COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA 17120

JOSH SHAPIRO
ATTORNEY GENERAL

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA 17120
(717) 787-3391

February 19, 2019

Teresa D. Miller, Secretary
Pennsylvania Department of Human Services
P.O. Box 2675
Harrisburg, PA 17105

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 Sates 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 right[3] 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.*

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
Michelle A. Henry, First Deputy Attorney General
Amy M. Elliott, Chief Deputy Attorney General