



First and Fourteenth

To: Minnesota State Legislature
From: L. Martin Nussbaum, esq.
Re: Minnesota SF 1704, fertility treatment mandate
Date: March 18, 2024

Our law firm has been asked to comment regarding SF 1704, a bill that requires employee health plans to cover fertility treatments. Because of our experience in public law and the law affecting religious institutions, we have closely followed developments with regard to the science, conscience issues, and legislation related to fertility treatment.

SF 1704 Would Burden Religious Exercise for Many. The eminent bioethicist, John Haas, Ph.D., has written that “[i]t is quite legitimate to try to find ways to overcome infertility” in marriage. That being said, many religious traditions recognize that some methods are morally acceptable while others are not. Generally, the morally unacceptable methods within those traditions involve either conception outside the marital act or the destruction of fertilized ovum.

Because science shows that the fertilized ovum, at conception and every stage of gestation thereafter is human life with its own sex and unique DNA, Catholics, Evangelical Christians, and others morally oppose reproductive methodologies that, while well intended, result in the destruction of human life. We explain this in more detail in our recent paper proposing inclusion of a meaningful religious exemption from HF 4053, a bill that mandates health plan coverage of abortion.

Why Provide Religious Exemption? Why should a legislative majority in favor of mandating health plan coverage of every form of reproductive methodology provide a religious exemption for those who favor some forms of such methodology but not others? In an earlier era, one may have asked why provide an exemption for those who conscientiously opposed going to war?¹ The answer is straightforward. Religious exemption from morally-controversial legislation is consistent with the finest traditions of American and Minnesota law. It has long been the practice in Minnesota and elsewhere that legislators often provide religious exemption from morally controversial laws. They do so because religious liberty is most distinctive aspect of the American experiment. This is why James Madison called it the “lustre

¹ See, e.g., General George Washington’s January 29, 1777 letter to Pennsylvania Council of Safety calling for imposition of a draft so long as it exempted the “conscientiously scrupulous” like Amish and Mennonites.

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Tradition wins.

of our country.” In the First Amendment, the founders of our country forbade government action “prohibiting the free exercise” of religion. U.S. Const., amend. I. Minnesota’s founders went further.² The preamble to the state constitution states that the people adopted Minnesota’s constitution because they were “grateful to God for our civil *and religious liberty*.” Then in article I, section 16, they stated that “[t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed . . . *nor shall any control or interference with the rights of conscience be permitted . . .*” The Minnesota Legislature has, consistent with this high tradition, provided statutory religious exemptions.³

Why does religious freedom matter? It matters because the most distinctive aspect of the human condition is that every person is endowed with a conscience. As Aristotle taught long ago, conscience requires exercise. Exercise of conscience requires freedom. Without freedom to act according to one’s conscience, we cannot become a virtuous people. Benjamin Franklin recognized that “only a virtuous people are capable of freedom.”

There’s more. Professor Elizabeth Clark has cited scores of studies showing that religious liberty promotes human flourishing.

Religion is extensively documented to have a positive effect on individuals’ well-being and health. This includes a sense of wellbeing, life satisfaction, mental health, and physical health levels, including lowered suicide rates and deaths of despair . . . Religiosity is correlated with reduced criminality [and] with lower recidivism rates and fewer disciplinary problems in prison. . . . The impact of religion in individuals is particularly noticeable in adolescents. Positive correlations with religiosity include physical and mental health, academic achievements, and community involvement. Frequent attenders at religious services engage in fewer risky behaviors such as illegal drug and alcohol use.

Religious beliefs can anchor and inspire communities, promote intergenerational norm transfer, and develop democratic values such as tolerance, reflective thinking, generosity, altruism, and law-abidingness. Religion and religious organizations also promote peacemaking through non-violent democratic movements, mediation . . . and shaping of transitional justice by religious actors. Faith-based associations also provide enormous support for humanitarian, educational, and medical care.

Elizabeth A. Clark, *The Impact of Religion and Religious Organizations*, 49 *BYU L. Rev.* 1, 5-6, 20 (2023).

² See *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (explaining that “Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution”).

³ See, e.g., Minn. Stat. §§ 363A.26 (religious organization exemption from Human Rights Act’s prohibition on religious discrimination); 253B.03 (protecting patient’s right to practice religion).

For these reasons, we recommend that the legislature amend Section 1 of SF 1704, subdivision 2 by replacing the opening sentence with the following: “Every health plan under subdivision 1, except a plan sponsored by an employer that, for religious reasons, objects to providing some or all reproductive services or care described below, must provide comprehensive coverage for the diagnosis of infertility, treatment for infertility, and standard fertility preservation services that are:”

SF 1704 Will Trigger Lawsuits Requiring the State to Incur Unnecessary Expense. If passed without religious exemption, conscientious religious employers are likely to sue the State seeking religious exemption as required by Minn. Const. art. 1, § 16 and U.S. Const., amend. I. Such lawsuits create unnecessary strife and expense.