Testimony of Attorney Mary Bonauto, GLBTQ Legal Advocates & Defenders

Testimony in Support of LD 780, a "*RESOLUTION, Proposing an Amendment to the Constitution of Maine to Protect Reproductive Autonomy*" - OTP

Joint Standing Committee on the Judiciary

January 22, 2024

Good day Senator Carney, Representative Moonen, and Honorable Members of the Joint Committee on the Judiciary. My name is Mary Bonauto and I am a Maine-based attorney who works for GLBTQ Legal Advocates & Defenders. GLAD works in New England and nationally to protect our cherished fundamental freedoms and equality under the law and accordingly supports LD 780, a "RESOLUTION, Proposing an Amendment to the Constitution of Maine to Protect Reproductive Autonomy."

GLAD believes that "reproductive autonomy" must be explicitly protected in the Maine Constitution, particularly in these turbulent times. This will provide clarity when it comes to protecting the right to carry a pregnancy to term or not, to choose or to refuse sterilization and to use contraception..

Reproductive autonomy is very much an issue for the LGBTQ communities. As GLAD and others argued in our brief at the Supreme Court in the *Dobbs* case, this personal autonomy is a fundamental aspect of being treated as an equal, respected, and participating member of our democracy. [1]

Women of all sexual identities experience pregnancy and unintended pregnancy. More than 80% of bisexual women and more than a third of lesbians have experienced pregnancy. Sexual minority women are at least as likely as heterosexual women to experience unintended pregnancies, due in part to higher rates of sexual victimization. Lesbian and bisexual adolescents are at especially high risk of unintended pregnancy due to social pressures to conform to heterosexuality. Transgender and nonbinary individuals seek reproductive autonomy on the same grounds as others, and also experience very high rates of sexual violence and assault, and thus unwanted pregnancies.

As amended, the language in this Resolution specifies that an individual's reproductive autonomy may not be denied or infringed absent a compelling state interest using the least restrictive means on exercise of the right. More specifically, a restriction must be a) for the limited purpose of improving or maintaining the health of an individual seeking care; and b) "consistent with accepted

[1] See U.S. Supreme Court Docket, *Dobbs v. Jackson Women's Health Org'n*, No. 19-1392, at pp. 19-23, available at: https://www.supremecourt.gov/DocketPDF/19/19-1392/194244/20210930150036336_Revised%20Amicus%20Brief.pdf.

clinical standards of practice and evidence-based medicine" that does not infringe on that individual's autonomous decisionmaking.[2]

This standard is important for several reasons. First, it requires strict scrutiny, which is the standard for rights fundamental to the person. Second, it requires the state to justify any restrictions by focusing on the individual's health – improving their health or maintaining it. And it requires that there be real evidence supporting this health-based restriction, again, with reference to consistency with both evidence-based medicine and accepted clinical standards. Gut feelings or imagined benefits would not suffice to justify a restriction.

There is a backstory here. There were two U.S. Supreme Court decisions prior to *Dobbs* addressing, in part, whether States must justify abortion restrictions with evidence demonstrating that a proposed state restriction would benefit the health and safety of those seeking abortions. In *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), the Court agreed that the Texas restrictions (hospital admitting privileges on abortion providers) would constitute an undue burden on the right to abortion, when there was no persuasive evidence justifying the restriction to attain health and safety.

But after *Hellerstedt*, and with changes to the Supreme Court's composition, the Court reconsidered the same restrictions in a Louisiana case four years later. While the Court still ruled against the restrictions in *June Medical Services, LLC v. Russo*, 591 U.S. --, 140 S.Ct. 2103 (2020), the Court dropped its emphasis on requiring States to provide specific evidence that a restrictive law would further the health and safety of patients.[3]

LD 780 rightly takes these lessons into account and says that the individual's health and safety are what matters, that their personal decisions should not be restricted, and that the State bears the burden of proof. In other words, this means that the State would have to demonstrate with specific evidence – evidence that is consistent with accepted clinical standards and evidence-based medicine -as to how the restriction is necessary to advance or maintain health.

As we know from *Dobbs*, the Supreme Court protected the right to abortion until it didn't. This language safeguards us against future administrations or courts that would assess restrictions in the abstract or based on stated intentions, but without regard to the restriction's impact on the health and safety of people seeking to exercise their reproductive autonomy rights.

This amendment protects against intrusion by the State into our most personal decisions, absent justification. GLAD urges you to vote ought to pass on LD 780. Thank you.

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[2] The amended text also clarifies that the Resolution's text, by specifying a right to reproductive autonomy, does not disparage or limit the broad protections of the Maine Constitution, that is, LD 780 neither "narrows or limits" constitutional rights to privacy or equal protection in the Constitution or in case law.

[3] For a richly detailed account of these issues, see Leah M. Litman, Leah M. Litman, Unduly Burdening Women's Health: How Lower Courts Are Undermining *Whole Woman's Health v. Hellerstedt (2017),* available at: Michigan Law Review, *https://michiganlawreview.org/unduly-burdening-womens-health-how-lower-courts-are-undermining-whole-womans-health-v-hellerstedt/*; Leah M. Litman, *June Medical as the New Casey (2020), available at: https://takecareblog.com/blog/june-medical-as-the-new-casey*.