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ACLU OF RHODE ISLAND LEGAL ANALYSIS OF THE ARCHAMBAULT REPRODUCTIVE PRIVACY ACT PROPOSAL

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Senator Archambault has published a document, as a substitute for House 5125 SubA and Senate 152 SubA (the Reproductive Privacy Act, or "RPA"), purporting to codify the protections of reproductive choice based on the principles of Roe v. Wade and related federal precedent currently in effect in Rhode Island. It does not.

What Are the Controlling Principles of Roe v. Wade and Later Cases

In Roe v. Wade, 410 US 113 (1973), and later cases such as Planned Parenthood v. Casey, 505 US 833 (1992), and Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016), the United States Supreme Court has recognized that an individual has a constitutional right, grounded in the "liberty" interest of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, to make her own decisions concerning whether to bear children, and this constitutional interest limits the state and federal governments' ability to restrict those decisions. Earlier decisions had limited governments' authority to prohibit access to contraception. See, e.g., Eisenstadt v. Baird, 405 US 438 (1972).

In Roe and later cases, the Court also made clear that this constitutionally protected right is not absolute and can be subjected to certain restrictions and regulations. Roe and later cases have defined the scope of these permitted restrictions. In the discussion which follows, I will refer to the constitutional standards established by Roe and the later cases as "the Roe principles."

The Roe principles provide that, before "viability," the state cannot prohibit abortions, but it may impose restrictions or regulations that further its legitimate interest in regulating the medical profession or to further the health of the pregnant person. However, such restrictions are still subject to a finding of unconstitutionality if they impose a significant obstacle to the pregnant individual's access to abortion.[1]

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[1] The following explanation appears in Hellerstedt, 136 S.Ct. at 2309:

> We begin with the standard, as described in Casey. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." Roe v. Wade, 410 U.S. 113, 150, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). But, we added, "a statute which, while furthering [a] valid state

After viability, the Roe principles make clear that abortions can be prohibited, except when necessary to preserve the life or health of the pregnant individual.

"Viability" is a medical concept. In Roe v. Wade, 410 U.S. at 160, the U.S. Supreme Court described "viability" as the point at which the fetus becomes "potentially able to live outside the mother's womb, albeit with artificial aid." In Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976), the Court stated that viability "essentially is a medical concept…The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."

For more than forty years, the Supreme Court has never wavered from its holding that a state may not restrict access to post-viability abortions that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Roe v. Wade, 410 U.S. 113, 165 (1973); see also Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 327–28 (2006); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

The concepts of "life" and "health" have common understandings. The Supreme Court clearly understood and intended that "health" encompasses *both* physical and mental health, stating, in Doe v. Bolton, 410 U.S. 179, 192 (1973):

> Whether, in the words of the Georgia statute, "an abortion is necessary" is a professional judgment that the Georgia physician will be called upon to make routinely. We agree with the District Court [citation omitted] that the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the wellbeing of the patient. *All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.* (Emphasis added)

When opponents of the Reproductive Privacy Act objected to a lack of definition of the word "health" in this legislation, I conducted a search of the Rhode Island General Laws to find other uses of the word "health" that included a definition of the word in other legislative contexts. This search was not comprehensive, and I do not have a list of all of the other references to "health" in the General Laws — of which there are at least thousands — but I did not find one usage that purported to define "health" as part of the enactment. This is not surprising. For example, in United States v. Vuitch, 402 U.S. 62, 72 (1971), decided before Roe, the Supreme Court rejected a claim that a criminal statute prohibiting abortion was void for vagueness on the ground that the words "as necessary for the preservation of the mother's life or health" were unconstitutionally vague. The Court noted that:

> [The interpretation applied by the D.C. courts] accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-

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interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." Casey, 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Id., at 878, 112 S.Ct. 2791.

> being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the '(s)tate of being * * * sound in body (or) mind.' Viewed in this light, the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered. (Footnote omitted)

The Archambault Draft Does Not Codify and Would Deny Pregnant Persons the Protections of the Roe Principles

The RPA defines "fetal viability" and contains five specific provisions which would prevent the government from interfering with reproductive choice currently in place in Rhode Island. These five provisions prohibit (1) interference with pregnancy continuation or termination prior to fetal viability; (2) interference with pregnancy continuation after fetal viability; (3) interference with pregnancy termination after fetal viability when necessary to preserve health or life; and (4 and 5) restrictions on the use or access to evidence-based, medically recognized methods of contraception or abortion outside of the limitations set forth therein.

The Archambault draft ("the draft") contains the same definition of "fetal viability," and fully contains only the first protection out of the five listed above. As for the third provision, the draft, like the RPA, generally prohibits post-viability abortions. However, the draft creates a much narrower, more restrictive set of exceptions that reject the standard established by the Roe principles, "necessary to preserve life or health."

In terms of the "life" exception, the draft prohibits a post-viability abortion unless the abortion is necessary "to *save* the life" – rather than "*preserve* the life" – of the pregnant person. This connotes a much later stage in the progress of a "life-threatening condition" than the Roe principles. For those who would say, "no, it's just semantics," the response is, "then why change it if you claim it means the same thing?"

The draft also creates a new exception for a "medical emergency" and defines it as "that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

Here, as well, the draft's language does not mesh with the Roe principles, and in fact represents a fundamental distortion and restriction of them. The concept of a "medical emergency" is taken from the Supreme Court's decision in Casey. But that was in the context of otherwise waiving, preliminary to obtaining a pre-viability abortion, various *ancillary* requirements associated with the procedure, such as a 24-hour waiting period and detailed "informed consent" requirements. Here, in contrast, the language is proposed as a narrow exception to an *absolute ban on proceeding at all*. In propounding this language in Casey, the Court was not addressing the contours of the health exception to a *ban* on abortion. The Supreme Court in Roe was clear that states cannot ban abortion at any point in pregnancy if the abortion is needed to preserve the health of the woman, medical emergency or not, and Casey did not disturb that principle. Roe, 410 U.S. at 163–64.

The concept of "preserve health," as quoted above, is defined by the Supreme Court as focusing on all factors "relevant to the wellbeing of the [pregnant] patient… for the benefit, not the disadvantage, of the pregnant woman." The draft jettisons this concept instead creating a much more demanding and restrictive standard by limiting the health determination to a demonstration that continuing the pregnancy "will impose on the individual a *substantial risk* of *grave impairment* to their physical or mental health." Note that the risk to the person's health must be "substantial" and the impairment must be "grave." Nothing in the Roe principles and the Court language cited above suggests such a constricting view of "health."

Taking these additional restrictions into account may alter or jeopardize the pregnant person's health or well-being by delaying or deferring an otherwise sound medical decision to a later point when the progress of a deteriorating condition is further advanced.

These mandates further come with the threat of a felony criminal prosecution of the physician, establishing a harsh penalty scheme that does not currently exist in the law. Currently, post-viability abortions, except those necessary to preserve the life or health of the pregnant person, are prohibited by regulations of the Department of Health, which carry the risk of a finding of unprofessional conduct and loss of medical license, not felony penalties. While there are criminal prohibitions "on the books," they have either been declared unconstitutional and enjoined (RI Partial Birth Abortion Act) or acknowledged as patently unconstitutional and not enforced (RI quick child statute). By establishing new criminal liability for performing an abortion in Rhode Island, the draft further restricts and chills exercise of reproductive choice as it currently exists here.

In addition, the draft does not repeal the state's patently unconstitutional "quick child" statute. To the contrary, it restates it, thereby reaffirming its continued enforcement, in direct conflict with the Roe principles. The quick child statute also contains a definition of "quick child" that is different from the definition of "fetal viability," and provides a criminal penalty of manslaughter on anyone who violates its terms, including the pregnant individual.

The draft's addition of a subparagraph (d) to the "quick child" statute is wholly inadequate and does not preclude its application to the performance of abortions protected by the Roe principles, since the "exclusion" it adds is limited to terminations meeting the new stringent standards contrary to Roe principles that the bill itself creates.

The draft also does not repeal the unconstitutional Partial Birth Abortion Act of Rhode Island, another criminal statute. By failing to repeal this statute which had specifically been declared unconstitutional under the Roe principles, the Archambault draft signifies a clear intent to deviate from those principles.

In short, by failing to repeal both the "quick child" and "partial birth abortion" statutes, the draft makes clear not only that many post-viability abortions protected under the Roe principles would be prohibited (with physicians and others subject to criminal prosecution and imprisonment), but

so would many of the safest pre-viability second trimester procedures, such as dilation and evacuation, presently practiced in Rhode Island and protected by the Roe principles.[2]

In conclusion, the Archambault draft violates the privacy rights guaranteed by the Roe principles in numerous ways. It instead reinforces and revives unconstitutional restrictions on the exercise of reproductive choice, and severely limits abortions necessary to preserve the life or health of the pregnant person as that right is protected by the Roe principles.

[2] Rhode Island's unconstitutional and never-enforced prohibition of a procedure labelled "partial birth abortion" is materially different from the procedure prohibited by federal law. In upholding the federal ban in Gonzales v. Carhart, 550 US 124 (2007), the Supreme Court was very careful to distinguish the narrow procedure banned by the federal act—which it upheld--from the procedure invalidated in Stenberg v. Carhart, 530 US 914 (2000). The First Circuit Court of Appeals found that Rhode Island's procedure was substantively identical to that invalid procedure when it agreed that Rhode Island's prohibition was unconstitutional. RI Medical Society v. Whitehouse, 239 F.3d 104 (1st Cir. 2001). Those cases found that the state bans, including Rhode Island's Partial Birth Abortion Act, if enforced, would prohibit some of the safest and most common termination procedures, including dilation and evacuation.