

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

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**No. 26 MAP 2021**

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

**Appellants,**

**v.**

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

**Appellees.**

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**Brief of Amici Curiae the ACLU of Pennsylvania and  
Law Professors Seth Kreimer and Robert Williams in Support of Appellants**

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Appeal from the Orders of the Commonwealth Court at 26 MD 2019 entered on  
January 28, 2020 and March 26, 2021

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## Statement of Interest of the Amici

The **American Civil Liberties Union** (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to preserving and defending the principles of individual liberty and equality embodied in the United States Constitution and civil rights laws. The ACLU of Pennsylvania, one of its state affiliates, has appeared many times as amicus curiae in federal and state courts at all levels, including both civil and criminal proceedings, in cases involving the rights of women, including pregnant women, to equal treatment under the law. The proper resolution of this case and clarification of the rights afforded by the Pennsylvania Constitution are matters of substantial importance to the ACLU of Pennsylvania and its members.

**Seth Kreimer** is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania. He has taught and written on constitutional law for four decades and has written and lectured regularly on the independent development and jurisprudence of the Pennsylvania Constitution. *See, e.g.*, 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, 355 (2018); Seth Kreimer, *The Right to Privacy in the Pennsylvania Constitution* in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES (Ken



Gormley and Joy McNally eds., 2d ed. 2020); Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. Pa. J. Const. L. 12 (2002); Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 77 (1993).

**Robert Williams** is Distinguished Professor of Law Emeritus and Director, Center for State Constitutional Studies, Rutgers Law School. Professor Williams has taught and written about state constitutions for over forty years. In addition, he has participated in state constitutional litigation in many states as lead counsel and amicus curiae, including this Commonwealth. This Court has cited his writings in cases including *Robinson Township. v. Commonwealth*, 83 A.3d 901, 945-46 (Pa. 2013).<sup>1</sup>

### **Summary of Argument**

This Court's decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), embodies a deference to federal constitutional analysis that this Court has since abjured. In *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), this Court articulated the principles and methods of constitutional interpretation that now govern its jurisprudence. In *Edmunds*—and many decisions since—this Court has emphasized that “it is both important and necessary that we undertake an

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<sup>1</sup> No other person or entity authored or paid in whole or in part for the preparation of this brief.

independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.” *Id.* at 894-95. That analysis requires this Court to revisit *Fischer*.

In giving independent voice and effect to the Pennsylvania Constitution, this Court has accorded special protection for the “inviolable” rights set forth in the Declaration of Rights, Article I of the Constitution, including the “right to privacy, right to marry, and right to procreate.” *Nixon v. Dep’t of Pub. Welfare*, 839 A.2d 277, 286-87 (Pa. 2003). Appellants invoke the rights of privacy and autonomy in the decision whether to bear children. The origin of those rights in the Declaration of Rights heightens the need to interpret them to preserve the greatest level of individual freedom.

This independent analysis is particularly salient with respect to the rights to privacy and autonomy—the very issues addressed in *Edmunds*. In the three decades since *Edmunds*, this Court has recognized and elaborated the fundamental nature of the rights to privacy and autonomy under Article I, Sections 1 and 8 as well as the “charter as a whole.” *Commonwealth v. Alexander*, 243 A.3d 177, 206-07 (Pa. 2020). Those rights extend to a woman’s decision whether to carry a pregnancy to term, and government policies that seek to punish the exercise of those rights must satisfy exacting scrutiny.

Amici are in agreement with the arguments set forth by the Appellants and urge this Court to take the opportunity today to correct the errors of *Fischer*.<sup>2</sup> Doing so will once again confirm the long-standing and fundamental centrality of privacy and autonomy in Pennsylvania Constitutional jurisprudence.

## Argument

### **I. This Court has both the duty and authority to interpret the Pennsylvania Constitution independently of Federal law.**

The *Fischer* Court’s deference to federal constitutional analysis<sup>3</sup>—despite the fact that the plaintiffs raised only claims under the Pennsylvania Constitution—is incompatible with the framework for constitutional interpretation this Court has applied for the last three decades. For that reason, *Fischer* presents no barrier to the Appellants’ claims.

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<sup>2</sup> This Court’s citations of *Fischer* in the current century read it for a proposition that is not put at issue by the Appellants’ arguments. See *Driscoll v. Corbett*, 69 A.3d 197, 212 (Pa. 2013) (“[I]n *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114 (1985), this Court determined that Section 26 does not define any new substantive civil rights, but clarifies that an individual may not be harassed or penalized for the exercise of his or her constitutional freedoms”); *Kramer v. Workers’ Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 537 (Pa. 2005) (“Article I, Section 26 safeguards the right not to be harassed or punished for the exercise of a constitutional right. *Probst v. Commonwealth*, 849 A.2d 1135, (Pa. 2004); *Fischer v. Dep’t of Pub. Welfare*, 502 A.2d 114, 123 (Pa. 1985)”).

<sup>3</sup> See, e.g., Elisabeth Wachsman and Ken Gormley, *Inherent Rights of Mankind*, in *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 101 (Ken Gormley and Joy McNally eds., 2d ed. 2020) (“the Pennsylvania Supreme Court followed the United States Supreme Court’s holding under the 14<sup>th</sup> Amendment in *Harris v. McRae*”).

*Fischer* was decided before this Court’s “seminal decision”<sup>4</sup> in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *Edmunds* laid the foundation of this Court’s modern approach to interpreting the Pennsylvania Constitution, turning the focus away from federal law and toward the unique history and development of law in this Commonwealth.

*Edmunds* was part of a wave of independent state constitutional analyses across the country. “As Justice Brennan noted in 1977, ‘more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.’” *Commonwealth v. Britton*, 229 A.3d 590, 599 (Pa. 2020) (Wecht, J., concurring) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977)). *Edmunds* highlighted “the importance of state constitutions with respect to individual rights” and the “strong resurgence of independent state constitutional

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<sup>4</sup> *Commonwealth v. Alexander*, 243 A.3d 177, 183 (Pa. 2020) (applying “seminal decision in *Commonwealth v. Edmunds*” to reject federal “automobile exception” to warrant requirement); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 792 (Pa. 2018) (applying “seminal decision in *Edmunds*” while independently interpreting “free and equal elections” clause to limit partisan gerrymandering); *id.* at 838 n.64 (referring to “landmark decision in *Edmunds*”); *DePaul v. Commonwealth*, 969 A.2d 536, 541-42 (Pa. 2009) (Castille, C.J.) (applying “seminal decision in *Commonwealth v. Edmunds*” to independently interpret Article I, Section 7 regarding political contributions); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 943-46 (2013) (Castille, J.) (invoking *Edmunds*’ “seminal, comparative review standard” while interpreting Article I, Section 27).

analysis, in Pennsylvania and elsewhere.” *Edmunds*, 586 A.2d at 894-95 (1991).<sup>5</sup>

Most importantly, *Edmunds* emphasized that “it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.” *Id.*; see, e.g., *Commonwealth v. Swinehart*, 664 A.2d 957, 961 (Pa. 1995) (citing to above passage from *Edmunds* and adopting broader protection against self-incrimination than exists under federal Constitution).

Rather than treating the federal Constitution as the starting place for understanding our charter, the *Edmunds* analysis brought the focus back to Pennsylvania’s own law and jurisprudence, directing courts to evaluate four factors—each independent of federal law:

- 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

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<sup>5</sup> To support this proposition, the Court cited: William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Harvard Law Review, *Developments in the Law -- The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982); Hans A. Linde, *E Pluribus - Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141 (1985); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081 (1985); William J. Brennan, Jr., *Symposium on the Revolution in State Constitutional Law: Foreword*, 13 Vt. L. Rev. 11 (1988).

local concern, and applicability within modern Pennsylvania jurisprudence.

*Edmunds*, 586 A.2d at 894-95.

In the years since *Edmunds*, this Court has regularly underscored that

Our autonomous state Constitution, rather than a “reaction” to federal constitutional jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

*League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). The result has been this Court’s rejection, in a multitude of contexts, of federal law in favor of providing protections for individual rights under the Pennsylvania Constitution.<sup>6</sup>

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<sup>6</sup> See, e.g., *Commonwealth v. Middaugh*, 244 A.3d 426, 434 n.9 (Pa. 2021) (reversing driver’s license suspension for want of basic fairness under Article I section 1, under which the most basic scrutiny “is more exacting than the rational-basis test under the federal Constitution”); *Commonwealth v. Johnson*, 231 A.3d 807, 821 (Pa. 2020) (interpreting Article I, Section 10 double-jeopardy provision as supplying broader protections than its federal counterpart, citing *Commonwealth v. Smith*, 615 A.2d 321, 325 (1992)); *Ladd v. Real Estate Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020) (Article I, Section 1 of the Pennsylvania Constitution provides greater protections for occupational freedom than the Due Process Clause of the Fourteenth Amendment); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) (independently interpreting “free and equal elections” clause); *Shoul v. Dep’t of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 677 (Pa. 2017) (noting that the federal rational basis test differs significantly from Pennsylvania’s “more restrictive” test); *In the Interest of J.B.*, 107 A.3d 1, 21 n.24 (Pa. 2014) (invalidating statute as applied to minors under irrebuttable presumption doctrine, although “our Court has recognized that the United States Supreme Court limited the irrebuttable presumption doctrine”); see also *Commonwealth v. Torsilieri*, 232 A.3d 567, 587-88 (Pa. 2020) (remanding “to allow the parties to present additional argument and evidence to address . . . the prongs of the irrebuttable presumption doctrine”); *Nixon v. Dep’t of Pub. Welfare*, 839 A.2d 277, 288 n.15 (Pa. 2003) (“Although the due process guarantees provided by the Pennsylvania Constitution are substantially coextensive with those provided by the

Time and again, this Court has noted that it is “not bound to interpret the two provisions [of state and federal constitutions] as if they were mirror images, even where the text is similar or identical.”<sup>7</sup> The independence from federal analysis declared in *Edmunds* is even stronger where the text of the Pennsylvania Constitution differs from the federal text, for the Court is obligated to give effect to the language adopted by the People of this Commonwealth, rather than simply

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Fourteenth Amendment, a more restrictive rational basis test is applied under our Constitution”).

<sup>7</sup> See, e.g., *Commonwealth v. Arter*, 151 A.3d 149, 157 (Pa. 2016) (quoting *Edmunds*; independently interpreting exclusionary rule to apply to parole and probation revocation); *Commonwealth v. Molina*, 104 A.3d 430, 443 (Pa. 2014) (quoting *Edmunds*; independently interpreting privilege against self-incrimination under Pa. Const. art. I, § 9); *Commonwealth v. Matos*, 672 A.2d 769, 772 (Pa. 1996) (quoting *Edmunds* for assertion that “this Court has traditionally regarded Article I, Section 8 as providing different, and broader, protections than its federal counterpart”); *Commonwealth v. Hess*, 617 A.2d 307, 313 (Pa. 1992) (quoting *Edmunds* and holding that right to be represented by counsel of defendant’s own choosing is more protected under Article I, Section 9 of the Pennsylvania Constitution than federal counterpart). See also *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017) (Dougherty, J. joined by J.J. Baer and Donohue) (interpreting Pennsylvania’s ex post facto clause to “provide even greater protections than its federal counterpart”); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 944 n.33 (Pa. 2013) (Castille, C.J., joined by J.J. Todd and McCaffery) (interpreting Article I, Section 27) (recognizing “a pattern of state court decisions that offer an independent analysis of arguments premised upon the state constitution, rather than following U.S. Supreme Court precedent interpreting analogous federal constitutional provisions in lock-step, even where the state and federal constitutional language is identical or similar). Chief Justice Castille cited to several sources to support this assertion in *Robinson Township. Id.*; see, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism*, 59 N.Y.U. Ann. Surv. Am. L. 283, 287-88 (2003); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499 (2005); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189 (2002); Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 Widener J. Pub. L. 343 (1993).

reflecting federal analysis. For this reason, the *Edmunds* analysis begins with an examination of the text of our constitution: “The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018); *see also* *Washington v. Dep’t of Pub. Welfare*, 188 A.3d 1135, 1149 (Pa. 2018); *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) (“our ultimate touchstone is the actual language of the Constitution itself”). “[T]he Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 925 (Pa. 2004). Indeed, when interpreting language that has no counterpart in the federal Constitution, federal law is “immaterial.” *See, e.g., William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 460 (Pa. 2017) (noting that because of “the United States Constitution’s conspicuous and complete silence on the very topic of education,” the Supreme Court’s determination regarding the right to education is “immaterial to the Pennsylvania Constitution, which, obviously, is not at all silent on the topic.”).

This point is especially important in this case, as each of the provisions invoked by Appellants—Article I, Sections 1, 26 and 28 and Article III, Section 32—differs from the wording of the federal constitutional provisions at issue in the



cases upon which *Fischer* relied.

The *Fischer* Court did not follow any of these steps set forth in *Edmunds*. While the *Fischer* Court acknowledged it was “free to interpret our Constitution in a more generous manner,” the opinion did not analyze the text of the Pennsylvania constitutional provisions at issue, address the history of the relevant provisions, or explore the arguments which had led other state supreme courts to contrary decisions under their state constitutions. *Fischer*, 502 A.2d at 121. Its unadorned holding should carry no weight in the Court’s present review of Appellants’ claims.

**II. This Court must interpret the Pennsylvania Constitution, as it was drafted, to preserve the greatest freedom and autonomy for the people of Pennsylvania.**

In the three and a half decades following *Fischer*, this Court has given greater attention to the importance of individual rights in the Pennsylvania constitutional structure. In part, that is a function of the fact that state constitutions may provide more, but not less, protections for individual rights than the federal Constitution. But in Pennsylvania, there is a more fundamental reason for this. As *Edmunds* emphasized, “[u]nlike the Bill of Rights of the United States Constitution which emerged as a later addendum in 1791, the Declaration of Rights in the Pennsylvania Constitution was an organic part of the state’s original constitution of

1776.” *Edmunds*, 586 A.2d at 896. As this Court has noted, “[t]he people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018).<sup>8</sup>

Since 1790, the Declaration of Rights has pronounced: “To guard against the transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.” Pa. Const. art. I, § 25.<sup>9</sup> This Court has noted:

In considering the text of the provisions, we first look to their placement in the larger charter. The structure of the Pennsylvania Constitution highlights the primacy of Pennsylvania’s protection of individual rights: “The very first Article of the Pennsylvania Constitution consists of the Pennsylvania Declaration of Rights, and the first section of that Article affirms, among other things, that all citizens ‘have certain inherent and inalienable rights.’” *Pap’s A.M.*, 812 A.2d at 603.

*Commonwealth v. Molina*, 104 A.3d 430, 442 (Pa. 2014). This language implies “special protections to safeguard the rights set forth in Article I.” *Yanakos v.*

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<sup>8</sup> As one commentator has noted, the fact that many state constitutions predate the federal constitution, and were drafted during a time when states sought and jealously defended a large measure of autonomy from the federal government, is a factor that should cut in favor of interpreting these documents independently. Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 121-122 (2021 forthcoming).

<sup>9</sup> In the 1790 Constitution, this provision was in Section XXVI.

*UPMC*, 218 A.3d 1214, 1231 (Pa. 2019) (Donohue, J., concurring) (interpreting Article I, section 11).<sup>10</sup> And as Justice Dougherty observed, “The location of Pennsylvania’s clause within the Declaration of Rights lends considerable force to the argument it provides even more protection than its federal counterpart.”

*Commonwealth v. Muniz*, 164 A.3d 1189, 1220 (Pa. 2017).<sup>11</sup>

The necessity of a purely Pennsylvania approach to interpretation is at its height in this case, in which the Court must not only interpret provisions that have no federal counterpart, but also must consider the interplay between distinct, but

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<sup>10</sup> One example of this heightened solicitude for a right set forth in Article I that has no counterpart in the federal Bill of Rights is the right to reputation. This Court has previously noted that “the right of citizens to security in their reputations” in Pennsylvania “is a fundamental constitutional entitlement” which is “established in the opening passage of the Pennsylvania Constitution’s Declaration of Rights – under the title ‘Inherent rights of mankind’ – and is couched as an ‘indefeasible’ guarantee. *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 572-73 (Pa. 2018) (citing Pa. Const. art. I, § 1; *R. v. Commonwealth*, 636 A.2d 142, 149 (Pa. 1994); *see also Interest of J.B.*, 107 A.3d 1, 16 (Pa. 2014) (recognizing that “the right to reputation, although absent from the federal constitution, is a fundamental right under the Pennsylvania Constitution”).

<sup>11</sup> Many other opinions of this Court have noted the importance of Section 25. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018) (“Article I is the Commonwealth’s Declaration of Rights, which spells out the social contract between government and the people and which is of such ‘general, great and essential’ quality as to be ensconced as ‘inviolable.’”); *Pa. Evtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) (“As forcefully pronounced in Section 25, the rights contained in Article I are ‘excepted out of the general powers of government and shall forever remain inviolable.’”); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947 (Pa. 2013) (Castille, C.J.) (“The Commonwealth’s Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such ‘general, great and essential’ quality as to be ensconced as ‘inviolable.’”); *Gondelman v. Commonwealth*, 554 A.2d 896, 904 (Pa. 1989) (“The concept of the sanctity of those rights set forth under Article I is expressly articulated in Article I, section 25”).

related protections. Pennsylvania’s original equality guarantee, set forth in Article I, Section 1, expressed a broad revolutionary, egalitarian, anti-aristocratic intent to move toward a more fair society.<sup>12</sup> Almost two centuries later, the voters adopted a more focused equality guarantee in Section 26 that “reveal[s] a clear mandate of neutrality and a prohibition of favoritism or partiality.”<sup>13</sup> Section 26 does not replace Section 1, but rather supplements it by adding to “the existing equality guarantees in the state and federal constitutions. The existing provisions must have been viewed as not reaching far enough.”<sup>14</sup> And, finally, in 1971, the voters added the even more explicit equality guarantee in Section 28 that is directly implicated by the Appellants’ challenge. Federal analysis offers no guidance whatsoever in interpreting this succession of enactments.<sup>15</sup>

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<sup>12</sup> Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 548-49 (1989).

<sup>13</sup> Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 Widener J. Pub. L. 343, 365 (1993).

<sup>14</sup> *Id.* at 363.

<sup>15</sup> The Pennsylvania Constitution contains another unique equality provision in Article III, Section 32, which prohibits “special laws.” This provision, originally Article III, Section 7 in the 1874 Constitution, listed twenty-six specific subjects of legislation that could only be addressed by general legislation; in a 1967 amendment, the number of specific subjects was reduced but the provision was prefaced with a general command that the “General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.” Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 161, 183 n.108 (1993). The intent of the provision is to ban the types of discriminatory laws that “involve arbitrary, favorable treatment for particular people, groups, and places, foster diversity and inequality rather than uniformity

The opinion in *Fischer* interpreted provisions that the people of Pennsylvania enshrined in the Declaration of Rights, but it gave no weight to the “inviolable” nature of the Declaration of Rights. In the decades since *Fischer*, this Court has taken the opposite approach. For this reason, as well, *Fischer* is ripe for reexamination.

### **III. *Fischer* is inconsistent with the robust rights to privacy and autonomy in modern Pennsylvania constitutional law**

*Fischer* accepted the federal account of the scope of women’s rights to privacy and autonomy. But in the decades following *Fischer*, this Court has elaborated the independence of Pennsylvania constitutional analysis of rights to privacy and autonomy.

Five years after *Fischer*, *Edmunds* highlighted the independent and greater protection from unreasonable search and seizure under Article I, Section 8 as compared with the Fourth Amendment. In *Edmunds*, the Court recognized that beginning in the 1970s “this Court began to forge its own path under Article I, Section 8 of the Pennsylvania Constitution, declaring with increasing frequency that Article I, Section 8 of the Pennsylvania Constitution embodied a strong notion of privacy, notwithstanding federal cases to the contrary . . . tied into the implicit

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and equality.” *Id.* at 167. As with the other provisions discussed above, this one, too, has no counterpart in the federal Constitution – the Equal Protection Clause of the Fourteenth Amendment. *Id.*

right to privacy in this Commonwealth.” *Edmunds*, 586 A.2d at 898.<sup>16</sup>

In the two decades since *Edmunds*, this Court has made clear that the right to privacy in Pennsylvania is not solely—or even primarily—rooted in the textual enumeration of freedom from unreasonable search and seizure. Instead, the Pennsylvania right to privacy is part of a structure of “enhanced privacy interests” under the Pennsylvania Constitution, rooted in the broad commitments of Article I,

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<sup>16</sup> In *Edmunds*, the court noted to “a steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth.” *Edmunds*, 586 A.2d at 898; *see, e.g., Commonwealth v. Arter*, 151 A.3d 149, 157 (Pa. 2016) (rejecting federal rule and applying exclusionary rule to parole and probation revocation while reiterating that “this Court has repeatedly emphasized that Article I, Section 8, is meant to embody a strong notion for privacy, carefully safeguarded in this Commonwealth for the past two centuries”); *Commonwealth v. Johnson*, 86 A.3d 182, 188-91 (Pa. 2014) (rejecting rule of *Herring v. United States*, 555 U.S. 135 (2009) because of privacy concerns); *Commonwealth v. Shaw*, 770 A.2d 295, 299 (Pa. 2001) (departing from Fourth Amendment and holding that Article I, Section 8 requires warrant for release of blood alcohol test administered by hospital); *see also Commonwealth v. Dunnavant*, 107 A.3d 29, 31 (Pa. 2014) (recognizing strong privacy interest in home and rejecting federal good-faith exception to exclusionary rule); *Commonwealth v. Mason*, 637 A.2d 251 (Pa. 1993) (rejecting independent source doctrine in some contexts); *Commonwealth v. White*, 669 A.2d 896, 901-02 (Pa. 1995) (holding that Article I, Section 8 does not permit an automobile exception to warrant requirement, and declining to follow *New York v. Belton*, 453 U.S. 454 (1981)); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (rejecting the U.S. Supreme Court’s Fourth Amendment-based reasoning in *California v. Hodari D.*, 499 U.S. 621 (1991) regarding evidence discarded while fleeing police stop); *Commonwealth v. Hawkins*, 692 A.2d 1068, 1069-71 n.2, (Pa. 1997) (rejecting the decisions of several federal circuit courts regarding anonymous tips); *Theodore v. Del. Valley Sch. Dist.*, 836 A.2d 76, 84, 88 (Pa. 2003) (rejecting the U.S. Supreme Court’s Fourth Amendment jurisprudence regarding drug searches in schools in favor of a distinct approach under Article I, Section 8, which recognizes “a strong notion of privacy I greater than that of the Fourth Amendment.”); *Commonwealth v. Melilli*, 555 A.2d 1254, 1257 (Pa. 1989) (recognizing a privacy interest in telephone numbers accessible by telephone company and holding that Article I, Section 8 requires warrant for installation of pen register device); *Commonwealth v. Grossman*, 555 A.2d 896, 899 (Pa. 1989) (declaring that warrant authorizing seizure of “all files” was “unconstitutionally overbroad” under Article I, Section 8, because the warrant specificity requirement under Article I, Section 8 is more stringent than the Fourth Amendment).

Section 1 and in the “charter as a whole.” *Commonwealth v. Alexander*, 243 A.3d 177, 206-07 (Pa. 2020). *Edmunds* itself relied on *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979), in affirming “the implicit right to privacy in this Commonwealth.” *Edmunds*, 586 A.2d at 898. *DeJohn*, in turn, relied on *Griswold v. Connecticut*, 381 U.S. 479 (1965), signaling this Court’s inclusion of the right to determine whether to bear children within the scope of the Pennsylvania right to privacy.

The Pennsylvania right to privacy encompasses a strong right to bodily integrity. *See, e.g., John M. v. Paula T.*, 571 A.2d 1380, 1386 (Pa. 1990) (noting that Pennsylvania’s constitutional jurisprudence has recognized an individual’s “clear privacy interests in preserving his or her bodily integrity, and the constitutional right to be free from unreasonable searches and seizures” in invalidating a blood testing requirement.); *Coleman v. Workers’ Comp. Appeal Bd. (Ind. Hosp.)*, 842 A.2d 349, 354 (Pa. 2004) (holding that “people have a privacy interest in preserving their bodily integrity, which may be afforded constitutional protections”); *In the Interest of D.R.*, 232 A.3d 547 (Pa. 2020) (interpreting statute to preclude demand for involuntary urine sample).

The right to privacy is part of the structure of “fundamental” rights of self-determination guaranteed by the Declaration of Rights. These include “a wide

variety of Article I rights, including the right to reputational security, the right to petition, the right to free expression, the right to privacy, the right to marry, the right to procreate and the right to make child-rearing decisions.” *Yanakos v. UPMC*, 218 A.3d 1214, 1231 (Pa. 2019) (Donohue, J., concurring) (citing *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003); *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 572-73 (Pa. 2018)). This Court has regularly reaffirmed that the rights to “privacy, to marry, and to procreate” are fundamental. *Nixon*, 839 A.2d at 287 (“Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test.”); *Ladd v. Real Estate Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020) (citing *Nixon*, 839 A.2d at 287).

This Court’s grounding of these rights of self-determination in the fundamental rights encompassed by the Declaration of Rights is explicit:

In identifying rights to informational privacy under the Pennsylvania Constitution, this Court has focused its attention not on the rights of persons accused as set forth in Article 1, Section 8, but rather to the broader array of rights granted to citizens under Article 1, Section 1, which is entitled “Inherent rights of mankind:”

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



*Pa. State Educ. Ass'n v. Commonwealth*, 148 A.3d 142, 150-51 (Pa. 2016) (*PSEA*) (quoting Pa. Const. art. 1, § 1). Justice Donohue in *PSEA* noted that in an earlier opinion, *Commonwealth v. Murray*, 223 A.2d 102 (Pa. 1966), Justice Michael Musmanno had “explained that Article 1, Section 1 provides the citizens of this Commonwealth with ‘inherent and infeasible rights’ to pursue ‘their own happiness’ because ‘[t]he greatest joy that can be experienced by mortal man is to feel himself master of his fate—this in small as well as in big things . . . the golden, diamond-studded right to be let alone.’” *PSEA*, 148 A.3d at 151 (quoting *Murray*, 223 A.2d at 109-10).<sup>17</sup>

Recently, in *Commonwealth v. Alexander*, 243 A.3d 177, 205-07 (Pa. 2020), this Court rejected the federal rule regarding searches of automobiles on the grounds that it “gives short shrift to citizens’ privacy rights.” *Alexander* relied on “reasons that extend beyond the text of Article I, Section 8.” *Id.* at 206. *Alexander* observed that in *Commonwealth v. Shaw*, 770 A.2d 295 (Pa. 2001):

We looked to precedents applying Article I, Section 1 . . . *In re June*

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<sup>17</sup> *PSEA* reviewed and reaffirmed the Article I, Section 1 analysis of *Denoncourt v. Pa. State Ethics Com'n*, 470 A.2d 945 (Pa. 1983); *Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12*, 713 A.2d 627 (Pa. 1998) (plurality); *Pa. State Univ. v. State Emps. Ret. Bd.*, 935 A.2d 530 (Pa. 2007); *Tribune-Rev. Publ. Co. v. Bodack*, 961 A.2d 110 (Pa. 2008). See *PSEA*, 148 A.3d at 152-55. This Court has continued to require recognition of this independent constitutional privacy protection rooted in Article I, Section 1. See *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 733 (Pa. 2020); *In re Fortieth Statewide Investigating Grand Jury in re R.M.L.*, 220 A.3d 558, 570 (Pa. 2019); *City of Harrisburg v. Prince*, 219 A.3d 602, 618-19 (Pa. 2019); *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143, 1159 (Pa. 2017).

*1979 Allegheny Cty. Investigating Grand Jury*, 415 A.2d 73 (Pa. 1980), and *Denoncourt v. Com., State Ethics Comm'n*, 470 A.2d 945 (Pa. 1983). The *In re June 1979* Court stated, “Clearly, the privacy interest of the patients which is implicated under the instant set of facts is the interest in avoiding disclosure of personal matters. This privacy interest finds explicit protection in the Pennsylvania Constitution, Art. 1, § 1[.]” 415 A.2d at 77. And the citation to *Denoncourt* was to the portion of the opinion wherein a plurality stated, “This Court has recognized the existence of a constitutionally guaranteed right of privacy based on Article 1, § 1 of the Pennsylvania Constitution. . . .” *Denoncourt*, 470 A.2d at 947-48 (Flaherty, J., joined by McDermott and Zappala, JJ.).

*Alexander*, 243 A.3d at 206. The *Alexander* court concluded:

We must consider our charter as a whole in terms of establishing a set of normative values that limits the government’s authority to search without a warrant, as opposed to the Dissent’s view, which attempts to divine the framers’ intent based solely on a textual comparison of Article I, Section 8 and the Fourth Amendment.

*Id.* This Court should reevaluate *Fischer* in light of the last two and a half decades of this court’s interpretation of “our charter as a whole.”

This history and these decisions bear directly on the issue in this case. This Court would not stand alone in interpreting Pennsylvania’s heightened protections for bodily integrity and autonomous decision-making to bar the punishment of a woman’s exercise of her right to choose to terminate a pregnancy. Since *Fischer*, a series of other state courts have addressed the exclusion of medically necessary abortions from state medical programs under state constitutions.<sup>18</sup> Four states have

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<sup>18</sup> When this Court decided *Fischer*, four other states had rejected the federal analysis under state

rejected challenges.<sup>19</sup> The better reasoned cases in ten other states have found exclusions unconstitutional.<sup>20</sup> And at least four other states have recognized independent state constitutional protection for reproductive autonomy.<sup>21</sup>

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constitutional provisions analogous to Pennsylvania's. *See Comm. to Defend Reprod. Rts. v. Meyers*, 625 P.2d 779 (Cal. 1981); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 390 n.4, 397 (Mass. 1981); *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982); *Planned Parenthood Ass'n v. Dep't of Human Res. of Or.*, 663 P.2d 1247, 1258-61 (Or. Ct. App. 1983), *aff'd on statutory grounds*, 687 P.2d 785 (Or. 1984) (en banc). Other than a citation to dicta in one dissenting opinion in one of these cases, however, the *Fischer* opinion did not engage with the reasoning of these courts.

<sup>19</sup> *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1041 (Fla. 2001); *Rosie J. v. N.C. Dep't of Human Res.*, 491 S.E.2d 535 (N.C. 1997); *Doe v. Dep't. of Social Servs.*, 487 N.W.2d 166 (Mich. 1992).

<sup>20</sup> *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 32, 37 (Ariz. 2002); *Alaska Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001), *aff'd*, *State v. Planned Parenthood of Great Nw.*, 436 P.3d 984 (Alaska 2019); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1999); *Roe v. Harris*, 917 P.2d 403 (Idaho 1996); *Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at \*21-28 (Mont. Dist. Ct. May 22, 1995); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995); *Doe v. Wright*, No. 91-CH-1958, slip op. (Ill. Cir. Ct. Dec. 2, 1994); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 663-67 (W. Va. 1993); *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986). *See Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 258-60 (Ind. 2003) (holding that the Indiana Constitution requires public funding for abortion only where "pregnancies create [a] serious risk of substantial and irreversible impairment of a major bodily function").


<sup>21</sup> *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 485-86 (Kan. 2019) (reviewing state courts in which "[t]he natural right of personal autonomy recognized in these states' constitutions allows individuals to control their own bodies, to make health care decisions, and to make decisions about whether to bear or beget a child"), *remanded to Hodes & Nauser, MDs, P.A. v. Derek*, 2015-CV-000490, 2021 Kan. Dist. LEXIS 5 (Shawnee Cty. Dist. Ct. Apr. 7, 2021) (granting permanent injunction against unconstitutional state law limiting specific abortion procedures); *Planned Parenthood v. Reynolds ex rel. Iowa*, 915 N.W.2d 206, 232, 237 (Iowa 2018); *Weems v. State by & through Fox*, 440 P.3d 4, 10 (Mont. 2019); *Armstrong v. State*, 989 P.2d 364, 373-74 (Mont. 1999); *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 765-67 (Ill. 2013); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 653-54 (Miss. 1998). *Cf. Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W. 3d 1, 16 (Tenn. 2000), *superseded by constitutional amendment* (state constitution protects right to abortion as fundamental requiring strict scrutiny).

Moreover, at this moment the status of the federal constitutional rights to privacy and autonomy that ensure a woman's right to choose whether to carry a pregnancy to term are at an inflection point, with a very real risk that those federal protections will disappear. *See Whole Women's Health v. Jackson*, 141 S.Ct. 2494 (2021) (declining to enjoin a Texas law that effectively bans all abortions after six weeks). Given this threat to federal protection of these constitutional rights, the mandate of *Edmunds* is imperative that this Court's revisit *Fischer* in light of the Court's own jurisprudence and the considered judgments in case law from other states.

### **Conclusion**

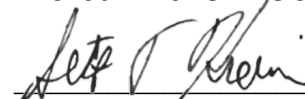
In the thirty years since this Court's decision in *Edmunds*, it has consistently and repeatedly affirmed that the Pennsylvania Constitution provides rights to privacy and autonomy that go beyond the floor set by the federal Constitution. *Fischer* is not only inconsistent with these decisions, but also reflects a deference to the federal approach that no longer fits with this Court's jurisprudence. For the foregoing reasons, this Court should overrule *Fischer* and confirm the long-standing and fundamental centrality of privacy and autonomy in Pennsylvania Constitutional jurisprudence.

Respectfully submitted,



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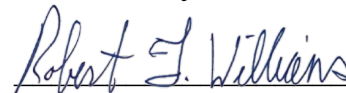
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Date: October 13, 2021

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I certify pursuant to Pa.R.A.P. 531 that this brief does not exceed 7,000 words.

**CERTIFICATE OF COMPLIANCE**

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

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the parties via PACFile.

Dated: October 13, 2021

/s/ Andrew Christy  
Andrew Christy

**IN THE SUPREME COURT OF PENNSYLVANIA**

Allegheny Reproductive Health Center, Allentown : 26 MAP 2021  
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

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IN THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF PENNSYLVANIA

**PROOF OF SERVICE**

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**PROOF OF SERVICE**

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*/s/ Andrew Chapman Christy*

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