IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,

Appellants,

– v. –

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

Appellees.

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

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 Pa. C.S. § 723 because this is an appeal of a final order of the Commonwealth Court entered in a matter properly commenced in the Commonwealth Court pursuant to its original jurisdiction. 42 Pa. C.S. § 761(a).

II. ORDERS IN QUESTION

Appellants seek review of two Orders of the Commonwealth Court:

> AND NOW, this 28th day of January, 2020, the applications for leave to intervene filed by members of the Pennsylvania State Senate and by members of the Pennsylvania House of Representatives are hereby GRANTED.

> AND NOW, this 26th day of March, 2021, the preliminary objections of Respondents are SUSTAINED as set forth in the attached Opinion, and Petitioners' petition for review is DISMISSED.

III. SCOPE AND STANDARD OF REVIEW

For questions of law such as those presented in this case, this Court's standard of review is *de novo*, and the scope of review is plenary. *First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178, 180 (Pa. 2005). This includes questions of legislator intervention that raise pure questions of law. *Markham v. Wolf*, 136 A.3d 134, 138 (Pa. 2016). "Upon review of a decision sustaining or overruling preliminary objections, we accept as true all well-pleaded material facts set forth in the petition for review and all inferences fairly deducible from those facts. We will

affirm an order sustaining preliminary objections only if it is clear that the party filing the petition for review is not entitled to relief as a matter of law." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (internal citations, quotations, and alterations omitted).

IV. QUESTIONS PRESENTED

1. Did the Commonwealth Court err in permitting individual members of the Senate and House to intervene as Respondents in this case?

2. Does the Pennsylvania Medicaid abortion coverage ban violate the Pennsylvania Constitution's explicit guarantee of equality on the basis of sex contained in Pa. Const. art. I, § 28 and its separate equal protection guarantee contained in Pa. Const. art. I, §§ 1, 26 & art. III, § 32?

3. Do Appellants have standing to bring these constitutional claims on behalf of their Medicaid patients who seek an abortion?

V. STATEMENT OF THE CASE

A. THE PENNSYLVANIA MEDICAL ASSISTANCE PROGRAM

Medicaid is a joint federal-state public insurance program that provides medical insurance for a wide array of covered services to eligible people with low incomes. R.126a-127a, ¶¶ 44, 45, 48. Pennsylvania's Medicaid program is known as Medical Assistance. R.126a, ¶ 44. Appellee Pennsylvania Department of Human Services ("DHS") is responsible for administering the Medical

Assistance program. R.124a, ¶ 40. DHS's Office of Medical Assistance Programs operates Medical Assistance, which includes a fee-for-service program that reimburses providers directly for covered medical services provided to enrollees, as well as a managed care program, HealthChoices, that is administered by contracted managed care organizations that receive a negotiated capitated rate from DHS to contract with health care providers to deliver covered services. R.125a-126a, ¶¶ 41, 46. As of July 1, 2018, roughly 84.6% of Medical Assistance recipients were enrolled in the HealthChoices managed care program, and 15.4% were in the fee-for-service program. R.126a, ¶ 47.[1]

The Pennsylvania Abortion Control Act prohibits the use of any Commonwealth funds to cover abortion, including the Medical Assistance program, except those abortions necessary to avert the death of the pregnant woman or to end a pregnancy caused by rape or incest. *See* 18 Pa. C.S. §§ 3215(c), (j) ("coverage ban"). No equivalent coverage ban applies to men; rather, Medical Assistance covers all reproductive health services that men need. R.128a-129a, ¶ 54. Likewise, no coverage ban applies to carrying a pregnancy to term; rather,

[1] As of July 1, 2019 (after the Petition was filed), 89.3% of Medical Assistance recipients were enrolled in HealthChoices managed care plans and 10.7% were in the fee-for-service program. Kaiser Family Foundation, Share of Medicaid Population Covered Under Different Delivery Systems, http://www.kff.org/medicaid/state-indicator/share-of-medicaid-population-covered-under-different-delivery-systems/ (last visited Sept. 17, 2021).

Medical Assistance covers all costs associated with pregnancy and childbirth, including care for medically-complicated pregnancies. R.129a, ¶ 55.

DHS has promulgated regulations implementing the coverage ban. *See* 55 Pa. Code §§ 1141.57,[2] 1163.62, 1221.57. Health care providers are prohibited from billing for services inconsistently with these regulations. *See* 55 Pa. Code §§ 1141.81, 1163.491, 1221.81, 1229.81.

B. THE IMPACT OF THE COVERAGE BAN ON PENNSYLVANIA WOMEN[3]

The coverage ban harms women in many ways. As set forth in the Petition for Review, these harms include the following:

- Low-income patients, enrolled in or otherwise eligible for Medical Assistance, are forced to pay for their abortion with money they need for essentials such as rent, utilities, food, diapers, or clothing. This is exactly the choice—between health care and basic essentials—that Medicaid was created to avoid. R.130a, 131a-132a, 137a, ¶¶ 59, 62, 77-79.

[2] Providers' reference to 55 Pa. Code § 1147.57 rather than § 1141.57 in the Petition's Wherefore clause was a typo.

[3] Providers use the terms "women" and "men" throughout this brief while recognizing that transgender men and people whose gender identity is non-binary may have female reproductive organs and be capable of pregnancy and childbirth. At the Commonwealth Court argument on preliminary objections, Legislators suggested that the existence of transgender men precludes sex-based discrimination claims such as Providers' coverage ban claims. This position is in clear tension with the ERA's purpose and ignores that pregnancy is a *sex-based* medical condition.

- The need to raise money can delay the abortion, thereby increasing the cost and complexity of the procedure and its medical risks, as well as increasing required travel for some women. R.130a-131a, 137a-139a, ¶¶ 60-61, 80-83.
- The coverage ban distorts the physician-patient and counselor-patient relationship. Instead of focusing on the patient's questions, medical needs, and contraceptive plans, a portion of the patient-provider dialogue revolves around identifying funding sources for the patient's procedure. Often, abortion providers absorb the abortion's cost (in part or in full) for Pennsylvania women on Medical Assistance. R.123a, 139a-140a, ¶¶ 36, 84-87.
- National studies show that, where Medicaid does not cover abortion, roughly one quarter of Medicaid enrollees who seek an abortion are forced to continue their pregnancy to term against their will because they cannot pay for the abortion themselves. As a result of the coverage ban, some Pennsylvania women fall within this category. These women are denied their autonomy and dignity and cannot exercise their constitutional right to terminate a pregnancy. They are also forced to face the medical risks associated with continued pregnancy and childbirth, including the fourteen-fold increase in

maternal mortality risk associated with childbirth as compared to abortion. For Black women, the maternal mortality rate associated with childbirth is three times that of white women. R.132a-133a, ¶¶ 63-68.

- Women with health problems aggravated by pregnancy (such as diabetes or heart disease), or medical conditions the treatment of which is complicated by pregnancy (such as major depression or cancer), risk sustaining severe health damage from the coverage ban. R.134a-136a, ¶¶ 69-74.
- Women who raise a child they did not want to have face an increased risk of psychosocial harm. Their education may be interrupted and their career prospects circumscribed. A year after unsuccessfully seeking an abortion, they are more likely to be impoverished, unemployed, and depressed than women who obtained an abortion. R.133a, 136a, ¶¶ 66, 75.
- All of the harms identified here fall disproportionately on women of color, because women of color disproportionately experience poverty. R.138a-139a, ¶ 83.

C. PROCEDURAL HISTORY

Appellants, seven[4] Pennsylvania corporations operating medical facilities licensed or certified by the Commonwealth to provide abortions (collectively, "Providers"), R.116a-123a, ¶¶ 2-32, filed their Petition for Review in the Nature of a Complaint Seeking Declaratory Judgment and Injunctive Relief pursuant to the Commonwealth Court's original jurisdiction on January 16, 2019. The Petition claims the coverage ban violates the Pennsylvania Equal Rights Amendment, Pa. Const. art. I, § 28 ("Pennsylvania ERA"), because it excludes abortion, a procedure sought by women as a function of their sex, and because it arises from and reinforces invidious gender stereotypes. R.140a-141a, ¶¶ 88-92. It also asserts that the coverage ban violates the Pennsylvania Constitution's equal protection guarantees, Pa. Const. art. I, §§ 1, 26; art. III, § 32, by excluding from coverage the procedures of those who exercise their fundamental right to choose abortion while covering the care of those who choose to carry their pregnancy to term. R.142a-143a, ¶¶ 93-96.

Respondents, DHS and several agency officials responsible for enforcing the challenged statute and regulations, filed preliminary objections on April 16, 2019. While DHS's preliminary objections were pending, two groups of

[4] At the time of the Petition's filing, there were eight Petitioners. However, Petitioner Berger & Benjamin LLP has since ceased operations. On May 28, 2020, the Commonwealth Court granted the uncontested application to remove Berger & Benjamin as Petitioner.

individual Pennsylvania legislators sought to intervene as respondents (collectively, "Legislators").[5] Following briefing and argument, their applications for leave to intervene were denied on June 21, 2019.[6] *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 MD 2019 (Pa. Commw. Ct. June 21, 2019) ("Simpson Op."). The Commonwealth Court granted reconsideration by Order dated July 22, 2019. After reargument, a three-judge panel[7] granted Legislators' applications on January 28, 2020. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 MD 2019 (Pa. Commw. Ct. Jan. 28, 2020) ("Panel Op.").

DHS and Legislators completed their preliminary objection filings and briefing on February 27, 2020. The Commonwealth Court held oral argument *en banc* on October 14, 2020,[8] and on March 26, 2021, dismissed the Petition. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 MD 2019, (Pa. Commw. Ct. Mar. 26, 2021) ("PObj. Op.").

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[5] Eighteen senators, comprising 36% of the Pennsylvania Senate, and eight representatives, comprising 4% of the Pennsylvania House, filed two separate applications to intervene.

[6] Judge Robert Simpson presided.

[7] President Judge Mary Hannah Leavitt and Judges Michael H. Wojcik and Bonnie Brigance Leadbetter.

[8] President Judge Mary Hannah Leavitt and Judges Renée Cohn Jubelirer, Patricia A. McCullough, Anne E. Covey, Michael H. Wojcik, Christine Fizzano Cannon, and Ellen Ceisler.

The court's opinion first sustained DHS's preliminary objection that Providers do not have standing to bring this lawsuit on behalf of their patients because they "lack standing to vindicate the constitutional rights of third parties." *Id.* at 15. Judge Ellen Ceisler dissented on this point, concluding that Providers "argue persuasively" that Pennsylvania precedent "confers standing in the circumstances of this case." *Id.* at EC-2.

On the merits, the court unanimously held that Providers' constitutional claims were foreclosed by this Court's 1985 decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985). Without addressing Providers' substantive arguments that *Fischer* should be overturned, the Commonwealth Court concluded simply that, because *Fischer* addressed the same legal claims that are presented in this case, "[t]he petition for review does not state a claim upon which relief can be granted." PObj. Op. 20.[9]

On April 26, 2021, Providers filed their Notice of Appeal and Jurisdictional Statement, and this Court noted probable jurisdiction on August 2, 2021.

VI. SUMMARY OF ARGUMENT

The coverage ban unconstitutionally discriminates against pregnant women enrolled in Medical Assistance who choose abortion. There is no sex-

[9] The Commonwealth Court did not address House Legislators' preliminary objections related to separation of powers, federal preemption, and mandamus.

specific medical care for men that Medical Assistance excludes from coverage. Furthermore, Medical Assistance covers pregnancy and childbirth, but excludes abortion. These discriminatory coverage provisions violate the Pennsylvania Constitution's Equal Rights Amendment and equal protection guarantees.

Although the Commonwealth Court was bound to follow the Pennsylvania Supreme Court's 1985 ruling in *Fischer*, this Court is not, and should overrule this grievously flawed and harmful decision. Not only was *Fischer* poorly reasoned at the time it was decided, but an independent assessment shows that doctrinal and factual developments since 1985 undermine its legitimacy. Rather than reaffirm *Fischer*, this Court should restore to the Pennsylvania ERA the power and vitality promised by its plain language and recognized by this Court in a body of vibrant case law following its ratification. Far from being a mere echo of federal law, the ERA prohibits Pennsylvania from carving out abortion, a sex-linked medical service, from its Medicaid program. The coverage ban's infringement upon the fundamental right to abortion likewise violates the more robust equal protection provisions of the Pennsylvania Constitution. This Court should declare that the coverage ban discriminates against indigent women who exercise their reproductive choice because it covers all pregnancy-related services for women who choose to continue their pregnancies but excludes coverage for women who choose to have abortions.

On the question of standing, contrary to the Commonwealth Court's opinion, a well-developed and longstanding body of decisions from this Court establishes that Providers have standing in this case. Their interests fit within Pennsylvania's traditional standing test, a test this Court has repeatedly used to determine whether a plaintiff can assert the constitutional rights of a third party. Properly applying this test here yields the same conclusion the U.S. Supreme Court and every state supreme court that has addressed the issue has reached: abortion providers are proper plaintiffs to assert their patients' constitutional rights.

Finally, Legislators are improper intervenors. They do not have a legally enforceable interest in the constitutionality of the coverage ban because the requested relief does not impinge on their authority as legislators. The Commonwealth Court's incorrect holding to the contrary relied on the flawed belief that Providers are seeking to dictate how the General Assembly should budget and appropriate funds. Instead, Providers request only that the coverage ban be declared unconstitutional and its enforcement enjoined. If this Court were to affirm the Commonwealth Court's decision allowing intervention, individual legislators effectively will have a boundless right to intervene in any suit that could possibly impact legislative appropriations. Under this Court's well-established precedent, a legislator's right to intervene exists only where the issues in the matter would establish a "concrete impairment" or "palpable infringement" of a specific

legislative right. Because Legislators' general interest in this constitutional challenge does not clear this high bar, the panel's decision granting intervention should be reversed.

VII. ARGUMENT

A. PROVIDERS HAVE STANDING TO CHALLENGE THE COVERAGE BAN ON BEHALF OF THEIR PATIENTS.

The Commonwealth Court's decision denying standing to Providers to litigate their patients' constitutional claims[10] is a singular outlier among federal and state court decisions that have considered the issue and ignores or misreads this Court's standing jurisprudence. Providers have alleged multiple ways—all of which must be taken as true for purposes of deciding the case at this stage—in which they are substantially, directly, and immediately adversely affected by the Pennsylvania coverage ban. R.139a-140a, ¶¶ 84-87. Thus, Providers have standing to bring this challenge on behalf of their patients.

1. Under this Court's Well-Established Jurisprudence, Providers Have Standing.

This Court applies the same basic standing rules whether a plaintiff seeks to raise its own rights or those of a third party. "The core concept of these rules is that a person who is not adversely affected in any way by the matter he

[10] The Commonwealth Court also rejected the "[a]lternative[]" argument that Providers have standing to sue to vindicate their own rights. PObj. Op. 13-14. However, Providers are not seeking standing to raise their own rights. R.124a, ¶ 39. Thus, this part of the Commonwealth Court's opinion addresses an issue not raised in this case.

seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge." *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975).

In *William Penn Parking*, this Court elaborated on the three basic requirements to show who exactly is "aggrieved": litigants can bring suit when they have a substantial, direct, and immediate interest in the matter being litigated. *Id.* at 286. Regarding the first prong, the Court said that "the requirement of a 'substantial' interest simply means that the individual's interest must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Id.* at 282. Regarding the second, the Court wrote that "'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *Id.* And finally, regarding "immediate," the Court said this term means that the interest must not be "a remote consequence of the judgment." *Id.* at 283.

Of particular importance to the case here is that *William Penn Parking* developed and applied these rules in a case in which the litigants were raising the rights of a third party not before the court. In that case, parking lot operators were challenging the imposition of a city tax on their patrons. *Id.* at 287. As a result of their patrons having to pay the tax, the parking lot operators alleged that the

operators "will suffer substantial losses of net income due to a reduced patronage of their facilities." *Id.* at 288. The City of Pittsburgh objected that only the patrons paying the tax could challenge its validity, not the parking lot operators. *Id.* Without adopting any special test for third-party standing, the Court analyzed the substantial, direct, and immediate factors to conclude that the parking lot operators could raise the claims of their patrons. On the first two factors, the Court wrote that "[s]urely the interest [the parking lot operators] claim is direct, for a declaration that the ordinance is invalid would obviate either injury alleged. It is also substantial, for they claim pecuniary loss rather than merely relying upon an abstract interest in full compliance with the law." *Id.* at 289. On the final factor of immediacy, the Court explained that "[w]hile the tax falls initially upon the patrons of the parking operators, it is levied upon the very transaction between them. Thus the effect of the tax upon their business is removed from the cause by only a single short step." *Id.*

This case is on all fours with *William Penn Parking*. Just as the parking lot operators claimed they were harmed by their patrons being taxed unlawfully, Providers here claim that they are injured by a legal harm done to their patients. In *William Penn Parking*, the substantial harm was lost business for the parking lot operators; here, Providers' substantial harm is increased expenditures in covering patients' costs, lost staff time in working to help patients obtain funding,

and an altered provider-patient relationship because of interactions that focus on financial matters rather than exclusively on medical issues. R.139a-140a, ¶¶ 84-87. These are concrete harms that cannot be considered abstract or shared by the general public. Moreover, just as in *William Penn Parking*, the Providers' interest is "direct" because striking down the coverage ban would "obviate [the] injury alleged" to Providers, as there would no longer be a barrier to Medicaid abortion coverage for low-income patients. 346 A.2d at 289. And, finally, just as in *William Penn Parking*, their interest is "immediate" because there is "only a single short step" between Medicaid coverage for Providers' patients and alleviating the harm Providers claim. *Id.* If parking lot operators have standing to challenge a purportedly unlawful tax on their patrons, then certainly abortion providers have standing to challenge a claimed infringement of their patients' constitutional rights.

In *William Penn Parking*, this Court understood that it was applying its ordinary standing principles to a case of third-party standing. In particular, in the section of the opinion discussing the parking lot operators' ability to raise the rights of their patrons (instead of their own rights), this Court examined two U.S. Supreme Court cases involving third-party standing, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Truax v. Raich*, 239 U.S. 33 (1915). *See William Penn Parking*, 346 A.2d at 289. The Court described both as follows: "In each case the regulation was directed to the conduct of persons other than the plaintiff. However,

the fact that the regulation tended to prohibit or burden transactions between the plaintiff and those subject to the regulation sufficed to afford the plaintiff standing." *Id*.[11] Here, as in these two cases and *William Penn Parking*, the coverage ban burdens transactions between the Providers and those subject to the regulation, their patients, thus sufficing to afford Providers standing.

An additional standing case involving rights of parties not before the court cited and overruled in *William Penn Parking* bolsters Providers' standing claim: *Northwestern Pennsylvania Automatic Phonograph Ass'n v. Meadville*, 59 A.2d 907 (Pa. 1948). *See William Penn Parking*, 346 A.2d at 290. The Court said that the 1948 decision rejecting standing for a jukebox owners association raising the rights of businesses that lease their machines was wrongly decided because it "exhibit[ed] an insufficient appreciation of the importance of secondary effects" on the association. *Id.* As Providers here have pled, Medicaid patients suffer greatly from the coverage ban, but the secondary effects on Providers themselves are substantial, direct, and immediate. R.139a-140a, ¶¶ 84-87.

Since *William Penn Parking* was decided, this Court has repeatedly assessed third-party standing under the basic three-pronged standing test. For instance, in *Robinson Township*, this Court found standing for a doctor to assert the

[11] Both cases cited by this Court are widely considered early examples of the third-party standing doctrine. *See* Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 287 (1984) ("[T]hese cases are now widely understood as early illustrations of jus tertii [third-party] standing.").

rights of his patient. 83 A.3d at 924-25. The doctor explained many ways in which he himself was harmed, but the Commonwealth argued that his harm "is based on the rights of his patients." *Id.* at 923-24. Addressing a very similar situation as Providers here allege, the Court wrote that "[t]he Commonwealth's attempt to redefine Dr. Khan's interests and minimize the actual harm asserted is unpersuasive [because he] must choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable." *Id.* at 924. Accordingly, the Court found the doctor's interests substantial, direct, and immediate, concluding that the outcome of the case will affect whether the doctor "will accept patients and may affect subsequent medical decisions in treating patients." *Id.* The same is true here. Providers are faced with the choice Dr. Khan faced: the "unappealing" option of accepting Medicaid patients despite the coverage ban and incurring higher costs, increased staff time, and medically-unnecessary patient counseling and the "equally undesirable" option of "refusing to provide medical services to a patient" because Medicaid will not cover their care. Just as Dr. Khan had standing to raise the rights of his patients in *Robinson Township* when faced with that choice, under well-established standing principles, Providers have standing as well.

This Court also found standing in *Dauphin County Public Defender's Office v. Court of Common Pleas*, for public defenders to raise claims on behalf of

their possible future clients. 849 A.2d 1145, 1148-49 (Pa. 2004). In its briefing to this Court, the defendant claimed that a general challenge to new eligibility requirements for representation must be made by a "criminal defendant who will go unrepresented unless he retains counsel." Brief for Respondent, *Dauphin Cnty. Pub. Defender's Office v. Court of Common Pleas*, 849 A.2d 1145 (Pa. 2004) (No. 145 MM 2003). This Court flatly rejected this attempt to deny standing by applying the three *William Penn Parking* factors. *Dauphin Cnty.*, 849 A.2d at 1148-49. The lesson from this case is the same as that from *William Penn Parking*: this Court does not use any special test in cases of third-party standing, but rather uses the traditional substantial, direct, and immediate factors in order to determine if a party is aggrieved and has standing. *Id.* Moreover, Providers' claim of standing on behalf of their future patients here shares all the hallmarks of the public defenders' claim of standing on behalf of their future clients.

Finally, even in a case that rejected an attempt by a plaintiff to assert the rights of others, this Court made clear that it broadly accepts claims of third-party standing under its traditional standing analysis. In *In re Hickson*, 821 A.2d 1238 (Pa. 2003), this Court found that an attorney lacked standing to seek judicial review of the district attorney's disapproval of the attorney's private criminal complaint against state parole agents who shot and killed a man who had no relationship to the attorney. *Id.* at 1245-46. This Court denied standing because the

attorney had "not established any peculiar, individualized interest in the outcome of the litigation that is greater than that of any other citizen." *Id.* at 1245. While the Court made clear that *this* plaintiff did not have standing, it recognized that *other* possible plaintiffs raising the rights of others would be judged by whether the injury was substantial, direct, and immediate. *Id.* In fact, the Court broadly conceived who could have standing beyond relatives and explained that "it is possible that other individuals who are not related to the victim may be able to [meet the standing test]." *Id.* Thus, without using the term, *Hickson* recognized that plaintiffs have standing to raise the rights of others not before the court if they satisfy the traditional *William Penn Parking* test.

The Commonwealth Court's decision effectively ignored this Court's jurisprudence applying traditional standing factors to third-party standing cases. It did recite the *William Penn Parking* factors, *see* PObj. Op. 8, but it improperly applied a "zone of interests" test and equated it with *William Penn Parking*'s "immediate" prong. The Commonwealth Court reasoned that Providers' harm is not part of the protected interests in either the Abortion Control Act or the Pennsylvania Constitution. PObj. Op. 15.

The Commonwealth Court's use of the "zone of interests" test as the equivalent of the "immediate" prong of this Court's standing test is error. In 2010, this Court recognized that its precedents had been "arguably unclear" about

whether the "zone of interests" test was an additional factor of standing analysis and held that it was not. *Johnson v. American Standard*, 8 A.3d 318, 333 (Pa. 2010). "When the standards for substantiality, directness, and immediacy are readily met, the inquiry into aggrievability, and therefore standing, ends." *Id.* This Court continued that if the immediacy prong is not apparent, a court "may (and should)" conduct a "zone of interests" analysis but that "such a consideration is merely a guideline that may be used to find immediacy, and not as an absolute test." *Id.* The Commonwealth Court did exactly what this Court warned against—it used the "zone of interests" analysis as an "absolute test" to determine if the Providers' interest was immediate.

Instead, the Commonwealth Court should have looked solely at whether the harm alleged by Providers had an immediate causal connection to the coverage ban. As analyzed above, the harm Providers allege is the result of caring for patients without Medicaid coverage because of the coverage ban and is, like the harm to the parking lot operators from their patrons being taxed in *William Penn Parking*, "removed from the cause by only a single short step." 346 A.2d at 289. This connection satisfies the immediacy requirement, which means the Commonwealth Court should not have considered "zone of interests," let alone made it a test.

2. If this Court Adopts the Commonwealth Court's Test for Third-Party Standing, Providers Meet that Test.

If this Court were to adopt the specific test for third-party standing from *Singleton v. Wulff*, 428 U.S. 106 (1976), used by the Commonwealth Court and the U.S. Supreme Court, that test also necessitates finding Providers have standing here. In *Singleton,* a case factually identical to this case, the U.S. Supreme Court allowed abortion providers to assert the constitutional rights of their patients in challenging a state's ban on Medicaid coverage of abortion. *Id.* The Court's plurality opinion initially found that the providers had met the basic federal Article III requirements of standing, having suffered concrete injury in being denied payment for abortions through the state's Medicaid program. *Id.* at 112-13. The Court then found that the providers could raise their patients' claims because the lawsuit met two additional requirements for third-party standing: (a) that "the enjoyment of the [third party's] right is inextricably bound up with the activity the litigant wishes to pursue," and (b) there is a "genuine obstacle" to the third party asserting their own rights. *Id.* at 114-16.

The U.S. Supreme Court found both of these additional elements present when abortion providers assert their patients' constitutional interests. As to the closeness of the relationship, the Court explained that a patient cannot obtain an abortion without the abortion provider, making the provider "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination

against, that decision." *Id.* at 117. As to the patient obstacles, the Court recognized two barriers: the threat to the patient's privacy from the inevitable publicity in a high-profile lawsuit and the impending mootness of the case given the dwindling nature of the window to have an abortion. *Id.* at 117-18. Therefore, the Court concluded that "it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Id.* at 118. Because Providers here are, as in *Singleton*, also abortion providers challenging the state's ban on Medicaid coverage of abortion, if this Court were to adopt the principles from that case for assessing claims of third-party standing, it would require a finding of third-party standing in this case as well.

The Commonwealth Court engaged in analytical gymnastics to reach the remarkable conclusion that while the test from *Singleton* applied to this case, the factual analysis—of identical facts—did not.[12] POBj. Op. 9-14. The Commonwealth Court attempted to differentiate *Singleton* for three reasons: first, that the court "ha[d] no way of knowing that the patients on whose behalf [Providers] purport to speak even want this assistance"; second, that no facts show

[12] The irony here is that the Commonwealth Court took a stricter view of standing than the U.S. Supreme Court even though Pennsylvania standing law is more flexible and expansive than federal standing law. *See Fumo v. City of Phila.*, 972 A.2d 487, 500 n.5 (Pa. 2009) (noting that in Pennsylvania standing is merely prudential whereas under federal law standing is both constitutional and prudential); *Armstead v. Zoning Bd. of Adjustment*, 115 A.3d 390, 402 (Pa. Commw. Ct. 2015) (Pellegrini, J., concurring) ("Pennsylvania courts are much more expansive in finding standing than their federal counterparts.").

Providers' interests are interwound with their patients' rights; and third, that there was no reason why the patients impacted by the coverage ban could not have brought their own claims. *Id.* at 12.

The Commonwealth Court's reasoning is unsupportable. First, the Commonwealth Court's assertion that it could not know whether Providers speak on behalf of their patients rests on a clear misunderstanding of Providers' claims. The court wrote that Providers "do not have standing to vindicate 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." *Id.* at 14 (emphasis added). To the contrary, the Petition clearly indicates that Providers sue only on behalf of a focused subset of women on Medical Assistance: "[Providers] sue on behalf of their patients who seek abortions and who are enrolled in or eligible for Medical Assistance, but whose abortions are not covered because of the Pennsylvania coverage ban." R.124a, ¶ 39. Thus, the Commonwealth Court's rejection of this element of third-party standing is fundamentally flawed.

Focusing on the actual group on whose behalf Providers sue leads to a different conclusion than the Commonwealth Court reached. It is self-evident that low-income abortion patients want Providers' assistance because they go to abortion clinics seeking an abortion. The realities of poverty are such that the price

of an abortion is beyond the capacity of an indigent patient to pay. As explained in depth by expert Colleen M. Heflin: "Given that low-income households are already struggling to get by each month, there is no margin for these households to handle an unexpected expense, such as to cover abortion services for an unwanted pregnancy." R.161a, ¶ 19. Given this reality, it defies logic to state that there is no way to know whether a low-income patient who goes to an abortion clinic seeking an abortion would actually "want [the] assistance" of having Medicaid pay for the abortion at no cost to the patient. PObj. Op. 12.

Second, patients and their medical providers are sufficiently connected such that the provider is a proper representative of the patients' interests. The U.S. Supreme Court explained this in clear terms in *Singleton*, stating that "[a]side 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." 428 U.S. at 117 (emphasis added); *see also June Medical Services v. Russo*, 140 S. Ct. 2103, 2119 (2020) (plurality opinion) (describing providers as the "most 'obvious' claimants"). The Commonwealth Court offered no explanation for rejecting this analysis other than stating that Pennsylvania courts are not bound by the standing jurisprudence of the U.S. Supreme Court. PObj. Op. 11-12. While that is axiomatically true, simply disagreeing with the U.S. Supreme Court without any supporting rationale is not legal reasoning. Nor is it

persuasive reasoning given the intimate connection between medical providers and patients, a connection long-recognized by this Court. *See, e.g.*, *Thierfelder v. Wolfert*, 52 A.3d 1251, 1274 (Pa. 2012) (recognizing the "relationship based on trust and the general duty of care that any doctor owes to his patients"); *Althaus v. Cohen*, 756 A.2d 1166, 1169-70 (Pa. 2000) (describing the "professional obligations and legal duties" related to the care a doctor provides to the patient); *see also* Br. for *Amicus Curiae* Medical Organizations. Applying these "legal and ethical obligations" doctors have to their patients, this Court has previously granted doctors the right to sue on behalf of their patients. *See Robinson Twp.*, 83 A.3d at 924-25.

Finally, the Commonwealth Court claimed that it could "ascertain no reason" why abortion patients could not sue on their own behalf, PObj. Op. 12, but both Judge Ceisler's dissenting opinion, *see id.* at EC-4, and *Singleton* set forth "several obstacles" in depth:

> For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion, her right thereto will have been irrevocably lost, assuming, as it seems fair to assume, that unless the impecunious woman can establish Medicaid eligibility she must forgo abortion. *It is true that these obstacles are not insurmountable* [but] there seems little loss in terms

> of effective advocacy from allowing its assertion by a physician.

428 U.S. at 117-18 (emphasis added); *see also* Br. for *Amicus Curiae* National Women's Law Center (discussing violent and coercive targeting of pregnant patients by anti-abortion extremists).[13]

Moreover, that some abortion patients do sue on their own, *see* PObj. Op. 13 (discussing *Fischer v. Dep't of Pub. Welfare*, 444 A.2d 774 (Pa. Commw. Ct. 1982)[14]), does not mean *every* abortion case requires an abortion patient as plaintiff. Were that the case, then standing would have been defeated in each of this Court's aforementioned third-party standing cases: the parking patrons could have sued in *William Penn Parking*; the patients could have sued in *Robinson Township*; and the indigent criminal defendants could have sued in

[13] The barriers preventing abortion patients from directly suing to enjoin abortion restrictions are so impenetrable that it is no wonder that eliminating third-party standing in abortion litigation is a prize sought by anti-abortion policy groups. *See* Elizabeth Slattery, "Revisiting Third-Party Standing in the Context of Abortion," Heritage Foundation (Mar. 4, 2020), http://www.heritage.org/life/report/revisiting-third-party-standing-the-context-abortion.

[14] Although this iteration of *Fischer* did involve a patient as plaintiff, the Commonwealth Court in that case also approved an abortion provider having standing on behalf of patients. In that ruling, an evenly divided *en banc* panel of the Commonwealth Court denied a preliminary objection based on the doctrine of third-party standing. 444 A.2d at 781-82. The three judges who voted to sustain the preliminary objection on standing did so because the abortion provider alleged no injury other than that which a general taxpayer would have. *Id*. at 779. Here, Petitioners have extensively detailed how they themselves are harmed by the funding ban, *see* R.139a-140a, ¶¶ 84-87, which this Court must accept as true at this stage of the case. Therefore, the opinion from the three judges who argued against standing in the Commonwealth Court's *Fischer* decision is not applicable here.

Dauphin County.[15] However, never has this Court or the U.S. Supreme Court required an "insurmountable" obstacle to establish third-party standing; rather, as the U.S. Supreme Court made clear in *Singleton*, genuine obstacles that make it more difficult (though not impossible) for the third party to litigate suffice. *See also, e.g.*, *Powers v. Ohio*, 499 U.S. 400 (1991) (recognizing third-party standing for criminal defendants to challenge racial exclusion of jurors even though jurors could potentially sue on their own behalf); *King v. Governor of N.J.*, 767 F.3d 216, 244 n.28 (3d Cir. 2014) (stating that even where a third party manages to overcome obstacles, standing is "not necessarily preclude[d]").

The *Singleton* factors support third-party standing here. Because of the intimate relationship between doctors who provide abortions and their patients, which this Court has previously recognized, the patients' rights are inextricably intertwined with Providers' ability to care for them, making Providers "fully, or very nearly, as effective a proponent of the right" as their patients. 428 U.S. at 115. And like the patients in *Singleton*, abortion patients face several "genuine obstacle[s such that] the third party's absence from court loses its tendency to suggest that [her] right is not truly at stake, or truly important to [her]." *Id.* at 116.

[15] And in *Hickson*, this Court would have required the decedent's estate to bring its own action rather than suggesting alternative plaintiffs.

Thus, if this Court adopts and applies *Singleton* to resolve this case, Providers meet its test and can properly assert the rights of their patients here.

3. Every State and U.S. Supreme Court Decision to Address the Issue Has Granted Abortion Providers Third-Party Standing to Assert the Rights of Their Patients.

Affirming the Commonwealth Court's decision denying standing for abortion providers on behalf of their patients would make Pennsylvania an outlier. The U.S. Supreme Court has repeatedly allowed abortion providers to assert the rights of their patients, and every state supreme court to directly or indirectly address this issue has done the same. Pennsylvania should join this unanimous chorus.

Singleton established the basic principle that abortion providers can sue on behalf of their patients. Last year, Louisiana directly attacked *Singleton*, but the U.S. Supreme Court answered the challenge unequivocally: "We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations [and this] long line of well-established precedents foreclose[s] [Louisiana's] belated challenge to the plaintiffs' standing." *June Medical*, 140 S. Ct. at 2118-20 (plurality opinion) (citing nine Supreme Court cases other than *Singleton* that allowed abortion providers to sue on behalf of their patients); *id.* at 2139 n.4 (Roberts, C.J.,

concurring in judgment) (agreeing with the plurality to form a majority on this point).

Other state supreme courts are in uniform agreement with the U.S. Supreme Court. Indeed, eleven state supreme courts have addressed this issue and specifically held that abortion providers have standing to litigate on behalf of their patients,[16] and at least twelve others have allowed, without discussion, an abortion provider to raise patient claims.[17] *In fact, Providers are not aware of a single state supreme court rejecting a claim that abortion providers have standing to raise their patients' constitutional claims.* The Alaska Supreme Court's observation about this area of the law is, aside from the Commonwealth Court decision below, just as true today as it was twenty years ago: "That physicians have standing to

[16] *Comprehensive Health of Planned Parenthood of Kan. and Mid-Mo. v. Kline*, 197 P.3d 370 (Kan. 2008); *Feminist Women's Health v. Burgess*, 651 S.E.2d 36 (Ga. 2007); *Planned Parenthood of Kan. and Mid-Mo. v. Nixon*, 220 S.W.3d 732 (Mo. 2007) (en banc); *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999); *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645 (Miss. 1998); *N.M. Right to Choose v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood League v. Bell*, 677 N.E.2d 204 (Mass. 1997); *Davis v. Fieker*, 952 P.2d 505 (Okla. 1997); *Cheaney v. State*, 285 N.E.2d 265 (Ind. 1972); *Ballard v. Anderson*, 484 P.2d 1345 (Cal. 1971).

[17] *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018); *Gainesville Woman Care v. State*, 210 So. 3d 1243 (Fla. 2017); *MKB Management Corp. v. Burdick*, 855 N.W.2d 31 (N.D. 2014) (per curiam); *Hope Clinic for Women v. Flores*, 991 N.E.2d 745 (Ill. 2013); *Humphreys v. Clinic for Women*, 796 N.E.2d 247 (Ind. 2003); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658 (W.V. 1993); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Simopoulos v. Commonwealth*, 277 S.E.2d 194 (Va. 1981).

challenge abortion laws on behalf of prospective patients seems universally settled." *Planned Parenthood of Alaska*, 35 P.3d at 34.

The Commonwealth Court has offered no reason why Pennsylvania should become a singular outlier on this issue that has been universally settled for almost half a century. The correct application of this Court's well-established principles of standing compels reversal of the Commonwealth Court's order denying Petitioners standing to raise the constitutional rights of their patients.

B. THE COVERAGE BAN VIOLATES THE PENNSYLVANIA CONSTITUTION'S EQUAL RIGHTS AMENDMENT.

This Court should overrule *Fischer*. Its holding with respect to the Pennsylvania ERA was legally incorrect, illogical, and based on a flawed, long-discredited analytical framework for reviewing pregnancy-based classifications. Moreover, *Fischer* relies exclusively on federal constitutional law rather than the independent and textually-distinct Pennsylvania ERA. It is long past time to overrule *Fischer* and conclude that the coverage ban violates the Pennsylvania ERA.

1. The Pennsylvania ERA Categorically Prohibits the Use of Sex-Based Legislative Classifications.

For half a century, the Pennsylvania ERA has proclaimed that "[e]quality 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. In the years following the ERA's adoption in 1971, this Court's cases applying and interpreting this core constitutional principle had two notable features. First, this Court recognized that the ERA established an absolute ban on legislative classifications that confer different benefits or burdens on women and men. *See Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974). In *Henderson*, this Court stated emphatically:

> The 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 may be man or woman.

Id.; *see also* Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 Widener J. Pub. L. 743, 745 (1994) (noting this Court's "absolutist interpretation" of the ERA).

Second, this Court has looked especially probingly at sex-based classifications rooted in traditional gender stereotypes. To the extent a statutory scheme's differential benefits and burdens "rely on and perpetuate stereotypes," this Court subjects them to intense and unflinching judicial review. *Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 548 (Pa. 1984) (striking sex-based insurance rates). Recognizing that laws arising from

traditional gender stereotypes harm both men and women, *Hartford* noted that "[w]e have 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 stereotypic roles of men and women.'" *Id*. (quoting *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 639 (Pa. 1977)).

In the years between Pennsylvania's adoption of the ERA and *Fischer*, this Court consistently and emphatically applied these absolute principles to invalidate an array of sex-discriminatory laws. *See, e.g.*, *Hartford*, 482 A.2d at 548; *Spriggs*, 368 A.2d at 639-40 ("Tender Years Doctrine") (plurality opinion); *Adoption of Walker*, 360 A.2d 603, 605 (Pa. 1976) (statutory distinction between unwed mothers and unwed fathers); *Butler v. Butler*, 347 A.2d 477, 480 (Pa. 1975) (wife's entitlement to constructive trust if husband obtains wife's property without adequate consideration); *Commonwealth v. Santiago*, 340 A.2d 440, 445-46 (Pa. 1975) (common law presumption that married woman, committing a crime in her husband's presence, was unwilling participant); *DiFlorido v. DiFlorido*, 331 A.2d 174, 180 (Pa. 1975) (property acquired in anticipation of or during marriage and which has been possessed and used by both spouses will, in the absence of contrary evidence, "be presumed to be held jointly by the entireties"); *Henderson*, 327 A.2d at 62 (statutory scheme awarding alimony *pendente lite* and counsel fees only to wife and not husband); *Commonwealth v. Butler*, 328 A.2d 851, 855-57 (Pa. 1974)

(statutory parole eligibility for women but not men); *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974) (presumption that father must bear principal burden of financial support for couple's children); *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974) (sex-specific loss of consortium claims). At the same time that Pennsylvania courts were applying the ERA to invalidate discriminatory statutes and common law doctrines, the Pennsylvania legislature and Attorneys General obviated the need to litigate dozens of other discriminatory statutes and rules by repealing them, suspending them, or conforming them to sex-equitable standards.[18]

As this line of precedent demonstrates, this Court applied the ERA's sex equality rule to strike down legislative classifications that apportion benefits and burdens unequally between men and women, with particular vigor where the sex-based classification is grounded in gender stereotypes.

[18] *See, e.g.*, Pa. Att'y Gen. Op. No. 69 (1971) (cosmetologists may treat men's as well as women's hair); Pa. Att'y Gen. Op. No. 71 (1971) (ERA impliedly repealed provision of Child Labor Law, 43 P.S. § 48, prohibiting female but not male minors between 12-21 years old from employment as newspaper carriers); Pa. Att'y Gen. Op. No. 150 (1972) (declaring unenforceable provisions of the Parole Act, 61 P.S. § 331.28, limiting hiring of female parole officers for only those positions needed to supervise female parolees); Pa. Att'y Gen. Op. No. 41 (1973) (declaring unenforceable 4 P.S. § 30.310 denying women eligibility for wrestling and boxing licenses); Pa. Att'y Gen. Op. Nos. 62, 72 (1973) (suspending state statutory provisions preventing women from choosing to use their married or unmarried surname on drivers' licenses, vehicle registrations, and voter registration applications); Pa. Att'y Gen. Op. No. 75-30 (1975) (declaring void and unenforceable 61 P.S. § 55, which prohibited official visitors from interviewing prisoners who were not the same sex); Pa. Att'y Gen. Op. No. 76-6 (1976) (extending death benefits for state employees killed in line of duty to surviving spouses regardless of sex).

2. *Fischer* Abandoned the ERA's Powerful Command and Now Should Be Overruled.

In a complete departure from the ERA precedent discussed above, *Fischer* focused neither on the language of the ERA nor, other than summarily, on the body of jurisprudence construing that constitutional provision. *Fischer*, 502 A.2d at 126. Instead, the *Fischer* Court wrote that pregnancy is "unique as to have no concomitance in the male of the species" and hence is beyond the ERA's reach. *Id*. Thus, *Fischer* held that the coverage ban is not discriminatory because differential treatment is "reasonably and genuinely based" on women's reproductive capacity. *Id.* at 125 (quoting *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976)).

This Court should overrule *Fischer*. As this Court has recently noted, "[W]e underscore that we are not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments." *William Penn Sch. Dist. v. Pa. Dep't of Educ*., 170 A.3d 414, 456 (Pa. 2017); *see also, e.g.*, *Yocum v. Commonwealth*, 161 A.3d 228 (Pa. 2017) (re-evaluating and overruling in part *Shaulis v. Pa. State Ethics Comm'n*, 833 A.2d 123 (Pa. 2003)). As the *William Penn* Court explained, "When presented with a case that hinges upon our interpretation and application of prior case law, the validity of that case law *always* is subject to consideration, and we follow the exercise of our interpretive function wherever it leads." *Id.* at 457 (emphasis added). Further, this Court has stated that

"the doctrine of stare decisis does not apply to pronouncements that are not adequately supported in reason." *Commonwealth v. Resto*, 179 A.3d 18, 22 (Pa. 2018).[19] Following the exercise of the interpretive function here leads to the clear conclusion that *Fischer* was not adequately supported in reason and must be abandoned.

3. The Coverage Ban Is a Prohibited Sex-Based Classification Arising from and Perpetuating Gender Stereotypes.

Here, the coverage ban, on its face, apportions Medicaid benefits unequally, excluding funding for an extremely common, sex-linked medical need of women while funding all reproductive medical needs for men. The coverage ban confers different benefits and burdens on the basis of sex, explicitly removing coverage for medical care for a sex-linked characteristic—the ability to become pregnant—from otherwise comprehensive coverage. Women enrolled in Medical Assistance are treated differently "on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple." *Cerra v. E. Stroudsburg Area Sch. Dist.*, 299 A.2d 277, 280 (Pa. 1973). The coverage ban is therefore explicitly sex-based, in the same way that a hypothetical Medicaid program

[19] This Court recently quoted the former Chief Justice Robert von Moschzisker on this point: "If, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration." *Balentine v. Chester Water Auth.*, 191 A.3d 799, 810 n.5 (Pa. 2018).

covering uterine cancer treatment but not prostate cancer treatment would necessarily be explicitly sex-based, and thus invalid under the ERA.

Fischer adopted a broad exception to the ERA: where a classification turns on physical characteristics unique to one sex, differential treatment does not implicate equality concerns. *Fischer* postulated that "[i]n this world there are certain immutable facts of life which no amount of legislation may change. As a consequence, there are certain laws which necessarily will only affect one sex." 502 A.2d at 125. This broad exception for physical characteristics unique to one sex ignores the reality that to treat people differently on account of characteristics unique to one sex *is* to treat them differently on account of their sex. It exempted wholesale those classifications that turn on sex-linked physical characteristics, *id.* at 126, without analyzing the harm inflicted on women or whether the classification arose from or furthered prohibited stereotypes. With this misstep, *Fischer* removed from the ERA's reach discrimination stemming from women's reproductive capacity—the very characteristic that has historically been invoked to justify unfavorable treatment of women. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (surveying history of state sex discrimination based on stereotypes of women's "maternal function"); *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 56 (2012) (Ginsburg, J., dissenting) (noting that "pregnancy provided a central justification for the historic discrimination against

women"); Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L. J. 929, 956 (1985) ("Women may raise a pregnancy-specific equality claim because society has consistently selected that 'difference' as a basis for their economic subordination."); *see also* Br. for *Amici Curiae* New Voices for Reproductive Justice, *et al*. (discussing history of coercive policies targeting women of color based on racialized gender stereotypes about reproduction).[20]

In removing discrimination based on reproductive capacity from the ERA's reach, *Fischer* ignored the ERA's goal of "eliminat[ing] sex as a basis for distinction." *Henderson*, 327 A.2d at 62. There is no valid limiting principle confining *Fischer* to regulation of abortion: taken to its logical conclusion, *Fischer*'s rationale could render the ERA powerless to address any disparate treatment involving any physical differences between men and women, including overt pregnancy discrimination—regardless of whether the physical difference played into and reinforced social stereotypes.

[20] A wealth of legal scholarship supports this principle. *See, e.g.*, Brief for Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178), at *38-46 ("[E]xaltation of woman's unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities and has impelled them to accept a dependent, subordinate status in society."); Michele Goodwin, *Challenging the Rhetorical Gag and TRAP: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. U. L. REV. 1417, 1420 (2018) (noting that "[c]ourts played a profound role in conscribing women to second-class citizenship that denied them broad civic participation . . . by declaring that so-called laws of nature dictate women bearing children").

If all "physical characteristics unique to one sex" can be the basis of valid legislative classifications, discrimination based on reproductive capacity would be beyond the reach of the Pennsylvania ERA. Yet such discrimination is at the heart of sex inequality and should trigger more intense judicial review because "state control of a woman's reproductive capacity and exaggeration of the significance of biological difference has historically been central to the oppression of women." Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. Penn. L. Rev. 955, 1008 (1984); *see also* Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* 6 (2017) ("[R]egulating Black women's reproductive decisions has been a central aspect of racial oppression in America."). That such discrimination exacts a profound economic and social price from women is amply supported by the allegations in the Petition. *See supra* Part V.B.

Even if the coverage ban were conceptualized as a facially neutral provision, it would still run afoul of the ERA for two reasons. First, the ERA's remedial purpose—to ensure equality of rights under the law and to eliminate sex as a basis for distinction—prohibits even legislative schemes that appear neutral in form but are discriminatory in fact.[21] For example, in eliminating the overtly sex-based common law presumption that all property acquired during marriage was

[21] In this respect, the Pennsylvania ERA is more expansive than the federal Equal Protection Clause, which requires disparate impact claims to show evidence of an invidious discriminatory intent. *See Personnel Admin. v. Feeney*, 442 U.S. 256 (1979).

owned by the husband, this Court in *DiFlorido* rejected the lower court's alternative method of determining ownership according to who paid for the household good in question—a method that, while neutral on its face, "would fail to acknowledge the [e]qually important and often substantial nonmonetary contributions made by either spouse." 331 A.2d at 179. In ensuring that the Court's sex-neutral solution did not perpetuate structural gender inequality for the less wealthy spouse, the Court chose an approach that promoted not only formal, facial equality, but also substantive equality eradicating the disparate impact of the challenged practice. *See also Kemether v. Pa. Interscholastic Athletic Ass'n*, 1999 WL 1012957, at *20, No. 96-cv-6986 (E.D. Pa. Nov. 8, 1999) (finding an ERA violation where a practice "purport[s] to treat men and women equally" but "has the effect of perpetuating discriminatory practices" and thereby "placing an unfair burden on women").

Second, beyond its formal sex classification analysis, *Fischer* also ignored the unconstitutional gender stereotypes undergirding the coverage ban. Legal distinctions "predicated upon traditional or stereotypic roles of men and women" are incompatible with the ERA. *See Hartford*, 482 A.2d at 583 (quoting *Spriggs*, 368 A.2d at 639); *Hopkins*, 320 A.2d at 140-41. The coverage ban is entirely rooted in a gender-based stereotype. It buttresses the primacy of

childbearing and childrearing for women and, in doing so, expresses the state's disapproval of women who reject the maternal role:

> State restrictions on abortion rest on an implicit value judgment that women's natural roles as mothers take precedence over other aspects of their lives, including their own health, and that women cannot be trusted to make the moral determination themselves of whether to carry a pregnancy to term.

Deborah L. Brake & Susan Frietsche, "Women on the Court and the Court on Women," in *The Supreme Court of Pennsylvania: Life and Law in the Commonwealth, 1684-2017* at 167 (John J. Hare, ed. 2018). Thus, the coverage ban "rel[ies] on and perpetuate[s] stereotypes" as to the responsibilities and capabilities of men and women, in violation of the ERA. *See Hartford*, 482 A.2d at 548.

Fischer treated this important anti-stereotyping principle dismissively. Even though it twice quoted from cases that recognized how critical assessing stereotyping is, *Fischer*, 502 A.2d at 125 (quoting *Hartford*, 482 A.2d at 548); *id.* at 126 (quoting *Salinas*, 551 P.2d at 706), the Court brushed this principle aside and never addressed it.

4. The *Edmunds* Factors Require an Independent Interpretation of the Pennsylvania ERA Untethered to Federal Equal Protection Jurisprudence.

The ERA was added as an amendment to the Pennsylvania Constitution with the specific intention of providing greater protection from sex

discrimination than the federal Constitution offered at the time of the ERA's adoption. *Butler*, 328 A.2d at 856. Yet *Fischer*'s state constitutional analysis deliberately mirrored U.S. Supreme Court doctrine regarding the federal Equal Protection Clause, explicitly centering its analysis on "the relevant federal constitutional authorities." 502 A.2d at 118.

Tellingly, *Fischer*'s discussion of the ERA looked only fleetingly at the actual language of the ERA, which has no federal analog, and did not mine the body of state case law construing the ERA. This superficial treatment of the ERA is attributable in part to the *Fischer* Court's decision to define the protected classification not as sex, but as abortion, while offering as sole authority for that interpretive choice a dissenting opinion from the Massachusetts Supreme Court relying on the U.S. Supreme Court decision in *Harris v. McRae*, 448 U.S. 297 (1980). *See Fischer*, 502 A.2d at 125 & n.16 (citing *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 405 (Mass. 1981) (Hennessy, C.J., dissenting)). In *Harris*, the U.S. Supreme Court found the federal coverage ban did not offend the federal Constitution, but did not consider Pennsylvania's constitutional provisions. 448 U.S. at 326.

Fischer determined that pregnancy-based classifications are beyond the reach of the ERA. *Id.* This line of reasoning tracked the widely critiqued U.S. Supreme Court decision *Geduldig v. Aiello*, 417 U.S. 484 (1974), which upheld a

pregnancy exclusion in a California disability insurance program based on the determination that pregnancy discrimination is not a form of sex discrimination under the Fourteenth Amendment's Equal Protection Clause. *Geduldig*, decided three years after the Pennsylvania ERA was ratified, does not control Pennsylvania law[22] and has lost vitality as federal precedent. As a leading sex discrimination scholar explained:

> Shortly after the Court decided *Geduldig*, the Court tried applying *Geduldig* to federal employment discrimination law and was roundly rebuked by the Congress, which amended Title VII in 1978 to clarify that distinctions on the basis of pregnancy are distinctions on the basis of sex, and to prohibit pregnancy discrimination in employment. . . . Citations to *Geduldig* in the Court's equal protection cases stop after these developments in the mid 1970s.

Reva B. Siegel, *The Pregnant Citizen, From Suffrage to Present*, 19th Amend. Ed. Georgetown L.J. 167, 208 n.229 (2020); *see also* Law, *Rethinking Sex*, *supra*, at 983-84 (describing widespread scholarly criticism of *Geduldig*). By the time *Fischer* decided that discrimination on the basis of decisions around pregnancy

[22] *Geduldig* has been cited just once by this Court, in 1974 as a counterpoint to the heightened level of scrutiny this Court uses under the ERA. *See Butler*, 328 A.2d at 858 n.20. *Geduldig* has never again appeared in this Court's opinions. Likewise, other Pennsylvania courts have cited it only five times, and not since 1984.

was not a form of sex discrimination, the federal precedent upon which it drew was already a dead letter.[23]

This Court should interpret Pennsylvania's unique constitutional provision independently of the federal Equal Protection Clause. For example, in rejecting insurers' argument that the state action doctrine rendered sex-discriminatory insurance rates not actionable under the ERA, *Hartford* drew a line in the sand against leveling the ERA down to the standards developed under federal equal protection case law:

> The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.

Hartford, 482 A.2d at 586.

Fischer's interpretive error becomes even more obvious when analyzed through the subsequently-developed *Edmunds* framework for determining when to read the Pennsylvania Constitution more expansively than the federal Constitution. The *Edmunds* factors require analysis of:

[23] And continues to be a dead letter today. *See, e.g., Coleman*, 566 U.S. at 39 (explaining why there was no history of sex discrimination proven in the case by stating that "Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies," thus assuming that had Congress done so it would have proven a history of sex discrimination).

1. the text of the Pennsylvania constitutional provision;

2. the history of the provision, including Pennsylvania case law;

3. related case law from other states;

4. policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991). Because this test had not yet been developed when *Fischer* was decided, Providers' ERA claim should be analyzed under this new framework. Doing so inevitably supports the conclusion that the ERA, unlike the extant interpretation of the Equal Protection Clause, prohibits excluding abortion from Medicaid coverage.

(a) *Edmunds* Factors: Text of Pennsylvania Constitution

With the ERA, the Pennsylvania Constitution contains an explicit prohibition against sex discrimination: "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. In contrast, the U.S. Constitution contains no such explicit prohibition. Rather, it guarantees "equal protection of the laws" with no mention of sex. It is only through judicial interpretation that the U.S. Constitution protects against some forms of sex discrimination. *See generally Craig v. Boren*, 429 U.S. 190 (1976). The federal Equal Rights Amendment has never been added to the U.S. Constitution. Thus, the Pennsylvania Constitution has

unique text explicitly prohibiting sex discrimination that the U.S. Constitution does not contain.

(b) *Edmunds* Factors: Historical Backdrop of the ERA

At the time the ERA was adopted in 1971, there is little question that a classification that disadvantaged women on the basis of pregnancy was widely regarded as facial sex discrimination. The ERA lacks legislative history, but contemporaneous interpretations of other sex discrimination prohibitions provide insight into its proper interpretation. Although these sources do not interpret the ERA itself, they demonstrate that, at the time of the ERA's adoption, the general understanding in Pennsylvania—by the Pennsylvania Human Relations Commission, the Attorney General, and this Court—was that the legal concept of sex discrimination included discrimination on the basis of pregnancy.[24]

In 1970 and 1971, the Pennsylvania Human Relations Commission issued guidelines interpreting the Human Relations Act's prohibition against sex discrimination to include discrimination against pregnant and postpartum women. Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex,* 1(24) Pa. Bull. 707-08 (Dec. 19, 1970) (forbidding, pursuant to the Human

[24] Ruth Bader Ginsburg detailed the contemporaneous understanding in the early 1970s that the proposed *federal* ERA also would preclude discrimination based on pregnancy. *See* Brief for Women's Law Project and American Civil Liberties Union as *Amici Curiae, General Electric v. Gilbert,* 429 U.S. 125 (1976) (Nos. 74-1589 and 74-1590).

Relations Act's prohibition against sex discrimination, discriminating against employees because they took time away from work due to childbirth); Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex*, 1(80) Pa. Bull. 2359 (Dec. 25, 1971) (same).

Shortly after, in 1974, the Pennsylvania Attorney General issued an opinion finding that discrimination against pregnant women constituted sex discrimination under Section 962(a) of the Human Relations Act. Pa. Att'y Gen. Op. No. 9 (1974). At issue were three provisions of the Unemployment Compensation Law that conclusively presumed that pregnant and postpartum women were incapable of working and hence ineligible for unemployment compensation benefits in the months before and after childbirth.[25] The Attorney General held that all three provisions "unlawfully discriminate against women on the basis of their sex," noting that while there was no reason to reach the constitutional question, it was "apparent" that the pregnancy exclusion also raised "serious questions" under the Pennsylvania ERA. *Id.* at n.1. Indeed, the stereotypes about pregnancy operating in the unemployment compensation system, pushing women out of the workforce and consigning them exclusively to a maternal role,

[25] 43 P.S. § 801(d)(2) (presuming all women unable to work and hence ineligible for unemployment compensation from their eighth month of pregnancy until a month after childbirth); 43 P.S. § 802(b)(1) (pregnancy leave not "necessitous and compelling" circumstance entitling employee to unemployment benefits); 43 P.S. § 802(f) (employee laid off by employer because of pregnancy ineligible for unemployment benefits for 90 days before and 30 days after childbirth).

illustrate that pregnancy discrimination is ineluctably part and parcel of discrimination against women.

Less than two years after the ERA was ratified, this Court held that a school district's termination of a pregnant employee constituted sex discrimination under the Human Relations Act. *Cerra*, 299 A.2d at 280. Noting that the termination occurred "solely because of pregnancy," this Court explained that pregnant women were "discharged from their employment on the basis of a physical condition peculiar to their sex. *This is sex discrimination pure and simple*." *Id*. (emphasis added). Thus, at the time when Pennsylvania adopted the ERA, this Court recognized that women who are treated differently "on the basis of a physical condition peculiar to their sex" are subjected to "sex discrimination pure and simple." *Id.*[26]

Significantly, at the same time Pennsylvania courts were elaborating the contours of the ERA, the U.S. Supreme Court was developing its own sex discrimination jurisprudence, never adopting strict scrutiny for sex discrimination cases. *See Frontiero v. Richardson*, 411 U.S. 677 at 691 (1973) (Powell, J.,

[26] The *Fischer* Court committed plain error in reading *Cerra* for the proposition that pregnancy discrimination is not a form of sex discrimination. *Fischer*, 502 A.2d at 125. The *Fischer* Court actually elided from its opinion the critical sentence that acknowledges that pregnancy is "a physical condition peculiar to [the female] sex," *Cerra*, 299 A.2d at 280, and that disadvantaging a woman on the basis of that peculiarly female physical condition is sex discrimination "pure and simple." This error formed the basis of the central legal argument supporting *Fischer*'s ERA holding.

concurring in judgment) (failing to provide the fifth vote for a majority opinion designating strict scrutiny as appropriate for sex-based classifications). The subsequent Pennsylvania Supreme Court cases endorsing and applying *Henderson*'s "no longer a permissible factor" standard came both before and after the U.S. Supreme Court explicitly adopted the intermediate scrutiny test in 1976 in *Craig v. Boren*. 429 U.S. at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

That this Court did not embrace the less protective federal standard that was emerging at the same time further supports the conclusion that this Court interprets the ERA as providing greater protection against sex discrimination than the U.S. Supreme Court does under the Equal Protection Clause. In the words of a Connecticut court determining whether to read its ERA as coextensive with the federal Constitution, "To equate our ERA with the [E]qual [P]rotection [C]lause of the federal [C]onstitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so. Such a construction is not reasonable." *Doe v. Maher,* 515 A.2d 134, 160-61 (Conn. Super. Ct. 1986).

(c) *Edmunds* Factors: Other States

There are currently seventeen states that cover abortion in their state Medicaid programs.[27] Twelve of these states provide this coverage because their courts held that excluding abortion violates their state constitutions. Among the states that cover abortion are three of the six states that border Pennsylvania—New York and Maryland, which cover abortion by statute, and New Jersey, which does so by court decision.

Of the twelve states that cover abortion because of a court decision, two have specifically ruled that the exclusion of abortion from their state Medicaid program violated their state's Equal Rights Amendment. *See Maher*, 515 A.2d at 134; *N.M. Right to Choose*, 975 P.2d at 859.[28] The New Mexico Supreme Court's

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[27] At the time of the Petition's filing, there were sixteen states that covered abortion in their state Medicaid programs. R.128a, ¶ 53. Since then, Maine has added abortion to its Medicaid program, bringing the total to seventeen. *See* 305 Ill. Comp. Stat. 5/5-5; Me. Rev. Stat. Ann. tit. 22, § 3196; Md. Code Regs. 10.09.02.04; N.Y. Soc. Serv. Law § 365-a(2); Wash. Rev. Code § 74.09.520; Wash. Admin. Code § 182-532-120(7)(b); *Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *State v. Planned Parenthood Great Nw.*, 436 P.3d 984, 1004-05 (Alaska 2019); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d at 34 (Ariz.); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798 (Cal. 1981); *Doe v. Maher*, 515 A.2d at 160-61 (Conn.); *Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d at 259-60 (Ind.); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d at 405 (Mass.); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31-32 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d at 937 (N.J.); *N.M. Right to Choose v. Johnson*, 975 P.2d at 859 (N.M.); *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986); State of Hawaii Dep't of Hum. Servs., Med-QUEST Div., Mem. No. FFS-1512: *Revised Guidelines for Submittal and Payment of Induced/Intentional Termination of Pregnancy (ITOP) Claims* (2015).

[28] The other ten states rule on different state constitutional grounds. Only one state supreme court has held that the coverage ban does not violate its state's ERA. *See Bell v. Low Income Women of Texas*, 95 S.W. 3d 253 (Tex. 2002). However, *Bell* is inapposite, insofar as

extensive analysis is particularly instructive here. The court examined the principles behind its own ERA, which is almost identical to Pennsylvania's. *See* N.M. Const. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person."). The court held that this explicit prohibition against sex discrimination goes beyond the federal constitutional standards for sex discrimination and that discrimination against pregnant women is discrimination based on sex. *N.M. Right to Choose*, 975 P.2d at 853-56. The court reasoned that it "would be error to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical characteristic unique to one sex." *Id.* at 854. Rather, the court looked beyond the facial classification in the law to whether the law disadvantaged women. *Id.* The court recognized that the government does not have "the power to turn the capacity [to bear children], limited as it is to one gender, into a source of social disadvantage" and that "women's biology and ability to bear children have been used as a basis for discrimination against them." *Id.* (citations omitted); *see also Maher*, 515 A.2d at 160 ("By adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex

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Texas uniquely requires that Medicaid coverage match federal law for all procedures, and the Texas court applied almost exclusively U.S. Supreme Court precedent rather than state precedent to conduct its state ERA analysis.

including their reproductive capabilities."). The New Mexico court found that the law was facially discriminatory because

> there is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision in the Department's regulations that disfavors any comparable, medically necessary procedure unique to the male anatomy. . . . Thus, [it] undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women.

N.M. Right to Choose, 975 P.2d at 856. This well-reasoned opinion is persuasive given the similarities between the Pennsylvania and New Mexico ERAs. *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination,* 36 Rutgers L.J. 1201, 1249-53 (2005).

(d) *Edmunds* Factors: Policy Considerations

The decades since *Fischer* have ushered in a better understanding around the connection between abortion access and women's equality. This connection shows that women need to be able to control their reproductive lives, including having real access to abortion, to be fully equal in society.

While early abortion cases did not draw this connection, more recent ones have. The U.S. Supreme Court recognized the importance of abortion access to women's equality starting with *Planned Parenthood v. Casey*, when it stated that "[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." 505 U.S. 833, 856 (1992) (plurality opinion). Justice Ginsburg later wrote for four Justices in dissent in *Gonzales v. Carhart* when she explained that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). Commentators have also noted an implicit equality thread throughout *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 Yale L.J.F. 149, 163 (2016) ("Concern for protecting women's liberty, equality, and dignity guides the majority's close scrutiny . . . .").

Thus, while American abortion jurisprudence had little recognition of the importance of abortion access to women's equality at the time of *Fischer*, that has changed in the decades since. When women do not have access to abortion as an option in controlling their reproductive lives, they are not able to participate fully and equally in all aspects of society. *See generally* R.129a-139a, ¶¶ 56-83. *Fischer* did not address this aspect of equality, but the years since have shown its vitality.

Furthermore, voluminous empirical research has been published in the decades following *Fischer* showing the deleterious impact the coverage ban has on indigent women. As detailed in the Petition and the five supporting expert affidavits filed with it—which must be accepted as true for purposes of considering these preliminary objections—denying indigent women access to abortion through the coverage ban has devastating effects on their lives. R.129a-139a, ¶¶ 56-83; Expert Decl. of Colleen M. Heflin, R.146a-171a; Expert Decl. of Elicia Gonzales, R.191a-201a; Expert Decl. of Terri-Ann Thompson, R.202a-221a; Expert Decl. of Courtney Ann Schreiber, R.228a-254a; Expert Decl. of Sarah C. Noble, R.286a-313a. As a result of the coverage ban, it is estimated that one-quarter of Pennsylvania women who would otherwise choose to have an abortion are forced to carry their pregnancies to term. R.132a, ¶¶ 63, 64.

When women are forced to carry an unwanted pregnancy to term, they are denied control over whether or not to have children, their plans for the future, their financial status, and their ability to participate equally in society. R.132a-133a, ¶ 65. Their education may be interrupted and their job and career prospects circumscribed. R.133a, ¶ 66. As a result, one year after unsuccessfully seeking an abortion, they are more likely to be impoverished, unemployed, and depressed than women in similar circumstances who were able to obtain an abortion. *Id*.

Moreover, when denied a wanted abortion, women are more likely to suffer physical and mental health problems. The risk of death is fourteen times higher for carrying a pregnancy to term than it is for abortion, and Black women have a maternal mortality rate that is three times that of white women. *Id.* ¶ 67. This risk is particularly acute in Pennsylvania, where almost thirteen women die within forty-two days of the end of pregnancy for every 100,000 live births in the state, a rate that has doubled since 1994. *Id.* ¶ 68.

Short of death, women who are denied an abortion will face other health risks associated with carrying a pregnancy to term, such as permanent disability, weakened immune system, threats to every major organ in the body, exacerbation of pre-existing conditions, and life-threatening medical conditions such as preeclampsia and eclampsia. R.134a-135a, ¶¶ 69-72. Continuing a pregnancy also threatens women's mental health, as pregnancy and childbirth can lead to increased vulnerability to mental health issues. R.135a, ¶ 73. In particular, denying a wanted abortion can inflict severe psychological distress on women, as they are forced to live for months with an unwanted pregnancy. R.136a, ¶ 74. Finally, they are also subject to the physical and emotional risks of interpersonal violence, which can escalate during pregnancy. *Id.* ¶ 75; *see also* Carly O'Connor-Terry et al., *Challenges of Seeking Reproductive Health Care in People*

Experiencing Intimate Partner Violence, J. Interpersonal Violence 1 (Sept. 24, 2020) (reporting the same in Pennsylvania).

Women on Medical Assistance who are nonetheless able to pay for an abortion on their own also suffer because of the coverage ban. Women who are in deep poverty—which, by definition, includes almost everyone on Medical Assistance—can be pushed even deeper into poverty by having to pay for the abortion and other related costs, such as transportation, overnight housing, and childcare. R.137a, ¶¶ 77-79. Raising money takes time, which delays the abortion, thus increasing the price and also increasing the risk of complications. R.137a-138a, ¶¶ 80-81.

The harms described here do not fall evenly on Pennsylvania women. Women of color in Pennsylvania are more likely to be poor than white women and are more likely to rely on Medical Assistance for health care. R.138a-139a, ¶ 83. Thus, they are less able to afford out-of-pocket costs for their abortion compared with their white counterparts. *Id.* The fact that this harm falls with special cruelty on women of color who face a historical legacy of reproductive coercion should trigger more, not less, exacting scrutiny. *See Harris*, 448 U.S. at 344 (Marshall, J., dissenting).

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Fischer's ERA holding should be overruled. It was wrong when it was decided, as its ERA analysis was flawed, unsupported, and not tied to Pennsylvania jurisprudence. Moreover, in the 36 years following *Fischer*, there have been major doctrinal shifts and factual developments around independently interpreting the Pennsylvania Constitution, as well as the connection between abortion and sex equality. Since 1985, there has been a widespread repudiation of *Fischer*'s conclusion that pregnancy discrimination is not encompassed within sex discrimination. Furthermore, there has been an emerging recognition in both federal and state case law of the importance of abortion to women's equality. Finally, a vibrant body of scholarship and empirical evidence has demonstrated the harm that coerced pregnancy and childbearing inflict on women, particularly women of color. These developments show that *Fischer*'s ERA analysis is "manifestly out of accord with modern conditions of life [and] should not be followed as controlling precedent." *Ayala v. Phila. Bd. of Pub. Educ.*, 305 A.2d 877, 888 (Pa. 1973). Accordingly, this Court should hold that the coverage ban violates the Pennsylvania ERA.[29]

[29] This case does not raise, nor is it necessary for this Court to resolve, the hypothetical questions of whether every classification involving a physical characteristic unique to men or women is a sex-based classification, and whether there could ever be a sex-based classification involving unique physical characteristics that could survive scrutiny under the Pennsylvania ERA. Where, as here, the coverage ban is so plainly intertwined with traditional gender roles and where the resulting harm to women is profound, there is no danger that the ERA will exceed its constitutional purpose by invalidating a genuinely neutral and non-discriminatory classification. Where the presence of unique physical characteristics raises a question of whether the

C. THE COVERAGE BAN VIOLATES THE PENNSYLVANIA CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION.

Fischer's equal protection analysis misconstrued the protected equality interest by declaring that the coverage ban "does not concern the right to an abortion," 502 A.2d at 116, and instead limited its inquiry to "the purported right to have the state subsidize the individual exercise of a constitutionally protected right," *id*. at 121. *Fischer*'s formulation of the equality-based right mischaracterized the claim. In this case, as in *Fischer*, Providers do not assert a generalized right to state subsidy. Rather, Providers claim that when states subsidize health care, they must do so in ways that do not place unequal burdens on the exercise of constitutionally-protected rights.[30] In other words, *if* pregnancy and childbirth are covered, abortion must be *as well*. *Fischer* simply did not address this argument.

Fischer declined to analyze the coverage ban under the Pennsylvania Constitution's equal protection provisions independently from federal precedent. Instead, *Fischer* simply adopted the federal court decisions in *Maher v. Roe*, 432

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classification is discriminatory, exceedingly strict judicial review is warranted. *See N.M. Right to Choose*, 975 P.2d 841, 854-56.

[30] Just as a government-run voter transportation service that refused to convey Republicans to the polls would be an equal protection violation, not because there is a right to be driven to the polls but because, if the government undertakes this service, it must do so evenhandedly.

U.S. 464, 479-80 (1977), and *Harris*, 448 U.S. at 316-17,[31] even though it was not bound by either case in reviewing the coverage ban under the Pennsylvania Constitution. A review of Providers' equal protection claims under the *Edmunds* factors supports a more expansive reading of the state constitution's equal protection provisions than their federal counterpart and leads to the conclusion that the coverage ban violates the Pennsylvania Constitution.

1. *Edmunds* Factors: Text of Pennsylvania Constitution

There is no express equal protection clause in the Pennsylvania Constitution; however, this Court has gleaned equality guarantees from several constitutional provisions reflecting equality concerns.

Article I, section 1 guarantees the inherent rights of humankind:

> All [persons] 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. I, § 1. Article I, section 26 expressly prohibits discriminating against individuals in the exercise of their civil rights:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

[31] Both *Maher*, 432 U.S. at 749, and *Harris*, 448 U.S. at 316-17, upheld similar coverage bans, but purely based on federal constitutional provisions.

Pa. Const. art. I, § 26. Article III, section 32 prohibits local and special laws:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.

Pa. Const. art. III, § 32.

These provisions collectively guarantee equal protection of the law and prohibit discrimination based on the exercise of a civil right. *Love v. Borough of Stroudsburg*, 597 A.2d, 1137, 1139 (Pa. 1991). As the text of these provisions deviates markedly from the federal Equal Protection Clause, *see* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."), this Court has not tied the construction of these provisions to the very dissimilar federal provision.

2. *Edmunds* Factors: History and Pennsylvania Case Law

The three equal protection provisions have separate origins but collectively constitute Pennsylvania's equality guarantee. Article I, section 1 dates back to the original Declaration of Rights adopted by the Pennsylvania constitutional convention of 1776. Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 Rutgers U. L. Rev. 287, 355 (2018). It has been readopted multiple times with the same wording, most recently in 1968. *Id.* Article III, section 32 dates to 1874 but was modified to its current form in 1967. *Id.* at 356. Article I, section 26 also dates

to 1967. *Id.* This Court has repeatedly referred to these provisions collectively as the "equal protection provisions of the Pennsylvania Constitution." *See, e.g.*, *Klein v. Commonwealth*, 555 A.2d 1216, 1224 (Pa. 1989) (plurality opinion). Importantly, none shares the origin of the federal Equal Protection Clause, which came about in 1868 to combat continuing discrimination against Black people following the end of slavery.

Under the Pennsylvania provisions, this Court has explained the proper framework for analyzing an equal protection claim involving fundamental rights: "[W]here a suspect classification has been made *or a fundamental right has been burdened*, another standard of review is applied: that of strict scrutiny." *Love*, 597 A.2d at 1139 (emphasis added) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302, 1306 (1984)). Although this Court has used the federal equal protection framework as a "guiding principle," it analyzes issues under this framework "while incorporating Pennsylvania-specific considerations regarding *enhanced* privacy interests." *Commonwealth v. Alexander*, 243 A.3d 177, 205 (Pa. 2020) (emphasis added). *Fischer* rightly acknowledged this point, stating that this Court interprets the state constitution in "a more generous manner" to "afford the citizens of this Commonwealth greater liberties than they would otherwise enjoy" under the federal Constitution, 502 A.2d at 121, but then failed to apply this principle to the coverage ban.

Legal scholarship on the history and origin of the Pennsylvania equal protection provisions confirms that Pennsylvania recognizes a stronger equality right than the federal Equal Protection Clause. Article I, section 1 has broader language than the U.S. Constitution and has repeatedly been analyzed under a "distinctive doctrinal framework." Kreimer, *supra,* at 329-30. Article I, section 26 was designed, according to state constitutional law expert Professor Robert Williams, "to reach beyond [] the Fourteenth Amendment." Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 Widener J. Pub. L. 343, 364 (1993). And Article III, section 32 was, in contrast to the Equal Protection Clause's anti-slavery origins, "meant to correct a very different kind of unequal treatment, grounded mainly in the area of 'economics and social welfare.'" Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 Widener J. Pub. L. 161, 184-85 (1993). These historical differences merit, as this Court has repeatedly recognized, interpreting the equality provisions of the Pennsylvania Constitution in a manner that gives greater protection to equality than the U.S. Constitution. *See generally* Br. for *Amicus Curiae* ACLU.

In failing to recognize that the Pennsylvania Constitution contains distinct and broader guarantees of liberty and equality, *Fischer* ignored the

powerful protection for individual autonomy in Article I, section 1—protection that is broad enough to include the right to reproductive autonomy. In that provision, the framers made clear that certain rights are reserved to the people of the Commonwealth because all people "have certain inherent and indefeasible rights." This Court has described this provision as "an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018).

In fact, within this right, this Court has repeatedly referred to the right to procreate as a fundamental right. In *Nixon v. Dep't of Pub. Welfare*, this Court listed "certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate." 839 A.2d 277, 287 (Pa. 2003); *see also Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108 (Pa. 2020) (contrasting the non-fundamental right of choosing a particular occupation with the fundamental "rights to privacy, marry, or procreate"). More recently, Justice Donohue has repeated and expanded this list: "the right to privacy, the right to marry, the right to procreate and the right to make child-rearing decisions." *Yanakos v. UPMC*, 218 A.3d 1214, 1231 (Pa. 2019) (Donohue, J., concurring). The decision whether to terminate a

pregnancy or carry it to term is part and parcel of these already recognized rights to procreate and make child-rearing decisions.

This Court also has recognized that a broad right to privacy is implicit in the constitutional guarantees included in Article I, section 1. Over fifty years ago, this Court stated that the right to privacy is rooted in people's "inherent and indefeasible rights" to pursue their own happiness: "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." *See Commonwealth v. Murray*, 223 A.2d 102, 109 (Pa. 1966). In *Murray*, this Court explained the paramount importance of Article I, section 1's strong commitment to individual privacy: "The greatest joy that can be experienced by mortal man is to feel himself master of his fate—this in small as well as big things. . . . Everything else in comparison is dross and sawdust." *Id.* at 110. Just last year, in reiterating that there is an "implicit right to privacy in this Commonwealth," *Alexander*, 243 A.3d at 206, this Court recognized that the Pennsylvania right to privacy is premised on the Pennsylvania constitutional provisions "afford[ing] greater protection to [its] citizens" than the U.S. Constitution, *id.* at 181.

Since *Murray*, this Court has recognized at least two different aspects of this right to privacy—decisional autonomy and bodily integrity—that together support the right to decide whether to carry or terminate a pregnancy. In 1983, this

Court stated clearly that an essential part of the right to privacy is the "freedom to make certain important decisions." *Denoncourt v. Commonwealth, State Ethics Comm'n*, 470 A.2d 945, 948 (Pa. 1983). Pursuant to this right, individuals have a protected privacy interest in independent decision-making over important personal matters such as marriage, family formation, and child rearing. *See id.*

Decisional autonomy principles likewise protect the right to make important life decisions, including certain decisions related to sex and sexuality, free from sanctions arising from the moral judgments of others. In *Commonwealth v. Bonadio*, this Court held that a statute criminalizing "voluntary deviate sexual intercourse" infringed upon the Pennsylvania Constitution's equal protection guarantees, specifically the right to liberty. 415 A.2d 47, 50-52 (Pa. 1980) (plurality opinion). Importantly, the Court remarked that "the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others." *Id.* at 50; *see also Fabio v. Civil Serv. Comm'n of City of Phila.*, 414 A.2d 82, 89 (Pa. 1980) (recognizing that decisional autonomy also applies to an individual's decision to engage in extramarital sex). The decision whether or not to form a family is among the most personal, important decisions a woman can make in her lifetime; it can profoundly alter every aspect of her life, including her health, education, employment,

economic stability, and family dynamics. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *see also* Expert Decl. of Terri-Ann Thompson, R.202a-221a. Thus, this broad right to decisional autonomy in matters involving reproduction and sexuality also includes the right to choose to end or continue a pregnancy.

Beyond decisional autonomy, the Pennsylvania Constitution's protection of privacy also includes the right to bodily integrity. As this Court wrote in *John M. v. Paula T.*, the Pennsylvania Constitution guarantees "clear privacy interests in preserving [] bodily integrity." 571 A.2d 1380, 1386 (Pa. 1990); *Coleman v. Workers' Comp. Appeal Bd. (Ind. Hosp.)*, 842 A.2d 349, 354 (Pa. 2004); *Cable v. Anthou*, 699 A.2d 722, 725-26 (Pa. 1997) (noting a woman "had an undeniable right to her bodily integrity, and to be free from invasions into her body"). This bodily integrity right necessarily includes the right to decide whether or not to continue a pregnancy because without it, a woman is no longer a "master of [her] fate." *Murray*, 223 A.2d at 110. Thus, because Article I, section 1's broad protections of individual rights include the fundamental rights to marry, procreate, and make child-rearing decisions, as well as a robust privacy right protecting decisional autonomy and bodily integrity in matters of reproduction, this Court should hold that the Pennsylvania Constitution protects women's right to decide whether or not to continue a pregnancy.

Once this right is recognized, Article I, section 26 and Article III, section 32 require that the government cannot favor one exercise of the right over another. Contrary to *Fischer*'s reliance on federal constitutional precedent, the text and history of Article I, Section 26 and Article III, section 32 support the conclusion that their neutrality command offers greater protection than the federal Equal Protection Clause. As this Court has observed about these equal protection provisions:

> While there may be a correspondence in meaning and purpose between the two, the language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it was not there. Because the Framers of the Pennsylvania Constitution employed these words, the specific language in our constitution cannot be readily dismissed as superfluous.

Kroger Co. v. O'Hara Twp., 392 A.2d 266, 274 (1978).

Specific to Article I, section 26, the text explicitly prohibits the Commonwealth from denying "the enjoyment of any civil right" and "discriminat[ion] against any person in the exercise of any civil right." *See* Pa. Const. art. I, § 26. This explicit prohibition should be interpreted in accordance with the obvious meaning of such words to avoid rendering portions of it "mere surplusage," *Allegheny Cnty. Sportsmen's League v. Rendell*, 860 A.2d 10, 19, (Pa. 2004), and to honor the provision's purpose of prohibiting discrimination against people exercising their civil rights. Williams, *supra*, at 361-62. Further prohibiting

discrimination against fundamental rights is Article III, section 32, which by its text prohibits "special laws." This Court has said that the purpose of this provision is to require "that like persons in like circumstances should be treated similarly by the sovereign." *Pa. Tpk. Comm'n v. Commonwealth*, 899 A.2d 1085, 1094 (Pa. 2006); *Kroger*, 392 A.2d at 274. Pennsylvania courts apply this provision more strictly to "areas of economics and social welfare" than the federal Constitution does, requiring classifications to be based on real distinctions relevant to the purpose of the statute. Marritz, *supra*, at 202-05. Providers' equality claims under these provisions should be applied in accordance with their text and underlying spirit—not, as *Fischer* did, in accordance with the inapplicable language and doctrine of the federal Equal Protection Clause.

Fischer erred in misconstruing the right implicated by the coverage ban to be an alleged entitlement to subsidized abortions. Providers do not argue in their equal protection claim that the Pennsylvania Constitution compels the state to fund abortions. Rather, Providers argue that *if* the Commonwealth chooses to establish a Medical Assistance program for medically necessary services for low-income Pennsylvanians (which the Commonwealth is not required to do), it cannot choose to cover one way of exercising a fundamental right but then omit covering a different way to exercise that same right. *See William Penn Sch. Dist.*, 170 A.3d at 458; *see also Planned Parenthood of Alaska*, 28 P.3d at 909 ("[W]hile the State

retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." (quoting *Moe*, 417 N.E.2d at 401)). Stated more specifically, the Commonwealth cannot fund all of the expenses associated with continuing a pregnancy and none of the expenses for terminating a pregnancy because this discriminatory coverage infringes on the fundamental right of reproductive choice, thus violating the equal protection provisions of the Pennsylvania Constitution. *See* Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 Temp. L. Rev. 1151, 1168-69 (1993).

Accordingly, the Pennsylvania Constitution's Declaration of Rights protects the abortion right as a fundamental right, and the coverage ban is a discriminatory funding scheme that impinges on that fundamental right in violation of the Constitution's equal protection provisions.

3. *Edmunds* Factors: Other States

Other state supreme courts have reached conclusions contrary to *Fischer*. In fact, the majority of state courts—including eight courts of last resort—have interpreted constitutional guarantees of privacy and/or equality similar to the Pennsylvania Constitution's as affording greater protection for abortion than the federal Constitution. *See* Linda J. Wharton, Roe *at Thirty-Six and Beyond:*

Enhancing Protection for Abortion Rights Through State Constitutions, 15 Wm. & Mary J. Race, Gender & Soc. Just. 469, 501-02 n.189 (2009) (collecting cases). In 1981, for example, the Massachusetts Supreme Judicial Court noted that the right to abortion is among the protected guarantees of privacy in the state constitution, which it has interpreted to protect rights beyond the federal Constitution. *Moe*, 417 N.E.2d at 399. In recognizing the right to abortion, the court explained that it is "but one aspect of a far broader constitutional guarantee of privacy" linked to a person's strong interest in "self-determination" and "being free from nonconsensual invasion of [her] bodily integrity." *Id.* at 398-99 (citations omitted).

Two years ago, the Kansas Supreme Court recognized that the Kansas Bill of Rights and its explicit right to liberty and pursuit of happiness grant women a right to personal autonomy, which includes the right to terminate a pregnancy. *See Hodes & Nauser v. Schmidt*, 440 P.3d 461, 486 (Kan. 2019). The court stated:

> At the core of the natural rights of liberty and the pursuit of happiness is the right of personal autonomy, which includes the ability to control one's own body, to assert bodily integrity, and to exercise self-determination. This ability enables decision-making about issues that affect one's physical health, family formation, and family life. Each of us has the right to make self-defining and self-governing decisions about these matters.

Id. at 484; *see id.* at 482 (citing *Murray*, 223 A.2d 102).

The Supreme Court of Minnesota also recognized abortion as a fundamental right implied in the state constitution's protection of privacy. *See Women of Minn.*, 542 N.W.2d 17. The court held:

> The right of procreation without state interference has long been recognized as one of the basic civil rights of man . . . fundamental to the very existence and survival of the race. We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities. We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy.

Id. at 27 (internal quotations and citation omitted).

Most state courts that have reviewed similar coverage bans for abortion declined to follow the reasoning of *Harris v. McRae* and *Maher v. Roe*. These courts have ruled that denying poor women coverage for abortion while fully funding childbirth is coercive and violates their right to reproductive choice under their respective state constitutions. *See, e.g.*, *Planned Parenthood of Alaska*, 28 P.3d 904; *Maher*, 515 A.2d at 158-59 ("The Connecticut equal protection clauses require the state when extending benefits to keep them free of unreasoned distinctions that can only impede [the] open and equal exercise of fundamental rights." (citation omitted)); *Right to Choose*, 450 A.2d at 935 ("Once [the legislature] undertakes to fund medically necessary care attendant upon pregnancy

[the] government must proceed in a neutral manner."); *Comm. to Defend Reprod. Rights*, 625 P.2d at 798 ("Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.").[32]

4. *Edmunds* Factors: Policy Considerations

Fischer not only fails at the abstract analytical level, but also ignores the practical realities of its calamitous impact. Similarly, DHS and Legislators wholly ignore the real-world context in which the coverage ban operates. Women eligible for and enrolled in Medicaid are poor by definition and lack the financial resources to afford medical services absent the Medical Assistance program. Bans on abortion coverage target this group of women—who are disproportionately women of color and experience intersecting forms of discrimination—because they are the least able to overcome financial coercion designed to override their reproductive decisions. *See* Melissa Murray, *Race-Ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2051–52 (2021); H. Pa. Legis. Journal No. 164-62, at 2244-45 (1980) (identifying legislative purpose of coverage ban to be ending abortion for women in poverty).

[32] In contrast, Florida and Michigan have followed *Harris* and *Maher* in part because the courts have held that, unlike in Pennsylvania, their equal protection provisions do not provide greater protection than the federal Equal Protection Clause. *See A Choice for Women, v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004); *Doe v. Dep't of Soc. Servs.*, 487 N.W.2d 166, 174-76 (Mich. 1992).

The coverage ban forces women with low incomes seeking abortion to choose between continuing an unwanted pregnancy and using money that they would have otherwise used for daily necessities, such as shelter, food, clothing, electricity or diapers, to pay for the procedure. R.137a, ¶ 79; Expert Decl. of Colleen M. Heflin, R.146a-171a. In this way, discriminatory funding schemes like the coverage ban act as a *de facto* abortion ban. *See, e.g.*, *Maher*, 515 A.2d at 152 (stating that the impact of the ban is the same "as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion"); *Women of Minn.*, 542 N.W.2d at 29 (labeling the coverage ban "just as effective[ly] as [] an outright denial of [abortion] rights through criminal and regulatory sanctions"). As a result, some women with low incomes will be forced by the coverage ban to carry their pregnancies to term against their wishes, risking their mental and physical health. R.132a, ¶¶ 63-64; Expert Decl. of Courtney Ann Schreiber, R.228a-254a; Expert Decl. of Sarah C. Noble, R.286a-313a.

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Framing the right at issue properly—not as a right to subsidized abortions but rather as a right to equal treatment of constitutionally-protected choices—shows that the coverage ban burdens a fundamental right in violation of the equal protection provisions of the Pennsylvania Constitution. For these reasons, this Court should overturn *Fischer* and hold that the coverage ban impinges on the

fundamental right to choose abortion by discriminating against women for seeking to exercise their right to reproductive choice.

5. The Coverage Ban Does Not Pass Strict Scrutiny.

Because it did not correctly perceive the interests at stake, *Fischer* applied rational basis review to the coverage ban and opined that the ban would also have passed intermediate scrutiny. *See Fischer*, 502 A.2d at 122-23. However, when a statute burdens the exercise of a fundamental right, as here, "another standard of review is applied: that of strict scrutiny." *Love*, 597 A.2d at 1139 (citing *James v. Se. Pa Transp. Auth.*, 477 A.2d 1302, 1306 (1984)).

Strict scrutiny requires the government classification to be "narrowly tailored and [] necessary to achieve a compelling state interest." *Klein*, 555 A.2d at 1225 (plurality opinion). Because the coverage ban not only impinges on a woman's fundamental right to terminate a pregnancy, but also selectively denies a benefit based on the exercise of a fundamental right, the Pennsylvania Constitution requires the state to show that the coverage ban is narrowly tailored to advance a compelling state interest, which it cannot do.

The asserted state interest is preserving the life and health of fetuses and women.[33] 18 Pa. C.S. § 3202(a). Even assuming this interest is compelling

[33] The coverage ban cannot be deemed to serve any state interest in cost reduction because the costs associated with continuing a pregnancy to term—which are fully covered by Medical Assistance—greatly exceed the expenses associated with terminating a pregnancy. *See* Br. for *Amicus Curiae* National Health Law Center.

throughout pregnancy, the state's interest in fetal life does not justify overriding a woman's fundamental right to make decisions about her own life course as well as her health and well-being. Women who are unable to access abortion are denied autonomy and dignity, and their plans for the future, financial status, and ability to participate equally in society are put at risk. *See* R.132a-136a, ¶¶ 65-75. Moreover, as the record demonstrates, there are numerous risks associated with pregnancy that, while not life-endangering, wreak profound harm on a woman's health and well-being. *Id*. The state's interest in promoting childbirth cannot outweigh a woman's constitutionally protected interest in making these important decisions about her life and health for herself. *Fischer* wrongly omitted from its analysis the woman's interest in her autonomy, health, bodily integrity, and privacy rights when it concluded the coverage ban would withstand heightened scrutiny. 502 A.2d at 122-23.

The majority of courts that have analyzed similar funding restrictions under heightened standards of review find that women's decisional autonomy regarding their own health and well-being comes first. *See, e.g.*, *Byrne*, 450 A.2d at 937 ("A woman's right to choose to protect her health by terminating her pregnancy outweighs the State's asserted interest in protecting a potential life at the expense of her health."); *Comm. to Defend Reprod. Rights*, 625 P.2d at 781 ("[T]he asserted state interest in protecting fetal life cannot constitutionally claim

priority over the woman's fundamental right of procreative choice."); *Maher*, 515 A.2d at 157 (concluding that under the federal and state constitutions the government's interest in protecting potential life "cannot outweigh the health of the woman at any stage of the pregnancy"); *Planned Parenthood of Alaska*, 28 P.3d at 913 ("[A]lthough the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.").

Nor is the coverage ban narrowly drawn to achieve the state's professed interests in preserving the life and health of fetuses and women. *See* 18 Pa. C.S. § 3202(a). Contrary to the state's claims, the coverage ban harms women's health, *see* R.132a-139a, ¶¶ 65-83, and in doing so also compromises women's future ability to have healthy pregnancies. R.128a-129a, ¶ 54. In Pennsylvania, the rate of maternal death has more than doubled since 1994, with alarming disparities among Black women. *See* Br. for *Amici Curiae* New Voices for Reproductive Justice (Black women in Pennsylvania are three times more likely than white women to die from pregnancy-related complications). There are less restrictive measures that would effectively advance the state's professed

interest in preserving the life and health of fetuses and women without infringing upon a protected constitutional right.[34]

Because it fails both parts of the strict scrutiny test, the coverage ban is unconstitutional under state equal protection provisions.

D. LEGISLATORS ARE NOT PROPER INTERVENORS IN THIS CASE.

1. Only in Very Narrow Circumstances Are Individual Legislators Permitted to Intervene.

Intervention is permitted when, *inter alia*, "the determination of such action may affect any legally enforceable interest of such person." Pa. R.C.P. No. 2327(4).[35] This requirement "owes its origin to the desire of the courts to prevent the curious and the meddlesome from interfering with litigation not affecting their rights." Goodrich Amram 2d, § 2327:8. In other words, "a mere general interest in

[34] For example, the state could implement policies and programs that: "1) address racial and ethnic inequities that contribute to disparities in pregnancy outcomes, [and] 2) increase early and adequate prenatal care." Pa. Dep't of Health, Pregnancy-Associated Deaths in Pennsylvania, 2013–2018, 27 (2020), http://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Pregnancy%20Associated%20Deaths%202013-2018%20FINAL.pdf; *see also* Aasta Mehta et al., Phila. Maternal Mortality Rev. Comm., Improving Outcomes: Maternal Mortality in Philadelphia, 21 (2020) https://www.phila.gov/media/20210322093837/MMRReport2020-FINAL.pdf (recommending, *inter alia*, paid parental leave).

[35] Legislators also sought intervention pursuant to Pa. R.C.P. No. 2327(3), but the Commonwealth Court declined to rule on this issue. Panel Op. at 19 n.15. To the extent Legislators still press this basis for intervention, it is foreclosed because they are not responsible for implementing, enforcing, or administering the coverage ban and thus Providers could not have properly joined them in the original action here. *See generally Wagaman v. Attorney General*, 872 A.2d 244 (Pa. Commw. Ct. 2005).

the litigation, or an interest in an issue that is collateral to the basic issues in the case . . . is not a sufficient basis for intervention." *Id.*

In considering intervention by individual legislators (as opposed to the entire General Assembly), this Court has held that they have a legally enforceable interest only "where there [i]s a discernible and palpable infringement on their authority as legislators." *Robinson Twp.*, 84 A.3d at 1054, 1055 (alteration in original). This Court has further explained that legislator standing is limited to situations when the legislator's "ability to participate in the voting process is negatively impacted or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator." *Markham*, 136 A.3d at 145; *Fumo*, 972 A.2d at 500-01.

These principles dictate that legislators are not afforded a general right to intervene for the purpose of defending the constitutionality of a statute. *See Robinson Twp.*, 84 A.3d at 1055. Rather, this Court has stated that once "votes which [legislators] are entitled to make have been cast and duly counted, their interest as legislators ceases." *Markham*, 136 A.3d at 141.

2. The Commonwealth Court Misapplied this Court's Standard for Intervention, Improperly Expanding the Right of Legislators to Intervene.

Legislators assert that they have a legally enforceable interest in this litigation because a ruling that the coverage ban is unconstitutional would impinge

upon their appropriations powers. But the outcome on the merits here will not diminish Legislators' voting power, prohibit them from voting on any subject matter, or substantively impinge on their right to pass legislation or appropriate funds in the future. *See Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 598 (Pa. 2013) (stating that "regardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens"). In granting intervention, the panel mistook Providers' request to declare the coverage ban unconstitutional for a demand to dictate the substance and form of appropriations bills. Panel Op. 15. But under settled precedent, that a ruling on the constitutionality of a statute *may* prompt the General Assembly to take action is insufficient to satisfy the standard to establish a legally enforceable interest necessary to permit intervention.

As this Court has repeatedly held, an intervenor's claimed interest in an action must be more than ephemeral—it must be "substantial, direct, and immediate," *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469 (Pa. 1994), and the harm must be "concrete" and "palpable," *Fumo*, 972 A.2d at 500-01.[36] To this end, this Court held in *Markham* that "diluting the substance of a

[36] The limited availability of legislative intervention was recognized by several of Legislators' colleagues when they proposed House Bill 1021, which would offer legislators intervention rights in constitutional challenges. The memorandum introducing the bill explained,

previously enacted statutory provision is not an injury which legislators, as legislators, have standing to pursue." 136 A.3d at 145. And consistent with this precedent, Judge Simpson rightly recognized that "the mere fact that the General Assembly may want or need to propose additional legislation if a court finds the coverage ban unconstitutional, and that this legislation may potentially involve the appropriation of funds, is not enough to establish a concrete, immediate impairment or deprivation of an official power or authority to act as a legislator." Simpson Op. at 16-17.

The Commonwealth Court panel's reasoning unduly expands the narrow circumstances under which individual legislators can intervene. Under that court's theory, any time a constitutional challenge might theoretically touch on appropriations, individual legislators will have a legally enforceable interest in the matter. Such a scenario is exactly what this Court sought to avoid in *Markham* when it cautioned against the slippery slope of legislators intervening in every challenge to government action. 136 A.3d at 145. Judge Simpson properly heeded this warning when he concluded that "there is no inherent, ongoing right to vote on future annual appropriations bills." Simpson Op. 16. He further stated that

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"[c]urrently, the grounds on which the General Assembly can participate as a party in these lawsuits is *extremely narrow*." Memorandum from Reps. Torren C. Ecker & Paul Schemel to All House Members, Cases Challenging State Statutes (Feb. 19, 2019), www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=28423 (emphasis added).

grounding standing in such a basis would result in "no obvious limiting principle for a standing analysis based on voting on future appropriation bills," as such a "boundless approach" would allow any legislator to intervene in any action involving state government. *Id.*

If the panel's ruling is affirmed, it would be difficult to imagine a scenario in which individual legislators would *not* have standing to intervene in a constitutional challenge under Rule 2327(4).[37] As one example, any lawsuit relating to sovereign immunity could satisfy Legislators' test for legislative intervention. If a court's decision interpreted sovereign immunity more narrowly, the Commonwealth could be open to greater liability which would implicate future appropriations. In reality, if the panel's position is accepted, any judicial action involving any Commonwealth agency or subdivision could impact how the government expends funds and—under the panel's reasoning—would justify intervention by individual legislators. Moreover, permitting intervention of two small groups of legislators in this case invites virtually-unbounded individual legislator intervention in future cases, burdening litigants and the lower courts with all the expense, delay, and complexity inherent in sprawling multi-party actions and raising questions of legislative encroachment upon coordinate branches. This

[37] Indeed, as Legislators expressly stated, to accept their argument would be to afford legislators a right to intervene "anytime there's a matter that impacts the budget." *See* Oral Argument Tr. at 30:16-20, R.586a.

dramatic expansion of a case to possibly include numerous parties with no real connection to the matter other than a general interest in the outcome is contrary to this Court's precedent.

3. If the Commonwealth Court's Decision Is Affirmed, Pennsylvania Law Would Have a Uniquely Broad View of Legislator Standing.

Not only is the panel's unbounded interpretation of individual legislator standing inconsistent with Pennsylvania precedent—it would put Pennsylvania law at odds with other jurisdictions that have found legislator standing to be limited.

For instance, under Maryland's similar intervention rules, Maryland's highest court denied intervention to legislators in *Duckworth v. Deane*, where they sought to intervene in a constitutional challenge to a same-sex marriage ban. 903 A.2d 883, 886 (Md. 2006). The court held that "an individual member of the General Assembly, or eight out of a total of 188 members, ordinarily have no greater legal interest in an action challenging the constitutionality of a statute than other Maryland residents have." *Id.* at 892. Like the attempted-intervenors in *Duckworth*, Legislators here are no different from other Pennsylvania residents who might have an opinion about the constitutionality of the coverage ban.

Indeed, neither Legislators nor the panel cited to any other jurisdiction that has held that legislators have an unbridled right to intervene in any suit simply

because the outcome could impact the state budget. Conversely, other courts have considered whether a judicial decision impacting the state budget or Legislators' ability to enact potentially unconstitutional laws warrant intervention and have held that it does not. *See, e.g.*, *Planned Parenthood of Wis. v. Kaul*, 384 F. Supp. 3d 982, 988 (W.D. Wis. 2019) ("[T]he desire to reenact invalidated legislation hardly serves as a cogent basis for intervening."), *aff'd on other grounds*, 942 F.3d 793 (7th Cir. 2019). This is because, as the Wisconsin Court of Appeals recognized, allowing intervention in cases where the interpretation of a statute or constitutional provision is at issue "would open the door to similar intervention in any case with policy or budgetary ramifications." *Helgeland v. Wisconsin Municipalities*, 724 N.W.2d 208, 219-20 (Wis. Ct. App. 2006), *aff'd,* 745 N.W.2d 1 (Wis. 2008); *accord* Simpson Op. 16.[38]

The Commonwealth Court's decision to permit Legislators to intervene based on the theory that striking down the coverage ban would affect their role in appropriations, if affirmed, would make individual legislators' right to intervene uniquely broad in Pennsylvania.

[38] In reaching its decision to permit intervention, the panel relied on an inapposite 60-year-old Michigan Supreme Court case, *Lewis v. State*, 90 N.W.2d 856, 860 (Mich. 1958), which simply had nothing to do with intervention. *See* Panel Op. 15-16.

4. The Commonwealth Court's Holding that Legislators' Interests Were Not Adequately Represented Is Premature.

Even if this Court finds that intervention was proper under Rule 2327(4), the panel did not make factual findings demonstrating that Legislators' interests were not adequately represented by DHS. Pa. R.C.P. No. 2329(2). In fact, such a finding would be difficult, as DHS and Legislators have the same interest in this suit: defending the constitutionality of the coverage ban. *See, e.g.*, *Pa. Ass'n of Rural & Small Sch. v. Casey*, 613 A.2d 1198, 1200-01 (Pa. 1992).

The panel did not make specific findings that would support its conclusion that Legislators' interests diverge from those of DHS and would not otherwise be adequately represented. Instead, it relied on dicta in Judge Simpson's opinion, contemplating that Legislators' "interest may not be adequately represented by the Department 'given the vastly different responsibilities and powers of the executive and legislative branches of government as they relate to the coverage ban.'" Panel Op. 18 (quoting Simpson Op. 17). This conjecture is not supported by the reality that DHS has aggressively opposed Providers' claims—including by raising an objection to Providers' standing, an objection not raised by Legislators. DHS's position thus gives the Court two separate theories on which to dispose of this lawsuit and more than adequately represents Legislators' asserted

interests. *See Casey*, 613 A.2d at 1201 (denying intervention when the proposed intervenor's "main interests" are already adequately represented).

VIII. CONCLUSION

For the foregoing reasons, Providers ask this Court to reverse the Commonwealth Court on all issues.

Dated: October 13, 2021

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CERTIFICATE OF COMPLIANCE

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

Dated: October 13, 2021 */s/ Susan Frietsche*

CERTIFICATE OF COMPLAINCE WITH RULE 2135(D)

I, Susan Frietsche, hereby certify that Brief for Appellants complies with the word count limitation from this Court's September 9, 2021, Order, because it contains 19,952 words, excluding the parts exempted by Pa. R.A.P. 2135(b). This Certificate is based on the word count of the word processing system used to prepare this Brief.

Dated: October 13, 2021 */s/ Susan Frietsche*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Petitioners	:	
v.	:	No. 26 M.D. 2019
	:	Heard: May 21, 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

BEFORE: HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: June 21, 2019**

Before the Court are two separate Applications for Leave to Intervene, one filed by 18 members of the Pennsylvania Senate (Proposed Senate Intervenors)

and one by eight members of the Pennsylvania House of Representatives (Proposed House Intervenors) (collectively, Proposed Intervenors).[1] For the reasons that follow, the Applications are denied.

I. Background

The facts as described in the Petition for Review (Petition) are as follows. Medical Assistance, Pennsylvania's Medicaid program, is a public insurance system that provides eligible Pennsylvanians with medical insurance for covered medical services. Pennsylvania operates two Medical Assistance programs: fee-for-service, which reimburses providers directly for covered medical services provided to enrollees, and HealthChoices, a managed care program. The Department of Human Services (DHS) is the agency responsible for administering Pennsylvania's Medical Assistance programs.

Medical Assistance covers comprehensive medical care for its enrollees, including family planning services and pregnancy-related care such as prenatal care, obstetrics, childbirth, neonatal and post-partum care. However, federal law establishes that federal Medicaid funds may not be used for the performance of an abortion, except in cases of endangerment to the mother's life or

[1] The Senate members' application was filed by President pro tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jacob Corman, and Senators Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw. The House members' application was filed by Speaker Mike Turzai, House Majority Leader Bryan D. Cutler, Chairman of the House Appropriations Committee Stan E. Saylor, House Majority Whip Kerry A. Benninghoff, House Majority Caucus Chair Marcy Toepel, House Majority Caucus Secretary Michael Reese, House Majority Caucus Administrator Kurt A. Masser, and House Majority Policy Commtitee Chair Donna Oberlander.

a pregnancy resulting from rape or incest. See, e.g., 42 U.S. Code § 1397ee(c). Of importance here, Section 3215(c) of Pennsylvania's Abortion Control Act, 18 Pa.C.S. § 3215(c),[2] commonly referred to as the coverage ban, prohibits the expenditure of **state and federal funds** for the performance of an abortion unless the procedure is necessary to avert the death of the pregnant woman, or the pregnancy is caused by rape or incest. As such, DHS has promulgated regulations implementing the Pennsylvania coverage ban which prohibit Medical Assistance coverage for abortions except in these three circumstances. See Pa. Code §§ 1147.57 (payment conditions for necessary abortions), 1163.62 (payment for inpatient

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[2] Section 3215(c) provides as follows:

> **(c) Public funds.--**No Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion, except:
>
> (1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.
>
> (2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction and has been personally reported by the victim.
>
> (3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been personally reported by the victim to a law enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

Section 3215(j) of the Abortion Control Act, 18 Pa.C.S. § 3215(j), sets forth certain requirements that must be satisfied before a Commonwealth agency disburses state or federal funds for the performance of an abortion pursuant to one of the enumerated exceptions.

hospital services), and 1221.57 (payment for clinic and emergency room services). Health care providers are also prohibited from billing through either the fee-for-service or HealthChoices managed care program for services inconsistent with the Medical Assistance regulations, and they are subject to sanctions for doing so. See 55 Pa. Code §§ 1141.81, 1163.491, 1221.81 and 1229.81.[3]

Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania (collectively, Petitioners) all provide medication and/or surgical abortion services in the Commonwealth. Collectively, Petitioners provide approximately 95% of the abortions performed in the Commonwealth. Many of Petitioners' patients are low income women who are either enrolled in or eligible for Medical Assistance benefits. Due to the coverage ban, these patients cannot use Medical Assistance to cover an abortion procedure unless they fall within one of the three exceptions.

Therefore, on January 16, 2019, Petitioners filed the Petition in this Court's original jurisdiction claiming the coverage ban and its implementing regulations violate Pennsylvania's Equal Rights Amendment (ERA)[4] because they single out and exclude abortion, a procedure sought singularly by women as a

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[3] For ease of reference, all of the challenged regulations will collectively be referred to throughout the Opinion as the implementing regulations.

[4] Article I, Section 28 of the Pennsylvania Constitution, known as the ERA, states: "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.

function of their sex, from coverage under Pennsylvania's Medical Assistance programs. Petitioners point out that there is no similar statute or regulation that singles out or excludes from Medical Assistance coverage any sex-based healthcare consultations or procedures for men. Petitioners assert that women are denied coverage for essential health care services solely on the basis of their sex, and that the coverage ban flows from and reinforces gender stereotypes in violation of the ERA. Petitioners further claim that the coverage ban violates the equal protection provisions of the Pennsylvania Constitution[5] because it singles out and excludes women from exercising their fundamental right to choose to terminate a pregnancy, while covering other procedures and health care related to pregnancy and childbirth.

Among other things, Petitioners assert that the coverage ban interferes with the ability of low income women in Pennsylvania to access the abortion care they need because they have to pay out-of-pocket for abortion services. Petitioners assert that some women on Medical Assistance who seek abortions in Pennsylvania are forced to delay abortion care in order to raise funds for their procedures, and this delay sometimes leads to women being past the gestational stage to be able to obtain an abortion. In addition, Petitioners assert that some women on Medical Assistance

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[5] Article I, Section 1 of the Pennsylvania Constitution guarantees that all persons "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty ... and of pursuing their own happiness." Pa. Const., art. I, § 1. Article I, Section 26 states that "[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any right." Pa. Const., art. I, § 26. Article III, Section 32 provides, in relevant part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law." Pa. Const., art. III, § 32. That section is akin to the equal protection clause of the Fourteenth Amendment, and "has been recognized as implicating the principle that like persons in like circumstances should be treated similarly ...." Robinson Township v. Commonwealth, 83 A.3d 901, 987 (Pa. 2013) (quotation omitted). See also Fischer v. Department of Public Welfare, 502 A.2d 114, 120 (Pa. 1985) ("Article I[,] § 1 and Article III[,] § 32, have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law.").

are forced to continue their pregnancies to term against their will because they are simply unable to acquire the necessary funds to pay for the procedure. Petitioners also claim that they themselves lose money due to the coverage ban and implementing regulations because they regularly subsidize abortions for Pennsylvania women on Medical Assistance who are not able to pay for the procedure on their own. Petitioners further claim that they expend valuable staff resources to assist patients in securing funding from private charitable organizations to cover the costs of abortions for low income women, and that the coverage ban interferes with Petitioners' counseling of patients by forcing them to discuss painful personal matters such as whether the sex that led to conception was non-consensual or with a family member.

As for the requested relief, Petitioners seek an order from this Court declaring that the coverage ban and its implementing regulations are unconstitutional and, therefore, enjoining their enforcement. They further seek a declaration that abortion is a fundamental right under the Pennsylvania Constitution.

The Petition names as Respondents DHS, as the agency responsible for administering Pennsylvania's Medical Assistance programs; Teresa Miller, Secretary of DHS; Leesa Allen, DHS's Executive Deputy Secretary for Medical Assistance Programs; and Sally Kozak, DHS's Deputy Secretary for the Office of Medical Assistance Programs (collectively, Respondents or DHS). On April 16, 2019, Respondents filed Preliminary Objections to the Petition asserting both a demurrer and lack of standing. Respondents assert that in Fischer v. Department of Public Welfare, 502 A.2d 114 (Pa. 1985), the Pennsylvania Supreme Court held that

the coverage ban does not violate the constitutional provisions upon which Petitioners base their claims. Since this Court lacks the authority to overrule the binding precedent of Fischer, Respondents assert that Petitioners have failed to state a claim upon which relief may be granted. Respondents also assert that Petitioners lack standing to challenge the coverage ban on behalf of their patients who are not parties to this action, and that Petitioners have not alleged harm to a protected interest as required to demonstrate they have standing to sue in their own right.

On April 17, 2019, the Proposed Senate Intervenors and Proposed House Intervenors each filed an Application for Leave to Intervene (Application) in this matter.[6] Pennsylvania Rule of Civil Procedure (Pa. R.C.P.) Number 2327 governs who may intervene in a civil action and provides as follows:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability

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[6] Pennsylvania Rule of Appellate Procedure 1531(b), Pa.R.A.P. 1531(b), provides:

> **(b) Original jurisdiction petition for review proceedings.** A person not named as a respondent in an original jurisdiction petition for review, who desires to intervene in a proceeding under this chapter, may seek leave to intervene by filing an application for leave to intervene (with proof of service on all parties to the matter) with the prothonotary of the court. The application shall contain a concise statement of the interest of the applicant and the grounds upon which intervention is sought.

Pursuant to Pa.R.A.P. 106 and 1517, the Pennsylvania Rules of Civil Procedure govern applications to intervene in original jurisdiction matters before this Court, in particular Rules 2326 through 2329.

> upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327. In particular, Proposed Intervenors argue that they qualify for intervenor status pursuant to subsections 3 and 4 of Rule 2327 because they could have been joined as original parties in this matter and because the determination of this case may affect their legally enforceable interests. The Applications have been fully briefed, were argued before this Court and are ripe for review.[7]

II. Discussion

A. Proposed Intervenors' Arguments

Proposed Intervenors first argue that they should be permitted to intervene because they could have originally been joined as respondents. They point to MCT Transportation Inc. v. Philadelphia Parking Authority, 60 A.3d 899 (Pa. Cmwlth. 2013), wherein this Court recognized that "[m]embers of the General Assembly may participate or be named defendants in a constitutional challenge to a statute ...." Id. at 904 n.7. Proposed Intervenors point to several cases involving constitutional challenges where Senator Scarnati or the General Assembly were named as respondents or were permitted to intervene, including William Penn

[7] On April 17, 2019, the Proposed Intervenors also submitted Preliminary Objections to be filed if they are granted intervenor status. Notably, Proposed Intervenors' Preliminary Objections contain objections not asserted by Respondents, including those based upon federal preemption and separation of powers arguments.

School District v. Pennsylvania Department of Education, 170 A.3d 414 (Pa. 2017), Leach v. Commonwealth, 141 A.3d 426 (Pa. 2016), and League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018). Proposed Intervenors argue that Pa. R.C.P. No. 2327(3) is not contingent upon whether the proposed intervenor has standing, or upon any criteria other than a demonstration that he or she could have joined or been joined as an original party. During oral argument they also asserted that they did not need to satisfy the test for standing because they were seeking to intervene as respondents rather than petitioners. Because Petitioners could have originally joined the Proposed Intervenors as respondents in this action challenging the constitutionality of the coverage ban, they should be permitted to intervene.

Proposed Intervenors also argue that they should be permitted to intervene pursuant to Pa. R.C.P. No. 2327(4) because they have a legally enforceable interest in protecting the scope of their legislative authority under the Pennsylvania Constitution. They assert that the Pennsylvania Supreme Court expressly held in Fischer that the coverage ban does *not* violate the equal protection guarantees contained in Article I, Section 1 and Article III, Section 32 of the Pennsylvania Constitution; therefore, the Proposed Intervenors currently have the authority to propose and/or vote for legislation that contains certain funding limitations. If Petitioners are successful in their ultimate goal of overturning Fischer, it will create new constitutional constraints on the General Assembly's authority to legislate and allocate funds, and the Proposed Intervenors will lose some of their authority to appropriate money from the State Treasury pursuant to Article II, Section 1 and Article III, Section 24 of the Pennsylvania Constitution. As such, Proposed Intervenors claim that they will suffer an injury personal to them as legislators;

therefore, this case is distinguishable from the recent Supreme Court decision in Markham v. Wolf (Markham II), 136 A.3d 134 (Pa. 2016).

Proposed Intervenors further argue that while Petitioners seek relief exclusively from DHS and its officials, DHS can only disburse funds in a manner authorized by legislation enacted by the General Assembly. They claim that in reality, Petitioners are seeking an order from this Court compelling the General Assembly to pass legislation that provides funding for abortions in all instances. Proposed Intervenors argue that this raises separation of powers concerns and implicates their exclusive power as legislators to appropriate Commonwealth funds. They further argue that if Petitioners prevail, the General Assembly may need to amend the coverage ban or pass new legislation. Therefore, they should be permitted to intervene so they may be heard on important questions concerning how much funding needs to be provided for abortion services, the manner in which the funding can or must be disbursed, or whether the General Assembly may impose other conditions, limitations or regulations on abortions and abortion-related services.

Finally, Proposed Intervenors argue that their interests are different from and not adequately represented by the named Respondents. They note that the named Respondents are all part of the executive branch of government and do not share the Proposed Intervenors' interest or duties in the appropriations process. They further claim that the Respondents' Preliminary Objections fail to raise all of the constitutional issues related to the General Assembly's appropriations power that arise from Petitioners' claims, and that this failure could negate or usurp the General Assembly's authority to make, or refuse to make, certain appropriations. Therefore,

Proposed Intervenors claim there is no basis to refuse the Applications under Pa. R.C.P. No. 2329[8] and they should be granted leave to intervene.

B. Petitioners' Arguments

Petitioners argue that the Applications should be denied because Proposed Intervenors lack standing to intervene. They argue that Proposed Intervenors have no role as legislators in implementing, enforcing or administering the coverage ban; therefore, there was no basis to join them as respondents in the Petition. Legislators are not and should not be afforded the general right to intervene in every case that challenges the constitutionality of a statute. See Robinson Township v. Commonwealth, 84 A.3d 1054 (Pa. 2014) (per curiam); First Philadelphia Preparatory Charter School v. Commonwealth, 179 A.3d 128 (Pa. Cmwlth. 2018).

Petitioners further argue that the Proposed Intervenors do not have standing because they lack a legally enforceable interest in this litigation. Petitioners note that legislators are only deemed to have such an interest in limited

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[8] Rule 2329 provides that an application for intervention shall be granted if the allegations have been established and are found to be sufficient. Pa. R.C.P. No. 2329. However, the rule also provides that:

> an application for intervention may be refused, if
> (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
> (2) the interest of the petitioner is already adequately represented; or
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Id.

circumstances, "where there [i]s a discernible and palpable infringement on their authority as legislators." Robinson Township, 84 A.3d at 1055 (quoting Fumo v. City of Philadelphia, 972 A.2d 487 (Pa. 2009)). As our Supreme Court recently reiterated, once "votes which [legislators] are entitled to make have been cast and duly counted, their interest as legislators ceases." Markham II, 136 A.3d at 141 (quoting Wilt v. Beal, 363 A.2d 876 (Pa. Cmwlth. 1976)). Petitioners claim they are not asking the Court to dictate how the General Assembly should budget and appropriate funds, merely to determine the constitutionality of the coverage ban, a power clearly committed to the judicial branch. As such, this litigation does not affect the Proposed Intervenors' appropriations power, their role as legislators has ended, and the separation of powers arguments are without merit.

Finally, Petitioners argue that the Applications should be denied because Proposed Intervenors' interest is adequately represented by the named Respondents, who are vigorously defending the constitutionality of the coverage ban. The fact that Proposed Intervenors may prefer a different litigation strategy or defense theory than that chosen by the Respondents is not an interest entitling them to intervene. Petitioners further argue that Proposed Intervenors have made no showing that the Respondents' defense of the coverage ban will be inadequate, and allowing them to intervene will unnecessarily complicate this litigation.

C. Analysis

First, I must address Proposed Intervenors' argument that standing plays no part in the intervention analysis here because they could have been joined as original parties, or because they are attempting to intervene as respondents rather

than as petitioners. It is well established that parties seeking to intervene must satisfy the standing requirements. See Markham II, 136 A.3d at 140; Markham v. Wolf (Markham I), (Pa. Cmwlth., No. 176 M.D. 2015, filed June 3, 2015), slip op. at 3 ("Standing is the touchstone by which we analyze applications to intervene."). Neither the Rules of Civil Procedure nor caselaw interpreting the rules regarding intervention make any distinction in the analysis based upon a proposed intervenor's status as petitioner versus respondent. To the contrary, Senator Scarnati sought to intervene as a respondent in Robinson Township, and both this Court and our Supreme Court utilized the standing requirements to analyze his application. Moreover, the concept of standing is inextricably linked to the question of intervention as Pa. R.C.P. No. 2327(4), upon which Proposed Intervenors specifically rely, states that an individual may intervene if the determination of the action may affect his or her legally enforceable interest.

I find unpersuasive the cases upon which Proposed Intervenors rely for their argument that standing principles are inapplicable if they could have joined or been joined as a party under Pa. R.C.P. No. 2327(3). While Proposed Intervenors were joined or intervened in a number of cases, there is no indication in any of the reported decisions that joinder was contested. Intervention is vigorously contested here. Because Proposed Intervenors' analysis presents such a significant departure from the traditional standing analysis, I decline to embark on that path without more express guidance from our Supreme Court.

For the foregoing reasons, Proposed Intervenors' argument in favor of side-stepping standing is without merit, and I now turn to the standard for demonstrating standing.

To have standing, a person must be aggrieved, meaning he or she "has a substantial, direct and immediate interest in the outcome of the litigation." Fumo, 972 A.2d at 496 (citing In re Hickson, 821 A.2d 1238, 1243 (Pa. 2003)). As our Supreme Court has explained:

> A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it. Yet, if that person is not adversely affected in any way by the matter he seeks to challenge[, he] is not "aggrieved" thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law.

In re Hickson, 821 A.2d at 1243 (internal citations omitted).

Our courts have specifically used these standing criteria when examining cases where legislators seek to bring or intervene in cases based upon their special status as legislators. In its recent decision in Markham II, our Supreme Court reviewed caselaw from both state and federal courts regarding the issue of legislative standing and distilled the following:

> legislative standing is appropriate only in limited circumstances. Standing exists only when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see Wilt,* [363 A.2d at 881,] or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see Fumo*[, 972 A.2d at 501] (finding standing due to alleged usurpation of legislators' authority to vote on licensing). These are injuries personal to the legislator, as a legislator. By contrast, a legislator lacks standing where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied. *Id.* (rejecting standing where legislators' interest was merely disagreement with way administrator interpreted or executed her duties, and did not interfere with legislators' authority as members of the General Assembly).

136 A.3d at 145.

Upon consideration of the above principles, I conclude that Proposed Intervenors are not aggrieved because their interest in the coverage ban and its implementing regulations is too indirect and insubstantial. The latest iteration of the coverage ban was voted on and went into effect in 1989; therefore, this litigation does not directly affect the Proposed Intervenors' ability to vote on legislation, nor does it dilute their vote. See Wilt, 363 A.2d at 881 ("Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action."). Simply put, once the votes on the coverage been were counted and it was signed into law, the legislators' connection with the transaction as legislators ended,

and they retained no personal stake in the outcome of their vote which differs from the stake of every citizen in seeing the law is observed. Id.

In particular, there is no inherent, on-going right to vote on future annual appropriations bills that refuse to provide funding for certain services such as abortions. I view this interest as too indirect and insubstantial to support a conclusion of aggreviement, as that term is understood in the standing context. See Markham II, 136 A.3d. at 145-46. Further, there is no obvious limiting principle for a standing analysis based on voting on future appropriation bills. Conceivably, such a boundless approach would enable any and all legislators to intervene in any matter involving state government. Concomitantly, as this argument is the main basis upon which Proposed Intervenors seek to distinguish our Supreme Court's recent decision in Markham II, I reject the attempt to distinguish the decision, and I adopt it as controlling here.

With all due respect, Proposed Intervenors' argument that the outcome of this case directly affects their appropriations power is tenuous at best. Petitioners' request for relief seeks a declaration that the coverage ban and its implementing regulations are unconstitutional, and an order enjoining their enforcement, as well as a declaration that abortion is a fundamental right in the Commonwealth. Despite Proposed Intervenors' arguments to the contrary, Petitioners are not asking the Court to mandate that the General Assembly enact specific legislation that funds abortion. Petitioners essentially admit in their brief to this Court that such mandamus relief would most likely violate the principle of separation of powers. Moreover, the mere fact that the General Assembly may want or need to propose additional legislation

if a court finds the coverage ban unconstitutional, and that this legislation may potentially involve the appropriation of funds, is not enough to establish a concrete, immediate impairment or deprivation of an official power or authority to act as a legislator. See Markham II, 136 A.3d at 145. Again, Proposed Intervenors' argument defeats the principle behind the standing requirement and goes against the reasoning developed in our cases analyzing legislative standing.

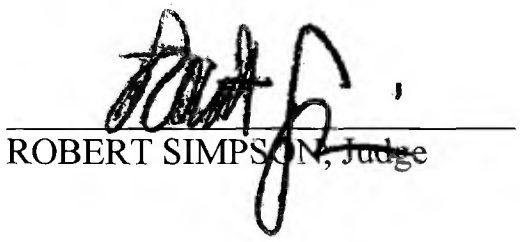
Proposed Intervenors also have no role in implementing, enforcing or administering the coverage ban and, notably, the agency and officials who do are already named as Respondents in this action. Moreover, I cannot accept Proposed Intervenors' overly broad contention that they can be joined as parties in **any** action challenging the constitutionality of a statute. If this were the case, there would have been no need for the legislative standing inquiry undertaken in Robinson Township. Such a blanket rule goes against the very purpose of the standing concept, which is to ensure that the parties are truly aggrieved or adversely affected by the matter they seek to challenge, above and beyond the common interest of all citizens of the Commonwealth. I also note that Proposed Intervenors' reliance upon MCT Transportation is misplaced, as that case specifically recognized that members of the General Assembly are not necessary parties in cases involving constitutional challenges to a statute. 60 A.3d at 904 n.7.

Nevertheless, I am not convinced Proposed Intervenors' interest in this litigation is adequately represented by the Respondents, given the vastly different responsibilities and powers of the executive and legislative branches of government as they relate to the coverage ban. However, because Proposed Intervenors failed to

show that they fall within one of the classes described in Pa. R.C.P. No. 2327, intervention must be denied regardless of whether any grounds for refusal of intervention exist. See LaRock v. Sugarloaf Township Zoning Hearing Board, 740 A.2d 308 (Pa. Cmwlth. 1999).

III. Conclusion

For the foregoing reasons, the Applications are denied. Proposed Intervenors may participate in this litigation as *amici curiae*, if they so desire.



ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Petitioners	:	
v.	:	No. 26 M.D. 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

ORDER

AND NOW, this 21st day of June, 2019, following argument on the Applications for Leave to Intervene filed by members of the Pennsylvania Senate and House of Representatives, the Applications are hereby **DENIED**.

ROBERT SIMPSON, Judge

Certified from the Record

JUN 21 2019

And Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Petitioners	:	
v.	:	No. 26 M.D. 2019
	:	Argued: October 4, 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION
BY PRESIDENT JUDGE LEAVITT FILED: January 28, 2020

Before this Court are two applications for leave to intervene. The first was filed by 18 members of the Pennsylvania State Senate[1] (Proposed Senate

[1] The Senate members' application was filed by President Pro Tempore Senator Joseph B. Scarnati, III, Majority Leader Senator Jacob Corman, and Senators Ryan Aument, Michele Brooks, John DiSanto, Michael Folmer, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw. Folmer filed a Praecipe to Withdraw as a Proposed Senate Intervenor on September 19, 2019.

Intervenors) and the second was filed by eight members of the Pennsylvania House of Representatives[2] (Proposed House Intervenors) (collectively, Proposed Intervenors). On June 21, 2019, the Court denied both applications to intervene in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 26 M.D. 2019, filed June 21, 2019) (single judge opinion by Judge Robert Simpson) (*Allegheny I*). Proposed Intervenors requested reargument, which this Court granted on July 22, 2019. Thereafter, the Court heard argument on whether Proposed Intervenors are entitled to intervene under Pennsylvania Rule of Civil Procedure No. 2327(3) and (4). Concluding that they have established grounds for intervention under Rule No. 2327(4), we grant the applications to intervene.

Background

On January 16, 2019, Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania (collectively, Reproductive Health Centers) filed a petition for review in the nature of a complaint seeking declaratory and injunctive relief against the Pennsylvania Department of Human Services; Teresa Miller, Secretary of Human Services; Leesa Allen, Executive Deputy Secretary for Medical Assistance Programs; and Sally Kozak, Deputy Secretary for the Office of Medical Assistance Programs (collectively, Department).

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[2] The House members' application was filed by Speaker Mike Turzai, House Majority Leader Bryan D. Cutler, Chairman of the House Appropriations Committee Stan E. Saylor, House Majority Whip Kerry A. Benninghoff, House Majority Caucus Chair Marcy Toepel, House Majority Caucus Secretary Michael Reese, House Majority Caucus Administrator Kurt A. Masser, and House Majority Policy Committee Chair Donna Oberlander.

In their petition for review, Reproductive Health Centers allege that they provide approximately 95 percent of the abortion services performed in the Commonwealth. Their patients include women enrolled in Medical Assistance,[3] which provides health insurance coverage to low-income persons. Medical Assistance coverage includes family planning and pregnancy-related care, such as prenatal care, obstetrics, childbirth, neonatal and post-partum care. However, Pennsylvania's Abortion Control Act[4] prohibits the expenditure of appropriated state and federal funds for abortion services unless (1) necessary to avert the death of the pregnant woman; (2) the pregnancy resulted from rape; or (3) the pregnancy resulted from incest. 18 Pa. C.S. §3215(c). Regulations promulgated by the Department prohibit Medical Assistance coverage for abortions except in these three circumstances. *See* 55 Pa. Code §§1141.57, 1163.62 and 1221.57.

The petition of Reproductive Health Centers contains two counts. Count I asserts that the Abortion Control Act and the Department's regulations, known as the "coverage ban," violate Pennsylvania's Equal Rights Amendment[5] because they deny coverage of a medical procedure that can be used only by women. Count II asserts that the coverage ban violates several other provisions of the Pennsylvania Constitution, *i.e.*, Article I, Sections 1 and 26 and Article III, Section 32,[6] that establish the guarantee of equal protection of the laws. Reproductive Health

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[3] Medical Assistance "is a joint federal and state program, and must be administered consistent with both federal and state law." *Eastwood Nursing and Rehabilitation Center v. Department of Public Welfare*, 910 A.2d 134, 136 (Pa. Cmwlth. 2006) (internal footnote and emphasis omitted).

[4] 18 Pa. C.S. §§3201-3220.

[5] It states:

> 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.

[6] Article I, Section 1 states:

Centers contend that the coverage ban restricts indigent women in the exercise of their right to terminate a pregnancy and thereby violates the Pennsylvania Constitution.

Reproductive Health Centers request this Court to declare 18 Pa. C.S. §3215(c) and (j) and the related regulations unconstitutional and to enjoin their enforcement.[7] In *Fischer v. Department of Public Welfare*, 502 A.2d 114, 116 (Pa.

> 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. I, §1. Section 26 states:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

PA. CONST. art. I, §26. Article III, Section 32 states, in relevant part, as follows:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law....

PA. CONST. art. III, §32.

[7] Section 3215(c) of the Abortion Control Act states:

> (c) Public funds.--No Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion, except:
>
> > (1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.
> >
> > (2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction and has been personally reported by the victim.
> >
> > (3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been

1985), our Supreme Court considered a 1985 constitutional challenge to the Abortion Control Act and rejected the claim that the case even concerned "the right

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> personally reported by the victim to a law enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

18 Pa. C.S. §3215(c). Section 3215(j) states:

> (j) Required statements.--No Commonwealth agency shall make any payment from Federal or State funds appropriated by the Commonwealth for the performance of any abortion pursuant to subsection (c)(2) or (3) unless the Commonwealth agency first:
>
> > (1) receives from the physician or facility seeking payment a statement signed by the physician performing the abortion stating that, prior to performing the abortion, he obtained a non-notarized, signed statement from the pregnant woman stating that she was a victim of rape or incest, as the case may be, and that she reported the crime, including the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction or, in the case of incest where a pregnant minor is the victim, to the county child protective service agency and stating the name of the law enforcement agency or child protective service agency to which the report was made and the date such report was made;
> >
> > (2) receives from the physician or facility seeking payment, the signed statement of the pregnant woman which is described in paragraph (1). The statement shall bear the notice that any false statements made therein are punishable by law and shall state that the pregnant woman is aware that false reports to law enforcement authorities are punishable by law; and
> >
> > (3) verifies with the law enforcement agency or child protective service agency named in the statement of the pregnant woman whether a report of rape or incest was filed with the agency in accordance with the statement.
>
> The Commonwealth agency shall report any evidence of false statements, of false reports to law enforcement authorities or of fraud in the procurement or attempted procurement of any payment from Federal or State funds appropriated by the Commonwealth pursuant to this section to the district attorney of appropriate jurisdiction and, where appropriate, to the Attorney General.

18 Pa. C.S. §3215(j).

to an abortion." It held that the funding restrictions in the Abortion Control Act did not offend Pennsylvania's Equal Rights Amendment or Article I, Sections 1 and 26 and Article III, Section 32 of the Pennsylvania Constitution. Reproductive Health Centers argue that *Fischer* was incorrectly decided; conflicts with recent developments in Pennsylvania law; and is inconsistent with the modern-day understanding that any restriction on a woman's reproductive autonomy is a form of sex discrimination. They further seek a declaration that abortion is a fundamental right under the Pennsylvania Constitution.

Allegheny I Ruling

On April 17, 2019, Proposed Intervenors filed their respective applications for leave to intervene.[8] On May 21, 2019, the Court held a hearing and heard oral argument. No evidence was proffered.

Proposed Intervenors asserted that they qualified for intervention under the Pennsylvania Rules of Civil Procedure. Specifically, they invoked Rule No. 2327(3), which authorizes intervention for persons that could have been named in the original action, and Rule No. 2327(4), which authorizes intervention for persons with a legally enforceable interest at issue. Reproductive Health Centers opposed their intervention, arguing that the Proposed Intervenors lacked standing to defend the constitutionality of a statute that was enacted in 1982.

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[8] On April 16, 2019, the Department filed preliminary objections in the nature of a demurrer to the petition for review filed by Reproductive Health Centers, asserting *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), established that Section 3215(c) and (j) of the Abortion Control Act is constitutional. The Department also asserts Reproductive Health Centers lack standing because they cannot sue on behalf of their patients. On April 17, 2019, Proposed House Intervenors also filed preliminary objections in the nature of a demurrer to the petition for review. On July 31, 2019, this Court suspended the briefing schedule on the preliminary objections until disposition of the applications for leave to intervene.

This Court denied intervention, reasoning, *inter alia*, that a putative intervenor must establish that he is "aggrieved," which requires "a substantial, direct and immediate interest in the outcome of the litigation" in order to be deemed to have standing. *Allegheny I*, slip op. at 14 (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). The Court concluded that Proposed Intervenors were not aggrieved, noting that the "last iteration of the coverage ban was voted on and went into effect in 1989...." *Id.* at 15. At that point, the interest of Proposed Intervenors ended. The Court dismissed the argument of Proposed Intervenors that the outcome of this litigation will limit their legislative power to appropriate funds as "tenuous." *Id.* at 16.

On July 22, 2019, this Court granted reargument to consider the challenge of Proposed Intervenors to the decision in *Allegheny I*.

Reargument Issues

Proposed Intervenors challenge this Court's denial of intervention on three grounds. First, they argue that the Court erred in holding that Proposed Intervenors had to establish the level of standing that is needed by a plaintiff to initiate a legal action. Second, they argue that the Court erred in holding that Proposed Intervenors could not have been named as parties in the action, a basis for intervention under Rule No. 2327(3). Third, they argue that the Court erred in holding they did not establish a legally enforceable interest in preserving the scope of their power to legislate, a basis for intervention under Rule No. 2327(4). However, Proposed Intervenors agree with this Court's holding with respect to Rule No. 2329, *i.e.*, that the Proposed Intervenors' interest in this litigation was not adequately represented by the Department.

Pennsylvania Law on Intervention

Intervention is governed by the Pennsylvania Rules of Civil Procedure. Rule No. 2327 states as follows:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have been named as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

PA. R.C.P. No. 2327. The corollary rule on intervention is found at Rule No. 2329, which sets forth the reasons for denying intervention. It states as follows:

> Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if
>
> > (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
> >
> > (2) the interest of the petitioner is already adequately represented; or

> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

PA. R.C.P. No. 2329.

This Court has held that a grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329. We reasoned as follows:

> Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that *if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.* Equally, if the petitioner does not show himself to be within one of the four classes described in Rule 2327, intervention must be denied, irrespective of whether any of the grounds for refusal in Rule 2329 exist. Thus, the court is given the discretion to allow or to refuse intervention only where the petitioner falls within one of the classes enumerated in Rule 2327 *and* only where one of the grounds under Rule 2329 is present which authorizes the refusal of intervention.

Larock v. Sugarloaf Township Zoning Hearing Board, 740 A.2d 308, 313 (Pa. Cmwlth. 1999) (internal citations omitted and emphasis added).

Proposed Intervenors argue that they are "such" persons identified as appropriate intervenors in Rule No. 2327(3) and (4) and, further, there exist no grounds for refusal of intervention under Rule No. 2329. Thus, they contend that the grant of their applications for leave to intervene was mandatory and that this Court erred in otherwise holding in *Allegheny I*.

I.

We begin with Pennsylvania Rule of Civil Procedure No. 2327(4) which permits intervention where the determination "*may affect* any legally enforceable interest" of a proposed intervenor. PA. R.C.P. No. 2327(4) (emphasis added). Proposed Intervenors assert that the litigation initiated by Reproductive Health Centers will certainly affect their power to legislate, *i.e.*, a "legally enforceable interest," particularly in the area of appropriating funds. Indeed, the petition for review rests expressly on Article III, Section 32 of the Pennsylvania Constitution, which is part of Chapter E, entitled "Restrictions on Legislative Power." *See* Petition for Review, ¶94 at 29. Proposed Intervenors argue that this litigation, if successful, will enlarge the restrictions on legislative power that are specified in Article III, Section 32 and create new restrictions.

There is a difference between personal standing and legislative standing, which difference this Court addressed in *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019). Therein, we explained that personal standing requires a party to have a direct, immediate, and substantial interest in order to initiate litigation. *See William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). Nevertheless, a legislator that lacks personal standing may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability "to act as a legislator." *Sunoco Pipeline*, 217 A.3d at 1291.

Legislative standing was first addressed by this Court in *Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976). There, State Representative Wilt sought to enjoin the Secretary of Public Welfare from using a newly constructed geriatric center as a mental healthcare facility; his standing as a legislator to initiate the action was

challenged. This Court summarized the relevant principles of legislative standing as follows:

> [L]egislators ... are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action. We find this distinction to be sound for it is clear that certain additional duties are placed upon members of the legislative branch which find no counterpart in the duties placed upon the citizens the legislators represent.

Id. at 881 (internal footnote omitted). Legislators have duties not shared with citizens, but enforcement of existing statutory law is not a special concern of legislators.

In *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009), state legislators challenged the City's issuance of a license for the construction of a casino upon submerged lands in the Delaware River. They asserted that the City's action had usurped their legislative authority to regulate riverbeds, a prerogative belonging solely to the General Assembly. The Supreme Court agreed, explaining as follows:

> Legislators and council members have been permitted to bring actions based upon their special status where there was a discernible and palpable infringement on their authority as legislators. The standing of a legislator or council member to bring a legal challenge has been recognized in limited instances in order to permit the legislator to seek redress for an injury the legislator or council member claims to have suffered in his official capacity, rather than as a private citizen. Legislative standing has been recognized in the context of actions brought to protect a legislator's right to vote on legislation or a council member's viable authority to approve municipal action. Legislative standing also has been recognized in actions alleging

> a diminution or deprivation of the legislator's or council member's power or authority. At the same time, however, legislative standing has not been recognized in actions seeking redress for a general grievance about the correctness of governmental conduct.

Id. at 501. Because the City had invaded the legislature's exclusive authority to regulate riverbeds, the Supreme Court concluded that the legislators had legislative standing to challenge the City's action.[9]

More recently, our Supreme Court addressed legislative standing in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016). In that case, state legislators sought to intervene in a civil action challenging an executive order that authorized home healthcare workers to organize. The Supreme Court listed the requirements of legislative standing as follows:

> Standing exists only when a legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see Wilt*, or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see Fumo* (finding standing due to alleged usurpation of legislators' authority to vote on licensing).

Id. at 145. Conversely, a legislator lacks standing

> where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirement being unsatisfied.

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[9] The legislators did not have standing to challenge the manner in which the license was issued because that claim did not "demonstrate any interference with or diminution in the state legislators' authority as members of the General Assembly[.]" *Fumo*, 972 A.2d at 502.

Id. The Supreme Court concluded that the legislators did not demonstrate that the executive order impacted their "ability to propose, vote on or enact legislation." *Id.* Indeed, they were free to enact legislation that would overrule the executive order. In short, the legislators lacked the legally cognizable interest required for intervention.

Proposed Intervenors assert that *Markham* is distinguishable and did not hold that legislators had to meet the standards of *William Penn Parking,* 346 A.2d 269, merely to intervene in existing litigation. Rather, they argue that the standards for intervention are governed by the rules of procedure that govern a tribunal's proceedings. In *Sunoco Pipeline,* 217 A.3d at 1288, this Court acknowledged this point. We noted that the standard for intervention in a proceeding before the Public Utility Commission is easily satisfied. *See* 52 Pa. Code §5.72(a)(3) (Public Utility Commission regulation permitting intervention where it "may be in the public interest."). Thus, it does not follow that because a legislator was permitted to intervene in a Commission proceeding that he has standing to initiate a proceeding before the Commission. Simply, the test for standing to initiate litigation is not co-terminus with the test for intervention in existing litigation

Nevertheless, the principles of legislative standing are relevant to a determination of whether a putative intervenor has demonstrated a "legally enforceable interest" for purposes of Rule No. 2327(4). Here, Proposed Intervenors argue that the outcome sought by Reproductive Health Centers could narrow their ability to exercise "legislative power," particularly in the matter of appropriation. Under Article III, Section 24 of the Pennsylvania Constitution, state government cannot expend funds "except on appropriations made by law" by the General

Assembly. PA. CONST. art. III, §24.[10] The ruling sought by Reproductive Health Centers will directly limit the General Assembly's exclusive authority to appropriate moneys from the treasury, a principle long recognized by our Supreme Court. Accordingly, in *Shapp v. Sloan,* 391 A.2d 595 (Pa. 1978), the Supreme Court held that executive branch agencies cannot spend moneys obtained by federal grants unless and until those funds are appropriated by the legislature. Proposed Intervenors argue that because the instant litigation "may affect" their power to appropriate funds, they are entitled to intervene under Rule No. 2327(4).

Reproductive Health Centers deny that they seek to expand the restrictions on legislative power set forth in Article III, noting that this petition for review only cites Article III, Section 32 because it is part of the construct of equal protection in the Pennsylvania Constitution. They also argue that legislators have no interest in the enforcement of the Abortion Control Act and, in support, invoke *Robinson Township v. Commonwealth*, 84 A.3d 1054, 1055 (Pa. 2014). In that case, legislators were denied intervention in a constitutional challenge to "Act 13" of the Oil and Gas Act.[11] The legislators wanted to offer "their perspective on the correctness of governmental conduct, *i.e.,* that the General Assembly did not violate the substantive and procedural strictures of the Pennsylvania Constitution in enacting Act 13." *Id.* at 1055. The Supreme Court rejected this proffer because it

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[10] Article III, Section 24 states:

> No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.

PA. CONST. art. III, §24.

[11] Act 13 is codified at 58 Pa. C.S. §§2301-3504.

did not relate to a "defense of the potency of their right to vote," and legislators do not have the right to offer "their perspective on the correctness of their conduct." *Id.*

What distinguishes this case from *Markham* or *Robinson Township* is that the instant litigation relates directly to the legislative power to appropriate. To be sure, this Court dismissed this argument as "tenuous at best" in *Allegheny I. See Allehgheny I,* slip op. at 16. Proposed Intervenors challenge this dismissive statement as conclusory and unfounded. They argue that the object of this litigation is to change the substance and manner by which the General Assembly can appropriate funds in the future for the Medical Assistance program. We agree.

Article III of the Pennsylvania Constitution is entirely dedicated to the subject of "legislation." It imposes standards for the form and consideration of bills and their passage and contains numerous provisions that relate directly to appropriations. *See, e.g.*, Article III, Section 3 (Form of Bills), Section 11 (Appropriation Bills),[12] and Section 24 (Paying Out Public Moneys). PA. CONST. art. III, §§3, 11, 24. A general appropriation act often contains language that is conditional or incidental to the subject of appropriation. *See, e.g., Commonwealth ex rel. Greene v. Gregg*, 29 A. 297, 298 (Pa. 1894) (holding that designating funds for Supreme Court prothonotary was permissible incidental language in a general appropriation act). Opinions of the Pennsylvania Attorney General have repeatedly approved the use of incidental language in a general appropriations act. *See, e.g.*, Op. Atty. Gen. No. 59 (1958), and Op. Atty. Gen. No. 12 (1957). Indeed, the use of

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[12] It states:

> The general appropriation bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools. All other appropriations shall be made on separate bills, each embracing but one subject.

PA. CONST. art. III, §11.

conditional language in a general appropriation act enjoys wide currency in many states. As the Michigan Supreme Court has explained,

> The tieing of legislative strings to appropriation of state funds for governmental purposes has never been considered as adding a second object to an appropriation law[.]

Lewis v. State, 90 N.W.2d 856, 860 (Mich. 1958) (quoting an opinion of the Michigan Attorney General).

The Abortion Control Act is part of the Crimes Code. If Reproductive Health Centers are successful in their litigation, the challenged provisions will be rendered null and void. However, the constitutional principle Reproductive Health Centers seek to establish will extend beyond the statute and the Department's regulations. It could bar the General Assembly from "tieing legislative strings" to its appropriation of funds for the Medical Assistance program. Reproductive Health Centers freely acknowledge this point. They believe that if they succeed in this litigation, the general appropriation act could not, for example, condition funding of Medical Assistance to coverage of only those reproductive health services that will ensure a full-term pregnancy. Similarly, the general appropriation act could not tie Medical Assistance funding for abortion services to the availability of federal funds.[13]

Reproductive Health Centers seek to restrict the substance and form of appropriation bills. They seek to eliminate the ability of legislators to add conditional or incidental language to a general appropriation act insofar as it relates

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[13] In *Fischer*, 502 A.2d at 119, our Supreme Court discussed the Hyde Amendment, which limits federal funding of abortion to life-threatening situations, and observed that in *Harris v. McRae*, 448 U.S. 297 (1980), the federal limit had been held not to contravene the right of indigent women to abortion in other circumstances.

to providing coverage of reproductive health services for indigent woman enrolled in Medical Assistance. Likewise, they seek to expand the prohibition against special laws in Article III, Section 32 to eliminate the General Assembly's power to decide the circumstances under which abortion services will be funded by the treasury.

Proposed Intervenors seek to do more than offer "their perspective on the correctness of their conduct." *Robinson Township*, 84 A.3d at 1055. Article III is peculiar to the legislative branch of state government, imposing both strictures and responsibilities. Proposed Intervenors seek to preserve their voting power as it currently exists under Article III and their authority to appropriate Commonwealth funds, a key legislative duty. As our Supreme Court has explained, the "General Assembly enacts the legislation establishing those programs which the state provides for its citizens and appropriates the funds necessary for their operation. The executive branch implements the legislation by administering the programs." *Shapp*, 391 A.2d at 604. In doing so, the executive branch must abide by "the requirements and restrictions of the relevant legislation, and within the amount appropriated by the legislature." *Id. See also Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008).

Proposed Intervenors seek to preserve their authority to propose and vote on funding legislation in the future. The constitutional authority of the members of the General Assembly to control the Commonwealth's finances constitutes a legally enforceable interest that entitles them to intervene and be heard before the Court rules in this matter.

We conclude that Proposed Intervenors have established grounds to intervene pursuant to Rule No. 2327(4) and so hold.

II.

Rule No. 2329 prohibits intervention if the interest of the proposed intervenor is already adequately represented or intervention will cause undue delay or prejudice. PA. R.C.P. No. 2329(2) and (3).[14] Proposed Intervenors claim that their interest is not shared with the Department. In fact, in *Allegheny I*, this Court acknowledged that Proposed Intervenors' interest may not be adequately represented by the Department "given the vastly different responsibilities and powers of the executive and legislative branches of government as they relate to the coverage ban." *Allegheny* I, slip op. at 17. Nor has prejudice been shown. As noted by Proposed Senate Intervenors, "although there are multiple Proposed Intervenors, they speak herein with one, unified voice – a voice that represents an entirely different set of long-term interests and goals from [the Department]." Proposed Senate Intervenors' Brief at 17. The Department has no legally enforceable interest in matters relating to Commonwealth appropriations. An executive branch agency is simply not in a position to represent Proposed Intervenors' interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.

Reproductive Health Centers counter that even if intervention was appropriate under Rule No. 2327, this Court should deny intervention because Proposed Intervenors will unduly delay, embarrass or prejudice the case in contravention of Rule No. 2329(3). They contend that the sheer number of Proposed Intervenors will unnecessarily complicate the matter. However, Reproductive Health Centers cite neither precedent nor evidence to support their contention that

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[14] Rule No. 2329(l) applies to cases where "the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action[.]" PA. R.C.P. No. 2329(1). This subsection is not at issue in this case.

legislator intervention has ever unduly complicated the orderly process of a judicial proceeding.

As held in *Allegheny I*, Proposed Intervenors' interest in the case will not be represented by the Department. This holding is unassailable under *Shapp v Sloan,* 391 A.2d at 604. Reproductive Health Centers' contention that Proposed Intervenors will cause prejudice or delay relies upon no more than speculation and, thus, is rejected as unfounded.

Conclusion

For all the above reasons, we conclude that Proposed Intervenors have established grounds to intervene pursuant to Rule No. 2327(4) and have established that none of the grounds for refusal set forth in Rule No. 2329 are applicable.[15] Accordingly, we grant Proposed Intervenors' applications for leave to intervene.

MARY HANNAH LEAVITT, President Judge

Judge Fizzano Cannon did not participate in the decision in this case.

[15] Because we grant intervention pursuant to Rule No. 2327(4), we need not decide whether Proposed Intervenors are also entitled to intervention under Rule No. 2327(3).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP, Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania, Petitioners	:	
v.	:	No. 26 M.D. 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

ORDER

AND NOW, this 28th day of January, 2020, the applications for leave to intervene filed by members of the Pennsylvania State Senate and by members of the Pennsylvania House of Representatives are hereby GRANTED.

Pursuant to this Court's order of July 31, 2019 (granting a stay pending disposition of the applications for leave to intervene), Respondents shall file a brief in support of their preliminary objections within 30 days of this order.

MARY HANNAH LEAVITT, President Judge

IN THE COMMONWEALTH 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, Petitioners	:	
v.	:	No. 26 M.D. 2019
	:	Argued: October 14, 2020
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge[1]
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION
BY PRESIDENT JUDGE LEAVITT FILED: March 26, 2021

[1] This case was assigned to the opinion writer before January 4, 2021, when Judge Leavitt completed her term as President Judge.

Petitioners are 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, Reproductive Health Centers). They are medical providers licensed by the Commonwealth of Pennsylvania to provide abortion services. Reproductive Health Centers have filed a petition for review seeking declaratory and injunctive relief, asserting that Sections 3215(c) and (j) of the Abortion Control Act[2] are unconstitutional because they discriminate against pregnant women enrolled in Medical Assistance who choose to have an abortion.

Respondents are the Pennsylvania Department of Human Services; the Secretary of Human Services, Teresa Miller; the Executive Deputy Secretary of Human Services, Leesa Allen; and the Deputy Secretary for the Office of Medical Assistance Programs, Sally Kozak (collectively, Commonwealth Respondents). The Commonwealth Respondents have moved to dismiss the petition, asserting that Reproductive Health Centers lack standing to raise constitutional claims that belong to other persons, *i.e.*, women enrolled in Medical Assistance. The Commonwealth Respondents also assert, along with the Intervenors,[3] that the petition for review fails to state a legally cognizable claim under the Pennsylvania Constitution.

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[2] 18 Pa. C.S. §3215(c), (j).

[3] Senate Intervenors are Senators Joseph B. Scarnati, III, Jacob Corman, Ryan Aument, Michele Brooks, John DiSanto, John Gordner, Scott Hutchinson, Wayne Langerhole, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, Eugene Yaw, and David Arnold. On February 9, 2021, the parties filed a stipulation to dismiss Senators Scarnati and Arnold from the action. On February 10, 2021, the Court marked the action discontinued and ended as to Senators Scarnati and Arnold.

For the reasons that follow, we sustain the preliminary objections and dismiss the petition.

Background

Medicaid is a joint federal-state public program that provides medical services to low-income persons; in Pennsylvania, it is known as Medical Assistance and administered by the Department of Human Services. Petition for Review ¶40, ¶¶44-45. Medical Assistance includes a Fee-for-Service program that "reimburses providers directly for covered medical services provided to enrollees" as well as a managed care program, HealthChoices, that "pays a per enrollee amount to managed care organizations that agree to reimburse health care providers that provide care for enrollees." *Id.* ¶46. "With some exceptions, Medical Assistance enrollees are required to enroll with a managed care organization participating in HealthChoices rather than the Fee-for-[S]ervice program." *Id.* ¶47.

Medical Assistance covers family planning and pregnancy-related care, including prenatal care, obstetrics, childbirth, neonatal, and post-partum care. Petition for Review ¶48. Medical Assistance does not cover nontherapeutic abortions. *Id.* ¶50. Pennsylvania's Abortion Control Act[4] prohibits the expenditure of appropriated state and federal funds for abortion services except where (1) necessary to avert the death of the pregnant woman, (2) the pregnancy resulted from rape, or (3) the pregnancy resulted from incest. 18 Pa. C.S. §3215(c). Likewise, regulations of the Department of Human Services prohibit Medical Assistance

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House Intervenors are Representatives Bryan D. Cutler, Stan E. Saylor, Kerry A. Benninghoff, Marcy Toepel, Donna Oberlander, Michael Reese, Kurt A. Masser, and Martin T. Causer.

[4] 18 Pa. C.S. §§3201-3220.

coverage for abortions, except in the above-listed exceptional cases.[5] *Id.* ¶50. Collectively, the Abortion Control Act and the Department's regulations are referred to as the "coverage ban." *Id.* ¶¶49-50.

On January 16, 2019, Reproductive Health Centers filed a petition for review seeking declaratory and injunctive relief in order to end this coverage ban. Reproductive Health Centers provide approximately 95% of the abortion services performed in the Commonwealth. Petition for Review ¶33. Their patients include women enrolled in Medical Assistance. *Id.* ¶57. The coverage ban prohibits Reproductive Health Centers from billing or being reimbursed for abortion services provided to women enrolled in Medical Assistance whose pregnancies do not fall into one of the three above-enumerated exceptions. *Id.* ¶52.

The petition alleges that the coverage ban harms women enrolled in Medical Assistance because they are forced to choose between continuing their pregnancy to term or using funds needed for essentials of life to pay for an abortion procedure. Petition for Review ¶59. Because the facilities in Pennsylvania that perform abortions are few in number, some women must travel significant distances to obtain a safe and legal abortion. *Id.* ¶60. If abortion were a covered procedure, some of those transportation costs would be reimbursed by Medical Assistance. *Id.* The coverage ban causes women on Medical Assistance to delay an abortion while they raise funds to pay for the procedure. *Id.* ¶61. Although Reproductive Health Centers assist their Medical Assistance patients to obtain this funding, they are not always successful. *Id.* ¶62. The coverage ban has forced many women to carry their pregnancies to term against their will. *Id.* ¶¶63-64.

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[5] *See* 55 Pa. Code §§1141.57, 1163.62 and 1221.57.

The petition alleges that the coverage ban has also caused direct harm to Reproductive Health Centers. Specifically, the coverage ban forces them to divert money and staff from "other mission-central work" to help women enrolled in Medical Assistance who lack the funds to pay for their abortions. Petition for Review ¶84. Reproductive Health Centers "regularly subsidize (in part or in full) abortions for Pennsylvania women on Medical Assistance who are not able to pay the fee on their own." *Id.* ¶85. Reproductive Health Centers expend "valuable staff resources to assist patients in securing funding from private charitable organizations that fund abortion[s] for women on Medical Assistance." *Id.* ¶86. Staff must also delve "into personal matters that the patient may not wish to discuss," *i.e.*, whether the pregnancy was the result of rape or incest. *Id.* ¶87.

The petition for review contains two counts. Count I asserts that the coverage ban violates Article I, Section 28 of the Pennsylvania Constitution, commonly referred to as Pennsylvania's Equal Rights Amendment,[6] because it denies coverage of a medical procedure that can be used only by women. Count II asserts that the coverage ban violates several other provisions of the Pennsylvania

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[6] The Equal Rights Amendment provides:

> Equality of rights under the law shall not be abridged in the Commonwealth of Pennsylvania because of the sex of the individual.

PA. CONST. art. I, §28.

Constitution, specifically Article I, Sections 1[7] and 26[8] and Article III, Section 32,[9] that establish the guarantee of equal protection of the laws. Asserting that the coverage ban unconstitutionally restricts indigent women in the exercise of their right to terminate a pregnancy, Reproductive Health Centers request this Court to declare the coverage ban unconstitutional and to enjoin its enforcement.

The Commonwealth Respondents, along with the Senate Intervenors and the House Intervenors, have filed preliminary objections in the nature of a demurrer. Specifically, they assert that the petition for review fails to state a cause of action upon which relief can be granted. In addition, the Commonwealth Respondents assert that Reproductive Health Centers lack standing to vindicate the individual constitutional rights of other parties, *i.e.*, all women enrolled in Medical Assistance.[10]

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[7] This Section states:

> 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. I, §1.

[8] This Section provides:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

PA. CONST. art. I, §26.

[9] This Section states, in part:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law[.]

PA. CONST. art. III, §32.

[10] Four *amici curiae* briefs were filed in support of Reproductive Health Centers' position. *Amici* are: (1) The National Health Law Program; (2) New Voices for Reproductive Justice and Pennsylvania and National Organizations Advocating for Black Women and Girls; (3) Members of the Democratic Caucuses of the Senate of Pennsylvania and the Pennsylvania House of

Preliminary Objections

In reviewing preliminary objections in the nature of a demurrer, this Court "must accept as true all well pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom." *Buoncuore v. Pennsylvania Game Commission*, 830 A.2d 660, 661 (Pa. Cmwlth. 2003). We are not required to accept as true "conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Id.* For this Court to sustain preliminary objections, "it must appear with certainty that the law will not permit recovery[.]" *McCord v. Pennsylvania Gaming Control Board*, 9 A.3d 1216, 1218 n.3 (Pa. Cmwlth. 2010) (quotation omitted). Where there is any doubt, this Court will overrule the preliminary objections. *Fumo v. Hafer*, 625 A.2d 733, 734 (Pa. Cmwlth. 1993).

I. Standing

We begin with the assertion of the Commonwealth Respondents that Reproductive Health Centers lack standing to initiate litigation to vindicate the constitutional rights of their patients enrolled in Medical Assistance. Although the petition for review alleges that the coverage ban causes Reproductive Health Centers to provide abortion services at a loss, the Commonwealth Respondents respond that these alleged pecuniary and administrative harms do not fall within the zone of interests protected by the Equal Rights Amendment and the equal protection clause of the Pennsylvania Constitution, or by the Abortion Control Act. In short, the Commonwealth Respondents assert that Reproductive Health Centers lack standing to bring this action either in their own right or on behalf of women enrolled in Medical Assistance who seek an abortion.

Representatives; and (4) The Pennsylvania Religious Coalition for Reproductive Justice (PARCRJ).

Generally, "a party seeking judicial resolution of a controversy 'must establish as a threshold matter that he has standing to maintain the action.'" *Johnson v. American Standard*, 8 A.3d 318, 329 (Pa. 2010) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). Our Supreme Court explained in the seminal case *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), that

> [t]he core concept, of course, 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. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law.

Id. at 280-81 (footnote omitted).

In determining whether a person is aggrieved, courts consider whether the person has a substantial, direct, and immediate interest in the claim sought to be litigated. *Fumo*, 972 A.2d at 496. In this regard, our Supreme Court has established the following principles:

> A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.... A "direct" interest requires a showing that the matter complained of caused harm to the party's interest.... An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, ... and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

South Whitehall Township Police Service v. South Whitehall Township, 555 A.2d 793, 795 (Pa. 1989) (citations omitted). The "keystone to standing in these terms is

that the person must be negatively impacted in some real and direct fashion." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (quoting *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005)). Critically, our Court has held that generally a "party may not contest the constitutionality of a statute because of its effect on the putative rights of other persons or entities." *Philadelphia Facilities Management Corporation v. Biester*, 431 A.2d 1123, 1131 (Pa. Cmwlth. 1981) (citations omitted).

Reproductive Health Centers contend that they have standing to assert the constitutional rights of others, *i.e.*, their patients enrolled in Medical Assistance. They point out that this Court has specifically allowed medical professionals to assert the constitutional rights of their patients. The Commonwealth Respondents rejoin that this was allowed in the narrow circumstance where the constitutional interests of those medical providers and their patients were inextricably entwined. They contend that circumstance does not exist here.

In *Harrisburg School District v. Harrisburg Education Association*, 379 A.2d 893 (Pa. Cmwlth. 1977), two labor unions representing striking teachers of the school district appealed a trial court order enjoining their teacher members from picketing at the homes of school board members. The trial court held that the school district had standing to represent the interests of its school board members. This Court held otherwise, concluding that the school board members' right to privacy was not "inextricably bound up" with the school district's collective bargaining interests. *Id.* at 896. Additionally, there was no obstacle to the school board members bringing an action on their own to protect their privacy interests.

In reaching this conclusion, this Court applied the analytical paradigm developed in *Singleton v. Wulff*, 428 U.S. 106 (1976), for determining a litigant's

standing to assert the constitutional rights of others. In *Singleton*, drawing on precedent, the United States Supreme Court held, first, that courts should not adjudicate constitutional rights unnecessarily because, *inter alia*, it may be that the holders of these rights do not wish to assert them. Second, the Supreme Court held, as characterized by this Court, that

> third parties themselves usually will be the best proponents of their own rights. The courts depend upon effective advocacy, and therefore should *prefer to construe legal rights only when the most effective advocates of those rights are before them.*

Harrisburg School District, 379 A.2d at 895 (emphasis added). Using the *Singleton* analytical framework, this Court concluded that the Harrisburg School District lacked standing. The school district's collective bargaining interests were not inextricably connected to the privacy interests of its board members to feel secure in their homes.

In *Pennsylvania Dental Association v. Department of Health*, 461 A.2d 329 (Pa. Cmwlth. 1983), the dental association challenged an amendment to the standard agreement between Pennsylvania Blue Shield and each participating dentist, which had been approved by the Pennsylvania Department of Health.[11] The amendment gave Blue Shield access to patient files when necessary to audit the dentist. The dental association asserted that this contract amendment violated the

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[11] An organization does not have standing by virtue of its purpose. *See Armstead v. Zoning Board of Adjustment of City of Philadelphia*, 115 A.3d 390, 399-400 (Pa. Cmwlth. 2015). Nevertheless, an organization may have standing to bring a cause of action if at least one of its members has standing individually. *North-Central Pennsylvania Trial Lawyers Association v. Weaver*, 827 A.2d 550, 554 (Pa. Cmwlth. 2003). "Where the organization has not shown that any of its members have standing, the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing." *Americans for Fair Treatment, Inc. v. Philadelphia Federation of Teachers*, 150 A.3d 528, 534 (Pa. Cmwlth. 2016).

constitutional right to privacy of its members and their patients. This Court held that the dental association had standing because the privacy interests of its member dentists were "inextricably bound up" with the privacy interests of their patients. *Id.* at 331. We explained that

> *unless individual patients had some means of knowing that the effect of the [Blue Shield amendment] may be to disclose some medical information which they may be entitled to withhold* by invoking their constitutional claim of privacy, the only way those rights could be protected would be by the dentist who is responsible for the patient's records.

Id. (emphasis added).

As noted above, this Court adopted the *Singleton* analytical framework in *Harrisburg School District.* We later confirmed that adoption in *Pennsylvania Dental Association*, stating that the "exceptions set forth in *Singleton* appl[y]." *Pennsylvania Dental Association*, 461 A.2d at 331. It is not lost on the Court that in *Singleton,* the United States Supreme Court held that licensed physicians had standing to challenge the constitutionality of a Missouri statute excluding Medicaid coverage of abortions that were not medically indicated. It does not follow, however, that the *Singleton* holding requires the conclusion that Reproductive Health Centers have standing to challenge Pennsylvania's coverage ban in this Court.

In federal courts, standing jurisprudence springs from Article III of the United States Constitution, which requires a case in controversy. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Our Supreme Court has explained that in Pennsylvania's state courts, standing precepts are not derived from the Pennsylvania Constitution, and, further, our state courts "are not governed by Article III and are thus not bound to adhere to the federal definition of standing." *In re Hickson*, 821

A.2d 1238, 1243 n.5 (Pa. 2003). Pennsylvania's standing doctrine "is a prudential, judicially-created tool meant to winnow out those matters in which the litigants have no direct interest in pursuing the matter." *Id.* at 1243. *Singleton's* grant of standing to physicians to challenge the Missouri coverage ban under the United States Constitution is interesting but irrelevant because Reproductive Health Centers are in state court and assert only state constitutional claims.

Standing in Pennsylvania's courts requires a substantial, direct, and immediate interest in the matter sought to be litigated. *William Penn Parking*, 346 A.2d at 280-82. That prime directive informs our application of the *Singleton* paradigm to determine whether Reproductive Health Centers have standing to assert the claims of some of their patients that the coverage ban violates their rights under the Equal Rights Amendment and the equal protection clause of the Pennsylvania Constitution.

We conclude that the application of the *Singleton* paradigm leads to a different conclusion in this case. First, to allow Reproductive Health Centers to assert the rights of others will require this Court to rule on constitutional questions when the Court has no way of knowing that the patients on whose behalf Reproductive Health Centers purport to speak even want this assistance. Second, the petition for review does not allege facts to show that the interests of Reproductive Health Centers are "inextricably bound up" with the equal protection rights of their patients. *Harrisburg School District*, 379 A.2d at 896. By contrast, in *Pennsylvania Dental Association*, the interest of the dentists and their patients were aligned perfectly on their shared constitutional right of privacy. Third, we can ascertain no reason, and none is alleged, why women enrolled in Medical Assistance cannot assert the constitutional claims raised in the petition for review on their own behalf.

Unlike the patients in *Pennsylvania Dental Association*, who had no way of knowing that their privacy interests were at stake, the patients of Reproductive Health Centers will be informed, in advance, that abortion services are not covered by Medical Assistance. There is no obstacle to these patients initiating litigation on their own behalf, and none is alleged in the petition for review.

In *Fischer v. Department of Public Welfare*, 444 A.2d 774 (Pa. Cmwlth. 1982) (*Fischer I*), the lead petitioner was a taxpayer, but other petitioners were indigent women advised to terminate their pregnancies for medical reasons. Thereafter a second amended petition for review was filed, and the case was tried before the Commonwealth Court. This Court, in a single-judge opinion by Judge McPhail, concluded that the coverage ban violated the equal protection clause and the Equal Rights Amendment of the Pennsylvania Constitution. *Fischer v. Department of Public Welfare*, 482 A.2d 1137 (Pa. Cmwlth. 1984) (*Fischer II*).[12] Notably, the Department of Public Welfare challenged the standing of some of the petitioners, including clergy and non-profit organizations, at trial. However, this Court held that the issue of standing had been waived because it had not been raised in the Department's pleading. *Id.* at 1139, n.11. The history of the *Fischer* litigation shows that women enrolled in Medical Assistance are fully able to pursue the constitutional claims raised in the instant petition for review without the assistance of their medical providers.

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[12] Thereafter, the Department of Public Welfare filed exceptions to the *decree nisi* entered by Judge McPhail. In an *en banc* decision, this Court sustained the exceptions in part. *Fischer v. Department of Public Welfare*, 482 A.2d 1148 (Pa. Cmwlth. 1984) (*Fischer III*). This Court held that the Abortion Control Act did not violate the Equal Rights Amendment or the equal protection clause of the Pennsylvania Constitution. It affirmed the injunction against enforcing the requirement that the victim of rape or incest report its occurrence within 72 hours to qualify for Medical Assistance coverage of an abortion. The Department did not appeal this injunction. *Fischer v. Department of Public Welfare*, 502 A.2d 114, 117 n.8 (Pa. 1985) (*Fischer IV*).

We conclude that Reproductive Health Centers do not have standing to vindicate 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. The interests of Reproductive Health Centers are not inextricably bound up with the equal protection interests of all women enrolled in Medical Assistance.

Alternatively, Reproductive Health Centers assert that they have standing because they perform abortions at a financial loss. Petition for Review ¶36. Specifically, they "lose money" because they "regularly subsidize (in part or in full) abortions for Pennsylvania women on Medical Assistance who are not able to pay the fee on their own." *Id.* ¶85. Further, their staff must assist patients to secure funding and question patients about personal matters to determine if they qualify for a coverage ban exception. *Id.* ¶¶84-87. Reproductive Health Centers acknowledge that the purpose of Pennsylvania's Equal Rights Amendment is to prohibit "sex-based discrimination by government officials in Pennsylvania." *Id.* ¶89. Likewise, they acknowledge that equal protection provisions guarantee "equal protection of the law" and prohibit "discrimination."[13] *Id.* ¶94. Reproductive Health Centers do not allege that they have been the victim of sex discrimination or denied equal protection of the law in violation of the Pennsylvania Constitution.

The harms to Reproductive Health Centers identified in their pleading are administrative or pecuniary, which do not bear a causal relationship to the constitutional claims presented in their petition for review. As such, their interest in

[13] As determined by the *Fischer IV* Court, the right at issue is the "purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights." *Fischer IV,* 502 A.2d at 121. *Fischer IV* established that there is no fundamental right to have the state fund the exercise of the right to an abortion.

the litigation they seek to advance is not "substantial, direct[,] and immediate." *Funk v. Wolf*, 144 A.3d 228, 243 (Pa. Cmwlth. 2016) (quoting *Fumo*, 972 A.2d at 496). An "immediate" interest requires a "causal connection between the action complained of and the injury to the party challenging it." *South Whitehall Township Police Service*, 555 A.2d at 795. Stated otherwise, to have standing, the litigant must show that its interest falls "arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question." *Application of Biester*, 409 A.2d 848, 851 n.6 (Pa. 1979) (citation omitted) (quotations omitted).

Here, the interest "protected or regulated" by the coverage ban is "the life and health of the women subject to abortion and to protect the life and the health of the child subject to abortion." 18 Pa. C.S. §3202(a). The interests sought to be protected by the Pennsylvania Constitution are the guarantee to equal protection of the laws and the prohibition against discrimination on the basis of sex. Reproductive Health Centers' asserted administrative and pecuniary interests do not fall within the "zone of interests" addressed in either the Abortion Control Act or the Pennsylvania Constitution.

Applying the principles established in *William Penn Parking* and *Harrisburg School District*, we hold that Reproductive Health Centers lack standing to vindicate the constitutional rights of third parties, who may or may not agree with this litigation brought on their behalf. They have not alleged harms to their own interests that are protected by the provisions of the Pennsylvania Constitution that they seek to vindicate. Accordingly, we will sustain the Commonwealth Respondents' demurrer to the petition for review for the reason that Reproductive Health Centers lack standing.

II. Failure to State a Claim

In *Fischer IV*, 502 A.2d 114, the Pennsylvania Supreme Court considered each constitutional claim raised in the petition for review *sub judice*. At the outset, the Supreme Court stated that "[t]his case does not concern the right to an abortion." *Id.* at 116. Rather, the Supreme Court defined the question as whether, "because this Commonwealth provides funds to indigent women for a safe delivery," it is "equally obliged to fund an abortion." *Id.* The Supreme Court concluded that the answer was no. It held, expressly, that the coverage ban did not violate any of the provisions of the Pennsylvania Constitution cited in the instant petition for review. This Court is bound by the decisions of the Pennsylvania Supreme Court. *Zauflik v. Pennsbury School District*, 72 A.3d 773, 783 (Pa. Cmwlth. 2013). On this basis, the Commonwealth Respondents and the Intervenors have demurred to the instant petition for review.

In *Fischer IV*, the appellants were a taxpayer, several women enrolled in medical assistance who were pregnant and desired nontherapeutic abortions, a clergyman, medical providers of abortion services and a charitable organization that counseled rape victims (collectively, *Fischer* appellants). The *Fischer* appellants challenged the constitutionality of the coverage ban, arguing that it violated the following provisions of the Pennsylvania Constitution: the equal protection guarantees contained in Article I, Section 1 and Article III, Section 32; the anti-discrimination prohibition in Article I, Section 26; and the Equal Rights Amendment in Article I, Section 28.

Beginning with the *Fischer* appellants' equal protection claim, our Supreme Court explained that Article I, Section 1, and Article III, Section 32[14]

[14] This section provides:

guarantee the citizens of this Commonwealth equal protection under the law. Nevertheless, a citizen's right to engage in an activity free of government interference does not require the Commonwealth to provide the means to do so. However, when the Commonwealth funds an activity, it must fund it for all, unless there is a constitutionally valid reason to limit that funding.

The Supreme Court framed the *Fischer* appellants' constitutional issue as the "purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights." *Fischer IV*, 502 A.2d at 121. Noting that "financial need" did not create a suspect class, *id.* at 122, the Supreme Court applied the rational

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> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
>
> 2. Vacating roads, town plats, streets or alleys:
>
> 3. Locating or changing county seats, erecting new counties or changing county lines:
>
> 4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
>
> 5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
>
> 6. Exempting property from taxation:
>
> 7. Regulating labor, trade, mining or manufacturing:
>
> 8. Creating corporations, or amending, renewing or extending the charters thereof:
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

PA. CONST. art. III, §32.

relationship test.[15] This requires that the legislative classification be directed at the accomplishment of a legitimate governmental interest and operate in a manner that is neither arbitrary nor unreasonable. *Id.* at 123.

In the case of the coverage ban, the legislative classification distinguishes abortions necessary to save the life of the mother from nontherapeutic abortions. The Supreme Court concluded that this classification relates to the stated legislative objective of life preservation because it encourages "the birth of a child in all situations except where another life would have to be sacrificed." *Id.* at 122. Further, the stated purpose of "preserving potential life" was accomplished by the coverage ban because "it accomplishes the preservation of the maximum amount of lives, *i.e.*, those unaborted new babies, and those mothers who will survive though their fetus be aborted." *Id.* at 122-23.[16]

The Supreme Court next considered the *Fischer* appellants' argument that the state punished women who elected abortions in violation of Article I, Section 26 of the Pennsylvania Constitution, which provides that citizens are not to be harassed or punished for the exercise of their constitutional rights. The Supreme Court rejected this claim, explaining that Article I, Section 26 cannot be construed

> as an entitlement provision; nor can it be construed in a manner which would preclude the Commonwealth, when acting in a manner consistent with state and federal equal protection

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[15] The Supreme Court also held that even if an intermediate level of scrutiny was appropriate, the coverage ban would pass "constitutional muster." *Fischer IV*, 502 A.2d at 123.

[16] Although the *Fischer* appellants did not raise claims under the United States Constitution, our Supreme Court observed that the federal limitation on funding abortions, known as the Hyde Amendment, Pub. L. 96-123, §109, 93 Stat. 926, had been sustained by the United States Supreme Court, which reasoned that the government's choice to favor childbirth over abortion did not offend the United States Constitution. *Fischer IV*, 502 A.2d at 120.

> guarantees, from conferring benefits upon certain members of a class unless similar benefits were accorded to all.

Fischer IV, 502 A.2d at 123. The Supreme Court concluded that the Commonwealth has "merely decided not to fund [abortion] in favor of an alternative social policy," and this decision did not offend Article I, Section 26. *Fischer IV*, 502 A.2d at 124.

The Supreme Court then turned to the argument of the *Fischer* appellants that the classification between pregnant women who choose to give birth and pregnant women who choose to have an abortion offended the Equal Rights Amendment in Article I, Section 28 of the Pennsylvania Constitution. The *Fischer* appellants argued that because medically necessary services for men were covered and a medically necessary abortion, which can only affect women, was not covered, "the state has adopted a standard entirely different from that which governs eligibility for men." *Fischer IV*, 502 A.2d at 124 (quotation omitted). The Supreme Court rejected the notion that the legislative classification in question related to sex.

The Supreme Court explained that the purpose and intent of the Equal Rights Amendment

> is to insure equality of rights under the law and to eliminate sex as the 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 may be a man or a woman.

Id. (quoting *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974)). The classification in the coverage ban related to a procedure, abortion, and to a woman's voluntary choice. *Id.* at 125. It did not impose a benefit or burden on the basis of the citizen's sex simply because the procedure involved "physical characteristics

unique to one sex." *Id.* (quoting *People v. Salinas*, 551 P.2d 703, 706 (Colo. 1976)). Thus, the Supreme Court held that the coverage ban did not violate Pennsylvania's Equal Rights Amendment.

Reproductive Health Centers raise the precise constitutional claims that were raised in *Fischer IV*, 502 A.2d 114, and unequivocally rejected by the Supreme Court. Reproductive Health Centers acknowledge that "*Fischer* [*IV*] is precedential" but argue that it was "wrongly decided." Reproductive Health Centers' Brief at 2. They contend that our Supreme Court's holding was "poorly reasoned at the time it was decided" and that "legal developments since the decision also undermine its legitimacy." *Id.* at 2-3. Even if they are correct, this Court is bound by *Fischer IV* and is "powerless to rule that decisions of [our Supreme] Court are wrongly decided and should be overturned." *Griffin v. Southeastern Pennsylvania Transportation Authority*, 757 A.2d 448, 451 (Pa. Cmwlth. 2000) (citations omitted).[17] In short, any argument that *Fischer IV* was wrongly decided must be presented to the Pennsylvania Supreme Court. *See Griffin*, 757 A.2d at 451.

The petition for review does not state a claim upon which relief can be granted. All of its legal claims have been addressed, and rejected, by our Supreme Court in *Fischer IV*, 502 A.2d 114.

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[17] *Amicus Curiae* PARCRJ argues that intermediate courts have refused to follow the Pennsylvania Supreme Court's decisions on "rare occasions" and that this Court should do so here. PARCRJ Brief at 17-18. PARCRJ cites a decision of the Pennsylvania Superior Court in *Manley v. Manley*, 164 A.2d 113, 119-20 (Pa. Super. 1960), that declined to follow *Matchin v. Matchin*, 6 Pa. 332 (1847), a Supreme Court decision holding that a wife in a divorce action could not raise insanity as a defense. *Matchin* had been severely criticized by courts of other jurisdictions and commentators on the subject of divorce, and subsequent Supreme Court rulings had weakened its precedential value. *Manley*, 164 A.2d at 120. Indeed, for 65 years, the Supreme Court made no reference to *Matchin*. By contrast, our Supreme Court has not called into question the *Fischer IV* decision.

Conclusion

We hold that Reproductive Health Centers lack standing to challenge the coverage ban on the basis of the constitutional rights belonging to third parties and sustain the demurrer of the Commonwealth Respondents. Because the petition for review fails to state a claim upon which relief can be granted, we sustain the demurrer of the Commonwealth Respondents and the Intervenors. Accordingly, we dismiss the petition for review.

s/Mary Hannah Leavitt
Mary Hannah Leavitt, President Judge

Judge Brobson and Judge Crompton did not participate in the decision in this case.

IN THE COMMONWEALTH 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, Petitioners	:	
v.	:	No. 26 M.D. 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

ORDER

AND NOW, this 26th day of March, 2021, the preliminary objections of Respondents are SUSTAINED as set forth in the attached Opinion, and Petitioners' petition for review is DISMISSED.

s/Mary Hannah Leavitt
Mary Hannah Leavitt, President Judge

IN THE COMMONWEALTH 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, Petitioners	:	
v.	:	No. 26 M.D. 2019
	:	ARGUED: October 14, 2020
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her 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, Respondents	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE CEISLER

FILED: March 26, 2021

I concur with the outcome reached by the majority. However, I respectfully disagree with the majority's conclusion that Petitioners lack standing to bring this action.

Petitioners (Providers) are medical providers asserting that Pennsylvania's statutory restriction under 18 Pa. C.S. § 3215(c) (Coverage Ban) on public abortion funding for recipients of publicly funded medical benefits (Medical Assistance) is a violation of patients' rights under the Pennsylvania Constitution's equal rights and equal protection guarantees. *See* Pa. Const. art. I, §§ 1, 26, 28; art. III, § 32. Respondents, various Commonwealth parties (Commonwealth), contend Providers lack standing to assert claims on behalf of non-party patients. However, applicable precedents demonstrate that Providers have standing based on their connection to their patients and their allegations of direct harm to themselves.

Providers aver that they collectively provide about 95% of all abortions performed in Pennsylvania. Pet. for Review, ¶ 56. Providers further aver that they are suing on behalf of their patients receiving Medical Assistance who seek abortions but are ineligible for Medical Assistance coverage of the cost because of the Coverage Ban. *Id.*, ¶ 39. Providers also assert that they themselves are directly harmed by the Coverage Ban's funding limitation for abortions, because they have to divert money and staff time from other work to help their patients who cannot afford an abortion, they subsidize abortions for women who cannot afford them, they expend staff resources to assist patients in securing private funding for abortions, and they are required to explore personal matters with their patients to determine whether one of the Coverage Ban's exceptions applies. *Id.*, ¶¶ 36, 58, 84-87.

The Commonwealth argues these averments are insufficient to confer third-party standing for Providers to assert constitutional challenges on behalf of non-

party patients. In my view, Providers have standing, and the Commonwealth's preliminary objection on this issue should be overruled.

The Commonwealth cites authorities for the general proposition that standing requires allegations of direct harm. The Commonwealth argues Providers have not pleaded sufficient direct harm. However, the Commonwealth offers no analysis or authority relating specifically to medical providers and their patients.

By contrast, Providers offer detailed analysis and citations of authorities directly on point. Providers argue persuasively that analogous United States Supreme Court authority, adopted by this Court as applicable in Pennsylvania, confers standing in the circumstances of this case.

Singleton v. Wulff

In *Singleton v. Wulff*, 428 U.S. 106 (1976), two physicians challenged a Missouri statute that limited public funding of abortions to cases where abortion was medically indicated. The defendants filed a pre-answer motion challenging the plaintiffs' standing. A plurality of the United States Supreme Court held that the physicians had standing to bring constitutional claims on behalf of Medical Assistance patients seeking abortions. *Id.* at 118.

The plurality observed that the standing issue raised two distinct questions. The first question was whether the plaintiffs had alleged an "injury in fact," a sufficiently concrete interest in the outcome of the litigation to invoke a federal court's jurisdiction. *Id.* at 112. The plurality concluded that the physicians had alleged a sufficiently concrete interest in the outcome, because they stated they had performed and would continue to perform abortions for which they would be entitled to reimbursement if not for the challenged statute. If the physicians prevailed, the plurality reasoned, they would benefit by receiving payment from the state.

However, because this first inquiry relates solely to invoking ***federal*** jurisdiction, it is not involved here.

The second standing question is "whether, as a prudential matter, the plaintiff[s] are proper proponents of the particular legal rights on which they base their suit." *Id.* The plurality easily concluded that the physicians had standing to the extent they were asserting ***their own*** "constitutional rights to practice medicine." *Id.* at 113. The real issue was whether the physicians had standing to assert claims based on ***the rights of their patients***. *Id.*

The plurality observed that standing to assert constitutional rights of third parties should be accorded sparingly. The true holders of the rights at issue may not wish them asserted, and in any event, they themselves are usually the best proponents of their own rights. *Id.* at 114. Therefore, the plurality formulated a two-part test for standing to assert the rights of third parties:

First, the relationship between the litigant and the third party whose rights are asserted must be such that "the right is inextricably bound up with the activity the litigant wishes to pursue. . . ." *Id.* Further, the relationship between the litigant and the third party must be such that the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party. *Id.* at 115 (citing doctor-patient relationships in *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), and *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973)).

Second, the third party must lack the ability to assert her own right. There must be "some genuine obstacle to such assertion, [such that] the third party's absence from court loses its tendency to suggest that [her] right is not truly at stake, or truly important to [her], and the party who is in court becomes by default the right's best available proponent." *Id.* at 116 (noting, for example, that forcing a third

party to assert her own right to remain anonymous "'would result in nullification of the right at the very moment of its assertion.'" *Id.* (quoting *NAACP v. Alabama*, 357 U.S. 449, 459 (1958)).

Applying the first factor, the parties' relationship, the plurality found:

> The closeness of the relationship is patent . . . . ***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. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade*, 410 U.S. [113,] 153-156 [(1973)]. ***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***.

Singleton, 428 U.S. at 117 (emphasis added).

Applying the second factor, the plurality recognized "several obstacles" to women's ability to assert their own abortion rights, including their desire to maintain the privacy of their decisions and the "imminent mootness" of any individual claim. *Id.* The plurality acknowledged these obstacles could be overcome: a woman might bring suit under a pseudonym; she might avoid mootness and retain her right to litigate after pregnancy because the issue was "capable of repetition yet evading review"; and a class action might be possible. *Id.* Regarding the class action, however, the plurality observed that "if the assertion of the right is to be 'representative' to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Id.* at 117-18.

Accordingly, applying the two factors it had identified, the plurality concluded "that ***it generally is appropriate to allow a physician to assert the rights***

of women patients as against governmental interference with the abortion decision . . . ." *Id.* at 118 (emphasis added).

Harrisburg School District v. Harrisburg Education Association

Singleton, standing alone, is not binding authority here for three reasons: it was a plurality opinion, it related only to claims under the federal constitution, and it analyzed standing only in relation to claims in federal courts. However, in *Harrisburg School District v. Harrisburg Education Association*, 379 A.2d 893 (Pa. Cmwlth. 1977) (*en banc*), ***this Court expressly adopted the Singleton plurality's two-factor analysis*** for determining standing to assert a third party's constitutional rights in Pennsylvania courts. *Id.* at 896.

In *Harrisburg School District*, the school district sued the teachers' union, seeking injunctive relief to stop striking teachers from picketing the school board members' private homes. The claim asserted the board members' privacy rights under the Pennsylvania Constitution. The union filed preliminary objections challenging the school district's standing to assert the board members' individual constitutional rights.

After quoting extensively from the *Singleton* plurality opinion, this Court held:

> Singleton . . . offers two "factual elements" for consideration in determining whether the general rule that one may not claim standing to vindicate the constitutional rights of others should not apply[:] the first, whether the relationship of the litigant to the third party is such that enjoyment of the right by the third party is inextricably bound up with the activity the litigant seeks to pursue; and the second, whether there is some obstacle to the assertion by the third party of his own right. ***We adopt this rule for standing to assert third party constitutional rights.***

Id. (emphasis added).

This Court found standing absent under the facts of *Harrisburg School District*. However, this Court expressly acknowledged the conclusion in *Singleton* that under the two-factor test, physicians had standing to assert a constitutional challenge to an abortion funding restriction on behalf of their patients. *Id.*

In short, the analysis of the United States Supreme Court plurality in *Singleton* concluded that physicians have standing to assert constitutional claims on behalf of their clients in federal court. This Court in *Harrisburg School District* concluded that the analytical framework applied in *Singleton* is also applicable to constitutional standing in Pennsylvania. Taken together, *Singleton* and *Harrisburg School District* strongly support Providers' standing to assert their patients' constitutional rights here.

Pennsylvania Dental Association v. Department of Health

In *Pennsylvania Dental Association v. Department of Health*, 461 A.2d 329 (Pa. Cmwlth. 1983) (*en banc*), the Pennsylvania Dental Association (PDA) alleged that statutory and regulatory amendments to reporting and file inspection requirements for dentists would violate the constitutional privacy rights of dental patients. The Department of Health (DOH) challenged the PDA's standing to assert the constitutional rights of patients. Citing *Singleton* and *Harrisburg School District*, this Court found that dentists had standing to assert their patients' constitutional rights:

> [U]nless individual patients had some means of knowing that the effect of the [new] regulation may be to disclose some medical information which they may be entitled to withhold by invoking their constitutional claim of privacy, the only way those rights could be protected would be by the dentist who is responsible for the patient's records. We are of the opinion that the exception set forth in *Singleton* applies and that PDA has standing to raise this issue.

Pa. Dental Ass'n, 461 A.2d at 331.

Fischer v. Department of Public Welfare

This Court's evenly divided decision in *Fischer v. Department of Public Welfare*, 444 A.2d 774, 776 (Pa. Cmwlth. 1982) (*en banc*), is not to the contrary. In *Fischer*, the petitioners challenged the Coverage Ban's limitations on Medical Assistance for abortions. They argued that public funding should be available to women whose physicians recommended abortions to preserve their health, even if their lives were not in imminent danger. Further, they contended that abortion coverage should be available to Medical Assistance recipients seeking abortions on religious grounds.[1] They also challenged the notice provisions that were part of the Coverage Ban at that time, which required a woman to notify criminal authorities within 72 hours of a rape or discovery of a pregnancy resulting from incest, in order to be eligible for Medical Assistance coverage for the related abortion.

In addition to women who were receiving Medical Assistance, the petitioners in *Fischer* included physicians and nonprofit providers of counseling and other services to Medical Assistance recipients. The physicians asserted the Coverage Ban would cause them direct economic hardship and would prevent them from providing necessary medical services according to their best medical judgment. *Id.* at 776.

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[1] One petitioner in *Fischer v. Department of Public Welfare*, 444 A.2d 774, 776 (Pa. Cmwlth. 1982) (*en banc*), claimed the tenets of her faith supported the abortion she was seeking. As one three-judge opinion (Craig opinion) in *Fischer* explained, "certain religious sects deem abortion to be the only moral response to certain pregnancies including those which will result in great suffering on the part of the pregnant woman or great danger to her health short of the threat of death necessary for reimbursement under the [statutory restriction on public abortion funding contained in 18 Pa. C.S. § 3215(c) (Coverage Ban)]." *Id.* at 782. Thus, the religious argument was closely aligned with the health preservation argument.

The respondents filed preliminary objections challenging the standing of the physicians and counseling entities to assert claims relating to the Coverage Ban's reporting requirements. This Court's *en banc* panel was evenly split three to three on that issue. Thus, neither three-judge opinion is precedential.

1. Blatt Opinion

One three-judge group (Blatt opinion) would have upheld the challenge to standing. The Blatt opinion reasoned:

> There are clearly no allegations that the petitioner-doctors are in any way harmed or that the nonprofit organizational petitioners suffer any direct harm to themselves as a result of the reporting requirements. Absent such allegations of direct, substantial and immediate injury to such petitioners themselves we must conclude that the doctors and these organizations do not have standing to bring this action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, . . . 346 A.2d 269 ([Pa.] 1975).

Fischer, 444 A.2d at 779. The Blatt opinion observed, "[W]e cannot say that mere concern for or attempts to aid a certain class of persons automatically endows [sic] an organization with standing to sue on their behalf." *Id.* Notably, the Blatt opinion did not mention the analysis of *Singleton* or *Harrisburg School District*. Thus, it appears the Blatt opinion was issued without the benefit of considering the most closely applicable precedents. Its reasoning is arguably contrary to those decisions.

Moreover, the Blatt opinion is distinguishable. First, in *Fischer*, the only challenge to standing related to reporting requirements for victims of rape and incest who were seeking to terminate the resulting pregnancies. The reporting requirements did not bear the same close relation to physicians' services that the abortions themselves did. Further, here, Providers expressly pleaded that they do and will continue to incur direct damages of the same type alleged in *Singleton* due

to providing abortion services for which they are not reimbursed. Therefore, the Blatt opinion's reasoning against standing is inapplicable here.[2]

2. Craig Opinion

By contrast, the other three-judge panel in *Fischer* (Craig opinion) would have overruled the preliminary objection to standing. Relying on *Singleton* and *Harrisburg School District*, the Craig opinion concluded that the physicians in *Fischer* were alleging the same kinds of direct financial damages that helped to confer standing in *Singleton* and *Harrisburg School District*. *Fischer*, 444 A.2d at 781-82.

As stated above, Providers here pleaded the same sorts of direct financial damage. *See* Pet. for Review, ¶¶ 36, 58, 84-87. The Craig opinion therefore offers persuasive authority that Providers have standing here.

Conclusion

Based on all of the authorities discussed above, I conclude that Providers have standing to maintain this action. Therefore, I respectfully dissent on that issue.

Ellen Ceisler

ELLEN CEISLER, Judge

[2] In addition, although not mentioned in the Blatt opinion, it is notable that in *Fischer*, a number of patients were parties and were asserting their own constitutional rights, thus undermining the existence of any genuine obstacle to their assertion of such rights. Therefore, the rationale behind the plurality rule in *Singleton v. Wulff*, 428 U.S. 106 (1976), was at least partially absent.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Jane Doe et al.,
Plaintiffs

v.

Robert Wright, Director,
Illinois Department of Public
Aid, Defendant

No. 91 CH 1958

ORDER

This matter coming before the Court for ruling on the parties' Cross-Motions for summary judgment, the parties appearing through counsel, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Cross-Motion for Summary Judgment is granted, on the grounds that 305 ILCS 5/5-5 and 5/6-1 and their accompanying regulations are in violation of the Constitution of the State of Illinois.

2. Defendant is hereby enjoined from enforcing 305 ILCS 5/5-5 and 5/6-1 and their accompanying regulations ~~in a manner that~~ insofar as they deny reimbursement for abortion necessary to protect a woman's health although not necessary to preserve her life.

3. Defendant is ordered to provide reimbursement through the State's medical assistance programs for abortions necessary to protect a woman's health.

4. Defendant's Cross Motion for Summary Judgment is denied.

ENTER: DEC 2 1994

Judge Judge's No.

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AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF VERMONT

CHITTENDEN COUNTY, ss.

JANE DOE On behalf of herself and all others similarly situated v. VERONICA CELANI, Commissioner of the Department of Social Welfare	CHITTENDEN SUPERIOR COURT DOCKET NO. S81-84CnC

OPINION AND ORDER

The Plaintiff seeks to enjoin the Defendant from denying Medicaid coverage to indigent Vermonters for medically necessary abortions.

The parties have submitted the case to the Court for a final decision on the legal issues raised by the pleadings and the Stipulation of Facts filed September 3, 1985.

On January 27, 1984, this Court preliminarily enjoined the Commissioner from denying Medicaid coverage to the named Plaintiff for a medically necessary abortion. On September 28, 1984, the preliminary injunctive relief was continued and extended to cover the class that Plaintiff represents. This class is defined as:

> [a]ll indigent pregnant women in Vermont who qualify for Medicaid and whose pregnancy is not life threatening but for whom an abortion is medically necessary and who desire an abortion.

The Commissioner's denial of Medicaid was based upon Department of Social Welfare Regulation M617, which states:

> Providers will be reimbursed by Vermont Medicaid for abortions performed only under circumstances for which Federal Financial Participation is available.

Regulation M617 was adopted after the passage of the so-called Hyde Amendment to a federal appropriations bill. In its current version the Hyde Amendment limits federal reimbursement for abortions to situations where the life of the woman would be endangered if the fetus were carried to term.

Except for the restriction contained in Regulation M617 Vermont provides Medicaid coverage for all medically necessary non-experimental procedures and the Federal Government reimburses the State pursuant to Title XIX of the Social Security Act, 42 U.S.C.A. §§1396 - 1396q (West 1983 & Supp. 1985). But for the provisions of the Hyde Amendment, medically necessary abortions would qualify for reimbursement under the joint Federal-State Medicaid program according to the terms of both Title XIX and 33 V.S.A. §§2901-2903. Prior to passage of the first Hyde Amendment the Vermont Department of Social Welfare provided Medicaid coverage for medically necessary abortions.

Even without Regulation M617, Vermont would still receive full reimbursement for all medically necessary services, except non-life threatening abortions. See, e.g. Moe v. Secretary of Administration, 417 N.E.2d 387, 391 (Mass. 1981).

Plaintiff and all other members of the class by categorical definition are eligible for Medicaid. Plaintiff has one non-functioning kidney and one partially functioning transplanted

kidney. In Plaintiff's case, the continuation of her pregnancy posed serious medical risks. Her physician indicated that these risks included adverse effects on the viability of her transplanted kidney from spontaneous abortion; serious complications directly related to the pregnancy, such as, high blood pressure and seizures resulting from a further decrease in the functioning of her transplanted kidney (which is only partly functional) and, finally, kidney failure which would require dialysis treatment to sustain her life. This medical opinion was confirmed by a second physician. Both doctors indicated that an abortion was medically necessary.

The adoption of Regulation M617 sets up the only exception to the clearly established public policy of providing health care services to the indigent for all conditions requiring medically necessary non-experimental procedures. Indeed, it is clear that Regulation M617 is not so much an exception to the stated public policy of providing medically necessary services to the indigent, as it is a complete negation of that policy as it relates to one medically necessary service.

Vermont passed its medical assistance program, 33 V.S.A. §§2901 - 2904 in 1967 under Title XIX of the Federal Social Security Act. Title XIX was passed

> [f]or the purpose of enabling each State, as far as practicable under the conditions in such state, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, ...

42 U.S.C.A. §1396.

The Commissioner reads into the Vermont statute which

provides for a medical assistance program a federal appropriations restriction which opposes the legislative goal of the program.

Unlike some other jurisdictions, Vermont does not prefer childbirth over abortion as a matter of public policy. Defendant advances two reasons for Regulation M617. She maintains that without federal reimbursement she does not have administrative authority to fund medically necessary procedures for which federal reimbursement is unavailable. She also maintains that funding medically necessary abortions in non-life-threatening pregnancies would increase the State's financial contribution to the Medicaid program due to the denial of federal reimbursement.

It should be noted that under the facts as stipulated, if in one year all 264 abortions are paid for entirely out of state funds at a normal cost of $200.00, the cost to the State would be $52,800.00. If federal funding were available at the rate of 67.06 percent, which it is not, savings to the State would be $35,407.68. If those 264 pregnancies went to term and resulted in normal births, at a cost of $1,225.00, the total cost would be $323,400.00. With federal reimbursement available at 67.06 per cent the cost to the State of these procedures would be $106,527.96. Thus, the cost to the State of funding live births with federal reimbursement is slightly over three times the cost of State funding for abortions without federal funding.

The State has failed to demonstrate a connection between the regulation and the only public purpose claimed, that of saving money. The regulation's sole demonstrable effect is to negate the purpose of the enabling statute under which it was

promulgated. The only purpose to which Regulation M617 relates rationally is to favor childbirth over abortion. But the State disavows this as public policy of the State of Vermont. [1] This disavowal leaves the Commissioner with no rational reason for retaining or enforcing Regulation M617.

Clearly the Federal Constitution as interpreted by the United States Supreme Court in Harris v. McRae, 448 U.S. 297 (1980), does not provide protection to Plaintiff in this situation. The question therefore is whether or not Regulation M617 impermissibly impinges upon some protection afforded or right guaranteed by the Vermont Constitution. See, State v. Badger, 141 Vt. 430, 438 (1982).

Initially it should be noted that the Vermont Constitution provides more protection for the individual than the United States Constitution, and delineates rights not recognized or guaranteed by that document. These textual differences provide a valid basis for independent analysis, and a determination that greater protection is provided by the Vermont Constitution. State v. Jewett, 146 Vt. 221 (1985).

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[1] Were the state to assert favoring childbirth over abortion as a public policy Regulation M617 would fall as an impermissible infringement of constitutionally guaranteed rights. Beecham v. Leahy, 130 Vt. 164, 169 (1972); see, Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Moe v. Secretary of Administration, 417 N.E.2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 352, 172 Cal.Rptr 866, 625 P.2d 770 (1981); but see, Fischer v. Commonwealth, 502 A.2d 114 (Pa. 1985); cf. Planned Parenthood Association v. Department of Human Resources, 687 P.2d 785 (Ore. 1984).

Article One of Chapter One of the Vermont Constitution provides: "That all men are born equally free and independent and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending of life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; . . ."

The language in Article One was obviously influenced by that portion of the United States Declaration of Independence which states: "We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. . . ."

It is significant that the United States Constitution contains no such language.

It is perhaps more significant that Article One of the Vermont Constitution is not an isolated statement in that document. Several other articles in Chapter One deal with equality and protection of rights, including Articles Four, Five, Six, Seven, Nine and Eighteen.

Of particular relevance is Article Seven, which provides in relevant part

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community;. . . .

Greater protection for the individual under the Vermont

Constitution also derives from the nature of state government exercising its reserved sovereign power to promote and protect the health and welfare of its inhabitants. See, Jewett at 227. The Ninth and Tenth Amendments of the Federal Constitution, recognizing the concern for the federal-state balance of power, explicitly recognize that additional rights and protections are retained by the people as inhabitants of the states. See, Id.

The Vermont Bill of Rights was adopted prior to the existence of the United States Constitution, and was retained in the Constitution of the State of Vermont after the United States Constitution was adopted and ratified in the state. The retention, unaltered in substance, of additional human rights guarantees and constraints on governmental action indicates a deliberate and still enduring intent on the part of Vermont to recognize greater protections and benefits for its inhabitants under the rule of law than those recognized federally. The Vermont Supreme Court has "never intimated that the meaning of the Vermont Constitution is identical to the federal document. Indeed, [it has] at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection." Badger at 449.

While the Federal Constitution establishes minimum levels below which states cannot go in treating individuals, it has never been questioned but that states can, and often do, afford persons within their jurisdiction more protection for individual rights. See, e.g. McRae at 311, n. 16, PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). States are free to provide

additional protections by statute, and are obligated to do so by the terms of their own constitutions. "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977).

It is this Court's duty and function to examine for constitutionality and to determine the precise meaning of our own constitutional provisions provided "no federal proscriptions are transgressed," In re E.T.C., 141 Vt. 275, 278 (1982); and obligation to determine the constitutional validity of the regulation in question. Badger at 449; Vermont Woolen Corporation v. Wackerman, 122 Vt. 219, 225 (1960).

Article Seven protects individuals against the discriminatory provision of government benefits by proscribing any particular emolument or advantage granted to only part of a community, whether or not that benefit affects fundamental rights. Article One gives constitutional stature to individuals' unalienable rights to health in the form of happiness, safety and the ability to enjoy life. Article One also protects individuals against discriminatory government treatment affecting fundamental constitutionally protected rights.

The safety of all Vermonters is promoted by the ready availability of adequate health care and the delivery of necessary health services. There is, therefore, a direct relationship between the availability of medically necessary services and the constitutionally guaranteed unalienable right to pursue and

obtain happiness and safety and to enjoy life. Health is central to personal safety and happiness. From medical well-being one may well say all other benefits flow. Faced with a threat to one's health, one's safety is integrally at risk. When one seeks a health service which is medically necessary, one is seeking, by definition, what is indispensable for the protection of one's health and safety. In a health care provider's judgment, a medically necessary service is essential for the treatment of a condition which if left untreated would affect adversely one's health.

This case does not present an issue involving the freedom of choice to obtain an abortion so much as it concerns an unequal protection by the State of indigent inhabitants' unconstitutionally protected right to personal health, safety and happiness. At issue is the constitutional validity of Regulation M617 when tested against the constitutionally protected fundamental right to personal safety and the constitutional prohibition against unequal provision of governmental benefits.

Recognizing that many of our inhabitants are not in a position to financially pursue happiness and safety and to enjoy life, it has long been the policy of the state to provide the necessities of life to qualified indigent persons. See, e.g. 33 V.S.A. Chap. 38, §3001(4).

Congress recognized the financial burden such programs place on the states, and provided for reimbursement to the

states which established appropriate assistance programs, e.g. 42 U.S.C.A. §§1396 - 1396q.

Consistent with the objectives of providing greater access to health care for indigents, a state is free under federal law "to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." McRae at 311, n.16. Although this Court does not rely on federal law in reaching its decision it does note that no federal proscriptions have been transgressed in arriving at a decision. See, In re E.T.C. at 278.

The purpose of these assistance programs is to place the indigent in a position to obtain services on an equal basis with those more fortunate people who can obtain these services for themselves. The Vermont Medicaid program was established to "furnish medical assistance [to those] . . . whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C.A. §1396; 33 V.S.A. §2901.

Regulation M617 singles out one necessary medical service and denies access to indigents for reasons which have nothing to do with promoting access to health care. Regulation M617 discriminates not only against indigents versus non-indigents, but between indigents seeking the medical procedure in question and those indigents seeking any other medically necessary service, all of which are reimburseable to providers by the State. More particularly Regulation M617 creates a single instance where the availability of reimbursement is conditioned on whether a woman's life or her health is threatened.

Regulation M617 impinges directly on the constitutionally guaranteed right to safety. It increases the danger to health by precluding access by indigents to a necessary medical procedure. It also treats Vermonters unequally by singling out small group of people for denial of access to medically necessar care.

Once the State has established a program of emoluments and advantages to a community of Vermonters, under Article Seven, it must ensure that the establishment and administration of that program is carried out for the common benefit, protection and security of that community. This prohibits discrimination among the provision of benefits once those benefits are being provided

The Vermont Supreme Court has set a standard under Article by which to measure the constitutionality of regulatory legislation. See, State v. Ludlow Supermarkets, Inc., 141 Vt.261 (1982 The Court's general concern was "with the propriety of the legislature's exercise of its general police power, and whether that power has been exercised so as to affect all citizens equally." Ludlow Supermarkets at 265. That concern generated the following constitutional tests. "[I]nequalities [in impact] are not fatal with respect to constitutional standards if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy." State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 265 (1982).

> Classifications are permissible only
>
> if a case of necessity can be established for overriding the prohibition of Article 7 by reference to the 'common benefit, protection, and security of the people.'
>
> Given the breadth of the police power, . . .its exercise, even in the presence of other generalized restraints on state action, may be supported if premised on an appropriate and overriding public interest.

Id. at 268.

The Commissioner has failed to establish a case of necessity by failing to show any compelling public policy which Regulation M617 implements. She has failed to establish any rational basis for the regulation. The only necessary consequence of Regulation M617, besides favoring childbirth over abortion, is piecemeal and selective dismantling of the legislative policy of providing medical assistance.

"[The] objective of favoring one part of the community over another is totally irreconcilable with the Vermont Constitution." Ludlow Supermarkets at 269. Once benefits are granted to a part of the community they must further a goal independent of the preference awarded. Id. This proposition applies to the selective withholding of benefits. One person's preference is another person's discrimination. Medical assistance furthers the independent goals of improving the level of health of Vermonters and lessening the impact of economic inequalities on the protection of fundamental rights to health, safety and enjoyment of life. By contrast, Regulation M617 bears no rational relation to any independent public policy goal.

The Commissioner maintains that under §§2901 and 2902 of the Vermont Medical Assistance Act, that state Medicaid funds can only be used to pay for services for which federal reimbursement is available. She argues that because the Hyde Amendment limits Medicaid funds to the states under Title XIX, by state law the Commissioner must follow suit. However, state law compels the opposite conclusion.

A Court's primary object in interpreting a statute is to ascertain and give effect to legislative purpose. Paquette v. Paquette, 146 Vt. 83, 86 (1985).

Absent compelling indications that administrators' construction is wrong the Court must follow those conclusions. Petition of Village of Hardwick Electric Department, 143 Vt. 437, 444 (1983), so long as they are "'reasonably related to the purposes of the enabling legislation.'" Farmers Production Credit Association of South Burlington v. State of Vermont, 144 Vt. 581, 584 (1984)[quoting Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, 150 (1979)].

3 V.S.A. §203 provides that "[t]he commissioner or board at the head of each department herein specified shall exercise only the powers and perform the duties imposed by law on such department." This statute together with 3 V.S.A. §212, (which creates and enumerates the various administrative departments) have been construed by the Vermont Supreme Court to mean that "the Legislature has established that authority in an administrative

department cannot arise through implication. An explicit grant of authority is required." Miner v. Chater, 137 Vt. 330, 333 (1979).

33 V.S.A. §2901 empowers the Commissioner of the Department of Social Welfare to administer a medical assistance program under Title XIX of the Social Security Act. Section 2901 provides that the Commissioner shall issue regulations not in conflict with federal regulations under Title XIX of the Social Security Act. It does not preclude the Commissioner from taking measures to protect individuals' health above and beyond federal ones.

33 V.S.A. §2902 provides: "In determining whether a person is medically indigent, the commissioner shall prescribe and use the minimum income standard or requirement for eligibility which will permit the receipt of federal matching funds under Title XIX of the Social Security Act."

Regulation M617 negates the clear legislative intent of the Vermont Medical Assistance Act, thereby providing compelling indications that the Commissioner has erred in her construction of the statute. A regulation such as M617 which creates an unjust result and which also runs contrary to a clear legislative purpose goes against the "fundamental rule in regard to any statute that no unjust or unreasonable result is presumed to have been contemplated by the Legislature." Nolan v. Davidson, 134 Vt. 295, 299 (1976).

The Commissioner interprets the statute to mean that she

has the power to withhold medical assistance based simply on the availability of federal funding. Nowhere does the statute so provide or imply. The fact that federal grants to state programs established under federal law can be limited and shaped by Congressional policies does not give state administrators power to ignore the mandate of state statutes. "[U]nder our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government. An agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene." In re Agency of Administration, State Buildings Division, 141 Vt. 68, 75 (1982). An administrative desire to synchronize funding with that reimburseable with federal funds, simply because a federal statute restricts reimbursement, is not within authorized bounds when that action is not expressly permitted by the enabling legislation.

Section 2902 merely says that the state definitions of a medically indigent person must be the same as federal guidelines provide in order for matching funds to be available. Section 2902 does not address limitations on medically necessary procedures for which a state may provide reimbursements to providers. Section 2902 only limits the "who" receiving medical assistance, it provides no authority for limiting the "what" of medically necessary services based on availability of federal funding.

Both Title XIX and 33 V.S.A. §§2901 and 2902 predate the Hyde Amendment and therefore cannot have contemplated that the

language at issue could have applied to limit funding based on selected procedures rather than on levels of income and resources. Indeed, Title XIX and 33 V.S.A. Chapter 36 were passed initially on a premise of universal access to all medically necessary procedures. The aberration to this universality, as embodied in the Hyde Amendment and Regulation M617 does nothing but further a social policy couched in terms of favoring childbirth over abortion at the expense of the health of the mother, which is antithetical to the medical assistance purpose of protecting health by equalizing and facilitating universal access to all medically necessary health care.

Nothing in Chapter 36 of 33 V.S.A. or Title XIX of the Federal Social Security Act suggests that federal matching funds for all other medically necessary services would be endangered if the State should choose independently to fund procedures for which federal funds are unavailable. The Commissioner points to no authority, state or federal, which compels the conclusion that independent state funding beyond that matched by federal funding endangers federal funding already available. There is no mandate in federal law which prohibits states from funding medically necessary abortions where the life of the mother is not threatened. The reverse, if anything, was implied by the Roe v. Wade, 410 U.S. 113 (1977), decision and its progeny. Maher v. Doe, 432 U.S. 464 (1977) and McRae held that no federal obligation existed to fund the right protected by the Federal Constitution to choose an abortion. Despite these holdings, the freedom of states to fund such abortions was explicitly

acknowledged, McRae at 311, n.16.

State funding for medically necessary abortions under Vermont's medical assistance program would have no effect on forfeiture of state eligibility for federal funds for reimbursable medical procedures. Therefore, Regulation M617 has no sound fiscal basis in light of the law and the facts stipulated to by the parties and adopted by the Court.

The only effect which the limitation on federal reimbursement embodied in the Hyde Amendment has, is to not provide federal reimbursement to abortions in instances of non-life threatening pregnancies. Absent Regulation M617, and despite the Hyde Amendment, Vermont would still receive federal reimbursement for a percentage of the costs of all other medically necessary services. See Moe v. Secretary of Administration and Finance, 417 N.E.2d 387, 391 (Mass. 1981)["Thus, the relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program."]

The onus is not on the Commissioner to find authority to fund medically necessary abortions, that funding is mandated by the language and purpose of the Medical Assistance Act and Title XIX. The onus on her is to provide a purpose for Regulation M617 which is expressly authorized and reasonably related to the purpose of medical assistance, Farmer's Production Credit Association at 584, Miner at 333. Patently that relation is missing and Defendant is exercising power beyond that delegated to her under the enabling act.

Regulation M617 operates contrary to the purpose of the Vermont Medical Assistance Act. "Article 5 of the bill of rights of this state expressly reserves to the legislature the right to regulate this [police] power. . . . But in exercising this right, the legislature cannot deprive a citizen of an essential right secured by the bill of rights or constitution,. . . ." State v. Hodgson, 66 Vt. 134 (1893), aff'd 168 U.S. 262 (1897). This exercise of administrative power violates Article Five of Chapter One of the Vermont Constitution in two ways. First, Regulation M617 impinges on the exclusive power of the Legislature to regulate the police power. Second, Regulation M617 exercises police power so as to deprive certain Vermonters of their constitutionally guaranteed rights to health and safety, and does so in a discriminatory manner.

Regulation M617 violates Vermont Constitutional principles of separation of powers and the accountability of officers of government to the people. The Commissioner's violation of 3 V.S.A. §§203 and 212 violates the principle of Chapter I, Article Six that to exercise authority which creates policy there must first be accountability to the people via popular elections, see, Welch v. Seery, 138 Vt. 126, 128 (1980). The cases decided under Chapter II, §2, 5 and 6, reach the same conclusions of unconstitutionality based on principles of separation of powers. State v. Auclair, 110 Vt. 147 (1939); Village of Waterbury v. Melendy, 109 Vt. 441 (1938). By contrast to Article Six of Chapter I, these Chapter II sections allow

direct recourse to the courts in the event of their violation.

The Commissioner's expansion of her authority with a result contrary to the purpose envisioned for that statute by the Legislature violates the separation of powers required by the Vermont Constitution in Chapter II, §5. Cf., State v. Jacobs, 144 Vt. 70, 75 (1984).

Plaintiff has failed to establish grounds to take her out of the scope of the general Vermont rule that attorneys' fees are not recoverable as an element of damages. Albright v. Fish, 138 Vt. 585, 590-91 (1980). Therefore, Plaintiff's request for attorneys' fees is denied.

ORDER

This Court finds Department of Social Welfare Regulation M617 unconstitutionally null and void. IT IS THEREFORE ORDERED: The State of Vermont, through its Department and Commissioner of Social Welfare is permanently enjoined from enforcing Regulation M617 or any other regulation which purports to deny reimbursement for medically necessary abortions.

Dated at Burlington, Vermont, this 23rd day of May, 1986.

Hilton H. Dier, Jr.
SUPERIOR JUDGE

AFFIDAVIT OF SERVICE

DOCKET NO 26 MAP 2021

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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,

– 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

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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on October 13, 2021

I served the within Brief for Appellants in the above captioned matter upon:

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via electronic service, or Express Mail for any party NOT registered with the PacFile system by depositing 2 copies of same, enclosed in a postal-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Upon acceptance by the Court of the PacFiled document, copies will be filed with the Court within the time provided in the Court's rules.

Sworn to before me on October 13, 2021

/s/ Robyn Cocho
_____

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2022

/s/ Elissa Diaz

Job # 307876