January 5, 2023

Representative Tina Liebling

Chair, Health Finance and Policy Committee

Re: HF1 – Protect Reproductive Options Act

Madam Chair and members of the Committee,

Thank you for the opportunity to provide testimony on the Protect Reproductive Options (PRO) Act (HF1). I am a Professor of Law at Mitchell Hamline School of Law and a Visiting Professor at Saint Louis University School of Law, and I support the PRO Act.

The Minnesota House of Representatives has a historic opportunity to protect reproductive freedom for all Minnesotans this legislative session. As we saw last year at the federal level with *Dobbs v. Jackson Women's Health Organization*[1] and in Iowa with *Planned Parenthood of the Heartland v. Reynolds*,[2] key judgments from high courts may be overturned when court membership changes, even when millions of people rely on those judgments in planning their lives.

The PRO Act would unambiguously codify the legal right of Minnesotans to autonomously and individually determine their own reproductive destinies. As such, it would help protect Minnesotans' reproductive freedoms from the possible future reversal of *Doe v. Gomez*,[3] the decision that protects abortion rights here in Minnesota, by a differently-constituted Minnesota Supreme Court.

The PRO Act is well worth passing precisely as introduced. That being said, the PRO Act could be improved – though only if politically feasible – by taking the following steps:

(1) **Clarify that embryos and fetuses have no independent legal rights**. The PRO Act as introduced in the last legislative session (HF259) provided that "[a] fertilized egg, embryo, or fetus does not have independent rights under the laws of this state." This provision should be returned to this session's bill, if politically feasible. One of the best ways to start our children off right is to ensure that all children who are born are wanted. For this to happen, the state should not create potential legal conflict between a fetus and the person carrying it. Before birth, only the woman carrying a fetus should have rights recognized by law, and not the fetus itself. The interest and attention of that pregnant woman should be enough protection. After all, it is the pregnant person who alone physically cares for the fetus during pregnancy, and who in nearly all cases will also be a primary support for the resulting child. If the state wants to support fetal welfare, it might do so by better

[1] 142 U.S. 2228, 2284 (2022) (overruling the right to an abortion as given in *Roe* and *Casey*).
[2] 975 N.W.2d 710, 740, 744 (Iowa 2022) (holding that neither the due process nor the equal protection clauses of the Iowa constitution provide fundamental protection for abortion).
[3] 542 N.W.2d 17, 27, 31 (Minn. 1995) (holding that the right to privacy under the Minnesota constitution protects a woman's right to terminate her pregnancy, and that the state may not interfere in that decision).

supporting the needs of people who are or can become pregnant, especially those who are less advantaged.[4]

(2) **Stipulate that the state's interest in fetal life starts only at viability (if not later)**. Reproductive freedom during pregnancy encompasses far more than just the right to keep or abort a pregnancy. It also entails trusting women to make the best decisions reasonably feasible for themselves and their fetuses within the context of their individual lives. The state should not have any actionable interest in not-yet-viable fetal life that would allow it to single out pregnant people for special surveillance or punishment for failing to meet certain standards. Nor should the state be able to deputize others to perform such actions for it. Such a stipulation should prohibit Minnesota laws that, for example, require mandated reporters to report women whom they suspect to be both pregnant and having used "a controlled substance [or alcohol] for a nonmedical purpose during the pregnancy," as an instance of "Mistreatment of Minors."[5] Laws like this have been associated with delayed and reduced receipt of prenatal and postnatal care, as well as higher rates of neonatal abstinence syndrome, as compared to states lacking such laws.[6] Study results "suggest that women of reproductive age, including pregnant and postpartum women, are disengaging from the health care system in states where punitive policies regarding substance use during pregnancy have been enacted."[7] Again, if the state wants to support fetal welfare by, e.g., addressing maternal substance use, it can do so by expanding and more generously funding drug treatment programs for pregnant people or by taking other positive, voluntary measures to improve access to and quality of treatment. Voluntary, supportive measures help harmonize maternal and fetal interests, rather than setting them at odds.

Even without such changes, all Minnesotans will benefit from the PRO Act's protection of reproductive freedoms. Thank you for considering it. I hope you pass the PRO Act with all due speed.

Sincerely,

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[4] *See, e.g.*, Anna Aizer et al., *The Intergenerational Transmission of Inequality: Maternal Disadvantage and Health at Birth*, 344 SCIENCE 856 (2014); Douglas Almond et al., *Childhood Circumstances and Adult Outcomes: Act II*, NBER WORKING PAPER 23017 (January 2017).

[5] Minn. Stat. § 260E.31, subd. 1 (2023).

[6] *See, e.g.*, Anna E. Austin et al., *Association of State Child Abuse Policies and Mandated Reporting Policies With Prenatal and Postpartum Care Among Women Who Engaged in Substance Use During Pregnancy*, 176 JAMA PEDIATRICS 1123, 1125-27 (2022); Laura J. Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, JAMA NETWORK OPEN 6 (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304.

[7] Faherty et al, *supra* note 5, at 7.