Memorandum

Date: January 24, 2019

To: Barth Bracy
Executive Director
Rhode Island Right to Life

From: Paul Benjamin Linton, Esq.

Re: Analysis of the Impact of 2019 – H 5127 and 2019 – H 5125 Upon the Regulation of Abortion in Rhode Island

Executive Summary

The enactment of either H 5127 (the Reproductive Health Care Act) or H 5125 (the Reproductive Privacy Act) would work a radical change in Rhode Island law as it relates to the regulation of abortion. Although both bills would preserve the State's statutes mandating informed consent and parental consent,[1] prohibiting fetal experimentation[2] and guaranteeing rights of conscience, *see* proposed § 23-4.13-2(c)(1), both bills, either expressly or by necessary implication, would repeal a wide range of Rhode Island abortion statutes, including statutes prohibiting late-term abortion and partial-birth abortion, regulating abortion clinics, restricting public funding of abortion, as well as those state statutes prohibiting abortion which are not currently enforceable because of the Supreme Court's decision in *Roe v. Wade* (1973), as reaffirmed in part in *Planned Parenthood v. Casey* (1992). Moreover, in the absence of subsequent legislation modifying the scope of the bills, both H 5127 and H 5125 would effectively prevent state agencies from adopting and enforcing rules regulating the practice of abortion. In no way may either H 5127 or 5125 fairly be described as simply "codifying" existing federal law on the subject of abortion. Both would repeal, expressly or by necessary implication, statutes and rules that are fully consistent with the federal constitution as interpreted by the Supreme Court.

Analysis of H 5127 and H 5125

Both the "Reproductive Health Care Act" (H 5127) and the "Reproductive Privacy Act" provide, in proposed § 23-4.13-2(a), that:

---

[1] H 5127 expressly retains § 23-4.6-1 (consent to medical and surgical care), but H 5125 does not. I assume that the drafters of both bills wish to retain § 23-4.6-1. If not, then the failure in H 5125 to retain § 23-4.6-1 could be interpreted to abrogate, by implication, the parental consent statute (§ 23-4.6-1(b) provides that "consent shall not be given pursuant to this subsection for abortion or sterilization).

[2] Both bills retain the *prohibition* of fetal experimentation set forth in § 11-54-1, but neither bill retains the *penalties* for violation of the prohibition, set forth in § 11-54-2. Perhaps this was a drafting oversight, but a crime without a punishment is not enforceable.

Neither the state, nor any of its agencies, or political subdivisions shall:

(1) Restrict an individual person from preventing, commencing, continuing, or terminating that individual person's pregnancy prior to fetal viability;

(2) Interfere with an individual person's decision to continue that individual's pregnancy after fetal viability;

(3) Restrict an individual person from terminating that individual's pregnancy after fetal viability when necessary to preserve the health or life of that individual;

(4) Restrict the use of evidence-based, medically recognized methods of contraception or abortion except in accordance with evidence-based medically recognized standards; or

(5) Restrict access to evidence-based medically recognized methods of contraception or abortion or the provision of such contraception or abortion except in accordance with evidence-based medically recognized standards.[3]

Impact on Late-Term Abortions

Under *existing* Rhode Island law, a late-term abortion (defined in terms of viability) may not be performed unless "it is necessary to preserve the life of the mother . . . ." Section 11-23-5(a). Although this part of § 11-23-5(a) is unconstitutional to the extent it prohibits post-viability abortions that are necessary to preserve the health of the mother, it clearly *is* constitutional with respect to *non*-therapeutic abortions under the Supreme Court's decision in *Roe v. Wade* (1973), as modified by *Planned Parenthood v. Casey* (1992). Under *Roe*, as affirmed in relevant part in *Casey*, the State *may* prohibit abortions after viability that are not necessary to preserve the life or health of the pregnant woman. Notwithstanding that unmistakable constitutional authority, neither H 5127 nor H 5125 preserves that authority. As a result, if either H 5127 or H 5125 were enacted, *abortions could be performed in Rhode Island throughout all nine months of pregnancy, regardless of the reason for which the abortion was sought*. That is a state of law (or absence of law) that exists almost nowhere in the United States and is certainly not required or compelled by the Supreme Court's abortion jurisprudence. It is critical to note in this regard that, although

[3] The only apparent difference between the two bills with respect to the scope of the exception to the "noninterference" principal set forth in this section is that H 5125 includes a proviso that the section does not apply to "evidence-based, medically recognized standards that are in compliance with all applicable federal and state law for the provision of abortion . . . ." Needless to say, this language in no way expands the exception. The adoption or enforcement of any standard cannot be a "pretext" for evading the "non-interference" principle of the bill.

both H 5127 and H 5125 appear to recognize the State's authority to "restrict" post-viability abortions that are *not* "necessary to preserve the health or life" of the pregnant woman, *see* proposed § 23-4.13-2(a)(3), neither bill actually *exercises* that authority. Thus, abortions could be performed at any stage of pregnancy for any reason.

Impact on Methods of Abortion

Under *existing* Rhode Island law, partial-birth abortions are prohibited except to save the life of the mother. Section 23-4.12-1 *et seq*. Although this statute has been declared unconstitutional and its enforcement has been enjoined by a federal district court,[4] it may in fact be constitutional under the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), upholding the federal partial-birth abortion act. And, certainly, a state statute prohibiting partial-birth abortions that was modeled after the federal statute upheld in *Gonzales v. Carhart* would be constitutional (and would provide a means of enforcement not available under federal law). Nevertheless, H 5127 would repeal Rhode Island's partial-birth abortion ban expressly (Section 4) and H 5125 would repeal the ban by implication, because it would conflict with the "non-interference" principal set forth in proposed § 23-4.13-2(a)(4) (State may not restrict "the use of evidence-based, medically recognized methods of contraception or abortion except in accordance with evidence-based medically recognized standards").

Under either H 5127 or H 5125, a pregnant woman could obtain an abortion in Rhode Island at any stage of pregnancy, for any reason and by any method. Even an abortion method that was not "evidence-based" and "medically recognized" would be permitted because nothing in either bill purports to exercise the State's authority to restrict the use of such methods.

Impact on the Regulation of Abortion Facilities

The "non-interference" principal set forth in both H 5127 and H 5125 prohibits the State or any state agency or political subdivision of the State from restricting an individual from "terminating that individual's pregnancy prior to fetal viability" or from "access to" or "the provision of" "evidence-based, medically recognized methods" of contraception or abortion "except in accordance with evidence-based medically recognized standards." Proposed §§ 23-4.13-2(a)(1), (a)(5). This very broad language could easily be understood to prohibit the State and its regulatory agencies from mandating *any* rules governing the operation of abortion facilities that would in any way "restrict" (note, not *prevent*) a pregnant woman from obtaining an abortion. Proposed § 23-4.13-2(c)(2) *appears* to qualify the broad language of subsection (a) of proposed § 23-4.13-2 by stating that nothing in § 23-4.13-2(a) shall be construed to

> Prevent the department of health from applying to licensed health care facilities that provide abortion, any generally applicable regulations or standards that are in

[4] *See Rhode Island Medical Society v. Whitehouse*, 66 F. Supp.2d 288 (D. R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

> accordance with evidence-based, medically accepted standards for the provision of abortion, *provided that such adoption or enforcement is not a pretext for violating subsection (a) of this section*.

H 5127 (emphasis added).[5]

There is little doubt that the emphasized language (in both bills) would provide a readily available means for abortion providers to challenge a wide range of otherwise constitutional regulations and standards, on the theory that they are just a "pretext' for evading the very broad (and not constitutionally required) "non-interference" language set forth in subsection (a) of proposed section 23-4.13-2. That "standard" is ambiguous, vague and entirely subjective (from whose perspective is it determined that a given regulation or standard is pretextual?) and is not constitutionally required.

Impact on Medicaid Funding of Abortions

Under *existing* Rhode Island law, the cost of abortions performed on Medicaid-eligible women may be paid by the State only if they qualify for reimbursement under the Hyde Amendment, which authorizes payment for abortions if the procedure is necessary to save the life of the woman or the pregnancy resulted from rape or incest. *See* Rhode Island Medicaid Rules 0.300.20.05 n.1, 0.300.20.05.15 (rape, incest), 0.300.20.05.15 (life-of-the-mother) (October 2013). Neither H 5127 nor H 5125 expressly preserves this restriction of public funding of abortion, *see* proposed § 23-4.13-2(c)(1). Under controlling Supreme Court authority, *Harris v. McRae* (1980), and *Williams v. Zbaraz* (1980), the States have *no* constitutional obligation to pay for abortions for which federal reimbursement is not available. Yet, under the "non-inference" principle set forth in both H 5127 and H 5125, the refusal of the State to pay for abortions for indigent women (other than those for which reimbursement is available under federal law) could be viewed as "restricting" or "interfering" with the woman's choice to terminate her pregnancy.

Impact on Parental Consent

Under *existing* Rhode Island law, an unemancipated minor may obtain consent for an abortion *only* from one of her parents or her legal guardian. *See* § 23-4.7-6. H 5125 would allow consent to be obtained not only from one of the minor's parents or her legal guardian, but also from one of her grandparents or a sibling over the age of twenty-five. H 5125, § 8. This amendment would undermine the parental authority the parental consent statute is intended to protect. And there is no constitutional requirement that grandparents or siblings must be given the authority to consent to the performance of an abortion upon a minor grandchild or sibling.

---

[5] H 5125 contains virtually identical language, except it adds (unnecessarily) that such standards must be in compliance with "all applicable federal and state law," which would be the case with or without such qualifying language.

Impact on the Willful Killing of an Unborn Child

Under *existing* Rhode Island law, "the willful killing of an unborn quick child [defined in terms of viability] by any injury to the mother of the child, which would be murder if it resulted in the death of the mother" is deemed manslaughter. *See* § 11-23.5. Although H 5125 preserves this language, *see* H 5125, § 4, H 5127 does not. *See* H 5127, § 5 (repealing entirety of § 11-23-5). Statutes that make the killing of (or injury to) an unborn child (outside the context of abortion) a crime are on the books and in force in three-fourths of the States. Not one of these statutes has ever been successfully challenged on either state or federal constitutional grounds. Yet H 5127 would repeal the only protection in Rhode Island law for an unborn child who is killed in the course of an assault against his or her their mother which would be murder if the mother died.

Impact on Other Statutes

In addition to the foregoing, both bills would repeal the Rhode Island statutes prohibiting abortion except to preserve the life of the mother (§ 11-3-1 *et seq*.) and requiring spousal notice before the performance of an abortion (§ 23-4.8-1 *et seq*.) *See* H 5127, §§ 2, 3, H 5125, §§ 2, 3. Both of these laws are unenforceable under current constitutional doctrine. Even if *Roe v. Wade* were ultimately overruled, however, neither statute would be enforceable until the federal court judgments striking them down were vacated. In the event state officials sought to vacate those judgments, abortion providers could always argue that the judgments should remain in place on other federal constitutional grounds (whether such arguments would prevail, of course, cannot be determined at this time).[6]

Conclusion

H 5127, the "Reproductive Health Care Act," claims that "This act would codify the current state of the law on reproductive rights in Rhode Island by incorporating the protections set forth in *Roe v. Wade* limiting restrictions on an individual's decision to terminate a pregnancy." In a similar vein, H 5125, the "Reproductive Privacy Act," claims that "This act would serve to codify the privacy rights guaranteed by the decision reached in the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny." As the foregoing analysis demonstrates, nothing could be further from the truth.

---

[6] If there is any concern about the sudden application of ch. 11-3 to abortions in the wake of a Supreme Court decision overruling *Roe v. Wade* (which is unlikely because the judgment in *Doe v. Israel*, 358 F. Supp. 1193 (D. R.I. 1973), declaring ch. 11-3 to be unconstitutional would have to be vacated before the law could be enforced), the legislature could amend ch. 11-3 to provide that it would not take effect until the thirtieth day following the adjournment of the session of the legislature that takes place after the Supreme Court overrules, in whole or in part, *Roe v. Wade*. Such an amendment would afford the General Assembly an opportunity to decide whether to retain, repeal or amend ch. 11-3 without having to be concerned about its immediate impact on physicians performing abortion.

Both H 5127 and H 5125 would

- Eliminate any constitutional restrictions on late-term abortions
- Eliminate any constitutional restrictions on methods of abortion
- Eliminate any penalties for engaging in experimentation on human fetuses
- Undermine the authority of the State and the Department of Health from enacting and adopting constitutional restrictions on the performance of abortions at facilities where abortions are performed
- Require the State to pay for all abortions sought by Medicaid-eligible pregnant women and women covered by the "payor of last Resort" program

In addition, H 5127 would

- Repeal existing constitutional protection from a viable unborn child from criminal assaults on the child's mother
- Arguably abrogate the parental consent statute by not retaining the provision of state law (§ 23-4.6-1) that disqualifies a pregnant minor from consenting to an abortion

and H 5125 would

- Substantially "water down" the State's parental consent statute by allowing consent to be obtained from persons who have no constitutional right to give consent (grandparents and adult siblings)

Neither H 5127 nor H 5125 could plausibly be regarded as merely "codifying" the principles of *Roe v. Wade.* Both H 5127 and H 5125 are extreme bills and should be rejected.[7]

[7] Although it lies outside the scope of this memorandum, would the language in proposed § 23-4.13-2(a)(1), prohibiting the State from interfering with a person's decision "to . . . *commence* . . . a pregnancy," emphasis added, repeal by implication laws making it a crime to engage in sexual intercourse with a minor, if the minor intends by such conduct to "commence" a pregnancy? Because proposed § 23-4.13-2(a)(1) is not limited in scope to adult women, it certainly could be so construed.

Supplemental Memorandum

Date: February 6, 2019

To: Barth Bracy
Executive Director
Rhode Island Right to Life

From: Paul Benjamin Linton, Esq.

This Memorandum is supplemental to the one dated January 24, 2019, and focuses exclusively on the impact of 2019 - H 5127 and 2019 - H 5125 upon Rhode Island's law prohibiting non-physicians from performing abortions.

Under current Rhode Island law, non-physicians may not perform *surgical* abortions, and health care providers *other* than physicians may not perform *non-surgical* (medical) abortions unless the performance of such abortions falls within the scope of their licensing authority. 216 Rhode Island Code of Regulations § 20-10-6.34(A) provides:

> All termination [of pregnancy] procedures shall be performed only by a physician licensed under the provisions of R.I. Gen. Laws § 5-37, or other licensed health care practitioner acting within his/her scope of practice, provided, however, *surgical terminations shall only be performed by a physician*.

Emphasis added. Neither H 5127 nor H 5125 preserves this limitation on who may perform abortions. As a result, it would be subject to challenge under the "non-interference" principle set forth in both H 5127 and H 5125. Proposed § 23-4.13-2(a)(5) provides, in relevant part,

> Neither the state, nor any of its agencies, or political subdivisions shall . . . Restrict access to evidence-based, medically recognized methods of . . . abortion or the provision of such . . . abortion except in accordance with evidence-based medically recognized standards.

There is no question that, under this language, an argument could be made, as it has been in other States (Idaho and Montana), that prohibiting health care professionals other than physicians (*e.g.*, nurse practitioners and physician assistants) from performing abortions would impermissibly "restrict access" to abortion. Under current law, non-physician health care professionals *are* permitted to perform abortions in at six States–California, Montana, New Hampshire, New York, Oregon and Vermont. Those laws would be cited as evidence that *permitting* non-physicians to perform abortions *is* "medically recognized," and that *forbidding* non-physicians from performing abortions cannot be justified by "evidence-based medically recognized standards."

In my judgment, it would be extremely likely that Rhode Island's prohibition of abortions by non-physicians would be challenged (and very possibly struck down) under either of these bills.