IN THE

Supreme Court of Pennsylvania

MIDDLE DISTRICT

No. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, MEG SNEAD, in her official capacity as Acting Secretary of the Pennsylvania Department of Human Services, ANDREW BARNES, in his official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Services' Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs,

Defendants-Appellees.

———

Appeal from the Orders of the Commonwealth Court, dated January 28, 2020, and March 26, 2021, in the Commonwealth Court of Pennsylvania at No. 26 MD 2019

BRIEF OF APPELLEES SENATORS JACOB CORMAN, RYAN AUMENT, MICHELE BROOKS, JOHN DISANTO, JOHN GORDNER, SCOTT HUTCHINSON, WAYNE LANGERHOLC, DANIEL LAUGHLIN, SCOTT MARTIN, ROBERT MENSCH,

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I. COUNTERSTATEMENT OF SCOPE AND STANDARD OF REVIEW

An order sustaining preliminary objections will be affirmed when "it is clear that that party filing the petition for review is not entitled to relief as a matter of law." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (citation omitted). This Court has recognized that "it is within the sound discretion of the trial court whether to grant intervention," and that "[a] trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will." *Pa. Ass'n of Rural & Small Sch. v. Casey*, 613 A.2d 1198, 1200 n.1 (Pa. 1992).

II. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Should this Court refuse to overturn its unanimous decision in *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985) based upon principles of *stare decisis*?

The Commonwealth Court followed Fischer's binding precedent.

2. Did the Commonwealth Court properly determine that 18 Pa. C.S. § 3215(c) and (j), as well as the regulations codified at 55 Pa. Code §§ 1141.57, 1163.62, and 1221.57 (collectively, the "Coverage Ban"), do not violate the Pennsylvania Constitution's Equal Rights Amendment ("ERA") contained in Pa. Const, art. I, § 28?

Answered affirmatively by the Commonwealth Court.

3. Did the Commonwealth Court properly determine that the Coverage Ban does not violate the Pennsylvania Constitution's equal protection provisions contained in Pa. Const, art. I, §§ 1, 26 & art. III, § 32?

Answered affirmatively by the Commonwealth Court.

4. Did the Commonwealth Court properly permit Appellees Senators Jacob Corman (President pro tempore of the Pennsylvania Senate), Ryan Aument, Michele Brooks, John DiSanto, John Gordner, Scott Hutchinson, Wayne Langerholc, Daniel Laughlin, Scott Martin, Robert Mensch, Michael Regan, Mario Scavello, Patrick Stefano, Judy Ward, Kim Ward, and Eugene Yaw (collectively, the "Senators") to intervene in this action?

Answered affirmatively by the Commonwealth Court.[1]

III. COUNTERSTATEMENT OF THE CASE

A. The Identity of the Parties and the Nature of the Cause of Action

On January 16, 2019, Appellants Allegheny Reproductive Health Center, *et al.* (collectively, "Providers") initiated this litigation by a Petition for Review in the Nature of a Complaint in Equity Seeking Declaratory Relief and Injunctive Relief (the "Petition"). Providers are organizations that provide a variety of reproductive health care services and are enrolled in Pennsylvania's Medicaid

[1] Appellants also contend that the Commonwealth Court erred in finding that they lack standing to advance their claims. This issue will be addressed in the briefing submitted by the other Appellees in this matter.

program, known as Medical Assistance. (R. 116a-123a, ¶¶ 2-32, 34). Each Petitioner alleges that it performs medication and/or surgical abortions. (R. 116a-123a, ¶¶ 2-32). Collectively, Providers allege that they perform 95% of all abortions in Pennsylvania. (R. 123a, ¶ 33).

The Respondents named in the Petition are the Pennsylvania Department of Human Services ("DHS"); DHS's Secretary; the Executive Deputy Secretary of DHS's Office of Medical Assistance Programs; and the Deputy Secretary of DHS's Office of Medical Assistance Programs (collectively, the "DHS Appellees"). The Senators are Senators in Pennsylvania's General Assembly, the legislative body responsible for funding DHS and its Medical Assistance programs. Via Order dated January 28, 2020, the Commonwealth Court granted the Applications for Leave to Intervene as Respondents filed by the Senators and by eight members of the Pennsylvania House of Representatives (the "House Appellees").

In this action, Providers advance two claims challenging the Coverage Ban, which is set forth in 18 Pa. C.S. § 3215(c) and (j), and in regulations codified at 55 Pa. Code §§ 1141.57, 1163.62, and 1221.57. These regulations were promulgated by DHS (the "DHS Regulations"). 18 Pa. C.S. § 3215(c) provides that "[n]o Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the

performance of abortion," unless the abortion is: (1) necessary to avert the death of the mother; (2) performed in the case of pregnancy caused by rape; or (3) performed in the case of pregnancy caused by incest. 18 Pa. C.S. § 3215(j) sets forth certain requirements that must be satisfied before a Commonwealth agency disburses State or Federal funds for the performance of an abortion pursuant to 18 Pa. C.S. § 3215(c)(2) or (3). Each of the DHS Regulations relate to the payment conditions imposed by the DHS for abortions and, consistent with 18 Pa. C.S. § 3215(c) and (j), apply only to abortions performed when a woman's life is endangered, or in the case of rape or incest. *See* 55 Pa. Code § 1141.57, § 1163.62, § 1221.57.

18 Pa. C.S. § 3215 is part of the Abortion Control Act—an Act that is premised on the General Assembly's authority to advance Pennsylvania's public policy of protecting life and encouraging childbirth over abortion. 18 Pa. C.S. § 3202(a) ("It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion."); 18 Pa. C.S. § 3202(c) ("In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection

of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.").

B. Providers' Alleged Harm

According to Providers, the Coverage Ban harms them and the women to whom they provide services in several ways. With respect to the alleged harm to women eligible for Medical Assistance, the Petition alleges, among other things, that the Ban forces them to: (a) make personal financial sacrifices in order to pay for abortions (R. 130a, ¶ 59; R. 137a, ¶¶ 77-79); (b) delay abortion care while they raise funds for the procedure (R. 131, ¶ 61; R. 137a-138a, ¶¶ 80-82); and/or (c) carry their pregnancy to term, which may interrupt their education/career and may expose them to medical risks. (R. 132a-136a, ¶¶ 64, 66-74).

With respect to the alleged harm to Providers, the Petition alleges that the ban: (a) forces them "to divert money and staff time from other mission-central work to help Pennsylvania women on Medical Assistance who do not have enough money to pay for their abortion" (R. 139a, ¶ 84); (b) causes them to subsidize abortions for women who cannot afford them (R. 139a, ¶ 85); (c) requires them to "expend valuable staff resources in securing funding from private charitable organizations that fund abortions for women on Medical Assistance" (R. 139a, ¶ 86); and/or (d) forces them "to expend their counselors' time delving into personal matters that the patient may wish not to discuss," such as whether the pregnancy

resulted from rape or incest. (R. 149a, ¶ 87).

C. Providers' Claims

In Count I of their Petition, Providers allege that the Coverage Ban violates Article I, Section 28 of the Pennsylvania Constitution (the ERA), which provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." (R. 140a-141a, ¶¶ 89-92). According to Providers, by prohibiting funding for abortions unless they are necessary to protect the life of a woman or are performed in the case of pregnancies that result from rape or incest, the Coverage Ban singles out and excludes "a procedure sought singularly by women as a function of their sex" and therefore "improperly discriminates against women based on their sex without sufficient justification." (R. 141a, ¶¶ 90, 92).

In Count II of the Petition, Providers allege that the Coverage Ban violates Article I, §§ I and 26, as well as Article III, § 32 of the Pennsylvania Constitution, which guarantee equal protection under the laws of the Commonwealth. Specifically, Providers allege that the Coverage Ban

> singles out and excludes women from exercising the fundamental right to choose to terminate a pregnancy, while covering procedures and health care related to pregnancy and childbirth. By singling out and excluding abortions from Medical Assistance, women throughout this Commonwealth who seek abortion care are being discriminated against for exercising their fundamental right to choose to terminate a pregnancy.

(R. 142a-143a, ¶ 95). Providers seek the following relief in connection with these two Counts: (a) a declaration that 18 Pa. C.S. § 3215(c) and (j) and the DHS Regulations are unconstitutional; (b) a declaration that abortion is a fundamental right under the Pennsylvania Constitution; and (c) an injunction to enjoin enforcement of the Coverage Ban. (R. 143a, "Wherefore" Clause).

Notably, in seeking this relief, Providers acknowledge that the claims they advance are based on ***exactly*** the same arguments that many of Providers themselves raised in—and were expressly rejected by—this Court's unanimous decision in *Fischer*, 502 A.2d 114.

D. The Commonwealth Court's Dismissal of the Petition

The DHS Appellees, Senators, and House Appellees each filed Preliminary Objections to the Petition. On March 26, 2021, the Commonwealth Court sustained the Preliminary Objections and dismissed the Petition in its entirety, finding that: (1) Providers lacked standing to assert the constitutional rights of their patients; and (2) the Petition failed to state a claim upon which relief could be granted because all of Providers' legal claims were addressed, and rejected by, this Court in *Fischer*. *See Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 249 A.3d 598 (Pa. Commw. Ct. 2021).

IV. SUMMARY OF THE SENATORS' ARGUMENT

The doctrine of *stare decisis* promotes the integrity of the judicial process and fosters the public's trust in the reliability of this Court's decisions. Consistent with this objective, this Court should reject Providers' effort to overturn *Fischer*. *Fischer's* analysis of the ERA and equal protection—and its application of these constitutional provisions to the Coverage Ban—has stood the test of time because it is balanced and well-reasoned, as evidenced by this Court's citation to *Fischer* with approval nine times since it was decided in 1985. In the intervening thirty-six years, nothing has happened—either in Pennsylvania or across the United States—that justifies departing from *Fischer's* well-settled precedent now. In fact, thirty-three states, plus the District of Columbia, do not cover most abortions in their Medicaid programs, demonstrating that Pennsylvania remains in line with the majority view of states. Providers offer no explanation for why they advance this action now, and the only logical conclusion is that Providers believe that the recent change in the membership of this Court will result in an outcome more favorable to them. But the laws of this Commonwealth should not be contingent upon who sits on the bench, especially when the law at issue has been a hallmark of ERA and equal protection jurisprudence for nearly four decades. The Court should therefore affirm the Commonwealth Court's March 26, 2021 Order.

Yet, even if the Court were to consider the merits of Providers' claims, those claims fail. To achieve their desired result, Providers repeatedly attempt to characterize this action as something it is not. This action is not about the right to an abortion (or whether that right is "fundamental"). Nor is it about discrimination on the basis of sex, pregnancy, or race. Rather, just as in *Fischer*, this case is about whether the Commonwealth can be compelled to fund abortions, and it indisputably cannot.

In Count I of their Petition, Providers contend that the Coverage Ban discriminates against women based on their sex in violation of the ERA because it singles out and excludes a procedure sought exclusively by women. But the Coverage Ban does not distinguish on the basis of sex, but rather on the circumstances under which Commonwealth funds may be used for an abortion, and therefore does not violate the ERA.

In Count II, Providers allege that the Coverage Ban violates the equal protection provisions of the Pennsylvania Constitution because it excludes women who exercise their right to choose to terminate a pregnancy. The Coverage Ban, however, neither infringes upon a woman's right to have an abortion nor penalizes her for exercising that right. Rather, the Ban simply reflects the General Assembly's choice not to subsidize a constitutionally protected right, which is a perfectly permissible exercise of legislative power. As this Court correctly held in

Fischer, even though the Coverage Ban affects neither a fundamental right nor a suspect class—and is therefore simply subject to a "rational basis" equal protection analysis—the Ban would *still* survive under the more rigorous standard of heightened scrutiny because it furthers the legitimate and important governmental interest of preserving potential life. *See* 502 A.2d at 122.

Finally, this Court should affirm the Commonwealth Court's decision to permit the Senators to intervene in this action. Pennsylvania law recognizes that parties have a right to intervene in actions that may affect their legally enforceable interests. There can be no dispute that this case is focused entirely on abortion *funding*. The exclusive constitutional authority of the General Assembly (including the Senators) to control the Commonwealth's finances constitutes a legally enforceable interest that entitles the Senators to intervene and be heard in this matter. Pennsylvania law also recognizes that parties have a right to intervene when they could have been joined as an original party to the action, which certainly could have been done here; legislators are often named as respondents in cases challenging the constitutionality of statutes.

V. ARGUMENT

A. There is No Reason to Overturn *Fischer's* Long-Standing, Unanimous Holding

1. Standard of Review Governing *Stare Decisis*

Stare decisis "derives from the Latin maxim '*stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). "Without stare decisis, there would be no stability in our system of jurisprudence." *Flagiello v. Pennsylvania Hosp*., 208 A.2d 193, 205 (Pa. 1965). It is therefore preferable "for the sake of certainty," *Commonwealth v. Tilghman*, 673 A.2d 898, 903 n.9 (Pa. 1996), to follow prior decisions, because *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (citation omitted). To overturn a prior decision, "we demand a special justification, over and above the belief that the precedent was wrongly decided." *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (quotation marks and citation omitted); *Ramos*, 140 S. Ct. at 1414 (explaining that when deciding to overrule a prior constitutional decision, courts should consider whether the prior decision is "not just wrong, but grievously or egregiously wrong"); *see also Commonwealth v.*

Alexander, 243 A.3d 177, 195-197 (Pa. 2020) (in which this Court relied upon *stare decisis* principles from the U.S. Supreme Court).

Before reversing a prior decision, courts must consider several factors, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. State, County, and Municipal Employees*, 138 S. Ct. 2448, 2478-79 (2018); *see also Alexander*, 243 A.3d at 196. The age of the challenged decision is also a relevant factor. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) ("[T]he strength of the case for adhering to such decisions grows in proportion to their 'antiquity.'") (quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)). Cases with a long lineage tend to have multiple precedents to overcome. *Gamble*, 139 S. Ct. at 1969.

2. Providers Have Failed to Identify Any Special Justification for Overturning *Fischer*

Providers contend this Court should overturn *Fischer* because "an independent assessment shows that doctrinal and factual developments since 1985 undermine its legitimacy." Providers' Br. at 10. To support this argument, Providers rely extensively upon *Commonwealth v. Edmunds*, in which this Court determined that "as a general rule," it was important for litigants to brief and analyze the following in cases implicating a provision of the Pennsylvania Constitution:

1) text of the Pennsylvania constitutional provision;

2) history of the provision, including Pennsylvania case-law;

3) related case-law from other states;

4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

586 A.2d 887, 895 (Pa. 1991).

Despite the fact that *Edmunds* is thirty years old, Providers contend this decision somehow sets forth a "new framework" that should be applied to the Coverage Ban analysis, and that *Fischer* should now just be ignored. *See, e.g.*, Providers' Br. at 44. *Edmunds*, however, was not an invitation by this Court to reevaluate every prior decision interpreting the Pennsylvania Constitution. Rather, this Court made clear in *Edmunds* that the four factors referenced above were to apply to *future* constitutional questions. 586 A.2d at 894 ("[W]e set forth a methodology to be followed in analyzing ***future state constitutional issues*** which arise under our own Constitution.") (emphasis added); *id.* at 895 ("[W]e find it important to set forth certain factors to be briefed and analyzed by litigants in ***each case hereafter*** implicating a provision of the Pennsylvania constitution.") (emphasis added).

Given that many of Providers were also Petitioners in *Fischer* and advanced the exact same claims in that action that they have raised in this matter, the relief sought by Providers is essentially a motion for reconsideration. Just as such a

motion should have been denied in 1985, it should also be denied now, as *Fischer's* status as a foundational decision of Pennsylvania constitutional law has only increased in the intervening years.

Indeed, this Court or pluralities thereof have cited *Fischer* and its equal protection analysis with approval in opinions nine times since *Fischer* was decided in 1985, and six of those opinions were issued after *Edmunds*. *See Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358, 1362-63 (Pa. 1986); *Commonwealth v. Bell*, 516 A.2d 1172, 1178 (Pa. 1986); *Klein v. Commonwealth*, 555 A.2d 1216, 1224 (Pa. 1989); *Love v. Stroudsburg*, 597 A.2d 1137, 1139-40 (Pa. 1991); *Commonwealth v. Wolf*, 632 A.2d 864, 868 n.8 (Pa. 1993); *McCusker v. Workmen's Comp. Appeal Bd. (Rushton Mining Co.)*, 639 A.2d 776, 781 (Pa. 1994); *Probst v. DOT, Bureau of Driver Licensing*, 849 A.2d 1135, 1143-44 (Pa. 2004); *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 531 n.12 (Pa. 2005); *Driscoll v. Corbett*, 69 A.3d 197, 212 (Pa. 2013).

Surely, if this Court believed that *Edmunds* had so radically altered constitutional analysis under Pennsylvania law, it could have and would have reevaluated *Fischer* in any one of those prior opinions. But it did not. Instead, this Court has continued to rely upon *Fischer's* well-established principles for *decades* since it was decided, which weighs heavily against overturning it now. *See Alexander*, 243 A.3d at 196 (holding that when deciding to reverse a prior

decision, this Court considers the quality of the decision's reasoning, the workability of the rules it established, reliance on the decision, and its consistency with other related decisions).

Further evidence that there are no "doctrinal and factual developments since 1985" that mandate overturning *Fischer* is that thirty-three states—and the District of Columbia—do *not* cover most abortions in their state Medicaid programs, meaning that the current trend for the majority of states is in full accord with Pennsylvania law.[2] Moreover, six courts expressly have held, like *Fischer*, that their state constitutions do not prohibit bans on abortion funding. *See Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1040 (Fla. 2001) (finding that a coverage ban comparable to Pennsylvania's did not violate the right of privacy in Florida's constitution, and that "[t]here is a big difference between a government making a decision not to fund the exercise of a constitutional right and doing something affirmatively to prohibit, restrict, or interfere with it") (citation and quotation omitted); *Planned Parenthood of Idaho, Inc. v. Kurtz*, No. CVOC0103909D, 2002 WL 32156983, at *5-6 (Idaho Dist. June 12, 2002) (finding that even under a strict scrutiny standard, the state's interest in protecting unborn human life was a compelling interest for purposes of the equal protection

[2] *State Laws and Policies: Restricting Insurance Coverage of Abortion*, GUTTMACHER INST. 1 (Nov. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

analysis); *Doe v. Dep't of Soc. Servs.*, 487 N.W.2d 166, 179 (Mich. 1992) ("[T]he state's decision to fund childbirth, but not abortion, does not impinge upon the exercise of a fundamental right provided by the Michigan Constitution."); *Rosie J. v. North Carolina Dept. of Human Resources*, 491 S.E.2d 535, 537-38 (N.C. 1997) (finding, among other things, that a coverage ban did not violate the North Carolina constitution's equal protection clause); *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 265-66 (Tex. 2002) (finding that a coverage ban did not violate the Texas constitution's equal protection clause); *see also* Linda M. Vanzi, Freedom at Home: State Constitutions and Medicaid Funding for Abortions, 26 N.M. L. Rev. 433, 440-41 (1996) (recognizing that a Kentucky court upheld abortion funding limitations under the equal protection clause of Kentucky's Constitution).

Additionally, as discussed in detail in the ensuing sections, *Fischer's* analysis of the ERA and equal protection—and its application of these constitutional provisions to the Coverage Ban—has stood the test of time because it is well-reasoned, and explains why the Commonwealth's decision to fund some abortions and not others promotes the Commonwealth's interest in preserving life, and does not infringe upon any woman's constitutional rights.

In short, Providers have failed to identify any reason why *Fischer*—a unanimous decision that this Court has cited approvingly for decades—was

wrongly decided, let alone any special justification for overruling it now. By upholding *Fischer*, this Court will demonstrate that it favors the evenhanded, predictable development of legal principles, and will further the public's trust in the reliability and integrity of this Court's decisions and the judicial process as a whole.

B. The Coverage Ban Does Not Violate the Pennsylvania Constitution's ERA

1. The Coverage Ban Does Not Discriminate on the Basis of Sex

The ERA provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const. Art. I, § 28. Providers allege that the Coverage Ban violates the ERA because it singles out and excludes "a procedure sought singularly by women as a function of their sex" and therefore "improperly discriminates against women based on their sex without sufficient justification." (R. 141a, ¶¶ 90, 92); *see also* Providers' Br. at 35 ("The coverage ban confers different benefits and burdens on the basis of sex, explicitly removing coverage for medical care for a sex-linked characteristic—the ability to become pregnant—from otherwise comprehensive coverage.").

In *Fischer*, this Court addressed and rejected this same claim as follows:

> [W]e 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, ... 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.

502 A.2d at 125 (emphasis added; citations and quotations omitted); *see also id.* ("The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex."); *id.* at 126 ("[T]he decision whether or not to carry a fetus to term is so unique as to have no concomitance in the male of the species[.]").

Thus, contrary to Providers' mischaracterization, *Fischer* did not adopt "a broad exception to the ERA" and hold that "where a classification turns on physical characteristics unique to one sex, differential treatment does not implicate equality concerns." Providers' Br. at 36. Nor did *Fischer* create a precedent that "could render the ERA powerless to address any disparate treatment involving any physical differences between men and women, including overt pregnancy discrimination . . . ." *Id.* at 37.[3] *Fischer* simply explained that a law that affects only one sex is not *per se* invalid when only that sex has the physical capability of

[3] It is telling that *Fischer* was decided more than thirty-five years ago, and Providers do not cite a single law, regulation, or judicial decision that relied on *Fischer* to justify "overt pregnancy discrimination."

engaging in the conduct at issue. If a law accords different benefits to men and women *because of their sex*, that is still a violation of the ERA under *Fischer*.[4]

Also, in arguing that any law directed towards a characteristic exclusive to one sex violates the ERA, Providers do not mean what they say. Specifically, recognizing that pregnancy has a unique, individual impact on women, states are constitutionally permitted to discriminate *in favor* of a woman, even though the decision to carry a child could also have consequences for the father. *See Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992) ("[W]hen the wife and the husband disagree on this decision [to terminate a pregnancy], the view of only one of the two marriage partners can prevail. ***Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor***.") (emphasis added) (citations and quotations omitted); *id.* at 897 ("[T]he Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion."); *id.* at 887-898 (holding that the Constitution does not permit a State to require a woman to notify her husband of her intent to obtain an abortion).

[4] Providers contend that the Coverage Ban is no different from "a hypothetical Medicaid program covering uterine cancer treatment but not prostate cancer treatment[.]" Providers' Br. at 35-36. This analogy fails, however, because: (1) there is no state interest in promoting life that would be advanced by the program; (2) there could be no possible reason, under any standard of review, not to fund treatment for one of these cancers and not the other; and (3) cancer is life-threatening, and the Coverage Ban does not apply when a woman's life is endangered.

Moreover, *amicus* briefs submitted on behalf of both sides recognize that public assistance programs may treat pregnant women more favorably than others. *See* Brief of *Amicus Curiae* National Health Law Program at 8 ("[T]he Medicaid Act explicitly allows states to provide services for pregnant individuals that it does not provide to other adults."); Brief of *Amici Curiae* the Pennsylvania Pro-Life Federation and the Thomas More Society ("PLF Br.") at 17 ("[P]regnant women are eligible for MA benefits with incomes about $20,000 higher than others."). Under Providers' view of the law, these examples constitute "discrimination based on reproductive capacity," Providers' Br. at 37, but they are nevertheless constitutionally permissible.[5]

Providers also allege that the Coverage Ban violates the ERA because it "reinforces gender stereotypes about the primacy of women's reproductive function and maternal role[.]" (R. 141a, ¶ 90); *see also* Providers' Br. at 36 (arguing that *Fischer* "exempted wholesale those classifications that turn on sex-linked physical characteristics . . . without analyzing the harm inflicted on women

[5] In arguing that the Coverage Ban violates the ERA, Providers voice concerns about "state control of a woman's reproductive capacity" and contend that "regulating Black women's reproductive decisions has been a central aspect of racial oppression in America." Providers' Br. at 38 (citations and quotations omitted). These arguments are entirely disconnected from the actual law at issue in this case, which relates only to funding, and does not restrict in any way the reproductive decisions a woman may make. And Providers' Petition does not include any claim that the Coverage Ban discriminates on the basis of race. These arguments highlight how Providers are forced to characterize the Coverage Ban as something it is not in their misguided effort to convince this Court to overturn *Fischer*.

or whether the classification arose from or furthers prohibited stereotypes"); *id.* at 39 ("The coverage ban is entirely rooted in a gender-based stereotype.").

But, *Fischer* addressed and rejected this argument as well. *Fischer*, 502 A.2d at 126 (holding that the Coverage Ban "is in no way analogous to those situations where the distinctions were based exclusively on the circumstance of sex, ***social stereotypes connected with gender***, [or] culturally induced dissimilarities.") (emphasis added; citations and quotations omitted). Stated simply, the Coverage Ban does not "express the state's disapproval of women who reject the maternal role," Providers' Br. 40, it expresses the Commonwealth's important "governmental interest of preserving potential life." *Fischer*, 502 A.2d at122.

And, although Providers allege that *Fischer* was wrongly decided and should now be reconsidered, they have not identified any post-*Fischer* decisions modifying the manner in which the ERA has been interpreted. Indeed, nearly a decade after *Fischer*, the Third Circuit Court of Appeals relied on *Fisher* in recognizing that the ERA "'does not prohibit differential treatment among the sexes when, as here[,] that treatment is reasonably and genuinely based on physical characteristics unique to one sex.'" *Williams v. Sch. Dist.*, 998 F.2d 168, 177 (3d Cir. 1993) (quoting *Fischer*, 502 A.2d at 125).

In sum, this Court has already clearly and thoughtfully explained why the Coverage Ban does not violate the ERA. The Court should therefore affirm the Commonwealth Court's decision to dismiss Count I of the Petition.

2. None of the Legal Authorities and Arguments Advanced by Providers Weigh in Favor of Overruling *Fischer's* Ruling on the ERA

While Providers cite to numerous cases and Attorneys General opinions invalidating laws that discriminated on the basis of sex, *see* Providers' Br. at 31-33, these authorities all pre-date *Fischer*, and none relate to abortion or state-funding programs. Also, those authorities addressed statutes that were expressly targeted towards sex (*e.g.*, a law prohibiting female minors from serving as newspaper carriers), not statutes directed towards conduct (terminating a pregnancy).

Providers contend that "*Fischer* focused neither on the language of the ERA, nor other than summarily, on the body of jurisprudence construing that provision." Providers' Br. at 34; *see also id.* at 41 ("*Fischer's* discussion of the ERA looked only fleetingly at the actual language of the ERA, which had no federal analog, and did not mine the body of state case law construing the ERA."). To the contrary, *Fischer* engaged directly with the text of the ERA, explaining its purpose and intent as follows:

> "The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a

> basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."

502 A.2d at 124 (quoting *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974)). Moreover, of the ten decisions that Providers cite on pages 32-33 of their Brief to demonstrate how this Court has applied "absolute principles to invalidate an array of sex-discriminatory laws," *Fischer* itself cites to ***nine of those decisions***.[6] It can hardly be said that *Fischer* somehow ignored the import of these decisions when it specifically cited *nine of the ten*.

Providers contend that *Fischer's* "superficial treatment of the ERA" derives from its "interpretive choice" to "define the protected classification not as sex, but as abortion," relying solely on a dissenting opinion in *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 405 (Mass. 1981). Providers' Br. at 41. *Fischer*, however, did not make an "interpretative choice" in finding that the Coverage Ban does not make a distinction based on sex. Rather, it simply explained how the Coverage

[6] Both *Fischer*, 502 A.2d at 125, and Providers cite to the following decisions: *Hartford Accident and Indemnity v. Insurance Commission*, 482 A.2d 542 (Pa. 1984); *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635 (Pa. 1977); *Adoption of Walker*, 360 A.2d 603 (Pa. 1976); *Commonwealth v. Santiago*, 340 A.2d 440 (Pa. 1975); *DiFlorido v. DiFlorido*, 331 A.2d 174 (1974); *Commonwealth v. Butler*, 328 A.2d 851 (Pa. 1974); *Henderson*, 327 A.2d 60; *Hopkins v. Blanco*, 320 A.2d 139 (Pa. 1974); and *Conway v. Dana*, 318 A.2d 324 (Pa. 1974). The only decision not cited by *Fischer* is *Butler v. Butler*, 347 A.2d 477 (Pa. 1975), in which this Court invalidated a law entitling a wife to a constructive trust if the husband obtained the wife's property without adequate consideration.

Ban actually functions: "[T]he 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 [i.e., whether to abort]." *Fischer*, 502 A.2d at 125. Despite Providers' best efforts to make the Coverage Ban about the difference between men and women, *Fischer* debunked this theory and explained that the Ban draws distinctions based on a particular woman's *decision to abort*, and not the fact that she is a woman, pregnant, or indigent.[7]

Next, Providers argue that "*Fischer* determined that pregnancy-based classifications are beyond the reach of the ERA," and that "[t]his line of reasoning track[s] the widely critiqued U.S. Supreme Court decision *Geduldig v. Aiello*, 417 U.S. 484 (1974), which upheld a pregnancy exclusion in a California disability insurance program based on the determination that pregnancy discrimination is not a form of sex discrimination under the Fourteenth Amendment's Equal Protection Clause." Providers' Br. at 42. But *Fischer* does not even cite to—let alone rely

[7] Providers also argue that even if the Coverage Ban was facially neutral, it would still violate the ERA because it is discriminatory in fact (i.e., it has a disparate impact on women). Providers' Br. at 38. In support, Providers rely on *DiFlorido*, 331 A.2d 174, in which this Court held that a method of determining property ownership acquired during marriage by looking at who purchased the property had a disparate impact on women, because it failed to account for the nonmonetary contributions to the marriage made by each spouse. *Id.* at 39. But Providers fail to explain how the Coverage Ban is at all comparable to the property ownership issues adjudicated in *DiFlorido*, let alone describe how a disparate impact analysis—which examines whether a law has an unintended, negative impact on one sex—could possibly apply to the Coverage Ban, which by its very terms applies only to women. And, as discussed above, the relevant question is not whether a law *affects* only one sex because that sex has a unique immutable characteristic, but whether the law *discriminates* on the basis of sex, which the Coverage Ban does not.

upon—*Geduldig*; hence, Providers' argument as to why that opinion was purportedly wrongly decided is irrelevant. Moreover, nowhere in *Fischer* did this Court hold that pregnancy-based classifications are beyond the reach of the ERA. *Fischer* simply made clear that the Coverage Ban does not distinguish on the basis of pregnancy, or even sex, but abortion. 502 A.2d at 125.

In their effort to mischaracterize *Fischer* to the greatest degree to better suit their arguments, Providers repeatedly and incorrectly contend that *Fischer* interpreted the ERA by relying improperly on a federal Equal Protection analysis. *See, e.g.*, Providers' Br. at 41 (". . . *Fischer's* state constitutional analysis deliberately mirrored U.S. Supreme Court doctrine regarding the federal Equal Protection Clause, explicitly centering its analysis on 'the relevant federal constitutional authorities.'") (quoting *Fischer*, 52 A.2d at 118); *id.* at 43 ("This Court should interpret Pennsylvania's unique constitutional provision [the ERA] independently of the federal Equal Protection Clause."). However, *Fischer*, in noting that it had to examine the "relevant constitutional authorities," was simply acknowledging the unremarkable principle that, even when there are no federal claims at issue, states must still look to federal law, which establishes certain minimum requirements with which all states must abide. 502 A.2d at 118 ("One of the nuances of living in this federal system is that individual states are free to make certain choices, so long as they do not transgress certain constitutional parameters,

as those parameters have been defined by the United States Supreme Court.") (citations omitted). In fact, in the section of *Fischer* that actually addresses the ERA claim, *this Court does not cite to a single federal authority*, and instead relies overwhelmingly on its own precedent applying the ERA, as well decisions from other states that have also adopted equal rights amendments. *Id.* at 125-26.

3. The *Edmunds* Factors Do Not Require This Court to Reject *Fischer's* Analysis of the ERA

For all of the reasons discussed herein, *Fischer* was correctly decided, and *Edmunds* imposes no obligation on this Court to reconsider it now. In addition, this Court has recognized that when a provision of the Pennsylvania Constitution, like the ERA, has no counterpart in the U.S. Constitution, *Edmunds* is not "directly applicable." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802-03 (Pa. 2018) ("[T]he Free and Equal Elections Clause has no federal counterpart, and, thus, our seminal comparative review standard described in [*Edmunds*], is not directly applicable.").

Nevertheless, even if the Court *were* to apply the *Edmunds* factors to the Coverage Ban, as Providers suggest, *Fischer* would still survive constitutional scrutiny for the reasons addressed below.

a) The Text of the Pennsylvania Constitution

Providers note that while the text of the ERA provides that "[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of

Pennsylvania because of the sex of the individual," the text of the U.S. Constitution does not expressly address sex discrimination. Providers' Br. at 44. Instead, sex discrimination has been deemed unconstitutional under the U.S. Constitution through judicial interpretation of the Equal Protection Clause. *Id.*

However, Providers' distinction between the Pennsylvania and U.S. Constitutions is irrelevant. Providers' entire purpose in applying the *Edmunds* factors is aimed at demonstrating why *Fischer* was allegedly wrongly decided. *Fischer*, however, did not rely upon the text of the U.S. Constitution in deciding that the Coverage Ban does not violate the ERA. Rather, as discussed above, it relied upon the text of the ERA itself, prior decisions of this Court applying the ERA, and decisions from other states that incorporated equal rights amendments into their constitutions. 502 A.2d at 125-26. In other words, *Fischer* actually analyzed the key issues that *Edmunds* has identified as important.

Second, Providers do not cite to a single example of a law that constitutes unlawful sex-discrimination under the ERA, but *is* constitutional under the U.S. Constitution's Equal Protection Clause. As such, Providers have failed to explain why the "unique text" of the ERA makes any difference in this context.

b) The History of the ERA

While Providers contend that "[t]he ERA lacks legislative history," Providers' Br. at 45, they neglect to mention that a year after the ERA was adopted

in 1971, the General Assembly debated whether to ratify the federal Equal Rights Amendment. During that debate, the House's principal sponsor of the ratifying legislation stated:

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

PLF Brief at 8 (quoting House Journal 2672 (May 2, 1972) (emphasis in PLF Brief)). If members of the General Assembly did not believe adopting the federal Equal Rights Amendment would affect abortion laws, then one can only reasonably conclude that they would have viewed Pennsylvania's ERA the same way.

Moreover, in discussing the second *Edmunds* factor, Providers conveniently ignore that *Fischer* did in fact analyze and address the history of the ERA, including Pennsylvania case law. Specifically, *Fischer* recognized that the "purpose and intent" of the ERA was, among other things, "'to insure equality of rights under the law and to eliminate sex as a basis for distinction.'" 502 A.2d 124 (quoting *Henderson*, 327 A.2d at 62). *Fischer* then cited ten prior decisions of this Court and found that in each of those cases, "we have vigilantly protected the rights of women and men to be treated without reliance upon their sexual identity. In doing so we have recognized that distinctions which 'rely on and perpetuate

stereotypes' as to the responsibilities and capabilities of men and women are anathema to the principles of the E.R.A." *Id.* (citation omitted).

The focus of Providers' argument as it pertains to the history of the ERA is that it has always been unlawful to discriminate "on the basis of pregnancy." Providers' Br. at 45. However, the examples Providers cite all relate to instances in which women were discriminated against *because* they were pregnant (*e.g.*, discriminating against women who took time away from work due to childbirth; denying unemployment compensation to pregnant women based on the presumption that they were incapable of working; and terminating women from their jobs because they were pregnant). *Id.* at 45-47. Providers do not cite to a single court decision, Attorney General opinion, or other authority that relates to laws governing abortion—let alone laws governing funding for abortion, or laws that permit funding for abortions in some circumstances but not others.

Next, Providers grossly misstate *Fischer* when they argue that this Court "committed plain error in reading [*Cerra v. East Stroudsburg Area School District*, 299 A.2d 277 (Pa. 1973)] for the proposition that pregnancy discrimination is not a form of sex discrimination." Providers' Br. at 47 n.26. Although it distinguished *Cerra, Fischer* acknowledged that the focus of the Court's determination in *Cerra* "was obviously on the varying treatment accorded the state of pregnancy," and that

the regulation at issue in that case was "'sex discrimination pure and simple.'"[8] *Fischer*, 502 A.2d at 125 (quoting *Cerra*, 299 A.2d at 280). In other words, *Fischer* did absolutely nothing to change that when a law *actually* discriminates against women on the basis of pregnancy, as it did in *Cerra*, it is invalid. The Coverage Ban, however, does not focus on the *condition* of pregnancy, but on the *act* of abortion.

Finally, Providers contend that because Pennsylvania courts have not adopted "intermediate scrutiny" for analyzing ERA claims in the same way that the U.S. Supreme Court analyzes sex-based Equal Protection claims, "this supports the conclusion that this Court interprets the ERA as providing greater protection against sex discrimination than the U.S. Supreme Court does under the Equal Protection Clause." Providers' Br. at 48. But this argument is not supported by *any* Pennsylvania legal authority, which is not surprising given that Pennsylvania does not analyze ERA claims using an equal protection framework. Indeed, in *Fischer*, this Court performed the equal protection analysis when it addressed the equal protection claim, and did not refer back to that analysis even once when it separately addressed the ERA claim. 502 A.2d 124-26.

[8] *Cerra* involved a regulation that required women to resign from their positions as teachers when they reached the end of the fifth month of pregnancy on the basis they were "incompetent," even though male teachers, who might become temporarily disabled from a multitude of illnesses, were permitted to keep their jobs. 299 A.2d at 278-80. In other words, in *Cerra*, there were similarly situated individuals—teachers who were temporarily unable to perform their jobs because of a physical condition—being treated differently for no valid reason.

Stated simply, there is nothing in the history of the ERA that could possibly justify overturning *Fischer* now.

c) Decisional Law from Other States

Providers boast that "[t]here are currently seventeen states that cover abortions in their state Medicaid programs," presumably to argue that the Coverage Ban is somehow antiquated. Providers' Br. at 49. But the fact that only seventeen states favor Providers' view wholly ignores that there are *thirty-three states*—and the District of Columbia—that do *not* cover most abortions in their state Medicaid programs.[9] Pennsylvania's law is therefore in accord with the overwhelming majority of states.[10]

Providers also note that two states, New Mexico and Connecticut, "have specifically ruled that the exclusion of abortion from their state Medicaid program violate[s] their state's Equal Rights Amendment." *Id.* By contrast, Providers contend that "[o]nly one state supreme court [Texas] has held that the coverage ban

[9] *State Laws and Policies: Restricting Insurance Coverage of Abortion*, GUTTMACHER INST. 1 (Nov. 1, 2021), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid.

[10] Providers note that three of the six states that border Pennsylvania—New Jersey, New York, and Maryland—cover abortion with state funds. *Id.* at 49. While it is not clear why Providers believe that geographical proximity is germane to the constitutional analysis at issue, there are an equal number of border states—Delaware, Ohio, and West Virginia—that do not fund abortions via Medicaid, except in limited circumstances, just like Pennsylvania. *See Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 800 n.4 (S.D. Ohio 2019); Ohio Rev. Code §§ 9.04, 3901.87; Ohio Admin. Code § 5160-17-01; W. Va. Const. amend. I; Delaware Medical Assistance Program General Policy Manual 1.22. Medicaid Eligibility Groups and Covered Services, http://medicaidpublications.dhss.delaware.gov/docs/search?Command=Core_Download&EntryId=897.

does not violate its state's ERA." *Id.* at 49 n.28. Actually, there is another, and it's Pennsylvania. This means that two state supreme courts—Pennsylvania and Texas—have upheld coverage bans under equal rights amendments, and only one state supreme court—New Mexico—has not. The Connecticut decision Providers cite, *Doe v. Maher*, 515 A.2d 134, 160-61 (Conn. Super. Ct. 1986), is a state trial court opinion.

Moreover, this Court already considered—and rejected—the very same arguments that New Mexico and Connecticut relied upon in finding that abortion funding restrictions were impermissible under their state's equal rights amendments. Specifically, Providers note that the New Mexico Supreme Court held that the restriction "'undoubtedly singles out for less favorable treatment a gender-linked condition that is unique to women,'" Providers' Br. at 51 (quoting *N.M. Right to Choose v. Johnson*, 975 P.2d 841, 856 (N.M. 1998)), and that the Connecticut trial court determined that "'[b]y adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities.'" Providers' Br. at 50-51 (quoting *Maher*, 515 A.2d at 160). As discussed above, however, *Fischer* correctly determined that the Coverage Ban does *not* use sex as a basis for distinction, but instead "accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women." 502 A.2d at 125.

On the other hand, Providers attempt to brush aside the Texas Supreme Court's decision, claiming that it has no import because "Texas uniquely requires that Medicaid coverage match federal law for all procedures, and the Texas court applied almost exclusively U.S. Supreme Court precedent rather than state precedent to conduct its state ERA analysis." Providers' Br. at 50 n.28. But the fact that Texas tracks federal funding procedures did not prevent the Texas Supreme Court from performing a well-reasoned analysis of whether equality was denied because of sex. In determining it was not, that court explained "[t]he classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method. We simply cannot say that the classification is, by its terms, 'because of sex' . . . ." *Bell*, 95 S.W.3d at 258 (citation omitted).

It is also worth noting that of the four states to have analyzed a coverage ban under a state constitutional equal rights amendment, Texas is the most recent to have done so in 2002, with New Mexico examining the issue in 1998, Connecticut in 1986, and Pennsylvania in 1985. This further undermines Providers' argument that *Fischer's* legitimacy has been undermined by developments in the law since it was decided in 1985.

d) Policy Considerations

When discussing the "public policy" factor of the *Edmunds* analysis, this Court has focused on "unique state sources, content, and context as bases for independent interpretation." *Commonwealth v. Russo*, 934 A.2d 1199, 1212 (Pa. 2007) (citations and quotations omitted). In explaining this approach, the Court held:

> ***were it otherwise, the tag-line "policy" could metamorphose into cover for a transient majority's implementation of its own personal value system as if it were an organic command***. . . . [A]ppellant cites general principles of Pennsylvania law, decisions from other states, and our trespass statute, 18 Pa.C.S. § 3502, without actually explaining how any of these authorities pertains to "unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895. Appellant's reliance on authorities that either come directly from another state or are indistinct from those of most other jurisdictions merely highlights the absence of Pennsylvania sources to support his position.

Id. (emphasis added). The Court has further recognized that "***the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature***." *Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978); *see also Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1122 (Pa. 2014) (noting that regardless of whether the statements in amici briefs were factually correct, "they are a cautionary tale that

this constitutional challenge implicates core public policy questions . . . that the political branches are better positioned to weigh and balance.").

Here, Providers fail to provide the kind of searching inquiry into public policy considerations unique to Pennsylvania that would justify overruling *Fischer* and removing the Coverage Ban from the General Assembly's purview. Indeed, they begin and end their discussion of policy by arguing that times have purportedly changed since this Court decided *Fischer*, and that there allegedly has been a significant change in society's understanding of sex equality and abortion. *See* Providers' Br. at 51 ("The decades since *Fischer* have ushered in a better understanding around the connection between abortion access and women's equality. This connection shows that women need to be able to control their reproductive lives, including having real access to abortion, to be fully equal in society."); *id.* at 56 ("[I]n the 36 years following *Fischer*, there have been major doctrinal shifts and factual developments around independently interpreting the Pennsylvania Constitution, as well as the connection between abortion and sex equality.").

Notably, however, the very first decision Providers cite in support of this proposition is the U.S. Supreme Court's plurality opinion in *Casey*. While *Casey* recognized that a woman's ability to control her reproductive life helps facilitate her ability to participate equally in the nation's social and economic life, it *also*

held that laws like the Coverage Ban—which reflect the state's preference for childbirth over abortion—are permissible, even when they have the indirect effect of making it more difficult to obtain an abortion. 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."); *id.* at 883 ("***[W]e permit a State to further its legitimate goal of protecting the life of the unborn*** by enacting legislation aimed at ensuring a decision that is mature and informed, ***even when in so doing the State expresses a preference for childbirth over abortion***.") (emphasis added).

Providers also describe the difficulties that indigent women and women of color allegedly encounter when they cannot afford an abortion. Providers' Br. at 53-55. But, as discussed in detail below in connection with Providers' equal protection claim, indigency is not a protected class. And, Providers have not advanced a race-based challenge to the Coverage Ban. More fundamentally, neither indigency nor race bear upon whether the Coverage Ban violates *the ERA*, which governs sex-based discrimination. It is also notable that while Providers focus repeatedly on women who "are forced to carry an unwanted pregnancy to term," *id.* at 53, the Coverage Ban does not compel women to do anything, and to

equate the absence of a public subsidy with state coercion is completely disingenuous.[11]

Finally, Providers contend that this case does not require the Court to decide "the hypothetical questions of whether every classification involving a physical characteristic unique to men or women is a sex-based classification, and whether there could ever be a sex-based classification involving unique physical characteristics that could survive scrutiny under the Pennsylvania ERA." *Id.* at 56 n.29. There is, however, nothing "hypothetical" about this issue. In arguing that *Fischer* was wrongly decided, Providers expressly and unequivocally contend that a "broad exception for physical characteristics unique to one sex ignores the reality that to treat people differently on account of characteristics unique to one sex *is* to treat them differently on account of their sex." *Id.* at 36 (emphasis in original). In the end, Providers offer no limiting principle for their novel constitutional argument that any law that implicates characteristics unique to one sex is immediately suspect under the ERA, and the Court should reject this approach.

[11] Providers also contend that "[t]he risk of death is fourteen times higher for carrying a pregnancy to term than it is for abortion" and that, in Pennsylvania, "almost thirteen women die within forty-two days of the end of pregnancy for every 100,000 live births in the state." *Id.* at 54. However, women whose lives are at risk are expressly *exempted* from the Coverage Ban. 18 Pa. C.S. § 3215(c).

C. The Coverage Ban Does Not Violate Article I, §§ 1 and 26 or Article III, § 32 of the Pennsylvania Constitution

1. Pennsylvania's Equal Protection Jurisprudence

As it did with the ERA, *Fischer* addressed the very equal protection arguments now advanced by Providers. As *Fischer* explained, Article I, § 1 and Article III, § 32 of the Pennsylvania Constitution "have generally been considered to guarantee the citizens of this Commonwealth equal protection under the law." *Fischer*, 502 A.2d at 120. Article I, § 1 of the Pennsylvania Constitution provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Article III, § 32 of the Pennsylvania Constitution provides, in relevant part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . . Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law."

Providers also premise their equal protection claim on Article I, § 26 of the Pennsylvania Constitution, which provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." *Fischer* held that Article I, § 26 "does not in itself define a new substantive civil

right." *Id.* at 123. Rather, "[w]hat Article I § 26 does is make more explicit the citizenry's constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights." *Id.* As *Fischer* explained, Article I § 26 cannot "be construed as an entitlement provision; nor can it be construed in a manner which would preclude the Commonwealth, when acting in a manner consistent with state and federal equal protection guarantees, from conferring benefits upon certain members of a class unless similar benefits were accorded to all." *Id.*

In reviewing government actions that affect disparate classes, Pennsylvania courts apply the following equal protection framework:

> [T]here are three different types of classifications calling for three different standards of judicial review. The first type classifications implicating neither suspect classes nor fundamental rights -- will be sustained if it meets a "rational basis" test. . . . In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. . . . Finally, in the third type of cases, if "important," though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review. . . . There are, in summary, three standards of review applicable to an equal protection case, and the applicability of one rather than another will depend upon the type of right which is affected by the classification.

Fischer, 502 A.2d at 121 (citations and quotation omitted).

Here, Count II of the Petition alleges, among other things, that the Coverage Ban discriminates "based on the exercise of a fundamental right" under Article I, §§ 1 and 26 and Article III, § 32 because it "operates to discriminate singularly against those women who seek abortion-related health care services by denying them coverage under Pennsylvania's Medical Assistance programs[.]" (R. 143a, ¶ 96). Once again, this Court in *Fischer* rejected this precise claim.

2. The Coverage Ban Does Not Violate the Pennsylvania Constitution's Equal Protection Provisions

Like the petitioners in *Fischer*, 502 A.2d at 120, Providers allege that abortion should be treated as a fundamental right.[12] Providers further allege that the Coverage Ban "excludes women from exercising the fundamental right to choose to terminate a pregnancy, while covering procedures and health care related to pregnancy and childbirth." (R. 142a, ¶ 95). In making these allegations, however, Providers misrepresent entirely both the "right" at issue and the effect of the Coverage Ban. Specifically, contrary to Providers' characterization, the Coverage Ban does *not* prohibit any woman from choosing to have an abortion.

As this Court recognized in *Fischer*, a challenge to the Coverage Ban does not implicate the right to have an abortion; rather, it concerns whether there exists a right to have the Commonwealth fund an abortion when it is unnecessary to

[12] As referenced above, many of the Providers were petitioners in *Fischer* as well.

protect the life of the woman, or when the pregnancy does not result from rape or incest:

> [W]e must first determine the type of right with which we are confronted. As we view it, the right with which we are here concerned is the purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights. **Such a right is to be found nowhere in our state Constitution, and therefore . . . such a right cannot be considered fundamental**.

502 A.2d at 121 (emphasis added; citations omitted).

This point was also recognized in the Commonwealth Court's *en banc* decision in *Fischer*, which this Court affirmed:

> A woman's freedom of choice does not carry with it a constitutional entitlement to every financial resource with which to avail herself of the full range of protected choices. . . . For example, a citizen has a constitutional right to travel but is not entitled to travel at the public expense. One has a constitutional right to freedom of expression but is not entitled to the use of public funds to finance the expounding of personal views. The economic constraints on the woman who would terminate her pregnancy are not caused by the Commonwealth. Her financial problems exist and continue to exist whether she elects to choose one or the other alternative. These problems are not the consequence of any action or legislation on the part of the Commonwealth.

Fischer v. Dep't of Public Welfare, 482 A.2d 1148, 1157 (Pa. Commw. 1984).

Providers contend that *Fischer* erred in determining that the issue posed by the Coverage Ban was whether there existed a right to have the state subsidize an

individual's exercise of a constitutional right. Providers' Br. at 57. Instead, Providers claim that they

> do not assert a generalized right to state subsidy. Rather, Providers claim that when states subsidize health care, they must do so in ways that do not place unequal burdens on the exercise of constitutionally-protected rights. In other words, *if* pregnancy and childbirth are covered, abortion must be *as well*. *Fischer* simply did not address this argument.

Id. (footnote omitted; emphasis in the original); *id.* at 67 (arguing "*if* the Commonwealth chooses to establish a Medical Assistance program for medically necessary services for low-income Pennsylvanians (which the Commonwealth is not required to do), it cannot choose to cover one way of exercising a fundamental right but then omit covering a different way to exercise that same right") (emphasis in original).

To the contrary, *Fischer* squarely addressed this issue when it recognized:

> When, however, the Commonwealth offers to fund a right they must fund it for all, ***unless they have a constitutionally valid reason to specify only a certain class as their beneficiaries***. It is the nub of equal protection that the Commonwealth cannot give or take from one and not the other unless their reason is to advance or protect a constitutionally recognizable interest of the common weal.

502 A.2d at 120-21 (emphasis added). It is in this context that *Fischer* determined that the Coverage Ban was constitutional because it advanced the Commonwealth's interest in protecting life. *Id.* at 121-22.

Fischer also rejected the argument that the Coverage Ban discriminates against a protected class. *See* 502 A.2d at 121-22 ("[I]t is clear that the statute does not affect a suspect class. Like the United States Supreme Court, this Court 'has never held that financial need alone identifies a suspect class for purposes of equal protection analysis[.]'") (quoting *Maher v. Roe*, 432 U.S. 464, 471 (1977)). In reaching this conclusion, this Court recognized that "'***although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category***.'" *Id.* at 119 (emphasis added) (quoting *Harris v. McRae*, 448 U.S. 297, 316-17 (1980)).[13]

Because the Coverage Ban affects neither a fundamental right nor a suspect class, this Court concluded that the Commonwealth is required to demonstrate only a rational basis—i.e., a "legitimate governmental interest"—to justify treating two classes of women differently in this context (*i.e.*, those who chose to abort versus

[13] Pennsylvania constitutional law has not changed with respect to its treatment of indigency since *Fischer*. Nearly two decades after it decided *Fischer*, this Court reiterated that "this court has rejected the proposition that financial need alone identifies a suspect class or that statutes that have a different effect on the rich and poor should on that basis alone come under strict scrutiny." *Probst*, 849 A.2d at 1144 (citing *Fischer*, 502 A.2d at 121-22) (further citations omitted).

those who do not). *Fischer*, 502 A.2d at 122-23. Notably, however, the Court found that *even if* the classification warranted heightened scrutiny, the Coverage Ban would *still* pass constitutional muster:

> [E]ven assuming, as appellants impliedly argue, that the funding distinction made in the Abortion Control Act constituted a "denial of a benefit vital to the individual" claimants, we would hold that the restriction here would satisfy the concomitant higher degree of scrutiny, to wit: (1) that the governmental interest be an important one; (2) that the governmental classification be drawn so as to be closely related to the objectives of the legislation; and (3) that a person excluded from the benefit be permitted to challenge the denial on the grounds that his particular denial would not further the governmental purpose of the legislation.

Id. at 122. With respect to the first factor, the Court identified the preservation of potential life as an important governmental interest. *Id.* ("[T]o 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.").[14]

Second, the Court found that the classification at issue was drawn between abortions necessary to save the life of the mother, and all other abortions,[15] and

[14] In *Casey*, which Providers themselves rely upon, the U.S. Supreme Court reaffirmed that a state has a legitimate goal of protecting life. *Casey*, 505 U.S. at 883 ("***[W]e permit a State to further its legitimate goal of protecting the life of the unborn*** by enacting legislation aimed at ensuring a decision that is mature and informed, ***even when in so doing the State expresses a preference for childbirth over abortion***.") (emphasis added).

[15] The Court noted that, in its analysis, "we are excepting abortions which are authorized for rape and incest, since no one at this point is contesting the Commonwealth's action in those situations." *Fischer*, 502 A.2d at 122 n.13.

concluded that this classification was closely related to the objectives of the legislation:

> [T]he Commonwealth has made a decision to encourage the birth of a child in all situations except where another life would have to be sacrificed. We think such a classification is specifically related to the ends sought, in that it accomplishes the preservation of the maximum amount of lives: i.e., those unaborted new babies, and those mothers who will survive though their fetus be aborted.

Fischer, 502 A.2d at 122-23. With respect to the third factor, the Supreme Court found that the Coverage Ban furthered the goal of preserving life. *Id.* at 123. In sum, this Court concluded that regardless of whether rational basis or heightened scrutiny applies, the Coverage Ban does not violate Article I, § 1 or Article III, § 32.

This Court also concluded that the Coverage Ban does not violate Article I, § 26. In assessing claims under this constitutional provision, the Court noted that "the focus is whether a person has been somehow penalized for the exercise of a constitutional freedom." *Id.* at 124. It then held that Article I, § 26 was not implicated by the Coverage Ban because "the Commonwealth here has not otherwise penalized appellants for exercising their right to choose, but has merely decided not to fund that choice in favor of an alternative social policy." *Id.*

Because this Court has already recognized that the Coverage Ban does not violate Article I, §§ 1 and 26 and Article III, § 32 of the Pennsylvania Constitution,

the Court should affirm the Commonwealth Court's decision to dismiss Count II of the Petition.

3. The *Edmunds* Factors Do Not Require This Court to Overrule Its Existing Precedent Governing Equal Protection

Providers contend that application of the *Edmunds* factors supports "a more expansive reading of the state constitution's equal protection provisions than their federal counterpart and leads to the conclusion that the coverage ban violates the Pennsylvania Constitution." Providers' Br. at 58. As discussed below, however, Providers offer no valid reason for this Court to depart so radically from decades of its equal protection jurisprudence. Indeed, Providers have failed to cite a single decision that applied the *Edmunds* factors to conclude that those factors have changed the standard under which equal protection claims are analyzed in Pennsylvania.

a) The Text of the Pennsylvania Constitution

Providers contend that because the text of the Pennsylvania Constitution's equal protection provisions differs from the federal Equal Protection Clause, "this Court has not tied the construction of these provisions to the very dissimilar federal provision." Providers' Br. at 59. But that is exactly what this Court has done and has continued to do even after *Edmunds*. *See, e.g.*, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 418 n.3 (Pa. 2017) ("[W]e long have gleaned equal

protection principles from Section 32, which we have held is substantially coterminous with the federal Equal Protection Clause.") (Wecht, J); *Curtis v. Kline*, 666 A.2d 265, 267 n.1 (Pa. 1995) (addressing whether a statute violated the Equal Protection Clause of the U.S. Constitution and recognizing that even though "[a]ppellee did not assert that he was denied equal protection under our state constitution. . . . we would apply the same analysis and reach the same result under our state constitution."); *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000) ("This Court has 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.'") (quoting *McCusker*, 639 A.2d at 777); *Sadler v. Workers' Comp. Appeal Bd.*, 244 A.3d 1208, 1215 (Pa. 2021) (addressing the Equal Protection Clause of the U.S. Constitution and Article I, § 1 of the Pennsylvania Constitution and holding that "[t]he protections afforded under the federal charter and this Commonwealth's Constitution in this regard are coterminous.") (citation omitted); *DeFazio v. Civ. Serv. Comm'n of Allegheny Cty.*, 756 A.2d 1103, 1105 (Pa. 2000) (addressing Article III, § 32 and recognizing that "[w]e have repeatedly held that the underlying purpose of this section is analogous to the equal protection clause of the federal constitution and that our analysis and

interpretation of the clause should be guided by the same principles that apply in interpretation of federal equal protection.") (citation omitted).

In fact, this Court has relied upon *Fischer's* Equal Protection analysis *six times* since *Edmunds* was decided, including as recently as 2013. *See Love*, 597 A.2d at 1139-40; *Wolf*, 632 A.2d at 868 n.8; *McCusker*, 639 A.2d at 781; *Probst*, 849 A.2d at 1143-44; *Kramer*, 883 A.2d at 531 n.12; *Driscoll*, 69 A.3d at 212. Again, if this Court believed that *Edmunds* required a fundamental overhaul of Pennsylvania's equal protection jurisprudence, it certainly would have done so in one or more of these many opportunities it has had to address the issue.

There is no reason for the Court to deviate from this construction of Pennsylvania's Constitution now. Indeed, if this Court were to accept Providers' invitation to determine that Pennsylvania's equal protection jurisprudence is "more robust" than the Fourteenth Amendment, *see* Providers' Br. at 10, it would necessitate overturning a significant portion of this Court's precedent to the contrary. Nor do Providers explain what limiting principle would apply here (i.e., whether Pennsylvania and federal equal protection should be treated the same *except* for abortion funding, or whether they are proposing a broad overhaul to Pennsylvania equal protection that would encompass other issues and rights). As a result, the Court should reject Providers' argument and continue to apply long-standing precedent governing equal protection.

b) The History of Pennsylvania Equal Protection

Providers contend that the history of the Pennsylvania Constitution's equal protection provisions supports the conclusion that those provisions should be read more expansively than the U.S. Constitution's Equal Protection Clause. Providers' Br. at 59-61; *see also id.* at 57 ("*Fischer* declined to analyze the coverage ban under the Pennsylvania Constitution's equal protection provisions independently from the federal precedent."). As with so many of Providers' arguments, *Fischer* has already addressed this issue, which Providers themselves acknowledge. *Id.* at 60 ("*Fischer* rightly acknowledged this point, stating that this Court interprets the state constitution in 'a more generous manner' to 'afford the citizens of this Commonwealth greater liberties than they would otherwise enjoy' under the federal Constitution . . . .") (quoting *Fischer*, 502 A.2d at 121).

Providers nevertheless argue that *Fischer* failed to give appropriate weight to the full panoply of rights encompassed within the equal protection provisions, which they contend include the rights to reproductive autonomy, to procreate, to make child-rearing decisions, and the right to privacy. *Id.* at 61-63. Providers further assert that the right to privacy includes rights to decisional autonomy and bodily integrity, and that these two rights combined support the right to carry or terminate a pregnancy. *Id.* at 63-65. This culminates in Providers' conclusion that "this Court should hold that the Pennsylvania Constitution protects women's right

to decide whether or not to continue a pregnancy," and that once it does so, the Pennsylvania Constitution's equal protection provisions "require that the government cannot favor one exercise of the right over another." *Id.* at 65-66.[16]

But, this entire effort to convince this Court to "hold that the Pennsylvania Constitution protects women's right to decide whether or not to continue a pregnancy" is a red herring, because *Fischer* has already acknowledged this point. *See* 502 A.2d at 121 ("[T]he right with which we are here concerned is the purported right to have the state subsidize the individual exercise of a ***constitutionally protected right***, when it chooses to subsidize alternative constitutional rights.") (emphasis added). In other words, *Fischer* accepted Providers' premise that the right to decide whether to continue with a pregnancy is constitutionally protected. *Fischer*, however, then went the next step and correctly determined that this is not the issue implicated by the Coverage Ban. Rather, the Coverage Ban required the Court to determine whether the Commonwealth's decision to fund the exercise of some rights and not others violates equal protection

[16] Providers cite *Alexander*, 243 A.3d 177 for the proposition that "[a]lthough this Court has used the federal equal protection framework as a 'guiding principle,' it analyzes issues under this framework 'while incorporating Pennsylvania-specific considerations regarding *enhanced* privacy interests.'" Providers' Br. at 60 (emphasis in original; citations omitted); *see also id.* at 63 (citing *Alexander* when arguing that "the Pennsylvania right to privacy is premised on the Pennsylvania constitutional provisions 'afford[ing] greater protection to [its] citizens' than the U.S. Constitution"). *Alexander*, however, did not discuss equal protection at all. Rather, it addressed Article I, Section 8 of the Pennsylvania Constitution (relating to unreasonable searches and seizures) in connection with privacy rights in the search of an automobile.

principles when the Commonwealth has a constitutionally valid reason to specify only a certain class as beneficiaries. *Fischer* held that it does not.

c) Decisional Law from Other States

After dedicating many pages to explaining why the Pennsylvania Constitution's equal protection provisions should be viewed differently than the U.S. Constitution's Equal Protection Clause and arguing that *Fischer* erred in looking to federal precedent for guidance, Providers urge this Court to overturn its own thirty-six year old precedent and adopt the holdings of courts in other states. Providers' Br. at 68-71. Notably, however, Providers do not even attempt to draw any link between the specific language in the Pennsylvania Constitution and the constitutions of those other states, let alone explain why this Court should depart from its long-standing practice of relying on federal precedent in favor of precedent from these other states.

Moreover, Providers cite to decisions from only six other state courts. Of those six, three were decided before *Fischer*, meaning that this Court could, but chose not to, look to those decisions for guidance. *See Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Comm, to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Moe v. Sec 'y of Admin. & Fin*., 417 N.E.2d 387 (Mass. 1981).[17] Another decision did not even address state funding for abortion. *Hodes & Nauser*

[17] *Fischer* did cite favorably to the dissent in *Moe*, 502 A.2d at 125 n.16, so that court's majority opinion was obviously considered and rejected.

v. Schmidt, 440 P.3d 461 (Kan. 2019). This means Providers have cited to *only two* decisions rendered after *Fischer* that reached a contrary holding—*Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) and *Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001).

By contrast, as discussed above, six courts to have considered this very issue after *Fischer* have held that their state constitutions do not prohibit bans on abortion funding. *See Renee B.*, 790 So. 2d 1036 (Florida, 2001); *Kurtz*, 2002 WL 32156983 (Idaho, 2002); *Doe*, 487 N.W.2d 166 (Michigan, 1992); *Rosie J.*, 491 S.E.2d 535 (North Carolina, 1997); *Bell*, 95 S.W.3d 253 (Texas, 2002); Linda M. Vanzi, Freedom at Home: State Constitutions and Medicaid Funding for Abortions, 26 N.M. L. Rev. 433, 440-41 (1996) (recognizing that a Kentucky court upheld abortion funding limitations under the equal protection clause of Kentucky's Constitution in 1995).[18]

Taking into account the totality of what other states have done with respect to abortion funding restrictions, there is simply no reason for this Court to overrule *Fischer*. *See Ramos*, 140 S. Ct. at 1414 (explaining that when deciding to overrule a prior constitutional decision, courts should consider whether the prior decision is "not just wrong, but grievously or egregiously wrong").

[18] Providers contend that the Florida and Michigan decisions are unpersuasive because the courts in those matters interpreted their equal protection provisions coextensively with the federal Constitution. Providers' Br. at 71 n.32. Of course, as discussed above, Pennsylvania likewise looks to federal precedent when analyzing equal protection under the Pennsylvania Constitution.

d) Policy Considerations

Providers contend that the Coverage Ban "forces women with low incomes seeking abortion to choose between continuing an unwanted pregnancy and using money that they would have otherwise used for daily necessities," and thereby acts "as a *de facto* abortion ban." Providers' Br. at 72. Yet, by focusing on the impact of the Coverage Ban on individuals with low incomes, Providers make plain that their equal protection arguments truly are premised on the assumption that indigency should be treated as a protected class. Again, this Court has repeatedly rejected this argument, both in *Fischer* and in a decision rendered nearly twenty years after *Fischer*. *See* 502 A.2d at 119 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.'" (citations and quotation omitted); *Probst*, 849 A.2d at 1144 ("[T]his court has rejected the proposition that financial need alone identifies a suspect class or that statutes that have a different effect on the rich and poor should on that basis alone come under strict scrutiny.").

As *Fischer* recognized in the first line of its opinion, this case is not about the right to an abortion. The refusal by the Commonwealth to fund the exercise of a constitutionally protected right is not a ban on the exercise itself, and this Court should reject Providers' effort to change this well-settled law.

4. The Court Should Not Analyze the Coverage Ban Under a Strict Scrutiny Standard

Providers' argument that this Court should apply strict scrutiny is premised upon the assumption that the Coverage Ban burdens a fundamental right. Providers' Br. at 73 ("Because the coverage ban not only impinges on a woman's fundamental right to terminate a pregnancy, but also selectively denies a benefit based on the exercise of a fundamental right, the Pennsylvania Constitution requires the state to show that the coverage ban is narrowly tailored to advance a compelling state interest, which it cannot do.").

For all the reasons discussed above, this is simply an inaccurate statement of the law, and there is no need for the Court to engage in a strict scrutiny analysis. But even if it did, Providers' arguments make clear that the Coverage Ban would *still* be enforceable. On page 73, Providers finally acknowledge for the first time in their 84-page Brief that the state interest advanced by the Coverage Ban is the preservation of "the life and health of fetuses and women." Providers nevertheless contend that "the state's interest in fetal life does not justify overriding a woman's fundamental right to make decisions about her own life course as well as her health and well-being." *Id.* at 74.[19]

[19] Providers cite to four of the same decisions from other states that they relied upon elsewhere in their Brief for the proposition that "[t]he majority of courts that have analyzed similar funding restrictions under heightened standards of review find that women's decisional autonomy regarding their own health and well-being comes first." Providers Br. at 74-75. As discussed above, however, seven state courts, including this Court in *Fischer*, have rejected this reasoning.

But the Coverage Ban does not "override" a woman's fundamental right to do anything. The Coverage Ban does not place any obstacles on the time, place, or manner in which a woman obtains an abortion. It simply does not make the funds of the Commonwealth available for that procedure, unless the pregnancy poses a risk to the woman's life, or resulted from rape or incest. In this sense, the Coverage Ban is narrowly-tailored to advance the Commonwealth's compelling interest in protecting life, because it generally withholds funds for a procedure that ends the life of the fetus, but makes an exception to this restriction when that procedure is necessary to preserve the life of a woman.[20]

Finally, as examples of how Pennsylvania could advance its interest in preserving the health and life of fetuses in a more narrowly-tailored fashion, Providers contend that the Commonwealth could address racial and ethnic inequities in pregnancy outcomes and increase early prenatal care. Providers' Br. at 76 n.34. But, these examples only undermine Providers' argument and show why the Coverage Ban as currently implemented strikes the appropriate balance between a woman's right to reproductive choice and the Commonwealth's interest in preserving life. Stated simply, addressing racial and ethnic inequities in pregnancy outcomes and/or increasing early prenatal care would not prevent the

[20] For this reason, Providers' argument that "the rate of maternal death has more than doubled since 1994, with alarming disparities among Black women," Providers' Br. at 75, does not justify applying a heightened standard of review.

fetus from being terminated; hence, these proposals are not tailored at all to the Commonwealth's interest in protecting life.

D. The Commonwealth Court Correctly Determined that the Senators Are Permitted to Intervene in This Action

Pennsylvania Rule of Civil Procedure 2327 provides in relevant part:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if …
>
> (3) such person could have joined 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.

The Senators sought to intervene in this action pursuant to Pa. R.C.P. 2327(3) because they could have been joined as original parties to this action, and pursuant to Pa. R.C.P. 2327(4) to protect their legally enforceable interests as members of Pennsylvania's General Assembly. The Commonwealth Court determined that the Senators were entitled to intervene pursuant to Pa. R.C.P. 2327(4) because they have a legally enforceable interest in controlling the Commonwealth's finances, and therefore did not address whether intervention was also appropriate pursuant to Pa. R.C.P. 2327(3). *See Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 225 A.3d 902, 914 n.15 (Pa. Commw. Ct. 2020). As explained below, the Senators are entitled to intervene under either Pa. R.C.P. 2327(3) or (4), and there is no basis to conclude that the Commonwealth

Court abused its discretion in permitting intervention. *See Pa. Ass'n of Rural & Small Sch.*, 613 A.2d at 1200 n.3 ("A trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will.").[21]

1. The Senators Are Entitled to Intervene Pursuant to Pa. R.C.P. 2327(4) Because They Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant to Articles II and III of the Pennsylvania Constitution

As the Commonwealth Court recognized, "the test for standing to initiate litigation is not [coterminous] with the test for intervention in existing litigation," but "the principles of legislative standing are relevant to a determination of whether a putative intervenor has demonstrated a 'legally enforceable interest' for purposes of Rule No. 2327(4)." *Allegheny Reprod. Health Ctr.*, 225 A.3d at 911. Both this Court and the Commonwealth Court have recognized that members of the General Assembly possess standing in actions that affect their power to act as legislators. *See, e.g.*, *Markham*, 136 A.3d at 145 (holding that legislative standing exists when the legislator "has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator"); *Fumo v. City of*

[21] Providers cite to *Markham v. Wolf*, 136 A.3d 134, 138 (Pa. 2016) for the proposition that the standard of review of a decision permitting intervention is *de novo*, and the scope is plenary. Providers' Br. at 1. But the legal question *Markham* held was subject to this standard and scope was whether "legislative standing" exists. 136 A.3d at 138. As discussed below, the Senators are intervening *Respondents*, not as Petitioners, and therefore need not establish standing (even though the standing analysis is useful for assessing whether a legally enforceable interest exists for purposes of one of the two bases upon which the Senators sought to intervene).

Phila., 972 A.2d 487, 501 (Pa. 2009) (holding that legislative standing "has been recognized in actions alleging a diminution or deprivation of the legislator's or council member's power or authority"); *id* at 502 ("[T]he claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, *qua* legislators, have standing to pursue."); *Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Commw. 1976) ("[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with.") (footnotes omitted).

In addition to these well-established legislative standing principles, Justice Dougherty recognized in his concurring opinion in *Markham* that this Court was willing to consider new theories of standing, given the Court's "practical and flexible approach" to this issue. *Markham*, 136 A.3d at 148 (Dougherty, J., concurring) ("Given the prudential basis for standing doctrine, . . . being cognizant of the deference due members of a coordinate branch, if there were a developed and persuasive challenge to the existing approach to standing involving legislators, the Court no doubt would be open to its consideration. Indeed, it appears the Court has adopted a practical and flexible approach to the concept of standing generally.") (citations omitted).

a) The Senators Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant to Article II, § 1, and Article III, § 24 of the Pennsylvania Constitution

Article II, § 1 of the Pennsylvania Constitution provides that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Article III, § 24 of the Pennsylvania Constitution provides, in relevant part, that "***[n]o money shall be paid out of the treasury, except on appropriations made by law*** and on warrant issued by the proper officers[.]" (emphasis added).

This Court and the Commonwealth Court have consistently recognized that these Constitutional provisions grant the General Assembly ***exclusive*** control over Pennsylvania's finances:

> Legislative power is vested in the General Assembly by article II, section 1, and its power is supreme on all such subjects unless limited by the Constitution. ***The control of the state's finances is entirely in the legislature***, subject only to these constitutional limitations; and, except as thus restricted, is absolute. Unless expressly prohibited or otherwise directed by that instrument, ***appropriations may be made for whatever purposes and in whatever amounts the law-making body finds desirable***. The legislature in appropriating is supreme within the limits of the revenue and moneys at its disposal.

Commonwealth ex rel. Snader v. Liveright, 161 A. 697, 707 (Pa. 1932) (emphasis added); *id.* ("The balance of the general revenue, subject to constitutional

limitations, is in the ***absolute and complete control of the General Assembly***. It follows that ***it may create preferential appropriations for any purpose which, in its judgment, it deems necessary in the interest of government***, and such appropriations will have a claim on this surplus prior to other appropriations not so favored.") (emphasis added); *Common Cause v. Commonwealth*, 668 A.2d 190, 205 (Pa. Commw. Ct. 1995) ("The power to appropriate moneys lies ***exclusively*** with the legislative branch. Article III, section 24 of our constitution specifically provides that no money may be paid out of the State Treasury except upon appropriation made by law or, in cases of refunds, as provided by law. This Court has stated that, 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.") (emphasis added).

Here, Providers filed this action against the DHS Appellees because they are responsible for administering Pennsylvania's Medical Assistance programs. (R. 124a-125a, ¶¶ 40-41). But, the DHS and the Medical Assistance programs it oversees are funded by Section 222 of the General Appropriation Act, HB 2121, a statute passed by elected legislators in the General Assembly, including the Senators. As such, while Providers seek relief exclusively from DHS and its agents, DHS can only disburse funds in a manner authorized by legislation enacted

by the members of the General Assembly, within their exclusive authority. Therefore, what Providers are actually seeking in this action is an order from the Court mandating that the General Assembly pass legislation every year providing funding for all abortions, even though the General Assembly has already made clear that, as a matter of public policy, it does not wish to dedicate the Commonwealth's limited resources to this purpose. On this point, it is notable that the Petition alleges that 30,881 abortions were performed in Pennsylvania in 2016 alone, (*see* R. 129a, ¶ 56), and that the cost of an abortion ranges from several hundred to several thousand dollars. (R. 137a, ¶ 77). Based on these allegations, even if one were to presume that the average cost of an abortion is $1,000, this would mean that tens of millions of taxpayer dollars could be spent each year on a procedure that the General Assembly has expressly chosen not to fund.[22]

This is a crucial aspect of the relief Providers seek that the Commonwealth Court focused on when granting intervention:

> [T]he constitutional principle [Providers] seek to establish will extend beyond the statute and the [DHS]'s regulations. It could bar the General Assembly from "tieing legislative strings" to its appropriation of funds for the Medical Assistance program. [Providers] freely acknowledge this point. They believe that if they

[22] To the extent Providers contend that a repeal of the Coverage Ban would result in savings on prenatal and childcare costs, the Senators note that it is not the amount of money spent or saved that is at issue, but the fact that the decision to spend or save millions is taken out of the control of the elected legislature, contrary to the expressed provisions of Pennsylvania's Constitution. Moreover, it is most likely that Providers' estimated spend of tens of millions per year would increase *exponentially* if the Coverage Ban is repealed.

> succeed in this litigation, the general appropriation act could not, for example, condition funding of Medical Assistance to coverage of only those reproductive health services that will ensure a full-term pregnancy. Similarly, the general appropriation act could not tie Medical Assistance funding for abortion services to the availability of federal funds.

Allegheny Reprod. Health Ctr., 225 A.3d at 912.

Providers hypothesize that the Commonwealth Court's decision means that "any time a constitutional challenge might theoretically touch on appropriations, individual legislators will have a legally enforceable interest in the matter." Providers' Br. at 79; *see also id.* at 78 ("[T]hat a ruling on the constitutionality of a statute *may* prompt the General Assembly to take action is insufficient to satisfy the standard to establish a legally enforceable interest necessary to permit intervention.") (emphasis in original). Of course, there is nothing theoretical about the relief Providers seek—it is an actual constitutional challenge that directly affects the Senators' appropriations power and how they may allocate Commonwealth funds in the future. Moreover, and more importantly, Providers offer no explanation why legislators should *not* be permitted to intervene and be heard when some aspect of their constitutional obligation to appropriate funds is being called into question. And the Commonwealth Court's decision does not "unduly expand[] the narrow circumstances under which individual legislators can intervene," as Providers contend. *Id.* Rather, it is in accord with *Markham* and

Fumo, in which this Court held that legislators possess standing or a legally enforceable interest when an action could diminish, interfere with, or deprive them of their power or authority. *Markham*, 136 A.3d at 145; *Fumo*, 972 A.2d at 501.

Further, because Providers' requested relief would mandate that the Commonwealth fund certain medical procedures—and because the purpose and amount of funding provided by the Commonwealth are determined exclusively by the General Assembly—the Petition raises separation of powers concerns in that it seeks to restrict the General Assembly's authority, but does not name as a Respondent any representative from the General Assembly capable of advancing the legal positions necessary to protect that authority.[23]

The Senators—who include high-ranking members of the Senate Appropriations, Finance, and Health and Human Services Committees—were therefore properly permitted to intervene and be heard on issues concerning how they may vote to allocate the Commonwealth's limited resources, thereby protecting their legally enforceable and exclusive interests as legislators under Article II, §1 and Article III, § 24 of the Pennsylvania Constitution.

[23] The Senators do not dispute that this Court has the exclusive authority to determine whether the Coverage Ban is constitutional, just as it did in *Fischer*. Rather, if this Court is considering overturning *Fischer*, and thereby forever changing the manner in which the General Assembly may appropriate funds for Medical Assistance, the Senators should be able to participate and be heard before the Court renders a decision.

b) The Senators Have a Legally Enforceable Interest in Protecting Their Authority to Legislate Pursuant to Article III, § 32 of the Pennsylvania Constitution

Article III, § 32 of the Pennsylvania Constitution falls under a subdivision of Article III entitled "Restrictions on Legislative Power" and provides, in relevant part, that "[t]he General Assembly shall pass no local or special law in any case which has been or can be provided for by general law." Pa. Const. Art. III, § 32.[24] This provision is part of the Pennsylvania Constitution's guaranty of equal protection under the law, *see Fischer*, 502 A.2d at 120, and prohibits the General Assembly from singling out a person or group for special treatment in the absence of any lawful distinction. *See, e.g.*, *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000).

Here, Count II of the Petition alleges, among other things, that the Coverage Ban violates Article III, § 32 because it "operates to discriminate singularly against those women who seek abortion-related health care services by denying them coverage under Pennsylvania's Medical Assistance programs[.]" (R. 143a, ¶ 96). In advancing this claim, Providers are unquestionably seeking to diminish, impair, and restrict the Senators' legislative authority as it presently exists under Article III, § 32.

[24] It is axiomatic that a legislator has standing to weigh in on any "Restriction of Legislative Power." Having chosen to advance a claim under this constitutional provision, Providers should not be surprised that it has invited a response from the legislators whose powers they seek to restrict.

Specifically, this Court expressly held in *Fischer* that the challenged restrictions in the Abortion Control Act, which created the Coverage Ban, do *not* violate Article III, § 32. *See Fischer*, 502 A.2d at 117, 126. Therefore, under this Court's long-standing precedent, the Senators currently have the authority to propose and/or vote for legislation that contains certain funding limitations, without concern that such legislation would be deemed an unconstitutional "local or special law" under Article III, § 32. Yet, if Providers succeed in overturning *Fischer*, the Senators—as legislators—will no longer have that authority. The Commonwealth Court correctly recognized this simple, but critical point in granting intervention in this action. *See Allegheny Reprod. Health Ctr.*, 225 A.3d at 912 (finding that Providers "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," and that "Proposed Intervenors seek to preserve their voting power as it currently exists under Article III and their authority to appropriate Commonwealth funds, a key legislative duty").

In this sense, the Senators' interest in this action is different from—and far greater than—the interest at issue in *Markham*, in which the Court found that legislators could not intervene to challenge an Executive Order on the basis that the Order "diminishes the effectiveness of, or is inconsistent with, prior-enacted

legislation." 136 A.3d at 145. In *Markham*, the Court explained that allowing intervention in that matter

> would seemingly permit legislators to join in any litigation in which a court might interpret statutory language in a manner purportedly inconsistent with legislative intent. Critically, Appellants offer no limiting principle which would permit their intervention in the instant matter, but constrain their ability to initiate litigation, seek declaratory relief, or to intervene in any matter which does not, under the principles we express today, impact them in their role of legislators.

Id.

Here, the issue is not whether some governmental action is inconsistent with the General Assembly's intent in passing the Abortion Control Act. Indeed, if, as in *Markham*, this were simply a matter of discerning legislative intent, and the Senators believed that the Court misconstrued that intent in rendering its decision, they would be free to propose and vote for legislation memorializing that original intent more clearly. This Court recognized this exact point in denying the application to intervene in *Markham*. *Id.* (noting that the proposed legislative intervenors "do not suggest that they are in any way prevented from enacting future legislation in this area"). Stated differently, if the legislators in *Markham* believed that the Court "got it wrong" when interpreting their legislative intent, they could pass new legislation to make that intent clearer, and thereby render the

Court's decision moot. As such, the General Assembly's power to legislate was not infringed, and there was no interest to protect through intervention.

Conversely, here, the entire purpose of Providers' action is not only to enjoin the existing statute, but to prevent members of the General Assembly from ever voting in favor of future legislation containing similar funding restrictions. *See Allegheny Reprod. Health Ctr.*, 225 A.3d at 911 ("[T]he 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."). For this reason, Providers miss the mark entirely when they contend that "the outcome on the merits here will not diminish Legislators' voting power, prohibit them from voting on any subject matter, or substantively impinge on their right to pass legislation or appropriate funds in the future." Providers' Br. at 78. This is exactly the outcome if Providers prevail. Right now, the Senators have the right vote in favor of funding restrictions consistent with the Abortion Control Act. But that right will be irretrievably lost if this Court overturns *Fischer*.[25]

This crucial distinction also helps establish the limiting principle that this Court found lacking in *Markham*. Specifically, if, as in *Markham*, an action is concerned only with whether governmental conduct is consistent with the

[25] For the same reason, the excerpt from Judge Simpson's opinion on page 79 of Providers' Brief is inapposite. The Senators' legally enforceable interest does not arise solely from the fact they "may want or need to propose additional legislation if a court finds the coverage ban unconstitutional," but also because they will never be able to vote a particular way again if the Coverage Ban is struck down.

legislative intent of an existing statute, it does not rise to the level of creating a legally enforceable interest for purposes of legislative intervention, because the action does not impair the General Assembly's powers under the Pennsylvania Constitution. But when, as here, the action seeks not only to challenge the existing statute, but to create new constitutional constraints on the General Assembly's authority to legislate, intervention should unquestionably be permitted as of right. *Markham*, 136 A.3d at 145 (legislators may participate in judicial proceedings when the legislator "has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator"); *Fumo*, 972 A.2d at 501 (recognizing legislators have an interest "in actions alleging a diminution or deprivation of the legislator's or council member's power or authority").

Because the Senators plainly have a legally enforceable interest in proposing and voting for funding legislation that may be affected by this litigation, the Commonwealth Court correctly held that they were permitted to intervene:

> Proposed Intervenors seek to preserve their authority to propose and vote on funding legislation in the future. The constitutional authority of the members of the General Assembly to control the Commonwealth's finances constitutes a legally enforceable interest that entitles them to intervene and be heard before the Court rules in this matter.

Allegheny Reprod. Health Ctr., 225 A.3d at 913; *see also Hickok*, 761 A.2d at 1134 n.1 (recognizing that the President pro tempore of the Pennsylvania Senate

was "permitted to intervene in support of the respondents" in that action, which addressed whether a portion of the Education Empowerment Act was unconstitutional under Article III, § 32); *Scarnati v. Wolf*, 135 A.3d 200, 210 (Pa. Commw. 2015) ("[I]ndividual legislators have standing to pursue matters that affect their interests as members of the General Assembly.") (*rev'd in part on other grounds by Scarnati v. Wolf*, 173 A.3d 1110 (Pa. 2017)).[26]

2. The Senators Are Also Entitled to Intervene in This Matter Pursuant to Pa. R.C.P. 2327(3) Because They Could Have Been Joined as Respondents

Pennsylvania Rule of Civil Procedure 2327(3) provides that a party shall also be permitted to intervene when "such person could have joined as an original party in the action or could have been joined therein." This rule is not contingent upon whether the proposed intervenor has standing, a legally enforceable interest, or any criteria other than a demonstration that the party could have joined or been joined as an original party. Indeed, it is illogical to speak of the concept of "standing" when, as here, the Senators intervened *as Respondents*. Standing is focused on a party's ability to institute and maintain an action, not on a defendant's

[26] Because the Senators are not seeking to intervene simply to defend the constitutionality of the Coverage Ban, Providers' citation to *Robinson Twp. v. Commonwealth*, 84 A.3d 1054 (Pa. 2014) is distinguishable. In *Robinson*, this Court found that "the legislators' interest implicates neither a defense of the power or authority of their offices nor a defense of the potency of their right to vote." *Id.* at 1055. As explained herein, Providers' attempt to limit the Senators' constitutional authority under Article III, § 32 plainly implicates the power of the Senators' offices and the potency of their right to vote.

ability to be sued. By definition, a defendant need not have a direct injury to be sued in an action.

In addition, "[m]embers of the General Assembly may participate or be named defendants in a constitutional challenge to a statute[.]" *See MCT Transp. v. Phila. Parking Auth.*, 60 A.3d 899, 904 n.7 (Pa. Commw. Ct. 2013). For example, the President pro tempore of the Pennsylvania Senate, who is one of the Senators, has often been named as a respondent in actions involving constitutional challenges. *See, e.g.*, *Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 78 A.3d 1020 (Pa. 2013) (President pro tempore named as a respondent in an action alleging that a statute authorizing the abolishment of the office of jury commissioner violated Article V, §§ 1, 10 and Article II, § I of the Pennsylvania Constitution, as well as the First Amendment to the United States Constitution); *Pa. State Ass'n of Cty. Comm'rs v. Commonwealth*, 52 A.3d 1213 (Pa. 2012) (President pro tempore named as a respondent in an action challenging the constitutionality of a statutory scheme for funding the Pennsylvania court system); *League of Women Voters v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) (President pro tempore named as a respondent in an action challenging the Pennsylvania Congressional Redistricting Act of 2011, 25 P.S. § 3596.101 *et seq.* as unconstitutional under, among other provisions, Article I, §5 of the Pennsylvania Constitution); *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205 (Pa.

Commw. Ct. 2018) (President pro tempore named as a respondent in an action alleging that a statute modifying the Commonwealth's Fireworks Law violated various provisions of Article II and Article III of the Pennsylvania Constitution); *Leach v. Commonwealth*, 141 A.3d 426, 427 (Pa. 2016) (President pro tempore of the Pennsylvania Senate named as a respondent in an action alleging that legislation related to the theft of certain metals violated the Pennsylvania Constitution's Article III, §§ 1, 3).

Here, the Petition includes an equal protection claim advanced under Article III, § 32 of the Pennsylvania Constitution. And, notably, the President pro tempore was named as a respondent in a recent action also involving a claim under Article III, § 32 which, like this matter, was premised upon an alleged fundamental right that has purportedly been infringed upon by a discriminatory funding program. Specifically, in *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, this Court described the claim against the President pro tempore and other respondents as follows:

> In their second count, ***Petitioners assert that Respondents have violated equal protection principles under Article III, Section 32 of the Pennsylvania Constitution. They aver that education is a fundamental right***, triggering strict scrutiny of the disadvantageous classification reflected in the disparity of educational resources at the disposal of low and high-wealth districts. . . . By adopting a school ***funding program that discriminates*** against students living in such districts by denying them an equal opportunity to

> obtain an adequate education, the General Assembly, according to Petitioners, has denied the disadvantaged students equal protection.

170 A.3d at 431-32 (emphasis added). In other words, one of the Senators was included as an original party respondent in an action premised upon the exact same legal theory as that which is being advanced by Providers in this action. It necessarily therefore follows that Providers could have named the Senators as respondents here in their effort to compel the General Assembly to provide the requested funding.

Providers contend that the Senators could not have been joined in this action because they are not responsible for implementing or enforcing the Coverage Ban. Providers' Br. at 76 n.35. The lone decision Providers cite in support of this argument is *Wagaman v. Attorney Gen. of Com.*, 872 A.2d 244 (Pa. Commw. Ct. 2005). But, *Wagaman* addressed the circumstances in which it is appropriate to name the Attorney General, not a member of the General Assembly, as a party.[27] Moreover, *Wagaman* was decided more than a decade before *William Penn*, and years before the other five decisions cited above in which the President pro tempore of the Senate was joined as a respondent.

[27] *See Wagaman*, 872 A.2d at 246-47 ("[W]e disagree that the Attorney General's general duty to uphold the laws of this Commonwealth, standing alone, suffices to render him a proper respondent/defendant in this action.").

Because the Senators "could have been joined" as Respondents in this action, intervention is appropriate pursuant to Pa. R.C.P. 2327(3).

3. There is No Basis to Deny Intervention Pursuant to Pa. R.C.P. 2329

Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action;" (2) the petitioner's interest 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." None of these factors apply to the Senators.

First, the Senators and the DHS Appellees do not share identical interests. The General Assembly, which includes the Senators, has the exclusive authority to pass laws specifying how Commonwealth funds may be spent, while DHS is charged with implementing those laws. If the Court rules in favor of Providers, the DHS Appellees would be prohibited from enforcing these particular funding restrictions, but the Court's decision would not have any effect on the executive branch's constitutional powers going forward. But an adverse ruling *would* dictate how members of the General Assembly may and may not allocate Commonwealth funds in any new legislation, and would therefore have a significant impact on the

General Assembly's exclusive authority to appropriate money out of the State Treasury pursuant to Article II, § 1 and Article III, § 24.

These separation of powers considerations demonstrate that intervention is necessary so that the Senators can adequately represent their interests as legislators—an interest that the DHS Appellees have no reason to raise, advance, or otherwise protect in this action. The Commonwealth Court aptly summarized this point when it held that DHS "has no legally enforceable interest in matters relating to Commonwealth appropriations. An executive branch agency is simply not in a position to represent Proposed Intervenors' interest in the exercise of legislative power under Article III of the Pennsylvania Constitution." *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913.

Providers suggest that the Senators' concerns about the DHS Appellees' ability to represent their interests is unfounded because "DHS has aggressively opposed Providers' claims." Providers' Br. at 83. But, the mere fact that the DHS Appellees have defended the action *so far* is not evidence that they will adequately represent the Senators' interests if this case proceeds further. Indeed, if this Court determines that Providers have standing to pursue their claims and overrules *Fischer*—a decision which, to date, all parties have been bound to follow notwithstanding their opinion on whether it was properly decided—it is entirely possible that the DHS Appellees may share *Providers*' interest in securing funding

for additional abortion-related services that are currently subject to the Coverage Ban.

Finally, none of the other bases for denying intervention under Rule 2329 apply here. Providers do not contend that the Senators' defense in this action is in subordination to and in recognition of the action's propriety. Nor have they argued that the Senators have unduly delayed in seeking to intervene, or that their intervention will cause any delay, embarrassment, or prejudice to any party.

4. The Commonwealth Court's Decision Does Not Expand the Scope of Legislative Intervention

Providers warn that if the Commonwealth Court's ruling on intervention is affirmed, it will lead to "virtually-unbounded individual legislator intervention" that would burden courts and litigants with unnecessary delay, expense, and complexity. Providers' Br. at 80. But, these concerns are unfounded. The Commonwealth Court's decision did not expand the scope of intervention at all, but merely applied the law that already exists. In actuality, it is Providers who seek to significantly *limit* the existing scope of intervention. The existing law governing intervention has not opened the floodgates to unlimited legislative participation in judicial proceedings, and Providers have not identified any evidence that this has changed in the nearly two years since the Commonwealth Court permitted intervention in this case. Going forward, legislators will still need to satisfy the elements necessary for intervention in each case, and the courts may

deny intervention if the legislators' interest is adequately represented, or if it would cause prejudice to the other litigants.[28]

Providers also contend that the Commonwealth Court's ruling is at odds with decisions from three other jurisdictions—Maryland, Wisconsin, and the Western District of Wisconsin—that have limited legislative participation in judicial proceedings. *Id.* at 81. Even assuming this is true, it is not clear why it matters that Pennsylvania has taken a different approach to legislative standing or intervention than two other states and a federal district court. Moreover, each of the three decisions are distinguishable from the present matter. Two did not address any issues related to the appropriation of state funds. *See Duckworth v. Deane*, 903 A.2d 883 (Md. 2006) (addressing a constitutional challenge to a same-sex marriage ban); *Planned Parenthood of Wis. v. Kaul*, 384 F. Supp. 3d 982 (W.D. Wis. 2019) (addressing statutory provisions that specified which individuals could perform certain abortion procedures and when they could be performed). The third involved an intervention standard that is significantly more restrictive than Pa. R.C.P. 2327, as the court held that "we allow intervention as a matter of right ***only where the intervenor is necessary to the adjudication of the action***."

[28] Providers argue that under the Commonwealth Court's ruling in this matter, legislators could intervene in any future lawsuit that limits the application of sovereign immunity, because such lawsuits may impact the allocation of Commonwealth funds. *Id.* However, while a decision that limits sovereign immunity might expose the Commonwealth to greater monetary damages in certain circumstances, Providers have failed to identify how such a decision would affect how the General Assembly votes to appropriate funds. Hence, this hypothetical example has no relevance here.

Helgeland v. Wisconsin Municipalities, 724 N.W.2d 208, 216 (Wis. Ct. App. 2006) (emphasis added). Here, the applicable standard is not whether the Senators are necessary to the adjudication of this action, but whether they could have been joined as respondents or have a legally enforceable interest. Indeed, Pa. R.C.P. 2327(4) authorizes intervention "whether or not such person may be bound by a judgment in the action," which plainly establishes that intervention in Pennsylvania is not conditioned upon whether the intervenor is necessary to the adjudication.[29]

5. The Court Should Not Depart From Well-Settled Precedent and Apply Federal Law Governing Standing and Intervention

While the issue is not properly before this Court because Providers did not raise it either in the Commonwealth Court or in this appeal, the Senators note that in the *amicus curiae* brief filed by the members of the Democratic Caucuses of the Senate of Pennsylvania and Pennsylvania House of Representatives (the "Democratic Amici"), the Democratic Amici urge this Court to apply federal standing and intervention standards to determine whether the Commonwealth Court properly granted intervention. *See* Brief of Democratic Amici at 16-18. The Court should reject this approach for several reasons.

[29] Providers criticize the Commonwealth Court for relying upon a Michigan Supreme Court decision, *Lewis v. State,* 90 N.W.2d 856 (Mich. 1958), which Providers contend has nothing to do with intervention. Providers Br. at 82 n.38. The Commonwealth Court, however, did not cite to *Lewis* for any principles governing intervention, but for the proposition that along with Pennsylvania, other states have recognized that a legislature may "'tie[] legislative strings to appropriation of state funds for governmental purposes . . . .'" *Allegheny Reprod. Health Ctr.*, 225 A.3d at 912 (quoting *Lewis*, 90 N.W.2d at 860).

First, the Democratic Amici's argument is premised upon the false assumption that the Senators and House Appellees have intervened to advance the interests of the General Assembly as a whole. *See id.* at 16 (arguing that the Senators and House Appellees do not represent the Democratic Amici's interests or the interests of the General Assembly, "nor do they have the capacity to assert the institutional interests of the legislature"); *id.* at 18 ("To represent the General Assembly's interest, as the Republican Legislative Intervenors purport to do in this case, there must be representation equal to a number necessary to maintain the power to enact or defeat future legislation and the two-thirds majority necessary in both chambers to override a gubernatorial veto.").

The Senators, however, do not purport to represent the interests of the General Assembly as a whole, or even a particular caucus. Rather, consistent with *Markham* and *Fumo*, the Senators have intervened to preserve their authority *as individual legislators* to propose and vote on funding legislation. *Markham*, 136 A.3d at 145 (holding that a legislator may participate in judicial proceedings when the legislator "has suffered a concrete impairment or deprivation of an official power or authority **to act as a legislator**") (emphasis added); *Fumo*, 972 A.2d at 501 (holding that legislators may participate "in actions alleging a diminution or deprivation of **the legislator's** or council member's power or authority") (emphasis added).

Second, standing in federal courts is governed by Article III to the U.S. Constitution, which this Court has repeatedly rejected in favor of a "prudential" approach to standing. *See Fumo*, 972 A.2d at 496 ("In Pennsylvania, the requirement of standing is prudential in nature."); *William Penn Sch. Dist.*, 170 A.3d at 437 ("We have held that, '[i]n contrast to the federal approach, notions of case or controversy and justiciability have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations.'") (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d at 917); *Johnson v. Am. Standard*, 8 A.3d 318, 329 (Pa. 2010) ("Unlike the federal courts, which derive their standing requirements from Article III of the United States Constitution, standing for Pennsylvania litigants has been judicially created.") (citation omitted); *In re Hickson*, 821 A.2d 1239, 1243 n.5 (Pa. 2003) ("State courts, however, are not governed by Article III and are thus not bound to adhere to the federal definition of standing.") (citation omitted).

Importantly, this Court made clear in *Markham* that there are no special standing criteria for legislators. Rather, legislators are subject to the same prudential standing criteria discussed above:

> Standing for legislators claiming an institutional injury is no different than traditional standing and, in order for legislators to bring a particular challenge, the legislators must satisfy the ***prudential standing*** criteria offered above. Indeed, our Court in *Pittsburgh Palisades* shied away from a special category of standing for legislators.

> *Id.* at 662 ("To be clear, by our decision today, we are in no way creating or espousing a special category of standing for legislators."); *see also id.* at 664 (Saylor, J., dissenting) (cautioning against the creation of distinct legislator standing apart from citizen-taxpayer standing).

136 A.3d at 140-41 (emphasis added). This underscores the radical impact of what the Democratic Amici are proposing. Given that legislators such as the Senators are subject to the same prudential standing criteria as any other party, applying Article III standing requirements to the Senators would open the door to having those same requirements apply to every litigant in every court in Pennsylvania. Not even Providers—the very parties that the Democratic Amici support in this action—favor this result. As Providers themselves recognized in arguing why they purportedly have standing in this action, "Pennsylvania standing law is more flexible and expansive than federal standing law." Providers' Br. at 22 n.12.

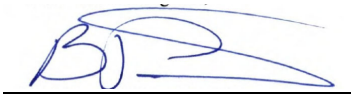
For all of the reasons set forth above, this Court should reject the Democratic Amici's invitation to eliminate Pennsylvania's flexible, prudential approach to standing in favor of the more rigorous Article III requirements, which would have the direct effect of overruling *Markham*, *Fumo*, and every other existing decision governing legislative standing and intervention.

VI. CONCLUSION

For all of the foregoing reasons, the Senators respectfully request that this Court affirm the Commonwealth Court's January 28, 2020 and March 26, 2021 Orders in their entirety.

Dated: December 13, 2021

BLANK ROME, LLP



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CERTIFICATE OF COMPLIANCE

I, John P. Wixted, hereby certify that the Brief for the Senate Appellees complies with the 20,000 word count limitation set forth in this Court's October 20, 2021 Order because it contains 19,920 words, excluding the parts exempted by Pennsylvania Rule of Appellate Procedure 2135(b). The Certificate is based upon the word count set forth in the word processing system used to prepare this Brief.

Dated: December 13, 2021

John P. Wixted, Esquire

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

Respectfully Submitted,

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