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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PLANNED PARENTHOOD OF THE HEARTLAND, INC., on behalf of itself and its patients, Petitioner, v. KIM REYNOLDS ex rel. STATE OF IOWA, et al., Respondents.	Equity Case No. EQCE084508 **BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

For many years, Petitioner Planned Parenthood of the Heartland, Inc. ("PPH") has received grants under the Community Adolescent Pregnancy Prevention and Services Program ("CAPP") and the Personal Responsibility Education Program ("PREP"). These grant programs are administered, respectively, by the Iowa Department of Human Services ("IDHS") and the Iowa Department of Public Health ("IDPH"). They enable PPH and other grantees throughout Iowa to provide sexual education and teen pregnancy prevention services in communities that desperately need them.

In April 2019, the Iowa Legislature passed Sections 99 and 100 of House File 766 (hereinafter, "the Act"), which provide in nearly identical language 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. 0263–66 (2019 Iowa Acts, House File 766 §§ 99, 100 (pp. 90–93)). At that time, IDHS and IDPH were reviewing bids from PPH and other organizations for new CAPP and PREP contracts that would begin in Summer 2019. Because the Act's language would have prevented PPH from entering into new CAPP and PREP contracts on or after July 1, PPH sued State officials, arguing that the Act violated the Iowa Constitution.

This Court entered a temporary injunction against the Act's enforcement. As relevant here, it found that PPH was likely to prevail on its equal protection claim, even if only rational-basis review applied. The Court therefore did not consider PPH's due process, free speech, and free association claims. PPH now asks that this Court enter summary judgment in its favor, declare the

Act unconstitutional, and make the injunction permanent.

First, as this Court foreshadowed in its temporary injunction decision, 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 advocacy and activities. 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 burden on PPH's other constitutional rights.

Second, the Act conditions PPH's participation in the CAPP and PREP programs on abandonment of its constitutionally protected rights to advocate—wholly apart from those programs—for safe and lawful abortions and to associate with other organizations that do the same. That use of leverage over government funds is impermissible and violates PPH's right of free speech under the Iowa Constitution. It also curbs PPH's right of free association with other Planned Parenthood entities that engage in the same activities.

Third, the Act impermissibly conditions participation in government programs on abandoning conduct protected by the Iowa Constitution's guarantee of due process: providing safe and lawful abortions. 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. The Iowa Supreme Court's precedent makes clear that it may not.

Based on the undisputed facts and record in this case, Petitioner is entitled to summary judgment because the Act violates its constitutional rights and threatens PPH with financial and other harm. *See Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017); *see also* Ruling on Mot. for Temporary Injunction ("TI Decision") at 6 (May 29, 2019). Enforcement of the Act would also injure the many young people in Iowa who depend on PPH for educational services. No other direct recipients of funding currently offer CAPP programming in the counties served by PPH, nor do they offer PREP programming in two of three counties that PPH serves. Stipulated Statement

of Undisputed Facts ("SUF") ¶ 53 (Nov. 13, 2019). This Court should enter declaratory and permanent injunctive relief to prevent these serious harms.

FACTUAL & PROCEDURAL BACKGROUND

A. Funding for Sexual Education and Teen Pregnancy Prevention Programs

CAPP is a grant program administered by IDHS, which obtains program funds through a federal Temporary Assistance to Needy Families (TANF) block grant from the U.S. Department of Health and Human Services (HHS). SUF ¶ 8. Through a competitive bidding process, IDHS then contracts with entities in Iowa to provide evidence-based or evidence-informed comprehensive sex education and/or adolescent pregnancy prevention programs. *Id.* ¶ 9. All counties in Iowa are eligible service areas for CAPP programming, though not all counties are currently served. *Id.*

PREP was authorized by Congress as part of the Patient Protection and Affordable Care Act of 2010 to educate young people regarding abstinence and contraception and other topics that prepare youth for success in adulthood. *Id.* ¶ 10. HHS provides this funding to state agencies, including IDPH, and other entities. *Id.* Through a competitive bidding process, IDPH then awards PREP funding to community-based organizations and agencies to deliver educational programming to youth, with the goal of reducing teen pregnancy and sexually transmitted infections (STIs) in parts of the state with the highest teen birth rates. *Id.* ¶ 11. Accordingly, IDPH identifies a select group of counties to serve with PREP programming, and it awards contracts for service delivery only in those counties. *Id.*

B. PPH's Services to the Community and Advocacy Efforts

Petitioner PPH is a not-for-profit corporation organized under the laws of Iowa and operating in Iowa and Nebraska. *Id.* ¶¶ 3, 12. In Iowa, PPH delivers clinical, educational, and counseling services at eight health centers across the state, and education programs in reproductive

health, human development, and sexuality throughout the communities in which it serves. *Id.* ¶¶ 12–13, 47. In 2018, it provided educational services to more than 25,000 participants in Iowa. App. 0006.

In Iowa, PPH has received funding in through CAPP since at least 2005, and through PREP since 2012. SUF ¶ 24. In each program, PPH—like all grantees—is required to rely on existing curricula selected by the respective state agencies administering the programs. *Id.* ¶ 26. For CAPP, the curricula include, for example, *Love Notes*, a program model for older youth that teaches young people how to build healthy relationships and prevent dating violence. App. 0053. Similarly, the *Draw the Line/Respect the Line* program is for students grades six to eight and focuses on providing students with knowledge to prevent HIV and other STIs, as well as pregnancy. *Id*. And in PREP, IDPH has selected as the only approved curricula the *Teen Outreach Program (TOP)*, which targets youth in at-risk communities, and *Wise Guys*, which was designed for adolescent boys. *Id.* 0146–48. As required by IDHS, PPH also uses CAPP funding to coordinate coalitions of community partners working on teen pregnancy prevention; those coalitions identify community resources, disseminate information, educate the public, and foster collaboration between public and private stakeholders. SUF ¶ 31.

PPH complies with significant reporting and other documentation requirements for both of these programs. *Id.* ¶ 30. It prepares quarterly reports, fidelity logs, and implementation plans; submits to external performance evaluations and site visits; and participates in regular meetings for awardees. *See* App. 0295–99.

In addition to its educational work, PPH provides comprehensive reproductive health services at its eight health centers in Iowa and two health centers in Nebraska. In Iowa, those 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. SUF

¶ 13. Contraceptive care makes up forty percent of all clinical services provided by PPH in Iowa and Nebraska, accounting for more than 60,000 patient visits. App. 0007.

As part of its clinical services, PPH also provides medication and/or surgical abortion at health centers in Des Moines, Iowa City, Ames, Cedar Falls, and Council Bluffs, Iowa, and at health centers in Lincoln and Omaha, Nebraska. SUF ¶ 14. Upon patient request, all PPH health centers also refer patients for abortion care. *Id.* ¶ 17. In 2017, PPH performed roughly ninety-five percent of all abortions in Iowa and fifty-five percent of abortions in Nebraska. *Id.* ¶ 15. 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 services. *Id.* ¶ 18.

PPH also associates with other organizations that provide abortion or advocate for abortion access. Until December 2018, PPH was a direct affiliate of, though independent from, Planned Parenthood Federation of America, Inc. (PPFA). *Id.* ¶ 22. Like PPH, PPFA advocates for access to comprehensive reproductive health care, including abortion. *Id*. Moreover, since January 1, 2019, PPH has been an ancillary organization of Planned Parenthood North Central States (PPNCS), one of the largest Planned Parenthood affiliates in the country. *Id.* ¶ 23. As a PPFA affiliate, PPNCS advocates for access to expert, comprehensive reproductive health care, including abortion. *Id*.

CAPP and PREP funding may not be used to carry out abortion care. *Id.* ¶ 32. Respondents 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 any other grantee has discussed abortion as part of the educational services provided under these grant programs. *Id.* ¶¶ 33–34.

C. The Act and This Lawsuit

In May 2019, Respondent Governor Reynolds signed the Act, which targets only PPH and bars CAPP and PREP funding to PPH based on its provision of abortion, referral for abortion,

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advocacy for access to reproductive health services, including abortion, and affiliation with other organizations that provide abortion or advocate for abortion access. Although the Act is written in general terms such that it might apply to groups other than PPH, the Iowa Legislature crafted an exception for the other known entity to which the Act's funding prohibition might have applied. Specifically, at the time of the Act's adoption, Unity Healthcare DBA Trinity Muscatine was a CAPP grantee but was affiliated with UnityPoint, which provides abortions. SUF ¶ 48. The legislature thus exempted CAPP and PREP applicants that are affiliated with a "nonprofit health care delivery system," defined to include only nonprofits that control hospital facilities and certain other locations that offer a "range of primary, secondary, and tertiary inpatient, outpatient, and physician services." App. 0263–66 (§ 99(1)–(3); § 100(2)–(4)). This exception had the effect of permitting Unity Healthcare DBA Trinity Muscatine to continue in the CAPP program, SUF ¶¶ 48–49, while excluding PPH, which does not offer, *e.g.*, tertiary care or inpatient services.

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. SUF ¶¶ 35, 39–40. PPH had submitted multiple applications to IDHS—one per designated service area—to continue to provide CAPP services in Des Moines, Lee, Linn, Polk, and Woodbury Counties, as it had in previous years. *Id.* ¶ 42. PPH had also submitted an application to IDPH to continue to provide PREP services in Polk, Pottawattamie, and Woodbury Counties. *Id.* ¶ 43.

To ensure its eligibility for funding, PPH filed a lawsuit in this Court against the government officials responsible for enforcing the Act (collectively, "the State") and sought a temporary injunction. It argued that the Act violates the guarantees of equal protection, due process, and freedom of speech and association under the Iowa Constitution. *See generally* Pet. ¶¶ 50–57.

In May 2019, this Court issued a temporary injunction. It concluded that PPH would likely prevail on its claim that the Act violates its right to equal protection under the Iowa Constitution, "even if the lowest level of scrutiny, the rational basis test, were applied." TI Decision at 10. As the Court explained, "a provider of legal abortions is similarly situated to non-abortion providers who seek government funds having nothing to do with abortion." *Id.* at 9. The Court explained that, just like grantees that do not provide abortion, PPH is "required to rely on existing curricula selected by the respective state agencies administering the programs, . . . must follow reporting and documentation requirements," and cannot use CAPP and PREP funds for "performing or promoting abortion." *Id.* at 3, 9. Yet the Act would exclude only PPH from consideration from CAPP and PREP funding.

The Court also rejected the only two interests that the State advanced to attempt to justify the Act. First, although the State asserted the legislature could reasonably have "favor[ed] childbirth over abortion" when it passed the Act, the Court concluded this interest, even if legitimate, would still "be completely unserved by this legislation." *Id.* at 11. Because all grantees must use approved curricula, and cannot use CAPP and PREP funds to provide abortion, the Court concluded that it was "hard to imagine how abortion would become more or less likely depending on who receives these grants." *Id.* at 12. It also emphasized that the statute was at once under- and over-inclusive. It observed that the Act "effectively singl[ed] out PPH, while permitting other potential grantees," such as those affiliated with Unity Point, "to provide extensive abortion related services," a discrepancy the Court concluded was "antithetical to a value judgment favoring childbirth over abortion." *Id.* The Court also observed that even if PPH stopped performing abortions in Iowa altogether, it still could not qualify for CAPP and PREP funding under the Act in light of its lawful association with other Planned Parenthood entities working in other states; meanwhile, entities that fell under the "nonprofit health care delivery system" exception in the Act

would remain eligible for these grants "even though they would be free to promote and refer patients for abortions within Iowa." *Id.*

Second, the Court rejected the contention that the legislature could reasonably have decided that Iowa teens should receive CAPP and PREP services from entities "other than those for whom abortion represents a significant revenue stream," on the State's theory that abortion providers are "less scrupulous" than other entities. *Id.* at 13. The Court observed that the Act in this respect was plainly underinclusive: It singled out PPH for exclusion while leaving a "nonprofit healthcare delivery system" facility free "to receive grants while also promoting abortions; contracting, subcontracting or affiliating with an entity that performs or promotes abortions; and/or regularly making referrals to an entity that provides or promotes abortions." *Id*. In any event, the Court asked, "what basis in fact could there be that providers of legal abortions have less scruples than anyone else?" *Id*. The Court also noted, as it did with the other State interest asserted, that even if PPH stopped performing abortions or abortion-related advocacy in Iowa, it would still be precluded from obtaining CAPP and PREP funding based on its association with Planned Parenthood entities in other states. *Id*.

Because the Court held that PPH was likely to succeed on the merits of its equal protection claims, even if rational basis review applied, it did not consider whether stricter scrutiny should apply, or any of PPH's other constitutional claims. After determining that the Act, if enforced, would cause irreparable harm to PPH and that the balance of interests favored a temporary injunction, the Court enjoined the Act's enforcement.

D. Subsequent CAPP and PREP funding

After the temporary injunction issued, IDHS awarded CAPP funding to PPH for a three-year project period to run from July 1, 2019, through June 30, 2022. *See* SUF ¶ 39, *see also* App. 0282–85. Pursuant to that award, PPH signed two-year CAPP contracts with the agency, for

services to be performed in the five counties (Des Moines, Lee, Linn, Polk, and Woodbury) identified in its application. SUF ¶ 42; *see also* App. 0289–436. Those contracts allocated, in total, more than $460,000 for PPH to provide CAPP services. SUF ¶ 42. IDHS will have the option to renew those contracts for up to one additional year-long term without any further competitive bid process. *Id.* As expected by the Iowa Legislature, UnityPoint Healthcare DBA Muscatine relied on the Act's "nonprofit health care delivery system" exception to the funding bar and received a new CAPP contract. *Id*. ¶¶ 48–49.

Similarly, after this Court's injunction, IDPH awarded PREP funding to PPH for a four-year project period, which runs from August 1, 2019, through July 31, 2023. *Id*. ¶ 42; *see also* App. 0286–88. Pursuant to that award, PPH signed a one-year PREP contract with IDPH to provide services in Polk, Pottawattamie, and Woodbury Counties. SUF ¶ 43; *see also* App. 0437–67. The contract was for a grant in the amount of $85,076. SUF ¶ 43. IDPH will have the option to renew that contract for up to three additional one-year terms without any further competitive bid process.

If the Act were to take effect now and provide a basis to exclude PPH from continued CAPP and PREP funding, it would damage PPH as an organization committed to and recognized for providing comprehensive educational programming and would significantly hurt the young people who rely on PPH's services.[1] No other grantees offer CAPP services in the counties that PPH serves; indeed, no other applicants even applied to serve those counties. *Id.* ¶¶ 51, 53. Similarly, no other grantees serve Pottawattamie County and Woodbury Counties. *Id.* ¶ 53.

[1] PPH and IDHS fully executed the CAPP contract on June 28, 2019. As PPH indicated in its temporary injunction papers, the plain language of the Act should preclude its application to the current CAPP contract, which was "entered into" *before* July 1, 2019. However, to date, the State has given no assurance that it interprets the statute as PPH does.

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ARGUMENT

I. Standard for Summary Judgment

"Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law." *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019) (quoting *Deeds v. City of Marion*, 914 N.W.2d 330, 339 (Iowa 2018)); *see also* Iowa R. Civ. P. 1.981(3). This Court views the facts in the light most favorable to the non-moving party. *Slaughter*, 925 N.W.2d at 800. In this case, the parties have stipulated to a set of undisputed facts and an appendix on which they ask the Court to base its decision.

II. The Act Violates PPH's State Constitutional Right to Equal Protection Under the Law.

The Iowa Constitution, Article I, sections 1, 6, guarantees equal protection of the law. Although federal case law may be persuasive in interpreting this provision, Iowa courts interpret it independently. *See Godfrey v. State,* 898 N.W.2d 844, 864–65, 869 (Iowa 2017); *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 45 (Iowa 2012). Iowa's "equal protection guarantee 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 v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009)), *as amended* (May 23, 2013); *see also Varnum*, 763 N.W.2d at 882; *Bowers v. Polk Cty. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002).

As this Court concluded in its temporary injunction order, for purposes of the challenged Act, PPH—an abortion provider and advocate for abortion access—is similarly situated to non-abortion providers who seek government funds having nothing to do with abortion. TI Decision at 9. PPH and other applicants are the same in all legally relevant ways: Each is "required to rely on existing curricula selected by the respective state agencies administering the programs," each

"must follow reporting and documentation requirements"; and each is forbidden from using CAPP and PREP funds for "performing or promoting abortion." *Id.* at 3, 9. Despite the fact that PPH is similarly situated to other CAPP and PREP applicants, the law targets for disfavored treatment only those entities that "promote" or "perform" abortions, or "affiliate" with entities that do so, categorically barring them from receipt of government funds having nothing to do with abortion.

Even the least stringent form of scrutiny applicable to equal protection claims—rational basis review—requires a "plausible policy reason for the classification." *Varnum*, 763 N.W.2d at 879 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) ("*RACI*")); *RACI*, 675 N.W.2d at 9 (noting that although the rational basis test is "deferential to legislative judgment, 'it is not a toothless one' in Iowa" (quoting *Mathews v. de Castro*, 429 U.S. 181, 185 (1976))). The "relationship of the classification to its goal" cannot be "so attenuated as to render the distinction arbitrary or irrational" or evince a basis in some other form of "invidious discrimination." *Varnum*, 763 N.W.2d at 879, 887 (quoting *RACI*, 675 N.W.2d at 7); *see also*, *e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

Here, the Act identifies *no* legitimate interest served by barring PPH from participating in non-abortion education programs simply because, with entirely separate funds, it "perform[s]" or refers for abortion, "promote[s]" abortion access, or "affiliate[s]" with entities that provide or "promote" abortion. And the State's post hoc justifications for the law are implausible. There is no reason to believe that "abortion would become more or less likely depending on who receives these grants." TI Decision at 12. Accordingly, as this Court has already determined, the Act cannot conceivably further the State's asserted interest in promoting childbirth over abortion. Moreover, Respondents have provided no "basis in fact" for the proposition "that providers of legal abortions have less scruples than anyone else," *id.* at 13, and they have never alleged that PPH or any other grantee in Iowa has used covered funding for abortion services, or discussed abortion as part of its

CAPP or PREP programming, SUF ¶¶ 33–34. In fact, as one senator noted during the legislative debate, "Planned Parenthood prevents abortions." Iowa Sen. Debate of Apr. 26, 2019, at 3:58:45–4:00:06 (statement of Sen. Peterson). It does so not only through its educational services, which are intended to prevent unintended pregnancy, but also through its medical care. Contraceptive services are the single largest category of clinical care at PPH, accounting for more than 60,000 patient visits in Iowa and Nebraska in a single year. App. 0007. Accordingly, the State's asserted interest in excluding PPH from offering sexual education and teen pregnancy prevention programming, while permitting non-abortion providers to do so, is illogical.

The Act's severe over- and under-inclusiveness underscores that it cannot survive even rational basis review. *See Varnum*, 763 N.W.2d at 899 (acknowledging that over- and under-inclusiveness are relevant with respect to rational basis review); *RACI*, 675 N.W.2d at 10 (concluding that 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" (quoting *Bierkamp v. Rogers*, 293 N.W.2d 577, 584 (Iowa 1980)). As this Court has already concluded, the Act sweeps in organizations that engage in advocacy far removed from the spending programs. TI Decision at 12. PPH would be excluded, for example, based on its advocacy for abortion access in Nebraska *alone*, even if PPH engaged in no conduct or speech in Iowa covered by the Act. Meanwhile, the Act carves out an arbitrary exception for applicants affiliated with abortion providers working in a hospital or other nonprofit health care delivery system. App. 0265–66 (2019 Iowa Acts, House File 766, § 100(2)–(4)). These entities may "provide extensive abortion related services" and "promote and refer patients for abortions" in Iowa, all while qualifying for funding. TI Decision at 12.

The history of the Act also confirms that the Iowa Legislature specifically gerrymandered this law to target PPH for disfavored treatment. Legislative opponents and supporters alike

acknowledged that PPH was the only current grantee who would be excluded from funding. *See, e.g.*, Iowa H. Debate of Apr. 27, 2019, at 12:38:00–12:43:00 (statement of Rep. Mascher); Iowa Sen. Debate of Apr. 26, 2019, at 3:55:47–4:00:23, 4:00:36–42, 4:00:45–51, 4:01:05–10, 4:01:27–33, 4:01:37–43, 4:02:20–28, 4:02:32–4:03:05 (statement of Sen. Peterson); *id.* 4:00:24–4:00:35, 4:00:43–45, 4:00:52–4:01:04, 4:01:11–28, 4:01:34–36, 4:01:43–4:02:20, 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.").[2] After being asked to explain the Act's exclusion of PPH alongside an exemption for Unity Point, Senator Costello, the Senate floor manager for the bill, answered: "We don't feel that the people of Iowa should be required to do business with people that provide abortions." Iowa Sen. Debate of Apr. 26, 2019, at 4:01:11–28 (statement of Sen. Costello); *see also* Iowa H. Debate, 1:19:00–11:19:20 (statement of Rep. Fry) (stating that any "distribution of federal funds for family planning and teen pregnancy prevention . . . would exclude any provider who provides abortions" but noting without explanation that "there is an exemption there for Unity Point or clearly articulating that Unity Point facilities that don't provide abortions are allowed to apply for those contracts"). This type of "arbitrary or irrational" classification violates the Iowa Constitution's guarantee of equal protection, no matter what standard of review applies. *Varnum*, 763 N.W.2d at 87.

In any event, even if the Act somehow survived rational-basis review, it would fail the more stringent review that should be accorded to it. As discussed below in Part III, by barring PPH

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[2] A video record of the House debate is available at https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20190427092516225&dt=2019-04-27&offset=6564&bill=HF%20766&status=r. The Senate debate is available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190426012941549&dt=2019-04-26&offset=2721&bill=HF%20766&status=r.

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from government programs because it "perform[s]" abortions, the Act burdens the fundamental right under Iowa's Constitution to an abortion. *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018). And by barring PPH because it "promote[s]" and "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 protected by Iowa's free-speech guarantee. *See State v. Hardin*, 498 N.W.2d 677, 679 (Iowa 1993); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992); *Iowans for Tax Relief v. Campaign Fin. Disclosure Comm'n*, 331 N.W.2d 862, 868 (Iowa 1983).

Because the Act impinges on the fundamental rights to free speech, free association, and abortion, it is more appropriately subject to strict scrutiny. *Planned Parenthood of the Heartland*, 915 N.W.2d at 237; *Varnum*, 763 N.W.2d at 880. And as a restriction on fundamental rights, the Act is presumptively invalid. *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004). To justify it, the State would have to establish that the Act is "narrowly tailored to serve a compelling government interest." *Id.* (quoting *Santi v. Santi*, 633 N.W.2d 312, 318 (Iowa 2001)). For all the reasons described above, and in this Court's decision to enter a temporary injunction, the State cannot possibly meet this burden.

III. The Act Unconstitutionally Conditions Funding on the Abandonment of State Constitutional Rights to Free Speech, Free Association, and Substantive Due Process.

The Act should be enjoined for another reason independent of PPH's equal protection claim: Under the unconstitutional-conditions doctrine, the Act violates PPH's rights to free speech, free association, and due process protected by the Iowa Constitution. The Iowa Supreme 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 v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)).

Here, Iowa has declared in the Act that anyone who engages in certain activity protected by the Iowa Constitution—advocacy in favor of a patient's right to terminate a pregnancy, the provision of and referral for safe and legal abortion, and/or association with advocacy in support of abortion rights and provision of that service—must be excluded from CAPP and PREP funding, even though those programs have nothing to do with abortion. In so doing, Iowa 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 Corp.*, 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).

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*"); *see also FCC v. League of Women Voters*, 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)).

This authority 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 Cty. Comm'rs, Wabaunsee Cty. 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, 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 comprehensive reproductive health care, including abortion services, in order to maintain eligibility as a CAPP or PREP grantee. *See* SUF ¶ 54.

A. The Act violates the free speech protection 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). Although Iowa courts look to federal courts' interpretation of the U.S. Constitution in construing parallel provisions of the Iowa Constitution, they "jealously reserve the right to develop an independent framework under the Iowa Constitution." *NextEra Energy Res., LLC*, 815 N.W.2d at 45; *see also State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010). That is so because the rights guaranteed to individuals under the Iowa Constitution have critical, independent importance. *Godfrey*, 898 N.W.2d at 864–65, 869.

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 (1992)); *see also Bigelow v. Virginia*, 421 U.S. 809 (1975). 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 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 v. Town of Gilbert*, 135 S. Ct. at 2226.

The Iowa Supreme Court's case law makes clear that the State may not use its spending powers to accomplish the same result. *See Hearst*, 461 N.W.2d at 304. Because the Act conditions receipt of government funds on the recipient's agreement to forego "promot[ing]" abortions, it violates Article I, section 7, of the Iowa Constitution.

Although the State may require that government money be used only for program-related purposes—and thus may also limit the subjects that funding recipients address *within the confines* of the program—that is not what Iowa has done here. Here, Iowa has imposed content and viewpoint restrictions on recipients' speech *outside* the government-funded program. The U.S. Supreme Court's decision in *Alliance for Open Society International* offers persuasive authority that this distinction is fundamental. 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 relevant distinction" between permissible and impermissible funding conditions, the Court emphasized, "is between conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* at 214–15. *Cf. Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (upholding restrictions on federal family planning funding that governed only "the scope of the Title X project's activities" and left the grantee free to "continue to perform abortions, provide abortion-related services, and engage in abortion advocacy" with its separate, non-federal funding).

The same distinction applies to the facts here. The activities funded through CAPP and PREP have nothing to do with abortion. These programs offer comprehensive sex education and programming on teen pregnancy prevention. SUF ¶¶ 9–11. Abortion is not discussed under either of the programs, which follow curricula selected by the State. *Id.* ¶¶ 25–27. 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 impressive line of analogous authority holds that state efforts to exclude Planned Parenthood affiliates from participating in government programs because of advocacy in favor of safe and lawful abortion violate the First Amendment. *See Planned Parenthood Ass'n of Utah v. Herbert* ("*PPAU*"), 828 F.3d 1245, 1259 (10th Cir. 2016) (exclusion of Planned Parenthood from state programs likely violated First Amendment); *Planned Parenthood of Cent. & N. Ariz. v. State of Ariz.*, 718 F.2d 938, 944–945 (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, 319–321 (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). This Court should do the same.

B. The Act violates Petitioner'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 or "promote[]" abortions. Although the Act does not define the term "affiliate," it appears to target PPH's association with PPFA, a nationwide organization that engages in education and advocacy to secure a woman's right to safe and lawful abortion, and its relationship as an ancillary organization of PPNCS, a regional Planned Parenthood affiliate covering Iowa and four other states. SUF ¶¶ 22–23; App. 0013; *see also* TI Decision at 12 (recognizing that PPH's affiliation with these entities would trigger the Act's exclusion from funding even if it did not provide abortions in Iowa). This provision of the Act would bar PPH from participating in government programs based on its association with PPFA and PPNCS alone—even if PPH stopped providing and promoting access to abortion entirely.

Although the Iowa Supreme Court has not defined the precise contours of the freedom of association under the Iowa Constitution, it has acknowledged that such a right under Article I, section 7, of the Iowa Constitution exists and is at least coextensive with the analogous federal constitutional right. *See Formaro v. Polk Cty.*, 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 must, therefore, protect a "fundamental right" to "engage in associations for the advancement of economic, religious, or cultural matters." *City of Maquoketa*, 484 N.W.2d at 184 (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.

C. The Act violates the Iowa Constitution's substantive due process protections.

The Act violates the substantive due process right protected by Article I, section 9, of the Iowa Constitution for much the same reason that it violates the free-speech and free-association guarantees: The statute requires that providers abandon constitutionally protected activity—performing safe and lawful abortions—to remain eligible to participate in government programs wholly unrelated to abortion.

Iowa indisputably could not ban PPH from providing abortions altogether. In *Planned Parenthood of the Heartland*, 915 N.W.2d at 237, the Iowa Supreme Court held that the right to abortion was a fundamental right under Article I, section 9's protection for substantive due process. *Id.* at 237. It rejected the "undue burden" framework applicable to due process claims under federal

law with respect to restrictions on abortion, and instead applied more stringent precedent that laws alleged to violate fundamental rights are subject to strict scrutiny. *Id.* at 240–41. Iowa may not use its leverage over public funds to demand that PPH surrender the right to engage in that same constitutionally protected activity. *See Hearst*, 461 N.W.2d at 304.

In persuasive authority, other courts have held that federal law prohibits states from excluding Planned Parenthood affiliates from participation in public programs because they provide abortions with funds unrelated to those programs. *See 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 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 Amendments).[3] This Court should do the

[3] Because the Act imposes an unconstitutional condition on PPH's due-process right, this Court need not predict the law's effect on abortion access in Iowa. *See, e.g.*, *Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey*, 167 F.3d 458, 464 (8th Cir. 1999); *Planned Parenthood of Cent. & N. Arizona*, 718 F.2d at 944. However, even if such a prediction were required, as one court has held, *see Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986–88 (7th Cir. 2012), there can be no doubt that if PPH acceded to the condition, it would unconstitutionally restrict abortion access. In 2017, PPH provided ninety-five percent of all Iowa abortions. SUF ¶ 15. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc), also does not undermine Petitioner's motion. *Hodges* was wrongly decided under federal law and contrary to the established unconstitutional-conditions doctrine. Certainly, *Hodges* is wholly unpersuasive under the Iowa Constitution given the nature of the abortion right, which the Supreme Court has deemed fundamental, subject to the highest level of scrutiny, and which necessarily involves both a provider and a patient. "'[B]ecause abortion is a medical procedure, . . . the full vindication of the woman's fundamental right necessarily requires

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same.

CONCLUSION

WHEREFORE, based on the undisputed facts in this case, Petitioner prays that this Court grant its Motion for Summary Judgment, declare the Act unconstitutional under the Iowa Constitution, and permanently enjoin Respondents from implementing and enforcing the Act's prohibition on CAPP and PREP funding to PPH.

Respectfully submitted,

/s/ Julie A. Murray
JULIE A. MURRAY*
CARRIE Y. FLAXMAN*
Planned Parenthood Federation of America
1110 Vermont Ave., NW, Ste. 300
Washington, DC 20005
Phone: (202) 803-4045
julie.murray@ppfa.org
carrie.flaxman@ppfa.org

/s/ Rita Bettis Austen
RITA BETTIS AUSTEN (AT0011558)
American Civil Liberties Union of Iowa Foundation
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2316
Telephone: 515.243.3988
Fax: 515.243.8506
rita.bettis@aclu-ia.org

Attorneys for Petitioner Planned Parenthood of the Heartland, Inc.

Dated: December 19, 2019

** Admitted pro hac vice*

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that her' medical provider be afforded the right to 'make his best medical judgment,' which includes 'implementing [the woman's decision] should she choose to have an abortion.'" *PPAU*, 828 F.3d at 1260 (alterations in original) (quoting *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *see also Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("A woman cannot safely secure an abortion without the aid of a physician . . . . [T]he constitutionally protected abortion decision is one in which the physician is intimately involved.").

All parties served via EDMS.