

**To: House Human Services**  
**From: Indi Schoenherr, Advocacy Fellow, ACLU of Vermont**  
**Re: Proposal 5**  
**Date: 1/19/2022**



Thank you for the opportunity to testify on Proposal 5. We fully support the proposal and urge you to pass it so that the voters can make their voices heard on this critical issue. Considering the U.S. Supreme Court's recent refusal to block Texas' ban on abortion, enshrining reproductive liberty in our Constitution is urgently important. These are unprecedented times, as we are witnessing at both the state and federal levels the wilting away of reproductive liberties we have held for decades. In the event that the Supreme Court decides to overturn *Roe*, we have a responsibility and an opportunity to not only sustain the rights afforded in *Roe* but to go a step further in establishing personal reproductive liberty for every Vermonter.

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The right to decide if, when, and how to have children is critical to an individual's autonomy, equality, and ability to participate in the social, economic, and political life of the state and the nation. Reproductive liberty is essential to fulfill the promise of equality and self-determination rooted in our nation and our state's founding documents and principles. Reproductive autonomy means opportunity: the opportunity to obtain an education, to work, to love, to build a family, to make a good life, and ultimately, the opportunity to live that life as one desires.

The United States Supreme Court has recognized the centrality of this right in numerous decisions. In *Griswold v. Connecticut* in 1965<sup>i</sup> and *Eisenstadt v. Baird* in 1972<sup>ii</sup>, the Court struck down bans on contraception for married and single people, respectively. In *Eisenstadt*, the Court recognized the importance of "the right of the individual, married or single, to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>iii</sup> *Roe v. Wade*, decided in 1973, built upon these cases, recognizing abortion as a fundamental right<sup>iv</sup> alongside decisions relating to marriage, contraception, education, and family relationships.

Even in *Planned Parenthood v. Casey* (1992),<sup>v</sup> a decision that weakened *Roe*, the Supreme Court continued to recognize reproductive autonomy as a fundamental right, saying that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>vi</sup> The right to reproductive liberty, and particularly the right to abortion, remains, for the time being, a fundamental right at the national level, and should be recognized as such here in Vermont as well.

But this right is under attack at the federal level as well as in other states, which have passed over 400 restrictions on abortion since 2010.<sup>vii</sup> Justice Kavanaugh's dissent in the Louisiana abortion clinic case,<sup>viii</sup> which could have closed nearly all the clinics in the state and essentially dismantled *Roe*, highlights the very real danger. More recently, the Supreme Court's refusal to consider the constitutionality of SB8 Texas's new abortion restriction law has allowed for that law to continue and actively impact people looking to exercise their right to reproductive liberty.

Justice Sotomayor opined that the Texas law raises a challenge to federal supremacy and, "[t]he Court's delay in allowing this case to proceed has had

catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas.”<sup>ix</sup>

We must respond to the mounting threat to reproductive liberty by enshrining reproductive autonomy as a constitutional and fundamental right in our state constitution.

This proposal is a simple affirmation of our values – values that Vermonters have cherished for generations. In *Beecham v. Leahy*,<sup>x</sup> the Vermont Supreme Court decision overturning a statute forbidding medical providers from providing abortions, the Court recognized that the legislature had “affirmed the right of a woman to abort.”<sup>xi</sup> Vermonters continue to value independence and the right to reproductive liberty free from government interference, yet there have been no other Vermont Supreme Court decisions on this issue since that case.

The lack of Vermont Supreme Court jurisprudence, and the legal cloud around these rights at the federal level, demonstrate the need for this amendment: there should be no question where Vermont stands with regard to its core values and commitment to fundamental rights. For those values and those rights to be protected definitively, they must be enshrined in our state constitution.

For all these reasons the ACLU supports Proposal 5. No one knows exactly how far the federal government and courts will go in dismantling reproductive rights, but Vermont should give voters the opportunity to stand up to attacks and affirm their commitment to reproductive liberty by enshrining the fundamental right to reproductive autonomy in our constitution. This right deserves the highest level of legal protection, and we urge you to pass this proposal.



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<sup>i</sup> 381 U.S. 479 (1965).

<sup>ii</sup> 405 U.S. 438 (1972).

<sup>iii</sup> *Id.* at 453.

<sup>iv</sup> *Roe v. Wade*, 410 U.S. 113, 115 (1973).

<sup>v</sup> 505 U.S. 833 (1992).

<sup>vi</sup> *Id.* At 856.

<sup>vii</sup> Elizabeth Nash, et al., State Policy Trends 2018: With *Roe v. Wade* in Jeopardy, States Continued to Add New Abortion Restrictions, GUTTMACHER INST. (Dec. 2018), <https://www.guttmacher.org/article/2018/12/state-policy-trends-2018-roe-v-wade-jeopardy-states-continued-add-new-abortion>. These restrictions include banning abortion at six weeks, banning the most commonly used method of second-trimester abortion, and requiring clinics that perform abortions to follow onerous building guidelines and restrictions. The over 400 restrictions enacted since 2010 comprise more than a third of all abortion restrictions enacted since *Roe*. *Id.*

<sup>viii</sup> *June Medical Services, L.L.C., et al. v. Gee*, 586 U.S. \_\_ (2019) (Kavanaugh, J., dissenting).

<sup>ix</sup> *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 551 (2021).

<sup>x</sup> 130 Vt. 164 (1972).

<sup>xi</sup> *Id.* At 170.