Honorable Robert Marshall - Virginia House of Delegates (Jan. 1992-Jan. 2018)

Before the Maryland Senate Judicial Proceedings Committee, March 11, 2020

on behalf of the Hosea Initiative

Senate Bill 664 -- Privacy Amendment, Maryland Constitution

Mr. Chairman, Vice Chairman, and committee members, thank you for allowing my testimony today. I grew up in Maryland attended public and private schools and have relatives in the Free State.

SB 664 would add a right of privacy for individuals in Maryland's Constitution ostensibly subject to a "compelling state interest" test.

Such a right is not a supplement to or merely the back side or inverse of what the Fifth Amendment to the Constitution asserts, namely, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …"

The right intended to be established by SB 664 suffers from the same vagueness as the Judge created "privacy" status discovered by Justice Douglas in the 1964 Planned Parenthood Birth Control case of *Griswold v. Connecticut*, "the First Amendment has a penumbra where privacy is protected from governmental intrusion … cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

Other than a limit in SB 664 relating to a privacy claim relating to firearms and ammunition, there are no parameters to the manifold privacy claims that could be proffered by "individuals" if SB 664 were made part of Maryland's Constitution.

First, why is the term "individuals" used instead of persons? The architect of the Judge created right to privacy, Justice Douglas suggested in his *Sierra Club v. Morton* (1972) dissent that trees and other inanimate objects of Nature be given standing to sue. Would the term "individuals" be similarly used under SB 664?

Second, there is no minimum age for declaring the right to privacy to be applicable. Will seven year olds have a "claim" to sex change surgery or drugs?

A "right to privacy" clearly will be used as a defense against criminal prosecutions for "hard" and "soft" drug use, sex between minors and adults, sex between humans and animals, the production of sexually explicit materials between adults and between minors and adults and other behaviors now prohibited by criminal law.

The reference to "data" in the preamble for SB 664 will be used as a defense against Maryland's Sex Offender Registry, as well as requirements for job history or criminal record history in public and private employment including day care and schools, school records, driving records and more.

To say that these matters would be covered by the "compelling interest" clause is to acknowledge that endless litigation would proceed from SB 664 based on slight alterations of subsequent privacy claims.

Could a disclosure of a child's grades on a report card be the basis for civil or even criminal litigation of invasion of privacy suits? Would parents have a right to see their child's report card?

The privacy right in the past has been closely associated with sexual matters starting with birth control and then applied to legalizing abortion.

The immediate concerns of the Hosea Initiative are directed at the Right to Life. The assertion of a "right to privacy" proposed in SB 664 would provide a legal basis in the Maryland Constitution for abortion and tax funding of abortion should the US Supreme Court reverse the *Roe* decision.

Roe v. Wade affirmed a right to abortion based on the application of the so-called privacy right affirmed in *Griswold*.

The recent efforts attempting to secure the purported ratification of the long thought dead Equal Rights Amendment are largely predicated on apprehensions that the Trump Administration will appoint a sufficient number of judges to the US Supreme Court and

other federal courts to reverse the central holding in Roe and push the criminalization of abortion back to the states.

At the June 2018 shadow hearings, Congressman Jerrold Nadler (D-NY) made clear his concerns for resurrecting the ERA have much to do with issues besides equal rights. He noted that, "We cannot trust the Supreme Court not to go back … what the Supreme Court giveth, the Supreme Court can taketh away … we are worried now that another Supreme Court nominee … might overturn *Roe v. Wade* …" [i]

The contentious and tawdry fight over President Trump's Supreme Court nominee, Brett Kavanaugh, has shown that the Constitution itself does not support abortion. The Justices themselves legalized abortion in *Roe v. Wade.* The Constitution did not establish such a right. Should Maryland approve a constitutional privacy amendment, the birth control and abortion related legislative and judicial history of the "privacy" right will give a pregnant female **of any age** in Maryland an unrestrained right to make decisions with respect to her "privacy" including abortion and abortion funding.

Scholars have long acknowledged that *Roe* was a weak prop for abortion.

Harvard's Laurence Tribe (pro-*Roe* and ERA) has written: "One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgments on which it rests are nowhere to be found." John Hart Ely, past Dean of Stanford Law School, stated that *Roe v. Wade* "is not constitutional law and gives almost no sense of an obligation to try to be. What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution …" [ii]

Because legal abortion has no actual constitutional authority in the federal Constitution, abortionists in Maryland will need to secure a constitutional basis for abortion if *Roe* is reversed.

If protecting abortion IS NOT a goal of the privacy constitutional amendment then adding another exception to the one already in the SB 664 pertaining to firearms will do no harm.

Accordingly, I suggest adding the abortion neutral amendment to SB 644 as Congressman Sensenbrenner (R-WI) proposed to the reintroduced ERA in 1983. His amendment stated: "Nothing in this article shall be construed to grant or secure any right relating to abortion or the funding thereof." (His amendment did not pass, and that led to the ERA's rejection.)

Adding the abortion-neutral amendment to SB 664 would eliminate one area of contention that is certain to arise should SB 664 be proposed as an Amendment to the Maryland Constitution, but that would, of course, start other equally contentious controversies.

Approval of SB 664 by Members of the Maryland General Assembly would ensure that lawmakers would be questioned as to whether they even understand the full implications of adding SB 644 to Maryland's Constitution. You would have to defend yourselves against many complaints of unrecognized, unintended or intended consequences.

There is an old adage in politics, that when you are explaining, you are losing.

Legislators who vote for such an open-ended constitutional proposal would have a lot of explaining to account for to voters, beginning with privacy protections for child porn and sex trafficking, child molesters, persons with reckless driving records operating school buses and other felons being hired by schools, and the list will get longer.
You can avoid these problems. Just vote NO to SB 664.

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[i] Representative Carolyn Malone, ERA Shadow Hearing, We are live # ERAnow, June 6, 2018, 2247 Rayburn House Office Building, Washington DC, 3-5 PM, https://www.pscp.tv/w/1YpJkEkjMbYKj

[ii] Senator Sam Brownback, comments, Senate Judiciary Committee Nomination Hearing, Judge Samuel Alito, January 9-13, 2006, 109th Congress, Second Session, Serial No. J–109–56, p. 464.