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ACLU OF RI POSITION: OPPOSE

TESTIMONY IN OPPOSITION TO
23-S 298, 23-S 347, 23-S 392 and 23-S 397,
BILLS RELATING TO ABORTION
May 8, 2023

The ACLU of RI is opposed to passage of these four anti-abortion bills being considered by the Senate Judiciary Committee today. Separately and collectively, they seek to undermine the state's 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 existed until the Court's complete overturning of that precedent in *Dobbs v. Jackson Women's Health Organization* last year. The RPA prohibits the 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also guaranteed that the State would not interfere with access to evidence-based medical care or medical treatment, and repealed or modified laws still technically on the books that had been declared unconstitutional and unenforceable, clarifying where our laws now stand.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, §§23-4.7-1 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 did not 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. Each of these four bills, we submit, is designed to, and will completely, disrupt that carefully crafted resolution, and should be rejected for that reason.

Senate bill S 392 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. It 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, and thus effectively nullify, the RPA.

Senate bill S 347 appears to add a duplicate provision to §11-9-18. However, like Senate bill 392, it defines the scope of its coverage to include every gestational age and thus also effectively bans termination of pregnancy at any gestational age, thereby nullifying the RPA.

Senate bill S 397 would enact a "Pain-Capable Unborn Child Protection Act." The language of the proposed legislation is expressly written to negate the holdings and underpinnings of *Roe v. Wade* and cases following *Roe.* Since the Reproductive Privacy Act was enacted with the express intention of making *Roe* the law in Rhode Island regardless of action by the United States Supreme Court, this legislation in its own words is intended to overturn those protections. More specifically, the bill would re-set to a much earlier stage in fetal development than the point of viability, as set forth in the RPA, when all abortions are prohibited with limited exceptions. The legislation would make a new standard, not medically determined but declared by the legislature, as to when a fetus might be capable of feeling pain. And at that point, all abortions would be

prohibited with exceptions far more restrictive than the standard articulated in *Roe* and adopted by this State in the RPA, which is to protect the life or health of the pregnant person. Instead, abortions after this point of alleged pain would be prohibited, under threat of criminal felony, except for narrowly defined medical emergencies: to avert the pregnant person's death or substantial and irreversible physical impairment of a major *physical* bodily function, specifically excluding mental health or fetal abnormality. We have seen nationally what these kinds of laws can do—requiring pregnant women to carry a much wanted, but nonviable, fetus to term and to postpone necessary medical care because the dangerous condition has not yet advanced to the inevitable stage where it will become life-threatening. The legislation also includes onerous and unnecessary reporting requirements and would create a host of legal claims designed to create chaos, uncertainty and interference with the private medical decisions of the pregnant patient and her physician. It cannot be reconciled with the protections of the RPA. To the contrary: these provisions directly contravene, and thus effectively nullify, the RPA.

Senate bill S 298 would enact a "Licensing of Healthcare Facilities" law that is limited to regulating healthcare facilities that are used to perform abortions. If all it were intended to do was hold those facilities up to the same standards as other similar healthcare facilities, it would be entirely unnecessary. But the real purpose is subsection (d), which provides that "[a]ny inspection that reveals a licensing requirement deficiency *shall* result in the facilities having its license revoked." (emphasis added). The Department of Health is fully capable of employing nondiscriminatory health regulations to ensure the safety of Rhode Islanders and to assess those deficiencies in facilities that are so critical that a licensed facility cannot safely function. The proposed legislation would remove that decision-making from the experts and make any and every deficiency a mandatory basis to revoke its license, no matter that it is technical, easily corrected,

and not involving patient care or safety at all. This is clearly designed to put healthcare facilities providing abortions out of business and to increase the financial burden of healthcare, which is passed along to the patient or the healthcare system.

In conclusion, each of these bills is an attack on the protections embodied in Rhode Island's 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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