



April 19, 2010

VIA FACSIMILE AND FEDERAL EXPRESS

The Honorable Brad Henry
Governor of Oklahoma
State Capitol Building
2300 N. Lincoln Blvd., Room 212
Oklahoma City, OK 73105

Re: House Bill 3284

Dear Governor Henry,

A few weeks ago, the Center for Reproductive Rights wrote to you to encourage you to veto the many restrictive abortion bills being considered by the Oklahoma legislature. We now write to reiterate our strong opposition to House Bill 3284, a bill that would enact the most onerous, burdensome and intrusive reporting requirements in the nation and would raise serious constitutional concerns. Although we have previously provided you with our legal analysis of this bill, we wanted to emphasize the following constitutional and policy concerns. We urge you to veto this legislation.

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 Oklahoma. In light of our background and experience, we believe that HB 3284 would intrude upon patient privacy, violate both patients' and physicians' constitutional rights under the United States and Oklahoma constitutions, and create poor public health policy.

House Bill 3284 would prevent women from obtaining constitutionally protected health care until after they have discussed with their physicians numerous intimate, private details of their personal life. Physicians would be required first to conduct this intrusive information-gathering and then to report this extremely personal information to the state. The state's department of health would then make this information available on a public website. The bill would also require reporting by physicians who do not provide abortions but who treat patients who may be experiencing any one of a number of unclear "complications" from abortion. Those physicians would be required to report those "complications" to the state whether or not there is actually a relationship between the woman's physical or emotional symptoms and a past abortion.

I. House Bill 3284 Would Impermissibly Intrude on Patient Privacy

House Bill 3284 would require abortion providers to seek information from patients about approximately ninety different factors and sub-factors about their lives. Most of the information would not be related to the woman's health or needs. Moreover, most of the information gathering would not be intended to provide a woman with any information that is relevant to her reproductive health care. Constitutional standards permit the state to *inform* women about facts relevant to their decision about whether to terminate a pregnancy.¹ House Bill 3284, on the other hand, asks each woman to *justify* her decision to seek an abortion. This requirement would unconstitutionally interfere with a woman's right to choose an abortion—nothing in the Constitution or the case law allows states to require women to justify their constitutionally protected decision to terminate a pregnancy.²

By forcing providers to probe into some of the most private aspects of women's lives, including their financial status, family makeup, and relationship status, and requiring the state to publish that extremely personal, private information on a public website, this bill would impermissibly intrude on women's and providers' privacy rights.³ Moreover, by requiring physicians to scrutinize their patients' personal lives for no valid health or medical reason, the bill would fundamentally change the nature and purpose of the physician-patient counseling process, inserting the state into the private relationship between health care provider and patient. The bill would therefore seriously interfere with the doctor-patient relationship serving no purpose other than to burden women's access to abortion care.

II. House Bill 3284 Would Violate Physicians' Rights Under the Federal and Oklahoma Constitutions and Would Result in Poor Public Health Policy

House Bill 3284 would unlawfully threaten the due process rights of physicians required to comply with this law. 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.⁴ Moreover, the Supreme Court has made clear that where, as is the case here, violation of a law carries criminal penalties or where the law will impact the exercise of a fundamental right, courts will give even closer scrutiny to ensure that the law provides clear guidance to those who must follow it.⁵

¹ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

² *Cf. id.* at 876 (permitting states to require that truthful, non-misleading information be given to patients, holding that the state may require information to be given to the patient to “ensur[e] a decision that is mature and informed”); see also *id.* at 877 (holding that an undue burden exists where “a state regulation has the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus . . . the means chosen by the State to further the interest in potential life must be calculated to *inform* the woman's free choice, not hinder it.” (emphasis added)).

³ The Supreme Court has recognized that individuals have a “privacy interest in keeping personal facts away from the public eye.” *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press* 489 U.S. 749 (1989); see also *Whalen v. Roe*, 429 U.S. 589 (1977).

⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁵ See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Colautti v.*

This bill imposes impermissibly vague requirements on physicians in Oklahoma, directing all doctors in the state to report so-called “complications” of abortion to the state but defining “complication” to include a list of vaguely worded conditions that have no credible scientific link to abortion, such as “emotional problems.” Moreover, the bill would require physicians to report complications that “a reasonably knowledgeable physician would judge is related to an induced abortion,” but provides no assurance that physicians would be protected from prosecution or liability if they fail to report a “complication” that they believe is not “related to abortion,” but that the Department of Health does consider to be “related.” Without further guidance, this bill would place providers in the impossible situation of having to screen women for an unlimited list of physical and emotional conditions that may have, at most, an attenuated relationship to a woman’s past abortion. The bill criminalizes any violation of the act, putting physicians’ due process rights in jeopardy by subjecting them to potential criminal penalties without appropriately guiding them on how to comply with the law, or adequately guiding those charged with enforcing it.⁶

In addition, House Bill 3284 would violate the Oklahoma Constitution by enacting an impermissible “special law.”⁷ “Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment.”⁸ House Bill 3284 would constitute a special law because it would require only abortion providers, but not other physicians who perform similar surgeries or procedures, to undertake extensive information gathering and reporting before performing a medical procedure.⁹

Finally, this bill, which would require the taxpayers of Oklahoma to bear the burden of paying for the collection, compilation and publication of this information, would create poor public health policy. The reporting and publication requirements in House Bill 3284 would skew the accuracy and reliability of the state’s public health records, creating a misleading catalog of “complications” supposedly caused by abortion. Because of the bill’s vague definition of “complication,” the list that the state collects and publishes on the internet may have no credible, scientifically-demonstrated relationship to abortion. Such unreliable and potentially biased information should not be presented as valid public health data.

III. Conclusion

The Oklahoma legislature first passed these reporting requirements in 2009 in House Bill 1595. The reaction from people in Oklahoma and around the nation was immediate and severe: the bill represented an extreme intrusion into patient privacy and was not supported by the public. Like House Bill 1595, House Bill 3284 goes beyond reporting requirements found anywhere in this country—no other state has ever required patients or physicians to provide this type of personal, private information to the government, or to make such information publically

⁶ See *Grayned*, 408 U.S. at 108; *Village of Hoffman Estates*, 455 U.S. at 498-99; *Colautti*, 439 U.S. at 390.

⁷ Okla. Const. Art. II, § 7; Art. V, §59.

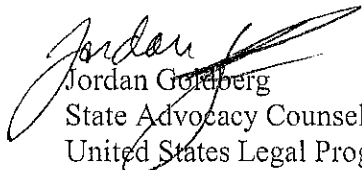
⁸ *Lang v. Erlanger Tubular Corp.*, 206 P.3d 589, 598 n.30 (Okla. 2009); see also *Ross v. Peters*, 846 P.2d 1107, 1119 (Okla. 1993).

⁹ In addition, the bill would also violate the prohibition against “special laws” by imposing requirements on medical professionals performing ultrasounds in abortion clinics, but no such requirements on medical professionals or others who perform ultrasounds in any other context. Okla. Const. article V, § 59.

available. Moreover, this bill raises significant constitutional issues, threatening the constitutional rights of Oklahoma women and their physicians.

We strongly urge you to veto House Bill 3284. Please do not hesitate to contact us if you would like further information.

Sincerely,



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