

2021 SENATE POLITICAL SUBDIVISIONS

SB 2323

2021 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Sakakawea, State Capitol

SB 2323
2/11/2021

A BILL for an Act to create and enact a new section to chapter 11-09.1, a new section to chapter 11-33, a new section to chapter 40-05, and a new section to chapter 40-05.1 of the North Dakota Century Code, relating to the zoning authority of counties and cities with respect to abortion facilities.

Chairman Burckhard opened the hearing on SB 2323 at 10:15 a.m. Members present: Burckhard, Anderson, Lee, Larson, Kannianen, Oban, Heitkamp.

Discussion Topics:

- 30-mile distance requirement
- Violence at abortion clinics
- Services to at risk mothers and children
- Child safety

[10:16] Senator Jason Heitkamp, District 26. Introduced SB 2323 and provided testimony #6400 in favor.

[10:22] Representative Jeffrey Magrum, District 28. Provided oral testimony in favor.

[10:26] Sierra Heitkamp, Executive Director, North Dakota Right to Life. Provided testimony #6402 in favor.

[10:28] Mark Jorritsma, Executive Director, Family Policy Alliance of North Dakota. Provided testimony #6362 in favor.

Senator Larson moves **DO PASS**.

Senator Heitkamp seconded.

Senators	Vote
Senator Randy A. Burckhard	N
Senator Howard C. Anderson, Jr.	N
Senator Jason G. Heitkamp	Y
Senator Jordan Kannianen	N
Senator Diane Larson	Y
Senator Judy Lee	N
Senator Erin Oban	N

The motion failed 2-5-0

Senator Oban moves **DO NOT PASS**.

Senator Lee seconded.

Senators	Vote
Senator Randy A. Burckhard	Y
Senator Howard C. Anderson, Jr.	Y
Senator Jason G. Heitkamp	N
Senator Jordan Kannianen	Y
Senator Diane Larson	N
Senator Judy Lee	Y
Senator Erin Oban	Y

The motion passed 5-2-0

Senator Anderson will carry SB 2323.

Additional written testimony: (3)

Katie Christensen, State Director, External Affairs, Planned Parenthood North Central States. Provided written testimony #6343 in opposition.

Elisabeth Smith, Chief Counsel, State Policy and Advocacy, Center for Reproductive Rights. Provided written testimony #6314 in opposition.

Elizabeth Skarin, Campaigns Director, ACLU of North Dakota. Provided written testimony #6272 in opposition.

Chairman Burckhard closed the hearing on SB 2323 at 10:37 a.m.

Patricia Lahr, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2323: Political Subdivisions Committee (Sen. Burckhard, Chairman) recommends **DO NOT PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2323 was placed on the Eleventh order on the calendar.

SB2323

Mr. Chairman and senators

At the core, we all have a basic human need to feel safe. We are pretty fortunate to call North Dakota home. Our state is ranked #6 in the nation for personal & resident safety and #2 for financial safety. It's safe to say that North Dakota checks a lot of boxes when it comes to protecting ourselves and our loved ones. But there's always more to do.

Our governor tells us that projects like Vision Zero are supposed to take on important meaning for our residents. This traffic safety strategy has a mission to eliminate fatalities and serious injuries caused by motor vehicle crashes. Most motor vehicle fatalities and serious injuries are preventable, so we're committed to cultivating a culture of personal responsibility. Our representatives and department leaders continue to look for ways to reduce preventable deaths when it comes to road safety, home and community safety, and workplace safety. Because any number other than zero is too high.

And there, in the middle of the plan is a place that attracts protestors, rioters, plugged sidewalks, people honking horns and yelling obscenities at the demonstrators. 310 police calls since 1989 according to the Fargo Police Department. A literal powder keg ready to go off at any time.

Our taxpayers have invested millions of dollars on a failed main street initiative. An initiative investing millions of dollars in an incompetent plan to have people shop downtown when there is danger on the streets. Millions of dollars wasted constructing streets that pass by eyesores. Squandering Millions of dollars in flood control to protect the constitutional right to an abortion. What kind of return on investment are our taxpayers getting?

Our opponents are against what they call, this unconstitutional legislation, which would harm North Dakotans by denying them access to abortion care. No where in this legislation does it call for the denial of access to abortion care. Our opponents want to protect the right to access safe and legal abortion and comprehensive reproductive health care services, while protestors line the streets

and cause mayhem. No where in this legislation does take away this right. Our opponents say that we are attempting to close the Red River Women's Clinic, the only remaining abortion clinic in North Dakota, and prevent new clinics from opening. Nothing can be farther from the truth. In fact, that is ludicrous.

Our opponents do not understand the term nonrecurring use. They say that our legislation does not explain how preventing maintenance on the state's existing clinic furthers a legitimate state interest. We cannot close down an existing facility, but over time, the smart facility can make a plan to move to a safer place. A place that ensures the safety of the citizens that are paying for the vision of zero deaths.

Our opponents state that the only possible rationale for SB 2323 is the desire to prohibit abortion by closing North Dakota's sole abortion clinic. Has anybody asked why there is only 1 facility in the state of North Dakota? I can only relate this fact to the will and the desire of the people in North Dakota. If 99.9% of the people in North Dakota are opposed to abortion, why should the people of north Dakota be forced by outsiders to have abortion as a whole in the state.

Remember, there are 47 hospitals in North Dakota, 3 of which are located near population centers. These facilities can perform a procedure right now for the welfare of the mother and or child. Our opponents are using buzzwords like unconstitutional and they have not proven that this legislation creates an undue burden on the right to abortion. Their argument is full of scare tactics and holes.

Isn't it interesting that the discussion used to be about the women's right to choose about her body. In recent times it has become apparent that we have killings of the child outside the womb. That shows you that the real argument is that our opponents want us to confirm and to say that it is acceptable to kill babies on demand. If this is really about women's health, we have stated already that there are 47 hospitals in North Dakota that can perform a procedure to protect the woman and the baby at the present time.

Senate Political Subdivisions Committee

SB 2323

02/11/2021

10:15 am

Chairman Burckhard and members of the Senate Political Subdivisions Committee,

My name is Sierra Heitkamp, Executive Director of North Dakota Right to Life. At North Dakota Right to Life, we have been dedicated to defending life from conception to natural death for over 50 years. With over 2,000 members, our statewide organization focuses on change through legislation and educational programming. As the oldest, pro-life organization in the state, we believe it is our duty to stand up for life at all stages.

I am here today in support of Senate Bill 2323. Our vision at the North Dakota Right to Life Association is that vulnerable persons in our society are protected throughout the span of their lives from fertilization to natural death. Part of our mission is to end unnecessary abortion, infanticide, and euthanasia; ultimately reinforcing societal norms to respect human life.

Having an abortion facility in any size community can bring a certain level of risk or danger. Fargo Police receive numerous calls a year in regard to incidents that occur at the Red River Women's Clinic. I myself have been a part of sidewalk advocacy that has turned violent with a member from our group being physically attacked during our counseling time. I am not alluding to the fact that there is a "side" to the life argument that tends to become more violent; tensions and passions are high on both sides of the issue.

Many of our students travel multiple miles to get to class. That is why NDRL agrees with a multiple mile requirement instead of something similar to a 2,000-foot requirement to protect our rural students. Growing up, I spent many weeknights with my grandfather in Wahpeton, ND, and would drive 27 miles one way to attend school. This is just an example but think of the thousands of students from across our state who have the similar experience of traveling more than a few miles to get to class.

Since our organization's focus is on protecting our vulnerable populations, we believe this bill creates protections for one of our most mentally malleable groups, our children.

Please vote for a DO PASS recommendation on SB 2323.

I will now stand for any questions.

Sierra Heitkamp – Executive Director
North Dakota Right to Life



Testimony in Support of Senate Bill 2323

**Mark Jorritsma, Executive Director
Family Policy Alliance of North Dakota
February 11, 2021**

Good morning Chairman Burckhard and members of the Senate Political Subdivisions Committee. My name is Mark Jorritsma and I am the Executive Director of Family Policy Alliance of North Dakota. I am testifying in support of Senate Bill 2323 and respectfully request that you recommend a “DO PASS” on this bill.

I want to be clear at the outset – our organization is not testifying today on zoning regulations. We are not sufficiently knowledgeable on that subject to speak to it in a meaningful manner. We *are* testifying on the impact abortion facilities could have on children and adolescents.

If located near a school, students could be subjected to disturbing images, a volatile environment, and potential violence when passing by an abortion facility. There have been multiple cases of shootings, violent altercations, and property damage that have occurred outside abortion facilities over the years. Family Policy Alliance of North Dakota unequivocally condemns such actions; however, the likelihood is that they will unfortunately be with us for the foreseeable future, as long as the abortion issue continues to deeply divide our nation.

It is well documented that a link exists between exposure to violence as a child and potential violence committed by these children themselves as they grow up. If we can help break that cycle, reducing exposure to violent situations would seem to be a step in the right direction.

For these reasons, we support legislation that would ensure the safety and reduce the potential emotional trauma these types of incidents could have on school-aged children. Locating abortion facilities away from schools could help reduce the likelihood of this happening.

Family Policy Alliance of North Dakota supports Senate Bill 2323 for these reasons and respectfully asks for you to pass this bill out of committee with a “DO PASS” recommendation.

Thank you for the opportunity to testify, and I will stand for any questions you may have.

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UNLEASHING CITIZENSHIP

FamilyPolicyAlliance.com/NorthDakota



Testimony
SB 2323
Political Subdivisions Committee
February 11, 2021

Chair Burckhard, Vice Chair Anderson, and members of the Committee,

My name is Katie Christensen and I am the State Director of External Affairs for Planned Parenthood North Central States. Thank you for the opportunity to submit testimony in opposition to SB 2323.

Planned Parenthood North Central States provides health services, advocacy, and education including expert reproductive health care for more than 100,000 patients each year across our five-state region. 60% of patients at our Moorhead clinic are residents of North Dakota. We have tens of thousands of activists and supporters throughout the state including interns located at major college campuses in the state. Our education team reaches more than 500 people each year through programming, trainings, and community presentations. Planned Parenthood is here to ensure all people have the information and the means to make free and responsible decisions about whether and when to have children, and our mission affirms human rights to reproductive health care and freedom.

SB 2323 is an unconstitutional and callous attempt to banish abortion providers and their patients from our communities. Access to abortion care is protected as a fundamental right under the United States Constitution and is supported by an overwhelming majority of Americans, including North Dakotans who soundly rejected a ballot measure that would have banned abortion in 2014. This is yet another bill in the broader effort to end abortion in North Dakota.

Current North Dakota law requires abortion providers to have admitting privileges at a hospital within 30 miles of the clinic, N.D. CENT. CODE § 14-02.1-04. And now lawmakers are aiming to impose an additional arbitrary restriction: a 30-mile barrier on where a clinic can be located. North Dakota does not impose extreme geographic restrictions on other similar services, like hospitals or urgent care centers. Nor does North Dakota impose this kind of school-based distance restriction on businesses that pose actual threats to young people in our communities like gun shops or liquor stores.

In 2016, Alabama passed a less extreme version of this bill, and it was swiftly struck down by a federal court.¹ In that case, the state could not show any evidence that students or their families expressed any concerns about the proximity of an abortion clinic to a school that was within only 2,000 feet. Yet, the proponents of this bill seem to believe that parents and students will be harmed by a clinic that is **thirty miles away**. The court noted that “Multiple studies have concluded that longer travel distances to access an abortion provider correlate with fewer women obtaining abortions... [and] The Supreme Court has also recognized that longer travel distances, when taken together with other burdens, increase the burdens on women seeking an abortion.” This distance does nothing to protect schools, but it will exacerbate harms to the people of North Dakota.

¹ *West Ala. Women’s Ctr. v. Miller*, 299 F. Supp. 3d 1244 (2017).



There is no rational justification for this bill—it is nothing more than anti-abortion legislators shaming and stigmatizing abortion providers and patients and seeking to put abortion care out of reach for the women who choose to access this safe, legal health care service.

The Planned Parenthood Action Fund strongly urges a Do Not Pass recommendation on SB 2323. At a time when resources are precious, our state legislators should be spending their time on policies that help generate resources—not wasting our time and money on harmful, unconstitutional bills.

Katie Christensen
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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.

CENTER *for* REPRODUCTIVE RIGHTS

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).

CENTER *for* REPRODUCTIVE RIGHTS

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,



Elisabeth Smith
Chief Counsel, State Policy and Advocacy
Center for Reproductive Rights
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¹¹ EVALUATING PRIORITIES, *North Dakota*, <https://evaluatingpriorities.org/>.

February 11, 2021

Dear Chairman Burckhard and Members of the Senate Political Subdivisions Committee:

The ACLU of North Dakota strongly opposes Senate Bill 2323, “relating to the zoning authority of counties and cities with respect to abortion facilities.” Per the bill’s description, SB 2323 appears to be a bill about zoning regulations. Yet any reading of the bill’s text makes clear one simple fact: that the purpose of this bill is to shut down North Dakota’s existing abortion clinic and to completely eliminate access to abortion.

The ACLU of North Dakota urges a **do not pass** recommendation on SB 2323.

This piece of legislation suffers from incurable constitutional flaws and, if passed, it would put North Dakota taxpayers on the hook – yet again – for legal fees arising out of litigation. To understand the likelihood that SB 2323 would ultimately be found unconstitutional by the courts one has to look no further than the states of Alabama and Tennessee.

Each of those states passed similar “zoning” laws over the past several years. In both instances, the ACLU successfully sued. In Alabama,¹ the federal court permanently blocked the restriction and the state did not appeal. In Mt. Juliet, Tennessee,² the federal court issued a preliminary injunction of the town’s zoning ordinance and in September 2020 the suit was settled after the town voluntarily repealed its ordinance.

Though courts found both of these laws and/or ordinances to be unconstitutional, it is worth noting that each of these regulations were *less extreme* than the distance requirements included in SB 2323. The regulations at issue in Alabama and Tennessee regulated clinic zoning at a distance of 1,000 to 2,000 feet from public or private schools. In contrast, SB 2323 attempts to prohibit abortion clinics from being granted zoning permits for either new builds or building additions within a 30-mile radius of a school. It is without question that if SB 2323 passes it will end up in court and be found unconstitutional.

SB 2323 is yet another attempt in a long line of attacks against abortion in North Dakota. We respectfully ask the committee to vote for a **do not pass** recommendation on this extreme and unconstitutional piece of legislation.

Sincerely,



Elizabeth Skarin
Campaigns Director
ACLU of North Dakota
northdakota@aclu.org

¹ *West Alabama Women's Center v. Miller*, 217 F.Supp.3d 1313 (M.D. Ala. 2016).

² *FemHealth USA, Inc. v. City of Mount Juliet*, M.D. Tenn., agreed order of compromise and settlement dated Sept. 2020, avail. [here](#).



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