

CENTER *for* REPRODUCTIVE RIGHTS

NEW YORK

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February 10, 2021

VIA ELECTRONIC MAIL

The Honorable Randy A. Burckhard and Members of the Political
Subdivisions Committee
Sakakawea Room

Re: Letter in Opposition to SB 2323

Dear Chairman Burckhard and Members of the Political Subdivisions
Committee:

The Center for Reproductive Rights (“Center”) opposes Senate Bill 2323 (“SB 2323”) and strongly urges you to vote against this unconstitutional legislation, which would harm North Dakotans by denying them access to abortion care. The Center is a legal advocacy organization dedicated to protecting the right to access safe and legal abortion and comprehensive reproductive health care services. For more than 28 years, we have successfully challenged restrictions on abortion throughout the United States.

SB 2323 is a transparent attempt to close Red River Women’s Clinic, the only remaining abortion clinic in North Dakota, and prevent new clinics from opening. This legislation prohibits the establishment of new abortion clinics within 30 miles of a school and prohibits existing clinics within 30 miles of a school from expanding or “otherwise rebuild[ing],” which would preclude any maintenance requiring a building permit. Nowhere does the legislation articulate any benefit from mandating a 30-mile distance between an abortion clinic and every school, preschool to university. Nor does it explain how preventing maintenance on the state’s existing clinic furthers a legitimate state interest. The broad language of this legislation does not distinguish between K-12 students and adults attending colleges and universities, leaves critical terms undefined, and does not include any legislative findings. The only possible rationale for SB 2323 is the desire to prohibit abortion by closing North Dakota’s sole abortion clinic.

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Under Supreme Court precedent, this bill is plainly unconstitutional as it creates an undue burden on the right to abortion.¹ Compliance with the requirements of SB 2323 is impossible because North Dakota law already requires abortion providers to have admitting privileges at a hospital within 30 miles of the clinic.² However, there are approximately 500 K-12 public schools in North Dakota, at least 50 additional private K-12 schools, and 21 schools of higher education. There are only 47 hospitals in North Dakota,³ all of which are located near population centers. It is highly unlikely that any location exists that is both within 30 miles of a hospital and at least 30 miles from a pre-existing school.⁴ By preventing any new abortion clinics from opening in North Dakota, this legislation unduly burdens the right to abortion.⁵

In addition to prohibiting new clinics from opening, SB 2323 would unreasonably prohibit the state's only clinic from maintaining its premises. Currently, zoning regulations in North Dakota are generally left to cities and counties.⁶ However, SB 2323 would usurp local control and prevent the City of Fargo from approving any building permits⁷ for the clinic, including routine maintenance activities on the clinic's exterior or interior that the city would otherwise approve. Without the ability to maintain its interior and exterior, the clinic would eventually be forced to close. This result would force pregnant people in North Dakota to travel

¹ A finding of an undue burden is a shorthand for the conclusion that 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... [and]...a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992); accord *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016); accord *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2133 (2020).

² N.D. CENT. CODE § 14-02.1-04 ("All physicians performing abortion procedures must have admitting privileges at a hospital located within thirty miles [42.28 kilometers] of the abortion facility and staff privileges to replace hospital on-staff physicians at that hospital.")

³ CENTER FOR RURAL HEALTH, UNIVERSITY OF NORTH DAKOTA, *North Dakota Hospitals*, <https://ruralhealth.und.edu/projects/flex/hospitals>.

⁴ See e.g., CENTER FOR RURAL HEALTH, UNIVERSITY OF NORTH DAKOTA, *North Dakota Critical Access Hospitals & Referral Centers*, <https://ruralhealth.und.edu/assets/1008-12250/north-dakota-critical-access-hospitals-referral-centers.pdf>.

⁵ *Planned Parenthood v. Casey*, 505 U.S. at 877; accord *Whole Woman's Health*, 136 S. Ct. at 2309; accord *June Med. Servs.*, 140 S. Ct. at 2133.

⁶ See N.D. CENT. CODE §§ 11-33-01, 11-09.1-05, 40-05-02, 40-05.1-06.

⁷ For existing buildings, the City of Fargo only exempts reroofing and window replacement from the permitting process. See Fargo Municipal Code, Ch. 21.2, Sec. 105.2.

outside of their state for care, clearly the intended result of SB 2323, and an undue burden on the right to abortion.⁸

Similar legislation, but less extreme than SB 2323, has already been blocked in Alabama and Tennessee. In 2017, an Alabama law, which prohibited abortion clinics within 2,000 feet of K-12 schools, was found unconstitutional and permanently blocked because it would have forced clinics to close. The United States District Court for the Middle District of Alabama found that “Alabama women attempting to obtain a pre-viability abortion would experience substantial, and even insurmountable, burdens if the school-proximity law were to take effect.”⁹ The United States District Court for the Middle District of Tennessee blocked a similar ordinance in Mt. Joliet, Tennessee, which prohibited abortion clinics that provide procedural abortion care from being within 1,000 feet of church, public or private school, or college campus. The court found that the purpose of the Mt. Joliet ordinance was to place a substantial obstacle in the path of people seeking abortion care “[a]nd *Casey* and *Hellerstedt* say that if such a purpose motivates a law that imposes an obstacle to women obtaining a pre-viability abortion, the obstacle is unconstitutional.”¹⁰ Just as in Alabama and in Mt. Joliet, the only explanation for SB 2323 is a desire to close Red River Women’s Clinic; if this legislation is enacted, costly litigation will ensue.

SB 2323 would prohibit new abortion clinics from opening in North Dakota and force North Dakota’s only clinic to close by preventing expansion or routine building maintenance. Thus, pregnant people in North Dakota attempting to obtain abortion care would likely experience substantial, and even insurmountable, burdens if SB 2323 were to take effect.

As the COVID-19 pandemic continues, we urge you to prioritize the safety of North Dakotans and expand health care access instead of further

⁸ “Since *Casey*, we have repeatedly reiterated that the plaintiff’s burden in a challenge to an abortion regulation is to show that the regulation’s ‘purpose or effect’ is to ‘plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’ 505 U.S. at 877, 112 S. Ct. 2791 (plurality opinion); see *Whole Woman’s Health*, 579 U.S., at —, 136 S. Ct. (slip op., at 8); *Gonzales*, 550 U.S. at 156, 127 S. Ct. 1610; *Stenberg*, 530 U.S. at 921, 120 S. Ct. 2597; *Mazurek*, 520 U.S. at 971, 117 S. Ct. 1865.” *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2133 (2020).

⁹ *W. Alabama Women’s Ctr. v. Miller*, 299 F. Supp. 3d 1244, 1264 (M.D. Ala. 2017), *aff’d sub nom. W. Alabama Women’s Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018).

¹⁰ *FemHealth USA, Inc. v. City of Mount Juliet*, 458 F. Supp. 3d 777, 793–94 (M.D. Tenn. 2020).

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restricting care. North Dakota has the third highest number of abortion restrictions in the United States, along with 3 other states, but has the fourth lowest number of policies proven to support pregnant people, children, and families in the country.¹¹ If the health of women and children is truly a concern for the state, policymakers' time and effort would be better spent increasing the number of policies that are known to support women and children, rather than enacting abortion restrictions that would be harmful to all North Dakotans.

In conclusion, SB 2323 is an unconstitutional ban on abortion that would be costly for the state to defend. It disregards the fundamental right to determine when and whether to have children and poses a serious risk to pregnant people's health. Pregnant people in North Dakota need to have all their medical options available to them without state interference.

We urge you to not to move SB 2323 forward. Please do not hesitate to contact me if you would like further information.

Sincerely,



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¹¹ EVALUATING PRIORITIES, *North Dakota*, <https://evaluatingpriorities.org/>.