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Re: In Opposition to Maryland H.B. 626: Pregnant Person's Freedom Act of 2022

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For the reasons set forth herein, the American Center for Law & Justice ("ACLJ"), on behalf of itself and over 354,000 of its members, including over 4,700 Maryland residents, who value the sanctity of life², urges that Maryland legislators vote NO on H.B. 626.

By way of introduction, the ACLJ is a national nonprofit organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life. Counsel for the ACLJ have presented expert testimony before state (including Maryland) and federal legislative bodies, and have presented oral argument, represented parties, and submitted amicus briefs before the Supreme Court of the United States and numerous state and federal courts around the country in cases involving a variety of issues, including the right to life. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); and *Dobbs v. Jackson Women's Health Org.*, No. 19-1393 (Sup. Ct.).

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² *Stop Barbaric New Abortion Laws*, ACLJ.ORG, <https://aclj.org/stop-barbaric-new-abortion-laws> (last visited Mar. 9, 2022).

I. Background

Maryland's statute prohibiting the murder or manslaughter of a viable fetus—Md. Code Ann., Criminal Law § 2-103—protects pregnant women and their preborn children from acts of violence committed by third parties; *it has nothing to do with abortion*. The statute would apply where, for example, a boyfriend or stranger strikes or stabs a pregnant woman which causes the child to die before or after birth. The statute *expressly excludes* abortion, or “an act or failure to act of a pregnant woman with regard to her own fetus,” from the types of acts that may be prosecuted under the statute. §§ 2-103(b), (d), (f). Nevertheless, House Bill 626's “Pregnant Person's Freedom Act of 2022” proposes a revision of the fetal murder/manslaughter statute that would serve to handcuff the investigation of *infant deaths unrelated to abortion*.

II. Legal Issues with House Bill 626

House Bill 626 would add a subsection (H) to the statute that states (among other things) that the statute “may not be construed to authorize any form of investigation or penalty for a person . . . experiencing . . . *perinatal death* related to a failure to act. . . .” (Emphasis added). The Bill goes as far as authorizing a cause of action for damages if a person was subject to a criminal investigation, or unlawful arrest, for a violation of the statute as a result of perinatal death. A “perinatal death,” however, is not limited to a pre-birth death, but *includes the death of a young newborn*.

In general, the term “perinatal” applies to the mother and her child both during the latter stages of pregnancy and early in the child's post-birth life. For instance, Maryland law includes both a newborn and his or her mother within the definition of “patient” and “client” for purposes of perinatal care. Md. Code Ann., Health Occupations Code § 8-6C-01(n)(2); COMAR 10.64.02.01(B)(3); *see also* COMAR 10.09.39.01 (with respect to doula services, the “perinatal period” extends “up to 180 days following childbirth.”). Maryland's Perinatal System Standards apply to perinatal programs that provide care to pregnant woman as well as infants after birth.³

More specifically, the term “perinatal death,” which appears twice in House Bill 626, *encompasses the deaths of young newborns* up to seven days of age.⁴ If House Bill 626 were

³ *The Maryland Perinatal System Standards, Revised April 2019*, at 6, https://health.maryland.gov/phpa/mch/Documents/perinatal_newsletters/Maryland%20Perinatal%20System%20Standards_Revised%20April%202019_FINAL.pdf.

⁴ *See, e.g.,* Elizabeth C.W. Gregory, *et al.*, *Lack of Change in Perinatal Mortality in the United States, 2014–2016*, NCHS Data Brief, no 316 (2018), <https://www.cdc.gov/nchs/data/databriefs/db316.pdf> (“Perinatal mortality rate is the number of *infant deaths under age 7 days* and fetal deaths at 28 weeks of gestation or more per 1,000 live births and fetal deaths at 28 weeks of gestation or more.”) (emphasis added); Belayneh Hamdela Jena, *et al.*, *Magnitude and trend of perinatal mortality and its relationship with inter-pregnancy interval in Ethiopia: a systematic review and meta-analysis*, BMC Pregnancy and Childbirth, Vol. 20, Art. 432 (2020), <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-020-03089-2>

enacted, when authorities learn that a young newborn baby has died—which sadly remains a regular occurrence in Maryland and nationwide—their investigation into the tragic circumstances of the infant’s death would be significantly chilled by the prospect of lawsuits filed by the very individuals who may, in fact, have intentionally, recklessly, negligently, or accidentally caused the infant’s death. The law, common sense, and the very nature of human dignity all demand that such deaths be fully investigated to ensure both that justice is done in the case of criminal acts and that future accidental deaths may be better avoided.

III. *Infants are Human Beings with Rights*

At the moment of birth, an infant born in Maryland is a citizen and national of the United States, with all the rights that that status encompasses. *See, e.g.*, 8 U.S.C. §§ 1401(a) & (b).⁵ Maryland law provides numerous special protections for minors, including newborns. Md. Code Ann., Criminal Law § 1-101(a)(g) (a “minor” is “an individual under the age of 18 years.”). These protections extend to harmful acts or omissions committed by the minor’s parent.⁶

Whether a newborn or other child has been the victim of murder, manslaughter, abuse, neglect, or other crimes—whether committed by a parent or another individual—*often depends on the circumstances*. For instance, a parent who abuses an infant or other minor that results in his or her death is guilty of first-degree child abuse, Md. Code Ann., Criminal Law § 3-601(b)(1). However, whether “abuse” has occurred may depend on whether the child’s injuries were sustained “as a result of a malicious act under circumstances that indicate that the minor’s health or welfare is harmed or threatened by the treatment or act.” § 3-601(a)(2). An objective, reasonable person standard is utilized to assess the conduct of a parent in order to differentiate between a “freak accident” and intentional acts that created a substantial risk of harm. *Hall v. State*, 448 Md. 318, 331-32 (2016). A law enforcement agency, child protective services worker, prosecutor, judge, or jury cannot determine which category an injury or death suffered by a young child falls into without having the benefit of an investigation unhampered by the prospect of a lawsuit seeking damages filed by the persons being properly investigated.

(“Perinatal mortality is defined as fetal loss at or after 28 weeks of gestation (stillbirth) or neonatal *death within 7 days of life* (early neonatal mortality).”) (emphasis added).

⁵ Maryland law defines the term “born” as “the complete expulsion or extraction of a product of human conception from the mother, regardless of the period of gestation, if, after the expulsion or extraction, it breathes or shows any other evidence of life, such as heartbeat, pulsation of the umbilical cord, or definite movement of voluntary muscle, whether or not the umbilical cord is cut or the placenta is attached.” Md. Code Ann., Health § 20-401(b).

⁶ *See, e.g., Sissoko v. State*, 236 Md. App. 676, 732-35 (2018) (affirming the defendant’s convictions for first-degree murder and child abuse in death of his 11-week-old son); *In re D.S.*, 2019 Md. App. LEXIS 851, 2019 WL 4860772 (Ct. Spec. App. Oct. 1, 2019) (unreported op.) (a mother’s convictions for second degree child abuse, second degree assault, and reckless endangerment for the death of her four-month-old child were affirmed); *Thodos v. State*, 2019 Md. App. LEXIS 427, 2019 WL 2207527 (Ct. Spec. App. May 22, 2019) (unreported op.) (a mother’s conviction for neglect of a minor, based on actions occurring at the hospital that impacted her newborn son, was upheld).

IV. *Prohibiting the Investigation of Perinatal Deaths Does Not Protect Women*

Additionally, House Bill 626 contradicts what the State of Maryland stated in its application for federal Title V block grant funds for material and child health services.⁷ Under the heading “Perinatal Health,” the application stated that, “[a]lthough infant mortality [in Maryland] has declined over the last few years, significant racial disparities still exist.” *Id.* The application stated that Title V funds support “Fetal and Infant Mortality Review (FIMR) activities” throughout the state, and “135 fetal and infant deaths were reviewed by FIMR teams in FY 2020.” *Id.* Funding was focused on “the seven jurisdictions in Maryland with the highest infant mortality rates and highest racial disparities in infant mortality.” *Id.* As the Maryland Department of Health has explained, “[t]he goal of the Fetal and Infant Mortality Review (FIMR) Program is to prevent infant mortality and morbidity through the review of fetal and infant deaths in Maryland. . . . Information about the infant death is gathered. Sources include public health (vital statistics) and medical records. An interview with the mother who has suffered the loss is conducted, if the mother agrees.”⁸

In sum, Maryland’s application for Title V funds touted the State’s work in improving perinatal health and mitigating racial disparities by investigating the circumstances surrounding fetal and infant deaths. Conversely, House Bill 626 reaches well beyond the realm of “pregnant person’s freedom” to handcuff the investigation of *newborn deaths that have nothing to do with abortion*. This is directly contrary to the laudable goal of “prevent[ing] infant mortality and morbidity through the review of fetal and infant deaths in Maryland.” The family members of a deceased infant, the State of Maryland, and the general public all have a significant and legitimate interest in ensuring that all infant deaths are properly investigated. House Bill 626 directly undermines that interest and should not be enacted into law.

CONCLUSION

For the reasons stated above, among others, we oppose House Bill 626.

⁷ *Maternal and Child Health Services Title V Block Grant: Maryland; FY 2022 Application / FY 2020 Annual Report*, at 15, <https://mchb.tvisdata.hrsa.gov/Admin/FileUpload/DownloadStateUploadedPdf?filetype=PrintVersion&state=MD&year=2022>.

⁸ *Fetal and Infant Mortality Review (FIMR) Program*, https://health.maryland.gov/phpa/mch/Pages/fimr_home.aspx.