

Chair Shane E. Pendergrass
House Health & Government Operations Committee
House Office Building
6 Bladen St.
Annapolis, MD 21401

March 9, 2022

Dear Honorable Chair Pendergrass,

The Bronfein Family Law Clinic at The University of Baltimore School **strongly supports** House Bill 0626 – Pregnant Person’s Freedom Act.

The Bronfein Family Law Clinic (FLC) provides pro bono, client-centered representation to individuals in Baltimore and the surrounding counties who could not otherwise afford a lawyer. Student-attorneys in the FLC represent clients seeking assistance on family law matters who are low-income, Maryland residents. As student attorneys, we also work on issues of reproductive justice.

Summary of Testimony

HB0626 is necessary even with the (hopeful) passage of HB1171 – Declaration of Rights – Right to Reproductive Liberty, which proposes an amendment to the Maryland Constitution to enshrine the fundamental right to reproductive liberty. HB0626 is distinct from HB1171 in that HB0626 offers (1) protection against criminalization of and civil liabilities for pregnancy loss; (2) protection against civil and criminal action targeting assisting third parties; and (3) a civil remedy if criminal actions are taken against certain types of pregnancy loss.

I. Constitutional Amendment v. Statute

To ensure Maryland residents maintain access to abortion care and do not face direct and/or indirect burdens to reproductive justice, we urge the passage of **both** HB0626 – Pregnant Persons Freedom Act and the proposed Maryland constitutional amendment, HB1171.¹ The enactment of the proposed constitutional amendment will not diminish the importance of HB0626. The constitutional amendment in HB1171 will ensure the necessary foundation, and the statute HB0626 will provide supplemental scaffolding to ensure that the fundamental right of reproductive liberty is not impeded. A state constitutional amendment serves the purposes of establishing a fundamental principle for an extended duration.² A state constitution importantly preempts statutes that are contrary to the constitutional amendment.³ A constitutional amendment contains the framework and general principles by which the government must abide by.⁴ For these reasons, HB1171 is necessary. But HB0626 is equally necessary because as a statute, it provides details and specific directives for the general constitutional principles at issue.⁵ Below, we have created a table to explain how the two bills work in tandem and how HB0626 is

¹ See (below) *Table 1. Summaries of and Distinctions between HB1171 and HB0626.*

² 16 Am. Jur. 2d Constitutional Law Sec. 2 (2022).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

not superfluous even if HB1171 passes. As seen in the table below, HB1171 does not speak to protection of third parties, nor does it create a cause of action for damages as HB0626 does. In addition, HB1171 does not provide specific guidance, as HB0626 does, regarding the protection of persons from state investigation, criminal prosecution, or civil liabilities for all forms of pregnancy loss – intentional or unintentional. Accordingly, HB0626 is critical because it offers these protections.

Table 1. Summaries of and Distinctions between HB1171 and HB0626

Constitutional Amendment (HB 1171) – Declaration of Rights – Rights to Reproductive Liberty	Statutory Amendment (HB 626) – Pregnant Persons Freedom Act of 2022
<ul style="list-style-type: none"> Protects the fundamental right to: <ul style="list-style-type: none"> make decisions about an individual’s own reproductive health, and to prevent, continue, or end pregnancy Prevents the State from abridging the right unless justified by compelling state interest 	<ul style="list-style-type: none"> Protects persons from state investigation, criminal prosecution, or civil liabilities for: <ul style="list-style-type: none"> Terminating their pregnancy, Experiencing a miscarriage or stillbirth, or Failing to act to prevent perinatal death Protects third parties from criminal liabilities and civil damages for: <ul style="list-style-type: none"> Aiding, informing, or assisting a pregnant person in terminating or attempting to terminate pregnancy Allows persons who are criminally investigated for the following actions to bring cause of action for damages: <ul style="list-style-type: none"> Terminating their pregnancy, Experiencing a miscarriage or stillbirth, or [Third Party] Aiding, informing, or assisting a pregnant person in terminating or attempting to terminate a pregnancy

II. HB0626 Protects Against the Criminalization of Pregnancy Loss

Passing HB1171 will prohibit the State from directly or indirectly burdening a person’s fundamental right to make and effectuate decisions regarding the individual’s own reproduction, including the right to keeping one’s pregnancy, accessing contraception, and undergoing abortion care. However, HB1171 may not protect individuals from what may come after exercising such rights where there is a compelling state interest. Without the protection of HB0626, pregnant persons may be subject to investigation, criminal prosecution, or civil liabilities due to pregnancy loss after seeking or accessing abortion care, experiencing a miscarriage or stillbirth, or failing to act to prevent perinatal death. This means, for example, that under the constitutional amendment alone, without the passing of HB0626, it is possible that a pregnant person who continues taking prescribed anti-depressants or fails to take prenatal vitamins during pregnancy, and then experiences a pregnancy loss, could be criminally investigated, and subsequently prosecuted for murder or manslaughter under Maryland’s current statutory scheme. The criminalization of pregnancy loss has far-reaching effects since about 10 to 20 percent of known pregnancies end in miscarriage, although it is estimated that the actual number of

miscarriages are much higher.⁶ As a result, such criminal investigations would not only be invasive, but also traumatizing to persons who have either just experienced and may be grieving a miscarriage or stillbirth. For these reasons, we strongly urge the passing of HB0626.

III. HB0626 Protects Assisting Third Parties

Furthermore, HB1171's important protections are limited to the pregnant individual, leaving abortion care providers and other third parties who may assist pregnant persons in seeking abortion care vulnerable to state or civil action.⁷ These third parties include not only family members or friends who may schedule appointments in a show of moral support, but also ride-share drivers who may simply provide transportation to appointments. With only the passage of HB1171 and not HB0626, there is a concern that third parties who assist a person in obtaining abortion care could be targeted with state investigations, criminal prosecutions, and civil liabilities. Accordingly, we strongly urge the passing of HB0626 to prevent this from happening.

IV. Conclusion

The protection of reproductive liberty to continue, prevent, or end one's pregnancy under the proposed state constitutional amendment (HB1171) is necessary and we strongly support that bill. Unfortunately, the proposed constitutional protection is simply not enough to stop the criminal and civil threat to pregnant persons who exercise their fundamental right and to those who assist them. For the foregoing reasons we urge a favorable report on HB0626.

Thank you for your consideration of our testimony. If we can provide any further information, please contact Neha Khan (neha.khan@ubalt.edu), Katherine Simon (katherine.simon@ubalt.edu), and Chandre Jones (chandre.jones@ubalt.edu).

Sincerely,

University of Baltimore School of Law Bronfein Law Clinic

⁶ Mayo Clinic, Pregnancy Loss Miscarriage <https://www.mayoclinic.org>.

⁷ The Daily Record reported that an aunt, Sandra Craine, was charged with second-degree child abuse after giving her 16-year-old niece pills obtained to cause a self-administered abortion. The aunt accepted a plea deal on a reckless endangerment charge and accepted a 5-year prison term. <https://thedailyrecord.com/2012/01/12/elkton-woman-faces-jail-for-giving-teen-abortion-pill/>