Nos. A23-0374; A23-0484

STATE OF MINNESOTA
IN COURT OF APPEALS

Andrea Anderson,

Appellant,

v.

Aitkin Pharmacy Services, LLC d/b/a Thrifty White Pharmacy; George Badeaux,

Respondents.

BRIEF OF AMICUS CURIAE MINNESOTA CATHOLIC CONFERENCE

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STATEMENT OF INTEREST

The Minnesota Catholic Conference ("MCC") is the public policy voice of the Catholic Church in Minnesota, representing the state's eight Catholic bishops and the dioceses that they lead.[1] The conference of bishops and its staff support legislation and public policy that protects human life from conception until natural death; that respects the authentic dignity of all persons, especially the poor and vulnerable; and promotes the common good. Additionally, MCC proposes to Catholics and to the wider public an ethical framework ("Catholic social teaching") that should be applied to public policy choices. MCC is particularly concerned about public policy matters related to the legal protections provided to pre-born children, in addition to upholding longstanding rights of conscience and the free exercise of religion provided in state and federal law.

SUMMARY OF ARGUMENT

This is a relatively straightforward case, and the judgment below should be affirmed. There is no factual dispute: Appellant admits that Respondent Badeaux has consistently stated that the reason for his declining to prescribe emergency contraception is based on his own beliefs and not on any discriminatory intent toward Appellant because of her protected-class status. *See* Appellant's Br. 6-8. In fact, Pharmacist George Badeaux had strong objections to prescribing ella for Plaintiff-Appellant Andrea Anderson—and any other customer requesting it—because of his belief that it was an abortifacient drug. The

[1] No counsel for any party authored this brief in whole or in part. No person or entity—other than Minnesota Catholic Conference and its counsel—made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

jury correctly found under the applicable *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard—which required Appellant to prove to the jury that Appellee Badeaux's religious objections were not sincere and merely pretexts for unlawful behavior—that Badeaux did not intend to discriminate on the basis of sex and, therefore, should not be punished under the Minnesota Human Rights Act. Minn. Stat. § 363A *et. al.* ("MHRA"). Appellant has a large burden to disturb this verdict because the jury's fact-finding is given such deference that a "jury verdict will be overturned only if no reasonable mind could find as the jury did," while the evidence is "viewed in the light most favorable to the verdict." *Fallin v. Maplewood-N. St. Paul Dist*. No. 622, 362 N.W.2d 318, 322-23 (Minn. 1985).

Appellant and her supporting amici, however, want Minnesota courts to re-write anti-discrimination law and rule *as a matter of law* that whenever a pharmacist refuses to fill a prescription related to pregnancy or reproduction, it is automatically an act of sex discrimination and punishable. The proposed rule and its application are stunningly broad and incoherent. The district court correctly denied Appellant's post-trial motions because Appellant's proposed jury instructions and rule of *per se* discrimination would violate Minnesota's Constitutional protection for rights of conscience and religious liberty. MINN. CONST. art. I, § 16. The law was correctly provided to the jury for its fact-finding role.

Badeaux refused to fill Appellant's prescription because he firmly believes that doing so would compel him to cooperate in ending a human life. In doing so, he shares the views of many pharmacists and medical professionals who believe that participating in abortions—even at the earliest stages of human life—directly contradicts their spiritual

beliefs and wrongly destroys the life of another human being. Badeaux's ability to work in accordance with his well-founded beliefs is protected by state and federal law, and for good reason. For people to enter vital professions such as healthcare, society cannot force them to contradict their mostly deeply revered truths when they walk through the clinic or pharmacy door.

Badeaux is asking this Court to defend the Constitution, liberty, and the right to refrain from engaging in conduct that violates one's well-formed conscience. Conversely, Appellant and her supporting amici ask this Court to broadly impose patient preferences in suppression of those who dissent. As discussed below, such a sweeping rule would be unconstitutional and could have harmful effects on healthcare access generally. The court should not disrupt the jury's verdict and the district court's judgment should be affirmed.[2]

[2] This brief will not address Defendant-Respondent Thrifty White's actions in accommodating Badeaux's conscientious objection to fulfilling a prescription for ella. It was correct for Thrifty White to provide an accommodation for Badeaux and Thrifty White could have been liable for violating Title VII if it had not done so by committing employment discrimination. As the U.S. Supreme Court recently and unanimously held in *Groff v. DeJoy,* 143 S. Ct. 2279 (2023), Title VII requires employers to provide accommodations for employees' religious beliefs unless it would create "substantial increased costs." And Thrifty White was following guidance from the Minnesota Board of Pharmacy. Beyond the immediate employment context, Part III addresses how Anderson's proposed strict liability rule negatively affects pharmacies and professionals with religious convictions and medical access in general.

ARGUMENT

I. THIS COURT SHOULD REJECT APPELLANT'S ATTEMPT TO CREATE A PER SE DISCRIMINATION RULE AND AFFIRM THE DISTRICT COURT'S POST-TRIAL RULINGS

Appellant asks this Court (as she did below) to conclude that one's refusal to fill a prescription related to reproductive health (including due to deeply held religious beliefs) is *per se* sex discrimination, thus transforming the MHRA into a strict-liability statute. That is not, and could not possibly be, the law. Respondents Badeaux and Thrifty White and other amici adequately presented arguments regarding the *McDonnell-Douglas* legal standard in anti-discrimination cases. This brief focuses on the Appellant's attempt to usurp the jury's fact-finding role and impose a *per se* sex discrimination rule, the propriety of the district court's instruction related to the legitimate, non-discriminatory reason for refusing to fill the prescription (namely, Badeaux's right to conscientiously object to being forced to provide the drug ella, which he believes is an abortifacient), and the practical dangers of Appellant's proposed strict liability rule.

A. The Jury Appropriately Determined Badeaux's Actions Were Not "Because Of" Appellant's Sex

The district court correctly held—when it denied Appellant's motion for judgment as a matter of law—that the jury properly found (based on the evidence presented at trial) that Respondents did not intend to discriminate on the basis of sex. Yet, Appellant seeks judgment as a matter of law and/or a new trial on the basis that Respondents engaged in *facial* sex discrimination because the drug at issue affects a woman's reproductive health. App. Br. at 12 *et seq*. Appellant's theory amounts to a proposed *per se* discrimination rule

that ignores the plain text of the MHRA, which requires a *plaintiff* to *prove* that a denial of a good, service, or accommodation was "*because of* . . . sex," rather than due to a legitimate and legal reason. Minn. Stat. § 363A.11 subd. 1(a)(1) (emphasis added). There is no dispute that Badeaux testified that his actions were "because of" his religious convictions regarding the effects of the drug. They were not "because of" any protected characteristics of Appellant or anyone else that he has or would refuse to give the drug, which Badeaux views as an abortifacient. In fact, although the district court excluded it, Badeaux was clear that he would not fill any prescriptions for emergency contraception regardless of whether it was prescribed to, requested, or picked up by a woman or man. ADD-88. Thus, the jury properly found that Badeaux followed his religious beliefs and did not unlawfully discriminate.

Minnesota Courts have refused claims akin to Appellant's under the MHRA. In *State by Cooper v. French*, 460 N.W.2d 2 (1990), for example, the court recognized that the protection of one matter does not necessarily extend any protections to another matter without legislative intent. The Court in *Cooper* examined whether "marital status" under the MHRA includes unmarried cohabiting couples and found that it did not. Similarly, in this case, no blanket protection exists for emergency contraception within the MHRA. Appellant provides no proof that the Legislature sought to protect access to such drugs when it protected discrimination against women. Even if it had—as discussed below—the Minnesota Constitution protects Badeaux. *See* MINN. CONST. art. I, § 16; s*ee* also II.A, *infra*.

The Department of Human Rights has proposed a dissimilar and incomplete analogy to a pharmacist refusing to fill an African-American's diabetes medication. MDHR Br. at 13. But in this analogy, the pharmacist may have refused due to the person's race, or due to another unknown reason. Badeaux, in contrast, refuses to participate in providing abortifacient drugs such as emergency contraception in whole—regardless of race, sex, or any other characteristic of any potential customer. It is a refusal *in whole* due to his conscience rights and religious beliefs about the effects of the drug, not the characteristics of the customer. This is—in fact—a refusal of the drug itself and not a refusal to serve any person or class in particular. Thus, the jury properly found that Badeaux's refusal to dispense ella was due to his religious beliefs, not "because of" Appellant's sex.

B. The District Court Did Not Err in Instructing the Jury on Badeaux's Legitimate, Non-Discriminatory Reasons for His Actions

The district court correctly held, when it denied Appellant's motion for a new trial, that Badeaux had the opportunity to present to the jury—and the jury was properly instructed on—a legitimate non-discriminatory motive regarding Badeaux's refusal to dispense emergency contraception to Appellant. According to the district court, "a jury instruction that does not allow Defendant George Badeaux to offer his conscience and his personal, religious beliefs in explanation of his interactions with Appellant would violate the Minnesota and United States Constitutions." ADD-50. It is essential under Title VII and the MHRA that defendants maintain the ability to "articulate" a "legitimate, nondiscriminatory reason" for refusing to take an action demanded by a member of the public. *See Bd. of Trs. v. Sweeney*, 439 U.S. 24, 25 (1978). And in a discrimination suit,

McDonnell-Douglas burden shifting only requires the defendant to "articulate" a legitimate, non-discriminatory reason for an action and does not create an affirmative defense for a defendant to "prove." *See McDonnell-Douglas*, 411 U.S. 792 *et seq.*[3]

Sex discrimination is a factual inquiry, and it was necessary for the jury to be instructed that legitimate, non-discriminatory reasons for the refusal to fill the prescription are protected under the law. The jury and district court correctly identified the rights of conscience and the free exercise of religion as legitimate, non-discriminatory reasons for Badeaux refusing to fulfill the prescription. Because there is no dispute that Badeaux, in fact, held such beliefs, the jury correctly found (when following its instructions for fact-finding) that no unlawful discrimination occurred.

II. APPELLANT'S PROPOSED *PER SE* RULE OF FACIAL DISCRIMINATION VIOLATES STATE AND FEDERAL LAW

As the district court appropriately held, for Minnesota courts to create a *per se* rule (or jury instruction) that a pharmacist acts in a facially discriminatory and unlawful manner whenever he objects to a reproductive drug due to his well-founded and deeply held religious beliefs would violate both the Minnesota and U.S. Constitutions. Jury instructions in a case like this must reflect the state and federal constitutional protections for professionals who exercise their religious and conscientious beliefs (the present

[3] Here, Badeaux explained to the jury at trial that he did not discriminate against Appellant under the MHRA because his actions were based on his constitutional conscience rights. Appellant's and related amici's arguments that Badeaux "waived" any constitutional arguments must be rejected for the reasons articulated by Badeaux. *See* Badeaux Br. at 39-45.

instructions should have done even more to convey to the jury the importance and scope of these constitutional protections).

A. Minnesota's Constitution Protects Religious Liberty and Conscience Rights

As the district court appropriately held, for Minnesota courts to create a *per se* rule (or jury instruction) that a pharmacist acts in a facially discriminatory and unlawful manner whenever he objects to a reproductive drug due to his well-founded and deeply held religious beliefs would violate the Minnesota Constitution.

The Minnesota Constitution declares: "The right of every man to worship God according to the dictates of his own conscience shall never be infringed." MINN. CONST. art. I, § 16. Minnesota's conscience clause provides a constitutional guarantee and an immunity for Minnesotans that protects them from being forced to perform acts that violate their conscience and sincerely held religious beliefs. The record confirms that Badeaux acted in accordance with his belief that ella can act as an abortifacient and that to fill the prescription would force him to cooperate in the destruction of nascent human life in violation of his sincerely held religious beliefs, which he never did. *See, e.g.,* Trial Tr. 211:5-12.

The Minnesota Supreme Court has recognized that the MHRA "abridges" deeply held and sincere religious beliefs, *State by McClure v. Sports and Health Club, Inc*., 370 N.W.2d 844, 851 (1985), like the beliefs Mr. Badeaux possesses. And, the language of Article I, § 16, "is of a distinctively stronger character than the federal counterpart…. Whereas the first amendment establishes a limit on government action at the point

of *prohibiting* the exercise of religion, section 16 precludes even an *infringement* on or an *interference* with religious freedom." *State v. Hershberger*, 462 N.W.2d 393 (1990).

Section 16 isn't merely words Minnesota's founders put on paper without intent, they are meaningful, and intended to fortify protections even beyond the U.S. Constitution. "[T]he state Bill of Rights expressly grants affirmative rights in the area[ ] of … religious worship while the corresponding federal provision simply attempts to restrain governmental action." Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist",* 7 Hamline L. Rev. 51, 67 (1984). It is Badeaux's affirmative constitutional rights that are at question in this appeal—affirmative rights protected by Minnesota's Constitution.

Although Appellant and perhaps the public majority may not agree with Badeaux's beliefs, there is no dispute that his beliefs are sincere. *See, e.g.,* Trial Tr. 211:5-12 (Badeaux repeatedly refused to fulfill such requests because of his beliefs). Indeed, courts generally do not question whether such beliefs are sincerely held and cannot base their decisions based on whether the sincerely held religious belief is popular to society. Courts must uphold the strong protections that Section 16 provides, even to the point that "[o]nly the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution." *Hershberger*, 462 N.W.2d at 397.

Minnesota's constitutional conscience protection is a fundamental right because it is a constitutive part of a person's identity and protecting Badeaux's religious rights helps to promote the common good. "Protection for individual exercise of rights of conscience

was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights." Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549, 561 (2017) (cleaned up).

B. The Federal Constitution Also Protects Conscience Rights

The First Amendment protects the free exercise of religion, as well as professional speech and expressive conduct. If Badeaux were subjected to state action that limited his ability to perform his duties consistent with his conscience, he would be able to assert a hybrid free-exercise and free-speech claim, as his actions speak to both interests. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993). In *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the U.S. Supreme Court held that anti-discrimination laws cannot compel a website designer to create work that violates her values. Like the case here, it involved a commercial actor refusing a good or service based on deeply held religious convictions, even though it was decided on free speech grounds. The decision in *303 Creative* highlights that there is a nexus between professional speech and conduct and religious conviction that is protected by the U.S. Constitution.

Further, there is strong evidence that there is a constitutional right not to participate in abortions, in particular. *See generally* Mark L. Rienzi, The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers, 87 Notre Dame L. Rev. 1, 6 (2011). In *Hobby Lobby*, the U.S. Supreme Court addressed a similar issue regarding insurance coverage for potentially abortifacient contraceptives. It stated the following:

> [Respondents] believe that providing the coverage demanded by the HHS regulations 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.

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 724 (2014); *see also* 42 USC § 2000e(j) (defining "religion").

The right to *live* one's faith in one's daily activities according to one's beliefs, and not just confine them to worship in a sanctuary, is the first of our freedoms in both the Minnesota and U.S. Constitutions. MINN. CONST. art. I, §16; U.S.. CONST. amend I. The effect of Appellant's proposed *per se* discrimination rule is to confine religion to the four walls of the sanctuary. That is not the law, and the district court allowed the jury to properly find the legitimate, non-discriminatory reasons for Badeaux's actions.

III. THERE ARE IMPORTANT POLICY REASONS WHY THIS COURT SHOULD NOT *SUA SPONTE* REWRITE STATE ANTI-DISCRIMINATION STATUTES

Beyond the reality that the strict liability *per se* discrimination rule Appellant seeks is contrary to state and federal law, there are additional important policy implications for why it should be rejected. First, conscience rights of healthcare professionals must be protected to ensure greater access to healthcare professions in general, which means more access for the population. Second, protecting the conscience rights of pharmacists and other health care professionals protects patients as well as providers. Third, legally forcing

pharmacists to provide certain drugs undermines their professional judgment by requiring them to provide drugs they have objections to, including objections based on the morality, ill-effects, and purpose of the particular drug. Finally, requiring all pharmacies to stock certain pharmaceuticals and pharmacists to dispense them undermines the professional judgment of pharmacists by *forcing* them to sell commercial products which may not serve the well-being of the patient in a particular situation (and, in the case of abortifacients, the unborn patient, whom many professionals sincerely believe must also be medically protected). Requiring health care professionals to provide their services without any conscience protections erodes professional integrity, healthcare in general, and public safety.

A. Per Se Discrimination Rules Would Limit Healthcare Access

Adopting a per se discrimination rule requiring pharmacists or other medical professionals to provide drugs or services without any protections for their deeply held religious convictions would exclude many people from the healthcare field. A 2019 Final Rule related to conscience rights in healthcare enacted by the U.S. Department of Health and Human Services ("HHS") states: "Numerous studies and comments show that the failure to protect conscience is a barrier to careers in the health care field. A 2009 study found that 82% of responding faith-based health care providers said it was either 'very' or 'somewhat' likely that they personally would limit the scope of their practice of medicine if conscience rules were not in place. This was true of 81% of medical professionals who practice in rural areas and 86% who work full-time serving poor and medically-underserved populations." *See* Federal Register, vol. 84, no. 98 at 23246-47 (citing

Christian Medical & Dental Association summary of Key Findings on Conscience Rights Polling, available at https://docs.wixstatic.com/ugd/809e70_2f66d15b88a0476e96d3b8e3b3374808.pdf). The same study cited by HHS noted that 20 percent of faith-based medical students chose not to pursue a career in obstetrics or gynecology because of perceived coercion in that field. *See id.*

The public comments received by HHS with respect to the Final Rule further "demonstrate that a lack of conscience protections diminishes the availability of qualified health care providers. For example, in a survey of providers belonging to faith-based provider organizations, over nine in ten (91 percent) agreed with the statement, 'I would rather stop practicing medicine altogether than be forced to violate my conscience.'" Fed. Reg. vol. 84, no. 98, at 23246 (citing Christian Medical Association & Freedom2Care summary of polls conducted April, 2009 and May, 2011, available at https://docs.wixstatic.com/ugd/809e70_7ddb46110dde46cb961ef3a678d7e41c.pdf). Protecting conscience rights "remove[s] barriers to the entry of certain health professionals, and [guards against] the exit of certain health professionals from the field, by reducing discrimination or coercion that health professionals anticipate or experience." *Id.*

Fewer healthcare professionals mean less healthcare for the whole population. Requiring current or aspiring professionals to participate in actions and ideologies that violate their consciences discourages many individuals with religious convictions from entering into the medical field or continuing to offer their professional services. This consequently results in fewer professionals and treatment opportunities, and longer wait times for patients. Conscience protections ensure that individuals with religious or moral

convictions are not improperly inhibited from pursuing careers in healthcare, thus increasing the amount of healthcare providers available to the public.

B. Protecting Medical Rights of Conscience Protects Patients as well as Providers

Protecting conscience rights in medicine also supports a more diverse medical field and improves the provider-patient relationships and quality of care. Academic literature supports the proposition that prohibiting the exercise of conscience rights in medicine decreases the quality of care that patients receive. Scholars have observed that ‘‘[a]bandoning the right to conscience of the medical practitioner not only harms the individual practitioner but also threatens harm to his patients as well— the harms, however paradoxical it might seem, are actually inseparable from one another.’’ *Id*. at 23246, n. 311 (citing Theriot & Connelly, *Free to Do No Harm*, 49 Ariz. St. L.J. at 565). Such protections "decrease the harm that providers suffer when they are forced to violate their consciences, with attending improvements to patient health." *Id.* at 23646.

Protecting religious beliefs and moral convictions serves as a societal good based on fundamental rights. *See* Fed. Reg. vol. 84, no. 98, at 23246. As an American Medical Association article noted, "[I]f physicians do not have loyalty and fidelity to their own core moral beliefs, it is unrealistic to expect them to have loyalty and fidelity to their professional responsibilities." D. White and B. Brody, *Would Accommodating Some Conscientious Objections by Physicians Promote Quality in Medical Care?*, 305 J. Am. Med. Assoc., 1804, 1804–1805 (May 4, 2011). "If the right to conscience were robustly defended, all patients—no matter their political, religious, or ideological beliefs—would

presumably be able to access and receive care from medical practitioners who share their values, which is an important component of the physician-patient relationship in its own right. Thus, quality of care and patient access would be ameliorated rather than hampered under a system of robust conscience protections." *Theriot & Connelly, Free to Do No Harm,* 49 Ariz. St. L.J. at 567.

Professional oversight boards and associations also recognize the need to protect rights of conscience. For example, in its policy statement on conscientious objection, the Minnesota Board of Pharmacy contemplates the possibility of conscientious objection for both the provider and pharmacy, and both followed it here. *See* Thrifty-White Br. in whole. The policy statement addresses solutions for "individual pharmacists who, for personal, moral, ethical, or religious reasons, refuse to dispense prescriptions for [emergency contraception], and from certain pharmacy chains that, as a corporate policy, are refusing to stock this medication." ADD-1. The court should not override the judgment of these professional oversight boards by creating a per se discrimination rule for any refusal to dispense emergency contraception.

C. Adopting a Per Se Discrimination Rule Would Impair the Professional Judgment of Pharmacists

Pharmacists are an integral part of the healthcare field. Like other medical providers, they are trained professionals who are required to exercise professional judgment in performing their jobs. They cannot be treated as prescription-dispensing machines. Society relies upon pharmacists for patients' well-being and safety, and they are given a great deal of discretion in exercising their professional judgment in refusing to

dispense prescriptions. For example, they screen prescriptions for drug interactions, allergies, and proper dosage, and they frequently exercise their judgment in determining whether a particular drug is suitable to treat particular medical conditions. *See Salier v. Walmart, Inc.*, 22-2960, --- F.4th ---, 2023 WL 5006735, at *3 (8th Cir. Aug. 7, 2023) ("Minnesota law enables pharmacists to exercise independent judgment in filling prescriptions …. not a single State has recognized the asserted right of a patient to force a medical provider to provide treatment against the provider's professional judgment, and several state courts have held there is not a right—constitutional, statutory, regulatory, or common-law—to compel such treatment") (quotations omitted). In short, a pharmacist is not required to dispense a prescription just because a doctor has prescribed it.

Many medical professionals have concluded based on their *professional medical judgment* that life begins at the moment of conception, rather than at implantation. For example, Dr. Jerome LeJune, Genetics Professor at the University of Descartes in Paris and the discoverer of the Downs Syndrome chromosomal pattern, testified before the Senate Judiciary Committee that "after fertilization has taken place, a new human being has come into being" and that this "is no longer a matter of taste or opinion" and "not a metaphysical contention, it is plain experimental evidence." Sen. Subcomm. on Separation of Powers of the Jud. Comm., The Human Life Bill: Hearings on S. 158, 97th Cong. (Apr. 23-24, 1981). In addition, Dr. Hymie Gordon, Chair of the Department of Genetics at the Mayo Clinic similarly testified that "[b]y all the criteria of modern molecular biology, life is present from the moment of conception." *Id.* Pharmacists, like other medical professionals, must be allowed to exercise their discretion in refusing to provide drugs or

procedures that, in their own professional judgment, would end the life of another human being.

Further, given that pharmacists are allowed to refuse to fill prescriptions based on other grounds, it would amount to religious discrimination to force them to fill prescriptions that they find morally abhorrent. Besides abortifacients, there are other categories of drugs of which many pharmacists may have professional, moral, ethical, or religious objections, such as drugs required for lethal injection or assisted suicide. Some pharmacists prepare and dispense the lethal drugs used by the Department of Corrections (both federally and in certain states) for executions via lethal injections. Pharmacists who object to capital punishment should not be forced to participate in this process. Similarly, for physician- assisted suicide, the pharmacist dispenses a drug prescribed by a doctor in a lethal dose that provides the patient with the means to end their own life. The majority of pharmacists object to being forced to participate in assisted suicide. Creating per se discrimination rules could effectively mandate pharmacists to dispense drugs that they find unethical out of fear of being sued for discrimination if they refuse. Such requirements undermine the professional judgment and personal dignity of the pharmacist.

D. Forcing the Provision of Abortifacients Would Have a Significant Discriminatory Effect on Religious Healthcare Provider Institutions and Pharmacies in Particular and as a Whole

The adoption of a per se discrimination rule for emergency contraception (or any other drug or medical procedure) would be discriminatory towards religiously affiliated providers and institutions, which often provide services to underserved and

underprivileged communities. The HHS has found that conscience protections in the medical field are "just as, or more, likely to result in a net increase access to care because religious or other conscientiously objecting providers are already more likely to serve underserved communities; imposing violations on their conscience may lead to them limiting their practices rather than providing services in violation of their beliefs; and in some underserved communities patients may have a proportionate likelihood to agree with religious providers on controversial services such as abortion." Fed. Reg. vol. 84, no. 98, at 23248.

Catholic and other religiously affiliated health care institutions play a major role in the delivery of healthcare to underserved or underprivileged communities in the United States stemming from a motivation by their beliefs to serve such populations. Catholic healthcare institutions are major healthcare providers, and some of these institutions have pharmacies. These religiously affiliated pharmacies cannot dispense emergency contraception according to the Ethical and Religious Directives for Catholic Healthcare promulgated the U.S. Conference of Catholic Bishops except in cases of sexual assault where, after testing, there is no evidence that conception has occurred. U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Healthcare*, Sixth Ed. at 15, No. 36 (2018), available at https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_0.pdf.

As the United States Supreme Court has recognized, a corporation can exercise religion, and such institutions must be protected with respect to the right of conscience. *Burwell v. Hobby Lobby*, 573 U.S. at 688 *et seq.* "Human beings, after all, act through

institutions. Thus, the former as well as the latter should be explicitly protected in law. Failing to do that 'contradicts the central purpose of conscience clauses, which is to protect the moral sensibilities and deeply held beliefs of the individuals who make up the institution.'" Theriot & Connelly, *Free to Do No Harm* at 580-81 (citing *Burwell v. Hobby Lobby*; other citations omitted).

Pharmacies and pharmacists must not be forced to provide drugs or services that violate their consciences via per se discrimination laws. Antidiscrimination laws must be balanced with critical conscience protections for pharmacists and pharmacies in order to ensure that religiously affiliated institutions are not forced out of service. Eliminating such institutions would effectively limit healthcare access to the underserved and underprivileged populations of society.

CONCLUSION

Medical professionals should not be compelled to fill prescriptions in violation of their deeply held religious beliefs. Respondent Badeaux refused to participate in the abortifacient drug ella and its known effects, which violated his conscience and deeply held religious beliefs about when a human life begins. Badeaux and all other health professionals' sincere religious beliefs are resoundingly protected by both the Minnesota and U.S. Constitutions. In no manner must professionals like Badeaux be forced to violate their beliefs and participate in actions that they sincerely believe would end a human life. Adopting such a per se discrimination rule would undermine the edifice of law, including protections for professional speech, conscience rights, and the free exercise of religion. This Court should honor Badeaux's rights and affirm the judgment of the district court.

Respectfully submitted,

Dated: August 21, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Brief submitted herein contains 4,937 words and complies with the type and volume limitations of the Minnesota Rules of Appellate Procedure 132.01, subds. 1 & 3(c). This Brief was prepared using a proportional spaced font size of at least 13 pt. The word count is stated in reliance on Microsoft Word for Microsoft 365, the word processing system used to prepare this Brief.

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