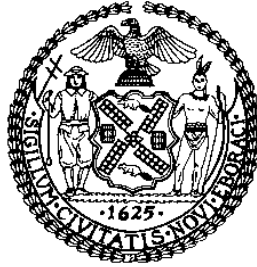


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The Council of the City of New York

COMMITTEE REPORT AND BRIEFING PAPER
OF THE HUMAN SERVICES DIVISION

Jeffrey Baker, Legislative Director
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COMMITTEE ON WOMEN
Hon. Helen Rosenthal, Chair

September 20, 2018

Oversight: Abortion and Reproductive Rights

Res. No. 84:

By the Public Advocate (Ms. James) and
Council Members Brannan, Rosenthal,
Ayala, and Rivera

Title:

Resolution urging the New York State
Legislature to pass and the Governor to sign
the Reproductive Health Act.

I. INTRODUCTION

On September 20, 2018, the Committee on Women, chaired by Council Member Helen Rosenthal, will hold a hearing on the oversight topic of Abortion and Reproduction Rights, as well as to consider Proposed Res. No. 84, sponsored by the Public Advocate Letitia James, a resolution urging the New York State Legislature to pass and the Governor to sign the Reproductive Health Act. Witnesses invited to testify include the New York City (NYC) Commission on Gender Equity (CGE), as well as local legal services offices, activists, advocacy groups, health professionals and other interested stakeholders.

II. BACKGROUND

Reproductive rights, the rights of individuals to have access to sexual and reproductive healthcare and autonomy in sexual and reproductive decision-making, are founded upon the promise of human dignity, self-determination and equality embodied in both the United States (U.S.) Constitution and the Universal Declaration of Human Rights (UDHR).¹ As such, reproductive rights are essentially human rights; they comprise a range of civil, economic, political and social rights, including the rights to health and life, the rights of equality and non-discrimination, privacy, information, and the right to be free from torture or ill-treatment.² This may include an individual's right to plan a family, terminate a pregnancy (also known as abortion), and use contraceptives as well as to have access to reproductive health services and

¹ Amnesty International USA, *Reproductive Rights: A Fact Sheet* (2007), available at <https://web.archive.org/web/20070714111432/http://www.amnestyusa.org/women/pdf/reproductiverights.pdf>.

² Center for Reproductive Rights, *Breaking Ground 2018: Treaty Monitoring Bodies on Reproductive Rights*, 3 (Feb. 2018), available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Breaking-Ground-2018.pdf>; Carmel Shalev, *Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*, Health and Human Rights, Vol. 4, No. 2, 1, 38 (2000), available at www.jstor.org/stable/4065196.

sex education in public schools.³ In fact, studies have shown that women and girls⁴ who are afforded such rights have better maternal/reproductive health outcomes, reducing rates of maternal morbidity and empowering women.⁵ Accordingly, comprehensive healthcare for women should include reproductive care.

Reproductive rights are fundamental to an individual’s control over their own life, and are therefore crucial to achieving gender equity.⁶ They are endowed by numerous international and national doctrines;⁷ the UDHR, the foundational document of international human rights law adopted by the United Nations General Assembly (UNGA) in 1948, affirms an individual’s right to not be “subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”⁸ The UDHR also asserts that “[m]arriage shall be entered into only with the free and full consent of the intending spouses,”⁹ which is echoed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a multilateral treaty adopted by UNGA in 1966.¹⁰ The ICESCR also recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical

³ United Nations Foundation Universal Access Project, *Briefing Cards: Sexual and Reproductive Health and Rights (SHSR) and the Post-2015 Development Agenda*, 3 (Sept. 2014), available at <http://www.unfoundation.org/what-we-do/campaigns-and-initiatives/universal-access-project/briefing-cards-srhr.pdf>.

⁴ Hereinafter, the term “women” is intended to include women and girls. However, non-binary/genderqueer people also deal with pregnancy, childbirth, nursing and parenting. See Chamindra Weerawardhana, *Reproductive Rights and Trans rights: Deeply Interconnected yet too often Misunderstood*, MEDIUM (Feb. 9, 2016) available at <https://medium.com/@fremancourt/reproductive-rights-and-trans-rights-deeply-interconnected-yet-too-often-misunderstood-8b3261b1b0de>.

⁵ Center for Reproductive Rights, *supra* note 2; Impassioned Advocates for Women and Girls, *Making the Connection between Maternal Health and Reproductive Rights* (Jul. 2015), available at <https://pai.org/wp-content/uploads/2015/07/Maternal-Health-Policy-Brief.pdf>.

⁶ United Nations General Assembly, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet—Synthesis Report of the Secretary-General on the Post-2015 Sustainable Development Agenda* (Dec. 4, 2015), 21-2, available at http://www.un.org/disabilities/documents/reports/SG_Synthesis_Report_Road_to_Dignity_by_2030.pdf.

⁷ See Amnesty International USA, *supra* note 7.

⁸ United Nations, *Universal Declaration of Human Rights/General Assembly Resolution 217A*, Article 5 (Dec. 10, 1948), available at <http://www.un.org/en/universal-declaration-human-rights/index.html>.

⁹ *Id.* at Resolution 217A, Article 16.2

¹⁰ United Nations, *International Covenant on Economic, Social and Cultural Rights*, Article 10.1 (Dec. 13, 1966), available at https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf.

and mental health”¹¹ as well as “to enjoy the benefits of scientific progress and its applications.”¹² Other examples of the enshrinement of reproductive rights are present in many other international doctrines which have been built on and affirmed over the years.¹³ These include the right to access to educational information related to family planning and the right to safe, effective, affordable, and acceptable methods of family planning of their choice, such as the regulation of fertility.¹⁴ However, comprehensive healthcare for women that even broadly includes reproductive healthcare is not yet the standard.¹⁵

a. The National Landscape of Abortion Rights in the U.S.

While the U.S. Constitution does not explicitly mention reproductive rights, the U.S. Supreme Court has recognized the right to reproduce as “fundamental” and one which extends to procreation (*Skinner v. State of Oklahoma, ex rel. Williamson*),¹⁶ contraception (*Eisenstadt v. Baird*),¹⁷ family relationships (*Prince v. Massachusetts*),¹⁸ and child-rearing decisions (*Pierce, Governor of Oregon, et al. v. Society of the Sisters of the Holy Names of Jesus and Mary*).¹⁹ Additionally, a person’s right to privacy is enshrined in the Fourteenth Amendment of the U.S. Constitution.²⁰ Historically, however, reproductive rights for women has been a controversial issue in the U.S. due to the perceived ethical, moral, and religious connotations associated with

¹¹ *Id.* at Article 12.1.

¹² *Id.* at Article 15.1(b).

¹³ See Amnesty International USA, *supra* note 7.

¹⁴ *Id.*

¹⁵ Karen Freund and Chloe Bird, *Comprehensive Healthcare: Why is the Inclusion of Reproductive Health Controversial for Women but Not Men?*, WOMEN’S HEALTH ISSUES, Vol. 22, No. 4 (Apr. 2012), available at [https://www.whijournal.com/article/S1049-3867\(12\)00034-5/pdf](https://www.whijournal.com/article/S1049-3867(12)00034-5/pdf).

¹⁶ *Skinner v. State of Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942).

¹⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁸ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹⁹ *Pierce, Governor of Oregon, et al. v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

²⁰ This was also the subject of *Roe v. Wade*. *Roe v. Wade*, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973); U.S. Const. amend. XIV, § 2; Findlaw, *What are Reproductive Rights* (last visited Sep. 17, 2018), available at <https://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html>.

abortion, birth control and family planning.²¹ As a result, the U.S. experienced a near-universal prohibition on abortion procedures for most of its history.

Until the 20th century, most states banned or severely restricted abortions and those few abortion-rights related laws that existed aimed to protect women and their fetuses from those who performed abortions.²² In the 20th century, however, social forces such as the fight for women's suffrage and the feminist movement began to shift the landscape toward one offering greater political and sexual freedom for women.²³ In 1967, Colorado became the first state to broaden the circumstances under which a woman could legally receive an abortion.²⁴ By 1970, 11 additional states had made similar changes to their abortion laws.²⁵ During this time period, abortion rights advocates also began to launch a series of legal challenges related to abortion.²⁶ While most of these arguments were rejected by state and lower federal courts, in the early 1970s, the Supreme Court began to change this setting by agreeing to hear the abortion-related case of *Roe v. Wade*.²⁷

In January 1973, the Supreme Court issued its landmark decision in *Roe v. Wade*, which found a Texas state law that banned abortions except to save the life of the mother unconstitutional, thus granting women the constitutional right to terminate their pregnancies.²⁸ This ruling restricted any state from outlawing or regulating any aspect of abortion performed

²¹ Karen Freund and Chloe Bird, *supra* note 15.

²² Pew Research Forum, *A History of Key Abortion Rulings of the U.S. Supreme Court* (Jan. 16, 2013), available at <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>.

²³ *Id.*

²⁴ *Id.*

²⁵ Further, New York and three other states, Washington, Hawaii and Alaska, completely decriminalized abortion during the early stages of pregnancy during this period. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ In this case, the Supreme Court recognized for the first time that the constitutional right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." However, the U.S. Supreme Court also recognized that the right to privacy is not absolute and that a state has valid interests in safeguarding mental health and protecting potential life. See *Roe v. Wade*, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973); Planned Parenthood, *Roe v. Wade: Its History and Impact* (last visited Sep. 13, 2018), available at https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf.

during the first trimester of pregnancy, and narrowed states' abilities to enact abortion regulations and laws.²⁹

Over the next three decades, the Supreme Court was repeatedly called upon to decide whether a wide range of abortion statutes violated a woman's right to privacy, as opponents of safe and legal abortion urged state and federal lawmakers to pass laws stripping away or banning abortion.³⁰ Indeed, since recognizing a woman's constitutional right to abortion in *Roe v. Wade*, the U.S. Supreme Court has in subsequent decisions reaffirmed that right.³¹ The Supreme Court has held that a state cannot ban abortion before viability (the point at which a fetus can survive outside the uterus), and that any restriction on abortion after viability must contain exceptions to protect the life and health of the woman.³² Further, in 1992, the U.S. Supreme Court decided *Casey v. Planned Parenthood*, which affirmed the core holding of *Roe v. Wade*³³ and established that any pre-viability abortion restriction cannot create an "undue burden" on a woman seeking an abortion.³⁴ Under the *Casey* "undue burden" test, many abortion restrictions have been

²⁹ *Id.*; ACLU, *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court* (last visited Sep. 13, 2018), available at <https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court>; PB Linton, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled*, 27(3), ISSUES LAW MED., Spring, 181-228 (2012), available at <https://www.ncbi.nlm.nih.gov/pubmed/22696839>; CNN, *Roe v. Wade Fast Facts* (Apr. 15, 2018), available at <https://www.cnn.com/2013/11/04/us/roe-v-wade-fast-facts/index.html>.

³⁰ It should be noted that over this time, courts also found restrictive statutes unconstitutional which indicating potential limits on the ability of women to make the decision to end a pregnancy. *See, e.g.*, Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present and Future*, 40 OHIO N.U. L. REV. 105, 109 (2013); ER Rubin, *Abortion, Politics, and the Courts: Roe v. Wade and Its Aftermath* (1982); The New York Times, *Abortion Restrictions in States* (June 17, 2013), available at <https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.html>; Planned Parenthood, *supra* note 28.

³¹ Jared Jones, *Women's Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. Fed. 2d 1 (2007); Jon F. Merz, et. al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967-1994*, 17 WOMEN'S RTS. L. REP. 1 (1995); Guttmacher Institute, *State Facts about Abortion: New York*, GUTTMACHER INSTITUTE (May 2018), available at <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-york>.

³² *Id.*; Boonstra HD et al., *Abortion in Women's Lives*, New York: GUTTMACHER INSTITUTE, 2006.

³³ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 2804, 120 L. Ed. 2d 674 (1992).

³⁴ The undue burden test is a test in which a law has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion, rather than the trimester framework set out earlier by *Roe v. Wade*, should be used

upheld, including requirements that women make multiple trips to an abortion provider and imposing waiting periods before obtaining an abortion.³⁵ Thus, the *Casey* decision made it more difficult to challenge laws that were less than absolute prohibitions on abortion.³⁶ Additionally, this undue burden standard was clarified in the 2016 decision in *Whole Woman's Health v. Hellerstedt*,³⁷ which held that scientific evidence must be considered when evaluating the constitutionality of abortion restrictions.

b. The Current Landscape

Over the 45 years since *Roe v. Wade*, federal courts, and particularly the U.S. Supreme Court, have continued to supersede states as the driving force in crafting abortion policy.³⁸ Coupled with longstanding gender inequality that impacts every factor of women's lives,³⁹ reproductive rights continues to be a politically charged and divisive issue.⁴⁰ In fact, the debate

in evaluating abortion restrictions before viability. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S. Ct. 2791, 2804, 120 L. Ed. 2d 674 (1992)

³⁵ Planned Parenthood, *Roe v. Wade: Its History and Impact* (Sep. 13, 2018), available at https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf.

³⁶ Meghan Keneally, *Where US Abortion Laws Stand 45 Years after Roe v. Wade*, ABC NEWS (Jan. 22, 2018), available at <https://abcnews.go.com/US/us-abortion-laws-stand-45-years-roe-wade/story?id=52462955>; Linda L. Schlueter, *40th Anniversary of Roe v. Wade: Reflections Past, Present and Future*, 40 Ohio N.U. L. Rev. 105, 109 (2013); *Id.*

³⁷ *Id.*

³⁸ Pew Research Forum, *supra* note 22.

³⁹ The obstacles that women face in making decisions about sexuality and reproduction have psychological, affective, and health costs. Many organizations such as the United Nations, consider gender equality a key social determinant of health. See United Nations Population Fund, *Universal Access to Sexual and Reproductive Health—the Key to Gender Equality* (Mar. 8, 2017), available at <https://www.unfpa.org/press/universal-access-sexual-and-reproductive-health—key-gender-equality>; International Planned Parenthood Federation, *Sexual and Reproductive Health and Rights are the Key to Gender Equality and Sustainable Development*, (Mar. 21, 2015), available at <https://www.ippf.org/blogs/sexual-and-reproductive-health-and-rights-are-key-gender-equality-and-sustainable-development>.

⁴⁰ See, e.g., Robert Barnes and Ann E. Marimow, *In Major Ruling, Kavanaugh Offers Clues of How he Might Handle Divisive Issue on the Supreme Court*, WASHINGTON POST (July 11, 2018), available at https://www.washingtonpost.com/politics/courts_law/in-major-abortion-ruling-kavanaugh-offers-clues-of-how-he-might-handle-divisive-issue-on-the-supreme-court/2018/07/11/1acd980a-8515-11e8-9e80-403a221946a7_story.html?utm_term=.2b8bba475b0f; Pew Research Center, *Public Opinion on Abortion, 1995-2017* (July 7, 2017), available at <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>; New York Civil Liberties Union, *Critical Conditions: How New York's Unconstitutional Abortion Law Jeopardizes Women's Health* (Jan. 2017), available at https://www.nyclu.org/sites/default/files/field_documents/nyclu_criticalconditions_20170126.pdf; National Institute for Reproductive Health, *2017 Year in Review* (Jan. 2018), available at <https://www.nirhealth.org/wp->

over abortion remains perhaps the single most controversial reproductive rights issue in the country, including whether a woman should have the “right” to terminate a pregnancy that has potential to result in a human life.⁴¹

While some advocates argue that state legislatures and governors encounter too many limitations in the ways they can regulate abortion,⁴² many U.S. laws and policies remain that restrict access to contraception, abortion and other reproductive healthcare.⁴³ These include obstacles to insurance coverage for reproductive healthcare on the basis of moral disapproval, as well as abstinence-only education that suppresses information on, and access to, modern contraceptives.⁴⁴ It is not surprising, then, that a 2016 study found that nearly half (45 percent, or 2.8 million), of pregnancies were unintended in 2011,⁴⁵ including three out of four pregnancies to women younger than 20 years old.⁴⁶ Though this indicates a decrease in rate from 2008, it continues to be higher than that in many other industrialized countries; if current trends continue, more than half of all American women will experience an unintended pregnancy by the time they reach 45 years old.⁴⁷ Furthermore, unintended pregnancies disproportionately affect

content/uploads/2018/01/NIRH_2016AR_P3_TS1-1-1.pdf; National Institute for Reproductive Health, *Analysis of Voters’ Opinions on Abortion Restrictions and Affirmative Policies* (Jan. 20, 2016), available at https://www.nirhealth.org/wp-content/uploads/2016/01/Memo-NIRH-Poll_Final_3.pdf.

⁴¹ National Women’s Law Center, *Roe v. Wade and the Right to Abortion* (Jan. 2013), available at <https://nwlc.org/resources/roe-v-wade-and-right-abortion/>; Planned Parenthood Federation of America, *What do the terms “pro-choice” and “pro-life” mean? Ask the Experts* (Sept. 2010), available at <https://www.plannedparenthood.org/learn/teens/ask-experts/can-you-explain-what-pro-choice-means-and-pro-life-means-im-supposed-to-do-it-for-a-class-thanks>.

⁴² Pew Research Forum, *supra* note 22; Guttmacher Institute, *supra* note 31 (explaining that some of the most common state-level abortion restrictions are parental notification or consent requirements for minors, limitations on public funding, mandated counseling designed to dissuade a woman from obtaining an abortion, a mandated waiting period before an abortion, and unnecessary and overly burdensome regulations on abortion facilities).

⁴³ Between 2010 and 2016 alone, states have enacted 338 new abortion restrictions, which account for nearly 30 percent of the 1,142 abortion restrictions enacted by states since *Roe v. Wade*. *Id.*

⁴⁴ Center for Reproductive Rights, “Women’s Reproductive Rights in the United States: A Shadow Report” (Jun. 2006), 6, available at <https://www2.ohchr.org/english/bodies/hrc/docs/ngos/crr.pdf>.

⁴⁵ 2011 is the most recent year for which national data is available.

⁴⁶ Lawrence Finer and Mia Zolna, *Declines in Unintended Pregnancy in the United States, 2008-2011*, 373(9) NEW ENGLAND J. MED. (Mar. 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4861155/pdf/nihms775633.pdf>.

⁴⁷*Id.*

economically disadvantaged women, women aged 18-24, cohabitating women and women of color.⁴⁸

c. The State Landscape: New York's Abortion Laws

New York's current abortion laws date back to 1970, three years before *Roe v. Wade* prohibited states from banning abortion.⁴⁹ While New York state's laws on terminating pregnancy are widely considered less restrictive than those in many other states,⁵⁰ which often impose long waiting periods, consent requirements, strict facility codes, and other statutory obstacles,⁵¹ some pro-choice advocates now consider the state abortion law, once considered one of the most progressive in the country,⁵² outdated.⁵³

Under current New York state abortion law, abortion is a criminal act unless 1) it is performed before the 24th week of pregnancy, or 2) it is necessary to preserve a woman's life under Penal Law § 125.05(3). New York state law makes an illegal abortion a Class E or D felony, under Penal Law §§ 125.40 (second degree) and 125.45 (first degree). If the mother dies

⁴⁸ Susheela Singh, Gilda Sedgh et al., *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41(4) STUDIES IN FAMILY PLANNING (2010), available at <http://mpts101.org/docs/SinghSFP-UnintendedPregnancy.pdf>.

⁴⁹ <https://www.democratandchronicle.com/story/news/politics/albany/2018/06/29/supreme-court-new-york-abortion-debate/745585002/>

⁵⁰ FindLaw, *New York Abortion Laws* (last visited Sep. 17, 2018), available at <https://statelaws.findlaw.com/new-york-law/new-york-abortion-laws.html>; League of Women Voters of New York, *Women's Equality* (last visited Sep. 17, 2018), available at <http://www.lwvny.org/advocacy/womens-issues/womens-equality-act.html>.

⁵¹ FindLaw, *State Abortion Laws* (last visited Sep. 17, 2018), available at <https://statelaws.findlaw.com/family-laws/abortion.html>.

⁵² Some consider the 1970 law the most permissive abortion law in America, one that "defined New York state as the country's abortion refuge." Some still see New York as advanced because Medicaid HMO pays for abortions for low-income women, teenagers don't need a parent's permission to have an abortion and there are no 24-hour waiting periods. See e.g., <http://www.safestabortion.com/in-the-know/abortion-laws/>;

<https://www.rochestercitynewspaper.com/rochester/advocates-lawmakers-push-for-abortion-law-vote/Content?oid=7490370>;

<https://www.nytimes.com/2018/07/19/us/politics/new-york-abortion-roe-wade-nyt.html>

⁵³ <https://www.law.columbia.edu/events/outdated-and-dangerous-new-yorks-abortion-laws-are-failing-us>;

<https://www.rochestercitynewspaper.com/rochester/advocates-lawmakers-push-for-abortion-law-vote/Content?oid=7490370>;

<https://www.democratandchronicle.com/story/news/politics/albany/2018/06/29/supreme-court-new-york-abortion-debate/745585002/>;

Christina Cauterucci, *New York State Still Bans Abortions After 24 Weeks. A Proposed Law Could Offer Exceptions*, SLATE (May 25, 2017), available at

http://www.slate.com/blogs/xx_factor/2017/05/25/new_york_state_still_bans_abortions_after_24_weeks_a_proposed_law_could.html;

New York Senate, *Reproductive Health Act* (last visited Sep 17, 2018) available at

<https://www.nysenate.gov/issues/reproductive-health-act>.

from the abortion, the doctor has committed a class B felony,⁵⁴ whereas self-performed abortion, and distributing abortion articles, are class B or A misdemeanors⁵⁵ under Penal Law §§ 125.50 (second degree) and 125.45 (First degree). There are no exceptions in the current law for the preservation of a woman's health or for situations in which the fetus is not viable. Additionally, under New York state law, abortions past 12 weeks of pregnancy must be performed in a hospital on an in-patient basis by a licensed physician.⁵⁶ For abortions performed beyond 20 weeks of pregnancy, a second physician must be present to care for any live birth that might occur.⁵⁷

The Reproductive Health Act (Assembly Bill 1748 / Senate Bill 2796),⁵⁸ currently in the state legislature, would update New York state's laws by removing abortion from the penal code⁵⁹ and legalizing abortions performed after 24-weeks' gestation in cases of fetal non-viability or threat to a woman's health. The Reproductive Health Act⁶⁰ would also expand upon those who can provide abortions to include health-care professionals other than doctors, such as nurse practitioners and physician assistants.⁶¹ Additionally, it would repeal Public Health Law

⁵⁴ New York Penal Law § 125.05, § 125.20, § 125.40-60; New York Pub. Health Law § 4164; FindLaw, *New York Abortion Laws* (last visited Sep. 17, 2018), available at <https://statelaws.findlaw.com/new-york-law/new-york-abortion-laws>.

⁵⁵ *Id.*

⁵⁶ New York Penal Law § 125.05, § 125.20, § 125.40-60.

⁵⁷ *Id.*

⁵⁸ New York State Senate, *Reproductive Health Act* (last visited Sep 17, 2018), available at <https://www.nysenate.gov/issues/reproductive-health-act>.

⁵⁹ *Id.*; Christina Cauterucci, *supra* note 24; New York Senate, *Reproductive Health Act* (last visited Sep 17, 2018), available at <https://www.nysenate.gov/issues/reproductive-health-act>.

⁶⁰ Or, an "Act to amend the public health law, in relation to enacting the reproductive health act and revising existing provisions of law regarding abortion; to amend the penal law, the criminal procedure law, the county law and the judiciary law, in relation to abortion; to repeal certain provisions of the public health law relating to abortion; to repeal certain provisions of the education law relating to the sale of contraceptives; and to repeal certain provisions of the penal law relating to abortion." See New York State Senator Liz Krueger, *Senate Bill S2796* (2017-2018), available at <https://www.nysenate.gov/legislation/bills/2017/S2796>; New York State Panel Law (last visited Sep. 17, 2018), available at <http://ypdcrime.com/penal.law/article125.htm#p125.05>.

⁶¹ New York State Senator Liz Krueger, *Senate Bill S2796* (2017-2018), available at <https://www.nysenate.gov/legislation/bills/2017/S2796>.

§ 4164,⁶² which requires an abortion after the 12th week of pregnancy to be performed in a hospital and only on an in-patient basis, and and repeal Penal Law §§ 125.40, 125.45, 125.50, 125.55 and 125.60, related to homicide, self-abortion, and related offenses.⁶³ The law would not enact any major changes in the way abortion is provided in New York. The state Assembly passed the bill in March 2018 and it is currently with the state Senate’s Health Committee.⁶⁴

This is not the first effort to update New York’s abortion laws. In 2016, New York’s former attorney general, Eric Schneiderman, issued an opinion stating that the state must make exceptions in the case of a health-threatening pregnancy or an unviable late-term fetus,⁶⁵ in an attempt to bring the state’s abortion laws closer in line with the U.S. Supreme Court.⁶⁶ While this opinion “allows hospitals and other abortion providers to perform late-term abortions without fear of prosecution,”⁶⁷ the State law passed in 1970 remains in effect. The law will not change without further legislative efforts.⁶⁸

⁶² Public Health Law § 4164, *available at* <https://codes.findlaw.com/ny/public-health-law/pbh-sect-4164.html>.

⁶³ *See* New York Penal Law § 125.05, § 125.20, § 125.40-60.

⁶⁴ New York State Assembly, *Assembly Bill A01748* (2017-2018), *available at* https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A01748&term=2017&Summary=Y&Actions=Y&Text=Y#jump_to_Actions (providing an overview under “Actions”).

⁶⁵ Office of Attorney General Eric T. Schneiderman, *Formal Opinion No. 2016-F1* (Sep. 7, 2016), *available at* https://ag.ny.gov/sites/default/files/abortion_opinion_2016-f1.pdf.

⁶⁶ Christina Cauterucci, *New York Women Can Now Get Legal Late-Term Abortions in More Cases*, SLATE (Sep. 9, 2016), *available at* http://www.slate.com/blogs/xx_factor/2016/09/09/new_york_women_can_now_get_legal_late_term_abortions_in_more_cases.html.

⁶⁷ Vivian Yee, *New York Can’t Block Late-Term Abortion in Certain Cases, Scheiderman Says*, NEW YORK TIMES (Sep. 7, 2016), *available at* <http://www.nytimes.com/2016/09/08/nyregion/new-york-late-term-abortion-schneiderman.html>; Christina Cauterucci, *New York Women Can Now Get Legal Late-Term Abortions in More Cases*, SLATE (Sep. 9, 2016), *available at* http://www.slate.com/blogs/xx_factor/2016/09/09/new_york_women_can_now_get_legal_late_term_abortions_in_more_cases.html.

⁶⁸ There are several different channels to achieve this goal. Options include through a Constitutional Amendment which would require the question to be heard by the state legislature twice and then put on the ballot or through statute, such as with the Reproductive Health Act. *See, e.g.*, Amendment on Initiative of Legislative, 20 N.Y. Jur. 2d Constitutional Law § 7.

III. ISSUES AND CONCERNS

a. Judge Kavanaugh's Potential Confirmation to the U.S. Supreme Court

In July 2018, Judge Brett Kavanaugh was nominated to replace Justice Anthony Kennedy on the U.S. Supreme Court.⁶⁹ During Judge Kavanaugh's confirmation hearings, documents obtained by news outlets seemed to raise doubts about whether Judge Kavanaugh considers *Roe v. Wade v. Wade* to be "settled law."⁷⁰ While the documents do not indicate how Judge Kavanaugh would rule in future cases looking to reverse *Roe v. Wade*,⁷¹ there are at least a few signs, in a recent lecture and his dissent in a case involving access to abortion, suggesting that Judge Kavanaugh might be more receptive to laws and policies restricting abortion.⁷²

Advocates have also voiced concerns with Judge Kavanaugh's approach to defining the scope of individual liberty under the Constitution.⁷³ They find his approach to be at odds with the Court's jurisprudence protecting the right to abortion.⁷⁴ Judge Kavanaugh has repeatedly praised U.S. Supreme Court justices for tying liberty to only those rights "deeply rooted in this Nation's history and tradition," which excludes a women's right to choose.⁷⁵ Fearing Judge Kavanaugh's confirmation will setback reproductive rights protections, advocates now seek stronger laws and policies at the state and local level to protect women's right to choose.

⁶⁹ Domenico Montanaro, *Who is Brett Kavanaugh, President Trump's Pick for the Supreme Court?*, NPR (Jul. 9, 2018), available at <https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court>.

⁷⁰ Sheryl Gay Stolberg, Charlie Savage and Adam Liptik, *Here's What Happened on Day 3 of the Kavanaugh Confirmation Hearings*, NEW YORK TIMES (Sep. 6, 2-018), available at <https://www.nytimes.com/2018/09/06/us/politics/kavanaugh-hearing-confirmation.html>.

⁷¹ *Id.*

⁷² Amy Howe, *Judge Kavanaugh on Abortion: Rehnquist as "judicial hero" and the Case of Jane Doe*, SCOTUSBLOG (July 18, 2018), available at <http://www.scotusblog.com/2018/07/judge-kavanaugh-on-abortion-rehnquist-as-judicial-hero-and-the-case-of-jane-doe/>.

⁷³ Center for Reproductive Rights, *Report on the Nomination of Judge Brett Kavanaugh to be Associate Justice of the Supreme Court* (Aug. 30, 2018), available at <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/PublicReportonJudgeBrettKavanaugh.pdf>.

⁷⁴ *Id.*

⁷⁵ *Id.*

b. The Domestic Gag Rule

Additional expressed concerns relate to potential cuts to Title X, or a “domestic gag rule,” which would apply restrictions to health providers that receive federal Title X funds.⁷⁶ The purpose of Title X, officially known as Public Law 91-572 or "Population Research and Voluntary Family Planning Programs," is to promote positive birth outcomes and healthy families by allowing individuals to decide the number and spacing of their children, and the funds assist low-income patients with accessing services such as contraceptive counseling and testing for sexually transmitted infections.⁷⁷ This is the sole federal program dedicated to family planning services,⁷⁸ and any cuts to Title X eligibility also affects 340B funding, which allows health centers to negotiate significantly better drug pricing.⁷⁹

According to the U.S. Department of Health and Human Services’ Office of Population Affairs (OPA), which administers Title X, Title X currently supports about 4,000 safety-net family planning sites that collectively serve four million women, men, and adolescents per year. In New York State, there are currently two grantees of Title X funding: Public Health Solutions (PHS) and the New York State Department of Health (NYSDOH). PHS sub-grantees include organizations like Community Health Network (CHN) and Planned Parenthood of New York (PPNY), while 11 hospitals in NYC receive funding through NYSDOH. Together, NYSDOH and PHS receive a total of \$25 million per year in Title X grants.⁸⁰

⁷⁶ See U.S. Department of Health & Human Services, Office of Population affairs, *Title X Family Planning* (last visited Sep. 17, 2018), available at <https://www.hhs.gov/opa/title-x-family-planning/index.html>; The Office of NYC Comptroller Scott M. Stringer, *Title X Funding in NYC: A Critical Resource That Must Be Protected* (Aug. 2017), available at https://comptroller.nyc.gov/wp-content/uploads/documents/Title_X_Funding_in_NYC.pdf; Public Law 91-572 (Dec. 25, 1970).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ New York city and state residents current have access to Medicaid coverage of abortion, regardless of immigration status, and laws prohibiting copays for abortion coverage. According to NIRH, however, abortion remains prohibitively expensive for many people, with the average cost ranging from \$523 at 10 weeks gestation to

Public programs, including Medicaid and the Title X national family planning program, are important for providing women with access to affordable contraceptive services and information. In 2014, 7.8 million women across the U.S. received publicly-funded family services, which helped women avoid 2 million unintended pregnancies, which would likely have resulted in 914,000 unplanned births and nearly 680,000 abortions (with the remainder likely resulting in miscarriages).⁸¹ Without such public access, the numbers of unintended pregnancies, unplanned births and abortions in the U.S. would have been 68 percent higher—and 73 percent higher for girls 15-19 years old.⁸²

In 2014, such family planning services helped avert 94,500 unintended pregnancies in New York, which would have resulted in 45,900 unplanned births and 34,100 abortions.⁸³ Averting unintended pregnancies and other negative reproductive health outcomes through publicly-funded health centers in New York saved the federal and state governments \$829 million in 2010.⁸⁴ With such little need met through publicly-funded family planning services,⁸⁵

\$3,000 at 24 weeks, and providing opportunity and access to women matters, however, because legal abortion is meaningless if it is not affordable. See New York Abortion Access Fund, *About* (last visited Sep. 17, 2018), available at <https://www.nyaaf.org/about/>.

⁸¹ Jennifer J. Frost, Lori F. Frohwirth, et al., *Contraceptive Needs and Services, 2014 Update*, GUTTMACHER INSTITUTE (2016), available at https://www.guttmacher.org/sites/default/files/report_pdf/contraceptive-needs-and-services-2014_1.pdf.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The term “domestic gag rule” is borrowed from the “global gag rule” that the Trump administration reinstated and expanded last year, which bans family planning clinics located abroad that receive aid money from the United States from performing abortions or even discussing abortion with their patients. The global gag rule has resulted in clinic closures, reductions in medical services around the world, and an increase in unsafe abortions in some places, and many advocates are concerned that the domestic gag rule will essentially have the same effect domestically. It would prohibit Title X recipients from counseling around or referring to abortion services, including a prohibition on providing a response if a patient specifically asked about abortion services. See, e.g., National Family Planning and Reproductive Health Association, *Domestic Gag Rule* (June 2017), available at <https://www.nationalfamilyplanning.org/file/Domestic-Gag-Fact-Sheet.pdf>; Korin Miller, *Here's What a 'Domestic Gag Rule' on Abortion Would Actually Mean for All of Us*, SELF (May 22, 2018), available at <https://www.self.com/story/domestic-gag-rule-abortion-what-this-means>; Kinsey Hasstedt, *A Domestic Gag Rule and More: The Administration's Proposed Changes to Title X*, GUTTMACHER INSTITUTE (June 18, 2018), available at <https://www.guttmacher.org/article/2018/06/domestic-gag-rule-and-more-administrations-proposed-changes-title-x>.

safe and legal abortion, which the Centers for Disease Control and Prevention (CDC) define as “an intervention performed by a licensed clinician (e.g., a physician, nurse-midwife, nurse practitioner, or physician assistant) that is intended to terminate an ongoing pregnancy,”⁸⁶ is an essential component of family planning.⁸⁷

c. Additional Concerns: The Cost of Unintended Pregnancies

It is estimated that nearly one in four women will have an abortion in her lifetime.⁸⁸ Abortion is considered to be one of the safest surgical procedures for women in the U.S.⁸⁹ Despite the safety of the procedure, access to abortion, stigma, and harassment around abortion still remain prevalent in New York State.⁹⁰ In New York state, more than half (55 percent or 246,000) of all pregnancies in the state in 2010 alone were unintended.⁹¹ Thirty-four percent of those unintended pregnancies resulted in births, 54 percent in abortions, and the remainder ended in miscarriages.⁹² Among girls 15-19 years old, the pregnancy rate was 45 per 1,000 in the state, compared to 43 per 1,000 nationally, in 2013.⁹³ Nationally, the majority (75 percent) of

⁸⁶ Centers for Disease Control and Prevention, *CDCs Abortion Surveillance System FAQs: Reproductive Health* (Nov. 2017), available at https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm.

⁸⁷ Carolyn Curtis, Douglas Huber, et al., *Postabortion Family Planning: Addressing the Cycle of Repeat Unintended Pregnancy and Abortion*, 36(1) INTL PERSP. ON SEX. & REPR. HEALTH (Mar. 2010), available at https://www.guttmacher.org/sites/default/files/article_files/3604410.pdf.

⁸⁸ Rebecca Wind, *Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INSTITUTE (Oct. 19, 2017), available at <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>.

⁸⁹ The National Academies of Science, Engineering and Medicine, *The Safety and Quality of Abortion Care in the United States* (Mar. 2018), available at <http://nationalacademies.org/hmd/reports/2018/the-safety-and-quality-of-abortion-care-in-the-united-states.aspx>; Guttmacher Institute, *supra* note 31; Tracy Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants under a California Legal Waiver*, 103(3) AMERICAN JOURNAL OF PUBLIC HEALTH 454–461 (2013).

⁹⁰ National Institute for Reproductive Health, *When Self-Abortion is a Crime: Laws That Put Women At Risk* (last visited Sep. 31, 2018), available at <https://www.nirhealth.org/wp-content/uploads/2017/06/SIA-Exec-Summary-FINAL1.pdf>.

⁹¹ Kathryn Kost, *Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002*, GUTTMACHER INSTITUTE (Jan. 2015), available at https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf.

⁹² *Id.*

⁹³ *Id.*

adolescent pregnancies are unintended, accounting for about 15 percent of all unintended pregnancies annually.⁹⁴

The cost of such unintended pregnancies is high, and can be prevented through proper sex education and access to contraception. In 2014, more than 1.2 million women 13-44 years old in New York were in need of publicly-funded family planning services.⁹⁵ Publicly-supported family planning centers served 390,350 female contraceptive clients in 2014, meeting 32 percent of New York women's need for contraceptive services and supplies, compared with 26 percent of met need nationally.⁹⁶ The cost of such services in the state totaled \$127.5 million, including \$83 million through Medicaid, \$11.6 million through Title X and \$29.4 million from New York.⁹⁷

VI. CONCLUSION

At this hearing, the Committee will seek information on abortion and reproductive rights in New York state and urge the New York State Legislature to pass and the Governor to sign the Reproductive Health Act. The Committee will also seek to review policies and procedures intended to address and protect the health and wellbeing of women and is interested in hearing about best practices and model policies in other jurisdictions.

RESOLUTION No. 84-2018

This resolution is intended to ensure that New York State is providing necessary safeguards for New York's women in the face of eroding federal protections by urging the state to pass the Reproductive Health Act. This Act would codify current federal law into state law,

⁹⁴ Lawrence Finer and Mia Zolna, *supra* note 46.

⁹⁵ Jennifer J. Frost, Lori F. Frohwirth, et al., *supra* note 84.

⁹⁶ *Id.*

⁹⁷ Adam Sonfield and Rachel Benson Gold, *Public Funding for Family Planning, Sterilization and Abortion Services, FY 1980-2010*, GUTTMACHER INSTITUTE (Mar. 2012), available at https://www.guttmacher.org/sites/default/files/report_pdf/public-funding-fp-2010.pdf.

would also take abortion out of the penal code, and regulate abortion as a matter of public health and medical practice.

Res. No. 84

Resolution urging the New York State Legislature to pass and the Governor to sign the Reproductive Health Act.

By The Public Advocate (Ms. James) and Council Members Brannan, Rosenthal, Ayala and Rivera

Whereas, In 1970, New York State was one of the first states in the nation to support the reproductive rights of women by pioneering legislation that decriminalized abortion; and

Whereas, This legislation was groundbreaking and crucial to ensuring the reproductive health and freedom of women; and

Whereas, In 1973, the United States Supreme Court legalized abortion throughout the country with the Roe v. Wade decision; and

Whereas, Following this ruling many states passed laws limiting women's ability to access the procedure in an effort to erode the rights granted by the Supreme Court; and

Whereas, According to the Guttmacher Institute, between 2011 to 2016, there have been 334 abortion restrictions adopted nationally, constituting 30 percent of all abortion restrictions enacted since the 1973 decision; and

Whereas, Furthermore, members of Congress who have anti-abortion positions have been trying for several years to pass a national ban on all abortions at or after 20 weeks of pregnancy; and

Whereas, In addition, President Donald Trump stated his intention to appoint a Supreme Court Justice who will help overturn Roe v. Wade; and

Whereas, The ability to access safe abortions is necessary so that women can plan their families without risking their health; and

Whereas, The Guttmacher Institute notes that improved contraceptive use has helped women to better avoid unintended pregnancies, and as a result, the national abortion rate declined to 17 per 1,000 women aged 15-44 in 2011, the lowest since 1973; and

Whereas, According to the New York City (NYC) Department of Health and Mental Hygiene, in 2013, almost 6 in 10 known pregnancies among NYC women were unintended; and

Whereas, While abortion rates have declined, women who are struggling financially experience higher levels of abortion; and

Whereas, In 2011, there were 225 abortion providers in New York state, and 94 of those were in clinics, which was a 10 percent decline in overall providers and a 9 percent decline in clinics from 2008; and

Whereas, According to the New York Civil Liberties Union, 7 out of 10 New Yorkers support a woman's right to choose; and

Whereas, The New York State legislation passed in 1970 is now outdated and needs revision; and

Whereas, On January 17, 2017 the New York State Assembly passed the Reproductive Health Act, as it has for the past several legislative sessions; and

Whereas, Despite having overwhelming support of New Yorkers, the New York State Senate continues to deny the passage of this legislation; and

Whereas, The Reproductive Health Act is legislation that would provide safeguards for New York's women in the face of eroding federal protections by codifying current federal law into state law; and

Whereas, The Reproductive Health Act would also take abortion out of the penal code, and regulate it as a matter of public health and medical practice; and

Whereas, It is critical that the New York State Legislature takes action to pass this legislation to explicitly outline these fundamental rights in state law; and

Whereas, The rights of women should include full control over their bodies and reproductive choices; and

Whereas, It is now more vital than ever for New York to take the lead and stand up for the health and freedom of its women; now, therefore, be it

Resolved, That the Council of the City of New York urges the New York State Legislature to pass and the Governor to sign the Reproductive Health Act.

Res. 1416-2017/LS 9627
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