IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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26 M.D. 2019

ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.*
Petitioners
v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, *et al.*
Respondents.

BRIEF OF AMICUS CURIAE PENNSYLVANIA RELIGIOUS COALITION FOR REPRODUCTIVE JUSTICE IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST[1]

Amicus Curiae the Pennsylvania Religious Coalition for Reproductive Justice (PARCRJ)[2] is the Pennsylvania affiliate of the Religious Coalition for Reproductive Choice (RCRC). In striving to be the Commonwealth's religious voice for reproductive justice, PARCRJ's mission is to educate, serve, witness and advocate for reproductive justice as a spiritual and moral issue. RCRC is a national, multi-faith organization mobilizing moral voices to end structural barriers to reproductive and sexual health and bringing the perspective and needs of women and other marginalized communities to the center of the conversation. Inspired by their faiths, they are religious and spiritual people who advocate for reproductive freedom and dignity, including access to compassionate abortion services.

PARCRJ supports the ability to access a full range of reproductive health services, including safe and legal abortion. As leaders and members of various faith communities, PARCRJ has ministered to thousands of women and their families. Many of these people find themselves faced with the decision to have an abortion, and one in four will decide to end a pregnancy at some point in their

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[1] No person or entity other than Amicus, its members, or counsel have authored or paid in whole or in part for the preparation of this brief. *See* Pa. R.A.P. 531(b)(2)(i).

[2] For information regarding PARCRJ, see http://parcrj.org/.

lives. These women are our neighbors, our co-workers, our friends, and our peers. As people of faith and as Pennsylvanians, PARCRJ believes in loving our neighbors and treating one another as we would like to be treated — with compassion, dignity, and respect. This means recognizing that the decision to have an abortion is deeply personal and should be left to a woman, with advice if she seeks it from her family, her spiritual advisor, and her doctor; as such, the decision to have an abortion should not be restricted by elected officials. PARCRJ also opposes the enshrinement of any faith strictures as public policy. PARCRJ values real religious liberty, which upholds the right of all persons to make their own faith- or conscience-based healthcare decisions. PARCRJ believes deeply that the religious principles of love and acceptance of all people means ending the shame and stigma associated with abortion and increasing access for all people to access a full range of reproductive healthcare options.

PARCRJ submits this brief to provide its view of the issues with the hope of "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r. of Labor & Indus.*, 694 F.2d 203, 204 (8th Cir. 1982).

II. SUMMARY OF ARGUMENT

As one can easily discern from the interest statement of Amicus Curiae, there are many religious traditions that recognize and support the moral right of women to make their own decisions about their pregnancy in accordance with their faith and conscience. All women—including those lacking monetary and other resources—should be able to exercise that right without overbearing and unconstitutional constraints or impediments.

Before *Roe v. Wade*, 410 U.S. 113 (1973), and since that decision, religious leaders and faith-based organizations, including PARCRJ, have counseled women who are deciding whether to terminate a pregnancy. They have worked to ensure that women who make the decision to have an abortion can do so with dignity through accessible and high-quality medical care. During that work—and particularly relevant to this case—these organizations have seen clinics provide safe and compassionate care. Based on our experience, Amicus believes that any genuine efforts to protect the health and well-being of pregnant women must allow for those seeking abortions to have access to safe and affordable abortion care. By imposing burdens without health benefits, Pennsylvania's ban on Medicaid funding for abortions unduly (and unconstitutionally) delays and restricts access to safe and legal health care for the women of Pennsylvania. Moreover, it does so in a way that disproportionately impacts indigent women. History has shown that a lack

of resources can prevent low income and minority women from accessing safe and legal abortion services.

Defendant DHS[3] and Intervenor members of the Pennsylvania Senate and House of Representatives have filed preliminary objections. Both Respondent DHS and Senate Intervenors rely almost exclusively on stare decisis based on the Supreme Court's decision in *Fischer v. Department of Public Welfare,* 502 A.2d 114 (Pa. 1985) as a virtual "rubber stamp" by which this court can easily dispose of this matter. The House Intervenors also raise *Fischer* as a bar to this action in addition to preemption and separation of powers/funding objections. Regarding *Fischer*, there are good and important reasons for this court to carefully assess the merits of this case and to advise the Supreme Court on whether *Fischer* still reflects the current social conditions and the state of the law. Contrary to DHS' second preliminary objection, Petitioners are reproductive health care providers who have standing where they have an interest in ensuring that that Pennsylvania's medical assistance program is implemented lawfully that goes beyond the abstract interest of the general citizenry in having others comply with the law. Moreover,

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[3] Amicus uses "DHS" as shorthand for the executive agency Respondents who are the Pennsylvania Department of Human Services, Teresa Miller, Secretary of the Department, Leesa Allen, Executive Deputy Secretary for the Department's Office of Medical Assistance Programs, and Sally Kozak, Deputy Secretary of the Department's Office of Medical Assistance Programs.

contrary to the House Intervenors' objections, preemption does not bar Petitioners' challenge, and Petitioners do not seek any forced appropriation of funds. DHS' and Intervenor legislators' preliminary objections are without merit and should be overruled.

For these and the reasons set forth below, PARCRJ urges the Court to recognize a woman's right to terminate her pregnancy in accordance with her own personal or religious conscience by thoroughly reviewing precedent and changes over the intervening years. In so doing this court should conclude that *Fischer* was wrongly decided and that Pennsylvania's ban on Medicaid funding for abortions violates the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees and reject Pennsylvania's unduly burdensome restrictions on those rights.

III. ARGUMENT

A. Introduction

Amicus curiae is a religious organization that is dedicated to protecting a woman's moral authority to terminate a pregnancy in consultation with her faith, values, and conscience. It shares the Petitioners' concerns that pregnant women in Pennsylvania who are enrolled in Medical Assistance and choose to have an abortion are discriminated against based on their sex and based on their choice to

exercise their fundamental right to terminate their pregnancy. PARCRJ joins in Petitioners' brief in all respects but intend to present this court with information from their faith-based perspective relevant to the important constitutional issues presented by this matter.

PARCRJ is concerned that the present Medicaid funding scheme in Pennsylvania creates disparities that fall predominantly on poor women and women of color. The bar on Medicaid funding often presents a heavy financial burden to these women, which often forces delays in obtaining the procedure and increases the risks involved. Although providers such as Petitioners attempt to fill the need with funding, these efforts often fall short and take away from the provision of reproductive health services overall. Some women are forced to forego the procedure, endangering their emotional and physical well-being and creating additional financial pressures difficult for indigent women to bear.

As to *Fischer*, PARCRJ also supports Petitioner reproductive health care providers' contentions that *Fischer* was poorly reasoned in 1985 and is inconsistent with subsequent developments in the law and society. Indeed, the expert declarations provided with the Petition for Review, as well as additional sources cited herein demonstrate the fallacious reasoning underlying *Fischer*. As people of faith, PARCRJ strongly believes that this court should seize this opportunity to rectify 35 years of shortsighted and unnecessary barriers to a woman's moral

authority to terminate a pregnancy in consultation with her faith, values, and conscience.

B. The present Medicaid funding scheme creates disparities that fall predominantly on poor women and women of color.

Studies compiled by the Guttmacher Institute[4] show that despite recent declines in unintended pregnancy, poor women and women of color are more likely than other groups to experience unintended pregnancy and abortion and to rely on Medicaid.

- Low-income women are more likely than more affluent women to have an unintended pregnancy. In 2011, the unintended pregnancy rate among women with an income below the federal poverty level ($18,530 for a family of

[4] The Guttmacher Institute was founded in 1968 as the Center for Family Planning Program Development. By integrating nonpartisan social science research, policy analysis and public education, the Center provides a factual basis for the development of sound governmental policies and for public consideration of the sensitive issues involved in the promotion of reproductive health and rights. *See* Guttmacher Institute, *available at* https://www.guttmacher.org

three in 2011[5]) was more than five times the rate among women with an income at or above 200% of the poverty level.[6]

- In addition to having elevated rates of unintended pregnancy,[7] poor and low-income women accounted for 75% of U.S. abortions in 2014; 49% of abortion patients that year had a family income less than 100% of the federal poverty level.[8]

- Women of color are much more likely than white women to experience unintended pregnancy. In 2011, black and Hispanic women had an unintended pregnancy rate of 79 and 58 per 1,000 women, respectively, compared with 33 per 1,000 among white women.[9]

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[5] Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services (HHS), 2011 HHS poverty guidelines, 2011, *available at* https://aspe.hhs.gov/2011-hhs-poverty-guidelines.

[6] Finer LB and Zolna MR, Declines in unintended pregnancy in the United States, 2008–2011, New England Journal of Medicine, 2016, 374(9):843–852.

[7] *Id.* n. 7

[8] Jerman J, Jones RK and Onda T, Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, New York: Guttmacher Institute, 2016, *available at* https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014.

[9] *Id.* n. 7.

- Medicaid provides critical access to health care for low-income women. In 2016, 13.2 million women of reproductive age were enrolled in Medicaid.[10]

As Petitioners point out and studies confirm: abortion can represent a heavy financial burden for poor and low-income women[11]; difficulties securing funds for an abortion can force a patient to delay the procedure, increasing both the cost and the risk associated with the termination. Some women may be unable to obtain the procedure altogether[12]; and, because the government has abdicated its responsibility by not providing coverage for abortion, private abortion funds have emerged to help patients obtain services. However, these organizations cannot

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[10] Guttmacher Institute, Dramatic gains in insurance coverage for women of reproductive age are now in jeopardy, News in Context, 2018, *available at* https://www.guttmacher.org/article/2018/01/dramatic-gains-insurance-coverage-women-reproductive-age-are-now-jeopardy.

[11] The cost of an abortion without insurance coverage is substantial: In 2014, the mean cost of an abortion—either surgical or medical—at 10 weeks of pregnancy was just over $500. The median cost at 20 weeks was $1,195. In addition, patients typically incur nonmedical costs, including for transportation, child care, lodging and lost wages. Jones RK, Meghan Ingerick and Jerman J, Differences in abortion service delivery in hostile, middle-ground and supportive states in 2014, Women's Health Issues, 2018, doi:10.1016/j.whi.2017.12.003.

[12] Medicaid Funding of Abortion, Guttmacher Institute, *available at* https://www.guttmacher.org/evidence-you-can-use/medicaid-funding-abortion

fully meet women's need for assistance,[13] forcing women to risk their physical and emotional well-being.[14]

C. A survey of cases finding a constitutional right to Medicaid abortion coverage supports reconsideration of *Fischer*

Courts in the thirteen states have ordered nondiscriminatory public funding of abortion based on their state constitutions. As numerous courts have found, it is time to end all attempts to have government interfere in private medical decisions about abortion, leaving them in the capable hands of women. An overview of relevant cases follows:

State v. Planned Parenthood of the Great Nw., 436 P.3d 984 (Alaska 2019)

The Alaska Supreme Court struck down a law that severely restricted state Medicaid funding for abortions, finding the statute and regulation were not narrowly tailored to meet State's alleged compelling interest in ensuring financial viability of Medicaid.

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[13] *Id.*

[14] Abortion restrictions put women's health, safety and wellbeing at risk, Bixby Center for Global Reproductive Health, *available at* https://bixbycenter.ucsf.edu/sites/bixbycenter.ucsf.edu/files/Abortion%20restrictions%20risk%20women%27s%20health.pdf.

Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981)

Various welfare and health care rights organizations, and others, brought suit against the Director of the State Health Department, challenging implementation of provisions of the state's various Budget Acts which restricted circumstances under which public funds would be authorized to pay for abortions for Medi-Cal recipients. The Supreme Court held that Budget Acts of 1978, 1979 and 1980 excluding funds for payment of elective abortions were unconstitutional, reasoning:

> By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state rich or poor is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion. Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature.

625 P.2d at 798.

Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981)

Medicaid-eligible pregnant women and physicians brought a class action seeking to invalidate and enjoin statutory provisions restricting Medicaid funding of abortions. The Supreme Judicial Court for Suffolk County, Kaplan, J., held that: (1) court had subject matter jurisdiction over action, which presented actual

controversy appropriate for declaration of rights; (2) restriction impermissibly burdened right protected by constitutional guarantee of due process; and (3) restriction would be invalidated insofar as it was constitutionally offensive, but remaining federal Medicaid appropriations, being severable, remained valid.

Stating that although "the Legislature need not subsidize any of the costs associated with childbearing, or with health care generally ... once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to 'achieve with carrots what (it) is forbidden to achieve with sticks.'" 417 N.E.2d at 402.

Women of Minn. v. Gomez, 542 N.W.2d 17 (Minn. 1995)

Women, physicians, financial aid organization, and providers of abortion and counseling services sought declaratory and injunctive relief against state and counties, challenging constitutionality of statutory provisions restricting use of public medical assistance and general assistance funds for therapeutic abortion services. The Supreme Court held that medical assistance and general assistance statutes that permitted use of public funds for childbirth-related medical services, but prohibited similar use of public funds for abortions, impermissibly infringed on a woman's fundamental right of privacy under the Minnesota Constitution.

Women's Health Ctr. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993)

Action was brought challenging constitutionality of statute which bans the use of state Medicaid funds for abortions except in limited circumstances. The Supreme Court of Appeals held that: (1) given West Virginia's enhanced constitutional protections, the statute constitutes undue government interference with exercise of federally protected right to terminate pregnancy, and (2) statute is severable from remainder of Medicaid tax reform bill.

As these cases illustrate, in the 35 years since the court's decision in *Fischer v. Department of Public Welfare*, the analytical framework for reviewing pregnancy-based classification and a woman's right to choose has evolved, necessitating reconsideration of the legal and factual basis underlying *Fischer*. See Petitioners' Br. at Section A. Correctly considered under this framework, the Coverage Ban clearly draws a distinction between women and men – such sexual discrimination is prohibited by the Pennsylvania Constitution through the explicit guarantee in the ERA, something the federal Constitution lacks.

D. *Fischer* does not make this an open and shut case

DHS and Intervenors posit that *Fischer* is conclusive of this matter before this court. DHS even appends a legal opinion by Pennsylvania's Attorney General

to that effect.[15] PARCRJ is constrained to point out however that to the extent DHS and Intervenors argue that this court owes Petitioners nothing beyond a denial of relief via a *Fischer* "rubber stamp", they are wrong.

Stare decisis is not "an iron mold into which every utterance by a Court, regardless of circumstances, parties, economic barometer and sociological climate, must be poured, and, where, like wet concrete, it must acquire an unyielding rigidity which nothing later can change." *Ayala v. Philadelphia Bd. of Pub. Ed*., 305 A.2d 877, 887–88 (Pa. 1973), *superseded by statute on other grounds*, Tort Claims Act, 42 Pa. C.S. §§ 8541-8542. "While stare decisis serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error." *Stilp v. Pennsylvania*, 905 A.2d 918, 967 (Pa. 2006) (citations omitted). "[S]tare decisis is not a universal, inexorable command. Stare decisis is not a vehicle for perpetuating error, but rather a legal concept that responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish...." *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1249 (Pa. 2016) (Wecht, J., concurring) (internal citations and punctuation omitted); see *Flagiello v. Pa. Hosp*., 208 A.2d

[15] Official opinions of the Attorney General are not binding on the courts, but may be considered as persuasive authority. 71 P.S. § 732–204(a)(1). *Schell v. Eastern York School Dist*., 500 A.2d 896 (1985).

193, 205 (Pa. 1965) ("The principle of stare decisis does not demand that we follow precedents which shipwreck justice."). Rather, the doctrine demands "thorough examination and deep thought" with respect to prior judicial decisions. *Ayala, supra*. Thus, a court bound by stare decisis may determine that prior decisions should not be followed as controlling precedent, but it may not do so without first paying proper deference to those decisions. *Id*. If a court decides to depart from its precedent, it should provide its reasons for doing so. *Id*.

Recently, our Supreme Court did precisely this in *William Penn School District v. Pennsylvania Department of Education,* 170 A.3d 414 (Pa. 2017). In that matter individual petitioners and groups, and several school districts which serve predominantly low-income individuals, asserted that Pennsylvania's education funding mechanism violated Article I, Section 14, the Education Clause, and Article I, Section 32, the Equal Protection provision, of the Pennsylvania Constitution. The matter came to the Court via this court's en banc decision holding, based upon this court's precedent and that of the Pennsylvania and United States Supreme Courts, that the petitioners' claims that the current state education funding mechanism violated the above-referenced provisions of the Pennsylvania Constitution was a non-justiciable political question best left to the legislative branch. *William Penn Sch. Dist. v. Pa. Dep't of Educ*., 114 A.3d 456 (Pa. Cmwlth. 2015).

The Supreme Court reversed, holding that petitioners' claims were justiciable in state court, and in so doing overruled *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999), which held to the contrary. In so doing, the Court stated as follows:

> To the extent that our prior cases have suggested, if murkily, that a court cannot devise a judicially discoverable and manageable standard for Education Clause compliance that does not entail making a policy determination inappropriate for judicial discretion, or that we may only deploy a rubber stamp in a hollow mockery of judicial review, we underscore that we are not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments. "Although this Court adheres to the principle of *stare decisis*, it will not be bound by a decision that in itself is clearly contrary to the body of the law. In such instances, it is consistent with the principle underlying *stare decisis* to purify the body of law by overruling erroneous decisions." *Lewis v. W.C.A.B. (Giles & Ransome, Inc.)*, 591 Pa. 490, 919 A.2d 922, 928 (2007); *see Ayala v. Phila. Bd. of Public Ed.*, 453 Pa. 584, 305 A.2d 877, 887–88 (1973), *superseded by statute as recognized in Dorsey v. Redman*, 626 Pa. 195, 96 A.3d 332 (2014) ("[I]f, after thorough examination and deep thought a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as controlling precedent."). As this Court previously has recognized, "[w]here ... by our decisions ... the Court distorted the clear intention of the legislative enactment and by that erroneous interpretation permitted the policy of that legislation to be effectively frustrated, we ... have no alternative but to rectify our earlier pronouncements and may not blindly adhere to the past rulings out of a deference to antiquity." *Perry*, 798 A.2d at 707 & n.1 (Castille J., concurring) (quoting *Mayhugh v. Coon*, 460 Pa. 128, 331 A.2d 452, 456 (1975), and observing that the principle "is no less applicable to constitutional provisions").
>
> We find irreconcilable deficiencies in the rigor, clarity, and consistency of the line of cases that culminated in *Marrero II*. When

> presented with a case that hinges upon our interpretation and application of prior case law, the validity of that case law always is subject to consideration, and we follow the exercise of our interpretive function wherever it leads. *Cf. Commonwealth ex rel. Margiotti v. Lawrence*, 326 Pa. 526, 193 A. 46, 48 (Pa. 1937) (quoting 1 Cooley, CONSTITUTIONAL LIMITATIONS 121 (8th ed. 1977)) ("[W]hen a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny.").

William Penn, 170 A.3d at 456-458.

The *William Penn* decision is not the first nor the sole time the Court has revisited and reversed prior precedent. However, it is recent and represents a decision by the Court to turn away from long held prior precedent and to measure that prior precedent by reviewing the continuing soundness of that precedent, new developments in the law both in Pennsylvania and in other states, and whether that precedent is in accord with current circumstances. *Id*. at 440-457; *see also*, *Ayala*, 305 A.2d at 887–88 (stating, "if, after thorough examination and deep thought a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as controlling precedent.")

It does not escape PARCRJ's notice that all the above cited decisions are from our Supreme Court. Indeed, this reflects the almost universally applied general rule is that intermediate appellate courts are bound to apply the Supreme

Court's decisions and lack authority to overturn them. However, there have been rare occasions when exactly that has occurred.

In *Manley v. Manley*, 164 A.2d 113 (Pa. Super. 1960), the court declined to follow 1847 Supreme Court precedent regarding grounds for divorce. In so holding, the court recognized that our Supreme Court had long ago declared in *Matchin v. Matchin*, 6 Pa. 332 (1847), that insanity is not a defense to an action for divorce on the ground of adultery. As Superior Court noted, "[t]his has been recognized as the law of this Commonwealth ever since." *Manley*, 164 A.2d at 118. However, the court declined to follow binding precedent, notwithstanding Section 10 of the Act of June 24, 1895, P.L. 212, 17 P.S. § 198,[16] where, as here, there exists "authority for our ignoring an ancient higher court rule which is

[16] The Act referenced established the Superior Court. Section 10 thereof provided in pertinent part that "[u]pon any question whatever before the said court the decision of the Supreme Court shall be received and followed as of binding authority." The Act was suspended and superseded by the Appellate Jurisdiction Act implementing the 1968 Constitution.

unreasonable and unjust by all known standards[.]" 164 A.2d at 119-20,[17] *citing* *Commonwealth v. Franklin*, 92 A.2d 272 (Pa. Super. 1952).[18]

PARCRJ has been unable to find similar decisions by this court. However, four decisions in the context of what was at one time an ongoing debate over the continued viability of the doctrine of sovereign immunity highlight this court's duty to go beyond the *Fischer* "rubber stamp" urged by DHS and Intervenors. We call the court's attention to *Lovrinoff v. Pennsylvania Turnpike Commission*, 281 A.2d 176 (Pa. Cmwlth. 1971). The context for *Lovrinoff* was our Supreme Court's 1969 reaffirmation of the viability of the doctrine of sovereign immunity in

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[17] It is worth noting that the Judge who authored *Manley*, the Honorable Robert E. Woodside, Jr., served as the Attorney General of Pennsylvania and is the author of the respected treatise *Pennsylvania Constitutional Law*.

[18] *Commonwealth v. Franklin*, 92 A.2d 272 (Pa. Super. 1952), involved "very old" decisions of our Supreme Court approving a "peace bond" for an acquitted defendant. Superior Court declined to follow them based upon the due process clause of Fourteenth Amendment to the United States Constitution. Again however, the "real" basis for the court's decision has bearing here:

> Finally we may state of record that the essentially real basis for our decision is simply that we consider the practice under review to be wrong. We are of the firm conviction that the practice is fundamentally in conflict with any modern and enlightened view of individual civil rights; that it offends the spirit and instinct, and the very letter of due process.

Id. at 292.

Thomas v. Baird, 252 A.2d 653 (Pa. 1969) (reaffirming *Rader v. Pennsylvania Turnpike Commission*, 182 A.2d 199 (Pa. 1962). Notwithstanding the 1969 decision, the *Lovinroff* plaintiff/appellants urged this court to ignore or overturn Supreme Court precedent arguing that the sovereign immunity as applied to the Commission was outdated, outmoded and not representative of the modern trend in the law to more narrowly restrict its application, particularly as to certain Commonwealth instrumentalities.

Then President Judge Bowman writing for the en banc court declined the invitation to invalidate the doctrine noting the longstanding rubric that "decisions of the Supreme Court were regarded as the law to be followed by inferior courts whatever the view of the latter may be as to their wisdom or justness." *Lovrinoff*, 281 A.2d at 177. However, then Judge, later president Judge Crumlish, joined by Judge Manderino, dissented, and stated that he would consider the merits of the issue and render a decision on that basis. Judge Crumlish's dissent is pertinent in every way to the matter now before this court, and merits quoting at length:

> I dissent. Today the majority holds that this Court is without the authority to consider for itself the merits of this case because a recent Pennsylvania Supreme Court decision upheld the doctrine of sovereign immunity under similar factual circumstances. In doing so, the majority takes an unwarranted narrow position with respect to the responsibilities of intermediate appellate courts in the Commonwealth's judicial framework. The Superior Court also bows to outmoded tradition. *Beckham v. Travelers Insurance Company*, 206 Pa.Super. 488, 214 A.2d 299 (1965). For my part, I cannot unearth

any viable reason aside from a display of fealty to the omnipotence of stare decisis for our failure to recognize the simple facts of life.

This Court has felt so constrained by the Supreme Court's pronouncements that it is unwilling to discuss the merits. By deciding as it does today, this Court merely acts as a conduit to the Supreme Court. This is not its function as commanded by the citizens and ultimately by legislative enactment. It seems to me that in our functioning as intermediate appellate judges, we have a duty to present our considered reasoning on the merits of this case and in doing so aid the Supreme Court in its final determination. Actually, the Superior Court assumed this posture in *Beckham*.

I cannot understand why this Court or the Superior Court would be enslaved so that they must ignore consideration of the of legal issues simply because of prior decisions of courts constituted by humans whose thinking and lives change with the times. The Supreme Court will grant allocatur and reverse us if it disagrees. In expressing our concept of the law, we are not usurping its right as the 'supreme judicial power of the Commonwealth'. It would seem appropriate and beneficial that a Supreme Court reconsider and reaffirm its position when the majority of the judges on an appellate bench have found reason to differ with that position.

This Court, while probably influenced by the reasoning of the Supreme Court's prior decisions, should not have refused to consider for itself the merits of the case.

In considering the substantive question raised in this appeal, I am moved by the most persuasive dissent of Justice Roberts in *Thomas v. Baird*, 433 Pa. 482, 252 A.2d 653 (1969). Many other jurisdictions have abrogated the doctrine of sovereign immunity and the list grows longer each year. 'It can be said with all due respect to those who originally promulgated the rule years ago that the doctrine is 'no longer just, reasonable, nor defensible' and that the 'reasons underlying the traditional wide-sweeping rule of sovereign immunity have virtually disappeared in modern society.'' 433 Pa. at 486, 252 A.2d at 655. Pennsylvania has modernized its legal structure, now it should modernize its legal tenets.

Lovrinoff, 281 A.2d at 178-79. *See also Duquesne Light Co. v. Department of Transp.*, 295 A.2d 351 (Pa. Cmwlth.1972) (Crumlish concurring on basis of *Lovrinoff* dissent); *Brown v. National Guard*, 3 Pa. Cmwlth. 457 (1971) (same); *Ayala v. Philadelphia Bd. of Public Ed*., 297 A.2d 495 (Pa. Super. 1972) (opinion upholding governmental immunity with a concurrence by Judge Packel[19] stating that Superior Court need not follow a Supreme Court decision it is convinced the Supreme Court itself would not follow). Ironically, the Supreme Court reversed Superior Court in the *Ayala* decision cited above and abolished governmental immunity.

PARCRJ acknowledges the strong considerations underlying the primacy of the decisions of our Supreme Court. However, we are obligated to point out that there are circumstances where subordinate courts have concluded that they are not bound by those decisions, or, alternatively, that they owe the Supreme Court a thorough review of the merits and a reasoned opinion based thereon. Where, as here, Supreme Court review is by right rather than by allowance, these considerations are paramount.

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[19] Judge Israel Packel was appointed to the Superior Court in 1972 and served as state attorney general from 1973 to 1975. In 1977, he was given an interim appointment to the Supreme Court, which he filled until reaching the mandatory retirement age of 70.

E. Petitioners have Standing

Petitioners are enrolled Medical Assistance Providers. Complaint at ¶ 34. Petitioners collectively provide 95% of Pennsylvania abortion services. *Id.* at ¶ 33. As a result of the funding restriction, Petitioners provide financial assistance to Medicaid eligible women at a financial loss to their organization. *Id.* at ¶ 36. Petitioners, therefore, have an interest in ensuring that that Pennsylvania's medical assistance program is implemented lawfully that goes beyond "the abstract interest of the general citizenry in having others comply with the law." *Pennsylvania State Lodge, Fraternal Order of Police v. Com., Dep't of Conservation & Nat. Res.,* 909 A.2d 413, 417 (Pa. Cmwlth. 2006), *aff'd sub nom. Pennsylvania State Lodge v. Com., Dep't of Conservation & Nat. Res.,* 924 A.2d 1203 (Pa. 2007).

Specifically, because the funding restriction operates to diminish Petitioners' opportunity to earn income through Medicaid reimbursement for abortion services, Petitioners suffer a particularized injury sufficient to confer standing as aggrieved parties. *See Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976) (holding that abortion-provider physicians suffer a concrete injury from the operation of a state statute excluding abortions from Medicaid coverage); *accord Harrisburg Sch. Dist. v. Harrisburg Education Assoc.*, 379 A.2d 893, 899 (Pa. Cmwlth. 1977); *see also, Temple Univ. of Com. Sys. of Higher Ed. v. Pennsylvania Dep't of Pub. Welfare*, 374 A.2d 991, 997 (Pa. Cmwlth. 1977) (hospital, which contracted with

Department of Public Welfare to participate in medical assistance program to provide care to indigents, were subrogated to claims of those individuals for medical care, and therefore had standing to challenge Department's regulation prohibiting reimbursement under medical assistance program).

Courts in other states have found standing for providers in similar matters. In *Mabel Wadsworth Women's Health Center v. Hamilton*, 2017 WL 6513589 (Maine Super. Ct. 2017), the court upheld Maine's Coverage Ban over constitutional challenges, but found abortion providers had standing to bring administrative law and constitutional claims, the latter including the rights to liberty and safety, equal protection and substantive due process. Plaintiffs were enrolled MaineCare providers of family planning and abortion services. No woman was an individual plaintiff.

While the court ultimately found in favor of the coverage ban under Maine's Constitution, its reasoning as to plaintiffs' standing to bring constitutional claims applies to Providers here:

> As abortion providers, Plaintiffs are intimately involved -in their patients' constitutionally protected decision to terminate a pregnancy. *See Singleton*, 428 U.S. at 117; *Roe v. Wade*, 410 U.S. 11.3, 153-556 (1973). Furthermore, the rights being asserted by Plaintiffs are those of indigent woman who rely on MaineCare to obtain healthcare services, and who must obtain the services through MaineCare enrolled providers, such as Plaintiffs.

> The fact that Plaintiffs have extended financial and other forms of support to MaineCare eligible women to assure that no woman is denied access to abortion services shows how closely the interests of the Plaintiffs correspond to the interests of MaineCare eligible women. Far from undermining Plaintiffs' standing argument as the Defendant asserts, the fact that Plaintiffs have seen to it that no woman has been denied access to abortion services due to her inability to pay shows the complete congruity between the interests of Plaintiffs and those of the women they serve.
>
> For these reasons, the court finds that Plaintiffs have standing to assert the state constitutional challenges to the validity of Rule 90.05-2(A) that are set forth in the second, third and fourth counts or causes of action in the Plaintiffs' Complaint.

Slip Op. at 10-11. Similarly, in *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998), the court found that abortion service providers had standing to challenge the constitutionality of New Mexico's funding restriction, reasoning:

> Insofar as they are providers of abortion services to Medicaid-eligible women, Plaintiffs have both a direct financial interest in obtaining state funding to reimburse them for the cost of these services, *see id*. at 112–13, 96 S.Ct. 2868, and a close relation to the Medicaid-eligible women whose rights they seek to assert in court, *see id*. at 117, 96 S.Ct. 2868. Insofar as Plaintiff New Mexico Right to Choose/NARAL seeks to assert the rights of its members who are Medicaid-eligible women, this organization also has a sufficiently direct interest and a sufficiently close relationship. *Cf. National Trust for Historic Preservation*, 117 N.M. at 594, 874 P.2d at 802 (organization may assert claim on behalf of its members). Further, we agree with the plurality in *Singleton*, 428 U.S. at 117–18, 96 S.Ct. 2868, that privacy concerns and time constraints impose a significant hindrance on the ability of Medicaid-eligible women to protect their own interest in obtaining medically necessary abortions. For all of these reasons, we

> determine that Plaintiffs have standing to challenge the constitutionality of Rule 766 in this case.

975 P.2d at 847.

For these reasons, this court should find that Providers have standing and overrule DHS' preliminary objection.

F. Preemption does not bar Petitioners' challenge

Contrary to the House Intervenors' objection, Br. at 9-11, preemption does not bar Petitioners' challenge. The challenged section 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, except" to avert the death of the mother or in cases of rape or incest. 18 Pa. C.S. § 3215(c)(emphasis added). The Act further provides that "[n]o Commonwealth agency shall make any payment from Federal or *State funds* appropriated by the Commonwealth for the performance of any abortion pursuant to subsections (c)(2) or (3) [the rape or incest exceptions] unless the Commonwealth agency first" satisfies certain criteria. 18 Pa. C.S. § 3215(j) (emphasis added). Nothing in federal law prohibits state coverage of abortion within a state's Medicaid program. Though the Hyde Amendment prohibits federal funding for abortions outside its exceptions, the U.S. Supreme Court has clearly stated that any "[s]tate is free, if it so chooses, to include in its Medicaid plan those

medically necessary abortions for which federal reimbursement is unavailable." *Harris v. McRae*, 448 U.S. 297, 311 n.16 (1980). For this reason, both the West Virginia and Oregon Supreme Courts have rejected the very argument raised by the House Intervenors here. *See Boley v. Miller*, 187 W. Va. 242, 245 (1992); *Planned Parenthood Ass'n v. Dep't of Human Res. of State of Or.*, 687 P.2d 785, 790 (Or. 1984).

To the extent the challenged section properly restricts the use of federal funds in accordance with the Hyde Amendment, this does not create a preemption issue as the offending portion of the challenged provision is severable from the federal funding restriction. The Pennsylvania rules of statutory construction provides that the provisions of every statute are severable. 1 Pa. C.S. § 1925 ("If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby.") Severance should be withheld only if:

> (1) the valid provisions of the statute are so essentially and inseparably connected with the void provisions that it cannot be presumed that the legislature would have enacted the remaining valid provisions without the voided ones; or (2) the remaining valid provisions standing alone are incomplete and incapable of being executed in accord with the intent of the General Assembly.

Commonwealth v. Resto, 179 A.3d 18, 21 (Pa. 2018), quoting *Commonwealth v. Hopkins*, 117 A.3d 247, 257 (Pa. 2015) (citing 1 Pa. C.S. § 1925). Neither exception applies here – severance of the term "Commonwealth funds" and "State funds" from the challenged provisions quoted above does not render the remainder of the provisions incomplete and incapable of being executed but would serve to restrict the use of *federal* funds only. Thus, even if preemption were to prevent this court from invalidating the entirety of the challenged provisions, such is not fatal to Plaintiffs claim because the offending portions are severable.

G. Petitioners do not seek a forced appropriation of funds

The plaintiffs do not seek any forced appropriation of funds. See House Intervenors' Br. at 12-14. Here, the General Assembly has already exercised its unquestioned power to appropriate funds. The appropriation is general in form; the sole restriction pertaining to the coverage of medical services is the abortion funding provision challenged here. *See Moe*, 417 N.E.2d at 395 (rejecting argument that challenge to abortion funding restriction amounts to a "forced appropriation of funds."). Moreover, because the costs associated with childbirth, neonatal and pediatric care greatly exceed the costs of abortion, public funding for abortion neither costs the taxpayer money nor drains resources from other services Thus, if the court grants the relief the petitioners seek, the net effect would be to reduce the Commonwealth's Medicaid expenditures, not increase them. *See, e.g.*,

Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 794 (Cal. 1981) (finding that ""whatever money is saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers"").

IV. CONCLUSION

As illustrated by this brief, by the Petition for Review and Petitioner reproductive health providers' brief, there are compelling reason to conclude that *Fischer* was wrongly decided and that Pennsylvania's ban on Medicaid funding for abortions violates the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees and this court should so find.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief contains 6,698 words exclusive of the tables of contents and authorities and this certificate according to the word processing system used to prepare it.

I further certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than nonconfidential information and documents.

/s/ Dennis A. Whitaker