IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, *et al.*,	:	
	:	
Petitioners,	:	
	:	
v.	:	No. 26 M.D. 2019
	:	
Pennsylvania Department of Human Services, *et al.*,	:	
	:	
	:	
Respondents.	:	

BRIEF OF *AMICI CURIAE*, MEMBERS OF THE DEMOCRATIC CAUCUSES OF THE PENNSYLVANIA SENATE AND HOUSE OF REPRESENTATIVES, IN SUPPORT OF THE PETITIONERS' RESPONSE TO RESPONDENTS' PRELIMINARY OBJECTIONS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The members of the Democratic Caucuses of the Senate of Pennsylvania ("Senate Democratic Caucus") and the Pennsylvania House of Representatives ("House Democratic Caucus") named below and on Attachment A attached hereto (collectively, "*Amici Curiae*") file this brief in support of Petitioners, the Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania and Planned Parenthood of Western Pennsylvania (collectively, "Petitioners").

State Senator Arthur Haywood is a member of the Senate of Pennsylvania representing the 4th Senate District including Montgomery and Philadelphia Counties. Senator Haywood serves as the Democratic Chairman of the Senate Health and Human Services Committee. State Senator Anthony H. Williams is a member of the Senate of Pennsylvania representing the 8th Senate District including Delaware and Philadelphia Counties. Senator Williams serves as the Whip of the Senate Democratic Caucus. State Senator Vincent J. Hughes is a member of the Senate of Pennsylvania representing the 7th Senate District including Montgomery and Philadelphia Counties. Senator Hughes serves as the Democratic Chair of the Senate Appropriations Committee. State Senator Wayne D. Fontana is a member of the Senate of Pennsylvania representing the 42nd Senate

District including Allegheny County. Senator Fontana services as Caucus Chair of the Senate Democratic Caucus. State Senator Lawrence Farnese is a member of the Senate of Pennsylvania representing the 1st Senate District including Philadelphia County. Senator Farnese serves as the Secretary of the Senate Democratic Caucus. State Senator Judy Schwank is a member of the Senate of Pennsylvania representing the 11th Senate District including Berks County. Senator Schwank serves as the Democratic Senate Chair of the bicameral Women's Health Caucus. State Senator John P. Blake is a member of the Senate of Pennsylvania representing the 22nd Senate District including Lackawanna, Luzerne and Monroe Counties. Senator Blake serves as the Administrator of the Senate Democratic Caucus.

State Representative Dan B. Frankel is a member of the Pennsylvania House of Representatives representing the 23rd House District including Allegheny County. Representative Frankel serves as the Democratic Chairman of the House Health Committee. State Representative Frank Dermody is a member of the Pennsylvania House of Representatives representing the 33rd House District including Allegheny and Westmoreland Counties. Representative Dermody serves as the Leader of the House Democratic Caucus. State Representative Jordan A. Harris is a member of the Pennsylvania House of Representatives representing the 186th House District including Philadelphia. Representative Harris serves as the

Whip of the House Democratic Caucus. State Representative Joanna E. McClinton is a member of the Pennsylvania House of Representatives representing the 191st House District including Philadelphia. Representative McClinton serves as the Chair of the House Democratic Caucus. State Representative Rosita C. Youngblood is a member of the Pennsylvania House of Representatives representing the 198th House District including Philadelphia. Representative Youngblood serves as the Secretary of the House Democratic Caucus. State Representative Matthew Bradford is a member of the Pennsylvania House of Representatives representing the 70th House District including Montgomery County. Representative Bradford serves as the Democratic Chairman of the House Appropriations Committee. State Representative Mike Sturla is a member of the Pennsylvania House of Representatives representing the 96th House District including Lancaster County. Representative Sturla serves as the Policy Chairman of the House Democratic Caucus. State Representative Mary Jo Daley is a member of the Pennsylvania House of Representatives representing the 148th House District including Montgomery County. Representative Daley serves as the Democratic House Chair of the bicameral Women's Health Caucus.

On January 19, 2019, Petitioners, various providers of reproductive health services across Pennsylvania, filed a Petition for Review in the Nature of a Complaint against the Commonwealth of Pennsylvania seeking declaratory and

injunctive relief as to the enforcement of Pennsylvania's statutory prohibition on the use of state and federal Medical Assistance Funds for abortion services, 18 Pa.C.S. §§ 3215(c) and (j) ("Coverage Ban").[1] Petitioners seek a declaration that the Coverage Ban is unconstitutional pursuant to the Equal Rights Amendment, Pa. Const. art. I, § 28, which guarantees the equality of rights will not be denied or abridged based on the sex of the individual, and the Pennsylvania Constitution's guarantee of equal protection of the laws, Pa. Const. art. I, §§ 1 and 26 and Pa. Const. art. III, § 32. Pet. for Review at ¶¶ 94-96.

Amici Curiae support the Petitioners' requests for relief. *Amici Curiae* have an interest in this case because the questions before this Court involve the interests of the entire General Assembly as the legislative authority of the Commonwealth, issues of separation of powers between the three branches of State government and the constitutional interpretation of a state statute restricting low-income women from obtaining health care services. *Amici Curiae* believe this Court would benefit from hearing the perspective of members of the Senate and House Democratic Caucuses germane to this case.

[1] 18 Pa.C.S. § 3215(c) provides, "No Commonwealth funds and no Federal funds . . . 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 the case of rape or incest. Additionally, 18 Pa.C.S. § 3215(j) provides that "[n]o Commonwealth agency shall make any payment from Federal or State funds . . . for the performance of any abortion" due to rape or incest unless certain requirements involving statements subject to penalty and verification of rape or incest reports are first met.

Pursuant to Pa.R.A.P. 531(b)(2), *Amici Curiae* disclose that no other person or entity other than *Amici Curiae*, its members, or counsel paid in whole or in part for the preparation of this *Amici Curiae* Brief, nor authored in whole or in part this *Amici Curiae* Brief.

INTRODUCTION

Amici Curiae believe Pennsylvania's Coverage Ban unconstitutionally restricts low-income women covered under the Pennsylvania Medical Assistance program from obtaining an abortion in violation of the Pennsylvania Equal Rights Amendment, Article I, Section 28 ("ERA") and the guarantees of equal protection under Article 1, Sections 1 and 26 of the Pennsylvania Constitution. Pennsylvania's ERA states, "Equality 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. The purpose of the ERA is to prohibit all sex-based discrimination and ensure that men and women are treated equally and fairly. Article 1, Section 1 provides that all persons within the Commonwealth "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty…and of pursuing their own happiness." Pa. Const. art. I, § 1. Article 1, Section 26 states: "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. These provisions guarantee equal protection of the law and prohibit discrimination based on the exercise of a fundamental right.

Pennsylvania's Medical Assistance program provides health care coverage for low-income Pennsylvanians. Medical Assistance is a public insurance system that provides eligible men and women of the Commonwealth with medical insurance for covered medical expenses that fall within the scope of benefits. 55 Pa. Code § 1101.31. Under Medical Assistance, both men and women are provided with coverage for a variety of medical services. 55 Pa. Code §§ 1101.31(b). While women can receive coverage for family planning, and other pregnancy-related care, such as prenatal care, obstetric, childbirth, neonatal, and post-partum care, they are denied coverage "for the performance of an abortion" except in the case of rape, incest, or to avert death of the pregnant woman. 18 Pa. C.S. § 3215(c). This prohibition on covering the cost of a medical procedure that is used solely by women violates the ERA and guarantees of equal protection mandated by the Pennsylvania Constitution because there is no medical condition specific to men for which Medical Assistance denies coverage.

Accordingly, *Amici Curiae* submit the following arguments in support of the Petitioners' proper requests for declaratory and injunctive relief so that the Court may hear perspectives from legislators not represented by Intervenor-Respondents; to demonstrate that there are no issues of separation of powers underlying the

Petitioners' request for relief; and to expand upon the greater protections afforded to our citizens by the Pennsylvania Constitution.

ARGUMENT

I. THE INDIVIDUAL LEGISLATIVE INTERVENOR-RESPONDENTS DO NOT REPRESENT THE INSTITUTIONAL INTERESTS OF THE PENNSYLVANIA GENERAL ASSEMBLY AS A WHOLE.

The institutional authority of the General Assembly consists of 50 state senators and 203 state representatives, of which at least a majority from each chamber are necessary to pass or defeat legislation, as provided in Article II, Section 1[2] and Article III, Section 4.[3] *Amici Curiae* submit this brief, in part, because the 18 Senate Intervenor-Respondents and eight House of Representative Intervenor-Respondents (collectively, "Republican Legislative Intervenors") do not represent the interests of the General Assembly as a whole nor do they have the capacity to assert the institutional interests of the entire legislature. *E.g., Raines v. Byrd*, 521 U.S. 811, 829 (1997); *See also, Corman v. Torres*, 287 F.Supp.3d 558 (M.D. Pa. 2018).

In *Corman v. Torres*, two state senators - the Republican Leader of the State Senate and the Republican Chair of the Senate State Government Committee - and

[2] "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. art. II, § 1.
[3] "No bill shall become law, unless . . . a majority of the members elected to each House is recorded thereon as voting in its favor." Pa. Const. art. III, § 4.

eight Republican members of the Pennsylvania delegation to the U.S. House of Representatives sued in federal district court, in their official capacities, after the Pennsylvania Supreme Court declared the 2011 Pennsylvania congressional redistricting map unconstitutional pursuant to the Free and Equal Elections Clause of the state constitution, Pa. Const. art. I, § 5. *Corman*, 287 F.Supp.3d at 561. The legislators sought to enjoin the use of the Pennsylvania Supreme Court-issued remedial redistricting map in the 2018 election cycle. *Id.* at 562.

In that case, the federal district court found that the individual legislators lacked standing to bring the challenge in the first place because U.S. Supreme Court precedent dictates that individual legislators do not suffer the injury required for legislative standing when "the alleged harm is borne equally by all members of the legislature." *Id.* at 567 (citing *Raines*, 521 U.S. at 821) (U.S. Supreme Court held that four U.S. Senators and two U.S. congressmen could not challenge the federal Line Item Veto Act, because the asserted injury - a diminution of legislative power - belonged to all congress*men* equally). The *Corman* court also recognized that the U.S. Supreme Court further cautioned, "[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) on the ground that their votes have been completely nullified." *Id.* at 568 (quoting *Raines*, 521 U.S. at 823).

In applying these principles, *Corman* held that the state senators lacked standing. Significantly, the court determined that only two legislators' votes out of the total 253 members of the Pennsylvania General Assembly could not have defeated or enacted any remedial redistricting legislation and acknowledged that the state senators, despite their leadership roles in the State Senate, could not "command the two-thirds majority necessary in both chambers to override a gubernatorial veto." *Id.* at 569.

Like the legislators in *Corman*, the Republican Legislative Intervenors in this case argue that the outcome of the Petitioners' challenge, if successful, will result in a usurpation or evisceration of their legislative power. Intervenor-Resp't's Pa. House of Representatives Brf. in Supp. of Prelim. Obj.'s at 12-14; Senate Resp't's Brf. in Supp. of Prelim. Obj.'s at 3.[4]

However, just as two individual legislators out of 253 members of the General Assembly were insufficient in *Corman*, the 26 Republican Legislative Intervenors here fall far short of the required majority needed to enact or defeat legislation. In accordance with well-established U.S. Supreme Court precedent, this assertion of diminution of legislative power belongs to the General Assembly as a whole. *See Raines*, 521 U.S. at 821. A mere 26 legislators of 253-members,

[4] Intervenor-Respondents from the Senate Republican Caucus make this claim as part of their preliminary statement in their Brief in Support of Preliminary Objections but fail to further support this claim throughout the remainder of their brief.

approximately ten percent of the General Assembly do not represent its interests. To represent the General Assembly's interest there must be representation equal to a number necessary to maintain the power to enact or defeat future legislation and the two-thirds majority necessary in both chambers to override a gubernatorial veto. *See Corman*, 287 F.Supp.3d at 567 (citing *Raines*, 521 U.S. at 821).

II. PETITIONERS' REQUESTED RELIEF DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE BECAUSE REVIEW OF THE CONSTITUTIONALITY OF A STATUTE IS PROPERLY WITHIN THE AUTHORITY OF THE JUDICIARY UNDER THE PENNSYLVANIA CONSTITUTION.

It is axiomatic that the judiciary is the final authority on the interpretation of the constitution. *Marbury v. Madison*, 5 U.S. 137 (1803); Pa. Const. art. V, § 1.[5]

The Republican Legislative Intervenors claim that the Petitioners' request for this Court to declare unconstitutional and enjoin enforcement of Pennsylvania's Coverage Ban would interfere with the General Assembly's authority to determine how to appropriate the Commonwealth's funds and improperly compel the legislative branch to appropriate sufficient Medical Assistance funds to cover abortion services. Intervenor-Resp't's Pa. House of Representatives Brf. in Supp. of Prelim. Obj.'s at 12; Senate Resp't's Brf. in Supp. of Prelim. Obj.'s at 3.[6]

[5] "The judicial power of the Commonwealth shall be vested in a unified judicial system . . ."
[6] *Supra* note 4.

On the contrary, Petitioners' request for this Court to review the constitutionality of a statute, regardless of whether the statute is related to an appropriation or could result in future appropriations, is not an extraordinary request; rather, it is asking the Court to perform its fundamental constitutional role.

A. The judiciary's review of the constitutionality of a statute is appropriate and does not offend the Separation of Powers Doctrine because the question before the Court is not a nonjusticiable political question.

"Ordinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers," and judicial abstention is implicated in limited settings. *Hospital & Healthsystem Ass'n of Pennsylvania v. Commonwealth*, 77 A.3d 587, 596 (Pa. 2013) ("*HHAP*") (quoting *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977); citing *Marbury*, 5 U.S. 137 (1803) and *Powell v. McCormack*, 395 U.S. 486, 549 (1969)). Limited circumstances for abstention exist "where it is demonstrable from the constitution's text that the matter in question is committed to the political branches, or where there is an 'unusual need for unquestioning adherence to a political decision already made.'" *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Furthermore, "the need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake." *Id*. at 597 (citing *Sweeney*, 375 A.2d at 709)).

In *HHAP*, several health care providers challenged Act 50 of 2009, in which the General Assembly transferred money from the Medical Care Availability and Reduction of Error Fund ("MCARE Fund") to the General Fund for purposes of balancing the budget, for violations of Article I, Section 1 of the Pennsylvania Constitution, the Fourteenth Amendment to the U.S. Constitution, U.S. Const. Amend. 14, § 1, and the Uniformity Clause of the Pennsylvania Constitution, Pa. Const. art. VIII, § 1. Similar to Republican Legislative Intervenors in this case, the Commonwealth parties in *HHAP* argued that the health care providers were requesting that the Pennsylvania Supreme Court improperly rule on how the General Assembly should appropriate funds and that those "functions are constitutionally committed to the executive and legislative branches." *Id*. at 595-96.

The *HHAP* court found that the issue of whether the MCARE Fund transfer of money to the General Fund violated the Constitution was justiciable. On abstention, the court acknowledged that "under the guise of deference to a co-equal branch of government . . . [I]t would be a serious dereliction on our part to deliberately ignore a clear constitutional violation." *Id.* at 598 (quoting *Jubelirer v. Singel*, 638 A.2d 352, 358 (Pa.Cmwlth. 1994)). Perhaps most relevant to this case, the court declared:

> Appellees here allege their constitutionally-guaranteed rights to due process and uniformity of taxation. This is significant because,

> *regardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens*.

Id. (emphasis added). Further, the court found that the issue of whether the transfer violated the Constitution was not a matter that was textually committed to the legislative or executive branches nor was there an "unusual need for unquestioning adherence to the legislative decision already made." *Id.*

Like the Commonwealth respondents in *HHAP*, the Republican Legislative Intervenors' contention here is that the declaratory and injunctive relief requested would violate separation of powers and interfere with the General Assembly's authority to determine how to appropriate Commonwealth funds. Just as the General Assembly's MCARE Fund transfer to the General Fund through budgetary legislation could not escape judicial review, the Coverage Ban is not exempt from constitutional scrutiny. As the Pennsylvania Supreme Court stated, when citizens' constitutionally-guaranteed rights are at issue, as in this case, regardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact unconstitutional legislation. *See id.*

B. The General Assembly's authority to make appropriations pursuant to Article III, Section 24 of the Pennsylvania Constitution does not foreclose judicial review of the constitutionality of a statute.

Amici Curiae do not believe that this case involves the General Assembly's authority to make appropriations under Article III, Section 24 of the Pennsylvania Constitution. However, even if the Court determines that this challenge to Pennsylvania's Crimes Code somehow implicates the General Assembly's appropriations authority, it is still appropriate for Petitioners' to challenge the constitutionality of the Coverage Ban.

Article III, Section 24 of the Pennsylvania Constitution states, in relevant part, "No money shall be paid out of the treasury, except on appropriations made by law." Pa. Const. art. III, § 24. Article II, Section 1 of the Pennsylvania Constitution provides that the lawmaking power of the Commonwealth is vested in the General Assembly.

While this appropriations power lies exclusively with the legislative branch, this does not prevent the judiciary from reviewing the constitutionality of appropriations-related legislation even when it may result in an increase of government funding. *See William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.*, 170 A.3d 414 (Pa. 2017); *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016) (holding a cause of action exists to allow indigent criminal defendants to allege systemic violations of the right to counsel due to underfunding as well as seek

injunctive relief compelling counties to provide adequate funding for public defenders' offices); *Pa. Env'l Defense Fund v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (holding that the Environmental Rights Amendment, Pa. Const. art. I, § 27, places a limitation on the Commonwealth's power to dispose of the proceeds from the sale of oil and gas).

In *William Penn School District*, several school districts and individuals involved in public education challenged the General Assembly's funding and the executive branch's maintenance of the public school system under the Pennsylvania Constitution's Education Clause, Pa. Const. art. III, § 14, and the guarantee of equal protection of the law, Pa. Const. art. III, § 32. *William Penn Sch. Dist.*, 170 A.3d at 417. The executive and legislative branches argued that the judiciary was barred from considering the petitioners' claims because providing the funding for the public education system was textually committed exclusively to the General Assembly. *Id.* at 431.

The Supreme Court ultimately held that the petitioners' claims were justiciable. *Id.* at 463. In coming to this conclusion, the court again recognized:

> It is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law . . . This is not a radical proposition in American law.

William Penn Sch. Dist. v. Pennsylvania Dep't of Educ., 170 A.3d 414, 437 (Pa. 2017) (internal citations omitted).

Finally, the Supreme Court also acknowledged that it has "allowed claims to proceed even when the remedy might require increased funding for a government function, where the precise amount of funding necessary is not amenable to easy quantification." *Id.* In other words, this is not the first nor will it be the last time the courts are faced with a challenge regarding the legislature's authority to appropriate. Simply because the proceeding may ultimately result in the General Assembly needing to revisit the budget for a particular program or prohibit a restriction on a budgetary appropriation does not foreclose the judiciary from exercising its authority as the final interpreter of the Constitution.[7]

Likewise, the General Assembly's exclusive authority to appropriate Commonwealth funds under Article III, Section 24 of the Pennsylvania Constitution does not bar the judiciary from determining the constitutionality of the Coverage Ban. Similar to the petitioners in *William Penn School District*, Petitioners here are merely asking this Court to interpret the Pennsylvania

[7] Similarly, in *HHAP*, the Pennsylvania Supreme Court rejected the argument that the court was foreclosed from ruling on the constitutionality of the MCARE Fund transfer legislation because the issue could only be resolved by making a legislative policy determination, i.e., funding the source of the transfer and what Commonwealth programs must be defunded in order to transfer the money back to the MCARE Fund. *HHAP*, 77 A.3d at 598 n. 12 ("[S]uch questions need not be answered in order to resolve whether the initial transfer of the money violated Appellees' constitutional rights.").

Constitution. If relief is granted, the judiciary is not compelled to require the General Assembly to make any particular appropriation for the Medical Assistance program. Intervenor-Resp't's Pa. House of Representatives Brf. in Supp. of Prelim. Obj.'s at 12.[8] In fact, it is nonsensical to claim that declaratory and injunctive relief in this case would force the General Assembly to create an appropriation dedicated to abortion services because the General Assembly does not appropriate Medical Assistance dollars using individual line items dedicated to specific medical procedures.

Consequently, Petitioners' requested relief does not violate the separation of powers doctrine. The General Assembly is free to place conditions and parameters on future appropriations, provided those conditions and parameters comply with the Constitution.

III. THE COURT IS NOT PRECLUDED FROM REVISITING *FISCHER* BECAUSE THE PENNSYLVANIA CONSTITUTION PROVIDES GREATER PROTECTIONS THAN THOSE PROVIDED UNDER THE U.S. CONSTITUTION.

Petitioners assert in Count I that the Coverage Ban violates the Equal Rights Amendment, Pa. Const. art. I, § 28, which guarantees the equality of rights will not be denied or abridged based on the sex of the individual, because the prohibition

[8] *Supra* note 4.

on Medical Assistance funding for abortions except for cases of rape, incest or to avert the death of the mother improperly discriminates against women based on their sex without sufficient justification. Pet. for Review at ¶¶ 89-92. Additionally, Petitioners assert in Count II that the Coverage Ban violates the Pennsylvania Constitution's guarantee of equal protection of the laws, Pa. Const. art. I, §§ 1 and 26 and Pa. Const. art. III, § 32, because the ban is instituted against women only, unequally denying women coverage for health care services under Pennsylvania's Medical Assistance program and, as such, operates to discriminate against women based on the exercise of a fundamental right. Pet. for Review at ¶¶ 94-96.

Respondents allege Petitioners' claims were settled in 1985 in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985), but Petitioners' claims should be examined outside of *Fischer*'s limited analysis. In the last thirty-five years of state constitutional jurisprudence, the proliferation of state court decisions that have expanded state constitutional rights afforded to their individual citizens demands that *Fischer* be revisited by the judiciary and the Coverage Ban enjoined as unconstitutional under the Pennsylvania Constitution's ERA, Pa. Const. art. I, § 28, and its guarantee of equal protection under the laws of the Commonwealth, Pa. Const. art. I, §§ 1 and 26.

A. Pennsylvania jurisprudence since *Fischer* demonstrates that the Pennsylvania Constitution provides greater protections to its citizens than those afforded by the U.S. Constitution.

Since *Fischer*, the Pennsylvania Supreme Court has repeatedly established that the Pennsylvania Constitution provides greater protections to its citizens than those afforded by the U.S. Constitution, and it is not always bound by U.S. Supreme Court jurisprudence when analyzing its own state constitution. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 813 (Pa. 2018) (finding that the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5, having no federal counterpart, is a distinct claim from the federal Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. 14, § 1); *William Penn Sch. Dist. V. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 456-57 (Pa. 2017) (reversing precedent that precluded judicial enforcement of the Pennsylvania Education Clause, Pa. Const. art. III, § 14); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 944 (Pa. 2013) ("The Environmental Rights Amendment[, Pa. Const. art. I, § 27,] has no counterpart in the federal charter and, as a result, the seminal, comparative review standard described in [*Commonwealth v. Edmunds*] is not strictly applicable here); *See also* Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 351-359 (2018) (discussing the Pennsylvania Supreme Court's willingness to revisit prior case law when the issue

presented involves state constitutional provisions that are disanalogous to the U.S. Constitution).

In *League of Women Voters v. Commonwealth*, the Pennsylvania Supreme Court rejected precedent requiring the court to apply federal equal protection analysis to a partisan gerrymandering challenge to the General Assembly's congressional redistricting plan predicated on the right to vote under the Free and Fair Elections Clause of the State Constitution, Pa. Const. art. I, § 5.[9] The court explained that the "touchstone" of constitutional interpretation was to examine the plain language of the Constitution itself. *League of Women Voters*, 178 A.3d at 802. Since the language of the Free and Fair Elections Clause had no federal counterpart in the U.S. Constitution, the court provided the following guidance:

> [I]n addition to our analysis of the plain language, we may consider, as necessary, any relevant decisional law and policy considerations argued by the parties, and any extra-jurisdictional case law from states that have identical or similar provisions, which may be helpful and persuasive.

Id. at 803.

Accordingly, after examining the plain language and history of the provision, the court rejected the notion that it must utilize the federal Equal Protection Clause analysis to evaluate a claim under the Free and Fair Elections

[9] "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Clause simply because it had done so in past cases, and refused to follow its prior finding in *Erfer v. Commonwealth* that the Clause did not provide greater protections. *League of Women Voters*, 178 A.3d at 811-813 (citing *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002)). Rather, the court decided that, just because it never before held that a redistricting plan violated the Free and Equal Elections Clause, did not preclude a party from bringing such a claim before the court now. *Id*. at 811. Notably, the court determined that the only reason it did not opine in *Erfer* on the issue of whether the Free and Fair Elections Clause provided greater protections of the right to vote than that provided under the federal Equal Protections Clause was because the parties failed to offer a persuasive argument as to why the court should interpret the state provision in such a manner - not because it in fact did not provide greater protections. *Id.* As a result, precedent did not preclude future challenges based on greater state constitutional protections under the Free and Fair Elections Clause independent of the federal Equal Protections Clause analysis. *Id.* at 812.

Similarly here, *Fischer* does not preclude further analysis by this Court as to whether the ERA or the state constitutional equal protection guarantees provide greater protections than under the federal Equal Protection Clause. Instead, the many cases decided since *Fischer* in which the courts have revisited and rejected precedent that strictly followed federal constitutional analysis, particularly for non-

analogous state provisions in Article I such as the ERA, demonstrate that the Pennsylvania Constitution affords its citizens greater protections than is provided under federal Equal Protection jurisprudence. *See, e.g.*, *See League of Women Voters v. Commonwealth*, 178 A.3d at 813; *Robinson Twp. v. Commonwealth,* 83 A.3d 901 at 944; *See also* Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 351-359 (2018).

In accordance with *League of Women Voters*, Petitioners offer persuasive arguments and supportive data detailing the exclusive harms to women on Medical Assistance seeking abortion health care services including, among others, increased maternal morbidity, danger to the pregnant woman's health, exacerbation of pre-existing conditions, increased partner abuse, increased poverty and disproportionate effects on women of color. Pet. for Review at ¶¶ 65-83. The *Fischer* court did not take into consideration the record of harms in 1985, which have since multiplied as presented by the Petitioners.

Given the Petitioners' persuasive arguments were not directly addressed in *Fischer*, case law has evolved providing citizens with greater protections under the Pennsylvania Constitution since 35 years ago when *Fischer* was decided, and the further record of harm, it is time this Court revisit the conclusions in *Fischer*.

B. *Fischer* failed to consider the wealth of sister court jurisprudence which also demonstrates that analogous state constitutional provisions provide greater protections than those afforded by the U.S. Constitution.

Just as *League of Women Voters* instructed state courts to consider other state court decisional law when interpreting their own constitutional provisions, this Court should consider the extra-jurisdictional case law from states that have identical or similar provisions, which are helpful and persuasive to this case. *League of Women Voters*, 178 A.3d at 803.

In *Fischer*, the court found that, at the time, "the prevailing view amongst our sister state jurisdictions is that the ERA does not prohibit treating the sexes differently when it is reasonably and genuinely based on physical characteristics unique to one sex." *Fischer*, 502 A.2d at 125 (internal citations and quotations omitted). However, numerous sister courts have since held differently, finding that statutes prohibiting state Medical Assistance funding for medically necessary abortions are unconstitutional under the ERAs of their state constitutions. *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (declaring an agency rule prohibiting the use of MA funds for abortion unconstitutional pursuant to the state's ERA); *Doe v. Maher*, 515 A.2d 134, 448 (Conn. 1986) ("At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny" and "the effect of the ERA was to raise the standard of review.").

In *New Mexico Right to Choose/NARAL,* the Supreme Court of New Mexico declared that a state agency rule barring state funding for abortion for Medicaid-eligible women, except when necessary to save life of the pregnant woman, to end ectopic pregnancy or when pregnancy resulted from rape or incest, was gender-based discrimination violating the State's ERA. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d at 857. In doing so, the court found that "[n]either the Hyde Amendment nor the federal authorities upholding the constitutionality of that amendment bar this Court from affording greater protection of the rights of Medicaid-eligible women under our state constitution." *Id.* at 851. Additionally, the court determined that the ERA demanded that state laws employing gender-based classifications require strict judicial scrutiny, even when the statute relies on a classification based on a unique physical characteristic of one sex:

> It would be error, however, to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex. In this context, similarly situated cannot mean simply similar in the possession of the classifying trait. All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test . . . It is equally erroneous to rely on the notion that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some "natural" grouping."

Id. at 854 (internal citations and quotations omitted).

Instead, to determine whether a classification based on a unique physical characteristic of one sex denies equality of rights under law pursuant to the State Constitution's ERA, the court found that it must examine the purpose of the law and whether the classification "operates to the disadvantage of persons so classified." *Id.* (internal citations omitted). After considering the nation's history of legislators using women's biology and ability to bear children as the basis for discrimination against them as well as the detrimental health consequences that becoming pregnant can have on women, the court concluded that a classification based on a woman's unique ability to become pregnant and bear children does not escape strict scrutiny requiring the State to provide a compelling justification. *Id.* at 854-55 (citing *Doe*, 515 A.2d at 142, 159).

The court further concluded that the rule employed a gender-based classification that operated to the disadvantage of women and was presumptively unconstitutional, because men and women meeting the state's criteria for financial and medical need were similarly situated regarding MA eligibility and there were no comparable restrictions in state regulations for physical conditions unique to men. *Id.* at 856 (citing *Doe*, 515 A.2d at 159 ("Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination")). Ultimately, the

New Mexico state agency rule violated the ERA because the State's purported interests in saving costs and in protecting the potential life of the unborn were not compelling justifications for treating men and women differently regarding their medical needs. *Id.* at 856-57.

Likewise, several sister state jurisdictions have also held that, pursuant to their individual state constitutions, it is unconstitutional to restrict the use of state Medical Assistance funds for abortion services only to the avert the death of the pregnant woman or in cases of rape or incest and that, once they choose to provide a general public benefits program, they must do so in a neutral manner. *See, e.g., Right to Choose v. Byrne,* 450 A.2d 925 (N.J. 1982) (holding that state restriction of Medicaid funds for only abortions to preserve a woman's life, but not her health, "violates the right of pregnant women to equal protection of the law" under analogous provision to Pennsylvania's Article I, § 1); *Committee to Defend Reproductive Rights v. Myers,* 625 P.2d 779 (Cal. 1981) (emphasizing the state court's role in interpreting its own state constitutional provisions despite an identical federal counterpart and holding the state must provide its benefits without withholding based on one's exercise of the constitutional right to choose whether or not to bear a child); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (recognizing that the state is subject to constitutional limitations when it decides to provide public benefits in that "it may not use criteria which

discriminatorily burden the exercise of a fundamental right"); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (interpreting the state constitution's fundamental right to privacy as affording greater protections than the U.S. Constitution and ruling the state cannot coerce a pregnant woman who is eligible for medical assistance to choose childbirth over a therapeutic abortion); *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001) ("The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care" without "deny[ing] medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program" and discriminating based on the exercise of a constitutional right).

For example, in *Right to Choose v. Byrne*, the Supreme Court of New Jersey declared a statute unconstitutional which prohibited state Medicaid funding for abortions except to preserve the woman's life. *Right to Choose*, 450 A.2d at 927. The Court determined, using an almost-identical equal protection provision to Article I, Section 1 of the Pennsylvania Constitution, that the right to choose whether to have an abortion is a fundamental right of all pregnant women, including those on Medicaid. *Id.* at 934. With that in mind, the court found that the statute denied equal protection to those women entitled to medical services through Medicaid, because it granted funds when life was at risk but withheld them when

health was at risk. *Id*. Additionally, the court concluded a woman's right to choose to protect her health outweighed the state's purported interest in protecting a potential life at the expense of the pregnant woman's health. *Id.* at 937. Ultimately, the court held that the funding restriction violated the state's equal protection provision. *Id*.

This Court should consider the extra-jurisdictional case law from states that have identical or similar provisions, which are instructive and persuasive regarding Petitioners' ERA and equal protection claims.

C. The Court is not precluded from declaring the Coverage Ban unconstitutional and enjoining its enforcement because the federal statutory prohibition does not preempt greater protections in state law afforded by the Pennsylvania Constitution.

The Republican Legislative Intervenors argue the Petition should be dismissed because the use of Medical Assistance dollars is preempted by federal law, 42 U.S.C. § 1397ee(c) ("Hyde Amendment"), which restricts the use of *federal* Medical Assistance funds received by States for abortions, except to avert the death of the woman or in cases of rape or incest. Intervenor-Resp't's Pa. House of Representatives Brf. in Supp. of Prelim. Obj.'s at 9. They further allege that the State's Coverage Ban "implements" this federal restriction in state law, which prevents the provision of *state and federal* Medical Assistance funds for the same abortions. Republican Legislative Intervenors allege that enjoining this state law would effectively invalidate and prohibit the enforcement of the federal Hyde

Amendment. *Id.* In citing no more than the federal Supremacy Clause, U.S. Const. art. VI, § 2, they make a peculiar argument that the federal statute preempts a differing interpretation of the Pennsylvania Constitution which would allow the Petitioners such relief. *Id.* 10-11.

Although the Supremacy Clause indeed establishes that the U.S. Constitution and federal laws preempt inconsistent state laws, enjoining the Coverage Ban would not make state law inconsistent with federal law. The Hyde Amendment follows federal funds, and that fact would not change whether Pennsylvania enacts a statute with mirroring language or not. Were this Court to enjoin the Coverage Ban, the resulting silence in state law concerning Medical Assistance restrictions on abortion would not create a contradictory state law. On the contrary, the only effect of enjoining the Coverage Ban would be to nullify the *state* restrictions on *state* Medical Assistance dollars, not the federal law.

Moreover, the Supremacy Clause precludes state courts from reaching contradicting conclusions regarding the interpretation of *federal* law, not its own state constitution. As the New Jersey Supreme Court recognized in *Right to Choose*, the U.S. Supreme Court held that "the [federal] prohibition on the use of Medicaid funds for abortion to protect the health of the mother did not violate the equal protection clause of the United States Constitution." *Right to Choose*, 450 A.2d at 933 (noting the majority's conclusion in *Harris v. McRae*, 448 U.S. 297

(1980)). However, the New Jersey Supreme Court further emphasized that "[u]nder the supremacy clause, U.S. Const. art. VI, § 2, that interpretation precludes our reaching a different result as a matter of *federal* law. We remain obligated, however, to evaluate [the state statute] in light of the Constitution of New Jersey." *Id.* (emphasis added). Thus, state courts have the authority to interpret their own state constitutional provisions to provide greater protections than those afforded under the U.S. Constitution.

Therefore, the States are free to provide *state* Medical Assistance funds for abortion services in accordance with their individual state constitutions. In fact, 17 states currently provide state Medical Assistance funds for abortion services beyond the federal prohibition, including several of Pennsylvania's own neighboring states - New York, New Jersey and Maryland. The Petitioners' request for this Court to enjoin the Coverage Ban would not invalidate the Hyde Amendment. Moreover, the Hyde Amendment does not preempt the greater protections afforded by the Pennsylvania Constitution to provide state Medical Assistance funding for a woman seeking an abortion for reasons other than to avert her death or due to rape or incest.

CONCLUSION

Because Petitioners' request for declaratory and injunctive relief is appropriate in light of the judiciary's authority to review the constitutionality of a

statute; and because precedent does not preclude the courts of this Commonwealth from interpreting Pennsylvania's constitutional provisions from affording greater protections than those provided by the United States Constitution, *Amici Curiae* respectfully request this honorable Court grant Petitioners' declaratory and injunctive relief.

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CERTIFICATION OF WORD COUNT COMPLIANCE

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 6,998 words, exclusive of the cover page, tables and the signature block.

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CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby 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 non-confidential information and documents.

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Attachment A

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