judicial decision or by statute. *Id.* (stating that relief from a prior judgment "would be proper if the decisional rule" overruled by a subsequent decision "had been overruled by statute"). That statement of the rule is consistent with this Court's decisions in cases like *Wilcox*, *Iowa Electric*, *Spiker*, and *Bear*. Planned Parenthood's statement of the rule is not.

C. *Spiker* reaffirmed that courts have the power to modify judgments granting continuing relief—it did not create an exception to some unknown rule to the contrary.

This Court's decision in *Spiker* confirms that courts may modify judgments granting continuing relief even after the promulgation of Iowa's Rules of Civil Procedure. Opening Br. 41–43, 47–49. In reaching that conclusion, *Spiker* applied the same section of the Restatement that Planned Parenthood partially quotes in its brief. *See, e.g.*, *Spiker*, 708 N.W.2d at 355 (quoting *Restatement (Second) of Judgments* § 13 cmt. c); *id.* at 360 ("[A] judgment may be set aside or modified if: . . . [t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust.") (quoting *Restatement (Second) of Judgments* § 73 cmt. c).

Unlike Planned Parenthood, though, the Court acknowledged and applied the distinction addressed in the Restatement between modification of judgments more broadly and modification of judgments granting continuing relief. *Spiker*, 708 N.W.2d at 356 (quoting *Restatement (Second) of Judgments* § 73 cmt. c). The "source" of a court's "power to modify" an injunction is "the fact that an injunction often requires continuing supervision by the issuing court." *Id.* at 357 (quoting *Sys. Fed'n*, 364 U.S. at 647). And that explains the Court's holding that the petitioner's failure to file

"within the time required by rule 1.1013 . . . [did] not deprive the court of its common-law power to modify judgments granting continuing relief and regulating future conduct upon a substantial change in circumstances." *Id.* at 360.

So the Court in *Spiker* did not create a "narrow exception" to some unknown "rule against modifying injunctions." Appellees' Br. 60. Quite the opposite, it applied the general, common-law rule allowing for the modification of injunctions and other forms of continuing relief based on a substantial change in the facts or the law. *Spiker*, 708 N.W.2d at 355–357, 360.

Unlike other forms of relief, "[i]njunctions do not give rise to vested rights; they enforce only rights existing under current law and conditions." *Modification and Dissolution*, 78 Harv. L. Rev. at 1081. So when the law changes, modification "does not deprive the complainant of any vested right in the injunction, because no such vested right exists." *Wilkinson v. State ex rel. Morgan*, 396 So. 2d 86, 89 (Ala. 1981) (quoting 42 Am.Jur.2d, *Injunctions*, § 334 (1969)). Planned Parenthood's misreading of *Spiker* overlooks that important distinction between final judgments more broadly—which often give rise to vested rights—and injunctions and other forms of continuing relief—which do not. *See* Appellees' Br. 60–61.

That is equally true of Planned Parenthood's incorrect claim that "Iowa courts of equity historically did not have inherent authority to vacate injunctions based on a change in law." *Id.* at 50. *Wilcox*, *Iowa Electric*, and *Johnston* each prove that has *not* been the rule historically in Iowa. And cases like *McGregor* and *Jackson*—which Planned Parenthood cites for its alleged rule—only address the rules for reopening final judgments more broadly. *McGregor v. Gardner*, 16 Iowa 538, 551 (1864) ("The present bill, which is substantially a bill for a new trial upon newly discovered facts, should have been brought originally, in the District Court."); *Jackson v. Gould*, 65 N.W. 406, 406 (Iowa 1895) (stating "that in a proper case a defendant may have a bill of review, and secure a new trial of a suit of action, even after the expiration of the year given by statute for new trials").

Of the three cases Planned Parenthood cites, only one of them, *Denby v. Fie*, even involved a motion to modify an injunction. 76 N.W. 702, 703 (Iowa 1898). And while Planned Parenthood quotes correctly from the portion of the Court's opinion where the Court stated that it did not think that case was a proper one for a bill of review "on account of new matter which has arisen since the decree was entered," Appellees' Br. 50–51 (quoting *Denby*, 76 N.W. at 703), Planned Parenthood omits what comes immediately after that: the Court's explanation for its decision.

In *Denby*, the asserted change in the law was a statutory change, but there had been "no allegation" the new law was in force where the injunction applied, there had been "no statement that defendants [had] complied with any of the conditions of that law if it [was] in force," and there had been "no showing that [defendants were] in position to avail themselves of [its] provisions." *Id.* Under those circumstances, if the Court would have held that the law "did modify the decree," it would have been "deciding an abstract proposition, of which" the defendants were "not entitled to avail themselves." *Id.* So the Court rightly decided not to reach that issue in the absence of "an actual controversy." *Id.*

Not so here. *PPH IV* changed the constitutional status of the previously recognized right to abortion for all of Iowa. The State has explained below and now on appeal how the fetal heartbeat law complies with a proper reading of Iowa's Constitution. And the Governor and Board of Medicine are prepared to avail themselves of that change in this Court's decisional law by starting the rule-making process to begin enforcing the fetal heartbeat law as soon as the injunction against it is lifted. Equity not only allows that result—it requires it.

D. The district court's 2019 holding that the fetal heartbeat law was unconstitutional under then-existing caselaw does not make it void for all time.

1. Constitutional defects can be removed when the law changes by judicial decision.

In trying to distinguish *Wilcox*, *Iowa Electric*, and *Spiker*, the district court invoked Article XII, § 1 of the Iowa Constitution and its declaration that laws inconsistent with it "shall be void." App. 301 (quoting Iowa Const., Art. XII, § 1). And Planned Parenthood now leads with that argument on appeal. Appellees' Br. 31–41.

But Article XII, § 1 does not mean a district court's injunction strikes the enjoined statute from the Code. If it did, any permanent injunction would deprive this Court of jurisdiction to rule on a statute's constitutionality—the statute would already have been erased. *See PPH IV*, 975 N.W.2d at 733 ("[C]ourts must be free to correct their own mistakes when no one else can.") (cleaned up).

True, this Court has said an unconstitutional act is "not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Sec. Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8, 10 (Iowa 1924) (quoting *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886)). And "[w]here a statute is adjudged to be unconstitutional it is as if it had never been." *Id.* (quoting T. Cooley, *Constitutional Limitations* 259 (7th ed. 1903)).

Those statements are true as far as they go. So too for the statements from other courts Planned Parenthood cites. Appellees' Br. 37–39. But they do not make a difference here. None of them speak to the question before the Court: what happens when the law changes so that the alleged constitutional defect in a statute has been removed or found not to exist in the first place?

For example, *Security Savings* quoted the U.S. Supreme Court's decision in *Norton* for the first set of statements quoted above. 200 N.W. at 10 (quoting *Norton*, 118 U.S. at 442). And the *Norton* Court thought it mattered that the "original invalidity of the acts of the commissioners [had] never been subsequently cured." 118 U.S. at 454. Under Planned Parenthood's theory, such curing would be impossible.

Even more revealing, *Security Savings* quoted Professor Cooley's 1903 treatise on Constitutional Limitations for its second set of statements about a statute that has been "adjudged to be unconstitutional" being treated "as if it had never been." 200 N.W. at 10 (quoting Cooley, *Constitutional Limitations* at 259). But Professor Cooley also clarified that, "[i]f a decision adjudging a statute unconstitutional is afterwards overruled, the statute is to be considered as having been in force for the whole period." Cooley, *Constitutional Limitations* at 259 n.2 (citing *Pierce v. Pierce*, 46 Ind. 86 (1874)).

In *Pierce*, the Indiana Supreme Court rejected an argument like the one Planned Parenthood makes here: that when that court had "declared the unconstitutionality" of certain acts under the state constitution, the acts "stood abolished, and private rights obtained their *status*, and became vested as if such unconstitutional and void acts had never been passed." 46 Ind. at 95.

In rightly rejecting that argument, the court explained that it had "no power to repeal or 'abolish' statutes." *Id.* So if it should hold an act "unconstitutional, while its decision remain[ed], the act must be regarded as invalid." *Id.* But if it should later overrule that decision, "the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly." *Id.* at 95–96.

2. *McCollum* and *O'Neil* confirm that a law becomes valid and enforceable without reenactment when the alleged constitutional defect is removed.

As Professor Muller shows, this Court has employed similar reasoning. Br. of *Amicus Curiae* Professor Derek T. Muller at 10–12. Even when statutes have been enjoined on constitutional grounds, this Court "has not required re-enactment of a law once the legal basis for enjoining [it] in the first place has changed." *Id.* at 10 (citing *State v. O'Neil*, 126 N.W. 454, 454 (Iowa 1910); *McCollum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909); *Blair v.*

Ostrander, 80 N.W. 330, 331 (Iowa 1899)). And that approach is consistent with the U.S. Supreme Court and an "overwhelming majority" of other courts that have "generally assumed that a statute once declared unconstitutional is revived when the initial decision striking it down is reversed." *Id.* at 11 (cleaned up).

In *McCollum*, this Court held that a statute that it previously had found to be unconstitutional as a "restraint upon freedom of interstate commerce" became "valid and enforceable" without reenactment when the Court overruled two prior decisions based on a more recent U.S. Supreme Court decision holding that such laws do not violate the U.S. Constitution. 119 N.W. at 540–41.

While "[i]t is true that an unconstitutional statute is, so far as it is unconstitutional, without force from the time of its enactment," the court's decisions "holding it to be unconstitutional may be overruled, and the supposed unconstitutionality may thus be found not to exist." *Id.* at 541. "There is nothing to prevent a court from overruling its own decisions and rendering them of no force and effect as precedents in other cases." *Id.*

That is exactly what happened here. This Court's overruling of *PPH II* rendered that decision "of no force and effect as precedent[]." *Id.* And it is "well settled" that a statute that has been held unconstitutional becomes "valid and enforceable after the supposed constitutional objection has been removed." *Id.*

This Court reaffirmed that conclusion in *O'Neil*, explaining that it "was the holding in *McCollum*," and it was not questioned. *O'Neil*, 126 N.W. at 454. Writing separately, Chief Justice Deemer agreed, adding that while an "unconstitutional statute is absolutely void," it can be "vitalized or resuscitated by a decision overruling prior ones holding to the contrary," even without "re-enactment by the Legislature." *Id.* at 459 (Deemer, C.J., concurring).

Planned Parenthood argues *McCollum* and *O'Neil* can be distinguished because both were decided under the U.S. Constitution. Appellees' Br. 37 n.11. But nothing in either opinion suggests that makes a difference. Indeed, both cite approvingly to state court decisions reaching the same result under state constitutions. *McCollum*, 119 N.W. at 541 (citing *Allison v. Corker*, 52 A. 362 (N.J. 1902)); *O'Neil*, 126 N.W. at 454 (citing *Pierce*, 46 Ind. 86).

The other authorities Planned Parenthood cites in support of its void-for-all-time argument also fail. For example, it quotes section 194 of *American Jurisprudence* for the "general rule" that an unconstitutional statute "is wholly void and ineffective for any purpose." Appellees' Br. 35 (quoting 16A Am. Jur. 2d *Constitutional Law* § 194). But two sections over, the same treatise clarifies that a "statute once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature to restore its operative force." 16A Am. Jur. 2d *Constitutional Law* § 196.

Finally, Planned Parenthood cites several academic articles, each of which takes a more aspirational approach—describing what they think the law should be, as compared to what the law is. Appellees' Br. 40. For example, Treanor and Sperling concede their approach is "at odds" with most of the caselaw. William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 Colum. L. Rev. 1902, 1955 (1993). In one case they discuss, the court took the exact opposite approach—joining most other courts in holding that a "statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished," meaning that "*so long as the decision stands the statute is dormant but not dead*," but if the decision is "reversed the statute is valid from its first effective date." *Id.* at 1913 (quoting *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952)).

Importantly, *Jawish* cites this Court's decision in *McCollum* as one of several cases adopting that mostly unanimous approach. *Jawish*, 86 A.2d at 97. And Treanor and Sperling do the same, citing both *McCollum* and *O'Neil* as cases embracing what they call "the revival principle." *Prospective Overruling*, 93 Colum. L. Rev. at 1914 n.50. That approach is still the correct approach. And nothing Planned Parenthood proffers justifies changing course now.

II. The Court should reject Planned Parenthood's attempt to evade this Court's review of the question of what standard applies to laws regulating abortion.

A. The State preserved its argument that rational-basis review applies to laws regulating abortion.

After this Court overruled *PPH II* last year, the State moved to dissolve the district court's 2019 injunction, arguing as it had before *PPH II* that "[b]ecause abortion is not a fundamental right, rational-basis review applies," App. 163, and "Iowa's fetal heartbeat law rationally advances the state's interest in protecting unborn life," App. 168. In response, Planned Parenthood argued this Court in *PPH IV* had "held clearly" that the undue-burden standard remains the governing test. App. 191.

Ultimately, the district court concluded "*PPH IV* explicitly did not find that the standard of review for abortion regulations would be rational basis," and instead that it had been "clear" that "'for now, this means that the *Casey* undue burden test [the court] applied in *PPH I* remains the governing standard.'" App. 305 (quoting *PPH IV*, 975 N.W.2d at 716). Thinking it was bound to apply that test, the district court ruled that if the fetal heartbeat law were allowed to take effect, it "would be an undue burden and, therefore, the statute would still be unconstitutional and void." App. 306. "Therefore, under the undue burden test," the court held that "there has not been a substantial change in the law." *Id.*

Against that backdrop, Planned Parenthood's argument that the State "did *not* preserve error on the question of what standard applies to abortion restrictions absent the undue burden standard" is without merit. Appellees' Br. 62. Planned Parenthood concedes the State "briefed that issue below." *Id.* It just says the State failed to preserve it because "the district court did not rule on it, holding instead only that *PPH IV* left undue burden in place," and the State "did not file a motion to enlarge the ruling." *Id.*

But the State did not need to move to enlarge a ruling on an issue that it had thoroughly briefed and that the district court had expressly decided. In *Bank of America, N.A. v. Schulte*, there had been no pleading on the unpreserved issue, the appellants had "made only a fleeting reference" to it at a hearing and had included only a "brief reference" to it in a subsequent filing, and the "district court did not address" the issue in its ruling. 843 N.W.2d 876, 884 (Iowa 2014).

That is a far cry from what happened here. Even Planned Parenthood concedes the State fully briefed the issue. Appellees' Br. 62. And three pages later in its brief, it appears to concede that the court decided it: "despite the State's invitation in its motion to dissolve to disregard this Court's precedent and apply rational basis scrutiny, the district court, again, correctly declined." *Id.* at 65.

This Court has allowed far less to suffice to preserve an issue for appeal. *See In re Det. of Anderson*, 895 N.W.2d 131, 138 (Iowa 2017); *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014). And even if *PPH IV* had left the undue-burden test in place, the State is not required "to argue existing law should be overturned before a court without the authority to do so." *State v. Williams*, 895 N.W.2d 856, 859 n.2 (Iowa 2017). The district court's ruling proves it "*considered* the issue and necessarily ruled on it," so "even if the court's reasoning is incomplete or sparse, the issue has been preserved." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (cleaned up).

B. Planned Parenthood has had ample opportunity to litigate the question of what standard applies.

Planned Parenthood's claim it has not had "an opportunity to address fully the question of what standard should apply" also fails. Appellees' Br. 66. Planned Parenthood notes that, "[i]n *PPH IV*, this Court remanded this very question to the trial court, but that case was dismissed without that question being briefed or considered." *Id.* (citation omitted). But that's because *Planned Parenthood* voluntarily dismissed that lawsuit. App. 277–78. In this case, there were no length limits placed on the parties' briefs below. And the State even agreed to Planned Parenthood's motion to file a surreply. Unresisted Mot. for Leave to File Surreply at 3, *Planned Parenthood of the Heartland v. Reynolds*, No. EQCE 83074 (Oct. 11, 2022).

Planned Parenthood made the strategic choice to argue only that *PPH IV* left *Casey*'s undue-burden standard in place, and that the Court's decision was binding below. App. 180–83, 191–94, 227. "While the State spends pages arguing that rational basis should apply, this case is not the appropriate vehicle for this argument," Planned Parenthood told the district court. App. 192. That was Planned Parenthood's choice, but it cannot complain now that it has not had an opportunity to brief the issue, or that this Court must wait for the issues to be "fully briefed in front of the district court before this Court passes on them." Appellees' Br. 66.

C. Nothing remains to be done in the district court for this Court to decide the merits of this appeal.

Planned Parenthood also says the Court cannot now decide what standard to apply because certain "factual issues should be developed" first. *Id.* And it objects to the Court applying rational-basis review "in the first instance because doing so would require resolving factual and legal issues not yet briefed." *Id.* at 67. Specifically, it says the "parties have not yet briefed at the district court the factual impact of the ban on Iowans." *Id.* And it claims there remains an "unresolved factual dispute regarding the point in pregnancy at which the Ban would prohibit abortions." *Id.* at 68.

Addressing that last point first, Planned Parenthood simply misreads the law—it does not dispute the State's facts. Opening Br. 17 n.1 (explaining that Planned Parenthood mislabels the law a "6-week abortion ban" based on data measuring how early a fetal heartbeat can be detected using a *transvaginal* ultrasound, even though the law only requires an *abdominal* ultrasound).

And none of Planned Parenthood's other arguments prevent the Court from applying rational-basis review. Planned Parenthood has not said whether or why it believes Iowa's fetal heartbeat law fails that review. That omission is understandable. But it cannot prevent the Court from deciding the issue in this appeal.

Similarly, while the district court did not apply rational-basis review, this Court still can apply it now. In *State v. Seering*, the Court did exactly that. 701 N.W.2d at 664–65. The district court had found the alleged right fundamental, applied strict scrutiny, and found the statute unconstitutional. *State v. Seering*, 2003 WL 21738894, at *9 (Iowa Dist. Apr. 30, 2003). And this Court reversed, holding the right was *not* fundamental, rational-basis review applied, and the statute survived. *Seering*, 701 N.W.2d at 664–65. *Accord State v. Wehde*, 258 N.W.2d 347, 352–53 (Iowa 1977). Likewise in *Dobbs*, the U.S. Supreme Court applied rational-basis review in the first instance and held that the State's "interests provide[d] a rational basis" for the law there. 142 S. Ct. at 2284.

This Court should do the same here. "The rational basis test is a deferential standard." *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012) (cleaned up). "The government is not required or expected to produce evidence to justify its action." *Id.* at 28. And the "analysis does not require a factual basis drawn from the record in the case." *Id.* at 39 (Cady, C.J., concurring specially). The State *did* produce evidence showing the rational basis for its law below. App. 120–28. But even if it hadn't, "there are certainly occasions where a rational basis test can be applied on the pleadings without taking evidence." *King*, 818 N.W.2d at 28 (cleaned up). And this is one such case.

D. The district court's decision to deny the State's motion to dissolve does not insulate it from review.

Finally, Planned Parenthood's argument that it could have appealed if the district court had *granted* the motion to dissolve, but the State can't appeal because the district court *denied* it, also fails. Appellees' Br. 69–71. Planned Parenthood claims this Court has "consistently held that such a ruling does not trigger an appeal." *Id.* But that's wrong. None of the cases it cites involved a motion to modify or vacate an injunction. *See Beck v. Fleener*, 376 N.W.2d 594, 596 (Iowa 1985) (motion to reconsider); *Recker v. Gustafson*, 271 N.W.2d 738, 738–39 (Iowa 1978) (motion to enlarge); *Stover v. Cent. Broad. Co.*, 78 N.W.2d 1, 4–5 (Iowa 1956) (motion to reconsider).

Motions to reconsider generally are *not* appealable because the "[e]rror, if any, is upon the previous ruling." *Recker*, 271 N.W.2d at 739. And "an appeal ordinarily must be taken from the ruling in which the error is said to lie." *Beck*, 376 N.W.2d at 596. Appeals from denial of a motion to modify or vacate an injunction—like this one—are different. Here the alleged error is in the district court's 2022 decision refusing to vacate its earlier injunction. Opening Br. 54–66. And the State's appeal from that more recent decision is timely. *See Matter of Young's Est.*, 273 N.W.2d 388, 390–91 (Iowa 1978) (overruling motion to dismiss appeal as untimely where appeal was from denial of a motion to modify a prior order, and the motion invoked prior versions of Rules 1.1012 and 1.1013 and the district court's "inherent power").

Planned Parenthood's concerns about the effects of "permitting a losing party to appeal" in such limited circumstances are unfounded. Appellees' Br. 30 n.5. This Court's "decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue." *Agostini*, 521 U.S. at 239. The Court should deny Planned Parenthood's motion to dismiss in its entirety and reach the merits.

III. The Court should hold rational-basis review applies, Iowa's fetal heartbeat law satisfies it, and the injunction against it must be dissolved.

A. No fundamental right is involved, so rational-basis review necessarily applies.

This Court's caselaw establishes that, when "a fundamental right is not implicated, a statute need only survive a rational basis analysis." Opening Br. 58 (quoting *Seering*, 701 N.W.2d at 662). In response, Planned Parenthood observes that, "[i]n other contexts," the Court has applied different tests for different types of claims. Appellees' Br. 66. But this is a substantive-due-process case. And the analysis in *this* context is well established. Opening Br. 57–58.[1]

Importantly, Planned Parenthood makes no effort to supply a legal basis for the undue-burden standard. That test never had any basis in federal or Iowa law. *Dobbs*, 142 S. Ct. at 2275; *PPH IV*, 975 N.W.2d at 746–50 (McDermott, J., dissenting in part). And its numerous problems, along with the "jurisprudential minefield" it produced, are well documented. Br. of *Amicus Curiae* 62 Members of the Iowa Legislature at 10.

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[1] Planned Parenthood incorrectly asserts that a partial quote from Justice Mansfield's dissent in *PPH II* supports the proposition that "even if a right is not recognized as fundamental, restrictions on it can be subject to a higher level of scrutiny than rational basis." Appellees' Br. 66. That dissent cast doubt on substantive due process more broadly. *PPH II*, 915 N.W.2d at 247, 249 (Mansfield, J., dissenting). It did not suggest a non-fundamental right could trigger heightened scrutiny.

"[T]he undue burden standard offers no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned." *PPH II*, 915 N.W.2d at 240 (cleaned up). That is especially true now that the U.S. Supreme Court and other federal courts will no longer develop the law under that test. If the Court adopts the undue-burden standard in Iowa, that task would fall squarely on this Court. Br. of *Amicus Curiae* 62 Members of the Iowa Legislature at 21–28. In keeping with the Court's precedent, the Court should reject that invitation and apply rational-basis review instead.

B. Planned Parenthood *still* has not argued the fetal heartbeat law fails rational-basis review, and for good reason—the rational basis here is obvious.

Under rational-basis review, Iowa's fetal heartbeat law "need only be rationally related to a legitimate state interest." *Sanchez v. State*, 692 N.W.2d 812, 817–18 (Iowa 2005). And it is. Opening Br. 59–60. Prohibiting elective abortions "after detectable human heartbeat is rational" because "'[r]espect for and preservation of prenatal life at all stages of development' is a legitimate interest." *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1326 (11th Cir. 2022) (quoting *Dobbs*, 142 S. Ct. at 2284).

Planned Parenthood does not argue otherwise. It asserts that "the rational basis standard is 'not a toothless one in Iowa.'" Appellees' Br. 67 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004) (*RACI II*)). But that does not mean it requires anything more than traditional rational-basis review, and "*RACI II* as a practical matter has been limited to its facts." *King*, 818 N.W.2d at 43 n.28 (Waterman, J., concurring specially).

Finally, testimony about the effects the law might have on Iowans who otherwise would choose to have an abortion would not undermine the State's interest in protecting fetal life. *Contra* Appellees' Br. 67. That interest is served by a law that prohibits elective abortions after a point in fetal development when "the unborn child's heart starts beating," "brain waves are detectable," "the child can move and starts to develop sensory receptors," and "the child's face is developing, with cheeks, chin, and jaw starting to form." Br. of *Amicus Curiae* American College of Pediatricians at 11, 16–17. *Accord* App. 120–21, 125–26. "After detection of a fetal heartbeat—and absent an abortion—the overwhelming majority of unborn children will now survive to birth." Br. of *Amicus Curiae* American College of Pediatricians at 16. In light of that evidence, a "remand[] for a costly trial to prove allegations that, if true, provide no grounds for judicial relief" would be unwarranted. *King*, 818 N.W.2d at 43 (Waterman, J., specially concurring).

CONCLUSION

The Court should deny Planned Parenthood's motion to dismiss this appeal, reverse the district court's decision denying the State's motion to dissolve the 2019 injunction, and remand the case to the district court with instructions to vacate that injunction and finally allow the State and the Board to enforce Iowa's validly enacted fetal heartbeat law.

Respectfully submitted,

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**Pro hac vice* granted by order entered January 19, 2023

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 6,994 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 28, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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