Written Testimony of Carolyn McDonnell, M.A., J.D.
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In Opposition to H.F. 1, "Protect Reproductive Options Act"
Submitted to Health Finance and Policy Committee
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Dear Chair Liebling, Vice Chair Bierman, and Members of the Committee:

My name is Carolyn McDonnell, and I am a proud graduate of the University of St. Thomas School of Law in Minneapolis, Minnesota. I serve as Litigation Counsel at Americans United for Life ("AUL"). Established in 1971, AUL is a national law and policy nonprofit organization with a specialization in abortion, end-of-life issues, and bioethics law. AUL publishes pro-life model legislation and policy guides,[1] tracks state bioethics legislation,[2] and regularly testifies on pro-life legislation in Congress and the states. Our vision at AUL is to strive for a world where everyone is welcomed in life and protected in law. As Litigation Counsel, I specialize in constitutional law, abortion jurisprudence, and conscience rights. I have published legal white papers and scholarship on the decision in *Dobbs v. Jackson Women's Health Organization*,[3] abortion litigation post-*Dobbs*,[4] federal abortion policy in a post-*Roe* world,[5] and conscience rights in the United States.[6]

Thank you for the opportunity to testify in opposition to H.F. 1, "Protect Reproductive Options Act" ("bill"). It is my expert opinion that by protecting abortion on demand, the bill infringes upon the United States Constitution's protection of parental rights as well as violates federal conscience protections. The bill also endangers women by severely limiting Minnesota's ability to ensure the health and

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[1] *Pro-Life Model Legislation and Guides*, AMS. UNITED FOR LIFE (last visited Jan. 4, 2022), https://aul.org/law-and-policy/.
[2] *Defending Life: State Legislation Tracker*, AMS. UNITED FOR LIFE (last visited Jan. 4, 2022), https://aul.org/law-and-policy/state-legislation-tracker/.
[3] Carolyn McDonnell, Dobbs v. Jackson Women's Health Organization: *The Overturn of* Roe v. Wade, AMS. UNITED FOR LIFE (July 5, 2022), https://aul.org/wp-content/uploads/2022/07/Dobbs-v.-Jackson-Womens-Health-Organization-The-Overturn-of-Roe-v.-Wade.pdf.
[4] Carolyn McDonnell, *Post*-Dobbs *Abortion Litigation Under Federal and State Constitutional Law*, 5 SOC'Y ST. SEBASTIAN (2022), https://www.societyofstsebastian.org/summer2022-post-dobbs-laws-mcdonnell.
[5] Carolyn McDonnell, *Federal Policymakers' Guide to a Post*-Roe *America*, AMS. UNITED FOR LIFE (Nov. 14, 2022), https://aul.org/2022/11/14/federal-policymakers-guide-to-a-post-roe-america/.
[6] Thomas C. Berg, Carolyn McDonnell, & Christian Matozzo, *Conscience Rights and the Taking of Life in the United States*, 57 REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIÁSTICO DEL ESTADO (2021).

safety and informed consent of women seeking abortion. I urge the Committee to abandon the bill because it exploits women, infringes upon constitutionally protected parental rights, and dehumanizes life by authorizing the killing of unborn children.

I. The Bill Is Radical and Protects Abortion on Demand Up Until the Baby's Birth Date.

Subdivision 3 of the bill creates a fundamental right for "[e]very individual . . . to make autonomous decisions about the individual's own reproductive health," including "obtain[ing] an abortion" and abortion referrals. There are no gestational limits nor qualifications within this language. Rather, Subdivision 3 authorizes abortion on demand up until the baby's birth date. Notably, only five jurisdictions explicitly endorse abortion on demand throughout pregnancy, and three of these states have done so through popular referendum to the state constitution, not legislative fiat.[7] The bill goes well beyond the overruled decisions in *Roe v. Wade*[8] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[9] which only licensed abortion through viability.

Subdivision 4 of the bill further contrives abortion protections within the Minnesota Constitution's "principles of individual liberty, personal privacy, and equality." In *Doe v. Gomez*, the Minnesota Supreme Court "conclude[d] that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy" and laws may not infringe upon this purported right. The Court, however, "emphasize[d] that [the] decision is limited to the class of plaintiffs certified by the district court and the narrow statutory provisions at issue in this case [regarding Medicaid funding]."[10] There is ongoing litigation to determine the extent of the *Gomez* decision's impact upon Minnesota abortion laws.[11] Regardless, the bill goes well beyond *Gomez*. The *Gomez* Court relied upon the state constitution's privacy protections and "f[oun]d it unnecessary to address the equal protection arguments raised by the plaintiffs."[12] The bill, however, devises abortion protections within the state constitution's equal protection provisions that the Minnesota Supreme Court declined to recognize.[13] Unlike *Gomez*, the bill also contrives protections for abortion counseling, which, as discussed *infra* Section III,

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[7] CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; 775 ILL. COMP. STAT. 55/1-1 to 55/1-97 (2019); N.Y. PUB. HEALTH LAW §§ 2599-AA to 2599-BB (McKinney 2019); VT. CONST. ch. I, art. 22.
[8] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[9] 505 U.S. 833, *overruled by Dobbs*, 142 S. Ct. 2228.
[10] Doe v. Gomez, 542 N.W.2d 17, 27, 32 (Minn. 1995).
[11] Doe v. State of Minnesota, No. 62-CV-19-3868 (Minn. Dist. Ct. July 11, 2022) (granting in part and denying in part abortionists' motions for summary judgment to invalidate state abortion laws).
[12] *Gomez*, 542 N.W.2d at 19.
[13] Many abortionists claim that abortion is critical to women's health and socioeconomical success. Yet, Professor Helen Alvaré has thoroughly refuted this notion by demonstrating that "these arguments regularly cite no evidence or are based upon highly flawed and incomplete studies." *Nearly 50 Years Post*-Roe v. Wade *and Nearing its End: What Is the Evidence that Abortion Advances Women's Health and Equality?*, 34 REGENT U. L. REV. 165, 167 (2022).

subvert federal conscience protections. In sum, the bill is legally extreme, extends beyond caselaw, and would place Minnesota among a handful of jurisdictions that have explicitly concocted abortion protections throughout pregnancy.

II. The Bill Infringes on Parental Rights, Which the United States Constitution Protects Under the Fourteenth Amendment.

Under the Fourteenth Amendment's Due Process Clause, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[14] Parental rights have a rich history of constitutional protection under the Due Process Clause. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[15] "[Supreme Court] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[16] Yet, the bill enables an unemancipated minor to access abortion services without parental involvement, which subverts parents' constitutional rights to the care and upbringing of their minor pregnant daughters.

Under the Supremacy Clause, the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[17] This means that a state statute cannot infringe upon the Constitution's protection of parental rights. Accordingly, the bill is unconstitutional by infringing upon parental rights.

III. The Bill Subverts Federal Conscience Protections.

As noted *supra* Section I, the bill contains broad protections for abortion under Subdivision 3. When read in combination with Subdivision 2's expansive definition of reproductive health care, the bill raises serious conscience rights issues. Under Subdivision 2, "reproductive health care" includes both abortion and abortion counseling. Yet, the bill is silent as to whether medical professionals may conscientiously object to the unfettered "fundamental right to make autonomous decisions about the individual's own reproductive health." Although the Minnesota Constitution has conscience protections,[18] and state law separately has protections for medical professionals and hospitals to conscientiously object to providing abortions,[19] the bill raises issues of conscientious objections to abortion referrals, counseling, funding, and insurance coverage.

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[14] U.S. CONST. amend. XIV, § 1.
[15] Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).
[16] Moore v. E. Cleveland, 431 U.S. 494, 504 (1977).
[17] U.S. CONST. art. VI, cl. 2.
[18] MINN. CONST. art. I, § 16.
[19] MINN. STAT. § 145.42 (1986).

The United States has a rich legal tradition of protecting conscience rights against abortion. Federal statutory protections include:

- The Church Amendment, which protects healthcare facilities and individuals' conscientious objections to performing or assisting an abortion.[20]
- The Coat-Snowe Amendment, which establishes anti-discrimination protections for healthcare entities that conscientiously object to training for or performing an abortion, as well as providing referrals for abortion training or abortion services.[21]
- The Weldon Amendment, which establishes anti-discrimination protections for medical professionals and facilities that conscientiously object to "provid[ing], pay[ing] for, provid[ing] coverage of, or refer[ring] for abortions."[22]

The bill infringes on these federal conscience protections by creating an unfettered right to abortion on demand. Again, under the Supremacy Clause, federal conscience laws preempt state laws when the two are in conflict. Accordingly, the bill is unconstitutional because it infringes on federal conscience protections.

IV. The Bill Prevents Minnesota from Passing Commonsense Health and Safety Safeguards for Women.

The bill hamstrings Minnesota's ability to enact public policy that protects the health and safety of women and girls and values human life. By protecting abortion on demand, the bill prevents basic regulation and oversight that is crucial to keeping women safe from the harms of abortion violence.

a. *There Are Numerous Health and Safety Risks to Late-Term Abortions.*

Abortions carry a higher medical risk when done later in pregnancy. Even Planned Parenthood, the largest abortion business in the United States, agrees that abortion becomes riskier later in pregnancy. On its national website, Planned Parenthood states: "The chances of problems gets higher the later you get the abortion, and if you have sedation or general anesthesia," which would be necessary for an abortion at or after 20 weeks of gestation.[23] To put this in context, a 2019 study

[20] 42 U.S.C. § 300a-7.
[21] *Id*. § 238n.
[22] *See*, *e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, tit. V, § 507(d), 136 Stat. 49, 496 (2022).
[23] *See* Planned Parenthood, *How Safe Is an In-Clinic Abortion?*, https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures/how-safe-is-an-in-clinic-abortion (last visited Jan. 4, 2023).

indicates "[i]t is estimated that about 1% of all abortions in the United States are performed after 20 weeks, or approximately 10,000 to 15,000 annually."[24]

Gestational age is the strongest risk factor for abortion-related mortality, and the incidence of major complications is significantly higher after 20 weeks' gestation.[25] For example, compared to an abortion at 8 weeks' gestation, the relative risk of mortality increases exponentially (by 38 percent for each additional week) at higher gestations.[26] Further, researchers have concluded that it may not be possible to reduce the risk of death in later-term abortions because of the "inherently greater technical complexity of later abortions."[27] This is because later-term abortions need to dilate the cervix to a greater degree, and the increased blood flow predisposes women to hemorrhage, and the myometrium relaxes and is more subject to perforation.

Later-term abortions also pose an increased risk to the woman's physical and mental health. Some immediate complications from abortion include blood clots, hemorrhage, incomplete abortions, infection, and injury to the cervix and other organs.[28] Immediate complications affect approximately 10% of women undergoing abortion, and approximately one-fifth of these complications are life-threatening.[29]

b. ***The Bill Severely Limits Minnesota's Ability to Ensure Women's Informed Consent and Prevent Domestic Violence.***

The decision to abort one's unborn child is a life-altering decision, and informed consent is critical to this decision. In its basic definition, informed consent "is a process by which the treating health care provider discloses appropriate information to a competent patient so that the patient may make a voluntary choice to accept or refuse treatment."[30] A woman cannot agree to medical treatment unless she is "competent, adequately informed and not coerced" in giving informed consent.[31] If one considers abortion "medicine," then healthcare professionals must receive a woman's voluntary, informed consent before inducing an abortion.

States, including Minnesota, often pass reflection periods to help ensure a woman has the time she needs to take all the given information into account without

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[24] James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, 6 HEALTH SERVS. RSCH. & MANAGERIAL EPIDEMIOLOGY 1, 1 (2019).
[25] Linda A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 731 (2004).
[26] *Id*. at 731; PRO. ETHICS COMM. OF AM. ASSOC. OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, *Induced Abortion & the Increased Risk of Maternal Mortality*, Comm. Op. 6 (Aug. 13, 2019).
[27] Bartlett, *supra* note 25, at 735.
[28] *See* Planned Parenthood, *supra* note 23.
[29] REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 48 (2005).
[30] Christine S. Cocanour, *Informed Consent—It's More Than a Signature on a Piece of Paper*, 214 AM. J. SURGERY 993, 993 (2017).
[31] *Id*.

the pressure of making an immediate decision since the "medical, emotional, and psychological consequences of an abortion are serious and can be lasting."[32] Similarly, states, including Minnesota, often require certain informed consent disclosures about the nature and risks of abortion procedures.[33] Yet, the bill prevents Minnesota from passing or enforcing these types of informed consent safeguards for women.

Informed consent is critical because women seeking abortion face serious risks of intimate partner violence ("IPV") and reproductive control. IPV includes physical violence, sexual violence, stalking, and psychological aggression by a current or former intimate partner.[34] Unfortunately, IPV is common, and "[a]bout 41% of women . . . experienced contact sexual violence, physical violence, and/or stalking by an intimate partner and reported an intimate partner violence-related impact during their lifetime."[35] Nearly one in five women have experienced severe physical violence by an intimate partner.[36] "Unintended" pregnancy, which may be a reason to seek an abortion, raises the risk of IPV. Women with unintended pregnancies are four times as likely to experience IPV as women with intended pregnancies.[37] Notably, half of all pregnancies are characterized as "unintended."[38]

Abortion also increases the risk of IPV. There are "[h]igh rates of physical, sexual, and emotional IPV . . . among women seeking a[n abortion]."[39] For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy.[40] Post-abortive IPV victims also have a "significant association" with "psychosocial problems including depression, suicidal ideation, stress, and disturbing thoughts."[41] Notably, a survey in the American Journal of Public Health indicated IPV perpetrators are more likely than non-abusive men to be involved in a pregnancy that ended in abortion.[42] The surveyed male IPV perpetrators were likely to be in conflict with their female partner particularly over her abortion

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[32] H.L. v. Matheson, 450 U.S. 398, 411 (1981); Minnesota's reflection period is currently enjoined by *Doe*, No. 62-CV-19-3868. *See* MINN. STAT. § 145.442(a) (2006).
[33] Minnesota's informed consent disclosures are currently enjoined by *Doe*, No. 62-CV-19-3868. *See* MINN. STAT. § 145.442(a)–(c).
[34] *Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Oct. 11, 2022), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html.
[35] *Id*.
[36] *Id*.
[37] COMM. ON HEALTHCARE FOR UNDERSERVED WOMEN, *Reproductive and Sexual Coercion*, Comm. Op. No.554, at 2 (reaffirmed 2022) (internal citation omitted).
[38] COMM. ON GYNECOLOGIC PRACTICE LONG-ACTING REVERSIBLE CONTRACEPTION WORKING GROUP, *Increasing Access to Contraceptive Implants and Intrauterine Devices to Reduce Unintended Pregnancy*, Comm. Op. No. 645, at 1 (reaffirmed 2018).
[39] Megan Hall et al., *Associations Between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis*, 11 PLOS MED. 1, 15 (Jan. 2014).
[40] *Reproductive and Sexual Coercion*, *supra* note 37, at 2.
[41] Hall, *supra* note 39, at 11.
[42] Jay G. Silverman et al., *Male Perpetration of Intimate Partner Violence and Involvement in Abortions and Abortion-Related Conflict*, 100 AM. J. OF PUB. HEALTH 1415, 1416 (Aug. 2010).

decision when the violence occurred.[43]

Reproductive control, which describes "actions that interfere with a woman's reproductive intentions,"[44] is also a public policy concern for women seeking abortion. Reproductive control occurs over "decisions around whether or not to start, continue or terminate a pregnancy, including deployment of contraception, and may be exercised at various times in relation to intercourse, conception, gestation and delivery."[45] Reproductive control includes intimate partners, family members, and sex traffickers asserting control over a woman's reproductive decisions.[46] Reproductive control not only produces coerced abortions or continued pregnancies, it also affects whether the pregnancy was intended in the first place.[47]

Reproductive control is a prevalent issue for women. "As many as one-quarter of women of reproductive age attending for sexual and reproductive health services give a history of ever having suffered [reproductive control]."[48] In the United States, African American and multiracial women, younger women, and minor victims of sex trafficking are more at risk for reproductive control.[49] Consequently, by limiting Minnesota's ability to ensure women's informed consent, the bill raises grave domestic violence and coercion concerns.

V. Conclusion

The bill enables abortion on demand throughout pregnancy. It infringes on constitutionally protected parental rights and federal conscience protections, while abandoning women without any health and safety safeguards. I urge the Committee to reject the bill to protect mothers and unborn children.

Respectfully Submitted,

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[43] *Id.*
[44] Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 62 (2019).
[45] *Id.*
[46] *Id.* at 65.
[47] *Id.* at 61–62.
[48] *Id.* at 62.
[49] Charvonne N. Holliday et al., *Racial/Ethnic Differences in Women's Experiences of Reproductive Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 26 J. OF WOMEN'S HEALTH 828 (2017); Elizabeth Miller et al., *Recent Reproductive Coercion and Unintended Pregnancy Among Female Family Planning Clients*, 89 CONTRACEPTION 122 (2014); Rowlands, *supra* note 44, at 64.