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IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.*,

Appellants,

v.

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

Respondents.

BRIEF OF AMICI CURIAE NATIONAL COUNCIL OF JEWISH WOMEN, CATHOLICS FOR CHOICE, AND OTHER FAITH-BASED ORGANIZATIONS, IN SUPPORT OF APPELLANTS ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.*

Appeal from the Orders of the Commonwealth Court of Pennsylvania,
Dated January 28, 2020 and March 26, 2021, at No. 26 M.D. 2019

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STATEMENTS OF INTEREST OF AMICI CURIAE

Amici curiae are national and Pennsylvania-based organizations from a broad range of religious traditions and faiths that are dedicated to protecting the moral authority of all people to terminate a pregnancy in consultation with their faith, values, and conscience, and to safeguarding the United States and Pennsylvania Constitution's guarantee of religious liberty. For a listing of *amici*, please see Appendix A, which is attached to this brief.

SUMMARY OF ARGUMENT

Amici write in support of the Appellants in seeking to overturn the Court's decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985). In *Fischer*, this Court upheld the constitutionality of statutory provisions that bar the use of state Medical Assistance funds for abortions unless the pregnancy is caused by rape or incest, or where the abortion is necessary to avert the death of the pregnant woman (the "coverage ban"). *See* 18 Pa. C.S. § 3215(c) and (j). As faith-based organizations concerned with protecting the rights of women to worship or not as they choose, and to make their own decisions on matters of personal importance, amici have supported and will continue to support the principle that decisions before the point of viability about whether to take a pregnancy to term belong to women—*all* of them, poor or not. These reproductive decisions are uniquely personal and informed by conscience. Both federal constitutional law and the right to personal

privacy recognized by Pennsylvania's courts—a right derived from the fundamental rights outlined in Article I of the Pennsylvania Constitution's Declaration of Rights—protect these rights of privacy and autonomy as they relate to certain important decisions and place them beyond the reach of government. Although the federal courts have interpreted the U.S. Constitution's obligations differently, Pennsylvania's Constitution and its protections for the rights of privacy and autonomy compel rejection of the coverage ban.

Federal courts and state courts around the country have acknowledged that a woman's decision to either terminate a pregnancy or carry it to term is guided by multiple considerations, including theological teachings. As discussed herein, these teachings vary across and even within religions, leading to a diversity of thought among citizens on whether and when abortion should be considered a morally acceptable choice. An examination of the relevant Pennsylvania Constitutional principles, of this Court's recognition and applications of the law governing the right to privacy, and of the Commonwealth's tradition of religious tolerance demonstrates that Pennsylvania's Constitution was intended to nourish and sustain diversity of thought on issues of conscience, and to provide the Commonwealth's citizens with the privacy and autonomy needed to make these decisions without undue interference by the state. This includes the right under Pennsylvania's Constitution to choose to terminate a pregnancy.

As the courts of other states have recognized, this right to privacy is unduly burdened by bans of medical coverage for certain abortions, such as those imposed by the federal government and Pennsylvania, which operate to deny indigent women the right to choose, literally, how to live their lives. The government's insistence to the contrary notwithstanding, the effect of the Commonwealth's ban essentially takes the right to choose protected by the state's Constitution away from the women affected by the prohibition. Indeed, the regulation's very intention and effect is to prevent indigent women from exercising these rights. The assumption anchoring *Fischer*'s reasoning—namely, that the ban does not unduly burden women on Medical Assistance who seek to exercise their right to choose in a constitutional sense because the law allows them to pursue abortions on their own if they can afford to pay for them or if the money is supplied by some other non-governmental source—is a fiction contradicted by the realities of these women's lives. In addition, the ban denies indigent women their right under Pennsylvania's Equal Rights Amendment to be treated as equals before the law, by subordinating their interests as women in exercising their constitutional right to reproductive care to the interests of legislators determined to make these choices for them.

As this Court has recognized, it is not bound to read the Pennsylvania Constitution as it did in *Fischer*, or to follow the reasoning, as it did thirty-five years ago, of the United States Supreme Court's decisions in *Harris v. McCrae*, 448 U.S.

297 (1980), or *Maher v. Roe*, 432 U.S. 464 (1977). The Court should instead adhere to the Commonwealth's historic tradition of encouraging and protecting the exercise of personal conscience in a community built on respect for diversity in philosophy and religious belief. Under Pennsylvania's Constitution, this right of privacy in decision-making is both fundamental and inviolate, empowering all women, including those who live in poverty, to live their lives in the Commonwealth armed with the full bundle of personal rights Pennsylvania's Constitution guarantees, undiminished by the political preferences of those who would choose to enforce their own religious and personal philosophies through law.

The Court's decision in *Fischer*, it is submitted, respectfully, does not afford poor women the protections the Commonwealth's foundational organizing document, including its guarantee in article I, section 1 of certain "inherent and indefeasible rights," was intended to provide to every citizen of this Commonwealth, including its less fortunate. Pa. Const. art. I, § 1. It should be reversed.

ARGUMENT

Many of America's greatest challenges today arise from its growing diversity. That diversity extends to questions of religious belief, including beliefs about abortion. The country's continuing divisions on abortion run deep, challenging government at all levels to address the concerns of all citizens equally, with fairness, justice and tolerance.

The Constitution of the Commonwealth of Pennsylvania provides its governments and citizens with tools to meet the challenges posed by this divide. Pennsylvania's Constitution has expressly embraced the protection of conscience, and has supported diversity in religious belief among its citizens since its founding as a colony. History teaches that Pennsylvania was specifically founded as a place where people of different religious beliefs could thrive and prosper. The courts of the Commonwealth are called upon now to wrestle with how the Commonwealth's history of tolerance for differing religious and philosophical views should apply to the deeply personal questions surrounding the right to choose, and with what its Constitutional protections for privacy require with regards to the Commonwealth's coverage of reproductive care under its Medical Assistance Program. Amici believe that the answers are found in the Pennsylvania Constitution's protections of liberty as an "inherent right."

I. Religious Teachings on Abortion Make Clear that Reproductive Choice Is Fundamentally a Matter of Personal Conscience That Is Informed by Faith-Based Beliefs.

Decisions about whether to bear a child are properly governed by the individual consciences of women. For many women, this choice is informed by their religious beliefs. Yet, there is no consensus among religions as to when life begins and whether and when a pregnancy can be terminated. In fact, there is a significant diversity of views both within and across religions concerning the nature and timing

of the beginning of life, as well as the moral propriety of obtaining an abortion. To be truly respectful of the right to choose, any analysis of the law of privacy must acknowledge and protect the diversity of religious and philosophical opinion surrounding questions of reproductive choice.

There are a variety of religious perspectives on the issue of when life begins. In the Jewish tradition, for example, the creation of a human life is generally viewed as something that happens gradually over time.[1] The majority of Jews do not believe that life begins at the moment of conception; rather, Jewish "tradition holds that we enter life in stages and leave in stages," according to Rabbi Elliot Dorff, bioethicist and professor of Jewish theology at the American Jewish University.[2] The Talmud teaches that the fetus is "mere fluid" up to the point of 40 days gestation, Yevamot 69b,[3] and following this period, the fetus is considered a physical part of the pregnant woman's body, Gittin 23b,[4] not yet having a life of its own or independent rights. It is not until the moment of birth when the baby has breathed outside air that it is considered a living being, Mishnah Ohalot 7:6.[5]

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[1] Elissa Strauss, *When Does Life Begin? It's Not So Simple*, Slate (Apr. 4, 2017), available at https://slate.com/human-interest/2017/04/when-does-life-begin-outside-the-christian-right-the-answer-is-over-time.html.

[2] *Id.*; *see also* National Council of Jewish Women, *Abortion and Jewish Values Toolkit*, at 16 (2020), available at https://www.ncjw.org/act/action-resources/jewish-values-and-abortion-toolkit/.

[3] Available at https://www.sefaria.org/Yevamot.69b?lang=bi. This is understood as 40 days from conception, or approximately 7-8 weeks gestation.

[4] Available at https://www.sefaria.org/Gittin.23b?lang=bi.

[5] Available at https://www.sefaria.org/Mishnah_Oholot.7.6?lang=bi.

Traditional Jewish teachings view abortion as permissible and even as required when necessary to safeguard the well-being of the mother, at any stage of pregnancy. *See id.* Reform, Reconstructionist, and Conservative Judaism all adopt the view that "women are capable of making moral decisions, often in consultation with their clergy, families and physicians, on whether or not to have an abortion." 144 Cong. Rec. S10491 (daily ed. Sept. 17, 1998) (quoting Letter of 729 Rabbis in Support of President Clinton's Veto of H.R. 1122 (Sept. 10, 1998)). Moreover, hundreds of Jewish leaders have recently reaffirmed the importance of ensuring women's access to reproductive healthcare, including abortion, as an essential matter of religious freedom.[6]

The position on the question of when life begins that is most closely associated with current teaching by the Catholic faith is that life begins at conception. However, contemporary Catholic pronouncements on abortion acknowledge the Catholic Church's lack of consistent teaching on that question. In early Catholic thought, St. Augustine drew a distinction between an embryo *inanimatus*, not yet endowed with a soul, and an embryo *animatus*, but concluded that it was impossible to pinpoint the moment during fetal development when this transition takes place. *See Roe v. Wade*, 410 U.S. 113, 134 n.22 (1973) (citing Augustine, *De Origine*

[6] *See* Letter of Jewish Clergy Leaders to the Senate Committee on the Judiciary, dated July 16, 2021, *available at* https://www.ncjw.org/wp-content/uploads/2021/07/06-16-2021_Jewish-Clergy-Leaders-WHPA-Letter-FINAL-1.pdf.

Animae 4.4). Some Medieval Catholic texts endorsed Aristotle's view that human ensoulment takes place 40 days after conception for males and 80 days after conception for females. *See* Anne Stensvold, *A History of Pregnancy in Christianity: From Original Sin to Contemporary Abortion Debates* 45-56 (2015).[7] Other Catholic theologians followed the teaching of St. Thomas Aquinas, who believed that human life does not begin until at or near the time of childbirth, following earlier stages in which the fetus initially has a "nutritive" soul (similar to plant life), and later a "sensitive" soul (similar to animals), only acquiring an "intellectual" human soul infused by God near the final stages of gestation. *See* St. Thomas Aquinas, *Summa Contra Gentiles* 2.88-89; St. Thomas Aquinas, *Summa Theologiae* 1.118. In the view of some contemporary Catholic scholars, the Catholic Church has *never* defined the moment when life begins, and therefore, as a matter of Catholic dogma, "[t]here is no defined moment of ensoulment."[8]

Further, there are diverse views among members of the Catholic Church on the moral propriety of obtaining an abortion. Although the official stance of the Catholic Church is that abortion is impermissible, polling suggests that the majority of American Catholics believe that abortion can be a morally acceptable choice,[9]

[7] Using the modern obstetric methodology of counting, this translates to approximately 7-8 weeks gestation for males and 13-14 weeks gestation for females.

[8] Strauss, *When Does Life Begin?* (quoting Daniel Sulmasy, Catholic bioethicist and director of the Program on Medicine and Religion at the University of Chicago).

[9] Belden Russonello Strategists, *2016 Survey of Catholic Likely Voters*, at 5 (Oct. 2016) ("Sixty percent of Catholic likely voters overall say that 'deciding to have an abortion can be a morally

that abortion should be legal in all or most cases,[10] and that *Roe v. Wade* should not be overturned.[11] Moreover, Catholic women in this country have abortions at approximately the same rate as do women of other (or no) faith traditions.[12] In fact, data shows that most women who have obtained an abortion have a religious affiliation.[13]

There is diversity of thought on when life begins among other major religions. Among Muslims, for example, "there is no universally agreed-upon moment when a fetus becomes a person." Strauss, *When Does Life Begin?* However, the predominant view is that a fetus acquires personhood 120 days from conception, or approximately 19-20 weeks gestation. *See* Mark Cherry, *Religious Perspective on Bioethics* 196-97 (2004). Many Christian religious groups, including the Presbyterian Church, the Lutheran Church, the United Church of Christ, and the Church of Jesus Christ of Latter-Day Saints, have acknowledged the wide range of

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acceptable position.'"), *available at* http://www.rifuture.org/wp-content/uploads/2016-Catholic-Voter-Poll.pdf.

[10] Dalia Fahmy, *8 Key Findings about Catholics and Abortion*, Pew Research Center (Oct. 20, 2020) (56% of Catholics believe abortions should be legal in all or most circumstances), *available at* https://www.pewresearch.org/fact-tank/2020/10/20/8-key-findings-about-catholics-and-abortion/.

[11] *Id.*

[12] *See, e.g.*, Guttmacher Institute, *Characteristics of U.S. Abortion Patients in 2014 and Changes since 2008*, at 1, 6-7 (May 2016), *available at* https://www.guttmacher.org/sites/default/files/report_pdf/charac%20%20teristics-us-abortion-patients-2014.pdf.

[13] *See, e.g.*, Rachel Jones, *People of All Religions Use Birth Control and Have Abortions* (http:www.guttmacher.org/article/2020/10/people-all-religions-use-birth-control-and-have-abortions).

views on the question of when life begins and therefore declined to identify a particular moment as the beginning of life.[14]

Similarly, other major religions teach that abortion is both permissible and moral under certain circumstances, embracing the ultimate authority of a woman to make the decision whether to terminate a pregnancy, consistent with her faith and values. For instance, many schools of Islamic thought permit abortion, under certain circumstances, at any point up to 120 days from conception. *See* Mohammad A. Albar, *Induced Abortion From An Islamic Perspective: Is It Criminal Or Just Elective*, 8 J. Fam. Cmty. Med. 25, 29-32 (2001). The Buddhist Churches of America assert that "it is the woman carrying the fetus, and no one else, who must in the end make this most difficult decision." Buddhist Churches of America Social Issues Committee, *A Shin Buddhist Stance on Abortion* at 6, Buddhist Peace Fellowship Newsletter 6 (1984). Similarly, many Hindus adopt the position that "each case [involving abortion] requires unique consideration" and that the "final decision will be based on a long series of choices made by the woman on her

[14] *See* Presbyterian Church (U.S.A.), Abortion/Reproductive Choice Issues ("We may not know exactly when human life begins[.]"), *available at* https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/; Evangelical Lutheran Church in America, Social Statement on Abortion at 1, 3 n.2 (1991), *available at* http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf; United Church of Christ, Statement on Reproductive Health and Justice, *available at* https://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/455/reproductive-health-andjustice.pdf?1418423872; The Latter-day Saints Tradition: Religious Beliefs and Healthcare Decisions (Deborah Abbott, ed.) at 10 (2002), *available at* https://www.advocatehealth.com/assets/documents/faith/latter-day_saints_tradition.pdf.

lifestyle, morals, and values." *Hindus in America Speak out on Abortion Issues*, Hinduism Today (Sept. 1985).

As American society becomes more diverse in its religious and moral beliefs, there will continue to be a wide range of personal and religious views about when, if ever, terminating a pregnancy should be allowed. As the U.S. Supreme Court held in *Roe*, a state may not "by adopting one theory of life override the rights of the pregnant woman that are at stake." *Roe*, 410 U.S. at 162. Pennsylvania's response to this duty to accommodate diversity of belief is clear: the Commonwealth's courts have recognized a right to privacy that respects the role individual conscience plays in decisions on important questions in a person's life.

II. Pennsylvania's Coverage Ban Violates the Commonwealth's Constitution.

Amici believe that the United States Supreme Court's current understanding of the federal right to privacy is potentially broad enough to encompass the relief sought in this case, but acknowledge that to the extent the federal courts have disagreed with this interpretation, all are bound by it, at least where federal law is concerned. Until now, Pennsylvania's courts have followed the federal interpretation. *See Fisher v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985). But the U.S. Supreme Court's holdings in *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), do not bind this Court in interpreting what Pennsylvania's Constitution requires. This Court has maintained that the

Pennsylvania's courts have "the power to provide broader standards than those mandated by the federal constitution," and that "on numerous occasions" it has "recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights." *Commonwealth v. Sell*, 470 A.2d 457, 466-67 (Pa. 1983) (citing cases). Courts in other jurisdictions have determined that measures like the statutory prohibition at issue in this case violate state constitutional provisions, holding that their states' constitutions required funding abortions for indigent women. *See, e.g.*, *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 850-51 (N.M. 1998); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 799 (Cal. 1981).

For reasons to be discussed in greater detail herein, Pennsylvania should join these jurisdictions in abandoning a reading of the Commonwealth's Constitution that allows the legislature to treat indigent women like second class citizens where their reproductive rights are concerned. Pennsylvania's Constitution protects the rights to privacy and the autonomous exercise of conscience in personal matters, including matters where religious teaching may have some bearing on the personal choices to be made. These protections can be found in the text of the Constitution itself, and in decisions of this Court. Amici assert, respectfully, that these protections compel the relief sought by the Appellants in this case.

A. Pennsylvania's Constitution Protects Personal Privacy and Autonomy, Values Deeply Held by Various Religious Traditions.

As the U.S. Supreme Court has recognized, the decision whether to terminate a pregnancy is uniquely personal and self-defining, one that originates "within the zone of conscience and belief" outside the scope of governmental influence:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992); *see also id.* at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). The question of abortion's morality, as California's courts have acknowledged, "is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles." *Committee to Defend Reproductive Rights*, 625 P.2d at 798. As the *Casey* plurality noted, the benefits accorded women as citizens from the Constitution's protections of this zone of choice are far from illusory: "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.* at 856.

Since its enactment, the Pennsylvania Constitution also has protected the exercise of personal conscience unfettered by unwarranted governmental action. As this Court has observed, "Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate." *Commonwealth v. Eubanks*, 512 A.2d 619, 622 (Pa. 1986). These protections are derived from section 1 of article I, the "Declaration of Rights," which is the first declaration of democratic principles listed in the Commonwealth's Constitution. Captioned "Inherent Rights of Mankind," article I, section 1 proclaims:

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

Pa. Const. Art. 1, § 1.

The language in section 1 proclaiming all citizens "free and independent" has been part of Pennsylvania's Constitution since 1776.[15] Importantly, the drafters of the 1776 Constitution saw the Declaration of Rights as part of the Constitution's substantive protections – that is, as a part of the Constitution that "ought never to be violated on any pretense whatsoever." Seth Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 77, 90 (1993). Accordingly, the

[15] *See* 1776 Constitution, chapter I, § I (available at paconstitution.org/texts-of-the-constitution/1776-2/).

Commonwealth's guarantee of personal autonomy concerning freedoms involving matters of conscience must be regarded as a foundational component of the "inherent and indefeasible" rights that define citizenship in the Commonwealth.

This Court has held that article I, section 1 is the source of the Constitution's protections of the right to privacy in Pennsylvania. In *Commonwealth v. Murray*, 223 A.2d 102 (Pa. 1966), the Court explained, "One of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back." *Id.* at 109. The Court continued:

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

Id. at 110. *See also In re T.R.*, 731 A.2d 1276, 1279 (Pa. 1999) ("[T]here is no longer any question that both the United States Constitution and the Pennsylvania Constitution provide protections for an individual's rights of privacy"). This Court has determined that, among the guarantees of liberty protected by Pennsylvania's right to privacy, is "the interest in independence in making certain kinds of important decisions." *Id.* at 1279.

The importance of protecting the exercise of individual conscience and autonomy essential to personal liberty is reflected equally strongly in other provisions of the Declaration of Rights, including article I, section 3's protections for "Religious Freedom." That section expressly references "rights of conscience" as it outlines core Constitutional protections:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.
>
> Pa. Const. art. I, § 3.

As was the case with Article I, section 1's Declaration of the "Inherent Rights of Man," a version of the current Constitution's Declaration concerning religious freedom can be found in the text of 1776 Pennsylvania Constitution. *See* 1776 Pennsylvania Constitution, *supra* note 15, at chapter I, § II. But another indication of the importance the drafters of the Constitution of 1776 attached to creating and sustaining a society intent on protecting a diversity of beliefs among its citizens also can be found in the 1776 Constitution's "Whereas" clause. In this clause, which consists essentially of a list of Pennsylvania's reasons for forming its own government independent of England, the drafters declared that it was their "indispensable duty" to establish "such original principles of government, as will

best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, *without partiality for, or prejudice against any particular class, sect, or denomination of men whatever." Id*. ("Whereas" clause) (emphasis added).

Pennsylvania's unique sensitivity to questions of religious conscience can be attributed in large part to the influence of the colony's founder, William Penn, who suffered persecution in Europe for his religious views, and was determined to create a state in America in which "freedom of conscience would be promoted." Gary Gildin, *Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty Under the Pennsylvania Constitution*, 4 U. Pa. J. Const. L. 81, 91-92 (2001).[16] As one historian concluded, Penn's thoughts on religious liberty played "an important part in laying the foundation for an extremely heterogeneous society." Sally Schwartz, *William Penn and Toleration: Foundations of Colonial Pennsylvania*, 50 Pennsylvania History 284, 303 (1983). Professor Schwartz explains:

> [Penn's] belief that conscience should not be restrained and that persecution was wrong led him to work for the relief of oppressed Christians, primarily but not exclusively Protestants, in England and abroad. Thus, when he needed colonists to people his territory, he turned to those persecuted for the sake of conscience but also advertised his province in more secular terms. Whatever the precise nature of the appeal to each individual who chose to emigrate to Pennsylvania, the

[16] To review a brief history of Penn's life and thinking on religious freedom, see *id.* at 89-92.

> province grew rapidly, adding greater variety to the pre-1681 settlers and soon overwhelming them.

Id.

This Court has interpreted Section 3's guarantees as not transcending the protections provided under the federal Constitution's Free Expression and Establishment Clauses. *See Wiest v. Mt. Lebanon School Dist.*, 320 A.2d 362, 366-67 (Pa. 1974). But this interpretation in no way contravenes the Pennsylvania Constitution's longstanding and foundational interest in protecting freedom of belief and in maintaining a polity that encourages philosophical and religious autonomy and embraces diversity in religious belief. As this Court has made clear, "[O]ur Commonwealth is neutral regarding religion. It neither encourages nor discourages religious belief. It neither favors nor disfavors religious activity. A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and whether he practices a religion is strictly and exclusively a private matter, not a matter of inquiry by the state." *Eubanks*, 512 A.2d at 622. The idea that, "no human authority can, in any case whatever, control or interfere with the rights of conscience," is thus one of the cornerstones of Pennsylvania's continuing interest in maintaining the government's neutrality towards, and encouraging tolerance for, religious differences among the Commonwealth's citizens.

Similarly, many major religious traditions, including those of amici, deeply value and respect both freedom of and from religion. For instance, one of the most

fundamental teachings in Catholicism is the primacy of conscience; indeed, the Catechism of the Catholic Church states that all have the right to act in conscience and in freedom to make moral decisions and that no one should be forced to act contrary to their consciences. Catholics believe that all must use the resources available to them to form their consciences so that they can make the best possible decisions for themselves, and that one's individual conscience is the final arbiter of what is right and wrong. This is particularly essential when making choices regarding sexual and reproductive health, including whether to have an abortion.[17] Everyone has the right to live according to their own beliefs and consciences, free from having the religious beliefs of others imposed on them.[18]

In the same way, Jewish tradition views religious liberty as protected in the Pennsylvania and U.S. Constitution as a protective shield. Because Jewish law not only permits abortion in many cases but also requires it when the mother's life is at risk, policies limiting or restricting access to abortion directly impede Jews' ability to practice Judaism, violating the constitutional rights to religious freedom and to privacy.[19] Based on the value of *kavod ha bri'ot* (respect and dignity for all human beings), Jews have an obligation to care for their health and to ensure all others can

[17] Catholics for Choice, *Conscience*, available at https://www.catholicsforchoice.org/issues/conscience/.
[18] Catholics for Choice, *Religious Freedom*, available at https://www.catholicsforchoice.org/issues/religious-freedom/.
[19] National Council of Jewish Women, *supra* note 2, at 18.

do the same. The proper role of government is to guarantee fair treatment and to protect the freedom of conscience for all patients.[20]

Ultimately, as several of amici recently stated in reaffirming that "[r]eligious freedom is an essential shared principle undergirding [their] support of policies that ensure equitable access to abortion": "The United States is home to people of many different faiths as well as people with no religious affiliation. We cannot limit an individual's religious liberty by enshrining one set of beliefs into law and restricting their ability to make personal decisions about their pregnancy, health, and family according to their own religious or moral beliefs and conscience."[21]

The contours of Pennsylvania's right to privacy have not been fully delineated by the Commonwealth's courts, but its protections are broad – indeed, broader in fact, this Court has held, than those of the U.S. Constitution. *See Pennsylvania State Education Association v. Commonwealth of Pennsylvania*, 148 A.3d 142, 151 (Pa. 2016). The Commonwealth's right to privacy certainly is broad enough to guarantee Pennsylvania's women citizens the right to choose to terminate or not terminate a pregnancy before viability, as the federal courts have recognized in *Roe* and *Casey*. This conclusion is in line with – and, amici would argue, mandated by – the

[20] National Council of Jewish Women, *Religious Liberty and Refusals of Care*, available at https://www.ncjw.org/wp-content/uploads/2019/08/Refusals-TPs_Updated-June-2021.pdf.
[21] Sheila Katz, Sara Hutchinson Ratcliffe & Rev. Katey Zeh, Denying Abortion Coverage Is Not a Religious Value, Rewire News Group (Aug. 17, 2020), available at https://rewirenewsgroup.com/article/2020/08/17/denying-abortion-coverage-is-not-a-religious-value/.

Pennsylvania Constitution's historical concern with protecting the liberty of conscience, lawfully exercised. Given the foundational nature of these protections, the government should proceed with great caution before burdening the exercise of this right through state action that amounts to government coercion.

B. Denying Indigent Women Access to the Medical Choices Protected by Rights to Privacy and Autonomy Violates the Pennsylvania Constitution.

The Constitutional protections outlined above played no part in this Court's opinion in *Fischer*, which begins with the sentence, "This case does not concern the right to an abortion." *Fischer*, 502 A.2d at 116. In the *Fischer* Court's view, the question to be decided was, "whether, because this Commonwealth provides funds to indigent women for a safe delivery, they are therefore equally obliged to fund an abortion." *Id.* Amici respectfully submit that this is not the true constitutional question raised by Pennsylvania's coverage ban. Rather, it is this: Should Pennsylvania's Constitution continue to allow the state to deny indigent women access to a constitutionally protected healthcare procedure – that is, the right to choose to terminate a pregnancy before the fetus' viability, a right guaranteed to every woman at least by the U.S. Constitution and, as this Court has interpreted Pennsylvania's right to privacy, by the law of this Commonwealth – simply because the state legislature would prefer that Medicaid recipients not exercise their "right" to choose this treatment?

Other states have held that denying poor women coverage for abortions, while fully covering the expenses of childbirth, violates their state constitutional protections for privacy. *See, e.g.*, *Doe v. Maher*, 515 A.2d 134, 159 (Conn. App. Ct. 1986) (holding that "the selective funding of medically necessary abortions impinges on the fundamental right of privacy guaranteed to all pregnant women—rich and poor alike—and that is, the right to choose whether to have an abortion [and thus], the defendants must establish both a compelling state interest in support of the classification and that no less restrictive alternative is available" and deciding that the defendants failed to meet that standard); *Moe v. Secretary of Administration and Finance*, 382 Mass. 629, 646, 649 (1981) (holding that the decision "whether or not to beget or bear a child" "holds a particularly important place in the history of the right to privacy" and that the denial of abortion coverage "impermissibly burdens" that right); *Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982) ("In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable."); *Women of State of Minn. By Doe v. Gomez*, 542 N.W.2d 17, 18 (Minn. 1995) ("Because we agree with plaintiffs[' position that the ban on funding of abortion care infringes the fundamental right to privacy] and because the State has not convinced us that the statutes in question are necessary to promote a compelling governmental interest, we hold that the challenged provisions

are unconstitutional."). Pennsylvania should join these courts by holding that its own right to privacy is unduly burdened by the Commonwealth's ban on funding certain abortions, and is thus subject to the strictest scrutiny by the Commonwealth's courts. *See Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (constitution requires strict scrutiny when "a fundamental right has been burdened" by a law).

In this case, the burden arises from a regulation with the intent and effect of forcing indigent women to abandon the exercise of a fundamental Constitutional right in exchange for state funding of the rest of their overall healthcare. The *Fischer* Court, following the lead of the federal courts on this issue, concluded that these women suffered no "burden" in the constitutional sense because they could still obtain pregnancy terminations as long as the state did not have to pay for them. Under this reasoning, the legislature was viewed as intending only to "encourage actions deemed to be in the public interest," not to "interfere" with the exercise of a protected right. *See Fischer*, 502 A.2d at 119 (citing *Harris*, 448 U.S. at 315).

As was the case with the U.S. Supreme Court decisions on these issues, the word "encourage" does a lot of work in *Fischer*. It suggests actions <u>voluntarily</u> taken because of a perceived benefit or incentive. As Justice Marshall's dissent made clear in *Harris*, the idea that this use of financial leverage amounts to no more than merely "encouraging" some women to take a different course in their lives is wholly

inconsistent with the realities facing indigent women. Describing the Hyde Amendment[22] as "the product of an effort to deny the poor the constitutional right recognized in *Roe*," the Justice wrote:

> Ultimately, the result reached today may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of government funds. In today's decision, as in *Maher v. Roe*, the Court suggests that a withholding of federal funding imposes no real obstacle to a woman deciding whether to exercise her constitutionally protected procreative choice, even though the Government is prepared to fund all other medically necessary expenses, including the expenses of childbirth. The Court perceives this result as simply a distinction between a "limitation on governmental power" and "an affirmative funding obligation." For a poor person attempting to exercise her "right" of freedom of choice, the difference is imperceptible.

Id. at 347. As Justice Brennan noted in his *Harris* dissent, this "unwillingness" on the part of *Harris'* majority was attributable to a "fundamental flaw" in its reasoning: namely, "[the Court's] failure to acknowledge the discriminatory distribution of the benefits of government largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." *Id.* at 334. State courts that have declined to adopt the *Maher*/*Harris* reasoning have reached similar conclusions about these realities. *See, e.g.*, *Committee to Defend Reproductive Rights*, 625 P.2d at 798-99 (answering in

[22] Representative Henry Hyde, who was responsible for the Coverage Ban's federal counterpart, the "Hyde Amendment," stated explicitly that "I would certainly like to *prevent*, if I could legally, anybody having an abortion: a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the…Medicaid bill." 123 Cong. Rec. 19,700 (1977) (emphasis added).

the negative the following question: “Can the state tell a poor woman that it will pay for her needed medical care but only if she gives up her constitutional right to choose whether or not to have a child?”).

Additionally, the relegation of women struggling to make ends meet to a second-class citizenry is antithetical to the religious and moral viewpoints of amici. A broad array of religions embrace as a central tenet of their faith the importance of serving and supporting vulnerable and marginalized communities. Many of these traditions teach that people of faith have a moral obligation to protect, succor, uplift, and advocate on behalf of those who are poor and low-income and those who have historically been disenfranchised and discriminated against, including people of color, people with disabilities, immigrants, and LGBTQ individuals. And numerous religions expressly affirm that this charge includes ensuring that individuals from these communities have the same access to health care and the same freedom to make decisions concerning their reproductive health, including the right to abortion, as everyone else.

For example, the preferential option for the poor is a radical idea from a tradition of Catholic liberation theology that privileges the needs of the marginalized over all others. It states that the poor, the marginalized and the vulnerable not only

should be taken care of, but that they should receive *better* care than anyone else.[23] Likewise, many believers from the Jewish tradition expressly link the Jewish teaching of *tzedek tzedek tirdof—i.e.*, to pursue justice for all—to the obligation to advocate for the reproductive rights of all persons, particularly the most vulnerable and marginalized among us.[24]

Appellants also are correct in arguing that Pennsylvania's coverage ban violates Pennsylvania's Equal Rights Amendment. The Amendment provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. art. I, § 28. This Court has made clear that:

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

Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (holding that alimony *pendente lite* must be awarded based on financial need and not on the sex of the petitioner).

Because there can be no true equality unless the state removes the legal barriers that have subordinated the interests of women to those of men, this Court

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[23] Catholics for Choice, *Social Justice*, available at https://www.catholicsforchoice.org/issues/social-justice/.

[24] National Council of Jewish Women, *supra* note 2, at 13-14.

has not hesitated "to effectuate the Equal Rights Amendment's prohibition of sex discrimination by striking down statutes and common law doctrines predicated upon traditional or stereotypical roles of men and women." *Weaver v. Harpster*, 975 A.2d 555, 571-72 (Pa. 2009); *see also Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 548 (Pa. 1984) (striking down gendered insurance rates and stating same). This has led to the invalidation of outdated and "one-sided" rules that had been allowed to perpetuate differential treatment of men and women under the law, even after the justifications proffered for the differences in treatment have been discredited. *See, e.g.*, *DiFlorido v. DiFlorido*, 459 Pa. 641 (1975) (rejecting the legal presumption, in this instance applied to the allocation of marital assets in a divorce, that property owned jointly by spouses belongs to the husband, because the assumption underlying the rule was based on the stereotype that husbands were the "sole providers" for families).

There is no notion more outdated or stereotypical than the belief that, before viability, denying any woman her right to choose whether to bear a child can be justified by a state's financial considerations or its interests in "encouraging" parenthood. By its operation and, indeed, the legislature's clear intent, Pennsylvania's ban subordinates the affected woman's constitutionally-protected interest in self-determination and autonomy to the interests of a group of legislators interested in discouraging the exercise of that right. In short, on the basis of a

physical condition particular to their sex, indigent women are forced by the state government's ban to forgo seeking the advice of professionals necessary to exercise a medically recognized and constitutionally-protected reproductive health choice. The state's ban forces this choice, moreover, while meeting the complete needs of men who also are eligible for reproductive health care from the Medical Assistance program. As this Court observed in *Cerra v. Stroudsburg*, 299 A.2d 277, 281 (Pa. 1973), when it addressed the constitutionality of a regulation that forced women to retire as teachers once they became pregnant, "This is sex discrimination, pure and simple."

CONCLUSION

For these reasons, amici respectfully submit that the opinion of the Commonwealth Court be reversed, and that the Court's decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), be overruled.

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APPENDIX A

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National Council of Jewish Women Pittsburgh Section

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Reconstructing Judaism

Religious Coalition for Reproductive Choice

Unitarian Universalist Church of the Restoration

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains **6,337** words within the meaning of Pa. R. App. Proc. 2135. In making this certification, I have relied on the word count of the word-processing system to prepare the brief.

I further certify that this filing complies with the provisions of the Public Access Policy of the United 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.

/s/ Vernon L. Francis
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Allegheny Reproductive Health Center, et al., Appellants,	:	
	:	26 MAP 2021
v.	:	
	:	
Pennsylvania Department of Human Services, et al., Respondents.	:	

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IN THE SUPREME COURT OF PENNSYLVANIA

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