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Re: In Opposition to Maryland H.B. 1171: Declaration of Rights – Right to Reproductive Liberty

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For the reasons set forth herein, the American Center for Law & Justice (“ACLJ”), on behalf of itself and nearly 400,000 of its members, including over 6,000 Maryland residents, who oppose abortion², urges that Maryland legislators vote NO on H.B. 1171.

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. Sumnum*, 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.).

The proposed bill is an attempt by abortion proponents unnecessarily to amend Maryland’s Constitution and to expand Maryland’s already extreme abortion laws.

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² *Overturn Roe v. Wade: Defeat Abortion. Save Babies.*, ACLJ.ORG, <https://aclj.org/pro-life/overturn-roe-v-wade-defeat-abortion-save-babies> (last visited Feb. 17, 2022).

I. *Historical Background*

Abortion advocates have a long history of using euphemisms in an attempt to disguise the horrific nature of the act that they support and promote – namely, the killing of innocent, preborn, human beings. Since the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113, 154 (1973), in which the Court purported to find a constitutional “right” to abortion under the scope of “privacy,” words such as “privacy” and “freedom” when combined with “reproductive” have become synonymous with “abortion.” (“We, therefore, conclude that the right of personal privacy includes the abortion decision”). House Bill 1171 is yet another in a long line of bills to use euphemistic terms, in this case “liberty” and “equality,” in an attempt to sell Maryland citizens on a bill that completely strips a certain section of human beings – preborn babies – of all dignity and human rights. Moreover, the bill would eliminate the ability of Maryland citizens to enact their opposition to state funding of abortion, adopt laws that protect life and promote and elevate human rights and dignity, and legislate protections for those with conscientious objections to participating in abortion.

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

Since the founding of the United States, Americans have valued and protected innocent human life. Clearly, the U.S. Constitution contains no language conferring a right to abortion. And, while supporters of this bill are trying to change this fact, neither does the Maryland Constitution. However, the U.S. Constitution, and the Declaration of Independence, most definitively value and protect life. Thus, the question that all members of this body should ask themselves is, “when does the right to life begin?” Or, more to the point, “when does innocent life not deserve to be 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.³ 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.”⁴ It is, however, clear on the right to life, stating: “nor shall any person . . . be deprived of life”⁵ 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,

³ *Roe v. Wade*, 410 U.S. 113 at 157 (1973).

⁴ *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ____, 20 (2019).

⁵ U.S. CONST. amend. V

Liberty and the pursuit of Happiness.”⁶ 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 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 vigorous 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?** Our nation already has had sorry experience – with slavery -- declaring a whole class of human beings as unworthy of rights. Maryland should not repeat that grave mistake here.

III. Abortion is Highly Controversial, and a Majority of Americans Do Not Support Deregulation of Abortion

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.”⁷ 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.⁸

⁶ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷ *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 587 U.S. ___, 20 (2019).

⁸ *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]

Roe's opinion has been limited and attacked repeatedly over the years, most recently in *Dobbs v. Jackson Women's Health*, which has yet to be decided by the Supreme Court, and is undoubtedly the reason that H.B. 1171 is before this body.

However, as Americans, we have always valued the right to life, and we should continue to do so. House Bill 1171 categorically frustrates the voices of everyday Marylanders who want to engage in a meaningful public discussion and debate over the various controversial issues surrounding abortion. Gallup Polling has found that at least 70% of Americans are opposed to abortion being legal in every circumstance;⁹ 65% of Americans oppose all abortion in the second trimester; and 81% oppose abortion in the third trimester.¹⁰ Approximately one third of Marylanders, in particular, believe abortion should be illegal in most or all instances.¹¹ House Bill 1171 would undo many of Maryland's laws, and prevent the many voices in opposition to abortion from having a voice.

IV. *The Full Scope and Repercussions of House Bill 1171 Are Unclear and Could Severely Impact the Rights and Freedoms of Maryland Citizens*

Because the radical measures that would be implemented should H.B. 1171 be passed are relatively new, and because the language of H.B. 1171 is both broad in scope, and vague, it is not possible to fully quantify the effects on law that H.B. 1171 would have if passed. Nonetheless, the proposed amendment would have seismic effects, disrupting the many laws in place that currently protect life and conscience. Most notably, the passage of H.B. 1171 would prohibit future legislative efforts to place even modest limits on abortion, thwarting those who value innocent life and seek to protect it, and would prohibit future legislation that protects life from being enacted.

House Bill 1171 goes far beyond simply attempting to codify the (erroneous) decisions of *Roe* and *Casey*. It incorporates "strict scrutiny" for abortion claims in a manner that will have a deleterious effect on a host of other laws, and neglects the balancing pursued by the Court.

In *Casey*, the Supreme Court rejected strict scrutiny for abortion explicitly as an insufficient test, emphasizing instead "that the State has legitimate interests in the health of the woman and in protecting the potential life within her."¹² That interest would be neglected by a strict scrutiny. Instead, under *Casey* only "where state regulation imposes an undue burden on a woman's ability" to seek abortion is a constitutional issue raised.¹³ House Bill 1171 goes far beyond this standard, prohibiting any burdens on the "right" to abortion "unless justified by a compelling state interest

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.

⁹ Lydia Saad, *Where Do Americans Stand on Abortion?*, GALLUP, <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx> (last visited Feb. 17, 2022).

¹⁰ *Id.*

¹¹ *Views About Abortion by State (2014)*, PEW RESEARCH CENTER, <https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/state/>.

¹² *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).

¹³ *Id.* at 874.

achieved by the least restrictive means.” Such a standard would invalidate many of the laws adopted by the state of Maryland in order to protect the interests of all. An abortion amendment would invalidate state abortion restrictions that are supported by the majority of the public, including the following common sense, protective laws: partial-birth abortion bans; infanticide bans; bans on selective abortion based on gender or disability; parental notification; informed consent; and many more. House Bill 1171 contains no saving provisions for already existing laws.

There is a long list of laws that would likely be struck down, without notice to the public, by this proposed legislation. The following are just a few of the Maryland laws that would be affected by the passage of H.B. 1171. Maryland requires abortion providers to be licensed as a surgical abortion facility and follow a routine set of health and safety standards.¹⁴ Only licensed Physicians may provide abortions.¹⁵ Abortions may be prohibited after viability in Maryland unless necessary to preserve the woman’s life or health or unless the preborn baby is affected by a genetic defect or serious deformity or abnormality.¹⁶ Maryland only allows women eligible for state medical assistance for general health care to obtain public funds for abortion services if: (1) continuation of the pregnancy is likely to result in the woman’s death; (2) the woman is a victim of rape, incest, or a sexual offense reported to a law-enforcement, public health, or social agency; (3) the fetus is affected by a genetic defect or serious deformity or abnormality; (4) abortion is medically necessary because there is substantial risk that continuation of the pregnancy could have a serious and adverse effect on the woman’s present or future physical health; or (5) continuation of the pregnancy is creating a serious effect on the woman’s mental health and if carried to term there is substantial risk of serious or long lasting effect on the woman’s future mental health.¹⁷

Perhaps most directly implicated is Md. Code Ann., Health-Gen. § 20-103. This law prohibits abortions on minors without notice to parents and guardians.¹⁸ Abortions may only performed without notice if a reasonable effort to give notice is unsuccessful, or the minor does not live with a parent, or it is not in the best interests of the minor.¹⁹

Further, Maryland law also protects the consciences of hospitals and individuals in Md. Code Ann., Health-Gen. § 20-214:

“A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy.”²⁰

¹⁴ Md. Regs. Code tit. 10, §§ 10.12.01, -02. Md. Regs. Code tit. 10, §§ 10.12.04, .05 (B)(2), .10, .17-20.

¹⁵ Md. Code Ann., Health-Gen. § 20-207 (Enacted 1970; Last Amended 1982), Md. Code Ann., Health-Gen. §20-208 (Enacted 1991).

¹⁶ Md. Code Ann. Health-Gen. §20-209 (Enacted 1991).

¹⁷ Md. Regs. Code tit. 10, §§ 09.02.04(G), 09.34.04(A)(5), 09.34.04(B)(2).

¹⁸ Md. Code Ann., Health-Gen. § 20-103(a).

¹⁹ *Id.* §§ 20-103(b) & (c).

²⁰ Md. Code Ann., Health-Gen. § 20-214 (a)(1)

“licensed hospital, hospital director, or hospital governing board may not be required: (i) To permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or (ii) To refer to any source for these medical procedures.”²¹

These laws are clearly acceptable and legitimate under current Supreme Court precedent. But H.B. 1171 would appear to be intended to drive a stake into all of these laws, and more, and do so in a way that would leave voters uninformed entirely on the scope of the issue on which they are voting, including the surrender of their right to adopt protections for life in the future.

The vague language of H.B. 1171 also raises questions as to whether individuals seeking abortions will have a “right” to funding for abortion, and a “right” to artificial reproductive technology, such as in-vitro fertilization and surrogacy. Moreover, how does the promotion of an “individual’s right” to reproduction affect the rights of another individual when their interest in reproduction conflicts with the other individual, i.e., the conflicting rights of parents?

House Bill 1171 is a can of poisonous worms euphemistically packaged as a “liberty” bill, which, in actuality, seeks to restrict liberty, not advance it.

As a final note, as Maryland House Minority Leader Jason Buckel emphasized, a constitutional amendment is not actually necessary to create or protect any abortion right.²² As he said, “it’s more politics and posturing.”²³ The issue presented in *Dobbs* is solely whether abortion is protected under the Federal Constitution. No possible result would invalidate state laws protective of abortion. There is simply no need to enshrine this issue in the strictures of constitutional law. The Maryland Freedom of Choice Act (1991) protects abortion and provides for its continued existence. It is also, unlike constitutional amendments, subject to alteration as needed according to the will of the people through their elected representatives. The Maryland Constitution is silent upon the abortion debate, and leaves the issue to the political process. A matter this divisive, this controversial, and this politically charged should not be enshrined into the Maryland Constitution in a radical pro-abortion direction.

CONCLUSION

For the reasons stated above, among others, we oppose this proposed bill.

²¹ *Id.* § 20-214 (b)(1)

²² Brian White, *Abortion Rights Proposed for Maryland’s Constitution*, AP (Feb. 14, 2022), <https://apnews.com/article/us-supreme-court-health-maryland-constitutions-constitutional-amendments-146ba8238e12b22a1b501262f282082e>.

²³ *Id.*