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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO 21-H 5037 & H-5582, 21-H 5552, 21-H 5579, 21-H 5865, AND 21-H 5996, BILLS RELATING TO ABORTION
April 9, 2021

The ACLU of RI is opposed to passage of the six anti-abortion bills being considered by the House Judiciary Committee today. They seek to undermine the constitutional and statutory protections available to an individual to exercise their right to an abortion without undue government interference, and attempt to turn this legislative body into an arbiter of medical decisions. These assaults on reproductive freedom should be rejected.

Before turning to the provisions of this legislation, it is important to understand what Rhode Island law currently permits and what is already prohibited. In 2019, after careful review and several revisions, the General Assembly enacted the Reproductive Privacy Act (RPA), 2019-H-5125 SubB, which was signed into law by Governor Raimondo.

The RPA did several things. First, it codified, for Rhode Island, the standards mandated by Supreme Court decisions generically known as the protections of *Roe v. Wade* as they currently exist. In general terms, the RPA prohibited the state or any government agencies from interfering with individuals in making decisions to commence, continue or terminate a pregnancy prior to fetal viability. The RPA also established that fetal viability is a critical marker, after which the government may restrict the individual's decision to terminate a pregnancy except when termination is necessary to preserve the health or life of that individual.

The RPA also guaranteed that the State would not interfere with access to evidence-based

medical care or medical treatment. The RPA further repealed or modified laws still technically on the books that had been declared unconstitutional and unenforceable, clarifying where our laws now stand.

At the same time, the RPA made clear that Rhode Island's statute which mandates "care of babies born alive during attempted abortion," RIGL §11-9-18, was not affected or undermined by the passage of the RPA. That statute provides:

> "Any physician, nurse, or other licensed medical person who knowingly and intentionally fails to provide reasonable medical care and treatment to an infant born alive in the course of an abortion shall be guilty of a felony and upon conviction shall be fined not exceeding five thousand dollars ($5,000), or imprisoned not exceeding five (5) years, or both. Any physician, nurse, or other licensed medical person who knowingly and intentionally fails to provide reasonable medical care and treatment to an infant born alive in the course of an abortion, and, as a result of that failure, the infant dies, shall be guilty of the crime of manslaughter."

Similarly, Rhode Island statutes that require "informed consent" for abortions, §§23-4.71 through 23-4.7-8, and restrict experimentation on human fetuses, §11-54-1, were not affected or undermined by the passage of the RPA. The RPA likewise made clear that it was not intended nor could it be construed to interfere with the federal law prohibiting "partial-birth abortions."

Finally, the RPA created or increased requirements for record-keeping for every termination after fetal viability as well as imposition of penalties for professional misconduct for violations of the law's terms.

Thus, the RPA carefully navigated between recognizing and honoring the individual's ability to make their own reproductive decisions, in consideration of best medical practices, about commencing, continuing or terminating a pregnancy, while also respecting the State's interest in fetal viability. The current legislation, it is submitted, is designed to, and will completely, disrupt that carefully crafted resolution. Each bill is designed to, and will, interfere with the protections to Rhode Islanders established by the provisions of the RPA. They are not constitutional under

federal standards. If passed, they would be subject to immediate challenge as violative of the principles of the *Roe v. Wade* line of cases and would needlessly embroil the State in federal constitutional litigation and exposure to the award of substantial attorneys' fees to the successful challengers.

I will now discuss the specific provisions of the bills.

The substantive provisions of House bills **2021-H5037 and H5582** are identical, so I will discuss them as one. Each bill would enact a "Born-Alive Infant Protection Act." As noted above, Rhode Island already has a criminal statute, RIGL §11-9-18, which mandates "Care of babies born alive during attempted abortion." The RPA specifically acknowledged that this statute was not affected or undermined by the passage of the RPA. No more is needed to address this situation, assuming it might occur.

However, House bills 5037 and 5582 are designed to do much more, and would interfere with and criminalize medical procedures and termination decisions protected by the RPA and by the federal case law developed by *Roe*. Each bill effectively bans termination of a pregnancy at any gestational age by redefining the mandates of providing medical care to the fetus without regard to viability. And, since it says nothing about viability, it also says nothing about recognizing the life or health of the pregnant individual. In fact, it acknowledges that whether or not the fetus was viable at the time the termination was performed is irrelevant in providing for a "wrongful death" action by the parent. These provisions directly contravene the *Roe* case mandates, which are embodied in the RPA, and would effectively nullify the RPA.

House bill 5579 appears to add a duplicate provision to §11-9-18. However, like House bills 5037 and 5582, it defines the scope of its coverage to include every gestational age and thus, like those bills, effectively bans termination of pregnancy at any gestational age. These provisions

also contravene *Roe* and undermine the RPA. It is not sufficient to say that it does nothing more than the existing §11-9-18, because it would be unnecessary if that were the case.

House bill H5552 would add as a category of unprofessional conduct by a physician "failing to ensure that all reasonable steps are taken to enable a viable fetus being carried by their patient to be brought to term." This language would impose on a physician, on pain of discipline including loss of license to practice medicine, an obligation to ignore and reject a pregnant individual's decision to terminate a pregnancy after the point of viability where that decision is medically necessary to preserve the life or health of the individual. Such an obligation would place the continuation of the pregnancy as paramount over the life or health of the pregnant person, in direct contravention of the RPA and the *Roe* case law. It places political decisions over the medical judgment of the treating physician and the health and life of the pregnant person. It is cruel and unconstitutional.

House bill H5865 also contravenes the protections of the RPA and *Roe* and is intentional and transparent in its approach to justify its disregard of those protections. It does so by substituting its judgment for those in the medical community, declaring that the critical timeframe for prohibiting pregnancy terminations is when a fetus is purportedly capable of feeling pain. The bill proceeds to declare that the dividing line is somewhere earlier than viability and at 20 weeks "post fertilization." The bill thus purports to create a compelling interest in preserving fetal life before viability, contrary to the Supreme Court's analysis and the careful standards established in the RPA. Not only would this legislation interfere with and prohibit termination decisions before viability, it would also alter the standard in *Roe* and the RPA and prohibit terminations from this alleged "pain point" forward unless termination is necessary to prevent death or a "substantial and irreversible physical impairment of a major bodily function, not including psychological or

emotional conditions." As I discussed above, the RPA incorporates the federally mandated standard for restriction of post-viability abortions as "necessary to preserve the life of health" of the pregnant person and is expressly understood to include both mental and physical health. And the RPA and the federal cases recognize that "viability" is a medical determination, not a specific date as this bill would establish. It turns its back on the carefully crafted provisions of the RPA, which recognized and approved reliance on medical decision making and evidence-based science, instead making a political decision on what the science should be. Our shared experience during the past year of the consequences of the denial of science and interference with medical professionals counsels strongly against this legislation, which purports to let the politicians decide what medicine should be.

House bill H5865 also contains detailed and onerous reporting requirements which are clearly designed to burden and deter performance of abortions. Additionally, it contains a completely contradictory provision in "construction" claiming that it shall not be construed to repeal any law, rule, or regulation "regulating" abortion, which would appear to include the RPA, but the two cannot stand side by side.

The sponsors of House bill H5865 appear also to be quite well aware that the law is unconstitutional. The bill would create a special restricted revenue account designed to pay the legal fees of "individuals" who seek to defend the law. That is, when the Attorney General acknowledges that the law is unconstitutional, as he must, the bill sponsors hope to provide legal resources from the taxpayers to pay for private individuals to mount a futile defense of this unconstitutional provision.

House bill 5996 would declare, on behalf of the House, that human life begins upon the existence of a fetal heartbeat or flutter and to recognize advances in the field of prenatal care.

While it would have no force of law if passed, it is noteworthy that the General Assembly previously purported to declare that "human life commences at the instant of conception," in RIGL §11-3-4, which was declared unconstitutional in *Doe v. Israel*, 358 F. Supp. 1193, stay denied pending appeal, 482 F.2d 156 (1973), cert. denied, 416 U.S. 993, never enforced, and formally repealed by the RPA. The specific purpose of the proposed Resolution is not stated, but it can be expected to be asserted as an argument for interfering with or restricting the decision to terminate a pregnancy in contravention of the RPA, which prohibits such restrictions prior to the point of viability.

In conclusion, all of these bills are an attack on *Roe v. Wade*, the state's recently enacted Reproductive Privacy Act, medical science, the doctor-patient relationship, and a person's fundamental right to bodily autonomy. They should be soundly rejected.

Submitted by:
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