Memorandum

Date: February 23, 2017

To: Fr. Bernard Healy
Director
Rhode Island Catholic Conference

From: Paul Benjamin Linton, Esq.

Re: Impact of 2017 – H 5343 Upon the Regulation of Abortion in Rhode Island

Executive Summary

The enactment of H 5343 would work a radical change in Rhode Island law as it relates to the regulation of abortion. With the limited exceptions of the State's parental consent law (R.I. Gen. Laws § 23-4.7-6, and its "right of conscience" law (§ 23-17-11), which would be preserved by the bill, *see* proposed § 23-4.13.2(c), the broad language of the bill would repeal by implication a wide range of Rhode Island statutes regulating abortion, including statutes mandating informed consent, prohibiting partial-birth abortions and post-viability abortions, 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 bill, H 5343 would effectively prevent state agencies from adopting and enforcing rules regulating the practice of abortion. In no way may H 5343 fairly be described as simply "codifying" existing law on the subject of abortion.

Analysis of H 5343

The "Reproductive Health Care Act" provides that "[n]either the state, nor any of its agencies, or political subdivisions shall (1) interfere with a woman's decision to prevent, commence, or terminate a pregnancy provided the decision is made prior to fetal viability," "(2) "[r]estrict the use of medically recognized methods of contraception or abortion," or (3) "[r]estrict the manner in which medically recognized methods of contraception or abortion are provided." H 5343, enacting § 23-4.13-2(a). Proposed subsection 23-4.13-2(b) defines "fetal viability" as "that stage of pregnancy where the attending physician, taking into account the particular facts of the case, has determined that there is a reasonable likelihood of the fetus' sustained survival outside of the womb." Finally, proposed subsection 23-4.13-2(c) excludes from the scope of the Act "the provisions of § 23-4.7-6 (parental consent) and § 23-17-11 (protecting rights of conscience).

Subject only to the exceptions set forth in § 23-4.13-2(c), proposed § 23-4.13-2(a)(1) would repeal by implication *any* statute (or administrative rule) regulating abortion that could be said to "interfere" with a woman's decision "to terminate a pregnancy" if her decision is made prior to fetal viability. This would include not only the (currently unenforceable) Rhode Island statues *prohibiting* abortion, *see* R.I. Gen. Laws §§ 11-3-1, 11-3-5, but also those statutes *regulating*

abortion, such as those mandating informed consent (§§ 23-4.7-2, 23-4.7-3, 23-4.7-5, 23-4.7-7), prohibiting partial-birth abortion (§ 23-4.12)[1] and post-viability abortions (§ 11-23-5),[2] and statutes and rules regulating abortion clinics (§ 23-17-1 *et seq*.), limiting abortion coverage for state employees (§ 36-12-2.1) and restricting public funding of abortion (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),. Each of these statutes and rules could be said to "interfere" with a woman's decision to "terminate a pregnancy," either by requiring her to be advised of certain information before she undergoes an abortion, banning a particular method of abortion or an abortion after viability, making it more difficult for an abortion clinic to operate, limiting insurance coverage for abortions or, in the case of an indigent woman, preventing her from obtaining an abortion. The ban on partial-birth abortion and the statutes and rules regulating abortion clinics would also be repealed by implication by virtue of the language in § 23-4.13-2(a)(2), forbidding the State from restricting "the manner in which medically recognized methods of . . . abortion are provided." A partial-birth abortions is a "recognized method" of performing an abortion, and clinic regulations clearly restrict "the manner in which" abortion services are provided. The restriction on political subdivisions "interfer[ing]" with a woman's decision to obtain an abortion would prevent units of local government from limiting abortion coverage for their employees.

The "Reproductive Health Care Act" does *not* place any restrictions on post-viability abortions, and, therefore, would arguably repeal by implication existing state law (§ 11-23-5), insofar as that law applies to post-viability abortions. Under the Act, those abortions could be performed right up to the point of birth. Moreover, the definition of "fetal viability" is flawed in a critical respect. The Supreme Court has repeatedly made clear that an unborn child may be considered to be viable if there is a reasonable likelihood of its sustained survival outside the womb, "*with or without artificial support*." *Colautti v. Franklin*, 439 U.S. 379, 388 (1979). That quoted language is entirely missing from the definition of "fetal viability" in the Act and, therefore, the definition in the Act is inconsistent with established Supreme Court precedent. Finally, the Act provides that the State may not interfere with a woman's decision to "terminate a pregnancy *provided the decision is made prior to fetal viability*." Proposed § 23-4-13.2(a)(1). In other words, what determines whether the State may restrict post-viability abortions is not *when* such abortions are performed (*i.e*., after viability), but *whether* the woman decided, "prior to fetal viability," to obtain an abortion (even if the abortion itself takes place after viability).

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[1] Although the partial-birth abortion law was declared unconstitutional, *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), the law may be constitutional in light *Gonzales v. Carhart*, 550 U.S. 124 (2007), upholding the federal partial-birth abortion act. If *Roe v. Wade* is overruled, the state ban would be enforceable. The fact that federal law also bans partial-birth abortion is beside the point. State law provides a means of enforcement not available under federal law.

[2] To the extent that § 11-23-5 does not allow post-viability abortions to preserve the health of the woman, it is unconstitutional under *Roe v. Wade*, but § 11-23-5 *is* constitutional with respect to non-therapeutic, post-viability abortions. A federal district court judgment striking down § 11-23-5 was reversed on standing grounds by the federal court of appeals. *See Rodos v. Michaelson*, 396 F.Supp. 768 (D. R.I. 1975), *rev'd*, 527 F.2d 528 (1st Cir. 1975).

Conclusion

H 5343, the "Reproductive Health Care Act," is not a codification of either federal constitutional law or state statutory and regulatory law. Rather, it would repeal by implication a broad range of abortion regulations that are entirely consistent with the federal constitution, including statutes mandating informed consent, prohibiting partial-birth abortions and post-viability abortions, limiting abortion coverage in insurance for government employees and statutes and rules regulating abortion clinics and restricting public funding of abortion. It would also repeal by implication statutes that would prohibit abortion if *Roe v. Wade* were overruled.

It may also be asked whether the people of Rhode Island, who expressly rejected *any* state right to abortion when they approved the 1986 Constitution,[3] would want their state legislature to "codify" in statute *Roe v. Wade* in the event *Roe* is ultimately overruled.

H 5353 is an extreme bill and should be rejected by the Rhode Island General Assembly.[4]

Addendum

The author has practiced law for more than forty years, and has devoted most of the past thirty years to the pro-life cause, first at Americans United for Life, a national public interest law firm, and later in his own practice. He has represented parties, intervenors and *amici curiae* in scores of beginning-of-life and end-of-life cases in the United States Supreme Court, most of the federal courts of appeals and more than half of all of the state appellate courts in country. He has provided legislative drafting advice to many state legislatures, and has testified as an expert legal witness in legislative hearings in more than a dozen States. He assisted in drafting a state constitutional amendment for Tennessee which was approved by the people of Tennessee in November 2014, and was the principal legal expert to testify on the measure when it was being considered by the House Health & Human Resources Committee in March 2009. He has published nineteen law review articles on a variety of topics, including abortion law, state and federal constitutional law, criminal law and procedure, religious freedom and sex discrimination, as well as many articles in journals of opinion. He has also published the only full length treatment of abortion as a state constitutional right, ABORTION UNDER STATE CONSTITUTIONS, A STATE-BY-STATE ANALYSIS (2d ed. 2012) (Carolina Academic Press). He received his undergraduate degree (B.A. Honors) and law degree (J.D.) from Loyola University of Chicago.

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[3] Article I, § 2, of the Rhode Island Declaration of Rights, which, among other things, guarantees due process of law and the equal protection of the laws, and prohibits discrimination on the basis of race, gender or handicap, specifically provides that "Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."

[4] Although it lies outside the scope of this memorandum, would the language in § 23-4.12-2(a)(1), prohibiting the State from interfering "with a woman'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?