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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO 21-S 645, 21-S 664, and 21-S 669,
BILLS RELATING TO ABORTION
April 26, 2021

The ACLU of RI is opposed to passage of the three anti-abortion bills being considered by the Senate 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 The RPA further repealed or modified laws still technically on the books that had been declared unconstitutional and unenforceable, clarifying where our laws now stand.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.

Senate bill S 664 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, Senate bill 664 is 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*. S 664 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.

Senate bill S 669 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.

Senate bill S 669 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 Senate bill S669 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.

Senate bill S 645 is equally transparent in its goal to close health care facilities where abortions are performed or to make continued provision of such services so onerous and expensive that the providers will decide to stop providing the services. It has four simple, but monumental, provisions. First, it has the circular requirement, already in existence, that licensed facilities shall meet their licensing requirements. Second, it imposes a specific requirement that facilities where abortions are performed shall be inspected annually to ensure that the facility is compliant with *all* applicable laws and regulations. Since abortions are performed at hospitals as well as freestanding facilities where other medical procedures are performed, S 645 will require the Department of Health to conduct a mandatory annual inspection of all free-standing facilities that perform abortions, as well as all hospitals in the state that provide any gynecological/obstetrical surgical services, because a pregnancy termination may be provided, whether scheduled or emergency. This mandatory shift in priorities would impose a severe burden upon and interference with the Department of Health and the health of Rhode Island residents by requiring a shift of resources from other health-related functions, such as dealing with the pandemic, to fulfill the obligations imposed by S 645. In authorizing unannounced inspections of facilities that perform abortions without any standards or basis to guide those decisions, S 645 would violate constitutional protections against unreasonable searches.

Even more telling of its true goal, S 645 requires the automatic revocation of the entire

facility's license to operate whenever an inspection reveals a licensing requirement deficiency. Since this requirement is absolute, even the most trivial and easily correctible infraction would require license revocation. In mandating automatic license revocation, S 645 would violate Rhode Island and United States constitutional provisions prohibiting deprivation of property without due process of law. S 645 would thus impose substantial regulatory requirements whose clear goal is to burden individuals' access to abortion, not to protect their health.

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, the Department of Health's ability to fix priorities on crucial health issues confronting our community, and a person's fundamental right to bodily autonomy. They should be soundly rejected.

Submitted by:
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