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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 Sneed, Andrew Barnes, and Sally Kozak, in their official capacities

Appellees.

Brief of the American Center for Law & Justice as Amicus Curiae in Support of House Appellees

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

JAY ALAN SEKULOW*
JORDAN A. SEKULOW*
OLIVIA F. SUMMERS*
WALTER M. WEBER*
BENJAMIN P. SISNEY*
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
Tel.: 202-546-8890
Email: sekulow@aclj.org
Counsel for Amicus Curiae

FRANCIS J. MANION
(PA BAR 40677)
GEOFFREY R. SURTEES*
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky 400052
Tel.: 502-549-7020
Email: fmanion@aclj.org
Counsel for Amicus Curiae

**Not admitted in this jurisdiction*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Center for Law and Justice (ACLJ) is a national nonprofit organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before the Supreme Court of the United States and numerous state and federal courts around the country in cases involving a variety of issues, including the right to life. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); and *Dobbs v. Jackson Women's Health Org.*, No. 19-1393 (Sup. Ct.).

The ACLJ submits this Brief of *Amicus Curiae* pursuant to 210 Pa. Code R. 531. The proper resolution of this case is a matter of utmost concern to the ACLJ — and its members — because it is opposed to taxpayer subsidization of abortion and of any organization that promotes abortion. On its own behalf, and on behalf of over 300,000 of its members, over 10,000 of whom are Pennsylvania residents, who are opposed to

taxpayer funding of abortion,[1] the ACLJ urges this Court to uphold the decision below.

Pursuant to 210 Pa. Code R. 531(b)(2), *amicus curiae* states that no person or entity other than the *amicus curiae*, its members, or counsel have (i) paid in whole or in part for the preparation of the *amicus curiae* brief or (ii) authored in whole or in part the *amicus curiae* brief.

Amicus submit this brief specifically to explain why the Commonwealth Court correctly held that the Appellant Reproductive Health Centers lack standing to challenge the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§3201-3220, and sections 1141.57, 1163.62, and 1221.57 the regulations of the Department of Human Services, which prohibit the expenditure of appropriated state and federal funds for abortion services except for instances of rape and incest, or when the woman's life is in danger. 55 Pa. Code §§ 1141.57, 1163.62, and 1221.57.

[1] *Stop Funding the Abortion Industry*, ACLJ, https://aclj.org/pro-life/stop-giving-tax-dollars-to-abortion-industry (last visited Dec. 8, 2021).

INTRODUCTION

This Court seeks to "do the best possible for human rights," *Downing v. McFadden*, 18 Pa. 334, 337 (1852). But "human rights" are not human rights if a being must be more than just human to have the rights. Since the prenatal child is a member of the human species, and thus a human being, that child cannot be treated as a nonentity, lacking the most basic human rights — the right to life, the right not to be killed in a brutal manner — without abandoning the notion of *human* rights and replacing it with a system of "*some humans'* rights." To overturn the abortion funding restrictions here would be exactly to embrace the position that some human beings are second-class, undeserving of even the most minimal legal recognition.

In the Declaration of Independence, our founders recognized "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."[2] This declaration unmistakably declares that all humans are *created* equal, not that we are *born* equal. The following language in the Declaration is equally important, as it states that

[2] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

governments were specifically created to secure those pre-existing unalienable rights, of which life has the highest importance. Thus, the Commonwealth of Pennsylvania ("Commonwealth") not only has an important and compelling interest in securing the right to life from the instance of creation, but a duty to do so.

Undeniably, the Commonwealth's Constitution recognizes the "inherent and indefeasible right [to] . . . enjoy[] and defend[] life and liberty." Penn. Const. § 1. In the Abortion Control Act, the Pennsylvania legislature also recognized the value the Commonwealth places on the right to life, stating, "the Commonwealth places a supreme value upon protecting human life." 18 Pa. Cons. Stat. §3202(b). As such, "[i]t is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion." 18 Pa. Cons. Stat. §3202(a).

As is well established in state and federal case law, neither the Constitution of the United States nor of the Commonwealth forces states to promote or even allow abortion for any and every reason, let alone subsidize them. Certainly, neither constitution contains a right for

abortion providers to profit from abortion. Yet, Appellants have asserted that women enrolled in Medical Assistance programs not only have a right to seek abortions, but a right to obtain *free* abortions. Appellants further argue that as a direct result of that so-called "right," health care providers, such as the Appellants, are entitled to reimbursement for providing abortions to women enrolled in Medical Assistance programs at little or no cost. This assertion implies that either the state or federal constitution — which supposedly contain this right to abortion at the expense of the government — incentivize or create a market for ending the lives of children before birth. Such an implication directly conflicts with the express and clear language of both constitutions, which recognize and protect the inherent value of human life.

Indeed, both state and federal governments are free to discourage abortion, including through the manner in which they allocate taxpayer dollars. States may make "value judgment[s] favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474, 479 (1977) (upholding state regulations denying payments for non-therapeutic abortions to Medicaid recipients); *see also Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding

that a "State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment").

The Pennsylvania Legislature chose to prohibit taxpayer subsidization of abortion for women enrolled in Medical Assistance programs, except in limited circumstances. 18 Pa. Cons. Stat. §3201, *et seq*. Moreover, the Commonwealth — as it has a right to do — has chosen to promote life, and its Medical Assistance program does so by, covering pregnancy-related care, including prenatal care, obstetrics, childbirth, neonatal, and post-partum care. As such, not only was the lower court correct in holding that the Appellants lack standing to assert "constitutional claims that belong to other persons, *i.e.*, women enrolled in Medical Assistance," *Allegheny Reprod. Health Ctr. v. Dep't of Human Servs.*, 249 A.3d 598, 601-02 (Pa. Cmwlth. 2021), but the women for whom the Appellants claim to represent do not have a constitutional claim to bring against the Commonwealth.

ARGUMENT

Appellants argue that the Commonwealth's Abortion Coverage Ban "unconstitutionally discriminates against pregnant women enrolled in Medical Assistance who chose abortion," because "[t]here is no sex-specific medical care for men that Medical Assistance excludes from coverage." Appellant's Br. 9-10. Moreover, Appellants correctly note that "Medical Assistance covers pregnancy and childbirth, but excludes abortion." *Id.* at 10. To evaluate this claim, amicus first identifies the nature of the right asserted, and then assesses whether Appellants have standing to press that right.

Contrary to the assertions made by Appellants, the true issue at the heart of this case is not whether women enrolled in the Commonwealth's Medical Assistance program are being discriminated against *in comparison to men* enrolled in the Medical Assistance program. Rather, based on arguments made by Appellants themselves, what is truly at issue is whether the Commonwealth has a duty to provide *free* abortions to women enrolled in its Medical Assistance programs, thus conveying upon those particular women an enhanced constitutional right to abortion.

If the Court follows the Appellants' argument, then the Commonwealth is not only *prohibited* from placing an undue burden on a woman's so-called constitutional right to abortion, but is *required* to provide the financial means to abort; not for all women seeking abortion, but only those women who cannot pay for it directly themselves. A woman's decision to obtain an abortion always has a financial impact on that woman, regardless of her economic status, because abortions are not cost-free.

In other words, Appellants argue, contrary to well-established state and federal law, that the Commonwealth has an affirmative duty to provide women with the means to obtain an abortion — but not all women, only a certain group: those women enrolled in Medical Assistance programs. Thus, the Commonwealth is required to discriminate among women based on economic status.

Further, Appellants argue that the Medical Assistance program is somehow discriminatory because it covers pregnancy and childbirth costs for women enrolled in the program. Appellant's Br. 10. It is unclear how this is an argument in support of discrimination, as the program clearly covers such costs for *all* women enrolled in the program who chose to

continue their pregnancies, and this coverage is directly connected to the Commonwealth's right to allocate state funds in furtherance of its interest in promoting and supporting life. The differential treatment is not between women and men, or even between women and women, but between two very different procedures.

A decisive question is therefore whether the Appellants have standing to assert this enhanced alleged constitutional right on behalf of women enrolled in Medical Assistance programs, namely, to force the Commonwealth to subsidize the abortions that Appellants choose to provide to women at low or no cost. This issue is in no way substantially, directly, or immediately related to Appellants' claims that the Abortion Control Act and Department of Human Services provisions represents sex-based discrimination in violation of the rights of women under the Equal Rights Amendment and the equal protection clause of the Pennsylvania Constitution. In other words, there is a disconnection between Appellants' legal arguments and the precise righto of third parties that they would assert. Thus, the Appellants cannot establish standing. Hence, the Appellants cannot establish standing.

In Pennsylvania,

> The requirement of standing . . . is prudential in nature, and stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete, rather than abstract. A party has standing to bring a cause of action if it is aggrieved by the actions complained of, that is, if its interest in the outcome of the litigation is substantial, direct, and immediate. . . .

Hospital & Healthsystem Ass'n. v. Commonwealth, 77 A.3d 587, 599 (Pa. 2013).

As this Court has established, a "substantial interest" requires that "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 195. "One has a direct interest in litigation 'if there is a causal connection between the asserted violation and the harm complained of; it is immediate of that causal connection is not remote or speculative." *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 235 (Pa. 2017) (quoting *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009)).

Moreover, this Court stated in *William Penn Parking Garage*,

> 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.

Wm. Penn Parking Garage v. City of Pittsburgh, 346 A.2d 269, 280 (Pa. 1975). Appellants lack such standing.

I. Appellant Reproductive Health Centers Are Not Aggrieved, Lack Standing, and Are Improper Plaintiffs.

Appellants claim that they have a substantial interest in asserting the constitutional rights of a third party, namely, women enrolled in Medical Assistance programs to seek abortions. The Appellants assert that they experience a "substantial harm" when they "divert money and staff . . . to help women enrolled in Medical Assistance who lack the funds to pay for their abortions." Appellant's Br. 5. And they claim to lose money when they must "regularly subsidize (in part or in full) abortions for Pennsylvania women on Medical Assistance." *Id.* (citing Pet. For Review ¶ 85). Further, Appellants claim that "[t]he Pennsylvania coverage ban also interferes with [Appellants'] counseling of patients." Pet. For Review ¶ 87.

(a) *William Penn Parking Garage v. City of Pittsburgh*

Appellants rely heavily on *William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975), to establish standing because, as in

this case, that case involved both the assertion of third-party rights and monetary interests. Appellants' reliance on *William Penn Parking Garage* is misplaced. Unlike the petitioners in that case, Appellants cannot establish a legal right to the interests they claim are being harmed. Notably, Appellants have not established that women are *not* obtaining abortions as a result of Appellants' purported injuries. Appellants have not linked their supposed loss of revenue and expenditure of additional resources to a protected legal right. They have merely asserted that the above situations hurt their bottom line.

The claims asserted by the Appellants are solely in the interest of the Appellants; namely, that they are not profiting from providing as much from abortions as they would like. This does not establish standing.

William Penn Parking Garage is distinguishable from this case in several significant ways. In that case, the City of Pittsburgh adopted an ordinance that "*impos[ed]* a tax on all patrons of 'non-residential parking places' in the amount of 20% of the consideration paid for storage of any vehicle in such a parking place." *Wm. Penn Parking*, 346 A.2d at 275. This Court held that the plaintiffs, nine operators of commercial parking facilities, were able to establish standing to assert a claim on behalf of

their patrons because of specific statutory language, which the Court held allowed "any taxpayer [to] appeal . . . if he is 'aggrieved by the ordinance' he challenges without regard to whether he is liable for the tax imposed." *Id.* at 289. In that case, the statutory language included the specific term "aggrieved." Thus, this Court further stated that "[b]ecause the term 'aggrieved' is widely used in jurisdictional statutes to refer to any person with an interest sufficient to confer standing, we see no reason to restrict its meaning here to refer only to those liable for the tax imposed by the ordinance." *Id.*

Here, however, there is no statutory language directly conferring aggrieved status to either the Appellants or the women whose interests the Appellants claim to assert. As such, Appellants do not have aggrieved status, and thus standing, in the same manner that the parking lot operators in *William Penn Parking Garage* enjoyed statutory aggrieved status and standing to assert third-party rights.

In addition, in *William Penn Parking Garage*, the City of Pittsburgh imposed a new tax burden on a specific group of its residents, and the Court found that any taxpayer, whether responsible for the tax imposed or not, could assert standing to challenge the legality of that new burden.

In this case, no similar burden has been imposed by the Commonwealth. *Id.* The Commonwealth does not require women to seek funding in order to obtain abortions; nor does it require the Appellants to either charge for abortions or provide them for free, cover other patient costs, or to allocate staff to help women obtain alternate funding for abortions. As there is no such imposition, it also follows that it is not the Commonwealth but the Appellants who are "interfering" with the provider-patient relationship because of interactions that focus on financial matters. Thus, the harm that the Appellants are alleging is a direct result of burdens they have placed on themselves. And yet, they essentially claim that a "harm" they have caused themselves, a loss in profit margin, entitles them to reimbursement from taxpayer funded Medical Assistance — all purportedly in the name of women. Indeed, the underlying interest of the Commonwealth in providing any Medical Assistance to pregnant women is the continued life and health of both the woman and her preborn child, not the profit margins of abortion providers. Moreover, the interests of women enrolled in Medical Assistance is their continued life and health, including those seeking abortions. Again, their interest is not the profit margin of abortion providers. And Appellants' asserted interest in being

reimbursed by public funding for abortions is not substantially, directly, or immediately related to the interests of the women whose interests they claim to assert.

Moreover, as is discussed in detail *infra*, the Commonwealth's decision to reimburse abortions for women enrolled in its Medical Assistance program only in cases of rape, incest, or where the woman's life is in danger, does not impose any burden on women enrolled in the Medical Assistance program who are seeking abortions for other reasons.

(b) *Robinson Township v. Commonwealth*

Appellants also cite *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013), to support their claim of standing. According to Appellants recital of the facts, the doctor in *Robinson Township* had standing to assert the rights of his patients because,

> [T]he 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."

Appellants' Br. 17. Appellants go on to state that the facts of this case are the same here because,

> 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 case.

Id.

However, the *Robinson Township* case was completely different from the situation here because it involved a challenge to direct legal restrictions on a physician's practice of medicine. In that case, Dr. Khan was a physician who needed access to and the ability to share confidential information in order to "provide proper medical care to his patients." Dr. Khan was trying to obtain "information on chemicals protected as trade secrets," that he "believe[d] . . . pose[d] a public health hazard," in order to "treat[] patients in an area where drilling operations were taking place." *Robinson*, 83 A.3d at 923. Dr. Khan challenged a statutory provision that prohibited disclosure of information regarding the composition of fracking chemicals, arguing that "the challenged provision prevent[ed] physicians from sharing diagnostic test results (*e.g.*, blood test results), and a patient's history of exposure, including the dose and duration of exposure – all of which are essential tools of treating patients and practicing medicine competently." *Id.* He argued that the restrictions forced physicians "to choose between abiding by the mandatory

provisions of Act 13 and adhering to their ethical and legal duties to report findings in medical records and to make these records available to patients and other medical professionals." *Id.* at 923-24. Ultimately, the Court held that, *with those specific facts*, Dr. Khan's interest was substantial and direct. *Id.* at 925.

The facts of this case are clearly distinguishable from *Robinson Township* Appellants suggest that they are faced with the *same* choice as Dr. Khan, who had to choose between complying with a non-disclosure statute or providing treatment for his ill patients by disclosing trade secrets. But in *Robinson*, the state was forbidding Dr. Khan from doing what he believed necessary to practice medicine. Here, the state does nothing of the kind. Dr. Khan's choice was in no way related to Medicaid reimbursements, and Appellants' self-created conflict between choosing to provide abortions at a cost lower to some women than others, or to raise their profit margin by only providing abortions to those women who can pay full price, is an entirely different issue. Furthermore, Appellants have admitted that the women who pay the lower cost for abortions are frequently able to obtain alternate funding, which reimburses the

Appellants for the full cost of the abortion. Appellant's Br. 18. Thus, Appellants' conflict is not so stark as they would have this Court believe.

Appellants' "'unappealing' option of accepting Medicaid patients" because it cuts into their profit margins is wholly a pecuniary interest. Appellant's Br. 17. Where Dr. Khan had a direct interest in *treating* his patients in a medically competent manner, and his patients a direct interest in being treated in a medically competent manner, here the interests of women enrolled in Medical Assistance programs seeking abortions is not to obtain them in a way that provides a profit for Appellants. Appellants' stated interests in freeing up staff time and profiting from abortion are unrelated to the alleged constitutional interests of the women whose rights they seek to assert, and therefore do not fall within the purpose and interests of the Commonwealth's provisions that they challenge. The challenged provisions exist to further the Commonwealth's interest in protecting the health and lives of women and their preborn children, not to help third-party organizations profit from abortion. As such, this monetary interest does not, and cannot, create standing.

In *Robinson Township*, there was a statutory provision which allegedly prohibited the disclosure of pertinent medical information, thus limiting the ability of physicians such as Dr. Khan to accept and treat their ill patients. In this case, there is no direct or indirect limitation on the ability of doctors or other health care providers to confer with or assist women — ill or otherwise.

As a side note, no evidence has been presented to assert that, in general, pregnant women are "ill." Whereas in *Robinson Township*, Dr. Khan's inability to treat ill patients could directly result in further injury or death, here, women not obtaining abortions results in the continued life and eventual birth of a human being — the manner in which the human race perpetuates its existence. And, in fact, the challenged provisions at hand specifically work to assist the minority of pregnant women who face medical emergencies and need Medical Assistance to procure treatment. They further foster life by providing pre and post-natal assistance to women and their babies. As such, there is no similarity between the facts of this case, and the facts in *Robinson Township*: there is no limitation placed upon any health care provider by the Abortion Control Act or the Department of Human Services

provisions such that it prohibits health care providers from providing adequate treatment and care. Rather, once again, it is Appellants' profit margin that is of concern, and it is their concern for that profit margin that affects their decision as to whether to provide low cost or free abortions. Appellants have failed to show a substantial, direct, or immediate interest that flows from the assertion of the constitutional rights of a third party.

II. Even if Appellants Had Standing, They Would not Succeed on the Merits as The Commonwealth not Only has no Duty to Subsidize Abortion, It has a Well-Established Right to Favor Childbirth over Abortion.

As Appellants acknowledge, the issues raised in this case as to whether the Commonwealth's decision to favor childbirth over abortion is constitutional, has already been decided by this Court in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985). In that case, this Court held that the "challenged funding restriction contained in the Abortion Control Act of 1982 does not violate the terms of the Pennsylvania Constitution." *Id.* at 126. This Court noted that it is "free to interpret our Constitution in a more generous manner than the federal courts . . . . However, at the same time we have often turned to federal constitutional analysis as an interpretational aid." *Id.* at 121. The U.S. Supreme Court

has regularly emphasized the discretion that states retain to determine whether or not to subsidize abortion, which is consistent with this Court's holding in *Fischer*, and there is no reason for this Court to overturn that decision.

In *Beal v. Doe*, 432 U.S. 438, 446 (1977), the Supreme Court held that the Commonwealth of Pennsylvania could legitimately decide to not subsidize non-necessary abortions and still conform with the requirements of Medicaid. The Commonwealth was seeking "to further this unquestionably strong and legitimate interest in encouraging normal childbirth." *Id.* The Supreme Court emphasized "that there is reasonable justification for excluding from Medicaid coverage a particular medically unnecessary procedure[:] nontherapeutic abortions." *Id.* at 446 n.11. The Commonwealth is free under Medicaid to choose to subsidize or not subsidize nontherapeutic abortions, as it may choose. *Id.* at 447. The Supreme Court emphasized that its decisions "leave entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court." *Id.* at

447 n.15. The Medicaid provisions confer "broad discretion on the States to adopt standards for determining the extent of medical assistance." *Id.* at 444. The Commonwealth therefore had no obligation to provide medical treatment for the pursuit of abortion.

In *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court held that the equal protection clause does not require a state participating in Medicaid to pay the costs of abortion. *Id.* at 469. "The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." *Id.* The Supreme Court has further emphasized that financial need alone does not create constitutional rights. In fact, *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474. Most importantly, the Supreme Court highlighted the fact that this funding decision ultimately imposes no burden on the individual seeking an abortion:

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of [a state's] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on

> access to abortions that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Id. at 474. Subsidizing childbirth, rather than abortion, is legitimately within the scope of state authority. *Id.* at 479. The Supreme Court also emphasized that cases "uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds." *Id.* at 479. The Equal Protection Clause does not require a State that elects to fund expenses incident to childbirth also to provide funding for elective abortions. *Id.*

In a parallel case, decided the same year, an indigent sought an abortion at a state-owned hospital, staffed entirely by doctors and students from a Jesuit-operated institution opposed to abortion, and her abortion was denied. *Poelker v. Doe*, 432 U.S. 519, 520 (1977). The Supreme Court emphasized "that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Id.* at 521.

The Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980), upheld the constitutionality of the Hyde Amendment, also holding that Medicaid

does not require states to provide anything that Congress has refused to subsidize. The Court held that "even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable." *Id.* at 310. "The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315. The Supreme Court emphasized that "*it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices*." *Id.* at 316 (emphasis added).

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to

> subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.

Id.

The Supreme Court upheld similar restrictions in the companion case of *Williams v. Zbaraz*, 448 U.S. 358 (1980), finding that a state participating in Medicaid is not obligated to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. Just as the Hyde Amendment may constitutionally restrict abortion funds, it "follows, for the same reasons, that the comparable funding restrictions in the Illinois statute do not violate the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 369.

In *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), the Supreme Court held that a state could legitimately refuse to let its facilities or employees be used for purposes of abortions.

> Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor, as appellees suggest, do private physicians and their patients have some kind of constitutional right of access to public facilities for the performance of abortions.

Id. at 510.

In *Rust v. Sullivan*, 500 U.S. 173, 201 (1991), the Supreme Court reaffirmed these principles *again*, affirming the congressional denial of funding for abortion counseling. It Court held that the government "has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion." *Id.* It further observed that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194. Drawing upon *Maher* and *Webster*, the Supreme Court emphasized that

> Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.

Id. at 201-02.

Indeed, even in one of the Supreme Court's landmark abortion cases, Justice Stevens noted that the "State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the

individual's freedom to make such judgments." *Planned Parenthood v. Casey*, 505 U.S. 833, 916 (1992).

This Court's decision in *Fischer [IV]* is clearly in line with U.S. Supreme Court precedent which has continually upheld the ability of both federal and state governments to direct the allocation of taxpayer dollars, and to discourage abortion and promote life. Thus, *Fischer [IV]* was not wrongly decided, should be followed by this Court, and the challenges that Appellant has brought, which are the same as those raised in *Fischer [IV]* should be dismissed.

CONCLUSION

For the foregoing reasons, the ACLJ and its members respectfully request the Court to uphold the Commonwealth Court on all issues.

Respectfully submitted,

/s/Francis J. Manion

FRANCIS J. MANION
(PA BAR 40677)
GEOFFREY R. SURTEES*
AMERICAN CENTER FOR LAW
AND JUSTICE
6375 New Hope Road
New Hope, Kentucky 400052
Tel.: 502-549-7020
Email: fmanion@aclj.org
Counsel for Amicus Curiae

JAY ALAN SEKULOW*
JORDAN A. SEKULOW*
OLIVIA F. SUMMERS*
WALTER M. WEBER*
BENJAMIN P. SISNEY*
AMERICAN CENTER FOR LAW
AND JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
Tel.: 202-546-8890
Email: sekulow@aclj.org
Counsel for Amicus Curiae

**Not admitted in this jurisdiction*

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

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

/s/ Francis J. Manion
FRANCIS J. MANION
(PA BAR 40677)
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky
400052
Tel.: 502-549-7020
Email: fmanion@aclj.org
Counsel for Amicus Curiae

Dated: December 10, 2021

CERTIFICATE OF COMPLIANCE

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

/s/ Francis J. Manion
FRANCIS J. MANION
(PA BAR 40677)
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky
400052
Tel.: 502-549-7020
Email: fmanion@aclj.org
Counsel for Amicus Curiae

Dated: December 10, 2021

CERTIFICATE OF SERVICE

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

/s/ Francis J. Manion
FRANCIS J. MANION
(PA BAR 40677)
AMERICAN CENTER FOR LAW AND JUSTICE
6375 New Hope Road
New Hope, Kentucky
400052
Tel.: 502-549-7020
Email: fmanion@aclj.org
Counsel for Amicus Curiae

Dated: December 10, 2021