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STATE OF RHODE ISLAND
SUPREME COURT OF RHODE ISLAND

MICHAEL BENSON, ET ALS.	:	
Appellants	:	
	:	**SU-2020-0066-A**
v.	:	**(PC 19-6761)**
	:	
DANIEL J. MCKEE, in his	:	
official capacity, ET ALS.	:	
Appellees	:	

ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT

BRIEF OF APPELLEES, DANIEL J. MCKEE, in his official capacity, K. JOSEPH SHEKARCHI, in his official capacity and DOMINICK J. RUGGERIO, in his official capacity

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I. **INTRODUCTION**

Judges and lawyers use the word "section" all the time. Sometimes the reference concerns the Rhode Island General Laws, which contains 47 titles with each title comprising various chapters. Every judge knows where to look when an attorney references a particular section of a specific chapter. Other times – like here – the reference concerns Rhode Island's Constitution, which is comprised of 15 articles and within each article are certain sections. The question here focuses on one sentence within the Rhode Island Constitution, Article I, Section 2. This sentence provides: "Nothing in this *section* shall be construed to grant or secure any right relating to abortion or the funding thereof." (Emphasis added). The Plaintiffs contend this sentence – even though limited to "this section" – prohibits the General Assembly from exercising its plenary legislative authority granted through Article VI to enact legislation related to abortion rights. The State argued – and the Motion Justice agreed – that since the plain language of Article I, Section 2 was limited to "this section," there was no restraint on the General Assembly's Article VI legislative powers to pass legislation related to abortion.

Moreover, the sentence in Article I, Section 2 relied upon by the Plaintiffs to support their claim that the Legislature lacks authority to pass legislation generally prohibiting interference with access to abortion does no such thing. Rather, this provision provides that nothing in "this section," e.g., the Due Process and Equal

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Protection Clauses, shall be "construed to grant or secure any rights relating to abortion or the funding thereof." While Article I, Section 2 may not be "construed" to guarantee or secure abortion rights, nothing in "this section" prohibits abortion in Rhode Island nor does "this section" prohibit the General Assembly from enacting pro-choice legislation. Had the framers' intent been otherwise, they could have clearly articulated this global prohibition.

At its core, this case concerns the General Assembly's plenary authority to enact legislation, specifically, the Reproductive Privacy Act ("RPA"). In relevant part, the RPA added language to the General Laws prohibiting the State of Rhode Island, or any of its political subdivisions, from: (1) restricting an individual from terminating her own pregnancy prior to fetal viability, (2) interfering with an individual's pregnancy after fetal viability, and/or (3) restricting an individual from terminating her own pregnancy after fetal viability when necessary to preserve the mother's health or life. R.I. Gen. Laws § 24-4.13-2(a).[1] Other portions of the RPA, discussed *infra*, struck or repealed provisions that then-existed in the General Laws. The intent of the RPA, as expressed by Legislative Council, was to codify the rights guaranteed through "*Roe v. Wade*, 410 U.S. 113 (1973) and its progeny." State's Appendix, at 13.

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[1] The distinction between fetal viability and non-fetal viability comes from United States Supreme Court precedent. *See Roe v. Wade*, 410 U.S. 113, 164-65 (1973). *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

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II. FACTUAL BACKGROUND

Plaintiffs fall into three categories. First, Plaintiffs Michael Benson, Nicole Leigh Rowley, and Jane Doe ("Adult Plaintiffs") are residents and voters who claim the General Assembly lacked the constitutional authority to enact the RPA. Since the General Assembly lacked the authority to pass pro-choice legislation, the Adult Plaintiffs claim, pro-choice rights may be conferred only through a constitutional amendment requiring voter approval. *See* R.I. Const. Art. XIV, § 1. The Adult Plaintiffs allege they have been deprived the right to vote on such a constitutional amendment – specifically the right to vote in the negative – and that this deprivation confers upon them standing. Plaintiffs' Appendix, at 83-85 (¶¶ 9, 10, 13, 20, 29, 30).

Second, at the time this lawsuit was filed, Baby Roe and Baby Mary Doe were the unborn children of Adult Plaintiffs Rowley and Doe ("Unborn Plaintiffs"). Both Baby Roe (a pre-viable fetus when this lawsuit was filed) and Baby Doe (a viable fetus when this lawsuit was filed) claim that R.I. Gen. Laws § 11-3-4 conferred certain legal rights of a "person" upon the unborn and that the RPA's repeal of Chapter 3 of Title 11[2] violates the Unborn Plaintiffs' rights under the Fourteenth

[2] Plaintiffs misstate the status of Chapter 3 of Title 11, representing to this Court that "[n]otwithstanding legislative dicta claiming said statute is 'unconstitutional,' it remained part of the general laws until repealed by the RPA." Plaintiffs' Brief, at 11 n.8. In actuality, it was not "legislative dicta," but rather the United States District

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Amendment to the United States Constitution. Plaintiffs' Appendix, at 86 (¶¶ 34, 35), at 88 (¶¶ 48, 49). In addition, Baby Doe claims R.I. Gen. Laws § 11-23-5 provided certain statutory protection to the unborn such that "the death of Baby Mary Doe would be an actionable crime" and that the RPA's repeal of this section violates Baby Doe's rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs' Appendix, at 90 (¶¶ 59-60). The Unborn Plaintiffs contend that the repeal or striking of these so-called statutory rights confers standing. Plaintiffs' Appendix, at 86-89 (¶¶ 36-50).

Third, Plaintiff Catholics for Life, Inc. (the "Corporate Plaintiff"), 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." Plaintiffs' Appendix, at 91-92 (¶¶ 65, 66, and 69). The Corporate Plaintiff asserts claims derivative of the Unborn Plaintiffs.

On June 19, 2019, all Plaintiffs commenced this lawsuit, seeking *inter alia*, to temporarily and permanently enjoin the General Assembly from passing and/or

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Court that declared Chapter 3 of Title 11 unconstitutional. *See Doe v. Israel*, 358 F.Supp. 1193, 1202 (D.R.I. 1973) ("R.I.G.L. §§ 11-3-1; 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"). Even Plaintiffs' amici recognize this nearly fifty year old precedent. *See* Thomas More Society Brief, at 12 ("it is correct that it was ruled unconstitutional in *Doe v. Israel*"). While the language set forth in Chapter 3 of Title 11 remained within the General Laws until it was struck as part of the RPA, the language has been a legal nullity since declared unconstitutional.

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transmitting H-5125B (which later became the RPA) to Governor Gina M. Raimondo for signature. The Superior Court (Long, J.) denied a motion to temporarily restrain the legislative and executive branches from performing their constitutional duties, and on June 19, 2019, House Bill 5125B passed the General Assembly and was signed into law by the Governor. Plaintiffs' Appendix, at 82.

On June 25, 2019, Plaintiffs filed an amended complaint, challenging the constitutionality of the RPA. In due course, the State Defendants filed a Motion to Dismiss, arguing that no Plaintiff had standing and that any limitation set forth in Article I, Section 2 was – by its own terms – limited to this "section," *i.e.*, Article I, Section 2. On November 27, 2019, the Honorable Melissa E. Darigan granted the Motion to Dismiss, explaining:

> none of the categories of plaintiff have standing here. The unborn persons I find do not have rights as persons to make this challenge, and they rest their claims in large part on statutory provisions that have been repealed as unconstitutional. I think that Mary Doe's quick child claim to standing is not persuasive, and the Servants of Christ for Life standing is derivative to the Baby Roe and Baby Doe claims and, therefore, fail. Plaintiffs' Appendix, at 61-62.

With respect to the Adult Plaintiffs, Justice Darigan concluded that these Plaintiffs "clearly have not suffered a concrete and particularized harm as required by a long line of Supreme Court precedents on either their so-called voter suppression claims or their equal protection and due process claims." Plaintiffs' Appendix, at 62. Thereafter, Justice Darigan rejected the "public interest exception" to standing

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doctrine, stating that exception was "reserved for truly rare and exceptional cases, and I don't think that that such truly rare or exceptional case is present here." Plaintiffs' Appendix, at 62.

Notwithstanding the disposition of the standing question – and despite Plaintiffs' appellate argument that they were entitled to, but did not receive, a merit-based decision – Justice Darigan continued and analyzed the merits. Justice Darigan agreed with the State Defendants that on a constitutional or statutory interpretation case, it is the province of the court hearing a motion to dismiss to "look at the actual language that is being addressed and endeavor to interpret it." Plaintiffs' Appendix, at 62-63. Applying this rationale, the Motion Justice expressed:

> I disagree with Plaintiffs' position that Article I, Section 2 is ambiguous, and I don't think it is ambiguous. I also do not believe that Article I, Section 2 prohibits the General Assembly from having enacted the RPA. I don't think the RPA is void [f]or lack of authority of the General Assembly, and I don't think that the RPA requires a vote of the citizens of Rhode Island.
>
> In the same vein, I agree with the Department of Attorney General that the General Assembly's broad authority to enact laws and this RPA in particular has not been limited by Article I, Section 2 or any other provision that's been presented to the Court under the Rhode Island or United States Constitution.

Plaintiffs' Appendix, at 63. Final Judgment entered on December 16, 2019 and this timely appeal ensued.[3] Plaintiffs' Appendix, at 7.

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[3] Plaintiffs contend that the Motion Justice erred "in dismissing all of Plaintiffs' claims" when the State's Motion to Dismiss sought dismissal of some – but not all – claims. Plaintiffs' Brief, at 32. This is not true and Plaintiffs fail to identify what

III. STANDARD OF REVIEW

When reviewing a Rule 12(b)(6) motion, this Court applies the same standards as the motion justice and must "assume that the allegations contained in the complaint are true, and examine the facts in the light most favorable to the nonmoving party." *McKenna v. Williams,* 874 A.2d 217, 225 (R.I. 2005). To carry out this function, we "examine the complaint to determine if plaintiffs are entitled to relief under any conceivable set of facts." *Id.* A motion to dismiss is proper if it is clear beyond a reasonable doubt that plaintiff will not be entitled to relief under any set of facts. *A.F. Lusi Const., Inc. v. Rhode Island Convention Ctr. Auth.*, 934 A.2d 791, 795 (R.I. 2007).

IV. ARGUMENT

This appeal presents two main issues: (1) Plaintiffs' failure to establish standing and (2) the construction of Article I, Section 2. Although standing is a

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claims allegedly remain. In any event, after the Motion Justice granted the Motion to Dismiss, the State requested Judgment. Plaintiffs' Appendix, at 67. Plaintiffs' legal counsel responded that "we will accept whatever the Court decides is appropriate" and the Court observed that "on a 12(b)(6) motion that the order of the Court is a final order." Plaintiffs' Appendix, at 67. The Motion Justice added that "[s]ince my intention is for this ruling to be the end of – the last stop in this court," the State should "submit an order and a judgment." Plaintiffs' Appendix, at 67. Any suggestion that the Superior Court's standing and constitutional construction decisions did not resolve the entire case is baseless and unsupported. Moreover, Plaintiffs never raised an objection and expressly deferred to the Motion Justice's ruling. *See Terzian v. Lombardi*, 180 A.3d 555, 557 (R.I. 2018) (waiver).

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"fundamental preliminary question," *see Watson v. Fox*, 44 A.3d 130, 135 (R.I. 2012), beginning with the constitutional construction issue will provide better context.

THE CONSTITUTIONAL CONSTRUCTION ISSUE

A. **Article I, Section 2 Limits its Application to "this section"**

Plaintiffs contend Article I, Section 2 prohibits the General Assembly from exercising its plenary authority to enact abortion-related legislation, such as the RPA, but they are wrong. Article I, Section 2 contains no such prohibition. While the focal point is on the last sentence, 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 contend the last sentence "specifically prohibits the General Assembly's unilateral passage of a new fundamental 'right' to abortion, 'or the funding thereof.'" Plaintiffs' Appendix, at 70. But applying the plain language rule provides no such restraint on the Legislature's Article VI 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). "[T]his section," of course, means Article I, Section 2.

On appeal, Plaintiffs express virtually no disagreement with the Motion Justice's constitutional construction that Article I, Section 2's last sentence limits its application to "this section," i.e., Article I, Section 2. Indeed, as discussed, *infra*, throughout this case Plaintiffs have offered a construction similar to the Motion Justice's conclusion, and as such, have waived any argument that the Motion Justice's interpretation was incorrect.[4]

Rather than offering a contrary interpretation, Plaintiffs seek to undermine the Motion Justice's interpretation by suggesting the construction was infected with various errors. For example, Plaintiffs argue the Motion Justice should have considered certain historical extrinsic evidence rather than relying solely upon the plain language of Article I, Section 2. In support, Plaintiffs reference this Court's observation that when "confronted with an issue of constitutional interpretation, 'this Court's chief purpose is to give effect to the intent of the framers.'" Plaintiffs' Brief, at 33 (citing *Woonsocket School Committee et. al v. Chafee*, 89 A.3d 778 (R.I. 2014)). Plaintiffs further relate that this Court will "also look to the 'historical context of a

[4] This Court has held, "[e]ven when a party has properly preserved its alleged error of law in the lower court, a failure to raise and develop it in its briefs constitutes a waiver of that issue on appeal and in proceedings on remand." *Terzian*, 180 A.3d at 557.

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constitutional provision' when 'ascertaining its meaning, scope, and effect.'" Plaintiffs' Brief, at 34 (citing *Viveiros v. Town of Middletown*, 973 A.2d 607 (R.I. 2009)).

Taken in isolation, these constitutional construction principles are correct, but in context, Plaintiffs omit a key principle. It is that principle and precedent (set forth in bold below) that was the basis of the Motion Justice's decision and the State's appellate argument. Specifically, this Court has recognized:

> [w]hen confronted with an issue of constitutional interpretation, 'this Court's 'chief purpose is to give effect to the intent of the framers.' ' *Viveiros v. Town of Middletown,* 973 A.2d 607, 610 (R.I. 2009) (quoting *Riley v. Rhode Island Department of Environmental Management,* 941 A.2d 198, 205 (R.I. 2008)). ***'We '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.' ' Id. (quoting Riley, 941 A.2d at 205). Furthermore, ' '[e]very clause must be given its due force,' meaning 'no word or section must be assumed to have been unnecessarily used or needlessly added.' ' Id. at 610–11 (quoting Riley, 941 A.2d at 205). '[W]e must 'presume the language was carefully weighed and its terms imply a definite meaning.' ' Id. at 611 (quoting Riley, 941 A.2d at 205).*** We will also look to the 'historical context of a constitutional provision' when 'ascertaining its meaning, scope and effect.' *Viveiros,* 973 A.2d at 611. 'Thus, this Court may properly consult extrinsic sources, including 'the history of the times' and the 'state of affairs as they existed' when the constitutional provision in question was adopted, as well as the proceedings of constitutional conventions.' *Id.* (quoting *Sundlun,* 662 A.2d at 45).

Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 787–88 (R.I. 2014) (bold represents language omitted by Plaintiffs).

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It is unclear why Plaintiffs omit "the well-established rule of construction that words in a constitution are to be given their usually accepted meaning." *McKenna*, 874 A.2d at 232. And, Plaintiffs avoid this Court's instruction that "[u]nless a contrary intent clearly appears on the face of the provision, absent equivocal or ambiguous language, the words cannot be interpreted or extended but must be applied literally." *Id*. "Constitutions, just like statutes, have an effect by what they say." *Id*. As this Court has explained, "[w]hen a constitutional provision is clear, it speaks for itself [and i]n the face of a clear constitutional provision (assuming it does not lead to absurd results), it is not necessary to anguish over what might have been the intent of the electorate." *Id*.

Throughout this case, Plaintiffs have made pellucid that they interpret Article I, Section 2 in the same manner as the State Defendants and the Motion Justice – namely that Article I, Section 2's last sentence applies only to "this section." For instance, Plaintiffs argued that the Superior Court "must accept as true: the allegation in Plaintiffs' pleading that the 'section' which Article I, Section 2, refers back to, is the due process and equal protection clause of Article I, Section 2[.]" State's Appendix, at 47. Plaintiffs later directed the Superior Court to "the operative clause of Article I, Section 2, prohibiting the use of anything 'in this section [Article I, Section 2],' – specifically, the 'due process clause' and 'equal protection clause[.]'" State's Appendix, at 49 (alternation in original). And, later Plaintiffs referenced the "[m]isuse

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of the 'due process' and 'equal protection' clauses of the Rhode Island Constitution, as alleged by Plaintiffs' in their pleading, squarely points to the operative clause in Article I, Section 2, that forbids the General Assembly from using anything 'in this section' (i.e. the due process and equal protection clauses) as a basis to 'grant' or 'secure' a right to abortion." State's Appendix, at 54.

Plaintiffs make similar representations to this Court. In their pre-briefing statement, Plaintiffs referenced Article I, Section 2 and argued that "nothing in that part of the provision of the constitution 'shall be construed to grant or secure any right relating to abortion or the funding thereof." State's Appendix, at 83. Plaintiffs later told this Court that "the current Article I, Section 2, in its title and relevant text, mandates that the **due process and equal protection clause of said Article I, Section 2**, shall not 'be construed to grant or secure any right relating to abortion or the funding thereof.'" Plaintiffs' Brief, at 22 (emphasis in original). The common theme of Plaintiffs' arguments is that Article I, Section 2 – and only Article I, Section 2 – shall not be "construed to grant or secure any right relating to abortion or the funding thereof." R.I. Const. Art. I, § 2. This interpretation does not attempt to alter the General Assembly's plenary legislative power as authorized through Article VI.

The Motion Justice correctly determined that Article I, Section 2 was clear and unambiguous, 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

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rule of constitutional construction, any limitation set forth in Article I, Section 2 is applicable 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).[5]

B. **The General Assembly Had the Legislative Authority to Pass the Reproductive Privacy Act**

The Rhode Island Constitution vests the "legislative power" of the State in "two houses, the one to be called the senate, the other the house of representatives."

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[5] Plaintiffs also make repeated conclusions regarding this Court's precedent that are either unsupported or wrong. For instance, Plaintiffs cite *Perron v. Treasurer of City of Woonsocke*t, 403 A.2d 252 (R.I. 1979) and state "this Court has held that a 'quick child,' is a 'person,' entitled to seek relief, and have the merits of her case heard." Plaintiffs' Brief, at 36. But *Perron* had nothing to do with a "quick child" or pro-choice rights, but rather concerned an agreement to access a waterline. Plaintiffs also represent that "this Court has held that a viable fetus was deemed a 'person' within the meaning of Rhode Island's wrongful death statute," but the case cited by Plaintiffs involved the alleged wrongful death of a non-viable fetus and the page cited by Plaintiffs concluded "[w]e do not believe that the Legislature intended a nonviable fetus to be defined as a 'person' within the meaning of the wrongful-death statute." *Compare* Plaintiffs' Brief, at 37 *with Miccolis v. AMICA Mutual Insurance Co.*, 587 A.2d 67, 71 (R.I. 1991). To be sure, as Plaintiffs' point out, the *Miccolis* Court does observe that "a viable fetus is capable of independent existence and is rightfully recognized as a separate entity capable of maintaining its own cause of action," but this observation was made in the context of surveying the law from other states and represented the law in Kansas, not Rhode Island. *See Miccolis*, 587 A.2d at 70 (citing *Humes v. Clinton*, 792 P.2d 1032, 1036 (Kan. 1990)). In another instance, Plaintiffs affirm that "it is uncontroverted that this Court has held that a post-viability fetus is a 'person' for purposes of the 'quick child' statute," but again Plaintiffs cite no case law for what they purport is an uncontroverted principle. Plaintiffs' Brief, at 35. *See also* Plaintiffs' Brief at 36 (referencing without citation "this Court's binding precedent that a post-viability fetus may bring suit for a change in legal or privileged 'status'"). On reply, Plaintiffs should provide this authority or correct the record.

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Article VI, § 2. "The concurrence of the two houses shall be necessary to the enactment of laws." *Id*. This Court has recognized "[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).

With respect to enacted legislation, such as the RPA, this Court "presumes that legislative enactments are valid and constitutional." *Oden v. Schwartz*, 71 A.3d 438, 456 (R.I. 2013). And, this Court has recognized that it 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 focus entirely upon Article I, Section 2 and its provision that "[n]othing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof," but they overlook that nothing within "this section,"

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meaning Article I, Section 2, limits the General Assembly's plenary authority to legislate through Article VI. Rather than addressing (or even acknowledging) the General Assembly's Article VI powers, Plaintiffs take the extreme position that Rhode Island's Constitution was radically altered in 2004 when voters repealed the "residual" or "continuing" powers clause. 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 (referencing repealed R.I. Const. Article VI, § 10).

The repeal of the residual powers clause, however, is of no moment when – like here – Rhode Island's Constitution expressly authorizes and assigns to the General Assembly the exercise of certain constitutional powers, such as enacting legislation. *See* R.I. Const. Art. VI, § 2. As this Court confirmed two years *after* the 2004 separation of powers amendments that Plaintiffs contend radically altered the Legislature's primary purpose, "[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*, 901 A.2d at 1150. Two years after that conclusion, the Justices of this Court reiterated that "we do not view the [separation of powers] 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*

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Representative (CRMC), 961 A.2d 930, 934 (R.I. 2008). The Justices continued 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).

To be sure, Plaintiffs assert Article I, Section 2 contains a "textual limitation[]" forbidding the General Assembly from enacting the RPA, but this argument is inconsistent with Plaintiffs' repeated admissions that Article I, Section 2's last sentence limits its application to "this section." *See supra* pp. 11-12. Although Plaintiffs suggest that Article I, Section 2's last sentence was intended to restrain the General Assembly's legislative authority, the authority to legislate comes from Article VI, not Article I, Section 2.

Moreover, the limitation that nothing within this "section" shall be "construed" to grant or secure any right relating to abortion must be read in context of the law that existed when Article I, Section 2 was passed. *See e.g., Barrett v. Barrett*, 894 A.2d 891, 898 (R.I. 2006) ("we presume the General Assembly knows the state of the law when enacting new legislation"). Thirteen years earlier, the United States Supreme Court concluded that the Due Process Clause set forth in the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. While Article I, Section 2 might restrain a Rhode Island court from construing the

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Due Process Clause set forth in Article I, Section 2 in a manner similar to *Roe*, the plain language of "this section" contains no restraint on the General Assembly's Article VI powers.

The Unborn Plaintiffs also submit that the RPA violates the Fourteenth Amendment to the United States Constitution by depriving them of their status as a "person." *Roe* squarely rejected the argument that for purposes of the Fourteenth Amendment, a "person" includes the unborn. *See Roe*, 410 U.S. at 158 ("the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). *See also id.* at 162 ("In short, the unborn have never been recognized in the law as persons in the whole sense."). Plaintiffs cannot point to any provision of the United States or Rhode Island Constitutions that prohibit the General Assembly from passing the RPA.

C. <u>Plaintiffs' Other Arguments are Meritless</u>

1. The Motion Justice May Reach the Merits on a Motion to Dismiss

Except for "unique circumstances, not presented in this case," Plaintiffs assert a hearing justice may not interpret a statute or constitutional provision at the motion to dismiss stage. Plaintiffs' Brief, at 30. Plaintiffs cite no authority for this conclusion and suggest that even when a court is presented with an unambiguous statutory or constitutional provision, a hearing justice must – except for the undefined "unique circumstances" – deny the motion to dismiss and allow the case to proceed to factual

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discovery. The United States Supreme Court has spoken on this matter:

> Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law…. This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' *Hishon, supra,* 467 U.S., at 73, 104 S.Ct., at 2232, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations.

Neitzke v. Williams, 490 U.S. 319, 326-27 (1989) (internal citation omitted). The Motion Justice's decision embraced this principle.

The Motion Justice rejected Plaintiffs' argument and explained "I do think that on a constitutional or statutory interpretation case that is based on language that is black and white, I think that for rightly or for wrongly that it is in the province of this Court to look at the actual language that is being addressed and endeavor to interpret it, so that's what I've done." Plaintiffs' Appendix, at 62-63. Thereafter the Motion Justice determined that Article I, Section 2 was not ambiguous, and expressed that the court did not believe "the RPA is void [f]or lack of authority of the General Assembly, and I don't think that the RPA requires a vote of the citizens of Rhode Island." Plaintiffs' Appendix, at 63. This conclusion is consistent with the numerous occasions where this Court has affirmed a hearing justice's merit-based statutory or constitutional

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construction on a motion to dismiss.[6]

2. The Motion Justice Did Not Improperly Shift the Burden of Proof

Plaintiffs contend that the Motion Justice improperly shifted the burden of proof from Defendants to the Plaintiffs on a Motion to Dismiss. Plaintiffs hardly expound upon this allegation and acknowledge that the Motion Justice "generally articulat[ed] the Rule 12(b)(6) standard." Plaintiffs' Brief, at 27. Indeed, the Motion Justice accurately explained:

> [t]his is a motion brought under 12(b)(6), and the standard, as has been discussed, is that the complaint will be dismissed when it is clear beyond a reasonable doubt that the Plaintiffs will not be entitled to relief under any set of facts that could be proven. As we've also discussed today, the Court must assume that all factual allegations in the complaint are true and statements that are in the nature of legal conclusions are not required

[6] Plaintiffs contend that the only matters where it may be proper to consider the merits at the 12(b)(6) stage are cases involving immunity or the determination of whether a constitutional provision is self-executing. Plaintiffs' Brief, at 29. This proposition is incorrect. *See e.g., Crenshaw v. State*, 227 A.3d 67, 74 (R.I. 2020) ("we conclude that the protections of the [Whistleblowers Protection Act] are limited to activities that occurred while the employee was still employed by the defendant employer or one in close nexus with it"); *Woonsocket School Committee*, 89 A.3d at 787 ("The outcome of this case largely depends on our interpretation of the Education Clause, article 12, section 1 of the Rhode Island Constitution."); *Tarzia v. State*, 44 A.3d 1245, 1254 (R.I. 2012) ("this Court holds that, even if § 12–1.3–3(c) did apply to the case now before this Court, the clear and unambiguous statutory language does not impose an affirmative duty upon the Attorney General to distribute expungement orders, and thus the Attorney General cannot be held liable for failing to do so"); *A.F. Lusi Const. Inc.*, 934 A.2d at 795 (affirming granting of a motion to dismiss based on statutory interpretation of the State Purchases Act); *Bandoni v. State*, 715 A.2d 580 (R.I. 1998) (engaging in statutory and constitutional construction on the review of a motion to dismiss).

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to be presumed as true.

Plaintiffs' Appendix, at 59-60. After these foundational observations, the Motion Justice addressed the Plaintiffs' opposition arguments and articulated the rationale for granting the Motion to Dismiss. At the conclusion, the Motion Justice addressed what is now Plaintiffs' appellate argument, acknowledging that the "Plaintiffs argue and believe that the standards have been flipped here and that a greater burden is being placed on Plaintiffs than is proper at this stage of the proceeding." Plaintiffs' Appendix, at 63-64. Nevertheless, the Motion Justice continued, "I find that based on the standing issues and based on my interpretation of Article I, Section 2, that Plaintiffs would not be entitled to any relief under any set of facts that could be proven." Plaintiffs' Appendix, at 64. This determination and burden accords with this Court's precedent. *See e.g., Woonsocket School Committee*, 89 A.3d at 787 (motion to dismiss is "properly granted 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim'").

Here, Plaintiffs' precise argument concerning the Motion Justice's alleged burden shifting is unclear because they cite no portion of the record. Plaintiffs' inability to identify a burden-shifting, factual, or credibility issue improperly determined by the Motion Justice represents a waiver of this issue on appeal and is not

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surprising given the lack of any credibility or factual issues presented by this case.[7] *See Terzian*, 180 A.3d at 557 (waiver). As this Court has made clear, questions of statutory or constitutional construction represent "question[s] of law." *See e.g. Miller v. Metropolitan Property and Casualty Insurance Company*, 88 A.3d 1157, 1160 (R.I. 2014).

While Plaintiffs acknowledge that "at trial, Plaintiffs bear the ultimate burden of proof on the issue of standing" – thus, suggesting their belief that pre-trial, Defendants have the burden of disproving Plaintiffs' standing – Plaintiffs cite no authority for this position – a position that conflicts with precedent from this Court and the United States Supreme Court. Plaintiffs' Brief, at 51. For instance, the Supreme Court has recognized that "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, *each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof*, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)

[7] During the pre-briefing stage, Plaintiffs twice referred to the issues presented on appeal as "pure questions of law." State's Appendix, at 84 ("The first impression pure questions of law before this Honorable Court are…."); at 85 ("The issues before this Honorable Court are plainly pure questions of law, meriting the de novo standard of review."). In their Brief, Plaintiffs similarly represent that "[a]ll issues are questions of law and this Court therefore applies the de novo standard of review." Plaintiffs' Brief, at 2 n.5.

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("plaintiffs, as the parties now asserting federal jurisdiction, [must] carry the burden of establishing their standing under Article III"). This Court's caselaw is in accord. *See Graziano v. Rhode Island State Lottery Commission*, 810 A.2d 215, 222 (R.I. 2002) ("[t]he burden of demonstrating such a grievance is upon the party who seeks to establish standing"); *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 934 (R.I. 1982) ("One who seeks review has the burden of setting the judiciary machinery in motion by establishing that he is aggrieved and has a right to redress."). In a case where only legal questions exist – such as standing and constitutional construction – the burden of persuasion lies with the plaintiff and it "never shifts." *See Cranston Police Retirees Action Committee v. City of Cranston*, 208 A.3d 557, 573 (R.I. 2019).

3. The Motion Justice Did Not Improperly Consider "Extrinsic Evidence" and Properly Excluded Consideration of the Affidavits

The Plaintiffs contend the Motion Justice committed error in two additional respects: (1) improperly considering "extrinsic evidence beyond the four corners of Plaintiffs' complaint" and (2) failing to consider affidavits submitted by Plaintiffs in support of their constitutional construction argument. Plaintiffs' Brief, at 27. Ordinarily, when ruling on a motion brought under Rule 12(b)(6), "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Chase v. Nationwide Mutual Fire Insurance Co.*, 160 A.3d 970, 973 (R.I. 2017). This

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Court, however, has recognized at least two exceptions. First, "documents attached to a complaint will be deemed incorporated therein by reference." *Bowen Ct. Assocs. v. Ernst & Young, LLP*, 818 A.2d 721, 725–26 (R.I. 2003). *See also* Super. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). Second, "a narrow exception [exists] for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Goodrow v. Bank of Am., N.A.*, 184 A.3d 1121, 1126 (R.I. 2018).

Despite their criticism, Plaintiffs never identify the "extrinsic evidence" the Motion Justice allegedly improperly considered. It suffices that the Plaintiffs' failure to identify the records they contend were improperly considered constitutes a waiver of this issue. *See Terzian*, 180 A.3d at 557. Even more, a review of the Motion Justice's decision finds no reference to any improperly considered "extrinsic evidence." Rather, the Motion Justice correctly articulated and applied the proper rule of law: "[t]he standard is a little bit complicated here when you have a complaint as extensive as Plaintiffs have submitted along with some, at least in my experience on both sides of the bench, some unusual exhibits attached to the complaint[.]" Plaintiffs' Appendix, at 60. Recognizing that the Plaintiffs attached exhibits to their amended complaint, the Motion Justice properly observed, "there is a lot in the complaint, the

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four corners of the complaint, encompassing the attachments." Plaintiffs' Appendix, at 60.[8]

The Motion Justice was correct. Attached to the Plaintiffs' amended complaint were numerous exhibits, namely, an "amicus" brief written by one of the Plaintiffs' attorneys and submitted to the General Assembly during its consideration of the RPA, various copies of the Rhode Island Constitution, a Guide to the 1986 Constitutional Convention Records, a printout from the American Civil Liberties Union website concerning the 1986 Constitutional Convention, a 1986 Report of the Citizens Rights Committee concerning the Equal Protection Clause, the 1986 Resolution relating to the Right of the People, a law review article, the RPA, and two affidavits signed days before this lawsuit was filed in 2019. The Motion Justice's consideration, if any, of documents Plaintiffs attached to their own amended complaint was not error. *See Bowen Ct. Assocs.*, 818 A.2d at 725–26.[9]

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[8] Plaintiffs provided the amended complaint in their appendix to this Court, but did not include in the appendix the exhibits attached to the amended complaint.

[9] Plaintiffs' allegation that the Motion Justice improperly considered extrinsic documents is surprising because in their Memorandum in Opposition to the Motion to Dismiss Plaintiffs argued that "[t]here is nothing in the record of this case outside Plaintiffs' pleading." State's Appendix, at 4 n.4. To the extent Plaintiffs suggest on appeal that the Motion Justice should have converted the Motion to Dismiss into a Motion for Summary Judgment, this allegation also contradicts Plaintiffs' lower court position. Specifically, Plaintiffs argued that the State's Motion to Dismiss was "not even ripe for summary judgment disposition, based on Plaintiffs' pleading alone" because "[t]here is nothing in the record of this case outside Plaintiffs' pleading." State's Appendix, at 4 n.4. Plaintiffs also told the Superior Court that they "reserve[d] the right to further argument and briefing on this issue should [the Superior Court]

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In addition to arguing that the Motion Justice improperly considered unspecified evidence that should not have been examined, Plaintiffs also contend that the Motion Justice erred when she did not consider two affidavits. Both affidavits were signed in the days preceding the filing of this lawsuit in June 2019 and 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." Plaintiffs' Appendix, at 97 (¶ 99). The Motion Justice's rationale for rejecting consideration of the affidavits was clear:

> I have not considered those affidavits to be facts, established facts. When we are dealing in this complaint with a question of constitutional interpretation, it is clear that affidavits and opinions and recollections do not trump the plain language that is used in the challenged provisions or the provisions that are being requested to be interpreted, and so, the focus of my analysis anyway has been on really the traditional rule of construction of looking at the actual language that is at issue, and I don't find that those affidavits are competent evidence of either intent nor are they competent evidence relative to the statutory interpretation analysis.

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convert Defendants' Rule 12(b)(6) motion into a Rule (56) motion – which Plaintiffs deem inappropriate here." State's Appendix, at 4 n.4. Neither party asked the Motion Justice to convert the Motion to Dismiss into a Motion for Summary Judgment. To the extent Plaintiffs contend on appeal that the Motion Justice erred by not converting the Motion to Dismiss into a Motion for Summary Judgment, Plaintiffs are estopped from making this inconsistent argument. *See Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 519 (R.I. 2006) (judicial estoppel).

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Plaintiffs' Appendix, at 61. The Motion Justice was on firm legal ground.

This Court has considered and rejected the precise issue Plaintiffs present, *i.e.*, the use of post-hoc affidavits as an interpretative tool to glean statutory (or in this case constitutional) intent. On a question certified from the United States District Court for the District of Rhode Island, this Court explained:

> [a]lthough the parties have not asserted the issue to us through their briefs or during oral argument, we nevertheless find it appropriate to comment upon Honda's attempt to introduce before Magistrate Judge Lovegreen affidavits of legislators who sponsored the bill in 1991 that led to the instant statute. We agree with Magistrate Judge Lovegreen that such post hoc affidavits offered as 'recollections' of the intent of legislators are not true legislative histories and *should be given no weight. They hold no place within the canons of statutory construction*.

LaPlante v. Honda North America, Inc., 697 A.2d 625, 628-29 (R.I. 1997) (emphases added). *See also Bandoni v. State*, 715 A.2d 580, 593 (R.I. 1998) ("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'").

Plaintiffs ignore this Court's precedent and overlook the distinction between factual allegations, which are presumed correct on a motion to dismiss, and legal conclusions, which are not entitled to deference. *See Doe ex rel. His Parents and*

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Natural Guardians v. East Greenwich School Department, 899 A.2d 1258, 1262 n.2 (R.I. 2006) ("[a]llegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true"); Robert B. Kent et al., Rhode Island Civil Procedure § 12:9, III-44 (West 2006) ("sweeping legal conclusions are not admitted" for purposes of reviewing a 12(b)(6) motion).

Most notably, Plaintiffs rely entirely upon affidavits submitted in opposition to the Motion to Dismiss[10] by the 1986 Speaker of the House of Representatives (Matthew Smith) and legal counsel to the President of the 1986 Constitutional Convention (Patrick Conley), both of whom purport to attest to the Framers' intent *33 years after* the 1986 Constitutional Convention. While the consideration of such affidavits would be inappropriate under any conceivable circumstance, this reliance is particularly misplaced when – as here – neither attesting individual was a member of the 1986 Constitutional Convention. It is these two affidavits Plaintiffs suggest creates a material issue of disputed fact, but the construction of Rhode Island's Constitution, like statutory construction, is a legal issue solely within the province of this Court. *See City of East Providence v. Public Utilities Commission*, 566 A.2d 1305, 1307 (R.I. 1989) ("dispute relat[ing] to statutory interpretation … is a question of law for which the Supreme Court has the ultimate responsibility").

As the Plaintiffs have represented to this Court, "[a]ll issues are questions of

[10] The affidavits were also attached to the amended complaint.

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law and this Court therefore applies the de novo standard of review." Plaintiffs' Brief, at 2 n.5. And, as this Court has recognized, "[w]hen a constitutional provision is clear, it speaks for itself." *McKenna*, 874 A.2d at 232. "In the face of a clear constitutional provision (assuming it does not lead to absurd results), it is not necessary to anguish over what might have been the intent of the electorate." *Id.* Moreover, "[u]nless a contrary intent clearly appears on the face of the provision, absent equivocal or ambiguous language, the words cannot be interpreted or extended but must be applied literally." *Id.* *See also Woonsocket School Committee*, 89 A.3d at 788 ("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"). The attempt to inject post-hoc affidavits more than 33 years after the event to contravene the plain language of Article I, Section 2 "hold[s] no place within the canons of statutory construction." *LaPlante*, 697 A.2d at 628-29.

THE STANDING ISSUE

A. All Plaintiffs Lack Standing to Bring This Civil Action

The modern standing doctrine was articulated in *Rhode Island Ophthalmological Society v. Cannon*, 317 A.2d 124, 129 (R.I. 1974), where this 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 would

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subsequently be describe as a "fundamental preliminary question,"[11] a plaintiff must allege that "the challenged action has caused *him* injury in fact, economic or otherwise." *Id*. at 128 (emphasis added). Even where the public interest is implicated, this Court added, "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).

Burns v. Sundlun, 617 A.2d 114 (R.I. 1992) is similar and made clear that to acquire standing, the plaintiff's asserted injury must be distinct from an 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. This Court concluded Burns "fail[ed] to meet th[e] test for standing" and its rationale applies equally in this case:

> [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. (Emphasis added).

[11] *See Watson*, 44 A.3d at 135.

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In *Bowen v. Mollis*, this Court examined a lawsuit seeking a declaratory judgment concerning whether the 2008 election was a general election within the meaning of the Rhode Island Constitution. 945 A.2d 314, 316 (R.I. 2008). Such a determination was important because constitutional amendments are required to be "submitted to the electors at the next general election." *Id*. (quoting R.I. Const. Article XIV, § 1). Although the trial justice determined the plaintiff had standing, this Court reversed and explained:

> [w]hen confronted with a request for declaratory relief, the first order of business for the trial justice is to determine whether a party has standing to sue. A standing inquiry focuses on the party who is advancing the claim rather than on the issue the party seeks to have adjudicated. *** Indeed, the 'party seeking relief must have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'

Id. at 317. Applying these principles, this Court concluded that "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*.

Similarly, in *Watson v. Fox* – a case in which certain legislators in their individual capacities challenged the legislative grant process as unconstitutional – this 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).

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This Court continued 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. This Court re-affirmed 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, this 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*. 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.

"These venerable principles apply equally to actions at law, in equity, or claims seeking declaratory relief." *McKenna*, 874 A.2d at 226. Indeed, "the Superior Court is without jurisdiction under the Uniform Declaratory Judgments Act unless it is confronted with an actual justiciable controversy." *Id*. "The constituent parts of a justiciable claim include 'a plaintiff who has standing to pursue the action' and 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" *Id*. *See also Providence Teachers Union v. Napolitano*, 690 A.2d 855, 856 (R.I. 1997) ("the party seeking declaratory relief must present the court with an actual controversy").

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1. The Unborn Plaintiffs and the Corporate Plaintiff Lack Standing

Plaintiffs Baby Roe and Baby Mary Doe contend that under the Declaratory Judgment Act they have standing to challenge the repeal or striking of certain provisions. The first – Chapter 3 of Title 11 – was declared unconstitutional almost 50 years ago. *See Doe*, 358 F.Supp. at 1202. The second – R.I. Gen. Laws § 11-23-5 – criminalizes the willful killing of an unborn quick child.[12] As discussed, *infra*, the Unborn Plaintiffs challenge only the repeal or striking of these provisions from the General Laws and do not appear to challenge any language added to the General Laws through the RPA. At the time the RPA was passed repealing or striking these provisions from the General Laws, neither Baby Roe nor Baby Doe had acquired any rights under either provision. As such, the striking or repeal of these provisions could not constitute an injury-in-fact.

a. R.I. Gen. Laws § 11-3-1 et seq.

The RPA struck R.I. Gen. Laws § 11-3-1 through § 11-3-5. State's Appendix, at 3-4. At its core, this Chapter provided that "human life commences at the instant of conception and that said human life at said instant of conception is a person with

[12] A "quick child" is defined as "an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state." R.I. Gen. Laws § 11-23-5(c).

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the language and meaning of the fourteenth amendment of the constitution of the United States[.]" R.I. Gen. Laws § 11-3-4; State's Appendix, at 3. Based upon the striking of this provision (and all of Chapter 3 of Title 11), the Unborn Plaintiffs contend that the RPA 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." Plaintiffs' Appendix, at 86, 88, 89 (¶¶ 34, 36, 48, 50). The Corporate Plaintiff asserts a derivative standing argument, claiming that its "right to sue on behalf of unborn 'persons'" represents a deprivation. Plaintiffs' Appendix, at 92 (¶ 71).

The Unborn and Corporate Plaintiffs' arguments that they were deprived of rights through the deletion of Chapter 3 of Title 11 is grossly and fundamentally flawed since the basis of this alleged right, *i.e.*, Chapter 3 of Title 11, was declared unconstitutional in 1973.

In *Roe v. Wade*, the United States Supreme Court declared that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973). As a result of *Roe*, the United States District Court declared unconstitutional the Rhode Island criminal abortion statute that then-prohibited abortions except when necessary to preserve the life of the mother. *See Doe v. Israel*, 358 F.Supp. 1193, 1196 (D.R.I. 1973) (referencing *Women of Rhode Island v. Israel*,

C.A. No. 4605 (D.R.I. Feb. 7, 1973) and *Rhode Island Abortion Counseling Service v. Israel*, C.A. No. 4586 (D.R.I. Feb. 7, 1973)). Thereafter, in March 1973, the Rhode Island General Assembly responded and passed Chapter 3 of Title 11.

Two months after enactment, the United States District Court struck down as unconstitutional the newly enacted criminal abortion law (Chapter 3 of Title 11), recognizing the "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." *Id*. at 1196. Chief Judge Pettine rejected this attempted legislative work-around, noting that the United States Supreme Court "held in the face of the argument that life begins at conception, that a fetus is not a person within the Fourteenth Amendment" and that the Rhode Island General Assembly has no power to "determine what is a 'person' within the meaning of the Fourteenth Amendment." *Id*. In sum, the United States District Court declared arguments as to the constitutionality of Chapter 3 of Title 11 to be "frivolous" and "essentially fictitious," and "declared, adjudged and decreed that the Rhode Island criminal abortion statute, R.I.G.L. §§ 11-3-1; 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." *Id*. at 1199-1201, 1202. After the Court of Appeals granted a brief *ex parte* stay of the District Court's declaration, the First Circuit terminated the

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stay and denied the motions for a stay pending appeal. *Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973), *cert denied* 416 U.S. 993 (1974).

Thus, as a matter of law, since the declaration of unconstitutionality in 1973, Chapter 3 of Title 11 has been a legal nullity. This was the precise basis of the Motion Justice's determination that the Unborn and Corporate Plaintiffs lacked standing. Plaintiffs' Appendix, at 61-62 ("The unborn persons I find do not have rights as persons to make this challenge, and they rest their claims in large part on statutory provisions that have been repealed as unconstitutional."). This conclusion is unassailable.

The Unborn and Corporate Plaintiffs do not address this binding precedent; instead they shoo away the federal court's declaration of unconstitutionality and fault the Motion Justice for relying upon "legislative dicta as a basis to hold R.I. Gen. Laws [§] 11-3-1, et seq., 'unconstitutional[.]'" Plaintiffs' Brief, at 43. Plaintiffs' rebranding of the federal court's declaration of unconstitutionality, however, does not obscure the uncontroverted legal conclusion that for almost fifty years, Chapter 3 of Title 11 has bestowed *no* rights because it has been held unconstitutional. *See Doe*, 358 F.Supp. at 1202. Even Plaintiffs' amicus agrees with this point. *See* Brief of Thomas More Society, at 12-13 n.6 (listing cases that an unconstitutional statute is void and unenforceable).

To be sure, amicus hints that even though Chapter 3 of Title 11 is presently a

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legal nullity, the Unborn and Corporate Plaintiffs maintain a present legal interest in not having these provisions struck from the General Laws because "[i]f *Roe* were overturned, the Rhode Island criminal abortion statute, were it still on the books, would be revived, inasmuch as *Doe v. Israel* relied solely on *Roe* and *Doe*." *See* Thomas More Society Brief, at 12. Amicus' argument provides a textbook example on ripeness and/or justiciability. As this Court has explained, "Section 9-30-1 is not intended to serve as a forum for the determination of abstract questions or the rendering of advisory opinions." *Berberian v. Travisono*, 332 A.2d 121, 124 (R.I. 1975). When a declaratory judgment complaint is based "on facts and circumstances which may or may not arise at a future date," this Court has recognized, the matter "is of necessity unripe and abstract." *Id*. Amicus' argument that the Unborn and Corporate Plaintiffs have standing to challenge the striking of a statute declared unconstitutional almost fifty years ago is expressly conditioned upon a specific future event that "may or may not arise at a future date," *i.e.*, "[i]f *Roe* were overturned."[13]

[13] Amicus suggests that "[i]f Roe were overturned," it would resurrect Chapter 3 of Title 11 and that this could happen as early as this United States Supreme Court Term. But the law at issue in *Dobbs v. Jackson Women's Health Organization* prohibits abortions after fifteen weeks' gestation, whereas the Rhode Island law struck down in 1973 provided that "human life commences 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." R.I. Gen. Laws § 11-3-4. Respectfully, there can be nothing more speculative and abstract than attempting to guess the conclusion, the rationale, and the effect of a United States Supreme Court decision before it is even argued. This is more so when amicus'

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And, while amicus' argument fails because it is based upon speculative abstract future events, it fails for another, more basic, reason – Plaintiffs never argued to the Superior Court or this Court that they had a legal interest in an unconstitutional statute remaining "on the books" because if *Roe v. Wade* were overturned, it would revive Chapter 3 of Title 11. This Court "will not consider arguments that have been made by an amicus curiae but that were not advanced by a party." *Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1170 (R.I. 2014). Here, even though the motivating factor behind the enactment of the RPA was to provide an independent state right in the event *Roe v. Wade* were overturned, Plaintiffs never argued that the possibility of Chapter 3 of Title 11's revival bestows upon them legal standing.

Because Chapter 3 of Title 11 has been declared unconstitutional and has provided no rights since 1973, the Unborn and Corporate Plaintiffs cannot demonstrate that the striking of Chapter 3 of Title 11 has caused an "injury in fact, economic or otherwise." *Bowen*, 945 A.2d at 317. This conclusion is buttressed by the Plaintiffs' amended complaint, which alleges that "[b]ut for" the RPA, a

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argument is premised upon overturning 50 years of Supreme Court precedent. *See e.g., Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now."). Even if amicus were correct, since Baby Roe and Baby Doe have been born, these arguments are not ripe and they have failed to articulate any specific and present injury they incur based upon the striking of Chapter 3 of Title 11.

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determination that the RPA is unconstitutional would "immediately restore" the Unborn Plaintiffs' and the Corporate Plaintiff's "legal rights and privileged status of a 'person.'" Plaintiffs' Appendix, at 87, 88, 90 (¶¶ 43, 44, 56, and 57); at 92 (¶¶ 73, 74). The answer to this causation averment is simple: because Chapter 3 of Title 11 has been declared unconstitutional, a declaration that the General Assembly's striking or repeal of Chapter 3 of Title 11 is itself unconstitutional would have no legal effect. Plaintiffs fail to present "some legal hypothesis which will entitle the plaintiff to real and articulable relief." *Bowen*, 945 A.2d at 317.

b. R.I. Gen. Laws § 11-23-5

Baby Doe also challenges the repeal of R.I. Gen. Laws § 11-23-5, which provided "[t]he willful killing of an unborn quick child by any injury to the mother of the child, which would be murder if it resulted in the death of the mother, the administration to any woman pregnant with a quick child of any medication, drug, or substance or the use of any instrument or device or other means, with intent to destroy the child, unless it is necessary to preserve the life of the mother, in the event of the death of the child, shall be deemed manslaughter." R.I. Gen. Laws § 11-23-5(a). "For purposes of this section, 'quick child' means an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state."

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R.I. Gen. Laws § 11-23-5(c).

At the time the amended complaint was filed (June 25, 2019), Plaintiff Doe was approximately 34 weeks (8 ½ months) pregnant with Baby Mary Doe. Plaintiffs' Appendix, at 88 (¶ 46). According to the amended complaint, Baby Doe is a "quick child" as defined in R.I. Gen. Laws § 11-23-5, and therefore, "the death of Baby Mary Doe *would be* an actionable crime." Plaintiffs' Appendix, at 90 (¶¶ 58-59) (emphasis added). According to Baby Doe, "but for" the repeal of R.I. Gen. Laws § 11-23-5, "Baby Mary Doe would still have the legal right and privileged status as a 'quick child,'" and a determination that the repeal of R.I. Gen. Laws § 11-23-5 was unconstitutional "will immediately restore Baby Mary Doe's legal rights and privileged status of a 'quick child.'" Plaintiffs' Appendix, at 90-91 (¶¶ 62-63). Because the amended complaint contains no facts that Baby Doe falls within the statutory framework set forth in R.I. Gen. Laws § 11-23-5, *i.e.*, that Baby Doe was willfully killed in utero – and because Plaintiffs admit that Baby Doe was born alive[14] – Baby Doe lacks an interest or injury that is "concrete and particularized *** and *** actual or imminent, not 'conjectural' or 'hypothetical.'" *McKenna*, 874 A.2d at 226. "Unfounded anxiety or a vague fear based on utterly speculative hypotheses is simply not enough." *Id*. at 227.

Here, Baby Doe's argument falls squarely within the speculative and abstract

[14] Plaintiffs' Brief, at 1 n.3.

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relief this Court warns is outside the Declaratory Judgment Act. Specifically, Baby Doe contends that her "guaranteed right to sue for any *future* injuries was 'immediately, irrevocably, and permanently' obliterated by the RPA." Plaintiffs' Brief, at 13 (emphasis added). For purposes of demonstrating that Baby Doe faced no actual or imminent injury, nothing more than Plaintiffs' pleading concerning "future injuries" is needed. *See Berberian*, 332 A.2d at 274 ("Any petition which is based on facts and circumstances which may or may not arise at a future date is of necessity unripe and abstract.").

In response, Baby Doe focuses on mootness and claims that doctrine poses no obstacle to justiciability because this issue is capable of repetition, yet evading review. But the State Defendants have never raised mootness since that doctrine applies when "the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake in the controversy." *Boyer v. Bedrosian*, 57 A.3d 259, 272 (R.I. 2012). On the contrary, the State Defendants contend that the amended complaint never raised a justiciable issue and therefore Baby Doe does not present an injury in fact or issue ripe for adjudication. *See State v. Gaylor*, 917 A.2d 611, 614 (R.I. 2009) ("contingent future events that may not occur as anticipated, or indeed may not occur at all," is not ripe for adjudication"); *Berberian*, 332 A.2d at 124.

The distinction between mootness and ripeness was recognized in *Roe v. Wade*,

where plaintiff Roe was thwarted in her attempt to obtain an abortion due to criminal abortion laws. *Roe*, 410 U.S. at 124. Because of the relative short-duration of a human pregnancy, the Court held that "[p]regnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'" *Id*. at 125. While the Supreme Court determined that Roe could pursue her claim based on "nonmootness," the Court held differently with respect to plaintiffs Doe, who were described as "a childless married couple, the woman not being pregnant, [and] who have no desire to have children at this time[.]" *Id*. at 128. With some applicability to Baby Doe's argument, the *Roe* Court explained, "[t]heir claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statute." *Id*. at 128. Based on these allegations, the Court held that the Doe plaintiffs were "not appropriate plaintiffs in this litigation" because "[t]heir alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health." *Id*. The Court continued that it was "not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy." *Id*.

Likewise, in this situation, even assuming a crime victim had standing to seek a declaratory judgment concerning the applicability of a criminal statute, the motion

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to dismiss record is devoid of any allegation that Baby Doe was deceased or otherwise within the purview of then-R.I. Gen. Laws § 11-23-5. And, unlike *Roe* where the plaintiff had a cognizable claim that became moot due to birth, Baby Doe's claim *never* ripened into a cognizable claim. Since the amended complaint contains *no* facts that Baby Doe deceased prior to birth – and since Baby Doe was born alive – this issue is not ripe for adjudication any more so than an adult could challenge the repeal of a manslaughter statute in the event of their future wrongful death. Baby Doe fails to set forth "some legal hypothesis which will entitle the plaintiff to real and articulable relief." *McKenna*, 874 A.2d at 226.

2. The Adult Plaintiffs Lack Standing

As Plaintiffs themselves describe, they "claim, and seek relief, for denial of their general constitutional 'right to vote.'" Plaintiffs' Brief, at 11. While Plaintiffs reference Rhode Island and United States Supreme Court precedent, *see* Plaintiffs' Brief, at 49-51, and assert that in line with those cases they have sustained a personalized injury-in-fact because the effectiveness of their vote has been diluted, this analogy is misplaced because *none* of these cases concern a private citizen(s) bringing an action to compel a general election.

For instance, the Plaintiffs assert that, like the plaintiffs in *Coleman v. Miller*, 307 U.S. 433, 438 (1939), they maintain a "'plain, direct and adequate interest in maintaining the effectiveness of their votes.'" Plaintiffs' Brief, at 49. But

immediately preceding the sentence Plaintiffs quote, the Court explains that the *Coleman* plaintiffs "include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Coleman*, 307 U.S. at 438. While an individual legislator generally does not have standing to challenge the actions of the legislative body, *Raines v. Byrd*, 521 U.S. 811, 830 (1997), "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Id*. at 823. Benson, Rowley, and Doe stand in a completely different position than the legislators in *Coleman*. The other cited cases are likewise inapposite.

Plaintiffs cite *United States v. Saylor*, 322 U.S. 385 (1944) (indictment for forging votes); *United States v. Classic*, 313 U.S. 299 (1941) (indictment for altering and falsely counting ballots); *United States v. Mosley*, 238 U.S. 383 (1915) (indictment for omitting votes cast in certain precincts); and *Ex parte Siebold*, 100 U.S. 371 (1879) (indictment for offenses committed at respective precincts). None of these criminal cases examined a party's standing to sue in a civil case in any manner.

Plaintiffs' reference to *Leser v. Garnett*, 258 U.S. 130 (1922) is likewise

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curious. In that case, the plaintiffs challenged the qualification of certain women to vote on the basis that Maryland's Constitution then-limited voting rights to men only and Maryland refused to ratify the Nineteenth Amendment to the United States Constitution. *Id*. at 135-36. To the extent *Leser* addressed standing the Court's entire analysis simply noted "[t]he laws of Maryland authorize such a suit by a qualified voter against the board of registry." *Id*. at 136. Plaintiffs also raise apportionment cases but even there a plaintiff's alleged harm is "district specific." *Gill v. Whitford*, 138 S.Ct. 1916, 1930, 1934 (2018) (remanding so that "the plaintiffs may have an opportunity to prove concrete and particularized injuries … that would tend to demonstrate a burden on their individual votes"). Plaintiffs also submit that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." Plaintiffs' Brief, at 50, citing (*Baker v. Carr*, 369 U.S. 186, 206 (1962), which referenced *Colegrove v. Green*, 328 U.S. 549 (1946)). Even accepting this argument, however, it poses the obvious question: what facts must a voter allege showing a personal and individualized injury? As applied to the facts of this case, this Court has answered that question.

In *Burns*, this Court rejected on standing grounds a voter's argument that a gaming referendum must have been subject to a local election, explaining:

> [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*

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> *allege his own personal stake in the controversy that distinguishes his claim from the claims of the public at large.*

617 A.2d at 116. (Emphasis added).

Subsequently, this Court examined a lawsuit brought by a private citizen seeking a declaratory judgment concerning whether the 2008 election was a general election within the meaning of the Rhode Island Constitution. *Bowen*, 945 A.2d at 316. This Court concluded "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*. at 317.

While Plaintiffs make certain conclusionary statements that they have sustained a personal injury, the Motion Justice properly concluded that the Adult Plaintiffs "have not suffered a concrete and particularized harm as required by a long line of Supreme Court precedents on either their so-called voter suppression claims or their equal protection and due process claims." Plaintiffs' Appendix, at 62. Plaintiffs' pleadings and arguments confirm the Motion Justice's conclusion that the asserted injury, *i.e.*, a right to vote (or the right to vote in the negative), is shared equally with all other Rhode Islanders. In other words, the Adult Plaintiffs do not assert a particularized injury.

For instance, 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." Plaintiffs' Appendix, at 118 (emphasis added). The Adult Plaintiffs also make clear they "claim their Rhode Island Constitution, Article I, Section 2 …, 'due process' and 'equal protection' rights, reserved *for the 'people of the State of Rhode Island and Providence Plantations*.'" Plaintiffs' Brief, at 18 (emphasis added). And, Plaintiffs tell this Court that they seek relief for the "denial of their general constitutional 'right to vote'" and that "many other Rhode Island 'citizens' [] suffer the same injury attendant to their right to vote." Plaintiffs' Brief, at 11, 22.

Despite these admissions about the generalized nature of their claim, Plaintiffs assert they "do not claim that Defendants' conduct was an unconstitutional suppression of every Rhode Islander's vote, but specifically, allege a suppression of his/her individual 'no' vote, relative to the RPA." Plaintiffs' Brief, at 20-21. *See also* Plaintiffs' Brief, at 21 ("Plaintiffs BRD allege that there are many other Rhode Island 'citizens' who share the same injuries as Plaintiffs BRD, but Plaintiffs BRD are not claiming any general public right, relative to the suppression of Plaintiffs BRD's individual negative vote suppression."). Standing principles are not so easily manipulated. This Court has explained, "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.'" *Watson*, 44 A.2d at 136. *See also* *Bowen*, 945 A.2d at 317; *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'").

A plaintiff who asserts a generalized claim – such as Benson, Rowley, and Doe – does not acquire standing merely because they complain only about their alleged injury while ignoring the same common injury shared by the public at-large. Here, Plaintiffs complain that the State "wrongly 'suppressed' their negative vote," but a more accurate characterization is that because a referendum was not required *no* Rhode Islander voted. Based on these circumstances, Plaintiffs correctly describe the situation as seeking "[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." Plaintiffs' Appendix, at 118 (emphasis added). The relief sought establishes that Plaintiffs are not alleging a particular and distinct injury as compared to the public at-large.[15]

Plaintiffs also blame the Motion Justice for "not considering federal law in her dismissal and judgment against Plaintiffs." Plaintiffs' Brief, at 50. This accusation is also misplaced. After the Motion Justice granted the Motion to Dismiss, Plaintiffs'

[15] Plaintiffs appear to suggest that standing principles do not apply in the equal protection context. Plaintiffs' Brief, at 54 (standing "offers no sword against [the Adult Plaintiffs'] alternative allegations of violations of state and federal equal protection clauses"). Plaintiffs cite no authority for this conclusion and Supreme Court precedent contravenes the argument. *See United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other.").

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counsel inquired, "Your Honor has to be clear as to whether or not your decision today is based on Rhode Island law or Supreme Court law or both because a federal question has been raised which makes this case ripe for review by the U.S. Supreme Court." Plaintiffs' Appendix, at 54. After some discussion, the State's counsel responded – and the Motion Justice later agreed – "the standing question is based on the state law, your Honor has made that clear, and the interpretation of Article I, Section 2 is a state law question." Plaintiffs' Appendix, at 55. Subsequently, the following colloquy ensued with Plaintiffs' counsel:

> Ms. Magee: Okay. So, to be specific, the standing question, you're relying on state law only?
>
> The Court: Yes.
>
> Ms. Magee: Even though we raised a federal question that there is standing under the Fourteenth and Fifth Amendment to the United States Constitution; is that correct?
>
> The Court: It is correct that I have relied upon Rhode Island law, and I have not really considered federal law.

Plaintiffs' Appendix, at 55.

The Motion Justice was correct in concluding that state standing law applied to a case brought in state court, even though Plaintiffs raised federal law issues intermingled with state law issues. On this point, the United States Supreme Court has observed that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy

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or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Plaintiffs cite no legal authority to suggest the Motion Justice should have applied federal standing law.[16]

3. The Unborn Plaintiffs Lack Standing to Seek a Declaratory Judgment Concerning Whether the Declaratory Judgment Act Applies

The Declaratory Judgment Act provides "[a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or

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[16] Whether the Motion Justice applied state standing law or federal standing law would be of no moment since this Court has adopted federal standing law as set forth by the United States Supreme Court. *See Rhode Island Ophthalmological*, 317 A.2d at 127 (applying test set forth in *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970)). More recently, this Court explained its standing requirement:

> '[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not conjectural or hypothetical.' *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). Moreover, 'there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court.' ' *Id.* Lastly, 'it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' ' *Id.* at 561, 112 S.Ct. 2130.

Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 535 (R.I. 2013). Since this Court adopted and applies federal standing law, whether the Motion Justice applied federal or state standing law, the result will be the same.

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franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." R.I. Gen. Laws § 9-30-2. Based upon this statute, Baby Doe and Baby Roe seek a declaratory judgement that they are "persons" eligible to seek relief under the Declaratory Judgments Act. Plaintiffs' Brief, at 13, 14. But it is unclear why the Unborn Plaintiffs seek or need such a declaration because the State never argued that the Unborn Plaintiffs were not eligible to seek declaratory relief based upon the Declaratory Judgment Act. Rather, the Motion Justice considered the declaratory judgment complaint and determined that the Unborn Plaintiffs lacked standing because they did not possess a cognizant legal interest in the striking or repeal of R.I. Gen. Laws §§ 11-3-1 et seq. or 11-23-5. *See supra*.

This Court has "consistently declared that the Superior Court is without jurisdiction under the Uniform Declaratory Judgments Act unless it is confronted with an actual justiciable controversy." *McKenna*, 874 A.2d at 226. "The consistent parts of a justiciable claim include 'a plaintiff who has standing to pursue the action' and 'some legal hypothesis which will entitle the plaintiff to real and articulable relief.'" *Id*. "A declaratory-judgment action may not be used 'for the determination of abstract questions or the rendering of advisory opinions." *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997).

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Here, a declaration that the Unborn Plaintiffs are "persons" for purposes of the Declaratory Judgment Act – and therefore the Unborn Plaintiffs are eligible to seek a declaratory judgment – fails to articulate "some legal hypothesis which will entitle the plaintiff to real and articulable relief." *Id*. As an example, the State Defendants have never claimed the Unborn Plaintiffs could not seek a declaratory judgment, but rather asserted the Unborn Plaintiffs lacked standing to assert a "legally cognizable and protected interest that is 'concrete and particularized *** and *** actual or imminent, not 'conjectural' or 'hypothetical.'" *McKenna*, 874 A.2d at 226. Even if this Court accepted the Unborn Plaintiffs' invitation to declare that they are "persons" for purposes of the Declaratory Judgment Act, it would simply leave the Unborn Plaintiffs in the precise posture previously described – eligible to seek a declaratory judgment that the Motion Justice dismissed for lack of standing. Since a declaration concerning the Unborn Plaintiffs' eligibility to seek a declaratory judgment does not provide "real and articulable" relief, this Court need not resolve this issue. *See e.g., Providence Teachers Union v. Napolitano*, 690 A.2d 855, 856 (R.I. 1997) ("there was no present, actual controversy because both sides agreed (albeit for different reasons) that the charter's residency requirement did not apply to the individual plaintiffs").

4. The Public Interest Exception Does Not Apply

Notwithstanding Plaintiffs' inability to demonstrate an injury-in-fact, they invite this Court to invoke the public interest exception to standing and reach the merits

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because this "case raises claims that implicate two sections of the Rhode Island Constitution that, to date, have not been interpreted by this Court." Plaintiffs' Brief at 60-61. The Motion Justice properly rejected this invitation and this Court should uphold that decision.

This Court has made clear that the public interest exception should be invoked only "[o]n rare occasions." *Watson*, 44 A.2d at 138. The first invocation of the public interest exception appears to have occurred in *Sennott v. Hawksley*, 241 A.2d 286 (R.I. 1968), where the plaintiff sought to enjoin State officials from expending any funds relating to holding a referendum on a constitutional convention. Notably, *Sennott* predated *Rhode Island Ophthalmological Society* where this Court established the personalized injury-in-fact requirement and the lack of a then-developed standing doctrine was critical to the Court's decision to reach the merits. This Court explained in *Sennott*, "[t]here is a considerable conflict among the authorities as to whether a taxpayer, acting in his individual capacity, may maintain a suit to enjoin a state agency." *Id*. at 287. On the one hand, "[i]t is clear … that courts in many jurisdictions uphold the right of a taxpayer, acting in his individual capacity, to maintain such a suit against a state agency;" however, other jurisdictions, "upon considerations of public policy will not permit interferences with state agencies by a taxpayer upon a mere showing that he will be affected in the same way and along with other taxpayers by an alleged invalid expenditure of state funds." *Id*. This Court recognized:

> [i]n deciding which of these views this court should follow, we would establish an important rule of law, a matter that should not be undertaken lightly. The time element alone that was involved here made us reluctant to consider the soundness of these conflicting views and to choose between them. It was clear that had we indulged in any extended consideration of the merits of the conflicting views, we would in all likelihood have so delayed a decision on the issues in this case that the basic question presented would have been rendered moot. In the light of these circumstances and because there was a substantial public interest in the adoption or rejection of a new constitution, we felt warranted, without first resolving the standing question, to determine whether, in enacting the pertinent resolutions, the constitutional convention acted within its authority.

Id. Thus, the Court's first invocation of the public interest exception was premised upon a shortened timeframe to decide whether a plaintiff had standing to sue for an injury common to the public at-large – an issue this Court resolved six years later in *Rhode Island Ophthalmological Society*.

The Motion Justice properly determined that the public interest exception is "reserved for truly rare and exceptional cases, and I don't think that that such truly rare or exceptional case is present here." Plaintiffs' Appendix, at 62. Plaintiffs claim this determination was error and reference *Burns v. Sundlun*, where this Court invoked the public interest exception based on a "question of statutory interpretation of great importance[.]" 617 A.2d at 116. Rationalizing that because this case raises issues of constitutional construction and the constitutionality of legislation, which according to Plaintiffs is "[f]ar greater than mere statutory construction," this case must also warrant invocation of the public interest exception. Plaintiffs' Brief, at 60.

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But Plaintiffs' invitation to reach these constitutional issues conflicts with this Court's long-standing rule that courts should "not decide a constitutional question raised on the record when it is clear that the case before it can be decided on another point and that the determination of such question is not indispensably necessary for the disposition of the case." *State v. Berberian*, 98 A.2d 270, 270–71 (R.I. 1953). *See also State v. Lead Indus. Ass'n Inc*., 898 A.2d 1234 (R.I. 2006).

The reason for judicial restraint strikes at the heart and structure of our Constitution, our form of government, and the due respect each branch of government must accord the other branches. As this Court recognized:

> [t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing government by injunction.

McKenna, 874 A.2d at 225-26.

Years later, this Court considered a constitutional challenge to the General Assembly's "legislative grant program." *See Watson*, 44 A.3d at 130. After determining that the plaintiff lacked an injury-in-fact distinct from the public at-large, this Court examined and rejected the public interest exception. In language equally applicable to the instant case, this Court explained it:

> will not be persuaded to vault over the required showing of a particularized injury, economic or otherwise, when faced with questions of constitutional import that bear on the authority and duties

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> of a coordinate branch of state government. In our opinion, to do so under these circumstances would be imprudent because this case lacks the 'concrete adverseness' that assists us when we are required to address thorny constitutional questions. * * * Additionally, if we were to dispense with the requirement of standing here, in the words of Chief Justice Warren, it would tend to 'distort the role of the Judiciary in its relationship to the Executive and the Legislature' and would verge on 'government by injunction.'

Watson, 44 A.3d at 138-39 (emphasis added).

Plaintiffs ignore these founding principles (and precedent) and invite this Court to dispense with the standing requirement, reach a constitutional issue that it need not decide, and declare the actions of two coordinate branches of government invalid. This case can be decided on non-constitutional grounds and this Court should do so. While this Court has recognized that in some "rare occasions" a court may overlook the threshold standing requirement, the State is unaware of *any* Rhode Island Supreme Court case law – and Plaintiffs cited none – where this Court has invoked the public interest exception to reach a constitutional issue and declare an act of legislation invalid. Plaintiffs' unprecedented invitation should be rejected.

V. <u>CONCLUSION</u>

For these reasons, the Judgment should be affirmed.

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Respectfully Submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(B)

1. This brief contains 14,815words, excluding the parts exempted from the word count by Rule 18(b).

2. This brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2021, I filed and served this document through the electronic filing service system on all counsel of record:

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