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2007 LEGISLATIVE MEMORANDUM

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**Subject: Governor's Program Bill No. 16
S.5829 Rules/ Sponsor**

(AN ACT to amend the public health law in relation to the Reproductive Health and Privacy Protection Act)

Position: SUPPORT

The Reproductive Health and Privacy Protection Act

I. Overview

The NYCLU strongly supports the Reproductive Health and Privacy Protection Act, which represents a long-overdue modernization of the laws in New York State governing abortion. The proposed legislation would provide strong protections of women's right to make private medical decisions without interference from the government. If adopted, the new law would ensure that New York State remains a beacon for choice in the face of broad federal attacks on women's health and reproductive freedom.

II. The Need for RHPPA

Reform of our current law is necessary for two principal reasons: our laws are (A) out of date, and (B) fail to adequately protect women's health. New York law must be modernized and brought into line with Constitutional standards. The law should be clear that family planning services are an essential component of health care, and that women have the right to make what are often profoundly important decisions about such matters in consultation with their families and physicians, free from government interference. This includes the decision to terminate a pregnancy before viability or when the woman's life or health is at risk. Regulations and restrictions on the provision of family planning and abortion services should be designed to further the interests of public health and safety. And doctors should not fear prosecution for providing these services. The Governor's bill accomplishes these needed changes, and should be enacted into law this session.

A. Current law is out of date:

New York liberalized its abortion law in 1970 – three years before the Supreme Court legalized abortion nationwide in *Roe v. Wade*.¹ It was one of the first states in the country to do so. The law was groundbreaking at the time, but in light of cases decided in the intervening years, as well as changes in health care delivery, New York law governing reproductive choice is archaic and inadequate. The law fails to provide clearly articulated protections of women’s reproductive choice.

For example, New York law does not contain an affirmative right to obtain an abortion, nor has the New York Constitution been definitively construed as including such a right.² Instead, we rely on the federal Constitution and on *Roe v. Wade* and the cases that followed it as the legal basis for the “rights” we currently enjoy.

Indeed, most New Yorkers would find it shocking to learn that family planning and abortion are still treated as crimes in our statute books. New York laws governing abortion are based on the pre *Roe* presumption that abortion as a general matter is illegal. The regulation of abortion, which is still a provision of the Penal Code, bans all abortions, but carves out exceptions for “justified” abortions (defined as occurring before 24 weeks of gestation or when a woman’s life is in danger).³ Current law also contains a criminal ban on the sale of contraceptives to minors that was held unconstitutional by the Supreme Court in *Carey v. Population Services International*,⁴ but that remains on the books. New York is the only state in the country that still regulates abortion in this manner, and this structure undoubtedly places a chill on medical providers.

B. Current law fails to protect women’s health:

Current New York law criminalizes abortion after 24 weeks, but includes an exception when a woman’s life is at risk. There is no exception, however, to the ban on abortion after 24 weeks when a woman’s health is at risk. A long line of Supreme Court precedent has held that a state may not ban abortions, even after fetal viability, without including an exception to permit termination of the pregnancy when it is necessary to protect either the woman’s life *or her health*.⁵

Because our Federal Constitution trumps New York statutes, a health exception must be “read in” to our laws. However, in practice, the lack of an explicit statutory exception for health has made it extremely difficult, if not impossible, for women to obtain abortions when conditions develop later in their pregnancies that place their health at risk. The 24-week cut-off can also result in tragic consequences for women who learn late in pregnancy that there is a serious anomaly, such as Trisomy 18 or Anencephaly, that eliminates the chances that the fetus will

¹ 410 U.S. 113 (1973).

² Although the Court of Appeals has acknowledged that the protections for reproductive privacy in our State Constitution may be at least as extensive as the protection afforded by the Federal Constitution, *see Hope v. Perales*, 83 N.Y.2d 563 (1994), the court has never directly held that the protections in our State Constitution specifically cover a right to abortion.

³ *See* N.Y. Penal Law §§ 125.05, 125.40 *et seq.*

⁴ 431 U.S. 678 (1977)

⁵ *Roe*, 410 U.S. 113; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006).

survive. In such circumstances, women have been forced to carry their non-viable pregnancies to term rather than being given the option to terminate the pregnancy after 24 weeks.

The need for greater protections of women's health in state laws governing the right to abortion is particularly urgent in light of recent Supreme Court rulings in *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*.⁶ Although the Court did not directly overrule the core principle that holds women must be able to obtain abortions, even after fetal viability, to protect their health,⁷ the ruling did significantly weaken this constitutional principle. What's more, the Court clearly signaled its willingness reconsider the principle in future cases. New York must act now to codify the constitutional protections of women's health before they are eroded even further.

III. RHPPA's Modernization of Abortion Laws

RHPPA would enact the following critically important reforms in New York's laws governing abortion:

- It adds language clearly delineating the right to privacy in reproductive decision-making, safeguarding not only the right to end a pregnancy but also the right to bear a child and the right to use or refuse birth control.
- It removes the post-24-week ban on abortions, replacing it with the "viability line." The bill also includes a health exception, in accordance with constitutional requirements,⁸ which will ensure that women who need later abortions, either because their health is at risk or because the fetus has a fatal anomaly, will be able to get them.
- It defines viability in a manner that ensures doctors are free to exercise their medical judgment about the best treatment for the patient (within the scope of federal and state statutes) without political interference.⁹
- It treats abortion and contraception as a public health issue, rather than as a criminal matter, by removing abortion regulation from the Penal Code and placing it in the Public Health law.
- It contains important protections for women's health and safety, mandating that only qualified, licensed medical professionals may provide abortion services and that later abortions must be performed in Article 28 facilities. The bill also stiffens penalties for unauthorized acts against pregnant women that result in pregnancy termination.

⁶ 550 U.S. ___, 127 S. Ct. 1610 (2007).

⁷ Although the Supreme Court's ruling in the *Gonzales* cases for the first time upheld a ban on a particular abortion procedure that did not contain an exception for women's health, it did not reconsider the issue of whether an outright ban on *all* abortions without a health exception would survive constitutional scrutiny. Indeed, it did not overrule *Stenberg v. Carhart*, 530 U.S. 913 (2000), in which it had struck down a similar ban as unconstitutional because it was vague and failed to contain a health exception, but rather, distinguished that case on the ground that the language of the Nebraska statute at issue in that case was different than that of the federal law at issue in *Gonzales*. Because the Court did not directly overrule its longstanding precedent that a total ban on all abortions without a health exception would be unconstitutional, that precedent still controls.

⁸ See *Roe*, 410 U.S. at 163-67; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. at 878-79; *Stenberg v. Carhart*, 530 U.S. 914.

⁹ The bill language closely tracks the definition of viability established by the Supreme Court as sufficiently precise to survive a vagueness challenge. See *Colautti v. Franklin*, 439 U.S. 379, 388 (1979).

In short, this important and necessary legislation would strengthen the foundation for reproductive freedom across New York State, and preserve our rights from further erosion. Every member of the legislature, democrat and republican alike, owes it to the women of New York to enact this important and timely legislation.