IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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, Petitioners	:	
v.	:	No. 26 M.D. 2019
Pennsylvania Department of Human Services, Teresa Miller, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Leesa Allen, in her official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's 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, Respondents	:	Argued: November 5, 2025

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MATTHEW S. WOLF, Judge

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: April 20, 2026

Today the four-member Majority declares that the corporate petitioners, four of which operate for profit (Abortion Providers), have a constitutionally-mandated ability to bill Pennsylvania taxpayers to pay for abortions-

on-demand sought by Medical Assistance recipients. What is more, however, is that the Majority got where it wanted without a hearing, without factfinding, without even an answer to Abortion Providers' Petition for Review. The Majority's decision is based entirely on unvetted "stipulations" submitted jointly by Abortion Providers and Respondents *after* Respondents abandoned any defense of the constitutionality of the abortion funding restrictions challenged in this litigation. Even after the Attorney General intervened on behalf of the Commonwealth to defend those restrictions and requested a hearing at which to do so, the Majority dispensed with a hearing and factfinding, and now grants summary relief by judicial fiat.

To impose this funding burden onto taxpayers, the Majority summarily re-writes longstanding Pennsylvania public policy favoring the protection of the life of an unborn child, a policy that remains enshrined in statutes and constitutional provisions enacted neither by the Majority nor by any court, but by the People. The Majority also creates a fundamental but nebulous constitutional right to "reproductive autonomy," inserts it into the 152-year-old article I, section 1 of the Pennsylvania Constitution, and then mandates that Pennsylvania taxpayers fund its exercise to include abortions sought by Medical Assistance recipients.

I simply cannot recall another case in which this Court has decided issues of such profound public importance in this kind of summary, we-believe-you-if-you-say-so fashion that does anything but give "full notice to the bench, bar, and public." *Allegheny Reproductive Center v. Pennsylvania Department of Human Services*, 309 A.3d 808, 998 (Pa. 2024) (Dougherty, J., concurring and dissenting). Because the Majority's decision is premature and unsupported in fact or law, I respectfully, but adamantly, dissent.

I. The Majority errs by granting summary relief in favor of Abortion Providers without a hearing or factfinding.

A. Procedural History

I do not fundamentally disagree with the Majority's recitation of the procedural history of this case, including its summary of the prior dispositions of this Court in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 225 A.3d 902 (Pa. Cmwlth. 2020) (*AR I*), and *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 249 A.3d 598 (Pa. Cmwlth. 2021) (*en banc*) (*AR II*), both of which were reversed by the Pennsylvania Supreme Court in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A.3d 808 (Pa. 2024) (*Allegheny Reproductive III*) (*AR III*). Nor do I disagree with the Majority's summary of Abortion Providers' Petition for Review and the relevant provisions of the Abortion Control Act[1] (ACA) challenged therein. Nevertheless, there are gaps in the Majority's narrative, and I begin by filling those in.

The ACA took effect in 1982.[2] In Section 3202 of the ACA, the General Assembly set forth explicitly the Pennsylvania public policies supporting its enactment. Because the Majority does not cite or reference them, I include them here in full:

> (a) Rights and interests.--**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**

[1] 18 Pa.C.S. §§ 3201-3220.

[2] The ACA passed in the General Assembly by a vote of 157-80 (30-19 in the Senate and 127-61 in the House). *See* https://www.palegis.us/legislation/bills/1981/sb439 (last visited April 20, 2026).

and health of the child[3] subject to abortion. It is the further intention of the General Assembly to foster the development of standards of professional conduct in a critical area of medical practice, to provide for development of statistical data and to protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term. **The General Assembly finds as fact that the rights and interests furthered by this chapter are not secure in the context in which abortion is presently performed.**

(b) Conclusions.--**Reliable and convincing evidence** has compelled the General Assembly to conclude and the General Assembly does hereby solemnly declare and find that:

(1) Many women now seek or are encouraged to undergo abortions without full knowledge of the development of the unborn child or of alternatives to abortion.

(2) The gestational age at which viability of an unborn child occurs has been lowering substantially and steadily as advances in neonatal medical care continue to be made.

(3) A significant number of late-term abortions result in live births, or in delivery of children who could survive if measures were taken to bring about breathing. Some physicians have been allowing these children to die or have been failing to induce breathing.

(4) Because the Commonwealth places a supreme value upon protecting human life, it is necessary that those physicians which it permits to practice medicine be held to precise standards of care in cases where their actions do or may result in the death of an unborn child.

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[3] The ACA defines "unborn child" and "fetus" synonymously as "an individual organism of the species homo sapiens from fertilization until live birth." 18 Pa.C.S. § 3203. In other words, the ACA views a fetus as an unborn child from fertilization to delivery.

> (5) A reasonable waiting period, as contained in this chapter, is critical to the assurance that a woman elect to undergo an abortion procedure only after having the fullest opportunity to give her informed consent thereto.
>
> (c) Construction.--In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, **the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion.**[4]
>
> **(d) Right of conscience.--It is the further public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care whether acting individually, corporately or in association with other persons;** and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability or financial burden upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, subsidize, accept or provide abortions.

18 Pa.C.S. § 3202(a)-(d) (emphasis provided). Thus, the ACA considers abortion to be a procedure that ends an unborn child's life, upon which this Commonwealth places supreme value. The ACA also mandates that courts, agencies, and any other tribunals, construe where relevant all Pennsylvania law, in all proceedings,

[4] Given the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 225-27 (2022), the federal constitution poses no barrier to construing Pennsylvania law in a way that furthers the express Pennsylvania public policy of encouraging childbirth over abortion.

consistently with the Pennsylvania public policies (1) guaranteeing unborn children the equal protection of the laws and (2) favoring unborn child life over unborn child death. As to Pennsylvania citizens' rights of conscience,[5] the ACA recognizes and protects their right to be free from coerced subsidization of a practice many consider to be morally and ethically wrong. It nevertheless leaves Pennsylvania citizens free to contribute voluntarily to causes or organizations (such as Abortion Providers) who support or perform abortions.

The ACA further imposes certain limitations and conditions on seeking an abortion, including that it be "necessary" as determined by a physician, *Id.* § 3204(a); that it be performed with the woman's "informed consent," *Id.* § 3205(a); that minors under the age of 18 and incapacitated persons must obtain the consent of at least one parent or guardian, *Id.* § 3206; that, with certain exceptions, married women must first attest that they have notified their spouse of their intent to seek an abortion, *Id.* § 3209(a); and that, with certain exceptions, abortions may not be performed on unborn children older than 24 weeks. *Id.* § 3211(a), (b).

In this suit, Abortion Providers challenge Subsections 3215(c) and (j) of the ACA (the Coverage Exclusion), arguing that they violate various provisions of the Pennsylvania Constitution. Section 3215 provides in pertinent part, as follows:

> **(c) Public funds.--**No 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, except:

[5] *See* Pa. Const. art. I, § 3 (providing, in part, that "no human authority can, in any case whatever, control or interfere with the rights of conscience").

(1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.

(2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction and has been personally reported by the victim.

(3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been personally reported by the victim to a law enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

. . . .

(j) Required statements.--No Commonwealth agency shall make any payment from Federal or State funds appropriated by the Commonwealth for the performance of any abortion pursuant to subsection (c)(2) or (3) unless the Commonwealth agency first:

(1) receives from the physician or facility seeking payment a statement signed by the physician performing the abortion stating that, prior to performing the abortion, he obtained a non-notarized, signed statement from the pregnant woman stating that she was a victim of rape or incest, as the case may be, and that she reported the crime, including the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction or, in the case of incest where a pregnant minor is the victim, to the county child protective service agency and stating the name of

> the law enforcement agency or child protective service agency to which the report was made and the date such report was made;
>
> (2) receives from the physician or facility seeking payment, the signed statement of the pregnant woman which is described in paragraph (1). The statement shall bear the notice that any false statements made therein are punishable by law and shall state that the pregnant woman is aware that false reports to law enforcement authorities are punishable by law; and
>
> (3) verifies with the law enforcement agency or child protective service agency named in the statement of the pregnant woman whether a report of rape or incest was filed with the agency in accordance with the statement.

18 Pa.C.S. § 3215(c), (j).

Under the Medicaid or Medical Assistance program, federal funds are distributed to states for use in providing certain medical or dental services to the elderly, indigent, and disabled. *See* 42 U.S.C. § 1396-1. Federal law prohibits the use of federal funds distributed under the Medicaid program to pay for abortions except when the patient's life is threatened or in cases of rape or incest. *See, e.g.,* 42 C.F.R. §§ 441.202, 441.203; 42 C.F.R. § 457.475(a), (b). Nevertheless, federal law does not preclude states from utilizing state-sourced funds to pay for abortions. The Coverage Exclusion's salient function, then, is to prohibit, with the three enumerated exceptions, payment for abortions with funds sourced exclusively from Pennsylvania taxpayers. To this prohibition Abortion Providers object, arguing it is an unconstitutional sex-based classification[6] and an unconstitutional, discriminatory burden on the exercise of their fundamental right to reproductive autonomy.

[6] *See* Pa. Const. art. I, § 28 (the Equal Rights Amendment, or ERA).

In *AR II*, this Court dismissed Abortion Providers' claims as required by the unanimous, seven-Justice Pennsylvania Supreme Court decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985). Then, in *AR III*, a three-Justice majority of the Pennsylvania Supreme Court (the *AR III* Majority) overruled *Fischer*[7] and reversed this Court's decisions in *AR I*[8] *and AR II*. *AR III*, 309 A.3d at 947. First, and following in principle the lead of the Supreme Court of New Mexico, the *AR III* Majority concluded that, because the Coverage Exclusion precludes public funding for abortions for indigent women but does not similarly restrict funding for similar healthcare for men, it is sex-based and presumptively unconstitutional under the ERA. *Id.* at 891. Because it held the Coverage Exclusion to be presumptively unconstitutional, the Majority further mandated that it be reviewed under strict scrutiny; in other words, the Commonwealth would bear the burden on remand to rebut the presumption of unconstitutionality with evidence establishing (1) a compelling state interest furthered by the Coverage Exclusion, and (2) that no less intrusive methods exist to further that interest. *Id*.

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[7] Two notable points about *Fischer* before I leave it. First, the petitioners in *Fischer* included actual people who claimed to be harmed by the Coverage Exclusion, including a taxpayer and "several [M]edical [A]ssistance recipients who, at the time the law suit was filed, were pregnant and desired abortions[.]" *Fischer*, 502 A.2d at 116 n.2. Here, there are only corporate petitioners, who complain that the Coverage Exclusion deprives them of access to taxpayer funding for abortions that they now must subsidize privately. Abortion Providers would rather spend their money more strategically, which taxpayer funding will permit. (Majority Op., at 6.)

Second, although the parties in *Fischer* filed a stipulation of *uncontested* facts, a judge of this Court, fulfilling our duty to actually hear cases filed in our original jurisdiction, sat as chancellor and received two days of additional testimony before issuing an adjudication. *Fischer*, 502 A.2d at 117.

[8] In *AR I*, this Court granted the applications for leave to intervene filed by several members of both the Pennsylvania State Senate and Pennsylvania House of Representatives who sought to defend the constitutionality of the Coverage Exclusion. 225 A.3d at 914. The Supreme Court in *AR III* reversed that ruling and precluded the legislators' intervention. *AR III*, 309 A.3d at 849.

The *AR III* Majority expressly rejected the notion that it had ruled the Coverage Exclusion unconstitutional: "As a result of this decision, [Abortion] Providers' claim that the Coverage Exclusion violates the [ERA] will be adjudicated in the Commonwealth Court where we are confident there will be zealous advocacy supporting the state interests in the sex-based distinction." *Id.* at 891 n.83; *see also id.* at 947 ("This appeal does not resolve the ultimate issues challenging the constitutionality of the Coverage Exclusion under the Pennsylvania Constitution.")

As to Abortion Providers' equal protection claim under article I, sections 1 and 26 and article III, section 32 of the Pennsylvania Constitution,[9] the *AR III* Majority did not conclude that the Coverage Exclusion was presumptively unconstitutional. Rather, only two Justices of the *AR III* Majority (the *AR III* Plurality) would find a fundamental right to reproductive autonomy contained in the Pennsylvania Constitution and remand for this Court to apply, under article I, section 26, strict scrutiny to the Coverage Exclusion's "partiality towards carrying a pregnancy to term." *Id.* at 945-46. The *AR III* Majority did, however, establish the general framework for analyzing claims under article I, section 26, determining that,

> when a court is presented with a legislative classification that touches on the exercise of a civil right and it is being challenged on the basis that it is discriminatory, the court shall determine whether the classification operates neutrally with regard to the exercise of that right. If it does not, the court shall then conduct a commensurate means-ends review.

[9] It appears that Abortion Providers have abandoned any challenge to the Coverage Exclusion under article III, section 32 of the Pennsylvania Constitution, and the Majority does not discuss it. *See* Pa. Const. art. III, § 32 (prohibiting, among other things, the passing of local or special laws where general laws would suffice). In any event, article III, section 32 is, on its face, irrelevant. *See AR III*, 309 A.3d at 1003 (Mundy, J., concurring and dissenting).

Id. at 945. The *AR III* Majority then remanded for further proceedings. *Id.* at 947.

After remand, Respondents, who originally opposed Abortion Providers' claims, notified this Court that they would abandon any defense of the Coverage Exclusion and, instead, submit a brief explaining why Abortion Providers were entitled to judgment as a matter of law. (Notice, 7/16/2024, at 2-5.) Then, on July 19, 2024, Abortion Providers filed an Application for Summary Relief (Application), a supporting brief, and a 67-paragraph Joint Statement of Undisputed Facts (Stipulations). The Stipulations expectedly include basic details of Abortion Providers' businesses, *see* Stipulations, ¶¶ 1-20, details about Respondents, *Id.* ¶¶ 11-14, and a summary of the Medicaid and Medical Assistance programs and the Coverage Exclusion, *Id.* ¶¶ 15-25.

The Stipulations go on, however, to include agreements to otherwise disputed facts, conclusions of law, and social policy objectives. For example, the Stipulations purport to agree (1) to the harms the Coverage Exclusion allegedly imposes on Medical Assistance recipients, citing to multiple "expert" testimonial declarations that are replete with unvetted statistics, *Id.* ¶¶ 32-42; (2) that there are "less intrusive ways to promote healthy pregnancies and advance fetal and maternal health," *Id.* ¶ 43; and that (3) the Coverage Exclusion forces women to carry their pregnancies to term against their will, *Id.* ¶ 42. The Stipulations next include an agreement that:

> The [Coverage Exclusion] eliminates coverage of an extremely common medical service for women that is linked to their reproductive capacity. Historically, women's capacity for pregnancy has been at the root of their discriminatory treatment. Denying women the ability to control their reproduction arises from and perpetuates traditional gender-based stereotypes about women's proper role in society. Specifically, covering the

> medical costs of pregnancy and childbirth, but not abortion, coerces pregnant people to adhere to the gender-based stereotype that a woman's primary roles are mother and caregiver. And by failing to cover abortion, the coverage ban perpetuates gender inequality in the state of Pennsylvania by harming women's ability to participate equally in civic life, protect their health, and achieve financial security. Again, this harm falls disproportionately on Black women and other women of color.

Stipulations, ¶ 44 (citation omitted in original). The Stipulations also agree to the "Harm to Women Who Are Forced to Carry Their Pregnancies to Term," such as (1) denying women "reproductive autonomy" and dignity, control over their future plans, and equal participation in society; (2) placing at risk women's ability to participate as equals in society; (3) risking psychological and physical harm to women; and (4) increasing the likelihood of domestic abuse. *Id.* ¶¶ 45-57. *See also* Stipulations, ¶¶ 58-64 ("Harm to Women Who Are Able to Obtain an Abortion Despite the Coverage Ban"); ¶¶ 65-67 (agreeing that abortion is healthcare that is denied to women but granted to men for "similar" procedures, like vasectomies).

After several *amici curiae* filed briefs opposing Abortion Providers' Application and disputing the veracity of the Stipulations, Respondents filed their brief in support of the Application on October 25, 2024. The Court scheduled the Application for oral argument *en banc* on February 5, 2025, at which counsel for *Amici Curiae* Republican House Leader Bryan D. Cutler and Republican House Appropriations Chair Seth M. Grove appeared, with leave, to argue against our granting the Application. *See* Order, 1/16/2025. We thereafter granted the Commonwealth, by the Office of Attorney General (Commonwealth), leave to intervene to defend the Coverage Exclusion and scheduled the Application for a second oral argument *en banc*.

In its brief opposing the Application, the Commonwealth argues that the Coverage Exclusion does not violate any provision(s) of the Pennsylvania Constitution because the Coverage Exclusion survives strict scrutiny analysis and because the constitution contains no fundamental right to reproductive autonomy. In support, the Commonwealth asserts three discrete state interests that it contends are compelling: (1) protecting the life of an unborn child, (2) protecting women's health, and (3) respecting the conscience rights of those Pennsylvania taxpayers who object to abortion. (Commonwealth Br. at 15-22.) The Commonwealth also argues that the Coverage Exclusion is narrowly tailored to further these interests and that the disputed issues of fact in this case must be decided after a hearing. *Id.* at 19-20, 22-28, 63-64, 65. At oral argument in November 2025, Counsel for the Commonwealth disclaimed agreement with many of the factual, legal, and policy assertions contained in the Stipulations and reiterated the need for this Court to afford the Commonwealth the opportunity to make its case at a hearing.

B. The Majority errs in dispensing with a hearing and factfinding and, therein, denies the Commonwealth the right to make its case.

Given its status as a party, the directive of the Supreme Court on remand, and the factual disputes in this case, the Commonwealth has the right to rebut the presumption of unconstitutionality with evidence at a hearing. Moreover, this Court has the duty to decide cases filed in our original jurisdiction based on a developed factual record and factfinding. The Majority has short-circuited that process here, granting summary relief while, as I discuss below, material factual disputes remain outstanding.

This is particularly true because the Stipulations do not, by themselves, entitle Abortion Providers to summary relief. Pursuant to Pennsylvania Rule of

Appellate Procedure 1532(b), this Court will grant summary relief only where a moving party establishes that their right to relief is clear and that no material facts are disputed. Pa.R.A.P. 1532(b); *Commonwealth by & through Krasner v. Attorney General*, 309 A.3d 265, 270 n.6 (Pa. Cmwlth. 2024). A fact is "material" if it "could affect the outcome of the case under the governing law." *Strine v. Commonwealth*, 894 A.2d 733, 738 (Pa. 2006). An application for summary relief is evaluated by the standards governing summary judgment, which require the record to be viewed in a light most favorable to the nonmoving party. *Meyers v. Commonwealth*, 128 A.3d 846, 849 (Pa. Cmwlth. 2015); *Meggett v. Pennsylvania Department of Corrections*, 892 A.2d 872, 877 (Pa. Cmwlth. 2006).

The record we review in deciding an application for summary relief includes depositions, affidavits, answers to interrogatories, pleadings, and reports by expert witnesses. *Borough of Bedford v. Department of Environmental Protection*, 972 A.2d 53, 60 n.6 (Pa. Cmwlth. 2009). Moreover, under the rule first announced in *Borough of Nanty-Glo v. American Surety Co. of New York*, 163 A. 523 (Pa. 1932), "[h]owever clear and indisputable may be the proof when it depends upon oral testimony, it is nevertheless the province of the [factfinder] to decide . . . as to the law applicable to the facts." *Id.* at 524 (internal quotation marks and citation omitted); *see also Woodford v. Insurance Department*, 243 A.3d 60, 70 (Pa. 2020) (citing *Nanty-Glo* for the proposition that issues of credibility are for the factfinder, and summary judgment was not appropriate where the only evidence in support was oral testimony); *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 37 (Pa. 2006) (a summary judgment movant must rely on something more than oral testimony because the decision whether to credit such testimony must be made by the factfinder); *Sanchez-Guardiola v. City of Philadelphia*, 87 A.3d 934, 938 (Pa.

Cmwlth. 2014) ("The 'Nanty-Glo rule' essentially means that the testimonial affidavits or depositions of the moving party's witnesses are insufficient by themselves to establish a material fact because the credibility of the testimony is still a matter for the jury[.]") (internal citations and quotation marks omitted). As our Supreme Court has noted, "[t]he function of the summary judgment proceedings is to avoid a useless trial but is not, and cannot, be used to provide for trial by affidavits or trial by depositions." *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 902 (Pa. 1989) (internal quotation marks and citation omitted).

As to stipulations, "[a] stipulation is a declaration that the fact agreed upon is proven, and a valid stipulation must be enforced according to its terms. Therefore, for a stipulation to be enforceable it must be valid." *Commonwealth v. Perrin*, 291 A.3d 337, 345 (Pa. 2023). Generally speaking, parties to a case may file stipulations and be bound by them as the law or facts of the case with regard to all matters *affecting them*. *Id.*; *George A. Fuller Co., Inc. v. City of Pittsburgh*, 327 A.2d 191, 194 (Pa. 1974). However, parties may not stipulate in a fashion that affects the jurisdiction or prerogatives of the court, which includes a stipulation to the invalidity of statutes or ordinances. *George A. Fuller Co.*, 327 A.2d at 194. Courts disregard such stipulations because they involve "matters of public interest transcending the rights of the litigants involved." *Id.* (citation and quotations omitted). "[C]ourts should generally willingly consider factual stipulations proposed by the parties[,] but courts nevertheless "retain an important role in overseeing the administration of the judicial process and cannot be relegated to a mere rubber stamp for the parties." *Perrin*, 291 A.3d at 334-35. In that vein, parties may not stipulate to issues of witness credibility in an attempt to bind a court, as witness credibility is a matter within the sole province of the factfinder, who may

believe all, part, or none of the evidence. *Id.* at 345. Nor may parties stipulate to matters affecting the public interest in an attempt to control the court's disposition. *Id. See also* 83 C.J.S. Stipulations § 53 (2025) ("Parties cannot by stipulation affect any rights but their own. . . . [T]here is no binding effect on parties to the action who do not join in the stipulation, especially when the rights of those not made parties involve a matter of public interest."); 73 Am Jur. 2d Stipulations § 8 (2025) ("Parties to an action may not by stipulation affect third parties' rights or the rights of those not party to the stipulation."; "One who becomes a party to an action after the making of a stipulation is not bound thereby[.]").

Here, it is clear that the Stipulations cannot support summary relief, and the Majority erred in relying on them. The Stipulations were entered by non-adversarial parties and are saturated with agreements to conclusions of law, statements of Pennsylvania public policy, and citations to multiple "expert" testimonial declarations about disputed facts. The parties cannot bind this Court on questions of law, they certainly cannot stipulate to public policy, and the testimonial declarations, even if uncontroverted, do not bind this Court, which may reject them *in toto* if they are noncredible. This is true particularly given the significance of the public interests involved in this case and the fact that the disputing party is the Commonwealth itself, which is entitled to present evidence.

Thus, and most fundamentally, granting summary relief on Abortion Providers' claims without a hearing, without a record, and without any factfinding by this Court is a serious and injudicious error by the Majority. I would correct it before reaching any of the issues on the merits, and this alone is sufficient to deny summary relief.

II. Abortion Providers' Claims Fail in Any Event

A. The Coverage Exclusion is Narrowly Tailored to Further Three Compelling State Interests

To the extent that I can analyze Abortion Providers' claims without a record, they still fail. As to their claim under the ERA, the Majority begins where it must under *AR III* with a presumption that the Coverage Exclusion is an unconstitutional sex-based distinction to be independently analyzed by this Court under strict scrutiny review. (Majority Op. at 23-24.) What follows next is the Majority's three-pages-long "searching" judicial inquiry, *see AR III*, 309 A.3d at 891, which contains precisely two citations. The Majority first indicates that it will not "defer" to "legislative policy judgments." (Majority Op. at 24.) It then concludes that none of the interests identified by the Commonwealth are compelling, analyzing each interest in parallel fashion: pinning together a straw man and setting out on a scarecrow hunt.

First, the Majority criticizes the Commonwealth for too narrowly construing the interest in "fetal life" to include only "already-existing fetuses" and excluding the interests in "promoting human reproduction" and "preventing unplanned pregnancy." (Majority Op. at 24.) The Majority here makes the same mistake that Abortion Providers have made throughout this litigation: identifying the interests at stake in terms of birth control, which has nothing to do with this case. The only interest asserted by the Commonwealth and identified by the General Assembly to support the Coverage Exclusion is the interest in unborn child life *already conceived*, which, I believe, is compelling on its face. Averting unwanted pregnancy may very well be the private interest of an individual, but it has nothing

whatsoever to do with the Coverage Exclusion, which is aimed at protecting, not preventing, life.

The Majority then criticizes the Commonwealth for not establishing why it must "ensure that every pregnancy is carried to term" given that, according to the Majority, the real interest asserted by the Commonwealth is the "coercive use of women's bodies" to force women to "bear children against their will." (Majority Op. at 24) (citation omitted). First, where is that requirement anywhere in Pennsylvania law, let alone in the Coverage Exclusion? Abortions are legal in Pennsylvania and may be sought freely by any woman any number of times for any reason, subject to the limited (and valid for now) restrictions in the ACA.[10] The Commonwealth has never stated, argued, or enacted a policy ensuring that all pregnancies are carried to term. What is more, the suggestion that the Coverage Exclusion coerces a woman's use of her body by requiring her to make choices about where to spend her (and, maybe more importantly, Abortion Providers') money is untenable. Not a single aggrieved individual has come forward as a petitioning party alleging that she has been "coerced" into doing anything because she did not have access to Pennsylvania taxpayer dollars to pay for an abortion. To the extent that it is alleged to have occurred, it is one of many questions of fact that remain unresolved.

Next, the Majority analyzes the interest of "women's psychological well-being" and concludes, citing to *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (upholding under First Amendment attack an Ohio statute criminalizing the

[10] According to the Stipulations, approximately 35,000 abortions were performed in Pennsylvania in 2022 alone. (Stipulations, ¶ 30.)

possession of child pornography),[11] that the Commonwealth's interest in "protecting a competent adult from feeling regret for her free choices" is paternalistic and uncompelling. (Majority Op. at 25.)

The harms to women caused both by abortion and the unavailability of abortion remain hotly contested yet unadjudicated in this litigation. Abortion Providers and Respondents identify at length what they assert are the individual and collective harms caused when a woman cannot obtain funding for an abortion and is thereby "forced" to carry her pregnancy to term. *See, e.g.*, Stipulations, ¶¶ 30-55. The Commonwealth in response references, and presumably would present evidence establishing, the harms to women caused by abortion. *See, e.g.*, Commonwealth Br. at 19-20. The Majority sidesteps this dispute and determines that whatever psychological harms might be caused by having an abortion are a woman's problem, and the Commonwealth has no compelling interest in preventing them. The Majority also assumes, however, the reality of the alleged socio-political and financial harms caused when a woman purportedly is "coerced" by the Coverage Exclusion to forfeit her equal status in society, crucify her prerogative of self-determination, and accept motherhood as her primary function. Those *alleged* harms, which are the darlings of the Majority's analysis, are taken directly from the Stipulations[12] and tacitly accepted, of course without saying so. Once again, the Majority has neither identified the proper interest nor permitted the Commonwealth

[11] In *Osborne*, the United States Supreme Court held the statute at issue to be constitutional in part because it was not based on Ohio's "paternalistic interest in regulating Osborne's mind," but, rather, on Ohio's interest in protecting non-consenting minors from exploitation. 495 U.S. at 190.

[12] *See* Stipulations, ¶¶ 44-45.

to prove with evidence that the *asserted* interest—the health and life of a mother—is compelling.

Lastly, the Majority turns to the asserted interest of respecting the consciences of Pennsylvania taxpayers who, for ethical, moral, and religious reasons, do not want to subsidize abortions with their own money. (Majority Op. at 25.) True to form, the Majority first renames the interest as one "favoring one group's conscience rights over another" and then declines to recognize it as compelling because the Commonwealth has not said why that is so.

First, the right to conscience (unlike the right to "reproductive autonomy") is expressly recognized in the Pennsylvania Constitution. *See* Pa. Const. art. I, § 3 ("[N]o human authority can, in any case whatever, control or interfere with the rights of conscience[.]"). It also has foundations in the organic law of this Commonwealth stronger than perhaps anywhere else in the Union, *see* Commonwealth Br. at 20, and has been expressly enacted in this context in Section 3202(d) of the ACA, 18 Pa.C.S. § 3202(d) ("[I]t is the public policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to . . . subsidize . . . abortions."). So, for the Majority to say that the Commonwealth has not "established" why the right to conscience is compelling is a *non sequitur*—the Constitution establishes it as such for the Commonwealth, its people, and this Court, and the Majority has no prerogative to ignore it.

Secondly, the Majority has not identified the *competing* conscience rights involved here. I do not understand Abortion Providers' and Respondents' fundamental argument to be that the Coverage Exclusion violates the conscience rights of Pennsylvania citizens because they cannot access, or contribute public money to fund, abortions. Pennsylvania citizens are entirely free to (and do)

contribute vast sums to privately subsidize abortions performed by Abortion Providers. Thus, I am at a loss to understand how any purported competing conscience rights of abortion funding supporters renders the General Assembly's careful policy choice in Section 3202(d) to be less than compelling.

Third, even assuming that policy choices concerning competing rights to conscience were at issue, the balance to be struck in that context (which is itself a compelling government interest) is to be made by the General Assembly and not this Court, and in no event without a hearing.

As to narrow tailoring, the Majority concludes via a single, citationless paragraph that the interests it has identified are not furthered by the Coverage Exclusion as the least intrusive means for doing so. The Majority first concludes that the interest in "promoting carrying a pregnancy to term" can be furthered by greater investment in maternal and infant healthcare and childcare, which make delivering and raising a child cheaper. (Majority Op. at 26.) The problem with the Majority's point, of course, is that Abortion Providers and Respondents are not arguing that expectant mothers on Medical Assistance have no choice but to seek an abortion because they cannot afford to deliver and raise a child. Although that might be an important consideration, it is not the one involved here in determining whether the Coverage Exclusion—a funding restriction on abortions, not childbirth—is narrowly tailored to serve the government interest of promoting unborn child life. With three narrow exceptions for rape, incest, and the preservation of a mother's life, the Coverage Exclusion is designed to restrict public funding of abortions sought for *any* reason, including for the very reasons courted by the Majority and Abortion Providers: self-determination, financial stability, equal participation in society, and avoiding "coerced" childbirths, none of which have anything to do with

the financial strain of raising a child. Thus, although increased taxpayer funding for maternal care and childcare might promote an interest in easing financial hardships that *could* lead to abortions, that interest is not implicated here.

As to women's health and life, the Majority concludes that, assuming abortions do inflict harm on women, the state can "license, regulate, and educate around such care." *Id.* Because there has been no hearing and no record made, I have no idea what additional licensing, regulation, and education would do to prevent any infliction of physical and mental harm on women who obtain abortions. Again, the Coverage Exclusion is aimed at favoring childbirth over *taxpayer-funded* abortions, in part because of the established public policy recognizing the harms that abortions can inflict on women.[13] I understand there is a dispute about that, but the Majority has skirted its resolution by granting summary relief.

Moreover, the Coverage Exclusion already is accompanied by an array of other provisions in the ACA that, at least for the time being, regulate abortion practice and licensing and require the pre-procedure education of women as to abortion's potential harms. *See, e.g.*, 18 Pa.C.S. § 3202(a) (expressing the intent of the General Assembly to "foster the development of standards of professional conduct in a critical area of medical practice"); § 3202(b)(1), (4), (5) (recognizing interests in establishing standards of care for providers and informed consent of women); § 3205(a)(1), (2) (requiring that a provider inform a patient of, among other things, the nature of the procedure, its risks and alternatives, the availability of printed literature on abortion and its alternatives, and the availability of medical

[13] For just one example, Amicus Curiae Eight Women Harmed by Abortions filed a brief identifying complex and long-lasting harms inflicted on women who obtain abortions. They also describe the impact that the availability of public funding for abortions has on abortion numbers and abortion harm. *See* Eight Women Harmed by Abortions Amicus Br., at 3-12.

assistance benefits for prenatal care, childbirth, and neonatal care); § 3207(a) (authorizing the Department of Health to make rules and regulations regarding the performance of abortions and the facilities in which they are performed, including their procedures, staff, equipment, and laboratory testing requirements); § 18 Pa.C.S. 3208(a)-(c) (requiring the Department of Health to produce clearly-understandable printed materials in multiple languages designed to inform women of, among many other things, "objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure").

Despite the fact that these licensure, regulation, and education requirements already exist, the Majority contends that they are preferable to "taking an entire medical procedure off the table categorically for some women" who might benefit from it. (Majority Opinion at 26.) Again, and as I already have labored to emphasize, the Coverage Exclusion does nothing of the sort, and to the extent that Abortion Providers suggest that it does, they have not *proven* that fact in this Court.

Lastly, the Majority concludes, in a single sentence, that the Commonwealth has not established that the Coverage Exclusion is narrowly tailored to further the interest of "favoring one policy or conscience view over another regarding abortion," chiefly because alternatives such as a "tax choice" or "tax credit" program would be less intrusive. As to the Majority's proposed alternatives, I am unaware of the substance or contours of such tax programs, and there is no evidence in the record indicating how effective they would be in protecting the asserted right of every taxpayer in the Commonwealth to not subsidize abortions with their tax dollars.

In sum, then, as to Abortion Providers' ERA claim, the General Assembly first, and now the Commonwealth, has identified state interests in preserving the lives of unborn children, supporting and protecting women's lives and health from harms caused *both* by abortion and by childbirth, and preserving and protecting the consciences of Pennsylvania taxpayers who do not want to subsidize abortions with their tax dollars. When addressed head-on as they are identified, those interests are facially compelling and have expressly been identified as such by the General Assembly, by our Constitution, or both. The Majority neither deals squarely with these interests nor permits the Commonwealth to make its case establishing, with evidence, why the Coverage Exclusion is a narrowly-tailored means of *balancing* and furthering those interests.

This last point is critical. For purposes of applying strict scrutiny to the Coverage Exclusion, we ought not consider each interest discretely or in a vacuum. In enacting the ACA, the Coverage Exclusion particularly, the General Assembly carefully balanced all three interests, based on the evidence presented to it, so that *all three* would be furthered in proportion to their weightiness. To the extent that the Majority correctly identifies any of these interests, it analyzes them in simplistic fashion as if they were standalone policies. As they relate to the Coverage Exclusion, they are not.

In the end, I would deny summary relief on this claim, permit the Commonwealth an opportunity to present its case, and decide the issues on the merits with a fully developed record.

B. Equal Protection

As a preliminary matter, given its disposition of Count I, the Majority, acting judiciously, should not have reached the merits of Count II. The Majority

acknowledges the principle that, where a single issue is sufficient to dispose of a matter, a court ought not resolve other issues that are unnecessary to the disposition. *See* Majority Op. at 28 n. 15 (citing *Commonwealth v. Dunkins*, 263 A.3d 247, 253 (Pa. 2021)). That principle applies with double force where, as here, disposing of a second, nonessential claim requires the recognition of a new constitutional right. *See, e.g.*, *In re: Fiori*, 673 A.2d 905, 909 (Pa. 1996) (in a case concerning the removal of life-sustaining medical treatment, the Court declined to find constitutional bases for the right of "self-determination" where common-law rights were sufficient). Nevertheless, the Majority concludes that the "unique procedural posture" of this case warrants consideration of whether the Pennsylvania Constitution contains a right to "reproductive autonomy" that is impermissibly burdened by the Coverage Exclusion. (Majority Op. at 28 n.15.) More specifically, the Majority interprets the Pennsylvania Supreme Court's mandate in *AR III* to require consideration of this claim on remand. *Id.* It does not. Although the Pennsylvania Supreme Court set forth the analytical framework that now must apply to such claims, *AR III*, 309 A.3d at 947, it did not compel disposition of the equal protection claim on remand. *Id.* Because it is unnecessary and, like Count I, is being decided without evidence, a record, or factfinding, the Majority should not have reached it.

Having reached it, though, the Majority errs in its disposition. In *AR III*, the Pennsylvania Supreme Court overruled *Fischer*'s interpretation of article I, section 26 of the Pennsylvania Constitution and concluded that it affords greater protections than its federal counterpart. 309 A.3d at 945. The Court then adopted an analytical framework that "adheres to principles of neutrality," requiring that, "when a court is presented with a legislative classification that touches on the

exercise of a civil right and it is being challenged on the basis that it is discriminatory, the court shall determine whether the classification operates neutrally with regard to the exercise of that right. If it does not, the court shall then conduct a commensurate means-end review." *Id.* The Court explained that to "discriminate" under article I, section 26 means to lack neutrality, which the government must adequately justify. *Id.* The Court determined that the Coverage Exclusion creates a classification by differentiating between pregnant women receiving Medical Assistance who would seek abortions and those who pursue childbirth. Based on the individuals' choices, the former would not receive public funding for the abortion, but the latter would receive public funding for prenatal and postnatal care. *Id.*

The Majority begins, not with the text of article I, section 1 of the Pennsylvania Constitution, but by finding a right to "reproductive autonomy" and a "right to reproductive decision-making" presumably in article I, section 1, article I, section 28, and elsewhere where the equality of the sexes is "enshrined." (Majority Op. at 32-34). This right includes the "right to self-determination," the right to "make important reproductive healthcare decisions," a "gender-neutral right to make decisions without government intrusion [except payment] into those private matters that play a defining role in the course of a lifetime," and a right "to be left alone [except payment] to pursue happiness and enjoy liberty." *Id.* at 34. The Majority then concludes that recognizing this fundamental right is necessary to "restrict the government to its proper sphere [except funding], thus protecting our liberty" and imposing strict judicial scrutiny upon the government's "attempts to coerce reproductive choice," which choices "are the People's, not the government's [except funding]." (Majority Op. at 34.) Having recognized a fundamental constitutional

right, the Majority conducts a strict scrutiny analysis and concludes, for the same reasons as under Count I, that the Coverage Exclusion fails. (Majority Op. at 36-37.)

It is impossible to conduct a careful analysis of language that clearly has spun, in various forms, from social policy objectives and not from any text of the Pennsylvania Constitution that I can find. The Majority simply concludes that this right, whatever it is, exists because the Majority says it does. I cannot agree with that conclusion, even were I to peek with the Majority into the various "penumbras, formed by emanations," of various clauses of the Pennsylvania Constitution. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Although addressing *Roe v. Wade*, 410 U.S. 179 (1973), the United States Supreme Court's analysis in *Dobbs* has now proved prophetic in this Court's constitutional jurisprudence:

> For the first [152] years after the adoption of [article I, section 1], [the General Assembly] was permitted to address [public funding for abortion] in accordance with the views of its citizens. Then, in [2026], this Court [issued the Majority Opinion]. Even though the Constitution makes no mention of abortion, the Court held that it confers a [fundamental] right to obtain one [as an exercise of "reproductive autonomy"]. It did not claim that [Pennsylvania] law or the common law had ever recognized such a right, and its [analysis] ranged from the constitutionally irrelevant . . . to the plainly incorrect . . . . After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a [collection of rights] much like those that might be found in a statute enacted by a legislature.

597 U.S. at 225-27.

I am not convinced that a right to reproductive autonomy or anything like it exists in the Pennsylvania Constitution to afford anyone a *constitutional* right to obtain an abortion. I accordingly would conclude that there is no constitutional right, let alone a fundamental one, "touched" by the Coverage Exclusion's distinction between women on Medical Assistance who seek abortions and those who do not. In Pennsylvania, there is only a statutory right to obtain an abortion, and as a result, rational basis review applies to the Coverage Exclusion. That requires us to determine whether the distinction made in the Coverage Exclusion between the women who receive taxpayer funding and those who do not is rationally related to a legitimate state interest.

As noted by Justice Mundy in her concurring and dissenting opinion in *AR III*, to ask such a question is to answer it. 309 A.3d at 1004 (Mundy, J., concurring and dissenting). Women receiving Medical Assistance who seek an abortion are not similarly situated to those who seek to give birth, and each group either furthers or inhibits the Commonwealth's interest in favoring the protection of unborn children. That interest undoubtedly is at least "legitimate," particularly where, as here, the question involves the allocation of limited taxpayer funds. Because the Coverage Exclusion's restriction on taxpayer funding certainly is rationally related to the Commonwealth's interest in favoring unborn child life, it survives judicial scrutiny and is valid under article I, section 26 of the Pennsylvania Constitution. *Id.*[14]

[14] Notwithstanding, even if strict scrutiny were to apply, for the reasons I have already stated under Abortion Providers' ERA claim, I would conclude first that a hearing and factfinding is necessary to determine whether the interests asserted by the Commonwealth are compelling and whether the Coverage Exclusion is narrowly tailored to further those interests. As with Count I, the Majority similarly deprives the Commonwealth of the opportunity to make its case on Count II, which is plainly erroneous.

The Majority concludes to the contrary, noting that even if rational basis review applied, the Coverage Exclusion is not rationally related to the three stated Commonwealth interests of protecting unborn child life, protecting maternal health, and protecting the right of conscience of Pennsylvania taxpayers. Specifically, as to the protection of unborn child life, the Majority concludes that, because the Coverage Exclusion does not contain an exception for unborn children that will not survive childbirth, it is not rationally related to an interest in preserving "potential life." "Rather, it must be pursuing some other interest, or no coherent interest at all." (Majority Op. at 38.) The Majority here erroneously applies strict scrutiny, concluding that the Coverage Exclusion is not narrowly tailored because of the exceptions it does not make. But, even assuming that the Coverage Exclusion could prevent, or has ever once prevented, a mother from aborting a child she knows will not survive childbirth, that does not change the fact that the Coverage Exclusion's restrictions on public funding for *all abortions* is rationally related to its objective: to preserve unborn child life. The Majority's analysis also is based on an entirely unjustified and, frankly, insulting assumption: that an unborn child's life, the vitality of which will end prior to or during childbirth, has no present value worthy of being protected by the Coverage Exclusion. Many aggrieved Pennsylvania parents who have simultaneously planned births and funerals for their unborn children would disagree.

Second, as to women's health, the Majority concludes that, even assuming the Commonwealth could prove with evidence that abortion causes harm to women, Abortion Providers have asserted in the Stipulations that carrying pregnancies to term has caused medical harm to women, including those who have been "coerced" into carrying their pregnancies to term by the Coverage Exclusion.

(Majority Op. at 38-39.) First, and again, the Commonwealth did not join, and is not precluded from making its case because of, the Stipulations, which in any event do not bind this Court for purposes of summary relief. Second, and again, neither the Stipulations nor anything else in the filings before us have *established* that the Coverage Exclusion has ever coerced anyone into doing anything, let alone forced a woman to carry to term a pregnancy from which she suffered medical harms. Third, the Majority agrees with Abortion Providers that it is "irrational" to exclude public funding for abortions without exceptions for unborn children with severe or fatal abnormalities to further a government interest in "encouraging those people to stay pregnant against their will." (Majority Op. at 39) (citing Abortion Providers' Br. at 46). This, once again, is strict scrutiny "narrow tailoring" analysis utilizing a straw man government interest and what is likely (although we do not know because we have no facts) a *de minimis* number of exceptional cases.

Third, in discussing the right of conscience, the Majority claims to not really know what "conscience" means in this context, but nevertheless construes it as religious belief, the favoring of which "seems like" a violation of the federal Establishment Clause.[15] (Majority Op. at 39.) The Majority then posits that, if the interest involved is a "content-neutral" interest in protecting the "conscience rights of all similarly situated taxpayers who oppose government use of their tax payments for objectionable things," the Coverage Exclusion is irrationally narrow. *Id.* (emphasis removed).

Preliminarily, the Establishment Clause has not been asserted in this case and is irrelevant to our analysis. As to the actual conscience interest involved here, it is not a generic interest in protecting taxpayers from funding anything they

[15] U.S. Const. amend. I (stating, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

find "objectionable." Rather, it is a recognized interest in protecting the longstanding moral and ethical objections that many people, as expressed by the General Assembly in the ACA, lodge generally to the termination of an unborn child's life and particularly to the funding of it with their own money. The Coverage Exclusion precisely furthers that interest and is rationally related to it, notwithstanding that it does not (1) allocate funding for abortions that would further certain factually undefined and unestablished interests in maternal "health" or (2) deal with fetus nonviability. (Majority Op. at 39.) Pursuant to current Pennsylvania law, women are free to seek abortions in those contexts and pay for them with their own or Abortion Providers' money.

Moreover, and more fundamentally, if the General Assembly did not have the power to choose certain moral and ethical interests to favor or emphasize over others, especially as regards public funding, it could not legislate at all. That is of the essence of both the police and purse powers, which the People, by their Constitution, have granted to the General Assembly, not this Court. *See* Pa. Const. art, I, § 2; art. II, § 1; art. III, § 24; *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901, 946 (Pa. 2013).[16]

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[16] The Concurring Opinion discovers in Pennsylvania a "clear and unbroken line of the foundational legal documents establishing a fundamental right to personal freedom, equality, and tolerance" that "compels" the provision of taxpayer-funded abortion-on-demand. (Concurring Opinion, at 2.) The Concurring Opinion tethers this line to a scholastic history of the Quaker faith, to selected provisions of William Penn's *Charter of Privileges*, and to Penn's writings on the necessity of the "right of conscience" to the preservation of undefiled Christian worship of Almighty God, as understood and dictated by the authoritative Scriptures. *Id.* at 3-13. The Concurring Opinion then turns to an analysis of prior versions of the Pennsylvania Constitution, noting that those charters, like our current one, protected the right of any person to worship "Almighty God" according to the dictates of his own conscience. *Id.* at 13-18.

Although the Concurring Opinion does not thereafter discuss "equal protection," "reproductive autonomy," "compelling interests," or "narrow tailoring," it nevertheless concludes

(Footnote continued on next page…)

that the right, liberty, or freedom of conscience, however one might prefer to term it, "precludes the Commonwealth from constitutionally coercing a competent woman by statute to prevent her from receiving required medical care to end her pregnancy." *Id.* at 19. It opines elsewhere that, "[a]s it relates to the exercise of a woman's right to choose," "this inherent right to act according to one's own conscience, or sincerely held system of beliefs, in the pursuit of happiness" prohibits the Commonwealth from "bending the moral will of a competent woman" by not publicly funding unrestricted access to abortion-on-demand. *Id.* at 25-26. The Concurring Opinion both insists that this "construction of William Penn's intent" for Pennsylvania is evidenced by modern Quaker statements on sexuality and abortion and agonizes that the ACA discourages or precludes a "Quaker patient" from obtaining taxpayer-funded abortions that conform to her "faith." *Id.* at 19-23, 26.

I do not understand Abortion Providers to be arguing either that taxpayer-funded abortion-on-demand is religious worship or that we ought to interpret the Pennsylvania Constitution consistently with public statements from modern religious meetings, but I cannot make sense of the Concurring Opinion's comments other than as suggesting such things. As far as they go, however, the Concurring Opinion's carefully sieved provisions of the *Charter of Privileges* and former and current Pennsylvania constitutions clearly establish that any right of conscience, particularly as understood by William Penn, was inextricably tied to what Penn and the Quakers deemed to be faithful Christian worship and practice. Indeed, Penn's First Frame of Government, which is omitted from the Concurring Opinion, begins with Penn's recognition of God's absolute rule as the basis for all government. For authority, Penn cites at length to the Epistles of the Apostle Paul, namely, Galatians 3:19, 1 Timothy 1:9, and Romans 13:1-5. *See Preface, Frame of Government of Pennsylvania* (May 5, 1682), *available at* https://avalon.law.yale.edu/17th_century/pa04.asp#1 (last visited April 20, 2026). The Concurring Opinion ironically characterizes Penn's attitudes in this regard as being in "stark contrast" to the other "theocentric" (tr., "God-centered") colonies in early America. (Concurring Opinion, at 23.) Here, it seems to me, the Concurring Opinion's "clear and unbroken line" snaps before ever shoving off from Sussex.

Last, I agree lockstep with the Concurring Opinion that this lady doth indeed protest. But not too much, and not by way of any hyperbolic "gratuitous attack." My protestations that the Majority and Concurring Opinions have recognized rights and performed legal analysis untied to any clear constitutional or historical texts are neither extreme nor personal. They are sober. In my view, I have rightly and tightly pressed my colleagues to read the texts involved here, as one would responsibly read Shakespeare, according to the meanings intended by their drafters. They simply cannot "change meaning from age to age to comport with [ ] whatever the zeitgeist," today divined by four judges of this Court, "thinks appropriate." *See* Justice Antonin Scalia, Reading Law, Princeton University (December 10, 2012), *available at* https://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution (last visited April 20, 2026).

III. Conclusion

On remand, this Court was responsible for properly *hearing* and deciding Abortion Providers' claims in our original jurisdiction, which necessarily required our affording the Commonwealth an opportunity to make its *case*, not just file a brief. I do not believe we have fulfilled that responsibility, in no small part because of the magnitude of the issues presented here.

Worse still, the Majority decides an unnecessary constitutional question by creating a new fundamental right that has no definition, no contours, no practical applicability, and no textual support in the Pennsylvania Constitution. If the People desire such a right, they freely may amend their constitution.[17] This Court may not.

I would deny summary relief, schedule a hearing, and decide Abortion Providers' claims with the development of a factual record and factfinding. Even without a hearing and on the record as it currently stands, I still would conclude that the Coverage Exclusion does not violate the Pennsylvania Constitution because it furthers compelling state interests and is narrowly tailored to suit that purpose.

I dissent.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

Judge Covey and Judge Wallace join in this Dissenting Opinion.

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[17] Article I, section 2 of the Pennsylvania Constitution provides:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

Pa. Const. art. I, § 2.