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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*.**

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

Brief of *Amici Curiae* the Pennsylvania Pro–Life Federation and the Thomas More Society in Support of Appellees

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Interest of the *Amici*[*]

The Pennsylvania Pro–Life Federation is the largest state-wide organization in the Commonwealth focused solely on promoting the dignity and value of human life from conception to natural death, and to restoring legal protection for unborn children. Through legislation, political action, education and other legal means, including submitting *amicus* briefs in appropriate cases, the Federation proclaims the truth about abortion.

The Thomas More Society is a not-for-profit, national public interest law firm, based in Chicago, Illinois, dedicated to restoring respect in law for human life, including the unborn, promoting family integrity and defending religious liberty. The Thomas More Society advocates and fosters support for these causes by providing expert *pro bono* legal services in state and federal courts.

[*] No person or entity other than the *amici curiae*, their members or counsel paid for the preparation of the *amicus curiae* brief in whole or in part or authored the *amicus* brief in whole or in part.

SUMMARY OF ARGUMENT

Pennsylvania, like thirty-two other States, has refused to facilitate, with the use of public funds, a woman's choice to end the life of her unborn child, except in limited circumstances. In a unanimous decision, *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985), this Court upheld the constitutionality of that decision. Providers are now requesting this Court to overrule *Fischer*, but have produced no new arguments or principled grounds on which to do so.[1]

The funding ban does not impermissibly discriminate on the basis of either a sex-based or a pregnancy-based classification. Instead, as *Fischer* correctly held, the ban distinguishes only between *two classes of pregnant women*: those who carry their children to term, and those who have abortions. As such, it makes a classification based on abortion, not on sex or pregnancy.

Neither Pennsylvania's Equal Rights Amendment ("ERA") nor its equal protection guarantees prohibit classifications based on abortion. First, there is compelling contemporaneous legislative history that demonstrates that the ERA was never intended to be applied to classifications based on abortion—a classification directly related to a characteristic that is unique to one sex—and that such classifications are not to be considered "sex-based." Second, there is no

[1] Appellants are referred to throughout as "Providers."

support in Pennsylvania's equal protection guarantees for finding that classifications based on abortion are "suspect" or "quasi-suspect," as *Fischer* properly concluded. Nor is there any support for a claim that a right to abortion is a fundamental right under any other provision of the Pennsylvania Constitution.

Although this Court has recognized that there is a state right of privacy in making certain important decisions, that right has never been understood to include abortion. Nor, given the Commonwealth's long history of criminalizing abortion, could it be so understood. Accordingly, the restrictions on public funding of abortion should be evaluated under the rational basis standard of review. The restrictions easily satisfy that standard because the refusal to pay for abortion is clearly related to the Commonwealth's important interest in protecting unborn human life—a conclusion Providers tacitly admit. *See* App. Br. at 73–76.

Moreover, the existence of a fundamental constitutional right does not carry with it a concomitant right to have the exercise of that right funded by the State. Accordingly, there is no need for this Court to address the question as to whether a right to abortion exists under the Pennsylvania Constitution because it would not dispose of the funding question that is before the Court.

Fischer was correctly decided and the judgment of the Commonwealth Court rejecting Providers' constitutional claims should be affirmed.

ARGUMENT

Providers essentially concede that the funding ban does not impermissibly discriminate on the basis of either sex-based or pregnancy-based classifications by admitting that Medical Assistance ("MA") covers "all pregnancy-related care except abortion." R. 127a, ¶ 48. On its face, this admission demonstrates that the funding ban does *not* exclude women (as a class) and, thus, is not sex-based. It also demonstrates that the ban does *not* exclude pregnant women (as a class) and, thus, is not pregnancy-based, either.

The classification, based solely on whether or not a woman is seeking an abortion, does not even involve a distinction between men and women. Only women can become pregnant and seek abortions. Therefore, men are not similarly situated and are not provided with a service (abortion) that women are denied. Moreover, even if both men and women *could* obtain abortions, the funding ban would prohibit *both* from having them publicly funded. So, it would not treat men and women differently on the basis of sex.

Nor does the funding ban involve pregnancy discrimination. Pregnant women *are* provided with all pregnancy-related care, except for most abortions. Thus, women are not discriminated against as a class because they are pregnant. Instead, as *Fischer* correctly held, the funding ban simply distinguishes between

two classes of pregnant women—those who carry their children to term and those who have abortions.[2] Accordingly, it makes a classification based *solely* on abortion, not on sex or pregnancy.

I.

THE COMMONWEALTH'S RESTRICTIONS ON PUBLIC FUNDING OF ABORTION DO NOT VIOLATE THE EQUAL RIGHTS AMENDMENT.

Providers contend that the Commonwealth's restrictions on public funding of abortion violate the state Equal Rights Amendment ("ERA"), Art. I, § 28, which prohibits unequal treatment because of the sex of the individual. Specifically, they argue that "the coverage ban, on its face, apportions Medicaid benefits unequally, excluding funding for an extremely common, sex-linked medical need of women while funding all reproductive needs for men." App. Br. at 35.

However, the actual challenged statutory provision (18 Pa.C.S. § 3215), *on its face*, states only that public funds shall not be used to pay for abortion.[3] It makes no distinction between men and women at all. Nor does it mention "reproductive medical needs" in general, App. Br. at 35, or attempt to regulate

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[2] *See Hope Clinic for Women*, *Ltd. v. Flores*, 991 N.E.2d 745, 769–71 (Ill. 2013) (even assuming that parental notice law discriminated between two classes of pregnant female minors, such "discrimination" did not violate the state equal rights provision).

[3] Providers challenged only one statute and none of the challenged regulations implments that statute. None of these provisions contains any broad language relating to medical services generally. They all refer specifically to abortion services.

with respect to "all reproductive medical needs." *Id*. Thus, the *challenged* provision does not deal with any broad category of "reproductive medical needs" and treat women and men differently with respect to that category. It simply concerns a single medical procedure (abortion) and provides that it shall not be publicly funded except in limited circumstances. Nothing in the text, history or interpretation of the ERA requires Pennsylvania to pay for abortions.[4]

A. Text of the Amendment.

The ERA provides: "Equality of rights under the law shall not be denied or abridged by the Commonwealth of Pennsylvania *because of the sex of the individual*." Art. I, § 28 (emphasis added). As such, it prohibits *unequal* treatment of men and women. This presumes that a specific benefit or burden could be provided to *both*, but applies *unequally* to only one and not the other. That presumption, quite obviously, has no application to the abortion funding ban.

B. History and Intent of the Amendment.

The Joint Resolution to propose the ERA (H.B. 1678) was first introduced on October 6, 1969, and passed the House of Representatives on December 2, 1969, by a vote of 190-0 (House Journal 1543). It passed the Senate, as amended,

[4] In this Argument, as well as in Argument II, *infra*, *amici* will apply the four-factor test this Court enunciated in *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991), for interpreting state constitutional guarantees.

on March 18, 1970, by a vote of 39-0 (Senate Journal 1082), and passed the House on April 29, 1970, by a vote of 180-0 (House Journal 1155). Per the requirement that state constitutional amendments pass two successive sessions of the legislature, the ERA was reintroduced (H.B. 14) on January 6, 1971. It passed the House on February 3, 1971, by a vote of 199–0 (House Journal 96), and passed the Senate on February 15, 1971, by a vote of 45–0 (Senate Journal 101). It was subsequently approved by the voters on May 18, 1971, and became law.

The legislative journals do not contain any debate on the ERA. Nevertheless, there is persuasive evidence that the drafters did not intend or expect that the amendment would preclude the Commonwealth from prohibiting abortion, much less refusing to fund abortion.

First, the same legislature that proposed the ERA overwhelmingly passed a bill prohibiting *all* abortions except those necessary to save the life of the mother.[5] It strains credulity to believe that a legislature that passed a bill to prohibit virtually all abortions intended or expected that an amendment to the state constitution it had proposed (without a single "no" vote) would invalidate such

[5] H.B. 800, introduced on April 27, 1971, passed the House on June 22, 1972, on a vote of 157-34 (House Journal 3241), passed the Senate, as amended, on November 15, 1972, on a vote of 39-9 (Senate Journal 1940), and the House concurred in the Senate amendments on November 20, 1972, on a vote of 127-50 (House Journal 4054). The bill would have clarified existing law, which prohibited "unlawful abortions."

legislation.[6] But it is not necessary to speculate as to what the legislature thought.

In the debate over Pennsylvania's ratification of the federal Equal Rights Amendment,[7] during that same legislative session, the principal House sponsor of the ratifying legislation, Representative Kelly, stated:

> [The Equal Rights Amendment] will not affect laws which apply to only one sex since it is not possible to legislate equal treatment in such cases. Therefore, *it will not affect abortion laws* or criminal acts capable of being committed by one sex only.

House Journal 2672 (May 2, 1972) (emphasis added). *See also* Senate Journal 1692 (September 20, 1972) (remarks of Senator Reibman) ("nothing in [the] equal rights amendment . . . erases the physical distinctions between man and woman").

The legislature's understanding that the proposed *federal* ERA would not affect the Commonwealth's authority to regulate abortion also applies to its understanding of the *state* ERA. As Representative Crawford said in explaining her support for ratification of the federal ERA:

> I know I do not have to enumerate the problems [with respect to sex discrimination] for this House, because we unanimously passed Pennsylvania's equal rights amendment last year.

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[6] Representative Kelly was a co-sponsor of both the state ERA (H.B. 14) and H.B. 800, which would have prohibited virtually all abortions. These bills were introduced just three months apart.

[7] The language of the proposed federal ERA (H.B. 2070) and the adopted state ERA is virtually identical.

> Now we have the opportunity to pass the ratifying legislation *so that these same legal guarantees can be extended to all women on the national level*.

House Journal 2624 (April 4, 1972) (emphasis added).[8] The General Assembly voted overwhelmingly to ratify the federal ERA.

In light of the foregoing contemporaneous evidence, it is clear that the legislature that proposed the state ERA did not intend or expect that amendment to be read as treating distinctions between two classes of pregnant women, based on abortion, as though they were prohibited sex-based distinctions. Providers (and their *amici*) ignore this clear legislative history regarding passage of the ERA and invite this Court to read into that provision a right that its sponsors and those who voted for it never intended. The Court should reject that invitation.

C. Pennsylvania's Interpretation of the Amendment.

Providers claim that *Fischer* departed from a long line of cases that had interpreted the ERA to prohibit sex discrimination. App. Br. at 34. However, *Fischer* did no such thing.

Providers cite almost a dozen decisions of this Court in which the court struck down various sex-based classifications, either on constitutional or statutory grounds. App. Br. at 13–24. All of the cases cited by Providers, however,

[8] Representative Crawford was a co-sponsor of the bills that proposed the *state* ERA.

involved different treatment of *similarly situated* men and women based only on their sex or pregnancy. As noted above, that is not true of the abortion funding ban. The funding ban does not provide that the Commonwealth will pay for abortions for men, but not women.

There cannot be any sex discrimination (unequal treatment) where men and women are not similarly situated. That is a foundational principle of analysis under the ERA. As Representative Kelly stated:

> [The ERA] will not affect laws which apply to only one sex *since it is not possible to legislate equal treatment in such cases.*

House Journal 2672 (May 2, 1972) (emphasis added). *Fischer* correctly recognized that the abortion funding restriction involved a classification that was directly related to a physical characteristic that is unique to women—their ability to conceive and bear children. Thus, it is not possible to legislate unequally between men and women in this respect.[9]

Providers also cite *Cerra v. East Stroudsberg Area School District*, 299 A.2d 277 (Pa. 1973), to claim that *Fischer* is contrary to this Court's decisions and should be overruled. In doing so, they seriously mischaracterize the holding of that case and ignore the specific facts of *Cerra* to claim that it established a

[9] Contrary to Providers' understanding, the indisputable biological fact that only women can conceive and bear children is not a "stereotype."

sweeping holding, that whenever a law treats women differently "on the basis of a physical condition peculiar to their sex," it "is sex discrimination, pure and simple." App. Br. at 35. *Cerra* did nothing of the kind.[10]

The primary fallacy of this approach is that it ignores the *nature* of the discrimination addressed in *Cerra*. In all of the cases cited by Providers, as is true of *Cerra*, a benefit/burden that *both* men and women *could* be affected by attached to only one group based solely on their sex. In each instance, the Court held that the different treatment of *similarly situated* individuals based solely on their sex constituted sex discrimination.

Cerra was a termination of employment case. Although both men and women could be employed as teachers and temporarily be absent from their teaching duties for a variety of reasons, only pregnant women were terminated from employment altogether—solely because of their pregnancy. As the *Cerra* Court explained:

> Mrs. Cerra's contract was *terminated* absolutely, *solely* because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her services as a teacher was or would be affected as a result of her pregnancy. *Male teachers who might well be temporarily disabled from a multitude of*

[10] Had it done so, it would have been in direct conflict with the intent of the ERA as set forth above.

illnesses, have not and will not be so harshly treated.

Cerra, 299 A.2d at 280 (emphasis added). Thus, the *Cerra* Court's decision rested squarely on the fact that women were treated *more harshly* with respect to their *employment* than a *similarly situated* man (who might be temporarily disabled) would be—*solely* because of her pregnancy.

Properly viewed, *Cerra* is a case based on gender stereotyping—women who have recently given birth are presumed to be unable to perform duties that men are permitted to perform. Simply recognizing that only women can become pregnant and obtain an abortion, however, is not succumbing to any gender stereotyping at all. It is not making any presumptions about women and treating women "more harshly" based on those presumptions. Neither men nor women are able to obtain a publicly funded abortion.

Fischer is entirely consistent with *Cerra* and the other cases Providers cite. The *Fischer* Court merely recognized that *Cerra* and the other cases were different in kind because none of them involved *an issue* upon which men and women are not capable of being similarly situated. Although men and women can both be employed, they cannot both choose to have an abortion. Pregnant women who are unable to obtain publicly funded abortions are not similarly situated to any men seeking to have publicly funded abortions, and are not denied such funding

because they are women.

Nothing in this Court's prior interpretation of the ERA even remotely suggests that *Fischer* was wrongly decided and should be overruled. *Fischer* properly distinguished *Cerra* in upholding the Commonwealth's restrictions on public funding of abortion. *Fischer* was correct when it was unanimously decided and remains correct today.[11]

D. Out-of-State Abortion Funding Authorities Involving State ERAs.

Only three state supreme courts have rendered decisions with respect to challenges to abortion funding restrictions based on a state ERA.[12] That there are not more such decisions may be attributable to the well-recognized exception (under state ERAs) for unique physical characteristics with respect to unequal treatment of individuals based on sex. As Maryland's highest court has observed: "Disparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments." *Burning*

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[11] *Fischer* was decided in 1985. Significantly, Providers cite no opinion of this Court in the intervening thirty-six years that questions either the reasoning or the result in *Fischer*. Indeed, this Court has repeatedly cited *Fischer* with approval. *See Klein v. Commonwealth*, 555 A.2d 1216, 1224 (Pa. 1989), and *Love v. Borough of Stroudsburg,* 597 A.2d 1137, 1139–40 (Pa. 1991).

[12] Providers cite several additional decisions from other States in Section B of their brief that deals with the ERA, but those cases were not decided on the basis of a state ERA. The same applies to the Alaska, California, Massachusetts and New Jersey Supreme Court cases cited by the Brief *Amicus Curiae* of the Equal Rights Amendment Project ("ERA Project Brief"), 17–19.

Tree Club, *Inc. v. Bainum*, 501 A.2d 817, 822 n. 3 (Md. 1985).

Two of the three cases, *Fischer* and *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002), follow this basic tenet, holding that abortion funding restrictions do not violate their state ERAs because pregnancy is a physical condition unique to women, and men, not being similarly situated, cannot choose abortion. Only one state supreme court has held contrary to this principle—the New Mexico Supreme Court in *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.3d 841 (N.M. 1998). That case, cited prominently by Providers, is basically unsound for the reasons stated above.[13] And its reasoning and holding are directly contrary to the views of the sponsors of the Pennsylvania ERA.[14]

Indeed, the New Mexico Supreme Court's determination that a physical characteristic unique to one sex does not insulate a classification based on that characteristic from an equal rights challenge has been rejected by every other state appellate court that has considered the question.[15] In sum, it is *New Mexico Right*

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[13] In applying "heightened scrutiny" to the challenged funding regulation, the New Mexico Supreme Court failed to recognize that the regulation did not use "the unique ability of women to become pregnant and bear children" as a pretext to discriminate against them in *other* respects, *e.g.*, "imposing restrictions on [their] ability to work and participate in public life." 975 P.2d at 854. Rather, the funding regulation there, as here, was directed at abortion as a medical procedure, which, in the nature of things, can affect only women.

[14] *See* Argument I(2), History and Intent of the Amendment, *supra*, at 6–9.

[15] The cases have upheld rape statutes, *State v. Rivera*, 612 P.2d 526, 530–31 (Haw. 1980), *State v. Fletcher*, 341 So.2d 340, 348 (La. 1976), *Brooks v. State*, 330 A.2d 670, 672–73

to Choose, which Providers find "particularly instructive," App. Br. at 50, and not *Fischer*, that is an outlier in the case law interpreting the meaning and scope of state equal rights amendments.

Providers repeatedly cite *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986), *an unappealed trial court decision*, as an authority this Court should follow. App. Br. at 48, 49, 50, 70, 72, 75.[16] However, the ERA analysis in *Doe* on which Providers rely is mere *dicta* because the trial court had already determined that the administrative funding restriction in question was not authorized by statute. 515 A.2d at 143-45. Moreover, a later Connecticut Appellate Court decision held that the State *could* treat men and women differently based upon physical characteristics unique to women. *See Dydyn v. Dep't of Liquor Control*,

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(Md. Ct. Sp. App. 1975), *State v. Craig*, 545 P.2d 649 (Mont. 1976), *Finley v. State*, 527 S.W.2d 553, 555–56 (Tex. Crim. App. 1975); statutory rape statutes, *People v. Salinas*, 551 P.2d 703, 705–06 (Colo. 1976), *State v. Bell*, 377 So.2d 303 (La. 1979); an aggravated incest statute, *People v. Boyer*, 349 N.E.2d 50 (Ill. 1976); statutes governing the means of establishing maternity and paternity, *Commonwealth v. MacKenzie*, 334 N.E.2d 613, 614–16 (Mass. 1975); *Bolden v. State*, 358 P.3d 1009, 1026-32 (Utah. 2014); *A v. X, Y & Z*, 641 P.2d 1222, 1224–26 (Wyo. 1982); statutes and rules barring female nudity in bars, *Dydyn v. Dep't of Liquor Control*, 531 A.2d 170, 175 (Conn. App. Ct. 1987); *MJR's Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 575 (Tex. App.-Dallas 1990, *writ denied*); and ordinances prohibiting public exposure of female breasts, *State v. Lilley*, 204 A.3d 198, 205-08 (N.H. 2019); *City of Seattle v. Buchanan*, 584 P.2d 918, 919–22 (Wash. 1978).

[16] The ERA Project Brief (at 18) and the National Council of Jewish Women Brief (at 22), misrepresent *Doe* as a decision of the Connecticut *Supreme* Court or of the Connecticut *Appellate* Court, respectively, not of the *Superior* Court which, as noted, is a Connecticut *trial* court.

531 A.2d 170, 175 (Conn. App. Ct. 1987) (topless dancing in bars).

E. Policy Considerations.

Providers assert that making any distinction on the basis of a physical characteristic peculiar to a person's sex is sex discrimination, and that this applies to all pregnancy-related distinctions. Acceptance of this line of reasoning, however, would require this Court to strike down the entire Pennsylvania Medical Assistance ("MA") law as a violation of the ERA and equal protection provisions of the Pennsylvania Constitution. The MA law mandates that pregnant women be given *preferential* treatment and contains numerous eligibility benefits for pregnant women that are not available to men or other non-pregnant women.

Although States are not required to participate in the Medicaid program, federal Medicaid law *requires* that States that do participate provide benefits to the "mandatory categorically needy" (pregnant women, children, parents and some disabled). 42 U.S.C. § 1396(a)(10)(A)(i). Those who do not fall within this category (*e.g.*, men and non-pregnant women (ages 19–64) without children) need not be covered. *See also* Amicus Brief of the National Health Law Program ("NHLP") at 3. Pennsylvania's current MA eligibility criteria (under Medicaid expansion) still treats pregnant women differently than other persons *solely* because they are pregnant. Men and women (ages 19–64) must have income

below *133%* of the Federal Poverty Level ("FPL") to be eligible for MA. Pregnant women, however, are eligible with incomes below *215%* of the FPL. https://www.dhs.pa.gov/Services/Assistance/Pages/MA-General-Eligibility.aspx; https://www.dhs.pa.gov/Services/Assistance/Pages/Pregnancy-and-Family-Planning.aspx. *See also* NHLP Br. at 3, 7–10 (133% of FPL is about $35,000/yr and 215% of FPL is about $57,000/yr for a family of four. Thus, pregnant women are eligible for MA benefits with incomes about $20,000 higher than others.

This Court *could* strike down the Pennsylvania MA law (because States are not required to participate in Medicaid). However, as a matter of public policy, to do so would be seriously detrimental to all of those currently benefitting from the MA law and would be clearly contrary to the public policy of the Commonwealth. Thus, applying the *Edmunds* factors to Providers' ERA claim requires this Court to reject that claim.

II.

THE FUNDING RESTRICTIONS DO NOT VIOLATE PENNSYLVANIA EQUAL PROTECTION GUARANTEES.

Providers also based their challenge on Art. III, § 32, and Art. I, § 26, of the Pennsylvania Constitution. Those provisions have been interpreted to provide

equal protection under the state constitution.[17]

This Court has stated that, in evaluating equal protection claims under the Pennsylvania Constitution, it must first determine the type of right at issue. *Fischer*, 502 A.2d at 121; *Love*, 597 A.2d at 1139. Providers claim that, although MA–eligible women do not have an independent, freestanding constitutional right to have their abortions funded, if the Commonwealth funds childbirth, then it must also fund abortion. App. Br. at 57, 67, 72.

Providers cite no constitutional provision that expressly, or otherwise, protects a right to abortion or a right to have an abortion funded if the Commonwealth chooses to fund childbirth. And an examination of the text and history of the provisions of the constitution Providers rely upon and the relevant caselaw confirms that *Fischer* correctly held that "[s]uch a right is to be found nowhere in our state Constitution," and, therefore, "cannot be considered fundamental." 502 A.2d at 122. We address each of the Providers claims separately below.[18]

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[17] *Amici* discuss Art. I, § 1 (referring to certain fundamental rights), within its discussion of Art. I, § 26.

[18] As set forth in Argument I of this brief, the funding ban is not sex-based and, thus, does not discriminate on the basis of a suspect or quasi-suspect classification.

A. Equal Protection under Article III, § 32.

As this Court has repeatedly indicated, in examining whether a constitutional right exists under the Pennsylvania Constitution, the Court must first look to the explicit language of the constitution. *See*, *e.g.*, *Kroger v. O'Hara*, 392 A.2d 266, 274–76 (Pa. 1978), and cases cited therein. "To do otherwise would be to place this Court's subjective value judgment as to what interests of the people are most important above the value judgment contained in our state Constitution." *Id.* at 276.

Kroger involved a challenge, under Art. III, § 32, to the Sunday Trading Laws ("blue laws")—prohibiting certain businesses from operating on Sundays, while allowing others to operate. The Court stated:

> In Article III, Section 32, of the Pennsylvania Constitution we find eight areas *explicitly* mentioned as areas which are not to be encumbered by special laws treating certain citizens differently from others.

392 A.2d at 274 (emphasis in original). Noting that one of the eight subsections expressly applied to special laws involving *trade*, the Court held that the blue laws fell within that provision. *Id*. The Court then held that the law violated Art. III, § 32, because it contained so many exceptions as to preclude any coherent rationale upon which it was based, and, thus, was not fairly and substantially

related to the object of the statute ("providing a uniform day of rest and recreation"). *Id*. at 275–76.

None of those eight express areas set forth in Art. III, § 32, remotely relates to the enactment of special laws associated with public funding of abortion.[19] Providers do not point to any of those specific areas as protective of a right to abortion, nor do they cite any Pennsylvania caselaw in support of a claim that Art. III, § 32, protects such a right. Thus, nothing in Art. III, § 32, prohibits the Commonwealth from refusing to fund abortion while funding childbirth.

B. Equal Protection under Article I, § 26.

1. Text and Pennsylvania Cases Regarding Proper Analysis under Article I, § 26.

Providers claim that the equal protection provisions of the Pennsylvania Constitution "deviate[] markedly from the federal Equal Protection Clause," and then erroneously claim that "this Court has not tied the construction of these provisions to the very dissimilar federal provision." App. Br. at 59. Inexplicably, Providers cite this Court's decision in *Love v. Borough of Stroudsberg*, 597 A.2d 1137 (Pa. 1991), in support of that assertion. However, in *Love*, this Court clearly

[19] The funding ban is not a "special law." In any event, equal protection analysis under Art. III, § 32, is the same as under the United States Constitution. *See Pennsylvania Turnpike Comm'n v. Commonwealth*, 899 A.2d 1085, 1094 n. 14 (Pa. 2006).

reiterated the longstanding position that:

> The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.

597 A.2d at 1139. The Court then recited the standard analysis for equal protection challenges—stating that "an equal protection claim must begin with a determination of the type of interest at issue." *Id*.[20] It also reiterated that strict scrutiny analysis applies only where a suspect classification or a fundamental right is at issue. *Id*.

Neither Providers nor pregnant women seeking abortion belong to any recognized suspect class, and, as discussed below, neither a right to abortion nor the funding thereof is protected by Art. I, § 1, of the Pennsylvania Constitution.

2. Text and Pennsylvania Caselaw Demonstrate that Abortion is not a Fundamental Right under Article I, § 1.

Article I, § 1, does not mention a right to abortion as among the "inherent rights of mankind," and there is nothing in the history, traditions of the Commonwealth, or caselaw that suggests that such a right was intended to be recognized. That is not surprising given that, at the time Art. I, § 1, was adopted (in 1874), abortion had long been a crime in the Commonwealth.

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[20] *Love* involved a challenge under Art. I, §§ 1 and 26, not Art. III, § 32.

In at least two cases decided *before* the Commonwealth enacted its first abortion statutes in 1860, this Court recognized that abortion was a common law crime throughout pregnancy. *See Mills v. Commonwealth*, 13 Pa. 630, 632 (1850) ("[t]he moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated"); *Commonwealth v. Demain*, 6 Penn. Law Jour. 29, 31 (Brightly's N.P. Reports 441, 444) (1846) (noting that it is not necessary, in an indictment for abortion, "to aver quickness on the part of the mother").

The 1860 statutes prohibited and punished as a felony an unlawful abortion performed at any stage of pregnancy. Pa. Laws No. 374, §§ 87, 88 (1860). In an early case, this Court recognized that the statutes had been enacted with an intent to protect unborn human life. *See Railing v. Commonwealth*, 1 A. 314, 315 (Pa. 1885). Amended from time to time, those statutes remained on the books until *Roe v. Wade*, 410 U.S. 113 (1973), was decided, and they were struck down on *federal*, not *state*, grounds. *See Commonwealth v. Page*, 303 A.2d 215 (Pa. 1973); *Commonwealth v. Jackson*, 312 A.2d 13 (Pa. 1973).

Following *Roe*, the General Assembly enacted the Abortion Control Act which, despite allowing abortion as *required by Roe*, continued to express the Legislature's intention to protect the life and health of the unborn child to the extent permitted by federal law. 18 Pa.C.S. § 3202(a). The Act implements that

intention by mandating a general rule of construction:

> 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.

Id. § 3202(c) (emphasis added).

Consistent with the policy of "encouraging childbirth over abortion," Pennsylvania has recognized the rights of unborn children in a variety of contexts outside of abortion, including criminal law, tort law and health care law.[21] Under the "Crimes Against the Unborn Child Act," the killing or injury of an unborn child at any stage of pregnancy (outside of an abortion) may be prosecuted as homicide or aggravated assault. 18 Pa.C.S. § 2601 *et seq*.

In tort law, a statutory cause of action for the wrongful death of unborn children has been recognized. *See Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Hudak v. Georgy*, 634 A.2d 600 (Pa. 1993). A common law cause of action for (nonlethal) prenatal injuries may also be brought. *Sinkler v. Kneale,* 164 A.2d 93 (Pa. 1960). And Pennsylvania has banned wrongful life and wrongful birth causes

[21] The Commonwealth's expression of public policy, together with its rule of construction and its recognition of the rights of unborn children in multiple areas of the law outside of abortion, *infra*, all relate to the fourth factor set forth in the *Edmunds* methodology, to wit, "policy considerations." 586 A.2d at 887.

of actions. *See* 42 Pa.C.S. §§ 8305(a), (b). *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 821 (Pa. Super. Ct. 1993) ("[t]he protection of fetal life has been recognized to be an important state interest"). And in health care law, except in limited circumstances, life-sustaining treatment, nutrition and hydration may not be withheld or withdrawn from a pregnant patient under a living will or a health care directive. 20 Pa.C.S. § 5429.

To summarize, there is a complete absence of any indication that the framers of the Pennsylvania Constitution ever intended to recognize a right to abortion.[22] Pennsylvania has a history of prohibiting abortion—both at common law and under statute—which long antedates adoption of the 1874 Pennsylvania Constitution. This history was interrupted only by virtue of the Supreme Court's decision in *Roe v. Wade*. And, despite *Roe*, the Commonwealth has continued to assert its interest in protecting the rights of unborn children in every way possible without violating federal law. Given this history, it cannot plausibly be said that there is an implied right of privacy or liberty interest hidden in Art. I, § 1, that secures a right to obtain an abortion.

[22] Nothing in a review of the debates over the Declaration of Rights discloses an intention to confer a right to abortion, and Providers do not suggest otherwise.

3. The Cases Cited by Providers do not Suggest Otherwise.

Providers do not cite a single case that supports a finding of a fundamental right to abortion in the Pennsylvania Constitution. Instead, they rely on scattered comments (mostly taken out of context) from a number of this Court's cases in unrelated areas of law to argue that the Court should create a new constitutional right to abortion out of thin air. This Court should not accept their invitation to do this. As the *Kroger* Court noted, to do so would "place this Court's subjective value judgment as to what interests of the people are most important above the value judgments contained in our state Constitution." 392 A.2d at 274.

This Court has recognized a state right to privacy under Art. I, § 1, that embraces both "a freedom from disclosure of personal matters" and "the freedom to make certain important decisions." *Denoncourt v. Commonwealth*, *State Ethics, Comm'n*, 470 A.2d 945, 948 (Pa. 1983). Cases falling into the first category, *i.e.*, informational privacy,[23] clearly provide no basis for recognizing a right to abortion, which involves conduct (nor do cases involving the search and seizure provision of the Pennsylvania Constitution). And Providers misrepresent cases

[23] Justice Musmanno's paean of praise to the importance of personal privacy in *Commonwealth v. Murray*, 223 A.2d 102, 109–10 (Pa. 1966), quoted by the Providers, App. Br. at 63, was *dicta* as the case (addressing eavesdropping) was decided on *statutory*, not *constitutional*, grounds. Moreover, only one other justice joined Justice Musmanno's opinion.

falling into the second category (privacy of conduct).

Providers quote Justice Flaherty's opinion in *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980), for the proposition that Art. I, § 1, recognizes a broad liberty interest where "each individual's right to be free from interference in defining and pursuing his own morality" is protected from the police power seeking to "enforce a majority morality on persons whose conduct does not harm others." App. Br. at 64 (citing *Bonadio* at 50). Providers ignore the fact that, by definition, an abortion not only harms but causes the death of another—the unborn child.[24] This takes the issue of abortion outside the scope of any principle Justice Flaherty may have articulated. Moreover, Providers fail to note that Justice Flaherty's opinion was not joined by any other member of the Court, and that it did not cite a single provision of the Pennsylvania Constitution with respect to his privacy analysis.

Providers also cite *Fabio v. Civil Service Comm'n of the City of Philadelphia*, 414 A.2d 82, 89 (Pa. 1980), as though it holds that "decisional autonomy" under Pennsylvania's Constitution protects a right to engage in

[24] Medical texts have long referred to the unborn child as a "second patient" in obstetrical practice, and pediatric hospitals around the country regularly perform surgery on this second patient. *See*, *e.g.*, Jack A. Pritchard and Paul C. MacDonald, *Williams Obstetrics*, vii (16th ed. 1980), and the website of Children's Hospital of Philadelphia, https://www.chop.edu/treatments/fetal-surgery.

extramarital sex. App. Br. at 64. But, *Fabio* holds no such thing. It merely recognized that, due to the *legislature's* repeal of the statute criminalizing adultery and the *judiciary's* abolition of the civil cause of action of criminal conversation, extramarital sexual conduct was no longer subject to governmental interference. The court did not rely for its holding on any provision of the state constitution.

This Court *has* recognized a state right of privacy in preserving one's bodily integrity. *See John M. v. Paula T.*, 571 A.2d 1380, 1386 (Pa. 1990) ("person whose blood is sought has clear privacy interests in preserving his or her bodily integrity"); *Coleman v. Workers' Compensation Appeal Board*, 842 A.2d 349, 354 (Pa. 2004) ("people have a privacy interest in preserving their bodily integrity, which may be afforded constitutional protection").[25] But that right, based upon the common law of battery, is a *negative* right to *refuse* unwanted medical treatment, tests or examinations, not an *affirmative* right to *insist* upon a particular type of treatment (*e.g.*, an abortion). *See Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (constitutional rights of privacy and personal liberty did not afford plaintiff the right "to obtain laetrile [for cancer treatment] free of the lawful

[25] *Cable v. Anthou*, 699 A.2d 722 (Pa. 1997), also cited by Providers, App. Br. at 65, was a dispute over a request for a second paternity test. The case was decided on Fourth Amendment grounds, not state constitutional grounds, and the quote Providers attribute to this Court was actually this Court's summary of the Superior's Court's opinion. *Id*. at 726.

exercise of government police power"); *Seeley v. State*, 940 P.2d 604, 612 (Wash. 1984) ("the selection of a particular treatment or medicine is not a constitutionally protected right") (marijuana). Moreover, unlike abortion, the right to refuse unwanted medical treatment has deep roots in English and American law. *See Cruzan v. Director*, *Missouri Dep't of Health*, 497 U.S. 261, 278–79 & n. 7 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 719–26 & n. 17 (1997).

In sum, Providers have cited no case that holds or even suggests that Art. I, § 1 (or any other provision of the Pennsylvania Constitution) protects a right to destroy human life through abortion. Indeed, Providers seem completely oblivious to the irony in their claim that Art. I, § 1, which expressly protects the right of "*defending life*," should be read to include a non-existent right of *destroying life* through abortion. Or that the right to "procreate" or "reproduce," *i.e*., the right to *create* life,[26] includes a non-existent right to *destroy* life through abortion.

There is simply no right to abortion—fundamental or otherwise—that is protected under the Pennsylvania Constitution. Accordingly, the proper standard of review for evaluating the refusal to fund abortion while funding childbirth is the rational basis standard. Under that standard, the refusal to facilitate the destruction

[26] *See Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003) (referring to "right to procreate"), and *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108 (Pa. 2020) (same). *See* App. Br. at 62.

of human life by funding abortion is clearly related to the Commonwealth's important, indeed, compelling, interest in protecting unborn human life.

Assuming, *arguendo*, that a right to abortion exists, the existence of such a right would not dispose of this case. Nothing in the funding ban prohibits an indigent woman from obtaining an abortion. It simply refuses to pay for it.

Providers repeatedly concede that the existence of a constitutional right does not carry with it a concomitant right to have its exercise publicly funded. However, they claim that by funding childbirth, and not abortion, the refusal somehow becomes unconstitutional. This is illogical. Whether an indigent pregnant woman has the ability to pay for an abortion from private sources has no relationship whatsoever to whether the Commonwealth funds childbirth. If she cannot pay for it, then, as a matter of course, she will carry to term regardless of whether childbirth is funded. As *Harris v. McRae* 448 U.S.297, 317 (1980) correctly stated, she is left with the "same range of choice" she would have had if neither childbirth nor abortion were funded and there is no constitutional violation. The Commonwealth's funding of childbirth is not the reason that she carries to term—her inability to pay for an abortion is, and that inability is due to her indigency.

Moreover, to suggest that the failure to fund abortion acts as a "*de facto*"

ban on abortion, App. Br. at 72, is the same as arguing that indigent women have a constitutional right to have their abortions publicly funded. However, as Providers concede, they have no such right. Thus, even if the Pennsylvania Constitution were held to recognize a constitutional right to abortion, nothing in the funding ban would burden that right.

CONCLUSION

For the foregoing reasons, the judgment of the Commonwealth Court should be affirmed.

Respectfully submitted,

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Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, I certify that this brief contains 6,995 words.

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Dated: November 23, 2021

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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.

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