THE IOWA SUPREME COURT
No. 23-1145

PLANNED PARENTHOOD OF THE HEARTLAND, INC., et al.,

Petitioners-Appellees,

v.

KIM REYNOLDS ex rel. STATE OF IOWA, et al.,

Respondents-Appellants.

Appeal from the Iowa District Court for Polk County
The Honorable Joseph Seidlin, Case No. EQCE089066

BRIEF OF INDIANA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of Respondents.[1] *Amici* States are committed to our Nation's shared traditions of representative government, separation of powers, and the rule of law, upon which freedom depends. As *amici* States understand through experience with their own constitutions—some of which contain provisions similar to Article I, Section 1 of the Iowa Constitution—preserving our system of government requires fidelity to the constitutional text as understood by those who drafted and ratified it. Petitioners' proposal that the judiciary wield Iowa's Article I, Section 1 to create an atextual, ahistorical abortion right

[1] Pursuant to Iowa Rule of Appellate Procedure 6.906(4), *amici* state that no party or party's counsel authored any portion of this brief, nor was the preparation or submission of this brief funded in any way by a party or party's counsel. No other person contributed money to fund the preparation or submission of this brief.

is therefore of concern to *amici*. That proposal threatens the principles that undergird our shared commitment to rule of law and respect for the democratic process.

ARGUMENT

The Court should reject Petitioners' attempt to read Article I, Section 1's reference to "inalienable rights" as including a "right to abortion." Dkt. 2, at 13. As this Court has explained, Article I, Section 1's Inalienable Rights Clause is not an empty vessel into which the judiciary can pour whatever it likes, nor does the Clause prohibit the people's elected representatives from exercising the State's police power for the common good. The Inalienable Rights Clause prohibits "only arbitrary, unreasonable legislative action that impacts" the "common law rights that pre-existed Iowa's Constitution." *Atwood v. Vilsack*, 725 N.W.2d 641, 651–52 (Iowa 2006).

Abortion is not among the common-law rights that the Iowa Constitution's drafters and ratifiers recognized. At common law, abortion was not a right; it was unlawful and criminal. "Histori-

cally, there is no support for abortion as a fundamental constitutional right in Iowa." *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State* (*PPH 2022*), 975 N.W.2d 710, 740 (Iowa 2022), *reh'g denied* (July 5, 2022). The Iowa legislature's decision to restrict abortion via the Fetal Heartbeat Statute is an eminently reasonable exercise of the police power to further "the State's vital interest in protecting unborn life." *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State* (*PPH 2023*), No. 22-2036, 2023 WL 4635932, at *8 (Iowa June 16, 2023) (opinion of Waterman, J.).

I. Article I, Section 1 Protects Only Specific, Historically Recognized Rights—Not Whatever Interests Happen To Be Popular in Some Quarters Today

Article I, Section 1 provides: "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1. As the adjective "inalienable" connotes, the "rights" mentioned in this constitutional

provision do not constitute a malleable, ever-evolving set of interests, but rather a specific, fixed set of rights that Iowans enjoyed when the Constitution was ratified in 1857.

This Court has described "inalienable rights" as the "common law rights that pre-existed Iowa's Constitution" (which this Court has also called "natural rights"). *Atwood*, 725 N.W.2d at 651–52; *see May's Drug Stores v. State Tax Comm'n*, 45 N.W.2d 245, 250 (Iowa 1950) ("[t]he property right which is secured by [section 1] is the pre-existing common law right"). Critically, "[c]ommon law rights existing in 1857" are not absolute; the legislature retains the power to abrogate or to "alter the common law." *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 87–88 (Iowa 2022); *see City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 352 (Iowa 2015). But an interest does not even come within the Clause's scope unless the interest constitutes a right under the "historical Iowa common law as appreciated by our framers . . . at the time of adoption of Iowa's Constitution." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 280 (Iowa 2018).

This Court's description of "inalienable rights" as common-law rights reflects how those who drafted and ratified the Constitution understood it. *See N.W. Halsey & Co. v. City of Belle Plaine*, 104 N.W. 494, 495–96 (Iowa 1905) (courts evaluate the "constitutional debates" to gain a "fuller understanding" of constitutional meaning). As the debates over Iowa's Constitution reflect, the term "inalienable rights" refers to what is "absolutely true in the nature of things"—not to an ever-changing set of rights. 2 *The Debates of the Constitutional Convention of the State of Iowa* 733 (W. Blair Lord rep.) (Davenport, Luse, Lane & Co. 1857) (statement of David Bunker). Those who drafted, debated, and ratified the Constitution understood it to preserve "the rights and privileges originally enjoyed by the ancient Britons, and by them deemed as old as the human race itself." 1 *id.* at 101 (statement of George Ells).

The notion that the Inalienable Rights Clause reflects an infinitely malleable set of rights would have been foreign to those who drafted and ratified the Constitution. When the Constitution was

enacted, it was widely understood that "[t]he meaning of [a] constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* 57–58 (2d ed., Boston, Little, Brown & Co. 1871). As the Court explained in one of the first cases arising under the Constitution, "[t]he people, through their constituted delegates, have made their constitution. It is our duty to declare what this constitution is, whatever the consequences, and not to alter or change it." *Dist. Twp. of City of Dubuque v. City of Dubuque*, 7 Iowa 262, 286 (1858).

The Constitution's structure, moreover, precludes the notion that the judiciary may create new, ahistorical "rights." Under the Constitution, "political power is inherent in the people," and the "legislative authority" of Iowa's people is "vested in a general assembly." Iowa Const. art. I, § 2; Iowa Const. art. III, § 1; *see Stewart v. Bd. of Supervisors*, 30 Iowa 9, 15 (1870) ("[T]he very words of the

constitution, which vests the power of legislation in the general assembly, exclude the judiciary from any share in it."). The judiciary's role is limited to enforcing the Constitution's written guarantees. *See State v. Warren*, 955 N.W.2d 848, 864 (Iowa 2021); *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021). It does not "sit as a superlegislature rethinking policy choices of the elected branches." *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 26 (Iowa 2019).

If the judiciary possessed the power to create new "inalienable rights" using Article I, Section 1, that power would render many other constitutional provisions a dead letter. The Constitution provides the people with a mechanism for amending it. Iowa Const. art. X. But what incentive would there be to undertake the difficult task of amending the Constitution if anyone dissatisfied with the legislative process can run to the courts claiming that a previously unprotected interest constitutes a new "inalienable right"? The Constitution also places explicit, textual limitations on enumerated rights. *See, e.g.*, Iowa Const. art. I, § 8 (only creating a right against "unreasonable" searches and seizures); Iowa Const. art. I, § 13

(providing for the suspension of the writ of habeas corpus "in case of rebellion, or invasion" as the "public safety may require it"). But what would be the point of those limits if the Inalienable Rights Clause provided an inexhaustible source of new "rights"?

The only way to prevent Article I, Section 1 from becoming a vehicle for amending the Iowa Constitution by judicial fiat is to require objective, historical evidence that the specific interest asserted constituted a right at ratification. That is precisely why federal substantive due-process decisions require a "'careful description' of the asserted fundamental liberty interest" and a showing that it is "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted); *see Hensler v. City of Davenport*, 790 N.W.2d 569, 581 (Iowa 2010). Without a careful, objective historical analysis, it would be all too easy "to confuse what [the Constitution] protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022).

II. Abortion Is Not an Inalienable Right

By any standard, abortion is not an inalienable right that pre-existed the Constitution. "At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages." *Dobbs*, 142 S. Ct. at 2235. "Historically, there is no support for abortion as a fundamental constitutional right in Iowa" either. *PPH 2022*, 975 N.W.2d at 740. Indeed, there was "no support in American law" for a "right to obtain an abortion" anywhere until the "latter part of the 20th century." *Dobbs*, 142 S. Ct. at 2235. Saying abortion is a historically supported right that always existed would be absurd.

A. Abortion was unlawful throughout Iowa's history

Under the English and American common-law tradition that Iowa inherited, abortion was not a right. To the contrary, the "'eminent common-law authorities (Blackstone, Coke, Hale, and the like)' *all* describe abortion after quickening as criminal." *Dobbs*, 142 S. Ct. at 2249 (citation omitted); *see PPH 2022*, 975 N.W.2d at 740 n.19. The meaning of "quickening" is "subject to some debate": The

term may have simply meant that the woman had a live child, which "under the era's outdated knowledge of embryology" was thought to occur "around the sixth week of pregnancy," or it may have required the woman's perception of fetal movement. *Dobbs*, 142 S. Ct. at 2249 n.24. Regardless, while abortion itself may not have been a "criminal offence" before quickening, *Abrams v. Foshee*, 3 Iowa 274, 274 (1856), "it does not follow that abortion was *permissible*"—much less an inalienable right, *Dobbs*, 142 S. Ct. at 2250.

Even before quickening, the common law regarded abortion as unlawful. Under "a proto-felony-murder rule," the act of performing a pre-quickening abortion could form the basis for a homicide conviction, *Dobbs*, 142 S. Ct. at 2250—a rule Iowa followed from its early days. In *State v. Moore*, 25 Iowa 128 (1868), this Court reaffirmed the two-hundred-year-old common-law rule that a person could be charged with homicide if the woman died during an abortion attempt because doing so was "unlawful," "dangerous," and "abhorrent to all our notions of sound morality." *Id.* at 136. It ex-

plained that the common law regarded "the right to life" as "inalienable," and that the common law extended its protections "not only . . . to persons actually born" but also to unborn children. *Id.* at 135–36; *see PPH 2022*, 975 N.W.2d at 747 (McDermott, J., concurring in part) (recognizing the common law understood the existence of an unborn child to be a "human life" "for some purposes").

During its territorial period, Iowa enhanced the penalties for abortion, criminalizing it at all stages of pregnancy. In 1838, the first territorial legislature prohibited "administer[ing] . . . any such poison, substance, or liquid, with the intention to procure the miscarriage of any woman being with child," and imposed a penalty of up to three years in prison and a maximum $1,000 fine. Iowa Rev. Stat. ch. 18, § 18 (Terr. 1838). In 1843, the territorial legislature classified performing an abortion at any stage of pregnancy as manslaughter, whether achieved by means of "any medicine, drug, or substance," or by "any other means with intent thereby to destroy such child, and thereby cause its death," unless necessary to save the mother's life. Iowa Rev. Stat. ch. 49, § 10 (Terr. 1843).

For whatever reason, the first state code adopted in 1851 did not include an express prohibition of abortion. *See* Iowa Code ch. 138 (1851); *PPH 2022*, 975 N.W.2d at 741. That omission presumably was an oversight introduced as the General Assembly's Code Commission reorganized hundreds of pages of early statutes in 1851. *See The Code of 1851*, 7 Annals of Iowa 625, 625–26 (1907). In *Moore*, however, this Court rejected the notion that this apparent oversight rendered abortion lawful. 25 Iowa at 135–36. The Court held that an abortion that resulted "in the unintended death of the woman would have been punishable as murder in the second degree" even "prior to the act of 1858" that outlawed abortion. *Id.* at 137.

In any event, not long after the adoption of the 1857 Constitution, the Iowa legislature reenacted a statutory prohibition on abortion. In March 1858, it imposed criminal penalties for procuring an abortion at any stage of pregnancy through any means:

> [E]very person who shall wilfully [sic] administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument

> or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars.

1858 Iowa Acts ch. 58, § 1 (codified at Revs. of 1860, Stats. of Iowa § 4421 (1860)); *see State v. Fitzgerald*, 49 Iowa 260, 261 (1878) (confirming that the prohibition applied at any stage of pregnancy).

Then, in 1882, the legislature increased the maximum term of imprisonment to five years. 1882 Iowa Acts ch. 19. That statute "remained in place" for the next 115 years "until *Roe* superseded it." *PPH 2022*, 975 N.W.2d at 741 (citing Iowa Code § 701.1 (1973)). And throughout that period, the Court consistently affirmed that abortion was an unlawful act in Iowa. *See, e.g.*, *State v. Hollenbeck*, 36 Iowa 112 (Iowa 1872); *State v. Leeper*, 30 N.W. 501 (Iowa 1886); *State v. Rowley*, 248 N.W. 340 (Iowa 1933); *State v. Anderson*, 33 N.W.2d 1 (Iowa 1948); *State v. Snyder*, 59 N.W.2d 223 (Iowa 1953); *State v. Abodeely*, 179 N.W.2d 347 (Iowa 1970). The decades-long persistence of Iowa's criminal prohibition on abortion even as times

and mores changed makes it particularly clear that abortion was never historically regarded as a right.

B. Iowa's historical view of abortion accords with a broader national understanding

What is true of Iowa's history was true nationally. "Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion." *Dobbs*, 142 S. Ct. at 2248. In fact, there was an "overwhelming consensus" that abortion was a criminal act. *Id.* at 2248, 2253. Not only was abortion a crime at common law, but during the nineteenth century, "the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy." *Id.* at 2252 & n.33. Many of these statutes were enacted around the same time as Iowa's 1858 prohibition and contain similar language. *See id.* at 2285–300.

Taking a closer look at a few state histories underscores the absence of any historical support for an abortion right. Since 1816, Indiana's Constitution has recognized the existence of "inalienable rights." Ind. Const. art. I, § 1. Those rights, however, have never included abortion. *See Members of Medical Licensing Bd. of Ind. v.*

Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc., 211 N.E.3d 957, 977–79 (Ind. 2023). In Indiana, as in Iowa, abortion was unlawful at common law; prohibited by "territorial law"; and "for the entire period [after] the ratification of [Indiana's] 1851 Constitution," "Indiana prohibited abortions at all stages of the pregnancy to the extent the federal courts interpreting the federal constitution permitted." *Id.* at 978; *see id.* at 962–64. The Indiana Supreme Court thus recently rejected the claim that Indiana's version of the Inalienable Rights Clause provided a right to abortion on demand, saying it had "no commission to revise the Constitution through judicial interpretation." *Id.* at 980–81.

Idaho's history is of a piece. Idaho's 1889 Constitution also guarantees certain "inalienable rights." Idaho Const. art. I, § 1. As the Idaho Supreme Court recently explained, however, there is no evidence that the "framers and adopters of [Idaho's] Inalienable Rights Clause intended to implicitly protect" an abortion right. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1148 (Idaho 2023). "Nothing in the territorial laws of Idaho, the record of the

1889 constitutional convention, the surrounding common law and statutes, the surrounding publications of the times, or Idaho's medical regulations at that time show abortion was viewed as a right." *Id.* "To the contrary," the historical record revealed that "abortion was viewed as an immoral act and treated as a crime." *Id.* For the judiciary to treat abortion as a right, the Idaho Supreme Court explained, would thus be to act as a "roving commission." *Id.* at 1164 (citation omitted). Iowa's longstanding common-law and statutory history of prohibiting abortion supports a similar conclusion here.

C. A stylistic amendment in 1998 does not provide a license to disregard two centuries of history

Despite the absence of any historical support suggesting that abortion was an inalienable right, either in Iowa or elsewhere, Petitioners suggest that a 1998 amendment to Article I, Section 1 alters its meaning. Dkt. 2, at 15–16. But that amendment was stylistic, not substantive, and there still is no evidence that abortion was ever considered an "inalienable right."

When the Inalienable Rights Clause was adopted as part of the 1857 Constitution, it read: "All men are, by nature, free and

equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1 (amended 1998). In referring to "men," the Clause in no way excluded women. It instead reflected the grammatical convention of the time of using "men" to include both sexes. *See* Peter Bullions, *The Principles of English Grammar* § 8, at 12 (13th ed., New York, Pratt, Woodford & Co. 1845) ("the masculine term has also a general meaning, expressing both male and female"). When Iowans amended the Clause in 1998 to read "men *and women*," the amendment did not effect any substantive change. Voters merely made a stylistic change to reflect more modern grammatical sensibilities. *Cf. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky.*, 211 N.E.3d at 981–84 (explaining that a similar 1984 amendment to Indiana's constitution was a "purely stylistic update").

Cases since the 1998 amendment reflect that the Constitution's meaning—and in particular the scope of the "inalienable

rights" included within Article I, Section 1—did not change. In post-1998 cases arising under the Inalienable Rights Clause, the Court has insisted that the term refers to "common law rights that pre-existed Iowa's Constitution." *Atwood*, 725 N.W.2d at 651. It has never suggested that the Clause now refers to whatever someone might claim was viewed as a right in 1998.

Nor does it follow that abortion would have been an inalienable right when the 1998 amendment was adopted. When the amendment was adopted, Iowa prohibited abortion as a class C felony after the end of the second trimester, and it had just enacted a new statute prohibiting partial-birth abortion unless necessary to save the mother's life. Iowa Code §§ 707.7, 707.8A (1998). Compared to the 1858 law, the statutory prohibition in 1998 was more modest. But its more limited scope reflects that federal decisions interpreting the federal Constitution at the time prevented Iowa from regulating abortion more stringently. It does not suggest that abortion constituted a right that could not be regulated.

III. Regardless, the Fetal Heartbeat Statute Is a Reasonable Exercise of the Police Power

Regardless of what constitutes an "inalienable right," the challenged Fetal Heartbeat Statute is constitutional. Even interests falling within the Inalienable Rights Clause are "subject to reasonable regulation by the state in the exercise of its police power." *Jacobsma*, 862 N.W.2d at 352. As this Court has explained, the Clause prohibits "only arbitrary, unreasonable legislative action that impacts an inalienable right." *Atwood*, 725 N.W.2d at 652. That Clause does not forbid any and all legislation touching matters considered inalienable rights, but only legislation that fails the "very deferential" rational-basis test. *Garrison*, 977 N.W.2d at 86 (quoting *AFSCME Iowa Council 61*, 928 N.W.2d at 32); *see id.* at 93 (Mansfield, J., concurring) ("[W]e've historically viewed article I, section 1 as simply incorporating a rational basis test.").

As historical practice and experience show, it is eminently reasonable to enact laws like the Fetal Heartbeat Statute that promote "respect for and preservation of prenatal life at all stages of

development." *PPH 2022*, 975 N.W.2d at 749 (McDermott, J., concurring in part) (citing *Moore*, 25 Iowa at 135–36). These laws also promote other legitimate, important state interests, including protecting the health and safety of pregnant mothers, eliminating "particularly gruesome or barbaric medical procedures," preserving the "integrity of the medical profession," and preventing fetal pain. *Dobbs*, 142 S. Ct. at 2284. Whatever one thinks about "the wisdom or desirability" of these "policy determinations," the Constitution permits the people's elected representatives to make them. *Baker v. City of Iowa City*, 867 N.W.2d 44, 57 (Iowa 2015).

CONCLUSION

The Court should dissolve the district court's injunction prohibiting enforcement of the Fetal Heartbeat Statute and enter judgment for Respondents.

Respectfully submitted,

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/s/ Thomas M. Bright
Signature

11/15/2023
Date

PROOF OF SERVICE AND CERTIFICATE OF FILING

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ADDENDUM

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PPH v. Reynolds] Consent for Amicus Briefs

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Good morning counsel,

We have received a request for consent to file an amicus brief in support of the appellants in Planned Parenthood of the Heartland v. Reynolds. As we've done in previous cases, would you consent to a blanket agreement to consent to all amicus briefs filed for either side?

Thanks,
Peter

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Dear Peter,

Yes, that makes sense to me. The State agrees to blanket consent. Thank you for affirmatively reaching out.

Best,
EHW

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Appreciate the quick response.

Best,
Peter
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