IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 26 MAP 2021

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ET AL.
v.
PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, ET AL.

BRIEF OF AMICUS CURIAE EQUAL RIGHTS AMENDMENT PROJECT AT THE CENTER FOR GENDER AND SEXUALITY LAW AT COLUMBIA LAW SCHOOL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Equal Rights Amendment Project at Columbia Law School's Center for Gender and Sexuality Law ("the ERA Project") is a law and policy think tank established to develop research, policy papers, expert guidance, and strategic leadership on the Equal Rights Amendment ("ERA") to the U.S. Constitution, and on the role of the ERA in advancing gender-based justice. The ERA Project provides academic, legal, and policy expertise to support efforts to expand protections for gender-based equality and justice.

The ERA Project brings rigorous academic research to bear on, *inter alia*, the question of the meaning and scope of state and federal measures written to secure and advance sex equality. To that end, this brief describes how Pennsylvania's Equal Rights Amendment should be understood to invalidate the Pennsylvania Abortion Control Act's limit on state-funded health care as a matter of fundamental sex equality.

Professor Katherine Franke, James L. Dohr Professor of Law, Founding Director of the Center for Gender and Sexuality Law, and Faculty Director of the ERA Project, is among the nation's leading scholars and teachers working on sex-based equality. Her scholarship has been published in the *Yale Law Journal*, *Pennsylvania Law Review*, *Columbia Law Review*, *Stanford Law Review*, among other elite journals, and she has published two books tracing the connections between sex and race discrimination.

Ting Ting Cheng is the Director of the ERA Project. Before joining the ERA Project, she was a staff attorney at Legal Momentum, the Women's Legal Defense and Education Fund. Earlier, she was an attorney at the New York City Commission for Human Rights and a public defender and immigrant defense attorney at Brooklyn Defender Services.

Cheng was the Legal Director of the 2017 Women's March on Washington and served on the National Organizing Committee. She was a foreign law clerk to Justices Albie Sachs and Edwin Cameron of the Constitutional Court of South Africa. In addition, Cheng was a Fulbright Scholar to South Africa, where she received the Amy Biehl Award.

INTRODUCTION

Our nation's history is the story of a gradual repudiation of the notion of second-class citizenship or caste.[1] The meaning of full and equal civil status for all people has evolved over the United States's almost 250 years since its founding. This is particularly true for the idea of sex equality. Nineteenth century courts sought to protect women's safety and well-being by placing them in a cage rather than a pedestal, reflecting the common beliefs at the time as described in a notorious ruling of the United States Supreme Court: "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[2] Today, we hold a very different concept of sex equality and women's citizenship—one that not only embraces a commitment to formal equality between people regardless of their sex, but also repudiates outdated, deterministic stereotypes about women's roles as fulfilling the biological functions of motherhood and as caregivers in the home. So too have sex equality principles evolved to accommodate the ways in which gender-based stereotypes and norms burden not only women, but also men (insofar as they too must bear the weight of what it means to be "a real, masculine man"), and people with other gender identities who often suffer the discriminatory bias of those who judge people who do not conform to

[1] See Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1311 (1999).

[2] *Bradwell v. The State of Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J. concurring) (upholding Illinois's denial of a law license to a woman based on her sex).

traditional expectations of what it means to be a man or a woman. The U.S. Supreme Court has embraced the view that sex equality laws are designed, of course, to protect women, but also men who are burdened by "sex-specific and derogatory terms ... as to make it clear that the harasser is motivated by general hostility" toward men, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 80 (1998), and people who have been discriminated against on the basis of their gender identity, *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

Pennsylvania ratified the Equal Rights Amendment ("ERA") in 1971 to incorporate modern principles of sex equality into the fabric of the state's fundamental law. In so doing, Pennsylvania expressly disavowed legal measures that discriminate on their face on the basis of sex, that embrace outdated, stereotypic notions of women's proper role as wife and mother, and that undermine the very possibility of sex equality in the workplace and other aspects of public life. The Pennsylvania Abortion Control Act ("Coverage Ban") violates the state ERA on several ways: by funding different, and worse, health care services for women based on sex, and by embracing and perpetuating outmoded gendered stereotypes identity, role in society, and autonomy to make fundamental decisions about one's reproductive life. Even worse, the Coverage Ban functionally relegates low-income women and pregnant people generally to second class status. For these reasons, the Coverage Ban should be declared invalid.

ARGUMENT

The argument that follows will lay out the several ways in which bans on access to abortion amount to forms of sex discrimination.

I. The Coverage Ban Amounts to a Form of Disparate Treatment on the Basis of Sex That Violates the Equal Rights Amendment

Fundamental sex equality principles, as embodied by the Pennsylvania ERA, instruct that the state may not burden women's access to health care in ways that men are not similarly burdened. Supreme Court Justice Sonia Sotomayor summarized this principle succinctly last term: "This country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks," imposing "an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose." *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 585 (2021) (Sotomayor, J., dissenting) (citing *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)). As *amicus* explains more fully below, the state of Pennsylvania may not impose unjustified and dangerous restrictions on access to health care in ways that differentiate on the basis of sex.

For much of the history of the United States, federal and state laws were built upon a common belief that women and men were sufficiently different in kind that laws "protecting" the "weaker sex" were justified as proper reflections of women's inherent or natural difference from, if not inferiority to, men. The Supreme Court both embraced and relied upon this view in upholding laws that paternalistically denied women the right to work on terms equal to their male colleagues or to serve on juries: "a woman is, and should remain, 'the center of home and family life,'" and "'a proper discharge of [a woman's] maternal functions … justif[ies] [protective] legislation.'" *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (third alteration added) (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961), and *Muller v. Oregon*, 208 U.S. 412, 422 (1908)).

The Supreme Court explicitly rejected the "separate spheres" doctrine in 1971 when Ruth Bader Ginsburg, then a women's rights litigator, urged the Court in *Reed v. Reed* to develop a sex-based equal protection doctrine skeptical of such laws. 404 U.S. 71, 77 (1971). The Court

accepted this invitation, ruling that an Idaho law that created a statutory preference for men over women as administrators of estates amounted to a form of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. The Court ruled, "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Reed v. Reed*, 404 U.S. 71, 77 (1971). Ginsburg's "brief in *Reed* sought to demonstrate that Idaho's preference for male administrators was part of a much broader pattern of sex-role enforcement that associated men with the marketplace and women with the home." Cary Franklin, *The Anti-Stereotyping Principle In Constitutional Sex Discrimination Law*, 85 NYU L. REV. 83, 124 (2009).

Extending the equality principle secured in *Reed* to pregnancy discrimination was Ginsburg's next agenda. She prevailed in *United States v. Virginia*, after she had ascended to the Court as an associate justice. In a ruling that she authored that was joined by five other justices, her line of reasoning made clear that equal protection principles should apply with equal force to pregnancy-based classifications. Justice Ginsburg's landmark opinion recognized that pregnancy-based regulations, too, are sex classifications subject to heightened scrutiny under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515 (1996). In *Virginia*, the Court held that sex classifications cannot be justified by physical differences between men and women. The Court affirmed that the Constitution's equality guarantees extend to women as men's equals, regardless of any "inherent differences" between the sexes. Those "[i]nherent differences," the Court explained, "remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." *Id.* at 533-34 (citing *California Fed. Sav.* & *Loan Assn.* v. *Guerra*, 479 U. S. 272, 289 (1987)).

Repudiating the separate spheres doctrine once and for all, the Court in *Virginia* held that

the Constitution's guarantee of equal protection means that sex "classifications may not be used, as they once were … to create or perpetuate the legal, social, and economic inferiority of women." *Id*. at 534 (internal citation omitted). Seven years later Chief Justice Rehnquist confirmed that the sex equality protection in the Equal Protection Clause applied to laws regulating pregnancy. In *Nev. Dep't of Hum. Res. v. Hibbs*, the Chief Justice ruled that "differential [maternity and paternity] leave policies were not attributable to any differential physical needs of men and women." 538 U.S. 721 at 731 (2003).

Pennsylvania legal authorities have similarly embraced the position that state sex equality protections do, and must, include protections against pregnancy-related discrimination. Sources from the time of the Pennsylvania ERA's adoption show that the general legal understanding of sex discrimination included discrimination against pregnant women. The Pennsylvania Human Relations Commission guidelines in 1970 and 1971 described pregnancy discrimination as a form of sex discrimination. Pa. Human Relations Comm'n, *Guidelines on Discrimination Because of Sex,* 1(24) Pa. Bull. 707-08 (Dec. 19, 1970). The Pennsylvania Attorney General took a similar position when it stated in 1974 that discrimination against pregnant women constituted sex discrimination under the Human Relations Act. Pa. Op. Att'y Gen. 9, § 401(d)(2) (1974).

Only two years after the passage of the State ERA, the Pennsylvania Supreme Court held in *Cerra v. E. Stroudsburg* that a school district's termination of a pregnant employee constituted sex discrimination, explaining that "pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple." 299 A.2d 277, 214 (Pa. 1973).

The Pennsylvania Abortion Control Act ("Coverage Ban") prohibits use of Medical

Assistance Program ("Medical Assistance") funds to cover abortions outside of three narrow exceptions. 40 Pa. Cons. Stat. Ann. §§ 3501, 3502 (2013). While Medical Assistance provides comprehensive care to men without exceptions to any sex specific or reproductive health related care, it excludes abortion coverage for women and singles out abortion as a restricted medical service while covering pregnancy and childbirth-related healthcare. This disparate treatment in medical funding deprives women of their constitutionally protected right to control their reproduction and equal coverage of their right to reproductive health. This right is explicitly secured under the Pennsylvania Equal Rights Amendment, P.A. CONST. art. I, § 28 (1971).

Pennsylvania's ERA states that "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." P.A. CONST. Art. I, § 28 (1971). The Pennsylvania Supreme Court has interpreted the state's ERA as prohibiting all legal distinctions based on gender. In *Henderson v. Henderson*, the Supreme Court struck down a law that excluded men from receiving alimony and covered related fees during a divorce proceeding. 327 A.2d 60 (Pa. 1974). The Court expressed this "absolutist" approach to the ERA: "The thrust of the Equal Rights Amendment is to ensure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman." *Id.* at 62; see generally Phyllis W. Beck & Joanne Alfano Baker, *An Analysis of the Impact of the Pennsylvania Equal Rights Amendment*, 3 Widener J. Pub. L. 743 (1994).

Thus, the Coverage Ban amounts to a form of sex-based classification that clearly violates sex equality protection specifically found in Pennsylvania's Constitution, Art. I, § 28.

II. The Coverage Ban's Burden on Access to Abortion is Grounded in and Perpetuates Illegitimate Sex-Based Stereotypes in Violation of the Pennsylvania ERA and Fundamental Sex Equality Principles

In the early 1970s, when the U.S. Supreme Court first began to seriously examine the justiciability of sex-based equal protection claims under the Fourteenth Amendment, it understood that it was doing so in response to "arbitrary legislative choice[s]"[3] that reflected "a long and unfortunate history of sex discrimination,"[4] and "an attitude of 'romantic paternalism'"[5] grounded in "gross, stereotyped distinctions between the sexes."[6] These stereotypes were found either to "foster[] 'old notions' of role typing,"[7] further "archaic and overbroad generalizations,"[8] or perpetuate inaccurate and "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"[9]

As a result, the Supreme Court recognized an additional foundation upon which sex discrimination claims could rest, beyond a sex-based classification rule: "It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less."[10] This rule was even more fully embraced by the Supreme Court in *U.S. v. Virginia* when the Court ruled "generalizations about 'the way women are,' estimates of what is appropriate for *most women,* no longer justify denying

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[3] *Reed v. Reed*, 404 U.S. 71, 76 (1971).
[4] *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).
[5] *Id.*
[6] *Id.* at 685.
[7] *Craig v. Boren*, 429 U.S. 190, 198 (1976).
[8] *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).
[9] *Boren*, 429 U.S. at 198-99 (quoting *Stanton v. Stanton*, 421 U.S. 7 (1975)).
[10] *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

opportunity to women whose talent and capacity place them outside the average description." 518 U.S. 515, 550 (1996).

In addition to the rule that the state may not impose sex-based classifications, including classifications based on pregnancy, the principle of sex-based equality also prohibits lawmaking that is based on or perpetuates stereotypes about the proper roles and abilities of women and men. "The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women ... What it means to be discriminated against because of one's sex must be reconceived beyond biological sex as well. To the extent that the wrong of sex discrimination is limited to conduct or treatment which would not have occurred but for the plaintiff's biological sex, antidiscrimination law strives for too little." Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,* 144 U. Penn. L. REV. 1, 2-3 (1995).

Notably, in *Hibbs*, the U.S. Supreme Court held that Congress could enact the Family and Medical Leave Act to remedy and prevent inequality in the provision of family leave because historically, "ideology about women's roles" had been used to justify discrimination against women particularly when they were "mothers or mothers-to-be." 538 U.S. at 736 (citation omitted). *Hibbs* made clear that pregnancy-based regulations anchored in archaic stereotypes about gender roles can violate the Equal Protection Clause. As Chief Justice Rehnquist described, these laws were based on "the pervasive sex-role stereotype that caring for family members is women's work." *Id*. at 731. Discrimination is afoot when false or stereotypical differences are mistaken for real differences, and thereby similar cases are mistaken as dissimilar. Justice Blackmun similarly connected the denial of the full range of reproductive health care to sex-based stereotypes in *Planned Parenthood of Southeastern Pennsylvania v.*

Casey, 505 U.S. 833 (1992), the "assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause," 505 U.S. at 928 & n.4 (Blackmun, J., concurring in part). See also Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey*, In *Reproductive Rights and Justice Law Stories* (Reva B. Siegel, Melissa Murray, and Katherine Shaw eds., Foundation Press 2019) (describing the role of sex equality principles in academic and judicial discourse leading up to *Planned Parenthood v. Casey*).

These "women-protective" policy rationales echo the language used to justify 19th-century abortion bans that enforced marital duties of wives, ensured the reproduction of white women, and preserved the demographic character of the nation while supposedly protecting women's health.[11] For example, in an 1871 report on criminal abortions, the American Medical Association described women who chose to have abortions as "unmindful of the course marked out for her by Providence, [as] she overlooks the duties imposed on her by the marriage contract." D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 Transactions Am. Med. Ass'n 239, 241 (1871). One leading physician stated that "[i]nterference with Nature so that [women] may not accomplish the production of healthy human beings is a physiological sin of the most heinous sort," warning that avoiding their biological destiny would destroy women's health and social standing. *See* Horatio Storer, Why Not? A Book for Every Woman 37 (1866). Women were also deemed throughout history to be incompetent to make their own decisions about childrearing, existing to fulfill the central purpose that women are "psychologically constituted and for which they are destined by nature." *Id.* at 75. Ending a pregnancy would

[11] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. REV. 261, 280-323 (1992).

lead to hysteria for women, so the view goes, because women lacked the capacity to make one of the most important decisions in her life. See E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867).

The Pennsylvania Supreme Court has repeatedly held that discriminatory laws that rely on and perpetuate sex stereotypes are not permitted under the ERA. *See, e.g., Hartford Accident & Indem. Co. v. Ins. Comm'r of the Commonwealth*, 482 A.2d 542, 548 (Pa. 1984) (invaliding a discriminatory rule governing interest rates that was "predicated upon traditional or stereotypic roles of men and women"); *Adoption of Walker*, 360 A.2d 603, 605 (Pa. 1976) (striking down a distinction between unwed mothers and unwed fathers); *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974) (striking down discriminatory loss of consortium claims); *Commonwealth v. Santiago*, 340 A.2d 440, 445-46 (Pa. 1975) (striking different intent standards based on gender); *Commonwealth v. Butler*, 328 A.2d 851, 855-57 (Pa. 1974) (invalidating differential parole eligibility based on sex); *Butler v. Butler*, 347 A.2d 477, 480 (Pa. 1975) (invalidating sex discriminatory treatment in trust and property laws); *DiFlorido v. DiFlorido*, 331 A.2d 174, 180 (Pa. 1975) (striking property regulations predicated on sex stereotypes of married couples).

The public policy rationales that have been articulated to support the Coverage Ban are based on improper stereotypes about gender-based identities and roles in society. Pennsylvania legislators originally passed the Coverage Ban based on the justification that the state "favor[s] childbirth over abortion." Act of December 19, 1980, No. 239, 1980 Pa. Laws 1321. The policy justification later included protecting "the life and health of the woman subject to abortion and [] the life and health of the child subject to abortion." Abortion Control Act of 1982, 18 Pa.C.S. § 3201. *Fischer v. Department of Pub. Welfare*, 509 Pa. 293, 308 (1985)

When passing the Coverage Ban, Pennsylvania relied on outdated and impermissible sex stereotypes when it expressed its preference for "childbirth over abortion." Being coerced by state law to carry a pregnancy to term, and thus forced into parenthood conscripts the pregnant person into an ineluctably gendered-frame and narrative limiting who pregnant people are and can be.

The Coverage Ban further enforces harmful sex stereotypes by coercing pregnant people, especially the most marginalized and underserved women in the state who depend on Medicaid to cover their basic healthcare needs, into continuing an unwanted pregnancy and thus conforming to an outdated gendered destiny in the home raising children rather than in the workplace, the boardroom, the statehouse, or any other more "masculine" spheres of life.

The Coverage Ban is not only based on impermissible stereotypes about women's roles as wives and mothers, but also causes significant harm, which is directly contrary to the asserted policy rationale of protecting the life and health of the woman. Denying women on Medicaid their constitutionally protected right to reproductive freedom comes at the expense of women's health and wellbeing, their economic stability, their educational attainment, workforce participation, and self-realization. Rather than protecting women, the Coverage Ban's reliance on outdated sex stereotypes forces women on Medicaid to choose between continuing their pregnancies against their will and using money otherwise needed for basic survival in order to afford an abortion—in both cases causing severe financial instability and putting herself and her family in peril. The high cost of abortions causes women to either not obtain an abortion at all or attempt to meet the cost of an abortion in ways that have harmful consequences in other aspects of their lives: such as not paying rent or utilities, skipping car payments, reducing food intake, and borrowing money using costly "payday" loans at high interest. Far from protecting the life

and health of women, the Coverage Ban harms pregnant people seeking abortion access—especially Black and Latina women, who make up a disproportionate share of Medicaid enrollees.

III. The Ability to Effectively Control One's Reproductive Life is Essential to the Possibility of Equality in the Workplace and Elsewhere and as Such the Coverage Ban Violates the Pennsylvania Equal Rights Amendment

Long before her appointment to the U.S. Supreme Court, Ruth Bader Ginsburg was an advocate and scholar who recognized that the ability to control one's reproductive capacities was essential to workplace equality and indeed equal citizenship more generally. As Ginsburg argued, without the capacity to rationally plan or space parenthood, parents who bear the largest burden of childrearing—typically women—would be incapable of participating equally in the workplace, in politics, and in other contexts fundamental to robust citizenship. In this sense, access to contraception and abortion were instrumental to full equality across a range of contexts. This approach to sex equality rested on an underlying conception of sex discrimination that recognized that sex-based "classifications may not be used, as they once were…to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 534 (1996).

Beginning in the 1980s, scholarship surrounding sex equality considered the presence of sex discrimination in both the formulation and effects of abortion restrictions.[12] For example, Catharine MacKinnon linked abortion rights and women's equality through arguing that no

[12] Neil S. Siegel and Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 162-164 (2013) (https://scholarship.law.duke.edu/faculty_scholarship/2872/). (Examples of such scholarship include: Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991).

matter what decision is ultimately reached, a woman's reproductive decision-making, though difficult, is "a moment of power in a life otherwise led under unequal conditions which preclude choice in ways she cannot control."[13] Other scholars such as Professor Sylvia A. Law emphasized that legal restrictions on abortion interfere with women's equality rights because of their "devastating sex-specific impact."[14]

The United States Supreme Court acknowledged the equality principles that support the constitutional right to abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, the Court observed that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives" 505 U.S. 833, 835 (1992). More recently, Justice Ruth Bader Ginsburg, writing in dissent in *Gonzales v. Carhart*, stated that the abortion right "protects a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

The real-world impact of the Coverage Ban makes clear that a right to abortion access is a necessary condition for—and thus instrumental to—women's full equality. The Coverage Ban has been devastating to low-income women, harming their ability to participate equally in the wage labor market and other public functions essential to full citizenship.[15] In a state where around 85% of counties lack abortion facilities, the issue of abortion access is a challenge faced by many women.[16] For women with Medicaid coverage, paying for abortions comes at a

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[13] Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991). (https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7341&context=ylj).
[14] Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. REV. 955 (1984)(https://scholarship.law.upenn.edu/penn_law_review/vol132/iss5/8/).
[15] See generally Declaration from Colleen M. Heflin in Petition for Review in the Nature of a Complaint (2019), for *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 225 A.3d 902 (Pa. Commw. Ct. 2020).
[16] Guttmacher Institute, State Facts About Abortion: Pennsylvania, https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-pennsylvania#.

substantial cost to already strapped financial resources.[17] Women must face additional costs of long distance travel, lodging, childcare coverage, job disruptions and reduced income. Scraping funds together for poor women oftentimes result in delays in obtaining an abortion, which increase risks, complications, and the likelihood of more invasive procedures.[18]

The Coverage Ban puts abortion access out of reach for many low-income women and disproportionately impacts women of color, the LGBTQ community, immigrants, and young women.[19] Poor women in need of reproductive health care in Pennsylvania face overlapping barriers to health care, educational and economic opportunities, access to housing, job security, financial safety nets, and social and political equality.[20] For these women, the Coverage Ban's restriction on abortion access and its prohibitive cost present a barrier that is sometimes impossible to overcome.

Detailed studies demonstrate the harmful impact of restrictive abortion access laws. A University of California San Francisco study—called the "Turnaway Study"—shows that being denied an abortion and carrying an unintended pregnancy to term leads to significant negative

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[17] Heather D. Boonstra, *Insurance Coverage of Abortion: Beyond the Exceptions For Life Endangerment, Rape and Incest*, 16(3) Guttmacher Policy Review (2013) . https://www.guttmacher.org/gpr/2013/09/insurance-coverage-abortion-beyond-exceptions-life-endangerment-rape-and-incest.

[18] Sarah Roberts, Heather Gould, Katrina Kimport, Tracey Weitz, Diana Foster, *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24(2) Women's Health Institute Journal (2014). (See study at University of California, San Francisco in the *Women's Health Institute Journal*, noting that low-income women were more likely to cite cost as a reason to delay abortion procedures when compared to their wealthier counterparts (https://www.whijournal.com/article/S1049-3867(14)00004-8/fulltext); see also Guttmacher Institute, Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters (https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters).

[19] See Declaration from Colleen M. Heflin in Petition for Review in the Nature of a Complaint (2019), for *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 225 A.3d 902 (Pa. Commw. Ct. 2020). See specifically reference to *Declines in Unintended Pregnancy in the United States, 2008–2011*, New England Journal of Medicine, https://www.nejm.org/doi/full/10.1056/nejmsa1506575.

[20] PEW, Philadelphia's Poor: Experiences From Below the Poverty Line, (https://pew.org/2NyZSJG). (For discussion of access to economic safety nets within the family, see Colleen M. Heflin and Mary Pattillo, *Poverty in* the Family: Race, Siblings, and Socioeconomic heterogeneity," 35(4) *Social Science Research* 804 (2006) (https://www.sciencedirect.com/science/article/pii/S0049089X04000870).

physical, psychological, and economic outcomes for the women. A subsequent analysis of data from the Turnaway Study supports a link between obtaining a desired abortion and achieving both short- and long-term personal goals.[21] Additionally, a report from the National Latina Institute for Reproductive Health shows that one in four women on Medicaid are forced to carry their pregnancy to term due to the financial burdens of paying for an abortion out of pocket.[22] A study on abortions globally found that countries with highly restrictive abortion laws experience significantly more unsafe abortion procedures than other countries, resulting in a discriminatory burden on the safety of women as a result of the restriction.[23]

Increasingly, women who have abortions live in poverty. In 2014, half of all women who chose to end their pregnancies lived in poverty, double the amount from 10 years prior.[24] Coercing women into continuing their pregnancies can push these women further into poverty. Women who are denied abortions face more economic struggles than women who obtain

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[21] Ushma D. Upadhyay, M. Antonia Biggs, and Diana Greene Foster, *The effect of abortion on having and achieving aspirational one-year plans*, BMC Women's Health (2015) (https://link.springer.com/article/10.1186/s12905-015-0259-1).

[22] See UNIV. OF CALIFORNIA-SAN FRANCISCO, TURNAWAY STUDY, (last visited Oct. 1, 2021) (detailing a prospective longitudinal study examining the mental health, physical health, and socioeconomic consequences of unintended pregnancy), https://www.ansirh.org/research/turnaway-study; NAT'L LATINA INST. REPRODUCTIVE HEALTH, ¡SIN SEGURO, NO MÁS! WITHOUT COVERAGE, NO MORE: LATINXS ACCESS TO ABORTION UNDER HYDE 2 (2018). https://latinainstitute.org/sites/default/files/NLIRH_Hyde%20Amendment18_Eng_R3.pdf; see also Br. of Amici Curiae Birth Equity Organizations and Scholars in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 209 L. Ed. 2d 748 (May 17, 2021) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/193076/20210920174752687_19-1392bsacBirthEquityOrganizationsAndScholars.pdf; Br. Of Amici Curiae Cecelia Fire Thunder, National Indigenous Women's Resource Center, The Native American Community Board, and Additional Advocacy Organizations and Individuals in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 209 L. Ed. 2d 748 (May 17, 2021) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/192846/20210917173106773_NIWRC%20Main%20EFILE%20Sep%2017%2021.pdf.

[23] Bela Ganatra, Caitlin Gerdts, Clémentine Rossier, Brooke Ronald Johnson Jr, Özge Tunçalp, Anisa Assifi, *Global, regional, and subregional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model, The Lancet* (2017). (https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)31794-4/fulltext#articleInformation).

[24] See, e.g., Sabrina Tavernise, Why Women Getting Abortions Now Are More Likely to Be Poor, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html.

abortions, according to researchers at the University of California, San Francisco.[25] The ongoing pandemic and the resulting economic and public crisis heighten the pressures that the Coverage Ban imposes on underserved communities seeking abortion access. In addition to socio-economic harm, the lack of access to abortion care results in severe mental health consequences and may further perpetuate intimate partner abuse.[26]

Justice Thurgood Marshall, dissenting in *Harris v. McRae* (in which the United States Supreme Court upheld the Hyde amendment) described the federal coverage ban as a "form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution [that] marks a retreat from *Roe v. Wade* and represents a cruel blow to the most powerless members of our society." 448 U.S. 297 (1980) (Marshall, J., dissenting). Although Medical Assistance was created to protect the most under-resourced individuals from unexpected and emergency health issues, the Coverage Ban, far from its purported purpose of protecting the health and wellbeing of the pregnant woman, harms the very people Medical Assistance was designed to benefit.

By creating a tiered system of health care coverage for reproductive health care and creating a substantial barrier for access to abortion for low income and poor people, the Coverage Ban further entrenches sex inequality in violation of the ERA.

IV. Interpreting the State ERA to Invalidate the Coverage Ban Would Bring Pennsylvania into Alignment with Other States' Interpretation of State Constitutional Protections for Sex Equality

[25] Foster DG, Roberts SCM, and Mauldon J, *Socioeconomic consequences of abortion compared to unwanted birth*, (2012), https://apha.confex.com/apha/140am/ webprogram/Paper263858.html.

[26] see American Psychological Association, Abortion and Mental Health, (2008) https://www.apa.org/pi/women/programs/abortion.; Nancy Felipe Russo, *Abortion, unwanted childbearing, and mental health*, Salud Mental. 37, 283-289 (2014); Sarah CM Roberts, M Antonia Biggs, Karuna S Chibber, Heather Gould, Corinne H Rocca & Diana Greene Foster, *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, BMC Med 12, 144 (2014). https://doi.org/10.1186/s12916-014-0144-z.

High courts in several states have interpreted ERAs comparable to Pennsylvania's to prohibit bans on Medicaid coverage for abortion care. Notably, the New Mexico Supreme Court held that an agency rule barring the use of Medicaid fund for abortion is a form of sex discrimination in violation of its ERA, clarifying that "[i]t would be error … to conclude that men and women are not similarly situated with respect to a classification simply because the classifying trait is a physical condition unique to one sex." *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998).[27]

Similarly, a Connecticut regulation restricting the funding of abortions by the state Medicaid program was struck down under the Connecticut ERA. The Connecticut Supreme Court reasoned that excluding abortion from Medicaid coverage "flies in the face of the Medicaid program's admitted goals…and since that one exception also is a subject of a woman's constitutional rights, the regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion." *Doe v. Maher*, 40 Conn. Supp. 394, 448 (1986).

Many courts have upheld comprehensive Medicaid coverage for reproductive health care including abortion based on equal protection and other grounds. In *Right to Choose v. Byrne*, the New Jersey Supreme Court held that state restriction of Medicaid funds for only abortions to preserve a woman's life, but not her health, "violates the right of pregnant women to equal protection of the law" because the right to have an abortion is a fundamental right for all women, including women on Medicaid. 450 A.2d 925, 928 (N.J. 1982). Similarly, the Massachusetts Supreme Court found that the failure to pay for medically necessary abortions violated the due process clause of its state constitution. *Moe v. Secretary of Administration Finance*, 417 N.E.2d

[27] See N.M. CONST. art. II, § 18 ("Equality of rights under law shall not be denied on account of the sex of any person").

387 at 646-7 (Mass. 1981) (holding that once the state "chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference."). The Supreme Court of California affirmed its long-standing state constitutional principle that once benefits are conferred, it may not be done on "a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right." *Committee to Defend Reproductive Rights* v. *Myers,* 29 Cal.3d 252, 264, 625 P.2d 779, 172 Cal.Rptr. 866 (1981). And the Alaska Supreme Court held that the state must adhere to neutral criteria in distributing Medicaid coverage without "deny[ing] medically necessary services to eligible individuals based on criteria unrelated to the purposes of the public health care program" and discriminating based on the exercise of a constitutional right. *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska,* Inc., 28 P.3d 904, 915 (Alaska 2001).

As such, the court should find that Pennsylvania's Coverage Ban on funding for abortion amounts to a clear violation of the state's constitutional protections for sex equality, thus repairing the state's status as an outlier when it comes to the interpretation of modern sex equality principles.

CONCLUSION

By denying Medical Assistance for important and constitutionally protected reproductive health needs, the Coverage Ban imposes a significant barrier to fundamental reproductive choice, and this barrier is fundamentally rooted in a long history of outdated sex-based classifications, odious sex-stereotyping, and documented impediments to equal citizenship for all Pennsylvanians, regardless of their sex.

In this brief, *amicus*, scholars of sex equality generally and of measures such as the Pennsylvania Equal Rights Amendment in particular, offer the court several ways in which the

Coverage Ban violates fundamental sex equality principles. Through whichever path the court takes, the destination is unavoidable: the Coverage Ban violates the Pennsylvania Constitution's protections securing sex-based equality.

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CERTIFICATION OF COMPLIANCE

The foregoing Amicus Brief complies with the word count limitation under Pa. R.A.P. 531 and 2135. Excluding the cover page, table of contents, table of authorities, Proof of Service and any addenda, this Amicus Brief contains 6082 words. In preparing this certificate, the word count feature of Microsoft Word was relied upon.

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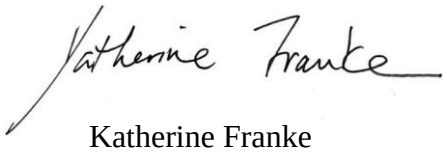

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 13th day of October, 2021, a true and correct copy of the foregoing Amicus Brief for Appellants was served in compliance with Pa.R.A.P.121.

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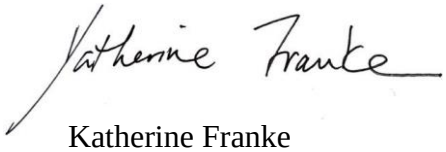

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