CENTER *for* REPRODUCTIVE RIGHTS

NEW YORK
199 Water Street, Fl. 22
New York, NY 10038
TEL. (917) 637-3600

reproductiverights.org

January 25, 2021

VIA ELECTRONIC MAIL

The Honorable Robin Weisz and Members of the Human Services Committee
Pioneer Room

Re: Letter in Opposition to HB 1313

Dear Chairman Weisz and Members of the Human Services Committee:

The Center for Reproductive Rights ("Center") opposes House Bill 1313 ("HB 1313") and strongly urges you to vote against this unconstitutional legislation that would harm North Dakotans by denying them healthcare and criminalizing physicians, medical staff, and the friends and family members of people seeking 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.

HB 1313 is blatantly unconstitutional and would be one of the most extreme abortion bans passed in this country since the Supreme Court decided *Roe v. Wade* in 1973. Simply put, HB 1313 is a total ban on abortion. For over forty-eight years, the U.S. Supreme Court has recognized that the rights to liberty and privacy as protected by the United States Constitution extend to individuals' right to choose when and whether to have children. This bill would deny all pregnant people in North Dakota their constitutional right to abortion, preventing them from making the basic and fundamental decision about whether to parent a child or to terminate a pregnancy. As a result, this bill would open the State up to litigation if enacted. Below, I outline the primary constitutional objections to HB 1313.

HB 1313 is an unconstitutional ban on abortion prior to viability. The U.S. Supreme Court has repeatedly held that the Constitution prohibits a state from enacting a law that bans abortion prior to the point in pregnancy when a fetus is viable.[1] As the Court has emphasized,

[1] E.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 879, 878, and 877 (1992); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

"viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[2] The U.S. Supreme Court has never wavered from this position, despite numerous opportunities to do so.[3] Based on this precedent, courts have blocked all total abortion bans[4] as well as every six week ban enacted,[5] including North Dakota's 6-week ban.[6] Courts have also blocked later pre-viability bans in states including Arizona, Arkansas, Mississippi, Missouri, and Utah.[7] By completely banning abortion, HB 1313 wholly conflicts with all U.S. Supreme Court precedent on abortion.

The unconstitutionality of pre-viability abortion bans is clear. In November of 2018, the U.S. District Court for the Southern District of Mississippi struck down a fifteen-week ban, which would have allowed

---

[2] *Planned Parenthood v. Casey*, 505 U.S. at 860, 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.").

[3] *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) (striking down ban on previability abortions at 6 weeks with exceptions), cert. denied, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015) (striking down ban on pre-viability abortions at 12 weeks with exceptions), cert. denied, 136 S. Ct. 895 (2016); *Horne v. Isaacson*, 716 F.3d at 1217, 1231 (striking down ban on pre-viability abortions at 20 weeks with exceptions), cert. denied, 134 S. Ct. 905 (2014); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117−18 (10th Cir. 1996) (striking down ban on pre-viability abortions at 22 weeks with exceptions), cert. denied, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), cert. denied, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368−69 (9th Cir. 1992) (striking down an almost total abortion ban), cert. denied, 506 U.S. 1011 (1992).

[4] *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019); *Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992) cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993); *Jane L. v. Bangerter*, 809 F. Supp. 865 (D. Utah 1992).

[5] *SisterSong Women of Color Reproductive. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297 (N.D. Ga. 2020); *Planned Parenthood of the Heartland, Inc. v. Reynolds*, WL 312072 (Iowa Dist. Jan. 22, 2019); *EMW Women's Surg. Ctr. v. Beshear*, 2019 WL 1233575 (W.D. Ky. Mar. 27, 2019); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 798 (S.D. Ohio 2019); *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) cert. denied, 136 S. Ct. 981 (2016); *Memphis Ctr. for Reprod. Health v. Slatery*, 2020 WL 4274198 (M.D. Tenn. July 24, 2020).

[6] *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015) cert. denied, 136 S. Ct. 981 (2016)..

[7] *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. et al. v. Parson*, No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 28, 2019); *Edwards v. Beck*, 8 F. Supp. 3d 1091 (E.D. Ark. 2014), aff'd, 786 F.3d 1113 (8th Cir. 2015); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

abortion care to be available for approximately fifteen weeks longer than HB 1313, determining that it violated the constitutional guarantee of due process under the Fourteenth Amendment. The judge in that case wrote, "Mississippi's law violates Supreme Court precedent, and in doing so it disregards the Fourteenth Amendment guarantee of autonomy for women desiring to control their own reproductive health."[8] This decision is just one of many recent decisions where a court has reaffirmed that pre-viability abortion bans violate longstanding U.S. Supreme Court precedent established in *Roe* more than 48 years ago and reaffirmed in 2020 in *June Medical Services v. Russo.*[9]

HB 1313 would violate the Constitution, not only because it bans abortion long before the state has the right to do so, but also because it fails to adequately protect the pregnant person's health at any stage of pregnancy. HB 1313 contains an extremely narrow "life" exception, permitting abortion care only when necessary to avert death. Such a narrow exception is unconstitutional at any stage of pregnancy, even after viability, because it does not adequately allow physicians to exercise their medical judgment to protect the pregnant person's health in all circumstances.[10]

Furthermore, the criminal penalties in HB 1313 are unconscionably broad. In addition to criminalizing the physicians who provide abortion care, Section 12.1-17.1-09 "Promoting the commission of an abortion" would make it a criminal offense to work in an abortion provider's office or to drive your spouse or your friend to their medical appointment. Providing support to a loved one seeking medical care should never be a crime. Criminalizing such common, routine conduct is dangerous and completely counter to common sense public policy.

As the COVID-19 pandemic continues, we urge you to prioritize the safety of North Dakotans and expand health care access instead of further restricting care. Moreover, if you are concerned about the wellness of children and families, policymakers' time and effort would be better spent increasing the number of policies that are known to support

---

[8] *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019).
[9] *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020).
[10] Since recognizing the constitutional right to choose an abortion, the Supreme Court has consistently held that a ban on abortion after viability must include an exception for situations in which an abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health" of the woman. *Roe*, 410 U.S. at 165; *Casey*, 505 U.S. at 879 (quoting *Roe*, same).

CENTER *for*
REPRODUCTIVE
RIGHTS

children and families such as expanding paid sick leave and providing paid family leave, rather than enacting abortion restrictions that would be harmful to all North Dakotans.

In conclusion, HB 1313 is an unconstitutional ban on abortion that would be costly to defend. It disregards the fundamental right to determine when and whether to have children, poses a serious risk to pregnant people's health, and creates harmful criminal liabilities for physicians, medical staff, and the friends and family members of pregnant people seeking care. One in four women will have an abortion in her lifetime, and this bill would seriously harm them. Pregnant people in North Dakota need to have all their medical options available.

We urge you to not to move HB 1313 forward. Please do not hesitate to contact me if you would like further information.

Sincerely,

Elisabeth Smith
Chief Counsel, State Policy and Advocacy
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, New York 10038
esmith@reprorights.org