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IN THE SUPREME COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, *et al.*,	:	
	:	
Appellants,	:	
	:	
v.	:	No. 26 MAP 2021
	:	
Pennsylvania Department of Human Services, *et al.*,	:	
	:	
	:	
Appellees.	:	

BRIEF OF *AMICI CURIAE*, MEMBERS OF THE DEMOCRATIC CAUCUSES OF THE PENNSYLVANIA SENATE AND HOUSE OF REPRESENTATIVES, IN SUPPORT OF THE BRIEF OF THE APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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

State Senator Arthur Haywood is a member of the Senate of Pennsylvania representing the 4th Senate District including Montgomery and Philadelphia Counties. Senator Haywood serves as the Democratic Chair of the Senate Health and Human Services Committee. State Senator Jay Costa is a member of the Senate of Pennsylvania representing the 43rd Senate District including Allegheny County. Senator Costa serves as Leader of the Senate Democratic Caucus. State Senator Anthony H. Williams is a member of the Senate of Pennsylvania representing the 8th Senate District including Delaware and Philadelphia Counties. Senator Williams serves as the Whip of the Senate Democratic Caucus. State Senator Vincent J. Hughes is a member of the Senate of Pennsylvania representing the 7th Senate District including Montgomery and Philadelphia Counties. Senator

Hughes serves as the Democratic Chair of the Senate Appropriations Committee. State Senator Wayne D. Fontana is a member of the Senate of Pennsylvania representing the 42nd Senate District including Allegheny County. Senator Fontana serves as Caucus Chair of the Senate Democratic Caucus. State Senator Maria Collett is a member of the Senate of Pennsylvania representing the 12th Senate District including Bucks and Montgomery Counties. Senator Collett serves as the Secretary of the Senate Democratic Caucus. State Senator Judy Schwank is a member of the Senate of Pennsylvania representing the 11th Senate District including Berks County. Senator Schwank serves as the Administrator of the Senate Democratic Caucus and the Senate Co-Chair of the bicameral Women's Health Caucus. State Senator Katie J. Muth is a member of the Senate of Pennsylvania representing the 44th Senate District including Berks, Chester, and Montgomery Counties. Senator Muth serves as the Policy Committee Chair of the Senate Democratic Caucus. State Senator Amanda M. Cappelletti is a member of the Senate of Pennsylvania representing the 17th Senate District including Delaware and Montgomery Counties. Senator Cappelletti serves as the Senate Co-Chair of the bicameral Women's Health Caucus.

State Representative Joanna E. McClinton is a member of the Pennsylvania House of Representatives representing the 191st House District including Delaware County and Philadelphia. Representative McClinton serves as the Leader of the

House Democratic Caucus. State Representative Jordan A. Harris is a member of the Pennsylvania House of Representatives representing the 186th House District including Philadelphia. Representative Harris serves as the Whip of the House Democratic Caucus. State Representative Dan Miller is a member of the Pennsylvania House of Representatives representing the 42nd House District including Allegheny County. Representative Miller serves as the Chair of the House Democratic Caucus. State Representative Tina M. Davis is a member of the Pennsylvania House of Representatives representing the 141st House District including Bucks County. Representative Davis serves as the Secretary of the House Democratic Caucus. State Representative Mike Schlossberg is a member of the Pennsylvania House of Representatives representing the 132nd House District including Lehigh County. Representative Schlossberg serves as the Caucus Administrator for the House Democratic Caucus. State Representative Matthew Bradford is a member of the Pennsylvania House of Representatives representing the 70th House District including Montgomery County. Representative Bradford serves as the Democratic Chair of the House Appropriations Committee. State Representative Dan B. Frankel is a member of the Pennsylvania House of Representatives representing the 23rd House District including Allegheny County. Representative Frankel serves as the Democratic Chair of the House Health Committee. State Representative Donna Bullock is a member of the Pennsylvania

House of Representatives representing the 195th House District including Philadelphia. Representative Bullock serves as the Chair of the bicameral Pennsylvania Legislative Black Caucus. State Representative Mary Jo Daley is a member of the Pennsylvania House of Representatives representing the 148th House District including Montgomery County. Representative Daley serves as the House Co-Chair of the bicameral Women's Health Caucus. Representative Morgan Cephas is a member of the Philadelphia House of Representatives representing 192nd House District including Philadelphia. Representative Cephas serves as the House Co-Chair of the bicameral Women's Health Caucus.

On January 19, 2019, Appellants, various providers of reproductive health services across Pennsylvania, filed a Petition for Review in the Nature of a Complaint against the Commonwealth seeking declaratory and injunctive relief as to the enforcement of Pennsylvania's statutory prohibition on the use of state and federal Medical Assistance Funds for abortion services, 18 Pa.C.S. §§ 3215(c) and (j) ("Coverage Ban").[1] Appellants sought a declaration that the Coverage Ban is unconstitutional pursuant to Pennsylvania's Equal Rights Amendment, Pa. Const. art. I, § 28, which guarantees the equality of rights will not be denied or abridged

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

based on the sex of the individual, and the Pennsylvania Constitution's guarantee of equal protection of the laws, Pa. Const. art. I, §§ 1 and 26 and Pa. Const. art. III, § 32. Pet. for Review at ¶¶ 94-96. On March 26, 2021, the Commonwealth Court entered an Order sustaining the Commonwealth parties' preliminary objections and dismissing the petition, holding that Appellants lacked standing and failed to state a claim upon which relief could be granted. *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs.*, 249 A.3d 598 (Pa.Cmwlth. 2021) (*Allegheny III*).

In the interim, the Commonwealth Court granted eighteen Republican state senators and eight Republican state representatives (collectively, "Republican Legislative Intervenors") intervention status in this proceeding on January 28, 2020, following reconsideration of the court's original Order denying intervention on June 21, 2019. *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs.*, 225 A.3d 902 (Pa.Cmwlth. 2020) (*Allegheny II*) (order granting intervention and parting with Court's original Order denying intervention in *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs*., No. 26 M.D. 2019 (Pa. Cmwlth. June 21, 2019) (Robert Simpson, J.) (*Allegheny I*)).

Amici Curiae support the Appellants' appeal and requests for relief. *Amici Curiae* have an interest in this case because the questions before this Court involve the interests of all individual legislators in the General Assembly of the

Commonwealth and the constitutional interpretation of a state statute restricting low-income women from obtaining health care services. *Amici Curiae* believe this Court would benefit from hearing the perspective of members of the Senate and House Democratic Caucuses germane to this case.

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

INTRODUCTION

Amici Curiae believe Pennsylvania's Coverage Ban unconstitutionally restricts low-income women covered under the Pennsylvania Medical Assistance program from obtaining an abortion in violation of the Pennsylvania Equal Rights Amendment, Article I, Section 28 ("ERA")[2] and the guarantees of equal protection under Article 1, Sections 1[3] and 26[4] and Article III, Section 32 of the Pennsylvania

[2] "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.

[3] Article 1, Section 1 of the Pennsylvania Constitution provides that all persons within the Commonwealth "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty…and of pursuing their own happiness." *Id.* § 1.

[4] "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." *Id.* § 26.

Constitution. The purpose of the ERA is to prohibit all sex-based discrimination and ensure that men and women are treated equally and fairly while Article I, Sections 1 and 26 and Article III, Section 32 guarantee equal protection of the law and prohibit discrimination based on the exercise of a fundamental right.

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

Accordingly, *Amici Curiae* submit the following arguments in support of the Appellants so that the Court may hear perspectives from legislators not represented

by Republican Legislative Intervenors, who do not have standing to intervene in this matter, and to expand upon the greater protections afforded to our citizens by the Pennsylvania Constitution.

ARGUMENT

I. THE COMMONWEALTH COURT ERRED IN PERMITTING INDIVIDUAL MEMBERS OF THE SENATE AND HOUSE TO INTERVENE AS RESPONDENTS.

A party seeking intervention must meet one of the grounds for intervention in Pa.R.C.P. 2327. At issue in the underlying matter was the ability of individual legislators to intervene under Pa.R.C.P. 2327(3)[5] and (4), which require a showing that "(3) such person could have joined as an original party in the action or could have been joined therein; or (4) the determination of such action may affect any *legally enforceable interest* of such person whether or not such person may be bound by a judgment in the action." Pa.R.C.P. 2327(3)-(4) (emphasis added). Once one of these grounds is met, intervention shall be permitted so long as one of the exclusions under Pa.R.C.P. 2329 do not apply. *See Larock v. Sugarloaf Township Zoning Hearing Bd.,* 740 A.2d 308, 313 (Pa.Cmwlth. 1999).

[5] The Republican Legislative Intervenors raised Pa.R.C.P. 2327(3) as a basis for intervention. *See* House Resp't's Appl. For Leave to Intervene at ¶ 11 *and* Senate Resp't's Appl. For Leave to Intervene at ¶ 26. However, during reconsideration, the Commonwealth Court only ruled on the Republican Legislative Intervenors standing under Pa.R.C.P. 2327(4). *See Allegheny II,* 225 A.3d at 913.

In its initial ruling, the Commonwealth Court correctly denied intervention, reasoning that the Republican Legislative Intervenors were not aggrieved as the last iteration of the Coverage Ban was enacted by the General Assembly in 1989 and this case did not directly affect their ability to vote on legislation. *Allegheny II,* 225 A.3d at 907 (discussing *Allegheny I* ruling). The Court also "dismissed the argument of Proposed Intervenors that the outcome of this litigation will limit their legislative power to appropriate funds as 'tenuous.'" *Id.* (citing *Allegheny I*, slip. op. at 16).

Following reconsideration, the Commonwealth Court erred when it overturned its prior decision, holding that the Republican Legislative Intervenors had a "legally enforceable interest" under Pa.R.C.P. No 2327(4) and none of the factors under Pa.R.C.P. No. 2329 prohibited intervention. *See Allegheny II*, 225 A.3d at 914. In doing so, the Commonwealth Court misapplied state court precedent establishing the requirements for legislator standing and intervention. *See Allegheny II,* 225 A.3d at 909-912 (discussing *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016); *Fumo v. City of Philadelphia,* 972 A.2d 487 (Pa. 2009)*; Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa.Cmwlth. 2019)). Effectively, the Commonwealth Court's second ruling granting intervention declares that 26 Republican Legislative Intervenors have standing to defend the institutional interests of the entire 253-member General Assembly based on its interest in

voting on future appropriations legislation. It also ruled that this interest was not adequately represented by the Department of Human Services which was already defending the suit on behalf of the Commonwealth. *Id.*

A. The Republican Legislative Intervenors do not have standing to intervene pursuant to Pa.R.C.P. 2327(3).

As a preliminary matter, it bears repeating that the Republican Legislative Intervenors could not have joined in this action under Rule 2327(3) because they are not tasked with the enforcement or administration of the Coverage Ban. "Clearly, Legislatures do not fall with[in] the category of persons permitted to intervene as described in Pa.R.C.P. No. 2327[](3)." *Robinson Twp. v. Commonwealth*, No. 284 M.D. 2012, 2012 WL 1429454, at *3 (Pa.Cmwlth. Apr. 20, 2012), *aff'd* 84 A.3d 1054 (Pa. 2014) (per curium) (denying petition to intervene by state legislators in an action challenging the constitutionality of the oil and gas statute). In other words, when the constitutionality of a statute is challenged, the correct respondent is either the government agency or the government official responsible for the implementation, enforcement, and administration of the statute. *See Wagaman v. Attorney General*, 872 A.2d 244, 247 (Pa.Cmwlth. 2005) (petitioners incorrectly named Pennsylvania Attorney General in a constitutional challenge when he was not responsible for administering or enforcing the law in question).

Prior to its second ruling in *Allegheny II*, the Commonwealth Court held firm to this principle. *See, e.g., First Phila. Preparatory Charter Sch. v. Commonwealth,* 179 A.3d 128, 135, 140-141 (Pa.Cmwlth. 2018). When the Commonwealth Court reversed its own decision denying intervention, it focused on the Republican Legislative Intervenors' argument that their ability to legislate *could* be narrowed, specifically in the matters of appropriation, and intervention should be permitted under Pa.R.C.P. 2327(4). *Id.*

B. The Republican Legislative Intervenors do not have standing to intervene pursuant to Pa.R.C.P. 2327(4).

Intervention under Pa.R.C.P. 2327(4) requires that the "determination of such action may affect any *legally enforceable interest* of such person whether or not such person may be bound by a judgment in the action." Pa.R.C.P. 2327(4) (emphasis added). The determination of whether a party has a "legally enforceable interest" to intervene in a lawsuit requires courts to examine the principles governing legal standing. *See Robinson Twp. v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014); Senate Resp't's Appl. For Leave to Intervene at ¶ 37.

Personal standing requires the aggrieved party have a substantial, direct, and immediate interest which must go beyond the abstract interest of all citizens and show a discernable adverse effect that is unique to the aggrieved party. *See In re Phila. Health Care Trust*, 872 A.2d 258, 262 (Pa.Cmwlth. 2005). By contrast, legislator standing exists only when a legislator's interest "to act as a legislator" is

jeopardized. *Sunoco Pipeline L.P.*, 217 A.3d at 1291. It is the ability of the legislator "to participate in the voting process" which must be negatively impacted. *Markham v. Wolf*, 136 A.3d at 145. A legislator must show an impact on the ability to vote and an interference with the authority of the General Assembly, not a mere personal grievance. Moreover, "a mere general interest in the litigation or an interest in an issue that is collateral to the basic issues in the case . . . or motive with respect to the litigation is not a sufficient basis for intervention . . . ." Goodrich Amram 2d, § 2327:8.

In *Markham v. Wolf,* like the underlying matter, state legislators sought to intervene in a challenge to the Governor's authority to issue an executive order concerning direct care health workers. *Markham*, 136 A.3d at 136. In its analysis, this Court explained that legislators have standing based upon their special status where there is a discernable and palpable infringement on their authority as legislators. *Id.* at 143 (citing *Fumo*, 972 A.2d at 501). This Court explained that if a party is also part of a legislative body, acting in its official capacity, then that party must meet the requirements for standing as derived from our Commonwealth's case law, which is analogous to federal case law, to intervene. *Id*. at 145. Again, the Court found that "[s]tanding exists only when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted…or when he or she has suffered a concrete impairment or

deprivation of an official power or authority to act as a legislator." *Id.* (citing *Wilt v. Beal*, 363 A.2d 876 (Pa.Cmwlth. 1976) and *Fumo*, 972 A.2d 487*)*. General grievances about the correctness of governmental conduct are insufficient. *Id*. Thus, this Court held in *Markham* that the state legislators did not have standing to intervene as their interests were not directly or substantially related to their unique legislative prerogatives. *Id* at 146.

This Court should rule here as it did in *Markham* and reject the Republican Legislative Intervenors' tenuous arguments for intervention. Just as in *Markham*, the Republican Legislative Intervenors' interest in the underlying challenge is too indirect and insubstantial. This case does not inhibit or in any way impact their ability to propose, vote on, or enact legislation, including appropriations legislation. *See Markham*, 136 A.3d at 145.

Moreover, despite Republican Legislative Intervenors' contention to the contrary, they do **not** have a legally enforceable interest in appropriating government funds in an unconstitutional manner. *See Hospital & Healthsystem Ass'n of Pennsylvania v. Commonwealth*, 77 A.3d 587, 596-98 (Pa. 2013) (Court found that the question of whether a budget-related statute violates the constitution is a justiciable one "regardless of the extent to which the political branches are responsible for budgetary matters."). Similarly, "the assertion that another branch of government . . . is diluting the substance of a previously-enacted statutory

provision is not an injury which legislators, as legislators, have standing to pursue." *Markham, 136* A.3d at 145.

This Court raised similar concerns with expanding legislator standing to intervene when deciding *Markham* which are pertinent here. *Id*. An expansion of legislator standing could "seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent." *Id.* If the Commonwealth Court's decision below were to stand, then it's possible that individual legislators would be given nearly *carte blanche* to intervene in any litigation where the constitutionality of a statute is raised,[6] as the General Assembly's appropriation power can be tied to nearly any law it enacts. Even more alarming is that the expansion of standing to intervene to individual legislators, such as the Republican Legislative Intervenors, will inevitably open the door to intervention by multiple separately-represented groups of legislators in support of opposing parties in a single proceeding – each group of legislators expressing a different shared point of view in the same litigation.

[6] A power that Republican members of the General Assembly acknowledge is limited as evidenced by its introduction and attempted passage of House Bill 1196 (Ecker), which would grant the General Assembly special standing to intervene in any matter where the constitutionality of a statute is raised. H.B 1196, 205th Leg., Reg. Sess. (Pa. 2021).

C. Even if the Court finds that Republican Legislative Intervenors have standing to intervene under Pa.R.C.P. 2327, which they do not, their intervention should still be prohibited under Pa.R.C.P. 2329(2).

Assuming *arguendo*, that this Court were to find that Republican Legislative Intervenors have standing to intervene under Pa.R.C.P. 2327, this Court should still refuse the intervention pursuant to Pa.R.C.P. 2329(2).

Pa.R.C.P. 2329(2) allows the court to deny an application for intervention if "the interest of the petitioner is already adequately represented." The phrase "adequately represented" permits an inquiry "whether there is of record a person who technically represents the interests of the petitioner and also an inquiry where such representatives are in fact performing their function of representation in a proper and efficient manner." Goodrich Amram 2d § 2329:7. The Commonwealth Court erred both in *Allegheny I* and *Allegheny II* when it ruled that Republican Legislative Intervenors may not be adequately represented by the Department. *Allegheny II,* 225 A.3d at 913. The interests of the Republican Legislative Intervenors are the same as those of the Department – to defend the constitutionality of the Coverage Ban. Moreover, as evidenced by the Commonwealth Court's dismissal of the case based upon the Department's preliminary objections and mirrored by the Republican Legislative Intervenors, it

is clear that the Department is representing the interests of the Commonwealth in a proper and efficient manner. *See Allegheny III,* 249 A.3d 598 (Pa.Cmwlth. 2021).

For these reasons, even if this Court finds that the Republican Legislative Intervenors have standing to intervene pursuant to Pa.R.C.P. 2327, the Court should still prohibit their intervention pursuant to Pa.R.C.P. 2329(2).

D. Federal case law concerning legislator standing and intervention are persuasive and should be considered when legislator standing is raised in State court for an institutional injury.

Arguments of an institutional nature should not be raised by a handful of legislators and, instead, must include the concerns of the General Assembly as a whole. The institutional authority of the General Assembly consists of 50 state senators and 203 state representatives, of which at least a majority from each chamber are necessary to pass or defeat legislation. *Amici Curiae* appear here because the Republican Legislative Intervenors do not represent the interests of the General Assembly, the Senate Democratic Caucus or the House Democratic Caucus, nor do they have the capacity to assert the institutional interests of the legislature. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Corman v. Torres*, 287 F.Supp.3d 558 (M.D. Pa. 2018). *See also* 32 P.S. §§ 815.101, 815.102, and 815.105; *see also Yaw v. Delaware River Basin Comm'n*, Civ. No. 21-119, 2021 U.S. Dist. WL 2400765 (E.D. Pa. June 11, 2021) (reiterating that individual

legislative-plaintiffs of the General Assembly lack standing to assert an institutional injury).[7]

In *Corman v. Torres*, two state senators and eight Pennsylvania Congressmen sued in federal district court after this Court declared the 2011 Pennsylvania congressional redistricting map unconstitutional pursuant to the Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5. *Corman*, 287 F.Supp.3d at 561. The legislators sought to enjoin the use of this Court's remedial redistricting map in the 2018 election cycle. *Corman*, 287 F.Supp.3d at 562.

Significantly, the *Corman* court determined that only two legislators' votes out of the total 253 members of the General Assembly could not have defeated or enacted any remedial redistricting legislation and acknowledged that the state senators, despite their leadership roles in the Senate of Pennsylvania, could not "command the two-thirds majority necessary in both chambers to override a gubernatorial veto." *Id.* at 569. Thus, as articulated by the Supreme Court of the United States, the ability of a legislator to sue in their official legislative capacity is limited: "[L]egislators whose votes would have been sufficient to defeat (or enact)

[7] The U.S. District Court for the Eastern District of PA recently ruled that standing cannot be conferred by a sub-division of legislative members of the General Assembly, rather, there must be an institutional harm which impacts the power of the legislature as a whole. *Yaw v. Delaware River Basin Comm'n,* No. 21-119, 2021 U.S. Dist. WL 2400765 (E.D. Pa. June 11, 2021).

a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. 811 at 823.

Similarly, a mere 26 legislators do not represent the interests of the 253-member General Assembly here. *See also Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1953 (2019). To represent the General Assembly's interest, as the Republican Legislative Intervenors purport to do in this case, there must be representation equal to a number necessary to maintain the power to enact or defeat future legislation and the two-thirds majority necessary in both chambers to override a gubernatorial veto. *See Corman,* 287 F.Supp.3d at 567 (citing *Raines*, 521 U.S. at 821).

Thus, the Republican Legislative Intervenors do not represent the institutional interests of the General Assembly and should not be permitted to intervene on its behalf.

II. THE COURT SHOULD OVERRULE *FISCHER* BECAUSE THE PENNSYLVANIA CONSTITUTION PROVIDES GREATER PROTECTIONS THAN THOSE PROVIDED UNDER THE U.S. CONSTITUTION.

In addition to their arguments under the ERA, Appellants also assert that the Coverage Ban violates the Pennsylvania Constitution's guarantee of equal protection of the laws, Pa. Const. art. I, §§ 1 and 26 and Pa. Const. art. III, § 32,

because the ban is instituted against women only, unequally denying women coverage for health care services under Pennsylvania's Medical Assistance program and, as such, operates to discriminate against women based on the exercise of a fundamental right. Pet. for Review at ¶¶ 94-96.

Appellees alleged before the Commonwealth Court that Appellants' claims were settled in 1985 in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985), but Appellants' claims should be examined outside of *Fischer*'s limited analysis. The proliferation of state court decisions that have expanded state constitutional rights afforded to their individual citizens in the last 35 years demands that *Fischer* be revisited by the judiciary and the Coverage Ban enjoined as unconstitutional under the Pennsylvania Constitution's ERA, Pa. Const. art. I, § 28, and its guarantee of equal protection under the laws of the Commonwealth, Pa. Const. art. I, §§ 1 and 26 and Pa. Const. art. III, § 32.

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

Since *Fischer*, this Court repeatedly established that the Pennsylvania Constitution provides greater protections to its citizens than those afforded by the U.S. Constitution, and that this Court is not always bound by U.S. Supreme Court jurisprudence when analyzing its own state constitution. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 813 (Pa. 2018) (finding that the

Free and Equal Elections Clause of the Pennsylvania Constitution, Pa. Const. art. I, § 5, having no federal counterpart, is a distinct claim from the federal Equal Protection Clause of the Fourteenth Amendment, U.S. Const. Amend. 14, § 1); *William Penn Sch. Dist. V. Pennsylvania Dep't of Educ.*, 170 A.3d 414, 456-57 (Pa. 2017) (reversing precedent that precluded judicial enforcement of the Pennsylvania Education Clause, Pa. Const. art. III, § 14); *Robinson Twp. v. Commonwealth,* 83 A.3d 901, 944 (Pa. 2013) ("The Environmental Rights Amendment[, Pa. Const. art. I, § 27,] has no counterpart in the federal charter and, as a result, the seminal, comparative review standard described in [*Commonwealth v. Edmunds*] is not strictly applicable here); *See also* Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 351-359 (2018) (discussing this Court's willingness to revisit prior case law when the issue presented involves state constitutional provisions that are disanalogous to the U.S. Constitution).

In *League of Women Voters v. Commonwealth*, this Court rejected precedent requiring the Court to apply federal equal protection analysis to a partisan gerrymandering challenge to the General Assembly's congressional redistricting plan predicated on the right to vote under the Free and Fair Elections Clause of the

State Constitution, Pa. Const. art. I, § 5.[8] The Court explained that the "touchstone" of constitutional interpretation was to examine the **plain language** of the Constitution itself. *League of Women Voters*, 178 A.3d at 802 (emphasis added). Moreover, since the language of the Free and Fair Elections Clause had no federal counterpart in the U.S. Constitution, the Court was not required to conduct federal comparative analysis as required in *Commonwealth v. Edmunds*. *Id.* at 802-803. Instead, the Court was free to utilize any of the factors enumerated in *Edmunds* in order to analyze the **plain language** of the constitutional provision. *Id.* at 803.[9] Accordingly, the Court provided the following guidance:

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

---

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

[9] In *League of Women Voters*, this Court succinctly explains *Commonwealth v. Edmunds*:

> *Edmunds* instructs that an analysis of whether a right under the Pennsylvania Constitution affords greater protection than the United States Constitution encompasses the following four factors:
>
> 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.

League of Women Voters,, 178 A.3d at 792 n.57 (citing *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991)).

Id. at 803.

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

Similarly here, *Fischer* does not preclude further analysis by this Court as to whether the ERA or the state constitutional equal protection guarantees provide greater protections than under the federal Equal Protection Clause. Instead, the many cases decided since *Fischer* – including *Commonwealth v. Edmunds* in 1991

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

In accordance with *League of Women Voters*, Appellants offer persuasive arguments and supportive data detailing the exclusive harms to women on Medical Assistance seeking abortion health care services including, among others, increased maternal morbidity, danger to the pregnant woman's health, exacerbation of pre-existing conditions, increased partner abuse, increased poverty and disproportionate effects on women of color. Pet. for Review at ¶¶ 65-83. First, the average cost of an abortion without insurance coverage in 2014 at 10 weeks was just over $500, which does not include the patient's cost of transportation, childcare and lodging if needed. Guttmacher Inst., *Evidence You Can Use: Medicaid Coverage of Abortion* (Feb. 12, 2021), https://www.guttmacher.org/evidence-you-can-use/medicaid-coverage-abortion. The patient's inevitable delay in obtaining care due to the increased cost only

increases the risks associated with abortion, as small in number as those risks may be at any given point. Specifically, 54% of abortion patients surveyed between 2008-2010 confirmed that having to raise money to cover costs delayed their care, while the risk of death rises from 0.3 for every 100,000 abortions at or before 8 weeks to 6.7 per 100,000 abortions at 18 weeks or later. *Id.*

Second, low-income persons and women of color are far more likely than other groups to experience unintended pregnancies and abortion and to rely on Medicaid given these barriers to contraception. In 2011, the rate of unintended pregnancy among women with incomes at or below the Federal poverty level was more than five times that of women with incomes at or above 200% of the Federal poverty level. *Id.* That same year, "Black and Hispanic women had an unintended pregnancy rate of 79 and 58 per 1,000 women, respectively, compared with a rate of 33 per 1,000 among White women." *Id.* Moreover, women of color are more likely to rely on Medicaid than other groups. "In 2018, 31% of Black women and 27% of Hispanic women aged 15-44 were enrolled in Medicaid, compared with 16% of White women." The result is that low-income women and, in particular, women of color suffer a disparate impact in seeking safe abortions when states prohibit Medicaid coverage for abortion. The *Fischer* court did not take into consideration this record of harms in 1985, which have since multiplied as presented here and by the Appellants.

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

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

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

In *Fischer*, this Court found that, at the time, "the prevailing view amongst our sister state jurisdictions is that the ERA does not prohibit treating the sexes differently when it is reasonably and genuinely based on physical characteristics unique to one sex." *Fischer*, 502 A.2d at 125 (internal citations and quotations omitted). However, numerous sister courts have since held differently, finding that statutes prohibiting state Medical Assistance funding for medically necessary abortions are unconstitutional under the ERAs of their state constitutions. *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Doe v.*

Maher, 515 A.2d 134, 448 (Conn. 1986) ("At the very least, the standard for judicial review of sex classifications under our ERA is strict scrutiny" and "the effect of the ERA was to raise the standard of review.").

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

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

> that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some "natural" grouping.

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

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

The court further concluded that the rule employed a gender-based classification that operated to the disadvantage of women and was presumptively unconstitutional, because men and women meeting the state's criteria for financial and medical need were similarly situated regarding Medical Assistance eligibility and there were no comparable restrictions in state regulations for physical conditions unique to men. *Id.* at 856 (citing *Doe*, 515 A.2d at 159 ("Since only women become pregnant, discrimination against pregnancy by not funding

abortion when it is medically necessary and when all other medical[ly necessary] expenses are paid by the state for both men and women is sex oriented discrimination")). Ultimately, the New Mexico state agency rule violated the ERA because the State's purported interests in saving costs and in protecting the potential life of the unborn were not compelling justifications for treating men and women differently regarding their medical needs. *Id.* at 856-57.

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

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

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

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

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

CONCLUSION

Because the Commonwealth Court erred in permitting the Republican Legislative Intervenors standing to intervene in this proceeding, and because precedent does not preclude this Court from interpreting Pennsylvania's constitutional provisions from affording greater protections than those provided by the United States Constitution, *Amici Curiae* respectfully request this honorable Court overturn *Fischer* and reverse the decisions of the Commonwealth Court.

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CERTIFICATION OF WORD COUNT COMPLIANCE

I hereby certify that the above brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 6,981 words, exclusive of the cover page, tables and the signature block.

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CERTIFICATION OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

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Attachment A

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