STATEMENT OF

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before the

PENNSYLVANIA HOUSE JUDICIARY COMMITTEE

HOUSE BILL 1979

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In Roe v. Wade, 410 U.S. 113, 153 (1973), the United States Supreme Court concluded that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The proposed amendments to Pennsylvania's Abortion Control Act in House Bill 1979 constitute a frontal assault on this right of privacy. Most of the provisions of this bill are in direct conflict with controlling decisions of the United States Supreme Court. In fact, some of the provisions are, with minor modification, the same as provisions in earlier versions of the Pennsylvania Abortion Control Act that have already been declared unconstitutional.

If the proposed amendments are enacted, Pennsylvania will have the distinction of being a state whose government willingly flaunts the United States Constitution by depriving its citizens of the liberties that the Constitution protects. In a week when the United States Congress has reinforced the right of privacy by restoring Medicaid funding for abortions for victims of rape and incest, in a week when the Florida legislature has resoundingly rejected efforts to restrict women's exercise of their fundamental right to choose an abortion, and in a week

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when the United States Supreme Court let stand a decision of the Third Circuit Court of Appeals in which it held that those who conspire to interfere with women's rights face liability under the federal RICO statute, it would be ironic and ultimately tragic for the Pennsylvania General Assembly to push this plainly unconstitutional legislation toward final enactment.

The remainder of this statement will review the major provisions of the proposed amendments to show how they conflict with existing precedent.

I. Abortion After Twenty-Four Weeks of Gestation -- Sections 3210 and 3211

Section 3210 of House Bill 1979 requires a determination of gestational age before all abortion procedures. Section 3211 prohibits all abortions after twenty-four weeks of gestation except where necessary to avert the death of the mother. These two sections cannot withstand constitutional scrutiny for several reasons.

In Roe v. Wade, the Supreme Court concluded that, "For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-65.

Section 3210(a) of the existing Abortion Control Act comports with this holding. It prohibits abortions after viability except where necessary to preserve the life or health of the mother. This provision has been used successfully to

prosecute a physician who performed an illegal post-viability abortion. Thus, there is simply no need to enact new legislation, except legislation intended to cross the line drawn in Roe. This is precisely what House Bill 1979 does.

In fact, because of the obvious unconstitutionality of Sections 3210 and 3211 and because the bill repeals existing Section 3210 which regulates abortion after viability, the likely effect of passage of House Bill 1979 is that new Sections 3210 and 3211 will be enjoined, old Section 3210 will be repealed and Pennsylvania will have no specific regulation for post viability abortions. Thus, the zeal to pass a statute that conflicts directly with Roe v. Wade may result in a statute that is less restrictive of abortion in Pennsylvania than current law.

Under proposed Section 3211, the health needs of the pregnant woman no longer provide a basis on which late term abortions can be performed. Beyond being unconstitutional, this provision is utterly cruel. Only when a physician determines that sure and certain death will come to his patient can he give her the medical care that he has been trained to give. The cruelty of this provision is obvious in the portion of Section 3211 stating that "no abortion shall be deemed necessary to prevent the death of a pregnant women if such death would result from suicide."

In addition, proposed Sections 3210 and 3211 both proceed from the premise that the state can dictate when viability occurs. This is directly contrary to the opinion in Colautti v. Franklin, 439 U.S. 379 (1979), where the Supreme

Court declared unconstitutional the post-viability provisions of the 1974 Pennsylvania Abortion Control Act. The Court concluded:

> Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the state has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

Id. at 388-89. This is the same conclusion the Supreme Court reached in the earlier case of Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 64 (1975).

Proposed Section 3211(c)(4), requiring that the physician terminate the pregnancy "in a manner which provides the best opportunity for the unborn child to survive," also runs afoul of both the Thornburgh and Colautti decisions. As the Third Circuit said in its decision in Thornburgh, which the Supreme Court affirmed:

> In Colautti v. Franklin the Court held that the earlier Pennsylvania statute impermissibly required the doctor to "make a 'trade-off' between the woman's health and . . . fetal survival." The new Pennsylvania statute, like the old, fails to require that maternal health be the paramount consideration.

737 F.2d 283, 300 (3d Cir. 1984). The proposed amendment, like the two earlier versions of the Pennsylvania statute, would force the physician to put the health of the fetus first, and deny the care his patient, the woman, deserves.

Finally, the determination of gestational age in proposed Section 3210 is simply unnecessary. A determination of probable gestational age is part of the routine care of a pregnant woman, whether or not she is having an abortion. But Section 3210 requires that the doctor perform a battery of tests to make an "accurate diagnosis," that he report the basis for his diagnosis to the authorities and that he subject himself to disciplinary proceedings and criminal liability if he fails to do so. There is no compelling state interest sufficient to justify these strictures, particularly since the determination of gestational age standing alone -- as opposed to the determination of viability -- has no legal significance.

II. Informed Consent -- Section 3205 and 3208

The proposed amendment to Section 3205, governing informed consent, would reenact that section as it existed in the 1982 Abortion Control Act. That version was found to be unconstitutional on its face by the Supreme Court in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). The Court's holding was based on a series of statutory features, each of which is repeated in the proposed amendment.

First, proposed Section 3205 requires a twenty-four hour waiting period between the time the information is given and the abortion procedure is performed. Even before the Thornburgh case, the Supreme Court had declared such an "arbitrary and

inflexible waiting period" to be unconstitutional in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Second, the amendment, like the earlier version of Section 3205, requires that some of the mandated information can be provided only by a physician, and not by a counselor or other health professional. Again, this requirement of physician-only counseling was declared unconstitutional in the Akron case, where the Court concluded, "the State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." 462 U.S. at 448.

Finally, proposed Section 3205, like its earlier counterpart, is unconstitutional because it requires the physician to recite specific pieces of information in all cases in order to obtain informed consent, whether or not that information would otherwise be appropriate in the circumstances. The Thornburgh Court concluded that the informational requirements in the earlier Section 3205, most of which are restated in the proposed amendment, were constitutionally invalid for two reasons. First, much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether. Second, the rigid requirement that a specific body of information be given in all cases irrespective of the needs of the patient intrudes upon the discretion of the physician.

The Thornburgh Court found particularly offensive the requirement that the printed information to be made available to the woman contained a description of fetal characteristics at two-week intervals. House Bill 1979 goes even further and requires that "pictures representing the development of unborn children at two-week gestation increments" be made available. As Governor Thornburgh stated in 1981, when he vetoed an earlier version of the Abortion Control Act, "I doubt that requiring the preparation and availability of detailed color photographs of a fetus at various gestational increments is necessary to an informed abortion decision. Moreover, the presentation would likely cause many women considerable anguish and distress." In short, like the prior version of Section 3205 that it copies almost word for word, the proposed amendment to Section 3205 is patently unconstitutional.

III. Reporting Requirements -- Section 3214(a)

The proposed amendment to Section 3214(a) continues the requirement that a report be filed for each and every abortion performed in Pennsylvania. The amendment also continues the requirement that the physician report the basis for his medical determinations, such as the determination of gestational age required by Section 3210. This requirement is directly contrary to the holding of the United States District Court for the Eastern District of Pennsylvania in Planned Parenthood of Southeastern Pennsylvania v. Casey, 686 F.Supp. 1089 (E.D. Pa. 1988), an action that challenged the constitutionality of the

1988 amendments to the Abortion Control Act. Judge Huyett concluded:

> The physician must be accorded broad discretion in exercising his medical judgment. The prospect that his exercise of medical judgment may be challenged at a later date, whether by the Commonwealth or by another physician, is likely to have a profound chilling effect on the physician's willingness to exercise his judgment in the mother's best interest. . . I now hold that a requirement a physician justify his medical judgment by reporting the basis therefor in a written report impermissibly interferes with the woman's ability to effectuate her abortion decision. I will, therefore, enjoin the enforcement of these provisions.

686 F.Supp. at 1132.

In response to Judge Huyett's ruling, the Department of Health has developed a form for the reporting of individual abortions that has been held to the constitutional, at least on a preliminary basis. That report form is now in use, but, if House Bill 1979 passes, a new form, that will probably be enjoined, will have to be put in place. Again, House Bill 1979 may be directly contrary to the intent of its sponsors, because it will result in the replacement of existing, constitutionally acceptable regulations with unconstitutional regulations subject to injunction.

IV. Spousal Notice -- Section 3209

Existing Pennsylvania law does not require that the spouse of the pregnant woman be notified before she receives an abortion. In Planned Parenthood v. Danforth, the Supreme Court concluded that a spousal consent provision is unconstitutional because the husband does not have a constitutionally protected interest sufficient to override a woman's right of privacy to

decide to have an abortion. Lower federal courts since Danforth have consistently held that spousal notice statutes are also unconstitutional. These courts have uniformly held either that husbands have no interest worthy of state protection or that whatever interests exist do not outweigh the woman's fundamental right to choose an abortion. Indeed, in 1987 Governor Casey vetoed amendments to the Abortion Control Act that included a paternal notice requirement concluding:

> The Supreme Court's decisions make it clear that the paternal notice requirement will be struck down as unconstitutional if enacted. Moreover, every state statute requiring merely spousal notice that has been taken before a federal court has been struck down. I am forced to conclude that this provision poses the almost certain and unacceptable prospect of invalidation, and costly, unsuccessful, and avoidable litigation.

Despite this consistent body of precedent, and the Governor's earlier veto, House Bill 1979 now proposes to require spousal notice in Section 3209. Beyond the fact that provisions like proposed Section 3209 have never withstood constitutional challenge, this section raises serious implications for state law generally.

The section specifically states that the purpose of the notice requirement is to "protect a father's right to procreate within marriage." Since this right does not have any apparent constitutional basis, this provision, if enacted, would create a new right of undefined proportion. For example, in defense to a charge of spousal rape, will a husband be able to invoke his right to procreate within marriage? Since Pennsylvania has an Equal Rights Amendment in its Constitution, this right to

procreate must also extend to the mother. Can a woman whose husband undergoes a vasectomy without her knowledge recover from the physician performing that procedure because he has violated her right to procreate within marriage? Plainly, declaration of a new right should not occur in an offhand manner that fails to consider fully the impact it will have on Pennsylvania law generally.

Obviously, in a marriage that is stable and caring, a pregnant woman would likely consult with her husband before having an abortion. Thus, this provision has its impact only when a woman, for whatever reason, feels she cannot inform her husband of her choice. Section 3209 purports to excuse the notice requirement in certain circumstances, apparently in an effort to ameliorate the harsh effect that the statute will have on a woman whose husband is not supportive of her decision. The exceptions themselves, however, are fraught with problems. For example what constitutes "diligent effort" to find the husband? When is the furnishing of notice "likely to result in the infliction of bodily injury upon" the woman? What about other reasons that might be equally valid, but which are statutorily unavailable, such as that the woman has instituted divorce proceedings or that she and her husband have entered a legal separation agreement?

The marital relationship is itself an intensely private one, and the state has no interest in interfering with the manner in which a husband and wife conduct their relationship. As the Danforth Court held, the husband cannot veto a woman's decision

to have an abortion. Plainly, notice does not serve any state interest in maternal health, nor can it be justified by the state's interest in potential life, since that interest becomes compelling only after viability. Thus, the spousal notice requirement represents both unconstitutional law and bad public policy.

V. Prohibition Against Sex Selection Abortions -- Section 3204

House Bill 1979 would add a sentence at the end of Section 3204(c) of the Act stating "no abortion which is sought solely because of the sex of the unborn child shall be deemed a 'necessary' abortion." The notion that sex selection abortions are occurring with a frequency to warrant any kind of regulation against them is wholly unfounded. Physicians and health care providers take their job and their obligation to protect health seriously.

More fundamentally, because this provision applies throughout pregnancy, it invades the absolute privacy accorded a woman and her physician during the period of time before the state's interest in maternal health becomes compelling. As the Supreme Court stated in Roe v. Wade:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. . . It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.
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> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient,

> is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

410 U.S. at 163.

Moreover, the chilling impact of the provision will undoubtedly extend far beyond sex selection abortions, if in fact such abortions occur. Physicians will be reluctant to provide genetic testing, even where otherwise indicated, because the product of that testing is knowledge of the sex of the fetus. While the provision purports to limit its application to instances where the abortion is "solely because of the sex of the unborn child," a health care provider and, perhaps, the woman herself or her spouse or her parents or any other person involved in the decision, are subject to criminal prosecution any time a zealous district attorney believes that sex selection may have entered into the abortion decision. Indeed, this provision invites the intrusion of public officials into the confidential files of physicians and health care facilities throughout the Commonwealth.

VI. Conclusion

As I discussed above, the major provisions of the proposed amendments to the Abortion Control Act are plainly unconstitutional and the likelihood that they will be successfully challenged is great. Moreover, certain of the provisions, such as the prohibition of abortions after twenty-four weeks of gestation and the prohibition against sex selection

abortions, strike at the heart of the privacy right defined in Roe v. Wade. Thus, passage of this legislation will inevitably result in protracted litigation over whether the right of privacy in the abortion decision will continue as it has since 1973.

In deciding how to vote on this legislation, I commend to you the words of Justice Blackmun from the Thornburgh decision, which apply not only to judges but also to legislators:

> Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. We recognized at the very beginning of our opinion in Roe that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully.
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> Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private or more basic to individual dignity and autonomy, than a woman's decision -- with the guidance of her physician and within the limits specified in Roe -- whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

476 U.S. at 771-72.