

CHARLOTTE

INSTITUTE

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State of Maryland, Senate Judicial Proceedings
Senate Bill 0664
March 10, 2020

The Charlotte Lozier Institute (CLI), the education and research arm of the Susan B. Anthony List, is pleased to submit this testimony regarding Senate Bill 664, a proposal to amend the constitution of Maryland to, among other provisions, declare a “right to privacy that guarantees freedom from government intrusion.”

Various provisions of the federal and state constitutions implicate rights that have generally been understood as protecting the liberties of the people from intrusive acts of government. The Fourth Amendment to the U.S. Constitution specifies that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” States, including Maryland, have acted in their own sphere to secure and protect the right to privacy in various ways, including with respect to, for example, the secrecy of the ballot box.

Since 1973, the existence of a right to privacy (though no such words appear in the U.S. Constitution) has been inferred by the U.S. Supreme Court to apply to and guarantee an expansive right to abortion. Writing for a 7-2 majority of the Court, Justice Harry Blackmun argued for a broad right to privacy, saying, “This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”¹ Consequently, the invocation of a right to privacy in any constitutional context raises a wide range of questions about the scope of that right, especially where, as here, the language of the amendment is exceedingly broad and limitations of the right must, in order to be valid, meet the high test of a compelling state interest.

These issues deserve the most careful scrutiny. The Charlotte Lozier Institute, however, reserves its comment today to a particular potential implication of the broad and needlessly vague language of the amendment regarding data collection. In particular, the amendment states the

¹ Roe v. Wade, 410 U.S. 113 (1973).

“right to privacy includes the right of an individual to live free from intrusion caused by or directly traceable to the unauthorized collection of data concerning the individual by another.”²

To be sure, all Americans are rightly concerned about the collection and dissemination of data of a personal nature by sources both public and private. Prior to the advent of modern computing and sophisticated handheld voice and data devices, Americans generally consumed information and media in a one-way transaction, reading newsprint, hearing radio transmissions, and using visual media in a passive mode which permitted the user access to the content of communications with a minimal rebound of information about the consumer to the content provider. In 2020, this one-way transaction has long since given way to communications technologies, either selected by consumers or imposed upon them by various forms of surveillance, that are capable of, and indeed do, transfer and network vast amounts of information about the individual. This information can, in turn, be auctioned or sold to other parties, private and public, for use in targeting offers of products or services, whose use can amalgamate additional information about the consumer and make it readily available to others.

Concern about declining privacy protections in a complex, advanced-technology society is a valid and proper subject matter for legislative consideration. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is but one example of Congressional action taken to protect the privacy rights of patients on sensitive personal matters. The seriousness of the statute is underscored by the punishment Congress has levied for violations of patient privacy, which include civil and criminal penalties for unauthorized disclosure of patient medical records. The HIPAA statute, however, makes appropriate exceptions for the purpose of protecting public health, by permitting the disclosure of certain forms of data of public interest with full respect for the right of individuals not to be identified or identifiable as a result of the data collected.³

As a controversial topic subject to public debate at virtually all levels of government, abortion is a prototypical example of a need for well-calibrated data collection that is sensitive to the requirements of individual privacy. Privacy in this regard is not itself a controversial topic. Research organizations with diverse positions on the legal and moral status of abortion concur that public officials have an affirmative duty to ensure that the identity of individuals obtaining abortions is not compromised. Likewise, while points of view differ about what characteristics of abortions and abortion providers constitute a public interest, broad consensus exists that information regarding such topics as demographics, in-state residency, abortion methods, prior use of contraception, previous pregnancy outcomes, stage of pregnancy, public funding, and other matters are issues of public moment.

Thus, current practice in the state of Maryland is particularly curious and anomalous. Only three of the 50 states fail to collect and publish information about abortion incidence and patient characteristics on an annual basis. Maryland, New Hampshire, and California are exceptions to the general rule, as the remainder of the nation not only collects and publishes a range of data but

² SB 664 bill text is available online at: <http://mgaleg.maryland.gov/2020RS/bills/sb/sb0664F.pdf>

³ Pub. L. 104-191.

voluntarily shares that data with the U.S. Centers for Disease Control and Prevention (CDC).⁴ This data is afflicted with numerous deficiencies, and the national CDC abortion surveillance summary is slow in coming and lacking in key information of interest to policymakers, but useful insights can still be gleaned from what is reported.⁵ At the same time, states have taken a variety of measures to safeguard individual privacy, including imposing penalties on anyone who exposes an individual's information and masking information when the small quantity measured poses a risk of individual exposure. These measures seem to have worked well in a wide variety of states with more or less robust schemes of abortion reporting.

In 2012, Charlotte Lozier Institute released a study of state abortion laws, praising some states and chiding others for the paucity of, or shortcomings in, their abortion reporting.⁶ Our review of the states examined their reporting standards and recommended new public investments in improving U.S. data collection, access of scholars to data, and public dissemination of key information. Maryland maintained a voluntary abortion reporting system until 2006. Even before that date, Maryland's Department of Health acknowledged that "the data contained in this report are incomplete. The number of facilities submitting data can change from year to year, making comparisons over time unreliable. The quality of the data is uncertain because no independent verification has been done."⁷ In response to a CLI inquiry in August 2018, the Maryland Department of Health informed us that "Maryland does not require reporting, or record information, on induced terminations. Therefore the Vital Statistics Administration does not produce reports on these events."⁸

Understanding rates of abortion and other facts about abortion is clearly a metric of keen public interest. The accumulation of year over year data in a single state or multiple states allows detection of trends in abortion incidence and assessment of the effect of various policy approaches. Maryland is among the minority of states that publicly fund abortions, reinforcing the public interest in how funds are being expended and fostering discernment of how patterns of resort to abortion may respond to changes in public policy. The Maryland Department of Health and Mental Hygiene reports on this one aspect of abortions performed, showing that in 2016, the

⁴ For a map of states' abortion reporting status and linked analyses of state reports, see "State Abortion Reporting," Charlotte Lozier Institute, <https://lozierinstitute.org/state-abortion-reporting/> (Accessed March 9, 2020).

⁵ "Although most reporting areas collect and send abortion data to CDC, three of the 52 reporting areas (California, Maryland, and New Hampshire) did not provide CDC data for 2007–2016, and one reporting area (DC) did not provide data to CDC for 2016. In 2016, abortions performed in California, DC, Maryland, and New Hampshire accounted for 20% of the abortions counted through the Guttmacher Institute's national survey of abortion-providing facilities." See Jatlaoui TC, Eckhaus L, Mandel MG, et al. Abortion Surveillance — United States, 2016. *MMWR Surveill Summ* 2019;68(No. SS-11):1–41. DOI: <http://dx.doi.org/10.15585/mmwr.ss6811a1>. (Accessed March 9, 2020).

⁶ Donovan, Charles A., and Nora Sullivan. Abortion Reporting Laws: Tears in the Fabric. *American Reports Series*, Issue 3 (Dec 2012), available at <https://s27589.pcdn.co/wp-content/uploads/2012/12/American-Report-Series-ABORTION-REPORTING-LAWS-Dec-12-Update-1-13.pdf> (Accessed March 9, 2020).

⁷ "Abortion Reporting: Maryland," Charlotte Lozier Institute (Oct 2019), available at <https://lozierinstitute.org/abortion-reporting-maryland/> (Accessed March 9, 2020).

⁸ *Ibid.*

state spent \$5.3 million with state and federal funds to pay for 7,812 abortions.⁹ The most recent national survey of abortion facilities by the Guttmacher Institute shows that an estimated 29,800 abortions were performed in Maryland in 2017. The same survey showed that there was a 7% increase in the abortion rate in Maryland between 2014 and 2017, from 23.4 to 25.0 abortions per 1,000 girls and women of childbearing age.¹⁰ Maryland's abortion rate is the 4th highest in the nation¹¹ as is the proportion of pregnancies in the state that are aborted, that is, nearly 30 percent.¹²

These sparse details about abortion in Maryland offer only a glimpse of what should be a subject of public interest and debate. The neighboring state of West Virginia has an abortion rate¹³ one-sixth of Maryland's and Virginia's rate¹⁴ is barely 40% of Maryland's.

What effect would the proposed constitutional amendment have on the Free State? The amendment text discloses little. As noted above, it refers to an individual's right "to live free from intrusions caused by or directly traceable to the unauthorized collection of data concerning the individual by another." The amendment does not affirmatively state what kinds of data it seals in a zone of personal privacy. Whatever that data may be, it is screened from view if the data will involve an "intrusion" "directly traceable" to an "unauthorized collection" of certain data. But which data? The amendment makes no reference, but apparently the data is something in particular, though it is not clear whether the amendment means to exclude only the collection of personally identifiable data.

More concerning, the amendment does not specify what constitutes "unauthorized collection" of data. Does a state statute collecting abortion data and allowing aggregation of deidentified data for analysis of public health trends constitute an intrusion under the language of the amendment? Does the amendment bar not only the release of such data, which all states and the federal government alike observe with respect to abortion data, but also the mere collection of such data as an intrusion on personal freedom and the right to privacy? Candor is called for on such a vital matter before an amendment of potentially vast scope is submitted for voter approval.

⁹ See "Exhibit 42 Abortion Funding under Medical Assistance Program* Three-year Summary Fiscal 2014-2016" at Medical Care Programs Administration, DHMH, <http://mgaleg.maryland.gov/pubs/budgetfiscal/2018fy-budget-docs-operating-m00q01-dhmf-medical-care-programs-administration.pdf#page=78> (Accessed March 10, 2020); and "Abortion Reporting: Maryland," Charlotte Lozier Institute (Oct 2019), <https://lozierinstitute.org/abortion-reporting-maryland/> (Accessed March 9, 2020).

¹⁰ "State Facts About Abortion: Maryland," Guttmacher Institute (March 2020), available at

<https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-maryland> (Accessed March 9, 2020).

¹¹ Jones RK, Witwer E and Jerman J, Abortion Incidence and Service Availability in the United States, 2017, New York: Guttmacher Institute, 2019, https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf (Accessed March 9, 2020).

¹² Johnston, Wm. Robert, Historical abortion statistics, Maryland (USA), available at

<http://www.johnstonsarchive.net/policy/abortion/usa/ab-usa-MD.html> (Accessed March 9, 2020).

¹³ "State Facts About Abortion: West Virginia," Guttmacher Institute (March 2020)

<https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-west-virginia> (Accessed March 9, 2020)

¹⁴ "State Facts About Abortion: Virginia," Guttmacher Institute (March 2020) <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-virginia> (Accessed March 9, 2020).

This concern is further heightened due to the specificity of the exclusion contained in the amendment, which sets forth affirmatively what the amendment authorizes the state to collect, which is information pertinent to the regulation of firearms and ammunition. Treated as an exception to the general rule of the amendment, Senate Bill 664 can be construed in its entirety to deny authorization by the state to collect data on abortion incidence, demographics, complications or more, even if the patient information is deidentified.

Conclusion

Senate Bill 664 does not create public concern over the unavailability of information about the incidence and features of abortion in Maryland, but it does draw that concern into sharp focus. Maryland is nearly alone among U.S. states in failing to collect or publish abortion data and it has not done so for nearly a decade and a half. It has among the highest abortion rates in the nation, and the rate is climbing. Abortions are publicly funded with state taxpayer dollars in Maryland, reinforcing the public interest in understanding the phenomenon and the stakes in making abortion rare. The impact of the proposed constitutional amendment on this topic of intense public interest must be disclosed and weighed in the balance. The people of Maryland have a right to know what is happening in their communities and not succumb to blindness about an issue of such importance.

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