In Opposition to H.F. 1, "Protect Reproductive Options Act"
MN House Judiciary Finance and Civil Law Committee
2023-2024 Regular Session
January 10, 2023

Rep. Jamie Becker-Finn, Chair
Rep. Cedrick Frazier, Vice Chair

Revised Prepared Testimony of Professor Teresa Stanton Collett[*]

Good morning, Madame Chair, Mr. Vice Chair, Members of the Committee, and other distinguished guests. I am pleased to have been given the opportunity to testify in opposition to the euphemistically named "Protect Reproductive Options Act", H.F. 1 (Kotyza-Witthuhn).

My testimony represents my professional knowledge and opinion as both a practicing lawyer and law professor at the University of St. Thomas School of Law, where I direct the school's Prolife Center. I regularly teach Property Law, Constitutional Litigation, and bioethics. I am an elected member of the American Law Institute and have testified before committees of the U.S. Senate and House of Representatives, as well as before legislative committees in several states. I am currently representing victims of intimate partner violence and their viable unborn children in challenging certain provisions of the New York Reproductive Health Act, and a group of mothers in Minnesota seeking to uphold that state's parental notification and informed consent laws. An experienced appellate advocate, I have represented numerous government officials including Congressman Ron Paul, and several state governors in amicus briefs to the United States Supreme Court. My testimony today represents my own views and is not intended to represent the views of my employer, the University of St. Thomas School of Law, or any other organization or person.

If enacted, this bill will result in litigation regarding a wide variety of issues including, but not limited to, state laws and constitutional provisions protecting private rights of conscience, prohibiting prostitution, requiring reporting of child sexual assault, and defining eligibility for and the scope of medical services to be funded by Minnesota taxpayers.

1. **HF 1 will create irreconcilable conflicts between constitutional and statutory protections of healthcare providers and personnel who believe that abortion ends the life of a "whole, separate, unique, living human being."**[1]

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[1] This description of the unborn child was upheld as truthful and not misleading by the U.S. Court of Appeals for the 8th Circuit in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 735–36 (8th Cir. 2008) (*en banc*).

My former student, Carolyn McDonnell, now litigation counsel for Americans United for Life, has ably addressed this point in her testimony on HF 1 before the House Health Finance and Policy Committee on January 5, 2023. Rather than seek to improve on her arguments, I simply quote them:

> [T]he 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,[2] and state law separately has protections for medical professionals and hospitals to conscientiously object to providing abortions,[3] the bill raises issues of conscientious objections to abortion referrals, counseling, funding, and insurance coverage.
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> The United States has a rich legal tradition of protecting conscience rights against abortion. Federal statutory protections include:
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> - The Church Amendment, which protects healthcare facilities and individuals' conscientious objections to performing or assisting an abortion.
> - 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.
> - 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."
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> 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.

Recently a Minnesota court and jury in Aitkin County had to grapple with claims that a pharmacist violated Minnesota anti-discrimination law by acting in accordance with his conscience and his employer's policy allowing pharmacists to refer customers to other pharmacists when filling a prescription would violate the conscience of the pharmacist

[2] Minn. Const. art. I, § 16.

[3] Minn. Stat. § 145.42 (1986).

originally approached by the customer .[4] Plaintiff's counsel argued that the referral by the objecting pharmacist violated the Minnesota Human Rights Act ("MHRA"), Minn. Stat §§ 363A.01, et seq., prohibiting sex-based discrimination. The jury ultimately found there was no illegal discrimination. Yet if HF 1 passes, healthcare providers and personnel should anticipate lawsuits based on claims that the exercise of the provider's conscience is outweighed by the customer's or patient's reproductive health preferences.

2. HF 1 may create challenges to Minnesota statutes prohibiting prostitution and sex trafficking.

While seemingly providing some limitation on the definition of "reproductive health services", HF 1 with its characterization of the availability of such services as "fundamental" may bring into question the ability of Minnesota to prohibit the sale of sexual services.[5] Minnesota statutes criminalizing solicitation of women to be prostitutes[6] and a statute Minnesota Statutes § 609.352, subd. 2a(2) (2016), prohibiting adults from communicating or describing the sexual conduct to a child with the specific intent to arouse sexual desire[7] have already been attacked as violating free speech protections, but passage of HF 1 could open up a new line of attack on these and other criminal statutes under the state constitution.

Both the World Health Organization[8] and the Guttmacher Institute[9] define reproductive health services to include "satisfying" sexual relations. This has, in part, been the basis for the Netherlands' inclusion of payment for sex therapy and sex with

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[4] *Anderson v. Aitkin Pharmacy Services, LLC et al*., Civil File No. 01-CV-19-1198, Aitkin Cty. Dist. Ct. (2023).

[5] Minnesota criminal prohibitions of prostitution and sex trafficking are contained in Minn. Stat. §§ 609/321 to 609.325.

[6] *See State v Washington-Davis*, 881 N.W.2d 531 (Minn. 2016).

[7] *See State v Muccio*, 890 N.W. 2d 914 (Minn. 2017).

[8] Programme of Action of the International Conference on Population and Development (Cairo 1994) provides this definition:

> Reproductive health is a state of complete physical. mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. . . . It also includes sexual health. the purpose of which is the enhancement of life and personal relations. and not merely counselling and care related to reproduction and sexually transmitted diseases.

World Health Organization, *Achieving Reproductive Health for All: The Role of WHO* (1995) *quoting* ICPD Programme of Action, A/CONF.171/13, paragraph 7.2. Available at http://apps.who.int/iris/bitstream/10665/63717/1/WHO_FHE_95.6.pdf.

[9] https://www.guttmacher.org/guttmacher-lancet-commission/accelerate-progress-executive-summary

prostitutes as part of its medical assistance to the disabled in that country.[10] It takes little imagination to anticipate a case arguing the failure to provide such services as part of Minnesota medical assistance constitutes discrimination against the disabled.

3. HF 1 would bring into question state mandatory reporting requirements related to sexual assault of minors.

Minnesota currently attempts to protect all children and teens in the state from sexual abuse[11] by requiring medical personnel, teachers, clergy, and others to report if they know of or have reason to believe a child is being sexually abused or has been abused within the preceding three years.[12] Clearly, given the state's criminal prohibitions of engaging in sex with a minor, a pregnant child under the age of 13, and often pregnant teens between the ages of 13 and 16 are the victims of sexual assault.[13]

It is important to note that the younger the girl, the greater likelihood that her first participation in sexual intercourse is likely to be forced by a man who is, on average, her senior by 6+ years. What researchers call "forced sexual initiation" occurs at around age 15, almost two years before teen girls engage in "voluntary sexual initiation," and the earlier the sexual initiation the greater the probability that the experience involves a criminal sexual assault.[14]

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[10] Chuka Nwanazia, Sex Care in the Netherlands: Helping the Disabled to find Intimacy (2018) at https://dutchreview.com/culture/relationships/sex-care-in-the-netherlands-helping-the-disabled-find-intimacy/. A similar but more extensive proposal has been advanced in Germany. German Green Party proposal to pay prostitutes https://www.glamour.com/story/german-sex-workers-funded-elderly-disabled

[11] Sexual abuse is defined in Minn. Stat. 260E.03, subd. 20, which means the subjection of a child to sexual contact by persons responsible for child's care, person with a significant relationship to child, or in a position of authority. For reports of sex trafficking, alleged offenders do not have to be in a caregiving role. Sexual abuse also includes any act involving a minor that constitutes a violation of prostitution offenses under Minn. Stats. 609.321 to 609.234 or 617.247.

[12] Minn. Stat. 260E.

[13] Mike A. Males, *Adult Involvement in Teenage Childbearing and STD*, LANCET 64 (July 8,1995)
citing HP Boyer and D. Fine, *Sexual Abuse as a Factor in Adolescent Pregnancy and Child Maltreatment*, FAM. PLAN. PERSPECTIVES at 4 (1992); and HP Gershenson, et al. *The Prevalence of Coercive Experience Among Teenage Mothers*, J. INTERPERS. VIOL. 204 (1989).

[14] Hawks L, Woolhandler S, Himmelstein DU, Bor DH, Gaffney A, McCormick D. *Association Between Forced Sexual Initiation and Health Outcomes Among US Women*. 179 JAMA Intern. Med. 11 (2019):
1551–1558. doi:10.1001/jamainternmed.2019.3500.

> The mean age at first intercourse for women with forced sexual initiation was almost 2 years younger than for those with voluntary sexual initiation (15.6 years; 95% CI, 15.3- 16.0 years vs 17.4 years; 95% CI, 17.3-17.5

Pregnant minors or minors seeking contraception may also be victims of sex trafficking. The majority of adolescent female sex trafficking victims in the U.S are recruited between the ages of 12 and 14.[15] Further, the most widely cited statistics regarding prevalence suggest that 300,000–400,000 children are at risk or become victims of sex trafficking in the U.S. each year. [16] Many researchers and healthcare professionals believe more accurate numbers are in the millions and the often-cited figures are likely seriously underestimated due to study limitations.[17]

This data is particularly relevant in Minnesota, given that the FBI has identified the Twin Cities as one of 13 U.S. cities with a particularly high incidence rate of child prostitution, and in 2015 Minnesota had the third-highest number of human trafficking cases.[18]

Yet abortion activists have routinely challenged mandatory reporting of suspected sexual abuse of minors in the context of providing contraception and abortion. These objections include not only claims that providers of "reproductive health services" should be immune from such laws[19] but even extend to silencing judges who learn a minor is pregnant resulting from rape. Let me provide just one example of this.

> Appellants would have a judge, who is sworn to uphold the law, withhold vital information regarding rape or incest which would allow state

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> years) (Table 1). The mean age discrepancy between study participants and their male partners/assailants at the time of sexual initiation was 6 years greater among those for whom sexual initiation was forced (27.0 years; 95% CI, 24.8-29.2 years vs 21.0 years; 95% CI, 20.6-21.3 years). Nearly three-fourths (74.7%) of women who experienced forced sexual initiation were younger than 18 years at the time of sexual initiation vs 60.5% of women with voluntary sexual initiation (P < .001); 6.8% of women reporting forced sexual initiation were aged 10 years or younger vs 0.1% of women with voluntary sexual initiation (P < .001).

Id. at 1555.

[15] Busch-Armendariz N, Nsonwu M, & Heffron L.(2011). Human trafficking victims and their children: Assessing needs, vulnerabilities, strengths and survivorship. J Appl Res Child Inform Policy Child Risk, 2(1), pp. 1-19.

[16]Willis, B. M., & Levy, B. S. (2002). Child prostitution: Global health burden, research needs, and interventions. The Lancet, 359, 1417–1422.

[17] Lutnik, A. (2016). Domestic minor sex trafficking: Beyond victims and villains, New York, NY: Columbia University Press.

[18] Minn. Dept. Transp., Human Trafficking Awareness at 2. https://www.dot.state.mn.us/humantraffickingawareness/index.html.

[19] *Aid for Women v. Foulston,* 441 F3d 1101, 1117-1120 (10th Cir 2006) (Kansas statute requiring doctors, teachers, and others to notify state government of suspected injury to minor resulting from sexual abuse was constitutional since minors do not have informational privacy rights to non-disclosure of criminal conduct).

> authorities to end the abuse, protect the victim, and punish the abuser. Not only would Appellants' position prevent the judge from helping the victim seeking the abortion, but it would prevent the judge from helping other juveniles in the same household under the same threat of incest. This Court does not believe that the Constitution requires judges to be placed in such an untenable position.

Manning v Hunt, 119 F3d 254, 273 (4th Cir 1997).[20]

Given the broad and undefined word "individuals" in HF 1 and the absence of any recognition that minors are differently situated from adults when seeking "reproductive health services", Minnesota courts will undoubtedly face challenges when mandatory reporting laws are enforced in the context of providing reproductive health services to minors.[21]

4. Minnesota will face challenges to existing statutes defining eligibility for and the scope of medical services to be funded by Minnesota taxpayers.

Currently Minnesota statutes restrict public medical assistance to low-income Minnesota residents[22] or migrant workers who meet certain eligibility requirements.[23]

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[20] *Accord Womancare of Orlando, Inc. v. Agwunobi*, 448 F Supp 2d 1293, 1305 (N.D. Fla 2005) (rejecting challenge to judicial bypass procedures based on claim that minor would be deterred due to judge's duty to report sexual partner to state authorities);

[21] *Cf. State of Minnesota v. Paul James Frederick*, Douglas County District Court, Case No. 21-CR-11-2285, affirmed unpublished Minnesota Court of Appeals Opinion, A13-0784 (April 21, 2014). The case is described in a 2015 summary of incidents in which Planned Parenthood failed to report sexual abuse of minors.

> This case reveals that Paul James Frederick, a 42-year-old father, was prosecuted for sexually assaulting the 14-year-old girlfriend of his son. Frederick groomed the young girl by driving her to and from school, buying her things, including clothing and Victoria's Secret underwear. Because the child was "inexperienced" and a "virgin," court documents indicate that Frederick took her to Planned Parenthood to get birth control. The court opinion states Frederick was convicted based on the discovery of a used condom in his bedroom, and no mention is made of a Planned Parenthood report of potential sexual abuse.

Alliance Defending Freedom, *How Planned Parenthood "Cares" for Child Victims of Sexual Abuse* (2015), available at https://adfmedialegalfiles.blob.core.windows.net/files/PlannedParenthoodSexAbuseSummary.pdf.

[22] MN Stat. 256B.055 established various categories of persons eligible for medical assistance, including children in a wide variety of circumstances, pregnant women and their needy unborn children, 256B.056 Subd. 1 provides: "Residency. (a) To be eligible for medical assistance, a person must reside in Minnesota, or, if absent from the state, be

The law establishes a policy of favoring childbirth over abortion.[24] The statutes further define the scope of services covered by public medical assistance, and expressly exclude sex reassignment services,[25] non-therapeutic abortions,[26] and fertility drugs.[27]

Under the proposed act, each of these provisions will be subject to litigation. By the bill's use of the word "individual", it appears to dispense with the state residency requirement and other eligibility requirements for medical assistance in the state. Given the bill has no language repealing the existing statutes it will first be left to unelected leaders of administrative agencies to determine whether to adhere to existing clear statutory guidance or treat the statutes as implicitly repealed by HF 1.

Regardless of the decision the agencies make, this bill virtually guarantees that some individuals or groups will sue – either to force the agencies to provide medical assistance to pay for reproductive health care as defined in HF 1 to all "individuals" in the state, regardless of residency and income requirements, on a theory that refusal to do so violated the legislative interpretation of state constitutional protections of individual liberty, personal privacy, and equality, HF 1, subd. 4, or on the theory that an agency's disregard of statutory limitations constitutes an illegal expenditure of taxpayers fund or

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deemed to be a resident of Minnesota, in accordance with Code of Federal Regulations, title 42, section 435.403."

[23] MN Stat. 256B.06 establishes the criteria for determining if a migrant worker is eligible for medical assistance.

[24] "Between normal childbirth and abortion it is the policy of the state of Minnesota that normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens. and limits such assistance to certain medical services." Minn. Stat. 256B.011.

[25] Minn. Stat. 256B.0625, Subd. 3a.

[26] While Minn. Stat. 256B.0625, Subd. 16 appears to limit payment for abortions to only cases where two physicians determine that the abortion is medically necessary to prevent the death of the mother, or cases where the pregnancy is the result of rape or incest, the scope of abortion services was expanded to include all "therapeutic" abortions by the Minnesota Supreme Court in *Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995).

> We emphasize that our decision is limited to the class of plaintiffs certified by the district court and the narrow statutory provisions at issue in this case. Specifically, we hold that the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons. The statutory scheme, as it exists, takes the decision from the hands of such women in a manner that, in light of the protections afforded by our own constitution, we simply cannot condone. *Contrary to the dissent's allegations, this court's decision will not permit any woman eligible for medical assistance to obtain an abortion "on demand."*

Id. (emphasis added).

[27] Minn. Stat. 256B.0625, Subd. 13.

violates the separation of powers. Either way, HF 1 puts members of the Minnesota executive branch in a no-win situation.

A similar theory will no doubt serve as the basis for challenging any refusal to fund services currently excluded for coverage by Minnesota medical assistance. Unlike other proposed legislation this session, HF1 would require Minnesota taxpayers to fund abortion on demand, contrary to *Doe v. Gomez*, sex reassignment surgeries, and fertility drugs. See HF 1, subd. 2 providing "Reproductive health care includes, but is not limited to, contraception; sterilization; preconception care; maternity care; *abortion care*; family planning and *fertility services*; and counseling regarding reproductive health care."

Conclusion

There are many additional deficiencies in this bill, but the time constraints of this committee limits my ability to address them. Should the committee or individual legislators have questions or wish to discuss the additional deficiencies I perceive in the bill, I welcome the opportunity to discuss them individually or with a group.

Thank you for allowing me to present my opposition to this proposed legislation in person and through this written testimony.