

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,

NOTICE TO THE COURT

Respondents Pennsylvania Department of Human Services, Valerie A. Arkoosh, MD, MPH, in her official capacity as Secretary of the Pennsylvania Department of Human Services, Andrew Barnes, in his official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Services, and Sally Kozak, in her official capacity as Deputy Secretary for the Office of Medical Assistance Programs in the Pennsylvania Department of Human Services (collectively, “the Department”) respectfully submit this notice to the Court regarding their position in this matter.

Consistent with the schedule entered by the Court on July 12, 2024, the Department will file a brief in response to Petitioners' application for summary relief on or before August 16, 2024.

In addition, the Department wishes to inform the Court that, after thoroughly reviewing the Supreme Court's January 29, 2024, decision in this matter, it has concluded that the provisions of the Abortion Control Act challenged by Petitioners violate the Pennsylvania Constitution.¹ The Department has likewise concluded that, under the framework set forth by the Supreme Court, it cannot advance a meritorious defense of those provisions.

While the Department remains bound by the statutory restrictions at issue in this case and therefore cannot consent to the relief Petitioners have requested, it intends to concede in its responsive brief that Petitioners are entitled to judgment in their favor.

The Department has reached this conclusion after a thorough review of the Supreme Court's decision and a careful analysis of the remaining issues in this litigation. In its January 29 decision, the Supreme

¹ *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 309 A.3d 808 (Pa. 2024).

Court reversed this Court’s judgment and overruled its previous decision in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985). It further set forth a framework for this Court to employ on remand in evaluating Petitioners’ claims that the Coverage Exclusion found at 18 Pa.C.S. § 3215(c), (j) violates the Equal Rights Amendment and the equal protection guarantees of the Pennsylvania Constitution. *See* 309 A.3d at 820, 947.

The Department has carefully studied the questions left unresolved by the Supreme Court’s opinion and concluded that Petitioners are entitled to judgment in their favor. The Department has previously argued that the Pennsylvania Constitution protects the fundamental right to reproductive autonomy, which includes the right to abortion, and it stands by that position.² In addition, the Department has determined that the Coverage Exclusion cannot satisfy the demanding means-end review

² *See* Supp. Br. for Appellees, at 2, *Allegheny Reprod. Health Ctr.*, 26 MAP 2021 (Nov. 25, 2022). (“Unquestionably, the Pennsylvania Constitution ‘has long provided a guarantee of reproductive health care rights independent of, and more expansive than, any protection provided by the United States Constitution’ and protects the fundamental right to abortion.”).

required by the Supreme Court.³ The Department has carefully considered the governmental interests asserted in the Abortion Control Act, *see* 18 Pa.C.S. § 3202, as well as other governmental interests that could be advanced in support of the Coverage Exclusion, and determined that none is sufficient to rebut the presumption of unconstitutionality that attaches to the Coverage Exclusion because it imposes a “a sex-based distinction.” *See* 309 A.3d at 891. Likewise, the Department has concluded

³ In discussing Petitioners’ claim that the Coverage Exclusion violates the Equal Rights Amendment, the Supreme Court described the appropriate test as follows: “[W]hen a statute is challenged as violative of Section 28 [the Equal Rights Amendment], a sex-based distinction is presumptively unconstitutional, and it is the government’s burden to rebut the presumption with evidence of a compelling state interest in creating the classification and that no less intrusive methods are available to support the expressed policy.” 309 A.3d at 891.

With respect to Petitioners’ allegation that the Coverage Exclusion violates the Constitution’s equal protection guarantees, the Supreme Court held that a court reviewing such a claim should “conduct a commensurate means-end review.” 309 A.3d at 945. Because the Coverage Exclusion interferes with the exercise of a fundamental right, it must satisfy strict scrutiny to pass constitutional muster. *See William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 458 (Pa. 2017).

To the extent there is any difference between strict scrutiny and the test the Supreme Court set forth for Equal Rights Amendment challenges, the Department has concluded that the Coverage Exclusion cannot satisfy either.

that the Coverage Exclusion cannot survive the exacting scrutiny required by the Constitution's equal protection guarantees.

The Department will explain the basis for its conclusions in more detail in its response brief. It is filing this notice to inform the Court that it has concluded that Petitioners are entitled to judgment in their favor on both counts and will so argue in its brief.

Finally, given the Department's position, it does not intend to oppose timely and reasonable requests to submit *amicus curiae* briefs in defense of the challenged provisions of the Abortion Control Act.

Dated: July 16, 2024

Respectfully submitted,

/s Matthew J. McLees

Matthew J. McLees (No. 71592)
Deputy Chief Counsel
Kenneth Serafin (No. 66481)
Chief Counsel
Camille Howlett (No. 319512)
Pennsylvania Department of
Human Services
Office of General Counsel
625 Forster Street
Health & Welfare Bldg.
Harrisburg, PA 17120
(717) 783-2800
mmclees@pa.gov

/s Michael J. Fischer

Michael J. Fischer (No. 322311)
Executive Deputy General Counsel
Aimee D. Thomson (No. 326328)
Deputy General Counsel
Governor's Office of General Counsel
Deputy General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
(717) 831-2847
mjfischer@pa.gov

Counsel for Respondents Department of Human Services et al.