Memorandum

Date: March 9, 2019

To: Barth Bracy
Executive Director
Rhode Island Right to Life

From: Paul Benjamin Linton, Esq.

Re: Analysis of the Impact of H 5125 Substitute A and S 152 Substitute A Upon the Regulation of Abortion in Rhode Island

Executive Summary

H 5125 Substitute A and S 152 Substitute A are *slightly* revised versions of the original versions of H 5125 (which is discussed in my two previous memoranda of January 24 and February 6, 2019) and S 152. The revisions to the bill, to the extent that they actually change the substance of the legislation — with respect to "prohibiting" post-viability abortions and eliminating criminal liability for injuries to the mother that cause the death of the unborn child — are noted in this memorandum. Otherwise, the analysis set forth in the earlier memoranda, which, for your convenience, is included in this memorandum, would apply to both substitute bills

The enactment of either substitute would work a radical change in state law regulating abortion. Although the bills would preserve statutes mandating informed consent and a significantly weakened version of 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 abortion statutes, including statutes prohibiting 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 as modified in *Planned Parenthood v. Casey* (1992). Moreover, in the absence of subsequent legislation modifying the scope of the bills, either substitute would effectively prevent state agencies from adopting and enforcing meaningful rules regulating the practice of abortion. In no way may either substitute fairly be described as simply "codifying" existing federal law. The bills would repeal, expressly or by implication, statutes and rules that are fully consistent with the federal constitution as interpreted by the Supreme Court.

---

[1] H 5125 Substitute A and S 152 Substitute A, like their original versions, significantly water down the parental consent requirement, as noted later in this memorandum.

[2] Both substitute bills retain the *prohibition* of fetal experimentation set forth in § 11-54-1, but not the *penalties* for violation of the prohibition, set forth in § 11-54-2. Given that both substitutes were redrafted after this omission was noted in my January 24, 2019, Memorandum, it is difficult to view this as an oversight. In any event, a "crime" without a punishment is not enforceable.

Analysis of H 5125 Substitute A and S 152 Substitute A

The "revised" Reproductive Privacy Act provides, in proposed § 23-4.13-2(a), that:

> 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 appropriate standards that are in compliance with state and federal statutes enumerated in subsections (c)(1) and (c)(2), department of health regulations and standards referenced in subsection (c)(3) and subsection (d); 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 appropriate standards that are in compliance with state and federal statutes enumerated in subsections (c)(1) and (c)(2), department of health regulations and standards referenced in subsection (c)(3) and subsection (d).

Although the terminology employed in §§ 23-4.13-2(a)(4), (5), in the substitute bills differs in minor respects from that set forth in §§ 23-4.13-2(a)(4), (5), in the original bills (*e.g.*, referring to "medically *appropriate* standards" instead of "medically *recognized* standards), and the substitute bills have a somewhat different way of referencing existing legislation that would not be affected by the bills, these differences do not appear to affect the substance of the legislation.

Impact on Post-Viability Abortions

The substitute bills differ from the original bills in expressly prohibiting post-viability abortions except "when necessary, in the medical judgment of the attending physician, to preserve the life or health of that individual." Section 23-4.13-2(d). The impact of including language in the bills that would prohibit post-viability abortions is considerably blunted by two considerations:

First, the proposed language does not define the scope of the mandated "health" exception. In light of the deference in the bills to the unfettered, subjective medical judgment of the attending physician, the "health" exception could include mental health (psychological or emotional) reasons, as well as physical health reasons. A "prohibition" that could be interpreted to include an exception for mental health reasons is not a prohibition. It is the *appearance* of a prohibition. This is obvious when one considers the pre-*Roe* experience with California's Therapeutic Abortion Act of 1967. According to data referenced by the California Supreme Court, more than 60,000 abortions were authorized and performed in 1970 for alleged "mental health" reasons, even though the standard for invoking the exception was the same as the standard for civil commitment, to wit, the pregnant woman had to pose a danger to herself or to others or to the property of others. *People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). It is absurd to believe that 60,000 women met the standard for civil commitment merely because they were pregnant.

Second, violation (by a physician) of this "prohibition" carries only the possibility of some type of professional discipline, not any criminal penalties. Moreover, professional discipline is not mandated, but merely permitted (in a number of States with post-viability bans on the books, violation of the ban entails not only potential criminal sanctions but also mandatory suspension or revocation of the physician's license to practice medicine). As a result, it may be asked what deterrent effect this alleged "prohibition" of post-viability abortions would actually have.

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,[3] 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 Nevertheless, both substitute bills (Section 5) would repeal the State's partial-birth abortion ban.

More troubling is the fact that nothing in H 5125 Substitute A or S 152 Substitute A restricts the *method* of abortion a physician may use in performing a post-viability abortion. Even in those circumstances when a physician, *with equal safety for the pregnant woman*, could use a method of abortion that would result in the live birth of a viable child (labor induction), rather than a method that would directly kill the child *in utero* (dismemberment), the physician would be under no legal obligation to use the method that would save the unborn child's life.

Under both substitutes, a pregnant woman could obtain an abortion at any stage of pregnancy, for both mental health reasons and physical health reasons, and by any method selected by her physician. Nothing in H 5125 Substitute A or S 152 Substitute A restricts the method of abortion.

---

[3] *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).

Impact on the Regulation of Abortion Facilities

The "non-interference" principal set forth in both substitute bills 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 appropriate 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)(3) *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 accordance with evidence-based, medically recognized standards for the provision of abortion in compliance with state and federal statutes enumerated in subsections (c)(1) and (c)(2) and with subsection (d), *provided that such application, adoption or enforcement is not a pretext for violating subsection (a) of this section*.

H 5125 Substitute A (emphasis added), S 152 Substitute A (emphasis added). There are two problems with this language, as it relates to department of health regulations.

First, the department of health may apply to licensed health care facilities that provide abortions only "*generally applicable*" regulations or standards. Regulations that would be "abortion-specific," no matter how justified, could not be adopted and enforced. Even if the department determined that "abortion-specific" regulations and standards *were* necessary to address health and safety failings at licensed abortion facilities, the department could not adopt them.

Second, even with respect to "generally applicable" regulations or standards, there is little doubt that the emphasized language set out above 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. In short, the language in the substitute bills is no different from the language in the original bills. Either bill would make it impossible for the department of health to adopt "abortion-specific" health and safety regulations, and exceedingly difficult for the department to apply "generally applicable" regulations and standards to licensed health care facilities that provide abortions.

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 substitute bill 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-interference" principle set forth in each substitute bill, 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. Section 9 of both H 5125 Substitute A and S 152 Substitute A 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. This amendment would undermine the parental authority the parental consent statute is intended to protect. It is the parents of a minor child (or her legal guardian), not her grandparents or adult siblings, who have the right to the care, custody and control of their daughter. 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.

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. Section 11-23.5. Unlike the original bills, which *preserved* this language, *see* Section 4 of H 5125 and S 152, Section 3 of both H 5125 Substitute A and S 152 Substitute A would *repeal* this language. Both substitutes would repeal the *only* protection in state law for an unborn child who is killed in the course of an assault against his or her mother which would be murder if the mother died.

Impact on the Regulation 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. H 5125 Substitute A and S 152 Substitute A, like the original versions of each bill, do not preserve 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 bills.

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 appropriate standards that are in compliance with state and federal statutes enumerated in subsections (c)(1) and (c)(2), department of health regulations and standards referenced in (c)(3) and subsection (d)..

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 least six States. 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 medically justified.

Impact on Other Statutes

In addition to the foregoing, both substitutes would repeal the state 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* Sections, 2, 4 of both substitutes. Both of these statutes are currently unenforceable. Even if *Roe v. Wade* were 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 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).[4]

---

[4] Any concern about the application of ch. 11-3 to abortions following a Supreme Court decision overruling *Roe v. Wade* could be addressed by amending 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 *Roe*. 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.

Conclusion

Like their original versions, H 5125 Substitute A and S 152 Substitute A claim that "This act would serve to codify the privacy rights guaranteed by the decision reached in the United States Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny." As with the original versions, nothing could be further from the truth. In fact, this claim is a gross distortion and blatant misrepresentation as to the scope of H 5125 Substitute A and S 152 Substitute A.

H 5125 Substitute A and S 152 Substitute A would:

- Eliminate any meaningful restrictions on post-viability abortions, by allowing such abortions to be performed for undefined reasons of "health," which could include mental health (psychological or emotional) reasons

- 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

- Repeal existing constitutional protection from a viable unborn child from criminal assaults on the child's mother

- 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)

- Provide a basis for challenging the regulation prohibiting non-physicians from performing abortions

Like the original versions of both bills, H 5125 Substitute A and S 152 Substitute A cannot plausibly be regarded as merely "codifying" the principles of *Roe v. Wade.* With the exception of imposing an essentially meaningless and unenforceable restriction on post-viability abortions neither substitute allows any more regulation of abortion than the original versions. And in at least one respect — repealing the statute providing protection for unborn children from criminal assaults on their mothers — the substitute bills are even worse than the original. The attempt to "rewrite" H 5125 and S 152 to make them more palatable to the public and the legislature should be rejected for what it is — a rewording, but not a revision. Different packaging, same contents.