



**WRITTEN TESTIMONY OF DENISE BURKE,
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ON MARYLAND SENATE BILL 798 (2023)
BEFORE THE SENATE FINANCE COMMITTEE
MARCH 1, 2023**

Chairwoman Griffen and Members of the Committee, I am Denise Burke, Senior Counsel with Alliance Defending Freedom. I am submitting testimony on Senate Bill (SB) 798 proposing an amendment to establish a “fundamental right to reproductive freedom” in the Maryland Constitution. If approved by the Legislature, the proposed constitutional amendment will appear on the November 2024 ballot.

The proposed amendment language is dangerously vague and endangers minors and parental rights. It also threatens the freedom of conscience of Maryland’s healthcare professionals and precludes the enactment and enforcement of commonsense, protective laws such as parental involvement for minors’ abortions and informed consent. It will force Maryland taxpayers to pay for more abortions, as well as contraception, sterilizations, and even the surgical removal of healthy reproductive organs. Taxpayers will even be forced to fund these services for non-residents, including having sex-traffickers bring their victims to Maryland to procure free abortions all while avoiding criminal liability for their actions. .

Proposed “Reproductive Freedom” Amendment is Dangerously Vague

Maryland voters deserve to know exactly what they are voting on—especially when asked to amend their foundational document: the state’s constitution. The proposed amendment language fails to accurately inform Marylanders of the meaning of “reproductive freedom” and the full implications of a vote in favor of the proposed amendment.

The proposed amendment language centers on the term “reproductive freedom” which is inadequately defined. SB 798 misleadingly provides that “reproductive freedom” includes “*but [is] not limited*” to the ability to make and effectuate

decisions to prevent, continue, or end one's pregnancy." This is not a full and fair definition.

Rather, this language is vague and will likely be interpreted by Maryland courts to include more than abortion, contraception, and sterilization (that are clearly implicated by the proposed amendment language). It could be found to encompass other medical procedures such as the removal of healthy reproductive organs and the provision of cross-sex hormones and other harmful chemicals that alter the normal functioning of the male or female body.

The proposed language also purports to declare "reproductive freedom" as a "fundamental right." The language of this amendment does not inform voters of the meaning and import of "fundamental rights" which have traditionally included rights reflected in the U.S. Constitution and the Maryland Declaration of Rights, such as the right to free speech and the right to a jury trial.

Fundamental rights are rights that have been recognized as requiring a high degree of protection from government encroachment. Government infringement on or regulation of these rights is subject to the highest degree of judicial scrutiny. This level of scrutiny is commonly called "strict scrutiny" and requires that state officials, when proposing a regulation or restriction on that right, must demonstrate a "compelling state interest." Further, the regulation or restriction must be narrowly tailored to effectuate that compelling interest.

Notably, even under the now overruled decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, abortion was not considered a "fundamental right" under the U.S. Constitution as abortion regulations and restrictions were not judged under the strict scrutiny standard, but under the lesser "undue burden" standard. It is not, therefore, accurate to claim that the proposed amendment language simply resurrects and codifies *Roe v. Wade*. It goes dangerously beyond *Roe*.

Proposed "Reproductive Freedom" Amendment Endangers Minors and Parental Rights

In addition to not knowing what is meant by a "fundamental right" to "reproductive freedom," voters will also be unwittingly compromising parental rights if the constitutional amendment is approved.

The proposed amendment language guarantees a “fundamental right” to “reproductive freedom” to “every person.” This means that anyone, including a minor (male or female), has a “right” to abortion, contraception, sterilization, and other procedures, including the removal of healthy reproductive organs. These and other complex and dangerous procedures will occur without the knowledge or consent of parents.

Under such a radical regime, current Maryland law requiring an abortion provider to first give notice to a parent or legal guardian before performing an abortion on a minor (except in specified circumstances) could be deemed unenforceable. Minors—including those being sex-trafficked—can be brought into Maryland to receive “no-questions-asked” abortions. This will only embolden traffickers to continue to wreck the lives of innocent young women in Maryland and beyond.

Parents are best equipped to protect and care for their children’s health and well-being. They have both the right and responsibility to do so. The proposed amendment language would eviscerate that fundamental right.

Proposed “Reproductive Freedom” Amendment Threatens the Freedom of Conscience of Medical Providers

The proposed constitutional amendment provides that “the State” may not “directly or indirectly, deny, burden, or abridge” the “fundamental right” to abortion, contraception, sterilization, and other potentially objectionable practices and procedures. Laws protecting the freedom of conscience of healthcare professionals and permitting them to opt out of performing or participating in these procedures could be seen as a “denial”—or at least a “burden”—on an individual’s “right to reproductive freedom.” In this “battle of rights,” the historically fundamental freedom of conscience may be deemed subservient to the newly created “right” to abortion. This threat to freedom of conscience is untenable.

The paramount importance of freedom of conscience has been repeatedly affirmed. Our Nation’s history, tradition, and jurisprudence confirm that Americans—including healthcare professionals—cannot be forced to commit an act that is against their moral, religious, or conscientious beliefs.

America’s Founders were united in a desire to protect freedom of conscience. For example, Thomas Jefferson made clear that no provision in the Constitution “ought to be dearer to man than that which protects the rights of conscience against the

enterprises of civil authority.”¹ Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience of all Americans be protected. He described conscience as “the most sacred of all property.”²

The Supreme Court has consistently ruled in favor of protecting the freedom of conscience of every American. It has explicitly stated that “[f]reedom of conscience... cannot be restricted by law.”³ But SB 798 undermines these sacred freedoms and will lead to more nurses, doctors, and other medical professionals leaving the field altogether rather than having their consciences violated.

Proposed “Reproductive Freedom” Amendment Precludes the Enactment and Enforcement of Commonsense Protective Laws

Current Maryland law contains a few protective abortion-related laws: a limit on post-viability abortions and a parental notice requirement. Each of these requirements is jeopardized by the proposed amendment. Notably, with regard to the future of Maryland’s limit on post-viability abortions, it is not a coincidence that a clinic performing abortions throughout pregnancy opened in College Park last fall.⁴

The proposed amendment provides that the State may not “directly or indirectly, deny, burden, or abridge” the “fundamental right” to abortion. Application of this provision means that existing protective laws will likely be seen as “burdening” the newly created constitutional “right” to abortion and will be invalidated by Maryland courts. The Legislature will be further prohibited from responding to the growing medical evidence of abortion’s harms to women and from evidence of abortion provider’s often substandard facilities and practices with commonsense legislation. Marylanders—and the citizens of other states—will be left completely unprotected.

¹ Jefferson, Letter to New London Methodists (1809).

² Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

³ *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added).

⁴ M. Block, *An all-trimester abortion clinic prepares to open in Maryland, one of few nationally*, NPR, Sept. 1, 2022.

Proposed Amendment Will Force Maryland Taxpayers to Fund More Abortions, Contraception, Sterilizations, Fertility Treatments, Cross-Sex Hormones, and Puberty Blockers

The U.S. Supreme Court and federal law prohibited taxpayer dollars from funding abortions. Strong majorities of taxpayers agree that tax dollars should not be used to support abortion. Yet under the proposed amendment, Maryland taxpayer dollars could be required to fund abortions, birth control, fertility treatments, cross-sex hormones, and even puberty blockers. They would be forced to fund these procedures and products for residents and non-residents, minors and adults, males and females. Maryland will join California, New York, and Minnesota as a dangerous, unregulated, and unrestricted “Wild West” for abortions to the detriment of women, infants, crime victims, and Maryland taxpayers.

SB 798 goes far beyond codifying the now-defunct decision in *Roe v. Wade*. The language is dangerously vague and will compromise parental rights and endanger minors and crime victims. It also threatens the freedom of conscience of Maryland’s healthcare professionals and precludes the enactment and enforcement of commonsense, protective laws such as parental involvement for minors’ abortions. It would also force Maryland taxpayers to pay for more abortions, contraception, sterilizations, and even the surgical removal of healthy reproductive organs. Taxpayers will be forced to fund these services even for non-residents and for crime victims when the crimes are not reported to law enforcement or appropriately addressed.