

April 12, 2010

**VIA FACSIMILE AND FEDERAL EXPRESS**

The Honorable Dave Heineman  
Governor of Nebraska  
P.O. Box 94848  
Lincoln, NE 68509-4848

**Re: Legislative Bill 594**

Dear Governor Heineman,

The Center for Reproductive Rights opposes Legislative Bill 594 and urges you to veto this measure. Legislative Bill 594 would require physicians to comply with vague, confusing and possibly harmful counseling requirements, and could prevent women in Nebraska from accessing abortion.

The Center for Reproductive Rights is a non-profit advocacy organization that seeks to advance reproductive freedom as a fundamental human right. A key part of our mission is ensuring that women throughout the United States have meaningful access to high-quality, comprehensive reproductive health care services. As a part of that mission, we have litigated cases all over the United States that secure the rights of women to have safe and legal abortions, including in Nebraska. In light of our knowledge and experience, we believe that Legislative Bill 594 is unconstitutionally vague, would interfere with doctors' ability to provide appropriate and ethical medical care, and would threaten a woman's constitutional right to choose to terminate her pregnancy.

**I. LB 594 Is Unconstitutionally Vague and May Prevent Women From Accessing Essential Reproductive Healthcare**

Legislative Bill 594 would require physicians to "screen" and counsel women for any risk factor that has been documented to have an "association" with abortion in a peer-reviewed study before being permitted to provide their patients with abortions. The definition of "risk factor" includes "any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with one or more complications associated with abortion." The bill would also require the physician to determine whether any such risk factors make it more or less likely that the woman will suffer a complication from having an abortion or carrying a pregnancy to term. Failure to identify any single risk factor could carry a civil penalty of ten thousand dollars.

This screening requirement is unconstitutionally vague. The Due Process Clause of the United States Constitution requires that laws adequately describe the conduct prohibited so that both

those who must conform their conduct to the law and those charged with enforcing the law can understand their obligations.<sup>1</sup> Moreover, statutes that threaten to inhibit the exercise of constitutionally protected rights, such as a woman's right to obtain an abortion, must meet an exacting standard of clarity.<sup>2</sup>

Legislative Bill 594 fails to meet that standard. The bill fails to give physicians sufficient guidance regarding how to compile the list of "risk factors" they are required to use in screening patients. The fact that a study has been published does not mean that the evidence is uncontroverted – studies published in peer-reviewed journals often reach ambiguous conclusions or have their methodology questioned by other studies or researchers. Moreover, peer reviewed journals often publish studies with conclusions that conflict with those reached in other studies. This bill provides no instruction as to how to discern whether to include potential factors in the compilation when it is unclear whether they meet the definition of risk factor or there are conflicting peer-reviewed conclusions about whether there is any association. Therefore, the bill fails to provide constitutionally adequate guidance as to how to comply and creates the potential that physicians will be chilled from providing abortions for fear of violating the law.

## **II. LB 594 Will Require Physicians To Violate Medical Ethics and Standards of Care**

Legislative Bill 594 removes physician discretion regarding how best to advise their patients, requiring physicians to screen and then counsel patients about *any* "risk factors" that have been identified as having an "association" with abortion. This requirement directly conflicts with appropriate medical care. Medical ethical guidelines and practice rules require physicians to counsel patients on risks relevant to that specific patient: The American Medical Association, for example, states that "[t]he quantity and specificity of [information given to patients to allow informed consent] should be tailored to meet the preferences and needs of individual patients."<sup>3</sup> Accordingly, physicians who provide abortions, like all other physicians, counsel patients about risks according to their training, judgment, experience, and the evidence before them, and allow patients to weigh those risks appropriately.<sup>4</sup> By requiring physicians who perform abortions to counsel patients about risks that may be misleading, conflicting or irrelevant, and that are not tailored to the needs of those patients, this bill will force physicians to practice medicine in violation of their medical training and ethics.

Moreover, the bill does not permit physicians to omit risks factors even if they believe that a particular study reporting an adverse effect is methodologically flawed. Finally, because the bill requires identifying risks that have an "association" with abortion, rather than those that have been shown to be caused by abortion, the bill will require counseling about "risks" that may not even be related to the patient's abortion decision.

## **III. Conclusion**

Legislative Bill 594 would enact the nation's most confusing, vague and onerous counseling

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<sup>1</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

<sup>2</sup> See *Colautti v. Franklin*, 439 U.S. 379, 389 (1979) (citing *Grayned*, 408 U.S. at 109).

<sup>3</sup> "Informed Consent," AMERICAN MEDICAL ASSOCIATION CODE OF ETHICS, § E-8.08, available at <http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.shtml>.

<sup>4</sup> In addition, physicians who provide abortions in Nebraska give their patients state-mandated counseling and information. See Neb. Rev. Stat. § 28-327 (2009).

requirements. Requiring physicians to create a laundry list of ever-changing, possibly false or misleading, and irrelevant risk factors has no basis in sound medicine or policy and will serve to only harm the women of Nebraska and their physicians. Rather than improve women's health, Legislative Bill 594 will make it more difficult for physicians to provide and women to obtain constitutionally protected, essential reproductive healthcare.

We urge you to veto Legislative Bill 594. Please do not hesitate to contact us if you would like further information.

Sincerely,



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