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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, <i>et al.</i> ,)	
)	
)	Civ. No. 26 MD 2019
<i>Petitioners,</i>)	
v.)	
)	
Pennsylvania Department of Human Services,)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenors, Senators Joseph B. Scarnati, III (President pro tempore of the Pennsylvania Senate), Jacob Corman (Majority Leader of the

Pennsylvania Senate), Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw (collectively, the “Proposed Intervenors”), by and through their counsel, Blank Rome LLP, respectfully submit the following Application for Leave to Intervene (the “Application”) as Respondents, and aver the following in support thereof:

PRELIMINARY STATEMENT

In 1985, the Pennsylvania Supreme Court held unequivocally that the funding restrictions set forth in the Abortion Control Act, 18 Pa. C.S. § 3201, *et seq.*, do not run afoul of the Pennsylvania Constitution. *See Fischer v. Dep’t of Public Welfare*, 502 A.2d 114 (Pa. 1985). Specifically, the Supreme Court recognized that the General Assembly’s decision to prohibit the use of *state* funds to pay for abortions that are not necessary to protect the life of a woman—or are not performed in the case of pregnancies resulting from rape or incest—was consistent with the Commonwealth’s interest in promoting and preserving human life.

The *Fischer* decision was rendered more than thirty years ago, and has remained the law in Pennsylvania ever since. And nothing has changed warranting

a different outcome now. Nevertheless, despite acknowledging the binding effect of *Fischer*, Petitioners Allegheny Reproductive Health Center, *et al.* (collectively, “Petitioners”) contend that *Fischer* was wrongly decided, and—based on precisely the same arguments raised and rejected in *Fischer*—have commenced the present action seeking declaratory and injunctive relief to enjoin the Abortion Control Act’s funding restrictions.

Recognizing the significant impact that the relief sought by Petitioners would have upon the General Assembly’s constitutional authority to control the Commonwealth’s finances, Proposed Intervenors seek to intervene in this matter in order to protect their right to propose and vote for the type of funding restrictions that have already been upheld by Pennsylvania’s highest court. And the right of Proposed Intervenors to intervene is supported by multiple, independently sufficient, legal bases.

First, Pennsylvania law recognizes that parties have a right to intervene when they could have been joined as an original party to the action, and legislators are often named as respondents in cases challenging the constitutionality of statutes. Notably, this matter involves a claim advanced under Article III, § 32 of Pennsylvania’s Constitution, which prohibits the General Assembly from passing any “local or special law,” and one of the Proposed Intervenors—Senator

Scarnati—is currently a named respondent in another matter pending before this Court involving a legal claim advanced under this same Constitutional provision. *See William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, Case No. 587 MD 2014 (involving a claim asserted under Article III, § 32 which, like this matter, is premised upon an alleged fundamental right that has purportedly been infringed upon by a discriminatory funding program). Because Petitioners could have named members of the General Assembly as Respondents here in their effort to compel the legislature to provide the requested funding, Proposed Intervenors should be permitted to intervene in this action just as they would have been heard if originally named.

Second, Pennsylvania law also recognizes that parties have a right to intervene when the action would affect their legally enforceable interests. Here, the Supreme Court in *Fischer* determined that the Abortion Control Act’s funding restrictions do *not* violate Article III, § 32 of the Pennsylvania Constitution. If Petitioners succeed in overturning *Fischer*, Proposed Intervenors’ authority will be significantly diminished and impaired, because they would be prohibited under Article III, § 32 from advancing *any* legislation that seeks to allocate Commonwealth resources using the funding mechanism that the Supreme Court deemed constitutional thirty-five years ago. Proposed Intervenors therefore have a

legally enforceable interest in preserving the scope of their legislative authority as it currently exists under the Pennsylvania Constitution, and should therefore be permitted to intervene as Respondents in this action.

Finally, both this Court and the Pennsylvania Supreme Court have consistently recognized that Article II, § 1 and Article III, § 24 of the Pennsylvania Constitution grant the General Assembly *exclusive* control over Pennsylvania's finances. Because Petitioners are seeking an order that would compel the Commonwealth to fund certain (currently unfunded) medical procedures—and because the purpose and amount of funding provided by the Commonwealth are determined exclusively by the General Assembly—Proposed Intervenors (who include high-ranking members of the Senate Appropriations, Finance, and Health and Human Services Committees) have a legally enforceable interest in this matter. They should therefore be permitted to intervene and be heard in this action, which seeks to restrict how the General Assembly would be permitted to allocate the Commonwealth's limited resources.

For all of the reasons set forth above and in greater detail below, Proposed Intervenors respectfully request that the Court grant their Application to intervene as Respondents, and to permit them to file of record the Preliminary Objections attached hereto.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On January 16, 2019, Petitioners initiated this litigation by filing their Petition for Review in the Nature of a Complaint in Equity Seeking Declaratory Relief and Injunctive Relief (the “Petition”).

2. Petitioners are eight organizations that provide a variety of reproductive health care services and are enrolled in Pennsylvania’s Medicaid program, known as Medical Assistance. *See* Petition ¶¶ 2-32, 34.

3. Each Petitioner alleges that it performs medication and/or surgical abortions. *See id.* ¶¶ 2-32.¹

4. Collectively, Petitioners allege that they perform 95% of all abortions in Pennsylvania. *Id.* ¶ 33.

5. Respondents are the Pennsylvania Department of Human Services (“DHS”); the DHS’s Secretary; the Executive Deputy Secretary of the DHS’s Office of Medical Assistance Programs; and the Deputy Secretary of the DHS’s Office of Medical Assistance Programs.

6. In this action, Petitioners advance two claims challenging the provisions of a Pennsylvania statute, 18 Pa. C.S. § 3215(c) and (j), as well as

¹ Petitioner Delaware County Women’s Center appears to perform only medication abortions. *Id.* ¶¶ 13-16.

certain regulations—55 Pa. Code §§ 1147.57,² 1163.62, and 1221.57—that were promulgated by the DHS (collectively, the “DHS Regulations”).³

7. 18 Pa. C.S. § 3215(c) provides that “[n]o Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion,” unless the abortion: (1) is necessary to avert the death of the mother; (2) is performed in the case of pregnancy caused by rape; or (3) is performed in the case of pregnancy caused by incest.

8. 18 Pa. C.S. § 3215(j) sets forth certain requirements that must be satisfied before a Commonwealth agency disburses State or Federal funds for the performance of an abortion pursuant to 18 Pa. C.S. § 3215(c)(2) or (3).

² Petitioners presumably refer to 55 Pa. Code § 1141.57, which pertains to payment conditions for necessary abortions. There does not appear to be a 55 Pa. Code § 1147.57. In addition, Chapter 1147 relates to optometrists’ services, not abortion or reproductive services.

³ Although Petitioners refer to 55 Pa. Code §§ 1141.57, 1163.62, and 1221.57 as 18 Pa. C.S. § 3215(c) and (j)’s “implementing regulations,” these provisions were not actually issued pursuant to 18 Pa. C.S. § 3215. Section 3215 falls under Title 18 of Pennsylvania’s Consolidated Statutes, which addresses Crimes and Offenses. By contrast, the regulations that Petitioners are challenging were implemented pursuant to the Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §§ 101-1503, which is the Human Services Code (formerly known as the Public Welfare Code). *See* 55 Pa. Code § 1141.57 (“The provisions of this § 1141.57 issued under the Public Welfare Code (62 P.S. § 453).”); 55 Pa. Code § 1163.62 (falling under Chapter 1163, the provisions of which are “issued under sections 443.1(1) and 443.2(1) of the Public Welfare Code (62 P.S. §§ 443.1(1) and 443.2(1)), unless otherwise noted”); 55 Pa. Code § 1221.57 (“The provisions of this § 1221.57 issued under the Public Welfare Code (62 P.S. § 453).”).

9. Each of the DHS Regulations relate to the payment conditions imposed by the DHS for abortions and, consistent with 18 Pa. C.S. § 3215(c) and (j), apply only to abortions performed when a woman’s life is endangered, or in the case of rape or incest. 55 Pa. Code § 1141.57 (governing payment for physician’s services); 55 Pa. Code § 1163.62 (governing payment for hospital services); and 55 Pa. Code § 1221.57 (governing payment for clinic and emergency room services).

10. In Count I of their Petition, Petitioners allege that 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations violate Article I, Section 28 of the Pennsylvania Constitution (the Equal Rights Amendment), which provides: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” *See* Petition ¶¶ 89-92.

11. According to Petitioners, by prohibiting funding for abortions unless they are necessary to protect the life of a woman or are performed in the case of pregnancies that result from rape or incest, 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations single out and exclude “a procedure sought singularly by women as a function of their sex” and therefore “improperly discriminate[] against women based on their sex without sufficient justification.” *Id.* ¶¶ 90, 92.

12. In Count II of the Petition, Petitioners allege that 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations violate Article I, §§ I and 26, as well as Article III, § 32 of the Pennsylvania Constitution, which guarantee equal protection under the laws of the Commonwealth.

13. Specifically, Petitioners allege that “[t]he Pennsylvania coverage ban singles out and excludes women from exercising the fundamental right to choose to terminate a pregnancy, while covering procedures and health care related to pregnancy and childbirth,” and that “[b]y singling out and excluding abortions from Medical Assistance, women throughout this Commonwealth who seek abortion care are being discriminated against for exercising their fundamental right to choose to terminate a pregnancy.” *Id.* ¶ 95.

14. Petitioners seek the following relief in connection with these two Counts: (a) a declaration that 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations are unconstitutional; (b) a declaration that abortion is a fundamental right under the Pennsylvania Constitution; and (c) an injunction to enjoin enforcement of 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations. *See* Petition at 30, “Wherefore” Clause.

15. Notably, in seeking this relief, Petitioners acknowledge that the very claims they advance now were expressly rejected by the Pennsylvania Supreme

Court in *Fischer*, 502 A.2d 114. Petitioners, however, contend that *Fischer* was wrongly decided and requires reconsideration.

16. On February 19, 2019, the Court granted Respondents an extension until April 1, 2019 to file their response to the Petition. On April 2, 2019, the Court granted Respondents an additional extension until April 16, 2019.

17. Respondents filed their Preliminary Objections to the Petition on April 16, 2019.

18. Proposed Intervenors are each members of the Pennsylvania Senate.

19. In addition, Proposed Intervenor Senator Kim Ward is the Vice Chair of the Senate Appropriations Committee, whose members also include Proposed Intervenors Senators Aument, Corman (*ex-officio*), Langerholc, Laughlin, Martin, Mensch, Scarnati (*ex-officio*), Scavello, and Yaw.

20. Proposed Intervenors Senator Hutchinson and Senator Aument are the Chair and Vice Chair, respectively, of the Senate Finance Committee, whose members also include Proposed Intervenors Senators DiSanto, Folmer, and Scarnati (*ex-officio*).

21. Proposed Intervenors Senator Brooks and Senator Judy Ward are the Chair and Vice Chair, respectively, of the Senate Health and Human Services

Committee, whose members also include Proposed Intervenors Senators Hutchinson, Martin, Mensch, and Scarnati (*ex-officio*).

22. Proposed Intervenors seek leave to intervene in this action in their official capacity for the reasons discussed below.

II. PENNSYLVANIA LAW GOVERNING INTERVENTION

23. Pennsylvania Rule of Appellate Procedure 1531(b) allows a person not named as a respondent in an original jurisdiction petition to seek leave to intervene by filing an application with the Court.

24. Pursuant to Pennsylvania Rules of Appellate Procedure 106 and 1517, original jurisdiction petitions for review are governed by the Pennsylvania Rules of Civil Procedure, unless the Rules of Appellate Procedure expressly provide otherwise.

25. Pennsylvania Rule of Civil Procedure 2327 provides in relevant part:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if ...

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

26. Proposed Intervenors seek to intervene pursuant to Pa. R.C.P. 2327(3) because they could have been joined as original parties to this action. Separately, Proposed Intervenors seek to intervene as Respondents pursuant to Pa. R.C.P. 2327(4) to protect their specific, substantial, and legally enforceable interest as members of Pennsylvania’s General Assembly under Article III, § 32; Article II, § 1; and Article III, § 24 of the Pennsylvania Constitution.

III. BASIS FOR PROPOSED INTERVENORS’ APPLICATION

A. Proposed Intervenors May Intervene in This Matter Pursuant to Pa. R.C.P. 2327(3) Because They Could Have Been Joined as Respondents

27. Pennsylvania Rule of Civil Procedure 2327(3) provides that a party shall be permitted to intervene when “such person could have joined as an original party in the action or could have been joined therein.”

28. This rule is not contingent upon whether the proposed intervenor has standing, a legally enforceable interest, or any criteria other than a demonstration that the party could have joined or been joined as an original party.

29. And this Court has recognized that “[m]embers of the General Assembly may participate or be named defendants in a constitutional challenge to a statute[.]” *See MCT Transp. v. Phila. Parking Auth.*, 60 A.3d 899, 904 n.7 (Pa. Commw. Ct. 2013).

30. Senator Scarnati, for example, has often been named as a respondent or has been permitted to intervene in actions involving such constitutional challenges. *See, e.g., Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 78 A.3d 1020, 1038 (Pa. 2013) (Senator Scarnati named as a respondent in his capacity as President pro tempore of the Pennsylvania Senate in an action alleging that a statute authorizing the abolishment of the office of jury commissioner violated Article V, §§ 1, 10 and Article II, § I of the Pennsylvania Constitution, as well as the First Amendment to the United States Constitution); *Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 52 A.3d 1213 (Pa. 2012) (Senator Scarnati named as a respondent in his capacity as President pro tempore of the Pennsylvania Senate in an action related to a challenge to the constitutionality of a statutory scheme for funding the Pennsylvania court system); *League of Women Voters v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) (Senator Scarnati named as a respondent in his capacity as President pro tempore of the Pennsylvania Senate in an action challenging the Pennsylvania Congressional Redistricting Act of 2011, 25 P.S. § 3596.101 *et seq.* as unconstitutional under, among other provisions, Article I, §5 of the Pennsylvania Constitution); *Phantom Fireworks Showrooms, LLC v. Wolf*, 2018 Pa. Commw. LEXIS 698 (Commw. Ct. Dec. 4, 2018) (Senator Scarnati named as a respondent in his capacity as President pro tempore of the

Pennsylvania Senate in an action alleging that a statute modifying the Commonwealth's Fireworks Law violated various provisions of Article II and Article III of the Pennsylvania Constitution); *Leach v. Commonwealth*, 141 A.3d 426, 427 (Pa. 2016) (Senator Scarnati permitted to intervene in his capacity as President pro tempore of the Pennsylvania Senate in an action alleging that legislation related to the theft of certain metals violated the Pennsylvania Constitution's Article III, §§ 1, 3).

31. Here, the Petition includes an equal protection claim advanced under Article III, § 32 of the Pennsylvania Constitution.

32. And Senator Scarnati is currently a named respondent in another action involving a claim under Article III, § 32 which, like this matter, is premised upon an alleged fundamental right that has purportedly been infringed upon by a discriminatory funding program.

33. Specifically, in *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, this Court described the petitioners' claim against Senator Scarnati and other respondents as follows:

In their second count, Petitioners assert that Respondents have violated equal protection principles under Article III, Section 32 of the Pennsylvania Constitution. They aver that education is a fundamental right, triggering strict scrutiny of the

disadvantageous classification reflected in the disparity of educational resources at the disposal of low and high-wealth districts. . . . By adopting a school *funding program that discriminates* against students living in such districts by denying them an equal opportunity to obtain an adequate education, the General Assembly, according to Petitioners, has denied the disadvantaged students equal protection.

170 A.3d 414, 431-32 (Pa. 2017) (emphasis added).

34. In other words, one of the Proposed Intervenors was included as an original party respondent in an action premised upon the exact same legal theory as that which is being advanced by Petitioners in this action.

35. It therefore follows that Petitioners could have named Proposed Intervenors as Respondents here in their effort to compel the General Assembly to provide the requested funding (but for reasons known only to them did not).

36. In sum, Proposed Intervenors “could have been joined” as Respondents in this action and should therefore be permitted to intervene pursuant to Pa. R.C.P. 2327(3).

B. Proposed Intervenors May Intervene in This Matter Pursuant to Pa. R.C.P. 2327(4) Because They Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant Articles II and III of the Pennsylvania Constitution

37. Although typically used to determine whether a plaintiff has a substantial, direct, and immediate interest in a matter, the concept of standing is

useful for assessing whether legislators, such as Proposed Intervenors, have a legally enforceable interest justifying their ability to intervene in this matter, even as Respondents.

38. Specifically, both the Pennsylvania Supreme Court and this Court have recognized that members of the General Assembly possess standing in actions that affect their power to act as legislators. *See, e.g., Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) (holding that legislative standing exists when the legislator “has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator”); *Fumo v. City of Phila.*, 972 A.2d 487, 501 (Pa. 2009) (holding that legislative standing “has been recognized in actions alleging a diminution or deprivation of the legislator’s or council member’s power or authority”); *id* at 502 (“***[T]he claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority*** and their vote, and for this reason, falls within the realm of the type of claim that legislators, *qua* legislators, have standing to pursue.”) (emphasis added); *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. 1976) (“***[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with.***”) (emphasis added; footnotes omitted).

39. And, in addition to these well-established legislative standing principles, Justice Dougherty recognized in his concurring opinion in *Markham* that the Supreme Court was willing to consider new theories of standing, given the Court’s “practical and flexible approach” to this issue. *Markham*, 136 A.3d at 148 (Dougherty, J., concurring) (“Given the prudential basis for standing doctrine, . . . being cognizant of the deference due members of a coordinate branch, if there were a developed and persuasive challenge to the existing approach to standing involving legislators, the Court no doubt would be open to its consideration. Indeed, it appears the Court has adopted a practical and flexible approach to the concept of standing generally.”) (citations omitted).

1. Proposed Intervenors Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant to Article III, § 32 of the Pennsylvania Constitution

a) Proposed Intervenors May Intervene in This Matter Because Petitioners Are Seeking to Diminish Their Legislative Authority

40. Article III, § 32 of the Pennsylvania Constitution falls under a subdivision of Article III entitled “Restrictions on Legislative Power” and provides, in relevant part, that “[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.” Pa. Const. Art. III, § 32.

41. This provision is part of the Pennsylvania Constitution’s guaranty of equal protection under the law, *see Fischer*, 502 A.2d at 120, and prohibits the General Assembly from singling out a person or group for special treatment in the absence of any lawful distinction. *See, e.g., Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000) (analyzing claim under Article III, § 32, and finding that “[t]he judicial function with respect to classifications, is to see that the classification at issue is founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition”).

42. Here, Count II of the Petition alleges, among other things, that the abortion funding restrictions set forth in 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations are prohibited under Article III, § 32 because they “operate[] to discriminate singularly against those women who seek abortion-related health care services by denying them coverage under Pennsylvania’s Medical Assistance programs[.]” Petition ¶ 96.

43. In advancing this claim, Petitioners are unquestionably seeking to diminish, impair, and restrict Proposed Intervenors’ legislative authority as it presently exists under Article III, § 32.

44. Specifically, the Supreme Court expressly held in *Fischer* that the abortion funding restrictions enacted by the General Assembly do *not* violate Article III, § 32. *See Fischer*, 502 A.2d at 117, 126 (addressing, among other things, “whether the funding restriction violates the equal protection guarantees contained in Article I § 1 and Article III § 32 of the Pennsylvania Constitution,” and finding “that the challenged funding restriction contained in the Abortion Control Act of 1982 does not violate the terms of the Pennsylvania Constitution”).

45. Therefore, under binding Pennsylvania Supreme Court precedent, Proposed Intervenors currently have the authority to propose and/or vote for legislation that contains certain funding limitations, without concern that such legislation would be deemed an unconstitutional “local or special law” under Article III, § 32.

46. If Petitioners succeed in overturning *Fischer*, Proposed Intervenors—as legislators—will no longer have that authority.

47. In this sense, Proposed Intervenors’ interest in this action is different from—and actually far greater than—the interest at issue in *Markham*, in which the Supreme Court found that legislators could not intervene to challenge an Executive Order on the basis that the Order “diminishes the effectiveness of, or is inconsistent with, prior-enacted legislation.” 136 A.3d at 145.

48. In *Markham*, the Court explained that allowing intervention in that matter

would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent. Critically, Appellants offer no limiting principle which would permit their intervention in the instant matter, but constrain their ability to initiate litigation, seek declaratory relief, or to intervene in any matter which does not, under the principles we express today, impact them in their role of legislators.

Id. at 145.

49. Here, the issue is not whether some governmental action is inconsistent with the General Assembly's intent in passing the Abortion Control Act.

50. If, as in *Markham*, this were simply a matter of discerning legislative intent, and Proposed Intervenors believed that the Court misconstrued that intent in rendering its decision, they would be free to propose and vote for legislation that implemented that original intent more clearly. This point was expressly recognized by the Supreme Court in denying the application to intervene in *Markham*. *Id.* (noting that the proposed legislative intervenors "do not suggest that they are in any way prevented from enacting future legislation in this area").

51. Stated differently, if the legislators in *Markham* believed that the Executive Order was inconsistent with legislative intent—but the Court nevertheless upheld that Order—the General Assembly could pass new legislation that rendered the Executive Order (and the Court’s decision thereon) moot. As such, the General Assembly’s power to legislate was not infringed, and there was no interest to protect through intervention.

52. Conversely, here, the entire purpose of Petitioners’ action is to not only enjoin the existing statute, but to prevent the General Assembly from ever enacting future legislation that contains similar funding restrictions.

53. This crucial distinction helps establish and articulate the limiting principle that the Supreme Court found was lacking in *Markham*.

54. Specifically, if, as in *Markham*, an action is concerned only with whether governmental conduct is consistent with the legislative intent of an existing statute, it does not rise to the level of creating a legally enforceable interest for purposes of intervention, because the action does not impair the General Assembly’s powers under the Pennsylvania Constitution.

55. But when, as here, the action seeks not only to challenge the existing statute, but to create new constitutional constraints on the General Assembly’s authority to legislate, then intervention should unquestionably be permitted as of

right. *Markham*, 136 A.3d at 145 (standing exists when the legislator “has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator”); *Wilt*, 363 A.2d at 881 (recognizing that legislators have standing “when specific powers unique to their functions under the Constitution are diminished or interfered with.”); *Fumo*, 972 A.2d at 501 (recognizing legislative standing “in actions alleging a diminution or deprivation of the legislator’s or council member’s power or authority”).

56. Because Proposed Intervenors plainly have a legally enforceable interest that may be affected by this litigation, they should be permitted to intervene. *See Hickok*, 761 A.2d at 1134, n.1 (recognizing that Senator Jubelirer, the President pro tempore of the Pennsylvania Senate, “was permitted to intervene in support of the respondents” in that action, which addressed whether a portion of the Education Empowerment Act was unconstitutional under Article III, § 32); *MCT Transp.*, 60 A.3d at 904 n.7 (“Members of the General Assembly may participate or be named defendants in a constitutional challenge to a statute[.]”); *Scarnati v. Wolf*, 135 A.3d 200, 210 (Pa. Commw. 2015) (“[I]ndividual legislators have standing to pursue matters that affect their interests as members of the General Assembly.”) (*rev’d in part on other grounds by Scarnati v. Wolf*, 173 A.3d 1110 (Pa. 2017)).

b) Proposed Intervenors May Intervene in This Matter Because the Relief Sought by Petitioners May Require Remedial Action by the General Assembly

57. Proposed Intervenors’ right to be heard on what constitutes an appropriate restriction on their legislative power pursuant to Article III, § 32 is particularly important given that Petitioners seek only to strike down two subsections of 18 Pa. C.S. § 3215—a statute that sets forth a variety of requirements and conditions as to how Commonwealth facilities and resources can be used in connection with abortion-related activity.

58. And 18 Pa. C.S. § 3215 itself is only a subpart of Pennsylvania’s Abortion Control Act, 18 Pa. C.S. § 3201, *et seq.*, an Act that is premised on the General Assembly’s authority to advance Pennsylvania’s public policy of protecting life and encouraging childbirth over abortion. 18 Pa. C.S. § 3202(a) (“It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion.”); 18 Pa. C.S. § 3202(c) (“In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, *the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth*

over abortion.”) (emphasis added); 18 Pa. C.S. § 3202(d) (“It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons.”).

59. In *Fischer*, our Supreme Court recognized that the Commonwealth has an important interest in preserving potential life, and that the Abortion Control Act is specifically designed to advance that purpose. *Fischer*, 502 A.2d at 122 (“[T]o say that the Commonwealth’s interest in attempting to preserve a potential life is not important, is to fly in the face of our own existence.”); *id.* at 122-23 (“The stated purpose of the Act is the preservation of life. In furtherance thereof, the Commonwealth has made a decision to encourage the birth of a child in all situations except where another life would have to be sacrificed. We think such a classification is specifically related to the ends sought, in that it accomplishes the preservation of the maximum amount of lives: i.e., those unaborting new babies, and those mothers who will survive though their fetus be aborted.”).

60. Here, the Petition requests declaratory and injunctive relief with respect to 18 Pa. C.S. § 3215(c) and (j), but other subsections of 18 Pa. C.S. §

3215—which Petitioners do not challenge—are inextricably intertwined with subsections (c) and (j).

61. For example, 18 Pa. C.S. § 3215(a) prohibits any hospital, clinic, or other health facility owned or operated by the Commonwealth, a county, a city or other governmental entity from: (1) providing or permitting its facilities to be used for the performance of any abortion; (2) leasing or selling its facilities to any physician or health facility for the performance of any abortion; or (3) entering into a contract with any physician or health facility under the terms of which the physician or health facility agrees to provide abortions, *unless the abortion is expressly authorized by 18 Pa. C.S. § 3215(c)*.

62. Next, 18 Pa. C.S. § 3215(d) provides that “[n]o health plan for employees, funded with any Commonwealth funds, shall include coverage for abortion, *except under the same conditions and requirements as provided in subsection (c)*.” (emphasis added).

63. These provisions make clear that, if Petitioners prevail, a vast array of activities governed by 18 Pa. C.S. § 3215—including the manner in which Pennsylvania hospitals provide services, lease their facilities, and contract with physicians and health facilities, and the manner in which health plans may be

funded with Commonwealth dollars—will all be premised upon a statutory prohibition on funding that this Court will have determined to be unconstitutional.

64. This may require the General Assembly and its members, such as Proposed Intervenors, to amend 18 Pa. C.S. § 3215 or pass new legislation addressing these issues.

65. This is particularly true given that the relief sought by Petitioners would *not* address how much funding needs to be provided; the manner in which the funding can or must be disbursed; or whether the General Assembly could impose other conditions, limitations, or regulations on abortions and abortion-related services in light of this novel constitutional funding obligation.

66. Indeed, the Petition alleges that 30,881 abortions were performed in Pennsylvania in 2016 alone, *see* Petition ¶ 56, and that the cost of an abortion ranges from several hundred dollars to several thousand. *Id.* ¶ 77.

67. These numbers suggest that, if Petitioners prevail, the Commonwealth could be required to provide a significant amount of additional new funding each year.

68. In other words, while Petitioners may not expressly ask this Court to compel the General Assembly to pass new legislation concerning how

Commonwealth funds may be used for abortion-related services, that is the practical effect of the relief they seek.

69. And, as discussed above, the entire Abortion Control Act is premised on the General Assembly's authority to advance the Commonwealth's public policy of promoting and preserving life—a public policy that the Supreme Court has already recognized as an important state interest.

70. If Petitioners prevail, and this Court concludes that promoting and preserving life is *not* an important state interest, then the entire foundation of the Abortion Control Act will be called into question, thereby potentially necessitating further legislative action on an intensely political, highly-regulated issue.

71. Because Petitioners are requesting declaratory and injunctive relief that will materially impact unchallenged, existing legislation in a manner that extends far beyond funding for Medical Assistance, Proposed Intervenors—who, along with the other members of the General Assembly, would be responsible for passing new or amending current legislation—have a legally enforceable interest in preserving the scope of their legislative authority under the Pennsylvania Constitution, and should therefore be permitted to intervene as Respondents in this action.

2. Proposed Intervenors Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant to Article II, § 1, and Article III, § 24 of the Pennsylvania Constitution

72. Article II, § 1 of the Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.”

73. Article III, § 24 of the Pennsylvania Constitution provides, in relevant part, that “[*n*]o money shall be paid out of the treasury, except on appropriations *made by law* and on warrant issued by the proper officers[.]” (emphasis added).

74. Both this Court and the Pennsylvania Supreme Court have consistently recognized that these Constitutional provisions grant the General Assembly *exclusive* control over Pennsylvania’s finances:

The power to appropriate moneys lies **exclusively** with the legislative branch. Article III, section 24 of our constitution specifically provides that no money may be paid out of the State Treasury except upon appropriation made by law or, in cases of refunds, as provided by law. This Court has stated that, pursuant to Article III, section 24, money may be paid out of the State Treasury **only by legislative action in the form of an appropriation act or in the form of other statutory enactment** of general or limited application as to particular subjects.

Common Cause v. Commonwealth, 668 A.2d 190, 205 (Pa. Commw. Ct. 1995) (emphasis added); *see also Shapp v. Sloan*, 367 A.2d 791, 797-98 (Pa. Commw.

1976) (“Article III, Section 24, of our Constitution mandates that money paid into the State Treasury, whether derived from State taxation or any other source, may be paid out of the State Treasury *only by legislative action in the form of an appropriation act or in the form of other statutory enactment* of general or limited application as to particular subjects. *Such legislative action, of course, rests with the General Assembly, and it is within its exclusive power and authority to appropriate money out of the State Treasury or to otherwise provide for disbursements therefrom.*”) (emphasis added); *Commonwealth ex rel. Snader v. Liveright*, 161 A. 697, 707 (Pa. 1932) (“Legislative power is vested in the General Assembly by article II, section 1, and its power is supreme on all such subjects unless limited by the Constitution. *The control of the state’s finances is entirely in the legislature*, subject only to these constitutional limitations; and, except as thus restricted, is absolute. Unless expressly prohibited or otherwise directed by that instrument, *appropriations may be made for whatever purposes and in whatever amounts the law-making body finds desirable*. The legislature in appropriating is supreme within the limits of the revenue and moneys at its disposal.”); *id.* (“The balance of the general revenue, subject to constitutional limitations, is in the *absolute and complete control of the General Assembly*. It follows that *it may create preferential appropriations for any purpose which, in*

its judgment, it deems necessary in the interest of government, and such appropriations will have a claim on this surplus prior to other appropriations not so favored.”) (emphasis added).

75. Here, Petitioners have filed this action against the DHS and certain of its agents because they are responsible for administering Pennsylvania’s Medical Assistance programs. Petition ¶¶ 40-41.

76. But the DHS and the Medical Assistance programs it oversees are funded by Section 222 of the General Appropriation Act, HB 2121, a statute passed by the General Assembly.

77. As such, while Petitioners seek relief exclusively from the DHS and its agents, the DHS can only disburse funds in a manner authorized by legislation enacted by the General Assembly.

78. Therefore, what Petitioners are actually seeking in this action is an order from the Court that would compel the General Assembly to pass legislation that would provide funding for abortions, even if those abortions are not necessary to protect a woman’s life, or where the pregnancy arises from rape or incest, notwithstanding that the General Assembly has already made clear that, as a matter of public policy, it does not wish to dedicate the Commonwealth’s limited resources to this purpose.

79. Because Petitioners’ requested relief would compel the Commonwealth to fund certain medical procedures—and because the purpose and amount of funding provided by the Commonwealth are determined exclusively by the General Assembly—the Petition raises separation of powers concerns in that it seeks to restrict the General Assembly’s authority, but does not name as a Respondent any representative from the General Assembly who could advance the legal positions necessary to protect that authority.

80. Proposed Intervenors—who include high-ranking members of the Senate Appropriations, Finance, and Health and Human Services Committees—should therefore be permitted to intervene and be heard on issues concerning how the Commonwealth’s finances can or should be disbursed, and to thereby protect their legally enforceable interests as legislators under Article II, §1 and Article III, § 24 of the Pennsylvania Constitution.

C. There is No Basis to Refuse Proposed Intervenors’ Application

81. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner’s claim or defense “is not in subordination to and in recognition of the propriety of the action;” (2) the petitioner’s interest is already adequately represented; or (3) “the petitioner has unduly delayed in making application for intervention or the intervention will

unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

82. None of these factors apply to Proposed Intervenors.

83. First, their defense in this action is not in subordination to and in recognition of the action’s propriety.

84. Second, while Proposed Intervenors and Respondents share the same overall goal of upholding the funding restrictions at issue, their interests are not identical.

85. Respondents, who are part of the Commonwealth’s executive branch, have an interest in ensuring that they are executing existing laws appropriately, and for this reason must defend the constitutionality of 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations.

86. As members of the Commonwealth’s legislative branch, however, Proposed Intervenors not only have an interest in defending the current law, but to defend their broader right to propose and vote for similar legislation in the future.

87. Stated differently, if the Court rules in favor of Petitioners, Respondents would be prohibited from enforcing these particular funding restrictions, but the Court’s decision would not have any effect on the executive branch’s constitutional powers going forward.

88. But an adverse ruling *would* dictate how the General Assembly may and may not allocate Commonwealth funds in any new legislation, and would therefore have a significant impact on the General Assembly's exclusive authority to appropriate money out of the State Treasury pursuant to Article II, § 1 and Article III, § 24.

89. These separation of powers considerations militate in favor of intervention so that Proposed Intervenors can adequately represent their interests as legislators—an interest that Respondents have no reason to raise, advance, or otherwise protect in this action.

90. Third, Proposed Intervenors have not unduly delayed in submitting this Application, which is being filed before the pleadings are closed and within one day of Respondents' own response to the Petition for Review, and their intervention will not cause any delay, embarrassment, or prejudice to any party.

IV. CONCLUSION

91. For the reasons set forth above, Proposed Intervenors have a clear right to intervene in this case.

92. Pursuant to Pennsylvania Rule of Civil Procedure 2328, Proposed Intervenors attach a copy of the pleading that they will file in the action if permitted to intervene.

93. Proposed Intervenors request a hearing on this Application, if deemed necessary.

WHEREFORE, Proposed Intervenors—in their official capacity as members of the Pennsylvania Senate—respectfully request this Honorable Court grant their Application for Leave to Intervene in this matter as Respondents, and further accept their Preliminary Objections attached hereto as their first filing.

Respectfully Submitted,

BLANK ROME, LLP

By: /s/ Brian S. Paszamant

Brian S. Paszamant (PA ID #78410)

Jason A. Snyderman (PA ID # 80239)

John Wixted (PA ID #309033)

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Counsel for Proposed Intervenor-Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, <i>et al.</i> ,)	
)	
<i>Petitioners,</i>)	Civ. No. 26 MD 2019
v.)	
)	
Pennsylvania Department of Human Services,)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

ORDER

AND NOW, this _____ day of _____, 2019, upon consideration of Proposed Intervenor Senators Joseph B. Scarnati, III, Jacob Corman, Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw (collectively, the “Proposed Intervenor”) Application for Leave to Intervene (the “Application”) as Respondents, and any response thereto, it is hereby **ORDERED** that the Application is **GRANTED**.

It is further **ORDERED** that Proposed Intervenor, in their official capacity as members of the Pennsylvania Senate, are hereby allowed to intervene as Respondents in this matter. It is further **ORDERED** that the Prothonotary shall file of record as of the date of this Order the Preliminary Objections attached to the

Application as Exhibit "A".

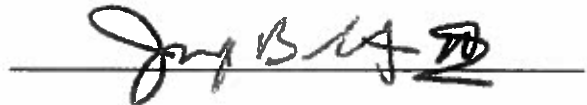
BY THE COURT:

J.

VERIFICATION

I, Joseph B. Scarnati, III, verify that the statements made in the foregoing Application for Leave to Intervene are true and correct to the best of my own personal knowledge, information, and belief. I understand that false statements herein are subject to the penalties of 18 PA. CON. STAT. § 4904 relating to unsworn falsification to authorities.

Date: April 17, 2019

A handwritten signature in black ink, appearing to read "Joseph B. Scarnati, III", is written over a horizontal line.

Joseph B. Scarnati, III

BLANK ROME LLP

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, <i>et al.</i> ,)	
)	
)	Civ. No. 26 MD 2019
<i>Petitioners,</i>)	
v.)	
)	
Pennsylvania Department of Human Services,)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

CERTIFICATE OF SERVICE

I, John P. Wixted, Esquire, hereby certify that on April 17, 2019, I caused a true and correct copy of the foregoing Application for Leave to Intervene to be delivered via first class mail, upon the persons below:

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Dated: April 17, 2019

Respectfully Submitted,

BLANK ROME, LLP

By: /s/ John P. Wixted
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*Counsel for Proposed Intervenor-
Respondents*

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, <i>et al.</i> ,)	
)	
)	Civ. No. 26 MD 2019
<i>Petitioners,</i>)	
v.)	
)	
Pennsylvania Department of Human Services,)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

ORDER

AND NOW, this day of , 2019, upon consideration of Intervenor-Respondents Senators Joseph B. Scarnati, III, Jacob Corman, Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw’s Preliminary Objections to the Petition for Review in the Nature of a Complaint in Equity Seeking Declaratory Relief and Injunctive Relief (the “Petition for Review”), and any response thereto, it is hereby **ORDERED** that the Preliminary Objections are **SUSTAINED** and the Petition for Review is **DISMISSED**.

BY THE COURT:

J.

BLANK ROME LLP

Brian S. Paszamant (PA ID #78410)
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John P. Wixted (PA ID #309033)
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Counsel for Intervenor-Respondents

Petitioners are hereby notified to
plead to the enclosed Preliminary
Objections within 30 days from
service hereof.

/s/ Brian S. Paszamant

Attorney for Intervenor-
Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, *et al.*,)

)

) Civ. No. 26 MD 2019

Petitioners,)

v.)

)

Pennsylvania Department of Human Services,)

et al.,)

)

Respondents.)

)

PRELIMINARY OBJECTIONS OF INTERVENOR-RESPONDENTS

Intervenor-Respondents Senators Joseph B. Scarnati, III (President pro tempore of the Pennsylvania Senate), Jacob Corman (Majority Leader of the Pennsylvania Senate), Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw (collectively, the “Intervenor-Respondents”), file these Preliminary Objections to the Petition for Review in the Nature of a Complaint in Equity Seeking Declaratory Relief and Injunctive Relief (the “Petition”) filed by Petitioners Allegheny Reproductive Health Center, *et al.* (collectively, “Petitioners”).

PRELIMINARY STATEMENT

Petitioners ask this Court to take the unprecedented and constitutionally impermissible step of overruling a Pennsylvania Supreme Court decision that has been the settled law in this Commonwealth for more than three decades. Specifically, Petitioners recognize that *Fischer v. Dep’t of Public Welfare*, 502 A.2d 114 (Pa. 1985) addressed and rejected the *same* claims advanced in their Petition—i.e., that state law prohibiting the use of state funds for certain abortions violates the Equal Rights Amendment and equal protection provisions of Pennsylvania’s Constitution. Yet, Petitioners contend that *Fischer* was wrongly decided and—without citing any developments or changes in Pennsylvania

constitutional law that would warrant a different result—ask this Court to grant the precise relief that was expressly denied in *Fischer*. Petitioners’ claims are entirely baseless, and should be dismissed with prejudice for multiple reasons.

First, the Supreme Court rejected the argument that existing abortion funding restrictions discriminate against women on the basis of their sex and therefore violate Article I, § 28 of the Pennsylvania Constitution (the Equal Rights Amendment). In rejecting this argument, the Supreme Court noted that certain laws will naturally have an effect only on one sex given that certain immutable characteristics—such as the ability to become pregnant—are unique to that sex. The Court further recognized that the funding restrictions distinguished not between men and women, but between which types of abortions would be covered, and therefore did not implicate the Equal Rights Amendment.

Second, the Court rejected the claim that the funding restrictions violated the petitioners’ constitutional right to equal protection under the law. In reaching this decision, the Supreme Court concluded that the funding restrictions do *not* place any barriers on a woman’s freedom to have an abortion. As such, the only question raised by the constitutional challenge to the funding restrictions was whether an individual has a right to have the state subsidize the exercise of an individual freedom. The Supreme Court correctly concluded that such a right is found nowhere in the Pennsylvania Constitution.

Next, in addressing the claim that the law had a disproportionate effect on indigent women, the Supreme Court noted that indigency is not a protected class for purposes of the equal protection analysis. *Fischer*, 502 A.2d at 119 (“[A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”) (quoting *Harris v. McRae*, 448 U.S. 297, 316-17 (1980)).

In sum, the Pennsylvania Supreme Court has held unequivocally that the abortion funding restrictions challenged by Petitioners are entirely constitutional. And the Pennsylvania Supreme Court has not rendered *any* decision since *Fischer* that would even remotely suggest that the Court’s analysis of the constitutionality of those restrictions should now be called into doubt. Moreover, Petitioners’ requested relief would upset Pennsylvania’s existing constitutional balance of powers by eviscerating the General Assembly’s ability to advance the Commonwealth’s important interest in promoting life through carefully constructed legislation, and by improperly interfering with the General Assembly’s authority to determine how to appropriate the Commonwealth’s limited resources. Because *Fischer* addressed the precise claims advanced in the Petition—and because this Court is bound by Supreme Court precedent—Intervenor-

Respondents' Preliminary Objections should be sustained, and the Petition should be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Identity of the Parties and the Nature of Petitioners' Cause of Action

1. On January 16, 2019, Petitioners initiated this litigation by filing their Petition.

2. Petitioners are eight organizations that provide a variety of reproductive health care services and are enrolled in Pennsylvania's Medicaid program, known as Medical Assistance. *See* Petition ¶¶ 2-32, 34.

3. Each Petitioner alleges that it performs medication and/or surgical abortions. *See id.* ¶¶ 2-32.¹

4. Collectively, Petitioners allege that they perform 95% of all abortions in Pennsylvania. *Id.* ¶ 33.

5. Respondents are the Pennsylvania Department of Human Services ("DHS"); the DHS's Secretary; the Executive Deputy Secretary of the DHS's Office of Medical Assistance Programs; and the Deputy Secretary of the DHS's Office of Medical Assistance Programs.

6. Intervenor-Respondents are Senators in the Pennsylvania General Assembly, which is the legislative body responsible for funding DHS and its

¹ Petitioner Delaware County Women's Center appears to perform only medication abortions. *Id.* ¶¶ 13-16.

Medical Assistance programs. Intervenor-Respondents were granted leave by the Court to intervene in this matter.

7. In this action, Petitioners advance two claims challenging the provisions of a Pennsylvania statute, 18 Pa. C.S. § 3215(c) and (j), as well as certain regulations—55 Pa. Code §§ 1147.57,² 1163.62, and 1221.57—that were promulgated by the DHS (collectively, the “DHS Regulations,” and together with 18 Pa. C.S. § 3215(c) and (j), the “Pennsylvania Coverage Ban”).³

8. 18 Pa. C.S. § 3215(c) provides that “[n]o Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion,” unless the abortion: (1) is necessary to avert the death of the mother; (2) is performed in the case of pregnancy caused by rape; or (3) is performed in the case of pregnancy caused by incest.

² Petitioners presumably refer to 55 Pa. Code § 1141.57, which pertains to payment conditions for necessary abortions. There does not appear to be a 55 Pa. Code § 1147.57. In addition, Chapter 1147 relates to optometrists’ services, not abortion or reproductive services.

³ Although Petitioners refer to 55 Pa. Code §§ 1141.57, 1163.62, and 1221.57 as 18 Pa. C.S. § 3215(c) and (j)’s “implementing regulations,” these provisions were not actually issued pursuant to 18 Pa. C.S. § 3215. Section 3215 falls under Title 18 of Pennsylvania’s Consolidated Statutes, which addresses Crimes and Offenses. By contrast, the regulations that Petitioners are challenging were implemented pursuant to the Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §§ 101-1503, which is the Human Services Code (formerly known as the Public Welfare Code). *See* 55 Pa. Code § 1141.57 (“The provisions of this § 1141.57 issued under the Public Welfare Code (62 P.S. § 453).”); 55 Pa. Code § 1163.62 (falling under Chapter 1163, the provisions of which are “issued under sections 443.1(1) and 443.2(1) of the Public Welfare Code (62 P.S. §§ 443.1(1) and 443.2(1)), unless otherwise noted”); 55 Pa. Code § 1221.57 (“The provisions of this § 1221.57 issued under the Public Welfare Code (62 P.S. § 453).”).

9. 18 Pa. C.S. § 3215(j) sets forth certain requirements that must be satisfied before a Commonwealth agency disburses State or Federal funds for the performance of an abortion pursuant to 18 Pa. C.S. § 3215(c)(2) or (3).

10. Each of the DHS Regulations relate to the payment conditions imposed by the DHS for abortions and, consistent with 18 Pa. C.S. § 3215(c) and (j), apply only to abortions performed when a woman's life is endangered, or in the case of rape or incest. 55 Pa. Code § 1141.57 (governing payment for physician's services); 55 Pa. Code § 1163.62 (governing payment for hospital services); 55 Pa. Code § 1221.57 (governing payment for clinic and emergency room services).

B. Petitioners' Alleged Harm

11. According to Petitioners, the Pennsylvania Coverage Ban harms them and the women to whom they provide services in several ways.

12. With respect to the alleged harm to women eligible for Medical Assistance, the Petition alleges, among other things, that the ban forces them to: (a) make personal financial sacrifices in order to pay for abortions (Petition ¶¶ 59, 77-79); (b) delay abortion care while they raise funds for the procedure (*id.* ¶¶ 61, 80-82); and/or (c) carry their pregnancy to term, which may interrupt their education/career and may expose them to medical risks. *Id.* ¶¶ 64, 66-74.

13. With respect to the alleged harm to Petitioners, the Petition alleges that the ban: (a) forces them "to divert money and staff time from other mission-

central work to help Pennsylvania women on Medical Assistance who do not have enough money to pay for their abortion” (*id.* ¶ 84); (b) causes them to subsidize abortions for women who cannot afford them (*id.* ¶ 85); (c) requires them to “expend valuable staff resources in securing funding from private charitable organizations that fund abortions for women on Medical Assistance” (*id.* ¶ 86); and/or (d) forces them “to expend their counselors’ time delving into personal matters that the patient may wish not to discuss,” such as whether the pregnancy resulted from rape or incest. *Id.* ¶ 87.

C. Petitioners’ Claims

14. In Count I of their Petition, Petitioners allege that the Pennsylvania Coverage Ban violates Article I, Section 28 of the Pennsylvania Constitution (the Equal Rights Amendment), which provides: “Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” *See* Petition ¶¶ 89-92.

15. According to Petitioners, by prohibiting funding for abortions unless they are necessary to protect the life of a woman or are performed in the case of pregnancies that result from rape or incest, the Pennsylvania Coverage Ban singles out and excludes “a procedure sought singularly by women as a function of their sex” and therefore “improperly discriminates against women based on their sex without sufficient justification.” *Id.* ¶¶ 90, 92.

16. In Count II of the Petition, Petitioners allege that the Pennsylvania Coverage Ban violates Article I, §§ I and 26, as well as Article III, § 32 of the Pennsylvania Constitution, which guarantee equal protection under the laws of the Commonwealth.

17. Specifically, Petitioners allege that “[t]he Pennsylvania coverage ban singles out and excludes women from exercising the fundamental right to choose to terminate a pregnancy, while covering procedures and health care related to pregnancy and childbirth. By singling out and excluding abortions from Medical Assistance, women throughout this Commonwealth who seek abortion care are being discriminated against for exercising their fundamental right to choose to terminate a pregnancy.” *Id.* ¶ 95.

18. Petitioners seek the following relief in connection with these two Counts: (a) a declaration that 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations are unconstitutional; (b) a declaration that abortion is a fundamental right under the Pennsylvania Constitution; and (c) an injunction to enjoin enforcement of 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations. *See* Petition at 30, “Wherefore” Clause.

19. Notably, in seeking this relief, Petitioners acknowledge that the claims they advance were expressly rejected by the Pennsylvania Supreme Court in

Fischer, 502 A.2d 114. Petitioners, however, contend that this decision was wrongly decided and should now be reconsidered.

20. As set forth below, *Fischer* was correctly decided and, even if it had not been, this Court has expressly recognized that it is bound by Pennsylvania Supreme Court decisions, and may not render conflicting opinions. Accordingly, Intervenor-Respondents' Preliminary Objections should be sustained, and the Petition should be dismissed.

II. PRELIMINARY OBJECTION – THE PETITION IS LEGALLY INSUFFICIENT PURSUANT TO PA R.C.P. 1028(a)(4) AND MUST BE DISMISSED

21. Rule 1028(a)(4) authorizes a preliminary objection arising out of the “legal insufficiency of a pleading (demurrer).” Pa. R. Civ. P. 1028(a)(4).

22. A preliminary objection in the nature of a demurrer is decided solely on the pleadings, without consideration of any evidence outside of the complaint. *Erdely v. Hinchcliffe & Keener, Inc.*, 875 A.2d 1078, 1081 (Pa. Super. Ct. 2005).

23. A demurrer is appropriate where, on the facts alleged in the complaint, “the law says with certainty that no recovery is possible.” *Morley v. Gory*, 814 A.2d 762, 764 (Pa. Super. 2002).

24. A preliminary objection in the nature of a demurrer tests the legal sufficiency of a complaint and should be sustained when a plaintiff has failed to state a claim for which relief can be granted, and thus a trial would be a fruitless

exercise. *See Composition Roofers Local 30/30B v. Katz*, 581 A.2d 607, 609 (Pa. Super. 1990).

25. In evaluating the averments of a complaint and preliminary objections, a court “need not consider the pleader’s conclusions of law, unwarranted inferences from facts, opinions, or argumentative allegations.” *Marks v. Nationwide Ins. Co.*, 762 A.2d 1098, 1099 (Pa. Super. Ct. 2000).

A. Pennsylvania Supreme Court Decisions Are Binding On All Other Pennsylvania Courts

26. It is well-established that “the Pennsylvania Supreme Court is the final authority with respect to the Pennsylvania Constitution.” *Meggett v. Pa. Dep’t of Corr.*, 892 A.2d 872, 878 (Pa. Commw. 2006).

27. And, once the Supreme Court has rendered a decision on an issue of law, all other Pennsylvania courts are bound by that decision and may not render a conflicting opinion, even if the court believes that the Supreme Court’s ruling was wrongly decided. *Griffin v. SEPTA*, 757 A.2d 448, 451 (Pa. Commw. 2000) (“[W]e, as an intermediate appellate court are bound by the decisions of the Pennsylvania Supreme Court and are powerless to rule that decisions of that Court are wrongly decided and should be overturned.”); *In re O’Reilly*, 100 A.3d 689, 694 (Pa. Commw. 2014) (“However persuasive we might find these arguments if we were writing on a clean slate, they must fail in light of the clear directive of our Supreme Court[.]”).

28. As set forth in detail below, the Pennsylvania Supreme Court previously considered in *Fischer* each of the precise claims that Petitioners advance in this action, and has rejected each one.

29. Accordingly, this Court is bound by the holding in *Fischer*, and the Petition must be dismissed with prejudice.

B. The Pennsylvania Supreme Court Has Expressly Recognized That the Pennsylvania Coverage Ban Does Not Violate the Equal Rights Amendment to the Pennsylvania Constitution

30. As set forth above, the Equal Rights Amendment provides that “[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Pa. Const. Art. I, § 28.

31. Petitioners allege that the Pennsylvania Cover Ban violates the Equal Rights Amendment because it singles out and excludes “a procedure sought singularly by women as a function of their sex” and therefore “improperly discriminates against women based on their sex without sufficient justification.” *Id.* ¶¶ 90, 92.

32. In *Fischer*, the Supreme Court addressed and rejected this claim as follows:

[W]e cannot accept appellants’ rather simplistic argument that because only a woman can have an abortion then the statute necessarily utilizes sex as a basis for distinction, To the contrary, *the basis for the*

distinction here is not sex but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.

502 A.2d at 125 (emphasis added; citations and quotations omitted); *see also id.* (“The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex.”); *id.* at 126 (“[T]he decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species[.]”).

33. Petitioners also allege that the Pennsylvania Coverage Ban violates the Equal Rights Amendment because it “reinforces gender stereotypes about the primacy of women’s reproductive function and maternal role[.]” Petition ¶ 90.

34. To the contrary, neither 18 Pa. C.S. § 3215(c) and (j) nor the DHS Regulations say anything at all about gender stereotypes, and the Supreme Court rejected this argument as well. *Fischer*, 502 A.2d at 126 (“[T]his statute, which is solely directed to that unique facet is in no way analogous to those situations where the distinctions were based exclusively on the circumstance of sex, **social stereotypes connected with gender**, [or] culturally induced dissimilarities.”) (emphasis added; citations and quotations omitted).

35. And, although Petitioners allege that *Fischer* was wrongly decided and should now be reconsidered, *see* Petition at 2, they have not identified any post-*Fischer* decisions modifying the manner in which Pennsylvania's Equal Rights Amendment has been interpreted.

36. Indeed, nearly a decade after *Fischer*, the Third Circuit Court of Appeals relied on that decision in recognizing that the Equal Rights Amendment “does not prohibit differential treatment among the sexes when, as here[,] that treatment is reasonably and genuinely based on physical characteristics unique to one sex.” *Williams v. Sch. Dist.*, 998 F.2d 168, 177 (3d Cir. 1993) (quoting *Fischer*, 502 A.2d at 125).⁴

37. In sum, the Pennsylvania Supreme Court has unequivocally held that the Pennsylvania Coverage Ban does not violate the Equal Rights Amendment to the Pennsylvania Constitution.

38. Intervenor-Respondents' Preliminary Objections should therefore be sustained, and Count I of the Petition should be dismissed with prejudice.

⁴ Moreover, Petitioners fail to acknowledge that the unique, individual impact that pregnancy has on a woman permits the state to discriminate in favor of women, even though the decision to carry a child could also have consequences for the man. *See Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992) (“[W]hen the wife and the husband disagree on this decision [to terminate a pregnancy], the view of only one of the two marriage partners can prevail. ***Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.***”) (emphasis added) (citations and quotations omitted); *id.* at 897 (“[T]he Constitution does not permit a State to require a married woman to obtain her husband’s consent before undergoing an abortion.”); *id.* at 887-898 (holding that the Constitution does not permit a State to require a woman to notify her husband of her intent to obtain an abortion).

C. The Pennsylvania Supreme Court Has Expressly Recognized That the Pennsylvania Coverage Ban Does Not Violate Article I, §§ 1 and 26 or Article III, § 32

1. Pennsylvania’s Equal Protection Jurisprudence

39. Article I, § 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. Art. I, § 1.

40. Article I, § 26 of the Pennsylvania Constitution provides: “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. Art. I, § 26.

41. Article III, § 32 of the Pennsylvania Constitution provides, in relevant part, that “[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law.” Pa. Const. Art. III, § 32.

42. Article I, § 1 and Article III, § 32 “have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law.” *Fischer*, 502 A.2d at 120.

43. Article I, § 26, on the other hand, “does not in itself define a new substantive civil right.” *Id.* at 123. Rather, “[w]hat Article I § 26 does is make more explicit the citizenry’s constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights. It can not however be construed as an entitlement provision; nor can it be construed in a manner which would preclude the Commonwealth, when acting in a manner consistent with state and federal equal protection guarantees, from conferring benefits upon certain members of a class unless similar benefits were accorded to all.” *Id.*

44. In reviewing government actions that affect disparate classes, Pennsylvania courts apply the following equal protection framework:

[T]here are three different types of classifications calling for three different standards of judicial review. The first type classifications implicating neither suspect classes nor fundamental rights -- will be sustained if it meets a “rational basis” test. . . . In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. . . . Finally, in the third type of cases, if “important,” though not fundamental rights are affected by the classification, or if “sensitive” classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review. . . . There are, in summary, three standards of review applicable to an equal protection case, and the applicability of one rather than another will depend upon the type of right which is affected by the classification.

Fischer, 502 A.2d at 120 (citations and quotation omitted).

2. The Pennsylvania Coverage Ban Does Not Violate the Equal Protection Provisions of the Pennsylvania Constitution

45. Here, Count II of the Petition alleges, among other things, that the Pennsylvania Coverage Ban discriminates “based on the exercise of a fundamental right” under Article I, §§ 1 and 26 and Article III, § 32 because it “operates to discriminate singularly against those women who seek abortion-related health care services by denying them coverage under Pennsylvania’s Medical Assistance programs[.]” Petition ¶ 96.

46. Once again, the Supreme Court in *Fischer* rejected this precise claim.

a) The Pennsylvania Coverage Ban Does Not Violate Article I, § 1 and Article III, § 32

47. Like the petitioners in *Fischer*, 502 A.2d at 120, Petitioners here allege that abortion should be treated as a fundamental right.

48. Petitioners further allege that the Pennsylvania Coverage Ban “excludes women from exercising the fundamental right to choose to terminate a pregnancy.” *Id.* ¶ 95.

49. In making these allegations, however, Petitioners misrepresent entirely both the “right” at issue and the effect of the Pennsylvania Coverage Ban.

50. Specifically, contrary to Plaintiff's characterization, neither 18 Pa. C.S. § 3215(c) and (j) nor the DHS Regulations prohibit any woman from choosing to have an abortion.

51. As the Supreme Court recognized in *Fischer* when analyzing the equal protection claim advanced under Article I, § 1 and Article III, § 32, the challenge to the Pennsylvania Coverage Ban does not implicate the right to have an abortion; rather, it concerns whether the Commonwealth has an obligation to fund an abortion when it is unnecessary to protect the life of the woman, or when the pregnancy has not resulted from rape or incest:

[W]e must first determine the type of right with which we are confronted. As we view it, the right with which we are here concerned is the purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights. Such a right is to be found nowhere in our state Constitution, and therefore . . . such a right cannot be considered fundamental.

Id. at 121 (citations omitted).

52. This point was also recognized in this Court's *en banc* decision in *Fischer*, which the Supreme Court affirmed:

A woman's freedom of choice does not carry with it a constitutional entitlement to every financial resource with which to avail herself of the full range of protected choices. . . . For example, a citizen has a constitutional right to travel but is not entitled to travel at the public expense. One has a constitutional right to freedom of

expression but is not entitled to the use of public funds to finance the expounding of personal views. The economic constraints on the woman who would terminate her pregnancy are not caused by the Commonwealth. Her financial problems exist and continue to exist whether she elects to choose one or the other alternative. These problems are not the consequence of any action or legislation on the part of the Commonwealth.

Fischer v. Dep't of Public Welfare, 482 A.2d 1148, 1157 (Pa. Commw. 1984).

53. In addition, years after *Fischer* was decided, the United States Supreme Court reiterated that “[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.” *Casey*, 505 U.S. at 874.

54. Next, to the extent Petitioners allege that the Pennsylvania Coverage Ban violates the equal protection provisions of the Pennsylvania Constitution on the basis that it discriminates against a protected class, our Supreme Court rejected this argument as well. *See Fischer*, 502 A.2d at 121-22 (“[I]t is clear that the statute does not affect a suspect class. Like the United States Supreme Court this Court ‘has never held that financial need alone identifies a suspect class for purposes of equal protection analysis[.]’”) (quoting *Maher v. Roe*, 432 U.S. 464, 471 (1977)).

55. In reaching this conclusion, the Supreme Court expressly recognized that “***although government may not place obstacles in the path of a woman’s***

exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.” *Id.* at 119 (emphasis added) (quoting *Harris v. McRae*, 448 U.S. 297, 316-17 (1980)).⁵

56. Because the Pennsylvania Coverage Ban affects neither a fundamental right nor a suspect class, the Supreme Court concluded that the Commonwealth is required to demonstrate only a rational basis—i.e., a “legitimate governmental interest”—to justify treating two classes of women differently in this context. *Id.* at 122-23.

57. Notably, however, the Supreme Court found that *even if* the classification warranted heightened scrutiny, the Pennsylvania Coverage Ban would still pass constitutional muster:

[E]ven assuming, as appellants impliedly argue, that the funding distinction made in the Abortion Control Act constituted a “denial of a benefit vital to the individual” claimants, we would hold that the restriction here would satisfy the concomitant higher degree of scrutiny, to wit: (1) that the governmental interest be an important one; (2) that the governmental classification be drawn so as to be closely related to the objectives of the legislation; and (3) that a person excluded from the benefit be permitted to challenge the denial on the grounds that his particular

⁵ Pennsylvania constitutional law has not changed with respect to its treatment of indigency since *Fischer*. Indeed, nearly two decades after it decided *Fischer*, the Supreme Court reiterated that “[l]ike the United States Supreme Court, this court has rejected the proposition that financial need alone identifies a suspect class or that statutes that have a different effect on the rich and poor should on that basis alone come under strict scrutiny.” *Probst v. DOT, Bureau of Driver Licensing*, 849 A.2d 1135, 1144 (Pa. 2004) (citing *Fischer*, 502 A.2d at 121-22) (further citations omitted).

denial would not further the governmental purpose of the legislation.

Id. at 122.

58. With respect to the first factor, the Supreme Court identified the preservation of potential life as an important governmental interest. *Id.*; *see also id.* (“[T]o say that the Commonwealth’s interest in attempting to preserve a potential life is not important, is to fly in the face of our own existence.”).⁶

59. Second, the Supreme Court found that the classification at issue was drawn between abortions necessary to save the life of the mother, and all other abortions,⁷ and concluded that this classification was closely related to the objectives of the legislation: “[T]he Commonwealth has made a decision to encourage the birth of a child in all situations except where another life would have to be sacrificed. We think such a classification is specifically related to the ends sought, in that it accomplishes the preservation of the maximum amount of lives: i.e., those unaborted new babies, and those mothers who will survive though their fetus be aborted.” *Id.* at 122-23.

⁶ Since *Fischer* was decided, the United States Supreme Court has reaffirmed that a State has a legitimate goal of protecting life. *Casey*, 505 U.S. at 883 (“[W]e **permit a State to further its legitimate goal of protecting the life of the unborn** by enacting legislation aimed at ensuring a decision that is mature and informed, **even when in so doing the State expresses a preference for childbirth over abortion.**”) (emphasis added).

⁷ The Supreme Court noted that, in its analysis, “we are excepting abortions which are authorized for rape and incest, since no one at this point is contesting the Commonwealth’s action in those situations.” *Fischer*, 502 A.2d at 122, n.13.

60. With respect to the third factor, the Supreme Court found that the Pennsylvania Coverage Ban furthered the goal of preserving life. *Id.* at 123.

61. In sum, the Supreme Court concluded that regardless of whether rational basis or heightened scrutiny applied, the Pennsylvania Coverage Ban did not violate the constitutional guarantee of equal protection under the laws.

b) The Pennsylvania Coverage Ban Does Not Violate Article I, § 26

62. Finally, the Supreme Court also concluded that the Pennsylvania Coverage Ban does not violate Article I, § 26.

63. In assessing claims under this constitutional provision, the Supreme Court noted that “the focus is whether a person has been somehow penalized for the exercise of a constitutional freedom.” *Id.* at 124.

64. It then held that Article I, § 26 was not implicated by the Pennsylvania Coverage Ban because “the Commonwealth here has not otherwise penalized appellants for exercising their right to choose, but has merely decided not to fund that choice in favor of an alternative social policy.” *Id.*

III. CONCLUSION

65. In their Petition, Petitioners contend that *Fischer* “was incorrectly reasoned at the time, goes against recent developments in Pennsylvania law with respect to independent interpretations of our state constitution, and is contrary to a modern understanding of the ways in which the denial of women’s reproductive

autonomy is a form of sex discrimination that perpetuates invidious gender and racial stereotypes.” Petition at 2.

66. As the foregoing Preliminary Objections make clear, none of what Petitioners say is true—*Fischer* has been the law of the land for nearly thirty-five years, and the Pennsylvania Supreme Court has not rendered *any* decision since *Fischer* that would even remotely suggest that the Court’s analysis of the constitutionality of the Pennsylvania Coverage Ban has been called into doubt.

67. Because *Fischer* addressed the precise claims advanced in the Petition—and because this Court is bound by Supreme Court precedent—Intervenor-Respondents’ Preliminary Objections should be sustained, and the Petition should be dismissed with prejudice.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, <i>et al.</i> ,)	
)	
)	Civ. No. 26 MD 2019
<i>Petitioners,</i>)	
v.)	
)	
Pennsylvania Department of Human Services,)	
<i>et al.</i> ,)	
)	
<i>Respondents.</i>)	
)	

CERTIFICATE OF SERVICE

I, John P. Wixted, Esquire, hereby certify that on April 17, 2019, I caused a true and correct copy of the foregoing Preliminary Objections to be delivered via first class mail, upon the persons below:

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