

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ALLEGHENY REPRODUCTIVE HEALTH CENTER <i>et al.</i>,	:	
	:	
	:	
Petitioners	:	
	:	
v.	:	No. 26 M.D. 2019
	:	
PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES <i>et al.</i>	:	
	:	
	:	
Respondents	:	

NOTICE TO PLEAD

TO: ALLEGHENY REPRODUCTIVE HEALTH CENTER *et al.*

You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof or such other time as the Court prescribes, or judgment may be entered against you.

Date: April 16, 2019

/s/ Matthew J. McLees
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Counsel for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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CENTER *et al.*, :
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**PRELIMINARY OBJECTIONS TO
PETITION FOR REVIEW IN THE NATURE OF
AN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

All Respondents, through their counsel, hereby submit the following
Preliminary Objections:

FIRST PRELIMINARY OBJECTION - DEMURRER

1. Petitioners seek a declaratory judgment that the statutory prohibition on expending state or federal funds for abortion, except in specified limited circumstances, at 18 Pa. C.S. § 3215(c) & (j), and its implementing regulations at 55 Pa. Code §§ 1147.57, 1163.62, 1221.57 (“abortion funding coverage ban”), are unconstitutional under the Pennsylvania Constitution; an order enjoining

enforcement of the abortion funding coverage ban; and such other relief as the Court deems just and proper.

2. In Count I, Petitioners claim that the abortion funding coverage ban improperly discriminates against women based on their sex without sufficient justification and, as enforced and administered by the Respondents, violates women's constitutional right to equality of rights under the law, as guaranteed by Article I, Section 28 of the Pennsylvania Constitution. Petition for Review at ¶ 92.

3. In Count II, Petitioners allege that the abortion funding coverage ban operates to discriminate singularly against women who seek abortion-related health care services by denying them coverage under Pennsylvania's Medical Assistance program and, as enforced and administered by Respondents, discriminates based on the exercise of a fundamental right under the equal protection principles of Article I, Sections 1 and 26, and Article III, Section 32 of the Pennsylvania Constitution. Petition for Review at ¶ 96.

4. In *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), the Pennsylvania Supreme Court held that the abortion funding coverage ban does not violate the constitutional provisions on which Petitioners base their claims.

5. In accordance with Section 204(a) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a), the Pennsylvania Office of Attorney General issued an opinion in which it concluded that *Fischer* is a "controlling decision from a court

of competent jurisdiction,” that the abortion funding ban coverage is therefore constitutional, and that *Fischer* is binding upon the Department of Human Services. *See* Letter from Jonathan Scott Goldman, Executive Deputy Attorney General, to Teresa Miller, Secretary, Pennsylvania Department of Human Services, February 19, 2019, attached hereto as Exhibit “A.”

6. Because *Fischer* is controlling precedent that this Court lacks the authority to overrule, Petitioners have failed to state a claim upon which relief may be granted.

SECOND PRELIMINARY OBJECTION - LACK OF STANDING

7. Petitioners are numerous non-profit and for-profit providers of reproductive health care services throughout the Commonwealth of Pennsylvania. *See* Petition for Review at ¶¶ 2-32.

8. None of the Petitioners is an individual seeking abortion services who is receiving or eligible for Medical Assistance.

9. A party that files suit must establish as a threshold matter that it has standing to maintain the action. *See, e.g., Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 235, 639 Pa. 521, 533 (2017) (citation omitted). To establish standing, a party must demonstrate that it has been aggrieved by establishing that it has a substantial, direct, and immediate interest in the outcome of the litigation. *Id.*; *see*

also *Scarnati v. Wolf*, 135 A.3d 200, 207 (Pa. Cmwlth. 2015) (party lacks standing if not sufficiently aggrieved by challenged action).

10. To establish a “direct” and “immediate” interest, the party must show that the matter complained of caused harm to the party’s own interest that is within the zone of interests protected by the statutory or constitutional guarantee in question. *See, e.g., McConville v. City of Philadelphia*, 80 A.3d 836, 842 (Pa. Cmwlth. 2013) (citation omitted). A party generally has no standing to attempt to vindicate the alleged constitutional rights of third parties. *See, e.g., Philadelphia Facilities Mgmt. Corp. v. Biester*, 431 A.2d 1123, 1131 (Pa. Cmwlth. 1981).

11. Petitioners seek to sue “on behalf of their patients who seek abortions and who are enrolled in or eligible for Medical Assistance, but whose abortions are not covered” because of the abortion funding coverage ban. Petition for Review at ¶ 39.

12. Petitioners also allege that the abortion funding coverage ban harms them because it “forces them to divert money and staff time . . . to help Pennsylvania women on Medical Assistance who do not have enough money to pay for their abortion.” Petition for Review at ¶ 84.

13. Petitioners lack standing to challenge that the abortion funding coverage ban violates Article 1, Section 28, Article I, Sections 1 and 26, and

Article III, Section 32 of the Pennsylvania Constitution on behalf of their patients, who are not parties to this action.

14. Petitioners also lack standing to sue on their own behalf because they allege harm to an interest that is not protected under Article 1, Section 28, Article I, Sections 1 and 26, or Article III, Section 32 of the Pennsylvania Constitution.

WHEREFORE, the Preliminary Objections should be sustained and the action dismissed.

Respectfully submitted,

/s/ Matthew J. McLees

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/s/ Doris M. Leisch

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JOSH SHAPIRO
ATTORNEY GENERAL

February 19, 2019

Teresa D. Miller, Secretary
Pennsylvania Department of Human Services
P.O. Box 2675
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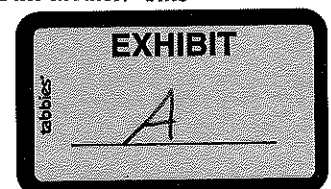
Dear Ms. Miller:

In accordance with Section 204(a) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a) (the “CAA”), which allows Commonwealth agencies to seek a binding opinion on a matter arising in connection with the exercise of the official powers or duties of the agency, you requested a legal opinion on behalf of the Pennsylvania Department of Human Services (“DHS”) concerning the constitutionality of Section 3215(c) of the Pennsylvania Abortion Control Act, 18 Pa. C.S.A. §3201 *et. seq.* (the “Act”), which prohibits the expenditure of Medical Assistance funds on elective abortion services.¹ After careful review, we conclude that, at the present time, Section 3215(c) is constitutional. As such, DHS is bound to follow it.

When providing legal advice to a Commonwealth agency, Section 204(a)(3) of the CAA requires the Attorney General “to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.” 71 P.S. § 732-204(a)(3). While the concept of a “controlling decision by a court of competent jurisdiction” is not predisposed to precise definition, here, a 1985 Pennsylvania Supreme Court case, *Fischer v. Department of Public Welfare*, 509 Pa. 293 (1985), governs the exact legal question you have posed. In *Fischer*, the appellants contended the Act’s funding restriction violated the following Articles of the Pennsylvania Constitution: (1) the equal protection guarantees in Article I §1 and Article III §32, (2) the nondiscriminatory provision in Article I §26, and (3) the Equal Rights Amendment in Article I §28.² *Fischer* at 299.

¹ The Act authorizes the expenditure of funds only for abortions necessary to prevent the death of the mother or in cases of pregnancy as a result of rape or incest. 18 Pa. C.S.A. §3215(c). “Elective abortion services” are abortions that are not performed to either avert the death of the mother or terminate pregnancies resulting from rape or incest.

² The appellants in *Fischer* did not raise any federal Constitutional claims; rather, they argued the Court should interpret the Pennsylvania Constitution more expansively than the United States Supreme Court had interpreted the federal Constitution. *Fischer* at 304. The United States Supreme Court had previously ruled in *Harris v. McRae*, 448 U.S. 297 (1980), that a federally enacted abortion funding restriction, the Hyde Amendment, was constitutional. In a separate case, *Williams v. Zbaraz*, 448 U.S. 358 (1980), the United States Supreme Court also upheld the ability of a state to enact a statute limiting abortion funding to where abortions were necessary to prevent the death of the mother. This federal jurisprudence has not changed in the intervening years.



For the equal protection claims, the appellants argued that the Court should find either that abortion was a fundamental right or that indigent women constituted a suspect classification, such that a strict scrutiny analysis would have to be applied. *Id.* at 305. In the alternative, they argued that the Act failed even a rational basis test. *Id.* The appellants also contended that, when the state limited Medical Assistance funding to women who elected to continue pregnancy or whose lives were in danger, it discriminated against other women who elected to have an abortion. *Id.* at 310. Finally, the appellants claimed that the creation of a statutory classification distinguishing between pregnant women who chose to give birth and those who chose to have an abortion infringed upon the Equal Rights Amendment. *Id.* at 312.

The Pennsylvania Supreme Court held in *Fischer* that the Act implicated neither a fundamental right³ nor a suspect class.⁴ *Fischer* at 307. It, therefore, applied a rational basis test, noting this was “the standard by which we have traditionally measured distinctions within government benefit programs.” *Id.* at 309. Under that standard, the Court held that the Act accomplished a legitimate governmental interest of preserving potential life in a manner that was not arbitrary or unreasonable. *Id.*

The Court further rejected the appellants’ argument that the non-discrimination clause in Article I §26 created greater guarantees than the equal protection provisions. *Fischer* at 310-311. It did not define a new substantive civil right but instead “made more explicit the citizenry’s constitutional safeguards not to be harassed or punished for the exercise of their constitutional rights.” *Id.* at 311. According to the Court, the Act did not punish women for exercising their right to choose an abortion – it merely “decided not to fund that choice in favor of an alternative social policy.” *Id.* at 312.

The Court also held that the Equal Rights Amendment afforded no relief because the fact that the Act affected only women did not necessarily entail discrimination on the basis of sex. *Fischer* at 314. Indeed, the Court found the decision to carry a fetus to term so unique that there was no corresponding condition in men and no analogy to situations where distinctions were based exclusively on gender stereotypes. *Id.* at 315.

Fischer is directly on point here and is still good law. It is also binding precedent from the highest court with jurisdiction over the issue. Put otherwise, *Fischer* is “a controlling decision from a court of competent jurisdiction.” 71 P.S. §732-204(a)(3). Therefore, Section 3215(c) of the Act is constitutional.

That said, our research has also uncovered a separate case on this issue that is presently pending before the Commonwealth Court of Pennsylvania. That matter is *Allegheny Reproductive Health Center, et al. v. Pennsylvania Department of Human Services, et al.*, 26 MD 2019 (Pa. Cmwlth.). In *Allegheny Reproductive Health Center*, the Petitioners seek reconsideration of *Fischer*, arguing that *Fischer* was incorrectly reasoned at the time and “goes against recent developments in Pennsylvania law with respect to independent interpretations of our state

³ The Court construed the “right” to be that of having “the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights” – a right not found in the Pennsylvania Constitution. *Id.* at 307.

⁴ The Court declined to consider financial need alone as identifying a suspect class for equal protection analysis. *Id.*

Teresa D. Miller, Secretary

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constitution....” See Complaint page 2. While our research has not revealed any intervening Pennsylvania case law overruling or abrogating *Fischer*, it is conceivable that, in deciding an eventual appeal in *Allegheny Reproductive Health Center*, the Pennsylvania Supreme Court could ultimately modify or overturn *Fischer* as the Petitioners in *Allegheny Reproductive Health Center* have requested. Unless and until that time, however, *Fischer* remains the controlling authority on this issue and is binding upon DHS.

In accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you may rely on the advice set forth in this Opinion and shall not in any way be held liable for doing so.

Sincerely,



JONATHAN SCOTT GOLDMAN
Executive Deputy Attorney General

C: Gregory G. Schwab, Deputy General Counsel
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CERTIFICATE OF COMPLIANCE

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.

Date: April 16, 2019

/s/ Matthew J. McLees

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 Respondents :

CERTIFICATE OF SERVICE

I hereby certify that I today served a copy of the foregoing Preliminary
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