



March 20, 2024

Members of the Health and Human Services Committee
Minnesota Senate Building
95 University Avenue W.
St. Paul, Minnesota 55155

Chair Wiklund and Members of the Committee,

True North Legal is a non-profit legal organization that advocates for life, family, and religious freedom on behalf of all Minnesotans. We offer the following high-level analysis regarding significant legal and policy concerns relating to SF 3967.

SF 3967's elimination of an insurance and public benefit coverage carveout for abortion funding violates the rights to free exercise of religion and conscience protected by the First Amendment to the United States Constitution and Article I, Section 16 of the Minnesota Constitution by forcing Minnesotans with religious and conscientious beliefs about abortion to be complicit in the act by mandating insurance coverage for abortion. Meanwhile, it leaves in place coverage gaps that are justified by the secular rationale of protecting the bottom line of insurance companies and the state Medicaid program, treating Minnesotans with sincerely held religious beliefs about abortion less favorably.

Existing Minnesota law mandates insurance and Medicaid coverage for some health care treatments and procedures, while coverage for other treatments and procedures is not required. These coverage mandates do not require coverage for all medically necessary health care procedures. Nor do they require that all elective procedures be excluded from coverage. These mandates reflect no "generally applicable" consistent rationale.¹ Presumably, where coverage gaps remain, they are justified by a secular financial rationale – that the gaps in coverage are justified by the limited resources of insurance carriers, employer sponsored plans and the state Medicaid program.

One part of the patchwork of insurance mandates that has remained consistent for decades is that Minnesota insurance policies and public benefit programs need not cover abortions. SF 3967 removes this abortion carveout impacting the religious liberties and rights of conscience of Minnesotans, such as employers who have religious or moral objections to funding abortions through their employer-sponsored health plans. As drafted, SF 3967 targets for elimination only the insurance coverage gap regarding abortion, leaving Minnesotans with deeply held religious beliefs and conscientious objections to facilitating abortion in a precarious position. Yet, SF 3967 leaves intact the innumerable other insurance health care coverage gaps that

¹ See, generally, Minnesota Statutes Chapters related to health insurance and health maintenance organizations, 62A, 62D, 62Q, and Medicaid, 256B.



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are grounded in the previously mentioned secular justification, namely protecting the bottom line of insurance companies or the state Medicaid budget.

As drafted, SF 3967's insurance mandate would force some employers whose religious beliefs forbid them from being complicit in abortion to pay for abortion.

A common principle of systems of culpability, for example laws that fix criminal responsibility, is that one who furnishes another with the means to commit a wrongful act is culpable for that act. Beliefs about being complicit in abortion are no different, including participation as mandated in SF 3967. Since Minnesota law now allows abortion up to birth without any restrictions and SF 3967 has no conscience exemptions or restrictions, will Minnesota employers be forced to participate in plans that pay for abortion at any stage of pregnancy, including up to 39 weeks into the pregnancy?

Moreover, this belief about abortion is not limited to a narrow, fanatical sect. It is shared by many Minnesotans as well as the U.S. Supreme Court. The Court has recognized, "[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning) women as a class[.]" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); see also *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2240 (2022) ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life.").

As drafted, SF 3967 can only represent a legislative determination that the conscientious objections of employers who do not wish to fund abortions are insubstantial or unworthy of protection. The U.S. Supreme Court has made clear that conscience rights, including conscience rights of business owners, may not be infringed in this way.

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014), the Supreme Court struck down an HHS regulation that would have required business owners to provide health insurance coverage for their employees' contraceptives, when doing so conflicted with the business owners' religious beliefs. The court stated,

The [business owners] believe that providing [contraceptive coverage] is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step... Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.

Burwell, 573 U.S. at 724.



Though *Burwell* applied the requirements of the Religious Freedom Restoration Act (RFRA) to federal HHS mandates where a state law like SF 3967 is not a “generally applicable” law, courts apply the same strict scrutiny applied under RFRA to determine whether the law satisfies the First Amendment. Such would likely be the case with respect to SF 3967 since the bill treats religious and conscience rights less favorably than coverage gaps based on secular financial considerations. SF 3967 is not a “generally applicable” law and if challenged in the courts would likely be subjected to the most stringent legal standard of strict scrutiny², where it would face an uphill battle to find any justification for infringing on clearly established legal protections for rights of conscience.

Where strict scrutiny applies, government policy survives “only if it advances interests of the highest order and is narrowly tailored to achieve those interests,” meaning that “so long as the government can achieve its interests in a manner that does not burden religion, it must do so.” *Fulton v. City of Philadelphia, Penn.*, 141 S. Ct. 1868, 1881 (2021) (quotation omitted).

SF 3967 does not make clear what interest it is intended to further. Assuming it is intended to provide women with access to abortions irrespective of ability to pay, the state could at the very least explore other no cost or low cost means available to further that interest that do not force conscientious objectors to violate their beliefs by supplying the means of payment.

As drafted, this bill infringes on the constitutional rights of Minnesotans whose sincerely held religious beliefs compel them to support life by not being complicit in abortion. The state of Minnesota can do better by seeking to achieve its goals without forcing its citizens to choose between disobeying the law and violating their sincerely held religious beliefs.

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² In determining whether a law is neutral or generally applicable, “[a] law is not generally applicable if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton v. City of Philadelphia, Penn.*, 141 S. Ct. 1868, 1877 (2021) (quotation omitted). A law also fails to be generally applicable “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* A policy is not neutral if it is “specifically directed at religious practice,” meaning that it either “discriminates on its face” or “religious exercise is otherwise its object.”