IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA, and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,
Appellants
v.
PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, MEG SNEAD, in her official capacity as Acting Secretary of the Department of Human Services, ANDREW BARNES, in his official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Services' Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Services' Office of Medical Assistance Programs,
Appellees

On Appeal from the January 28, 2020 and March 26, 2021 Orders of the Commonwealth Court, at Docket No. 26 MD 2019, Granting Applications for Leave to Intervene and Sustaining Preliminary Objections, Respectively

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BRIEF FOR APPELLEES

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COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Appellate review of the decision to sustain preliminary objections is limited to determining whether the lower court abused its discretion or committed an error of law. *See In re Redevelopment Auth. of Phila.*, 938 A.2d 341, 345 (Pa. 2007) (citations omitted). When reviewing the Commonwealth Court's grant or denial of preliminary objections, the Supreme Court's standard of review is *de novo* and the scope of review is plenary. *Seeton v. Pa. Game Comm'n*, 937 A.2d 1028, 1032 n.4 (Pa. 2007) (citing *Luke v. Cataldi*, 932 A.2d 45, 49 n.3 (Pa. 2007)).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether Appellants lack standing because they are attempting to vindicate the purported rights of third parties and the harm they allegedly suffered is not protected by the constitutional provisions on which they rely?

Answer Below: Yes.
Suggested Answer: Yes.

II. Whether the Commonwealth Court followed this Court's precedent in *Fischer* and Appellants have not provided a special justification for overturning the holding that case?

Answer Below: Not addressed.
Suggested Answer: Yes.

COUNTER-STATEMENT OF THE CASE

Appellants, Allegheny Reproductive Health Center, Allentown Women's Center, Berger & Benjamin LLP,[1] Delaware County Women's Center, Philadelphia Women's Center, Planned Parenthood Keystone, Planned Parenthood Southeastern Pennsylvania, and Planned Parenthood of Western Pennsylvania (collectively, "Appellants") are corporations that provide reproductive health care services to patients enrolled in or eligible for the Medical Assistance ("MA") program. R.116a-123a, ¶¶ 2-32. On January 16, 2019, Appellants filed a Petition for Review in the Nature of a Complaint seeking Declaratory Judgment and Injunctive Relief ("Petition for Review"). R.111a-328a. Therein, Appellants challenged the statutory provisions codified at 18 Pa. C.S. § 3215(c) and (j) and the associated regulations at 55 Pa. Code §§ 1147.57, 1163.62, and 1221.57 (hereinafter, the "abortion funding coverage ban"). These provisions prohibit the expenditure of state funds for the performance of an abortion, except where necessary to avert the death of the pregnant woman or where the pregnancy was caused by rape or incest. R.127a, ¶¶ 49-50.

In Count One of the Petition for Review, Appellants alleged that the abortion funding coverage ban discriminates against women based on their sex in violation

[1] Since the filing of the Petition for Review, Berger & Benjamin LLP has been removed from this action.

of the Pennsylvania Equal Rights Amendment ("ERA"), contained at Article I, Section 28 of the Pennsylvania Constitution. R.140a-141a, ¶¶ 88-92. In Count Two, Appellants alleged that the abortion funding coverage ban violates the equal protection provisions of Article I, Sections 1 and 26 and Article III, Section 32 of the Pennsylvania Constitution by discriminating against women who seek to terminate a pregnancy, while covering care related to pregnancy and childbirth, and excluding women from exercising the fundamental right to choose to terminate a pregnancy. R. 142a-143a, ¶¶ 93-96.

On April 16, 2019, Appellees, Pennsylvania Department of Human Services, Acting Secretary Meg Snead, Executive Deputy Secretary Andrew Barnes,[2] and Deputy Secretary Sally Kozak (hereinafter, collectively the "Department Appellees") filed Preliminary Objections to the Petition for Review in the Nature of an Action for Declaratory Judgment and Injunctive Relief ("Preliminary Objections"). R.328a-340a. The Department Appellees asserted preliminary objections based on legal insufficiency of a pleading (demurrer) and lack of standing. In their first preliminary objection, the Department Appellees argued that Appellants have failed to state a claim upon which relief may be granted

[2] This action was initially instituted against prior Secretary of Human Services Teresa Miller and prior Executive Deputy Secretary Leesa Allen in their official capacities. Both have since left employment by the Department of Human Services. As such, Acting Secretary Meg Snead and Executive Deputy Secretary Andrew Barnes have been substituted pursuant to Pa. R.A.P. 502.

because binding Pennsylvania Supreme Court precedent previously held that the abortion funding coverage ban is constitutional. R.329a-331a, ¶¶ 1-6. In their second preliminary objection, the Department Appellees asserted that Appellants lack standing because they are bringing this action on behalf of their patients, who are not parties to this action, and cannot establish standing to sue on their own behalf because they fail to allege a harm to a constitutionally protected interest. R.331a-333a, ¶¶ 7-14.

On February 27, 2020, the Department Appellees filed a Brief in Support of Preliminary Objections.[3] On October 14, 2020, the Commonwealth Court heard oral argument *en banc*. On March 26, 2021, the Commonwealth Court sustained the Preliminary Objections, holding that Appellants did not have standing to challenge the abortion funding coverage ban on the basis of the constitutional rights belonging to third parties and that the Petition for Review failed to state a claim on which relief can be granted because all of the claims raised therein have

[3] The Commonwealth Court suspended the briefing schedule for the Department Appellees' Preliminary Objections pending the disposition of Applications for Leave to Intervene filed by members of the Pennsylvania Senate and Pennsylvania House of Representatives. *See* R.358a-433a. On June 21, 2019, the Commonwealth Court entered an Order denying the Applications for Leave to Intervene. The members of the Pennsylvania Senate and Pennsylvania House of Representatives filed Applications for Reargument. R.638a-677a. On July 22, 2019, the Commonwealth Court granted reconsideration, R.738a-739a, and on January 28, 2020, the Commonwealth Court granted the Applications for Leave to Intervene.

been previously addressed and denied by the Pennsylvania Supreme Court in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985). *See Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 249 A.3d 598, 611 (Pa. Cmwlth. 2021).

On April 26, 2021, Appellants filed a Notice of Appeal and Jurisdictional Statement. This Court noted probable jurisdiction on August 2, 2021. On October 13, 2021, Appellants filed their Brief. On October 20, 2021, this Court granted the Department Appellees' Application for Enlargement of Time to File Brief and Application for Leave to File an Overlength Brief. The Department Appellees now timely submit this Brief.

SUMMARY OF ARGUMENT

Appellants lack standing to assert the constitutional rights of their patients. Appellants' asserted injuries consist of pecuniary and administrative harm, such as subsidizing the cost of abortion care for low-income women who cannot afford them. These types of injuries, however, are not within the zone of interests to the be protected by the constitutional provisions on which Appellants rely. As such, Appellants do not meet the requirement that their interests be immediate in order to establish standing, and Appellants therefore lack standing to bring the claims asserted in the Petition for Review.

Additionally, even if Appellants have standing, this Court previously addressed the same claims asserted by Appellants in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985), where this Court held that the abortion funding coverage ban did not violate the Pennsylvania ERA or the equal protection provisions of the Pennsylvania Constitution. Since this Court ruled on this matter previously, *Fischer* remains the precedent, which the Commonwealth Court followed. Appellants have failed to set forth any special justification to overrule *Fischer*; therefore, the doctrine of stare decisis applies.

ARGUMENT

I. APPELLANTS LACK STANDING BECAUSE THEY ARE ATTEMPTING TO VINDICATE THE PURPORTED RIGHTS OF THIRD PARTIES AND THE HARM THEY ALLEGEDLY SUFFERED IS NOT PROTECTED BY THE CONSTITUTIONAL PROVISIONS ON WHICH THEY RELY.

Appellants before this Court are reproductive healthcare providers. They do not claim their own constitutional right to be paid for abortion services provided to Medical Assistance (MA)-eligible individuals, and no one could contend that they hold such a constitutional right. Instead, Appellants before this Court seek only to assert the constitutional rights of unnamed, and in many cases unknown, women who may be patients now and in the future. The Commonwealth Court correctly determined that Appellants lack standing to vindicate the constitutional rights of these unnamed and unknown third parties.

A. Appellants Do Not Meet the Requirements to Establish Standing Because They Lack an Immediate Interest in the Outcome of the Litigation.

It is fundamental that a party must establish standing as a threshold matter to litigate a case. *See Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 235 (Pa. 2017) (quoting *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009)); *see also Philadelphia Facilities Mgmt. Corp. v. Biester*, 431 A.2d 1123, 1127 (Pa. Cmwlth 1981) ("[A]ny objection to the validity of a statute can only be raised by a person having the right to do so.").

In general, to have standing in a legal action, a party must be aggrieved. *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). One who is not adversely affected by a matter is not aggrieved and has no standing to obtain a judicial resolution of his or her challenge. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975). A party is aggrieved only it if has a substantial, direct, and immediate interest in the outcome of the litigation. *Yocum*, 161 A.3d at 235.

A party has a substantial interest if his or her interest surpasses the common interest of all citizens in procuring obedience to the law. *Id.* (quoting *Fumo*, 972 A.2d at 496); *Wm. Penn Parking*, 346 A.2d at 280-81. A party has a direct interest if there is a causal connection between the alleged violation and the alleged harm. *Yocum*, 161 A.3d at 235; *Wm. Penn Parking*, 346 A.2d at 282. An immediate interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the constitutional guarantee in question. *Upper Bucks Cty. Vocational-Tech. Sch. Educ. Ass'n v. Upper Bucks Cty. Vocational-Tech. Sch. Joint Comm.*, 474 A.2d 1120, 1122 (Pa. 1984) (immediate interest requires that protection of type of interest asserted is among policies underlying the legal rule relied upon); *see also South Whitehall Twp. Police Serv. v. South Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989) (immediate interest is shown where the interest the party seeks to protect is

within the zone of interests sought to be protected by the statute or constitutional guarantee in question).

"Generally, a party may not contest the constitutionality of a statute because of its effect on the putative rights of other persons or entities." *Philadelphia Facilities Mgmt. Corp.*, 431 A.2d at 1131 (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). Put another way, a party does not have standing where it seeks to vindicate the rights of another. *Id.*

Appellants do not have an immediate interest in the outcome of this case, and are therefore not aggrieved for standing purposes, because the alleged harm suffered by Appellants, which consists of pecuniary and administration-related matters, is not within the zone of interests sought to be protected by the constitutional provisions on which Appellants rely.

Here, Appellants allege that the abortion funding coverage ban discriminates against women on the basis of their sex in violation of the ERA of Article I, Section 28 of the Pennsylvania Constitution and discriminates against women who seek abortion-related health care services in violation of the equal protection provisions of Article I, Sections 1 and 26 and Article III, Section 32 of the Pennsylvania Constitution. R.141a, ¶ 92; R.143a, ¶ 96.

The ERA provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the

individual." PA. CONST. art. I, § 28. Similarly, the equal protection provision of the Pennsylvania Constitution provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art. I, § 26. In addition, the Pennsylvania Constitution states: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. Finally, the Pennsylvania Constitution provides that the "General Assembly shall pass no local or special law in any case which has been or can be provided for by general law." PA. CONST. art. III, § 32.

Appellants are providers of reproductive health care services throughout the Commonwealth of Pennsylvania. R.116a-123a, ¶¶ 2-32. Appellants allege that they are harmed by the abortion funding coverage ban because they have to divert money and staff time from other work to help their patients who cannot afford an abortion, they subsidize abortions for women who cannot afford one, they expend staff resources to assist patients in securing private funding for abortions, and they are required to explore personal matters with their patients to determine whether one of the abortion funding coverage ban exceptions applies. R.139a-140a, ¶¶ 84-87.

Even assuming Appellants suffered these alleged harms, they have failed to demonstrate an "immediate" interest in the outcome of this case and therefore lack standing. The alleged harm suffered by Appellants, which consists of pecuniary and administration-related matters, is clearly not within the zone of interests sought to be protected by the constitutional provisions on which Appellants rely. Within the requirement that the interest of the plaintiff be "immediate" in order to confer standing is the concept that the "protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved.'" *Wm. Penn Parking*, 346 A.2d at 284. The United States Supreme Court has phrased this guideline as whether "the interest the plaintiff seeks to protect is arguably within the zone of interests sought to be protected by the statute or constitutional guarantee in question." *Upper Bucks*, 474 A.2d at 1122-23 (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)). Should a party's immediate interest not be apparent, a zone of interests analysis may and *should* be employed to assist a court in determining whether a party has been sufficiently aggrieved, and therefore has standing. *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010).

Appellants acknowledge that the purpose of the ERA is to prohibit "sex-based discrimination by government officials in Pennsylvania." R.140a, ¶ 89. Appellants likewise state the purpose of the equal protection provisions as

"guarantee[ing] equal protection of the law and prohibit[ing] discrimination based on the exercise of a fundamental right."[4] R.142a, ¶ 94. An immediate interest is not apparent where Appellants assert pecuniary and administrative-related harms in connection with the purported violations of the rights of unnamed, and in many cases unknown, third parties under the Pennsylvania Constitution's ERA and equal protection guarantees. Accordingly, a zone of interests analysis should be employed. *Johnson*, 8 A.3d at 333.

In employing this analysis, the harms allegedly incurred by Appellant-providers are simply not within the zone of interests sought to be protected or vindicated by the ERA or the equal protection guarantees of the Pennsylvania Constitution. By Appellants own acknowledgement in the Petition for Review, the purpose of the ERA and the purpose of the equal protection provisions of the Pennsylvania Constitution (R.140a, ¶ 89; R.142a, ¶ 94) do not encompass protecting reproductive healthcare providers against pecuniary or administrative-related burdens incurred when providing services to low-income individuals.

Appellants do not allege, let alone establish, that they have suffered harm to a constitutionally-protected interest or discrimination in violation of the

[4] As determined by the *Fischer* Court, the right at issue here is properly defined as the "purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights." *Fischer*, 502 A.2d at 121. And, pursuant to *Fischer*, this is not a fundamental right. *Id.*

Pennsylvania Constitution. Rather, under the requirements to establish standing, the only individuals who could potentially assert that they suffer the type of harm that is protected by the cited constitutional provisions are individuals who were enrolled in or eligible for MA and sought abortion services that were not covered due to the abortion funding coverage ban. Appellants are not individuals who sought abortion services while enrolled in or eligible for MA and, as set forth above, Appellants do not have standing to sue on behalf of their patients.

This Court's decision in *Upper Bucks* demonstrates that standing does not exist when a party is seeking to protect his or her interest when that interest is outside the zone of interests sought to be protected by the legal rule relied upon. *Upper Bucks*, 474 A.2d at 1120. In *Upper Bucks*, the school year for the Upper Bucks County Area Vocational-Technical School was delayed due to a strike by members of the Vo-Tech faculty. As a result of the strike, sixteen instruction days were lost from the Vo-Tech program, and the participating school districts approved a calendar which did not make up the days lost because of the strike. An action was commenced by teachers, taxpayers, and the collective bargaining unit representing the teachers seeking a declaratory judgment declaring that the school districts operate the Vo-Tech school for 180 days in accordance with 24 Pa. C.S. § 15-1501 and Department of Education regulations. *Id.* at 1121. The teachers asserted that they had standing because their contract rights to compensation and

computation of retirement and other benefits are adversely affected by the failure of the school districts to schedule 180 days in compliance with the statute and regulations. *Id.* at 1122. In analyzing whether the teachers had standing, this Court found that the teachers did not meet the "immediate" interest requirement because the type of interest being asserted by the teachers (i.e. pecuniary loss) was not within the zone of interests sought to be protected by the statute and regulations. *Id.* Specifically, this Court concluded that the sole purpose of the 180-day requirement contained in the statute and regulations is to benefit the students of the Commonwealth. Any benefit to the teachers arising out of its operation or non-operation is purely incidental, and not within the zone of interests sought to be protected. *Id.* at 1123.

Similarly, here, the financial or organizational harm alleged by Appellants does not fall within the zone of interests sought to be protected by the ERA or the equal protection guarantees of the Pennsylvania Constitution. Therefore, even assuming Appellants suffered the harm they allege, such harm was incidental and they lack standing to assert the constitutional claims set forth in the Petition for Review. The Commonwealth Court's determination that Appellants lack standing in this matter should be affirmed.

Appellants' reliance on *Wm. Penn Parking* and their assertion that it is on all fours with this case is misplaced. App. Br. at 14. *Wm. Penn Parking* concerned a

tax imposed on those who park in parking garages. *Wm. Penn Parking*, 346 A.2d at 287. The owners of the parking garages challenged the tax asserting that the tax was illegal and caused them injury in the nature of lost business and loss of income. *Id.* at 287-88. The Court found that the owners had standing because they suffered an injury, or had been aggrieved, as a result of the allegedly illegal tax and they could challenge the tax like any other taxpayer under the statute at issue.[5] *Id.* at 289. In other words, this Court found that the owners were not vindicating the legal rights of others, only *their own rights as taxpayers*.

Wm. Penn Parking is also not on point with this case because the parking garage owners did not attempt to vindicate the constitutional rights of third parties, but merely challenged a tax because it caused them pecuniary harm. Generally, a party may not contest the constitutionality of a statute because of its effect on the putative rights of other persons or entities. *Warth*, 422 U.S. at 490; *Pequea Valley Sch. Dist. v. Dep't of Ed.*, 387 A.2d 1022 (Pa. Cmwlth. 1978). Put differently, one ordinarily has no standing to vindicate the constitutional rights of third persons. *Barrows v. Jackson*, 346 U.S. 249 (1953).

Similarly, Appellants mistakenly rely upon the *Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145

[5] Section 6 of the Local Enabling Act, Act of December 31, 1965, P.L. 1257, as amended, 53 P.S. § 6906 (1972); Renumbered as 53 P.S. §§ 6924.101 to 6924.312 by July 2, 2008, P.L. 197, No. 32 §§ 2, 3.1 to 11.

(Pa. 2004) for the proposition that it provides for third-party standing. In *Dauphin County*, the Public Defender had complete discretion to determine who was eligible to obtain its legal representation. *Dauphin Cty. Pub. Def.'s Off.*, 849 A.2d at 1147. The Dauphin County Court of Common Pleas ("Dauphin County C.C.P.") issued an Administrative Order that dictated new eligibility requirements for criminal defendants seeking representation from the Public Defender. *Id.* The Public Defender challenged the action, and the Dauphin County C.C.P. asserted that the Public Defender did not have standing to do so. *Id.* at 1148. In a brief analysis, the Court determined that the Public Defender had standing because it asserted its own rights as an "aggrieved" party, not the rights of third parties. *Id.* at 1149 ("[T]here is a clear and immediate causal connection between the Administrative Order and the Public Defender's diminished ability to make eligibility determinations and to provide representation to the defendants of its choice."). *Dauphin County* is not germane to this case where Appellants claim standing to vindicate the constitutional rights of third parties.

Lastly, Appellants' reliance on *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), is likewise unpersuasive because it similarly found standing because the individual doctor asserted his own rights as an "aggrieved" party, not the rights of third parties. *Robinson Twp.*, 83 A.3d at 924-25.

Here, Appellants seek to vindicate not their own constitutional rights, but those of others and they are not within the zone of interests sought to be protected by those rights. This, however, is not permitted under the standing principles in Pennsylvania.

B. If this Court Adopts the Commonwealth Court's Test for Third-Party Standing, Appellants Do Not Meet the Test.

Based on Commonwealth Court precedent, the lower court in this case applied the analytical paradigm developed in *Singleton v. Wulff*, 428 U.S. 106 (1976), for determining a litigant's standing to assert the constitutional rights of others. *Allegheny Reprod. Health*, 249 A.3d at 606. As explained by the Commonwealth Court, in *Singleton*, the United States Supreme Court held that courts should not adjudicate constitutional rights unnecessarily because, *inter alia*, it may be that the holders of these rights do not wish to assert them. Also, third parties themselves usually will be the best proponents of their own rights, and the courts should prefer to construe legal rights only when the most effective advocates of those rights are before them. *Id.* at 605; *see also Harrisburg Sch. Dist. v. Harrisburg Educ. Ass'n*, 379 A.2d 893, 895-96 (Pa. Cmwlth. 1977).

The analytical framework offers two factual elements for consideration in determining whether the general rule that one may not claim standing to vindicate the constitutional rights of others should not apply; first, whether the relationship of the litigant to the third party is such that enjoyment of the right by the third party

is inextricably bound up with the activity the litigant wishes to pursue; and second, whether there is an obstacle to the assertion by the third party of her own right. *Harrisburg Sch. Dist.*, 379 A.2d at 896.

In employing the *Singleton* analytical framework, the Commonwealth Court determined that Appellants did not meet standing requirements. First, the Court explained that to allow Appellants to assert the rights of others would require the Court to rule on constitutional questions when the Court has no way of knowing that the patients on whose behalf Appellants purport to speak even want this assistance. *Allegheny Reprod. Health*, 249 A.3d at 607.

Second, the Commonwealth Court determined that the Petition for Review does not allege facts to show that the interests of Appellants are "inextricably bound up" with the equal protection rights of their patients. *Id.* Appellants interests are focused on the pecuniary and administrative-related burdens caused by the prohibition of using MA funds to pay for abortion services. It therefore bears to reason that if some type of non-Commonwealth funding existed to pay Appellants for abortion services provided to Medicaid-enrolled or -eligible women, Appellants interests would be satisfied while the asserted violations of the patients' constitutional rights related to the coverage ban statute would remain outstanding.

Further, the Commonwealth Court could ascertain no reason why women enrolled in or eligible for MA cannot assert the constitutional claims raised in the

Petition for Review on their own behalf. *Id.* In Appellants' Brief, they cite the 1976 U.S. Supreme Court *Singleton* plurality opinion suggesting that women seeking abortions generally face a hindrance in asserting their own rights. App. Br. at 27-28. However, in the years since that 1976 plurality opinion, women have challenged abortion-related restrictions on their own behalf in case after case across this country, including the *Fischer* case here in Pennsylvania.[6] The MA-enrolled or -eligible women seeking an abortion are the aggrieved party, not reproduction health care providers.[7]

Appellants assert that the *Singleton* opinion established the basic principle that abortion providers can sue on behalf of their patients. App. Br. At 28. The *Singleton* opinion, however, is only a plurality opinion that has never been adopted by the majority of the U.S. Supreme Court. *Singleton*, 428 U.S. at 112-13. In

[6] *E.g.*, *McCormack v. Herzog*, 788 F.3d 1017 (CA9 2015); *Jane L. v. Bangerter*, 102 F.3d 1112 (CA10 1996); *Margaret S. v. Edwards*, 794 F.2d 994 (CA5 1986); *Fischer*, 502 A.2d at 114; *Maher v. Roe*, 432 U.S. 464 (1977); *Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Poelker v. Doe*, 432 U.S. 519 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

[7] If there are privacy concerns, patients may use pseudonyms or initials, like many others do who assert their own rights in courts across the county. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). Also, women seeking abortions fall into the mootness exception for cases capable of repetition yet seeking review. *See Consumers E. and Protective Ass'n v. Nolan*, 368 A.2d 675, 681 (Pa. 1977).

addition, the plurality court conceded that the obstacles faced by patients in initiating litigation on their own behalf were not "insurmountable." *Id.* at 117.

Lastly, although Appellants cite to other state courts which found that providers have standing to challenge abortion-related restrictions (App. Br. at 29), these determinations do not apply. The determinations of other jurisdictions are not binding precedent in Pennsylvania. Over many years, Pennsylvania courts have developed standing principles that are unique to Pennsylvania. These standing principles, and not the standing requirements of other jurisdictions, should be applied in Pennsylvania. As set forth above, the Pennsylvania courts have addressed standing in depth and there is no need to look to other jurisdictions to determine the standing principles to be applied in this case.

Courts should not adjudicate third party rights unnecessarily. Accordingly, the Commonwealth Court determination that Appellants lack standing should be affirmed.

II. THE COMMONWEALTH COURT FOLLOWED THIS COURT'S PRECEDENT IN *FISCHER* AND APPELLANTS HAVE NOT PROVIDED A SPECIAL JUSTIFICATION FOR OVERTURNING THE HOLDING IN THAT CASE.

As an initial matter, the Department Appellees are defending the statute and regulations at issue pursuant to their responsibilities under the Commonwealth Attorneys Act. 71 P.S. § 732-301. The Office of Attorney General authorized the

Office of General Counsel to defend this matter. *See id.* § 732.204(c). As provided in further detail below, the Office of Attorney General previously determined that the abortion funding coverage ban was constitutional, and the Department was bound to follow the Attorney General's advice pursuant to the Commonwealth Attorneys Act. *Id.* § 732-204(a). The legal position taken herein regarding the abortion funding coverage ban, however, does not represent the policy position of the Governor's Administration.

A. This Court Previously Held that the Abortion Funding Coverage Ban Was Constitutional in *Fischer.*

In *Fischer*, an action was brought challenging the Abortion Control Act of 1982, 18 Pa. C.S. §§ 3201—3220. *Fischer*, 502 A.2d at 117. Specifically, the appellants in *Fischer* challenged 18 Pa. C.S. § 3215, which prohibited Commonwealth and federal funds from being expended for the performance of an abortion, except where necessary to avert the death of the mother or when the pregnancy was caused by rape or incest. *Id.* (quoting 18 Pa. C.S. § 3215(c)). The appellants in *Fischer* alleged that this statute violated the equal protection guarantees of Article I, Section 1 and Article III, Section 32 of the Pennsylvania Constitution, the nondiscriminatory provision of Article I, Section 26 of the Pennsylvania Constitution, and the ERA of Article I, Section 28 of the Pennsylvania Constitution. *Id.* at 117-18.

In previously reviewing these claims, this Court first looked to federal constitutional cases, which have provided that the states have a significant interest in protecting potential life. *Id.* at 118 (citing *Roe*, 410 U.S. at 162; *Beal*, 432 U.S. at 446). Although the U.S. Supreme Court has recognized a woman's right to be free from an unduly burdensome interference with her freedom to choose to obtain an abortion, there is no limit on a state's authority to favor childbirth over abortion and implement that determination through the allocation of public funds. *Id.* (quoting *Maher*, 432 U.S. at 473). As such, a state may enact a statute curtailing medically necessary abortion funding without offending the U.S. Constitution. *Id.* (citing *Williams*, 448 U.S. at 358). Additionally, a state may limit abortion funding to life threatening situations and such a restriction does not contravene the rights of indigent women who seek abortions. *Id.* (citing *Harris*, 448 U.S. at 297). Put simply, this Court previously concluded that a woman's freedom of choice does not create a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. *Id.* at 119 (quoting *Harris*, 448 U.S. at 316-17).

Applying those cases to the matter at issue in *Fischer*, this Court analyzed the appellants' first claim that the statute violated the equal protection provisions of the Pennsylvania Constitution at Article I, Section 1 and Article III, Section 32. *Id.* This Court found that the right at issue was the "purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it

chooses to subsidize alternative constitutional rights." *Id.* at 121. This Court noted that this was not a fundamental right. *Id.* In addition, this Court held that financial need did not create a suspect class. *Id.* Accordingly, this Court found that the proper standard to determine the constitutionality of the statute was the rational basis test, which requires the statute be directed at the accomplishment of a legitimate governmental interest and do so in a manner that is not arbitrary or unreasonable.[8] *Id.* at 123.

This Court held that the abortion funding coverage ban met this standard. The classification between abortions necessary to save the life of the mother and all other abortions is specifically related to the stated objective of preservation of life because it encourages childbirth in all situations except where another life would be lost. *Id.* at 122-23. The legitimate governmental interest of preserving life is accomplished by the abortion funding coverage ban because it "encourage[s] the birth of a child in all situations except where another life would have to be sacrificed," thereby preserving the "maximum amount of lives." *Id.* at 122.

Next, this Court examined whether the statute violated the non-discrimination clause of Article I, Section 26. *Id.* at 123. Article I, Section 26 does not create any new rights, but ensures that citizens will not be harassed or

[8] The *Fischer* Court also held that even if intermediate scrutiny was appropriate (which the Court concluded was not), the statute would still pass constitutional muster. *Id.* at 123.

punished for exercising their constitutional rights. *Id.* To determine if a violation of the non-discrimination clause occurred, this Court applied a "penalty" analysis, which focuses on whether a person has been penalized for exercising a constitutional freedom. *Id.* at 124. "[T]hat analysis does not warrant relief in a situation such as here where a state merely seeks to encourage behavior by offering incentives, as distinct from where a state refuses to subsidize a person's exercise of a constitutional right." *Id.* Since the Commonwealth did not penalize individuals for exercising their right to choose, but instead decided not to fund that choice in favor of an alternative social policy, this Court previously held that the statute did not violate Article I, Section 26. *Id.*

Finally, this Court reviewed the appellants' claim that the statute violated the ERA of Article I, Section 28. *Id.* The ERA provides that equality of rights shall not be abridged on the basis of sex. *Id.* (quoting Pa. Const. art. I, § 28). The Court held that the basis for the distinction at issue, however, was not sex, but abortion. *Id.* at 125. The statute did not accord different benefits to men and women because of their sex, but rather, accorded different benefits to one class of women based on a voluntarily choice of whether or not to have an abortion. *Id.* The Court therefore held that the funding restriction did not violate the terms of the Pennsylvania Constitution. *Id.* at 126.

B. Appellants Have Not Presented Any Special Justification to Reverse the Precedent Set by *Fischer*.

Stare decisis requires the application of the Court's prior decision in *Fischer* here. "The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Commonwealth v. Tilghman*, 673 A.2d 898, 903 n.9 (Pa. 1996) (citing *Burke v. Pittsburgh Limestone Corp.*, 100 A.2d 595 (Pa. 1953)). Stare decisis provides stability and certainty in our system of jurisprudence. *See Commonwealth v. Alexander*, 243 A.3d 177, 195 (Pa. 2020) (quoting *Flagiello v. Pennsylvania Hosp.*, 208 A.2d 193, 205 (Pa. 1965)).

This Court has found it to be preferable for the sake of certainty 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.'" *Id.* at 196 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Though not absolute, stare decisis demands "a special justification, over and above the belief that the precedent was wrongly decided," to reverse a decision. *Id.* (quoting *Allen v. Cooper*, —— U.S. ——, 140 S.Ct. 994, 1003 (2020)); *see also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992) ("To overrule prior law for no other reason than that would run counter to

the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.").

Fischer is directly applicable here because the facts and legal issues are substantially the same. In fact, on February 19, 2019, the Pennsylvania Office of Attorney General opined that *Fischer* is "directly on point here and is still good law." R.334a-336a. The Office of Attorney General further found that *Fischer* has not been overruled or abrogated and remains the controlling authority on this issue. *Id.* Thus, the Office of Attorney General determined that the abortion funding coverage ban was constitutional, and the Department was bound to follow it. *Id.* The Department Appellees are bound by this opinion of the Office of Attorney General and, as such, are likewise required to follow *Fischer*. *See* 71 P.S. § 732-204(a)(1).

Appellants in this case challenge the abortion funding coverage ban on the same grounds and legal principles as the appellants in *Fischer*. Appellants, however, do not point to any special justification to support the overruling of *Fischer*. Appellants' primary contention for challenging *Fischer* is the Court's reliance on federal constitutional law in holding that the abortion funding coverage ban was constitutional. *See* App. Br. at 30. However, the *Fischer* Court acknowledged that it was permitted to interpret the Pennsylvania Constitution in a more generous manner than the federal Constitution and stated it had done so in

the past. *Fischer*, 502 A.2d at 121. The Court further acknowledged that it has "often turned to federal constitutional analysis as an interpretational aid." *Id.*

Additionally, Appellants do not cite to any opinion of this Court that calls *Fischer* into doubt. On the contrary, since its publication, this Court has cited *Fischer* with approval multiple times in various contexts. *See*, *e.g.*, *Klein v. State Employees' Ret. Sys.*, 555 A.2d 1216, 1224 (Pa. 1989); *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991); *Driscoll v. Corbett*, 69 A.3d 197, 213 (Pa. 2013).

Accordingly, under the doctrine of stare decisis, this Court should apply its prior decision in *Fischer* to the same issues raised in this case.

III. THE DEPARTMENT APPELLEES TAKE NO POSITION ON THE INTERVENTION ISSUES RAISED BY APPELLANTS.

In the proceedings below, the Commonwealth Court, after reconsideration, granted Applications for Leave to Intervene filed by various members of the Pennsylvania Senate and Pennsylvania House of Representatives. While Appellants advance various challenges to the intervention of the members of the Pennsylvania Senate and Pennsylvania House of Representatives, the Department Appellees take no position on the intervention and will not address those issues herein.

CONCLUSION

For all the foregoing reasons, the Commonwealth Court correctly sustained the Department Appellees' Preliminary Objections for failure to state a claim on which relief can be granted and lack of standing. This Court should affirm the Commonwealth Court's dismissal of the Petition for Review and deny Appellants' appeal.

Respectfully submitted,

Date: December 13, 2021

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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

Date: December 13, 2021

s/Camille A. Howlett