AMERICAN CENTER
for LAW & JUSTICE

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WRITTEN TESTIMONY OF BENJAMIN P. SISNEY[1]
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Re: In Opposition to Maryland S.B. 798: Declaration of Rights – Right to Reproductive Freedom

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For the reasons set forth herein, the American Center for Law & Justice ("ACLJ"), on behalf of itself and over 201,000 of its supporters, including over 2500 Maryland residents, who oppose abortion[2], urges that Maryland legislators vote NO on S.B. 798.

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. Summum*, 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.*, 142 S. Ct. 2228 (June 24, 2022).

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] *Defend Life, Defeat Abortion in All 50 States*, ACLJ.ORG, https://aclj.org/pro-life/defend-life-defeat-abortion-in-all-50-states (last visited Feb. 27, 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"). Senate Bill 798 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. 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.

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 me, 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.

It is an indisputable biological fact that abortion kills "a whole, separate, unique, living human being." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735-36 (8th Cir. 2008) (en banc). As such, abortion implicates many significant interests—including those of the preborn child who may be killed, the child's parents, the government, and the public—and it also "presents a profound moral issue on which Americans hold sharply conflicting views." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (June 24, 2022). The basic premise of S.B. 798, however, is that the state constitution should give one group of human beings (pregnant women) a privacy-based "right" to intentionally kill other separate, unique, living human beings (preborn children), and no one has much, if any, say in the matter.

Yet, the question of when and whether the law should authorize, or at least excuse, the intentional killing of a living human being is *never* a primarily *private* question. To the contrary, both the public and the government clearly have *compelling* interests at stake whenever human life is being taken, regardless of whether the circumstance entails abortion, capital punishment, murder, the use of lethal force by individuals asserting defense of self or others, deaths caused in military operations, suicide, or euthanasia. The fact that a particular killing impacts the individuals involved in a more direct way than it impacts the general public does *not* render legislatures powerless to carefully weigh the competing interests at stake and set policies that reflect the values of the public. However, S.B. 798, if enacted, would strip the public and the legislature of any ability to regulate the intentional killing of preborn babies.

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

III. The Full Scope and Repercussions of Senate Bill 798 Are Unclear and Could Severely Impact the Rights and Freedoms of Maryland Citizens

Because the radical measures that would be implemented should S.B. 798 be passed are relatively new, and because the language of S.B. 798 is both broad in scope, and vague, it is not possible to fully quantify the effects on law that S.B. 798 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 S.B. 798 would prohibit future legislative efforts to place even reasonable restrictions on abortion, thwarting those who value innocent life and seek to protect it, and would prohibit future legislation that protects life from being enacted.

Senate Bill 798 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."[7] That interest would be neglected by a strict scrutiny standard. Instead, under *Casey* only "where state regulation imposes an undue burden on a woman's ability" to seek abortion is a constitutional issue raised.[8] Senate Bill 798 goes far beyond this standard, prohibiting any burdens on the "right" to abortion "unless justified by a compelling state interest 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. Senate Bill 798 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 S.B. 798. 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.[9] In fact, supporters of S.B. 798, the identical version of this bill now in committee in the House, testified that late-term abortions should be unrestricted – and that they were unwilling to even entertain an amendment to prevent late-term abortions.[10] Maryland requires abortion providers to be licensed as a surgical abortion facility and follow a routine set of

[7] *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992).
[8] *Id.* at 874.
[9] Md. Code Ann. Health-Gen. §20-209 (Enacted 1991).
[10] *HGO Committee Session, 2/21/2023 #1*, YOUTUBE.COM, (Feb. 21, 2023) (starting minute 11:45), https://www.youtube.com/watch?v=9NIB9TPxQEY&list=PLfEpKNSgWQsLjMDntm1Wc6YPU28eo241v&index=25.

health and safety standards.[11] Only licensed Physicians may provide abortions.[12] 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.[13]

Perhaps most directly implicated is Md. Code Ann., Health-Gen. § 20-103. This law prohibits abortions on minors without notice to parents and guardians.[14] 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.[15]

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.[16]
>
> A 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.[17]

These laws are clearly acceptable and legitimate under current Supreme Court precedent. But S.B. 798 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 S.B. 798 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"

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[11] Md. Regs. Code tit. 10, §§ 10.12.01, -02. Md. Regs. Code tit. 10, §§ 10.12.04, .05 (B)(2), .10, .17-20.
[12] Md. Code Ann., Health-Gen. § 20-207 (Enacted 1970; Last Amended 1982), Md. Code Ann., Health-Gen. §20-208 (Enacted 1991).
[13] Md. Regs. Code tit. 10, §§ 09.02.04(G), 09.34.04(A)(5), 09.34.04(B)(2).
[14] Md. Code Ann., Health-Gen. § 20-103(a).
[15] *Id.* §§ 20-103(b) & (c).
[16] Md. Code Ann., Health-Gen. § 20-214 (a)(1)
[17] *Id.* § 20-214 (b)(1)

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?

Senate Bill 798 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 last year, a constitutional amendment is not actually necessary to create or protect any abortion right.[18] As he said, "it's more politics and posturing."[19] He was, and remains, correct. The issue presented in *Dobbs* was solely whether abortion is protected under the Federal Constitution. Contrary to popular myth, the overruling of *Roe* and *Casey* did not create a nationwide prohibition of abortion, nor did it undo any states laws on abortion. Rather, the Supreme Court removed the abortion issue from its purview and restored to the states their rightful constitutional authority to regulate whether, and under what conditions, abortion should be permitted within the state. Thus, each state is now free to legislate on the matter as its voters see fit. That being said, the Maryland Freedom of Choice Act (1991) continues to protect 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.

Roe and *Casey* stripped legislatures of their authority, effectively ushering in an era of abortion provider self-regulation, with disastrous consequences. For instance, one abortion-related lawsuit produced extensive evidence that:

- "women are often herded through their procedures with little or no medical or emotional counseling,"
- "what counseling is received is heavily biased in favor of having an abortion,"
- women "are rushed through the process, and exposed -- without sufficient warning -- to health risks ranging from unsanitary clinic conditions to physical and psychological damage,"
- countless women seek post-abortion counseling for "the emotional, physical, and psychological symptoms" they experienced after the abortion, and
- in some instances, "both abortion counselors and physicians worked on commission and aggressively followed a script to encourage prompt election of the procedure."

McCorvey v. Hill, 385 F.3d 846, 850-51 & n.8 (5th Cir. 2004) (Jones, J., concurring).

[18] 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.
[19] *Id.*

The evidence in the case included "about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision," and "[s]tudies by scientists . . . [that] suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions." *Id*.; *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 775 (8th Cir. 2015) (same); *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("[S]ome women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow.").

S.B. 798 is a voluntary attempt, on the part of some members of the legislature, to give up the legislative ability, nay, *duty*, to regulate abortion – even with common sense measures that are already in place – and to leave women and girls vulnerable to the unregulated practices of people who profit from abortion.

CONCLUSION

For the reasons stated above, among others, we oppose S.B. 798.