Received 12/13/2021 8:01:10 AM Supreme Court Middle District

Filed 12/13/2021 8:01:00 AM Supreme Court Middle District
26 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.*,
Appellants,

v.

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

BRIEF OF *AMICUS CURIAE* DEMOCRATS FOR LIFE OF AMERICA IN SUPPORT OF APPELLEES

Appeal from the Order of the Commonwealth Court entered March 26, 2021, at No. 26 MD 2019

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INTEREST OF *AMICUS CURIAE*[1]

Democrats for Life of America ("DFLA") is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life at all stages is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees all people sufficient access to food, shelter, health care, and life's other necessities.

DFLA is committed to defending restrictions on government funding of abortion. Such restrictions properly ensure that government gives its support to the protection, rather than the taking, of human life. Funding restrictions also respect the conscience of millions of Americans, including DFLA's members, who believe their taxes should not contribute to the taking of life. Finally, DFLA emphasizes, from its direct experience, that restrictions on funding abortion help ensure bipartisan support for funding programs that truly promote health and welfare. Pennsylvania has a rich

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[1] No other person or entity authored or paid in whole or in part for the preparation of this brief.

history of electing pro-life Democratic officials who have supported such social-welfare legislation, from former Gov. Robert Casey Sr. to members of the General Assembly to members of the U.S. Congress.

In particular, as this brief describes, restrictions on funding of abortions were crucial to Congress's enactment of the Affordable Care Act, and pro-life Democrats secured those provisions and provided crucial votes for the ACA. DFLA has defended those provisions since their enactment, and it has analogous interests in defending the constitutionality of Pennsylvania's restriction on funding abortions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The exclusion from Medical Assistance funding of elective abortions (those not involving rape, incest, or threat to the mother's life) is constitutional; the petition for review should be dismissed. *Amicus* DFLA agrees with the Commonwealth Court's ruling that appellants, who include abortion clinics and no individual women, lack standing to assert the claimed interests of women in equality based on sex or based on abortion decisions. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, 249 A.3d 598, 608-09 (Pa. Commw. Ct. 2021). We also agree that the abortion-funding ban does not discriminate based on sex and that the mere refusal of funding does not impose an unconstitutional burden on any fundamental interest in obtaining an elective abortion. For those reasons, this Court correctly upheld the

funding ban in *Fischer v. Dept. of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114 (1985) (*Fischer IV*). In particular, *Fischer* IV correctly held that the ban serves an "important" interest in "preserving the life of the unborn child," and that in any event, the ban need only satisfy rational-basis review and clearly meets that standard. There is no reason to question *Fischer IV*; there are multiple reasons to reaffirm it.

DFLA files this brief to emphasize three interests that the ban on funding of elective abortion serves. These interests are important, and at the very least, are clearly valid and legitimate under rational-basis scrutiny.

A. First, the funding ban serves the interest in protecting fetal life, which has been held to be "important" by this Court in *Fischer IV* and, as this Court noted, by the U.S. Supreme Court as well. Since *Fischer IV*, scientific advances, including ultrasound technology, have made it even clearer that the unborn child is a distinct human life during its development in the mother. These developments reinforce *Fischer IV*, both as a matter of *stare decisis* and because it is correct.

B. Second, the funding ban serves the important, and unquestionably valid, interest in respecting the conscience of many taxpayers who believe that abortion takes an innocent human life, and that the government revenue to which they contribute should not support that practice. Although the government is not required to accommodate taxpayers' objections by declining funding, it has discretion to do so. From the nation's founding, our governments have accommodated taxpayers'

conscience by denying funding to various practices that violate their deeply held beliefs. Abortion-funding restrictions stand within this tradition of respecting taxpayer conscience on deeply divisive issues; indeed, the tradition is especially strong in protecting people against being forced to facilitate abortions.

C. Finally, because abortion-funding restrictions avoid forcing taxpayers to facilitate abortion when they deeply oppose it, such restrictions make it possible to secure broad support for health and welfare-related funding in general. The government has a strong interest in maintaining the flexibility that helps build such consensus for social-welfare assistance programs. Since 1980, Pennsylvania's ban on funding elective abortions has bolstered support for the Medical Assistance Program. Similarly, since 1976 the federal Hyde Amendment has bolstered support for federal health and welfare spending. And adoption of abortion-funding restrictions in the Affordable Care Act—restrictions with bipartisan support—were crucial to the passage of that major healthcare-reform legislation.

ARGUMENT

THE BAN ON FUNDING OF ELECTIVE ABORTIONS SERVES MULTIPLE STATE INTERESTS THAT ARE IMPORTANT, AND CERTAINLY VALID.

This Court in *Fischer IV* rejected the very challenges made by appellants here. With respect to the claim under Pennsylvania's equal protection provisions, this

Court held that the denial of funding for elective abortions "affects neither a fundamental right nor a suspect class," since the statute did not penalize the abortion right but merely chose to fund the alternative of childbirth, and since "financial need alone" is not a suspect class. *Fischer IV*, 509 Pa. at 307, 502 A.2d at 121-22. Therefore, this Court held, "the interest of the state need not be a compelling one" in order to sustain the statute. *Id.* at 307, 502 A.2d at 122. This Court found that the interest in "preserving the life of the unborn child" was sufficiently important to uphold the funding ban under intermediate scrutiny, *id.* at 308-09, 502 A.2d at 122—and that in any event, the statute need only satisfy deferential "rationality" review and clearly satisfied that standard. *Id.* at 309-10, 502 A.2d at 123. Similarly, the Court held that the mere denial of funding for elective abortions did not penalize the abortion right in violation of Article I, § 26 of the state constitution. *Id.* at 311-12, 502 A.2d at 124.

Finally, *Fischer IV* properly held that denying funds for elective abortions did not discriminate against women in contrast to men, because "the decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species." *Id.* at 315, 502 A.2d at 126 ("Thus, this statute, which is solely directed to that unique facet is in no way analogous to those situations where the distinctions were 'based exclusively on the circumstance of sex, social stereotypes connected

with gender, [or] culturally induced dissimilarities.") (bracket in original; citation omitted)).

The U.S. Supreme Court later echoed this Court in emphasizing that preferences for childbirth and against abortion represent legitimate moral concerns, not discrimination against women. "Whatever one thinks of abortion," the U.S. Supreme Court stated, "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward … women as a class—as is evident from the fact that men and women are on both sides of the issue[.]" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

Because opposition to abortion is a "common and respectable" moral position (*Bray*), grounded in the "important" interest in "preserving the life of the unborn" (*Fischer IV*), the state has multiple reasons to decline to fund elective abortions. These reasons are "important," and certainly valid; we detail three of them here.

A. THE BAN ON FUNDING OF ELECTIVE ABORTIONS SERVES THE STATE INTEREST IN PRESERVING FETAL LIFE—AN INTEREST MADE EVEN CLEARER BY RECENT SCIENTIFIC ADVANCES.

Fischer IV held that the ban on funding elective abortions satisfied the Pennsylvania Constitution even if the ban had to survive the requirements of intermediate scrutiny—that is, the requirements "(1) that the governmental interest be an important one" and "(2) that the governmental classification be drawn so as to

be closely related to the objectives of the legislation." 509 Pa. at 308, 502 A.2d at 122. *Fischer IV* found explicitly that "the governmental interest of preserving potential life" was important. *Id.* Its importance "ha[d] been consistently recognized by the United States Supreme Court." *Id.*[2] Indeed, this Court observed, "to say that the Commonwealth's interest in attempting to preserve a potential life is not important, is to fly in the face of our own existence." *Id.* at 308-09, 502 A.2d at 122. None of us would be here if we were aborted.

The passage of time since *Fischer IV* has only strengthened the interest in recognizing and preserving fetal life. Advances in the study of fetal development, and in visualization of the womb through ultrasound technology, have made it clearer than ever that the unborn child is a distinct human life during its development in the mother. Recently seventy biologists, who come from fifteen nations and hold varying positions with respect to abortion rights, demonstrated to the U.S. Supreme Court that "[t]he fertilization view is widely recognized—in the literature and by biologists—as the leading biological view on when a human's life begins." Brief of

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[2] As *Fischer IV* detailed, the U.S. Supreme Court "has at various times described" the interest in fetal life "as 'valid and important,' 'important and legitimate,' 'significant' and, 'unquestionably strong.'" 509 Pa. at 308, 502 A.2d at 122 (quotations omitted).

Biologists as *Amici Curiae* in Support of Neither Party at 3, *Dobbs v. Jackson Women's Health Ctr.*, No. 19-1392 (argued Dec. 1, 2021).

Another brief, filed by physicians in *Dobbs*, details the ways in which, since the 1970s, "scientific advancements have allowed both physicians and the public to learn more about the unborn child and its development, including its capacity to feel pain." Brief for Monique Chireau Wubbenhorst, M.D., Ph.D., Grazie Pozo Christie, M.D., Colleen Malloy, M.D., & the Catholic Ass'n Foundation as *Amici Curiae* in Support of Petitioners at 5, *Dobbs v. Jackson Women's Health Ctr.*, No. 19-1392 (argued Dec. 1, 2021). Among other things, "[u]ltrasound technology has dramatically improved and provides a clear window into the womb to witness the humanity of the unborn child." *Id.* at 8. "Over the last decade, ultrasound has been widely used not only for medical purposes, but also for bonding with the unborn child." *Id.* at 9 (citations omitted; noting, among other things, that "gender reveal" parties have been made possible by the reliability of ultrasounds). "Using a 3D ultrasound, clinicians can see a ten-week fetus moving its arms, and in the eleventh week, moving its tiny fingers." *Id.* at 12 (citation omitted). Likewise, because of the capacities provided by ultrasound technology, "[m]ainstream medicine now recognizes the fetus as a patient, capable of being treated and worthy of care." *Id.* at 18 (citation omitted). And "[c]urrent science shows that the fetus is pain-capable much earlier than previously thought." *Id.* at 22-23 (citing, e.g., Stuart WG

Derbyshire & John C. Bockmann, *Reconsidering Fetal Pain*, 46 J. Med. Ethics 3, 4 (2020)).

Appellants assert that new information since *Fischer IV* gives reasons to reexamine and overturn that precedent. But the greatly increased understanding of fetal development since *Fischer IV* strengthens that decision's conclusion that the protection of fetal life is an important governmental interest. Overall, there remains no reason to question *Fischer IV*'s correctness, or to revisit it under principles of *stare decisis*.

B. THE FUNDING BAN SERVES THE IMPORTANT INTEREST IN ACCOMMODATING THE CONSCIENCE OF TAXPAYERS WHO OBJECT TO SUPPORTING THE TAKING OF HUMAN LIFE.

The state also has an important interest, and surely a valid interest, in respecting the conscience of taxpayers. The many taxpayers who oppose abortion believe that it takes an innocent human life and that the government revenue to which they contribute should not support that practice. As a result, although the government is not required to accommodate taxpayers' objections by declining funding, it has discretion to do so.[3]

[3] Legislatures play a central role in taking account of taxpayer objections to funding, since federal courts, in virtually all cases, will not hear taxpayer suits to enjoin expenditures of funds. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

Many Pennsylvanians, and many Americans in general, have strong, sincere objections to abortion, based on "common and respectable reasons" (*Bray*, 506 U.S. at 270). And legislative protections of conscience have been particularly prevalent as to abortion restrictions: federal law and the laws of nearly every state protect objectors from having to participate in or facilitate abortions, in a broadly defined range of situations. See Mark. L. Rienzi, *The Constitutional Right Not to Participate in Abortions:* Roe*,* Casey*, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 30-35 (2011). "Our nation's general commitment to rights of conscience has been even greater in the specific context of abortion." *Id.* at 38.

Legislatures have shown broad respect for objections to facilitating abortions, as well as for other objections to what the individual sincerely believes is an unjustified taking of human life, such as the death penalty, war, or assisted suicide. See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 130-54 (2012). "[A]lthough we have obvious national disagreements over whether abortion is a killing and over whether assisted suicide is morally permissible, our laws recognize that unwilling individuals cannot and should not be coerced into participating in these practices, even in tangential ways." *Id.* at 175.

The interest in avoiding coercion of unwilling individuals extends to taxpayers. From the nation's founding, governments at all levels have

accommodated taxpayers' objections to government funding of various practices that violate their deeply held beliefs. Such accommodations have included eliminating the funding altogether or redirecting it to uses to which the taxpayers do not object. During and shortly after the founding, for example, taxpayers in several states objected to funding programs that were designed to support religious teaching by supporting payments to clergy. In the most famous instance, James Madison wrote his "Memorial and Remonstrance" in successful opposition to a proposed Virginia bill "Establishing a Provision for Teachers of the Christian Religion." See *Memorial and Remonstrance Against Religious Assessments*, Nat'l Archives (June 20, 1785), https://founders.archives.gov/documents/Madison/01-08-02-0163. Madison argued, among other things, that funding of clergy coerced taxpayers' conscience. *Id.* at para. 1. After that proposed tax was defeated, Virginia barred public funding of clergy and churches by adopting a statute, drafted by Thomas Jefferson, stating: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom*, Nat'l Archives (June 18, 1779), https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082.(emphasis in original). By 1833 all states had eliminated public funding for clergy. Michael W. McConnell *et al.*, *Religion and the Constitution* 24 (4th ed. 2016).

For much the same reasons, the legislature can conclude that it is inappropriate "[t]o "compel [taxpayers] to furnish contributions of money" to support elective abortion, a practice that many of them "disbelieve[ ] and abhor[ ]." Jefferson, *supra*. Because "[o]ur nation's general commitment to rights of conscience has been even greater in the specific context of abortion" (Rienzi, *supra*, 87 Notre Dame L. Rev. at 38), that commitment can certainly support the legislature's discretion to decline to fund elective abortions.

Since the founding era, both Congress and state legislatures have taken steps in multiple instances to respect the consciences of taxpayers. During the Civil War, "the United States government, on the urgings of peace churches, used the monies provided by objectors in lieu of military service for the sick and wounded soldiers." Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, 1999 Wis. L. Rev. 939, 953–54. In the 1960s, Congress passed a statute exempting individuals in certain religious sects from paying Social Security taxes. 26 U.S.C. § 1402(g) (2018). The U.S. Supreme Court upheld this accommodation of "those who believe it a violation of their faith to participate in the social security system." *United States v. Lee*, 455 U.S. 252, 260 (1982).

Restrictions on tax funding of abortion, in Pennsylvania and elsewhere, stand within this tradition of respecting taxpayer conscience on deeply divisive issues. As we detail in the next section, very soon after the U.S. Supreme Court in 1973

declared abortion legal nationwide, Congress and state legislatures moved to exclude elective abortions from health and welfare funding. See *infra* pp. 16-18. Congress did so in the Hyde Amendment beginning in 1976; Pennsylvania first did so in 1980; and the restrictions have applied continuously since then. *Id.* The tradition remains strong: not only the federal government but also thirty-three states and the District of Columbia decline to fund abortions except for rape, incest, or endangerment of the mother's life. *State Funding of Abortion Under Medicaid*, Guttmacher Institute (Nov. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid#. The fact that the federal government and two-thirds of the states deny such funding shows recognition of the taxpayers' interests at stake.

We do not argue that taxpayers have a *constitutional* right to object to the use of tax revenues to fund abortion. Courts have rejected the citizen's First Amendment claim that he or she "'could refuse to pay all or part of his taxes because he disapproved of the government's use of money.'" *Adams v. Commissioner*, 170 F.3d 173, 179 (3d Cir. 1999) (noting that if such claims were allowed, "'the ability of the government to function could be impaired or even destroyed'") (quotation omitted). But the legislature has broad discretion to accommodate its citizens' conscience, even when the Constitution does not require it to do so. With respect specifically to religious conscience, for example, the Supreme Court has emphasized that "'[t]he limits of permissible state accommodation … are by no means co-extensive with the

noninterference mandated by the Free Exercise Clause.'" *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (bracket in original; ellipsis added) (quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970)).

The argument here is simply that the General Assembly can permissibly decline to fund elective abortions based on respect for the conscience of taxpayers who deeply object to supporting the taking of human life. To forbid that legislative choice would put Pennsylvania out of step with both the federal government and the great majority of the states.[4]

C. THE FUNDING BAN SERVES THE IMPORTANT INTEREST IN PROMOTING BIPARTISAN COMPROMISES THAT MAKE PUBLIC-WELFARE LEGISLATION POSSIBLE.

Precisely because abortion-funding restrictions avoid forcing people to facilitate abortion when they deeply oppose it, such restrictions make it possible to secure broad support for health and welfare-related funding in general. The

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[4] Related to this but distinctly, government has a valid interest in avoiding taxpayer funding of organizations over which its regulatory power is significantly limited. The U.S. Supreme Court has limited states' ability to regulate abortion clinics such as appellants. *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). As a result, the Commonwealth can legitimately be concerned about providing tax funds to support those entities when their accountability through regulation is limited.

Of course, current U.S. Supreme Court jurisprudence also allows regulations of abortion. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But the fact that the state can regulate an activity hardly provides any reason why it should have to fund the activity.

government has a strong interest in maintaining the flexibility that helps build such consensus for social-welfare assistance programs.

Appellants here seek to require that the Commonwealth fund abortions on the same terms as it funds "medical care for pregnancy and childbirth." Pet. for Review in the Nature of a Compl. Seeking Declaratory J. and Injunctive Relief para. 55; *see id.* at para. 95. Appellants also seek to require funding of elective abortions on the same terms as some unspecified set of "covered services" for "male recipient[s]." *Id.* at paras. 54, 91. Because many Pennsylvanians (and Americans) reasonably oppose elective abortions as a grave wrong—the taking of a human life—they will be reluctant to fund public-health legislation generously if doing so also requires them to fund such abortions. Mandatory funding of elective abortions therefore creates a serious barrier to passage of legislation strengthening government support for the public's health. That barrier will likely be intractable, because the division over whether abortion in unjust is deep and intractable. Accommodation of taxpayers' moral objections to abortion, therefore, serves the important purpose that Professor (and former federal appeals judge) Michael McConnell has identified for accommodations of conscience in general: "If there were no accommodations, the underlying legislation would become much more controversial and difficult to enact." Michael W. McConnell, *Accommodation of Religion: An Update and a*

Response to the Critics, 60 Geo. Wash. L. Rev. 685, 694 (1992).[5] Accommodations are "a commonsensical way to deal with the differing needs and beliefs of [citizens] in a pluralistic nation." *Id.*

The past fifty years, in Pennsylvania and the nation, dramatize the important role that abortion-funding restrictions play in making bipartisan social-welfare legislation possible. Since 1980, Pennsylvania's exclusion of elective abortions from the Medical Assistance program—an exclusion with bipartisan support—has maintained bipartisan support for the funding program itself. As already noted, two-thirds of the states, plus the federal government, decline funds for such abortions. See *supra* p. 13. These include politically liberal states (Delaware, Rhode Island) as well as conservative states. *State Funding of Abortion under Medicaid*, *supra.*[6]

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[5] This passage speaks of accommodation of religious beliefs. But objections to abortion, of course, rest on many grounds entirely independent of religious beliefs. See, e.g., *Harris v. McRae*, 448 U.S. 297, 319 (1980) (upholding the Hyde Amendment on the ground that it is "as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion"). Above all, objections to abortion rest on the fact that that the unborn child is a distinct human being. We raise the analogy to accommodation of religious beliefs only because they, like objections to abortion, involve deeply held moral views.

[6] The bipartisan funding restrictions reflect bipartisan public opinion. According to a 2021 Marist poll, "Nearly six in ten Americans oppose using tax dollars to pay for a woman's abortion." *Americans' Opinions on Abortion: January 2021*, Knights of Columbus & Marist Poll 4 (Jan. 2021), https://www.kofc.org/en/resources/news-room/polls/kofc-americans-opinions-on-abortion012021.pdf.

1. At the federal level, bipartisan abortion-funding restrictions in the Hyde Amendment and the Affordable Care Act have been crucial to generating bipartisan support for health and welfare funding.

At the federal level, bipartisan efforts have enacted integral welfare legislation with abortion-funding restrictions. The longest running example is the Hyde Amendment, which has been a part of appropriations for health and welfare in every federal budget since Congressman Henry Hyde first proposed adding it to the Department of Labor and Health, Education, and Welfare Appropriation Act of 1977. The original Hyde Amendment provided: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).[7] In presenting the amendment, Congressman Hyde explained, "we who seek to protect that most defenseless and innocent of human lives, the unborn – seek to inhibit the use of Federal funds to pay for and thus encourage abortion as an answer to the human and compelling problem of an unwanted child." 122 Cong. Rec. 20,410 (1977).

The Hyde Amendment garnered robust support, with the House (256-114) and Senate (47-21) votes approving final bill amendments in mid-September 1976.

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[7] In its present form, the Hyde Amendment includes exceptions for medical emergencies and cases of rape or incest. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. H, tit. V, §§ 506-507, 134 Stat. 1182, 1622 (2020).

Actions Overview: H.R. 14232 – 94th Congress (1975-1976), Congress.gov, https://www.congress.gov/bill/94th-congress/house-bill/14232/actions (last visited Dec. 11, 2021). When President Ford vetoed the appropriations bill based on objections about "fiscal integrity" (H.R. Doc. No. 94-636 (1976)), Congress overrode the veto by overwhelming bipartisan majorities in the House (312-93) and the Senate (67-15). *Actions Overview: H.R. 14232 – 94th Congress (1975-1976)*, *supra*.

The Hyde Amendment has been a bipartisan cornerstone of appropriations bills since 1976 and has survived constitutional review by the Supreme Court. *Harris v. McRae*, 448 U.S. 297, 326-27 (1980). Even in December 2020, the Consolidated Appropriations Act of 2021, which included Hyde Amendment restrictions, passed the House (359-53) and Senate (92-6) with strong bipartisan support before being signed into law by President Biden. *Actions Overview: H.R. 133 – 116th Congress (2019-2020)*, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/133/actions (last visited Dec. 11, 2021). See Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. H, tit. V, §§ 506-507, 134 Stat. 1182, 1622.

The major 2010 healthcare-reform law, the Affordable Care Act (ACA), likewise has abortion-funding restrictions that received bipartisan support. Even more important, those restrictions were crucial to the ACA's passage. As enacted, the ACA references the Hyde Amendment, prohibiting public funds for "abortions

for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(a)(1)(B)(i), 124 Stat. 119, 169 (2010), codified at 42 U.S.C. § 18023(b)(1)(B)(i) (2010). In other words, ACA funds cannot go for elective abortions if the current Department of Health and Human Services appropriations bill has restricted abortion funding. This provision was the result of pro-life Democrats' efforts and bipartisan compromise.

In the House, a bipartisan amendment co-sponsored by Bart Stupak (D-Mich.) and Joseph R. Pitts (R-Pa.) (Stupak-Pitts Amendment) sought to restrict public abortion funds. H. Amdt. 509 to H.R. 3962, 111th Cong. (2009). The Stupak-Pitts Amendment codified the Hyde Amendment within the ACA, limiting public funds for abortions to medical emergencies and instances of rape or incest. 155 Cong. Rec. H12,921 (daily ed. Nov. 7, 2009). It passed the House 240-194, with sixty-four Democrats voting in favor of it. Roll no. 884, H. Amdt. 509, 111th Cong. (Nov. 7, 2009). The amendment reflected Representative Stupak's goal, shared by many other right-to-life Democrats, "to see health-care reform pass while maintaining the long-standing principle of the sanctity of life." Bart Stupak, *Why I wrote the 'Stupak amendment' and voted for healthcare reform*, Wash. Post, Mar. 27, 2010, https://www.washingtonpost.com/wp-

dyn/content/article/2010/03/26/AR2010032602921.html. As Stupak noted when presenting his amendment:

> The Hyde amendment has been law in Federal funding of abortion since 1977 and applies to all other federally funded health care programs…. I am not writing a new Federal abortion policy. The Hyde amendment already prohibits Federal funding of abortion and the use of Federal dollars to pay for health care policies that cover abortion.

155 Cong. Rec. H12,921 (daily ed. Nov. 7, 2009).[8]

In the Senate, a bipartisan-sponsored amendment was introduced mirroring the Stupak-Pitts Amendment, restricting public abortion funds to medical emergencies and cases of rape or incest. 155 Cong. Rec. S12,600 (daily ed. Dec. 7, 2009). The Senate did not adopt that proposal. But it did adopt, by a 60-39 vote, the language ultimately enacted in the ACA, quoted *supra*. See Roll no. 387 on S. Amdt. 3276 to S. Amdt. 2786, 111th Cong. (Dec. 22, 2009) (ultimately codified at 42 U.S.C. § 18023). Under that provision, ACA abortion funding restrictions are tied

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[8] President Obama also expressed openness to bipartisan compromise that would move healthcare legislation forward with abortion-funding restrictions, stating: "I'm pro choice. But I think we also have a tradition [ ] in this town, historically, of not financing abortions as part of [ ] government-funded health care." Quoted in Ben Smith, *Abortion and the public option*, Politico, July 22, 2009, https://www.politico.com/blogs/ben-smith/2009/07/abortion-and-the-public-option-020066. He added: "[M]y main focus is making sure that people have the options of high quality care at the lowest possible price." *Id.*

with the current Department of Health and Human Services appropriations bill's Hyde Amendment language. 155 Cong. Rec. S13,494 (daily ed. Dec. 19, 2009).

After the Senate bill passed, the House then adopted the Senate language, in part because any attempt to amend the Senate bill seemed likely to fail because of filibusters. Bart T. Stupak, *For All Americans: The Dramatic Story Behind the Stupak Amendment and the Historic Passage of Obamacare* 368-69 (2017). The deciding votes for the ACA in the House came from seven pro-life Democratic members who approved the law only because President Obama issued an executive order aimed "to ensure that that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered)." Executive Order No. 13535, *Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion*, § 1 (Mar. 24, 2010), https://obamawhitehouse.archives.gov/the-press-office/executive-order-patient-protection-and-affordable-care-acts-consistency-with-longst. As Rep. Stupak later put it, those members "vote[d] 'Yes' on final passage based on the promise to apply the Stupak/Hyde Amendment to the Affordable Care Act through the executive order." Stupak, *For All Americans*, at 421. The legislation passed the House 222-211. "Without our [seven] votes," Stupak points out, "the tally would have been 215-218 and the legislation would have been defeated." *Id.* at 421.

There was sharp disagreement over whether the Obama executive order was sufficient to prevent all government funding of abortion under the ACA. *Id.* at 364. But that controversy is irrelevant here. The appellants' argument would invalidate *every one* of the abortion-funding restrictions involved in the ACA process: the Stupak-Pitts Amendment, the ultimate statutory language, and the provisions in the executive order. At every stage in the ACA's consideration, abortion-funding restrictions of one kind or another were crucial to the passage of this major piece of public-welfare legislation. If appellants prevail, every such bipartisan compromise in Pennsylvania will be invalid—and consequently it will be increasingly difficult to enact legislation improving Pennsylvanians' well-being. The governmental interest in preserving policymaking flexibility through compromise on this issue is more important than ever in our deeply polarized society. And it supports the longstanding restrictions on elective abortions, in the Commonwealth and elsewhere.

2. In Pennsylvania, the Real Alternatives Program, which assists women and their children without funding abortion, has likewise received bipartisan support.

Pennsylvania's Real Alternatives program also highlights how bipartisan abortion-funding restrictions pave the way for social-welfare legislation. Real Alternatives is a charitable non-profit that provides pregnancy and parenting support in Pennsylvania. According to Democratic Governor Tom Wolf's 2021-2022

executive budget, "The Expanded Medical Services for Women program [Real Alternatives program] provides counseling and other services to women seeking alternatives to abortion. Nonprofits are awarded grants to provide services to women for up to 12 months after childbirth including food, shelter, clothing, health care, counseling, adoption services, parenting classes, assistance for post-delivery stress, and other support programs." Pa. Off. of the Governor, Governor Tom Wolf: Executive Budget 2021-2022 E27-19 (Feb. 2, 2021).

This program has a bipartisan history, beginning with Democratic Governor Robert P. Casey Sr. Between 1993 and 1995, Governor Casey included pregnancy and parenting support services in the state's annual budget. *See*, *e.g.*, Pa. Off. of the Governor, 1993-94 Governor's Executive Budget E34.07 (1993-1994). These services included "alternatives to abortion," offered to low-income pregnant women, such as "pregnancy tests, prenatal care referrals, counseling, [and] adoptions referrals." Pa. Off. of the Governor, 1994-95 Governor's Executive Budget E33.15 (1994-1995). After assuming office in 1995, pro-choice Republican Governor Tom Ridge continued allotting money in the state's yearly budget for abortion alternatives. Pa. Off. of the Governor, 1995-96 Governor's Executive Budget E34.15 (Mar. 7, 1995). In 1997, Real Alternatives formed, and the state has awarded it grants since then to provide non-abortion pregnancy and parenting support. *History of Government-funded Pregnancy and Parenting Support Services*, Real Alts. 1,

https://www.realalternatives.org/wp-content/uploads/2021/01/History-of-RA-2021.01.pdf (last visited Dec. 11, 2021). The Pennsylvania General Assembly annually appropriates funds to Real Alternatives, and the budget bills containing those appropriations have had bipartisan support. *See*, *e.g.*, *2021-2022 Enacted Budget Line Item Appropriations*, Pa. Off. of the Budget 7, https://www.budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Documents/2021-22%20Budget%20Track%201.pdf (last visited Dec.11, 2021) (appropriating $6,263,000 for Real Alternatives).

Presumably, funding these "alternatives to abortion," while declining to fund elective abortions, would be unconstitutional were appellants to prevail in this case. See *supra* p. 15 (noting appellants' assertion that the government must fund abortions if it funds childbirth). Thus, again, appellants' argument would undercut beneficial public-welfare legislation that has become a bipartisan staple of yearly budgets—in this case, a program that expands low-income women's access to pregnancy resources and parenting support.

CONCLUSION

This Court should affirm the decision of the Commonwealth Court, sustain the preliminary objections to the petition for review, and dismiss the petition.

Respectfully submitted.

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DATED: December 13, 2021

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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.

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

CERTIFICATE OF SERVICE

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

L. Theodore Hoppe, Jr.

DATED: December 13, 2021 L. Theodore Hoppe Jr.