Written Testimony in Opposition to H.F. 1

House Judiciary Finance and Civil Law Committee

January 10, 2023

Madame Chair and Members of the Committee:

The Minnesota Catholic Conference writes in opposition to H.F. 1 (Kotyza-Witthuhn). Beyond its denial of the humanity and rights of fetal life at any state, and its endangerment of women in its attempt to block any reasonable regulation of abortion, we ask this committee to vote "no" because it will open a pandora's box of novel legal decisions related to complex bioethical decisions that are properly within the realm of legislative consideration and not the courts.

Since the *Dobbs* decision in June by the U.S. Supreme Court, the matter of the legality of abortion has been surrounded by misinformation, especially in Minnesota. The remedy being advanced by abortion proponents for *Dobbs* has been to "codify *Roe*" and attempt to return to the status quo ante, irrespective of the fact that abortion is already a protected constitutional right in Minnesota.

Both legislators and the general public are uninformed about the state of the law, and therefore the Legislature is now considering a bill creating a broader right to "reproductive freedom" developed by the abortion and fertility industries that will represent a financial windfall for them and which goes far beyond what many in the public were sold as being necessary as a response to *Dobbs*.[1]

The bill does not "codify *Roe*"

The U.S. Supreme Court concluded in *Roe v. Wade* that the right of privacy allowed a woman to procure an abortion free from criminal prosecution. It rejected the argument, however, "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[2] It also concluded that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." Though later modified in a subsequent decision, *Roe* and its progeny provided ample room for regulation

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[1] It is telling that so much focus as to why abortion is needed has been on difficult cases, such as the ten-year old girl in Indiana, or matters supposedly necessitating "abortion care" that do not even constitute abortions, such as treating miscarriages or ectopic pregnancies—rhetoric that needlessly causes emotional harm to women in those circumstances by suggesting their medical care is abortifacient, which it is not. *See, for example,* Peter Callaghan, "Protecting abortion and legalizing cannabis: Speaker Hortman on Minnesota House priorities in the 2023 DFL trifecta," MinnPost, Dec. 22, 2022, *available at* https://www.minnpost.com/politics-policy/2022/12/protecting-abortion-and-legalizing-cannabis-speaker-hortman-on-minnesota-house-priorities-in-the-2023-dfl-trifecta/. It is telling because the actual matter of abortion cannot be discussed too much lest it trouble the conscience and turn off voters who are far more moderate on the issue than this bill provides. *See* Ava Kian, "MinnPost poll: In wake of Dobbs ruling, Minnesotans remain supportive of abortion rights in many cases," MinnPost," MinnPost, Oct. 19, 2022, *available* at https://www.minnpost.com/health/2022/10/minnpost-poll-in-wake-of-dobbs-ruling-minnesotans-remain-supportive-of-abortion-in-many-cases/.

[2] The quotes from *Roe* in this paragraph regarding the state's interest can be found at 410 U.S. 113, 153-55 (1973).

of abortion—regulations that have been on the books for many years in Minnesota.[3] Notably, *Roe* and subsequent cases upheld the state's interest in protecting nascent human life at later stages of development. In fact, it stated that and "at some point the state interests as to protection of health, medical standards, and pre-natal life, become dominant."

The recent hearing in the House Health Policy Committee made clear that the intent of this bill is to, at minimum, create a legal landscape for abortion free of any limitations—even those that protect the health and safety of women, such as a requirement that later-term abortions be performed in hospitals. Such legislation goes far beyond *Roe*. This legislation seeks to protect something far broader than simply abortion, namely, "reproductive freedom" more generally. The language of what constitutes reproductive freedom itself is open-ended and ambiguous in the legislation, however, portending a host of novel outcomes.

What does the bill actually do?

Minnesota statutes fulfill one of three functions: they command, prohibit, or authorize. Minnesota statutes do not include general statements of policy. Apart from subdivision five, however, it is unclear into which category this legislation falls, as it reads more like a statement of policy and contains no enforcement mechanism. That could be a problem of drafting that needs to be addressed. The more likely conclusion is that this legislation is designed to be a policy directive to Minnesota courts (a command) to protect this broader right of reproductive freedom in a whole variety of contexts, only some of which are enumerated.

Under the proposed the language, the fundamental right of reproductive freedom means "the right to make autonomous decisions about the individual's own reproductive health," including whether to give birth or have an abortion, as well as to "make autonomous decisions about how to exercise this fundamental right." Reproductive health care is defined as "health care offered, arranged, or furnished for the purpose of preventing pregnancy, terminating a pregnancy, managing pregnancy loss, or improving maternal health and birth outcomes. 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." (Subd. 2, Lines 1.8-1.13).

In general, access to such services is widely available and not in any jeopardy. But in some novel cases, the intersection of science, new technology, and ethics has led to debates about the use of certain practices and whether they are ethical means of overcoming fertility. One such practice is surrogacy arrangements. Minnesota appellate courts have not issued a binding decision recognizing the validity of such contracts, nor has this Legislature decided to create a regulatory framework for surrogacy arrangements, either for those in which the surrogate is paid or serves for altruistic reasons. Surrogacy arrangements, and the contracts that create them, are filled with a host of ethical questions about the exploitation of socio-economically disadvantaged women and the commodification of children. For these reasons, among others, surrogacy legislation has both failed to pass in numerous sessions and in the one session it did pass this Legislature, it was vetoed by Gov. Tim Pawlenty.

The language of the bill seems to instruct courts to give people (not just women), access to any and all forms of "reproductive healthcare" regardless of the ethics or wisdom of those technologies or procedures, precisely because the litigant wants it. The language could be read to give courts the

[3] A state district court issued an opinion after *Dobbs* striking down many of these regulations under a novel theory of the constitutional right of privacy. Regardless whether that decision stands, it shows this bill is unnecessary at this time.

legislative direction needed to recognize the validity of surrogacy contracts,[4] even though that decision should be made by the Legislature as a matter of public policy.

Another potential impact of this legislation is that the broader community, including private actors and medical professionals, not just the state, could be forbidden from acting in any way that puts limitations on the individual's desire to access such "reproductive healthcare." In a whole host of novel bioethical matters that continue to emerge, courts will be compelled to side with "reproductive freedom." In the absence of specific statutory exemptions, medical professionals may be required to perform any and all procedures, and pharmacists, for example, must dispense the relevant pharmaceuticals, irrespective of conscience rights or religious liberty. One set of values and rights—reproductive freedom—is elevated to the status of a fundamental right and could trump other rights, enumerated or otherwise.

The impact of *Doe v. Gomez* (1995) and taxpayer funding

In *Doe v. Gomez*, 542 N.W.2d 17 (1995), the Minnesota Supreme Court concluded that the state could not provide medical assistance to indigent women that paid for childbirth, but that did not cover abortions. The refusal of the state to provide this form of welfare assistance was considered coercive on the women's reproductive healthcare decision-making.

Under *Gomez*, government cannot interfere with a fundamental right (reproduction) by funding one option (childbirth) for its exercise and not the other (abortion). Nor can it interfere in the decision-making process by funding one choice and not the other. Funding one option amounts to psychological coercion to not pursue the other. The statute here is designed specifically with this logic in mind.

Though the court did not state it directly, one implication of *Gomez* is that, to be protected as a fundamental right, a person not able to exercise that right due to financial constraints must be subsidized to do so. Similarly, the state may not make discriminatory classifications in the exercise of this right, such as privileging childbirth over abortion or contraception, nor may it discriminate between the types of individuals who seek reproductive healthcare.

According to the Minnesota Department of Health, the state's Medical Assistance (MA) program does not cover "artificial ways to become pregnant, including in vitro fertilization and fertility drugs." Nor does it cover medications used for erectile dysfunction.[5] If this legislation should pass, could MDH's prohibition of coverage on these procedures and drugs withstand judicial scrutiny under the logic of *Gomez*, especially with the specific intent to protect "fertility treatments"? Perhaps not, as they are potentially discriminatory between various types of healthcare procedures and treatments already covered by MA (including natural childbirth and abortion).

Does this statute lead to state-funded IVF cycles, which can cost between $15,000 and $30,000,[6] and are not always successful? Is this the "Viagra for All" bill?

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[4] There was no means in the common law system to sell your baby. Therefore, to terminate one's parental rights (and responsibilities) through surrogacy, legislatures must create a specific mechanism to do so. *See* Minn. Stat. § 260C.301.

[5] https://mn.gov/dhs/people-we-serve/adults/health-care/health-care-programs/programs-and-services/ma-coverage.jsp

[6] Marissa Conrad, "How Much Does IVF Cost?" Forbes, July 27, 2022, *available at* https://www.forbes.com/health/family/how-much-does-ivf-cost/

Conclusion

If the state wanted to simply codify *Roe*, it can clarify that procuring an abortion will not lead to criminal prosecution. It can then leave space, as *Roe* did, for other regulations, such as those already on the books.

If the Legislature is inclined to move forward with this expansive statute, it may wish to take a pause and clarify what is *not included* as "reproductive healthcare" and create some specific exclusions, as well as limit the open-ended language. The potential drafting problems and unintended consequences of the bill should give legislators pause.

Respectfully submitted,

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