Received 5/15/2020 2:56:02 PM Commonwealth Court of Pennsylvania

Filed 5/15/2020 2:56:00 PM Commonwealth Court of Pennsylvania
26 MD 2019

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.,*	:	No. 26 MD 2019
Petitioners,	:	
vs.	:	
PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, *et al.*,	:	
Respondents.	:	

PETITIONERS' OMNIBUS BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS

Susan Frietsche (PA 65240)
Christine Castro (PA 326694)
WOMEN'S LAW PROJECT
428 Forbes Avenue, Suite 1710
Pittsburgh, PA 15219
(412) 281-2892

David S. Cohen (PA 88811)
3320 Market St., Suite 232
Philadelphia, PA 19104
(215) 571-4714

Counsel for Petitioners
(additional counsel identified on page 67)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Petitioners, Pennsylvania reproductive health care providers, challenge Pennsylvania's statutory ban on Medical Assistance coverage of abortion care (hereinafter "Coverage Ban") as violating the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees. As detailed in the Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief (hereinafter "Petition"), a woman's ability to determine whether and when to have children is essential to her health, equal citizenship, and liberty. Because of the Coverage Ban, women on Medical Assistance in Pennsylvania who seek to terminate their pregnancy have been forced to choose: continue their pregnancy to term against their will or use money that they would have used for shelter, food, clothing, or childcare to pay for the procedure. This is exactly the choice—between health care and basic essentials—that Medicaid was created to avoid. Yet low-income women in Pennsylvania, and disproportionately low-income women of color, routinely face this choice.

Fischer v. Department of Public Welfare, 502 A.2d 114 (Pa. 1985), decided over three decades ago, upheld the Coverage Ban, but was unsoundly reasoned and replete with legal error. Legal and factual developments since *Fischer* have further eroded its legitimacy. Independently assessing the constitutional issues leads to the unavoidable conclusion that legislative

classifications that disadvantage women on the basis of their reproductive capacity and based on their decision to exercise a fundamental right are unconstitutional.

I. SUMMARY OF ARGUMENT

The Coverage Ban unconstitutionally discriminates against pregnant women enrolled in Medical Assistance and who choose to have an abortion. It does so on the basis of their sex and on the basis of their choice to exercise their fundamental right to terminate their pregnancy. There are no sex-specific medical procedures that Medical Assistance excludes from coverage for men, but coverage for women who choose the sex-specific procedure of abortion is excluded. Furthermore, Medical Assistance covers pregnancy and childbirth care, but excludes abortion care. These discriminatory coverage provisions violate the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees.

The preliminary objections filed in this case are premised almost exclusively on the Pennsylvania Supreme Court's 1985 decision upholding the constitutionality of the Coverage Ban in *Fischer*.[1] Although *Fischer* is precedential, this Court should consider the reasons why *Fischer* was wrongly decided. Not only was it poorly reasoned at the time it was decided, but an

[1] Throughout this Brief, unless indicated otherwise, all references to "the Supreme Court" are to the Pennsylvania Supreme Court. References to the United States Supreme Court will specifically reference "the United States" or "U.S."

independent assessment of the legal question shows that the legal developments since the decision also undermine its legitimacy.

Moreover, contrary to Respondent Department of Human Services' other preliminary objection, a well-developed and longstanding body of appellate decisions clearly establishes that Petitioners have third-party standing to assert the constitutional rights of their patients. Similarly, numerous appellate decisions establish that Pennsylvania courts are, contrary to House Intervenor-Respondents' arguments, well within their powers to pronounce a statute unconstitutional, even if that would subsequently require the General Assembly to act to come into compliance with the Constitution. Finally, striking down a state law as unconstitutional would not, as House Intervenor-Respondents also contend, relieve the General Assembly and all other state actors from complying with federal law because the Supremacy Clause of the United States Constitution compels such compliance.

II. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Have Petitioners stated a claim that the Coverage Ban violates the Pennsylvania Constitution's Equal Rights Amendment?

Suggested answer: Yes.

2. Have Petitioners stated a claim that the Coverage Ban violates the Pennsylvania Constitution's equal protection provisions?

Suggested answer: Yes.

3. Have Petitioners stated a claim that abortion is a fundamental right under the Pennsylvania Constitution?

Suggested answer: Yes.

4. Do Petitioners have third-party standing to assert the constitutional rights of their patients?

Suggested answer: Yes.

5. Do Pennsylvania courts have the power to pronounce an act of the legislature unconstitutional and enjoin its operation?

Suggested answer: Yes.

6. Is Petitioners' requested relief permissible under federal law?

Suggested answer: Yes.

III. SCOPE OF REVIEW AND STANDARD OF REVIEW

In considering preliminary objections, all material facts set forth in the challenged pleading must be accepted as true, as well as all inferences reasonably deducible therefrom. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). Preliminary objections in the nature of a demurrer test the legal sufficiency of a complaint and must be overruled unless "it is clear and free from doubt that the facts pled are legally insufficient to establish a right to relief." *Dotterer v. Sch. Dist. of City of Allentown,* 92 A.3d 875, 880 (Pa. Commw. Ct. 2014); *see also Pa. State Troopers Ass'n v. Commonwealth*, 606 A.2d 586, 587 (Pa. Commw. Ct. 1992) ("[W]here any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain them."). "If any

theory of law will support a claim, preliminary objections are not to be sustained." *Goodheart v. Thornburgh*, 522 A.2d 125, 128 (Pa. Commw. Ct. 1987).

IV. STATEMENT OF THE CASE

A. The Pennsylvania Medical Assistance Program

Medicaid is a joint federal-state public insurance program that provides eligible persons with medical insurance for a wide array of covered services. Pet. ¶¶ 44, 45, 48. Pennsylvania's Medicaid program is known as Medical Assistance. *Id.* ¶ 44. Respondent Pennsylvania Department of Human Services ("DHS") is responsible for administering the Medical Assistance program. *Id.* ¶ 40. DHS's Office of Medical Assistance Programs operates Medical Assistance, which includes a fee-for-service program that reimburses providers directly for covered medical services provided to enrollees, as well as a managed care program, HealthChoices, that is administered by contracted managed care organizations that receive a negotiated capitated rate from DHS to contract with health care providers to deliver covered services. *Id.* ¶¶ 41, 46. As of July 1, 2018, roughly 84.6% of Medical Assistance recipients were enrolled in the HealthChoices managed care program; only 15.4% were in the fee-for-service program. *Id.* ¶ 47.[2]

[2] As of July 1, 2019 (after the Petition was filed), these numbers are 89.3% for HealthChoices managed care enrollment and 10.7% for fee for service. Kaiser Family Foundation, *Share of Medicaid Population Covered under Different Delivery Systems*, https://www.kff.org/medicaid/state-indicator/share-of-medicaid-population-covered-under-different-delivery-systems/ (visited May 1, 2020).

The Pennsylvania Abortion Control Act prohibits the use of any Commonwealth funds to cover abortion care, including the Medical Assistance program, except those abortions necessary to avert the death of the pregnant woman or to end a pregnancy caused by rape or incest. *See* 18 Pa. C.S. §§ 3215(c), (j). No equivalent coverage ban applies to men; rather, Medical Assistance covers all common reproductive health services that men need. Pet. ¶ 54. Likewise, no equivalent coverage ban applies to carrying a pregnancy to term; rather, Medical Assistance covers all costs associated with pregnancy and childbirth, including medically complicated pregnancies. *Id.* ¶ 55.

DHS has promulgated regulations implementing the Coverage Ban. *See* 55 Pa. Code §§ 1141.57 (payment conditions for necessary abortions),[3] 1163.62 (payment for inpatient hospital services), 1221.57 (payment for clinic and emergency room services). Health care providers are prohibited from billing for services inconsistent with these regulations and are subject to penalties if they do. *See* 55 Pa. Code §§ 1141.81, 1163.491, 1221.81, 1229.81.

B. The Impact of the Coverage Ban on Pennsylvania Women

The Coverage Ban harms women in many ways. As set forth in the Petition, these harms include the following:

[3] As noted in Senate Intervenor-Respondents' brief page 5, note 3, Petitioners' reference to 55 Pa. Code § 1147.57 rather than § 1141.57 in the Petition's Wherefore clause was a typo.

- Women who are already poor are forced to spend money on abortion care that they need for essentials such as rent, utilities, food, diapers, or clothing. This is exactly the choice—between health care and basic essentials—that Medicaid was created to avoid. Pet. ¶¶ 59, 62, 77-79.
- The need to raise several hundred to several thousand dollars can delay the abortion, thereby increasing the cost and complexity of the procedure and increasing its medical risks, as well as increasing travel distances for women to access care because of the limited availability of abortion care later in pregnancy. *Id.* ¶¶ 60-61, 80-83.
- The Coverage Ban distorts the physician-patient and counselor-patient relationship. Instead of focusing entirely on the patient's questions, medical needs, and contraceptive plans, a portion of the patient-provider dialogue revolves around identifying funding sources for the patient's procedure. Often, these funding sources include Petitioners' subsidizing (in part or in full) abortions for Pennsylvania women on Medical Assistance. *Id.* ¶¶ 36, 84-87.
- Women with health problems aggravated by pregnancy (such as diabetes or heart disease), or certain medical conditions the management or treatment of which is complicated by pregnancy (such

as major depression or cancer), risk sustaining severe health damage from the Coverage Ban. *Id.* ¶¶ 69-74.

- National studies show that roughly one quarter of women on Medicaid who seek an abortion are forced to continue their pregnancy to term against their will because Medicaid does not cover their abortion and they do not have the funds to pay for the abortion themselves. As a result of the Coverage Ban, some Pennsylvania women fall within this category and are forced to carry their pregnancies to term against their will. These women are denied their autonomy and dignity, cannot exercise their constitutional right to terminate a pregnancy, and are forced to face the medical risks associated with continued pregnancy and childbirth. They also face greater risk to their health, as the maternal mortality risk associated with childbirth is estimated to be fourteen times greater than the risk associated with abortion. For African American women, the maternal mortality rate is three times that of white women. *Id*. ¶¶ 63-68.
- Women who keep and raise a child they did not want to have face an increased risk of psychosocial harm. Their education may be interrupted, and their career prospects circumscribed. A year after unsuccessfully seeking an abortion, they are more likely to be

impoverished, unemployed, and depressed than women in similar circumstances who were able to obtain abortion care. *Id.* ¶¶ 66, 75.

- All of the harms identified here fall disproportionately on women of color because women of color are more likely than white women to be poor. *Id.* ¶ 83.

C. Procedural History

Petitioners, seven[4] medical facilities licensed or certified by the Commonwealth to provide abortion care (collectively, "Petitioners" or "providers"), Pet. ¶¶ 2-32, filed their Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief in the original jurisdiction of this Court on January 16, 2019. Respondents, DHS and several agency officials responsible for enforcing the challenged statute and regulations, filed preliminary objections on April 16, 2019.

While DHS's preliminary objections were pending, two groups of individual Pennsylvania legislators sought to intervene as respondents.[5] Following briefing and argument, their motions for leave to intervene were denied on June 21, 2019. This Court granted reconsideration by Order dated July 22, 2019. After

[4] At the time of the Petition's filing, there were eight different Petitioners. However, Petitioner Berger & Benjamin LLP has since ceased operations. An application for Berger & Benjamin LLP to be removed from this case is being filed simultaneous with this Brief.

[5] Eighteen members of the Republican caucus of the Pennsylvania Senate and eight members of the Republican caucus of the Pennsylvania House filed separately.

reargument before a three-judge panel of this Court, the proposed intervenors' motions were granted on January 28, 2020.

DHS then filed its brief in support of its preliminary objections on February 27, 2020. House Intervenor-Respondents filed preliminary objections with their initial intervention petition on April 17, 2019, and filed a supporting brief on February 27, 2020. Senate Intervenor-Respondents filed preliminary objections and a supporting brief on the same day.

V. ARGUMENT

A. THE COVERAGE BAN VIOLATES THE PENNSYLVANIA CONSTITUTION'S EXPLICIT GUARANTEE OF EQUALITY ON THE BASIS OF SEX.

The Respondents' and Intervenor-Respondents' primary argument in support of their preliminary objections is that *Fischer* conclusively decides the Pennsylvania Equal Rights Amendment claim in this matter.[6] Petitioners acknowledge that this Court cannot overturn *Fischer*.[7]

But precedent does not live in perpetuity, particularly precedent as deeply flawed and inconsistent with basic constitutional principles as *Fischer*.

---

[6] As DHS and both sets of Intervenor-Respondents raise the identical preliminary objections based on *Fischer*, Part V.A of this Brief covering the Equal Rights Amendment and Part V.B covering the equal protection provisions apply equally to all parties' preliminary objections.

[7] *See, e.g.*, *Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448, 451 (Pa. Commw. Ct. 2000) ("[W]e, as an intermediate appellate court are bound by the decisions of the Pennsylvania Supreme Court and are powerless to rule that decisions of that Court are wrongly decided and should be overturned.").

When faced with precedent that is legally incorrect, illogical, and based on a flawed, long-discredited analytical framework for reviewing pregnancy-based classifications, our courts have the power and duty to set matters right. As the Supreme Court has recently noted, "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." *William Penn Sch. Dist. v. Pa. Dep't of Educ.,* 170 A.3d 414, 456 (Pa. 2017); *see also, e.g.*, *Yocum v. Commonwealth*, 161 A.3d 228 (Pa. 2017) (re-evaluating and overruling in part *Shaulis v. Pa. State Ethics Comm'n*, 833 A.2d 123 (Pa. 2003)); *Commonwealth. v. Doughty*, 126 A.3d 951 (Pa. 2015) (overruling in part *Commonwealth v. Brachbill*, 555 A.2d 82 (Pa. 1989)).

In *William Penn School District*, the Supreme Court overruled precedent in connection with a constitutional challenge to the Pennsylvania education funding statute. 170 A.3d at 457 (overruling *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999)). In doing so, the Supreme Court provided instructive insight into how to determine whether precedent should be overruled.

Ultimately, *William Penn School District* analyzed two separate questions—whether the precedent was correctly reasoned at the time it was decided and whether it was correct based on an independent, current assessment of the matter. As the Court explained with regard to the first inquiry: "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." *Id.* at 457 (emphasis added). This "interpretive function" includes parsing the precedents that formed the basis of the decision, *id.* at 440, as well as the soundness of the reasoning in the decision itself, *id.* at 445-46. The Court explained that although precedent necessarily informs its analysis, "to rely uncritically" upon the precedent "would be to rest our decision upon an unstable three-legged stool." *Id.* at 445.

Second, the Court engaged in its own independent assessment of the issue presented in the case. This includes looking to developments since the precedent was decided, in particular any changes in Pennsylvania jurisprudence, *id.* at 455-57, as well as decisions from other state courts, *id.* at 453-55.

As the Pennsylvania Supreme Court said in an earlier case, "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." *Ayala v. Phila. Bd. of Public Educ.*, 305 A.2d 877, 887-88 (Pa. 1973) (quoting *Flagiello v. Pa. Hosp.*, 208 A.2d 193, 205 (Pa. 1964)), *superseded by statute on other grounds*.

1. *Fischer* Was Not Soundly Reasoned.

Like this case, *Fischer* involved a challenge to the Coverage Ban under the Pennsylvania Equal Rights Amendment ("ERA") and equal protection provisions of the state Constitution. Adopted in 1971, the ERA provides:

> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

Pa. Const. art. I, § 28. This sex-equality command prohibits sex-based classifications, including those that reflect and perpetuate invidious gender stereotypes. In one of its first rulings interpreting the ERA, the Supreme Court interpreted the ERA to establish a near-absolute rule barring sex-based classifications. *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974). In that case, the Court ruled that alimony *pendente lite* must be awarded based on relative financial need, not on the sex of the petitioner, and stated emphatically:

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman.

Id. at 62. A decade later, the Court explained further that to the extent such differential benefits "rely on and perpetuate stereotypes," they are particularly suspect. *Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*,

482 A.2d 542, 548 (Pa. 1984) (striking gender-based insurance rates). It stated definitively that "[w]e have not hesitated to effectuate the Equal Rights Amendment's prohibition of sex discrimination by striking down statutes and common law doctrines 'predicated upon traditional or stereotypic roles of men and women . . . .'" *Id.* (quoting *Spriggs v. Carson*, 368 A.2d 635, 639 (Pa. 1977)).

In the years between the adoption of the ERA and *Fischer*, the Pennsylvania Supreme Court consistently and easily applied these principles in ERA cases to invalidate laws conferring different benefits and burdens on men and women. *See, e.g.*, *Hartford*, 482 A.2d at 548; *Spriggs*, 368 A.2d at 639-40 (holding that "Tender Years Doctrine" was offensive to concept of equality because it was predicated upon traditional or stereotypic roles of men and women in marriage); *Adoption of Walker*, 360 A.2d 603, 605 (Pa. 1976) (invalidating statutory distinction between unwed mothers and unwed fathers); *Butler v. Butler*, 347 A.2d 477, 480 (Pa. 1975) (abolishing presumption that wife is entitled to constructive trust if husband obtains wife's property without adequate consideration because non-monetary contributions can be made by either spouse); *Commonwealth v. Santiago*, 340 A.2d 440, 445-46 (Pa. 1975) (abolishing presumption that married woman, committing a crime in her husband's presence, was unwilling participant because she was lacking a will of her own and could not formulate criminal intent); *DiFlorido v. DiFlorido*, 331 A.2d 174, 180 (Pa. 1975) (concluding that property

acquired in anticipation of or during marriage and which has been possessed and used by both spouses will, in the absence of contrary evidence, be presumed to be held jointly by the entireties); *Henderson*, 327 A.2d at 62 (invalidating statutory scheme awarding alimony *pendente lite* and counsel fees only to wife and not husband); *Commonwealth v. Butler*, 328 A.2d 851, 855-57 (Pa. 1974) (invalidating statutory parole eligibility for women but not men); *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974) (abolishing presumption that father must bear principal burden of financial support for couple's children); *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974) (recognizing loss of consortium claim by wives as well as husbands); *see also Bartholomew v. Foster*, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988) (holding that ability to operate motor vehicle is not unique to one sex and that sex-based auto insurance rating is unconstitutional).

Then came *Fischer*—a complete departure from this line of consistent ERA decisions. Tellingly, *Fischer*'s discussion of the ERA focused not on the language of the ERA, which has no federal analog,[8] nor on the body of state caselaw construing that constitutional provision. Instead, the Court wrote that pregnancy is "unique as to have no concomitance in the male of the species" and

[8] The proposed federal Equal Rights Amendment has never been added to the United States Constitution. In 1985, when *Fischer* was decided, the federal ERA was considered a dead letter as it had failed to garner enough state support by its June 30, 1982, deadline. Even now, when the necessary thirty-eight states have ratified the federal ERA, there remain major hurdles to it being recognized as a lawfully ratified constitutional amendment. *See generally* Complaint, *Commonwealth of Virginia v. Ferriero*, No. 1:20-cv-00242 (D.D.C. Jan. 30, 2020).

hence is beyond the reach of the ERA. 502 A.2d at 126. This line of reasoning tracked the widely critiqued U.S. Supreme Court decision *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding a pregnancy exclusion in a California disability insurance program based on the determination that pregnancy discrimination is not a form of sex discrimination under the Fourteenth Amendment's Equal Protection Clause),[9] and ignored the fact that, unlike the federal constitution, the Pennsylvania Constitution prohibits sex discrimination through the explicit guarantee in the ERA.

In reasoning that the Coverage Ban does not discriminate against women based on sex because the law affects a decision—whether to continue a pregnancy—that is "unique" to women, 502 A.2d at 125, *Fischer* adopted a broad exception to the ERA: where a classification turns on physical characteristics unique to one sex, differential treatment does not implicate equality concerns. *Fischer* explained that "[i]n this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain

[9] As now-D.C. Circuit Judge Cornelia Pillard has written, "[t]he scholarly consensus is strongly critical of *Geduldig*; indeed, it is difficult to find scholars supporting the decision." Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 Emory L. J. 941, 972 n.102 (2007) (citing numerous articles and legal commentaries critical of *Geduldig*); *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 995, 983-84 (1984) (describing widespread criticism of *Geduldig*). In the words of a *Geduldig* dissenter, "[i]n effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

laws which necessarily will only affect one sex." *Id.* In other words, *Fischer* held that the Coverage Ban is not discriminatory because pregnancy and decisions around pregnancy cannot be compared to any condition men face, and differential treatment is "reasonably and genuinely based" on women's reproductive capacity. *Id.* (quoting *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976)).

Fischer was incorrect the day it was decided. First and foremost, *Fischer* relies on a plain legal error. Simply put, *Fischer* misstated the holding of *Cerra v. E. Stroudsburg*, 299 A.2d 277 (Pa. 1973), in reaching its conclusion that the ERA does not prohibit discrimination based on pregnancy or abortion.

Decided less than two years after the ratification of the ERA, *Cerra* was an employment discrimination case that held that a school district's termination of a pregnant employee constituted sex discrimination under the Pennsylvania Human Relations Act. *Id.* Noting that the termination occurred "solely because of pregnancy," the Supreme Court explained:

> In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. *They are discharged from their employment on the basis of a physical condition peculiar to their sex.* This is sex discrimination pure and simple.

Id. (emphasis added). In other words, almost contemporaneous with Pennsylvania's adoption of the ERA, the Supreme Court recognized that women

who are treated differently "on the basis of a physical condition peculiar to their sex" are subjected to "sex discrimination pure and simple." *Id.*

Fischer plainly misread this case by omitting the italicized sentence above. Rather, *Fischer* re-wrote *Cerra* by stating that it did *not* hold that pregnancy discrimination is a form of sex discrimination, but rather that varying treatment of temporary disability because of the disabled person's gender was sex discrimination. *Fischer*, 502 A.2d at 125. Moreover, *Fischer* attempted to distinguish *Cerra* by saying that the "present situation is distinct from *Cerra*, since the decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species." *Id.* at 126. Yet, that analysis flatly ignores the critical language in *Cerra*—omitted from the *Fischer* decision—which acknowledges that, for women, pregnancy is "a physical condition peculiar to their sex." *Cerra*, 299 A.2d at 280.

In this essential way, *Fischer* fundamentally misstated *Cerra*'s holding. In fact, *Fischer*'s error turns *Cerra* on its head. By omitting key language from *Cerra* from its analysis, *Fischer* concluded that a case that found that pregnancy discrimination *is* sex discrimination *despite* pregnancy being a condition unique to women stands for the proposition that pregnancy discrimination *is not* sex discrimination *because* pregnancy is a condition unique to women. This is

plain error that formed the basis of the central legal argument behind *Fischer*'s ERA holding.

Analysis of pregnancy-related discrimination really is as "pure and simple" as the Supreme Court recognized in 1973 in *Cerra*. Contrary to *Fischer*'s erroneous holding, the Coverage Ban draws a clear distinction between women and men: Medical Assistance covers all reproductive medical needs for men, but not for women. Whether women are currently pregnant or not, those with reproductive capacity face an ongoing risk of a common condition for which Medical Assistance will not cover a treatment option; in this respect, all women with reproductive capacity in the Medical Assistance program are harmed by the Coverage Ban. Using the key language from *Cerra* that was left out of *Fischer*, women on Medical Assistance are treated differently "on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple." *Cerra*, 299 A.2d at 280. *Fischer*'s omission of this essential sentence from the precedent it relied upon fundamentally undermined its sex discrimination analysis.

Fischer also deviated from the long line of ERA caselaw that preceded it. *See supra* (listing ERA cases). *Fischer* limits the ERA's concept of equality such that women are entitled to be treated the same as men but are denied substantive equality in matters related to pregnancy and reproduction, especially where such differential treatment promotes and arises from sex stereotypes.

Fischer ignored the reality that to treat people differently on account of characteristics unique to one sex is to treat them differently on account of their sex. *Fischer* exempted wholesale those classifications that turn on sex-linked physical characteristics, 502 A.2d at 126, without analyzing the harm inflicted on women or whether the classification arose from or furthered prohibited stereotypes. With this misstep, *Fischer* engrafted a limitation onto the ERA in defiance of its express language, removing from the Amendment's reach discrimination stemming from women's reproductive capacity—the very characteristic that has historically been invoked to justify unfavorable treatment of women.

In doing so, *Fischer* ignored the principle upon which the ERA was adopted. *See Henderson*, 327 A.2d at 62 ("The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction."). If the state is free to disadvantage women any time a sex-linked characteristic ("physical characteristics unique to one sex") is the basis of the legislative classification, then all oppression based on reproductive capacity is beyond the reach of the Pennsylvania ERA. Yet this oppression is at the heart of sex inequality because "state control of a woman's reproductive capacity and exaggeration of the significance of biological difference has historically been central to the oppression of women." Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. Penn. L. Rev. 955, 1008 (1984). That such discrimination

exacts a profound economic and social price from women is supported by the allegations in the Petition for Review. *See* Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights,* 60 UCLA L. Rev. Disc. 160, 163 (2013).

In addition to deviating from caselaw interpreting the ERA, *Fischer* also ignored clear contemporaneous evidence of the original understanding of the ERA from high-level legal actors in the Pennsylvania government. As noted above, the Pennsylvania ERA was adopted in 1971. There is no legislative history for the Amendment. However, contemporaneous interpretations of other sex discrimination prohibitions indicate that it was widely understood at the time of the ERA's adoption the concept of sex discrimination included discrimination against pregnant women.

Cerra is one example, with the Supreme Court holding less than two years after the ERA was adopted that discrimination against pregnant women is a form of "sex discrimination pure and simple." 299 A.2d at 280. Guidance from the Pennsylvania Human Relations Commission in the early 1970s also makes clear that pregnancy discrimination is a form of sex discrimination. In both 1970 and 1971, the Commission issued guidelines interpreting the Pennsylvania Human Relations Act's prohibition against sex discrimination to include discrimination against pregnant women. Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex*, 1(24) Pa. Bull. 707-08 (Dec. 19, 1970); Pa. Human

Relations Comm'n, *Guidelines on Discrimination Because of Sex*, 1(80) Pa. Bull. 2359 (Dec. 25, 1971) (both forbidding, pursuant to the Human Relations Act's prohibition against sex discrimination, discriminating against employees because they took time away from work due to childbirth). Similarly, in 1974, the Pennsylvania Attorney General took the position that discrimination against pregnant women constituted sex discrimination under the Human Relations Act. Pa. Op. Att'y Gen. 9 (1974) ("UCL Section 401(d) (2), with its conclusive presumption that women eight (8) months pregnant to one month after parturition are unavailable for work, is contrary to the guarantee of sexual equality expressed in [the Human Relations Act].").

Although these sources do not interpret the ERA itself, they demonstrate that, at the time of the ERA's adoption, the general legal understanding was that the concept of sex discrimination—from the Supreme Court, the Attorney General, and the state agency charged with enforcing anti-discrimination laws—included discrimination against pregnant women. *Fischer* completely ignored this important evidence of the understanding of the concept of sex discrimination at the time of the ERA's adoption, further compounding the fatal flaws in its reasoning.

Beyond this formal sex classification analysis, *Fischer* also ignored the sex stereotypes undergirding the Coverage Ban. Legal distinctions "predicated

upon traditional or stereotypic roles of men and women" are incompatible with the ERA. *See Hartford*, 482 A.2d at 583 (quoting *Spriggs*, 368 A.2d at 639-40); *Hopkins*, 320 A.2d at 140-41 (noting the stereotype behind loss of consortium claims as relying on wives' traditional status as chattle, "similar . . . to a servant; thus, the husband technically owned her"). But the Coverage Ban is entirely rooted in a sex-based stereotype. It buttresses the primacy of childbearing and childrearing for women and, in doing so, expresses the state's disapproval of women who reject the maternal role. As two scholars have noted (one of whom is an author of this brief):

> State restrictions on abortion rest on an implicit value judgment that women's natural roles as mothers take precedence over other aspects of their lives, including their own health, and that women cannot be trusted to make the moral determination themselves of whether to carry a pregnancy to term.

Deborah L. Brake & Susan Frietsche, "Women on the Court and the Court on Women," in *The Supreme Court of Pennsylvania: Life and Law in the Commonwealth, 1684-2017* (Penn State Univ. Press, John J. Hare, ed.) at 167. Thus, the Coverage Ban "rel[ies] on and perpetuate[s] stereotypes" as to the responsibilities and capabilities of men and women, in violation of the ERA. *See Hartford*, 482 A.2d at 548.

Eschewing this important anti-stereotyping principle, *Fischer* treated it dismissively, almost derisively. In fact, even though it twice quoted from cases

that mentioned how critical assessing stereotyping is, *Fischer*, 502 A.2d at 125 (quoting *Hartford*, 482 A.2d at 548); *id.* at 126 (quoting *Salinas*, 551 P.2d at 706), the Court brushed this principle aside by never addressing it. Instead, it focused its analysis entirely on the formal classification at issue in the case. This missing consideration of a key aspect of the Pennsylvania framework for addressing sex discrimination under the ERA is further proof of *Fischer*'s flaws at the time of decision.

2. Independent Assessment of the Constitutional Issue Also Demonstrates Why *Fischer* Was Wrongly Decided.

Beyond *Fischer*'s flawed reasoning at the time of its holding, the legal and factual developments that post-date *Fischer* further undermine its legitimacy. As the Pennsylvania Supreme Court has instructed, "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." *Ayala*, 305 A.2d at 887-88 (quoting *Flagiello*, 208 A.2d at 205).

Fischer's state constitutional analysis almost exactly mirrored comparable U.S. Supreme Court doctrine regarding the federal Constitution. However, in the years since *Fischer*, the Supreme Court has developed a framework for determining when the Pennsylvania Constitution should be

interpreted more expansively than the federal Constitution. In 1991, the Pennsylvania Supreme Court announced a new set of factors—known as the *Edmunds* factors—for determining whether a Pennsylvania constitutional provision should be interpreted differently than the federal Constitution:

1. text of the Pennsylvania constitutional provision;
2. history of the provision, including Pennsylvania case law;
3. related case law from other states;
4. policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991). This post-*Fischer* analysis should provide the framework for an independent analysis of the claims in this case.

Moreover, in the 35 years following *Fischer*, there have been major doctrinal shifts and factual developments around Medical Assistance funding for abortion. Since 1985, there has been a widespread repudiation of *Fischer*'s conclusion that pregnancy discrimination is not encompassed within sex discrimination. Furthermore, there has been an emerging recognition in both federal and state case law of the importance of abortion to women's equality. Finally, a vibrant body of scholarship and empirical evidence has developed

demonstrating the harm that coerced pregnancy and childbearing inflict on women, particularly women of color. Incorporating each of these developments into a full *Edmunds* analysis shows that *Fischer* is "manifestly out of accord with modern conditions of life [and] should not be followed as controlling precedent." *Ayala*, 305 A.2d at 888.

(a) Text of Pennsylvania Constitution

"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. With the ERA, the Pennsylvania Constitution contains an explicit prohibition against sex discrimination. In contrast, the U.S. Constitution contains no such explicit prohibition. Rather, it guarantees "equal protection of the laws," and it is only through judicial interpretation that the Fifth and Fourteenth Amendments protect against some forms of sex discrimination. *See generally Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973). This jurisprudence took over 100 years to develop. The federal Equal Rights Amendment has never been added to the U.S. Constitution. *See supra* n.8. Thus, the Pennsylvania Constitution has unique text explicitly prohibiting sex discrimination that the U.S. Constitution does not contain.

(b) History of the provision, including Pennsylvania case law

The second *Edmunds* factor also indicates the Pennsylvania ERA should be interpreted to cover discrimination against pregnant women. There is no legislative history for the ERA, which was ratified in 1971. Yet, as noted above, several contemporaneous legal pronouncements indicate that discrimination against pregnant women is a form of sex discrimination. *See Cerra*, 299 A.2d at 280 (calling it "sex discrimination pure and simple"); Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex*, 1(24) Pa. Bull. 707 (Dec. 19, 1970); Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex*, 1(80) Pa. Bull. 2359 (Dec. 25, 1971); Pa. Op. Att'y Gen. 9 (1974).

Thus, when the ERA was adopted, high-level legal actors in Pennsylvania were unequivocal that discrimination against pregnant women was sex discrimination. Yet, the Coverage Ban excludes a full range of medical care to pregnant women but not to men, who are covered for all of their sex-specific medical care and/or their reproductive health care. Because pregnant women are treated differently than men by the Coverage Ban, the history of the ERA supports the conclusion that this is a form of sex discrimination.

Moreover, the Pennsylvania Supreme Court has interpreted the state ERA as more protective against sex discrimination than the federal Equal Protection Clause. The Pennsylvania Supreme Court applies a near-absolute ban on

sex discrimination. *See Henderson*, 327 A.2d at 62 ("The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities."). *See generally* Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment,* 3 Widener J. Pub. L. 743, 745 (1994) (calling the Pennsylvania rule an "absolutist interpretation"). This is in contrast to the federal Constitution which applies an intermediate standard of review to sex discrimination. *See, e.g.*, *Nguyen v. I.N.S.,* 533 U.S. 53, 60 (2001).

Of significance, the Pennsylvania Supreme Court developed its sex-discrimination jurisprudence of a near-absolute bar at the exact same time the U.S. Supreme Court was developing its jurisprudence of intermediate scrutiny. *Henderson* was decided in 1974, one year after the U.S. Supreme Court failed to garner five votes for strict scrutiny of sex classifications in *Frontiero*. *See* 411 U.S. at 691 (Powell, J., concurring in judgment) (failing to provide the fifth vote for a majority opinion announcing strict scrutiny). The subsequent Pennsylvania Supreme Court cases endorsing and applying *Henderson*'s "no longer a permissible factor" test came both before and after the U.S. Supreme Court officially announced its much less stringent intermediate scrutiny test in *Craig* in 1976. 429 U.S. at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental

objectives and must be substantially related to achievement of those objectives."). That the Pennsylvania Supreme Court did not embrace the less protective federal standard that was emerging at the same time further supports the conclusion that the Pennsylvania Supreme Court interprets the ERA as providing greater protection against sex discrimination than the U.S. Supreme Court does under the Equal Protection Clause. *See, e.g.*, *Darrin v. Gould*, 540 P.2d 882, 889 (Wash. 1975) ("Had such a limited purpose been intended, there would have been no necessity to resort to the broad, sweeping, mandatory language of the Equal Rights Amendment."); *Doe v. Maher*, 515 A.2d 134, 160-61 (Conn. Super. Ct. 1986) ("To equate our ERA with the [E]qual [P]rotection [C]lause of the [F]ederal [C]onstitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable.").

(c) Case law from other states

There are currently seventeen states that cover abortion in their state Medicaid programs.[10] Twelve of these states provide this coverage because their courts held that excluding abortion violates the state constitution. Among the states that cover abortion are three of the six states that border Pennsylvania—New York, New Jersey, and Maryland. New York and Maryland cover abortion voluntarily,

[10] At the time of the Petition's filing, there were sixteen states that covered abortion in their state Medicaid programs. Pet. ¶ 53. Since then, Maine has added abortion to its Medicaid program, bringing the total to seventeen.

while New Jersey does so under court order. *See Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982).[11]

Of the twelve states that cover abortion because of court order, two have specifically ruled that the exclusion of abortion from their state Medicaid program violated their state's Equal Rights Amendment. *See Doe*, 515 A.2d 134; *N.M. Right to Choose v. Johnson,* 975 P.2d 841, 859 (N.M. 1998). Both of these cases were decided after *Fischer*.

The New Mexico Supreme Court's extensive analysis is particularly instructive here. The court examined the principles behind its own ERA, which is almost identical to Pennsylvania's. *See* N.M. Const. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person."). The court held that this explicit prohibition against sex discrimination goes beyond the federal constitutional standards for sex discrimination and that discrimination against pregnant women is discrimination based on sex. *N.M. Right to Choose*, 975 P.2d at 853-56. That court reasoned that it "would be error to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex." *Id.* at 854. Rather, the court looked beyond the facial classification in the law to whether

[11] Neighbor West Virginia covered abortions under Medicaid through 2018 as the result of a decision from the state's supreme court. *See Women's Health Ctr. of W. Va. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993). A 2018 state constitutional amendment reversed that decision.

the law disadvantaged women. *Id.* The court recognized that the government does not have "the power to turn the capacity [to bear children], limited as it is to one gender, into a source of social disadvantage" and that "women's biology and ability to bear children have been used as a basis for discrimination against them." *Id.* (citations omitted). The court found that the law was facially discriminatory because

> there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department's regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy. . . . Thus, [it] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.

Id. at 856. This well-reasoned opinion is persuasive here given the similarities between the Pennsylvania and New Mexico ERAs. *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination,* 36 Rutgers L.J. 1201, 1249-53 (2005) (explaining the New Mexico decision in detail, including based on several of the factors relevant to an *Edmunds* analysis).

Only one state court other than the Pennsylvania Supreme Court has concluded that its state ERA does not require funding abortion. In *Bell v. Low Income Women of Texas*, the Texas Supreme Court concluded that Texas' state Medicaid abortion ban does not violate its state ERA. 95 S.W. 3d 253 (Tex. 2002).

The Texas Supreme Court relied heavily on *Fischer* to conclude that a classification based on pregnancy is not a classification based on sex. *Id.* at 260-61. However, the Texas Supreme Court put heavy emphasis on the state's unique Medicaid scheme that limits all coverage—not just abortion—to the extent provided under federal law: "As far as we can tell, no other state appeals court that has considered the issue had before it a statute similarly authorizing the provision of services only to the extent federal matching funds are available." *Id.* at 259. The Texas provision at issue "was plainly not directed at abortion funding" because abortions were illegal in Texas at the time of its passage and because the provision prohibited *any* services "unless federal matching funds are available." *Id.* at 261. Thus, the Texas Supreme Court applied the Texas ERA to a law that was fundamentally different from Pennsylvania's Coverage Ban, which is explicitly targeted at abortion.

Moreover, notwithstanding initially noting that the Texas ERA has unique applicability beyond the federal constitution, the Texas Supreme Court applied U.S. Supreme Court precedent to conclude that the state ERA claim did not involve a sex-based classification. *See id.* at 258-64. Thus, although the Texas Supreme Court reached the same conclusion as *Fischer*, its ruling turned on a Texas statutory provision with no Pennsylvania equivalent and was based almost entirely on federal constitutional precedent, rendering it inapposite here.

(d) Policy considerations

The final *Edmunds* factor is policy considerations, including those that are unique to Pennsylvania. The decades since *Fischer* have ushered in a better understanding of the connection between abortion access and women's equality. This connection shows that women need to be able to control their reproductive lives, including having real access to abortion, to be fully equal in society.

While early abortion cases did not draw this connection, more recent ones have. The U.S. Supreme Court recognized the importance of abortion access to women's equality starting with *Planned Parenthood v. Casey*, when it stated that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." 505 U.S. 833, 856 (1992). Justice Ginsburg later wrote for four Justices in dissent in *Gonzales v. Carhart* when she explained that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Commentators have also noted an implicit equality thread throughout the Court's recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole*

Woman's Health, 126 Yale L.J.F. 149, 163 (2016) ("Concern for protecting women's liberty, equality, and dignity guides the majority's close scrutiny . . . .").

Thus, while at the time of *Fischer* American abortion jurisprudence had little recognition of the importance of abortion access to women's equality, that has changed in the decades since. When women do not have access to abortion as an option in controlling their reproductive lives, they are not able to participate fully and equally in all aspects of society. *See generally* Pet. ¶¶ 56-83. *Fischer* did not address this aspect of equality, but the years since have shown its vitality.

Furthermore, there has been voluminous empirical research published in the decades following *Fischer* showing the serious impact the Medicaid exclusion has on indigent women. As detailed in the Petition and the five supporting expert affidavits filed with it, which must be accepted as true for purposes of considering these preliminary objections, modern evidence proves that denying indigent women access to abortion by prohibiting Medical Assistance from paying for it has devastating effects on their lives. Pet. ¶¶ 56-83; Expert Decl. of Colleen M. Heflin, Pet. Ex. A; Expert Decl. of Elicia Gonzales, Pet. Ex. B; Expert Decl. of Terri-Ann Thompson, Pet. Ex. C; Expert Decl. of Courtney Ann Schreiber, Pet. Ex. D; Expert Decl. of Sarah C. Noble, Pet. Ex. E. As a result of the Coverage Ban, it is estimated that one quarter of Pennsylvania women who would

otherwise choose to have an abortion are forced to carry their pregnancies to term. Pet. ¶¶ 63, 64.

When women are forced to carry an unwanted pregnancy to term, they are denied control over whether or not to have children, their plans for the future, their financial status, and their ability to participate equally in society. *Id.* ¶ 65. Their education will be interrupted, and their job and career prospects circumscribed. *Id.* ¶ 66. Research indicates that, as a result, one year after unsuccessfully seeking an abortion, they are more likely to be impoverished, unemployed, and depressed than women in similar circumstances who were able to obtain abortion care. *Id.*

Moreover, when denied a wanted abortion, women are more likely to suffer physical and mental health problems. The risk of death is fourteen times higher for carrying a pregnancy to term than it is for abortion, and African-American women have a maternal mortality rate that is three times that of white women. *Id.* ¶ 67. This risk is particularly acute in Pennsylvania, where almost thirteen women die within forty-two days of the end of pregnancy for every 100,000 live births in the state, a rate that has doubled since 1994. *Id.* ¶ 68.

Short of death, pregnancy poses other health risks, such as permanent disability, weakened immune system, threats to every major organ in the body, exacerbation of pre-existing conditions, and life-threatening medical conditions

such as preeclampsia and eclampsia. *Id.* ¶¶ 69-72. Continuing a pregnancy also threatens women's mental health, as pregnancy and childbirth can lead to increased vulnerability to mental health issues. *Id.* ¶ 73. In particular, denying a wanted abortion can result in women suffering severe psychological distress because they are forced to live for months with continuing an unwanted pregnancy. *Id.* ¶ 74. Finally, they are also subject to the physical and emotional risks of interpersonal violence, which can increase when a woman becomes and stays pregnant. *Id.* ¶ 75.

Women on Medical Assistance who are nonetheless able to get an abortion also suffer because of the Coverage Ban. Women who are in deep poverty, which includes by definition almost everyone on Medical Assistance, can be pushed even deeper into poverty by having to pay for the abortion and other related costs, such as transportation, overnight housing, and childcare. *Id.* ¶¶ 77-79. Raising money takes time, which delays the abortion, thus increasing the price and also increasing the risk of complications. *Id.* ¶¶ 80-81.

The harms described here do not fall evenly on Pennsylvania women. Women of color in Pennsylvania are more likely to be poor than white women and are more likely to rely on Medical Assistance for health care. *Id.* ¶ 83. Thus, they are less able to afford out-of-pocket costs for their abortion compared with their white counterparts. *Id.*

This empirical research about the impact of the Coverage Ban on women's health and life is essential to a full *Edmunds* analysis in this case. Almost all of the research supporting these conclusions was conducted and published long after *Fischer*. Moreover, the research supports the policy developments noted by the U.S. Supreme Court in its recent caselaw—that abortion access is essential to women's equality.

The foregoing compels the conclusion that *Fischer*'s ERA analysis was wrong. It was flawed the day it was decided. Moreover, since then, the Pennsylvania Supreme Court has changed its framework for evaluating unique state constitutional provisions, and an independent and modern assessment of the issues under the *Edmunds* factors indicates that the ERA prohibits the Coverage Ban because it is an unjustifiable sex-based classification. For these reasons, DHS's and the House and Senate Intervenor-Respondents' preliminary objections to Petitioner's ERA claim based on *Fischer* should be overruled.

B. THE COVERAGE BAN VIOLATES THE PENNSYLVANIA CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION.

DHS and the House and Senate Intervenor-Respondents assert that *Fischer* also conclusively decided Petitioners' equal protection claim. But *Fischer* misread the fundamental equal protection interest by declaring that the Coverage Ban "does not concern the right to an abortion," 502 A.2d at 116, and instead

limited its inquiry to "the purported right to have the state subsidize the individual exercise of a constitutionally protected right," *id*. at 121. *Fischer*'s formulation of the equality-based right here is wrong, as Petitioners do not assert a generalized right to state subsidy. Rather, Petitioners seek a right to have constitutionally protected decisions subsidized *equally*. In other words, *if* pregnancy and childbirth are covered, abortion must be *as well*.

In construing the equal protection interest so narrowly, *Fischer* failed to examine the Coverage Ban under the Pennsylvania Constitution's equal protection provisions. Instead, *Fischer* simply adopted the U.S. Supreme Court decisions in *Maher v. Roe*, 432 U.S. 464, 479 (1977), and *Harris v. McRae*, 448 U.S. 297, 316-17 (1980),[12] even though it was not bound by either case. Demonstrably, a review of Petitioner's equal protection claim under the *Edmunds* factors supports a more expansive reading of the state Constitution's equal protection provisions than its federal counterpart—a consideration *Fischer* did not undertake. And that analysis should depart from the flawed reasoning in *Harris v.*

[12] In *Maher v. Roe*, the U.S. Supreme Court held that a state could restrict its Medicaid program from paying for abortions while at the same time fully cover expenses related to childbirth without violating the equal protection clause of the U.S. Constitution. 432 U.S. at 479. Similarly, in *Harris v. McRae*, the Court held that it was constitutional for Congress to restrict federal funding to cover abortion only in life threatening situations and that the different treatment of the protected right to carry a pregnancy and the protected right to terminate a pregnancy did not violate freedom of choice because "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." 448 U.S. at 316-17.

McRae and *Maher v. Roe* to find the Coverage Ban violates the Pennsylvania Constitution.

1. Pennsylvania's Equal Protection Provisions

Although there is no express equal protection provision in the Pennsylvania Constitution, the Supreme Court has gleaned equal protection principles from other provisions. *See William Penn Sch. Dist.*, 642 Pa. at 242 n.3. In *Love v. Borough of Stroudsburg*, the Court described Article I, Sections 1 and 26, and Article III, Section 32 as the "equal protection provisions of the Pennsylvania Constitution." 597 A.2d 1137, 1139 (Pa. 1991). Article I, Section 1 guarantees the inherent rights of mankind, and states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. art. I, § 1. Article I, Section 26 guarantees no discrimination by the Commonwealth and its political subdivisions, and 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. Article III, Section 32 provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided by general law.

Pa. Const. art. III, § 32. These provisions collectively guarantee equal protection of the law and prohibit discrimination based on the exercise of a fundamental right. *Love*, 597 A.2d at 1139.

The Pennsylvania Supreme Court has distinguished the analytical framework to be used in considering equal protection claims from their substantive construction. Long-standing and oft-cited precedent from the Pennsylvania Supreme Court indicates that the equal protection provisions of the Pennsylvania Constitution are analyzed under the same framework applied under the U.S. Constitution to review equal protection claims under the Fourteenth Amendment of the federal Constitution. The Pennsylvania Supreme Court has stated that review of equal protection claims begins with defining the interest at stake:

> Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type—classifications implicating neither suspect classes nor fundamental rights—will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made *or a fundamental right has been burdened*, another standard of review is applied: that of strict scrutiny. Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.

Id. at 1139 (emphasis added) (quoting *James v. Southeastern Pa. Transp. Auth.*, 505 Pa. 137, 145 (1984)). Notably, although Pennsylvania courts track the judicial review framework used to analyze equal protection claims under the federal Constitution, the Pennsylvania Supreme Court recently noted the similarities do not conclusively determine the outcome of state equal protection claims under the state constitution. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 812-13 (Pa. 2018).

2. A Woman's Right to Terminate Her Pregnancy is Firmly Embedded in the State Constitution's Inherent Rights and Its Explicit Concepts of Liberty and Pursuit of Happiness.

The Pennsylvania Constitution contains distinct and broader rights than those provided in the Fourteenth Amendment of the federal Constitution. It begins with its Declaration of Rights, which is entitled "Inherent rights of mankind":

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. art. I, § 1. The framers of the state constitution were mindful that certain rights are reserved to the people (*e.g.*, "[a]ll men are created equally free and independent, and have certain inherent and indefeasible rights"), and these rights exist regardless of the laws enacted by the state. *League of Women Voters of Pa.*,

178 A.3d at 803 (emphasizing the Declaration of Rights "is an enumeration of the fundamental individual rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish"). While Article I, Section 1 lists five fundamental rights—life, liberty, property, reputation, and pursuit of happiness—the framers made clear that they are *among* a non-exhaustive list of fundamental rights.

The Pennsylvania Supreme Court, in construing this provision, has recognized that an implicit right to privacy is located among the constitutional guarantees included in Article I, Section 1. Over fifty years ago, the Pennsylvania Supreme Court stated that the right to privacy is rooted in people's "inherent and indefeasible rights" to pursue their own happiness. *See Commonwealth v. Murray*, 223 A.2d 102, 109 (Pa. 1966) (plurality opinion) ("One of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back."). In recognizing that Article I, Section 1 embodies a strong commitment to individual privacy, the *Murray* Court explained how the right to privacy is intrinsically linked to one's dignity and liberty:

> The greatest joy that can be experienced by mortal man is to feel himself master of his fate,--this in small as well as big things. Of all the precious privileges and prerogatives in the crown of happiness which every American citizen has the right to wear, none shines with greater luster and imparts more innate satisfaction and soulful contentment

> to the wearer than the golden, diamond-studded right to be let alone. Everything else in comparison is dross and sawdust.

Id. at 110.

Since *Murray*, the Pennsylvania Supreme Court has identified two components of privacy: "(1) a freedom from disclosure of personal matters and (2) freedom to make certain important decisions." *Denoncourt v. Commonwealth, State Ethics Comm'n*, 470 A.2d 945, 948 (Pa. 1983). More recently, in a case involving Pennsylvania's Right to Know Law, the Pennsylvania Supreme Court noted that the state constitution provides "more rigorous and explicit protection for a person's right to privacy" than does the federal Constitution. *See Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 151 (Pa. 2016) (quoting *In re "B"*, 394 A.2d 419, 425 (Pa. 1978)).

In defining rights to informational privacy, the Pennsylvania Supreme Court has held that a mother's privacy rights barred forced disclosure of a psychological evaluation in a dependency hearing. *In re "B"*, 394 A.2d at 425 (observing that the records contain "the patient's most intimate emotions, fears, and fantasies"). The Court concluded that the right to prevent disclosure of personal information derives from "the penumbras of the various guarantees of the Bill of Rights, *Griswold v. Connecticut*, as well as from the guarantees of the Constitution of this Commonwealth," and relied on Article I, Sections 1 and 26.

Id.; *see also In re June 1979 Allegheny Cty. Investigating Grand Jury*, 415 A.2d 73, 77 (1980) (stating that the right to informational privacy "finds explicit protection in the Pennsylvania Constitution, Art. I, § 1."). Similarly, in *In re T.R.*, the Pennsylvania Supreme Court reiterated that privacy rights protected under the state constitution prohibit disclosure of court ordered psychological evaluations, stating that "[c]ompelling a psychological examination . . . is nothing more or less than social engineering in derogation of constitutional rights." 731 A.2d 1276, 1281 (Pa. 1999).

Moreover, individuals have a protected privacy interest in independent decision-making over important and personal matters—such as decisions about marriage, family formation, and child rearing. In *Commonwealth v. Bonadio*, the Pennsylvania Supreme Court held that a statute criminalizing voluntary "deviate sexual intercourse" infringed upon the Pennsylvania Constitution's equal protection guarantees, specifically the right to liberty. 415 A.2d 47, 50-52 (Pa. 1980). Importantly, the Court remarked that "the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others." *Id.* at 50 (plurality opinion). Beyond this statement, the Pennsylvania Supreme Court has held that an individual's privacy rights extend to the right to engage in extramarital

sex, *see Fabio v. Civil Service Comm'n of City of Phila.*, 414 A.2d 82, 89 (Pa. 1980), and in preserving one's bodily integrity, *see John M. v. Paula T.*, 571 A.2d 1380, 1386 (Pa. 1990). Although this right is not absolute, "only a compelling state interest will override one's privacy right." *See Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796, 802 (Pa. 1992).

The robust privacy rights embodied in the Pennsylvania Constitution encompass the rights to personal autonomy and bodily integrity, which include the right to decide whether or not to continue a pregnancy. Indeed, for a woman to be "master of [her] fate" and freely pursue her own happiness, she must be able to control her reproductive life. *Murray*, 223 A.2d at 110 ("The greatest joy that can be experienced by mortal man is to feel himself master of his fate . . . ."); *see also* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 27-28 (1997). The decision of whether or not to form a family is among the most personal, important decisions a woman can make in her lifetime; it can profoundly alter every aspect of her life, including her health, education, employment, economic stability, and family dynamics. Denying women the ability to decide whether or not to continue a pregnancy denies them bodily autonomy, privacy, and equal opportunity to participate in society. *See supra* Part V.A.2.d.

Indeed, other state supreme courts have reached this conclusion in interpreting similar constitutional guarantees of privacy and/or equality to afford greater protection for abortion than the federal Constitution. *See* Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 Wm. & Mary J. Race, Gender & Soc. Just. 469, 499-510 (2009) (collecting cases). In 1981, for example, the Massachusetts Supreme Judicial Court noted that the right to abortion is located in the protected guarantees of privacy in the state constitution, which it has interpreted to protect rights beyond the federal Constitution. *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981). In recognizing the right to abortion, the court explained that it is "but one aspect of a far broader constitutional guarantee of privacy" linked to a person's strong interest in "self-determination" and "being free from nonconsensual invasion of [her] bodily integrity." *Id.* at 398-99 (citations omitted).

The Supreme Court of Iowa also recognized abortion as a fundamental right implied in the state constitution's explicit concepts of liberty. *See Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 237 (Iowa 2018). The court held that the right to personal autonomy is rooted in the right to dignity and liberty:

> Autonomy and dominion over one's body go to the very heart of what it means to be free. At stake in this case is the right to shape, for oneself, without unwarranted governmental intrusion, one's own identity, destiny, and

> place in the world. Nothing could be more fundamental to the notion of liberty. We therefore hold, under the Iowa Constitution, that implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy.

Id.

Just last year, the Kansas Supreme Court recognized that the Kansas Bill of Rights and its explicit right to liberty and pursuit of happiness grant women a right to personal autonomy, which includes the right to terminate a pregnancy. *See Hodes & Nauser v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019). The court stated:

> At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life. Each one of us has the right to make self-defining and self-governing decisions about these matters.

Id. at 484. The court's analysis favorably cited other state court decisions that have reviewed broader or similar state constitutional provisions, including the Pennsylvania Supreme Court's decision in *Commonwealth v. Murray*. *See id.* at 482.

3. The Medicaid Coverage Ban Discriminates Against Women Who Choose to Exercise Their Fundamental Right by Favoring the Choice to Continue a Pregnancy but not the Choice to Terminate a Pregnancy.

Fischer erred in construing the right implicated by the Coverage Ban to be an alleged entitlement to public benefits when it analyzed the issue in lockstep with the reasoning behind the U.S. Supreme Court's decision in *Harris v. McRae*. Instead, the correct inquiry, which *Fischer* did not undertake, is whether the state may selectively refuse to cover one option within a constitutionally protected decision (abortion) while covering the other (continued pregnancy and childbirth), solely because the state morally objects. *Cf. Bonadio*, 415 A.2d at 50 (stating that the state cannot "enforce a majority morality" at the expense of an "individual's right to be free from interference in defining and pursuing his own morality").

Contrary to *Fischer* and the arguments put forth by DHS and Senate and House Intervenor-Respondents, Petitioners do not argue in their equal protection claim that the Pennsylvania Constitution compels the state to fund abortions. Far from it. Rather, Petitioners argue that if the Commonwealth chooses to establish a Medical Assistance program for medically necessary services for low-income Pennsylvanians (which the Commonwealth is not required to do), it cannot choose to cover one way of exercising a fundamental right but then omit

covering a different way to exercise that same right. Stated more specifically, the Commonwealth cannot fund all of the expenses associated with continuing a pregnancy and none of the expenses for terminating a pregnancy because this discriminatory coverage infringes on the fundamental right of reproductive choice, thus violating the equal protection provisions of Article I, Sections 1 and 26, and Article III, Section 32.

Fischer not only fails at the abstract analytical level, but also ignores the practical realities of the women impacted by the Coverage Ban. Similarly, DHS and the Intervenor-Respondents wholly ignore the real-world context in which the Coverage Ban operates. Women with financial means will always have the right to choose and access abortion, regardless of state created obstacles like the Coverage Ban. Women eligible for and enrolled in Medicaid, however, are by definition poor and lack the financial resources to afford medical services absent support from the state's Medical Assistance program. The Coverage Ban forces low-income women seeking abortion to choose between continuing an unwanted pregnancy and using money that they would have otherwise used for daily necessities, such as shelter, food, clothing, electricity or diapers, to pay for the procedure. Pet. ¶ 79. And some low-income women will not have the money to do so and will be forced by the Coverage Ban to carry their pregnancies to term against their wishes. *Id.* ¶¶ 63-64.

The coercive nature of the Coverage Ban should not be ignored; it preys on the economic hardship of low-income women through a discriminatory funding scheme with the intent to ensure they exercise a reproductive choice aligned with the moral beliefs of the state.[13] Thus, the Coverage Ban interferes with a woman's right to terminate her pregnancy by adding state-created financial constraints into her decision-making process.

Indeed, a majority of state courts that have reviewed similar coverage restrictions for abortion services declined to follow the U.S. Supreme Court in *Harris v. McRae* and *Maher v. Roe*. These courts have ruled that denying poor women coverage for abortion while fully funding childbirth is coercive and violates their right to reproductive choice under their respective state constitutions. *See, e.g.*, *Alaska v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001) ("[W]hile the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise

[13] Other state courts have drawn considerable attention to the coercive nature of the funding restrictions as an impingement on women's reproductive decision-making. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 29 (Minn.1995) ("[T]he discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions") (quoting *Harris*, 448 U.S. at 333-34 (Brennan, J., dissenting)); *Panepinto*, 446 S.E.2d at 667 ("[T]he state's offer of subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her federally-protected choice"); *Moe*, 417 N.E.2d at 402 ("[I]njecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity." (quoting *Harris*, 448 U.S. at 333 (Brennan, J., dissenting)).

of a fundamental right." (quoting *Moe*, 417 N.E.2d at 401)); *Doe*, 515 A.2d at 162 ("The Connecticut equal protection clauses require the state when extending benefits to keep them free of unreasoned distinctions that can only impede [the] open and equal exercise of fundamental rights." (citation omitted)); *Byrne*, 450 A.2d at 935 ("Once [the legislature] undertakes to fund medically necessary care attendant upon pregnancy [the] government must proceed in a neutral manner."); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798 (Cal. 1981) ("Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion."). Part of the analysis in these decisions has been a recognition of the ways in which funding restrictions increase existing barriers for low-income women accessing abortion and undermine their ability to exercise reproductive choice. *See, e.g.*, *Comm. to Defend Reprod. Rights*, 625 P.2d at 793 (examining how funding restriction exacerbated existing obstacles to accessing abortion).

4. The Pennsylvania Constitution Requires a Compelling Justification to Warrant the Distinction of Coverage of Medical Services to Continue a Pregnancy and to Terminate a Pregnancy.

Because it did not correctly perceive the interests at stake, *Fischer* applied rational basis review to the Coverage Ban and opined that the Ban would also have passed intermediate scrutiny. *See Fischer*, 502 A.2d at 122-23. However, when a statute impinges upon the exercise of a fundamental right, a higher

standard of review is triggered. As the Pennsylvania Supreme Court explained, when "a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny." *Love*, 597 A.2d at 1139.

Strict scrutiny requires the government classification to be "narrowly tailored and [] necessary to achieve a compelling state interest." *Klein v. Commonwealth*, 555 A.2d 1216, 1225 (Pa. 1989). Because the Coverage Ban not only impinges on a woman's fundamental right to terminate a pregnancy, but also selectively denies a benefit on the basis of low-income women exercising their fundamental right to abortion, the Pennsylvania Constitution requires the state to show that the statute is necessary to advance a compelling state interest and it is narrowly tailored to achieve those means, which it cannot do in the instant case.

The asserted state interest is preservation of potential life.[14] Even assuming this interest is compelling throughout pregnancy, the state's interest in the potential life of a fetus can never justify overriding the health and well-being of the pregnant woman. As the record demonstrates, there are numerous risks and complications associated with pregnancy that may not rise to the level of life endangerment yet have a profound impact on a woman's health and well-being. *See* Pet. ¶¶ 65-75. The state's interest in promoting childbirth cannot outweigh a

[14] The Coverage Ban cannot be deemed to serve as a legitimate cost-saving effort in reducing the state's costs in providing medical assistance because the costs associated with continuing a pregnancy to term—which are fully covered by Medical Assistance—greatly exceed the expenses associated with terminating a pregnancy.

woman's constitutionally protected interests in preserving her own health and privacy. *Fischer* wrongly omitted from its analysis the woman's interest in her health, bodily integrity, and privacy rights when it concluded the Coverage Ban would withstand heighted scrutiny. 502 A.2d at 122-23.

Indeed, other state courts that have analyzed similar funding restrictions under heightened standards of review find that women's health and well-being always come first. *See, e.g.*, *Byrne*, 450 A.2d at 937 ("A woman's right to choose to protect her health by terminating her pregnancy outweighs the State's asserted interest in protecting a potential life at the expense of her health."); *see also Comm. to Defend Reprod. Rights*, 625 P.2d at 781 ("[T]he asserted state interest in protecting fetal life cannot constitutionally claim priority over the woman's fundamental right of procreative choice."); *Doe*, 515 A.2d at 157 (concluding that under the federal and state constitution the government's interest in protecting potential life "cannot outweigh the health of the woman at any stage of the pregnancy"); *Planned Parenthood of Alaska*, 28 P.3d at 913 ("[A]lthough the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.").

This analysis shows that *Fischer* was also wrong about equal protection. Framing the right at issue properly—not as a right to subsidized abortions but rather as a right to equal treatment of constitutionally-protected

choices—shows that the Coverage Ban burdens a fundamental right in violation of the equal protection of the Pennsylvania Constitution. For these reasons, DHS's and the House and Senate Intervenor-Respondents' preliminary objections to Petitioner's equal protection claim based on *Fischer* should be overruled.

C. DHS'S PRELIMINARY OBJECTION AS TO PETITIONERS' STANDING SHOULD BE OVERRULED.[15]

This Court has long recognized the principle of third-party standing. *See, e.g.*, *Harrisburg School Dist. v. Harrisburg Educ. Ass'n*, 379 A.2d 893 (Pa. Commw. Ct. 1977); *Pa. Dental Ass'n v. Dep't of Health*, 461 A.2d 329 (Pa. Commw. Ct. 1983). While DHS states in its Preliminary Objections that "[a] party generally has no standing to attempt to vindicate the alleged constitutional rights of third parties," DHS Prelim. Objs. ¶ 10, this Court has held that this principle gives way in exactly the circumstance at issue here: when medical professionals bring a claim on behalf of their patients. Therefore, well-established precedent from this Court requires the conclusion that Petitioners have third-party standing to challenge the Coverage Ban.

[15] DHS's Preliminary Objections claim that Petitioners lack standing to sue on their own behalf. DHS Prelim. Objs. ¶ 14. Nowhere in the Petition do Petitioners indicate they are suing on their own behalf. To the contrary, the Petition clearly states that "Petitioners sue on behalf of their patients who seek abortions and who are enrolled in or eligible for Medical Assistance, but whose abortions are not covered because of the Pennsylvania coverage ban." Pet. ¶ 39. Therefore, this is a case of third-party standing with no claim of Petitioners' standing on their own behalf.

1. Long-Standing Precedent from this Court Establishes that Petitioners Have Third-Party Standing in this Case.

DHS's assertion that Petitioners do not have standing because they are asserting the claims of their patients ignores clear precedent from this Court that medical care providers can bring claims on behalf of the patients they serve. In *Pennsylvania Dental Association*, this Court held that a professional association of dentists had standing to raise constitutional issues on behalf of dental patients. 461 A.2d 329. In that case, the Department of Health made the same argument DHS advances here: that medical care providers have no standing to raise the constitutional rights of their patients. *Id.* at 331. This Court rejected that argument, holding that the dentists can bring their patients' constitutional claims because the dentists are responsible for protecting their patients' privacy interests. *Id.*

Pennsylvania Dental Association applied the principles of third-party standing this Court developed in *Harrisburg School District*. In that case, this Court approved the principle of third-party standing, 379 A.2d at 896 ("We adopt this rule for standing to assert third party constitutional rights."), though the case ultimately held that there was no third-party standing for its particular facts because the school district plaintiff and the school board third party were not closely enough related nor was there an obstacle to school board members asserting their own rights. *Harrisburg School District* and *Pennsylvania Dental*

Association clearly demonstrate that DHS has misrepresented the law of standing before this Court. *See* DHS Br. 15 ("[A] party does not have standing where it seeks to vindicate the rights of another.").

These two cases mandate a finding of standing here. This Court allowed dentists to assert the interests of their patients in *Pennsylvania Dental Association* just as Petitioners here are asserting the interests of their patients. Moreover, this Court's rejection of third-party standing for a school district representing the interests of the school board in *Harrisburg School District* has no application because, as *Pennsylvania Dental Association* explains, medical care professionals that sue on behalf of their patients have a much closer relationship and raise unique privacy interests not present with a school board. Petitioners are in the same position as the dental association and have standing under this clear precedent.[16]

---

[16] Moreover, in a case almost identical to this one, an evenly divided *en banc* panel of this Court rejected preliminary objections regarding third-party standing. In *Fischer v. Department of Public Welfare*, the agency claimed that abortion providers did not have standing to challenge a ban on medical assistance funding for abortion. Three of the six *en banc* judges ruled that an abortion provider had third-party standing to challenge a ban on medical assistance funds covering abortion. 444 A.2d 774, 781-82 (Pa. Commw. Ct. 1982). (This iteration of the *Fischer* litigation was never appealed to the Pennsylvania Supreme Court. In the subsequent *Fischer* cases, the Commonwealth waived objections based on standing. *See Fischer v. Dep't of Pub. Welfare*, 482 A.2d 1137, 1139 n.11 (Pa. Commw. Ct. 1984).) Though this ruling has only persuasive value rather than binding precedent because of the evenly divided Court, *see Commonwealth v. Covil*, 378 A.2d 841, 844 (Pa. 1977), it is consistent with this Court's previous cases regarding third-party standing.

This 1982 *Fischer* decision also supports third-party standing for Petitioners, because the judges who rejected standing in *Fischer*'s three-three decision did so for reasons inapplicable to

This Court's third-party standing jurisprudence has been developed in light of the U.S. Supreme Court's decision in *Singleton v. Wulff*. *See Harrisburg Sch. Dist.*, 379 A.2d at 896 (explicitly adopting *Singleton*). *Singleton*, a plurality opinion from the U.S. Supreme Court addressing the exact same situation as Petitioners' case, allowed abortion providers to assert the constitutional rights of their patients in challenging a state's ban on Medicaid coverage of abortion. 428 U.S. 106 (1976). As an initial matter, the Court found that the providers had met the basic requirements of standing, having suffered concrete injury in being denied payment for abortions through the state's Medicaid program. *Id*. at 112-13 (labeling the "relationship between the parties" as "classically adverse"). The Court then found that the providers could raise their patients' claims because the lawsuit met the two requirements for third-party standing: (a) that "the enjoyment of the [third party's] right is inextricably bound up with the activity the litigant wishes to pursue," and (b) there is a "genuine obstacle" to the third-party asserting their own rights. *Id.* at 114-16.

---

this case. Those judges rejected standing only to the extent the abortion providers were challenging a 72-hour reporting requirement for rape and incest victims to obtain abortion funding and because the abortion provider had no injury other than that a general taxpayer would have. *Fischer*, 444 A.2d at 779. Here, unlike in *Fischer*, Petitioners have extensively detailed how they themselves are harmed by the funding ban, *see* Pet. ¶¶ 84-87, which this Court must accept as true at this stage of the case. Therefore, the three-judge opinion rejecting standing in *Fischer* is not applicable here. Rather, the three-judge opinion finding the abortion providers had third-party standing, which is consistent with *Pennsylvania Dental Association*, is the applicable authority from that case.

The U.S. Supreme Court found both of these elements present. As to the closeness of the relationship, the Court explained that a patient cannot obtain an abortion without the abortion provider, making the provider "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Id.* at 117. As to the patient obstacles, the Court recognized two barriers: the threat to the patient's privacy from the inevitable publicity in a high profile lawsuit and the impending mootness of the case given the short-lived nature of the window to have an abortion. *Id.* at 117-18. Therefore, the Court concluded that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 118. Because Petitioners here are, as in *Singleton*, also abortion providers challenging the ban on funding abortion through the state's public health insurance program, that case, which has been adopted by the Commonwealth Court, also mandates that this preliminary objection be overruled.

2. Recognizing Petitioners' Third-Party Standing Is Consistent with the Supreme Court's General Standing Doctrine.

The Pennsylvania Supreme Court has applied its general standing doctrine in contexts similar to this one. The general rule of standing in Pennsylvania is that litigants can bring suit when they have a substantial, direct, and immediate interest in the matter being litigated. *William Penn Parking Garage,*

Inc. v. City of Pittsburgh, 346 A.2d 269, 286 (Pa. 1975).[17] Explaining each part of this test, the Supreme Court has written:

> In order to be substantial, there must be some discernible effect on some interest other than the abstract interest all citizens have in the outcome of the proceedings. In order to be direct, the party must show some causation of harm to his interest. In order to be immediate, there must be a causal connection between the action complained of and the injury to the person challenging it.

Spahn v. Zoning Bd. of Adjustment, 977 A.2d 1132, 1151 (Pa. 2009). Unlike constitutionally-required standing rules in federal court, Pennsylvania's standing rule is "a prudential, judicially-created tool meant to winnow out those matters in which the litigants have no direct interest in pursuing the matter." *In re Hickson*, 821 A.2d 1238, 1243 & n.5 (Pa. 2003).

Without stating so explicitly, the Supreme Court has applied these principles in the context of third-party standing and has done so without crafting any additional requirements. In *William Penn Parking* itself, the Court held that nine parking lot operators could challenge a Pittsburgh tax on behalf of a third party, parking lot customers who would have to pay the tax. 346 A.2d at 289-90. The Court held that the parking lot operators were aggrieved by the impact on the

[17] *William Penn Parking* is a plurality decision but nonetheless has been cited repeatedly by the Supreme Court as the essential statement of standing for Pennsylvania. *See, e.g.*, *Johnson v. Am. Standard*, 8 A.3d 318, 330 (Pa. 2010) (referring to *William Penn Parking* as "seminal"); *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009); *Application of Biester*, 409 A.2d 848, 851 (Pa. 1979). For example, in this case this Court has already cited *William Penn Parking* as establishing the basic rule of standing in Pennsylvania. *Allegheny Reproductive Health Ctr. v. Pa. Dep't of Human Servs.*, 225 A.3d 902 (Pa. Commw. Ct. 2020).

transaction between them and their customers because "the effect of the tax upon their business is removed from the cause by only a single short step." *Id.*

Importantly, in *William Penn Parking* the Court cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Truax v. Raich*, 239 U.S. 33 (1915), as persuasive authority. In both cases, the U.S. Supreme Court allowed the plaintiffs to assert the constitutional claims of a third party—in *Pierce* allowing private schools to assert the constitutional rights of parents who wanted to send their children to the schools, 268 U.S. at 536, and in *Truax* allowing a non-citizen to assert the rights of an employer who was forbidden from employing too high a percentage of non-citizens, 239 U.S. at 38-39. The Pennsylvania Supreme Court described both of these cases as involving the essence of third-party standing—a "regulation [that] was directed to the conduct of persons other than the plaintiff." 346 A.2d at 289.[18]

The Pennsylvania Supreme Court has also applied the basic standing principles in other third-party standing cases. Most relevant, in *In re Hickson*, 821 A.2d 1238 (Pa. 2000), the Court found that an attorney lacked standing to seek judicial review of the district attorney's disapproval of the attorney's private

[18] Indeed, both *Pierce* and *Truax* are widely considered early examples of the doctrine. Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 287 (1984) (stating that "these cases are now widely understood as early illustrations of jus tertii [third-party] standing"); *Singleton*, 428 U.S. at 118 n.7 (listing *Pierce* as an example of the U.S. Supreme Court allowing "jus tertii assertion" of standing).

criminal complaint against state parole agents who shot and killed a man who had no relationship to the attorney. *Id.* at 1245-46. The Court rejected the attorney's standing not because the Court rejected the idea of third-party standing but rather because the basic standing requirements applied in his case but he did not meet them. *Id.* at 1243 ("After careful consideration, we hold that traditional standing principles are equally applicable."). The Court explained that this attorney had "not established any peculiar, individualized interest in the outcome of the litigation that is greater than that of any other citizen." *Id.* at 1245. While the Court made clear that *this* plaintiff did not have third-party standing, it recognized that *other* plaintiffs who raise a claim of third-party standing would be judged by whether the injury was substantial, direct, and immediate. *Id.* In fact, the Court refused to limit the possible group of people who could have standing in that particular type of case to victims, families, or personal representatives because, as it explained, "it is possible that other individuals who are not related to the victim may be able to [meet the standing test]." *Id.* Thus, without using the term "third-party standing," the Supreme Court in *Hickson* recognized the existence of third-party standing claims and held that they would be judged against the traditional *William Penn Parking* test.

Application of the Pennsylvania Supreme Court's *William Penn Parking* factors supports third-party standing here. Like the effect on the plaintiffs

in *William Penn Parking* itself, the effect of the Coverage Ban on the abortion provider "is removed from the cause by only a single short step." 346 A.2d at 289. This close causal connection puts Petitioners in a position different than any other Pennsylvanian and gives them a "direct interest in pursuing the matter." *In re Hickson*, 821 A.2d at 1243. Petitioners' interests are thus substantial, direct, and immediate, giving them standing here to bring the constitutional claims of their patients. Accordingly, DHS's third-party standing preliminary objection should be overruled.

D. HOUSE INTERVENOR-RESPONDENTS' PRELIMINARY OBJECTION AS TO SEPARATION OF POWERS SHOULD BE OVERRULED.

House Intervenor-Respondents raise a separate preliminary objection that a ruling on Petitioners' behalf would contravene principles of separation of powers. They argue that striking down the Coverage Ban as unconstitutional would allow DHS, which is part of the executive branch, to usurp the functions of the legislative branch, since the General Assembly has explicitly refused to fund abortion under Medical Assistance. House Br. 12-14.

This preliminary objection misunderstands the nature of constitutional provisions such as the Equal Rights Amendment and the equal protection provisions and how they limit legislative power. The Pennsylvania Supreme Court has made this perfectly clear. In a case seeking to force the General Assembly to

fund county judicial systems in compliance with the Pennsylvania Constitution, the General Assembly raised a similar objection, claiming that an order from the Supreme Court requiring it to appropriate money in compliance with the Constitution would violate principles of separation of powers. *Pa. State Ass'n of County Comm'rs v. Commonwealth*, 681 A.2d 699 (Pa. 1996). In that case, the Supreme Court explained what has been fundamental since *Marbury v. Madison*, 5. U.S. (1 Cranch) 137 (1803)—the principle of separation of powers "does not insulate the legislature from this court's authority to require the legislative branch to act in accord with the Constitution." 681 A.2d at 703. Put differently, other than the political question doctrine (which has not been raised as an issue in this case), "the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers." *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977).

House Intervenor-Respondents' support for their argument involves sleight of hand. They quote a passage from *Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Commw. Ct. 2010), to support their argument that this Court cannot interfere with the General Assembly's powers. House Br. 13. However, in doing so, they omit an explanatory footnote at the end of that passage which cites directly to *Pennsylvania State Association of County Commissioners* and recognizes that courts *can* interfere with the legislative function of appropriation when there are "compelling

circumstances." *Finn*, 990 A.2d at 106 n.4. Indeed, one such compelling circumstance is acting in accordance with the Constitution, as the footnote recognizes by referencing the page from *Pennsylvania State Association of County Commissioners* (quoted from above) that says exactly that. 681 A.2d at 703.

Petitioners seek nothing more than what is at the heart of the judicial power—to evaluate statutes and regulations for their compliance with the state constitution and declare unconstitutional those that fail this evaluation. As the Pennsylvania Supreme Court has described this power, "it is the duty of the courts to invalidate legislative action repugnant to the constitution." *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981). Therefore, this Court has not just the authority but the duty to strike down laws of the General Assembly that fail to comply with the Constitution, and the House Intervenor-Respondents' preliminary objection to the contrary should be overruled.

E. HOUSE INTERVENOR-RESPONDENTS' PRELIMINARY OBJECTION AS TO FEDERAL PREEMPTION SHOULD BE OVERRULED.

House Intervenor-Respondents claim that Petitioners ask this Court to overturn federal law, something that this Court has no power to do. House Br. 11. This is a gross misreading of Petitioners' requested relief and a basic failure to understand how principles of federalism operate here. A plain reading of the Petition in this case indicates that Petitioners ask this Court to declare a

Pennsylvania statute unconstitutional and enjoin its enforcement.[19] Pet. (Wherefore clause). Nowhere in the Petition do Petitioners seek to declare the federal ban on abortion funding unconstitutional and enjoin its enforcement. Doing so would violate basic principles of constitutional law. U.S. Const. art. VI, cl. 2.

House Intervenor-Respondents appear to argue that, because the language of 18 Pa. C.S. §§ 3215(c), (j) prohibits the Commonwealth from spending both state *and federal* funds in violation of the Coverage Ban, a ruling striking down these provisions would suddenly allow Pennsylvania to use federal funds to cover abortion. House Br. 9-10. Nothing could be further from the truth, and nowhere do Petitioners claim otherwise. Even without the language from §§ 3215(c), (j), Pennsylvania is still bound by federal law. U.S. Const. art. VI, cl. 2. Here, federal law prohibits states from using federal Medicaid funds to pay for abortion except in cases of a threat to a woman's life, rape, or incest. *See, e.g.*, 42 U.S.C. § 1397ee(c).

A ruling in Petitioners' favor would have no effect on this provision of federal law. Pennsylvania would have no choice but to continue to comply with federal law with respect to the use of *federal* funds and abortion, even with §§ 3215(c), (j) enjoined. It could do so just as the seventeen other states that cover

[19] If necessary, Pennsylvania statutory construction rules permit this Court to sever 18 Pa. C.S. §§ 3215(c), (j) and declare only the part of the provisions with respect to state funds unconstitutional. *See* 1 Pa. C.S. § 1925.

abortion under Medicaid do—by using *state* Medicaid funds to cover abortion services. Nothing in federal law prohibits doing so. In fact, just last year the United States Government Accountability Office explained as much in a comprehensive report of Medicaid coverage for abortion throughout the country. *See* U.S. Government Accountability Office, *Medicaid: CMS Action Needed to Ensure Compliance with Abortion Coverage Requirements*, 7 (Jan. 4, 2019) ("States may also opt to cover other optional populations and services, including abortions for which federal funding is not available."). Accordingly, if Petitioners were to succeed with their lawsuit, Pennsylvania would not be required to violate federal law. Thus, House Intervenor-Respondents' preliminary objection should be overruled.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to overrule all Preliminary Objections.

Dated: May 15, 2020

Respectfully Submitted,

By: */s/ Jan P. Levine*

Susan Frietsche (PA 65240)
Christine Castro (PA 326694)
WOMEN'S LAW PROJECT
428 Forbes Avenue Suite 1710
Pittsburgh, PA 15219
(412) 281-2892
Counsel for Petitioners

Jan P. Levine (PA 43869)
Leah Greenberg Katz (PA 307413)
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000
Counsel for Petitioners

Amal Bass (PA 202954)
WOMEN'S LAW PROJECT
125 S 9th St, Suite 300
Philadelphia, PA 19107-5117
(215) 928-5772
Counsel for Petitioners

Michael S. DePrince (PA 322500)
PEPPER HAMILTON LLP
2000 K St NW, Suite 600
Washington, DC 20006-1865
(202) 220-1200
Counsel for Petitioners

David S. Cohen (PA 88811)
3320 Market St., Suite 232
Philadelphia, PA 19104
(215) 571-4714
Counsel for Petitioners

Thomas B. Schmidt III (PA 19196)
(Special Counsel)
Donna L. Fisher (PA 39410)
PEPPER HAMILTON LLP
100 Market Street, Suite 200
P.O. Box 1181
Harrisburg, PA 17108-1181
(717) 255-1155
Counsel for Petitioners

Melissa Cohen*
PLANNED PARENTHOOD
FEDERATION OF AMERICA
123 William Street, Floor 9
New York, NY 10038
(212) 261-4649
Counsel for Petitioners Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, Planned Parenthood of Western, Pennsylvania

Carrie Flaxman (PA 78575)
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave NW, Suite 300
Washington, DC 20005-6300
(301) 461-2100
Counsel for Petitioners Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, Planned Parenthood of Western, Pennsylvania

*admitted *pro hac vice*

CERTIFICATE OF COMPLIANCE

I 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.

Dated: May 15, 2020 */s/ Michael S. DePrince*

CERTIFICATE OF WORD COUNT

I, Michael S. DePrince, hereby certify that this brief contains 15,600 words and, therefore, complies with the order of this Court, dated April 22, 2020, granting Petitioners' motion to file a single omnibus brief in opposition to preliminary objections not in excess of 16,000 words.

Dated: May 15, 2020 */s/ Michael S. DePrince*

CERTIFICATE OF SERVICE

I certify that on this 15th day of May, 2020, I am this day serving the foregoing Petitioners' Omnibus Brief in Opposition to Preliminary Objections upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

Service by PACFile eService:

Counsel for Respondents

Matthew J. McLees, Esquire
Doris M. Leisch, Esquire
Department of Human Services
Office of General Counsel
3rd Floor West
Health & Welfare Building
Harrisburg, PA 17120

Mary Abbegael Giunta, Esquire
Pennsylvania Governor's Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101

Thomas Paul Howell, Esquire
Pennsylvania Governor's Office of General Counsel
333 Market Street, 9th Floor
Harrisburg, PA 17126

Counsel for Senate Intervenor-Respondents

Brian S. Paszamant, Esquire
Jason A. Snyderman, Esquire
John P. Wixted, Esquire
Naomi Zwillenberg, Esquire
Blank Rome LLP
130 North 18th Street
Philadelphia, PA 19103

Counsel for House Intervenor-Respondents

David R. Dye, Esquire
Katherine M. Fitz-Patrick, Esquire
Teresa R. McCormack, Esquire
Philip J. Murren, Esquire
Ball, Murren & Connell, LLC
2303 Market Street
Camp Hill, PA 17011

Dated: May 15, 2020 */s/ Michael S. DePrince*