26 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALLEGHENY REPRODUCTIVE HEALTH CENTER, ALLENTOWN WOMEN'S CENTER, DELAWARE COUNTY WOMEN'S CENTER, PHILADELPHIA WOMEN'S CENTER, PLANNED PARENTHOOD KEYSTONE, PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA and PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF HUMAN SERVICES, MEG SNEAD, in her official capacity as Acting Secretary of the Pennsylvania Department of Human Services, ANDREW BARNES, in his official capacity as Executive Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs, and SALLY KOZAK, in her official capacity as Deputy Secretary for the Pennsylvania Department of Human Service's Office of Medical Assistance Programs,

Appellees.

Appeal from the Orders of the Commonwealth Court,
dated January 28, 2020, and March 26, 2021, in the
Commonwealth Court of Pennsylvania at No. 26 MD 2019

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Under The Federal Floor And State Ceiling Doctrine, There Is No State Constitutional Right To Abortion 3

A. Pennsylvania Has Always Analyzed Abortion Cases Under the U.S. Constitution 8

B. Pennsylvania's Equal Protection Guarantees Offer No Reason to Expand Upon the U.S. Supreme Court's Holding in *Casey* 11

II. Abortion Does Not Correlate with Women's Social or Economic Success 13

A. Abortion in the United States and Pennsylvania Steadily Has Declined Since 1990 15

B. Since 1990, Women Have Achieved Greater Social and Economic Success 17

III. Recognizing a State Constitutional Right to Abortion Would Manufacture an Intractable Litigation Standard and Mire the Pennsylvania Judiciary in Litigation 21

CONCLUSION 28

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

APPENDIX 1a

I. Graphs Illustrating the Decline of Abortion in the United States and Pennsylvania Since 1990 .... 1a

II. Graphs Displaying the Advancements in Women's Social and Economic Success Since 1990 .... 5a

TABLE OF AUTHORITIES

Cases

Akron v. Akron Ctr. for Reprod. Health,
462 U.S. 416 (1983) 1

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729 A.2d 588 (Pa. Super. Ct. 1999) 12

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503 A.2d 921 (Pa. 1985) 12

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541 A.2d 347 (Pa. Super. Ct. 1988) 8

Commonwealth v. Page,
303 A.2d 215 (Pa. 1973) 8

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623 A.2d 816 (Pa. Super. Ct. 1993) 8

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No. 19-1392 (argued Dec. 1, 2021) 24

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No. 19-2382 (4th Cir. dismissed July 28, 2020) 27

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509 A.2d 114 (Pa. 1985) 2, 3, 22

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448 U.S. 297 (1980) 10

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440 P.3d 461 (Kan. 2019) 23

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33 A.3d 615 (Pa. 2011) 8

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No. 3:18-cv-171-CWR-FKB (S.D. Miss. am. compl. filed May 30, 2019) 27, 28

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477 A.2d 1302 (1994) 11

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140 S. Ct. 2103 (2020) 1, 23

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No. 3:17-cv-404-BAJ-RLB (M.D. La. dismissed Oct. 16, 2020) 27

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392 A.2d 266 (1978) 12

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597 A.2d 1137 (1991) 11

Maher v. Roe,
432 U.S. 464 (1977) 10

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762 A.2d 369 (Pa. Super. Ct. 2000) 6

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703 A.2d 407 (Pa. 1997) 11

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No. 4:19-207-JGZ (D. Ariz. dismissed Nov. 6, 2020) 27

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No. 1:18-cv-500-LY (W.D. Tex. argued Jan. 7, 2019) 27

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No. 21-2480 (7th Cir. *appeal docketed* Aug. 12, 2021) 27, 28

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136 S. Ct. 2292 (2016) 27

Constitutional Provisions

Pa. Const. art. I, § 1.. 22

Pa. Const. art. I, § 11.. 22

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Figure 12. Percentage of U.S. Medical School Graduates by Sex, Academic Years 1980-1981 through 2018-2019, Assoc. Am. Med. Colls. (Aug. 16, 2019), https://www.aamc.org/data-reports/workforce/interactive-data/figure-12-percentage-us-medical-school-graduates-sex-academic-years-1980-1981-through-2018-2019 ....19, 20

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Table B-1.2: Total Enrollment by U.S. Medical School and Sex, 2016-2017 through 2020-2021, Assoc. Am. Med. Colls. 4 (Nov. 3, 2020), https://www.aamc.org/media/6101/download 20

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Supreme Court opinions have cited briefs authored by AUL. *See*, *e.g.*, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426 n.9 (1983); *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment); and *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting). AUL attorneys regularly evaluate and testify on various bioethics bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including a model bill preventing public funds from subsidizing abortion. *See* Ams. United for Life, DEFENDING LIFE 2021 (2021 ed.) (state policy guide providing model bills that protect women's health).

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. *Amici* are filing this brief pursuant to 210 Pa. Code § 531(b)(1)(i) (2018).

SUMMARY OF ARGUMENT

Appellants are challenging the Pennsylvania Abortion Control Act's exclusion of Commonwealth funds to cover abortions, including abortions performed under Pennsylvania's Medical Assistance program. *See* 18 Pa. Cons. Stat. § 3215(c) (1989).[2] Appellants similarly urge this Court to overrule *Fischer v. Department of Public Welfare*, 509 A.2d 114 (Pa. 1985), which upheld Pennsylvania's abortion funding restrictions. We agree with Respondents that the coverage restriction is constitutional under Pennsylvania's Equal Rights Amendment. We write separately to address why there is no state constitutional right to abortion and the premise of Appellants' equal protection argument fails.

In their brief, Appellants have based their equal protection argument on the false notion that the Pennsylvania Constitution recognizes an abortion right. Yet, under the federal floor and state ceiling doctrine, Pennsylvania courts do not have a compelling reason to recognize such a right. Contrary to Appellants' assertion, women do not

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[2] The statute contains public funding exceptions to avert the death of the mother or in cases of rape or incest. 18 Pa. Cons. Stat. § 3215(c).

need abortion to succeed socially and politically. Since 1990, United States abortion numbers, rates, and ratios have declined while women have achieved greater social and economic participation. Recognizing a state constitutional abortion right ultimately would inundate Pennsylvania courts with abortion litigation. This Court should affirm the judgment below and uphold the State's abortion funding restrictions.

ARGUMENT

I. UNDER THE FEDERAL FLOOR AND STATE CEILING DOCTRINE, THERE IS NO STATE CONSTITUTIONAL RIGHT TO ABORTION.

Appellants have asked this Court to overrule its prior decision in *Fischer v. Department of Public Welfare*. 509 A.2d 114. In doing so, Appellants urge this Court to create a state constitutional right to abortion that is more expansive than the abortion right the U.S. Supreme Court recognized in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Roe*, 410 U.S. at 153; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992). This novel abortion right never has appeared in the history of Pennsylvania constitutional law. Consequently, Appellants construct a case for their proposed right out of this State's privacy protections by using a varied collection of cases that

do not discuss abortion. Br. for Appellants 60–65. However, their proposed right runs counter both to this Court's abortion precedents and to its established principles of constitutional interpretation.

Appellants' brief portrays childbirth as a burden that interferes with a woman's "plans for the future, financial status, and ability to participate equally in society." *See id.* at 74. Pennsylvania has never regarded childbirth in this demeaning manner. In fact, far from finding a right to abortion under Pennsylvania law, both the courts and the state legislature have defended unborn life to the fullest extent permitted by the federal constitution. Br. of *Amici Curiae* the Pa. Pro-Life Fed'n and the Thomas More Soc'y in Supp. of Appellees 21–24.

Appellants essentially are asking this Court to apply a "federal floor, state ceiling" doctrine to transpose the U.S. Supreme Court's holdings in *Roe* and *Casey* into the Pennsylvania state constitution. The idea of a federal "floor" rightly recognizes that state courts may not deprive citizens of rights that are protected by the federal constitution. It does not, however, mean that all state constitutions contain the same rights as the U.S. Constitution, or that state courts may reinterpret U.S.

Supreme Court holdings in light of state constitutional provisions, immune from federal judicial review. As Paul Linton explains in his book Abortion Under State Constitutions:

> What is *not* principled . . . is . . . to say, on the one hand, that federal constitutional law will be controlling in determining whether a given right is protected by the state constitution (thereby establishing, as a matter of state law, a federal "floor" of protection), but, on the other hand, that federal law will not be controlling in determining the scope of that same right (allowing for a higher state "ceiling" of protection).

Paul Benjamin Linton, ABORTION UNDER STATE CONSTITUTIONS 13 (3d ed. 2020).

The result of misapplying this "federal floor, state ceiling" approach is that Appellants have used state constitutional principles and language to define the contours of a right that is found in an unrelated document. This is an illogical method of textual interpretation. The original Pennsylvania Constitution predated both the original U.S. Constitution and the Fourteenth Amendment, while the current version postdates both. A different set of legislators drafted and ratified the Pennsylvania Constitution. It serves different purposes, and the Pennsylvania constitution can more easily be amended than can the federal

constitution. As the Michigan Supreme Court has recognized, "appropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz v. Dep't of State Police*, 506 N.W.2d 209, 217 (Mich. 1993).

The notion of a state constitutional provision with a narrower scope than its federal counterpart is not merely theoretical. Pennsylvania courts previously have interpreted portions of the state constitution more narrowly than their corresponding federal provisions. In *Mishoe v. Erie Insurance Company*, the Superior Court of Pennsylvania determined that the state constitution did not provide a plaintiff with the right to a civil jury trial in an insurance action even though the Seventh Amendment would have provided such a right, since "it is possible that a state law claim might entitle the parties to a jury trial in federal court, but not confer the same right if the issue were litigated in state court." 762 A.2d 369, 371 (Pa. Super. Ct. 2000). This outcome is to be expected, as "there is no constitutional impediment preventing state courts from

granting a lesser degree of protection under state law, *provided* only that these courts then proceed to apply the command of the Federal Constitution as interpreted by the United States Supreme Court." Ronald K. L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 Hastings Const. L. Q. 1, 15 (1981). In other words, state courts must enforce the federal constitution, but need not incorporate it into their own constitutional law.

Appellants' argument in favor of a federal "floor," as enhanced by a broader state privacy analysis, has two critical flaws. First, it disregards the fact that Pennsylvania has always construed abortion as a right originating in the U.S. Supreme Court's interpretation of the *federal* constitution. Second, the Pennsylvania equal protection guarantees are not, as Appellants claim, generally independent from and broader than their federal counterparts. Rather, this Court has largely analyzed the two equal protection provisions as co-extensive. Therefore, even if a federal abortion "floor" were warranted, Pennsylvania's equal protection provisions offer no reason to expand that right.

A. Pennsylvania Has Always Analyzed Abortion Cases Under the U.S. Constitution.

Pennsylvania courts have never recognized a right to abortion under the Pennsylvania Constitution. Appellants do not (and cannot) cite to any case that does so. Instead, Pennsylvania's courts from 1973 onward have always analyzed abortion rights under the U.S. Constitution as interpreted by *Roe* and *Casey*. *See Commonwealth v. Page*, 303 A.2d 215, 217–218 (Pa. 1973) (striking down Pennsylvania's criminal abortion statutes "as violative of the Due Process Clause of the Fourteenth Amendment"); *Commonwealth v. Markum*, 541 A.2d 347, 350 (Pa. Super. Ct. 1988) ("[A] woman's right to abortion is protected by the Constitution of the United States"); *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 819 (Pa. Super. Ct. 1993) (referring to the abortion right as "a woman's constitutional rights under *Roe v. Wade*"); *In re Doe*, 33 A.3d 615, 623 (Pa. 2011) ("The right involved in a woman's decision to terminate her pregnancy . . . is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution").

In addition to the funding restriction at issue in this case, the Pennsylvania Abortion Control Act also provides that: "In every relevant

civil or criminal proceeding in which it is possible to do so without violating *the federal constitution*, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this Commonwealth encouraging childbirth over abortion." 18 Pa. Cons. Stat. § 3202 (1982) (emphasis added). Significantly, the Pennsylvania legislature only identified an abortion right under the federal constitution. The omission of any reference to the Pennsylvania Constitution implicitly confirms that it does not provide an abortion right. More importantly, the Abortion Control Act is incompatible with Appellants' proposed interpretation of the Pennsylvania Constitution. If Pennsylvania courts interpret the common and statutory law as favoring childbirth over adoption (in line with explicit direction from the legislature), they cannot simultaneously recognize independent state constitutional grounds for an abortion right.

If this Court, in line with its precedents, continues to analyze abortion rights under the U.S. Constitution as interpreted in *Roe* and *Casey*, it must also accept as controlling the Supreme Court's ruling in

Maher v. Roe, where the Court held that Connecticut's restriction on state funding of abortion did not violate the Fourteenth Amendment's Equal Protection Clause. 432 U.S. 464, 470 (1977). It must also follow the Court's subsequent holding in *Harris v. McRae*, which found that the federal Hyde Amendment did not violate the U.S. Constitution. 448 U.S. 297, 326–327 (1980). The Pennsylvania statute at issue in this case is largely identical to the federal Hyde Amendment, which has prevented federal funds from being used to pay for abortions since 1976. *Compare* 18 Pa. Cons. Stat. § 3215(c) *with* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. H, tit. V, §§ 506–507, 134 Stat. 1182, 1622 (2020) (limiting abortion funds to medical emergencies and cases of rape or incest. The Pennsylvania Supreme Court is not the final arbiter of the interpretation of the federal constitution; the U.S. Supreme Court is. Thus, Pennsylvania cannot disregard the ruling of *Harris v. McRae* unless it develops an entirely independent state constitutional basis for the right to an abortion. Recognizing this, Appellants ask the Court to relocate the source of the abortion right from the United States to the

Pennsylvania Constitution, but they do not offer a compelling reason for doing so.

B. Pennsylvania's Equal Protection Guarantees Offer No Reason to Expand Upon the U.S. Supreme Court's Holding in *Casey*.

After making the assertion that the "Court has not tied the construction" of Pennsylvania's equal protection provisions with the federal Equal Protection clause, Appellants do not cite a single Pennsylvania case that supports this assertion. In contrast, this Court has affirmed repeatedly that "in analyzing the equal protection provisions of the Pennsylvania Constitution we apply the same standards used by the United States Supreme Court when reviewing a claim under the Fourteenth Amendment." *Nicholson v. Combs*, 703 A.2d 407, 413 (Pa. 1997) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302, 1305–1306 (1994)). *See also Love v. Stroudsburg*, 597 A.2d 1137, 1139 (1991) (reiterating that the Pennsylvania equal protection analysis is the same as the U.S. Supreme Court's Fourteenth Amendment analysis).

When the Court deviates from its general principle that the two equal protection guarantees are coextensive, it is usually (including in the principal case cited by Appellants, *Kroger Co. v. O'Hara Twp.*, 392

A.2d 266, 274 (1978)), because the right at issue is found in the list of enumerated rights in Article III, § 32 of the Pennsylvania Constitution's prohibition on local or special laws.[3] Abortion is not one of those listed rights. Privacy is not even one of the listed rights. And Pennsylvania courts "are to construe the Pennsylvania Constitution as providing greater rights to its citizens than the federal constitution 'only where there is a compelling reason to do so.'" *Commonwealth v. Crouse*, 729 A.2d 588, 596 (Pa. Super. Ct. 1999) (citing *Commonwealth v. Gray*, 503 A.2d 921, 926 (Pa. 1985)). Here, there is no such compelling reason to create a

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[3] Article III, § 32 of the Pennsylvania Constitution provides:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts:
> 2. Vacating roads, town plats, streets or alleys:
> 3. Locating or changing county seats, erecting new counties or changing county lines:
> 4. Erecting new townships or boroughs, changing township lines, borough limits or school districts:
> 5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury:
> 6. Exempting property from taxation:
> 7. Regulating labor, trade, mining or manufacturing:
> 8. Creating corporations, or amending, renewing or extending the charters thereof:
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

state constitutional abortion right. In fact, the state legislature has given a compelling reason to *not* recognize an abortion right: it is Pennsylvania public policy to favor childbirth over abortion and courts must interpret Pennsylvania law accordingly.

Ironically, Appellants are trying to invoke the privacy protections of the Pennsylvania Constitution to make abortion a publicly funded enterprise. But, with a proper analysis of the right to abortion by the U.S. Supreme Court in *Roe* and *Casey*, there is no need to manufacture a right to abortion within the Pennsylvania Constitution. Moreover, since Pennsylvania courts have interpreted its equal protection guarantees largely in line with the federal provision, Appellants' public-funding argument ultimately would fail under *Harris v. McRae.* This Court would have to create an entire line of independent jurisprudence in an area it has never before considered, which, as discussed below, would release a floodgate of legal questions and confusion.

II. ABORTION DOES NOT CORRELATE WITH WOMEN'S SOCIAL OR ECONOMIC SUCCESS.

In 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a three-justice plurality opinion determined "[t]he 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. at 856. Under this social reliance theory, the Supreme Court reaffirmed that a woman has a constitutional right to terminate her pregnancy. *Id*. at 856–857.

Appellants echo the *Casey* plurality's sentiment, arguing "[w]omen who are unable to access abortion are denied autonomy and dignity, and their plans for the future, financial status, and ability to participate equally in society are put at risk." Br. for Appellants 64; *id*. at 51 (contending "women need to be able to control their reproductive lives, including having real access to abortion, to be fully equal in society"). Yet, socioeconomic data shows Appellants' argument is meritless. Over the past three decades, abortion has declined while women's social and economic participation in society has increased. [4]

[4] For visualization of the following socioeconomic statistics cited by this brief, the Appendix has converted most of the data into graphs.

A. Abortion in the United States and Pennsylvania Steadily Has Declined Since 1990.

The Centers for Disease Control and Prevention (CDC) reports that since 1990, two years before the Supreme Court decided *Casey*, abortion rates have consistently diminished in the United States. *See Data and Statistics: Abortion*, Ctrs. for Disease Control & Prevention (Nov. 23, 2021), https://www.cdc.gov/reproductivehealth/data_stats/index.htm (listing yearly abortion surveillance reports). In 1990, states reported 1,429,577 abortions to the CDC. Ctrs. for Disease Control & Prevention, 42 Morbidity and Mortality Weekly Rep. No. 6, *Abortion Surveillance—United States, 1990* (Dec. 17, 1993). The abortion ratio was 345 legal induced abortions per 1,000 live births. *Id*. The abortion rate was twenty-four per 1,000 women ages fifteen to forty-four years. *Id*.

By 2005, these national statistics had decreased noticeably. There were 820,151 reported abortions that year. Ctrs. for Disease Control & Prevention, 57 Morbidity and Mortality Weekly Rep. No. 13, *Abortion Surveillance—United States, 2005* (Nov. 28, 2008). The abortion ratio was 233 legal induced abortions per 1,000 live births, while the abortion rate was fifteen per 1,000 women ages fifteen to forty-four years. *Id*.

In 2019, the most recent year for available statistical data, states only reported 629,898 abortions to the CDC. Ctrs. for Disease Control & Prevention, 70 Morbidity and Mortality Weekly Rep. No. 9, *Abortion Surveillance—United States, 2019* (Nov. 26, 2021). The national abortion ratio was 195 abortions per 1,000 live births whereas the abortion rate was 11.4 abortions per 1,000 women ages fifteen to forty-four. *Id*.

Pennsylvania has seen a similar decline in abortion. In 1990, Pennsylvania reported 52,143 abortions. *Abortion Surveillance—United States, 1990*, *supra*, at tbl. 3. Pennsylvania's abortion ratio was 305 abortions per 1,000 live births. *Id*. The state's abortion rate was nineteen abortions per 1,000 women ages fifteen to forty-four. *Id*.

Pennsylvania reported 36,852 abortions in 2005. *Abortion Surveillance—United States, 2004*, *supra*, at tbl. 3. The state's abortion ratio was 253 abortions per 1,000 live births. *Id*. Pennsylvania's abortion rate was fifteen abortions per 1,000 women ages fifteen to forty-four. *Id*.

By 2019, the state only reported 31,018 abortions. *Abortion Surveillance—United States, 2019*, *supra*, at tbl. 2. Pennsylvania had an abortion ratio of 231 abortions per 1,000 live births and an abortion rate

of thirteen abortions per 1,000 women ages fifteen to forty-forty. *Id*. Thus, at both the national and state level, abortion steadily has decreased since 1990.

B. Since 1990, Women Have Achieved Greater Social and Economic Success.

Despite the diminishing abortion statistics, women now have greater social and economic participation in society. In 1990, a woman's annual salary was 71.6% of a man's annual salary. *Gender Earnings Ratio by Weekly and Annual Earnings*, U.S. Dep't of Labor https://www.dol.gov/agencies/wb/data/earnings/gender-ratio-weekly-annual (last visited Nov. 30, 2021). By 2005, this ratio increased to 77%. *Id*. As of 2019, it stands at 82.3%. *Id*.

Women composed 45.2% of the labor force in 1990. *Civilian Labor Force by Sex*, U.S. Dep't of Labor, https://www.dol.gov/agencies/wb/data/lfp/civilianlfbysex (last visited Nov. 30, 2021). This number slightly increased to 46.4% in 2005 and reached 47.0% in 2020. *Id*.

In the science, technology, engineering, and math (STEM) field, women were 23% of the labor force in 1990. *Percentage of Women Workers*

in Science, Technology, Engineering, and Math (STEM), U.S. Dep't of Labor, https://www.dol.gov/agencies/wb/data/occupations-stem (last visited Nov. 30, 2021). This number increased to 25% in 2000 and rose to 27% in 2019. *Id.*

A 2019 American Express report on women-owned businesses shows similar achievements. *The 2019 State of Women-Owned Businesses Report*, Am. Express (2019), https://s1.q4cdn.com/692158879/files/doc_library/file/2019-state-of-women-owned-businesses-report.pdf. According to the report, "The share women-owned businesses represent of all businesses has skyrocketed from a mere 4.6% in 1972 to 42% in 2019." *Id.* at 3. "Between 2014 and 2019, the number of women-owned business climbed 21% to a total of nearly 13 million (12,943,400). Employment grew by 8% to 9.4 million. Revenue rose 21% to $1.9 trillion." *Id.* Businesses owned by women of color particularly grew 43% between 2014 and 2019. *Id.* at 4.

According to the National Center for Education Statistics, the gender gap of college educational attainment of twenty-five- to twenty-nine-year-olds expanded between 2010 and 2020 in favor of women.

Educational Attainment of Young Adults, Nat'l Ctr. for Educ. Stat., at fig. 1 (May 2021), https://nces.ed.gov/programs/coe/indicator/caa. In 2010, 46% of women had an associate's or higher degree while 36% of men had the same. *Id*. By 2020, 55% of women had an associate's or higher degree, but only 45% of men had the same. *Id*. Over the same period, the number of women earning a bachelor's or higher degree rose from 36% to 44% (men only increased from 28% to 35%). *Id*. Similarly, between 2010 and 2020, women holding a master's or higher degree rose from 8% to 12% (men again trailed women, increasing merely from 5% to 7%). *Id*.

Medical school statistics demonstrate women have advanced since 1990. In the 1989-1990 academic year, 34.0% of the graduating class was female. *Figure 12. Percentage of U.S. Medical School Graduates by Sex, Academic Years 1980-1981 through 2018-2019*, Assoc. Am. Med. Colls. (Aug. 16, 2019), https://www.aamc.org/data-reports/workforce/interactive-data/figure-12-percentage-us-medical-school-graduates-sex-academic-years-1980-1981-through-2018-2019. By the 2004-2005 academic year, this number increased to 47.0%. *Id*. For the 2018-1019 academic year, women composed 47.9% of the graduating

class. *Id*. Medical schools also have enrolled more women than men for the 2019-2020 (50.6% women) and 2020-2021 (51.5% women) academic years. *Table B-1.2: Total Enrollment by U.S. Medical School and Sex, 2016-2017 through 2020-2021*, Assoc. Am. Med. Colls. 4 (Nov. 3, 2020), https://www.aamc.org/media/6101/download.

Women similarly have a higher enrollment percentage in law school. In 1993, 43% of law students were female. *Women in the Legal Profession*, Am. Bar. Ass'n, https://www.abalegalprofile.com/women/ (last visited Nov. 30, 2021). This number rose to 47.5% in 2005. *Id*. Since 2016, women have outnumbered men at law schools. *Id*. The most recent statistic from 2020 reveals 54.1% of law students are female. *Id*.

The federal government has increased representation by women. In 1990, there were thirty-one female members of Congress. Cong. Rsch. Serv., *Women in Congress: Statistics and Brief Overview* 18 (updated June 29, 2021). This number increased to eighty-five female members in 2005. *Id*. In the current 2021-2022 legislative session, there are 151 female members of Congress. *Id*.

More women are also in state legislatures. In 1990, women made up 17.1% of state legislatures. *Women in State Legislatures 2021*, Ctr. for Am. Women and Pol., https://cawp.rutgers.edu/women-state-legislature-2021 (last visited Nov. 30, 2021). This number grew to 23.0% in 2005 and 31.1% in 2021. *Id*.

In sum, in the labor force, education, medicine, law, and government, women are narrowing the gender gap and excelling up to and beyond their male colleagues. They are accomplishing this as abortion statistics decline. In this regard, women do not need abortion to advance in society.

III. Recognizing a State Constitutional Right to Abortion Would Manufacture an Intractable Litigation Standard and Mire the Pennsylvania Judiciary in Litigation.

Appellants urge this court to recognize a state constitutional right to abortion that is more expansive than the abortion right recognized in *Roe v. Wade*. Br. for Appellants 60; *see Roe*, 410 U.S. at 153, *aff'd Casey*, 505 U.S. at 871. Yet, as federal abortion cases show, a newly constructed state abortion right would invite an influx of abortion litigation for an unmanageable standard.

If this court recognizes abortion as a fundamental state constitutional right, Pennsylvania courts could apply strict scrutiny to abortion equal protection claims. *See Fischer*, 509 A.2d at 121 (internal citation omitted) (noting in equal protection claims, "where…a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny"). By recognizing an abortion right under state equal protection provisions, however, the court also would open the door to due process abortion challenges under the state constitution. *See* Pa. Const. art. I, §§ 1, 11 (protecting due process rights). Although Appellants purport that a state constitutional abortion right exists, they have not identified a corresponding litigation standard of review for due process challenges.

Casey's undue burden standard likely will not apply to abortion lawsuits arising under state law. Appellants argue their state abortion right is broader than its federal counterpart. Similarly, Appellants have not discussed a viability line, upon which *Casey*'s undue burden standard relies. *See Casey*, 505 U.S. at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a

substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”).

Presumably, courts could apply strict scrutiny to state due process challenges to Pennsylvania’s abortion laws. *See*, *e.g.*, *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 493 (Kan. 2019) (applying strict scrutiny to abortion challenges arising under Kansas’ constitutional personal autonomy right to abortion); *State of Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 (Alaska 2007) (applying strict scrutiny to abortion challenges arising under Alaska’s constitutional privacy right to abortion). Defining the limits of a court-crafted state constitutional abortion right, however, will take years of litigation.

Constructing an abortion litigation standard is difficult, essentially asking Pennsylvania courts “to weigh the State’s interest in ‘protecting the potentiality of human life’ and the health of the woman, on the one hand, against the woman’s liberty interest in defining her ‘own concept of existence, of meaning, of the universe, and of the mystery of human life’ on the other.” *June Med. Servs.*, 140 S. Ct. at 2136 (2020) (Roberts, C.J., concurring in the judgment) (citing *Casey*, 505 U.S. at 851). Any

litigation standard would be a "verbal shell game . . . conceal[ing] raw judicial policy choices concerning what is 'appropriate' abortion legislation." *Casey*, 505 U.S. at 987 (Scalia, J., dissenting in part).

It has been almost fifty years, for example, since the Supreme Court recognized a federal constitutional right to abortion in *Roe v. Wade*. 410 U.S. at 153. Yet, federal courts are still grappling with how to reconcile states' legitimate interests in maternal health and prenatal life against a woman's constitutional right to abortion. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (argued Dec. 1, 2021) (reviewing the question of "[w]hether all pre-viability prohibitions on elective abortion are unconstitutional).

Appellants' proposed constitutional right does not acknowledge how Pennsylvania may legislate to further its compelling interests in maternal health and preborn life. In fact, Appellants' proposed right is not just broader than the federal abortion right recognized in *Roe* and *Casey*, it is essentially boundless and always trumps the State's interests. *See* Br. for Appellants 73–74 ("the state's interest in fetal life does not justify overriding a woman's fundamental right to make decisions about

her own life course as well as her health and well-being"). As the Supreme Court has acknowledged, states have "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life." *Casey*, 505 U.S. at 876–877 (citing *Roe*, 410 U.S. at 162) (brackets in original). Abortion litigation standards particularly must have "a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life." *Id.* at 873. Here, Pennsylvania explicitly recognizes "the public policy of this commonwealth encouraging childbirth over abortion." 18 Pa. Cons. Stat. § 3202(c); *see id.* § 3202(a) ("It is the intention of the General Assembly of the Commonwealth of Pennsylvania to protect hereby the life and health of the woman subject to abortion and to protect the life and health of the child subject to abortion."). Appellants' proposed abortion right would trample the State's interest in childbirth and institute a new constitutional right to abortion throughout pregnancy.

While attempting to delineate a workable litigation standard, Pennsylvania courts would become bogged down with abortion litigation.

The State has many abortion regulations susceptible to legal challenge under Appellants' proposed abortion right. These laws include:

- Informed consent counseling, 18 Pa. Cons. Stat. § 3205 (1989);
- Twenty-four-hour reflection period following the informed consent counseling, *id.* § 3205(a)(1);
- Parental consent for minors, *id.* § 3206 (1992);
- Abortion ban after twenty-four weeks gestation, *id.* § 3211 (1989);
- Reporting requirements, *id.* § 3214 (1989);
- Physician-only rule for abortion procedures, *id.* § 3204(a) (1989);
- Prohibition on sex selection abortions, *id.* § 3204(c);
- Abortion restrictions at public facilities and for public funding, *id.* § 3215(a);
- Limitations on abortion coverage in Pennsylvania's health insurance exchanges, *id.* § 3215(e);
- Clinic health and safety standards, 28 Pa. Code §§§ 29.33, 29.34, 29.43 (1983);
- Monetary allocations to pregnancy resource centers and abortion alternative programs, which cannot be used for abortion or abortion counseling, *see*, *e.g.*, Pa. Off. of the Budget, *2021-22 Enacted Budget Line Item Appropriations* 7 (2021) (listed as "Expanded Medical Services for Women").

Again, Appellants' proposed abortion right is broader than the federal constitutional right to abortion. Even Pennsylvania laws upheld

by the Supreme Court under the undue burden standard in *Casey* would be vulnerable to legal challenges under Appellants' broader state constitutional abortion right. *See Casey*, 505 U.S. at 887, 880–881, 899, 900–901 (upholding Pennsylvania's twenty-four-hour reflection period, parental consent provision, medical emergency exception, and certain abortion facility reporting requirements).

The fear of increased litigation is realistic. In 2016 in *Whole Woman's Health v. Hellerstedt*, the Supreme Court expanded its interpretation of *Casey*'s undue burden standard to include a balancing test that was favorable to abortion rights advocates. 136 S. Ct. 2292, 2310 (2016) (concluding that a court also must "weigh[] the asserted benefits against the burdens" an abortion regulation places on women seeking abortion). In response, abortion rights proponents filed omnibus challenges in six states, each challenging a multitude of state abortion regulations.[5] Parties still are litigating the omnibus challenges in

[5] *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 4:19-207-JGZ (D. Ariz. dismissed Nov. 6, 2020); *Whole Woman's Health All. v. Rokita*, No. 21-2480 (7th Cir. *appeal docketed* Aug. 12, 2021); *June Med. Servs., LLC v. Gee*, No. 3:17-cv-404-BAJ-RLB (M.D. La. dismissed Oct. 16, 2020); *Jackson Women's Health Org. v. Dobbs*, No. 3:18-cv-171-CWR-FKB (S.D. Miss. am. compl. filed May 30, 2019); *Whole Woman's Health*

Indiana, Mississippi, and Texas. A Pennsylvania constitutional right to abortion would encourage similar legal challenges.

In sum, crafting a state constitutional right to abortion will institute an unwieldly litigation standard and attract a torrent of abortion legal challenges.

CONCLUSION

The Court should affirm the judgment below and uphold the abortion funding restrictions in Pennsylvania's Medical Assistance program.

Respectfully submitted,

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Dec 13, 2021

All. v. Paxton, No. 1:18-cv-500-LY (W.D. Tex. argued Jan. 7, 2019); *Falls Church Med. Ctr., LLC v. Oliver*, No. 19-2382 (4th Cir. dismissed July 28, 2020).

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. I hereby certify, pursuant to Pa.R.A.P. 2135(d), that this brief complies with the type-volume limit of Pa.R.A.P. 531(b)(3) because it contains 5122 words, excluding the parts exempted by Pa.R.A.P. 2135(b).

2. I also certify that this brief complies with the typeface and type-style requirements of Pa.R.A.P. 124 because it has been prepared in a double-spaced text using Microsoft Word 2016 in 14-point Century Schoolbook with one-inch page margins on 8.5 x 11 inch paper.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

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CERTIFICATE OF SERVICE

Pursuant to Pa.R.A.P. 121, I certify that on December 13, 2021, I served the foregoing Brief *Amicus Curiae* of Americans United for Life in Support of Appellees and Affirmance upon the persons indicated below via PACFile, or by first class United States Postal Service mail for any party not registered with the PACFile system:

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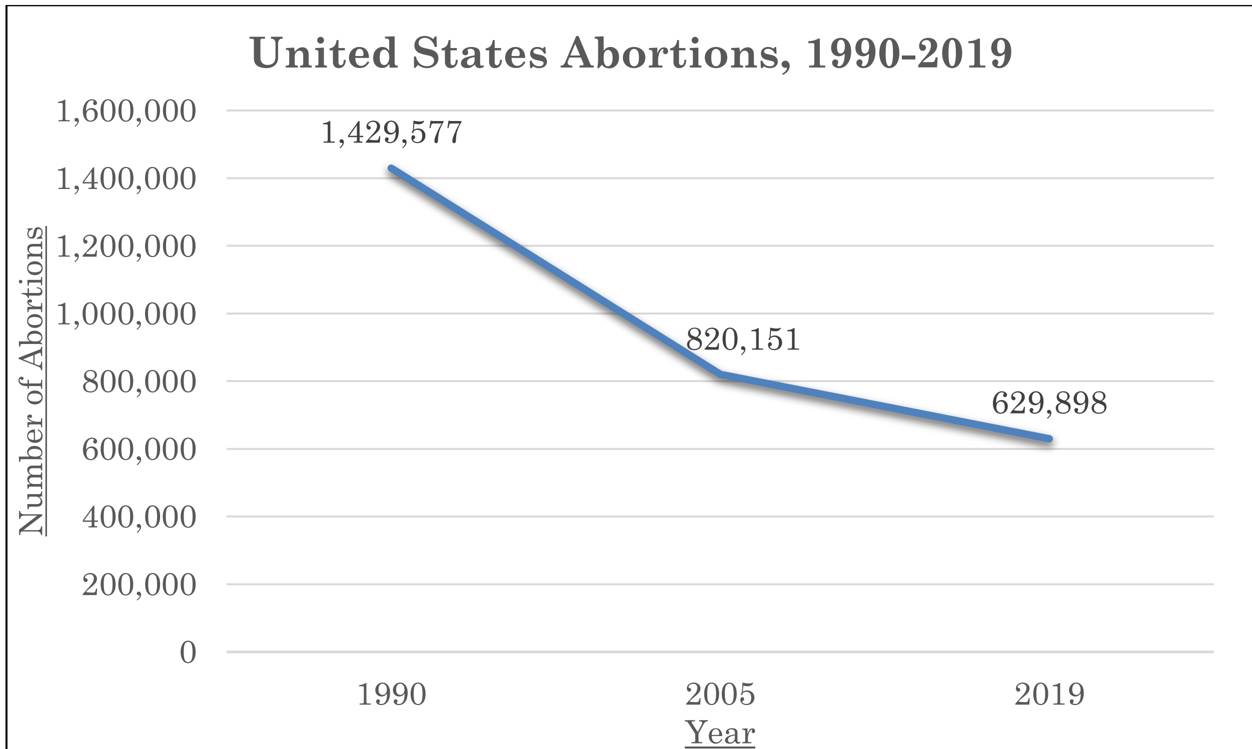
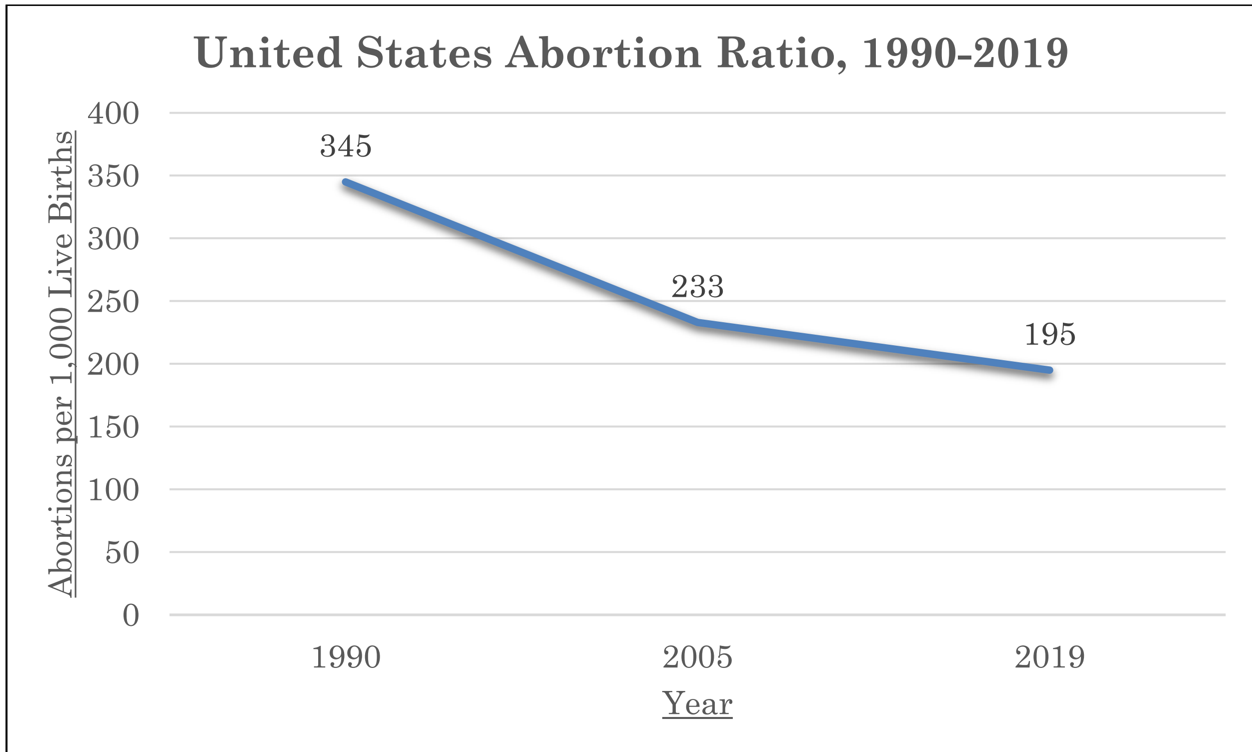
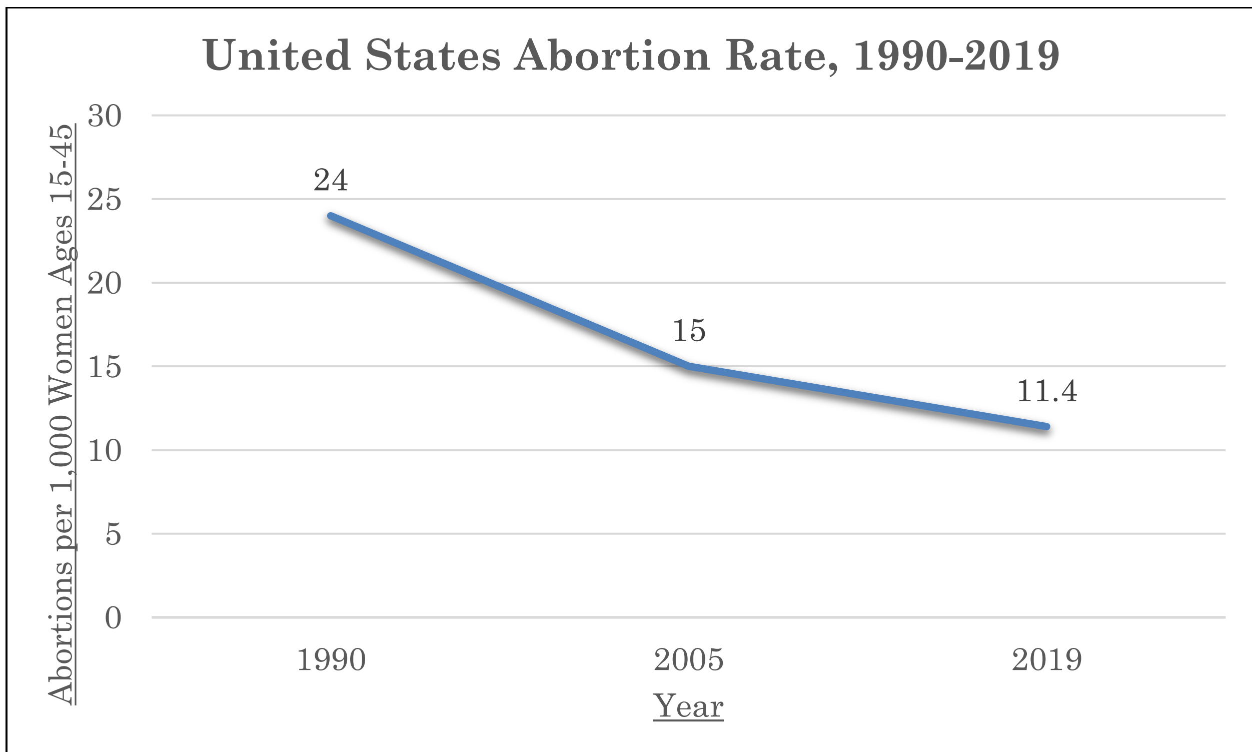
APPENDIX

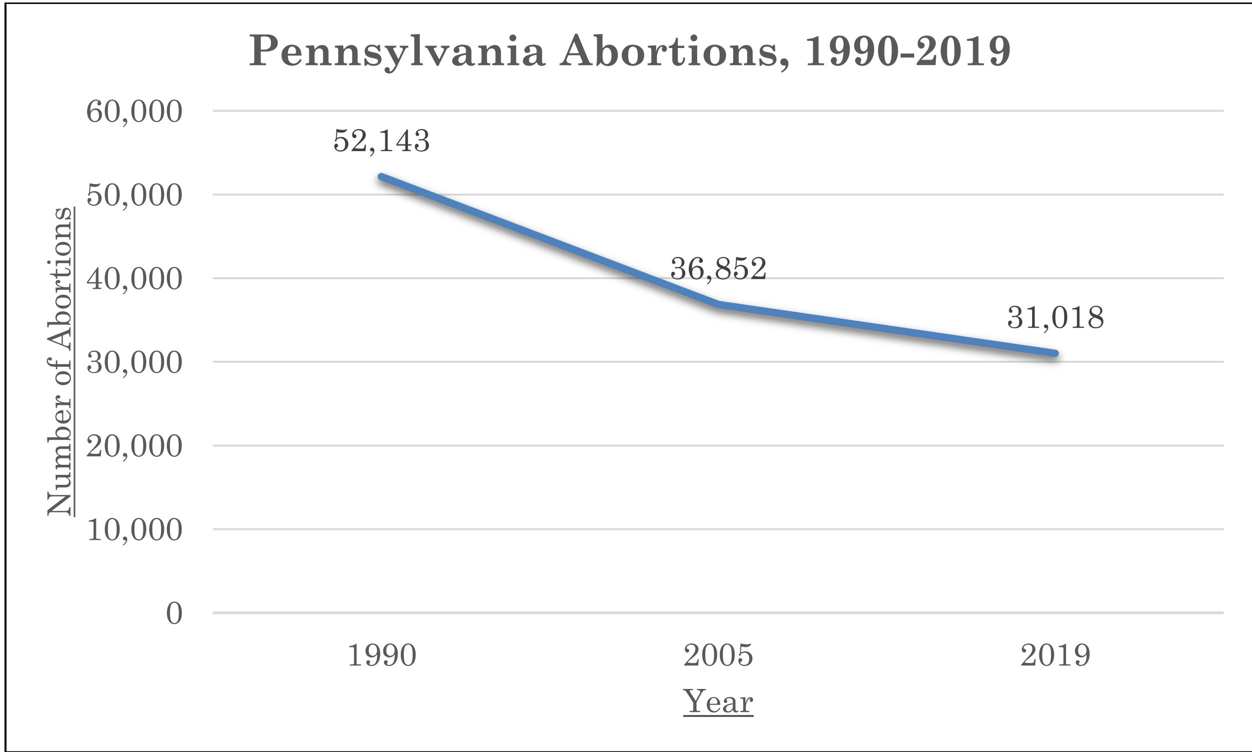
The following graphs display selected statistics cited in Section II of this brief, discussing how abortion does not correlate with women's social or economic success.

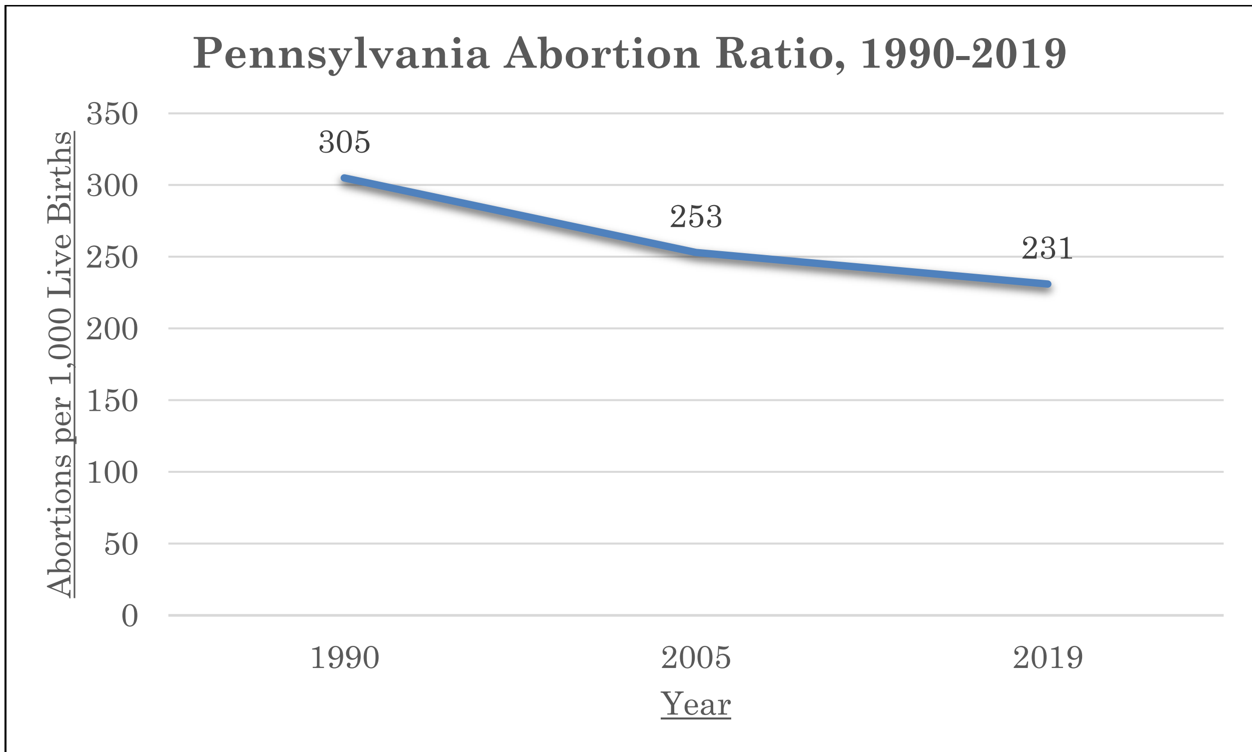
I. GRAPHS ILLUSTRATING THE DECLINE OF ABORTION IN THE UNITED STATES AND PENNSYLVANIA SINCE 1990.

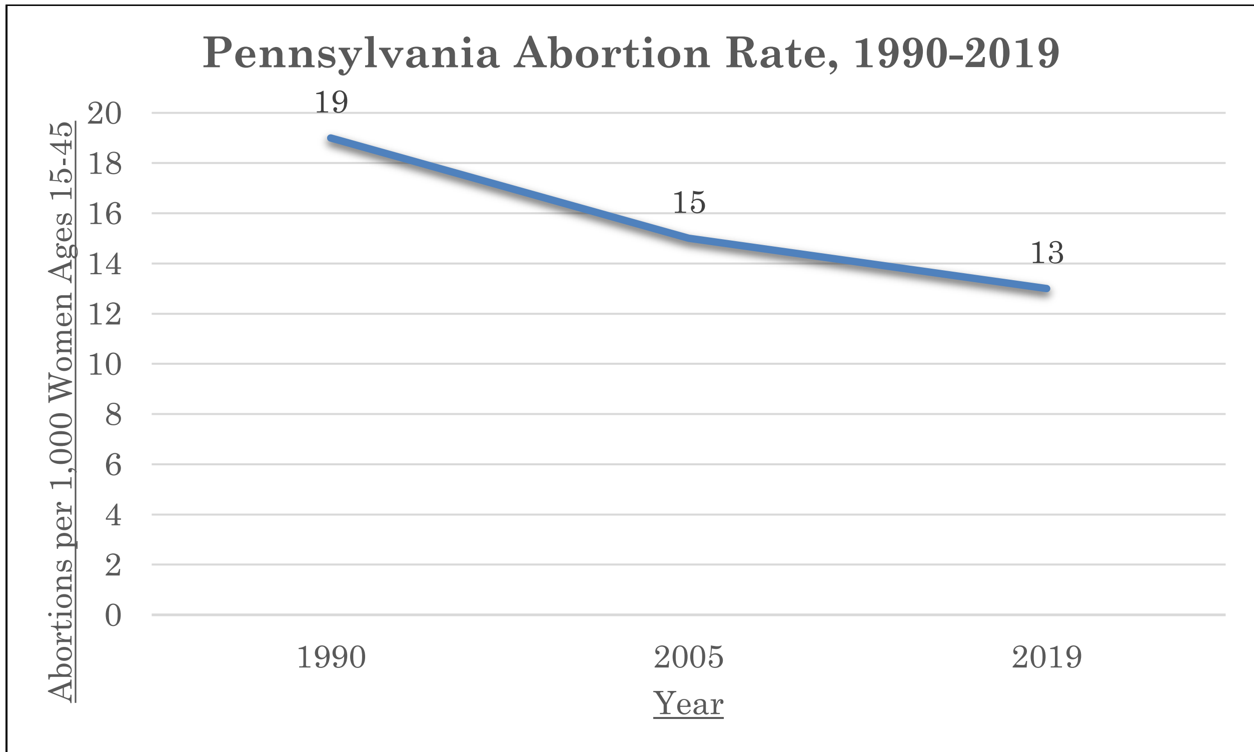



United States Abortion Ratio, 1990-2019
Abortions per 1,000 Live Births
400
350
300
250
200
150
100
50
0
345
233
195
1990
2005
2019
Year

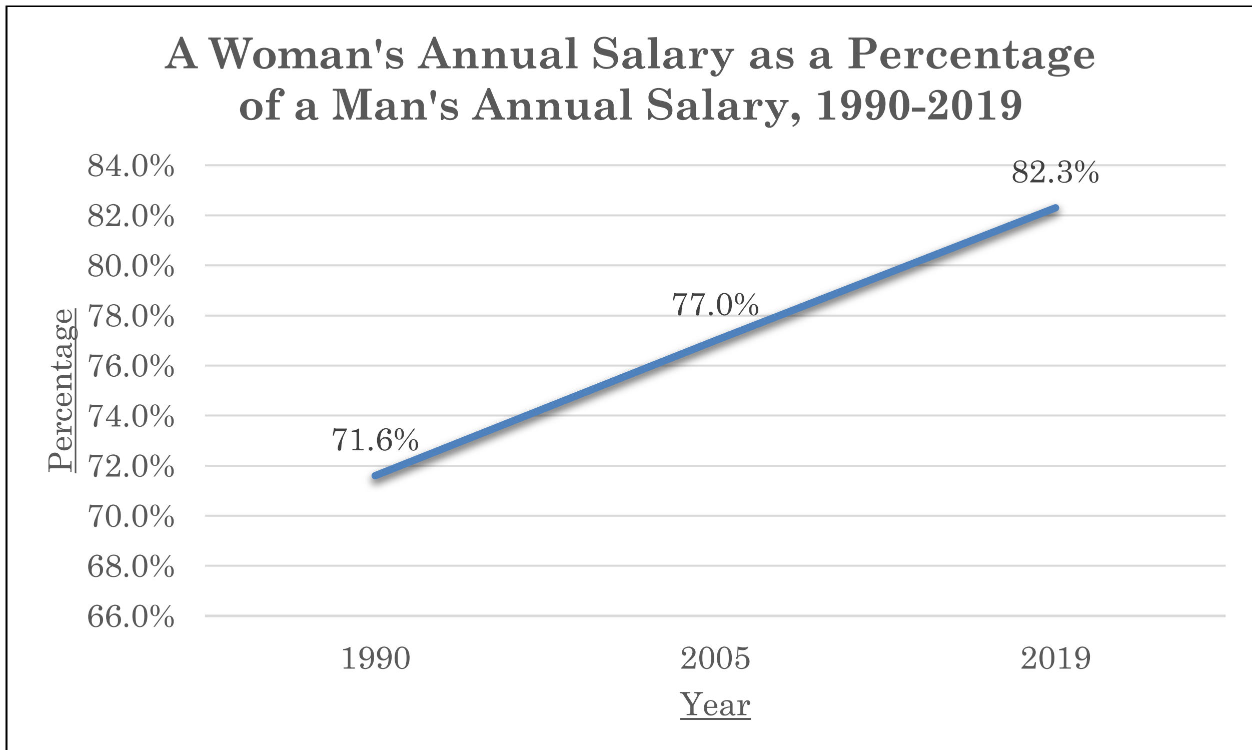

United States Abortion Rate, 1990-2019
Abortions per 1,000 Women Ages 15-45
30
25
20
15
10
5
0
24
15
11.4
1990
2005
2019
Year

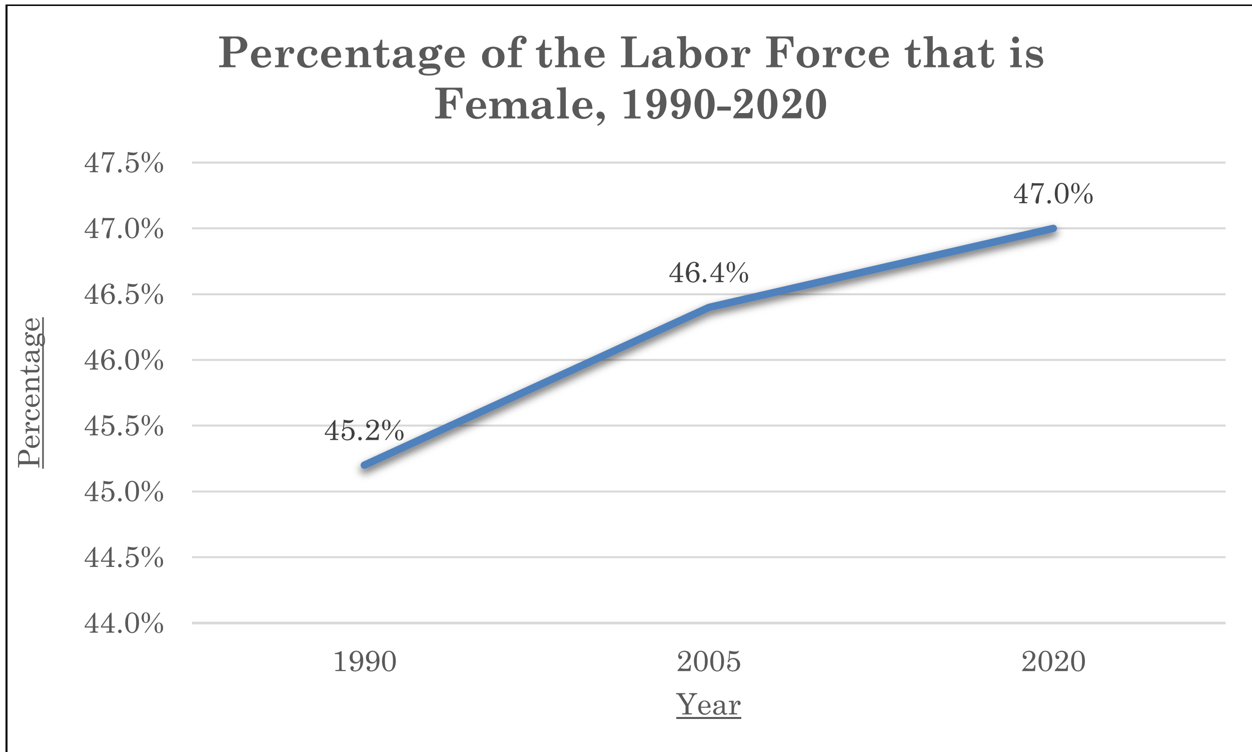

Pennsylvania Abortions, 1990-2019
60,000
50,000
40,000
30,000
20,000
10,000
0
Number of Abortions
52,143
36,852
31,018
1990
2005
2019
Year

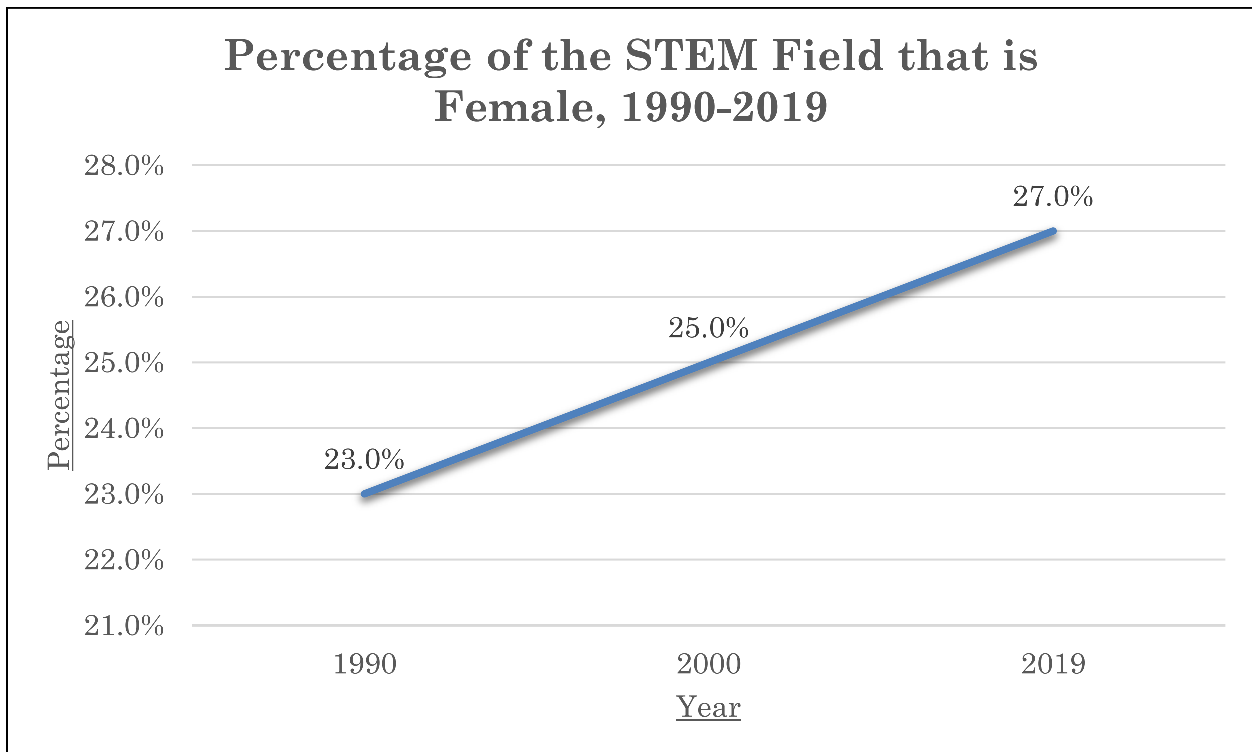

Pennsylvania Abortion Ratio, 1990-2019
350
300
250
200
150
100
50
0
Abortions per 1,000 Live Births
305
253
231
1990
2005
2019
Year

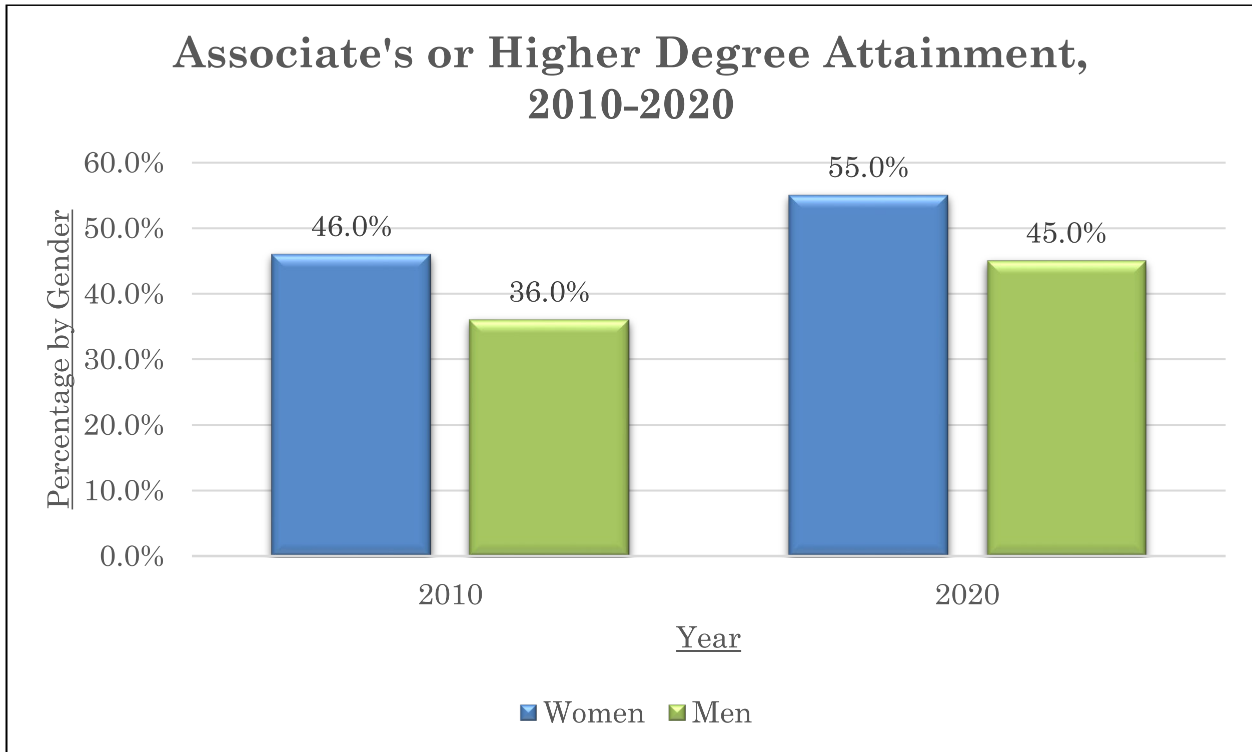

Pennsylvania Abortion Rate, 1990-2019
Abortions per 1,000 Women Ages 15-45
20
18
16
14
12
10
8
6
4
2
0
19
15
13
1990
2005
2019
Year

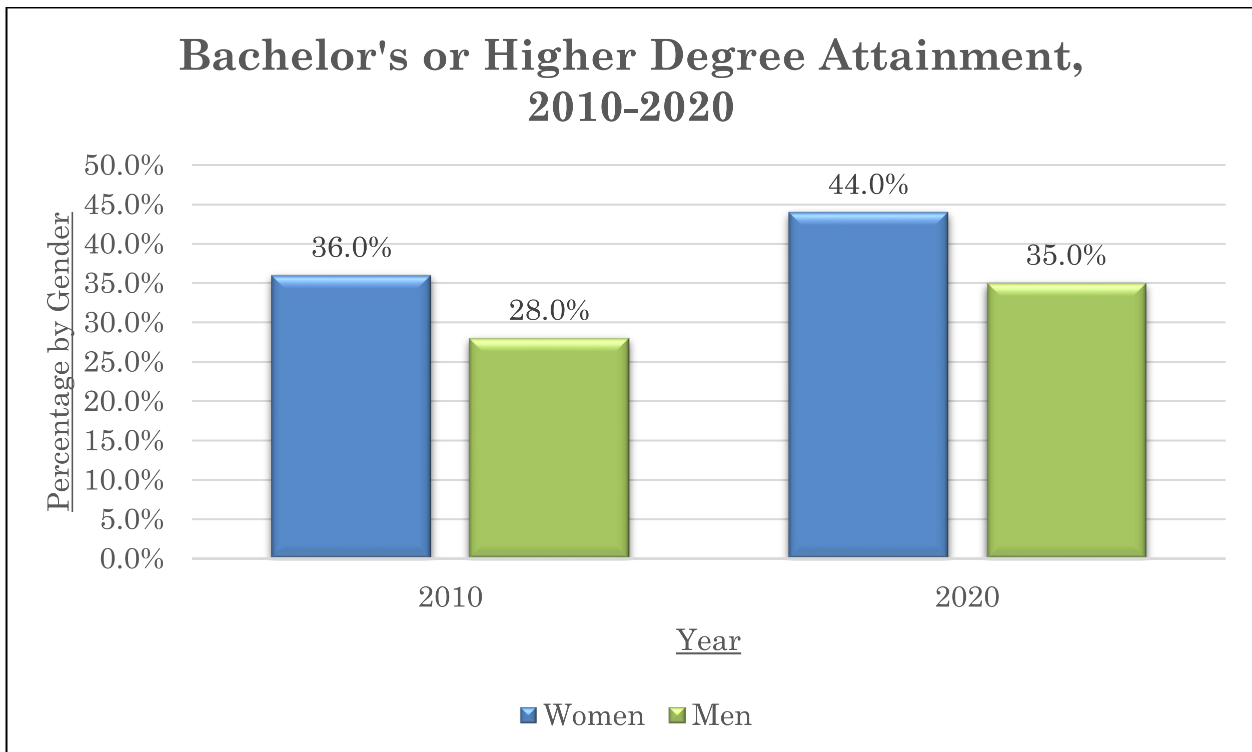
II. GRAPHS DISPLAYING THE ADVANCEMENTS IN WOMEN'S SOCIAL AND ECONOMIC SUCCESS SINCE 1990.

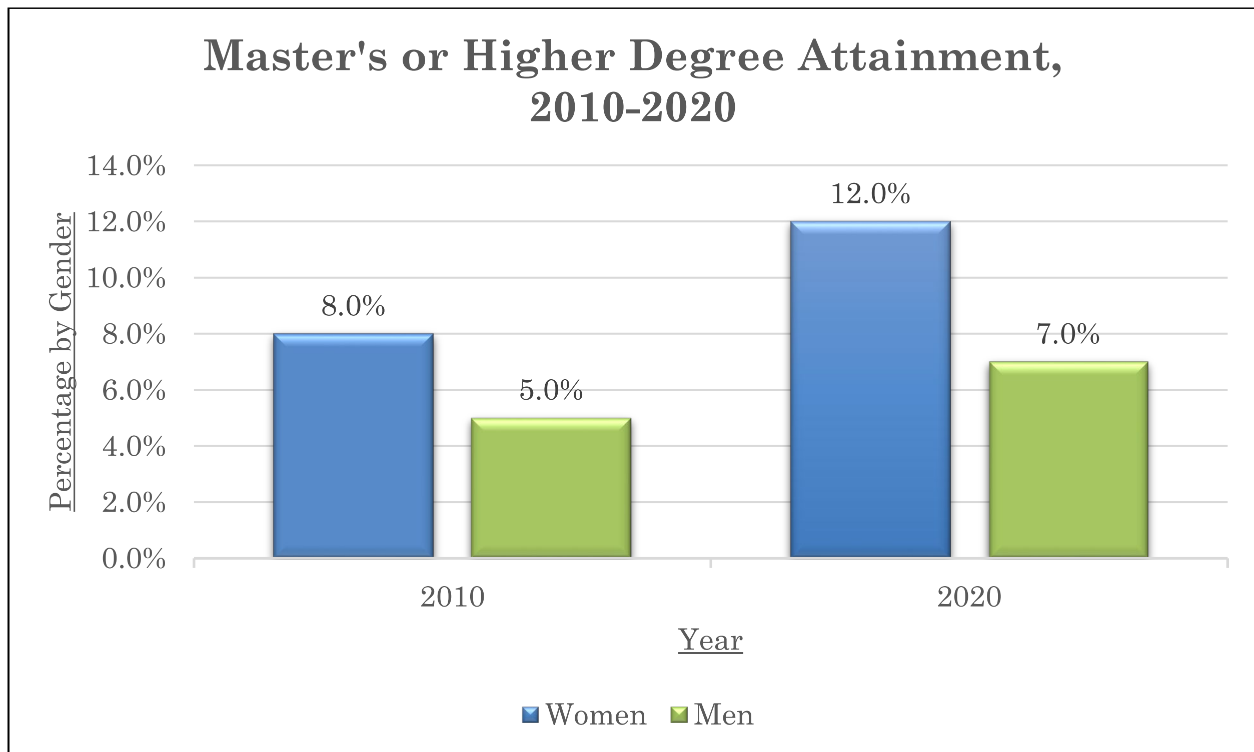


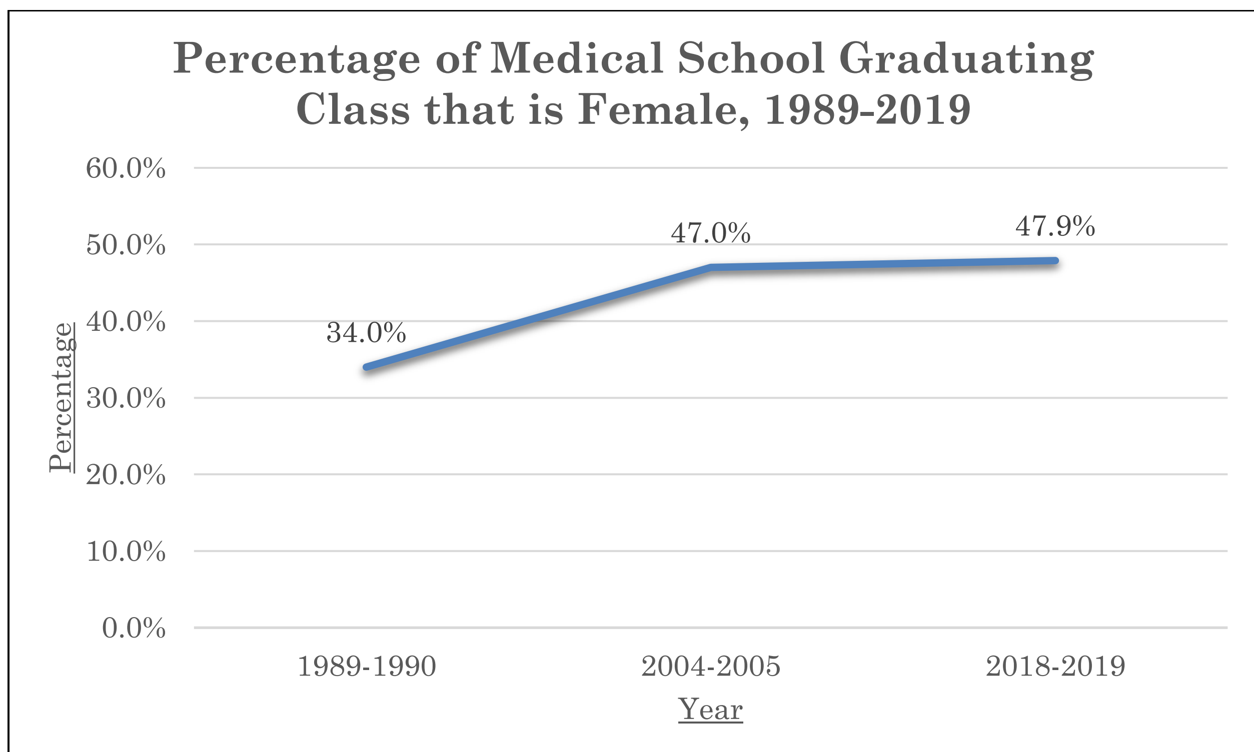

Percentage of the Labor Force that is Female, 1990-2020
47.5%
47.0%
46.5%
46.0%
45.5%
45.0%
44.5%
44.0%
Percentage
45.2%
46.4%
47.0%
1990
2005
2020
Year

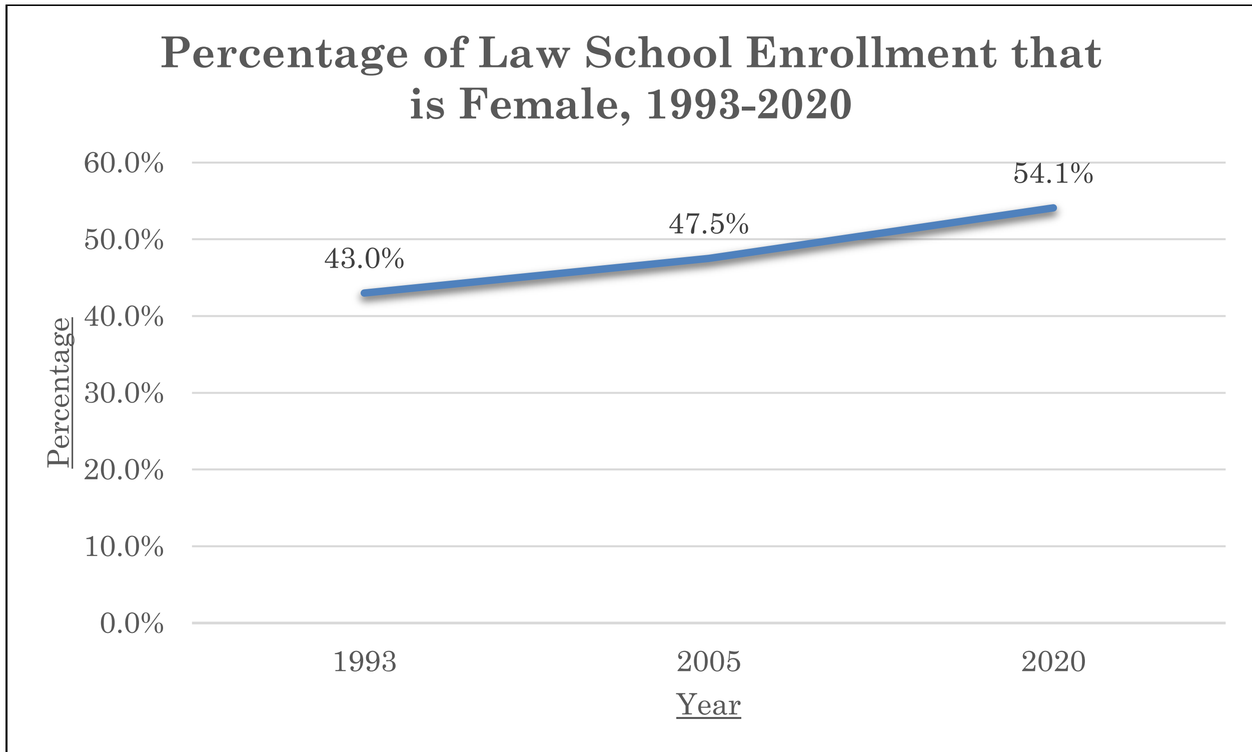

Percentage of the STEM Field that is Female, 1990-2019
28.0%
27.0%
26.0%
25.0%
24.0%
23.0%
22.0%
21.0%
Percentage
23.0%
25.0%
27.0%
1990
2000
2019
Year

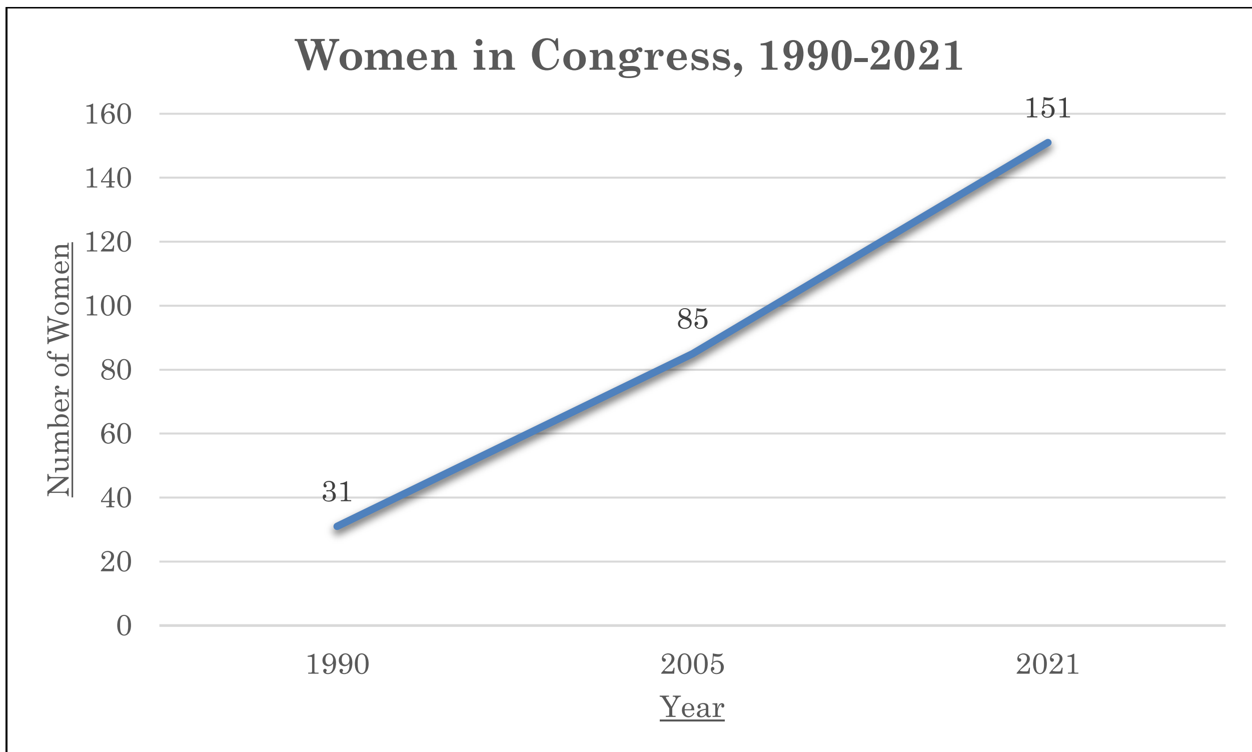

Associate's or Higher Degree Attainment, 2010-2020
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
Percentage by Gender
46.0%
36.0%
55.0%
45.0%
2010
2020
Year
Women
Men

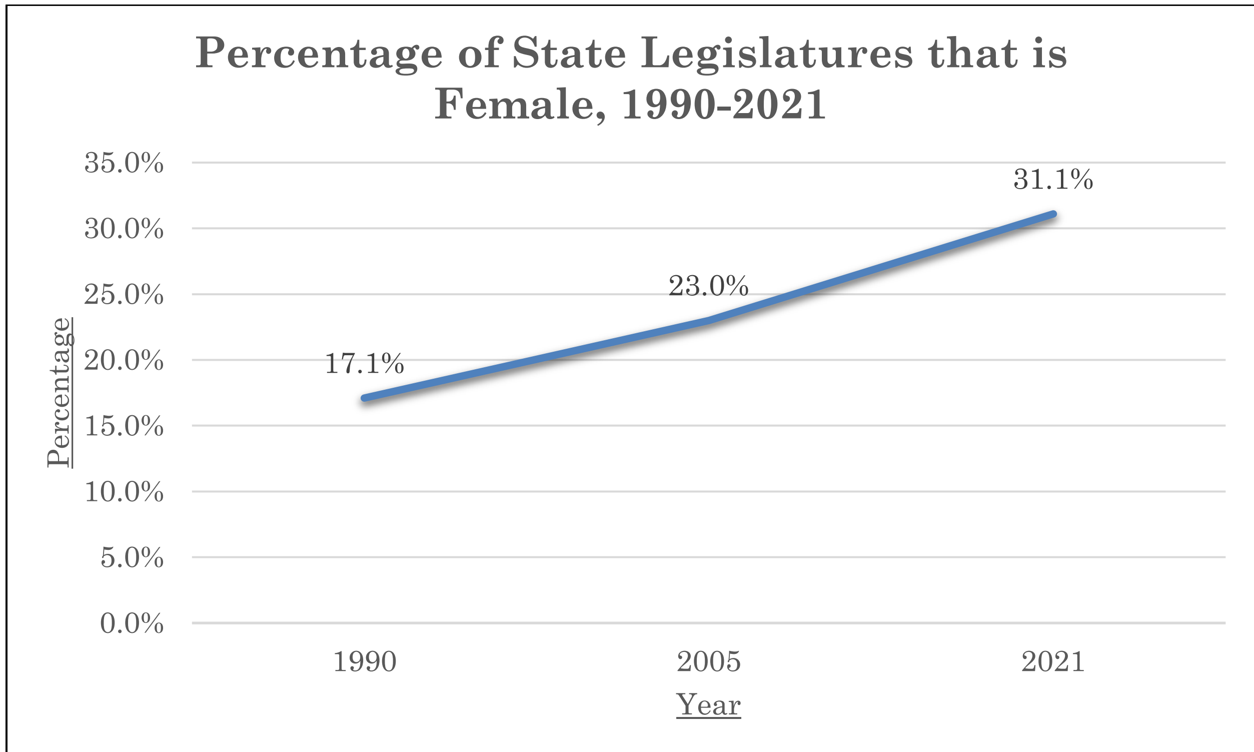

Bachelor's or Higher Degree Attainment, 2010-2020
50.0%
45.0%
40.0%
35.0%
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
Percentage by Gender
36.0%
28.0%
44.0%
35.0%
2010
2020
Year
Women
Men


Master's or Higher Degree Attainment, 2010-2020
Percentage by Gender
14.0%
12.0%
10.0%
8.0%
6.0%
4.0%
2.0%
0.0%
8.0%
5.0%
12.0%
7.0%
2010
2020
Year
Women
Men


Percentage of Medical School Graduating Class that is Female, 1989-2019
Percentage
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
34.0%
47.0%
47.9%
1989-1990
2004-2005
2018-2019
Year


Percentage of Law School Enrollment that is Female, 1993-2020
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
Percentage
43.0%
47.5%
54.1%
1993
2005
2020
Year


Women in Congress, 1990-2021
160
140
120
100
80
60
40
20
0
Number of Women
31
85
151
1990
2005
2021
Year


Percentage of State Legislatures that is Female, 1990-2021
35.0%
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
Percentage
17.1%
23.0%
31.1%
1990
2005
2021
Year