IN THE

Supreme Court of Maryland

SEPTEMBER TERM, 2025

NO. 47

IN RE: B.CD & B.CB

BRIEF OF AMICI CURIAE PREGNANCY JUSTICE AND LAWYERING PROJECT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE

Pregnancy Justice is a New York-based nonprofit legal organization that works to decriminalize pregnancy while defending the rights of pregnant women and all pregnancy-able people facing civil or criminal prosecution in connection with their pregnancies or pregnancy outcomes.

The Lawyering Project is a nonprofit legal advocacy organization that blends traditional impact litigation with movement lawyering to promote reproductive health, rights, and justice throughout the United States.

This case will create important precedent regarding the inalienable rights informing reproductive freedom—the right to have children; the right to not have children; and the right to nurture the children we do have in safe and healthy environments.[1] Amici share an interest in ensuring that these rights, which are safeguarded by Articles 48 and 45 of Maryland's Declaration of Rights, are not read so narrowly by the Court as to limit an individual's right not to parent, including when a parent avails themselves of Maryland's Safe Haven Act and surrenders a child.

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[1] *See* Loretta Ross, *Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change* 4 (2007), https://shorturl.at/Qcv42.

Given the proliferation of pregnancy criminalization[2] in the post-*Roe* era, this matter holds great significance for Marylanders and all people of the United States with regard to reproductive freedom and the constitutional obligations to protect the decision whether or not to parent from unjustifiable government interference.

Amici file this brief with the written consent of the parties.

QUESTION PRESENTED

Whether the State violates Articles 48 and 45 of the Maryland Declaration of Rights by imposing a finding of neglect on a mother for properly exercising her surrender rights as guaranteed by Maryland's Safe Haven Act?

INTRODUCTION

Sometimes the most loving act a parent can take is to choose not to parent at all. This decision—whether or not to parent—is a fundamental right protected by the Maryland Constitution and given expression by the Safe Haven Act, Md. Code Ann., Cts. & Jud. Proc. § 5-641 (the "Act"). In upholding a finding of neglect against Ms. C based solely on her decision to lawfully surrender custody of her newborn children in accordance with the Act, the Appellate Court of Maryland violated Articles 48 and

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[2] *See Post*-Dobbs *Pregnancy Criminalization Cases*, Pregnancy Just., https://shorturl.at/9uKS0 (last visited Jan. 12, 2026).

45 of the Maryland Constitution, which respectively proclaim that "every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom," Md. Const., Decl. of Rts. art. 48, and that the enumeration of certain rights "shall not be construed to impair or deny others retained by the People." Md. Const., Decl. of Rts. art. 45.

STANDARD OF REVIEW

Constitutional interpretation is a matter of law reviewed by this Court *de novo*. *Mayor & City Council of Ocean City v. Comm'rs of Worcester Cnty.*, 475 Md. 306, 311–12 (2021).

ARGUMENT

The decision to become pregnant, the decision to terminate a pregnancy, and the decision to relinquish custody of a newborn each involves a fundamental choice about whether to become or remain a parent. The ability to make that choice is at the core of reproductive freedom. Article 48 of the Maryland Constitution, or the Reproductive Freedom Amendment ("RFA"), ensures that reproductive freedom includes the full range of decisions about whether or not to parent, extending its scope beyond abortion and contraceptive access. Whether made before or immediately after birth, these decisions fall squarely within the RFA's protections.

In addition, the right to parent and the right not to do so—opposite sides of the same coin—are subject to Article 45's protections because they are unenumerated fundamental rights that precede the RFA's passage and are "retained by the people." Md. Const., Decl. of Rts. art. 45.

The neglect finding here, which subjects Ms. C to an array of legal burdens, is not the least restrictive means of achieving any compelling state interest. Rather, the neglect finding, made in the context of a child-in-need of-assistance ("CINA") proceeding, impermissibly burdens Ms. C's fundamental rights. For these reasons, the Appellate Court of Maryland's judgment violates Ms. C's reproductive freedom and abridges the constitutional safeguards for that freedom provided by Articles 48 and 45. Accordingly, this Court should reverse the lower court's judgment.

I. THE DECISION NOT TO PARENT IS A FUNDAMENTAL RIGHT

The decision whether to parent is among the most intimate and consequential choices a person can make. Confining that decision to the period before birth reflects an unduly narrow understanding of both constitutional liberty and lived experiences. The right not to parent is a necessary component of the right to parent, and for many in the United States, because of inadequate access to sex education, contraception, and abortion, the decision not to assume parental responsibilities arises in a meaningful way only after birth.

Whether before or after birth, the choice not to parent may be lawfully exercised through established legal mechanisms, including adoption and, in Maryland, the Safe Haven Law. Both Article 48 and Article 45 of the Maryland Constitution's Declaration of Rights protect the fundamental right to make this choice.

A. The Decision Not to Parent is an Essential Element of the Reproductive Freedom Protected by Article 48

Article 48 expressly protects "reproductive freedom."[3] Reproductive freedom necessarily includes the right to decide whether—and under what circumstances—to assume or relinquish legal parenthood.

Article 48 establishes that "every person . . . has the fundamental right to reproductive freedom, *including but not limited to* the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy." Md. Const., Decl. of

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[3] Although the initial finding of neglect occurred before the RFA took effect on January 17, 2025, *see In re B.CD.*, 267 Md. App. 61, 71 (2025); Off. of Gov. Wes Moore, *Governor Moore Signs Proclamation to Enshrine Reproductive Freedom in Maryland's Constitution*, Maryland.gov (Jan. 17, 2025), https://governor.maryland.gov/news/press/pages/governor-moore-signs-proclamation-to-enshrine-reproductive-freedom-in-maryland%E2%80%99s-constitution.aspx, the courts below had an obligation to enforce it in proceedings pending as of that date. That is the well-settled rule for newly enacted statutes that do not deprive individuals of vested rights, *see In re M.P.*, 487 Md. 53, 86 (2024) (citing *State v. Johnson*, 285 Md. 339, 343 (1979)), and there is no sound reason to apply a different rule to constitutional amendments, *see Andrews v. Gov. of Md.*, 294 Md. 285, 290 (1982) ("In ascertaining the meaning of a constitutional provision, we are governed by the same rules of interpretation which prevail in relation to a statute."); *see also Smith v. State*, 44 Md. 530, 535 (1876) (holding that a constitutional amendment altering the process for removing a criminal case from one county to another applied to cases pending when it took effect).

Rts. art. 48. (emphasis added). The phrase *"including but not limited to"* signals that the listed decisions are examples of reproductive freedom, not an exhaustive set of its components. This construction reflects an intent by Marylanders to protect a wide array of choices comprising reproductive freedom, and not merely decisions about pregnancy.[4] Article 48 thus protects decisions about parenthood, including the choice to parent a child, give a child up for adoption, or relinquish custody of a child in accordance with the Safe Haven Act.

For those who make the decision not to parent after giving birth, State law provides multiple mechanisms to achieve safe transfer of parental custody. One of these is adoption, which is used daily in Maryland. According to the National Council for Adoption, in 2023, an estimated 1,133 children were adopted in Maryland, including private domestic adoptions, intercountry adoptions, and adoptions from foster care.[5] The practical realities of these families demonstrate that the decision to parent occurs at various times and in multiple ways. The Safe Haven Act provides another mechanism for safe transfer of parental custody. Md. Code

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[4] Reproductive freedom cannot be disentangled from "issues of economic justice, the environment, immigrants' rights, disability rights, discrimination based on race and sexual orientation, and a host of other community-centered concerns." Ross, *supra* n.1, at 4.

[5] Nat'l Council for Adoption & Opt. Inst., *Adoption by the Numbers 2025* 37 (Mar. 2025), https://shorturl.at/DwvsJ.

Ann., Cts. & Jud. Proc. § 5-641. This mechanism may be more accessible than adoption to some Maryland residents, such as those who lack sophistication about the legal system or those, like Ms. C, who are in an abusive relationship and experiencing a crisis.

While contraception prevents the biological process leading to parenthood and abortion terminates pregnancy before the birth of a child, adoption and safe haven laws transfer parental responsibilities to others after a child is born. These distinct actions highlight the same protected reproductive decision: "I am not prepared to parent this child."[6] A textual reading that excludes post-natal decisions about whether to parent would render Article 48 an incomplete guarantee of reproductive freedom. "Reproductive liberty must encompass more than the protection of an individual woman's choice to end her pregnancy. It must encompass the full range of procreative activities . . . and it must acknowledge that we make reproductive

[6] Both federal and state courts have recognized that personal decisions concerning parenting and family relationships are closely related to personal decisions concerning procreation. *See, e.g.*, *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified governmental interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" (citations omitted) (collecting federal cases)); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (holding that the right to personal autonomy protected by the Kansas Constitution "allows a woman to make her own decisions regarding her body, health, family formation, and family life.").

decisions within a social context, including inequalities of wealth and power."[7]

In 2024, Marylanders voted overwhelmingly to enshrine a broad conception of reproductive freedom in the State Constitution. In voting for an amendment that utilized broad "including but not limited to" language to describe those freedoms, Marylanders elected to protect the entire spectrum of decisions about whether to parent, and not merely a single point on that spectrum. Indeed, "[f]rom a legal perspective, a conspicuously narrow reading of reproductive rights limits rather than expands rights for women, because it ignores the importance of choosing when and under what circumstances to give birth, terminate a pregnancy, parent or not to parent."[8] Neither the RFA's drafters nor Maryland voters took such a narrow view of reproductive freedom, and this Court should give effect to their words. *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013).

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[7] Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 6 (1997).

[8] Michele Goodwin, *Policing the Womb: Invisible Women and the Criminalization of Motherhood* 12 (2020).

B. The Decision Not to Parent is an Unenumerated Fundamental Right Protected by Article 45

Long before Maryland adopted Article 48, decisions regarding whether or not to parent were constitutionally protected by Article 45 of Maryland's Declaration of Rights, Maryland's analogue to the Ninth Amendment of the United States Constitution. Article 45's language—as maintained in the 1864, 1867, and 1967 drafts of the Maryland Constitution—affirms that "there were rights not enumerated in the declaration of rights, and that they were retained by the people." 1 Debates and Proceedings of the Maryland Reform Constitutional Convention 225-26 (1851); Interim Report of the Constitutional Convention Commission 40 (1967); *see also Bd. of Sup'rs of Elections for Anne Arundel Cnty. v. Att'y Gen.*, 246 Md. 417, 432 (1967) (noting that the people retain inherent rights above and beyond the constitution); *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."). The right not to parent is one of these fundamental unenumerated rights.

Holding that a right is not protected by the Maryland Constitution merely because it is not enumerated in the Declaration of Rights would be contrary to the

clear language of Article 45. Md. Const., Decl. of Rts. art. 45; *cf. Griswold*, 381 U.S. at 491 ("[A] judicial construction that [a] fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment.").

This Court has long recognized that the right to raise a child, though not enumerated in the federal or State Constitution, is a fundamental right. *See In re Billy W.*, 386 Md. 675, 683-84 (2005) ("As we have often stated, a parent's interest in raising a child is a fundamental right, recognized by the United States Supreme Court as well as this Court."). It should likewise recognize the corollary right not to raise a child, which is equally foundational to an individual's liberty and dignity. As the Supreme Court of Iowa explained in determining the disposition of frozen embryos: "When chosen voluntarily, becoming a parent can be an important act of self-definition. Compelled parenthood, by contrast, imposes an unwanted identity on the individual, forcing her to redefine herself, her place in the world, and the legacy she will leave after she dies . . . ." *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003); *see also In re Marriage of Rooks*, 429 P.3d 579, 595 (Colo. 2018) (holding, in the context of a divorcing couple's dispute over the disposition of frozen embryos, that the "right to procreate and right to avoid procreation" are "equivalently

important"). Thus, for the same reasons that Maryland cannot force a person to become pregnant against their will, bear a child they do not want, or relinquish custody of a child they seek to raise without satisfying the highest level of constitutional scrutiny, the State cannot infringe upon a person's decision to relinquish parental responsibilities through lawful means.

In sum, the decision whether to parent a child is deeply personal and highly consequential, and the right to make this decision is indispensable to upholding human dignity and creating healthy and sustainable communities. The right not to parent is thus an essential component of the reproductive freedom expressly protected by Article 48 as well as an unenumerated fundamental right protected by Article 45.

II. THE NEGLECT FINDING BURDENS MS. C'S FUNDAMENTAL RIGHT NOT TO PARENT

The State burdens Ms. C's fundamental right to decide whether or not to parent by making her decision to relinquish custody of her newborn children in a safe and lawful manner *per se* grounds for a neglect finding. That finding carries significant collateral consequences within the child welfare system, including heightened surveillance, adverse presumptions, increased barriers to securing visitation with or custody of the twins in the future, and increased risk of child removal proceedings involving Ms. C's other children. *See* Amici Curiae Br. of Civil

Rts. Orgs. & Orgs. Advocating for Fams. at 15-23 (detailing a neglect finding's associated harms and underscoring the disparate impact that those harms have on poor families and families of color.). As Ms. C's attorneys persuasively argue in their brief to this Court, "once the parent has incurred a neglect finding," that finding "makes regaining custody of one's child more difficult, in specific, concrete ways" and "adversely impacts the parent's ability to raise their other children free from state interference." Pet'r's Br. at 30–31.

Moreover, inclusion on the State's child abuse registry, Md. Code Ann., Fam Law § 5-714, cannot be seen as anything less than what Judge Sonner has deemed a "substantial injurious collateral consequence." *Prince George's Cnty. Dep't of Soc. Servs. v. Knight*, 158 Md. App. 130, 142 (2004) (Sonner, J. concurring). Not only does it threaten the livelihood of parents, *id.*, it threatens an individual's ability to parent in the future, whether as a foster parent, an adoptive parent, or a biological one, *see In re Adoption/Guardianship No. T96318005*, 132 Md. App. 299 (2000); *In re Nathanial A.*, 160 Md. App. 581, 596 (2005).

Tellingly, *removing* the choice around whether or not to parent from individuals and conferring it to the State is an act that has been strategically used throughout United States' history to justify unspeakable reproductive cruelties and

miscarriages of justice, from punishment for female sexuality[9], to eugenics[10], to the violence of slavers[11], to the legitimization of white racists' demographic panics.[12]

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[9] *Roe v. Wade*, 410 U.S. 113, 148 (1973) (noting the argument in favor of abortion bans as the product of a Victorian social concern to discourage women's illicit sexual conduct), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see generally* June Carbone & Naomi Cahn, *The Court's Morality Play: The Punishment Lens, Sex, and Abortion*, 96 S. Cal. L. Rev. 1101, 1121 (2023) (noting that the regulation of sexual morality is of a piece with abortion).

[10] *Buck v. Bell*, 274 U.S. 200, 207 (1927) (justifying the sterilization of a young rape victim by noting that "[t]hree generations of imbeciles are enough."); Harriet A. Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* 189-90 (1st ed., Random House 2006) (detailing the nonconsensual sterilization of Fannie Lou Hamer); Ariel S. Tazkargy, *From Coercion to Coercion: Voluntary Sterilization Policies in the United States*, 32 Law & Ineq. 135, 152 (2014) ("Images of women who were 'socially inadequate' to procreate also inspired several eugenic experiments throughout the 1960s and 1970s. During these sterilization campaigns, women who were Black, Native American, and poor were sterilized disproportionately in comparison to other groups. For instance, it was estimated that a program in Puerto Rico sterilized over one-third of the childbearing-age women on the island between 1937 and 1968. The procedure was so common that it was (and still is) referred to colloquially by Puerto Rican women as simply, 'la operación.' Native American women were also sterilized in large numbers—four Indian Health Service Hospitals performed over three thousand sterilizations without obtaining proper consent from 1973 to 1976.").

[11] "Be it enacted . . . by the advice and consent of the Upper and Lower Houses of this present General Assembly, that all negroes . . . to be hereafter imported into the Province . . ., and *all children born of any negro or other slave, shall be slaves as their fathers were for the term of their lives* . . . . And forasmuch as divers free-born English women, forgetful of their free condition, and to the disgrace of our nation, do intermarry with negro slaves . . . for prevention whereof, for deterring such free-born women from such shameful matches; be it further enacted, by the authority, advice and consent aforesaid, that whatsoever free-born woman shall intermarry with any slave, . . . shall serve the master of such slave, during the life of her husband; *and that all the issue of such free-born women, so married, shall be slaves as their fathers were*." *Butler v. Boarman*, 1 H. & McH. 371, 371 (Md. Prov. 1770) (emphasis added), *rev'd* (May Term 1771); Thomas Jefferson, Extract of Letter from Thomas Jefferson to Joel Yancey (Jan. 17, 1819), https://shorturl.at/E3vwf ("*I consider the labor of a breeding woman as no object, and that a child raised every 2. years is of more profit than the crop of the best laboring man* . . . with respect therefore to our women & their children I must pray you to inculcate upon the overseers that it is not their labor, but their increase which is the first consideration with us." (emphasis added)).

[12] *See* Theodore Roosevelt, *The Works of Theodore Roosevelt: American Ideals and Other Essays, Social and Political* 293-94 (2d ed., G.P. Putnam's Sons 1898) ("Unquestionably, no community

III. THE NEGLECT FINDING FAILS STRICT SCRUTINY

Article 48 prohibits the State from burdening the fundamental right to reproductive freedom, which encompasses the right not to parent, *see supra* at 5-8, "unless justified by a compelling state interest achieved by the least restrictive means," Md. Const., Decl. of Rts. art. 48. This strict scrutiny standard also applies to infringement of unenumerated fundamental rights. *Pizza di Joey, LLC v. Mayor of Balt.*, 470 Md. 308, 346 (2020). The Court will "invalidate [governmental action] that is subject to strict scrutiny unless it 'is necessary to promote a compelling governmental interest.'" *Id.* (citation omitted). "Because such [actions] must be the least restrictive means available to accomplish the compelling governmental interest, they 'rarely survive the legal glare.'" *Id.* at 346-47 (citation omitted).

No compelling interest justifies the burden that the neglect finding imposes on Ms. C's right to relinquish custody of her children in a safe and lawful manner.

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that is actually diminishing in numbers is in a healthy condition; and as the world is now, with huge waste places still to fill up, and with much of the competition between the races reducing itself to the warfare of the cradle, no race has any chance to win a great place unless it consists of good breeders as well as of good fighters."); Alex Samuels & Monica Potts, *How the Fight to Ban Abortion is Rooted in the 'Great Replacement' Theory*, FiveThirtyEight (July 25, 2022, 6:00 AM), https://fivethirtyeight.com/features/how-the-fight-to-ban-abortion-is-rooted-in-the-great-replacement-theory/ (noting that the movement to end legal abortion has a long, racist history with roots in the fear that white people are going to be outnumbered by immigrants and people of color); Becky Sullivan, *A GOP congresswoman said the end of Roe is a "historic victory for white life*," NPR (June 26, 2022, 4:17 PM), https://www.npr.org/2022/06/26/1107710215/roe-overturned-mary-miller-historic-victory-for-white-life.

Although the State has a compelling interest in preventing harm to children, that interest is not implicated here. *See In re M.Z.*, 490 Md. 140, 144 (2025); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972). To the contrary, Maryland adopted the Safe Haven Act to *prevent* harm.

The Safe Haven Act explicitly states that individuals can only avail themselves of the Act's protection if they leave "an *unharmed* newborn"[13] with a responsible adult or at a designated facility. Md. Code Ann., Cts. & Jud. Proc. § 5-641(b)(1) (emphasis added). No one disputes that Ms. C acted in full compliance with the Act. Indeed, a pediatrician from the University of Maryland Baltimore Washington Medical Center "determined that the Twins were 'healthy' with 'no medical concerns.'" *In re B.CD*, 267 Md. App. at 69. Contrary to the Department of Social Services' position, CINA proceedings are not meant to govern parents who lawfully surrender custody of unharmed, healthy newborns in accordance with the Safe Haven Act. Other legal mechanisms exist to enable the Department or a private party to assume guardianship of a child. *See, e.g.*, Md. Code Ann., Est. & Trusts § 13-702(a).

[13] "Unharmed" is defined to mean that "there is no evidence of physical injury or failure to give proper care and attention to a newborn." Md. Code Regs. 07.02.27.02(B)(10).

Maryland law also permits parents to relinquish custody of their children through private adoption. *See generally* Md. Code Ann., Fam. Law §§ 5-3b-01 to 5-3b-32. Parents with access to the resources needed to initiate an adoption are not subjected to governmental intrusion, civil prosecution for child neglect, or the resulting harms. Like the statutes governing adoption, the Safe Haven Act provides a lawful mechanism for a person who does not want to parent a child to relinquish custody in a manner that ensures the child's safety. Md. Code Ann., Cts. & Jud. Proc. § 5-641. The State has no compelling interest in encumbering a person who uses the Safe Haven Law with a neglect finding for the same reason that it has no compelling interest in encumbering a person who gives a child up for adoption with a neglect finding: in each case, a neglect finding would injure someone acting in full compliance with the law and undermine a statutory system created by the legislature to promote both child welfare and reproductive freedom.

Because the State lacks a compelling interest in treating surrender of a child in accordance with the Safe Haven Law as *per se* child neglect, the neglect finding cannot satisfy strict scrutiny and thus violates Ms. C's constitutional rights.

CONCLUSION

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are . . . 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule, . . . [i]ts general principles would have little value and be converted by precedent into impotent and lifeless formulas.

Weems v. United States, 217 U.S. 349, 373 (1910).

For the forgoing reasons, Amici Curiae respectfully urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 4,197 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the requirements stated in Rule 8-112.

/s/ Amanda Allen
Amanda Allen

PERTINENT AUTHORITY

Maryland Constitution, Declaration of Rights Article 45

This enumeration of Rights shall not be construed to impair or deny others retained by the People.

Maryland Constitution, Declaration of Rights Article 48

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The State may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling State interest achieved by the least restrictive means.

CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2026, the foregoing brief was served on all counsel of record via MDEC. In addition, the brief was sent via electronic mail to the following individuals, who consented to receiving an electronic copy in lieu of two paper copies:

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