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**STATE OF MARYLAND**  
**OFFICE OF THE ATTORNEY GENERAL**  
**OFFICE OF THE SOLICITOR GENERAL**  
**CRIMINAL APPEALS DIVISION**

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March 4, 2026

TO: The Honorable Heather Bagnall  
Chair, Health Committee

FROM: Jer Welter  
Principal Deputy Solicitor General, Office of the Attorney General,  
Office of the Solicitor General, Criminal Appeals Division

RE: House Bill 1143 – Public Health – Office of the Chief Medical Examiner –  
Perinatal Autopsies (Lung Float Test Ban) – **Letter of Concern**<sup>1</sup>

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The Office of the Attorney General writes to express concern regarding **House Bill 1143**, which would prohibit medical examiners and other pathologists from performing the hydrostatic float test or “HFT” (also known as the “lung float test”) when conducting a perinatal autopsy to determine whether the death resulted in a stillbirth or, instead, occurred after a live birth.

The Office of the Attorney General commends the apparent impetus of the bill to support the right to reproductive freedom guaranteed by Article 48 of the Maryland Declaration of Rights. Nevertheless, the bill as written raises significant policy concerns.

The HFT is a procedure performed in perinatal autopsies that generally involves placing the deceased’s lungs in water and noting whether they rise or sink. As explained in a recent position paper from the National Association of Medical Examiners (NAME), the test is longstanding and the principle behind it “is relatively simple, with the rationale that the lungs of a liveborn infant will float in water due to aeration from breathing, while the lungs of a stillborn fetus, absent of air, will sink.”<sup>2</sup> As the NAME paper explains, the HFT is a subject of current medico-legal controversy: citing a publication for the criminal defense bar, the NAME paper

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<sup>1</sup> This letter is a statement of the Office of the Attorney General’s policy position on the referenced pending legislation. For legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Office of Counsel to the General Assembly.

<sup>2</sup> Alison Krywaczyk, M.D., et al., “The National Association of Medical Examiners (NAME) position paper on the investigation and certification of fetal demise, stillborn, and early neonatal deaths,” at 7 (Oct. 17, 2025), available at <https://name.memberclicks.net/assets/docs/Investigation%20and%20Certification%20of%20Fetal%20Demise%2C%20Stillborn%2C%20and%20Early%20Neonatal%20Deaths%2010-17-2025.pdf>.

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notes that “[s]ome literature calls for the outright condemnation of the test as unreliable and dangerous,” while observing that “others applaud the test, and its usefulness if certain caveats are taken into consideration.”<sup>3</sup> Those caveats include awareness of the possibility of “false positives” (circumstances where the lungs of a stillborn fetus float) and “false negatives” (circumstances where the lungs of a liveborn infant sink).<sup>4</sup> The largest study investigating the HFT, a peer-reviewed German study in 2013 that examined 208 autopsies of known liveborn infants and known stillborn fetuses all occurring in a hospital setting, found an overall 98% accuracy rate, with zero false positives (all 194 known stillbirths had lungs that sank) and four false negatives (four out of 14 known liveborn infants had lungs that sank despite intubation).<sup>5</sup> The NAME position paper ultimately recommends that the HFT should, “along with all other [autopsy] findings, be interpreted in the totality of the case and is not a diagnostic tool able to stand on its own as the sole determinant of whether an infant is liveborn or stillborn.”<sup>6</sup>

In a recent case in the Maryland courts, *Akers v. State*, the Appellate Court of Maryland considered the HFT and upheld the admission of expert testimony about the HFT as sufficiently reliable to be considered by a jury under Maryland’s legal standards for admission of scientific evidence.<sup>7</sup> In that case, the State’s expert witnesses acknowledged controversy over the HFT but highlighted the overall 98% accuracy rate found in the German study mentioned above. The assistant medical examiner who conducted the autopsy recognized that the HFT cannot conclusively prove whether the decedent took a breath but only shows if the lungs were aerated. Consistent with the NAME guidance, the assistant medical examiner explained that the HFT therefore cannot be used as the sole determinant of whether a child was born alive, but rather that pathologists must look for concordance across a variety of tests. Another expert witness, who testified for the defense, noted the ways in which the HFT could produce false positives, but he acknowledged that the HFT is generally accepted as valid and that he conducts it in his own autopsies, teaches it to his students, and would have performed it if he had conducted the autopsy in the *Akers* case.

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<sup>3</sup> *Id.* (endnote omitted).

<sup>4</sup> *Id.* at 8. A false positive could occur if “external air/gas is introduced to the respiratory and/or gastrointestinal tract, as can occur by attempted resuscitation or by the internal production of air/gas (as in putrefaction),” whereas a false negative could occur if “the infant, despite being born alive, does not draw sufficient air into the respiratory tract,” which could happen “due to birth into water (such as a toilet bowl or bath), lung pathology . . . , or other congenital anomalies which prevent full respiration.” *Id.* (endnotes omitted).

<sup>5</sup> *Id.* (citing Grosse Ostendorf, A.L., et al., “Is the lung floating test a valuable tool or obsolete? A prospective autopsy study,” *Int. J. Legal Med.*, 2013. 127(2): p. 447-51).

<sup>6</sup> *Id.*

<sup>7</sup> *Akers v. State*, No. 925, Sept. Term 2022, 2024 WL 338958 (Md. App. Ct. Jan. 30, 2024) (unreported), *rev’d on other grounds*, 490 Md. 1 (2025). The Supreme Court of Maryland was not asked to review the portion of the Appellate Court’s decision that upheld admission of evidence about the HFT, and so the Supreme Court did not address the HFT. The Supreme Court reversed after finding that other unrelated evidence in the case was not admissible, and a retrial in the *Akers* case is currently scheduled for June 2026 in the Circuit Court for Howard County.

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**House Bill 1143**, by prohibiting forensic pathologists from performing the HFT altogether, raises significant concerns. *First*, the guidance from the National Association of Medical Examiners and the expert testimony discussed in the *Akers* case indicates that, notwithstanding ongoing debate about the HFT, the test remains generally accepted in the medical community as a test that, though unable to serve as a standalone basis to differentiate live births from stillbirths, can be valuable in combination with other autopsy findings. Given the test's continuing general acceptance and the ability of courts applying Maryland evidentiary standards to exclude testimony about the test if it were used improperly as a sole determinant of stillbirth vs. live birth, it would not be advisable to statutorily prohibit a useful diagnostic tool.

*Second*, putting debates about the HFT itself aside, the provisions of the bill as written are objectionable from a policy perspective. There is no other autopsy test that Maryland specifically prohibits by statute. Enacting this bill would set the troubling precedent of dictating which forensic tests are valid by legislation, rather than allowing the validity of particular tests to be assessed by ongoing research in the relevant scientific communities and regulated by courts applying Maryland's established legal standards for the admission of scientific evidence. Moreover, the bill as written, rather than simply limiting the admission of evidence derived from the test, would prohibit pathologists from performing the test at all. Most problematically, the bill would create a new cause of action for civil lawsuits against pathologists who perform the test and would also subject them to potential loss of their licenses to practice medicine. Even if it were desirable to regulate the admission of evidence from a forensic test, imposing civil liability and loss of licensure for performing it is an excessive and unwarranted policy response.

The Office of the Attorney General thanks the Health Committee for this opportunity to share its concerns regarding **House Bill 1143**.

cc: Del. Lesley J. Lopez  
Members, Health Committee