Received 12/13/2021 1:36:48 PM Supreme Court Middle District

Filed 12/13/2021 1:36:00 PM Supreme Court Middle District
26 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 26 MAP 2021

ALLENGHENY REPRODUCTIVE HEALTH CENTER, *et al.*,

Appellants,

v.

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

Appellees.

Brief of *Amicus Curiae* JUDICIAL WATCH, INC. in Support of Appellees

---

Appeal from the Order of the Commonwealth Court at 26 MD 2019 entered on March 26, 2021

Meredith Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
mdiliberto@judicialwatch.org

Counsel for *Amicus Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and Regulations

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals in both state and federal courts.

Judicial Watch seeks to participate as an *amicus curiae* in this matter because of the threat to the doctrine of separation of powers present in this case. The possibility that groups with tenuous standing can use the judiciary to force the legislative branch to use public funds as they desire and by-pass the constitutional process puts Pennsylvania's system of government in danger.

SUMMARY OF THE ARGUMENT

The separation of powers is no less essential to maintaining a proper balance of power in the Commonwealth of Pennsylvania than it is for the federal government. This Court has been clear that the legislative branch is an independent body, separate from the judiciary, with specific responsibilities and powers, including the appropriations power. What Appellants request in this case is for the Court to ignore this carefully constructed separation of powers and by-pass the constitutional legislative process and mandate that public funds be used to pay for abortion. Pennsylvania's restriction on Medicaid funding for abortion, like

the federal restriction, passes constitutional muster. For the integrity of the governing structure of Pennsylvania, Appellants' perilous request must be rejected.

ARGUMENT

I. The Doctrine of Separation of Powers Forbids Appellants' Request for Changes to the Appropriation of State Funds.

The doctrine of separation of powers has been clearly articulated by this Court many times. In *Renner v. Court of Common Pleas*, 234 A.3d 411, 419 (Pa. 2020), the doctrine was described as "essential to our tripartite governmental framework," and "inherent in the Pennsylvania Constitution." Not merely some antiquated concept debated in law schools with no practical meaning, the doctrine of separation of powers is the one thing that maintains governmental stability so that the people can enjoy the rights established in the Pennsylvania Constitution.

Anchored in history, and "vigorously maintained," the separation of powers is

> "[t]he delineation of the three branches of government, each with distinct and independent powers, [which] has been inherent in the structure of Pennsylvania's government since its genesis – the constitutional convention of 1776.

Id. at 420. The deep roots and robust longevity of the separation of powers doctrine in Pennsylvania demonstrates its significance.

The doctrine of separation of powers is achieved by respecting the co-equal and independent nature of each branch of government. *See Beckert v. Warren*, 439

A.2d 638, 642 (Pa. 1981) (*quoting Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa 1971) (plurality opinion). This is accomplished through a division of powers – each branch maintaining control of its own sphere of power and providing a check on the other two branches. *See Renner*, 234 A.2d at 419. "Under the principle of separation of powers of government, however, *no branch should exercise the functions exclusively committed to another branch*." *Beckert,* 439 A.2d at 145 (emphasis in original).

The power to appropriate funds is conferred on the legislative branch. "The appropriations power in this Commonwealth is vested in the General Assembly by Article III, Section 24 of the Pennsylvania Constitution." *Shapp v. Sloan*, 391 A.2d 595, 601 (Pa. 1978). Put more plainly, "control of state finances, specifically, the power to appropriate funds and levy taxes, lies with the legislative branch." *Jefferson County Court Appointed Emples. Ass'n v. Pa. Labor Rels. Bd.*, 985 A.2d 697, 707 (Pa. 2009). This includes the power to appropriate federal funds. *See Shapp*, 391 A.2d at 602.

> The funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth.
>
> It is fundamental within Pennsylvania's tripartite system that the General Assembly enacts legislation establishing those programs which the state provides for its citizens and appropriates the funds necessary to their operation.

Id. at 604. It is, therefore, the role of the General Assembly, "which has the constitutional power to determine what programs will be adopted in our Commonwealth and how they will be financed." *Id*.

This Court could not be any clearer: the power to appropriate funds belongs to the General Assembly and that power cannot be infringed upon by another branch without violating the separation of powers doctrine. Appellants seek a direct violation of the separation of powers by asking this Court to wrest a task away from the legislative branch. This request is more than simply one case, one program, or one set of funds. Appellants' request, if granted, will harm the underlying separation of powers that "averts the danger inherent in the concentration of absolute power in a single body." *Berkert*, 439 A.2d at 642.

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Id. (quoting The Federalist No. 47 (J. Madison)).

Appellants have a constitutional avenue at their disposal that can achieve their appropriation preferences – the General Assembly. Like every other Pennsylvanian, Appellants can utilize the legislative branch and lobby for the changes they desire. Appellants should not, for the sake of the integrity of the

governmental system of the State of Pennsylvania, be permitted to by-pass this constitutional avenue and violate the separation of powers.

II. Pennsylvania's Current Restrictions on Medicaid Funding for Abortion Are Constitutional.

In light of the separation of powers doctrine, the Court's role is simply to provide a check and determine if Pennsylvania has unconstitutionally applied Medicaid benefits. *See e.g., Harris v. McRae*, 448 U.S. 297, 302 (1980); *see also Fischer v. Dep't of Public Welfare*, 502 A.2d 114, 120-26 (Pa. 1985). A brief overview of the facts demonstrates that Pennsylvania's restrictions on Medicaid funding for abortion are legally proper and constitutional.

Medicaid is a federal financial assistance program which reallocates taxpayer funds toward medical treatment for low-income individuals. *See Harris*, 448 U.S. at 301. To participate in the Medicaid program, states must adhere to the minimum federal standard of medical treatment for those deemed "categorically needy." *Id*. at 301-02. Within the required areas of medical treatment, the U.S. Supreme Court has held that "participating State[s] need not 'provide funding for all medical treatment falling within the five general categories."[1] *Harris*, 448 U.S. at 302. States are free to expand their state coverage beyond the federal minimum.

[1] The five general categories of required medical treatment are: (1) inpatient hospital services, (2) outpatient hospital services, (3) laboratory and x-ray services, (4) skilled nursing, screening and diagnosis for children, and family planning services, and (5) services of physicians. *Harris*, 448 U.S. at 301-02.

Federal law prohibits federal Medicaid funds from being used for the payment of abortions except under well-defined exceptions. *Id*. at 302-03. The so-called Hyde Amendment provides Medicaid-participating states a baseline for Medicaid reimbursements for abortion – states must cover the same well-defined federal exceptions. *Id*. Anything beyond the federal exceptions must be carried entirely by state taxpayer funds. This flexibility permits states to decide how best to allocate their own state Medicaid funds. *See Fischer*, 502 A.2d at 118 ("One of the nuances of living in this federal system is that individual states are free to make certain choices, so long as they do not transgress certain constitutional parameters.")

Pennsylvania participates in the federal Medicaid program and must therefore abide by the federal restriction regarding the use of federal funds for abortion. Pennsylvania is one of 29 states, together with the District of Columbia, that mirrors the Hyde Amendment restrictions on using public funds for abortion.[2]

---

[2] *See* "Abortion Coverage Under Medicaid," National Health Law Program, Fabiola Carrion at https://healthlaw.org/wp-content/uploads/2019/04/Abortion-Coverage-Under-Medicaid-FINAL.pdf. Based on independent research, *Amicus* disputes the inclusion of West Virginia in the category of states that expand its Medicaid coverage for abortion. A 2018 constitutional amendment by the people of West Virginia states that nothing in the state constitution "requires funding of abortion." See https://www.register-herald.com/news/state_region/west-virginia-voters-passed-an-anti-abortion-constitutional-amendment-womens-health-advocates-say-its-a/article_a088cb69-5f94-5147-90ba-24c2a68ba45b.html.

In these jurisdictions, state funds can only be used to pay for abortions if the Medicaid-qualifying woman's life is in danger or the pregnancy is a result of rape or incest.[3] This funding restriction has been unquestionably affirmed as constitutional by the U. S. Supreme Court. *See Beal v. Doe,* 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464, 480 (1977); *Harris*, 448 U.S. at 326-27; *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980).

The remaining states have taken different approaches and expanded Medicaid coverage of abortion in varying degrees, as is their prerogative under our federal system. Ten states have expanded Medicaid coverage to include "medically necessary" abortions.[4] These states vary greatly in what "medically necessary" means.[5] Five states have expanded Medicaid coverage to less than

---

[3] *Id*., note 1.

[4] The states of Alaska, Connecticut, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, and Vermont all cover "medically necessary" abortions. *See State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska, 2019); *Doe v. Maher*, 515 A.2d 134 (Conn. 1986); Code of Md. Regs. 10.09.02.04; *Moe v. Secretary of Admin,* 417 N.E.2d 387 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795 (May 22, 2995); *New Mexico Right to Choose v. Johnson*, 975 P.2d 841 (N.M. 1991); 11 N.Y. Comp. Codes R. & Regs. § 52.1; *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986). Several abortion advocacy organizations state that New York covers all Medicaid abortions and not just abortions that are "medically necessary." *Amicus* cannot find a legal authority for those statements and therefore, leaves New York in this category. *See e.g*., https://www.choicesmedical.com/medicaid-coverage-abortion-need-know/ and https://www.nyaaf.org/need-help-paying-for-an-abortion/.

[5] One example of this is *Women of Minn. v. Gomez*, 542 N.W.2d 17 (Minn. 1995) which recognized everything from "poorly controlled diabetes" and preeclampsia to stress as a reason that qualified as "necessary for therapeutic reasons." *Id.* at 25, 32.

"medically necessary" but use language different than the federal Hyde Amendment language. These include cases of "serious risk of substantial and irreversible impairment of a major bodily function," "a grave, long-lasting health issue," and a "lethal medical condition in the unborn child."[6] Six states have expanded Medicaid coverage of abortion to all state Medicaid recipients.[7]

In states that have expanded Medicaid funding for abortion, the expansion has come both through the state legislatures in the form of yearly state budgeting and state laws, as well as through the courts. In the cases where the expansion has originated in the courts, the courts universally based their holdings on state constitutions and analyzed legislative intent. *See e.g.*, *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 993-999 (Alaska 2019) (the court analyzed legislative intent); *Doe v. Maher* 515 A.2d 134, 150 (Conn. 1986). For example, in states such as Arizona, California, Massachusetts and New Jersey, the courts relied on implicit state constitutional guarantees of privacy that exceeded the

---

[6] These states are Arizona, Colorado, Indiana, Utah, and Wisconsin. *See* Ariz. Rev. Stat. § 35-196.02; Colo. Rev. Stat. § 25.5-4-415; *Humphreys v. Clinic for Women*, 796 N.E.2d 247 (Ind. 2003); Utah Code Ann. §76-7-331; Wis. Stat. Ann. § 20.927

[7] These states are California, Hawaii, Illinois, Maine, Oregon, and Washington. *See Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981), 305 Ill. Comp. Stat. 5/5-5; 22 Me Rev. Stat. § 3196 (as amended in 2019); Ore. H.B. 3391, "Reproductive Health Equality Act"; Wash. Rev. Code § 9.02.160. It is unclear to Amicus where Hawaii's expansion of state Medicaid funds originates. Hawaii states it covers all abortion for Medicaid-qualifying women and this is acknowledged by abortion advocates. *See* https://humanservices.hawaii.gov/mqd/quest-overview/ and https://www.prochoiceamerica.org/wp-content/uploads/2021/03/Who-Decides-2021-Hawaii.pdf.

"penumbral" rights found in *Roe v. Wade* or explicit rights to "safety."[8] The courts in these states also disregarded the U.S. Supreme Court's holdings in *Beal, Maher*, *Harris*, and *Williams*, declaring the right to abortion "fundamental" and utilizing a higher standard of scrutiny than the Supreme Court did in analyzing funding restrictions.[9]

By following binding legal precedent and the plain language of Pennsylvania's Constitution, maintaining the federal Hyde Amendment restrictions is not unconstitutional. Pennsylvania's Constitution does not contain any penultimate privacy or safety rights. And neither Appellants nor their *amici* can point to any legislative history that demonstrates that the Pennsylvania Bill of Rights was designed to enshrine abortion as a fundamental right and guarantee taxpayer funding.[10]

Pennsylvania's Medicaid restriction was previously challenged in 1985 in *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985). In *Fischer*, this

---

[8] *See* Ariz. Const., Art. II, § 8; Cal. Const., Art. I., § 1; Mass. Const., Pt. 1, Art. 1; N.J. Const., Art. I, Para 1.

[9] It is ironic that, in expanding Medicaid abortion funding, every state court relied on the U.S. Supreme Court's interpretation of the right to privacy as incorporating abortion yet summarily rejected the same Court's holding that that right does not include the right to funding for abortion.

[10] In fact, in recent litigation, Appellants sought to have abortion recognized as a fundamental right under the Pennsylvania Constitution. *Allegheny Reprod. Health Ctr v. Pa. Dep't of Human Servs*., 225 A.3d 902, 907 (Pa. Commw. Ct. 2020). This suggests even Appellants understand that the Pennsylvania Constitution does not speak on the subject in the manner they now claim in the present case.

Court held that Pennsylvania's Medicaid restrictions did not violate the Pennsylvania Constitution. *Id.* at 126. In reaching that conclusion, the Court performed an equal protection analysis and held the right invoked was not a fundamental one and plaintiff's class was not a suspect one.[11] *Id*. at 121-22. This holding is unequivocally supported by the U.S. Supreme Court's holdings in *Beal, Maher*, *Harris*, and *Williams*. This Court also found that the Commonwealth was permitted to elevate childbirth over abortion as a legitimate method of furthering its governmental interest in protecting prenatal life. *Id*. at 122-24. This conclusion is also unequivocally supported by U.S. Supreme Court decisions in *Beal, Maher*, *Harris*, and *Williams*. *Fischer* is binding legal precedent in Pennsylvania and the principle of stare decisis applies.

Despite Appellants' claims, nothing has changed that would legally alter the *Fischer* outcome or require this Court to overrule *Fischer*. The federal Hyde Amendment remains a constitutionally sound restriction. The U.S. Supreme Court cases that have issued since *Fischer* have not changed so as to require this Court to utilize a higher standard of scrutiny or diminish the state's legitimate interests. In fact, the only real change since *Fischer* is that it is no longer the holder of the

[11] This has not changed since *Fischer* and Appellants claim to the contrary is disingenuous. As this Court noted in 1985, the equal protections afforded in the Pennsylvania constitution are not offended by the Medicaid restriction because "the basis for distinction here is not sex, but abortion." *Fischer*, 502 A.2d at 314-15.

protected right who is litigating. In the present case, it is only those with a significant financial interest that bring the challenge.

CONCLUSION

Individual states are permitted to participate in the federal Medicaid program and restrict state funds in accordance with the federal Hyde Amendment restrictions. This is clear. Pennsylvania is free to alter the amount of state Medicaid funding for abortion. This is accomplished through the General Assembly, as written in the Pennsylvania Constitution. Appellants must comply with the constitutional structure and laws of the State of Pennsylvania and lobby for appropriation changes through the proper legal channels. This Court should uphold Fischer and reject Appellant's request.

Dated: December 13, 2021

Respectfully submitted,

Meredith Di Liberto

Meredith Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
mdiliberto@judicialwatch.org

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief complies with the word count limits in Pa.R.A.P. 531(b)(3) because it contains less than 7,000 words.

Dated: December 13, 2021

Meredith Di Liberto

Meredith Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
mdiliberto@judicialwatch.org

Counsel for *Amicus Curiae*

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

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

Dated: December 13, 2021

Meredith Di Liberto

Meredith Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
mdiliberto@judicialwatch.org

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2021, a true and correct copy of the foregoing Amicus Brief was served on the Parties via PPACFile.

Dated: December 13, 2021

Meredith Di Liberto

Meredith Di Liberto
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, D.C. 20024
(202) 646-5172
mdiliberto@judicialwatch.org

Counsel for *Amicus Curiae*