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Pennsylvania House Judiciary Committee
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To the Distinguished Chair and Honored Members of the Committee,

Thank you for the opportunity to testify on HB 1888, a bill which proposes an amendment to the Constitution of the Commonwealth of Pennsylvania, providing for personal reproductive liberty.

My name is Elizabeth Kirk, and I direct the Center for Law and the Human Person at the Columbus School of Law at the Catholic University of America, where I am also a faculty research associate and lecturer, teaching in the area of family law.[1] I have studied and written about abortion law and policy for decades. I received my law degree *magna cum laude* from the University of Notre Dame Law School. I also serve as an associate scholar at the Charlotte Lozier Institute, the leading national scholarly institute devoted to identifying "policies and practices that will protect life and serve both women's health and family well-being."

The aim of my testimony is to provide a legal analysis of HB 1888. Advocates of amendments such as that proposed by HB 1888 may claim that it merely "restores *Roe*,"[2] but that euphemism is inaccurate and misleading. Rather, as my testimony is meant to explain, such amendments go further in expanding access to abortion than ever occurred under *Roe*. HB 1888 adopts a strict legal test, with no limiting framework, applicable to all legislation that is so protective of abortion (and any other decision deemed to fall within "reproductive liberty") that it is virtually certain to both unsettle existing Pennsylvania law *and* to discourage future common-sense laws.

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[1] A complete professional biography is available at https://www.law.edu/about-us/faculty-and-staff/directory/expert-faculty/kirk-elizabeth/index.html.

[2] *See, e.g.*, https://www.wxyz.com/news/video-whitmer-dixon-discuss-abortion-in-michigan-gubernatorial-debate (Michigan's Governor Gretchen Whitmer described Prop 3 (a proposed constitutional amendment similar to the one proposed by HB 1888) as "absolutely necessary to preserve the rights we've had for 49 years under *Roe v. Wade*").

In summary, I will make three points about HB 1888:

- ❖ The likely impact of the creation of a "fundamental right" and imposition of the onerous "strict scrutiny" standard;
- ❖ The ambiguity and breadth of the terms "individual" and "reproductive liberty"; and
- ❖ The likely impact of the non-discrimination clause.

Implications of "Fundamental Liberty" and Strict Scrutiny Standard

First, HB 1888 creates a "fundamental right to personal reproductive liberty" and states that the Commonwealth may not "deny, burden, infringe upon or abridge" the fundamental right "unless justified by a compelling state interest achieved by the least restrictive means." This test is known as the "strict scrutiny" standard. This standard is so rigorous that it's referred to colloquially as "strict in theory, fatal in fact."[3]

Very few abortion restrictions survive challenge under this rigorous test,[4] and, based on well-established federal and state law precedent, it is predictable and likely that the consequence of adopting this standard will be the striking down of long-standing Pennsylvania laws that have overwhelming public support including its parental consent law, 24-hour waiting period, taxpayer funding restrictions, clinic safety regulations, and late-term restrictions.

When the Supreme Court first identified a federal constitutional right to abortion in *Roe v. Wade*, it adopted the "strict scrutiny" test.[5] And, in the years after *Roe,* very little legislation survived scrutiny under this rigorous standard. Courts invalidated many laws, including clinic health and safety regulations, parental and informed consent requirements, and 24-hour waiting periods.[6] A notable exception was the consistent ruling that the federal right to abortion did not carry with it an affirmative public funding obligation.[7]

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[3] This phrase originated in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (referring to standard as "'strict' in theory and fatal in fact").

[4] *See* Elizabeth R. Kirk, "Impact of the Strict Scrutiny Standard of Judicial Review on Abortion Legislation under the Kansas Supreme Court's Decision in *Hodes & Nauser v. Schmidt*," (Charlotte Lozier Institute, On Point ser. No.42, 2020) (contains extensive analysis and examples of abortion laws struck down by federal and state courts using the strict scrutiny standard).

[5] 410 U.S. 113, 155 (1973).

[6] *See* Kirk *supra* note 4, nn. 12-17.

[7] *See Maher v. Roe,* 432 U.S. 464 (1977) (upheld Connecticut law which prohibited the use of Medicaid funds for non-therapeutic abortions and states are not required to show a compelling interest for its policy preference of childbirth to abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which prohibits the use of federal Medicaid funds to reimburse states the cost of abortions under the program, and the federal right to abortion carries with it no affirmative funding obligation); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upheld a Missouri law which prohibited the use of public employees or facilities to perform abortions and prohibited the use of public funds, employees, or facilities for the purpose of encouraging a woman to have an abortion); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upheld federal regulations prohibiting family planning clinics receiving Title X funding from abortion counseling or referrals).

Almost 20 years later, as Pennsylvanians well know, when the Court revisited *Roe* in *Planned Parenthood of Southeast Pennsylvania v. Casey*, it affirmed the federal constitutional right to abortion,[8] but, notably, it lowered the legal standard of judicial review because it determined that the strict scrutiny standard was … too strict! The Court said the "strict scrutiny" test had prevented states from expressing important interests and had "led to the striking down of ... regulations which *in no real sense* deprived women of the ultimate decision."[9] In place of strict scrutiny, the Court created a new "undue burden" standard which remained the governing federal standard until *Dobbs*.[10] Under this new standard, the Court upheld the Pennsylvania omnibus statute, including its informed consent requirements, 24-hour waiting period, parental consent, and reporting requirements – all of which had been declared unconstitutional by the lower court applying the strict scrutiny test.[11]

Most compellingly, we can also look to what has happened in states that have adopted the "strict scrutiny" test. When a state recognizes an independent state right to abortion, and adopts strict scrutiny, it is the beginning of a long line of cases striking down regulations, just like the ones Pennsylvania has enacted.[12] For example, Alaska, California, Massachusetts and New Jersey struck funding restrictions, parental consent and/or notification; Minnesota struck public funding restrictions; Florida struck parental notice and consent; Iowa struck a 72-hour waiting period; and Montana struck a requirement that only physicians may perform abortions. Tennessee struck down informed consent requirements and a 24-hour waiting period. A Kansas court, employing strict scrutiny, recently issued a temporary injunction preventing the state's entire informed consent law from being enforced.[13]

Based on this persuasive federal and state law precedent, there is little reason to trust that similar Pennsylvania statutes would survive strict scrutiny review. At a minimum, under the amendment proposed by HB 1888, Pennsylvania's laws will be vulnerable to extensive, expensive litigation. Moreover, every future bill proposed in this legislature touching on reproduction will be immediately subject to the objection that it is unconstitutional under the standard articulated in HB 1888 and thus a waste of legislative time and resources to pursue.

Moreover, HB 1888 is actually *more extreme* than the standards adopted in *Roe* and *Casey*. In both of those cases, the U.S. Supreme Court used a sliding scale (whether described as the trimester framework[14] or viability[15]) to recognize the State's growing interest in the life of the child as he or she approaches delivery and to allow states more latitude in restricting abortion

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[8] 505 U.S. 833, 846 (1992).
[9] *Id.* at 875. *Casey* in fact overturned, in part, such prior decisions. *Id.* at 883 ("As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.")
[10] 505 U.S. at 877.
[11] *Planned Parenthood of SE Pa. v. Casey*, 744 F.Supp. 1323 (E.D. Pa. 1990).
[12] *See* Kirk *supra* note 4, nn. 55-66.
[13] *Hodes & Nauser, M.D.s, P.A. v. Kobach*, No. 23CV03140 (Kan. Dist. Ct. Oct. 30, 2023).
[14] *Roe*, 410 U.S. at 162-66.
[15] *Casey*, 505 U.S. at 870.

after the child is viable. HB 1888 makes no such allowance. In contrast, the constitutional amendments recently passed in Michigan[16] and Ohio[17] preserved the state's authority to regulate late-term (or post-viability) abortion.[18] It is reasonable to conclude, then, that this proposed amendment, without any such limiting language, is intended to apply strict scrutiny to any law touching on abortion, from informed consent to clinic safety standards, throughout the entire pregnancy, from conception to the delivery room. This means that even abortion regulations which survived the strict scrutiny standard of *Roe*, such as post-viability bans[19] or born-alive protections,[20] are vulnerable under HB 1888.

"Individual" and "Procreative Liberty"

The next concern relates to the scope of HB 1888. It provides that "every *individual* has the fundamental right to exercise personal *reproductive liberty*" (*emphasis added*). The word "individual" is not defined and raises interpretive questions. For example, and most seriously, does the proposed amendment grant minors a fundamental right to reproductive liberty? It is axiomatic that children enjoy constitutional rights.[21] Nevertheless, numerous courts, including the United States Supreme Court, have held that due to their immaturity and vulnerability, and the importance of parental rights, minors' rights are not co-extensive with adults in every context and setting, including regarding reproductive decisions.[22] But, the text of this proposed amendment suggests that Pennsylvania courts may be required to interpret protections of "individual" broadly to give minors an absolute right to abortion,[23] striking down the Commonwealth's parental consent law.[24] This weakens substantially the Commonwealth's interests in protecting minors from reproductive coercion and sex-trafficking. At a minimum, questions regarding the scope of protection are likely to be the subject of extensive, expensive litigation.

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[16] Mich. Const. Art I, § 28.
[17] Ohio Const. Art I, § 22.
[18] In contrast, the broad, categorial text of the constitutional amendments in California and Vermont do not recognize any state authority to regulate late-term abortions. *See* Cal. Const. Art I, § 1.1; Vt. Const. ch. 1, art. 22.
[19] 18 Pa. Cons. Stat. § 3211.
[20] 18 Pa. Cons. Stat. § 3212.
[21] *See, e.g., In re Gault*, 387 U.S. 1, 13 (1967) (holding that the protections of the 14th Amendment apply to juvenile delinquents and noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
[22] *See e.g., Bellotti v. Baird*, 443 U.S. 622 (1979).
[23] The use of the broad term "individual" may be intentional. Abortion advocates oppose a potential proposed constitutional amendment in South Dakota, in part because its protection of "women" arguably excludes minors. *See* https://southdakotasearchlight.com/2023/12/06/abortion-rights-groups-dont-support-ballot-measure-that-aims-to-restore-abortion-access/. Moreover, there is legal precedent for interpreting such terms broadly. For example, in *In re T.W.*, the Florida Supreme Court interpreted its state constitutional guarantee of privacy (which protects every "natural person") to apply fully to minors stating, "Minors are natural persons in the eyes of the law and '[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, ... possess constitutional rights.'" 551 So.2d 1186, 1193 (Fla. 1989) (quoting *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (holding state parental consent statute unconstitutional); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003) (holding state parental notification statute unconstitutional), *superseded by constitutional amendment*, Fla. Const. art. X, § 22.
[24] 18 Pa. Cons. Stat. § 3206.

Another interpretive question raised by the proposed amendment relates to the scope of the term "reproductive liberty." HB 1888 provides that such liberty "entails the right to make and effectuate decisions regarding the individual's own reproduction, *including* the ability to choose or refuse to prevent, continue, or end the individual's pregnancy, the right to choose or refuse contraceptives and the right to choose or refuse fertility care ...." (*emphasis added*) The term "including" means that the list which follows are examples of what is meant by "reproductive liberty." But it is not an exclusive or exhaustive list and none of its terms are defined. Thus, reproductive liberty (combined with the gender-neutral term "individual") could be interpreted to include decisions regarding many other matters related to reproduction such as sterilization, gender-transition drugs and surgeries, and so on. Again, questions regarding the scope of protection raised by the broad and vague language of the proposed amendment are thus likely to be the subject of extensive, expensive litigation.

Non-Discrimination Clause

Lastly, HB 1888 states that "reproductive liberty" includes the ability to make decisions "without discrimination on the basis of race, age, disability, sex, sexual orientation, gender identity, religion or relationship status." It is predictable and likely that this non-discrimination clause will lead to constitutionally required state funding of any services, procedures, or resources determined to be protected by the fundamental right to reproductive liberty.[25]

Despite the different outcome under the federal constitution,[26] with the exception of the Florida Supreme Court,[27] every state court that has recognized an independent state constitutional right to abortion and that has also adopted the strict scrutiny standard of judicial review has struck down restrictions on public funding of abortion when those restrictions have been challenged on equal protection or non-discrimination grounds. For example, restrictions have been declared unconstitutional on state constitutional grounds by the supreme courts of Alaska, California, Massachusetts, Minnesota and New Jersey.[28] And, applying the equivalent of a "strict scrutiny" analysis under the state's equal right provision, the New Mexico Supreme Court has also invalidated restrictions on public funding of abortion.[29] Restrictions on public funding of

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[25] In 1985, a unanimous Pennsylvania Supreme Court held that the Commonwealth's limit on public funding for abortion, except those for rape, incest, or to save the woman's life, does not violate the various equal protection and non-discrimination guarantees in the Pennsylvania constitution. *Fischer v. Department of Public Welfare*, 509 Pa. 293 (1985). A case is currently pending before the Supreme Court in which abortion providers have asked the court to overrule *Fischer*. *See Allegheny Reproductive Health Ctr. v. Pennsylvania Dep't of Hum. Serv.*, 26 MAP 2021 (argued Oct. 26, 2022).

[26] *See* n. 7, *supra.*

[27] *See Renee B. v. Florida Agency for Health Care Administration,* 790 So.2d 1036 (Fla. 2001).

[28] *See State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); Committee *to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); Moe *v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). *See also Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (under state constitutional right to abortion, nonprofit hospital which accepted public funds was "quasi-public" institution and therefore could not refuse to permit its facilities to be used for elective abortions).

[29] *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

abortion have been struck down on state constitutional grounds even under a standard of review that is less exacting than strict scrutiny.[30]

Given the overwhelming weight of state constitutional authority, the Pennsylvania restriction on the public funding of abortion[31] likely would be struck down, if challenged on the basis of the proposed amendment. Moreover, because of the breadth of the term "reproductive liberty," constitutionally required state funding of other "reproductive" procedures, drugs, or services may be justified under the broad language of the proposed amendment.

In conclusion, HB 1888 adopts a standard of review, with no limiting framework, so protective of abortion (and any other decision deemed to fall within "reproductive liberty") that it is virtually certain to both unsettle existing Pennsylvania law *and* to discourage future common-sense laws.

Thank you for the opportunity to contribute to the discussion on this important issue.

Sincerely,

/s/ Elizabeth R. Kirk

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[30] *See Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (limited partial invalidity); *Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (overturned by a state constitutional amendment in 2018).

[31] 18 Pa. Cons. Stat. § 3215.