

May 5, 2017

The Honorable Mark Dayton  
Governor of Minnesota  
130 State Capitol  
75 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155

Dear Governor Dayton:

The Center for Reproductive Rights urges you to veto House Bills 809 and 812, which would enact discriminatory, harmful, and unconstitutional public policies in Minnesota. House Bill 809 would prohibit state insurance plans from covering abortion services even when necessary to preserve a woman's health, and House Bill 812 would impose unnecessary and likely unconstitutional red tape regulations on abortion facilities in Minnesota. These bills would significantly impact women's access to essential reproductive healthcare and raise serious health policy and constitutional concerns.

The Center for Reproductive Rights is a legal advocacy organization dedicated to protecting the rights of women to access safe and legal abortion and other reproductive health care. For nearly 25 years, we have successfully challenged restrictions on abortion throughout the United States, including in Minnesota. Indeed, just last June, we won the landmark case *Whole Woman's Health v. Hellerstedt*, in which the U.S. Supreme Court reaffirmed the Constitution's robust protections for a woman's decision to have an abortion. And, we brought a case in Minnesota state court more than two decades ago challenging a nearly identical ban on insurance coverage for low-income women accessing abortion care. In that case, the Minnesota Supreme Court established strong constitutional protections for abortion under the Minnesota constitution. This letter sets forth the constitutional and health policy flaws contained in House Bills 809 and 812.

**I. House Bill 809 is Unconstitutional Under the Minnesota Constitution and Would Enact Harmful Public Policy.**

House Bill 809 would prohibit "state-sponsored health programs" from covering abortion care, including medically necessary abortions, unless the abortion qualifies for federal funding under

Medicaid.<sup>1</sup> This law would impact many people, including low-income women enrolled in Medicaid and state employees who have state-sponsored health insurance.

a. House Bill 809 is Unconstitutional.

The Minnesota legislature attempted to enact a similar restriction in 1992, in that case restricting Medicaid funds for abortion. The Center filed a lawsuit, *Doe v. Gomez*, challenging that restriction, and the law was ultimately struck down as unconstitutional by the Supreme Court of Minnesota.<sup>2</sup> In the *Gomez* case, the state supreme court recognized that the Minnesota constitution provides strong protection for the right to privacy, including “a woman’s right to decide to terminate her pregnancy,” which is a “decision . . . of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities.”<sup>3</sup> Moreover, the state constitution protects not just the right to have an abortion, but also “the woman’s *decision* to [obtain an abortion].”<sup>4</sup> As a result, any law that infringes on this decision will be subject to the strictest scrutiny, requiring the state to show that it has a compelling interest in violating that fundamental right.<sup>5</sup> Importantly, a state appellate court recently reaffirmed the core holding of *Gomez* in 2014.<sup>6</sup>

House Bill 809 would directly interfere with the child-bearing decisions of Minnesota women and unequivocally violate the core holding in *Gomez*. In particular, the bill would burden low-income women by subsidizing child-birth related health services, but prohibiting any assistance for abortion services except in very narrow circumstances that would exclude the vast majority of medically necessary procedures.<sup>7</sup> In *Gomez*, the Minnesota Supreme Court addressed this precise issue and held that a state law that funds “child-birth related health services,” but refused to fund “abortions [for Medicaid] eligible women when the procedure is necessary for therapeutic reasons,” directly “infring[es] on the fundamental right to privacy” and does not

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<sup>1</sup> Current federal law permits Medicaid and Medicare funding for abortions that are necessary to save the woman’s life or where the pregnancy is a result of rape or incest. *See, e.g.*, Centers for Medicare and Medicaid Services, Medicare Benefit Policy Manual, Chapter 1 – Inpatient Hospital Services Covered under Part A, *available at* <http://www.cms.gov/manuals/Downloads/bp102c01.pdf>.

<sup>2</sup> *Doe v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995).

<sup>3</sup> *Id.* at 27.

<sup>4</sup> *Id.* at 31 (emphasis added).

<sup>5</sup> *See id.*

<sup>6</sup> *Walker v. Jesson*, 2014 WL 1758210 at \*2 (Minn. Ct. App. May 5, 2014).

<sup>7</sup> *See infra* n.1.

“withstand strict scrutiny.”<sup>8</sup> House Bill 809 seeks to re-enact the same unconstitutional policy and would doubtlessly meet with the same result in court.<sup>9</sup>

b. House Bill 809 Would Damage Public Health Policy by Allowing Politicians to Deny a Woman’s Health Coverage Just Because She’s Poor.

In addition to being unconstitutional, House Bill 809 would create destructive, misguided policy that would discriminate against Minnesotans, particularly women of color, who are disproportionately low-income. The federal restrictions on Medicaid funding for abortion, which apply in some parts of the United States but not in Minnesota, unfairly limit access to essential reproductive health care for many impoverished women and have imposed serious and life-altering burdens on women in many states. In contrast to this harmful federal policy, Minnesota courts have affirmed that the state constitution safeguards women’s health and well-being by ensuring that every woman has insurance coverage for abortion care if she needs it.

Abortion is an essential part of reproductive healthcare and the harms imposed by the prohibitions on federal funding for this critical service are well documented. For example, some poor women who need abortion services are forced to forego paying for basic necessities, such as rent, food, or clothes for their children, in order to gather the funds to pay for their abortions. Others must work extra hours or borrow money from friends or family. Moreover, the restrictions on federal funding for abortion disproportionately impact women of color, who are more likely to be low-income and reliant on Medicaid than white women. A woman’s income should never dictate whether she can access reproductive health care.

The federal policy prohibiting funding for abortion is both harmful and discriminatory, and should not be extended to Minnesota. However we feel about abortion, politicians should never deny a woman’s health coverage just because she’s poor. We urge you to veto House Bill 809.

**II. House Bill 812 Would Single out Abortion Providers For Targeted Regulation in Violation of *Whole Woman’s Health*.**

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<sup>8</sup> *Gomez*, 542 N.W.2d at 31-32.

<sup>9</sup> The fact that these funding restrictions are permissible under federal law is irrelevant, as the *Gomez* court expressly rejected *Harris v. McRae*, 448 U.S. 297 (1980), the U.S. Supreme Court’s decision finding that the federal funding restrictions do not violate the U.S. Constitution. *Gomez*, 542 N.W.2d at 19; *id.* at 29-30 (“to the extent that *McRae* stands for the proposition that a legislative funding ban on abortion does not infringe on a woman’s right to choose abortion, we depart from *McRae*”).

House Bill 812 creates a regulatory scheme that would single out abortion providers for disparate treatment in licensing and inspection requirements. The bill would require *only* abortion facilities, and not doctors' offices and other health care facilities that provide comparable procedures, to obtain licenses, accreditation, and be subject to unannounced inspections.

This requirement is constitutionally suspect under the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt*.<sup>10</sup> *Whole Woman's Health* provides a robust reaffirmation of prior Supreme Court decisions affording strong constitutional protection to women's right to terminate a pregnancy.<sup>11</sup> Notably, the U.S. Supreme Court in *Whole Woman's Health* issued a strong rebuke against abortion restrictions that do not provide a health benefit for patients, and requires courts to carefully scrutinize the facts presented by the state in support of the regulation.<sup>12</sup> The Court made clear that even if a law regulating abortion care serves a valid state interest, its benefits must outweigh its burdens in order to pass constitutional muster.<sup>13</sup>

House Bill 812 is divorced from any legitimate health-related state interest, as the bill requires a separate licensing scheme only for abortion providers, and makes no similar requirement of other health care facilities that provide comparable procedures. The state is unlikely to offer credible evidence that this licensing scheme increases patient safety or addresses health needs of abortion patients in Minnesota. We therefore believe House Bill 812 would fail under the robust legal standard announced by *Whole Woman's Health*. In addition, to the extent the strict scrutiny standard is more demanding than the undue burden standard, the bill also fails under the Minnesota constitution, which requires courts to subject laws that infringe on the fundamental right to privacy to the most stringent standard of judicial review.<sup>14</sup> We urge you to veto this measure.

### III. Conclusion

House Bills 809 and 812 are unconstitutional, harmful public policies and would significantly impede women's access to essential reproductive healthcare. We thank you for vetoing similar abortion restrictions in the past, and urge you to veto this legislation as well.

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<sup>10</sup> 136 S.Ct. 2292 (2016).

<sup>11</sup> *Whole Woman's Health*, 136 S.Ct. at 2309-10.

<sup>12</sup> *Id.* at 2113 (“[W]hen determining the constitutionality of laws regulating abortion procedures,” courts must place “considerable weight upon evidence . . . presented[.]”); *id.* at 2310 (courts cannot give “uncritical deference” to the facts supporting the government’s position).

<sup>13</sup> *See id.*

<sup>14</sup> *Gomez*, 542 N.W.2d at 31.

Please do not hesitate to contact us with any questions or for additional information.

Sincerely,



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