



**Written Testimony of Benjamin P. Sisney¹
Senior Counsel for Litigation and Public Policy,
American Center for Law & Justice**

**Re: In Opposition to Maryland SB 664: Constitutional Amendment, “Declaration of Rights
– Right to Privacy”**

March 11, 2020

For the reasons set forth herein, the American Center for Law & Justice (“ACLJ”), on behalf of itself and its members, urges that Maryland legislators vote NO on S.B. 664.

The proposed bill is an attempt by abortion proponents unnecessarily to amend Maryland’s Constitution.

1. Under the Guise of “Privacy,” this Bill Seeks to Establish a State Constitutional “Right” to Abortion

Supporters of this bill are seeking to establish a constitutional “right” to abortion that would serve to invalidate common-sense state abortion-related laws that are supported by a majority of Americans.

Under the proposed bill, Maryland’s constitution would be amended to include an unlimited and “inherent right to privacy.”² “Privacy” is the same rubric under which the Supreme Court purported to find a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113, 154 (1973) (“We, therefore, conclude that the right of personal privacy includes the abortion decision”). An express privacy amendment therefore might be read as an invitation to find a right to abortion under the state constitution.

The experience with other state constitutions confirms this likelihood. The constitutions of eleven states – Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina, and Washington – have provisions explicitly related to a right to

¹Mr. Sisney serves as Senior Counsel for Litigation and Public Policy at the ACLJ’s Washington D.C. office. He also serves as the ACLJ’s Director of FOIA Practice. Mr. Sisney practiced law in Oklahoma City for five years, following the conclusion of his two-year clerkship with United States District Judge Gregory K. Frizzell in Tulsa, two years with the American Center for Law & Justice in Virginia, and a Legal Fellowship with Senator James M. Inhofe in Washington, D.C. Mr. Sisney graduated from Regent University School of Law in 2007. As a law student, he interned with an Oklahoma District Attorney’s office and Oklahoma’s oil and gas administrative law court. Mr. Sisney’s practice has focused on the areas of government affairs and accountability, international and United Nations affairs, pro-life litigation and issues, family law, First Amendment law, and religious liberty.

² S.B. 664 (Md. 2020).

privacy. Notably, not one of these state constitutions' privacy clauses expressly mention abortion. Nonetheless, abortion advocates frequently use privacy clauses in state constitutions to advocate for a "right" to abortion under state law. For instance, in a 2013 Illinois case, abortion advocates argued that "because [the Illinois] state constitution contains an explicit right of privacy which the federal constitution does not have, the right to an abortion under [the Illinois] state constitution is broader than the right to an abortion under the federal constitution."³ While the court in that case ultimately found that "any right to abortion in Illinois is clearly not grounded in the privacy clause of [the Illinois] state constitution,"⁴ other state courts *have* interpreted privacy to include a "right" to abortion.

For example, the Alaska Supreme Court has interpreted the privacy provision in that state's constitution to include a right to abortion. Moreover, the court found that the state constitution was even more protective of abortion than the U.S. Constitution.⁵ Alaska's constitution had been amended in 1972 to include a provision for a right to privacy. This amendment was "prompted by a fear of the potential for misuse of computerized information systems,"⁶ yet was later used to create a "right" to abortion.

Similarly, the Supreme Court of California found that all women possess a fundamental constitutional right to choose abortion under the California constitutional privacy provision.⁷ The Florida Supreme Court has likewise interpreted Florida's privacy provision.⁸ The Montana Supreme Court found a right to abortion in the Montana state constitution stating:

the delegates to Montana's 1972 Constitutional Convention viewed the textual inclusion of this right in Montana's new constitution as being necessary for the protection of the individual in 'an increasingly complex society . . . [in which] our area of privacy has decreased, decreased, decreased.' This 'right to be let alone . . . the most important right of them all,' as Delegate Campbell put it, 'produces . . . a semipermeable wall of separation between individual and state' in much the same fashion that a constitutional wall separates church from state.⁹

³ *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 754 (2013).

⁴ *Id.* 756.

⁵ *Planned Parenthood of the Great Nw.*, 375 P.3d 1122, 1129 (Alaska 2016) ("In 1997 we examined this express privacy provision in the context of pregnancy-related decisions and held that a woman's fundamental privacy right to reproductive choice is more broadly protected by the Alaska Constitution than the United States Constitution") (citing to *Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 971 (Alaska 1997)).

⁶ GORDAN HARRISON, *ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE*, ALASKA LEGISLATIVE AFFAIRS AGENCY 38 (2018, 5th Edition).

⁷ *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981) (striking down limits on Medicaid coverage for abortions); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (invalidating parental-consent requirement).

⁸ FLA. CONST. art. I, § 23. See *Gainesville Woman Care v. State*, 210 So. 3d 1243, 1254 (Fla. 2017) ("Florida's constitutional right of privacy encompasses a woman's right to choose to end her pregnancy."); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida Constitution embodies the principle that [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental.") (internal quotations and citations omitted).

⁹ *Armstrong v. State*, 989 P.2d 364, 373-74, 376 (Mont. 1999).

The court also found that, “Montana’s Constitution affords significantly broader protection than does the federal constitution.”¹⁰ This, as in the Alaskan case, is because there is no provision in the U.S. Constitution for a right to privacy.

The language in the Montana case is quite telling. In quoting Delegate Campbell, the Montana Supreme Court focused on the apparently diminishing nature of privacy and his belief that privacy is the most important right. However, we know both that the American people are often content with their apparent diminishing amount of privacy, and that the right to privacy is by no means the greatest right. We live in the age of Facebook, Instagram, Twitter, and facial recognition as a means of unlocking our phones. We willingly invite programs to spy upon our activities in the name of convenience. We are not here today to talk about privacy. That is just a guise. The real issue here today is whether we are willing to sacrifice the truly greatest right of all – the right to life.

2. *The U.S. Constitution Clearly States a Right to Life.*

While supporters of this bill will argue to the contrary, S.B. 664 is an attempt by abortion advocates to establish a right to abortion under the Maryland Constitution. However, each and every member of this body should ask themselves the following question: when are rights protected, and more specifically, when is the right to life protected?

Although this question has been debated since the highly contested opinion in *Roe v. Wade*, even Justice Blackmun himself conceded that *Roe* fails if it is ever established that an unborn baby has the right to life.¹¹ Blackmun goes on to state, as a matter of fact, that the right to life would absolutely trump the judicially fabricated right to abortion created in the majority opinion. Thus, the author of one of the most controversial Supreme Court decisions to date set the path to invalidate that same decision. Although the opinion tries to claim that there is no historical argument to support a preborn baby’s right to life, this conclusion is completely erroneous, with the most condemning rebuttal found in the United States Constitution and in the Declaration of Independence.

As Supreme Court Justice Thomas recently noted in a concurring opinion, “The Constitution itself is silent on abortion.”¹² It is, however, clear on the right to life, stating: “nor shall any person . . . be deprived of life”¹³ And we are all familiar with the language in the Declaration of Independence that says “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”¹⁴ However, the opinion of *Roe* and anyone who supports the killing of preborn children clearly have missed the meaning of those words. It unmistakably declares that all men are *created* equal and endowed by their Creator with certain unalienable rights. Again, we are endowed with unalienable rights upon *creation*. Our founders did not declare

¹⁰ *Id.* at 376.

¹¹ *Roe v. Wade*, 410 U.S. 113 at 157 (1973).

¹² *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ____, 20 (2019).

¹³ U.S. CONST. amend. V

¹⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

that we are *born* equal and endowed with rights, but that we were *created* equal and endowed with rights.

Therefore, although Blackmun tried so hard to argue that we were never given any indication of when rights attach, there is clear room for substantiated and vehement disagreement. The Declaration could not be more clear that rights attach at creation. Furthermore, the language in the Declaration is equally important, as it states that governments were specifically created to secure those unalienable rights, of which life is of utmost importance. Therefore, the government of Maryland absolutely not only has the right to secure the right to life from creation, but the duty to do so.

Consider that modern scientific developments confirm beyond debate that the life of a human being, as a biological organism, begins at the moment of fertilization. We've all seen the ultrasound photos of babies before birth. We've also heard stories of babies surviving at earlier and earlier stages of gestation when born prematurely – and even surviving outside the womb at the opposite end of pregnancy, namely when living in a petri dish after in vitro fertilization before being placed in a mother's womb. Given the overwhelming evidence that humans before birth are just as much members of the human species as you and I, we face a question. Do we want to say that there are human beings who have no rights at all, not even the most basic right to life?

3. *Roe v. Wade is Highly Controversial and not Settled Law*

Abortion is an issue that has torn apart our country for 47 years. Reliance upon *Roe* to support a judicially fabricated right to abortion (or “privacy” as supporters of this bill will call it) above the right to life is misguided. The *Roe* opinion does claim to find a previously unknown constitutional right to abortion. However, the rest of the opinion cannot simply be ignored, and as Justice Thomas so aptly put it, “[h]aving created the constitutional right to an abortion, this Court is dutybound to address its scope.”¹⁵ Supreme Court cases subsequent to *Roe* have merely assumed the “right” to abortion created by the *Roe* opinion, and then address its faults and limit its reach.¹⁶

In fact, *Roe*'s opinion has been limited and attacked repeatedly over the years.

¹⁵ *Box*, *supra* note 12.

¹⁶ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Importantly, the Supreme Court in *Casey* overturned the part of *Roe* that applied different levels of judicial scrutiny to abortion regulations, depending on the trimester. *Casey*, *Id.* at 872–74. Under this set of rules,

almost no regulation at all [was] permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, [were] permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions [were] permitted provided the life or health of the mother is not at stake.

Id. at 872. *Casey* replaced this “elaborate but rigid construct” with a simpler test which allows regulation of abortion so long as it does not impose an “undue burden” on the woman's right to have an abortion. *Id.* at 874–76. This test, the Court concluded, places sufficient weight on the State's interest in protecting potential human life and balances it with the woman's right to abort. *Id.* at 876. See also *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). The Court had previously struck down a ban on partial birth abortions in *Stenberg v. Carhart*, 530 U.S. 914 (2000). In upholding the Partial-Birth Abortion Ban Act in *Gonzales*, the Court also lowered the standard of abortion regulation even further by adding a “rational basis” test (the lowest level of protection under the Constitution) to the undue burden standard outlined in *Casey*. *Id.*

Furthermore, a 2019 Gallup poll show that 74% of Americans support restrictions on abortion.¹⁷ In fact, according to that same poll, 60% of Americans desire abortion to be illegal in most or all circumstances.¹⁸ In other words, a *large majority* of Americans think that abortion should be restricted – significantly restricted. Supporters of this bill are seeking to silence the voices of those Maryland residents who are among the majority of Americans desirous of restrictions on abortion.

CONCLUSION

For the reasons stated above, the proposed bill should be opposed.

¹⁷ *Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 10, 2020).

¹⁸ *Id.*