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26 MAP 2021

IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

No. 26 MAP 2021

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,

Appellants,

– v. –

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, MEG SNEAD, in her official capacity as Acting Secretary of the Pennsylvania Department of Human Services, ANDREW BARNES, in his official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs,

Appellees.

REPLY BRIEF FOR APPELLANTS

Appeal from the Orders of the Commonwealth Court at No. 26 MD 2019 dated January 28, 2020, and March 26, 2021.

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SUMMARY OF ARGUMENT

Appellees' briefs do nothing to undermine Providers' core arguments[1] that: (1) they have standing to challenge the coverage ban; (2) the coverage ban violates the Pennsylvania Constitution's Equal Rights Amendment ("ERA") and its equal protection guarantee; and (3) individual state legislators are not proper intervenors in this case.

Ultimately, this case presents this Court with two competing visions of equality under our Commonwealth's Constitution: one that is faithful to the unique language of the Constitution and also contextual, informed by the history of legally-sanctioned sex discrimination that the ERA was adopted to eradicate; and a narrower vision, shrinking our state Constitution to a mere shadow of its federal counterpart.

Pennsylvania has a strong history of extending broader protection for individual rights than the federal system requires. *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), wrongly ignores this history, and the health, lives, and liberty of Pennsylvanians must not be sacrificed out of deference to this

[1] Appellees' briefs contain numerous direct challenges to the facts contained in the Petition, which must be accepted as true at this stage of the proceedings and contrary assertions given no weight. *See Robinson Township v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013).

outdated precedent. *Fischer* should be overruled, and the coverage ban declared unconstitutional.

I. *Stare Decisis* Does Not Justify Perpetuating the Coverage Ban.

Appellees argue that Providers' substantive claims fail by virtue of *stare decisis* principles. But *stare decisis* does not require blind adherence to erroneous precedent. Indeed, this Court has been clear that past decisions that "cannot bear the weight of judicial scrutiny" must be overruled. *Commonwealth v. Bradley*, 261 A.3d 381, 400 (Pa. 2021) (citations omitted). Overruling "a decision that in itself is clearly contrary" to law "is consistent with the principle underlying *stare decisis* to purify the body of law." *Lewis v. W.C.A.B. (Giles & Ransome, Inc.)*, 919 A.2d 922, 928 (Pa. 2007) (citation omitted); *see also* Appellants' Br. at 34–35, 56.

Fischer is particularly apt for re-examination because it involves a question of public importance only presented to this Court once. A passage this Court has quoted repeatedly over the past century underscores the importance of re-examining such a precedent:

> [W]hen a *question involving important public or private rights*, extending through all coming time, *has been passed upon on a single occasion*, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny.

1 Cooley, *Constitutional Limitations* 121 (8th ed. 1977) (emphasis added) (quoted in *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 457 (Pa. 2017); *Pa. State Ass'n of Cnty. Comm'rs v. Commonwealth*, 681 A.2d 699, 710 (Pa. 1996) (Castille, J., dissenting); *Falco v. Pados*, 282 A.2d 351, 357 (Pa. 1971); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6*, 199 A.2d 266, 268–69 (Pa. 1964); *Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 48 (Pa. 1937)).

Furthermore, as this Court has often recognized, *stare decisis* is less powerful in cases involving constitutional issues. In *Commonwealth v. Reid*, Justice Dougherty, writing for the Court, explained: "[W]e have recognized that changing course demands a special justification—over and above the belief that the precedent was wrongly decided—in matters involving statutory, as opposed to constitutional, construction." 235 A.3d 1124, 1168 (Pa. 2020) (citations omitted). Even if such a "special justification" were needed to overturn *Fischer*'s error in constitutional interpretation, Providers have offered several in their opening brief. *See* Appellants' Br. at 56.

To put this analysis within the *Commonwealth v. Alexander* framework that Senators discuss, *see* Senators' Br. at 11–12, the four factors of "quality of [the decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision," 243

A.3d 177, 196 (Pa. 2020) (citation omitted), counsel in favor of overturning *Fischer*. As Providers have explained in detail in their main brief, *Fischer* is poorly reasoned: it illogically excludes classifications based on women's reproductive capacity from the ERA's reach; it blindly relies on federal constitutional cases to interpret Pennsylvania's equal protection provisions; and it is inconsistent with Pennsylvania caselaw that applies the federal equal protection framework in a far more robust manner.

Fischer is also inconsistent with other sex discrimination decisions from this Court, particularly those that emphasize our Constitution's prohibition against any sex-based classification arising from and perpetuating gender stereotypes that limit women's opportunity and autonomy. Additionally, there are no significant reliance interests in play with *Fischer*, as the General Assembly passed the coverage ban decades ago and will not have to change its actions if *Fischer* is overruled. *See* Br. for *Amici Curiae* Members of Democratic Caucuses at 13–14 (explaining that ending the coverage ban will not require the General Assembly to take any responsive action).

Contrary to DHS's and Senators' suggestions, DHS Br. at 26–27; Senate Br. at 48, *Fischer* is not a foundational precedent for Pennsylvania equal protection jurisprudence. None of the cases they cite have "relied upon *Fischer*'s Equal Protection analysis" or otherwise "cited *Fischer* with approval." Senate Br.

at 48; DHS Br. at 28. Most of those cases cite *Fischer* for more general equal protection principles established elsewhere in Pennsylvania caselaw. *See Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139–40 (Pa. 1991) (citing for the rational basis test); *Commonwealth v. Wolf*, 632 A.2d 864, 868 n.8 (Pa. 1993) (same); *McCusker v. W.C.A.B. (Rushton Mining Co.)*, 639 A.2d 776, 781 (Pa. 1994) (same); *Probst v. Commonwealth*, 849 A.2d 1135, 1143 (Pa. 2004) (citing for general equal protection claims); *Klein v. Commonwealth State Emps. Ret. Sys.*, 555 A.2d 1216, 1224 (Pa. 1989) (same). To the extent that cases cite *Fischer* for any original analysis or conclusions, these references either are to propositions that are not at issue in this case, *see* Br. for *Amici Curiae* ACLU et al. at 4 n.2, or would be undisturbed by an overruling of *Fischer. See, e.g.*, *Probst*, 849 A.2d at 1144 (citing *Fischer*'s rejection of poverty as a suspect class). *Fischer* is far from a keystone without which the structure of Pennsylvania equal protection jurisprudence would collapse.

Providers have offered this Court powerful justifications for departing from precedent in this case. This Court has not hesitated to correct erroneous rulings in other areas of importance; it should not hesitate to do the same with *Fischer*.

II. Appellees' Reading of the ERA Conflicts with the Amendment's Text, History, and Purpose.

Appellees'[2] two principal arguments against Providers' ERA claim are that the coverage ban is not a sex-based classification and that, even if it were a sex-based classification, it falls within an exception to the ERA for classifications based on physical characteristics unique to one sex. These arguments are inherently contradictory and cannot withstand scrutiny.[3]

A. By Appellees' Own Admission, the Coverage Ban Is a Sex-Based Classification.

That the coverage ban is an inherently sex-based classification is underscored by Appellees' own statements to that effect. As Representatives state, "Only women can give birth or have an abortion because only women can get pregnant." *See* House Br. at 80; *see also id.* at 81 ("Abortion can only be performed on biological women due to a condition which is unique to the female's fundamental, biological characteristics."). And as Senators write, "the Coverage Ban . . . by its very terms applies only to women." Senate Br. at 24 n.7. These

[2] DHS's brief does not attempt to independently justify *Fischer* but rather rests entirely upon *stare decisis*. *See* DHS Br. at 25.

[3] Appellees also argue that Providers' position is inconsistent with the legislative history of the ERA. *See* Senate Br. at 28; Br. of *Amici Curiae* Pennsylvania Pro-Life Federation et al. at 7–9. Yet, the legislative history they cite consists of isolated comments about the *federal* ERA from two state legislators a year *after* the adoption of the state ERA. There is no reason to impute these two legislators' views retroactively to their colleagues, to say nothing of the entire electorate.

admissions that the coverage ban affects only women make clear that it is subject to scrutiny under the ERA. Further proving the point, nowhere in Appellees' briefs or the countless *amicus* briefs supporting them is there a single example of any Medicaid carve-out excluding medical care men need, let alone a carve-out comparable to the coverage ban.

As a sex-based classification, the coverage ban is indeed subject to scrutiny under the ERA. *See Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974). In an attempt to shield the coverage ban from ERA scrutiny, Appellees rely on *Fischer*'s flawed logic and characterize the classification created by the coverage ban as between two classes of women, those who choose abortion and those who choose childbirth.[4] House Br. at 80. In doing so, Appellees are manipulating the delineation of the affected class to avoid scrutiny under the ERA. Under similar logic, a state law that barred women but not men from the practice of medicine would pose no constitutional problem because it would not differentiate between men and women but rather between women who choose to be doctors (who would be prohibited from doing so by the statute) and women who choose to pursue another occupation (who would be free to pursue their desired careers). Such

[4] In reality, these are not two distinct groups as the majority of women who obtain abortions have given birth and are raising children. *See* R.195a, ¶ 10 (72% of Women's Medical Fund clients had children).

sophistry would eviscerate the ERA. Any statute that exposes a subset of members of only one sex to harm (whether based on the biological functions that define their sex or in any other manner) has created a sex-based classification, regardless of whether every member of the disadvantaged class actually suffers harm.

The coverage ban is also a sex-based classification because it invokes the sex stereotype that giving birth and motherhood are the proper choices for pregnant women. That the coverage ban promotes and reinforces women's socially-prescribed, traditional maternal role and expresses distrust and disapproval of the reproductive decisions of women who deviate from such a role is evident in the briefing in support of Appellees. For instance, Texas Right to Life supports the coverage ban by arguing that "[a] woman's body is designed to carry her pregnancy to term and give birth to her child," strongly implying that a woman's natural place in society is to be a mother and that women who do not deliver at full term are unnatural. Br. for *Amici Curiae* Texas Right to Life et al. at 16. This traditional gender role stereotype is closely associated with and indeed permeates the coverage ban. Such stereotypes trigger close scrutiny under the ERA. *See Hartford Accident and Indem. Co. v. Ins. Comm'r*, 482 A.2d 542, 548 (Pa. 1984).

B. *Fischer*'s "Unique Physical Characteristics" Exception Does Not Save the Coverage Ban from Scrutiny Under the ERA.

Instead of close scrutiny, *Fischer* incorrectly carved out an exception to the ERA for sex-based "unique physical characteristics," an exception that has

no basis in the ERA's text or caselaw. Appellees and their *amici* largely embrace this exception and adopt *Fischer*'s rationale for it. None of the Appellees or their *amici* attempts to cabin this exception to those rare circumstances where equal treatment of men and women is genuinely impossible. Instead, they repeat *Fischer*'s central error: that whenever a legislative classification turns on physical characteristics unique to one sex, that classification is immune from judicial review under the ERA. *See, e.g.*, House Br. at 79–80; Senate Br. at 18. So construed, the exception largely swallows the rule, because sex-linked characteristics can easily serve as a proxy for sex. Furthermore, women's "unique physical characteristics"—their reproductive capacity—have historically been the justification for disadvantageous treatment at work, at school, and in civic life. *See* Appellants' Br. at 38. *Fischer*'s support for engrafting this exception onto the ERA has no basis in the text of the ERA and no basis in Pennsylvania precedent: before *Fischer* created it in 1985, not a single Pennsylvania appellate court had recognized such an exception.[5]

Acknowledging that the issue was one of first impression, *Fischer* based its decision to incorporate a "unique physical characteristics" exception into

[5] Even in cases prior to *Fischer* where "unique physical characteristics" might have been at issue, this exception was not discussed. *See, e.g.*, *Packel v. PIAA*, 334 A.2d 839 (Pa. Commw. Ct. 1975) (invalidating under ERA state rule barring girls from athletic competition against boys).

the Pennsylvania ERA on four out-of-state rulings discussing the application of other states' ERAs: *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976) (upholding male-only rape statute); *Hawaii v. Rivera*, 612 P.2d 526, 530–31 (Haw. 1980) (same); *City of Seattle v. Buchanan*, 584 P.2d 918, 930 (Wash. 1978) (upholding ban on public nudity including exposure of female breast); and *Holdman v. Olim*, 581 P.2d 1164, 1170–71 (Haw. 1978) (upholding prison regulation requiring female visitors to wear bras). These cases do not support grafting a sweeping exception for "unique physical characteristics" onto Pennsylvania's ERA. For instance, with respect to *Salinas* and *Rivera*, Pennsylvania and other states long ago rejected gender-specific sexual assault statutes, responding to scholars' and activists' arguments that male-only statutes were based on the stereotype that men are always the perpetrators and women always the victims of sexual assault. *See, e.g.*, 18 Pa. C.S. § 3121; Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 Utah L. Rev. 117, 133–36. *Holdman*, which upheld a sex-based prison regulation, did so based on important security considerations unique to prison administration. 581 P.2d at 1167. Finally, the public lewdness ordinance at issue in *Buchanan* "applies alike to men and women, requiring both to cover those parts of their bodies which are intimately associated with the procreation function." 584 P.2d at 921. That case cannot justify

a broad exception to the ERA and has no bearing on sex-based distinctions like the coverage ban that affect only one sex.

These cases relied on the work of influential ERA scholars to support their conclusions, but these scholars recognized that "unique physical characteristics" could only on rare occasions excuse a sex-based classification, and they provide a basis for a much less sweeping exception than Legislators would have it be. *See* Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971). Such cases, they argued in a subsequently-published book about equal rights amendments, should be subject to the strictest scrutiny, and "almost no sex-based classifications can pass this rigorous test." Barbara A. Brown et al., *Women's Rights and the Law: The Impact of the ERA on State Laws* 16 (1977). Specifically, they noted that the "unique physical characteristics" exception does not "allow broadly differential treatment of sex-based characteristics, such as pregnancy, which traditionally have been used arbitrarily to restrict women's opportunities." *Id.* These ERA scholars concluded that this "kind of invidious discrimination, such as the noncoverage of pregnancy under a state disability program," was exactly what the ERA was aimed to target. *Id.*

Fischer ignored or distorted this scholarship, asserting that "the prevailing view amongst our sister state jurisdictions is that the E.R.A. 'does not

prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex.'" 502 A.2d at 125 (quoting *Salinas*, 551 P.2d at 706) (additional citations omitted). *Fischer*'s error, which Legislators urge this Court to perpetuate, lies in ending the analysis with the identification of a unique physical characteristic, but that is instead where the analysis should begin: with a searching examination into whether the disparate treatment of people with a unique physical characteristic is truly unavoidable,[6] or whether it entrenches gender-based stereotypes and assumptions that the ERA was designed to combat.

This is the ERA analysis that the New Mexico Supreme Court undertook in its examination of that state's Medicaid coverage ban. *See N.M. Right to Choose v. Johnson*, 975 P.2d 841 (N.M. 1998). That court's analytical method is instructive because it situated its analysis within the historical context of New Mexico's "evolving concept of gender equality." *Id.* at 852. It first determined that the New Mexico ERA, with its distinct text, provided greater equality rights than the federal Constitution. *Id.* at 850–51. It next addressed the purported "unique physical characteristics" exception, noting that the ability to become pregnant and bear children has historically been used to justify denying women employment,

[6] The ERA scholars mention two examples that might be: laws regulating wet nurses and sperm banks. Brown et al., *Women's Rights and the Law*, *supra*, at 16.

property rights, and equal citizenship rights. *Id.* With this historical context in mind, the New Mexico court determined that the coverage ban disadvantaged women based on their reproductive capacity, and that "unique physical characteristics" did not spare the coverage ban from a "searching judicial inquiry" under the ERA. *Id.* at 851. Next, it analyzed whether the coverage ban disadvantages women and concluded that, as men and women are similarly situated in their need for health care, the coverage ban is presumptively unconstitutional because it treats men and women differently. *Id.* at 853. Finally, the court looked for a compelling justification for the differential treatment and found that New Mexico's asserted interests in saving money and protecting potential life were not sufficiently compelling and that the coverage ban was not the least restrictive means of advancing these interests. *Id.* at 857. A similar analysis of Pennsylvania's coverage ban would look behind the assertion of "unique physical characteristics" and find no basis for its disadvantageous treatment of women.

Pennsylvania courts have upheld sex-based classifications under *Fischer*'s "unique physical characteristics" exception only one other time, in a case in which a sex-based prison regulation of hair length survived scrutiny because the ERA "does not apply to the same degree to a prisoner." *Wise v. Commonwealth of Pa. Dep't of Corr.*, 690 A.2d 846, 848 (Pa. Commw. Ct. 1997). Aside from this

readily distinguishable Commonwealth Court ruling, only *Fischer* and the Commonwealth Court's ruling in the instant case have applied the "unique physical characteristics" exception to uphold a sex-based classification.[7]

Other cases merely allude to the "unique physical characteristics" exception without applying it. *See, e.g.*, *Bartholomew v. Foster*, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988), *aff'd per curiam*, 563 A.2d 1390 (Pa. 1989) (invalidating gender-based automobile insurance rates under ERA); *Am. Council of Life Ins. v. Foster*, 580 A.2d 448, 451 (Pa. Commw. Ct. 1990) (dismissing on ripeness grounds insurers' challenge to insurance commissioner's power to disapprove sex-based insurance rating); *Corso v. Corso*, 59 Pa. D. & C.2d 546, 547–48 (Ct. C.P. 1972) (challenging "bed and board" provisions of Pennsylvania Divorce Code). *Fischer* is indeed an outlier.

Legislators counter that Providers' reading of the ERA would require the elimination of Medicaid program components that offer pregnant people

[7] Four federal cases have addressed this exception under the Pennsylvania ERA. One rejected a school district's argument that its policy prohibiting female students from participating on the school's wrestling team was reasonably based on "unique physical characteristics." *See Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 395 (M.D. Pa. 2014). Two other federal cases indicated that the sex-based classifications at issue could potentially be upheld under a "unique physical characteristics" exception upon a showing of actual, relevant physical differences, but in neither case was that showing made. *See Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 177–80 (3d Cir. 1993); *Kemether v. PIAA*, 15 F. Supp. 2d 740, 755–56 (E.D. Pa. 1998) (denying defendant PIAA's summary judgment motion). And in a fourth, the exception was mentioned, but the court suggested *Fischer*'s invocation of the exception was nothing but dicta. *See Haffer v. Temple Univ.*, 678 F. Supp. 517, 536 (E.D. Pa. 1987) (ERA challenge to university's treatment of female athletes).

preferential treatment—for example, higher income eligibility thresholds. Senate Br. at 19–20. There could possibly be classifications that turn on "unique physical characteristics" that could survive the searching scrutiny the ERA demands. *Cf. United States v. Virginia*, 518 U.S. 515, 533 n.6 (1996) (observing that "strict scrutiny . . . is not inevitably 'fatal in fact'" (citation omitted)). A Medicaid income eligibility rule that extends health care to pregnant patients with slightly higher incomes may be one of them.[8] Those cases and their underlying facts, however, are not currently before this Court.

III. Appellees' Attempt to Weaken Pennsylvania's Equal Protection Guarantee Is Inconsistent with Precedent.

A. Pennsylvania's Equal Protection Provisions Are Stronger Than Their Federal Counterpart.

Appellees argue that Pennsylvania's equal protection provisions are coextensive with the federal Equal Protection Clause and offer no greater protection. *See* House Br. at 54–58; Senate Br. at 46–48. In making this argument, they repeat *Fischer*'s mistake and ignore the textual differences between the state and federal provisions. *See Fischer*, 502 A.2d at 120–24; Appellants' Br. at 57–58; Br. for *Amici Curiae* ACLU et al. at 4.

[8] Surely, Legislators and their *amici* would agree that such a rule advances the compelling state interest of protecting patients' health and promoting fetal development throughout the critical period of pregnancy.

This argument misreads precedent. Appellees point to *Sadler v. W.C.A.B.*, 244 A.3d 1208, 1215 (Pa. 2021), and *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000), to support their position that this Court applies the "same standards" to state and federal equal protection claims. *See* Senate Br. at 46–47; House Br. at 45, 56. As this Court has explained, however, while Pennsylvania has adopted the three-tiered means-ends *framework* developed under federal Equal Protection caselaw, it does not walk in lockstep with federal law in how this test is *applied* under the state Constitution. *See* Br. of *Amici Curiae* ACLU et al. at 8–14. For example, Appellees cite *Love*, 597 A.2d at 1139, in support of a lockstep interpretation, House Br. at 55–58, but they ignore this Court's rejection of just such an interpretation: *Love* "merely remarked that [Pennsylvania's] Equal Protection Guarantee and [the Federal] Equal Protection Clause involve the *same jurisprudential framework—i.e.*, a means-ends test taking into account a law's use of suspect classification, burdening of fundamental rights, and its justification in light of its objectives." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 784 n.54 (Pa. 2018) (emphasis added) (citation omitted).[9]

Even where this Court has invoked *Love*'s "same standards" language, the analysis turned on Pennsylvania jurisprudence. For instance, in *William Penn*

[9] Since rendering this clarification, the Court has not cited *Love* or its "same standards" language.

School District, 170 A.3d at 418, this Court relied on Pennsylvania caselaw in considering whether there is a right to education under the Pennsylvania Constitution and declined to mirror the federal analysis of the issue. *See id.* at 457–58, 460–63 (relying on Pennsylvania Constitution's protection of right to education and declining to follow *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)); *see also DeFazio v. Civ. Serv. Comm'n.*, 756 A.2d 1103, 1105–06 (Pa. 2000) (citing only Pennsylvania caselaw in its equal protection analysis).[10]

Certainly, this Court is not obligated to interpret Pennsylvania's equal protection provisions identically with the federal Equal Protection Clause: "when a provision of the Pennsylvania Constitution has a federal counterpart," and a party invokes "the state charter . . . to support a departure from established federal law"—as Providers have done in this case—"the court should engage in [the *Edmunds*] four-factor analysis to determine whether the Pennsylvania provision has a different scope or meaning." *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1117 n.10 (Pa. 2014) (referring to *Commonwealth v. Edmunds*, 586 A.2d 887,

[10] Senators also cite *Sadler*, 244 A.3d at 1215, for the claim that the "protections afforded under" Article I, section 1 of the Pennsylvania Constitution and the Equal Protection Clause of the federal Constitution are "coterminous," Senate Br. at 47; yet, the *Sadler* Court relied on *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 883 A.2d 518, 532 (Pa. 2005), which, as this Court has clarified, indicated only that the parties in that case did not dispute that the protections were coterminous. *See Sadler*, 244 A.3d at 1215–16; *see also League of Women Voters*, 178 A.3d at 784 n.54 (citing *Kramer*, 883 A.2d at 532).

894–95 (Pa. 1991)). The *Fischer* Court did not have the benefit of *Edmunds* to guide its analysis, which is yet another reason for this Court to revisit the decision.

B. Appellees Incorrectly Assert That the Coverage Ban Does Not Burden a Fundamental Right.

Appellees incorrectly—and inconsistently—argue that because the coverage ban neither implicates a suspect class nor impinges on a fundamental right, rational basis is the appropriate standard of review. While Senators concede that the abortion right is constitutionally protected, they claim in the equal protection portion of their brief that Providers' assertion that the coverage ban burdens a fundamental right is "an inaccurate statement of the law[.]" Senate Br. at 50, 54. Yet, earlier in their brief, when discussing the ERA, they contradict this and concede that the coverage ban burdens the right to abortion, insisting that it apportions varying benefits based on "the *act* of abortion" and because of a "woman's *decision to abort*." *Id.* at 24, 30. This formulation of the coverage ban burdening the right to abortion is correct. *See* Appellants' Br. at 66–68.

Moreover, Legislators entirely disregard this Court's broad statements about fundamental rights under our state Constitution. *Fischer* is inconsistent with this Court's treatment of individual rights to privacy, bodily autonomy, and procreation under the Pennsylvania Constitution. *See* Appellants' Br. at 60–65; Br. of *Amici Curiae* ACLU et al. at 14–20; Br. of *Amici Curiae* Faith-Based Orgs. at 14–15, 20–21. These rights encompass an individual's right to choose whether to

continue or terminate a pregnancy. Appellants' Br. at 60–65. Indeed, as noted above, Senators readily admit there is a state constitutional right to abortion. Senate Br. at 50.

Representatives dispute this and discount this Court's discussions of the right to privacy and procreation because none of the cases in which those declarations were made dealt specifically with abortion. House Br. at 64–71. Following this logic, the Court would be effectively barred from applying general principles of law to new facts. That is not how precedent works. *See Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582, 604–05 (Pa. 2012) (criticizing "exceedingly literal" fact-bound reading of a past case without regard to the "prudential considerations governing it" as inconsistent with "the concept of precedent at common law").

Representatives support their argument that the coverage ban does not infringe upon a fundamental right under the Pennsylvania Constitution by citing *Maher v. Roe*, 432 U.S. 464, 478–79 (1977), a federal case that upheld a Connecticut coverage ban, *see* House Br. at 47–48; but they fail to mention that a Connecticut court subsequently *struck down* that state's coverage ban in a state equal protection challenge similar to Providers' claim in the instant case. *See Doe v. Maher*, 515 A.2d 134, 159–62 (Conn. Super. Ct. 1986) (holding that abortion is a fundamental right under the Connecticut Constitution and that the ban could not

survive strict scrutiny under the state's equal protection clause). Just as the state court recognized greater protections under the Connecticut Constitution than those available under the federal Constitution, this Court has likewise recognized Pennsylvania's broader protection of individual rights. *Cf. William Penn Sch. Dist.*, 170 A.3d at 460–61 (refusing to march in lockstep with U.S. Supreme Court's equal protection analysis of right to education).

Representatives again omit pertinent subsequent legal developments when they cite a nineteenth century case to support their view that abortion cannot be accorded the status of a fundamental right as there is no history of Pennsylvania courts protecting this right. *See* House Br. at 61 (citing *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850)). In citing to *Mills*, a case decided in an era when women did not have full citizenship status,[11] Representatives omit the more relevant and more recent Pennsylvania cases that did recognize a constitutional right to abortion. Importantly, in 1970 the Common Pleas Court applied strict scrutiny to invalidate the Pennsylvania criminal abortion statute, describing it as an invasion of the

[11] The antiquated views expressed in *Mills* should not have any bearing on whether the Pennsylvania Constitution protects a right to abortion. As this Court has noted, legal "question[s] must be resolved in the light of present day considerations rather than considerations more appropriate to the Middle Ages." *Commonwealth v. Santiago*, 340 A.2d 440, 445 (Pa. 1975); *see also Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 491 (Kan. 2019) (per curiam) ("[W]e cannot ignore the prevailing views justifying widespread legal differentiation between the sexes [at common law] and the reality that these views were reflected in policies impacting women's ability to exercise their rights of personal autonomy, including their right to decide whether to continue a pregnancy.").

constitutional right to privacy. *See Commonwealth v. Page*, 54 Pa. D. & C.2d 12, 13–16 (Ct. C.P. 1970). Subsequently, this Court affirmed, *Commonwealth v. Page*, 303 A.2d 215 (Pa. 1973), and then applied the constitutional right in another case. *Commonwealth v. Jackson*, 312 A.2d 13 (Pa. 1973).

Representatives yet again distort caselaw in their reading of *Cable v. Anthou*, 699 A.2d 722 (Pa. 1997), which recognized a state constitutional right to bodily integrity. *See* House Br. at 67 (dismissing *Cable* as merely "a shield against unwanted government intrusion"). *Cable* cannot be read so narrowly, as it expressly recognized precedent that "stated that [a woman] had an undeniable right to her bodily integrity, and to be free from invasions into her body." *Cable*, 699 A.2d at 726 (citing *Koleski v. Park*, 525 A.2d 405, 408 (Pa. Super. Ct. 1987)). By necessary implication, this undeniable right to bodily integrity allows a woman to make decisions about her own body and protects against state intrusion into her decisions about her pregnancy. By covering pregnancy care but not abortion care, the Commonwealth is coercively influencing the choices of women enrolled in Medicaid. *See* Appellants' Br. at 67–68; *see also, e.g.*, *Women of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995) ("We simply cannot say that an indigent woman's [constitutionally protected] decision whether to terminate her pregnancy is not significantly impacted by the state's offer of comprehensive medical services

if the woman carries the pregnancy to term."). The right to bodily integrity recognized in *Cable* does not permit such coercive government intervention.

Because the coverage ban infringes on a fundamental right, *see Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2013) (counting "right to privacy, the right to marry, and the right to procreate" among "rights considered fundamental"), and denies a benefit based on the exercise of that right, this Court should review the coverage ban under strict scrutiny in accordance with its precedents. *See* Appellants' Br. at 62–65. Even if the coverage ban does not trigger heightened scrutiny, it would still fail rational basis review. In defining the Commonwealth's interest that is promoted by the coverage ban, Appellees conflate "promoting childbirth" with "protecting life" and disregard the Commonwealth's interest in protecting the health and lives of women. *See* House Br. at 52–53; Senate Br. at 55–56; 18 Pa. C.S. § 3202(a). The coverage ban prevents women from receiving timely abortion care, if not from accessing abortion care altogether. *See, e.g.*, Appellants' Br. at 5–6. Women—particularly women of color—who are denied prompt access to abortion care face significant risks to their health and lives. *See id.*; Br. of *Amici Curiae* New Voices et al. at 27–29. Clearly, the coverage ban

bears no rational relationship to the Commonwealth's asserted interest in protecting the health and lives of women and instead undermines that interest.[12]

C. Appellees Misrepresent Caselaw From Other Jurisdictions.

Appellees mischaracterize *Fischer* as being among a majority of state court decisions upholding similar coverage bans. But, other than *Fischer*, only seven cases, from only six states, have upheld bans on public funding for abortion, compared to fourteen states that have struck down coverage bans on state constitutional grounds. Nearly half of the decisions upholding coverage bans entailed the courts' conclusions that the equal protection provisions of their state constitutions—unlike the equal protection provisions of the Pennsylvania Constitution—provided no greater protection than does the federal provision. *See* Appellants' Br. at 71; Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. Rev. 433, 441 (1996) (citing *Doe v. Masten Childers*, No. 94CI02183, slip op. at 20 (Ky. Cir. Ct. Aug. 7, 1995)). Two other cases erroneously identified the right at issue as the right to have the state pay for abortion care. *See Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001); *Rosie J. v. N.C. Dep't of Hum. Res.*, 491 S.E.2d 535, 537

[12] Contrary to Appellees' dismissive treatment of the coverage ban's health consequences for women, Senate Br. at 55, the statute's life endangerment exception utterly fails to protect women's health. R.238a, ¶ 22; R.252a–253a, ¶ 52.

(N.C. 1997). Providers have made clear that this is not the right implicated by the coverage ban. *See* Appellants' Br. at 67–68.

In another case, the coverage ban at issue was part of a unique statutory scheme, the purpose of which was to "provide indigent health care only *to the extent that federal matching funds are available*." *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 265–66 (Tex. 2002); *see also* Appellants' Br. at 49 n.28. Whereas the Texas coverage ban "was plainly not directed at abortion care," as coverage of all services was limited to that for which federal funds were available, *Bell*, 95 S.W.3d at 261, Pennsylvania's coverage ban solely and explicitly targets abortion. In the last case, the court recognized as "compelling" the state's asserted interests of "protecting unborn human life and promoting live childbirth," and completely disregarded the lives and health of women, *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2002 WL 32156983, at *5–6 (Idaho Dist. Ct. June 12, 2002), which the Commonwealth has explicitly asserted an interest in protecting, 18 Pa. C.S. § 3202(a). None of these cases supports upholding Pennsylvania's coverage ban.

As Providers have established, the weight of authority from other states supports invalidating the coverage ban under the Pennsylvania Constitution. *See* Appellants' Br. at 49–51, 68–71. Thirteen state courts have invalidated similar coverage bans as unconstitutional on their face,[13] and another state court held that a coverage ban was unconstitutional as applied.[14] Notably, seven of those courts invalidated the coverage bans on equal protection grounds.[15] Senators imply that most state courts considering the issue have followed *Fischer*, *see* Senate Br. at 51–52, but the opposite is true: ten of these fourteen cases invalidating coverage bans were decided after *Fischer*.[16]

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[13] *See* Appellants' Br. at 49–51, 68–71; *see also Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *21–28 (Mont. Dist. Ct. May 22, 1995); *Planned Parenthood Ass'n v. Dep't of Hum. Res.*, 663 P.2d 1247, 1249–50, 1261 (Or. Ct. App. 1983); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 660–61 (W. Va. 1993), *superseded by* W. VA. CONST. art. VI, § 57 (2018).

[14] *See Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 260 (Ind. 2003).

[15] *See* Appellants' Br. at 68–71; *see also Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 32–35 (Ariz. 2002); *Jeannette R.*, 1995 Mont. Dist. LEXIS 795, at *21–28; *Women's Health Ctr.*, 446 S.E.2d at 666–67; Kelley P. Swift, Comment, Hope v. Perales*: Abortion Rights Under the New York State Constitution*, 61 BROOK. L. REV. 1473, 1529 n.310 (1995) (explaining that *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986), invalidated the coverage ban under the Vermont Constitution's common benefit clause, which is the state counterpart of the Equal Protection Clause of the Federal Constitution, *see, e.g.*, *Baker v. State*, 744 A.2d 864, 870 (Vt. 1999)).

[16] While Senators attempt to discount the pre-*Fischer* cases as irrelevant because *Fischer* disregarded them, it is appropriate to consider them. *See Edmunds*, 586 A.2d at 895.

IV. Providers Have Standing to Raise the Rights of Their Patients.[17]

Nothing in the briefs from DHS or Representatives[18] regarding standing undermines Providers' central argument that they are harmed in a substantial, direct, and immediate way by the coverage ban and thus have standing under Pennsylvania law. Notably, Appellees cannot point to any case, in any jurisdiction (other than the decision below in the instant case), in which abortion providers were denied standing in cases challenging abortion restrictions on behalf of their patients. This Court's "flexible, prudential approach to standing," *see* Senate Br. at 79–80, necessitates rejecting the Commonwealth Court's conclusion that Providers lack standing in this case.

A. Providers' Interests Are Substantial, Direct, and Immediate.

Neither DHS nor Representatives dispute that the three *William Penn Parking* factors—substantial, direct, and immediate—are the proper measure for

[17] Representatives' new argument, not raised in the court below, that this Court should deny jurisdiction because Providers have no standing to assert a claim under the Declaratory Judgment Act fails because arguments about standing are waived when raised for the first time on appeal. *See* Pa. R.A.P. 302(a); *In re Paulmier*, 937 A.2d 364, 368 n.1 (Pa. 2007); *Carrasquillo v. Kelly*, No. 2720 EDA 2018, 2019 WL 5887293, *5 (Pa. Super. Ct. Nov. 12, 2019). Alternatively, if Representatives can in fact raise this objection for the first time now, the legal analysis underlying the objection overlaps almost entirely with the issue of standing (whether Providers are harmed in a substantial, direct, and immediate), discussed further within this section.

[18] Both sets of Legislators had the opportunity to object to Providers' standing in their preliminary objections, their briefing, and their oral argument to the Commonwealth Court, but did not. Representatives argue for the first time before this Court that Providers lack standing; Senators are silent on the matter in their briefing.

whether Providers have standing in this case. Walking through these factors in order, neither DHS nor Representatives argue that Providers have failed to allege a substantial interest in this matter. Rather, Representatives claim instead that Providers have "all but admitted" that no *patients* have been harmed by the coverage ban. House Br. at 17. This is a plainly erroneous reading of Providers' Petition, which includes dozens of allegations about the harm the coverage ban causes patients. R.129a–139a, ¶¶ 56–83. Representatives point to Providers' charitable efforts as evidence that no patient is harmed, but Providers plainly state in their Petition that despite these efforts, "there are Pennsylvania women who are forced to carry their pregnancies to term against their will." R.132a, ¶ 64.

Representatives next claim that Providers' interests are not direct because the asserted harm comes from "their own business practices and business model." House Br. at 16. This argument is tantamount to saying that Providers are suffering harm only because they are choosing to provide abortion care and if they changed their business model to provide some other kind of care, such as tonsillectomies or pediatric checkups, they would no longer suffer harm because Medicaid would cover those procedures.

DHS and Representatives finally both claim that Providers do not possess an immediate interest. Both begin their argument to this effect by attempting to add a "zone of interests" test onto Pennsylvania standing analysis,

DHS Br. at 9, 12; House Br. at 16, but this Court has rejected that additional requirement. *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010). The only support cited for this proposition comes from cases decided long before *Johnson* clarified the issue.

By selectively quoting from the decision, DHS distorts this Court's analysis in *William Penn Parking* to support its argument that immediacy requires a zone of interests analysis. DHS argues that a necessary requirement for standing is, quoting from *William Penn Parking*, that the "protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved.'" DHS Br. at 12. But DHS omits the introduction to that statement: "standing will be found more readily where . . . ." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 284 (Pa. 1975). The full quote from *William Penn Parking* makes clear that DHS's attempt to graft a hard and fast "zone of interests" rule onto this Court's standing jurisprudence is a misreading of precedent. *Johnson* explicitly recognized as much. *Id.* at 333.

DHS and Representatives' arguments about this Court's standing jurisprudence ignores precedent from this Court that has allowed abortion providers to raise the constitutional rights of their patients. In both *Page*, 303 A.2d 215, and *Jackson*, 312 A.2d 13, this Court allowed individuals accused of performing illegal abortions to assert constitutional challenges to their prosecutions

based on their patients' constitutional rights, not on their own. Standing was never mentioned in the opinions; however, by ruling that the statutes were unconstitutional based on *Roe v. Wade*, 410 U.S. 113 (1973), this Court implicitly adopted the position that abortion providers can assert the constitutional rights of their patients. Had this Court adopted Appellees' view of standing, both cases would have never reached the merits.

Both DHS and Representatives also attack the precedent upon which Providers rely. However, DHS's claim that *William Penn Parking* does not involve third-party standing, DHS Br. at 16, overlooks this Court's statement of the issue in the case: "whether the parking operators have standing to challenge the imposition of this tax upon their patrons," as well as its discussion of two of the leading U.S. Supreme Court third-party standing cases. 346 A.2d at 287; *id.* at 289 (discussing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Truax v. Raich*, 239 U.S. 33 (1915)). The Court concluded that because the customer pays the tax on the transaction between the customer and the parking operator, "the effect of the tax upon [the parking operators'] business is removed from the cause by only a single short step." *Id.* at 289. The same is true with Providers' harm here: it is removed from the cause—their patients being denied coverage for their abortions—by only a single short step.

DHS and Representatives also misrepresent *Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145 (Pa. 2004), and *Robinson Township v. Commonwealth*, 83 A.3d 901, 924 (Pa. 2013). As both parties in *Dauphin* explained in their briefing to the Court, at issue in the case was the constitutional right of criminal defendants to have counsel, as set forth by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Despite new eligibility requirements causing these criminal defendants to be deprived of their right to representation, the Court found public defenders had standing because their harm of being unable to provide services to clients was substantial, direct, and immediate. *Dauphin Cnty. Pub. Def.'s Off.*, 849 A.2d at 1148–49. Likewise, Providers' harm here is the same, as their clients are being deprived of a right, and as a result Providers suffer. And in *Robinson*, as this Court recognized, the state had argued that the doctor had no standing because he was asserting the rights of his patients. 83 A.3d at 924. This Court found no barrier to standing despite this posture.

B. Under *Singleton v. Wulff*, Providers Also Have Standing.

Beyond *William Penn Parking*, Providers rely secondarily on the U.S. Supreme Court's decision in *Singleton v. Wulff*, 428 U.S. 106 (1976), reliance upon which both DHS and Representatives claim is misplaced. DHS's argument simply parrots the Commonwealth Court's flawed reasoning regarding the *Singleton*

factors, which Providers addressed in their opening brief. *See* Appellants' Br. at 21–30. DHS also incorrectly states that *Singleton* has "never been adopted by the majority of the U.S. Supreme Court." DHS Br. at 20. Yet, a majority of the U.S. Supreme Court reaffirmed *Singleton* in *June Medical Services v. Russo*, 140 S. Ct. 2103, 2118–20 (2020) (plurality); *id.* at 2139 n.4 (Roberts, C.J., concurring in judgment) (agreeing with the plurality to form a majority on this point).[19] In fact, the four-Justice plurality cited nine other Supreme Court cases that applied *Singleton* to allow abortion providers to sue on behalf of their patients. *Id.* at 2118–20 (plurality).

Representatives attempt to distinguish *Singleton* and *June Medical* from this case, claiming that this case involves abortion *clinics*, whereas *Singleton* and *June Medical* involved *doctors* who were prohibited by law "from engaging in their chosen profession and serving their patients." House Br. at 18–19. Representatives provide no citation for this distinction between doctors and clinics for the simple reason that there is none. The U.S. Supreme Court has never rejected standing for an abortion clinic, *see, e.g.*, *June Medical*, *supra*, and dozens of courts that have specifically addressed this argument have found that *Singleton*'s

[19] This discussion of standing in *June Medical* belies Representatives' contention that "the standing issue was . . . not considered at any level during the litigation" of the case. House Br. at 17.

principles apply equally to clinics as they do to doctors, with none holding otherwise. *See, e.g.*, *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n.3 (8th Cir. 1977) ("There is an intimate relationship between Planned Parenthood and its patients and the right of a pregnant woman to secure an abortion is 'inextricably bound up' with the ability of Planned Parenthood to provide one."); *Volunteer Med. Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 223 (6th Cir. 1991); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987); *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F. Supp. 3d 807, 813 (W.D. Ky. 2019).[20]

C. Adopting Appellees' Arguments Would Place Pennsylvania Alone Among Other High Courts.

Ultimately left with no legitimate way to distinguish *Singleton*, DHS and Representatives resort to the proposition that "Pennsylvania courts have developed standing principles that are unique to Pennsylvania." DHS Br. at 21; House Br. at 19–20. Providers agree but point to long-standing jurisprudence that these unique Pennsylvania principles are *less stringent* than federal standing doctrine, as this Court just recently reiterated. *See, e.g.*, *Firearm Owners Against*

[20] Relatedly, Representatives' contention that *Robinson* is different from this case because there was a doctor-patient relationship in that case while the clinics here have no such relationship is wrong as a matter of law. *See Thompson v. Nason Hosp.*, 591 A.2d 703 (Pa. 1991) (recognizing duty of care between hospital and patient); *Scampone*, 57 A.3d 582 (expanding *Thompson* beyond just hospitals to other medical entities that provide care).

Crime v. Papenfuse, 261 A.3d 467, 481–82 (Pa. 2021) (contrasting the two); *see also* Senate Br. at 80 (noting Pennsylvania's more "flexible, prudential" approach to standing compared to federal law). Neither DHS nor Representatives can possibly explain why the federal courts would uniformly *allow* abortion providers to sue on behalf of their patients in every abortion case presenting the issue in the last half-century, but Pennsylvania, with its more flexible approach to standing, would *reject* it.

Nothing in Appellees' briefs gives this Court any reason to deviate from the principle it implicitly recognized long ago in both *Page* and *Jackson*, that abortion providers can assert the constitutional rights of their patients. Were this Court to hold otherwise, it would stand alone among the highest courts in the land. *See* Appellants' Br. at 28–30.

V. Legislators Are Not Proper Intervenors.[21]

Because Providers' Petition does not impact the General Assembly's power to appropriate funds or any other uniquely legislative function, Legislators are not proper intervenors.[22] If this Court were to agree with Legislators, it would create an unbounded right to individual legislator intervention in all cases having

[21] Contrary to Senators' position, *de novo* review is appropriate here because this decision on intervention involves a legal rather than factual determination. *See Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 956 A.2d 956, 963 (Pa. 2008).

[22] DHS has taken no position on the issue of intervention. DHS Br. at 28.

even a merely tangential impact on the Commonwealth's budget. For instance, individual legislators in the General Assembly—all 253 of them, each with the right to be separately represented by counsel—would have the right to intervene not only in this case but in, for instance, all constitutional tort cases, as the resulting verdict could impose financial liability on the Commonwealth and impact the General Assembly's appropriations. Not only would this be nonsensical and highly burdensome on the court system, it is also contrary to the plain language and purpose of the intervention rules and this Court's precedent.

The proper way for Legislators to express their views on the merits of this lawsuit is the way their individual House colleagues did—file *amicus* briefs that effectively convey to this Court their views on this matter. With that avenue available to them, and without satisfying the requirements for intervention, Legislators are not proper intervenors in this case.

A. Legislators Have No Legally Enforceable Interest in this Litigation.

Legislators fail to articulate any discernible, direct, palpable infringement on their authority as legislators, and thus have no grounds to intervene under Rule 2327(4).[23] Tellingly, they cite no precedent supporting their

[23] To the extent Legislators suggest that intervention analysis differs from legislative standing analysis because they seek to intervene as respondents, rather than petitioners, this is incorrect. This Court has applied the same legislative standing standard to legislators who sought to intervene as respondents. *See Robinson Twp. v. Commonwealth*, 84 A.3d 1054 (Pa. 2014)

request for party status in a constitutional challenge to a previously enacted law. This is because there is no such precedent. While Legislators cite to *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016), for the proposition that intervention is appropriate when legislators suffer "a concrete impairment or deprivation of an official power or authority to act as a legislator," Senate Br. at 57, they omit that the examples cited by *Markham* regarding when intervention is appropriate relate to impingements on a legislator's authority to *vote*. *Markham* explained 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." 136 A.3d at 145 (citing *Fumo v. City of Phila.*, 972 A.2d 487 (Pa. 2009) (regarding usurpation of legislators' authority to vote on licensing)). As the Commonwealth Court put it plainly, "once [a legislator's] vote had been duly counted and the bill signed into law, his connection with the transaction [a]s a legislator was at an end." *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. Ct. 1976).

Faced with no legal support for their arguments, Legislators distort Providers' requested relief in an effort to concoct a legally enforceable interest.

(affirming denial of intervention to legislators seeking to intervene as respondents under legislative standing analysis).

They incorrectly assert that Providers are seeking to mandate legislative action on their part, but all that Providers have requested is that a court block the enforcement of the coverage ban and declare it unconstitutional. *See* R.143a at 30.

Further, Legislators provide no response to the concern that allowing intervention in all constitutional challenges purportedly affecting appropriations would result in boundless individual legislator intervention in any matter touching on government money. Rather, Legislators argue that "Providers offer no explanation why legislators should *not* be permitted to intervene and be heard when some aspect of their constitutional obligation to appropriate funds is being called into question." Senate Br. at 62. But this is not the standard for intervention. As this Court has recognized, there must be some limiting principle to avoid a slippery slope that would allow every individual legislator in Pennsylvania to intervene in every challenge to government action that involves money. *See Markham*, 136 A.3d at 145. Similarly, Legislators provide no support for the claim that the right to vote on appropriations in the future constitutes a legally enforceable interest.

Legislators also claim they can intervene because the Petition raises "separation of powers concerns in that it seeks to restrict the General Assembly's authority[.]" Senate Br. at 63. Again, Legislators cite no caselaw for this proposition. Individual legislators have no unique interest in defending a law once

passed. It is the judiciary's role to interpret the Constitution and determine whether laws passed by the General Assembly are, in fact, constitutional. The exercise of this "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). That the coverage ban raises a challenge under Article III and may impact future appropriations does not compel a different result. *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 598 (Pa. 2013) ("[R]egardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens.").

B. Legislators Could Not Have Been Joined as Respondents.

The Commonwealth Court refrained from addressing Legislators' intervention argument under Rule 2327(3), but Legislators now attempt to resurrect it, claiming that they can intervene because they "could have [been] joined as an original party to the action." Pa. R.C.P. No. 2327(3). This argument is unfounded because neither the Legislature as a whole nor the individual legislators seeking intervention here could have been properly joined in Providers' original suit.

It is well-settled that the proper respondent to a challenge to an unconstitutional statute is the agency tasked with implementing, enforcing, or administering that law rather than the legislators who enacted it. *See Robinson*

Twp. v. Commonwealth, No. 284 M.D. 2012, 2012 Pa. Commw. Unpub. Lexis 387 (Pa. Commw. Ct. Apr. 20, 2012) (denying petition to intervene by legislators in action challenging constitutionality of oil and gas law), *aff'd*, 84 A.3d 1054 (Pa. 2014) (per curiam); *Wagaman v. Att'y Gen.*, 872 A.2d 244 (Pa. Commw. Ct. 2005) (holding that proper Commonwealth party is the agency tasked with enforcing the law). Thus, this Court should decline to permit intervention on this alternative ground.

The cases relied upon by Legislators to support Rule 2327(3) intervention are procedurally inapposite because, as Judge Simpson explained, they involve suits against the legislature in which "there is no indication . . . that joinder was contested." Simpson Op. at 13. Thus, although the cases Legislators cite do in fact involve individual legislators *named* as defendants in lawsuits, they do not support their position. After all, if Providers had improperly named prominent anti-abortion Pennsylvanians as respondents and these individuals never objected because they wanted to be involved in this case, this case could not possibly become precedent for the argument that concerned private citizens are proper intervenors because they "could have [been] joined as an original party in the action." Pa. R.C.P. No. 2327(3).

Legislators attempt to analogize this case to several where the petitions sought to directly enjoin a uniquely legislative function such as voting or

redistricting. *See, e.g.*, *Stilp v. Commonwealth*, 974 A.2d 491 (Pa. 2009) (legislator compensation); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (drawing of district lines); *Leach v. Commonwealth*, 141 A.3d 426 (Pa. 2016) (enactment process under single-subject rule). The remaining cases cited by Legislators were lawsuits that sought specifically to mandate the Legislature to take action to appropriate additional funds. *See, e.g.*, *Sears v. Wolf*, 118 A.3d 1091 (Pa. 2015) (funding a health insurance program); *Pa. State Ass'n of Cnty. Comm'rs v. Commonwealth*, 52 A.3d 1213 (Pa. 2012) (funding for the court system). Unlike these cases, the instant case does not involve a direct challenge to the Legislature's exercise of a uniquely legislative function, rather than an agency's ongoing responsibility to administer previously-appropriated funds. *Wilt*, 363 A.2d at 881.

Where, as here, a petitioner merely challenges the constitutionality of a previously enacted law that is enforced by an executive agency, the interest of the Legislature—and, *a fortiori*, an individual legislator's interest—has ended, and the agency is the proper party-in-interest. *See, e.g.*, *First Phila. Preparatory Charter Sch. v. Commonwealth*, 179 A.3d 128, 135, 140–41 (Pa. Commw. Ct. 2018) (imposing sanctions on petitioners that refused to dismiss legislative respondents who were not responsible for enforcement of the statute at issue). The only proper respondent in a case like this is the agency tasked with administering the legislation. *See Robinson Twp.*, 2012 Pa. Commw. Unpub. Lexis 387.

Were this Court to hold otherwise, actual separation of powers problems would arise. If this Court concludes that Legislators can intervene under 2327(3) because they could have been properly named as parties in this case, then in every case touching on Commonwealth funds, not only could individual legislators intervene if they wanted, but every plaintiff could name individual legislators as defendants. And, because there is no principle separating the individual legislators who attempted to intervene in this case from each of their other colleagues who did not, this would be true for all 253 individual legislators in Pennsylvania. Turning every constitutional case like this one into a forum for every member of the General Assembly to voice their concerns would turn the court system into another legislative body and thwart the judiciary's unique and independent role in our system of government. *Sprague v. Cortes*, 145 A.3d 1136, 1141–42 (Pa. 2016) (per curiam) ("[T]he judiciary is the branch entrusted with interpreting the Constitution.").[24]

[24] In an argument not raised below, Representatives assert, without pointing to any authority, that the Declaratory Judgment Act, 42 Pa. C.S. § 7540 ("DJA"), serves as an independent basis for legislators to intervene. House Br. at 38. This argument is waived. Pa. R.A.P. 302(a). Moreover, this argument is nothing but a repetition of the intervention argument under Rule 2327(3) and contrary to this Court's statement that the DJA's joinder language is limited, particularly in the context of joining the General Assembly as a necessary party. *See City of Phila. v. Commonwealth*, 838 A.2d 566, 584 (Pa. 2003).

Like Legislators' arguments about intervention under 2327(4), intervention under 2327(3) is not supported by Pennsylvania law, and this Court should reject this attempt to turn the court system into a general legislative body.

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Respectfully Submitted,

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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: January 26, 2021 */s/ Susan Frietsche*

CERTIFICATE OF COMPLIANCE WITH RULE 2135(d)

I, Susan Frietsche, hereby certify that the Reply Brief for Appellants complies with the word count limitation from this Court's December 20, 2021, Order, because it contains 9,808 words, excluding the parts exempted by Pa. R.A.P. 2135(b). This Certificate is based on the word count of the word processing system used to prepare this Brief.

Dated: January 26, 2022 */s/ Susan Frietsche*

CERTIFICATE OF SERVICE

I, Susan Frietsche, certify that on January 26, 2022, the foregoing Reply Brief of Appellants was served upon the persons on the date and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121.

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