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TESTIMONY OF ALISON BEYEA, ESQ.

LD 327 - Ought Not To Pass
An Act to Allow a Wrongful Death Cause of Action for the Death of a Viable Fetus

JOINT STANDING COMMITTEE ON THE JUDICIARY

May 16, 2017

Greetings Senator Keim, Representative Moonen, and members of the Judiciary Committee. My name is Alison Beyea and I am the Executive Director of the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the United States and Maine Constitutions through advocacy, education, and litigation. On behalf of our members, we oppose LD 327.

The ACLU has long defended the rights and safety of pregnant women and victims of domestic violence through our women's rights project, founded by Supreme Court Justice Ruth Bader Ginsburg. We believe that violence against pregnant women is an attack on their Fourteenth Amendment constitutional rights to equal protection under the law. Regardless of our personal views about abortion, everyone can agree that the heinous act of intentionally harming a pregnant woman that would cause her to lose her pregnancy warrants special consideration and enhanced punishment under the law.

LD 327 Is Unnecessary Because Maine Law Already Provides Criminal And Civil Remedies Under The Law For Harm To A Pregnant Woman Causing Damage Or Loss Of Her Pregnancy.

In 2005, the ACLU of Maine joined a broad coalition in advocating for the successful passage of our state's Motherhood Protection Act. The Motherhood Protection Act requires judges, when determining sentences for perpetrators, to assign special weight to the fact that "the victim is a woman that the convicted person knew or had reasonable cause to believe to be in fact pregnant at the time the crime was committed."¹ At that time the Legislature also created the crime of Elevated Aggravated Assault on a Pregnant Woman. This Class A crime punishable by up to 40 years in prison is defined as intentionally or knowingly causing serious bodily injury to a person the person knows or has reason to know is pregnant. By law, "serious bodily injury" includes injury to the fetus or termination of the pregnancy.²

Maine law already provides specific, additional tools for prosecutors and judges seeking to charge or punish a perpetrator who has harmed a pregnant woman in a way that damaged or terminated her pregnancy, and does so without defining fetuses as separate persons with individual legal rights.

¹ 17-A M.R.S.A. §§ 1251 and 1252.

² 17-A M.R.S.A. § 208-C.

LD 327 seeks to amend tort remedies under the probate code rather than the criminal code. In discussing Maine's existing tort remedies with experts, it is clear that a pregnant woman who suffers serious harm resulting in damage or loss to her pregnancy may seek and obtain both compensatory and punitive damages on multiple counts for her pain and suffering, emotional distress and loss of happiness. A family member may also seek and obtain damages for emotional distress and loss of happiness. The Maine Supreme Judicial Court upheld these legal rights under *Milton v. Cary Medical Center*.³

The Maine Supreme Judicial Court has appropriately declined to establish legal rights for the fetus as a separate, legal entity from the mother. Nine other jurisdictions including California, New York and New Jersey also do not recognize a cause of action prior to live birth.

Maine Would Be The Only State In New England To Convey Statutory Rights To The Fetus As A Distinct Legal Entity From The Mother.

The proposed shift under LD 327 from rights of the mother to rights of an "unborn viable fetus" is more than a question of semantics. Fetal personhood laws have been pursued by anti-choice groups like the National Right to Life Committee with specific intent to provide a legal vehicle to overturn *Roe v. Wade*.⁴ The proposals across the country vary significantly from state to state. At the ballot box, voters in Colorado, Mississippi, and North Dakota have rejected extreme versions of fetal personhood laws.

Across the country, only three states provide a statutory right of action for the wrongful death of a fetus.⁵ LD 327 would make Maine one of four states nationwide and the only state in New England to codify a wrongful death action on behalf of a fetus. While some state courts have interpreted their respective wrongful death statutes to cover actions for fetuses, very few legislatures have explicitly recognized such a right. And, this distinction is significant. The Maine Legislature has never conveyed statutory rights to the fetus as a distinct legal entity from the mother. To do so would signal a shift in the Legislature's overall policy goals. Courts in other jurisdictions examining legislative intent have interpreted the express recognition of fetal rights in one area of law to signal a general desire to protect fetal rights.

You will hear conflicting views about whether this bill could potentially undermine the legal right to abortion. We're all familiar with the concept that you can judge a person by the company she keeps. The same can be true about legislation. This legislation did not arise in a vacuum. It originated with the organizations whose mission is to end legal abortion and

³ *Milton v. Cary Medical Center*, 538 A. 2d 252 (Me. 1988).

⁴ In *Roe v. Wade*, abortion opponents argued that the fetus is a person and thus subject to protections under the Fourteenth Amendment. The Justices in the *Roe v. Wade* opinion rejected this argument but acknowledged:

"If this suggestion of personhood is established, the appellant's case, of course collapses, for the fetus's right to life would then be guaranteed specifically by the Amendment."⁴

In other words, if abortion opponents can convince the United States Supreme Court that a fetus is a person under the law, then by extension, abortion would have to be ruled illegal, returning us to the dark days pre-Roe when women died from illegal abortion. Constitutional jurisprudence is fundamentally about weighing conflicting interests. If, as LD 327 suggests, the law creates a new interest that did not exist previously, then the new interest must be weighed against those of anyone else.

⁵ 740 Ill. Comp. Stat. Ann. 180/2.2 (Illiois); S.D. Codified Laws §21-5-1 (South Dakota); Tenn. Code Ann. §20-5-106 (Tennessee).

overturn a woman's right to choose. That is not a coincidence, and it is not a coincidence that the organizations dedicated to preserving a woman's right to obtain a safe, legal abortion are opposed to this bill.

LD 327 Would Create Potential Unintended Consequences To Doctors And Potentially Mothers.

The language of LD 327 is poorly drafted and could lead to substantial unintended consequences, creating a barrier to a pregnant woman's access to appropriate medical care.

LD 327 opens the door to protracted litigation against abortion providers who would be forced to defend in court the legality of the abortion and informed consent in every individual case. That's because the exception in LD 327 from recovery in a civil action against an abortion provider is *if*, and *only if*, the doctor can prove in court that the abortion and the informed consent procedures were legal. In other words, the burden will be on the provider to defend every action alleging that an abortion was performed illegally.

LD 327 further allows for civil actions against all healthcare providers if they should have known that the woman was pregnant. The language could chill doctor's treatment during emergencies because doctors might fear that "consent" was not "lawfully given" if a patient is unconscious. In this way, LD 327 could actually have a detrimental effect on a pregnant woman's ability to access medical care. Moreover, the federal Emergency Medical Treatment and Active Labor Act provides specific remedies for women who are negligently denied appropriate medical care.⁶

Because LD 327 amends the probate code, the question of personal representative arises. The fetus will not have a will, so the probate court must determine who the personal representative is. "Parents" are one category of personal representative, and it is entirely conceivable that two parents may feel very differently about a medical procedure, including abortion, that results in termination of a pregnancy. Under LD 327, the probate court would have to decide whether the mother or the father were the appropriate legal representative of the fetus. If LD 327 were to pass, it could potentially allow a father to sue a healthcare provider, including an abortion provider, on behalf of the estate of the fetus even if the suit is contrary to the mother's desires. While LD 327 guards against suit against the mother in the case of death of the fetus, it is silent on the question of whether a cause of action exists if the woman's actions cause injury to the fetus.

Conclusion

Regardless of our political or religious views, we can all agree that pregnant women deserve special protection under the law and should be treated with compassion and care. The area of disagreement between proponents and opponents of this bill is not about whether pregnant women should be protected and people who inflict harm appropriately punished under the law. Where we disagree is on the fundamental question of whether abortion should be legal under the Constitution and the laws of Maine and the United States. LD 327 is an anti-abortion bill advocated by anti-abortion activists.

⁶ 42 U.S.C. § 1395dd.

Maine can and should continue to protect pregnant women by focusing on the devastating loss or injury to the *woman* without undermining reproductive freedom or getting entangled in the abortion debate. LD 327 would insert the politics of abortion into Maine's tort law under the probate code and opens a potential Pandora's box of unintended consequences. We urge you to reject LD 327 as unnecessary and unwise. Please vote "ought not to pass."