



April 14, 2021

Governor Jim Justice  
c/o Brian Abraham, Chief of Staff for Governor Jim Justice  
*Sent via email to:* brian.r.abraham@wv.gov

**Re: Senate Bill 334**

Governor Justice,

We are writing to urge you to veto Senate Bill 334. This legislation is in contradiction of CDC best practices, creates needlessly high barriers which will be all but impossible for most harm reduction programs to comply with, and would put public health decisions in the hands of local elected politicians. Quite simply, this legislation was designed to outlaw syringe service programs in our state. If you sign this into law, that may well be the result.

But we're not just writing because this is bad policy. This bill is also unconstitutional.

At the last minute, the state legislature put back into the bill a provision that would require syringe service distribution program participants to have a West Virginia ID in order to access syringe distribution services. Such a requirement is a textbook violation of the privileges and immunities clause of the United States Constitution.<sup>1</sup>

An analysis under the privileges and immunities clause is triggered when a state law discriminates against out-of-state residents on matters of fundamental concern. United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 220 (1984). Access to public health and medical services is one such area of fundamental concern. Almost fifty years ago, the United States Supreme Court analyzed whether a requirement in a Georgia state law that limited access to certain medical care to state residents violated an out of state resident's rights under the privileges and immunities clause. *See Doe v. Bolton*, 410 U.S. 179, 200 (1973). The Court, in striking down this provision of the law, noted that any holding to the contrary would mean that a State could limit to its own residents the general medical care available within its borders." *Id.* The Court stated: "This we could not approve." *Id.*

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<sup>1</sup> U.S. Const. Art. IV, § 2, Cl 1, ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) ("It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.")

In undergoing its analysis, the Court noted that the state residency requirement was “not based on any policy of preserving state-supported facilities,” as it also applied to private facilities. *Id.* Nor was there an argument that the residency requirement was intended to alleviate a burden on the state because of capacity concerns. *Id.* Instead, the requirement appeared to exist solely for the sake of discriminating against out-of-state residents. Therefore, the Court determined, the residency requirement was unconstitutional. *Id.*

Because the provision of sterile syringes is a public health service that contributes to community health and helps stem the spread of bloodborne diseases<sup>2</sup>, it is a matter of fundamental concern. The state, in crafting this statute, elected to treat syringe service programs as medical care in requiring that programs be licensed under the Office for Health Facility Licensure and Certification in the Department of Health and Human Services,<sup>3</sup> and SB 334 defines harm reduction programs as programs “intended to lessen the adverse consequences of drug use and protect public safety, by providing direct access to or a referral to: syringe services program; substance use disorder treatment programs; screenings; vaccinations; education about overdose prevention; wound care; opioid antagonist distribution and education; **and other medical services.**”<sup>4</sup> The statute further requires a “qualified licensed healthcare provider” to be on site to offer services to program participants at “every visit.” *Id.*

While the privileges and immunities clause “does not preclude discrimination against citizens of other states where there is a substantial reason for the difference in treatment,” the state bears a significant burden in demonstrating “whether such reasons do exist and whether the degree of discrimination of bears a close relation to them.” United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 210 (1984). Nonresidents must “somehow be shown to constitute a peculiar source of the evil at which the statute is aimed.” *Id.* And while the clause does not preclude “situations where there are perfectly valid independent reasons” for disparity of treatment, “it does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states.” Hicklin v. Orbeck, 437 U.S. 518, 525 (1978).

The history of this bill is rife with animus against people who are not West Virginians, but is bare when it comes to data or evidence to justify this discrimination.<sup>5</sup> In order to justify a West Virginia ID requirement, the state must demonstrate that there exists a “substantial reason” for the discrimination against out-of-state residents. There is nothing beyond unsubstantiated assertions in the legislative history of this bill to suggest

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<sup>2</sup> Syringe Service Programs, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ssp/syringe-services-programs-faq.html> (last visited April 13, 2021).

<sup>3</sup> Office of Health Licensure and Certification, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.wvdhhr.org/oig/ohflac.html> (last visited April 13, 2021) (“The Office of Health Facility Licensure and Certification has the mission to shape healthy environments for clients, patients and residents within health care facilities by promoting the quality services and high standards of care that exist when facilities are in compliance with state licensure rules and federal certification regulations.”).

<sup>4</sup> Enrolled Committee Substitute for Senate Bill 334, *available at* [https://www.wvlegislature.gov/Bill\\_Text\\_HTML/2021\\_SESSIONS/RS/bills/SB334%20SUB1%20ENR.pdf](https://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/bills/SB334%20SUB1%20ENR.pdf) (emphasis added).

<sup>5</sup> *See e.g.*, My explanation to the WV Senate Health Committee for the Need to Regulate Needle Exchanges, ERIC J. TARR FOR STATE SENATE, <https://www.facebook.com/watch/?v=767051120863408> (wherein Sen. Tarr describes a complicated narrative involving peer recovery homes “bussing in” out-of-state residents to West Virginia for profit. The term “peer recovery home” appears nowhere in Senate Bill 334).

that the state would be able to meet this burden. Further, strict identification requirements disproportionately impact Black people, people of color, women, and people in poverty and may violate other civil rights laws.<sup>6</sup>

Another last-minute addition to the bill requires that a majority of a county commission *and* a city council (when applicable) provide a letter of support to a harm reduction program as a prerequisite for the program to obtain licensing. The statute also permits these governing bodies to unilaterally rescind that support at any time, thus jeopardizing a program's licensure. These provisions of the bill include no reference to timelines under which a county commission or city council must make a decision as to whether or not it will issue its letter of support, or whether that deliberation would be subject to the West Virginia Open Governmental Proceedings Act. Nor does it provide criteria under which these bodies would follow to make their determination. These issues present significant administrative due process and transparency concerns. If the legislature deems it fit to *require* that local governing bodies be involved in the licensing process, it may not also allow those bodies to be a passive participant in the process, electing to acknowledge or not acknowledge an applicant's request for a statement of support. Just as Senate Bill 334 provides a mechanism for appeal if OHFLAC does not grant a license, so too must it provide those same safeguards for applicants seeking to fulfill requirements via city councils and county commissions.

These local approval requirements may also open up local governments to potential liability under the Americans with Disabilities Act and the West Virginia Human Rights Act. Courts have struck down ordinances targeting substance use treatment facilities. *See e.g., New Directions Treatment Servs. V. City of Reading*, 490 F.3d 293 (3d. Cir. 2007); *MX Group v. City of Covington*, 293 F.3d 326, 345 (6th Cir. 2002); *Bay Area Addiction Research and Treatment, Inc., v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999). The breadth of services a harm reduction program is required to offer in order to qualify for licensing under the statute means that, in addition to syringe service distribution, participants, including those who are in treatment, must be given access to a harm reduction program for everything from birth control to behavioral health services. If a local government determines it will not support a program's application for licensing because of animus against substance use, this action could potentially violate state and federal law.

Senate Bill 334 is cruel legislation that will shut down syringe service programs across the state and deprive vulnerable West Virginians of access to life-affirming healthcare. But it's not just abhorrent policy. When the legislature elected, in the final hours of session, to add an unconstitutional identification requirement and a local approval requirement with no due process safeguards, it also opened the state and its local governments up to significant liability.

Governor Justice, we urge you to veto this bill.

Regards,



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Executive Director, Mountain State Justice, Inc.

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<sup>6</sup> *See, e.g.,* Oppose Voter ID Fact Sheet, ACLU, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> (last visited Apr. 14, 2021).