

TESTIMONY OF MEAGAN SWAY, ESQ.

**LD 1899 - An Act To Ensure Safe Entry and Access for People Seeking  
Health Care and Other Constitutional Rights**

JOINT STANDING COMMITTEE ON JUDICIARY

March 1, 2022

Senator Carney, Representative Harnett, and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Meagan Sway, and I am policy director for the ACLU of Maine. The ACLU of Maine is a state-wide organization dedicated to the principles of liberty and equality embodied in the United States and Maine constitutions and civil rights laws. LD 1899 touches on at least three issues that are core to our mission and our values as an organization— issues that you and your colleagues have heard me and my colleagues talk about here for as long as we have existed as an organization: 1) individuals should have the right to peacefully express themselves in public about matters that are most concerning to them and to the public; 2) individuals should have control over whether and when to have a child; 3) the State should be extremely cautious when it comes to relying on the criminal justice system to address social problems.

My job, and your job, would be easier if these principles never crossed each other's paths, but the reality is that they sometimes do, and this legislation is an attempt to strike a balance among them. We agree that striking a balance is both necessary and difficult. People should be able to get the medical care that they need without being threatened or intimidated, but threats and intimidation have unfortunately been a part of the real experience of people trying to access abortion care all across the country, including here in Maine. People should be able to express their opinions about abortion, so long as they do so in a peaceful manner that does not interfere with the right to access abortion care. And expanding the

criminal code and relying on the criminal legal system to address social problems has not worked in the past and should not be our default going forward.

This bill does several things: (1) creates an 8-foot “medical safety zone” around the entrances of a building where patients receive health service; (2) makes it a Class E crime to violate a person’s civil rights by purposefully making extremely loud noises outside an abortion clinic with the intent of jeopardizing a person’s health or of interfering with the safe delivery of medical services; (3) makes it a Class E crime to create an obstruction in a “medical safety zone;” and (4) requires municipalities to mark the boundaries of medical safety zones if requested. There are aspects of this bill that we support, but there are other aspects that we find objectionable.

#### **A. The Right to End a Pregnancy Is Dependent on Peoples’ Ability to Access Reproductive Health Care in Safe Conditions**

The ACLU has long been committed to preserving the constitutional right to end a pregnancy. Our colleagues have litigated abortion access cases in state and federal court in every state in the country, including this one, and we have participated in every major reproductive rights case decided by the Supreme Court in the last sixty years.

A right is not meaningful if it cannot be meaningfully exercised, which is why we sued the State of Maine to remove its restriction on access to abortion care for people who are Medicaid-eligible, as well as the restriction prohibiting Advanced-Practice Clinicians from performing abortions. Cost and accessibility are not the only unreasonable restrictions on abortion access; nobody should need to run a gauntlet of violence, intimidation, and harassment in order to access medical care to which they are legally and constitutionally entitled. Yet, people attempting to obtain an abortion have been subject to all of those things and worse. Violence and threats of violence are not protected by the First Amendment.

## **B. Abortion Clinic Protest Must Not Sacrifice the Right to Access Abortion or the Right to Engage in Peaceful Protest**

In general, “the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>1</sup> However, the government may place reasonable restrictions on the time, place, or manner of protected speech so long as (1) the restrictions are content neutral and (2) they “are narrowly tailored to serve a significant government interest, and they leave open ample alternative channels for communication of information.”<sup>2</sup>

### **1. The Proposed Medical Safety Zone Is A Content-Neutral Restriction**

In order to determine whether a restriction is content-neutral, the Courts will look to both the language of the law and its intent. The language at issue is content-neutral. The law would apply to people at all health care facilities, not just abortion clinics, and would not regulate the content of the speech expressed there.<sup>3</sup> It does not regulate what can be said, but is instead “a regulation of the places where some speech may occur.”<sup>4</sup>

Whether the restriction is content-neutral may also be determined from the purpose of the law.<sup>5</sup> We understand the purpose of the law is to further public safety and obstruction of health clinics. You will hear today about incidents of harassment at Maine clinics, including the blockading of entrances and the intimidation of staff and patients. The bill sponsor will testify that she has proposed this bill to attempt to succinctly address an existing problem in Maine that people seeking access to health care face. Under the *McCullen* framework, this is enough to make the law content-neutral.

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<sup>1</sup> *McCullen v. Coakley*, 473 U.S. at 477 (quotation omitted).

<sup>2</sup> *Id.* (quotation omitted).

<sup>3</sup> *See id.* at 479.

<sup>4</sup> *Hill v. Colorado*, 530 U.S. 703, 719 (2000).

<sup>5</sup> *McCullen v. Coakley*, 473 U.S. at 481-82.

## **2. The buffer zone is narrowly-tailored**

In order to be constitutional, a buffer zone must be “narrowly tailored,” that is, it must not “burden more speech than is necessary” to further the government’s interests.<sup>6</sup> The buffer zone proposed by LD 1899 is quite small, only 8 feet. This is the same distance that was found constitutional by the US Supreme Court in *Hill v. Colorado*. The Court there explained that “the 8-foot restriction on an unwanted physical approach leaves ample room to communicate through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease... [and] demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance and, without physically approaching those who enter the clinic, peacefully hand them leaflets as they pass by.”<sup>7</sup> Given the documented difficulties that people have shown at the entrances to health care clinics, 8 feet is substantial enough to protect people seeking entrance to the facility while restricting relatively little speech.

If a Court were reviewing the constitutionality of this restriction, all of these factors would weigh in favor of a finding that the law is constitutional.

### **C. The Legislature Can Protect People Seeking Health Care Without Further Reliance on New Crimes and Incarceration**

People are entitled to be safe as they end their pregnancy, and we support the legislature’s protecting the right when it is endangered. We disagree, however, on the enforcement method provided in this bill. Although we do not support the use of criminal penalties to enforce the medical safety zone, if the committee were to make the enforcement mechanism a civil one, we would remove our opposition.

As we have done consistently for the past decade, the ACLU of Maine urges policymakers not to expand the criminal code and to reexamine their reliance on the criminal legal system to solve society’s problems. At times like this, when people

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<sup>6</sup> *Hill v. Colorado*, 530 U.S. at 728.

<sup>7</sup> *Id.* at 729-30.

increasingly fear for their safety when seeking health care to which they are constitutionally entitled, we do not take this position lightly.

We urge legislators to look at the larger picture of how our reliance on the criminal legal system has created a system of mass incarceration. Every year, approximately 14,000 people cycle through Maine's jails, and on any given day, 1,820 people are locked up there.<sup>8</sup> Jails have been a hotspot for COVID-19, endangering the lives of people who are detained there despite not having been convicted of a crime.<sup>9</sup> Criminal records are almost always permanent in Maine, and even a Class E on a person's record can keep someone from housing or employment. And, the racial disparities are stark: in 2018, Black people made up only 1 percent of Maine's population but were 5 percent of the people arrested.<sup>10</sup>

Supporting the right to access health care could also include non-criminal measures such as better resourcing health providers and patients trying to access health care so there are more hours of operation and easier access, creating private civil remedies against people who substantially interfere with a person seeking health care, or strengthening the right to abortion generally so that it is even clearer that the State of Maine supports a person's right to end their pregnancy. These are but a few of the non-punitive measures the legislature should consider enacting, regardless of what it does with this bill.

## **Conclusion**

The record at this hearing will show that people in Maine seeking to exercise their constitutional right to end a pregnancy have faced increasing intimidation, harassment and other dangers in recent years and months. An 8-foot buffer zone is an appropriate response that balances the rights of protesters with the rights of

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<sup>8</sup> Wanda Bertram & Alexi Jones, *How many people in your state go to local jails every year?*, Prison Policy Initiative, Sept. 18, 2019, <https://www.prisonpolicy.org/blog/2019/09/18/state-jail-bookings/>.

<sup>9</sup> See, e.g., Sean Murphy, *Multiple COVID outbreaks reported at Maine Correctional Facilities*, Spectrum News (Dec. 9, 2021), <https://spectrumlocalnews.com/me/maine/news/2021/12/09/covid-hits-corrections-facilities>.

<sup>10</sup> Ben Shelor, et al., Justice Reinvestment in Maine, "Second Presentation to the Maine Commission to Improve the Sentencing, Supervision, Incarceration and Management of Prisoners," Nov. 2, 2019, at 17, <https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Maine-second-presentation1.pdf>.

people seeking health care. We urge the legislature to protect peoples' right to end their pregnancy while exploring ways outside of the criminal legal system to do so.