



First and Fourteenth

To: Minnesota State Legislature
From: L. Martin Nussbaum, esq.
Re: Minnesota HF 4053, abortion health plan coverage mandate
Date: March 18, 2024

Our law firm has been asked to comment regarding HF 4053, a bill that requires employee health plans to cover abortion. 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 chemical and surgical abortion.

HF 4053 Would Burden Religious Exercise for Many. The science is clear. The unborn child, at whatever stage of gestation, is human life. From the moment of conception, it is male or female with its own unique DNA. It can be no surprise to Minnesota legislators that Catholics, Evangelical Christians, and others understand the taking of human life, at whatever stage of development or dependency, constitutes a grave offense against God who creates human life in His own image. *See* Ps. 139:13-16 (“Thou has covered me in my mother’s womb. I will praise Thee; for I am fearfully and wonderfully made; marvelous are Thy works”); Jer. 1:5 (“Before I formed you in the womb I knew you for my own; before you were born I consecrated you”; Didache 2:2 (c. 150 A.D.) (“you shall not murder a child by abortion nor kill that which is born”).

What is less well known is a respected form of moral reasoning called “material cooperation with evil.” “Material cooperation” is “when a person actions unintentionally help another person do something wrong.”¹ Many Christian employers, including those that are Catholic and Evangelical, understand that they have a moral obligation to provide their employees with health care benefits. This is a good thing. But when the law requires those that fund employee health plans to cover abortion, then the law requires them to cooperate with evil. Ethicists and religious leaders teach against material cooperation not only because material cooperation facilitates wrongdoing but it also gives rise to scandal. A Christian employer may teach against abortion, but if it then provides employees with health plan benefits that pays for abortion, this causes scandal. Scandal is a terrible burden. It undermines the credibility of the entity engaged in scandal. For ministries, scandal degrades every aspect of their witness.

¹ Gerry Rauch, *Formal vs. Material*, National Catholic Register (January 11, 1998).

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Tradition wins.

The great compromise between the pro-choice and pro-life communities in the United States for forty years was called the Hyde Amendment. The Hyde Amendment forbade the use of taxpayer funds to pay for abortion. For the pro-choice community, abortion remained legal and available. For the pro-life community, there was not even remote cooperation with what they understood to be evil. Minnesota has previously abandoned this compromise. HF 4053 would take this a step further by requiring pro-life employers to cooperate with evil by actually paying for the abortions of their employees and those employees' family members.

For these reasons, we recommend that the legislature amend Section 5 of HF 4503, subdivision 2 with language similar to this: **“This subdivision shall not apply to health plans sponsored by any employer that, for religious reasons, objects to covering abortion, abortion-related services, or pre-abortion services.”**

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.² They do so because religious liberty is most distinctive aspect of the American experiment. This is why James Madison called it the “lustre 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.³ 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.⁴

² See, e.g., 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.

³ 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”).

⁴ 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).

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).

HF 4053 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.