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House Bill 57
Testimony of Deputy Solicitor General Eleanor Spottswood
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Madam Chair and committee members, on behalf of the Vermont Attorney General's Office, thank you for this opportunity to provide testimony in support of House Bill 57.

I. Comparison of House Bill 57 and Proposition 5.

The makeup of the U.S. Supreme Court has changed, and the Court is expected to dial back or abolish entirely its protection of reproductive rights at any moment. House Bill 57 and Proposition 5 work hand in hand to protect reproductive rights in Vermont now and in the future. Proposition 5's future is still uncertain: its passage will take another three years, and it depends on the next legislature and all the voters. H.57 will take effect immediately and is in the total control of this legislature. So, it is important to pass the statute now and not wait until the amendment is passed.

H.57 is also more specific than Proposition 5 in many ways—it lays out, for example, specifics about what kinds of entities it affects, and it describes a private right of action. This is consistent with the differences between statutes and constitutional amendments that this committee discussed during the testimony on Proposition 5. Constitutional provisions usually work in broad strokes, while statutes provide details. This is in part because statutes are much easier to amend or repeal. H.57 creates a framework for future legislatures to build off of. As you know, H.57 can't bind future legislatures, but Proposition 5 will bind future legislatures if it passes.

This statute and the constitutional amendment work towards similar ends. Both are intended to protect reproductive rights. So, if Proposition 5 passes, H.57 will remain good law. Statutes and constitutional provisions often complement each other in this way. For example, the state and federal constitutions both protect against certain kinds of discrimination. The Vermont Constitution includes the Common Benefits Clause and the U.S. Constitution includes the Equal Protection Clause. But, there are also state and federal statutes that specifically prohibit certain

kinds of discrimination and provide remedies for any breach.¹ H.57 will still be important even if Proposition 5 passes because it adds specificity to the constitutional language.

II. What does House Bill 57 do?

H.57 codifies current practice in Vermont. Currently, decisions about abortion and other reproductive choices are private, between a doctor and a patient. But, we don't have any statutes to keep this practice in place. So far we have relied on federal constitutional caselaw like *Roe v. Wade*² and *Planned Parenthood v. Casey*.³ This bill would keep current practice in place.

There are three parts to this bill. First, there is a section on legislative intent. It is the position of the Attorney General that this bill is not ambiguous in its purpose or effect. However, if there was a question about ambiguity in the bill, a court would look first to the legislative intent section, which reads in part: "Currently Vermont does not restrict the right to abortion. The General Assembly intends this act to safeguard the existing rights to access reproductive health services in Vermont . . ." And, if the court was still not convinced that the intent section answered the ambiguity, it could look to the record being made right now by you, as you consider whether to pass this bill.

The second section of the bill, section 2 subchapter 1, recognizes a fundamental right to an individual's choice to pursue or refuse contraception, sterilization, pregnancy, childbirth, and abortion. It also prohibits government interference with the fundamental right and it prohibits prosecution for any self-induced abortion. Unlike Proposition 5, H.57 does not specify the level of scrutiny that governmental interference with the fundamental right should receive. Proposition 5 specifies that governmental interference with the right to reproductive autonomy should receive strict scrutiny, which is the highest level of scrutiny a court will provide. So, H.57's fundamental rights cannot get a higher level of scrutiny than Proposition 5, because there is no higher level of scrutiny.

In addition, designating something as a fundamental right does not mean that the government can never interfere with that right. For example, we know from *Loving v. Virginia*⁴ and *Obergefell v. Hodges*⁵ that marriage is a fundamental right. But, marriage is still regulated by governments on the basis of age, incest, number per person, and license. Similarly, although abortion has been a fundamental right since *Roe v. Wade*, the U.S. Supreme Court has used different tests to scrutinize governmental restrictions on abortion over the years.⁶ The U.S. Supreme Court has upheld several governmental restrictions on abortion despite the designation of abortion as a fundamental right.⁷

¹ E.g., 9 V.S.A. § 4503 (unfair housing practices); 21 V.S.A. § 495 (unlawful employment practices).

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

⁴ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

⁶ Compare *Roe v. Wade*, 410 U.S. 113 (1973) (trimester framework) with *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (undue burden framework).

⁷ E.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

The third section of H.57, section 2 subchapter 2, specifically prohibits a public entity from interfering with a consenting individual's choice to terminate a pregnancy, and provides a private right of action for injunctive relief for anyone injured by a violation of the bill. This bill will protect against executive branch agencies creating barriers for those who provide or receive abortions. For example, a new Secretary of Human Services would not be able to impose onerous and medically unnecessary regulations on clinics, for example requiring multiple doctors to approve each abortion, or imposing a "gag order" on providers who counsel pregnant women. It would also prohibit the state or any municipal agency from discriminating against abortions in the provision of benefits. For instance, to the extent that the state provides health insurance to its employees or healthcare reimbursements to clinics, it would have to cover abortion-related care to the same extent it covers similar procedures. And, a government employer could not try to prevent an employee from accessing abortion care, for instance by refusing to allow the employee to take sick leave.

III. What does House Bill 57 *not* do?

H.57 does *not* do the following:

- Require private health care practitioners to provide any particular service, including abortion;
- Restrict the State from regulating health care providers out of legitimate health and safety concerns;
- Change any family laws regarding child support;
- Change any criminal laws, such as homicide;
- Change any tort law, including medical malpractice law;
- Change any federal law, including the Partial Birth Abortion Ban Act of 2003;⁸ or
- Prevent future legislatures from passing other statutes about abortion, or from amending or repealing this statute.

⁸ 18 U.S.C. § 1531.