

**CENTER
FOR
REPRODUCTIVE
RIGHTS**

March 26, 2013

VIA FEDERAL EXPRESS AND FACSIMILE

The Honorable Jack Dalrymple
Governor of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0100
Fax: (701) 328-2205

Re: Senate Bill 2305

Dear Governor Dalrymple:

The Center for Reproductive Rights strongly opposes Senate Bill 2305, and urges you to veto this measure. As we stated in our letter to you on March 18th, all of the extreme abortion bans before you are unconstitutional and we urge you to veto all three bills now on your desk, House Bill 1456, House Bill 1305 and this bill. These bills would prevent women from accessing critical reproductive healthcare and threaten physicians with criminal penalties for providing standard medical care. In this letter, we will outline the primary policy and constitutional objections to Senate Bill 2305.

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 in North Dakota and all over the United States that secure the rights of women to access reproductive healthcare, including safe and legal abortions. Notably, we have represented Red River Women's Clinic, the sole abortion clinic in the state, in multiple lawsuits against the State of North Dakota relating to restrictions on abortion and are currently engaged in litigation involving HB 1297 passed in 2011, which has been enjoined by a court pending trial.¹ The bills before you are the most extreme, unconstitutional and harmful legislation considered in North Dakota since *Roe v. Wade*. We urge you to carefully consider the implications of each of these bills and to reject them all.

I. Senate Bill 2305 Would Impose Medically Unnecessary, Unreasonable Requirements With the Goal of Banning Abortions in North Dakota

Senate Bill 2305 would require any physician who provides abortions in North Dakota to "have admitting privileges at a hospital located within thirty miles . . . of the abortion facility and

¹ *MKB M'gmt Corp. v. Burdick*, No. 09-2011-CV-02205, 2012 WL 1360641 (Cass Cty., N.D. Dist. Ct. Feb. 16, 2012).

staff privileges to replace hospital on-staff physicians at that hospital.” The bill seeks to eliminate abortion services in the state of North Dakota and is both medically unnecessary and unconstitutional.

A. Senate Bill 2305 Imposes Medically Unnecessary and Unreasonable Requirements

In North Dakota, Red River Women’s Clinic is the sole clinic providing abortion services. The clinic and its physicians are members in good standing of the National Abortion Federation and have provided safe abortion care and other reproductive health care services for women in North Dakota for almost 15 years. The clinic’s physicians are board certified in Family Medicine and have a combined total of over 30 years practicing medicine. These physicians provide the highest level of professional care to their patients, and provide services in Minnesota and South Dakota as well as North Dakota. However, none of these physicians have admitting privileges at a North Dakota hospital.

Abortion is an extremely safe procedure that rarely requires emergency care. Less than 0.3% of abortion patients experience a complication that requires hospitalization,² and both the mortality and morbidity associated with abortion are markedly lower than that associated with continuing a pregnancy to term.³ Because of the inherent safety of abortion procedures, abortion providers rarely if ever admit patients to a hospital. Requiring admitting privileges is neither medically necessary nor reasonable in this context: in general, physicians maintain admitting privileges at a hospital for the purpose of admitting and treating patients in that hospital and it is not typical for a physician who rarely admits to a hospital to maintain or be given such privileges. This point was made all the more clear during the House floor debate on this bill, when Representative Becker (R-Bismark), a physician himself, stood to note that he has done hundreds of surgeries in his office-based practice and is not required to have admitting privileges, and furthermore that having admitting privileges would not make his patients any safer in the event of a complication.

B. Senate Bill 2305 Is Unconstitutional

Senate Bill 2305 is likely to eliminate women’s access to abortion in North Dakota through the medically unnecessary and unreasonable requirement that any physician providing abortions in the state obtain admitting privileges at a local hospital. This bill is modeled on a bill enacted in Mississippi in 2012, which has since been partially enjoined as litigation challenging the law goes on.⁴ In Mississippi, as here, the point of the bill was clear – to ban abortion in the state, using this admitting privileges requirement to shut down the one remaining clinic providing abortion services in the state.

² See Facts on Induced Abortion in the United States, Guttmacher Institute, http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited March 25, 2013). Further, when such rare complications occur, federal law ensures that patients have access to hospital care. 42 U.S.C.A. §§1395dd(a),(b)(1),(e)(1) (West 2008). Thus, no abortion patient suffering a medical emergency can be denied examination, and treatment if necessary, by a hospital in North Dakota.

³ See, e.g. David Grimes & E. Raymond, *The comparative safety of legal induced abortion and childbirth in the United States*, 119 J. Obstet. & Gynecol. 215 (2012).

⁴ Jackson Women's Health Org. v. Currier, 878 F. Supp. 2d 714 (S.D. Miss. 2012).

As we discussed in our letter regarding House Bills 1456 and 1305, the United States Constitution protects a woman's right to determine when and whether to have children and to terminate a pregnancy until the point of viability.⁵ Although states may regulate the provision of abortion services throughout pregnancy, no state may impose a regulation on abortion that has either the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁶ In this case, SB 2305 is intended to and is likely to eliminate the provision of abortion services in North Dakota, clearly constituting a substantial obstacle in the path of all women seeking abortion in the state.

Moreover, it is both inappropriate and unconstitutional to give the hospitals in North Dakota the power to decide whether abortion should be available in this state: It is unfair to women who need these services and who have a constitutional right to access them and unfair to the hospitals, which will likely become the center of a political firestorm. Furthermore, this transfer of power over women's constitutional rights to local hospitals would constitute an improper delegation of legislative authority to a private party in violation of the Due Process clause.⁷ The Supreme Court and other courts have held that "the state cannot confer upon a private institution the exercise of an arbitrary and capricious power."⁸ The Constitution simply does not condone laws that condition one person's ability to exercise her constitutional rights on the approval of another person, who is free to withhold approval arbitrarily.⁹ This bill would thus violate the Due Process Clause of the United States Constitution by conferring on two hospitals in the North Dakota the absolute and complete power to determine whether individual women can exercise their constitutional rights.

⁵ See *Carey v. Pop. Servs. Int'l*, 431 U.S. 678, 685 (1977); accord *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

⁶ *Casey*, 505 U.S. at 879.

⁷ See, e.g., *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (striking down a law that prevented the use of land as a philanthropic home for children or the elderly unless such use had been consented to in writing by two-thirds of the property owners in the immediate vicinity, holding that the delegation of this authority by the government was "repugnant to the due process clause of the Fourteenth Amendment") see also *Santa Fe Natural Tobacco Co., Inc. v. Judge*, 963 F. Supp. 437 (M.D. Pa. 1997) (striking a law that "establishe[d] a system in which private approval is a prerequisite for public action" as unconstitutional delegation of power); *Hallmark Clinic v. N. Carolina Dep't of Human Resources*, 380 F. Supp. 1153, 1158-59 (E.D. N.C. 1974) (striking a law that allowed licensure of abortion facilities only if hospitals had signed a written transfer agreement or granted admitting privileges as conferring "upon a private institution the exercise of arbitrary and capricious power").

⁸ *Hallmark*, 380 F. Supp. at 1159.

⁹ See, e.g., *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (striking down a law that prevented the use of land as a philanthropic home for children or the elderly unless such use had been consented to in writing by two-thirds of the property owners in the immediate vicinity, holding that the delegation of this authority by the government was "repugnant to the due process clause of the Fourteenth Amendment") see also *Santa Fe Natural Tobacco Co., Inc. v. Judge*, 963 F. Supp. 437 (M.D. Pa. 1997) (striking a law that "establishe[d] a system in which private approval is a prerequisite for public action" as unconstitutional delegation of power); *Hallmark Clinic v. N. Carolina Dep't of Human Resources*, 380 F. Supp. 1153, 1158-59 (E.D. N.C. 1974) (striking a law that allowed licensure of abortion facilities only if hospitals had signed a written transfer agreement or granted admitting privileges as conferring "upon a private institution the exercise of arbitrary and capricious power").

II. Conclusion

Senate Bill 2305 is an unconstitutional, irrational measure designed to end abortion in North Dakota by imposing arbitrary requirements on the sole abortion clinic in the state. This legislation would impose serious costs on North Dakota women, who have both the right and need to access the healthcare it would ultimately ban. We urge you to veto this legislation. Please do not hesitate to contact us if you would like further information.

Sincerely,



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