MOIRA E. AKERS,	*	In the
Petitioner	*	SUPREME COURT OF
v.	*	MARYLAND
STATE OF MARYLAND	*	September Term, 2024
Respondent	*	Petition Docket No. 20

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF MARYLAND IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Maryland is the state affiliate of the American Civil Liberties Union, with approximately thirty thousand members in Maryland, working to empower Marylanders to exercise their rights so that the law values and uplifts their humanity. Both organizations (collectively "ACLU") advocate for the right of individuals to freely make decisions about their own reproductive lives.

STATEMENT OF PERTINENT FACTS

The ACLU adopts the Petitioner's Statement of Pertinent Facts.

REASONS FOR GRANTING THE WRIT

The Appellate Court's opinion chills the right of all Marylanders, guaranteed by Maryland Code, Health-General § 20-209, to freely decide whether to continue or terminate a pregnancy. By allowing the State to introduce evidence that a person contemplated ending their pregnancy as proof of guilt concerning a later pregnancy outcome, the people of Maryland will now fear that if they exercise their right to make an informed and deeply personal decision around pregnancy termination, that decision will be used against them in some future criminal prosecution. Doing so will have a chilling effect, diminishing the right itself and impacting all Marylanders. Consequently, this case presents an issue of critical public importance that merits this Court's consideration. Left untouched, the appellate opinion does significant harm to the reproductive rights guaranteed by Maryland law.

To give meaningful protection to the exercise of critical rights, Maryland courts repeatedly prohibit the State from using evidence that a person exercised their constitutional or statutory rights as proof of guilt. For example, the prosecution is prohibited from admitting or commenting on a defendant's silence in response to questions during interrogation, *Younie v. State*, 272 Md. 233, 240-41 (1974); a defendant's decision not to testify, *Woodson v. State*, 325 Md. 251, 265 (1992); a defendant's pre-arrest silence in police presence, *Weitzel v. State*, 384 Md. 451, 461 (2004); a defendant's

refusal to provide consent to search, *Longshore v. State*, 399 Md. 486, 537 (2007); a defendant's filing of a Notice of Alibi, *State v. Simms*, 420 Md. 705, 727 (2011); a defendant's request or obtaining of counsel, *Hunter v. State*, 82 Md. App. 679, 690-91 (1990); a defendant's intention to speak to their lawyer, *Waddell v. State*, 85 Md. App. 54, 63-64 (1990); or a defendant's invocation of the right to remain silent after being provided *Miranda* warnings, *Zemo v. State*, 101 Md. App. 303, 316 (1994). Similarly, sentencing courts are prohibited from commenting on a defendant's exercise of their right to appeal or their decision to proceed to trial. *Abdul-Maleek v. State*, 426 Md. 59, 73-74 (2012); *Johnson v. State*, 274 Md. 536, 543 (1975).

Such evidence is inadmissible even if relevant.[1] *See Zemo*, 101 Md. App. at 316 ("Adverse comment (nay, all comment) on a defendant's invocation of a right to silence is constitutionally forbidden but not because such silence is irrelevant. It is very relevant. It is at times devastatingly relevant."). *See also Longshore*, 399 Md. at 538 (finding evidence inadmissible while recognizing that refusal to consent to search was relevant to whether

[1] The ACLU agrees with Petitioner that evidence concerning Ms. Akers' decision about whether to terminate a pregnancy was irrelevant or, alternatively, more prejudicial than probative. A finding of relevance requires accepting that people who consider getting an abortion are more likely to murder their child. This assumption is morally questionable, factually incorrect, at odds with Maryland's statutory protection of the right to obtain an abortion, and relies on gendered stereotypes. The evidence was therefore also inadmissible under Rules 5-401 and 5-403.

Longshore had knowledge of contraband contained in car); *Simms*, 420 Md. at 733 (finding evidence inadmissible even if "relevant to the ultimate issue of guilt").

The prohibition against using the exercise of a right as evidence of guilt is necessary not only as a matter of fairness for the accused, but to protect the right itself. Allowing admission of otherwise protected conduct as evidence of guilt discourages and deters people from exercising their right. As explained by this Court: "An individual's assertion of the constitutional right to refuse a search of his car cannot be used as evidence of his guilt if the constitutional protection against unreasonable search and seizure is to have any meaning." *Longshore*, 399 Md. at 537. A contrary rule places individuals in an untenable position in which they would fear being penalized for exercising a right guaranteed to them under Maryland law. *Dupree v. State*, 352 Md. 314, 324 (1998) ("It is fundamentally unfair to induce the defendant's silence by giving *Miranda* warnings, only then to punish the invocation of the constitutional right to remain silent by using that silence to impact the defendant's testimony at trial."). Because of this potential chilling effect, Maryland courts routinely hold that the exercise of a right is inadmissible in a criminal prosecution.

These principles apply equally to Maryland's firmly established right to freely decide whether to terminate a pregnancy. Preliminarily, throughout

Ms. Akers' pregnancy and trial, the federal constitution guaranteed the right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Additionally, in 1991 the Legislature enacted Maryland Code, Health-General § 20-209, to protect this right under Maryland law. This statute provides that "the State may not interfere with the *decision* of a woman to terminate a pregnancy . . . [b]efore the fetus is viable[.]" *Id.* (emphasis added). The following year, Maryland voters resoundingly upheld the law in a veto referendum by nearly a 2-1 margin. *1992 Presidential Election Official Results for Statewide Questions*, State Board of Elections, https://elections.maryland.gov/elections/1992/results_1992/ballot_questions.html. The right protects not only a person's ability to obtain an abortion, but a person's ability to freely *decide* whether to continue or terminate a pregnancy.

The Maryland legislature passed Section 20-209 to codify the right to an abortion so that it would be protected under state law even if *Roe* was reversed or abrogated. *Kelly v. Vote Know Coal. of Maryland, Inc.*, 331 Md. 164, 170 (1993) (explaining statute "essentially codified the Supreme Court's decision in *Roe v. Wade*"). *See also New Maryland Law Protects Right to Abortion*, New York Times, A15 (Feb. 19, 1991), https://www.nytimes.com/1991/02/19/us/new-maryland-law-protects-right-to-abortion.html (characterizing Section 20-209 as "protect[ing] a woman's right to abortion if

the United States Supreme Court should ever restrict abortions"). After *Roe* was overturned, the people of Maryland were assured their right to abortion was protected because of Section 20-209. *See, e.g.*, *Abortion Laws in DC, Maryland, Virgina: What Happens After Roe v. Wade Ruling*, NBC Washington (June 24, 2022), https://www.nbcwashington.com/news/local/abortion-laws-in-dc-maryland-virginia-what-happens-after-roe-v-wade-ruling/3077882/ (quoting Governor's statement referencing Section 20-209 as "legalizing and protecting access to abortion as a matter of state law"); *See also* Md. Code Ann., Crim. Law § 2-103(d) (citing to Section 20-209 as guaranteeing "a woman's right to terminate a pregnancy").

For over 30 years, Maryland courts have reaffirmed the importance of the right to freely decide whether to terminate a pregnancy. In recognizing the tort of wrongful birth, this Court explained that the harm caused was "the denial to the parents of their rights" to "decide whether to bear a child[.]" *Lab. Corp. of Am. v. Hood*, 395 Md. 608, 624 (2006) (quoting *Reed v. Campagnolo*, 332 Md. 226, 237 (1993)). This Court further noted that the right flowed from Section 20-209, and was indicative of the "clear, strong, and important Maryland public policy" concerning a person's right to terminate a pregnancy. *Id.* at 625. The Attorney General agrees, conceding in its appellate brief that a "woman's unfettered access to reproductive healthcare is constitutionally guaranteed." (Appellee's Br. at 36 n.14).

Yet despite Maryland's right to freely decide whether to continue or terminate a pregnancy, the State used Ms. Akers' exercise of this right as evidence against her at trial. According to the State, during her first trimester of pregnancy, Ms. Akers allegedly researched various methods of ending a pregnancy and met with a health care provider about obtaining an abortion. In doing so, Ms. Akers was deciding whether to terminate her pregnancy, exercising her rights guaranteed by both Section 20-209 and, at that time, the federal constitution.[2] Flouting these protections, the State used evidence that Ms. Akers exercised a protected right as evidence of guilt, resulting in a criminal conviction and 30-year prison term.

The Appellate Court's validation of this trial strategy deeply diminishes the meaning of the right for all Marylanders. Following this decision, anyone who considers terminating their pregnancy will have to worry whether an exercise of this right (by merely looking up an abortion provider, for example) could be used against them in a criminal trial if they choose to continue the pregnancy and later have an adverse pregnancy outcome.[3] This is no longer a

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[2] Ms. Akers allegedly contemplated a pregnancy termination in the spring of 2018. Her trial took place in April of 2022. Both occurred before *Dobbs* overturned *Roe*. *Dobbs*, 597 U.S. 215. Nevertheless, regardless of the application of the federal right, Ms. Akers should have been able to rely on her independent, firmly established state right.

[3] To be clear, the *Akers* opinion impacts far more than the 30,000 people who choose to terminate a pregnancy in Maryland every year. *Maryland*,

hypothetical fear but a sanctioned prosecutorial tactic with concrete consequences. As a result, the Appellate Court's decision undermines the right itself by deterring people from exercising what is intended to be fully protected conduct, contrary to Maryland precedent.

Moreover, allowing admission of this evidence amounts to the very interference expressly prohibited by Maryland law. Section 20-209 protects not only the right to an abortion, but broadly prohibits the State from "interfer[ing] with the *decision* of a woman to terminate a pregnancy." (emphasis added). Under the Appellate Court's opinion, a pregnant person's decision about whether to continue or terminate a pregnancy will be fraught with fear, chilling that person's ability to freely research pregnancy options or speak to their health care providers, and thus interfering with the right. Such interference is prohibited by the plain terms of the statute.

Guttmacher Institute, https://states.guttmacher.org/policies/maryland/demographic-info. 1.4 million people in Maryland have the capacity to get pregnant. *Id.* Every one of them has the right to decide whether to continue or terminate a pregnancy, and many will explore their reproductive health options even before becoming pregnant. For those who do become pregnant, adverse pregnancy outcomes are not uncommon; about 20% of pregnancies end in a loss. Centers for Disease Control, *Updated Methodology to Estimate Overall and Unintended Pregnancy Rates in the United States* at 9 (April 2023). Now, pursuant to *Akers*, the State can criminalize these pregnancy outcomes based on a person's prior researching of reproductive care. All Marylanders who may get pregnant will now fear this real possibility.

In sum, the appellate opinion cannot stand. This case presents an opportunity for the Court to clarify and safeguard Maryland's well-established right to freely make decisions about one's own pregnancy. Granting the writ is therefore desirable and in the public interest.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the writ.

Respectfully submitted,

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STATEMENT OF INTENT TO FILE SUPPLEMENTAL BRIEF PURSANT TO RULE 8-511(E)(2)

Should this Court grant the petition for a writ of *certiorari*, the *amici* intend to seek consent of the parties or move for permission to file an *amicus curiae* brief on the issues before the Court.

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH 8-112

1. This brief contains 1868 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/_____
David R. Rocah

CERTIFICATE OF SERIVICE

I hereby certify that, pursuant to Rule 20-201(g), on March 25, 2024, the following Brief of Amici Curiae in Support of Petition for Certiorari was electronically filed via the MDEC File and Serve Site, and thereby served on all persons entitled to service.

/s/_____
David R. Rocah