Albany UPDATE
NEW YORKERS FOR CONSTITUTIONAL FREEDOMS

PO Box 107
Spencerport, NY 14559-0107

Ph. 585-225-2340
info@AlbanyUpdate.com

Reproductive Health Act
(S.240 – Krueger/A.21 – Glick)

Memorandum of Opposition

The Reproductive Health Act (RHA) is an extreme and unnecessary piece of legislation that would endanger women and unborn children. The RHA would allow non-physicians to perform abortions, would take abortion-related crimes off the books in cases where pregnant women miscarry after being assaulted, and would repeal existing protections for children born alive following attempted late-term abortions. Taken together, these flaws provide ample reason for fair-minded elected officials—regardless of their political affiliation or their overall perspective on abortion—to oppose this deeply misguided measure.

1. Instead of safeguarding the rights of women, the RHA would place women's health and safety in jeopardy.

While the RHA is portrayed as a pro-woman piece of legislation, its provisions actually endanger women.

First, the RHA would allow certain non-physicians to perform abortions, including third-trimester abortions.[1] Absent from the RHA is any justification for its proposal to empower non-physicians to perform surgical procedures on women and girls in New York, or any connection between that proposal and the promotion of women's health. Allowing non-physicians to perform abortion procedures would display callous disregard for women's health and safety.

[1] Section Seven of the RHA would repeal Penal Law § 125.05(3), which provides that abortions shall be performed by licensed physicians. Section Two of the RHA would add a new § 2599-BB(1) to the Public Health Law; that section would provide, in pertinent part, as follows: "A health care practitioner licensed, certified, or authorized under Title Eight of the Education Law, acting within his or her lawful scope of practice, may perform an abortion…" Examples of health care professionals licensed, certified, or authorized under Title Eight of the Education Law include physician assistants, nurses, nurse practitioners, and midwives.

Second, the RHA would repeal existing laws that punish persons who harm pregnant women in an attempt to harm those women's unborn children.[2] If the RHA becomes law, such persons could still be prosecuted for their assaults against women, but could not be charged separately for their crimes against unborn children. There is nothing pro-woman about removing these protections; in fact, the RHA would leave prosecutors with fewer procedural weapons to use against persons who attack pregnant women.

The truth is this: The RHA has nothing to do with promoting or safeguarding women's rights. Instead, the RHA would actually endanger women to advance the political aspirations of one man: Gov. Andrew Cuomo.

2. The RHA would repeal an existing law that protects viable infants who are aborted late in a pregnancy but are born alive.

The RHA would repeal Public Health Law § 4164, which contains important provisions relating to the rights of infants born alive following abortions performed after 20 weeks' gestation.

Public Health Law § 4164(1) provides that for abortions performed after the twentieth week of pregnancy, a second physician "shall be in attendance to take control of and to provide immediate medical care for any live birth that is the result of the abortion." Also, Public Health Law § 4164(2) mandates that a viable infant born alive following an abortion performed after 20 weeks' gestation "shall be accorded immediate legal protection under the laws of the state of New York…"

The proposed repeal of this statutory section would withdraw legal protection from such infants, making it legal for them to be denied treatment. This is a truly ghastly proposal, and it must be rejected by all persons of conscience.

3. The RHA would not merely 'codify' *Roe v. Wade*; it is an abortion expansion bill.

For years, supporters of the RHA have attempted to downplay its potential impact. Language about "codifying *Roe v. Wade*" is typically used to reassure legislators and voters that the RHA would not change the status quo, but would merely lend it added permanence.

Quite simply, this messaging is dishonest. The RHA would <u>not</u> simply codify *Roe.*[3] The *Roe* decision and later Supreme Court decisions on abortion hold that states may not place undue burdens upon access to pre-viability abortions, but may regulate post-viability abortions so long as abortion remains available to protect a woman's life or health. Neither *Roe* nor the Supreme Court's other abortion-related cases require the State of New York to let non-physicians perform abortions. Neither *Roe* nor other cases require the State of New York to purge all abortion-related crimes from

---

[2] Section Five of the RHA would repeal Penal Law §§ 125.05(2), 125.40, and 125.45. These statutes ban forced abortions and assaults upon women with the intent of causing miscarriages. While other existing laws could be used to prosecute these types of offenses against women, no other laws can be used to prosecute them as crimes against fetuses.

[3] It should be noted that if *Roe v. Wade* were overturned by the Supreme Court, abortion would not be banned in the State of New York; rather, abortion would remain legal here pursuant to a 1970 state law.

its Penal Law. And neither *Roe* nor other cases require the state to allow the denial of medical care to viable aborted babies who are born alive.

Furthermore, the RHA would allow dangerous late-term abortions under a broad "health" exception. Currently, New York bans third-trimester abortions except when a mother's life is endangered by the continuation of the pregnancy. The RHA would make such abortions legal in two situations: (a) when "there is an absence of fetal viability;" or (b) when an abortion is "necessary to protect the patient's life or health" (emphasis added). Existing court decisions make it clear that broad health exceptions like the one contained in the RHA effectively legalize abortion for any reason whatsoever.[4] While federal courts might allow greater access to third-trimester abortion in New York if a lawsuit were filed, the question has never been decided. In practical terms, the RHA would clearly and unequivocally open the door to elective abortion at any stage of pregnancy—including the third trimester.[5]

The Reproductive Health Act should be called exactly what it is: An abortion expansion bill.

4. The RHA would place religious liberty in jeopardy.

There is no level of conscience protection that could possibly make up for the many appalling defects contained within the RHA. However, the fact that the bill contains no conscience protections whatsoever for pro-life hospitals or health care practitioners is an outrage.

In past years, New Yorkers for Constitutional Freedoms objected to versions of the Reproductive Health Act that contained inadequate conscience protections for pro-life hospitals and health care practitioners. The current version of the RHA "solves" this problem by removing those conscience protections altogether. Because of this (and because of the fundamental rights language contained in the bill), the RHA could be construed to require faith-based hospitals to provide abortions or to risk loss of public funding or state licensure due to having infringed upon a "fundamental right." This is both unnecessary and unacceptable.

***

New Yorkers for Constitutional Freedoms opposes the Reproductive Health Act in the strongest possible terms. We respectfully call upon Members of the Legislature to summon the courage and compassion to vote against it.

[4] *See Doe vs. Bolton*, 410 U.S. 179, 192 (1973) ("medical judgment may be exercised in the light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well-being of the patient. All these factors may relate to health").

[5] On September 7, 2016, then-New York Attorney General Eric Schneiderman opined that the United States Constitution requires third-trimester abortions to be available in New York under a broad "health" exception. (*See* https://ag.ny.gov/sites/default/files/abortion_opinion_2016-f1.pdf, last accessed January 7, 2019). The RHA would expand upon the Schneiderman opinion by placing this broad "health" exception within New York's statutes.