

January 26, 2021

Dear Chairman Weisz and Members of the House Human Services Committee:

The ACLU of North Dakota strongly opposes House Bill 1313, legislation that would criminalize all abortions in North Dakota. This bill is unquestionably unconstitutional and if enacted would cause great harm to people across North Dakota seeking the care they need and to which they have a constitutional right.

We urge a **do not pass** recommendation for HB 1313 for the following reasons:

- 1). HB 1313 is an unconstitutional abortion ban and an unconstitutional restriction on speech

More than forty-five years ago, the U.S. Supreme Court decided *Roe v. Wade* (1973), the landmark case that secured the right to abortion. Since that time, courts – including the Supreme Court – have repeatedly held that states cannot prevent their residents from making the decision to terminate a pregnancy prior to viability; this was affirmed again in *Planned Parenthood v. Casey* (1992). To this day, extreme abortion bans (such as those presented in HB 1313) have consistently been struck down.

In fact, North Dakota is no stranger to the passage and subsequent striking down of its attempts at legislation banning abortion. The state’s 2013 attempt to ban abortions at the six-week mark was struck down as unconstitutional; given that reality, HB 1313 will face the same fate.

Even assuming that the remainder of the bill is not constitutionally invalid (it is), Section 3 of HB 1313 violates the First Amendment right to Freedom of Speech. If we analyze Section 3 under an assumption that the rest of the bill, if passed, remained valid, this becomes clear. It is well-settled that a state cannot prohibit speech merely because it advocates that someone break the law. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (“The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (“This Court has made clear . . . that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.”). Instead, in the landmark case of *Brandenburg v. Ohio*, the Supreme Court made clear that a state may only forbid “advocacy . . . of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.” *Brandenburg*, 395 U.S. at 447 (1969).

With this one sentence, the Supreme Court defined three distinct elements that a statute must include to pass constitutional muster if it prohibits speech advocating law breaking: the law can proscribe only speech that (1) is uttered with the specific intent to incite lawless action; and (2) is likely to incite such action; but only if (3) the intended lawless action is imminent. See also *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (specific intent and likelihood of violence); *U.S. v. McDermott*, 29 F.3d 404, 406 (8th Cir. 1994) (specific intent); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (imminence). Section 3 of HB 1313 violates all of these elements. First, a person in this hypothetical in which the bill, if passed, remained valid could be convicted under Section 3 of HB 1313 if they “knowingly” incite someone to



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commit an abortion. Under North Dakota's Criminal Code, "knowingly" engaging in an activity is a lower level of scienter than "intentionally" doing so. See N.D.C.C. § 12.1-02-02(1)(a) and (b). Additionally, Section 3 punishes speech that incites a person to commit an abortion regardless of when they made their speech or whether it was at all likely that their speech would result in this behavior. As such, this section per se violates clear Supreme Court precedent as it would apply to speech which was not intended or to incite immediate lawless action.

2). HB 1313 will harm North Dakotans seeking abortion care

In addition to HB 1313's clear legal faults, the bill's complete ban on abortion would cause real harm to North Dakotans seeking abortion care. If passed, the burden of this legislation would fall most heavily on people of color, rural North Dakotans, and people with lower incomes.

As with any abortion ban, people who are financially able would be able to circumvent state regulations and travel elsewhere; for those who are not financially able, that option does not exist. Denying an individual abortion care has lasting effects on both the pregnant person and their family; to force someone to carry a pregnancy to term will exacerbate existing economic hardship and increase the odds of people and their families living in poverty.

Adding insult to injury, this bill is being proposed during a global pandemic. This is a time when people need more healthcare options and more ways to access treatment. To eliminate the right to access abortion is harmful – to do so during a sustained health crisis is simply cruel.

For these reasons, the ACLU of North Dakota strongly urges you to oppose HB 1313 and we respectfully ask that you give it a do not pass recommendation.

Sincerely,

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