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IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, *et al.*,

Appellants,

vs.

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

Appellees.

Appeal from the Orders of the Commonwealth Court at 26 MD 2019, entered on January 28, 2020, and March 26, 2021

Brief of *Amicus Curiae* Life Legal Defense Foundation in Support of Appellees

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INTEREST OF AMICUS CURIAE[1]

Amicus Life Legal Defense Foundation ("Life Legal") is a California non-profit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. Life Legal litigates cases to protect human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care.

Life Legal shares the interest of the people and the General Assembly of Pennsylvania in preserving and protecting unborn human life, which interest would be diminished if the state and its taxpayers were forced to pay for abortions.

[1] This brief was authored and paid for solely by counsel for Life Legal Defense Foundation and Randy Lee, Professor of Law, Commonwealth Law School—Widener University, Harrisburg, PA.

SUMMARY OF THE ARGUMENT

Appellants urge this Court to overturn a 35-year-old precedent applying several provisions of the Pennsylvania Constitution to a statute prohibiting the use of public funds to pay for most abortions. Rather than addressing the traditional stare decisis factors, Appellants and their amici argue solely that *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985) was wrongly decided and for that reason alone should be overruled.

Fischer was correctly decided, but even should this Court perceive some error in the reasoning, stare decisis counsels that the decision should be affirmed, not overruled. This Court's decision in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) does not require reconsidering, much less overruling, *Fischer*.

ARGUMENT

I. THE COMMITMENT TO STARE DECISIS IS DEEPLY ROOTED IN THE JURISPRUDENCE OF PENNSYLVANIA.

In his concurrence in *Morrison Informatics, Inc. v. Members 1st Federal Credit Union,* Justice Wecht observed that stare decisis is "a principle as old as the common law itself." 139 A.3d 1241, 1249 (Pa. 2016) (Wecht, J. concurring). Justice Wecht's observation reflects the reality that as early as 1791, the Pennsylvania Supreme Court had acknowledged stare decisis as an essential element of judicial power for the Pennsylvania Judiciary. *Hannum v. Askew*, 1 Yeates 25, 26 (Pa. 1791). By 1809, the Pennsylvania Supreme Court had described stare decisis as "a maxim in our law," *French v. M'ilhenny*, 2 Binn. 13, 27 (Pa. 1809), and in 1812, the Court described "stare decisis" as "the duty of our courts." *Alexander v. Jameson*, 5 Binn. 238, 239 (Pa. 1812). In that same case, the Court went on to counsel that the importance of stare decisis was such that "nothing can be more dangerous than too nicely to criticize the reason of decisions." *Id*.

The Pennsylvania Supreme Court's commitment to stare decisis is consistent with the longstanding commitment of the federal courts to this concept. In *Marbury v. Madison,* for example, Chief Justice Marshall observed approvingly that "[t]he Government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. 137, 163 (1803). Chief Justice

Marshall further explained in *Marbury* that when a court speaks in the name of a constitution, that court speaks not on its own behalf but on behalf of the people whose "very great exertion" established that constitution and whose labors, so dearly invested, have a right to be regarded as "permanent." 5 U.S. at 176 (1803)

A Westlaw search of the term "stare decisis" reveals that since 1791, the Pennsylvania Supreme Court has referred to the doctrine in at least 380 cases. The real story, however, is not how frequently stare decisis comes up in cases but how often it does not come up in cases: how frequently in disputes the parties and the courts accept unquestioningly the authority of the law that has come before them. As Justice Wecht explained in *Morrison Informatics,* this acceptance is granted """"for the sake of certainty."""" 139 A.3d at 1249 (Pa. 2016) (Wecht, J., concurring) (quoting *Estate of Fridenberg v. Commonwealth*, 613 Pa. 281, 33 A.3d 581, 589 (Pa. 2011) (quoting *Commonwealth v. Tilghman*, 543 Pa. 578, 673 A.2d 898, 903 n. 9 (Pa. 1996))).

That certainty is not without its own profound value. As Justice Wecht further pointed out in *Morrison Informatics,* the certainty created by stare decisis, """"promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."""" *Id.* (quoting *Buckwalter v. Borough*

of Phoenixville, 603 Pa. 534, 985 A.2d 728, 730–31 (Pa. 2009) (quoting *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 954 n. 31 (Pa. 2006))).

As this Court acknowledged in *William Penn School District v. Pennsylvania Department of Education,* the Pennsylvania Supreme Court does not regard stare decisis as absolute. However, the Court also does not depart from this doctrine lightly. Instead, this Court has indicated that it will only consider departing from the course set by stare decisis when the Court is confronted "by a decision that in itself is clearly contrary to the body of the law." 170 A.3d 414, 456-57 (Pa. 2017).

The opinions of this Court, then, have created a longstanding tradition of adhering to precedent except where the prior decision is so "clearly contrary to the body of law" that "it is consistent with the principle underlying stare decisis to purify the body of law by overruling such erroneous decisions." *William Penn School District*, 170 A.3d at 457. As Justice Wecht pointed out in his *Morrison Informatics* concurrence, the Court engages in such purification when the situation is such that "[n]o principled reconciliation is available," and "[t]o leave that aspect of this case unacknowledged is to risk confusion. Lawyers and judges might read today's decision as forcing them to strive mightily in an attempt to reconcile disparate precedents." 139 A.3d at 1250 (Pa. 2016) (Wecht, J. concurring).

In America, the trust to be enjoyed by each branch of government is in proportion to the degree to which that branch is regarded as one of law and not of men. The second Justice Harlan, meanwhile, insisted that for the Judicial Branch in particular such regard comes "only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). It is out of these very factors that the commitment to the doctrine of stare decisis has been born, and it is within the framework of that doctrine and this Court's commitment to it that the current case arises.

II. APPELLANTS MUST ESTABLISH MORE THAN SIMPLE ERROR TO DISTURB PRECEDENT.

"Without stare decisis, there would be no stability in our system of jurisprudence." *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193, 205 (Pa. 1965). It is therefore preferable to follow even questionable decisions, because stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (citation omitted). As the United States Supreme Court recently stated, "To reverse a

decision, we demand a special justification, over and above the belief that the precedent was wrongly decided." *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quotation marks and citation omitted).

In assessing the weight of stare decisis in particular cases, this Court has relied on the same factors enunciated by the United States Supreme Court, including (1) the quality of the reasoning; (2) whether the precedent is settled; (3) the workability of the rule established; 4) consistency with related decisions; (5) factual developments since the rule was handed down. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 834-35 (1991) (Scalia, J. concurring); *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020).

III. THE RELEVANT STARE DECISIS FACTORS OVERWHELMINGLY WEIGH AGAINST OVERTURNING *FISCHER.*

A. *Fischer* Was Well-Reasoned and Correctly Decided.

The quality of this Court's reasoning in *Fischer* and the correctness of its decision are amply established in the briefs of the Respondents and *Amicus* Pennsylvania Pro-Life Federation*, et al*. Life Legal will not repeat those arguments here.

B. *Fischer* Is Settled Law.

This Court handed down the *Fischer* decision 36 years ago. The decision was unanimous; no justice disagreed with or even sought to qualify or limit the decision with a dissent or concurrence. No justice of this Court has criticized

Fischer in a later ruling.[2] Since *Fischer* was decided, no case has been brought seeking to modify or narrow its holding. No reported Pennsylvania decision has criticized its reasoning, and only one out-of-state court has done so. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 854 (N.M. 1998).

"The age of the challenged decision" is also relevant to the stare decisis analysis, as "the strength of the case for adhering to" precedent "grows in proportion to [its] 'antiquity.'" *Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020) (quoting *Montejo v. Louisiana*, 556 U. S. 778, 792 (2009). *Fischer* has been the sole and controlling precedent in this area since the issue of public funding of abortion first arose in Pennsylvania.

Fischer is a settled precedent of this Court.

C. *Fischer* Is a Workable Decision.

Appellants do not suggest that *Fischer* is in any way unworkable. The decision upholding statutes restricting public funding of abortion created no thorny ancillary questions about procedure or about statutory or constitutional

[2] *Cf. Payne*, *supra*, 501 U.S. at 828-829 ("*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions . . . . Reconsidering these decisions now, we conclude . . . that they were wrongly decided and should be, and now are, overruled."); *Seminole Tribe v. Florida*, 517 U.S. 44, 63-64 (1996) ("The Court in *Union Gas* reached a result without an expressed rationale agreed upon by a majority of the Court. . . . Justice Brennan's decision received the support of only three other justices. . . and four justices joined together in a dissent that rejected the plurality's rationale.")

interpretation, nor any difficult rules or standards with applications that contribute to confusion and uncertainty for lower courts.[3]

Similarly, the reasoning *underlying* the holding in *Fischer* has created no workability problems. With regard to equal protection, this Court found that the challenged provisions met *at least* the intermediate level of scrutiny, by serving the important governmental interests of preserving life and encouraging childbirth, and doing so by means of classifications closely related to the objectives of the law. 502 A.2d at 122-123. Appellants fail to point to any way in which the *Fischer* holding has created problems or conflicts in the area of equal protection analysis.

As to the Appellants' challenge under the Pennsylvania Equal Rights Amendment, this Court held that "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. 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.'" *Fischer*, 502 A.2d at 126. Again, Appellants point to no cases which have struggled to reconcile this holding with other applications of the Equal

[3] Cf. *Seminole Tribe*, *supra*, 517 U.S. at 64 ("Since it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision.")

Rights Amendment.[4] This failure is not surprising, because the distinction between childbirth and abortion as pregnancy outcomes rests on indisputable biological and medical realities, not the "gender-based stereotypes"[5] or cultural prejudices which were the targets of the Equal Rights Amendment.

Finally, it should be noted that Appellants' proposed legal principle that the state "cannot choose to cover one way of exercising a fundamental right but then omit covering a different way to exercise that same right" (Appellants' Brief at 67) is a recipe for legal chaos. *Fischer* rightly rejected this "purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights," noting that "[s]uch a right is to be found nowhere in our state Constitution." 502 A.2d at 121.

The fact that Appellants classify having an abortion and having a child as the "same right" exercised in "different ways" shows the murkiness of this principle. Are marriage and divorce the "same right" exercised in "different ways," requiring that any public benefits be bestowed equally? Marriage and cohabitation? Are

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[4] Appellants complain that in *Fischer*, this Court omitted, and therefore failed to follow, the "critical sentence" in *v. East Stroudsberg Area Sch. Dist*., 299 A.2d 277 (Pa. 1973) concerning discrimination "on the basis of a physical condition peculiar to their sex." App. Br. at 47 & n.26. In the almost five decades since *Cerra* was handed down, it has been followed solely in the identical context in which it was decided: forced maternity leave (and in one case, disability benefits), with the "critical sentence" appearing only in quotations from *Cerra*. Moreover, while quoting the entire "critical" passage from *Cerra*, the Commonwealth Court "easily distinguish[ed]" it from the situation of public funding for abortion. *Fischer v. Department of Public Welfare,* 482 A.2d 1148, 1158 (Pa. Commw. Ct 1981)

[5] *Cf.* App. Br. at 39 ("The coverage ban is entirely rooted in a gender-based stereotype.")

childbirth, adoption, and surrogacy all "different ways" to exercise the "same right"? If the state subsidizes fine art, must it also subsidize pornography? If it subsidizes books, must it also subsidize video games? Are religious schools, homeschooling, and public school all "different ways" to exercise the "same right" of child-rearing? *Cf. Maher v. Roe*, 432 U.S. 464, 477 (1977) ("We think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education.")

Fischer is an eminently workable decision. Appellants' proposed alternative would create havoc as courts grappled with the unanswerable questions of which activities constitute the "same right" exercised in "different ways" and what "equal treatment" demands.

D. *Fisher* Is Consistent with Other Pennsylvania Law.

Four decades ago, the Pennsylvania legislature declared:

> In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.

18 Pa. Cons. Stat. Ann. § 3202(c). In accord with this policy declaration, Pennsylvania courts have recognized the rights of unborn children in a variety of

contexts not violative of the federal constitution (i.e., outside the context of abortion), including criminal, tort, property, and health care law.[6]

Contrary to this clearly expressed intent by the state to recognize and protect the lives of the unborn within the bounds of the federal constitution, Appellants urge an interpretation of Article I, §§1 and 28, and Article III, §32 of the Pennsylvania Constitution (all adopted prior to 1973) that would place these constitutional guarantees in conflict with the state's longstanding policy of protecting the unborn and favoring childbirth over abortion.

Appellants cite no case law in which *Fisher's* interpretation of these constitutional provisions is inconsistent with later-decided cases. Rather, Appellants generally claim a reconsideration of *Fischer*'s constitutional analysis is necessitated by this Court's decision in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). Appellants' Brief at 43-44. This is incorrect.

First, Appellants are at a loss to find any case applying the *Edmunds* factors to an equal protection claim and deciding that those factors dictate a different or broader interpretation of equal protection than is found in the federal constitution. Indeed, repeatedly after *Edmunds*, "this Court has noted that federal and state equal protection rights are coextensive. *Driscoll v. Corbett*, 620 Pa. 494, 69 A.3d 197,

[6] *See* Brief *Amicus Curiae* of the Pennsylvania Pro-Life Federation et al., at 23-24.

209 (Pa. 2013); *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325, 332 (Pa. 2002); *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1136 n.10 (Pa. 2014).

As to the Equal Protection Amendment, Appellants urging of a reconsideration of *Fischer* in light of *Edmunds* is completely inapposite. The *Edmunds* test applies only where the state constitutional provision at issue *has a federal counterpart*. Where these is no federal counterpart, as Appellants themselves concede is the case with the Pennsylvania Equal Rights Amendment,[7] this Court has "not engaged in the four-factor test set forth by *Edmunds*." *Jubelirer v. Rendell*, 953 A.2d 514, 524 (Pa. 2008); see also *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-03 (Pa. 2018) ("Free and Equal Elections Clause has no federal counterpart, and, thus, our seminal comparative review standard described in *Commonwealth v. Edmunds* [] is not directly applicable.")

Thus, *Fischer* is not inconsistent with *Edmunds*, nor does *Edmunds* suggest, much less require, reconsideration of *Fischer*'s holding in light of the *Edmunds* factors.

E. No Factual Changes Require Overturning *Fisher*.

Appellants do not describe with any specificity any factual changes have occurred that would warrant the overturning of *Fischer*. And indeed, none have. Instead, Appellants broadly claim, "The decades since *Fisher* have ushered in a

[7] Appellants' Brief at 44 ("In contrast, the U.S. Constitution contains no such explicit prohibition" against sex discrimination).

better understanding around the connection between abortion access and women's equality." App. Br. at 51. There are several problems with this argument.

First, a "better understanding" is not a factual change.

Second, the purpose of the Pennsylvania ERA was to guarantee equal treatment of men and women *under the law*, not to serve as a means for judges to craft social policies that purportedly enhance "women's equality" in all spheres of life and society. Even if women's equality were dependent on abortion access – a connection that *amicus* Life Legal and other *amici* strenuously deny – that would not mean that the ERA empowers this Court to act as a super-legislature, deciding cases according to a constitutional imperative to guarantee and increase abortion access.

Finally, if Appellants were correct that this "better understanding" of the connection between abortion access and women's equality is such a new and radical concept that it should be considered a factual change since *Fischer*, then, by the same token, when the Pennsylvania ERA was adopted, there was at that time no understanding that an explicit constitutional guarantee of equality of the sexes under the law was intended to, or would be used to, guarantee or expand abortion access. And indeed, the fact that the state ERA was adopted while Pennsylvania prohibited almost all abortions bears out that conclusion.

Appellants' purported "factual changes" after *Fischer* are simply abortion advocacy by another name.

IV. STARE DECISIS IN CONSTITUTIONAL CASES.

Although this Court, like the United States Supreme Court, has held that stare decisis is "at its weakest" when interpreting the Constitution, the reason behind that distinction is critical: "because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). In other words, courts should avoid imposing precedents that deprive the other branches of government, and the people, of the authority to create and guide public policy except by amending the constitution.

Appellants paint a grim picture of the burdens imposed by Pennsylvania's restriction on public funding of abortion, but make no mention of the value of the human lives saved from abortion. They then announce *their* conclusions concerning the relative weight to be assigned the interests at issue as if *their* value judgments were self-evident truths:

> Even assuming this interest [in preserving the life of the unborn] is compelling throughout pregnancy, the state's interest in fetal life does not justify overriding a woman's fundamental right to make decisions about her own life course as well as her health and well-being. . . The state's interest in promoting childbirth cannot outweigh a woman's constitutionally protected interest in making these important decisions about her life and her health for herself.

Appellants' Brief at 73-74.

The proper audience for Appellants' arguments is the Pennsylvania General Assembly. The legislature is charged with balancing the "supreme value" that the State places on protecting human life (18 Pa. Cons. Stat. Ann. § 3202(b)(4)) against the other interests that Appellants adduce in support of their preferred outcome. *Cf. June Medical Services v. Russo*, 140 S.Ct. 2103, 2136 (2020) (weighing the state's interest in human life against the woman's liberty interest in defining her own concept of existence, etc., would "require us to act as legislators, not judges, and would result in mothering other than an unanalyzed exercise of judicial will in the guise of a neutral utilitarian calculus") (Roberts, C.J. concurring) (internal quotations omitted).

Appellants have not been deprived of a forum for their arguments or a path toward accomplishing their goals. The forum is a co-equal branch of the state government, and the path is through the political process of persuading the people's elected representatives, or electing new representatives. Throughout the 36 years since *Fischer* was decided, the General Assembly has had the unfettered power to repeal the challenged statutes and fund some or all abortions, for both indigent and non-indigent women.

However, should this Court overrule *Fischer* and hold 18 Pa. Cons. Stat. Ann. §§ 3215 (c) and (j) unconstitutional (subject to proof of the allegations in the Petition), that decision will banish from the debate the voices of those who place

great weight on the preservation of human life, including the life of the unborn. By such a ruling, the Court would make itself the sole authority on abortion funding policy for Pennsylvania with a decision that "can be altered only by constitutional amendment" or yet another overruling of precedent.[8]

CONCLUSION

This Court has frequently emphasized the presumption of constitutionality for legislative acts:

> [A]cts passed by the General Assembly are strongly presumed to be constitutional, including the manner in which they were passed. Accordingly, a statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution. If there is any doubt that a challenger has failed to reach this high burden, then that doubt must be resolved in favor of finding the statute constitutional.

Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 618 (Pa. 2013). (internal citations and quotations omitted).

In the instant case, this Court has already unanimously upheld the challenged legislative enactments against the identical constitutional challenges brought here. Appellants have failed to overcome both the high burden of overruling a settled precedent and the high burden of the presumption of

[8] Appellants do not stop with abortion funding. They argue that the equal protection provisions of the Pennsylvania Constitution require this Court to "hold that the Pennsylvania Constitution protects women's right to decide whether or not to continue a pregnancy." App. Br. at 65. Thus, adopting Appellants' arguments would result not only in the reversal of *Fischer*, but in endowing this Court with veto power over all legislation affecting abortion.

constitutionality. The decision of the Commonwealth Court dismissing the petition should be affirmed.

Respectfully submitted,

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Certificate of Compliance with Word Limit

Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, I certify that this brief contains 3963 words.

/s/ *Catherine W. Short*
Catherine W. Short

Dated: December 8, 2021

Certificate of Compliance

Pursuant to Rule 127 of the Pennsylvania Rules of Appellate Procedure, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ *Catherine W. Short*
Catherine W. Short

Dated: December 8, 2021