AMERICAN CIVIL LIBERTIES UNION
Rhode Island

128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

TESTIMONY IN SUPPORT OF 19-H 5127,
THE REPRODUCTIVE HEALTH CARE ACT,
AND IN OPPOSITION TO
19-H 5125, THE REPRODUCTIVE PRIVACY ACT
January 29, 2019

Good evening. My name is Lynette Labinger and I am a volunteer attorney with the ACLU of RI.

We have reached a critical juncture in our cultural and legal landscape. The status quo, in which the right of reproductive choice is preserved by federal decisions starting with *Roe v. Wade*, is about to unravel. To borrow from another cultural and legal phenomenon, "time's up."

If reproductive choice—as we presently know it—is to be preserved in Rhode Island, the General Assembly needs to act now and pass House bill H5127, the Reproductive Health Care Act, which does simply that—codify the principles of *Roe v. Wade* and later decisions, and repeal unconstitutional provisions remaining on the Rhode Island statute books which conflict with those principles, and nothing more, or less.

I would like to walk you through the provisions of H5127 to show you how it does that, and nothing more, or less. I will also address House bill H-5125, which fails to do that.

Section 1 of House Bill 5127 is the proactive section which recites the principles of reproductive choice that are established by *Roe* v. Wade and later cases—for which I will use the shorthand "*Roe* principles." It is written in descriptive statements which set forth the *Roe* principles to prevent any claims of ambiguity or confusion about what is meant. And what is meant, as in the *Roe* principles, is that the decision whether or not to continue a pregnancy to term is declared by our State to rest in the individual pregnant person. It says that the State can never interfere with the individual's decision to carry a pregnancy to term if she so chooses, and that the State *can* interfere with the individual's decision to end the pregnancy after viability, except when that decision is necessary to preserve her life or health. Section 1 includes the definition of fetal viability described in *Roe* and which the US Supreme Court made clear is a medical determination in Planned Parenthood v. Danforth in 1976.

Section 1 also makes clear that making the proactive *Roe* principles Rhode Island law will not alter or restrict the current laws in force in Rhode Island which concern or create limitations on abortion, and which

do so constitutionally and consistently with the *Roe* principles. Thus section 1 recites that the proactive provisions do not abrogate or negate state laws which are currently in force and conform to *Roe* principles as a matter of Rhode Island law. These restrictions that are kept in place require informed consent before the abortion is performed, require parental consent or a judicial determination before a minor's pregnancy can be terminated, preserve the right of medical participants to decline to participate in abortion or sterilization based on religious or moral objections, require medical care to an infant born alive during an abortion, regulate fetal experimentation, and exclude abortions from state funded family planning services. They remain in operation just as they are operating now.

The rest of H5127 is devoted to clearing up the state law and law books to get rid of unconstitutional provisions that have either been struck down or never enforced, so that there is no ambiguity or confusion in passing a law preserving reproductive choice. Thus sections 2 through 6 repeal laws still on the books that have previously been declared unconstitutional or, in the case of the "quick child" statute, recognized as unconstitutional and unenforceable and never enforced. Section 7 revises the state law preserving the prohibition on state funding of

abortions in health insurance provided to state employees, but removes 5 words which relate to municipal employees and which was declared unconstitutional in 1986. Section 8, which preserves prohibition of state funding for abortions for Medicaid recipients, is revised to conform to federal requirements.

For those of us who believe that the status quo does not go far enough in preserving and protecting reproductive choice, H5127 does not go far enough. For those who believe that the status quo goes too far because it does not protect fetal life, H5127 does nothing to roll that back.

In short, H5127 does nothing new in terms of the current state of reproductive choice. What it does do, if enacted, is preserve the current state of reproductive choice as a matter of Rhode Island law, so as to no longer be dependent upon principles of federal court decisions to provide such protections. Without its passage, reproductive choice in Rhode Island rests on the next decision of the United States Supreme Court. Truly, time's up.

I would like to close my remarks by addressing H5125. It is clear that the drafters of H5125 started with Section 1 of the RHCA, H5127, in modelling the proactive reproductive choice protections embodied in the *Roe* principles. But peppered throughout H5125 are qualifiers and

modifiers which can only be understood to create ambiguity and uncertainty as to whether those protections are real or can be undermined elsewhere in H5125 or other laws. Thus, the initial provision in H5127 designed to codify *Roe* principles is revised in H5125 to start with the qualifier "except where restricted by federal law..." What does that mean? Federal law, because of the Supremacy Clause of the US Constitution, always trumps inconsistent state law where the federal law has the right to legislate on a subject. That is why the *Roe* principles provide reproductive choice protections right now.

But what if *Roe* is overturned and federal law no longer protects reproductive choice? Does that constitute a "federal law restriction" within the meaning of H5125? You can bet that those opposed to any reproductive choice protections will argue that it does and that is exactly what was meant by including that proviso, since otherwise it would be viewed as superfluous, and our Rhode Island Supreme Court has many times cautioned that interpretations of state law should give meaning to every word appearing in the statute. If those words are truly unnecessary—and they are if preserving reproductive choice is the goal—then it is dangerous to add them.

This is also true of language in H5125 adding after the words "evidence-based medically recognized standards" the qualifier "that are in compliance with all applicable federal and state law." "Evidence-based medicine" refers to science, not law. The addition of those words is dangerous. They are not superfluous—they are designed to alter the meaning of the protections and transform them from ones based upon medicine to ones that permit meddling by the state, or state bureaucrats.

House Bill 5125 does not preserve the current status of reproductive choice in Rhode Island. In addition to the qualifiers listed above, H5125 fails to repeal the state's Partial Birth Abortion statute, which was declared unconstitutional in 1999 and on appeal in 2001 after the US Supreme Court ruled a substantially identical law unconstitutional. Leaving it on the books, especially while reciting that evidence-based methods of abortion may be restricted by "applicable state law," leaves a wide-open loophole in a post-*Roe* world that the most common form of pre-viability second trimester abortion procedure, dilation and evacuation, not the so-called partial birth abortion—could be viewed as outlawed or "non-compliant." If the goal is to preserve the current state of reproductive rights, and not increase or diminish them—

then H5125 fails to do that by failing to repeal the State's unconstitutional partial birth abortion statute.

House Bill 5125 does not repeal the unconstitutional and never-enforced "quick child" statute, but instead proposes to add a new criminal prohibition against fetal homicide. It contains a definition of "quick child" which seems similar to the definition of viability, but it is not the same and creates instant ambiguity and confusion by having two competing definitions in the same bill. It also has nothing to do with preserving reproductive choice and should not be tacked onto a bill to preserve those rights. It contains no protections for the pregnant person or medical personnel who, with consent, are performing a termination, leaving the possibility that the quick child provision would be used as a backdoor way to restrict reproductive choice, to intimidate women or criminalize their behavior during pregnancy, or to create a status for a fetus as a person.

House Bill 5127, in contrast, repeals the original provision in its entirety.

Finally, H5125, in Section 8, would expand the identity of individuals who can give consent to a minor's abortion to include grandparents and adult siblings beyond parents, a legal guardian, or the

courts. In individual cases, this may be a good thing, but it also can create mischief and unintended incursions into the parent-child relationship that the judicial bypass route of the current law addresses. If the General Assembly is willing to consider expansions in reproductive choice protections, such as contained in the minor-parental consent provision of H5125, there are a number of additional protections that we also can envision. But in drafting H5127, the RHCA, the sponsors carefully restricted its provisions to create a state law which makes the principles of *Roe* a matter of law in Rhode Island, no more and no less. H5125 does not follow that path and is not a suitable "alternative" to H5127.

I look forward to the Committee's favorable consideration of House bill 5127, and I would be pleased to answer any questions that you may have.