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Proposition 5
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 Proposition 5.

I. Background.

The Vermont State Constitution operates as a check on state government power. Some of the rights in the State Constitution are the same as the rights in the U.S. Constitution. For example, the right to free speech is interpreted the same way in Chapter I, article 13 of the Vermont Constitution and in the First Amendment to the U.S. Constitution. Some of the rights in the Vermont Constitution are interpreted differently from the rights in the U.S. Constitution. For example, while the Common Benefits Clause of the Vermont Constitution is similar to the U.S. Constitution's Equal Protection Clause, it operates differently to provide protections for same-sex relationships¹ and equality of educational opportunities² at times when the U.S. Constitution did not so provide.

The Vermont Constitution also provides for its own amendment in Chapter II, § 72. In that way, it is meant to be a living document. And, Vermonters have amended their Constitution many times throughout its history. It was last amended in 2010 to lower the constitutional voting age.

At the same time, the Constitution is a lot harder to change than statutes. It requires the approval of two different general assemblies as well as the approval of the voters in the state. So, the Constitution is where we declare our basic principles of democratic government and our fundamental rights. Because the constitution is an enduring document, the wording of a constitutional amendment should be clear enough to convey its purpose, but flexible enough to account for changing circumstances that we may not anticipate. For example, the right to free speech written into the First Amendment of the U.S. Constitution does not discuss the internet, but it does apply to the internet.

¹ *Baker v. State*, 170 Vt. 194 (1999).

² *Brigham v. State*, 166 Vt. 246 (1997).

II. What does Proposition 5 do?

Proposition 5 clearly recognizes an important fundamental right to reproductive autonomy. We've been talking a lot about abortion today, and the impact that this right will have on women in particular. But Proposition 5 encompasses more than that. Reproductive autonomy includes a whole basket of rights that come from cases decided before and after *Roe v. Wade*. Reproductive autonomy includes the right to choose or refuse contraception,³ the right to choose or refuse sterilization,⁴ the right to become pregnant,⁵ as well as the right to choose abortion.⁶ At least some of these rights will also protect men.

Because the State Constitution is a constraint on state government, Proposition 5 would prevent future state governments from restricting reproductive rights. This would include laws passed by the Legislature as well as information or policies followed or adopted by the executive branch. For example, Proposition 5 would prevent future state governments from taking the following actions, unless they could be justified by a compelling state interest achieved by the least restrictive means:

- Require hospital admitting privileges for abortion clinic doctors;
- Require multiple doctors to approve each abortion;
- Require doctor to prescribe and administer the abortion pill rather than a qualified nurse practitioner;
- Require abortion to take place in a hospital when it can safely be performed in an outpatient clinic or private office;
- Require abortions (including medical abortions) be performed only by certified OB/GYN;
- Impose “gag order” on providers that counsel pregnant women;
- Restrict what insurance plans may cover for abortion care (Green Mountain Care Board);
- Impose excessive waiting periods;
- Require non-medically necessary procedures like an ultrasound or inaccurate counseling; and
- Restrict benefits or treat people differently on the basis of their reproductive choices.

III. Strict scrutiny.

“Justified by a compelling state interest achieved by the least restrictive means” is a legal term of art. It is also known as strict scrutiny. It is the highest and most intense form of scrutiny that the U.S. Supreme Court uses to review government action. Generally speaking, the U.S. Supreme Court uses strict scrutiny to review when the state is infringing on fundamental rights or suspect classes (for instance, when the government tries to categorize people based on race). Strict

³ *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁵ *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

scrutiny is the standard the U.S. Supreme Court used in *Roe v. Wade*. Notably, the U.S. Supreme Court has drifted away from the strict scrutiny framework in its more recent abortion-related cases, instead using a test of whether the State imposed an “undue burden” on the right to abortion.⁷ This test has been less consistently applied and has already resulted in an erosion of the right originally described in *Roe v. Wade*.

Strict scrutiny is not absolute. The government can still infringe on a fundamental right if it can justify its action properly. But, it is a high bar. State action that infringes a fundamental right is presumptively invalid, and the burden is on the government to show why its action should be upheld. The Attorney General’s Office supports the inclusion of strict scrutiny in Proposition 5.

IV. What does Prop 5 not do?

Proposition 5 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; and
- Require private individuals to undergo any medical procedures.

Proposition 5 also does not change any family laws regarding child support. Child support laws take effect after a child has been born, and after any reproductive autonomy rights have been exercised.⁸

Proposition 5 does not allow anyone to force their contraceptive or reproductive choices on another. So, no individual could sue to force another person to get pregnant or carry their fetus to term. In cases where two private individuals have competing rights, courts will weigh each of the interests at stake and fashion a solution, which is something we trust them to do all the time. But no individual’s right can override another person’s right to the other person’s reproductive autonomy based on Proposition 5.

Proposition 5 does not create a right to privacy. Privacy was part of the original rationale for the right to abortion in *Roe*. But, privacy encompasses a much broader range of issues than Proposition 5, including criminal search and seizure doctrines. The right guaranteed by Proposition 5 is important right now because of the changes to the makeup of the U.S. Supreme Court. Reproductive liberty and autonomy are concepts that come directly from U.S. Supreme Court cases and much more directly address the rights the committee is trying to protect here.

Proposition 5 does not create a right to prostitution. The first sentence of proposed Article 22, “That the people are guaranteed the liberty and dignity to determine their own life’s course,” must be read in the context of Proposition 5 as a whole. It must also be read in the context of the record being created before this committee and the record that will be created over the next four years, through the popular referendum. Proposition 5, as a whole, as well as the record currently being created around it, clearly speaks to a right of reproductive liberty and autonomy. The

⁷ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992).

⁸ *See, e.g., Dubai v. Wells*, 506 F.3d 422, 429-30 (6th Cir. 2007).

language of the first sentence of Proposition 5 itself came from U.S. Supreme Court caselaw discussing reproductive rights and freedoms.⁹

V. Recommendation.

The Attorney General's Office agrees with the ACLU that, if the committee intends Proposition 5 to protect the right to abortion, that should be written into the language to be perfectly clear. Specifically, our recommendation is to add a few words to part (b) of the purpose section so that it reads: "The right to reproductive liberty, *including the right to abortion*, is central . . ."

⁹ In her dissent in *Gonzalez v. Carhart*, 550 U.S. 124, 172 (2007), Justice Ginsburg concluded: "Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."