NO. A23-0374
NO. 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.

ON APPEAL FROM AITKIN COUNTY, NINTH JUDICIAL DISTRICT
HONORABLE DAVID F. HERMERDING, JUDGE PRESIDING

BRIEF OF AMICUS CURIAE MINNESOTA FAMILY COUNCIL AND TRUE NORTH LEGAL IN SUPPORT OF RESPONDENTS

Renee K. Carlson (#389675)
TRUE NORTH LEGAL
525 Park Street, Suite 460
St. Paul, MN 55103
PH: (651) 789-8811
rcarlson@truenorthlegalmn.org

Counsel for Amici Curiae Minnesota Family Council and True North Legal

2023 – BACHMAN LEGAL PRINTING – PHONE (612) 339-9518

Ranelle Leier (#277587)
FOX ROTHSCHILD LLP
33 South Sixth Street, Suite 3600
Minneapolis, MN 55402
(612) 607-7247
rleier@foxrothschild.com

Counsel for Respondents Aitkin Pharmacy Services

Rory T. Gray*
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Road
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
rgray@adflegal.org

Charles Shreffler, (#0183295)
SHREFFLER LAW LTD.
16233 Kenyon Avenue, Suite 200
Lakeville, MN 55044
(612) 872-8000
chuck@chucklaw.com

Counsel for Respondent George Badeaux
**Admitted Pro Hac Vice*

Jess Braverman (#397332)
Christy L. Hall (#392627)
GENDER JUSTICE
663 University Avenue West
St. Paul, MN 55104
(651) 789-2090
jess.braverman@genderjustice.us
christy.hall@genderjustice.us

Kristen G. Marttila (#346007)
Rachel A. Kitze Collins (#396555)GENDER
LOCKRIDGE GRINDAL NAUEN PLLP
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
(612) 339-6900
kgmarttila@locklaw.com
rakitzecollins@locklaw.com

Counsel for Appellant Andrea Anderson

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STATEMENT OF INTEREST AND AUTHORITY TO FILE[1]

The Minnesota Family Council is a non-partisan, grassroots, Christian organization dedicated to strengthening the family by advancing foundational biblical principles in and through churches, the media, and the public square throughout the state of Minnesota. Minnesota Family Council is a non-profit organization under Section 501(c)(4) of the Internal Revenue Code.

True North Legal is a non-partisan public interest law firm which promotes and defends life, family, and religious freedom by engaging in educational initiatives, public policy, and litigation. True North Legal has, since its inception, supported religious liberty and rights of conscience through education, policy, and litigation. Representatives of True North Legal have testified before the Minnesota Legislature on several bills related to the sanctity of life and in support of Christian counselors against censorship. It has testified at state agency hearings on rule changes that would significantly impact rights of conscience for peace officers, teachers, and other licensed professionals.

In addition, True North Legal has assisted an employee in bringing a charge of religious discrimination against a company that failed to

[1] No party or counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae*, its members, or its counsel made monetary contributions to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

accommodate the employee's sincerely held religious beliefs. It has participated as counsel for *amicus curiae* in three recent cases before the Supreme Court of the United States on important First and Fourteenth Amendment issues: Brief of Amici Curiae Advancing American Freedom, Inc.; Minnesota Family Council; Center for Political Renewal; the Family Leader (Iowa); Family Heritage Alliance; and Nebraska Family Alliance in Support of Petitioners, *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022) at 2021 WL 3374374; Brief of Amici Curiae Louisiana Family Forum, Dr. James Dobson Family Institute, and 25 Additional Family Policy Organizations Supporting Respondent, *June Med. Servs., L.L.C. v. Russo*, ___ U.S. ____, 140 S. Ct. 2103 (2020) at 2019 WL 7397760; and Brief of Walk for Life West Coast, Arizona Life Coalition, and Coalition for Life of Iowa as Amici Curiae in Support of Petitioners, *303 Creative v. Elenis*, ___ U.S. ____, 143 S. Ct. 2298 (2023) at 2022 WL 2047734.

POSITION OF MINNESOTA FAMILY COUNCIL AND TRUE NORTH LEGAL

Minnesota Family Council and True North Legal support Respondent George Badeaux's position on appeal. This case requires this Court to review Appellant's claims that conscientious refusal[2] to dispense a drug that may

[2] The Encyclopedia of Ethics (1992) distinguishes civil disobedience from conscientious disobedience. 1 Encyclopedia of Ethics 165 (1992). The first is characterized by an intention to influence a change in law or policy, while the

function as an abortifacient is sex or pregnancy discrimination violating Minn. Stat. § 363.11 and that such refusal is not protected by religious liberty provisions in both the Minnesota and U.S. Constitution. Appellant is wrong on both counts.

SUMMARY OF THE ARGUMENT

In this case, the Court is faced with an important evaluation of the interplay between the Minnesota Human Rights Act (MHRA) and an individual's rights of conscience and free exercise of religion. The district court was obligated to instruct the jury to consider the conscience rights of Badeaux in his decision not to dispense ella, also known as Ulipristal Acetate, to Appellant Andrea Anderson, because to do otherwise would violate Article I, section 16 of the Minnesota Constitution and the First Amendment to the U.S. Constitution.

First, Appellant's argument mischaracterizes opposition to abortion with sex or pregnancy discrimination ignoring Badeaux's undisputed motive – sincere opposition to the practice of abortion. Accepting the definition of MHRA on Appellant's terms would create an unnecessary constitutional conflict – something Minnesota courts are duty bound to avoid if possible. *See* Minn. Stat. § 645.17(3) and *In re Cold Spring Granite Co.*, 136 N.W.2d 782, 787 (1965)

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second is premised upon the protester's refusal to either perpetrate or become a victim of the injustice resulting from compliance with a particular law. *Id*.

("If the act is reasonably susceptible of two different constructions, one of which would render it constitutional and the other unconstitutional, we must adopt the one making it constitutional.")

Moreover, the district court correctly relied on the Minnesota Supreme Court's decision in *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (en banc), in reaching its decision denying Appellant's motion for judgment as a matter of law. Add. 48 (Order Denying Pl.'s Mot. for J. as a Matter of Law, Jan. 12, 2023, p. 15 ("JMOL Order")). As *French* demonstrates, courts cannot ignore the overriding principles of the Minnesota Constitution—as Appellant requests—whenever faced with claims related to conscience under the MHRA. Instead, Badeaux "must be granted an exemption from the MHRA unless the state can demonstrate [a] compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption to [Badeaux]." *French*, 460 N.W.2d at 9. Indeed, Minnesota courts have repeatedly recognized the importance of prioritizing Minnesotans' rights of conscience over state civil rights laws, including the MHRA. *See Rasmussen v. Glass*, 498 N.W.2d 508, 516 (Minn. App. 1993); and *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990).

The Minnesota Constitution's robust conscience protections are especially important in the circumstances at issue here. Badeaux was faced with being forced to dispense ella, a drug he believed to act as an abortifacient,

despite his long-held and sincere religious objection to dispensing any medication that could cause an abortion. Respondent Badeaux's Br. 5-8.

Recent decisions by the U.S. Supreme Court and federal appellate courts interpreting local and state public accommodations laws in relation to the First Amendment affirm the importance of protecting rights of conscience. As recently as this June, the Supreme Court opined, "[W]hen a state public accommodations law and the Constitution collide, there can be no question [the Constitution] must prevail." *303 Creative LLC v. Elenis,* __ U.S. __, 143 S. Ct. 2298, 2315 (2023).

And finally, while substantial scientific evidence supports Badeaux's belief that ella can operate as an abortifacient, the scientific accuracy of his position does not impact the constitutional obligation of the state to respect his sincerely held belief that dispensing the drug would be inconsistent with his religious beliefs, and sinful. The district court, like this Court, is prohibited from questioning the legitimacy of Badeaux's religious beliefs, as opposed to their sincerity. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014); *see also* 42 USC § 2000e(j) (defining "religion"). Appellant would not only have this Court violate Badeaux's constitutional rights, but she would also force his employer to violate his statutory rights under Title VII of the Civil Rights Act of 1964. Appellant's Br. at 25, fn. 9.

Amici believe the district court's jury instruction was required by the

high standard to which the Minnesota Constitution holds the state when seeking to compel conduct contrary to the conscience of an individual. *Amici* therefore urge this Court to affirm the district court's decision. Add. 50 (JMOL Order 17). ("[T]o have 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 Andrea Anderson would violate the Minnesota and United States Constitutions.").

ARGUMENT

I. Refusal to Facilitate Abortion is Not Sex or Pregnancy Discrimination.

Appellant seeks to resurrect a long-discredited argument that opposition to induced abortion is a surrogate for opposition to or animus toward women, or more particularly to pregnant women. She argues that George Badeaux's conscientious refusal to dispense a drug that may act as an abortifacient is *per se* sex discrimination violating Minn. Stat. § 363.11. This is erroneous, both legally and logically.

When presented with a similar argument in the context of claims under civil rights laws and the Racketeer Influenced and Corrupt Organizations Act, the United States Supreme Court opined, "Whatever 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—as is evident from the fact that men and women are on both sides of the issue . . .” *Bray v Alexandria Women's Health Clinic*, 506 US 263, 270 (1993) (rejecting claims that clinic protests where predicate acts for RICO claims by abortion clinics). *See also Dobbs v Jackson Women's Health Org.*, ___ U.S. ___, 142 S. Ct. 2228, 2235 (2022) (“a State's regulation of abortion is not a sex-based classification”); *cf. Kvalvog v Park Christian School, Inc.*, 66 F.4th 1147, 1154 (8th Cir. 2023) (class as “something more than a group of individuals who share a desire to engage in conduct that the [ ] defendant disfavors”).

Opposition to induced abortion is based on the belief that the abortion will terminate the life of a whole, separate, unique, living human being. This belief in turn is based on a truthful statement of biological reality. *Cf. Planned Parenthood Minnesota, N. Dakota, S. Dakota v Rounds*, 530 F.3d 724, 735-36 (8th Cir. 2008) (*en banc*) (rejecting constitutional challenge to South Dakota informed consent statute requiring that women be provided written disclosure that “the abortion will terminate the life of a whole, separate, unique, living human being”).

The attempt to equate opposition to abortion with sex or pregnancy discrimination represents an effort, by semantic manipulation, to mischaracterize Badeaux's undisputed actual motive – sincere opposition to

the practice of abortion – as discrimination against women generally or pregnant women more particularly. Either characterization is both under and overinclusive. If opposition to abortion is *per se* discrimination against women, it is overinclusive since it must necessarily admit no exceptions, regardless of the reasons the woman is seeking to end an unwanted pregnancy, such as terminating an ectopic pregnancy or the exceedingly rare cases involving chorioamnionitis or HELLP syndrome where delivery of the fetus is medically indicated prior to the unborn child achieving viability. It also includes as discriminatory conduct opposition to abortion based on the fact that abortion is and has been used as a tool for female gendercide,[3] or a belief that widely available abortion diminishes women's ability to effectuate authentic change advancing women's equality. *E.g.*, Amicus Brief for 240 Women Scholars and Professionals, and Prolife Feminist Organizations in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) at 2021 WL 3469798, *35-*41.

Characterizing opposition to abortion as discrimination against women is also underinclusive since such opposition regularly includes opposition to attempts by male sexual partners or others to coerce or induce women to obtain

[3] *See e.g.*, Hilary Bowman-Smart et al., *Sex selection and non-invasive prenatal testing: A review of current practices, evidence, and ethical issues*, 40 PRENATAL DIAGNOSIS 398 (2020).

abortions. *E.g.*, Brief of Amici Curiae Advancing American Freedom, Inc.; Minnesota Family Council; Center for Political Renewal; the Family Leader (Iowa); Family Heritage Alliance; and Nebraska Family Alliance in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) at 2021 WL 3374374, *11 -*13 (citing data showing that among women experiencing reproductive coercion, 75% of the pregnancies ended in abortion, most due to the partner's demands for abortion) and Brief of Amici Curiae the American Center for Law and Justice and Bioethics Defense Fund in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) at 2021 WL 4264277, *22 -*30 (citing studies showing coerced abortions are often tool of human traffickers, sexual predators, and domestic abusers).

Appellant attempts to avoid the obvious flaws in her characterization of opposition to abortion as sex discrimination by focusing more specifically on pregnancy discrimination. Complaint, ¶¶ 59-60. This linguistic sleight of hand is equally flawed. There is absolutely no evidence in the record that Badeaux has refused to dispense any other prescription drugs used to treat various pregnancy-related symptoms and conditions. Such drugs would include a combination of doxylamine and pyridoxine (Diclegis®), promethazine (Phenergan®), metoclopramide (Reglan®), and ondansetron (Zofran®) – all used to treat pregnancy-induced nausea and vomiting. Prescriptions for antibiotics like nitrofurantoin, metronidazole, amoxicillin, and azithromycin

are also common during pregnancy. Carolynn Dude and Denise J. Jamieson, *Assessment of the Safety of Common Medications Used During Pregnancy*, 326 J. Amer. Med. Assoc. 2421 (2021). Refusal to dispense these and other non-abortifacient drugs to pregnant women could evidence discrimination on the basis of pregnancy, but no such evidence exists in this case.

There simply is no legal basis to equate opposition to induced abortion with illegal discrimination based on sex and pregnancy. Acceptance of Appellant's mischaracterization of opposition to abortion as illegal discrimination under the Minnesota Human Rights Act (MHRA) creates an unnecessary constitutional conflict. This Court should reject Appellant's attempt to do so, and therefore avoid violating the conscience rights of Badeaux under Article I § 16 of the Minnesota Constitution and his religious liberty under Amendment I of the United States Constitution. *See e.g., SooHoo v Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (courts presume "legislature did not intend to violate either the U.S. Constitution or the Minnesota Constitution" *citing* Minn. Stat. § 645.17).

II. Badeaux's Conscious-Based Refusal to Dispense Ella is Protected by the Minnesota Constitution.

The Minnesota Constitution guarantees every Minnesotan the right "to worship God according to the dictates of his own conscience" and that such right "shall never be infringed *** *nor shall any control of or interference with*

the rights of conscience be permitted." Minn. Const. art. I, § 16 (emphasis in original). This provision "require[es] a more stringent burden on the state" and "grants far more protection of religious freedom than the broad language of the United States Constitution." *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990).

A. The Minnesota Constitution affords greater protections for rights of conscience than the U.S. Constitution.

In this case, Appellant seeks to impose civil liability on Badeaux under the MHRA for refusing to act contrary to his conscience. While various tests are used to analyze discrimination claims under the MHRA, Minnesota courts have consistently sought to protect a defendant's constitutional rights of conscience and sincerely held religious beliefs. *State v. French*, 460 N.W.2d 2, 3-4 (Minn. 1990) (upholding Defendant's right not to rent housing to cohabiting unmarried couple because of religious beliefs); *Rasmussen v. Glass*, 498 N.W.2d 508, 509-10, 516 (Minn. App. 1993) (deli owner's religious beliefs regarding abortion precluded state from forcing him to deliver food to a clinic that performed abortions).

French is particularly instructive in this case because it involved the state's attempt to compel the defendant to act contrary to his conscience through the application of the MHRA. In *French*, the complainant (Parsons) sought to lease an apartment from a residential property owner (French) and

to live in the apartment with her fiancé. 460 N.W.2d at 3. French declined to lease the apartment to plaintiff due to his religious convictions about pre-marital sexual relations and co-habitation. *Id.* at 3-4. While French did not have proof that Parsons and her fiancé would engage in pre-marital sexual relations on his property, "Parsons did not deny such intent when queried by French." *Id.* at 4. Even if they were not going to have sexual relations, French still concluded he could not lease the property to Parsons as doing so would constitute the "appearance of evil." *Id.* French's decision not to rent to couples engaging in "fornication" bolstered the sincerity of his conscience claim, since adhering to his convictions would arguably be against his financial interest. *See id.* at 10. Parsons thereafter filed a claim with Minnesota Department of Human Rights, accusing French of marital status discrimination.

Despite recognizing that French's religious beliefs were sincere and that they were "being infringed upon by the Human Rights Act," the Department nevertheless determined that the state's "interest in promoting access to housing for cohabiting couples . . . overrides French's right to exercise his religion." *Id.* at 10. After further proceedings, the administrative law judge and the Minnesota Court of Appeals found French guilty of marital status discrimination in violation of the MHRA.

The Minnesota Supreme Court reversed, opining that while French had indeed refused to rent to Parsons because of her intent to cohabit with a person

who was not her spouse, such refusal did not constitute a violation of the MHRA. "It is obvious that the legislature did not intend to extend the protection of the MHRA to include unmarried, cohabiting couples in housing cases." *French*, 460 N.W.2d at 8.

A plurality of the court also held that the state's interest in preventing such discrimination was "[not] sufficient to override French's religious freedom." *Id*. at 9. Most importantly, the *French* plurality interpreted Article 1, § 16 of the Minnesota Constitution as creating a rights-of-conscience exemption to the MHRA "unless the state can demonstrate compelling and overriding state interest, not only in the state's general statutory purpose, but in refusing to grant an exemption…" *Id.* at 9-10. The plurality determined the state had not met that burden. *Id*. at 9-10.

Reiterating the serious regard for conscience protections, the plurality explained that the Minnesota Constitution "commands this court to weigh the competing interests at stake *whenever* rights of conscience are burdened. Under [Article 1 § 16], the state may interfere with the rights of conscience only if it can show that the religious practice in question is…'inconsistent with the peace or safety of the state.'" *Id*. at 9 (emphasis added).

In a discussion of Minnesota's shared history with Wisconsin, the *French* plurality describes some of the historical reasons for Minnesota's adamant protection of conscience rights as being "a lively appreciation by its members

of the horrors of sectarian intolerance and the priceless value of perfect religious and sectarian freedom and equality." *French*, 460 N.W.2d at 9 (*quoting with approval State ex rel. Weiss v. District Bd. of School Dist. No. Eight,* 44 N.W. 967, 974-75 (Wisc. 1890)). The *French* plurality recognized the legislature's intent to preserve rights of conscience and individual actions that are motivated by one's own religious beliefs and firmly understood the role of the "highest court of this state [to be] independently responsible for safeguarding the rights of [its] citizens." *French*, 460 N.W.2d at 8 (quoting *State v. Fuller,* 374 N.W.2d 722, 726 (Minn. 1985)).

While the *French* plurality split with the dissent 3-3 on the constitutional discussion, Chief Justice Popovich, the author of the dissent, subsequently wrote the majority opinion in *Hershberger*, acknowledging the force of the *French* plurality's reasoning and holding that the Minnesota Constitution has more robust religious liberty protections than its federal counterpart. *Hershberger*, 462 N.W.2d at 398 (Minnesota Constitution requires exception to Minnesota law requiring display of certain emblems when such display offends sincere religious beliefs of vehicle owner). "Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution" because the Minnesota Constitution's "language is of a distinctively stronger character than the federal counterpart." *Id.* at 397. "[I]if freedom of conscience

and public safety can be achieved through use of an alternative to a statutory requirement that burdens freedom of conscience . . . section 16 requires an allowance for such an alternative." *Id.* at 399.

Nor are *French* and *Hershberger* the only cases in which Minnesota courts have strongly protected rights of conscience. In *Rasmussen v. Glass*, 498 N.W.2d 508 (Minn. App. 1993) this Court held that "rights of conscience...are jealously guarded by the Minnesota Constitution, [and] are entitled to priority." *Id.* at 516. Based on this fundamental principle this Court upheld the right of a deli owner who objected to abortion to refuse to deliver food to an abortion clinic, reversing a decision by the Minneapolis Commission on Human Rights that the owner's refusal violated the Minneapolis Civil Rights Ordinance. *Id.* at 515-16.

B. The circumstances of this case compel protection of Badeaux's conscience rights.

Minnesota courts have a long history of powerfully safeguarding rights of conscience—a history that must not be overlooked when considering the district court's ruling in this case denying judgment as a matter of law. Add. 47 (JMOL Order 14). Similar to *French*, the district court's denial of JMOL acknowledges that the plaintiff in this case also "failed to make such a showing" of any discriminatory intent by Badeaux. *See French*, 460 N.W.2d at 8; *see also Hershberger*, 462 N.W.2d at 397 ("Section 16 also expressly limits

the governmental interests that may outweigh religious liberty. Only the government's interest in peace or safety or against acts of licentiousness will excuse an imposition on religious freedom under the Minnesota Constitution.").

Unfortunately, just as it did in *French*, the Minnesota Department of Human Rights, has misinterpreted and misapplied the law here, essentially relying on the same flawed legal reasoning it espoused in *French*: that if the state asserts an interest in some end, that interest is sufficient to override one's constitutionally protected right to exercise their sincerely held religious beliefs. *See French*, 460 N.W.2d at 9.

Like *French* and the deli owner in *Rasmussen*, Badeaux's actions are grounded in his strong, sincerely held religious beliefs, making clear that his refusal to provide ella was not an invidious act of sex discrimination or animosity toward abortion-minded women. Trial Transcript ("Trial Tr.") at 567-68, 595-98, 603. In fact, the following points show that the facts in this litigation present an even stronger case for conscience protections than those present in *French*.

First, neither Badeaux nor the property owner in *French* had previously engaged in conduct inconsistent with the conscience claims Defendants asserted. In *French,* the property owner had previously rented to single unmarried individuals and to married couples only. *French*, 460 N.W.2d at 3.

Similarly, Badeaux has never dispensed ella and the record reflects that he had refused to provide emergency contraceptives on at least three prior occasions, thus demonstrating a consistently held and acted-upon religious belief. Add. 39 (JMOL Order 6).

Second, the sincerity of the beliefs of both the property owner in *French* and Badeaux is supported by the fact that neither man enjoyed any economic or personal advantage from declining to comply with the requests of the plaintiffs in their respective cases. The actions of both the proprietor and Bandeaux were motivated by a sincere desire was to honor the laws of God as each man understood them.[4] Such acts lie at the very core of conscience rights and the free exercise of religion.

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[4] Appellant incorrectly claims that Respondent Thrifty White could have fired Respondent Badeaux because of his religious beliefs because having another pharmacist working at the same time would not be financially feasible for Thrifty White. Appellant's Br. 26 n.9. In so claiming, Appellant turns *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), on its head. The Court in Groff expressly held that "no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs." 143 S. Ct. at 2296. Here, as both Respondents cite in their briefs, Thrifty White had a policy to ensure that others would fill prescriptions like Appellant's, Br. of Resp't Aitkin Pharmacy Services, Aug. 14, 2023, at 3-4, and Badeaux himself took initiative to ensure that another pharmacist, Grand, would be available to fulfill the prescription, winter storm permitting, Respondent Badeaux Br. at 10-12. In fact, multiple emergency contraceptive orders had been filled by Respondent Thrifty White during Badeaux's employment with them. Respondent Aitkin Pharmacy Services Br. at 3-4. These sort of shift swaps and administrative issues are the sort of incidental burdens the Supreme Court said did not rise to the levels of an undue hardship under *Groff*. Appellant's view of *Groff* is entirely backwards.

Third, Badeaux's actions in this case were based on his professional judgment, consistent with manufacturer's package insert and FDA description of preapproval studies, that ella can cause an abortion.[5] Minnesota law requires that Badeaux, as a licensed pharmacist, exercise such judgment. "It has been said that the ordinary care which a druggist is bound to exercise in filling his prescriptions and in the sale of drugs and medicines is the highest possible degree of prudence, thoughtfulness, and diligence, and the employment of the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not be exposed to the danger following the substitution of deadly poison for harmless medicine." *Tiedje v Haney*, 239 N.W. 611, 613 (Minn. 1931).

In contrast, the evidentiary basis in *French* for the landlord's concern that the cohabiting couple would in engage in sexual relations is far less clear. "The record is in dispute as to whether appellant had knowledge of Parsons' intended sexual activity with her fiancé, but Parsons did not deny such an intent when queried by French. *French*, 460 N.W.2d at 4. Notwithstanding this, the Minnesota Supreme Court ruled that French's refusal to rent to the applicant based on his assumptions about cohabiting couples, and an "appearance of evil," were sufficient to warrant conscience protection. *French*,

[5] Def.'s Ex. 12 at 6, 11.

460 N.W.2d at 3.

The Minnesota Constitution protects Badeaux's freedom to decline to dispense ella in violation of his religious beliefs. Appellant cannot use the MHRA to force Badeaux to violate his religious beliefs and effectively erase from the Minnesota Constitution one of our most cherished liberties. Therefore, this Court should affirm the jury verdict and the district court's decision as a matter of law.

III. Appellant's *Per Se* Theory of Liability Under the MHRA Would Eliminate Constitutional Rights of Conscience Enumerated in the First Amendment.

The First Amendment guarantees that "Congress shall make no law . . . prohibiting the free exercise" "of religion." U.S. Const. amend. I. Consistent with this command, a long line of federal authority holds that a state should not compel a citizen to relinquish his enumerated constitutional rights, including rights of conscience in the Free Exercise Clause of the U.S. Constitution.

Various courts, including the U.S. Supreme Court, uniformly forbid such attempted compulsion in the context of public-accommodations laws, consistent with the rights enumerated in the Minnesota Constitution. The decision of the Minnesota Department of Human Rights is just another in this line of public officials seeking to impose an unconstitutional orthodoxy on citizens who disagree. In all of these cases, the courts have held that even the

most laudable policy embodied in state public accommodation laws is not to be applied in a manner that suppresses a citizen's constitutionally protected right of conscience. In other words, "[w]hen a state public accommodations law and the Constitution collide, there can be no question [the Constitution] must prevail." *303 Creative LLC v. Elenis,* __ U.S. __, 143 S. Ct. 2298, 2315 (2023).[6]

Even in public-employment cases, where courts acknowledge the strong state interests as employers, those state interests still do not extinguish the employee-citizen's right to speak and act according to conscience as guaranteed by the First Amendment outside the confines of a job description.[7] Though at

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[6] *See also Id.* (Colorado public accommodation law's prohibition on discrimination on the basis of sexuality must yield to website designer's right to refrain from speech affirming message which she disapproves of based on religious belief); *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (New Jersey public-accommodations law's prohibition of discrimination on the basis of sexual orientation must yield to Boy Scouts' expressive association rights to limit adult membership to men supportive of Scouts' position on immorality of homosexual conduct)*; Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 578 (1995) (Massachusetts public-accommodations law forbidding discrimination on the basis of sexuality must yield to public-parade organizers' right to create parade's composition and message as they pleased and so bar homosexual alliance a part in parade); *Telescope Media Group v. Lucero*, 936 F.3d 740, 745 (8th Cir. 2019) (Minnesota public-accommodations law's prohibition on discrimination on the basis of sexuality must yield to videographers' right to refrain from speech affirming behavior which they disapprove of on grounds of religious belief: "Even antidiscrimination laws, as critically important as they are, must yield to the Constitution").

[7] The question of whether or not a state may compel a citizen to relinquish enumerated, constitutionally protected rights in specific, limited circumstances (in contrast to such compulsion by law of general application to the citizenry universally) arose in the context of public employment in the

times afforded great deference, courts have recognized that state policy must respect the discrete provisions of the Bill of Rights. See *Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 2421 (2022) ("The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.") (internal quotation marks omitted).

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) is the most analogous to the case before this Court. Like this case the issue of religious liberty claims in the context of contraception and abortion was central to resolution of the case, and like this case the operative effect of the drugs and devices involved was hotly disputed.

A. The free exercise of religion extends to decisions regarding contraception and abortion.

1960's in *Pickering v. Board of Education*, 391 U.S. 563 (1968), where the Court addressed whether a state's "interests as an employer" allows it to create some workplace constraint on employees' constitutional speech rights—a subject that would be litigated over the course of the next 50 years to allow determinations to be made about what is private workplace speech (and so regulatable), and what is speech on a matter of *public* concern (and so *not* regulatable). *Pickering v. Board of Education*, 391 U.S. 563 at 568; *See Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Kennedy v. Bremerton School District,* __ U.S.__, 142 S. Ct. 2407 (2022).

Conflating politics with science, Appellant maintains an erroneous position that ella is an "emergency contraceptive" and not an "abortifacient." *See, e.g.,* Add. 100-103 (Order on Motions in Limine at 18-21) (discussing Appellant's expert's opinions on ella and its effects).

This characterization of how ella functions is wrong, or at least deceptively incomplete. Multiple studies have found that ella's mechanism of action both prevents implantation of the fertilized human zygote and may also disrupt already implanted embryos, thereby causing an abortion.

Science confirms:

> fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. The combination of 23 chromosomes present in each pronucleus results in 46 chromosomes in the *zygote*. Thus, the diploid number is restored and the embryonic genome is formed. The embryo now exists as a genetic unity."

O'Rahilly, Ronan and Muller, Fabiola. *Human Embryology & Teratology*. 2nd edition. New York: Wiley-Liss, 1996, pp. 8, 29. This view, that an embryo is a distinctly unique human life with its own DNA, is known as the fertilization view and is supported by medical professionals—including 96% of biologists surveyed in a recent study.[8] Thus, Respondent's position that life begins at

[8] Fertilization and the beginning of pregnancy have been tantamount for years among scientific researchers, with a large majority of biologists still in agreement with the view that pregnancy begins with fertilization as opposed to implantation. In 2021 "biologists from 1,058 biologists from academic institutions around the world assessed survey items on when a human's life

fertilization, and that an embryo is a new unique human life, is reasonably grounded in science. Trial Tr. at 596-98.

To understand ella's abortifacient effect, consider how it operates. Ella is a second-generation drug that, like Mifeprex (RU-486), is a progesterone receptor blocker.[9] By blocking receptors in the uterine lining from receiving the progesterone needed to begin and sustain implantation, ella ends the lives of whole, distinct, living human beings. Blocking progesterone prevents the mother's placenta from functioning, thus starving the embryo leading to fetal death.[10] Moreover, various studies and clinical trials confirm ella has caused

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begins. Overall, 96% (5337 out of 5577) affirmed the fertilization view," while further studies suggested that 80% of Americans view biologists as the group most qualified to determine when a human's life begins. Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36(2) ISSUES LAW MED (2021) PMID: 36629778.

[9] Harrison & Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 ANNALS PHARMACOTHERAPY 115 (Jan. 2011); *See also* Giuseppe Bernagiano & Helena von Hertzen, *Towards more effective emergency contraception?*, 375 THE LANCET 527, 527 (2010) ("Ulipristal has similar biological effects to mifepristone, the antiprogestin used in medical abortion"). It can cause abortions both after and before implantation.

[10] Harrison, supra note 10.

abortions in both humans[11] and animals[12] by disrupting both established and implanted embryos. Even the manufacturer's package insert for ella, introduced as evidence in this case, acknowledges that ella causes "alterations to the endometrium that may affect implantation," and that *"[i]t is possible that ella may also work by preventing attachment (implantation) to the uterus*." Def.'s Ex. 12 at 6,11 (emphasis added).

Science and medical literature confirm ella may function as an abortifacient—an abortion-inducing drug. These authorities further support Respondent Badeaux's religiously based conscience objection to dispensing ella to avoid complicity in abortion. Badeaux's concern that dispensing ella would make him complicit in abortion should not be overridden by Appellant's beliefs about ella. Ella's propensity to cause an abortion warrants Bandeaux's refusal

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[11] *Id.* "Further experience with abortion in humans is supplied by the 2 Phase 3 trials submitted to the FDA for approval [of ella]. Two of these trials provided information on pregnancies after ulipristal administration." The data submitted to the FDA for approval for the first trial showed 5 of 6 pregnancies with known outcomes ended in miscarriage for women who did not choose to abort. The second trial showed 4 of 6 women miscarried, and the remaining two were lost to follow up. *See also* Paul Fine et al., *Ulipristal acetate taken 48-120 hours after intercourse for emergency contraception,* 115(2) OBSTETRICS AND GYNECOLOGY 257 (2010); Anna F. Glasier et al., *Ulipristal acetate versus levonorgestrel for emergency contraception: a randomised non-inferiority trial and meta-analysis*, 375 LANCET 555 (2010).

[12] European Medicines Agency, *Evaluation of Medicines for Human Use: CHMP Assessment for Ellaone* (2009), at 8, 16.; see www.ema.europa.eu/docs/en_GB/document_library/EPAR - Public_assessment_report/human/001027/WC500023673.pdf.

to dispense it (even if such refusal is merely precautionary).

Despite this evidence, Appellant continues to perpetuate a false narrative that any pharmacist choosing not to dispense ella has an ulterior motive– sex or pregnancy-based discrimination. This ignores the sincerely held religious belief of many that each unique human life begins at fertilization—a belief that is, but need not be, supported by science. It also ignores the Supreme Court's recognition that, "[w]whatever 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*, 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.").

Just nine years ago, the Supreme Court held that individuals, like Respondent Badeaux, may reasonably believe, and act on a religious objection to participating in providing drugs to third parties, based on the mechanism inherent in a contraceptive or abortifacient:

> The Hahns and Greens 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").

It is neither unreasonable nor unpopular to believe there is a moral duty to protect human life even at its earliest stages of development. Yet, even if Appellant and her supporters are correct that such belief is unreasonable and unpopular, Badeaux's beliefs are protected by both the federal and Minnesota constitutions. Acting on his own religious convictions about when life begins, bolstered by a shared belief with myriad biologists, he consistently conveyed a clear position that a fertilized zygote is a new human life, and that taking any action—such as dispensing ella—that might prevent this new life from surviving would make him complicit in the killing of that life. Trial Tr. 596-98. Therefore, Respondent's refusal to dispense ella cannot possibly be construed as sex discrimination in violation of MHRA.

Appellant's *per se* theory of liability in this case would have had the trial court bar the jury from hearing any testimony or argument to the effect that Badeaux had a *religious* objection to dispensing Appellant's prescription. Add.

86-87 (Order on Motions in Limine, July 11, 2022, at 4-5). Such a ruling would defy all of state and federal cases interpreting the constitutional protections of conscience and religious liberty. It would make the simple fact that Badeaux acted on his sincere religious objection to dispensing ella (or any other abortifacient) itself a *per se* violation of the MHRA, and, accordingly, would read the U.S. Free Exercise Clause out of existence in public-accommodations cases like this case.

CONCLUSION

In this case, Appellant seeks to use the MHRA to snuff out Respondent Badeaux's religious beliefs, or at least punish him for so believing. This cannot be allowed. Badeaux is a pharmacist whose religiously-informed conscience belief compels him to refuse to dispense a drug, ella, he believes may end the life of another human being. The Minnesota and United States Constitutions stand between Appellant and her apparent goal. Rather than preventing sex discrimination, Appellant's reasoning would require this Court to render the U.S. and Minnesota constitutions secondary authorities in a court of law. Not only is this wrong as a matter of first principles, but it also has the perverse effect of creating public-accommodation policies that contradict the spirit and intent of the MHRA by marginalizing another category of individuals this very law explicitly protects—religious individuals.

Badeaux's conscience-based beliefs are not simply his own but are shared

by myriads of others, including medical professionals beyond the pharmaceutical industry. Badeaux clearly and consistently articulated his belief that he would not and could not dispense abortion-inducing drugs, affirming that his objection is to the use of ella itself, not Appellant's sex. Therefore, Appellant's claim of sex-based discrimination must fail. The Court should affirm the jury verdict and judgments below.

Respectfully submitted,

Date: August 21, 2023

TRUE NORTH LEGAL

/s/ Renee K. Carlson

Renee K. Carlson (#389675)
525 Park Street, Suite 460
St. Paul, Minnesota 55103

Counsel for* Amicus Curiae *Minnesota Family Council and True North Legal

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Date: August 21, 2023

TRUE NORTH LEGAL

/s/ Renee K. Carlson
Renee K. Carlson (#389675)
525 Park Street., Suite 460
St. Paul, Minnesota 55103

Counsel for* Amici Curiae *Minnesota Family Council and True North Legal