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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 26 MD 2019

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ET AL.,

Petitioners,

v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, ET AL.,

Respondents.

On Consideration of Petitioners' Application for Summary Relief

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Brief of the American Center for Law & Justice and Judicial Watch, Inc. as *Amici Curiae*

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Statement of the Interest of *Amici Curiae*

The American Center for Law and Justice is a non-profit organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. The ACLJ regularly represents parties, presents oral argument, and submits amicus curiae briefs before the Supreme of the United States and various federal courts involving abortion and constitutional law. *See e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); and *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

The ACLJ submits this Brief of *Amici Curiae* under 210 Pa. Code R. 531. The proper resolution of this case is a matter of utmost concern to the ACLJ – and its supporters – because it is opposed to abortion and taxpayer subsidization of abortion. The ACLJ writes this brief on its own behalf, and on behalf of over 300,000 of its supporters, over 10,000 of whom are Pennsylvania residents, who are not only opposed to abortion, but also opposed to Pennsylvania using its tax dollars to fund abortion.

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and

fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs and lawsuits related to these goals in both state and federal courts.

Judicial Watch seeks to join the ACLJ and submit this Brief of *Amici Curiae* because of the threat to the doctrine of separation of powers present in this case. The possibility that powerfully connected groups with an enormous financial interest can manipulate the judiciary in order to bypass the legislative branch and access public funds as they desire threatens the constitutional process and puts Pennsylvania's system of government in danger.

Pursuant to 210 Pa. Code R. 531(b)(2), *amici curiae* state that no person or entity other than the *amici curiae*, their supporters, or counsel have (1) paid in whole or in part for the preparation of the *amici curiae* brief or (2) authored in whole or in part the *amici curiae* brief.

ARGUMENT

I. The Commonwealth of Pennsylvania Not Only has the Right to Favor Childbirth Over Abortion, but It has an Interest in Protecting Fetal Personhood and the Life of the Unborn.

In its decision in this case, the Supreme Court of Pennsylvania has endangered longstanding statutes and caselaw that clearly define Pennsylvania's interest in protecting fetal personhood and the right to use state funds to further this interest. Although this case is not about the right to an abortion, the Pennsylvania Supreme Court thwarted the legislative process and interpreted the Abortion Control Act to be

discriminatory against women. The Commonwealth now must overcome a presumption that its interest in protecting preborn life is compelling. While regrettable that the Commonwealth must overcome this hurdle, it does so easily, as its interest in protecting preborn life and favoring birth over abortion is one that, even under *Roe*, court have found compelling and constitutional.

A. Pennsylvania has a Well-Established Right to Favor Childbirth Over Abortion and No Duty Whatsoever to Subsidize the Intentional Killing of a Human Life.

As Justice Mundy stated, "[this case] is about an alleged right to obtain taxpayer money to pay for [an abortion]" and not about the right to obtain an abortion. *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 2024 Pa. LEXIS 118, 375 (Pa. 2024). The court, in *Fischer*, unanimously decided that Pennsylvania has the right to favor childbirth over abortion and appropriately allocate taxpayer dollars accordingly. *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Pa. 1985). Notably, the Supreme Court of the United States has also emphasized the discretion that states retain to determine whether to subsidize abortion, even when the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), "found" a right to abortion within the Federal Constitution.

In 1977, four years after *Roe* was decided, the U.S. Supreme Court held that the Commonwealth of Pennsylvania could legitimately decide to refrain from subsidizing non-necessary abortions and still conform with Medicaid requirements.

Beal v. Doe, 432 U.S. 438, 446 (1977). The Commonwealth sought "to further this unquestionably strong and legitimate interest in encouraging normal childbirth." *Id.* The Supreme Court accentuated "that there is a reasonable justification for excluding from Medicaid coverage a particular medically unnecessary procedure[:] nontherapeutic abortions." Thus, the Commonwealth is free to choose whether to subsidize or not subsidize nontherapeutic abortions under Medicaid. *Id.* at 447.

The Supreme Court emphasized that its decision "l[eft] entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court." *Id.* at 447 n. 15. The Medicaid provisions grant "broad discretion on the States to adopt standards for determining the extent of medical assistance." *Id.* at 444.

Further, in *Maher v. Roe*, 432 U.S. 464 (1977), the Supreme Court was tasked with determining whether the equal protection clause requires states participating in Medicaid to pay for the costs of abortions. In its discussion of the impact or effect of *Roe* on the issue presented, the Supreme Court notably emphasized "[*Roe*] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474. Thus, subsidizing childbirth over abortion is legitimately within a state's

scope of authority. *Id.* at 479. Furthermore, the Court in *Mayer* emphasized that cases "uniformly, have accorded States a wider latitude in choosing among competing demands for limited public funds." *Id.*

Following the overturning of *Roe* by the U.S. Supreme Court's decision in *Dobbs*, there is no federal right to abortion, and the ability of the States to regulate abortion through legislation has only increased. There is, therefore, no need for this Court to do what the U.S. Supreme Court refused to do – force the Commonwealth to fund abortion. The legislature is fully capable of fulfilling its role by enacting or refraining from enacting abortion-related funding.

Not only has the U.S. Supreme Court acknowledged the ability of states of favor birth over abortion, but that same ability of Congress. For example, the Hyde Amendment, a federal restriction on abortion funding, mirrors the language of the Commonwealth's Abortion Control Act. In *Harris v. McCrae*, 448 U.S. 297 (1980), the Supreme Court held that the Hyde Amendment was constitutional, and further held that Medicaid does not require states to provide anything that Congress refused to subsidize. Thus, the Supreme Court emphasized Congress's role in the allocation of public funds to favor childbirth over abortion. Specifically, the Court held "even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which the federal

requirement is unavailable." *Id.* at 310. Moreover, "the Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. *Id.* at 315. Further, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316 (emphasis added).

The Supreme Court also upheld the constitutionality of analogous restrictions in the companion case of *Williams v. Zbaraz*, 448 U.S. 358 (1980). There, the Court found that a state is not obligated to fund medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. Just as Congress may constitutionally restrict abortion funding in the Hyde Amendment, it "follows, for the same reasons, that the comparable funding restrictions in the Illinois statute do not violate the Equal Protection of the Fourteenth Amendment." *Id.* at 369.

A state's interest in favoring childbirth is further echoed in the U.S. Supreme Court's opinion, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

> Nothing in the Constitution requires States to enter or remain in the business of performing abortions. Nor as appellees suggest, do private physicians and their patients have some constitutional right of access to public facilities for the performance of abortions.

Id. at 510. There, the U.S. Supreme Court held that a state could legitimately refuse to let its facilities or employees be used for purposes of abortions in the same manner

it can refuse to fund abortions. *See id.* at 509-10 ("Having held that the State's refusal to fund abortions does not violate *Roe v. Wade*, it strains logic to reach a contrary result for the use of public facilities and employees.").

Again, the U.S. Supreme Court reaffirmed these same principles when it upheld the denial of funding for abortion counseling in *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). Notably, the Court held that the government "has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion." *Id.* Further, in *Planned Parenthood v. Casey*, 505 U.S. 833, 916 (1992), Justice Stevens noted the ability of states to "promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments."

Here, the issue has been obfuscated by equating the right to an abortion *and* the right to have an abortion funded by the state. As explained above, federal courts have made clear that states have the right and ability to favor childbirth over abortion. Moreover, these U.S. Supreme Court decisions were made during a time when abortion was considered a cognizable right under the federal Constitution. The *Dobbs* case put the decision to enact legislation regarding abortion back in the hands of the states and there is no question this issue is directly addressed by the Abortion Control Act.

B. Pennsylvania Has a Longstanding Interest in Protecting Fetal Personhood and the Lives of Preborn Children.

The founding fathers, through the Declaration of Independence, recognized the importance of preserving human rights. As our founding fathers stated, "[w]e hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." Declaration of Independence, July 4, 1776 (emphasis added). The Pennsylvania Constitution echoes the Declaration of Independence's preservation of human rights and undeniably recognizes the "the inherent and indefeasible right [to] . . . enjoy[] and defend [] life and liberty." Pa. Const. § 1. As a Pennsylvania court has emphasized, "[c]onstitutions are to be revered, and enacted laws deserve respect, provided, of course, that their provisions do not clash with human rights." *In Interest of Tina K*, 390 Pa. Super. 94, 100, n. 2 (1989).

As the Pennsylvania Supreme Court stated long ago, "we do the best possible for human rights." *Downing v. McFadden*, 18 Pa. 334, 337 (1852). But here, the Pennsylvania Supreme Court has veered away from this principle replacing it with a system of "some human rights." Despite a longstanding state interest in protecting fetal personhood and the life of preborn children, the January decision furthers the Court's undermining of protections that the Commonwealth saw fit to put in place to protect the most vulnerable class of humans – preborn babies. The Abortion

Control Act itself and various laws established by the Pennsylvania legislature evidence that the Commonwealth values preborn life over abortion. As Justice Alito stated in *Dobbs*, "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Dobbs*, 597 U.S. at 300 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 729-730 (1963)).

Indeed, the Pennsylvania legislature places a great emphasis on defending the right to life. In the Abortion Control Act, the Pennsylvania Legislature clearly stated the Commonwealth's position on the right to life: "[T]he Commonwealth places a supreme value upon protecting human life." 18 Pa. Cons Stat. §3202(b). Further, the legislature ensured, "the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and further the public policy of this Commonwealth encouraging childbirth over abortion." 18 Pa. Cons. Stat. § 3202(c). Moreover, the Abortion Control Act goes further in defending the right to life by "respecting and protecting the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions . . . ." 18 Pa. Cons. Stat. § 3202(d). Accordingly, and pursuant to the legislature's value for human life, "[i]t 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 protect the right to life and health of the child subject to the abortion." 18 Pa. Cons Stat. §3202(a).

Even outside the context of abortion, Pennsylvania civil action statutes and caselaw all give way to the state's interest in protecting life. For example, the Pennsylvania wrongful death statute provides:

> [a]n action may be brought . . . to recover damages for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime. . .

42 Pa. Cons. Stat § 8301 (a). In a similar manner, the state's Survival Act states, "[a]ll causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant, or the death of one or more of the joint plaintiffs." 42 Pa. Cons. Stat. § 8302. When it comes to answering the question, who is an "individual" or who could bring one of these actions, wrongful death and survival actions were limited to children born alive. *See Scott v. Kopp*, 431 A.2d 959 (Pa. 1981); *Carroll v. Skloff*, 202 A.2d 9 (Pa. 1964). However, the Pennsylvania Supreme Court, in *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985), overturned these prior cases and held that wrongful death and survival actions extended to preborn children. Thus, the court promoted the state's interest in defending life and "recognize[d] that the child's wrongful death is a separate injury from that of the mother's. . . ." *Id.* at 1088. Further, Pennsylvania defends the right to life and promotes its interest in protecting the lives of unborn children by statutorily barring claims for wrongful birth and wrongful life. *See* 42 Pa. Cons. Stat. § 8305.

Moreover, the state's interest in protecting the life of unborn children can be seen in the Commonwealth's criminal code. Enacted in 1997 by the Pennsylvania legislature, the Crimes Against Unborn Children Act codifies the states interest in protecting unborn children. Specifically, the statute covers: (1) criminal homicide of unborn children (2) murder of an unborn child (3) voluntary manslaughter of an unborn child and (4) aggravated assault of an unborn child. 18 Pa. Cons. Stat. §§ 2603-2606.

Thus, the Commonwealth's interest in preferring birth over abortion and refusing to subsidize abortion should clearly pass the strict scrutiny standard.

II. Pennsylvania Courts Should be Wary of Constitutionalizing Abortion.

A. Moral and Societal Policy Issues Such as Abortion, are Better Suited for the Legislature Rather Than the Courts

When one reads the Constitution of this Commonwealth, it is quite obvious to anyone that no right to abortion, let alone this alleged right to "reproductive autonomy" appears anywhere within the document. *See Allegheny*, 309 A.3d at 1002 (the plurality would create an entirely new constitutional doctrine out of whole cloth, christening it 'reproductive autonomy,' which does not appear anywhere in the Pennsylvania Constitution's text or history."). The Pennsylvania Constitution clearly vests the General Assembly with its legislative authority. Pa. Const. Art. II, § 1. "Legislative power has been defined as the power to make, alter, and repeal laws." *Mt. Lebanon v. Cnty Bd. of Elections*, 368 A.2d 648, 649 (Pa. 1977). This includes

the constitutional power to determine what programs will be adopted in our Commonwealth and how they will be financed." *Shapp v. Sloan*, 391 A.2d 595, 604 (Pa. 1978). Accordingly, Pennsylvania "courts may not encroach upon the powers of the legislature." *Leahey v. Farrell*, 66 A.2d 577, 579 (Pa. 1949).

Every judge-made right or judge expanded right shifts power from the political branches and extinguishes the right of people of Pennsylvania to vote on or even influence extremely political questions, such as abortion. Courts "should be extremely reluctant to breathe still further substantive content into" the constitution "so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the [state] without constitutional authority." *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (citation omitted). The United States Supreme Court admonished this principle, and this Court should apply it full force:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. . . . [This] is inconsistent with the underlying principles of a responsible, functioning democracy. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.

Schuette v. BAMN, 572 U.S. 291, 312-13 (2014) (plurality).

Roe and *Casey* did just that, and that is one of the many reasons why the *Dobbs* decision overruled those cases. The Court in *Dobbs* noted and emphasized how *Roe*

was the "exercise of 'raw judicial power'" and "abruptly ended" state legislatures' duty of reviewing and/or changing state abortion laws. *Dobbs*, 597 U.S. at 228. Justice Kavanaugh echoed, "[b]y taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court's constitutional authority [and] gravely distorted the Nation's understanding of this Court's proper constitutional role." *Id.* at 343 (Kavanaugh, J., concurring).

The separation of powers principles that *Dobbs* restored are at stake here. *See id.* at 292 ("[T]he authority of to regulate abortion must be returned to the *people and their elected representatives*.) (emphasis added). The Pennsylvania Supreme Court has attempted to create a right out of thin air and this would shift the separation of powers that belies the decision in *Dobbs* and runs afoul to the principle that the Supreme Court of Pennsylvania has emphasized, that courts shall not interfere with the powers of the legislature. *See e.g.*, *Pa. State Ass'n of Jury Commissioners v. Commonwealth,* 78 A.3d 1020, 1032 (Pa. 2013) ("Under the principle of separation of powers of government, however, no branch should exercise the functions exclusively committed to another branch."

B. Finding a Right to an Abortion Opens Pennsylvania Courts to Pandora's Box and Would Set the Commonwealth's Judicial System on a Long and Tortuous Path

Not only did the decision in *Dobbs* restore separation of powers principles, but it also noted the "distortion of many important but unrelated legal doctrines."

Dobbs, 597 U.S. at 286. Constitutionalizing abortion inevitably changes many areas of the law. As Justice O'Connor emphasized, "Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) (internal citation omitted).

One of the distortions that evolved from out of the right to obtain an abortion, is that opposing abortion somehow discriminates towards women. The *Dobbs* court made clear that the "goal of preventing abortion," does not constitute "invidiously discriminatory animus' against women." *Dobbs*, 597 U.S. at 236. As a result, laws that regulate abortion deserve the same standard of review as other health and safety measures and not any heightened scrutiny. *Id.* at 237.

The Supreme Court emphasized in *Maher* that the individual seeking an abortion has no burden imposed on them by a state's decision to fund childbirth over abortion. *Maher*, 432 U.S. at 472 (1977). Accordingly, the Supreme Court explained:

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of [a state's] decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the [state] regulation.

Id. at 474. A state is not required to provide funding for an abortion simply because a woman cannot afford to pay for one herself.

Just as the Supreme Court faced decades of abortion related litigation when it invented the right to obtain an abortion, Pennsylvania courts are in danger of setting themselves on the same path, even though the legislature has repeatedly affirmed its interest in protecting preborn human life. For example, in the years since *Roe* and *Case*y were decided the U.S. Supreme Court has addressed:

1) Whether a state may require that only physicians provide abortions, *Connecticut v. Menillo*, 423 U.S. 9 (1975);
2) Whether parental and/or spousal consent must be obtained before an abortion, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976);
3) Whether doctors can be required to protect the life of a fetus who, "may be viable" both during an after an abortion, *Colautti v. Franklin*, 439 U.S. 379 (1979);
4) Whether informed consent requirements that include information on the medical risks of abortion, fetal development, alternatives to abortion, and a 24-hour waiting period, can be mandated, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).
5) Whether informed consent requirements on fetal development, abortion alternatives, and the medical risks of abortion, reporting of abortions, and

requiring that the physicians use the abortion method most likely to preserve the right of a viable child, can be mandated, *See Thornburgh*, 476 U.S. at 747.

Inventing a right to an abortion out of thin air would put this court and the Commonwealth's judicial system on a similar path and the courts will be required to answer these questions without relying on the text of Pennsylvania's Constitution. Having to decide these questions puts the power of the legislature in the court's hands and will inevitably politicize the judiciary and take the power away from the citizens and the elected officials of the state. The separation of powers principles that *Dobbs* restored have been completely undermined here. This judge-made expansion will now allow Pennsylvania judges to legislate abortion policy from the bench, one of the exact reasons that *Roe* and *Casey* were overturned.

CONCLUSION

For the foregoing reasons, the Amici and its members respectfully requests this Court to deny Petitioners' Application for Summary Relief.

Respectfully submitted this 16th day of September 2024,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that pursuant to Pa. R.A.P. 531 that this brief does not exceed 7,000 words.

Respectfully submitted this 16th day of September 2024,

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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.

Respectfully submitted this 16th day of September 2024,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties via PACFile.

Respectfully submitted this 16th day of September 2024

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