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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO
22-S 2386, S-2387, S-2625 and S-2626,
BILLS RELATING TO ABORTION
May 31, 2022

The ACLU of RI is opposed to passage of the four 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 The RPA further repealed or modified laws still technically on the books that had been declared unconstitutional and unenforceable, clarifying where our laws now stand.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.

I will now discuss the specific provisions of the bills.

Senate bill 2022-S 2386 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, this bill 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*. 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, and in doing so, would effectively nullify the RPA.

Senate bill S-2387 appears to add a duplicate provision to §11-9-18. However, like S-2386, it defines the scope of its coverage to include every gestational age and thus, like the other bill, 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.

Senate bill S-2625 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 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 or health" of the pregnant person and is expressly understood to include both mental and physical health. And the RPA recognizes 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 two years 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.

This bill 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.

Finally, **Senate bill S-2626** is a cynical attempt, in the name of safety, to chill the

availability of abortion services. Although it purports to treat facilities providing abortions like any other healthcare facility, the bill provides for the summary revocation of an abortion facility's license if an inspection reveals *any* licensing requirement deficiency, no matter how small or unrelated to patient safety. This sledgehammer approach is clearly an attempt to shut down abortion services in the state for trivial reasons.

In conclusion, the problem with these bills is not just that they are an attack on *Roe v. Wade*, whose legal fate undoubtedly is in jeopardy. Rather, it is that these bills are also an attack on the state's recently enacted Reproductive Privacy Act, medical science, the doctor-patient relationship, and a person's fundamental right to bodily autonomy. For these reasons, they should all be soundly rejected.

Submitted by:
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