STATE OF RHODE ISLAND **SUPERIOR COURT**
PROVIDENCE, SC.

Michael Benson, *et al.*,	:	
Plaintiffs	:	
	:	
v.	:	**C.A. No. 2019-6761**
	:	
Gina M. Raimondo, in her official capacity as Governor, *et al*.,	:	
Defendants	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The legal background for this case concerns the recently enacted Reproductive Privacy Act, Chapter 4.13 of Title 23, which codified *Roe v. Wade*, 410 U.S. 113 (1979); but despite this legislation serving as the vessel for this lawsuit, the over-arching principle concerns the General Assembly's constitutional authority to legislate and the Governor's constitutional authority to sign or veto such legislation. Here, the Plaintiffs misapply these constitutional principles, misinterpret the plain language of R.I. Const. Article I, Section 2, and incorrectly suggest that the repeal of R.I. Const. Article VI, Section 10 (the residual powers clause) somehow deprives the General Assembly of its plenary authority to legislate pursuant to Article VI, Section 2. The Plaintiffs bring a six-count complaint,[1] but when reduced to its essence, this lawsuit simply alleges that the

[1] Counts I, II, and III allege the Reproductive Privacy Act violated Article I, Section 2 of the Rhode Island Constitution. These allegations are premised on Plaintiffs' argument that Article I, Section 2 prohibits the General Assembly from *passing any law* that would grant or secure any rights relating to abortion or the funding thereof. Count IV alleges a violation of Article VI of the Rhode Island Constitution and appears to be premised on the allegation that the Reproductive Privacy Act is inconsistent with the Rhode Island Constitution. *See supra*. Count V contends that the Reproductive Privacy Act violates the Fourteenth Amendment to the United States Constitution since the Reproductive Privacy Act deprives unborn Plaintiffs of their status as a "person." Count VI seeks declaratory relief consistent with Count I through V. The Amended Complaint is attached as Exhibit 1.

General Assembly lacked the constitutional authority to pass the Reproductive Privacy Act and that in doing so, it violated the Rhode Island and United States Constitutions. The Plaintiffs seek declarations that the Reproductive Privacy Act is unconstitutional and ask this Court to enjoin its effect.[2] Because the General Assembly had the constitutional authority to pass the Reproductive Privacy Act, and the Governor properly signed that legislation into law, this Motion to Dismiss must be granted.

II. FACTUAL BACKGROUND

This case concerns two groups of Plaintiffs. Plaintiffs Benson, Rowley, and Doe (Group One) are residents and voters who claim that the General Assembly lacked the constitutional authority to enact the Reproductive Privacy Act. Based on their conclusion that the General Assembly lacked the constitutional authority to grant a woman the right to an abortion, Plaintiffs Benson, Rowley, and Doe contend that this right can only be conferred through a constitutional amendment requiring voter approval. *See* R.I. Const. Art. XIV, § 1. If given the opportunity, Plaintiffs Benson, Rowley, and Doe aver they would vote against a constitutional amendment codifying the right to choose. Amended Complaint, ¶ 3 (Benson), 13 (Rowley), 23 (Jane Doe). It is this alleged deprivation of the right to vote that Plaintiffs Benson, Rowley, and Doe contend give them standing to sue. Amended Complaint, ¶¶ 9, 10, 13, 20, 29, 30.

Plaintiffs (Group Two) consist of the unborn child of Plaintiff Rowley (Baby Roe) and the unborn child of Plaintiff Doe (Baby Doe). Both Baby Roe and Baby Doe claim that R.I. Gen. Laws § 11-3-4 confers certain legal rights of a "person" upon them (Baby Roe and Baby Doe) pursuant to Rhode Island law and the Fourteenth Amendment to the United States Constitution.

[2] Plaintiffs' Amended Complaint also seeks to enjoin the General Assembly's transmission of H5125B to the Governor for signature, but this relief is moot. Amended Complaint, p. 48-49.

Amended Complaint, ¶¶ 34, 35 (Baby Roe), ¶¶ 48, 49 (Baby Doe). It is the infringement of this alleged right to "personhood" that Baby Roe and Baby Doe contend gives them standing. Amended Complaint, ¶¶ 36-50. Lastly, Plaintiff Catholics for Life, Inc., is a domestic non-profit corporation, d/b/a "Servants of Christ for Life," whose purpose is "to advocate for, represent, and support the legal rights of those unborn, specifically, Baby Roe and Baby Mary Doe – and others similarly situated." Amended Complaint, ¶¶ 65, 66, and 69.[3] Catholics for Life's claims are derivative of Baby Roe and Baby Doe's claims.

On or about June 19, 2019, the Plaintiffs filed this lawsuit, seeking *inter alia* to temporarily and permanently enjoin the General Assembly from transmitting H-5125B (which later became the Reproductive Privacy Act) to the Governor for signature. At the time of filing this lawsuit, H-5125B was pending in the General Assembly. Contemporaneously, the Plaintiffs also moved for a temporary restraining order, *i.e.*, asking this Court (Long, J.) to enjoin the transmission of H-5125B to the Governor should that legislation pass the General Assembly. On June 19, 2019, the motion for a temporary restraining order was denied. Amended Complaint, p. 14. Later that same day and evening – June 19, 2019 – House Bill 5125B passed the General Assembly, was transmitted to the Governor, and signed into law. Amended Complaint, p. 14. This law, The Reproductive Privacy Act, codifies *Roe v. Wade* and provides, among other things, that "[n]either the state, nor any of its agencies, or political subdivisions shall: (1) Restrict an individual person

[3] Defendants are: Governor Raimondo, Senate President Ruggerio, Speaker Mattiello, Attorney General Neronha, House Clerk McCabe, Senate Secretary Ricci, John Doe House Clerk/Page, and John Doe Senate Clerk/Page. All Defendants are sued in their official capacity only. This memorandum is filed on behalf of all named Defendants, *i.e.*, Governor Raimondo, Senate President Ruggerio, Speaker Mattiello, Attorney General Neronha, House Clerk McCabe, and Senate Secretary Ricci (hereafter collectively "Defendants"). This memorandum is not filed on behalf of any John Does.

from preventing, commencing, continuing, or terminating that individual's pregnancy prior to fetal viability." R.I. Gen. Laws § 23-4.13-2(a)(2). Exhibit 2.

On June 25, 2019, Plaintiffs filed an Amended Complaint, challenging the constitutionality of the Reproductive Privacy Act. As further described, *infra*, Plaintiffs Benson, Rowley, and Doe contend that R.I. Const. Article I, Section 2 "specifically prohibits the General Assembly's unilateral passage of a new fundamental 'right' to abortion, 'or the funding thereof.'" Amended Complaint, p. 2. Additionally, Plaintiffs Benson, Rowley, and Doe aver, "in 2004, the voters of the State of Rhode Island and Providence Plantations *** approved the repeal of Article VI, Section 10 of the Rhode Island Constitution, which stripped the Rhode Island General Assembly of its 'residual powers,' generally called its 'plenary powers.'" Amended Complaint, p. 2. Based upon one or both of these provisions or actions, Plaintiffs contend that only a constitutional amendment can confer pro-choice rights and that the failure to pose such a question to all Rhode Island voters violated their right to vote. Plaintiffs ask this Court to declare that the General Assembly lacked constitutional authority to pass the Reproductive Privacy Act and to declare such legislation unconstitutional.

III. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure, a civil action can be dismissed for "failure to state a claim upon which relief can be granted." R.I. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion should be granted where there is no conceivable set of facts that would entitle the plaintiff to relief. *McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005). Further, a complaint will only be dismissed where it is clear beyond a reasonable doubt that the plaintiff will not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim. *Ellis v. Rhode Island Pub. Transit Authority*, 586 A2d 1055 (R.I. 1991).

A dismissal is appropriate when, assuming all of the allegations in the complaint to be true and viewing the allegations in a light most favorable to the plaintiff, it is clear that the complaint cannot succeed. *Id*. The sole function of a motion to dismiss is to test the sufficiency of the complaint. *Rhode Island Affiliate, American Civil Liberties Union, Inc. et al. v. Bernasconi*, 557 A.2d 1232 (R.I. 1989). In so doing, the trial justice is required to look no further than the complaint itself. *Id*.

IV. ARGUMENT

A. Article I, Section 2 Does Not Prohibit the General Assembly From Enacting the Reproductive Privacy Act

Plaintiffs Benson, Rowley, and Doe claim that the plain language of R.I. Const. Article I, Section 2, prohibits the General Assembly from passing legislation that would ensure that a woman or family has the right to choose an abortion. Plaintiffs badly and fundamentally misconstrue Article I, Section 2. While only the last sentence is relevant, Article I, Section 2 provides in whole:

> [a]ll free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. *Nothing in this **section** shall be construed to grant or secure any right relating to abortion or the funding thereof.*

R.I. Const. Art. I, § 2 (emphasis added).

Plaintiffs focus on the last sentence of Article I, Section 2, and argue that this sentence "specifically prohibits the General Assembly's unilateral passage of a new fundamental 'right' to abortion, 'or the funding thereof.'" Amended Complaint, p. 2. But applying the plain language rule provides no such global restraint on the Legislature's powers; rather by its own terms, Article I, Section 2, provides only that "[n]othing in this *section* shall be construed to grant or secure any

right relating to abortion or the funding thereof." R.I. Const. Art. I, § 2 (emphasis added). This "section," of course, refers to Article I, Section 2. Considering the context, it is understandable that the Framers to the 1986 Constitutional Convention, which added the Equal Protection and Due Process Clauses to Rhode Island's Constitution for the first time,[4] may have wanted to ensure that Article I, Section 2 did not codify *Roe v. Wade*.

In *Roe*, the United States Supreme Court recognized that a woman had a constitutional right to an abortion. The Court explained, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. Because the 1986 Framers amended Article I, Section 2, to include into Rhode Island's Constitution Equal Protection and Due Process Clauses, it is understandable that the 1986 Framers may have taken great care to ensure that the newly amended Article I, Section 2 was not construed similarly to the Fourteenth Amendment to the United States Constitution and provide for a woman's right to choose. This construction is supported by the plain language of Article I, Section 2.

When confronted with an issue of constitutional interpretation, courts "employ the well-established rule of construction that when words in the constitution are free of ambiguity, they must be given their plain, ordinary, and usually accepted meaning." *Woonsocket School*

[4] *See Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 736 (R.I. 1992) ("before our current constitution was ratified in 1986, there was no specific provision for equal protection in the Rhode Island Constitution"); *L.A. Ray Realty v. Town Council of Town of Cumberland,* 698 A.2d 202, 218 (R.I. 1997) (Flanders, J., concurring and dissenting in part) ("All this changed in 1986 when the framers of the new State Constitution decided to add equal-protection, due process, and antidiscrimination clauses to this section of our state constitution.").

Committee v. Chafee, 89 A.3d 778, 788 (R.I. 2014). "'Every clause must be given its due force,' meaning 'no word or section must be assumed to have been unnecessarily used or needlessly added.'" *Id*. "[W]e must 'presume the language was carefully weighed and its terms imply a definite meaning.'" *Id*. "When the language at issue is clear, we need look no further." *In re Request for Advisory Opinion from the House of Representatives (CRMC)*, 961 A.2d 930, 935 (R.I. 2008). And, as our Justices have observed, "[s]tatutory construction begins with the plain text, and, 'where the statutory language provides a clear answer, it ends there as well.'"[5] *Id*.

Here, Article I, Section 2 is clear and free of ambiguity, and in such a case, it "must be given [its] plain, ordinary, and usually accepted meaning." *Woonsocket School Committee*, 89 A.3d at 788. Applying this rule of constitutional construction, it is clear that whatever rights Article I, Section 2 is intended to restrict or protect, its reach is limited *only* to Article I, Section 2: "[n]othing *in this section* shall be construed to grant or secure any right relating to abortion or the funding thereof." (Emphasis added). In other words, while Article I, Section 2 may not be construed "to grant or secure any right relating to abortion or the funding thereof," since this limitation applies only "in this section," Article I, Section 2 cannot otherwise restrict the General Assembly's granting or securing of rights relating to abortion or the funding thereof through other constitutional or statutory provisions.

Plaintiffs not only ignore the "in this section" language, but Plaintiffs also misconstrue the plain language and effect of the operative sentence as a limitation on legislative power, as opposed to a limitation on individual rights, *i.e.*, the right recognized in *Roe*. On this point, it is noteworthy

[5] The Justices noted that "[w]hile some of the cases cited in the text involve statutory (as opposed to constitutional) construction, the hermeneutic principles that they set forth are applicable in both contexts." *In re Request for Advisory Opinion from the House of Representatives (CRMC)*, 961 A.2d at 935 n.6.

that the operative restriction appears in Article I of our Constitution and that Article I is comprised entirely of *individual* rights.[6] When read in conjunction with other Article I individual rights it becomes pellucid that the operative language represents a limitation on *personal or individual rights* found in Article I, Section 2, not a global restriction or prohibition *on the powers of any of the three branches of government*. This is consistent with the plain language of the operative sentence, which does not actually *prohibit* any action by any person or subdivision of government, but rather provides that certain rights "relating to abortion or the funding thereof" are not "grant[ed] or secure[d]" through Article I, Section 2. *See* R.I. Const. Art. I, § 2 ("Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.").

If the Framers intended this last sentence to affirmatively prohibit or restrain legislative action – as Plaintiffs contend – one would have expected such a restraint to be worded differently and to appear in the articles pertaining to the legislative power (Article VI), the House of Representatives (Article VII), and/or the Senate (Article VIII). Instead, the Framers placed this limitation in Article I only, the Article pertaining to individual rights. For these reasons, Plaintiffs' argument that Article I, Section 2 "specifically prohibits the General Assembly's unilateral passage

[6] For example, Section 2 (Equal Protection and Due Process), Section 3 (Freedom of Religion), Section 4 (Prohibiting Slavery), Section 5 (Right to Justice and Access to the Courts), Section 6 (Protection Against Unreasonable Search and Seizure), Section 7 (Right to Grand Jury and Protection Against Double Jeopardy), Section 8 (Protection Against Excessive Fines, Excessive Bail, and Cruel and Unusual Punishment), Section 9 (Right to Bail and Right to Habeas Corpus), Section 10 (Rights of Accused in Criminal Proceedings), Section 11 (Relief of Debtors from Prison), Section 12 (Ex Post Facto Laws), Section 13 (Right Against Self-Incrimination), Section 14 (Presumption of Innocence), Section 15 (Right to Trial by Jury), Section 16 (Takings Clause), Section 17 (Right to Shoreline), Section 18 (Subordination of Military to Civil Authority), Section 19 (Right Against Quartering of Soldiers), Section 20 (Freedom of Press), Section 21 (Right to Assemble and Freedom of Speech), Section 22 (Right to Bear Arms), Section 23 (Right of Victims of Crime), Section 24 (Enumeration of Rights Does Not Impair Other Rights Retained by People).

of a new fundamental 'right' to abortion, 'or the funding thereof,'" Amended Complaint, p. 2, is fundamentally incorrect and must be rejected.

B. The Submission of Affidavits Cannot Alter the Plain Meaning of Article I, Section 2

In contrast to the foregoing precedent and authority, Plaintiffs urge a contrary interpretation of Article I, Section 2, one they contend is supported by affidavits from the then-Speaker of the House of Representatives and the then-legal counsel to the President of the 1986 Constitutional Convention. Both affidavits purport that "[i]t was the intent of Article I, Section 2, to mandate that any establishment of a new Rhode Island fundamental 'right' to abortion, and the funding thereof, would require a proper amendment to the Rhode Island Constitution, pursuant to Article XIV of the Rhode Island Constitution." Amended Complaint, ¶ 99. These after-the-fact affirmations of the intent of the Framers – in this case 33 years after-the-fact – "are not to be given talismanic significance." *Bandoni v. State*, 715 A.2d 580, 592 (R.I. 1998).

In *Bandoni*, the Court considered arguments raised by the dissent concerning extrinsic evidence that the dissent argued should be considered in interpreting R.I. Const. Article I, Section 23, the Constitutional amendment providing crime victims certain rights. In doing so, the Court reviewed and relied upon *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), where the First Circuit Court of Appeals recognized that Congressional assurances made on-the-record during Floor debate (that the newly enacted Indian Gaming Regulatory Act would not repeal jurisdiction granted a decade earlier subjecting the Narragansett Indian Tribe to the civil, criminal, and regulatory laws of the State of Rhode Island) had no place in constitutional interpretation. *Bandoni,* 715 A.2d at 592. The *Bandoni* Court explained that:

> the First Circuit had little trouble rejecting the state's claims since '[i]n the game of [constitutional] interpretation, [constitutional] language is the ultimate trump card.' *** Likewise, in the case at bar, we too have little trouble rejecting the purported

> assurances ***. The simple, and indeed unmistakable, fact is that when the constitutional framers decided to add article 1, section 23, to our Constitution, they did so by means of an exercise that requires putting pen to paper.

Id. (alterations in original, ellipses added). The Supreme Court continued:

> [o]nce Congress has spoken, it is bound by what it has plainly said, notwithstanding the nods and winks that may have been exchanged in floor debates and committee hearings. After all, it is not the proper role of legislators to use unwritten assurances or side arrangements to alter the clear meaning of agreed language. And the judiciary must stand as the ultimate guarantor of the integrity of an enacted statute's text.
>
> In sum, once Congress has spoken, a court cannot override the unambiguous words of an enacted statute and substitute for them the court's views of what individual legislators likely intended. Any other rule imports a virulent strain of subjectivity into the interpretive task and, in the process, threatens to transfer too large a slice of legislative power from Congress to the courts.

Id. at 593 (quoting *Narragansett Indian Tribe*, 19 F.3d at 699-700). Applying these principles, the *Bandoni* Court rejected attempts to inject extrinsic evidence, concluding that if it were "to give primary effect to the contemporaneous words of one individual's planned remarks moments before a final vote on Resolution 86–140, [it] would have to turn a blind eye to our well-established rules of constitutional construction, which states that it is presumed the language in an enactment was carefully considered before it was finally adopted and 'that when words in the constitution are free of ambiguity, they must be given their plain, ordinary, and usually accepted meaning.'" *Id*. (quoting *City of Pawtucket v. Sundlun*, 662 A.2d 40, 45 (R.I. 1995)).

Likewise, here, Plaintiffs invite this Court to commit a similar error. In lieu of applying the plain language of Article I, Section 2, Plaintiffs ask this Court to reject this venerable rule of construction and instead accept the meaning of affidavits from two persons attesting to the intention of the 1986 Constitutional Convention Framers 33 years after the events occurred. While the consideration of such affidavits would be inappropriate under any conceivable circumstance, *see supra*, this reliance is particularly misplaced when – as here – neither attesting individual was

a member of the 1986 Constitutional Convention. Indeed, one affidavit was submitted by the then-Speaker of the House of Representatives and the other affidavit was submitted by the then-legal counsel to the President of the 1986 Constitutional Convention. Because Article I, Section 2 is clear and unambiguous, the plain language of this provision must be given effect and the submission of the affidavits or other extrinsic evidence to inject a contrary interpretation must be rejected.

C. The General Assembly Has the Legislative Authority to Pass the Reproductive Privacy Act

While it is important that the plain language in Article I, Section 2 does not prohibit or restrain the General Assembly from enacting legislation pertaining to the right to an abortion, it is equally important that another constitutional provision provides plenary powers to the General Assembly to legislate. It is pursuant to this constitutional power that the General Assembly enacted the Reproductive Privacy Act. Specifically, Article VI, Section 2 provides in relevant part:

> [*t*]*he legislative power under this Constitution, shall be vested in two houses*, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws. (Emphasis added).

With respect to enacted legislation, our Supreme Court has emphasized that it "presumes that legislative enactments are valid and constitutional." *Oden v. Schwartz*, 71 A.3d 438, 456 (R.I. 2013). As such, the Court exercises the "'greatest possible caution' in reviewing a challenge to a statute's constitutionality" and the "burden lies on the party challenging the statute's constitutionality to 'prove beyond a reasonable doubt that the act violates a specific provision of the [Rhode Island] [C]onstitution or the United States Constitution' – unless that standard is met, 'this Court will not hold the act unconstitutional.'" *Id*. (alternations in original). Furthermore, "when a statute can be interpreted as having two meanings, only one of which is constitutional, we

will construe the statute under its constitutional meaning." *Smiler v. Napolitano*, 911 A.2d 1035, 1038 (R.I. 2006).

Plaintiffs ignore this plenary authority our Constitution delegates to the General Assembly to legislate and instead contend that Rhode Island's Constitution was radically altered when voters repealed the "residual" powers clause in 2004. That provision had provided "[t]he general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution." *See Woonsocket School Committee*, 89 A.3d at 789-90. The repeal of the residual powers the General Assembly historically exercised without specific constitutional authorization, however, in no way affected the General Assembly's expressly delegated exercise of constitutional powers, such as the authority to legislate. *See* Article VI, Section 2. As the Justices explained four years *after* the voters' 2004 repeal, "we do not view the amendments as effectuating a wholesale reallocation of power among the executive and the legislative departments." *In re Request for Advisory Opinion from the House of Representative (CRMC)*, 961 A.2d 930, 934 (R.I. 2008). The Justices later added that "it would be overly simplistic and patently erroneous to view the amendments as somehow s*ubordinating* the role of the legislative branch to that of the executive." *Id*. (emphasis in original).

While the Plaintiffs suggest that the 2004 separation of powers amendments (which included the repeal of Article VI, Section 10), effectuated a wholesale change in the General Assembly's legislative powers, even after 2004, our Supreme Court observed that "[c]ertain powers of the General Assembly * * * were left largely or entirely unaffected by the amendments." *Id*. at 935. Among these untouched powers was Article VI, Section 2, which continued to provide (and still provides) that "the [t]he legislative power under this Constitution, shall be vested in two houses." In direct contradiction to the Plaintiffs' suggestion that the repeal of Article VI, Section

10 somehow diminished the General Assembly's legislative powers, our Supreme Court recognized in 2006 that "[t]he General Assembly possesses the broad and plenary power to make and enact law, 'save for the textual limitations * * * that are specified in the Federal or State Constitutions.'" *East Bay Community Development Corporation v. Zoning Bd. of Review of the Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006). Since the General Assembly possesses the plenary authority to legislate pursuant to Article VI, Section 2, there can be no doubt that the General Assembly acted within its constitutional authority when it passed the Reproductive Privacy Act and sent it to the Governor for signature. This disposes of Plaintiffs' claims.

To be sure, Plaintiffs Baby Roe and Baby Doe submit that the Reproductive Privacy Act violates the Fourteenth Amendment to the United States Constitution by depriving them of their status as a "person." For instance, Baby Roe and Baby Doe reference R.I. Gen. Laws § 11-3-4 and contend that this provision provided (until the Reproductive Privacy Act was enacted) that "human life begins at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the constitution of the United States." Amended Complaint, ¶¶ 33, 47. As a result, both Baby Roe and Baby Doe allege that if a woman exercises her right to choose, they (as a fetus) will be deprived of the legal rights and status as a "person." Amended Complaint, ¶¶ 37, 51.

In *Roe*, the United States Supreme Court considered and rejected this very argument, holding that the "word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. *See also id*. at 162 ("In short, the unborn have never been recognized in the law as persons in the whole sense."). Months after *Roe*, a lawsuit was filed in the United States District Court for the District of Rhode Island challenging newly enacted Rhode Island statutes that criminalized abortion, *i.e.*, the very same statutes that Plaintiffs contend in this case

grant them the "legal right and privileged status of 'personhood.'" Amended Complaint, ¶¶ 36, 50. As described by the District Court, "[t]he present legislative product at issue is an attempt by the Rhode Island lawmakers to infuse constitutionality into its heretofore unconstitutional statute by declaring that human life begins at the moment of conception and that such life is a person within the meaning of the Fourteenth Amendment to the United States Constitution." *Doe v. Israel*, 358 F. Supp. 1193, 1195 (D.R.I. 1973). The District Court rejected this argument, cited *Roe*, and observed that the United States Supreme Court had held, "in the face of the argument that life begins at conception, that a fetus is not a person within the meaning of the Fourteenth Amendment." *Id*. at 1200.

Ever since *Roe v. Wade* and *Doe v. Israel*, an unborn is not a "person" within the purview of the Fourteenth Amendment to the United States Constitution. As such, Chapter 3 of Title 11 was declared unconstitutional. *See Doe*, 358 F. Supp at 1202 ("It is hereby declared, adjudged, and decreed that the Rhode Island criminal abortion statute, R.I.G.L. §§ 11-3-1; 11-3-2; 11-3-2; 11-3-3; 11-3-4; and 11-3-5 (73-S 287 Substitute A) is on its face in violation of the Constitution of the United States."). Exhibit 3. The First Circuit Court of Appeals denied a Motion to Stay the District Court's declaration of unconstitutionality. *See Doe v. Israel*, 482 F.2d 156 (1st Cir. 1973). Because the purported source of Baby Roe and Baby Doe's state rights, *i.e.*, Chapter 3 of Title 11, was declared unconstitutional in 1973, it is axiomatic that these provisions are null and void and cannot serve as a source of rights.[7] And, since Catholics for Life assert rights derivative of Baby Roe and Baby Doe, their claim must also fail.

[77] While declared unconstitutional in 1973, the Reproductive Privacy Act struck these unconstitutional provisions from the General Laws. Exhibit 2.

D. The Plaintiffs Lack Standing to Bring This Civil Action

The Reproductive Privacy Act does not require any woman or family to have an abortion, it only allows any woman or family to make this decision if they choose. This is important for standing purposes; the Reproductive Privacy Act does not require Plaintiffs (or any person) to choose to end a pregnancy. As such, Plaintiffs Benson, Rowley, and Doe are not directly affected by the Reproductive Privacy Act – this legislation does not require them to do anything or to refrain from anything; Plaintiffs seem to implicitly acknowledge this point. In fact, the only injury Plaintiffs Benson, Rowley, or Doe assert is that passage of the Reproductive Privacy Act deprived them of the "constitutional right to vote on the issue of establishing a new Rhode Island 'right' to abortion and the funding thereof." Amended Complaint, ¶ 11. While Defendants strenuously deny that pro-choice legislation could not be passed by the General Assembly and could only become effective through a constitutional amendment, *see supra*, even if this legal conclusion were accurate, Plaintiffs would still lack standing in this case because they assert no particularized, individual harm.

i. Plaintiffs Benson, Rowley, and Doe Lack Standing Because They Assert No Personal Injury

The modern standing doctrine was articulated in *Rhode Island Ophthalmological Society v. Cannon*, 317 A.2d 124, 129 (R.I. 1974), where the Court determined that the "question is whether the person whose standing is challenged has alleged an injury in fact resulting from the challenged statute." To satisfy what the Court would describe in a subsequent case as a "fundamental preliminary question,"[8] a plaintiff must allege that "the challenged action has caused

[8] *See Watson v. Fox*, 44 A.3d 130, 135 (R.I. 2012).

him injury in fact, economic or otherwise." *Id*. at 128 (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970) (emphasis added)). As the Rhode Island Supreme Court explained, even in cases where the public interest is implicated, "the representative [plaintiff] *must still allege his personal stake in the controversy – his own injury in fact – before he will have standing to assert the broader claims of the public at large*." *Id.* at 130 (emphasis added). Significantly, although the plaintiff Ophthalmological Society alleged that the challenged legislation endangered the public health at large, the plaintiff also asserted an injury that impacted its members and was distinct from the injury suffered by the public at large, namely that the legislation encroached on the ophthalmologists' professional rights and privileges. *Id.* at 126. The Court was sure to "emphasize that the ophthalmologists have standing only because of their own injury." *Id.* at 130.

Likewise, *Burns v. Sundlun*, 617 A.2d 114 (R.I. 1992) made clear that in order to acquire standing, the plaintiff's asserted injury must be distinct from any injury suffered by the public at large. In *Burns*, the plaintiff was a Newport resident who voted against off track betting in a general election and who claimed that prior to State approval of simulcasting out-of-state horse racing, a question approving simulcasting needed to be placed on a public referendum in the city or town where the gambling facilities were located – in that case, Newport. The Court had no trouble deciding that *Burns* "fail[ed] to meet th[e] test for standing" and its rationale applies equally in this case. The Court explained:

> [t]he only injury plaintiff asserts is 'that he has been denied his right to vote on the establishment of off track betting and the extension of an existing gambling activity.' This injury is shared by each and every registered voter in the State of Rhode Island. The plaintiff has failed to allege his own personal stake in the controversy that distinguishes his claim from the claims of the public at large.

Id. For this reason, the Court concluded that Burns lacked standing.

Bowen v. Mollis, 945 A.2d 314 (R.I. 2008) is another case where the Supreme Court considered the purported right to vote and determined that the plaintiff lacked standing. In *Bowen*, the Supreme Court examined Article 14, Section 2 of the Rhode Island Constitution, which requires voters to consider every ten years whether to hold a constitutional convention. Bowen sought declaratory relief that the 2004 election was not a general election, and therefore, "the Secretary of State was required to comply with article 14, section 2, of the Rhode Island Constitution by placing before the voters a ballot question concerning whether a constitutional convention should be held." *Bowen*, 945 A.2d at 315. Judge Fortunato determined that Bowen had standing to challenge whether a constitutional convention question should appear on the general election ballot for the voters' consideration, stating that "if a voter doesn't have standing to determine when he or she or other persons similarly situated in the electorate will have a chance to have a properly convened constitutional call go out from the [L]egislature or Secretary of State, then I don't know who has standing[.]" *Id*. at 316. After determining that Bowen had standing, however, the Superior Court rejected Bowen's substantive constitutional argument.

Bowen appealed, but the Supreme Court never reached the substantive constitutional issue, noting instead that "the first order of business for the trial justice is to determine whether a party has standing to sue." *Id*. at 317. The Court then reviewed its precedent, explained that a plaintiff must demonstrate an injury-in-fact for an alleged constitutional injury, and concluded that Bowen lacked standing to challenge the requirement that a question be presented to voters every ten years concerning the convening of a constitutional convention. *Id*.; *see also* R.I. Const. Art. 14, § 2. In direct conflict with Plaintiffs Benson, Rowley, and Doe's claim that they have sustained an injury because they did not have the opportunity to vote on a constitutional amendment regarding the right to an abortion, the *Bowen* Court held:

> [t]he plaintiff contends that as an elector and taxpayer – who must pay to the state his proportionate share of the expense of 'a constitutionally-justifiable ballot' – he has standing to bring this action. However, Mr. Bowen's putative interests are indistinguishable from the interest of the general public, and he has failed to allege a particularized injury or demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large.

Id. *See also Cote v. Inman*, 2002 WL 237778 * 13 (R.I. Super. 2002) (Rodgers, J.) ("It seems that plaintiffs' standing relies on an injury in common with the body of electors who voted in the 1994 general election.").

Similarly, in *Watson v. Fox* – a case in which certain legislators in their individual capacities challenged the legislative grant process – the Court further recognized "the necessity of [demonstrating] a 'concrete' injury has been the subject of particular emphasis in this jurisdiction." 44 A.3d 130, 135 (R.I. 2012). The Court noted that it has "held fast to the notion that a plaintiff's injury must be 'particularized' and that he must 'demonstrate' that he has a stake in the outcome that distinguishes his claims from the claims of the public at large." *Id*. at 136. And, the Court stressed that "[i]n this jurisdiction, generalized claims alleging purely public harm are an insufficient basis for sustaining a private lawsuit." *Id*.

Based on the foregoing, the Court had "little trouble concluding . . . that if this Court's longstanding principles of standing are applied to the circumstances of this case, then his suit must fail." *Id*. As the Court summarized, "[t]he plaintiff sought a declaratory judgment as a private taxpayer" and "plaintiff has complained of no concrete, particularized harm; to the degree he can point to any injury, it is the same, indistinguishable, generalized wrong allegedly suffered by the public at large." *Id*. at 137; *see also id*. at 138 ("this Court's long-standing jurisprudence – perhaps to a greater degree than that of some other jurisdictions – has had a discernable focus on the requirement of concrete and particularized harm"). Consequently, the Supreme Court held that plaintiffs lacked standing and reached no other issue.

Here, Plaintiffs Benson, Rowley, and Doe assert no individualized, particularized harm; rather, they only assert a generalized right to vote common to all Rhode Island voters. For instance, Plaintiffs contend that "[c]ertain Plaintiffs here are properly registered voters in Rhode Island or its members are registered Rhode Island voters [a]nd, those Plaintiffs are alleging Defendants suppressed their votes." Amended Complaint, p. 7. Even more persuasive is the remedy Plaintiffs seek: "[a] declaration that Plaintiffs, *and all the citizens of Rhode Island*, have a right to vote, for or against, the establishment of a new fundamental 'right' to abortion (and the funding thereof) in the State of Rhode Island." Amended Complaint, p. 50 (emphasis added). Based on Plaintiffs' allegations and the remedy they seek, there can be no doubt that Plaintiffs allege only a generalized injury common to all Rhode Island and that such an allegation does not bestow standing. *See Burns*, 617 A.2d at 116 ("[t]he only injury plaintiff asserts is 'that he has been denied his right to vote on the establishment of off track betting and the extension of an existing gambling activity'"). Accordingly, Plaintiffs Benson, Rowley, and Doe lack standing.

ii. Plaintiffs Baby Roe, Baby Doe, and Catholics for Life, Inc., d/b/a Servants of Christ for Life Lack Standing

Plaintiffs Baby Roe, Baby Doe, and Catholics for Life similarly lack standing. Specifically, Plaintiffs Baby Roe and Baby Doe premise their legal standing on R.I. Gen. Laws § 11-3-4, which Plaintiffs contend provides that "human life begins at the instant of conception and that said human life at said instant of conception is a person with the language and meaning of the fourteenth amendment of the constitution of the United States." Amended Complaint, ¶¶ 33, 47. Based upon this and other provisions of Chapter 3 of Title 11, Plaintiffs Baby Roe and Baby Doe contend that certain legal rights have been conferred upon them "of a 'person,'" and that the Reproductive Privacy Act deprives them of the "legal right and privileged status of 'personhood' under R.I. Gen. Laws § 11-3-1. et. seq., the due process and equal protection clauses of the Rhode

Island Constitution and the United States Constitution, Amendment XIV." Amended Complaint, ¶¶ 34, 36, 48, 50. Catholics for Life assert a derivative standing argument, claiming that its "right to sue on behalf of unborn 'persons'" represents a deprivation. Amended Complaint, ¶ 71. As described, *supra*, this argument is fatally flawed since the alleged basis of this right, *i.e.*, R.I. Gen. Laws § 11-3-4 that provided "human life begins at the instant of conception," was declared unconstitutional in 1973. Exhibit 3.

On this point, the United States Supreme Court declared that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn, *Roe*, 410 U.S. at 158; the United States District Court for the District of Rhode Island declared Chapter 3 of Title 11 "on its face in violation of the Constitution of the United States," *Doe*, 358 F. Supp. at 1201; and on a motion for stay pending appeal, the First Circuit Court of Appeals observed that "[n]o reading of [the United States Supreme Court] opinions, however, can be thought to empower the Rhode Island legislature to 'defin[e] some creature as an unborn child, to be a human being and a person from the moment of its conception." *Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973). Because the basis of the asserted right has been declared unconstitutional, Plaintiffs Baby Doe, Baby Roe, and Catholics for Life cannot demonstrate "some legal hypothesis which will entitle the plaintiff to real and articulable relief." *Bowen*, 945 A.2d at 317. Indeed, this conclusion is reinforced by Plaintiffs' allegation that "[b]ut for" the Reproductive Privacy Act, Baby Roe and Baby Doe would "still have the legal right and privileged status as a 'person' under Rhode Island law, and under the United States Constitution, Amendment XIV;" and that a determination by this Court that the Reproductive Privacy Act is unconstitutional would "immediately restore" Baby Roe and Baby Doe's "legal rights and privileged status of a 'person." Amended Complaint, ¶¶ 43, 44. For the reasons detailed above, the impediment to Plaintiffs' argument that Baby Roe and Baby Doe are

"persons" under state and federal law is not the Reproductive Privacy Act, but rather *Roe v. Wade*. Accordingly, they also lack standing.

V. CONCLUSION

For the aforementioned reasons, and those asserted at the hearing of this matter, the State respectfully requests that this Honorable Court enter an Order granting its motion to dismiss.

Respectfully submitted,

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Case Number: PC-2019-6761
Filed in Providence/Bristol County Superior Court
Submitted: 8/27/2019 9:35 AM
Envelope: 2223682
Reviewer: Brittany A.

CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the attorneys of record on this 27th day of August, 2019.

/s/ Karen M. Ragosta