IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, BERGER & BENJAMIN LLP, 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 AND SALLY KOZAK, in their official capacities,

Appellees,

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

BRIEF OF APPELLEES HOUSE RESPONDENTS

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COUNTER-STATEMENT OF THE CASE

Appellants, providers of abortion services in Pennsylvania ("Appellants" or "Abortion Providers"), filed a Petition for Review on January 16, 2019, in Commonwealth Court, seeking declaratory and injunctive relief alleging that §§3215(c) and (j) of the Abortion Control Act (18 Pa.C.S.) are unconstitutional. *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services,* 225 A.3d 902, 913 (Pa. Cmwlth. 2020), Opinion of the Comm. Court dated March 26, 2021, p.2. (*Allegheny II*) The Petitioners, now Appellants, did not include any individual physicians or women enrolled in Pennsylvania's Medicaid Program. R. 116a-123a, 331a. Medicaid is a joint federal-state public program that provides medical services to low-income persons. In Pennsylvania, this program is known as "Medical Assistance (MA)." The MA program covers family planning and pregnancy-related care, including prenatal care, obstetrics, childbirth, neonatal and post-partum care. The MA program does not cover abortion services because the Abortion Control Act prohibits the expenditure of appropriated state and federal funds for abortion services, except where it is necessary to avert the death of the pregnant woman, or the pregnancy resulted from rape or incest. *Id*. at 3.

The original Respondents included Pennsylvania's Department of Human Services (DHS) and several agency officials responsible for enforcing the challenged statute and regulations. Respondents filed preliminary objections to the complaint,

arguing that the Pennsylvania Supreme Court in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), held that the abortion funding coverage ban does not violate the constitutional provisions on which the Abortion Providers base their claims. On February 19, 2019, the Pennsylvania Attorney General's Office issued a legal opinion regarding the challenged provisions of the Abortion Control Act, in response to DHS' request. The Attorney General's Office concluded that 18 Pa.C.S. §§3215(c) and (j) are still valid under controlling precedent from a court of competent jurisdiction and, therefore, are constitutional. R. 330a-331a.

Leaders of the Pennsylvania House and Senate filed Applications for Leave to Intervene on April 17, 2019. The Applications were initially denied (*Allegheny I*), but ultimately granted by the Commonwealth Court on January 28, 2020. The Commonwealth Court determined that the ruling sought by the Abortion Providers would "directly limit the General Assembly's exclusive authority to appropriate moneys from the treasury," agreeing with the Intervenors' argument that the object of this litigation is to change the substance and manner by which the General Assembly can appropriate funds in the future for the Medical Assistance Program. The Court found that the Abortion Providers sought to eliminate the ability of legislators to add conditional or incidental language to a general appropriation act insofar as it relates to providing coverage of reproductive health services for indigent women enrolled in MA. In addition, the Court found that the Abortion Providers

sought to expand the prohibition against special laws in Article III, § 32 of the Pennsylvania Constitution, to eliminate the General Assembly's power to decide the circumstances under which abortion services will be funded by the State Treasury. The Court found that the Intervenors sought to preserve their voting power as it currently exists under Article III and their authority to appropriate state funds, which is a key legislative duty. Opinion of the Comm. Court dated January 28, 2020, p.14-17 (*Allegheny II*). The Commonwealth Court affirmed the holding in *Allegheny I* that the interests of the Intervenors would not be adequately represented by the DHS, "given the vastly different responsibilities and powers of the executive and legislative branches of government as they relate to the coverage ban." *Id*. at 19.

The Commonwealth Court determined in *Allegheny II* that the Abortion Providers did not have standing to vindicate the constitutional rights of all women on MA, some of whom may not be their patients and who may not agree with the claims asserted on their behalf. The Court held that the Abortion Providers did not allege facts in their petition for review to show that their interests are "inextricably bound up" with the equal protection rights of their patients. The Court concluded that there was no reason why women enrolled in MA could not assert the constitutional claims raised in the petition for review on their own behalf. *Id*. at 12. The Court rejected the Abortion Providers' argument that they suffer harm, such as financial loss, because the MA program does not cover nontherapeutic abortions.

The Court found that the harms identified by the Abortion Providers were administrative or pecuniary, which did not bear a causal relationship to the constitutional claims presented in the petition for review. Therefore, the Court said that their interest was not "substantial, direct and immediate." *Id*. at 14-15.

The Commonwealth Court further held in *Allegheny II* that the Abortion Providers' petition for review does not state a claim upon which relief can be granted, because all of the legal claims have already been addressed, and rejected, by the Pennsylvania Supreme Court in its *Fischer* decision. In the *Fischer* decision, the Supreme Court defined the question as whether because the "Commonwealth provides funds to indigent women for a safe delivery it is equally obliged to fund an abortion." The Court said the answer to that question was "no." *Id*. at 116. The Supreme Court determined that "financial need" did not create a suspect class and that there was a rational basis for the legislative classification that distinguishes abortions necessary to save the life of the mother from nontherapeutic abortions. The Court concluded that that the ban on funding elective abortions in the MA program did not violate the Equal Rights Amendment in Article I, § 28 of the Pennsylvania Constitution. The Court held that the legislative classification in the coverage ban related to a procedure (abortion) and to a woman's voluntary choice. It did not impose a benefit or burden on the basis of sex simply because the procedure involved physical characteristics unique to one sex. *Id*. at 125.

SUMMARY OF THE ARGUMENT

The Commonwealth Court decision should be upheld because Appellants have not shown that, as for-profit and non-profit businesses, they have standing to advance the constitutional claims of their clients when there is no reason those individuals cannot assert their own constitutional rights, and there is nothing in the record suggesting that any of their clients even want their rights asserted.

Additionally, nothing in the Complaint asserts that the challenged statute has actually prohibited any person from exercising a civil right and because no Pennsylvania Medical Assistance (MA) recipient is challenging the statute, and because declaratory judgment relief is only available when an actual controversy exists or is imminent, and no other established remedy is available.

Further, intervention was properly granted by the Commonwealth Court because the House Respondents intervened to defend a legally enforceable interest because they could have been joined originally as Respondents and no disqualifying circumstances prohibiting intervention exists. Additionally, House Respondents should have been joined pursuant to the Declaratory Judgment Act.

Moreover, Appellants have failed to demonstrate that Pennsylvania's Equal Protections guarantees embodied in Art. I, §§ 1 and 26 require a broader reading or a more expanded protection than the Fourteenth Amendment to the U.S. Constitution. Under long-established Fourteenth Amendment Equal Protection

jurisprudence, as articulated by the 1985 *Fischer* decision, the Pennsylvania abortion funding prohibitions warrant only rational basis review because the law in question impacts neither a suspect class nor a fundamental right. Commonwealth Court properly held that the statute does not violate Equal Protection standards. Reviewed under the rational basis analysis, the law advances the General Assembly's rational policy goals of protecting and promoting childbirth over abortion and also manages limited budgetary resources.

Finally, the Commonwealth Court properly held that the statute does not offend the Pennsylvania Equal Rights Amendment because it equally prohibits both men and women from using MA funds for elective abortions and the ERA is not offended when a classification is based solely upon a physical characteristic unique to only one gender.

ARGUMENT

I. JURISDICTION OVER THE PRESENT MATTER SHOULD BE DENIED

As an initial matter, under the Rules of Appellate Procedure, "[i]f the Supreme Court in its order notes probable jurisdiction . . . the parties shall address the question of jurisdiction at the outset of their briefs and oral arguments." 210 Pa. Code § 909. The Court's August 2, 2021, Order noted probable jurisdiction. "[A] court must resolve justiciability concerns as a threshold matter before addressing the merits of the case. . . These justiciability doctrines ensure that courts do not issue inappropriate advisory opinions." *Firearm Owners Against Crime v. Papenfuse*, 29 MAP 2020, 2021 WL 4890413, at *10 (Pa. Oct. 20, 2021) *citing Stuckley v. Zoning Hearing Board of Newtown Township*, 79 A.3d 510, 516 (Pa. 2013). Therefore, it is appropriate to address the question of jurisdiction at the outset.

This Court lacks jurisdiction over this matter because there is no actual case or controversy as is required under the Declaratory Judgment Act. Appellants do not have a substantial interest but are merely raising a speculative scenario which has not yet impacted an actual party in interest. Additionally, Appellants assert, without permission or authority from any woman, a purported right for women to have abortion paid for with taxpayer money, a right which does not exist, and no woman has come forth to assert that right on her own behalf.

Appellants filed a Petition for Review in the Nature of a Complaint (Complaint) seeking a Declaratory Judgment and injunctive relief by invoking the power of the Declaratory Judgment Act. 42 Pa. C.S.A. § 7531, *et seq.* Appellants alleged that the denial of tax-payer funding of abortion through the Pennsylvania MA program violates the Pennsylvania Constitution's guarantees of equal protection of a women's right to obtain an elective abortion. The caption of Appellants' Complaint, their prayer for relief and the Docket sheet for the case maintained by the Unified Judicial System of Pennsylvania all identify the case as a claim under the Declaratory Judgment Act. Complaint, p. 30.

The Declaratory Judgment Act ("Act") provides a means for relief for "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." 42 Pa. C.S.A. § 7533.

A. Appellants' Claims Do Not Present an Injury

Presently, Appellants claim that their rights are affected by a Pennsylvania statute, but they do not present a cognizable injury for which this Court would be able to provide a legal remedy. This Court has long held that "[o]nly where there is a real controversy may a party obtain a declaratory judgment." *Gulnac v. South*

Butler County School District, 587 A.2d 699 (Pa. 1991) citing *Carwithens's Estate*, 194 A. 743 (Pa. 1937). "The courts in our Commonwealth do not render decisions in the abstract or offer purely advisory opinions; consistent therewith, the requirement of standing arises from 'the principle that judicial intervention is appropriate only when the underlying controversy is real and concrete....'" *Pittsburgh Palisades Park, LLC v. Commonwealth.,* 888 A.2d 655, 659 (Pa. 2005) *citing City of Philadelphia v. Commonwealth of Pennsylvania,* 838 A.2d 566, 577 (Pa. 2003). Relief in the form of a declaratory judgment is available only if the controversy is inevitable and imminent: "We early decided that, under declaratory judgment statutes, (1) relief could be had only in cases where an actual controversy existed or was imminent, and that (2) even there, it could not properly be given where another established remedy was available." *In re Cryan's Estate,* 152 A. 675, 678 (Pa. 1930).

Pennsylvania Courts have previously held that declaratory judgment relief requires that a petitioner "must possess an interest that is direct, substantial, and present…." *North-Central Pennsylvania Trial Lawyers Association v. Weaver,* 827 A.2d 550, 554 (Pa. Cmwlth. 2003). An interest is 'substantial' when there is a "discernible adverse effect to an interest of the aggrieved individual that differs from the abstract interest of the public generally in having others comply with the law." *Id*. *See also, Commonwealth of Pennsylvania, Office of Governor v. Donahue*, 98

A.3d 1223, 1229 (Pa. 2014) ("A party's interest is substantial when it surpasses the interests of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative.").

A party's interest in an issue cannot be substantial if the party does not suffer an injury or is not aggrieved. "Stated another way, a controversy is worthy of judicial review only if the individual initiating the legal action has been 'aggrieved.' This principle is based upon the practical reason that unless one has a legally sufficient interest in a matter, that is, is 'aggrieved,' the courts cannot be assured that there is a legitimate controversy." *Pittsburgh Palisades Park,* 888 A.2d at, 659–60 *citing In re Hickson,* 821 A.2d 1238, 1243 (Pa. 2003); *see also City of Philadelphia,* 838 A.2d at 577.

Here, Appellant abortion providers are not legally aggrieved by the law that is being challenged. The law allegedly aggrieves individual women by denying them equal protection. The equal protection right, if there be any, belongs solely to the pregnant person, not to the abortion providers. The abortion providers suffer no discernible adverse legal effect to their individual interests that differs from the general public's interest. Additionally, here, Appellants' interest is speculative. No individual has come forward claiming that a request for MA payment for abortion

was denied or claimed that an abortion was denied for any reason. To the contrary, Appellants have expressly stated that no person goes without an abortion because the abortion providers take it upon themselves to find private charities to cover the cost, or they cover the cost themselves. Often, abortion providers absorb the abortion's cost (in part or in full) for Pennsylvania women on MA. RR.123a, 139a-140a, ¶¶ 36, 84-87.

No doctors have come forward indicating that the statute prohibits them from delivering their services. No individual has come forward claiming that their rights were violated because they were forced to give birth due to the lack of MA funding for their elective abortion. Only corporate abortion providers have come forward to claim lost profits because they cannot dip into the public treasury. Appellants proudly admit that they do not turn women away for lack of payment but that they find private sources or private donors who cover the cost of the abortion. RR-123a, 131a. This is not the type of inevitable or imminent controversy which the Declaratory Judgment Act was intended to remedy.

B. Appellants' Claims are Speculative

Additionally, "[a] declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *City of Philadelphia v. Philadelphia Transportation*

Company, 171 A.2d 768 (Pa. 1961); see also *In re: Johnson's Estate,* 171 A.2d 518 (Pa. 1961). "Moreover, this Court has noted that the justiciability doctrines of standing and ripeness are closely related because both may encompass allegations that the plaintiff's harm is speculative or hypothetical and resolving the matter would constitute an advisory opinion." *Firearm Owners Against Crime v. Papenfuse*, 29 MAP 2020, 2021 WL 4890413, at *10 (Pa. Oct. 20, 2021).

"In keeping with those goals, this Court has consistently refused to exercise judicial power to remedy speculative future harms." *Donahue*, 98 A.3d at 1248 (Todd, J., concurring). Presently, Appellants make no claim that the alleged harms actually occurred. The Appellants make no claim that they tried to bill MA for their services but were denied. They make no claim that any pregnant person sought pre-approval through MA but was denied. Appellants' claims are entirely speculative and anticipatory of events which may, or may not, occur in the future.

C. Appellants' Claims Do Not Assert a Cognizable Right

The Declaratory Judgment Act's plain language precludes the requested relief. The Declaratory Judgment Act exists to determine issues of construction or validity arising under a statute, ordinance, contract or other instrument. Only those persons "interested under a deed, will, written contract, or other writing constituting a contract" (none of which apply here) or "whose rights, status, and other legal relations are affected by statute…" shall have recourse to seek a

declaratory judgment. 42 Pa. C.S. § 7533. The legal relationship between Appellants, corporate abortion providers, and their customers/clients are not impacted by the statute. The statute does not change the relationship between them at all; and there is no allegation that that it does. Appellants' status or relationship with their customers is not altered by the statute.

The statute does not impact any of Appellants' rights. Appellants attempt to assert a right that does not exist - the "right" to demand payment from the public treasury for performing a service (the termination of the life of an unborn child) which, absent exceptional circumstances, the General Assembly has deemed to be contrary to the public policy of Pennsylvania. Taken to its logical extreme, Appellants' claim is akin to tobacco companies suing the State to allow Supplemental Nutrition Assistance Program (SNAP) recipients to use SNAP benefits to purchase tobacco products.

Even if an actual controversy is deemed to exist, declaratory judgment is still not proper when another established remedy is available. *In re Cryan's Estate*, 152 A. at 678. Here, Appellants do not like the fact that the law allows public funds to be used to pay for childbirth but not for an elective abortion (except for limited circumstances). However, that is the law, and that law was upheld as valid by this Supreme Court in *Fischer*. Mere dissatisfaction with a law which was validly passed and upheld as constitutional by the Supreme Court is an improper basis upon which

to seek this Court's jurisdiction under the Declaratory Judgment Act. When there has been no substantive change in the law in over thirty years and the Supreme Court has weighed the issue and held the law to be a constitutionally valid Legislative prerogative to establish public policy and spending priorities for the Commonwealth, changing the law through the legislative process is the proper, established remedy available to Appellants.

Because Appellants are trying to prematurely assert a non-existing right on behalf of people who have chosen to not assert that right for themselves, in a situation which has not yet occurred, there is no actual case or controversy, and this Court should deny jurisdiction.

II. APPELLANTS LACK STANDING TO ASSERT CONSTITUTIONAL CLAIMS OF THIRD PARTIES

Appellants' lack of standing is closely aligned with lack of jurisdiction. The circumstances in which one may stand before the Court to assert a claim or right of another are very limited and are not present here. As is more fully explained in the Brief of *Amicus Curiae* American Center for Law and Justice, Appellants do not satisfy those criteria.

Appellants lack standing because they are not truly aggrieved because they are not adversely affected by the statute itself. They are adversely affected only by their own business decision to provide their services for free. The statute does not

impose that detriment upon them, the abortion businesses create that detriment for themselves.

A. Appellants Do Not Meet Standing Requirements

Standing is the first hurdle any litigant must overcome to advance a litigable claim. As this Court explained in the seminal standing case, *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A.2d 269 (Pa. 1975), "[t]he core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law." *Id.* at 280-81 (footnote omitted). This Court has further clarified that "where a person is not adversely affected in any way by the matter challenged, he is not aggrieved and thus has no standing to obtain a judicial resolution of that challenge." *Pennsylvania Medical Society v. Department of Public Welfare of the Commonwealth of Pennsylvania*, 39 A.3d 267, 278 (Pa. 2012). The Court explained further that:

> a 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. 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 statute or constitutional guarantee in question.

Id.

Here, Appellants do not have a direct interest because they cannot show that the injury complained of, an equal protection violation suffered by an individual pregnant third party, causes harm to their interests. Appellants complain that the statute's prohibitions on using MA funds for elective abortion services, harms their interests. The injury that they claim is lost profits and lost time by having to coordinate payments from private donors for their services. This "harm to the party's interest" results not from an equal protection violation against women, but from their own business practices and business model.

Nor can Appellants show that they possess an "immediate interest" because an "immediate" interest requires a causal connection between the action complained of (women's equal protection violation) and the injury to the party challenging it. This required 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. Appellants' interests do not overlap with the interests of the people Appellants claim to represent – unidentified women whose purported interest is the equal protection guarantees under the Pennsylvania Constitution. Appellants' real interest is financial - minimizing the amount of lost profits.

Appellants are no more adversely affected by the statute in question than for

example, are retail stores that cannot accept the SNAP benefits to pay for certain items beneficiaries may want to buy, such as beer, wine, liquor, cigarettes, or tobacco. Similarly, while Pennsylvania lawmakers have chosen to provide certain public health benefits, due to cost and policy considerations, not all health benefits are provided to all people. The General Assembly has chosen to limit the health benefits Pennsylvania provides. While MA may cover breast reconstruction for breast cancer, breast reconstruction is not covered when performed only for cosmetic purposes. Here, the General Assembly makes an annual decision to appropriate public funds to only pay for abortions in the exceptional cases of rape, incest and to save the mother's life but to not pay for elective abortions. Appellants are not adversely affected by the statute itself but only because they freely choose to give away their professional services.

B. No Individual Who is Allegedly Directly and Adversely Harmed by the Statute is a Petitioner/Appellant

Appellants claim that persons adversely affected by the statute are pregnant individuals who are actually enrolled in the MA program. Fatal to Appellants claim is the fact that no individual person has come forward to claim such an injury or has asked Appellants to assert these claims on their behalf. Further, Appellants have all but admitted that no such person is harmed because they coordinate payments and find private donors to cover the cost of each customer's abortion. Complaint, at ¶ 10, 62, 86. No individuals who sought to have the abortion service covered by MA,

but was denied coverage, claimed an injury.

C. Appellants Are Not Physicians Treating Patients but Corporations Trying to Minimize Loss of Profits

Appellants' reliance on *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (U.S. 2020) and *Singleton v. Wulff*, 428 U.S. 106 (1976), is misplaced. In *June Medical*, several abortion businesses and four doctors who perform abortions filed an action seeking to enjoin enforcement of Louisiana's Physician Admitting Privileges Law, Act 620. (La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a)), which required every doctor who performed abortions to have active hospital admitting privileges within 30 miles of where the abortion was performed or induced.

June Medical is not comparable to Appellants' case because the standing issue was waived and not considered at any level during the litigation. "The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs' undue-burden claims bars our consideration of it here." *June Medical*, 140 S. Ct. at 2118. Presently, Appellants' standing to advance these claims was contested from the beginning. Also, four *June Medical* Plaintiffs/Petitioners were doctors whose ability to actually perform their job was directly threatened by the Louisiana law. Their interests were immediate and direct because the law prohibited them from engaging in their chosen profession and serving their patients. That was a direct and immediate impact on the *June*

Petitioners that the present Appellants do not have and cannot claim. None of the present Appellants are doctors and the challenged statutes will not prohibit them from actively practicing their chosen profession. Appellants have not averred that the challenged Pennsylvania statute prohibits them from providing more abortion services – only that their profits were diminished because they had to dedicate corporate resources to secure alternative funding for the services they did perform. Consequently, *June Medical* is inapplicable.

Appellants incorrectly claim that *Singleton* was factually identical to this case. The issue in *Singleton* was "whether the plaintiff-appellees, as physicians who perform nonmedically indicated abortions, have standing to maintain the suit." 428 U.S. at 108. The United States Supreme Court held that they did. *Id*. at 118. The factual differences between *Singleton* and the present case are glaring. *Singleton* was brought by two physicians. By stark contrast, none of the current Appellants are physicians. None of the Appellants have attested that they are actually licensed to or have ever actually performed elective abortions. Appellants affirmed that they are corporations who provide "financial assistance, performing abortions at a financial loss [and] also invest their own time and resources to identify and secure private funding sources" to help cover the costs for abortions. Complaint, ¶ 36. Therefore, *Singleton* is inapplicable.

Additionally, as noted in the Court below by then President Judge Leavitt,

reliance on *Singleton* is misplaced for additional reasons. *Singleton* advanced federal claims and claimed standing under the Federal Art. III Case and Controversy requirement. Such is not the case here. As articulated by Judge Leavitt, "*Singleton's* grant of standing to physicians to challenge the Missouri coverage ban under the United States Constitution is interesting but irrelevant because Reproductive Health Centers are in state court and assert only state constitutional claims." *Allegheny II*, at 10.

Further, fifty years ago in 1971, Dr. Singleton was a physician standing to assert the rights of his minor patients. Today, there is no reason why an adult cannot assert their own claim for equal protection under the MA program. The proper analysis demonstrates why Appellants do not satisfy the *Singleton* test. Again, from Judge Leavitt:

> First, Appellants are raising and asking the Court to rule on constitutional questions without knowing whether the patients on whose behalf the corporations purport to speak even want their assistance – and none is alleged. Second, the corporations' interests are not "inextricably bound up" with the equal protection rights of their patients. Third, Appellants present no reason why, in this day and age, persons enrolled in MA cannot assert their own constitutional claims on their own behalf.

Allegheny II, at 12 (internal citations omitted). Again, Singleton is inapplicable.

This Court should require any party, when they are seeking to establish on another's behalf a new right not previously acknowledged in Federal or Commonwealth law, the right to demand tax-payer funding for an elective abortion,

to demonstrate that the third party actually wants the right asserted on their behalf.

D. Appellants' Reliance on *Dauphin County Public Defender's* is Misplaced

Appellants' reliance on *Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County,* 849 A.2d 1145 (Pa. 2004) is likewise misplaced. The issue in *Public Defender's* was whether the Court of Common Pleas of Dauphin County (CCP) could issue an Administrative Order directing that only persons who meet strict income qualifications, established by the federal poverty guidelines, could be represented by the Public Defender's Office. In defending its Writ of Prohibition before this Court, the CCP argued that the Public Defender lacked standing. This Court determined that the Public Defender did, in fact, have standing to challenge the Administrative Order because the Public Defenders' office has a statutory obligation to "ascertain whether an individual seeking its representation has an ability to procure 'sufficient funds to obtain legal counsel' [and] is 'satisfied' of a person's inability to procure sufficient funds to hire private counsel..." 849 A.2d at 1149 (*citing* The Public Defender Act of 1969, 16 P.S. §§ 9960.1 – 9960.13). Under the Public Defender Act, every Public Defender's Office has a statutory obligation to determine financial eligibility for persons seeking its representation. Under the statute, the Public Defender's Office has an obligation to determine eligibility using their own criteria – not criteria issued by the President Judge.

In the present matter, the abortion businesses have no such statutory obligation to perform abortion services for indigent clients. There is certainly no requirement that the abortion businesses perform any service for free. While the abortion businesses may seek alternative private funding for their customers, that decision may be viewed merely as a matter of preferred customer service. Hence, *Public Defender's* is inapplicable.

E. Appellants' Reliance on *Robinson Township* is Misplaced.

Appellants' reliance on *Robinson Township, Washington County, v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013) is also misplaced for several reasons. In *Robinson Township,* a physician, Dr. Khan, was deemed to have standing to challenge provisions of the Pennsylvania Oil and Gas Act ("Act 13"), 58 Pa. C.S. §§ 2301-3504 on behalf of his patients. In determining that "Dr. Khan's interest in the outcome of litigation regarding the constitutionality of Section 3222.1(b) is neither remote nor speculative," this Court found that Dr. Khan pled an actual physician/patient relationship with the patients he sought to represent and acted on their behalf with their permission. 83 A.3d at 923. Here, the Appellants have not alleged an actual relationship with any actual patient similar to a physician/patient relationship which Dr. Khan held and have not alleged that they have any individuals' permission to assert these claims.

Additionally, the statutory provisions in question prohibited Dr. Khan from

sharing his patients' diagnostic test results or patients' exposure history with other physicians and it "prevented him from treating patients by accepted medical standards, and may affect other treatment decisions." *Id*. at 924.

Again, Appellants are not claiming any injury similar to the interference Dr. Khan experienced with his patients. Appellants have not pled that they are treating physicians, or that they have a doctor/patient relationship with anyone, or that anyone was prevented from obtaining their medical services, or that the statute in question interferes with a doctor's medical judgment or the physician's ability to treat anyone according to accepted medical standards. Hence, the urgency and intimacy of the doctor/patient relationship which provided ground for Dr. Khan's standing in *Robinson Township* is simply not present here and *Robinson Township* is inapplicable.

For all these reasons, Appellants lack standing to advance the constitutional claims of unidentified individuals with whom they have no professional relationship and cannot even assert that they have been authorized to assert claims on anyone's behalf. The Commonwealth Court's decision should be affirmed.

III. COMMONWEALTH COURT PROPERLY GRANTED HOUSE RESPONDENTS' APPLICATION FOR LEAVE TO INTERVENE

Intervention was properly granted by the Commonwealth Court. That Court's decision should be affirmed because the House Respondents sought to intervene to

preserve their legally enforceable interest and constitutionally conferred authority to appropriate Commonwealth funds and to protect their constitutional authority to establish policy as it currently exists under Article III of the Pennsylvania Constitution. Both are key legislative duties and legally enforceable interests which individual legislators hold. Additionally, House Respondents could have been (and should have been) joined as original Respondents. No disqualifying circumstances under the Pa. Rules of Civil Procedure, No. 2329, exists to prohibit intervention. Finally, House Respondents should be joined because Appellants filed this action under the Declaratory Judgment Act.

A. House Lawmakers Possess a Legally Enforceable Interest in the Outcome of this Action

Under the Pennsylvania Rules of Civil Procedure, a party is entitled to intervene in an action which has already been commenced if that party satisfies one of four criteria set forth in in Rule 2327. Only criteria 3 and 4 are pertinent to the House Respondents in the present case. Under those criteria, a person is entitled to intervene if:

> (3) such a person could have been named as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R. Civ. P. 2327(3), (4).

The Pennsylvania Constitution accords Legislative Leaders in the House of Representatives ("House Respondents") a legally enforceable interest in the outcome of this action which warrants intervention. That interest is the members' ability to address matters which threaten to impinge upon their constitutional duties and authority.

Article III of the Pennsylvania Constitution sets forth the parameters by which all legislation is proposed, considered, and passed by the General Assembly. *See, e.g.,* Article III, Section 1 (Passage of Laws),[1] Section 2 (Reference to Committee; Printing), and Section 3 (Form of Bills).[2] Pa. Const. Art. III, §§ 1-3. Sections 1, 2, and 3 make it clear that Legislators originate all bills, taxing, spending or otherwise. While the Governor may suggest or propose legislation – including budgetary spending bills – only Legislators can introduce legislation, and only the General Assembly can pass legislation.

The following additional sections of the Pennsylvania Constitution make it quite clear that the Constitution vests the power to raise and appropriate money – taxpayer money – exclusively in the General Assembly. *See, e.g.,* Article III, Section

[1] "No law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose." Pa. Const. art. III, § 1.

[2] "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Pa. Const. art. III, § 3.

10 (Revenue Bills), Section 11 (Appropriation Bills),[3] Section 14 (Public School System), Section 15 (Public School Money Not Available to Sectarian Schools), Section 17 (Appointment of Legislative Officers and Employees), Section 18 (Compensation Laws Allowed to General Assembly), Section 19 (Appropriations for Support of Widows and Orphans of Persons who Served in the Armed Forces), Section 22 (State Purchases), Section 24 (Paying Out Public Moneys),[4] Section 26 (Extra Compensation Prohibited; Claims Against the Commonwealth; Pensions), Section 29 (Appropriations for Public Assistance, Military Service, Scholarships), and Section 30 (Charitable and Educational Appropriations). Pa Const. art. III, §§ 10, 11, 14, 15, 17-19, 22, 24, 26, 29-30.

Pennsylvania Courts have long defended the General Assembly's sole authority to raise revenue and determine spending. *See Shapp v. Sloan*, 391 A.2d 595, 601 (Pa. 1978) ("The appropriations power in this Commonwealth is vested in the General Assembly."); *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 707 (Pa. 1932) ("The legislature in appropriating is supreme within the limits of the

[3] "The general appropriation bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject." Pa. Const. art. III, § 11.

[4] "No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer." Pa. Const. art. III, § 24.

revenue and moneys at its disposal."); *Shapp,* 391 A.2d at 603 (The framers gave to the General Assembly the exclusive power to pay money out of the state treasury without regard to the source of the funds. In contrast, nowhere in our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose.); *Jubelirer v. Rendell,* 953 A.2d 514, 529 (Pa. 2008) ("[T]he General Assembly enacts the legislation establishing those programs which the state provides for its citizens and appropriates the funds necessary for their operation[] [while] [t]he executive branch implements the legislation by administering the programs." *citing Shapp,* 391 A.2d at 604 (plurality opinion)); *see also*, *Jubelirer v. Rendell*, 953 A.2d at 529 ("appropriations are to be 'made by the General Assembly,' Pa. Const. art. VIII, § 13, and '[n]o money shall be paid out of the treasury, except on appropriations made by law,' Pa. Const. art. III, § 24."); *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190, 205 (Pa. Cmwlth. 1995) ("The power to appropriate moneys lies exclusively with the legislative branch."); *also*, ("pursuant to Article III, section 24, money may be paid out of the State Treasury only by legislative action in the form of an appropriation act or in the form of other statutory enactment of general or limited application as to particular subjects."); *MCT Transportation Inc. v. Philadelphia Parking Authority,* 60 A.3d 899, 909 (Pa. Cmwlth. 2013), *aff'd*, 622 Pa. 741, 81 A.3d 813 (2013), and *aff'd*, 623 Pa. 417, 83 A.3d 85 (2013). ("In short, a state agency can only spend funds, regardless of their

source, after they have been appropriated by the General Assembly.") Although the underlying legislative act at issue in *MCT Transportation* was superseded by statute[5], the foundational premise, that the General Assembly alone controls the power to appropriate Commonwealth funds, remains unquestioned and a legally enforceable interest.

The principle that the Legislators' constitutional duty and authority to make appropriations is a legally enforceable interest is demonstrated by the fact that in the context of educational funding, the legislature was sued for, allegedly, not fulfilling its constitutional duty to "provide for the maintenance and support of a thorough and efficient system of public education" by not allocating sufficient funds within the proper formula for allocating those funds. *See William Penn School District v. the Pennsylvania Department of Education*, 170 A.3d 414 (Pa. 2017), *infra*. It defies intellectual consistency to argue that the Legislature has no legally enforceable interest with regard to allocating money from the treasury if the Legislature can be sued and held legally accountable for NOT sufficiently fulfilling that very constitutional duty in another context.

Presently, the Commonwealth Court recognized that the responsibility for

[5] In 2013, the Commonwealth Court found certain portions of Act 94 to be unconstitutional. *See MCT Transportation Inc. v. Philadelphia Parking Authority.* 60 A.3d 899 (Pa. Cmwlth. 2013). The General Assembly then enacted Act 64 to cure the constitutional shortcomings identified by the Commonwealth Court. *Germantown Cab Company. v. Philadelphia Parking Authority*, 651 Pa. 604, 611, 206 A.3d 1030, 1034 (2019).

determining Pennsylvania's spending priorities belongs to the Legislature. Because that responsibility belongs to the Legislature, the Legislature has a legally enforceable interest (duty) in determining spending priorities for the Department of Human Services. Therefore, allowing intervention by the House Respondents was proper under Pa. R. Civ. P. 2327.

The Commonwealth Court determined that, if granted, the relief requested by Petitioners-Appellants in this case would impair the legislators' individual authority to exercise duties committed exclusively to them as legislators, specifically to determine the amount of funds appropriated for the MA Program and the manner in which those funds are used. The Court below acknowledged that:

> Reproductive Health Centers seek to restrict the substance and form of appropriation bills. They seek to eliminate the ability of legislators to add conditional or incidental language to a general appropriation act insofar as it relates to providing coverage of reproductive health services for indigent woman enrolled in Medical Assistance. Likewise, they seek to expand the prohibition against special laws in Article III, Section 32 to eliminate the General Assembly's power to decide the circumstances under which abortion services will be funded by the treasury." *Allegheny II*, at 912.

Because the Commonwealth Court determined that the Legislators' authority and ability to exercise their constitutional duties would be impacted if the Appellants were ultimately successful, granting Intervenor status to the House Respondents was proper and the Commonwealth Court's decision should be upheld.

B. House Respondents are Entitled to Intervene as Persons Who Could Have Been Joined as Original Parties

Although the argument was not addressed by the Commonwealth Court, Appellees argued below, and still maintain, that a second and independent basis for intervention could be found under Pa. Rule of Civil Procedure No. 2327 (3) because the Appellee House Respondents could have been joined therein [as an original Respondent]. Pa. R. Civ. P. 2327 (3).

Rule 2327 of the Pennsylvania Rules of Civil Procedure, states that a person may be permitted to intervene when "such a person could have joined as an original party in the action or could have been joined therein." Pa. R. Civ. P. 2327(3). The House Respondents could have been joined as original parties to this action. Numerous examples demonstrate individual legislators, as well as the entire General Assembly, being named parties in cases challenging the passage of allegedly unconstitutional statutes or when certain appropriations were challenged.

In *Finn v. Rendell,* 990 A.2d 100, 106 (Pa. Cmwlth. 2010) a group of County Commissioners sued the Governor, the State Treasurer, and the General Assembly challenging an appropriations decision made by the General Assembly regarding the sufficiency of funding for district attorneys. In *Finn*, the General Assembly was named as an original party "as the scrivener of the applicable law and the source of the appropriations to comply with same." *Finn*, 990 A.2d at 106. Amended Petition for Review, ¶ 7.

Similarly, in the present case, the Legislature makes an annual appropriations decision to not permit taxpayer funding for certain medical procedures because they believe it reflects the people's will and advances the Commonwealth's best interests. Just as the General Assembly was named as an original party in *Finn*, here, the General Assembly, including House Respondents could have been named as an original Respondent.

In *Stilp v. Commonwealth*, 974 A.2d 491 (Pa. 2009), the Commonwealth of Pennsylvania, the General Assembly, and various individual legislators were sued over an allegedly unconstitutional receipt of compensation provided to members of the General Assembly in excess of salary and mileage limits as provided in the Pennsylvania Constitution. *Stilp* challenged the General Assembly's authority to make certain appropriations to the legislature's internal operating budget. This Court determined that the Legislature had the authority to make the appropriation. Presently, just as the General Assembly was named as an original party in *Stilp*, here, the House Respondents, collectively or individual members could have been named as an original Respondent.

In *Sears v. Wolf,* 118 A.3d 1091 (Pa. 2015) the Corbett administration, as well as the Speaker of the House of Representatives and the President Pro-Tempore of the Senate, were sued for discontinuing or reallocating funds for a low-cost health insurance program known as 'adultBasic' which received monies through the multi-

state Tobacco Settlement Agreement Act. The *Sears* litigation named, among other, the General Assembly and the leaders of the respective chambers as original Respondents. *Sears* demonstrates the importance of the Legislators participation in cases when, as here, the General Assembly's power to appropriate necessary funds is challenged. Just as the leaders of the General Assembly were named as an original party in *Sears*, here, the General Assembly's officers could have been named as original Respondents.

In *William Penn School District*, school districts, parents, and others sued Governor Wolf, the Secretary of Education, the State Board of Education, and the legislative leadership over the school funding formula which the General Assembly crafted and passed, the Governor signed, and the Department of Education implemented. The *William Penn* Petitioners specifically complained that the formula which the General Assembly adopted for funding public education violated the Commonwealth's constitutional guarantees of Equal Protection under Pa. Const. Art. III, §§ 14 and 32 and a thorough and efficient system of public education. Just as the legislative leaders were named as an original party in *William Penn,* which raised Equal Protection claims under Art. III, § 32, here the General Assembly could have been named as an original Respondent.

Finally, in the *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), the Commonwealth of Pennsylvania, the General Assembly, and other

legislative and administrative officials were sued for enacting an allegedly unconstitutional statute which resulted in allegedly gerrymandered Congressional districts. This action implicated a core legislative function, and the General Assembly and individual legislators were named as original Respondents. Just as the General Assembly was named as an original party in *League of Women Voters,* here, the General Assembly and House Respondents could have been named as original Respondents.

In all these cases, the General Assembly, and its individual officers, were sued as an original party because someone believed that a certain appropriation or other legislative enactment was unconstitutional. The Legislature's authority to pass a certain law or make a specific funding decision was challenged. The same is true in this case. Instantly, Appellants claim that the Legislature has fashioned an unconstitutional statutory appropriations scheme and asks the Courts to require the General Assembly to make certain appropriations which it has, in keeping with federal law, declined to make.

Appellants could have included and sued the General Assembly as an original defendant due to the allegedly unconstitutional funding statute as was done in *Finn*, *Stilp*, *Sears*, *William Penn,* and *League of Women Voters*. Because the claims presented below allege an unconstitutional funding structure, and because the allegations directly challenge and impact the Legislature's exclusive budgetary

authority, the House Respondents very well could have been included as original Respondents.

Therefore, the House Respondents satisfy the requirements for intervention as "such a person [who] could have joined as an original party in the action or [who] could have been joined therein." Pa. R. Civ. P. 2327 (3) and the Commonwealth Court's decision should be upheld on this basis as well.

C. Intervention is Appropriate Because No Disqualifier for Intervention Exists

Upon a showing that **any** of the criteria required by Rule 2327 are satisfied, granting intervention is required unless one of three specified reasons exists for denying intervention. The disqualifying reasons are found in Rule No. 2329 and none are present in this case. The applicable sections of Rule 2329 state:[6]

> An application for intervention may be refused only if:
>
> (2) the interest of the petitioner is already adequately represented; or
> (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P. No. 2329.

Addressing the last disqualifying factor first, the House Respondents did not delay in applying for intervention. Appellants' Complaint was filed on January 16,

[6] The Commonwealth Court rightly determined that the first subsection was not relevant in this case. *Allegheny II*, at 913, n. 14.

2019 and named only Department of Human Services personnel as respondents. On April 16, 2019, the Department of Human Services filed its Preliminary Objections to the Petition for Review. Without delay, on April 17, 2019, House intervenors filed their Application to Intervene with Preliminary Objections. Senate Intervenors filed their Application to Intervene on the same day. Filing an application to intervene with preliminary objections the day following the Department's filing speaks strongly against an undue delay argument. Further, Appellants never argued that the applications for intervention were untimely, only unmanageable.

Nor is the second disqualifying factor satisfied. No other party adequately represents the House respondents' interests. As noted by Judge Simpson and echoed by then President Judge Leavitt, the Legislative Intervenors' interest will not be adequately represented by the Department "given the vastly different responsibilities and powers of the executive and legislative branches of government as they relate to the coverage ban." (*Allegheny II)* (*citing* Judge Robert Simpson's unreported slip opinion in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 25 M.D. 2019) (*Allegheny I)*). The Court correctly observed that "[t]he Department has no legally enforceable interest in matters relating to Commonwealth appropriations" and, "[a]n executive branch agency is simply not in a position to represent [House Respondents] Intervenors' interest in the exercise of legislative power under Article III of the Pennsylvania

Constitution." *Id.*

Appellants claim that the determination that the House Respondents' interests are not adequately represented is premature until the case proceeds and it is seen which issues the Government (DHS) Respondents address and how vigorous the fight. Appellants suggest that the Court should have waited to allow factual findings to develop to see if the Legislators' interests were not adequately represented by DHS. That suggestion ignores the realities of litigation. The only way that the Court could be satisfied is by engaging in a factual determination that DHS did not adequately represent the House Respondents' interest. At that point, it will be too late for the House Respondents to step in and defend their own interests.

D. *Fischer* Supports the Commonwealth Court's Determination that House Respondents have a Legally Enforceable Interest in the Outcome of this Action

The House Respondents have a legally enforceable interest in defending their authority to annually make funding decisions because *Fischer* held that they have the authority to set the Commonwealth's public policy underlying those funding decisions and those decisions do not offend the Constitution. *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985) In *Fischer*, this Court held that the funding restrictions in the Abortion Control Act did not offend Pennsylvania's Equal Rights Amendment under Art. I, § 28 or Pennsylvania's Equal Protection guarantees under Art. I, §§ 1 and 26 and Art. III, § 32. "In conclusion, we today hold that the

challenged funding restriction contained in the Abortion Control Act of 1982 does not violate the terms of the Pennsylvania Constitution." *Id*. at 126.

It is upon that pillar of constitutionality which House Respondents stand. There is no current constitutional impediment to the General Assembly voting annually to determine the amounts which the Commonwealth will provide to the Department of Human Services, and the policy initiatives for which those funds may be spent. *Fischer* confirmed that authority. House Respondents have a legitimate, constitutional, and compelling interest in safeguarding their constitutionally conferred authority to establish a budget which reflects the people's will and ensures that the General Assembly's 'power of the purse' remains unfettered. This is true not because the House Respondents claim it to be true but because *Fischer* declared it to be true. The mere possibility that a future determination may question the soundness of *Fischer* does not prohibit the House Respondents from presently defending the authority which *Fischer* secured to them.

E. The Declaratory Judgment Act Confers a Legally Enforceable Interest Requiring Intervention

The Declaratory Judgment Act also supports affirming House Appellee's Intervention. Concerning who shall be made a party when declaratory relief is requested, Section 7540 of the Act specifically states:

> (a) General rule.--When declaratory relief is sought, all persons **shall** be made parties who have or claim any interest which

> would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard.

42 Pa. C.S. § 7540 (emphasis added). The Act requires that "all persons shall be made parties who have a claim or any interest…" *Id*. House Appellees have a claim or interest.

Appellants filed a Petition for Review seeking a Declaratory Judgment and Injunctive Relief. Appellants specifically requested "that the Court declare the Pennsylvania coverage ban . . . and its regulations . . . unconstitutional . . ." and also "declare that abortion is a fundamental right under the Pennsylvania Constitution..." Complaint, at 30.

Presently, Appellants' request for declaratory judgment relief impacts an interest of the legislative leaders who have been granted Respondent status in this case. Appellee House Respondents' interest is a particularized interest, constitutionally conferred upon them, to adopt a state budget and allocate state resources in accord with the will of their constituents. The Pennsylvania Constitution's plain language evidences Appellees' constitutionally conferred interest. As was confirmed by *Fischer*, the declaration Appellants seek encroaches upon Appellee House Respondents' constitutionally conferred legal interest.

Under Article II, Section 1 and Article III, Section 24 of the Pennsylvania Constitution, the power to make appropriations is vested exclusively in the General Assembly. *See Shapp v. Sloan*, 391 A.2d 595, 601 (Pa. 1978) ("The appropriations power in this Commonwealth is vested in the General Assembly."); *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 707 (Pa. 1932) ("The legislature in appropriating is supreme within the limits of the revenue and moneys at its disposal."); *Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190, 205 (Pa. Cmwlth. 1995) ("The power to appropriate moneys lies exclusively with the legislative branch."). Constitutionally, the power to appropriate funds and make spending decisions for the Commonwealth, by the plain language of the Constitution, is an interest held by the legislators.

The Pennsylvania Supreme Court has affirmed the constitutionality of Art. III, § 24 when it declared that "[g]ranting the relief sought by the Commissioners and compelling appropriations of sufficient funds and reimbursement of the district attorney's salary would interfere with the functions exclusively committed to the legislative and executive branches…" *Finn v. Rendell,* 990 A.2d 100, 106 (Pa. Cmwlth. 2010).

Similarly, in this present case, forcing the General Assembly to appropriate sufficient Commonwealth funds to satisfy Appellants' request for MA payments for

abortion services would interfere with the functions exclusively committed to the legislative branch, violating the separation of powers doctrine.

The House Appellees not only claim to have an interest in the declaration sought but, by virtue of a plain reading of the Constitution, and as articulated by *Fischer*, they have an actual interest in the declaration sought. Therefore, by the clear language of the Declaratory Judgment Act, it is proper that the members of the Legislature are made parties to this action through intervention.

Therefore, the Commonwealth Court's grant of intervenor status on the grounds that the requirements for any legally enforceable interest for intervention were satisfied under Pa. R. Civ. P.2327 (4) is bolstered by and wholly conforms to an independent basis for intervention under the Declaratory Judgment Act. Additional support is also found in the argument that intervention is also proper under Pa. R. Civ. P. 2327 (3) as the Legislators could have been named as additional parties.

F. Appellants' Reliance on Federal and Other States' Precedent on Legislative Standing to Intervene Are Inapplicable Here.

Appellants suggest that Pennsylvania follow Maryland intervention rules. Appellants cite *Duckworth v. Deane*, 903 A.2d 883 (Md. 2006), for the proposition that "an individual member of the General Assembly, or eight out of a total of 188 members, ordinarily have no greater legal interest in an action challenging the

constitutionality of a statute than other Maryland residents have." *Id*. at 886; Appel. Brief at 81.

Pennsylvania cases contain similar discussions regarding legislative standing, but they are not applicable to the present circumstances. In *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), this Court stated that "[s]tanding exists only when a legislator's direct and substantial interests in his or her ability to participate in the voting process is negatively impacted, *see Wilt* [*Wilt v. Beal,* 26 Pa. Cmwlth. 298 (1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator." *Markham*, 136 A.2d at 145. Additionally, seven years prior in *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009), this court observed that "[w]hat emerges from this review of the federal cases is the principle that legislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action." *Id.* at 497. Presently, that other nexus is the House Respondents' confirmed authority to establish public policy for the Commonwealth and to decide how the Commonwealth will, or will not, spend tax-payer money.

Duckworth v. Deane involved a constitutional challenge to a same-sex

marriage ban. Arguably, whether individual legislators agreed with or opposed a same-sex marriage ban, assuming that the statute was legally proposed, voted upon, adopted, and enacted, legislators would have no greater interest than other Maryland residents to challenge its constitutionality. These are not the facts of the case before this Court. Here, House lawmakers sought intervention to protect their constitutional duties to pass annual appropriations which had been confirmed in 1985 by the *Fischer* Court. House Respondents are not merely defending the constitutionality of a statute, but their exclusive, ongoing, constitutional authority to enact appropriation limits as expressed in this particular statute. *Duckworth* had nothing to do with protecting the constitutionality of Maryland lawmakers' authority to establish appropriations limits based upon the public policy expressions of their constituents. Because *Duckworth* is wholly distinguishable from our present case, and because Pennsylvania case law already accepts that a legislator's interest must be distinguishable from that of the citizen, *Duckworth* offers no guidance to this Court.

For all the forgoing reasons, the Commonwealth Court's grant of Intervention to House Respondents was proper and should be affirmed.

IV. The Prohibition on Covering Abortion Through the MA Program Does Not Offend the Pennsylvania Constitution's Guarantee of Equal Protection.

Appellants' Equal Protection argument fails because Appellants have not demonstrated that the guarantees of Equal Protection found in Pa. Const. Art. I, §§

1 and 26 are greater than, or are treated differently from, the protections granted under the Fourteenth Amendment to the United States Constitution. Appellants wrongly assert, without citing any supporting authority, that when states subsidize any healthcare, the state is required to subsidize all healthcare. Appellants argue that the Pennsylvania Constitution's Equal Protection provisions must be read more expansively than the Federal Fourteenth Amendment counterpart to conclude that the coverage ban violates the Pennsylvania Constitution. Appellants' Equal Protection argument advances from a false premise by wrongly assuming that abortion is a fundamental right, which it is not, and then builds upon that false premise to arrive at an erroneous conclusion that Equal Protection demands the result they desire.

Appellants present the false analogy to a government-run voter transportation service which deliberately excludes voters from one political party. A proper comparative would correctly compare MA to a free bus service for a specific limited purpose, not for any purpose the rider wishes, regardless of the importance to the recipient.

Appellants repeatedly and mistakenly conflate the fundamental right to procreate,[7] with the limited right, under federal constitutional law, to abort a child.

[7] *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), which solidified procreation as a fundamental right. However, even such fundamental rights as marriage and procreation have limits. *See Gerber v. Hickman,* 291 F.3d 617 (9th Cir. 2002) which demonstrates that even the right to procreate is not without limitations.

The two are not the same. While procreation is a fundamental right, abortion has never received such status under the Pennsylvania Constitution. As explained in *Fischer*, the State's important and legitimate interest in preserving and protecting life requires regulations in furtherance of the State's legitimate public interests.

Appellants have not shown that Pennsylvania's Equal Protection provisions contained in Article I, Sections 1 and 26 of the Pennsylvania Constitution should be read more broadly than the federal Fourteenth Amendment – which is the jurisprudence our Courts have historically used in evaluating analogous complaints under Article I, Sections 1 and 26 of the Pennsylvania Constitution.

> [Appellants] do not argue that the equal protection analysis differs under the two [Constitutions]. Accordingly, we will not address any potential distinctions other than to acknowledge that this Court has previously recognized the difference in language utilized in the [Constitutions] but proceeded to apply the same analytical tests to both texts.

Lohr v. Saratoga Partners, L.P., 238 A.3d 1198, 1210 (Pa. 2020), *cert. denied sub nom. Fouse v. Saratoga Partners L.P.,* 141 S. Ct. 2599, 209 L.Ed.2d 734 (2021) (*citing Zauflik v. Pennsbury School District*,104 A.3d 1096, 1117 n.10 (Pa. 2014)).

By examining the proper level of review required for a law prohibiting taxpayer funding of abortion, and then by properly analyzing the four factors prescribed by *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), it is clear that abortion is not – and never has been – a fundamental right in Pennsylvania. Therefore, the challenged statute receives rational basis analysis.

A. Identifying the Appropriate Standard to Apply.

Equal Protection claims raised under Article I, Sections 1 and 26 of the Pennsylvania Constitution are analyzed using the same framework as is used for Federal Equal Protection claims raised under the Fourteenth Amendment. *Love supra.* and *Commonwealth v. Albert*, 758 A.2d 1149 (Pa. 2000) ("This Court has held that 'the equal protection provisions of [Article I, Section 26] of the Pennsylvania Constitution are analyzed … under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment of the United States Constitution.'"); *Pocono Mountain Charter School v. Pocono Mountain School District,* 908 F.Supp. 2d 597 (M.D. Pa. 2012) ("Plaintiffs' equal protection claim under Article I, Section 26 of the Pennsylvania Constitution, ... is analyzed the same as claims made pursuant to the Fourteenth Amendment of the United States Constitution." *Citing Kramer v. Workers' Compensation Appeal Board,* 883 A.2d 518, 532 (Pa. 2005)). Pennsylvania case law is thus clear that Art. I, Sections 1 and 26 are treated the same as the Fourteenth Amendment Equal Protection claims. Under that standard, rational basis review should be applied to the challenge at hand.

Both federal and state equal protection analyses apply one of three standards of judicial review of governmental actions: rational basis review, intermediate, or heightened scrutiny, and strict scrutiny. Under both Pennsylvania and federal

constitutional jurisprudence, strict scrutiny is applied to governmental actions that impact race, alienage, or national origin or substantially burden the exercise of a fundamental right afforded by the Constitution. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973); *see also*, *William Penn School District*, 170 A.3d at 458 (*citing James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984)). Under strict scrutiny, the governmental action will be upheld if it advances a compelling governmental interest and is narrowly tailored to impose the least restrictive burden on the exercise of the fundamental right. Such treatment is not necessary here.

Intermediate, or heightened scrutiny, applies to sex-based classifications or actions touching on illegitimacy. To survive heightened scrutiny, the government action must be substantially related to an important government interest. "[T]he United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review." *James* 477 A.2d, at 1306.

Legislation, or any government action, which does not impact any protected classification, or impinge upon the exercise of any fundamental right protected by the Constitution, is subject to the least restrictive standard of review- rational basis review. There, government action is presumed to be valid and will be upheld if the action is rationally related to a legitimate state interest. "Absent the identification of a constitutionally-protected right triggering an increased level of scrutiny, we

conclude that rational basis review applies to the equal protection challenge raised herein." *Lohr v. Saratoga Partners, L.P.,* 238 A.3d 1198, 1204–05 (Pa. 2020), *cert. denied sub nom*. *Fouse v. Saratoga Partners L.P.,* 141 S. Ct. 2599, 209 L.Ed.2d 734 (2021).

As explained more fully below, the prohibition on using taxpayer money to fund abortions expressed in 18 Pa.C.S. § 3215 (c) and (j) does not substantially burden a constitutionally protected fundamental right or impact race, alienage, or national origin and does not discriminate based on sex or illegitimacy. Therefore, the Pennsylvania public funding prohibition is subject to, and is permissible under, rational basis review.

1. Strict Scrutiny does not apply

Strict Scrutiny does not apply to the abortion funding prohibition at issue here because the funding prohibition does not implicate a suspect classification based on race, alienage, or national origin. Nor, for several reasons, does the funding prohibition apply to a fundamental right afforded by the Pennsylvania Constitution.

First, the challenged statute merely prohibits using tax-payer dollars to pay for the elective abortion. The funding prohibition does not prevent any woman from making the decision of whether or not to seek an abortion. *Fischer*, 502 A.2d at 116. Under a Fourteenth Amendment analysis, federal courts have held numerous times that there is no expectation or entitlement to have the state pay to exercise the

decision to have an abortion. In *Maher v. Roe*, 432 U.S. 464, 475 (1977), when analyzing a Connecticut statute similar to Pennsylvania's, the U.S. Supreme Court stated "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

The Pennsylvania Supreme Court has similarly determined that citizens do not have a fundamental right to demand that the Commonwealth "subsidize an individual's exercise of a constitutionally protected right [choosing to abort a child], when it chooses to subsidize alternative constitutional rights." *Fischer*, 502 A.2d at 121.

Second, strict scrutiny does not apply because controlling caselaw is clear that "*Roe* did not declare an unqualified 'constitutional right to an abortion'. . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (emphasis added) (*citing Maher v. Roe*, 432 U.S. 464 (1977)). An undue burden must be "substantially limiting." *Carey v. Population Services International*, 431 U.S. 678, 688 (1977). The fact that no woman has actually complained or joined the present action, and since Appellants have affirmed that no woman goes without an abortion because they ensure that there are private donor funds available to subsidize the abortion costs, shows that women

are not substantially limited due to the regulation. RR 123-a, Complaint, at ¶ 10, 62, 86.

2. Intermediate Scrutiny does not apply

Intermediate scrutiny does not apply to a state law that prohibits taxpayer funding of abortion because the prohibition does not discriminate on the basis of sex, nor is it rooted in animus to women generally. Additionally, Appellants' claim that the funding prohibition discriminates against women on the basis of sex because abortion only impacts biological women is false. The Pennsylvania Supreme Court has held that different treatment of men and women based upon biological differences which are inherent to the species does not constitute sex discrimination. Different treatment of men and women is recognized as valid when the difference "is reasonably and genuinely based on physical characteristics unique to one sex." *Beattie v. Line Mountain School District*, 992 F.Supp.2d 384 (M.D. Pa. 2014) (*citing Fischer*, 502 Pa. at 125).

Nor is opposition to tax-payer funded abortion akin to opposition to women generally. Both men and women oppose taxpayer funding for abortion and both men and women support the issue. A January 2021 survey showed that more women oppose tax-payer funding of abortion than men. 59 % of women oppose/strongly oppose tax-payer funding of abortion compared to 37% of women who support /strongly support thereof. 57% of men oppose/strongly oppose it compared to 39%

who support/strongly support. Among both men and women, fewer than one in 10% "strongly support" such funding.[8] Such strong support for the prohibition amongst women disproves any argument that the prohibition is rooted in animus to women generally.

3. Rational Basis is the appropriate standard

Because no fundamental right is implicated and the law does not impact a suspect class, the law receives rational basis review. "[I]f the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification." *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995) (*citing Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986)). A "rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices … [but] affords substantial deference to legislative policy making." *Lohr v. Saratoga Partners, L.P.*, 238 A.3d 1198, 1211 (Pa. 2020), *cert. denied sub nom. Fouse v. Saratoga Partners L.P.,* 141 S. Ct. 2599 (2021) (*citing Shoul v. Commonwealth, Department of Transportation Bureau of Driver Licensing*, 173 A.3d 669, 677 (Pa. 2017)).

In applying the rational basis test, Courts must first "determine whether the challenged statute seeks to promote any legitimate state interest or public value. If

[8] https://www.kofc.org/en/resources/news-room/polls/kofc-national-survey-with-tables012021.pdf

so, we must next determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests. *Lohr*, at 1211, (*citing Curtis v. Kline*, 666 A.2d 265, 269 (Pa. 1995)).

Appellants falsely claim that the funding prohibition has no rational basis because paying for childbirth costs more than paying for child abortion. This is a false comparison. First, Pennsylvania's prohibition on elective abortion funding advances multiple governmental interests not just cost reduction. The issue is not only the amount of taxpayer money that is spent or saved under the statutory framework, but the principle that the statute is effectuating the will of the citizens of Pennsylvania – which is the preservation of innocent human life and is a legitimate governmental interest of the Legislature.

Further, Appellants' argument seemingly proceeds from a false premise that every MA pregnancy which ends in an elective abortion saves the State the expense of paying for childbirth. Appellants have never asserted precisely how many women enrolled in the MA program deliver their child without considering an abortion. Appellants have never asserted precisely how many abortions are performed on women who are enrolled in the MA program. Appellants only assert that those abortions performed on MA enrollees are paid for by private donors or performed at a reduced rate. It is for these abortions that Appellants seek state subsidization.

The pregnancies which Appellants terminate do not cost the State anything.

Granting Appellants' requested relief will only increase the State's expenditures in addition to the expenditures already being paid by the state for childbirth. It is not a zero-sum game. Even if DHS is forced to spend MA funds on abortion, it will not eliminate the funds DHS already spends on childbirth. Appellants only claim is that the MA funds used for abortion will replace or reduce the dollars which they and their private donors currently spend to cover those abortions.

Additionally, *Fischer* aptly summarized how the funding prohibition furthers Pennsylvania's strong and legitimate public interests in protecting life.[9] Pennsylvania has a historically strong interest in promoting childbirth. As is more fully developed in the Brief by *Amicus Curiae* House Pro-Life Caucus, this keen interest has been demonstrated repeatedly over the years through the legislature's advancing and choosing to fund various programs and initiatives.

Several notable legislative examples include establishing and annually appropriating finds for Pennsylvania's alternative to abortion program, Real

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[9] "Here the importance of the governmental interest of preserving potential life has been consistently recognized by the United States Supreme Court. That Court has at various times described that right as 'valid and important,' *Beal v. Doe*, supra, 432 U.S. at 445, 97 S. Ct. at 2371; 'important and legitimate,' *Harris v. McRae*, supra, 448 U.S. at 324, 100 S. Ct. at 2692, citing *Roe v. Wade*, 410 U.S. at 162, 93 S. Ct. at 731; 'significant' and, 'unquestionably strong,' *Beal v. Doe*, supra, 432 U.S. at 446, 97 S. Ct. at 2371. Moreover, the Court has recognized the unique aspect of abortion as being the only medical procedure involving 'the purposeful termination of a potential life.' *Harris*, supra, 448 U.S. at 325, 100 S. Ct. at 2692. We also recognize this fact; and to say that the Commonwealth's interest in attempting to preserve a potential life is not important, is to fly in the face of our own existence." *Fischer*, 502 Pa. at 308-309.

Alternatives; establishing The Newborn Protection Act, 23 Pa. C.S. § 6501, otherwise known as the Safe Haven Laws; enacting 18 P. C.S. § 2601, *et seq.*, the Crimes Against the Unborn Child Act; eliminating a cause of action for wrongful birth and wrongful life, 42 Pa. C.S. § 8305 and barring the defense against a claim for injury sustained in utero, 42 Pa. C.S. § 8306. Additionally, The Newborn Child Testing Act, 35 P.S. § 621; The Keystone Mothers' Milk Bank Act, 35 P.S. § 5011; The Freedom to Breastfeed Act, 35 P.S. § 636.1; and, The Maternal Mortality Review Act, 35 P.S. § 10241 are all legislative initiatives intended to assist mothers and newborns. All these legislative programs demonstrate the General Assembly's commitment to childbirth and newborn care rather than abortion.

Administratively, the Bureau of Family Health within the Department of Health has a myriad of services and programs which administer both pre-natal and infant health services. The Division of Child and Adult Health Services addresses social determinants of health to reduce infant mortality and improve birth outcomes, through group prenatal programs, lead poisoning prevention, and SIDS education. The Division of Newborn Screening provides formula, newborn services and breastfeeding education and support. The Division of Community Systems Development and Outreach assists providers and parents of children and youth with special health care needs to access local services and supports.

Accordingly, because Pennsylvania's prohibition on funding abortion through

MA does not impact any protected classification or impinge upon the exercise of any fundamental right protected by the Constitution, and because the government action is presumed to be valid and is rationally related to the state's legitimate interest in promoting childbirth over abortion, rational basis review is the appropriate standard for Review. Under that standard, Pennsylvania's prohibition on public funding for elective abortion is permissible.

B. The First Edmunds Factor – The Text of the Pennsylvania Constitution and Cases Cited by Appellants do not Support Appellants' Argument

When a statutory or constitutional challenge requires Courts to determine if the Pennsylvania Constitution provides greater privileges and protections, and should be read more broadly than corresponding provision of the U.S. Constitution, Courts must review the challenged law or constitutional provision in light of the four factors articulated in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). See for instance, *Jubelirer v. Rendell*, 953 A.2d 514, 523-24 (Pa. 2008). The *Edmunds* factors do not require an expanded interpretation of Pennsylvania's Art. I, §§ 1 and 26 as Appellants suggest. An accurate review of *Edmunds* shows that Art. I, §§ 1 and 26 are interpreted and treated identically to claims under the Fourteenth Amendment.

Art. I, § 1 and § 26, and Art. III, § 32 contain those constitutional provisions which secure equal protection under the Pennsylvania Constitution. Specifically,

Art. I, § 1 guarantees the inherent rights of mankind; Art. I, § 26 prohibits discrimination by the Commonwealth and its political subdivisions; and Art. III, § 32 prohibits local or special laws. Properly understood, and as discussed below, Art. III, § 32 is inapplicable in this case and neither Art. I, § 1 or § 26, either individually or collectively, establishes what Appellants claim they establish – a fundamental right to abortion or a fundamental right to state-subsidized abortion.

1. Art. I, §§ 1 and 26 are interpreted identically to claims under the Fourteenth Amendment.

Appellants cite *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991), for the proposition that the Pennsylvania Constitution, Art. I, § 1 and § 26, and Art. III, § 32, should be read differently than the Federal Constitution and deviate markedly from the Federal Equal Protection clauses. Appellants' analysis and conclusions are incorrect.

Not all rights subject to equal protection are "fundamental rights." Appellants reliance on *Love* is misplaced. *Love* did not involve a fundamental right, but a challenge to a parking ordinance which was more restrictive on non-residents than on residents. In upholding the restrictive parking ordinance against Love, this Court specifically stated that "[t]he 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 325 (*citing James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984)). The Court continued, "[o]bviously, parking restrictions such as the ordinances at issue, involve 'neither suspect classes nor fundamental rights.'" *Id*.

The analytical framework applied in *Love* is still applied today. In *Commonwealth v. Albert*, 758 A.2d 1149 (Pa. 2000), this Court was asked to determine the constitutionality of Pennsylvania sexual assault statutes which punish defendants who are more than four years older than their victims more severely than defendants who are less than four years older than their victims. Analyzing Pennsylvania's Art. I § 26 and the Fourteenth Amendment to the U.S. Constitution, this Court held that "the equal protection provisions of the Pennsylvania Constitution are analyzed ... 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." *Commonwealth v. Albert*, 758 A.2d at 1151 (*citing McCusker v. Workers' Compensation Appeal Board,* 639 A.2d 776, 777 (Pa. 1994), quoting *Love,* 597 A.2d at 1139.

This Court has since had the opportunity to address *Love's* specific reference to Pa. Const. Art. I, § 26, but has chosen not to do so. In *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), in the context of allegedly partisan gerrymandering of Congressional districts, this Court determined that claims under

the Pennsylvania Free and Equal Elections clause, Pa. Const. Art. I, § 5, and the Federal Equal Protection Clause remain "two distinct claims [and] remain subject to entirely separate jurisprudential considerations." *League of Women Voters* at 813. Separate jurisprudential considerations may be required for elections under Art. I, § 5, but not for Art. I, §§ 1 and 26.

In *League of Women Voters*, the Supreme Court also had the opportunity to correct, but did not disturb the Commonwealth Court's conclusion of law that, as stated by *Love*, "equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United Stated Supreme Court when reviewing equal protections claims under the Fourteenth Amendment to the United States Constitution." 178 A.3d at 784, n. 53, citing *Love*, 597 A.2d at 328. This Court differentiated between the Free and Equal Elections clause under Pa. Const. Art. I, § 5, which is analyzed differently from the Federal Equal Protection Clause, and Pa. Const. Art. I, § 26, which is analyzed the same as the Federal Equal Protection Clause.

In *Love,* the Court stated that "[o]bviously, parking restrictions such as the ordinances at issue, involve 'neither suspect classes nor fundamental rights.'" 597 A.2d at 325. The same is true in the present case. While the inability to pay for an elective medical procedure, such as an abortion, is a far weightier matter in a person's life than a mere parking restriction, the basic legal principle holds true. The

Commonwealth's choice to not fund elective abortion procedures implicates neither a suspect class or fundamental right so as to trigger strict scrutiny, nor is the restriction a sex-based classification. Thus, as in *Love*, the statute prohibiting MA funding for abortion is reviewed under a rational basis analysis.

Accordingly, Appellants are wrong to assert that Pennsylvania's Equal Protection clauses in Art. I, §§ 1 and 26 require an analysis different from that used under the Fourteenth Amendment of the Federal Constitution.

2. Art. III, § 32 Does Not Apply to Appellants' Challenge

Appellants' attempt to seek equal protection rights to abortion funding under Art. III, § 32 fails as well. Article III, § 32, Certain Local and Special Laws, prohibits the making of any "special or local law in any case which has been or can be provided for by general law. . ." Pa. Const. Art. III, § 32. Appellants cite to Art. III, § 32 for the proposition that it, along with §§ 1 and 26, embody Pennsylvania's Equal Protection jurisprudence. However, nowhere in their original Petition for Review, or in their brief to this Court, do Appellants explain how the statewide prohibition on using MA funds to pay for abortions, found in 18 Pa. C.S. § 3215(c), is a special law in violation of Art. III, § 32. Appellants do not cite the general law which is, allegedly, offended by this alleged "special law."

Rather, 18 Pa. C.S. § 3215(c) is the general law which is equally applicable

which prohibits public funding for all abortions (except for instances of rape, incest, or to preserve the mother's life) for all persons regardless of race, sex, national origin, age or any other protected classification. Appellants cite *Kroger Co. v. O'Hara Township*, 392 A.2d 266 (Pa. 1978), for the proposition that the text of Art. III, § 32 prohibits 'special laws' which discriminate against exercising fundamental rights and affords greater protection than the Federal Equal Protection Clause. Their only justification for this assertion is at page 67 of their brief:

> Further prohibiting discrimination against fundamental rights is Article III, section 32, which by its text prohibits "special laws." This Court has said that the purpose of this provision is to require "that like persons in like circumstances should be treated similarly by the sovereign." *Pa. Turnpike Commission v. Commonwealth*, 899 A.2d 1085, 1094 (Pa. 2006); *Kroger*, 392 A.2d at 274.

Surprisingly, neither case cited by Appellants involves a fundamental right. *Kroger* was a challenge to the Sunday Closing Laws which the Court found had become riddled with so many exceptions and exemptions that the law no longer bore "a fair and substantial relationship to the [the Commonwealth's goal of] providing a uniform day of rest and recreation to the citizens of Pennsylvania." *Kroger*, 392 A.2d at 276.

In *Pa. Turnpike*, the First-Level Supervisor Collective Bargaining Act, 43 P.S. §§ 1103.101-1103.701 (the "Act"), was challenged by the Pennsylvania Turnpike Commission because the Act mandated the Turnpike Commission to engage in collective bargaining with first-level supervisors but did not require any other

agency to bargain with its first-level supervisors. Even though the law in question did not involve a fundamental right, the Supreme Court determined that it was, in fact, a special law in violation of Art. III, § 32. However, supporting present Appellees' position, the Court reiterated that:

> Nonetheless, it is settled that equal protection principles do not 'vitiate the Legislature's power to classify, which necessarily flows from its general power to enact regulations for the health, safety, and welfare of the community,' nor do these principles 'prohibit differential treatment of persons having different needs.'"

899 A.2d at 364 (internal citations omitted).

Because women who choose to deliver their child and women who choose to abort their child are two different groups of women with different needs, the Legislature properly pursued different statutory schemes which it believes is in the best interests for "the health, safety, and welfare of the community." *Id*.

The prohibition on using MA funds for abortion is not a special law. Appellants merely make an unsubstantiated claim that 18 Pa. C.S. § 3215(c) is a 'special law' without citing the general law it would contravene or explaining how it is 'special.' Therefore, Art. III, § 32 is not applicable to Appellants' challenge.

C. Second *Edmunds* Factor - History and Pennsylvania Case Law

The history and relevant case law from Pennsylvania does not support the argument that the Pennsylvania's Equal Protection guarantees can be read so broadly

as to protect abortion as a fundamental right. The cases which Appellants cite do not show that Pennsylvania's Equal Protection provisions have developed to require a different analysis from the Fourteenth Amendment. Nor do Appellants' cases require finding a right to abortion in Pennsylvania's Equal Protection jurisprudence.

1. Historically, Abortion was Not Considered a Fundamental Right Warranting Constitutional Protection.

The history of abortion jurisprudence in the United States generally, and Pennsylvania specifically, disproves Appellants' argument that Article I, §§ 1 and 26 afford abortion protection as a fundamental right under the Pennsylvania Constitution. In 1850, the Pennsylvania Supreme Court declared abortion throughout pregnancy a crime under the common law. *Mills v. The Commonwealth*, 13 Pa. 631 (1850). In *Mills*, Pennsylvania rejected the quickening doctrine, which held that abortion was not a common-law crime if performed before the woman felt the fetus move or "quicken" within her—an event generally believed to occur at about four months gestation. 13 Pa. at 633.[10]

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), provides an informative and historical perspective that abortion has not,

[10] "It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this indictment was therefore sufficient, to wit, "that she was then and there pregnant and big with child." By the well settled and established doctrine of the common law, the civil rights of an infant in *ventre sa mere* are fully protected at all periods after conception." *Mills*, at 633, *citing* 3 Coke's Institutes.

traditionally, enjoyed acceptance and protection as a fundamental right.

> Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then–37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe v. Wade,* 410 U.S., at 139–140, 93 S.Ct., at 720; *id.,* at 176–177 , n. 2, 93 S.Ct., at 738–739, n. 2 (REHNQUIST, J., dissenting). On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

505 U.S. at 952-953 (Rehnquist, White, Scalia, Thomas concurring).

With this historical backdrop, it is clear that Pennsylvania has never afforded abortion the status afforded to recognize fundamental rights or that the act of aborting an unborn child enjoyed the same constitutional protection as the fundamental rights to worship, speech, vote or marry.

2. The Article I, Sections 1 and 26 Guarantee of Equal Protection are Analyzed the Same as the Fourteenth Amendment

As previously noted, Pennsylvania Courts, and federal courts interpreting and applying Pennsylvania law, continue to hold that the same approach is applied when

analyzing a challenge to a statute under Pa. Const. Art. I, §§ 1 and 26 as is applied when analyzing Equal Protection under the Fourteenth Amendment.

In *Montanye v. Wissahickon School District,* 327 F.Supp.2d 510 (E.D. Pa. 2004), the Eastern District Court, analyzing and applying Pennsylvania law, aptly stated that Art. I, § 26 of Pennsylvania's Constitution "is 'designed to protect Commonwealth citizens from being harassed or punished for the exercise of their constitutional rights.'" 327 F.Supp.2d at 524 (*citing Bronson v. Lechward,* 624 A.2d 799, 801 (Pa. Cmwlth. 1993)). *Montanye* went on to explain that "[s]ection 26 is known as the state's equal protection provision and is 'analyzed under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment.'" *Id. (citing Small v. Horn*, 722 A.2d 664, 672 n. 13 (1998), (*citing Love*, 597 A.2d at 1139); *and Kaehly v. City of Pittsburgh,* 988 F.Supp. 888, 893 n. 5 (W.D. Pa. 1997) (stating the same while analyzing both Art. I, § 1 and § 26). Additionally, "[p]laintiffs' equal protection claim under Article I, Section 26 of the Pennsylvania Constitution, is analyzed the same as claims made pursuant to the Fourteenth Amendment of the United States Constitution." *Pocono Mountain Charter School v. Pocono Mountain School District,* 908 F.Supp.2d 597, 618 (M.D. Pa. 2012) (*citing Kramer v. Workers' Compensation Appeal Board,* 883 A.2d 518, 532 (Pa. 2005)). Based on this precedent, Appellants' claim that Pennsylvania's Art. I, §§ 1 and 26 is applied

differently from Equal Protection claims under the Fourteenth Amendment is incorrect.

3. Art. I, §§ 1 and 26 do not Require Finding that the Right to Privacy Necessitates a Right to Abortion.

Appellants correctly state that Pa. Const. Art. I, § 1 embodies a right to privacy, but try to extend the right to privacy to include abortion as a fundamental right. The cases upon which Appellants rely do not support their claim.

The Pennsylvania Constitution acknowledges that mankind enjoys "certain inherent and indefeasible rights." Pa. Const. Art. I, § 1. Appellants' reliance on *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018) is misplaced. *League of Women Voters* did not concern the right to privacy generally, the right to procreate, or specifically the right to abortion. As previously explained, *League of Women Voters* concerned a challenge to the Fair and Equal Elections clause, Art. I, § 5, and the Legislative District clause under Art. II, § 16; *League of Women Voters* did not challenge any law or examine equal protection under Pa. Const. Art. I, §§ 1 and 26. Appellants' presentation of *League of Women Voters* for the proposition that Art. I, §§ 1 and 26 is broad enough to include the right to abortion or that those sections must be read more expansively than Equal Protection under the Fourteenth Amendment is inaccurate.

Straying further, Appellants also cite *Nixon v. Department of Public Welfare*,

839 A.2d 277 (Pa. 2003), for support of their claim that Art. I, § 1 affords "certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate." 839 A.2d at 287. *Nixon* had nothing to do with marriage or procreation and certainly had nothing to do with abortion. *Nixon* challenged the regulatory prohibition on employment of individuals with criminal records in certain healthcare settings under DPW (now Department of Human Services) regulations. While striking down the criminal record-based prohibition, this Court did recognize that the right to engage in a particular occupation is not a fundamental right. *Id.* at 288.

Similarly, Appellants cite *Yanakos v. UPMC*, 1218 A.3d 1214 (Pa. 2019), to support their claim that the right to marriage and procreation necessarily includes the right to abort a child. But again, *Yanakos* had nothing to do with §§ 1 or 26, procreation, or abortion. *Yanakos* dealt with the right to a remedy for a medical injury and simply does not stand for the point of law that Appellants claim.

Appellants also cite to *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020), to support their claim that the Pennsylvania Equal Protection provisions should be read more expansively than the Fourteenth Amendment. *Alexander* did not address the Equal Protection provisions under Art. I, §§ 1 or 26 which are at issue here, but was a search and seizure case which examined the automobile exception under Art. I, § 8. *Alexander* does not support Appellants' claims either.

The cases Appellants cite do not accurately represent or support their erroneous claims that the Pa. Const. Art. I, §§ 1 and 26 are analyzed differently than the Fourteenth Amendment or should be read so broadly as to requiring a right to taxpayer funding of elective abortion.

4. The Right to Privacy and Bodily Integrity are Limited

Appellants wrongly claim that the right to privacy and bodily integrity in the Pennsylvania Constitution includes the right to elective abortion. Appellants misunderstand the "bodily integrity" right and mis-cite authority to support their erroneous position.

"The right to privacy has never been held to be absolute." *Stenger v. Lehigh Valley Hospital Center,* 609 A.2d 796, 801 (Pa. 1992) (*citing Florida Star v. B.J.F.*, 491 U.S. 524 (1989)). "Similarly in Pennsylvania, this right is not absolute." *Stenger,* 609 A.2d at 802; *see also John M. v. Paula T.*, 571 A.2d 1380 (Pa. 1990). The U.S. Supreme Court has also routinely held that an individual's right to privacy, while fundamental, can be abridged by certain overriding governmental interests. See, for instance, *Whalen v. Roe*, 429 U.S. 589 (1977).

Appellants cite to *Commonwealth v. Murray*, 223 A.2d 102, 110 (Pa. 1966), for support that Pennsylvania's right to privacy includes the right to bodily integrity and abortion. *Murray* had nothing to do with bodily integrity. *Murray* was a simple

wiretap case examining Pennsylvania's Article I, § 8 and the Fourth Amendment of the U.S. Constitution. *Murray* did not analyze Art. I, §§ 1 or 26, and had nothing to do with bodily integrity, pregnancy, or abortion.

Appellants also cite *Cable v. Anthou*, 699 A.2d 722 (Pa. 1997), for the same point. In *Cable*, the Supreme Court granted *allocatur* to decide whether a trial court can order a second DNA test to determine paternity when there was no evidence that the first test was inaccurate. Using federal constitutional jurisprudence under the Fourth Amendment, the Court observed that the Fourth Amendment's proper function "is to constrain, not against all intrusions … but against intrusions which are not justified in the circumstances." *Id*. at 725.

Of importance is not the fact that Appellants mis-cited *Cable,* which concerned multiple or unnecessary blood draws when determining paternity. Rather, the important point is the concept overlooked by Appellants: that constitutional protection of bodily integrity found in the right to privacy is a shield against unwanted government intrusion. "Bodily integrity" is not, and never has been, a sword to create or assert new rights. Whatever Appellants claim *Cable* stands for, it certainly does not support Appellants' assertion that Pennsylvania's right to privacy necessitates a right to abortion.

5. Decisional Autonomy is also a Limited Right

Appellants cite *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980), and *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A.2d 82 (Pa. 1980), to support a claim that Art. I, §§ 1 and 26 should be read more broadly to confer a greater degree of equal protection upon citizens than is granted under the Federal Fourteenth Amendment. *Bonadio* does not support Appellants' conclusion.

Appellants suggest that *Bonadio*, which affirmed a Superior Court ruling overturning a conviction for sodomy between consenting adults who were not husband and wife, struck down a statute because the law violated the Pennsylvania Constitution's equal protection guarantees, specifically the right to liberty. *Bonadio* said no such thing. *Bonadio* did not even examine the Pennsylvania Constitution's Equal Protection clauses. *Bonadio* came to its conclusion based on the Fourteenth Amendment to the U.S. Constitution. Rather, *Bonadio* shows, in support of Appellee's argument, that §§1 and 26 are analyzed just as Federal Equal Protection claims are under the Fourteenth Amendment.

Also supporting Appellee's argument, *Bonadio* says that exercising one's civil right can be limited by the state to protect others. According to Appellants, "[t]he police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others." 415

A.2d at 50 (emphasis added). To the contrary, this passage instead supports Appellee's argument that whether analyzed under federal or state constitutional grounds, equal protection is not violated when the state curtails the exercise of a civil right in order to protect another human being. Similarly, Pennsylvania's abortion "funding ban" does not offend equal protection because the statute furthers Pennsylvania's stated interest in promoting childbirth rather than abortion.

Second, Appellants cite *Fabio* to contend that decisional autonomy protects an individual's choice to engage in extramarital sex. *Fabio* too did not raise a challenge under any sections of the Pennsylvania Constitution. *Fabio* challenged the Philadelphia Police Duty Manual's prohibition on conduct unbecoming an officer by having a sexual affair with his wife's eighteen year old sister. The *Fabio* Court did not analyze or cite to <u>any</u> section of the Pennsylvania Constitution but did cite to numerous federal cases which have found a right to privacy emanating from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and also their "penumbras." *Fabio*, 141 A.2d at 89. *Fabio* does not support Appellants' claim that Art. I, §§ 1 and 26 should be read more broadly than the Fourteenth Amendment.

Similarly, Appellants assert that *John M. v. Paula T.*, 571 A.2d 1380 (Pa. 1990), shows that the Pennsylvania Constitution guarantees clear privacy interests in preserving bodily integrity. Appellants misconstrue the concept of bodily integrity. *John M.* says nothing about the Pennsylvania Constitution; it doesn't even

mention the Pennsylvania Constitution. *John M.* involved a putative father, John M, trying to force a husband (the presumptive father) to undergo a DNA test to establish his own (John M.'s) paternity of Paula T's child.

The Pennsylvania Supreme Court, again relying only on Federal Fourth Amendment search and seizure jurisprudence, stated that "[t]he person whose blood is sought has clear privacy interests in preserving his or her bodily integrity, and the constitutional right to be free from unreasonable searches and seizures." 571 A.2d at 1386. Again, privacy and bodily integrity rights are shields intended to protect citizens from government intrusion. Contrary to Appellants' representations, the privacy interest in preserving bodily integrity protected in *John M.* was rooted in Federal Fourth Amendment search and seizure jurisprudence, not the Pennsylvania Constitution. This too reaffirms Appellee's position that Article I, §§1 and 26 of Pennsylvania's Constitution do not require greater protection than the Fourteenth Amendment.

The cases Appellants cite do not support the assertion that Pennsylvania Constitution Art. I, §§ 1 and 26 are more expansive and should be applied more liberally than their federal counterparts. The cases they cite certainly do not support their radical conclusion that the Pennsylvania Constitution provides women an unqualified right to decide whether or not to abort a pregnancy, and that taxpayers should pay for it. Certainly, on the cases Appellants cite, Art. I, §§ 1 and 26 cannot

be read so broadly to find that abortion is a fundamental right under the Pennsylvania Constitution.

Other than *Fischer*, the Pennsylvania Supreme Court has not opined about whether there is a constitutional right to receive public funding to subsidize the exercise of a personal choice. However, numerous federal courts, and our Commonwealth Court, have consistently held that there is no constitutional right to receive public assistance. See for instance, *Walker v. O'Bannon*, 487 F.Supp. 1151 (W.D. Pa.1980), *aff'd.* 624 F.2d 1092 (3d Cir. 1980); *Smith v. Reynolds*, 277 F.Supp. 65 (E.D. Pa. 1967), *aff'd sub nom. Shapiro v. Thompson*, 394 U.S. 618 (1969). *See also*, *Shaffer-Doan ex rel. Doan v. Commonwealth Department of Public Welfare*, 960 A.2d 500 (Pa. Cmwlth. 2008) ("there is no constitutional right to receive public assistance."); and *Kratzer v. Com., Department of Public Welfare*, 481 A.2d 1380 (Pa. Cmwlth. 1984). ("Despite petitioner's assertion to the contrary, there is no constitutional right to receive public assistance."). Most recently, in a 2019 unpublished opinion cited here only for persuasive value, the Commonwealth Court again upheld the foundational principle that "there is no constitutional right to receive public assistance" and that the "General Assembly has 'legitimate interest in allocating undeniably scarce social welfare resources'" as it deems best. *Patel v. Department of Human Services*, 2019 WL 1593910 (Pa. Cmwlth. 2019). The United States Supreme Court also recognizes the same constitutional reality. "Public

assistance benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimal levels of support." *Lavine v. Milne*, 424 U.S. 577, 585 n.9 (1976).

Because there is no constitutional right to receive public assistance at all, the receipt of public assistance is not "owed equally to all." Therefore, the state is free to confer a benefit to one group of citizens who are in one circumstance but not confer a benefit to other citizens who are in a different circumstance if it is against the Commonwealth's public policy.

For the foregoing reasons, and despite their repeated attempts to strain the holdings of inapposite case precedent, Appellants' Equal Protection argument must fail because they have not shown that the equal protection guarantees under Art. I, §§ 1 and 26 of the Pennsylvania Constitution are greater than, or must be read more expansively than, the protections granted under the Fourteenth Amendment. Accordingly, Pennsylvania's prohibition on funding abortions should be rightly analyzed under Federal Fourteenth Amendment jurisprudence – as it was by *Fischer*. Under that jurisprudential framework, the funding prohibition receives rational basis review – as it did by *Fischer*. Accordingly, the determination by the Commonwealth Court was proper and should be upheld.

D. Third Edmunds factor - Guidance from Other States

Appellants would have this Court believe that the majority of other states have reviewed similar coverage bans for abortion and have declined to follow the reasoning of *Harris v. McRae* and *Maher v. Roe*, and that Pennsylvania is an outlier among our sister states. That portrayal is far from accurate. As is more fully developed in the *amicus* brief filed by *amicus* Americans United for Life Pennsylvania is not an outlier among other states but a leader among the majority of states that restrict MA funding for abortion. According to the abortion industry's own information[11] as of November 1, 2021, the majority of states (69 %), including Pennsylvania and the District of Columbia, restrict the use of taxpayer money for abortions, except in cases of rape, incest or to preserve the life of the mother (Utah's only exception is to save the life of the mother).

Only a minority, 16 states (31%), permit the use of taxpayer money for all or most abortions. Interestingly, of those 16 states which have chosen to use taxpayer money for abortion, only 7 states[12] did so via vote expressing the true will of the

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[11] https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid. Last viewed December 2, 2021.

[12] States in which the people have chosen to permit taxpayer funding of abortion include Hawaii, Illinois, Maine, Maryland, New York, Oregon, and Washington. However, New York does not fund abortion for all eligible recipients. New York funds medically necessary abortions for women whose family incomes are below 100% of the federal poverty level but denies abortion funding to women with family incomes between 100 and 185% of the poverty level.

people. The majority, 9[13] of the 16 states which use taxpayer money to fund abortion, have done so through judicially imposed Court order. West Virginia's *Panepinto* case, *Women's Health Center of West Virginia*, *Inc. v, Panepinto*, 446 S.E.2d 658 (W. Va. 1993), may no longer be considered as an authoritative interpretation of the state constitution because it has been overturned by a state constitutional amendment. *See* W. Va. Const. art. VI, § 57 ("Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion"). Utah has also recently adopted a constitutional amendment restricting abortion.

By comparison, five state supreme courts (including the Pennsylvania Supreme Court in *Fischer*), one court of appeals and two state trial courts have upheld abortion funding restrictions when challenged on state constitutional grounds.[14]

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[13] *See State of Alaska*, *Dep't of Health & Human Resources v. Planned Parenthood of Alaska*, 28 P.3d 204 (Alaska 2001); *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 23 (Ariz. 2002); *Committee to Defend Reproductive Rights v. Myers*, 172 Cal. Rptr. 866 (Cal. 1981); *Moe v. Secretary of Admin. & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); and *Women's Health Center of West Virginia*, *Inc. v, Panepinto*, 446 S.E.2d 658 (W. Va. 1993).

[14] *See Renee B. v. Florida Agency for Health Care Admin.*, 790 So.2d 1036 (Fla. 2001); *Doe v. Dep't of Social Services*, 487 N.W.2d 166 (Mich. 1992); *Rosie J. v. North Carolina Dep't of Human Resources*, 491 S.E.2d 535 (N.C. 1997); *Fischer*; *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002); A *Choice for Women*, *Inc. v. Florida Agency for Health Care Admin.*, 872 So.2d 970 (Fla. Dist. Ct. App. 2004); *Planned Parenthood of Idaho*, *Inc. v. Kurtz*, Case No. CVOC0103909D, Fourth District Court, Ada County (Idaho), June 12, 2002; and *Doe v. Childers*, Case No. 94CI02183, Jefferson Circuit Court (Kentucky), August 3, 1995.

In sum, focusing on appellate courts only, and excluding the West Virginia opinion, seven state supreme courts have struck down restrictions on public funding of abortion, five state supreme courts and one intermediate court of appeals have upheld such restrictions in their entirety, and one state supreme court has upheld most applications of the State's funding restriction. In light of the foregoing, it cannot be said that the weight of authority supports invalidating the Pennsylvania statutes challenged by Appellants. More accurately, the guidance from other states demonstrates that Pennsylvania is not out of step but is, along with a majority of states, on the correct side of this policy debate which must be held in the public arena and resolved by the Legislature.

E. Fourth Edmunds Factor – The Public Policy of The Commonwealth of Pennsylvania does not Offend Equal Protection

Pennsylvania's historic and current public policy requires an affirmance of *Fischer* and a rejection of Appellants' arguments. Appellants mistakenly claim that the Commonwealth's decision to spend tax dollars to pay for childbirth but not for elective abortion violates Pennsylvania's constitutional Equal Protection provisions. Equal protection considerations only apply when a right owed equally to all is given to one but withheld from another. The constitutional essence of 'equal protection under the law' is that like persons, in like circumstances, will be treated similarly. *Laudenberger v. Port Authority of Allegheny County,* 436 A.2d 147 (Pa. 1981); *see*

also, Curtis v. Kline, *supra*. and *James v. Southeastern Pennsylvania Transportation Authority,* 477 A.2d 1302 (Pa. 1984) (However, it does not require that all persons under all circumstances enjoy identical protection under the law).

The right to equal protection under the law does not absolutely prohibit the Commonwealth from "classifying individuals for the purpose of receiving different treatment and does not require equal treatment of people having different needs." *Curtis v. Kline*, 666 A.2d at 267 (*citing James,* 477 A.2d 1302 (Pa. 1984)). Further, "[e]qual protection principles do not, however, vitiate the Legislature's power to classify, which necessarily flows from [the Commonwealth's] general power to enact regulations for the health, safety, and welfare of the community." *Harrisburg School District v. Zogby*, 828 A.2d. 1079, 1088 (Pa. 2003).

Presently, pregnant women who are enrolled in the MA program fall into one of two different circumstances; one group decides to carry their baby to term while the other group decides to abort their child. Both groups contain like individuals, but they are not in similar circumstances; they are equal people who have different needs. Their dissimilar circumstances and their different needs do not result from any governmental action but are a result of their respective choices.

The General Assembly, reflecting the people's will, has made a policy determination that Pennsylvania will appropriate funds for childbirth, but not for

elective abortions. To further this policy determination, the Legislature has passed, and the Governor has enacted, laws intended to advance the health, safety, and wellbeing of all persons – born and unborn –which reflect the values of the citizenry as a whole. The General Assembly has chosen to allocate scarce social service dollars to assist low-income women who are pregnant, receiving MA and choose to give birth to their child. Alternatively, and again because it reflects the citizens' values, the General Assembly has chosen to not allocate scarce social service funds to the category of women who are pregnant, receiving MA, and choose to abort their child because it best reflects the values of the citizens they represent.

Pennsylvania's abortion funding prohibition does not offend principles of Equal Protection because individuals who are pregnant and decide to carry their child to term are in a different circumstance than those individuals who are pregnant and decide to abort their child. The former group is choosing to advance the same social policy (favoring childbirth over abortion) which the elected representatives of the people of Pennsylvania have officially chosen to advance. The latter group is not.

Equal Protection guarantees are not violated because public funding of abortion does not impact a duty that is owed equally to all. Pennsylvania, acting through its elected representatives, may freely provide public tax dollars for one program deemed to be beneficial to the citizens and withhold funding for another

initiative which the people, speaking through their representatives, deem adverse to the Commonwealth's policy interests. Therefore, as originally determined by *Fischer*, the challenged statute survives rational basis review and the Commonwealth Court's determination should be upheld.

V. The Prohibition on Medical Assistance Covering Abortion does not Offend the Pennsylvania Constitution's Equal Rights Amendment.

The Commonwealth Court's decision, based on *Fischer,* that the prohibition on public funding for abortion found in 18 Pa. C.S § 3215(c) did not offend the Equal Rights Amendment in Article I, § 28 of the Pennsylvania Constitution, was proper and should be upheld. Appellants ask the Court to, among other things, strike 18 Pa. C.S. §§ 3215(c) and (j) in their entirety as unconstitutional. Appellant's claim is not supported by law.

The Pennsylvania ERA "was intended to ***generally*** equalize the benefits and the burdens between the sexes." *In re. Olexa*, 317 B.R. 290 (W.D. Pa. 2004) (emphasis added). The Court, in *Olexa,* wisely used the word 'generally' because females and males are not completely interchangeable. The ERA was not intended to prohibit the recognition of, or erase the commonsense distinctions between, men and women. The Pennsylvania ERA recognizes that different treatment of men and women may be permitted or necessary when the distinction "is reasonably and genuinely based on physical characteristics unique to one sex." *Beattie v. Line*

Mountain School District, 992 F.Supp.2d 384 (M.D. Pa. 2014) (*citing Fischer*, 502 A.2d at 125).

A. The coverage ban does not perpetuate a stereotype.

It is not a stereotype to acknowledge the fact that the female human, the person who is born with "xx" sex determination chromosomes, is the person who may become pregnant; it is a scientific fact of life. Appellants' argument, and the cases Appellants cite to support their argument, involve those circumstances and situations where men and women were treated differently under the law when they were otherwise physically able to perform the same task, carry the same burden, or enjoy the same benefit equally. For instance, in *Cerra v. East Stroudsburg*, 299 A.2d 277 (Pa. 1973), decided not under the ERA but the Pennsylvania Human Relations Act,43 P.S. § 955(a), men were allowed re-employment following a short-term disability but women were not allowed re-employment after pregnancy. *Henderson v. Henderson*, 327 A.2d 60 (Pa. 1974), concerned the equal payment of fees and costs in a divorce action. *Hartford Accident v. Insurance Commissioner of the Commonwealth,* 482 A.2d 542 (Pa. 1984), concerned sex-based automobile insurance rates. *Adoption of Walker*, 360 A.2d 603 (Pa. 1976), concerned unwed fathers being treated differently under the Adoption Act than unwed mothers. *Commonwealth by Packel v. PIAA*, 18 Pa. Cmwlth. 45 (1975), concerned allowing males and females to compete equally in PIAA sports. *Conway v. Dana*, 318 A.2d

324 (Pa. 1974), concerned the presumption that males are primarily responsible for supporting children. *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974), concerned eliminating sex-specific loss of consortium claims.

In all of these cases, the discrimination against women occurred in areas where the different treatment of women and men was not due to innate fundamental biological differences between males and females, but in areas where biological differences do not matter – in employment, sports, etc. When addressing the equal opportunity to participate, the equal burden of paying insurance, or the equal ability to adopt a child, distinctions between the sexes was impermissible because both sexes were equally able to do what the other sex could do. There was no reason the sexes should have been treated differently.

But, in the context of becoming pregnant and giving birth, women and men are not equally situated. Only women can give birth or have an abortion because only women can get pregnant; innate, fundamental, biological differences do matter in that context. Comparing the treatment of women who can become pregnant to the treatment of men who can never become pregnant is not discrimination because you cannot discriminate between the sexes in this situation. Men and women are not equally physically able to carry that burden, perform that task or enjoy that privilege. The relevant comparison is instead between pregnant women who plan to give birth to their child versus pregnant women who plan to abort their child.

B. The Commonwealth Court Correctly Relied on *Fischer.*

This Court was not wrong in *Fischer* when it relied upon case law that recognized these natural differences between women and men. The fundamental biological differences between males and females have nothing to do with the physical ability to pay car insurance, child support, costs and fees for divorce, wrestle, perform the same occupation, or eligibility for re-employment following short-term disability. Therefore, Appellants' cases offer no real guidance to this Court in this particular case. Alternatively, in this present case, the fundamental biological difference between males and females is why males and females are not similarly situated and why *Fischer* was correct when it stated:

> In the present case, however, we cannot accept appellants' rather simplistic argument that because only a woman can have an abortion then the statute necessarily utilizes "sex as a basis for distinction," *Henderson v. Henderson*, supra, 458 Pa. at 101, 327 A.2d at 62. To the contrary, the basis for the distinction here is not sex but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.

Fischer, 509 Pa. at 313-314.

Abortion can only be performed on biological women due to a condition which is unique to the female's fundamental, biological characteristics. Appellants' position transforms or contorts the ERA's purpose from recognizing the mutual

equality of men and women, into what it was never intended to do – ignore innate biological differences and make women and men fungible.

VI. CONCLUSION

The Commonwealth Court's judgment should be upheld for several reasons. The Court lacks jurisdiction over this matter because the doctrine of justiciability requires an actual case or controversy. Because Appellants are corporations seeking to assert constitutional rights which belong to third parties, who have not authorized Appellants to speak for them or have chosen to not assert their own rights, and because the alleged constitutional injuries have no substantial relationship to Appellants' financial interests, and because the alleged injury is speculative, this Court should deny jurisdiction.

Closely related to jurisdiction, Appellants, none of whom are doctors or women enrolled in the MA program but businesses, lack standing to assert the rights of individuals with whom there is no doctor/patient relationships or have not authorized Appellants to speak on their behalf. Therefore, Appellants lack standing.

Third, Appellee House Respondents were properly granted status as Respondents through intervention. House Respondents have a keen and legally enforceable interest to defend in this litigation – the constitutional authority and obligation to establish public policy for the Commonwealth, and to determine the appropriate amount of appropriations to pay for those policy initiatives which

compete for scarce tax dollars. House Respondents could have been joined as original parties and, under the Declaratory Judgment Act, were required to be joined as parties with an interest. Additionally, this Supreme Court's last utterance on this very issue held that the General Assembly had a legally enforceable interest in defending its appropriations authority and that the funding policy did not offend the Constitution.

The prohibitions on Medical Assistance funding for elective abortions do not offend the Pennsylvania Constitution's Equal Protection guarantees. Longstanding court precedent has determined that Article I, Sections 1 and 26 are analyzed and applied in the same way as are claims under the Federal Fourteenth Amendment. Using that jurisprudence, the funding scheme does not impact a suspect class or impinge a fundamental right. Therefore, rational basis review applies. Under a rational basis review, the funding prohibition furthers a legitimate governmental policy and is applied equally to all pregnant people.

Finally, the funding prohibition does not offend the Pennsylvania Equal Rights Amendment because any different treatment is between females who make different individual choices during their pregnancies.

The Commonwealth Court was correct in recognizing that these factors required sustaining Respondents' Preliminary Objections on all grounds. The Commonwealth Court's decision should be upheld.

Respectfully Submitted,

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Date: December 13, 2021

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1. I certify that the foregoing brief complies with the word count limits of Pa.R.A.P. 531(b)(3). Based on the word count feature of the word processing system used to prepare this brief, this document contains 19,741 words, exclusive of the cover page, tables, the signature block, and certifications.

2. I certify that this filing complies with the provisions of the *Case Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than nonconfidential information and documents.

3. I hereby certify that on December 10, 2021, I caused a true and correct copy of the foregoing Brief for Amici Curiae, to be served via electronic filing upon all counsel of record.

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