Received 10/13/2021 6:26:56 PM Supreme Court Middle District

Filed 10/13/2021 6:26:00 PM Supreme Court Middle District
26 MAP 2021

SUPREME COURT OF PENNSYLVANIA

No. 26 MAP 2021

Allegheny Reproductive Health Center, Allentown Women's Center, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania
Appellants,
v.
Pennsylvania Department of Human Services, Meg Sneed, Andrew Barnes, and Sally Kozak, in their official capacities
Appellees.

Brief of the Obstetrical Society of Philadelphia, Philadelphia County Medical Society, The Midwife Center for Birth & Women's Health, Physicians for Reproductive Health, Medical Students for Choice, and Individual Healthcare Providers as Amici Curiae in Support of Appellants

Appeal from the March, 26 2021 Opinion of the Commonwealth Court of Pennsylvania, No. 26 MD 2019

Leah A. Mintz (PA 320732)
Erin M. Duffy (PA 93924)
Katharyn I. Christian McGee (PA 312347)
Samantha R. Dalmass (PA 327367)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae Obstetrical Society of Philadelphia, Philadelphia County Medical Society, The Midwife Center for Birth & Women's Health, Physicians for Reproductive Health, Medical Students for Choice, and Individual Healthcare Providers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

PENNSYLVANIA CASES

ADDITIONAL CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

Amici are organizations representing physicians, nurses, and midwives, as well as individual physicians, nurses, and midwives, from around the Commonwealth who recognize the importance of allowing healthcare professionals to advocate for their patients through the legal system.

The Obstetrical Society of Philadelphia is an educational organization for "town and gown" obstetricians and gynecologists, residents in training, medical students and all practitioners with an interest in women's health. Originally founded in 1866 and officially incorporated in 1877, the Obstetrical Society of Philadelphia's mission is to foster collegiality, share expertise, and improve the health of women by promoting equity, compassionate and evidence-based care, education, advocacy, and scholarly endeavors in women's health.

The Philadelphia County Medical Society ("PCMS") is a vibrant multispecialty county medical society with several thousand members. Its members are not only from many specialties, but encompass academic attending physicians as well as the many private practices in the city. PCMS's members share a common belief of the prime importance of the

physician-patient relationship to good medical decisionmaking, and the common goal of extreme high quality accessible innovative care for the county and region's citizens. PCMS's mission is to advance and support the interests of physicians and their patients. PCMS strives to not only be a consensus voice of the membership but also to serve as a trusted information source to practitioners on the many complex regulatory/health policy issues that affect the way and ability to deliver high quality care.

The Midwife Center for Birth & Women's Health ("TMC") has offered primary gynecological care, prenatal care, and childbirth services to individuals of all ages since 1982. TMC promotes wellness by providing exceptional, client-centered primary gynecological, pregnancy and birthing care in southwestern Pennsylvania's only independent birth center. TMC focuses outreach efforts on communities who experience poor health outcomes in order to have a more significant impact on improving the health of people in the region.

Physicians for Reproductive Health ("PRH") mobilizes and organizes medical providers to advance sexual and reproductive health, rights, and justice. PRH's programs

leverage education, advocacy, and strategic communications to ensure access to equitable, comprehensive health care, that will always include abortion care. PRH believes that this work is necessary for all people to live freely with dignity, safety, and security.

Medical Students for Choice was founded by medical students in 1993 in response to the lack of abortion education in their medical training. Its 220 chapters around the world work to ensure that medical students and trainees are educated about all aspects of reproductive health care, including abortion.

These organizational Amici are also joined by the following individual healthcare professionals[1]:

Sherry L. Blumenthal, MD.

Rupsa Boelig, MD, Assistant Professor, Division of Maternal Fetal Medicine, Thomas Jefferson University Hospital.

Raymond A. Cattaneo, MD, MPH, FAAP, MD, Einstein Medical Center - Einstein Healthcare Network, Adolescent Medicine, Pediatrics.

[1] These Amici appear in their individual capacities; institutional affiliations are listed here for identification purposes only.

Holly Cummings, MD, MPH, Penn Medicine, OB/GYN.

Megan Duffy, MSN, CNM, Thomas Jefferson University Hospital, Midwifery, OB/GYN.

Arielle Effron, MD, Resident Physician, Thomas Jefferson University Hospital.

Brian S. Englander, MD, Chairman, Pennsylvania Hospital, Department of Radiology.

Margaret Falbo, RN, DNP.

Laura Felder, MD, Thomas Jefferson University Hospital, OB/GYN.

Joy Friedman, MD, Einstein Medical Center - Einstein Healthcare Network.

Lex J. Gardner, MD, OB/GYN Resident Physician, Lankenau Medical Center.

Lindsay Goldblatt, MD.

Anna S. Graseck, MD, Assistant Professor of Clinical Obstetrics and Gynecology, Penn Medicine.

Michele L. Hartigan, CRNA, Esq.

Feather O'Connor Houston, Senior Advisor for Journalism and Public Media, Wyncote Foundation. Senior Advisor for Journalism and Public Media,

Wyncote Foundation. Ms. Houstoun has held positions at every level of government, including previously serving as Secretary of the Pennsylvania Department of Public Welfare.

Abike T. James, MD, MPH, Associate Professor of Obstetrics and Gynecology, University of Pennsylvania-Perelman School of Medicine.

David Jaspan, DO, FACOOG, Chair of the Department of Obstetrics and Gynecology, Einstein Healthcare Network.

Rodney Jones, Sr., CEO, East Liberty Family Health Care Center.

Lisa Lent, CRNP, Thomas Jefferson University Hospital, OB/GYN.

Christina Mezes, DO, OB/GYN Resident Physician, Lankenau Medical Center.

Aishat Olatunde, MD, Complex Family Planning Attending, Einstein Medical Center Philadelphia.

Iris Olson, MPH, Center Manager, Center for Women's Health Research and Innovation, University of Pittsburgh.

Kannika M. Osborne, CRNP, Thomas Jefferson University Hospital, Gynecology.

Sara Pentlicky, MD, Chief, Division of Family Planning, Einstein Medical Center - Einstein Healthcare Network.

Edward Schulman, MD, Professor Emeritus of Medicine, Division Chief for Pulmonary and Critical Care Medicine, Drexel University College of Medicine.

Sarita R. Sonalkar, MD, Penn Medicine, OB/GYN.

Kate Stampler, DO, Division Chair of Gynecology and Section Chief of Minimally Invasive Gynecology, Einstein Medical Center Philadelphia.

Holly N. Thomas, MD, MS, Assistant Professor of Medicine, University of Pittsburgh School of Medicine.

Dante Varotsis, MD, Resident, OB/GYN Residency Program, Thomas Jefferson University Hospital.

Peter J. Vasquez, MD, Penn Medicine, OB/GYN.

Stuart Weiner, MD, Thomas Jefferson University Hospital OB/GYN; Global Volunteers Reaching Children's Potential Program Advisory Committee.

Abigail Wolf, MD, Vice Chair, Education Director, Obstetrics & Gynecology Residency, Thomas Jefferson University Hospital.

Joan Zeidman, MD.

Amici support Plaintiffs Allegheny Reproductive Health Center, Allentown Women's Center, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania (collectively, the "Reproductive Health Centers") in challenging the constitutionality of the Abortion Control Act, 18 Pa.C.S. § 3125, and its corresponding regulations (collectively referred to as the "Abortion Control Act").

Amici submit this brief specifically to explain why the Commonwealth Court erred in holding that the Reproductive Health Centers lack standing. In particular, the Commonwealth Court based its decision largely on the unfounded idea that Reproductive Health Centers' interests are not aligned with the interests of their patients—namely, women[2] seeking abortion

[2] Amici acknowledge that transgender men and non-binary persons can become pregnant and may need abortion care. We refer here and elsewhere to "women" seeking abortion simply

care while being covered by the Commonwealth's Medical Assistance program, otherwise known as Medicaid.[3] The assumption that the Reproductive Health Centers were not acting in the patients' best interests in bringing this lawsuit goes against fundamental tenets of medical ethics and is incorrect.

Further, Amici are concerned that the Commonwealth Court's holding will have far-reaching, negative effects on the Commonwealth's medical community. Under the Commonwealth Court's reasoning, *no* medical provider would

---

in recognition that the majority of people seeking abortions are women and in keeping with the Court's jurisprudence.

[3] The Commonwealth Court erroneously characterizes the Reproductive Health Centers' claim as attempting to advance "the constitutional rights of all women on Medical Assistance, some of whom may not be their patients, and who may or may not agree with the claims asserted on their behalf in the petition for review." *Allegheny Reproductive Health Ctr. v. Pa. Dep't of Human Servs.*, 249 A.3d 598, 608 (Pa. Cmwlth. 2021) (en banc). This is incorrect. The Petition for Review makes clear that the Reproductive Health Centers only are suing "on behalf of their patients who seek abortions *and* are enrolled in or eligible for Medical Assistance, but whose abortions are not covered because of the Pennsylvania coverage ban." (Pet. for Review ¶ 39 (emphasis added).)

have standing to assert the rights of his or her patient. Unless the Commonwealth Court's holding is reversed, *all* healthcare providers could lose a key method for protecting their patients' rights and advancing their patients' best interests. Such a rule would be detrimental to healthcare professionals, their patients, and society as a whole. For these reasons, the Commonwealth Court's holding as to standing should be reversed.

No one other than Amici, their members, or their counsel paid for the preparation of this brief or authored this brief, in whole or in part.

SUMMARY OF ARGUMENT

The Commonwealth Court erred in holding that the Reproductive Health Centers lack standing to advance the constitutional rights of their patients under the Equal Rights Amendment to the Pennsylvania Constitution, *see* Pa. Const. art. I, § 28, and the Constitution's guarantee of equal protection under the law, *see* Pa. Const. art. I, §§ 1, 26; Pa. Const. art. III, § 32.

The Commonwealth Court's opinion is based on a fundamental misconception about the role of abortion providers in supporting their patients. The Commonwealth

Court repeatedly implies the Reproductive Health Centers' interests are not aligned with their patients' interests. Nothing could be further from the truth. All healthcare professionals—including abortion providers—have a sacred duty to act in the best interests of their patients. It is a duty that healthcare professionals treat with the utmost respect. Abortion providers are no different. Distinguishing abortion providers from other healthcare professionals fails to recognize that abortion is healthcare and that abortion providers are vital members of the healthcare community.

The Commonwealth Court's opinion, in addition to being incorrect, also has far-reaching implications for Pennsylvania's healthcare professionals and their ability to advocate for their patients and promote their patients' interests. By holding that the Reproductive Health Centers lack standing to assert the constitutional claims of their patients, the Commonwealth Court created a restrictive rule of law that prevents *all* healthcare providers from advancing lawsuits on behalf of their patients, even in cases that do not involve the constitutional right to abortion. Such a rule ignores the reality that, in many cases, healthcare professionals are in the best position to

advance their patients' rights. Indeed, healthcare professionals may be the *only* advocates for their patients' legal rights when patients have limited resources or when each patient's claim would become moot during the course of litigation. Concrete harms may come to patients if healthcare professionals are unable to access the legal system on behalf of their patients.

Finally, the Commonwealth Court failed to articulate any reason why Pennsylvania's rule for healthcare provider standing should be stricter than the equivalent rules in federal court and in every jurisdiction that has considered the issue. Indeed, the Commonwealth Court's holding as to standing makes Pennsylvania an unwelcome outlier as the only state that prevents abortion providers from asserting the constitutional rights of their patients.

This Court should reverse the Commonwealth Court's holding that the Reproductive Health Centers lack standing to challenge the constitutionality of the Abortion Control Act.

ARGUMENT

Healthcare Professionals Should Have Standing to Advance the Rights and Interests of Their Patients and to Promote the Provider-Patient Relationship.

The Commonwealth Court erroneously held that the Reproductive Health Centers lack standing to advance the constitutional rights of their patients. In reaching that conclusion, the Commonwealth Court adopted an overly strict interpretation of the standing requirements under Pennsylvania law, thus threatening the ability of all healthcare providers to advance the legal rights of their patients.

Standing under Pennsylvania law is a flexible concept that is primarily meant to reserve judicial intervention for the cases "where the underlying controversy is real and concrete, rather than abstract." *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 599 (Pa. 2013) (quoting *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003)). In other words, "the core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge." *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). While the traditional

test for standing in Pennsylvania looks to whether the plaintiff has a "substantial, direct, and immediate interest" in the subject matter of the litigation, *see William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 281 (Pa. 1975) (plurality), these factors are not applied rigidly. *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010). Instead, courts also look to "other factors such as, for example, the appropriateness of judicial relief, the availability of redress through other channels, or the existence of other persons better suited to assert the claim." *Id.* at 334.

The Commonwealth Court's analysis of standing is incorrect for all the reasons explained by the Reproductive Health Centers in their opening brief. Even worse, the Commonwealth Court fundamentally misunderstood the relationship between health professionals and their patients—implying that the patients' interests and the providers' interests are not aligned. That error was further compounded by the Commonwealth Court's refusal to recognize the value of healthcare provider-led litigation on behalf of patients. As a result, the Commonwealth Court created a stricter rule for third party standing for healthcare professionals than exists in the federal system and in most other states that have considered

the issue. This Court should not allow such an anomalous result and should reverse the determination of the Commonwealth Court as to the Reproductive Health Centers' standing.

A. Healthcare professionals' interests are aligned with those of their patients.

The Commonwealth Court's reasoning for denying standing to the Reproductive Health Centers is flawed because the Commonwealth Court assumed (without any basis) that the Reproductive Health Centers' interests were not aligned with their patients' interests. In fact, the Commonwealth Court took the strange position that the Court should not allow Reproductive Health Centers to advocate for their patients' rights because "the Court has no way of knowing that the patients on whose behalf Reproductive Health Centers purport to speak even want this assistance." *Allegheny Reproductive Health Ctr.*, 249 A.3d at 607. In the context of this case, the Commonwealth Court questioned whether the Reproductive Health Centers' patients actually wanted the Commonwealth to assist in paying for their abortion care—as if women who live close to or below the poverty line and qualify for Medicaid would, for some reason, *prefer* to scrape together sufficient

money to cover the costs of their abortion care themselves, thus perhaps being unable to afford rent, utilities, food, or other basic necessities.

Beyond this bizarre suggestion, the Commonwealth Court's opinion also unjustifiably assumes that the Reproductive Health Centers were not acting in their patients' interests in pursuing this litigation. *See id.* The Commonwealth Court's assumption runs counter to established medical ethics for healthcare professionals and should not be given any weight or credence. For example, the American Medical Association's ("AMA") Code of Medical Ethics affirms the following with respect to the patient-physician relationship:

> the practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patient and to alleviate suffering. The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgement on patients' behalf,

> and to advocate for their patients' welfare.

American Medical Association, Code of Medical Ethics Opinion 1.1.1 (citing AMA Principles of Medical Ethics: I, II, IV, VIII)[4]. Similarly, the AMA Code of Medical Ethics VIII requires that all physicians "regard responsibility to the patient as paramount." American Medical Society, Code of Medical Ethics VIII.[5]

Individual specialties within the physician community make similar promises to their patients. Particularly relevant here, the American College of Obstetricians and Gynecologists' Code of Professional Ethics states that "[t]he welfare of the patient (beneficence) is central to all considerations in the patient-physician relationship." American College of Obstetricians and Gynecologists, Code of Professional Ethics, at

---

[4] Available at: https://www.ama-assn.org/delivering-care/ethics/patient-physician-relationships (last visited Oct. 12 2021).

[5] Available at: https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/principles-of-medical-ethics.pdf (last visited Oct. 12, 2021).

Ethical Foundation I (2018).[6] Indeed, the "patient-physician relationship is the central focus for all ethical concerns, and the welfare of the patient must form the basis of all medical judgments." *Id.* at Code of Conduct I.1. As part of providing obstetric and gynecological care to patients, the "obstetrician-gynecologist should serve as the patient's advocate and exercise all reasonable means to ensure that the most appropriate care is provided to the patient." *Id.* at Code of Conduct I.2.

Others in the medical community take similar oaths to safeguard and advance patients' best interests. A nurse famously takes the Florence Nightingale Pledge when graduating from nursing school, swearing to "devote myself to the welfare of those committed to my care." *See* Florence Nightingale Pledge.[7] Similarly, the American Nurses

---

[6] Available at: https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/acog-policies/code-of-professional-ethics-of-the-american-college-of-obstetricians-and-gynecologists.pdf?la=en&hash=CC213370E1EFDCD3E81242D8384BE4AB (last visited Oct. 12, 2021).

[7] Available at: https://nursing.vanderbilt.edu/news/florence-nightingale-pledge/ (last visited Oct. 12, 2021).

Association publishes its own Code of Ethics for Nurses, which asserts a "nurse's primary commitment is to the patient, whether an individual, family, group, community, or population." American Nurses Association, Code of Ethics for Nurses with Interpretive Statements, Provision 2 (2015).[8] A nurse is also required to "promote[], advocate[] for, and protect[] the rights, health, and safety of the patient." *Id.*, Provision 3.

The American Academy of Physician Assistants has analogous Guidelines for Ethical Conduct for the PA Profession. As part of these Guidelines, Physician Assistants "should act in the patient's best interest." American Academy of Physician Assistants, Guidelines for Ethical Conduct for the PA Profession, at 2 (2013). "PAs should always act in the best interests of their patients and as advocates when necessary." *Id.* at 4.[9]

---

[8] Available at: https://www.nursingworld.org/coe-view-only (last visited Oct. 12, 2021).

[9] Available at: https://www.aapa.org/wp-content/uploads/2017/02/16-EthicalConduct.pdf (last visited Oct. 12, 2021).

Such ethical codes and guidelines, among many others governing healthcare professionals, affirm that healthcare professionals are duty-bound to act in their patients' best interests. This fundamental tenet of medical practice holds true, even when physicians and other healthcare professionals initiate lawsuits to vindicate their patients' rights. The perception, bought into by the Commonwealth Court, that healthcare professionals' interests in bringing these types of lawsuits somehow diverge from their patients' interests is incorrect and should be resoundingly rejected.

B. The Commonwealth Court's holding, if left unchecked, will have far-reaching impacts on healthcare professionals' ability to advocate for their patients.

The Commonwealth Court's opinion rests on flawed legal premises and fundamental misconceptions about the goals and duties of healthcare professionals. The result is devastating to abortion providers such as the Reproductive Health Centers, who deliver vital healthcare—including abortion care—to vulnerable communities throughout the Commonwealth. But, the implications of the Commonwealth Court's opinion reach far beyond the abortion context and could deprive all

healthcare professionals of an important avenue for advocating for their patients.

Nothing in the Commonwealth Court's opinion limits its holding to the Reproductive Health Centers or the abortion context. Indeed, the Commonwealth Court's opinion implies that it would be very difficult for medical professionals to obtain legal standing to pursue their patients' rights in any context. Yet, resorting to the legal system often is necessary to protect patients' rights. In fact, many important legal decisions were the result of physicians and other medical professionals advocating for their patients' interests, including:

- In *Griswold v. Connecticut*, 381 U.S. 479, 480-81 (1965), a professor of medicine who also served as medical director of a clinic dispensing contraceptive devices and advising couples on how to prevent pregnancy championed the right of married people to access contraceptives.
- Doctors advanced the substantive due process and equal protection claims of their terminally ill patients when challenging laws banning assisted suicide, even after the patients succumbed to their illnesses. *See Washington v. Glucksberg*, 521 U.S. 702, 707-08 (1997); *Vacco v. Quill*, 521 U.S. 793, 797-98 (1997).

- In *Aid for Women v. Foulston*, 441 F.3d 101 (10th Cir. 2006), the U.S. Court of Appeals for the Tenth Circuit held that healthcare providers had standing to assert the minor patients' privacy rights because, among other reasons, the patients may have had a desire to protect their privacy, and minors, "are generally not legally sophisticated and are often unable even to maintain suits without a representative or guardian." *Id.* at 1113-14.

- The U.S. Court of Appeals for the Third Circuit held psychiatrists had standing to their patients' rights because, among other reasons, "the stigma of receiving mental health services presents a significant deterrent to litigation." *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002).

- In *Children's Hospital of Philadelphia v. Horizon NJ Health*, Civ. A. No. 07-5061, 2008 WL 4330311, at *5-6 (E.D. Pa. Sept. 22, 2008), the court held that physicians at CHOP had standing to assert claims against a New Jersey Medicaid provider for violating the dormant commerce clause and the Social Security Act because of the "inherent closeness of the doctor-patient relationship" and because "Horizon members 'are heavily dependent on Horizon for medical care for their children' and therefore members may would [sic] be concerned that bringing suit against Horizon might upset that relationship." *Id.* (quotations omitted).

These cases recognize that a patient may not be in the best position to advance his or her own claims because of a patient's desire for privacy, the embarrassment associated with divulging medical information in litigation, and the enormous strain that litigation can put on a party's finances and time. These considerations are even more acute in the context of abortion care litigation, as the U.S. Supreme Court has repeatedly recognized in granting abortion care providers standing to litigate on behalf of their patients. *See, e.g.*, *June Med. Serv. v. Russo*, 140 S. Ct. 2103, 2118 (2020) (collecting cases).

Even this Court and the Commonwealth Court previously allowed physicians to assert certain interests in litigation due to the patients' interests or needs. In *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 924 (Pa. 2013), this Court held that a doctor has standing to challenge portions of a regulation that would put the doctor in the untenable position of "violating his legal and ethical obligations to treat a patient by accepted standards, or not taking a case and refusing a patient medical care." Further, the Commonwealth Court previously held that a dental association had standing to protect their patients' privacy interests because the patients

may not know that the challenged regulation could require their medical information to be disclosed. *Pa. Dental Ass'n v. Dep't of Health*, 461 A.2d 329, 331 (Pa. Cmwlth. 1983) (en banc).

Many, if not most, of these cases would have come out differently if the Commonwealth Court's cursory and restrictive analysis were to continue to govern third party standing in Pennsylvania. Under the Commonwealth Court's misguided precedent, legal challenges implicating individuals' right to contraception, abortion, physician-assisted suicide, medical privacy, and mental health treatment would not have even had their days in court, regardless of the cases' outcomes on their merits. A restrictive rule for standing, like the one adopted by the Commonwealth Court here, would have the deleterious effect of preventing lawsuits on fundamental issues from being considered on the merits. The healthcare profession, and indeed society as a whole, would be harmed by such restrictions on accessing the legal system and medical care.

A legal rule restricting physicians and other healthcare professionals from bringing lawsuits to advance the rights of their patients would also interfere with the providers' ethical obligations. The AMA expressly recognizes that physicians not

only have the "right to advocate for change in law in policy[] in the public arena," but also "have an ethical responsibility to seek change when they believe the requirements of law or policy are contrary to the best interests of patients." AMA, Code of Medical Ethics Opinion 1.2.10.[10] The American Board of Internal Medicine Foundation, in conjunction with the American College of Physicians Foundation and the European Federation of Internal Medicine, authored the seminal document Medical Professionalism in the New Millennium: A Physician Charter, which similarly recognizes:

> Physicians must individually and collectively strive to reduce barriers to equitable health care. Within each system, the physician should work to eliminate barriers to access based on education, laws, finances, geography, and social discrimination. A commitment to equity entails the promotion of public health and preventive medicine, as well as public advocacy on the part of each physician,

[10] Available at: https://www.ama-assn.org/delivering-care/ethics/political-action-physicians (last visited Oct. 12, 2021).

> without concern for the self-interest of the physician or the profession.

Medical Professionalism in the New Millennium: A Physician Charter (2002).[11] The Physician Charter has been adopted by over 108 medical associations worldwide, including the American Academy of Emergency Medicine, the American Academy of Family Physicians, the American Academy of Pediatrics, the American Board of Obstetrics and Gynecology, the American Society of Anesthesiologists, the Association of American Medical Colleges, and the Accreditation Council for Graduate Medical Education.[12]

The Commonwealth Court's rule for standing fails to recognize that healthcare professionals are effective advocates for their patients in the legal system and prevents healthcare providers from engaging in their ethical duty to seek social change for their patients. This Court should reverse.

---

[11] Available at: https://abimfoundation.org/wp-content/uploads/2015/12/Medical-Professionalism-in-the-New-Millenium-A-Physician-Charter.pdf (last visited Oct. 12, 2021).

[12] The complete list of signatories is available at https://abimfoundation.org/what-we-do/physician-charter/endorsements-of-the-charter (last visited Oct. 12, 2021).

C. Pennsylvania should not adopt a rule for standing of healthcare providers that is more restrictive than that of federal courts and many other states.

To reach its anomalous result as to standing, the Commonwealth Court claimed to import the third-party standing doctrine from federal law—one that this Court never has adopted. *See Allegheny Reproductive Health Ctr.*, 249 A.3d at 607 (applying *Singleton v. Wulff*, 428 U.S. 106 (1976) (plurality)). Under *Singleton*, third parties have standing to assert the rights of others where two conditions are met. The first condition focuses on the "relationship of the litigant to the person whose right he seeks to assert," and is satisfied if both "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," and the litigant is "fully, or very nearly, as effective a proponent of the right" held by the non-litigating party as the non-litigant. *Singleton*, 428 U.S. at 114-15. The second element considers the ability of the non-litigating party to assert his or her own rights. *Id.* at 116.

Notably, the *Singleton* decision is on all fours with this case. There (as here), physicians challenged a state statute that excluded "non-medically indicated" abortions from Medicaid coverage. *Id.* at 108. Those physicians (like here) also

"provided, and anticipated providing abortions to welfare patients who are eligible for Medicaid payments." *Id.* A plurality of the Supreme Court found the physicians had standing because the two conditions were easily met. *Id.* at 117. First, "[t]he closeness of the relationship is patent," as it was in other federal cases like *Griswold*, 381 U.S. at 481, and *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). *Singleton*, 428 U.S. at 117. As the U.S. Supreme Court plurality recognized, "[a] woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State." *Id.* In other words, "[t]he woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here." *Id.* Further, healthcare providers, including physicians, are intimately involved in the decision of a woman to exercise her constitutional right to an abortion. *Id.* "Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Id.*

As to the second factor—a woman's ability to assert her own right—the Supreme Court plurality determined this factor,

too, supported the physicians' standing. *Id.* The Court noted several obstacles to a woman asserting her own right to abortion care being funded by Medicaid. For example, a woman "may be chilled from such assertion by desire to protect the very privacy of her decision from the publicity of a court suit." *Id.* The Court also noted the imminent mootness problem of any individual pregnant woman's claim. *Id.* These problems could be resolved through pseudonyms, class actions, or exceptions to mootness; yet, in all these instances, the litigant asserting the right would be "representative" anyway. *Id.* at 117-18. In other words, the name of someone other than the woman herself seeking an abortion would appear as a plaintiff in each of these instances. Accordingly, "there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* As a result, the Supreme Court plurality concluded that it is "generally appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 118.

Although the Commonwealth Court noted the identical issues in *Singleton* and this case, the Court nevertheless reached the opposite result. *Allegheny Reproductive Health Ctr.*, 249 A.3d

at 606-07. The Commonwealth Court based its decision solely on its determination that *Singleton*, as a federal case, was not binding on Pennsylvania courts. *Id.* While this is of course true, it does not justify the Commonwealth Court's anomalous result.

The Commonwealth Court fails to articulate any defensible reason why a Pennsylvania court should not grant standing to healthcare providers where federal courts do. Indeed, Pennsylvania's standing doctrine always has been more flexible and permissive than that of federal courts. As President Judge Pellegrini explained in his concurrence in *Armstead v. Zoning Board of Adjustment of Philadelphia*, 115 A.3d 390 (Pa. Cmwlth. 2015) (en banc):

> Juxtaposed against the federal standards, the test for standing in Pennsylvania is a flexible rule of law, perhaps because the lack of standing in Pennsylvania does not necessarily deprive the court of jurisdiction, whereas a lack of standing in the federal arena is directly correlated to the ability of the court to maintain jurisdiction over the action.

Id. at 401-02 (Pellegrini, P.J., concurring) (citations omitted). Further, "in Pennsylvania, there is a constitutional right of

every person who finds it necessary or desirable to resort to the courts for production of legally recognized interests to have justice administered without sale, denial or delay." *Id.* at 402 (citing Pa. Const. art. I, § 11; *Masloff v. Port Authority of Allegheny Cnty.*, 613 A.2d 1186 (Pa. 1992)). For these reasons, "Pennsylvania courts are much more expansive in finding standing than their federal counterparts." *Id.*

The Commonwealth Court's decision in this case turns that paradigm on its head. Now, contrary to established precedent, standing is *more* difficult to establish in Pennsylvania than it is in federal court, at least for healthcare professionals seeking to advance the rights of their patients.

Nor does the Commonwealth Court's analysis comport with that of all other states that have considered whether medical professionals can challenge Medicaid coverage bans under state law. In fact, "virtually every state court considering the issue has similarly held that abortion providers have standing to raise the constitutional rights of their patients." *Feminist Women's Health Ctr. v. Burgess*, 651 S.E.2d 36, 38 (Ga. 2007). Many of those decisions have come in cases involving challenges to Medicaid coverage bans. *Id.* at 38-39 (holding that

abortion care providers have standing to challenge Georgia's prohibition on Medicaid funds being used for abortion care); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 847 (N.M. 1998) (holding that abortion providers and pro-choice organization have standing to challenge New Mexico Medicaid coverage ban and holding that the coverage ban was unconstitutional); *see also Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993) (invalidating West Virginia's Medicaid coverage ban through lawsuit brought by abortion care providers); *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002) (physicians prevailed on their challenge to Arizona's Medicaid coverage ban as to medically-necessarily abortions); *Dep't of Health & Social Service v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001) (same for Alaska); *Planned Parenthood Ass'n, Inc. v. Dep't of Human Res. of Oregon*, 663 P.2d 1247 (Or. 1983) (same for Oregon); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981) (same for Massachusetts in case brought by physician, among others); *Women of Minn. ex rel. Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (same for Minnesota); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982) (same for New Jersey).

None of these state supreme courts thought that physicians were improper plaintiffs to litigate the constitutional rights of their patients. Moreover, Pennsylvania's articulated reason for creating a harsher standing rule—that healthcare professionals' interests do not align with their patients' interests—is false.

Accordingly, this Court should reverse the Commonwealth's denial of standing and permit the Reproductive Health Centers and healthcare professionals across the Commonwealth to advocate for their patients' rights and interests.

CONCLUSION

For the foregoing reasons this Court should reverse the decision below.

October 13, 2021 Respectfully submitted,

/s/ Leah A. Mintz

Leah A. Mintz (PA 320732)
Erin M. Duffy (PA 93924)
Katharyn I. Christian McGee (PA 312347)
Samantha R. Dalmass (PA 327367)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Obstetrical Society of Philadelphia, Philadelphia County Medical Society, The Midwife Center for Birth & Women's Health, Physicians for Reproductive Health, Medical Students for Choice, and Individual Healthcare Providers

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief complies with the word count limits in Pa.R.A.P. 531(b)(3) because it contains 5,360 words.

/s/ Leah A. Mintz
Leah A. Mintz (PA 320732)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Obstetrical Society of Philadelphia, Philadelphia County Medical Society, The Midwife Center for Birth & Women's Health, Physicians for Reproductive Health, Medical Students for Choice, and Individual Healthcare Providers

October 13, 2021

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA

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 from non-confidential information and documents.

/s/ Leah A. Mintz
Leah A. Mintz (PA 320732)
Duane Morris LLP
30 S. 17th Street
Philadelphia, PA 19103-4196
(215) 979-1000

Counsel for Amici Curiae Obstetrical Society of Philadelphia, Philadelphia County Medical Society, The Midwife Center for Birth & Women's Health, Physicians for Reproductive Health, Medical Students for Choice, and Individual Healthcare Providers

October 13, 2021

Received 10/13/2021 6:26:56 PM Supreme Court Middle District

Filed 10/13/2021 6:26:00 PM Supreme Court Middle District
26 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, Allentown Women's Center, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Appellants	:	26 MAP 2021
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	:	

PROOF OF SERVICE

I hereby certify that this 13th day of October, 2021, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Service

Served:	Adam Ryan Martin
Service Method:	eService
Email:	martinar@pepperlaw.com
Service Date:	10/13/2021
Address:	100 Market Street Suite 200 Harrisburg, PA 17101
Phone:	276--68-5-3009
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Amal Munas Bass
Service Method:	eService
Email:	abass@womenslawproject.org
Service Date:	10/13/2021
Address:	Women's Law Project 125 S. 9th Street, Suite 300 Philadelphia, PA 19107
Phone:	215--92-8-5772
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Brian S. Paszamant
Service Method:	eService
Email:	paszamant@blankrome.com
Service Date:	10/13/2021
Address:	One Logan Square 130 N. 18th Street Philadelphia, PA 19103
Phone:	215--56-9-5791
Representing:	Appellee Jacob Corman, et al.

Served:	Carrie Yvette Flaxman
Service Method:	eService
Email:	carrie.flaxman@ppfa.org
Service Date:	10/13/2021
Address:	5403 Lambeth Road Bethesda, MD 20814
Phone:	301-461-2100
Representing:	Appellant Allegheny Reproductive Health Center, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Christine K. Castro
Service Method:	eService
Email:	ccastro@womenslawproject.org
Service Date:	10/13/2021
Address:	428 Forbes Ave. Suite 1710 Pittsburgh, PA 15219
Phone:	412-281-3048
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	David Russell Dye
Service Method:	eService
Email:	dye@bmc-law.net
Service Date:	10/13/2021
Address:	2303 Market Street Camp Hill, PA 17011
Phone:	717--23-2-8731
Representing:	Appellee Bryan D. Cutler, et al.

Served:	David Samuel Cohen
Service Method:	eService
Email:	dsc39@drexel.edu
Service Date:	10/13/2021
Address:	3320 Market St. Philadelphia, PA 19104
Phone:	215--57-1-4714
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Doris M. Leisch
Service Method:	eService
Email:	dleisch@pa.gov
Service Date:	10/13/2021
Address:	Health & Welfare Building, 3d Floor 7th & Forster Streets Philadelphia, PA 17120
Phone:	717- 78-32800
Representing:	Appellee Pennsylvania Department of Human Services, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Eugene K. Cuccarese
Service Method:	eService
Email:	ecuccarese@pa.gov
Service Date:	10/13/2021
Address:	301 5th Ave. Suite 430 Pittsburgh, PA 15222
Phone:	412--56-5-5765
Representing:	Appellee Pennsylvania Department of Human Services, et al.

Served:	Jan Paula Levine
Service Method:	eService
Email:	jan.levine@troutman.com
Service Date:	10/13/2021
Address:	3000 Two Logan Square 18th & Arch Streets Philadelphia, PA 19103
Phone:	215--98-1-4714
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Jason Adam Snyderman
Service Method:	eService
Email:	snyderman@blankrome.com
Service Date:	10/13/2021
Address:	Blank Rome LLP One Logan Square, 130 North 18th Street Philadelphia, PA 19103
Phone:	215--56-9-5774
Representing:	Appellee Jacob Corman, et al.

Served:	John Patrick Wixted
Service Method:	eService
Email:	jwixted@blankrome.com
Service Date:	10/13/2021
Address:	130 North 18th Street Philadelphia, PA 19106
Phone:	215--56-9-5649
Representing:	Appellee Jacob Corman, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Kaitlin Leigh Meola
Service Method:	eService
Email:	meola.kaitlinl@gmail.com
Service Date:	10/13/2021
Address:	172 Alder Avenue Wayne, NJ 07470
Phone:	862--37-7-9789
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Katherine Marie Fitz Patrick
Service Method:	eService
Email:	fitz-patrick@bmc-law.net
Service Date:	10/13/2021
Address:	Ball, Murren & Connell, LLC 2303 Market Street Camp Hill, PA 17011
Phone:	(71-7) -232-8731
Representing:	Appellee Bryan D. Cutler, et al.

Served:	Leah Greenberg Katz
Service Method:	eService
Email:	katzl@pepperlaw.com
Service Date:	10/13/2021
Address:	3000 Two Logan Square 18th and Arch Streets Philadelphia, PA 19103
Phone:	215-981-4547
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Matthew John McLees
Service Method:	eService
Email:	mmclees@pa.gov
Service Date:	10/13/2021
Address:	625 Forster Street Room 305 Harrisburg, PA 17120
Phone:	717--78-3-2800
Representing:	Appellee Pennsylvania Department of Human Services, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Michael Stephen DePrince
Service Method:	eService
Email:	michael.deprince@troutman.com
Service Date:	10/13/2021
Address:	401 9th Street NW Suite 1000 Washington, DC 20004
Phone:	202-220-1244
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Philip Joseph Murren
Service Method:	eService
Email:	bmc-law2@msn.com
Service Date:	10/13/2021
Address:	Ball, Murren & Connell 2303 Market St Camp Hill, PA 17011
Phone:	717- 23-2-8731
Representing:	Appellee Bryan D. Cutler, et al.

Served:	Susan Frietsche
Service Method:	eService
Email:	Sfrietsche@womenslawproject.org
Service Date:	10/13/2021
Address:	401 Wood Street Suite 1020 Pittsburgh, PA 15222
Phone:	412--28-1-2892
Representing:	Appellant Allegheny Reproductive Health Center, et al.

Served:	Thomas B. Schmidt III
Service Method:	eService
Email:	schmidtt@pepperlaw.com
Service Date:	10/13/2021
Address:	P. O. Box 1181 Harrisburg, PA 17108
Phone:	717--25-5-1164
Representing:	Appellant Allegheny Reproductive Health Center, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Thomas Paul Howell
Service Method:	eService
Email:	thowell@pa.gov
Service Date:	10/13/2021
Address:	333 Market Street 17th Floor Harrisburg, PA 17101
Phone:	717-772-4252
Representing:	Appellee Pennsylvania Department of Human Services, et al.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	Andrew Chapman Christy
Service Method:	eService
Email:	achristy@aclupa.org
Service Date:	10/13/2021
Address:	1624 Huntingdon Road Abington, PA 19001
Phone:	609--50-2-0767
Representing:	Amicus Curiae ACLU of Pennsylvania

Served:	Claude Joseph Hafner II
Service Method:	eService
Email:	chafner@pasenate.com
Service Date:	10/13/2021
Address:	Room 535 Main Capitol Harrisburg, PA 17120
Phone:	717--78-7-3736
Representing:	Amicus Curiae Democratic Caucus Members of the Pennsylvania Senate and House of Representative

Served:	James Patrick Davy
Service Method:	eService
Email:	jimdavy@allriselaw.org
Service Date:	10/13/2021
Address:	P.O. Box 15216 Philadelphia, PA 19125
Phone:	609--27-3-5008
Representing:	Amicus Curiae The National Women's Law Center

Served:	Krysten Leigh Connon
Service Method:	eService
Email:	kconnon25@gmail.com
Service Date:	10/13/2021
Address:	246 S Farragut St Philadlephia, PA 19139
Phone:	201-486-5417
Representing:	Amicus Curiae New Voices for Reproductive Justice, et al

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Lam Dang Truong
Service Method:	eService
Email:	ldtruong3@gmail.com
Service Date:	10/13/2021
Address:	125 Long VW Carlisle, PA 17013
Phone:	717-877-0544
Representing:	Amicus Curiae Democratic Caucus Members of the Pennsylvania Senate and House of Representative

Served:	Megan E. Watson
Service Method:	eService
Email:	mwatson@bkwfamily.com
Service Date:	10/13/2021
Address:	1528 Walnut Street Suite 1100 Philadelphia, PA 19102
Phone:	215--79-0-8800
Representing:	Appellee Amicus Curiae National Health Law Program

Served:	Robert F. Williams
Service Method:	First Class Mail
Service Date:	10/13/2021
Address:	Rutgers University School of Law, Camden 217 North Fifth St., Suite E427 Camden, NJ 08102
Phone:	856-225-6372
Representing:	Amicus Curiae Robert F. Williams

Served:	Seth F. Kreimer
Service Method:	eService
Email:	skreimer@law.upenn.edu
Service Date:	10/13/2021
Address:	3501 Sansom St. Philadelphia, PA 19104
Phone:	215--89-8-7447
Representing:	Amicus Curiae Seth F. Kreimer

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Shannon Amanda Sollenberger
Service Method:	eService
Email:	shannon.sollenberger@pasenate.com
Service Date:	10/13/2021
Address:	6212 N Highlands Ct Harrisburg, PA 17111
Phone:	302-222-2997
Representing:	Amicus Curiae Democratic Caucus Members of the Pennsylvania Senate and House of Representative

Served:	Tara Lynn Hazelwood
Service Method:	eService
Email:	thazelwood@pahouse.net
Service Date:	10/13/2021
Address:	621 Main Capitol Building Harrisburg, PA 17120
Phone:	717--78-7-3002
Representing:	Amicus Curiae Democratic Caucus Members of the Pennsylvania Senate and House of Representative

/s/ Leah Ariel Mintz

(Signature of Person Serving)

Person Serving:	Mintz, Leah Ariel
Attorney Registration No:	320732
Law Firm:	
Address:	Duane Morris Llp 30 S 17TH St Philadelphia, PA 19103
Representing:	Amicus Curiae Medical Students for Choice Amicus Curiae Obstetrical Society of Philadelphia Amicus Curiae Philadelphia County Medical Society Amicus Curiae Physicians for Reproductive Health Amicus Curiae The Midwife Center for Birth & Women's Health