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To: House Human Services Committee
From: Christopher Dodson - Co-Director
Date: Feb 5, 2025
Re: House Bill 1373 - Criminalizing Women Who Have Abortions

The North Dakota Catholic Conference is firmly committed to building a culture of life by advocating for legislation that ends abortion and provides support for women in need so that abortion becomes unthinkable. Although we share with some of the supporters of this bill the desire to end all abortion, this bill is not acceptable as a means to that end.

The central problem with HB 1373 is the imposition of a criminal punishment on women who have abortions. The Catholic Church has consistently held that for pastoral, moral, and prudential reasons, the law should not criminalize the woman. In most cases, if not all, she is an abortion's second victim. Our experience as counselors, spiritual advisors, and caregivers to women who have had abortions tells us that the decision to have an abortion is often the result of intense pressure, coercion by others, and a fear-driven attempt at self-preservation -- all in a culture of lies about the choices before her and a society that too often leaves her alone with her "choice." Criminalizing her only compounds her victimization and serves no purpose.

Abortion is a grave moral wrong. Not every moral wrong, however, demands a corresponding penalty in the civil law. Moreover, civil law must further a legitimate purpose and extend only so far as is necessary to achieve the desired end. Since she is one of the victims, criminalizing a woman who has had an abortion does not further the interest of justice. To punish the woman as a criminal is unnecessary. It is enough to extend criminal culpability to the abortionist, who is truly the wrongful actor.

To say that a woman who has had an abortion should not be punished in the civil law does not mean that she has acted without fault. Her act is terribly wrong. However, compassion, not a desire to punish, should guide our response to her. We should be mindful of Christ's response to the woman accused of adultery: "Neither do I condemn you."

This compassionate approach to post-abortive women has also been the approach of the pro-life community at large. Just before the release of the 2022 *Dobbs* decision that overturned *Roe v. Wade*, 75 pro-life leaders signed an open letter to state lawmakers urging them to oppose legislation that would criminalize or punish women for obtaining an abortion. The signatories included the heads of the U.S. Conference of Catholic Bishops' Pro-Life Committee, the National Right to Life

Committee, the Susan B. Anthony List, the Pro-Life Action League, and virtually every other major pro-life organization nationwide.

Proponents of HB 1373 claim that the 14th Amendment of the United States Constitution and Article 1, Section 1 of the North Dakota Constitution require the state to treat abortion statutorily the same as murder. They go so far as to say that failure to pass HB 1373 violates both constitutions. The claim has no legal merit. The U.S. Supreme Court has not held that unborn children are “persons” under the 14th Amendment. If the argument that homicide statutes must, by law, include unborn children were true, all of our homicide statutes would currently be unconstitutional and unenforceable. The Equal Protection Clauses of the U.S. and state constitutions have no relevance to HB 1373 and they certainly would not save it from a constitutional challenge.

The North Dakota Supreme Court has found that the North Dakota Constitution includes a legal right to abortion to preserve the life or health of the mother. *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d 231 (2023). Although the meaning of “health” remains unclear, it is clear that HB 1373 has no exceptions for health. On its face, HB 1373 would be considered unconstitutional.

The bill also leaves intact the state’s existing statutes that prohibit abortion, unborn homicide, and unborn assault. The conflicting provisions and definitions would provide abortionists another ground to challenge the law. This flaw also could jeopardize the state’s existing laws protecting unborn children.

Moreover, the bill’s exception for abortions to save the life of the mother is not clearly defined. This makes the bill likely to be challenged as unconstitutionally vague.¹

In short, three constitutional problems are immediately apparent. Under North Dakota law, in cases like this, if the state loses it has to pay the challenger’s attorney fees and costs. To give you an example of these costs, the parties currently challenging the state’s existing abortion laws are seeking \$141,988.57 for just the trial portion of the case. The costs associated with defending human life are sometimes worth it. But in a case like this, where the law is obviously unconstitutional, we might as well write the check to the abortionists now.

Proponents of HB 1373 contend these legal risks are necessary because mail-order abortion drugs have resulted in more abortions being done on North Dakota women than ever before. Specifically, they claim that in 2023 one thousand unborn children from North Dakota were killed by abortions that “remained legal” under North Dakota law. According to the claim, 780 of these abortions were done out-of-state, and 221 were done with mail-order abortion pills. There are many problems with this assertion that warrant attention.

First, abortions done on North Dakota residents out of state are not abortions that “remained legal” under North Dakota law. They were legal under the laws of those other states. An individual cannot be charged under North Dakota law for an act that occurred in another state, even if the act is illegal in our state. HB 1373 will not, and cannot, change that.

Second, the claim that 221 North Dakota women used the abortion pill in 2023 is highly suspect. The figure is derived from the total number of presumably pregnant women who requested the abortion pill from a national abortion pill provider during the two months immediately following the *Dobbs* decision in July of 2022. We do not know how many of these women actually used the pills. Moreover, the pro-abortion groups manufactured a false narrative that abortions would immediately be banned and that women should quickly order abortion pills. The numbers do not account for this “panic effect” that occurred in the few months immediately after the *Dobbs* decision.²

In fact, abortion was legal and available in North Dakota during these months. The court had immediately enjoined the law which would have gone into effect and the abortion center was still operating in Fargo. In other words, there would have been no reason for women to seek mailed abortion drugs during this time.

Nevertheless, the proponents would like us to believe that the *Dobbs* decision and the mere possibility that North Dakota’s abortion might go into effect immediately caused a 26% increase in the number of North Dakota women getting abortions.³ The claim is, quite frankly, unbelievable. Many factors contribute to why abortion numbers go up or down, but no credible study has ever concluded that abortion restrictions cause abortion numbers to go up. Indeed, the research shows the opposite.⁴

We share this information not because we want to attack the bill’s well-meaning supporters. We share this information because it is relevant to the decision before you. Supporters of HB 1373 are asking this legislative body to depart from the wisdom and experience of every major pro-life organization in the country, criminalize all women who get abortions, and place our existing laws in legal jeopardy so the state can stop 221 phantom abortions that no one can show actually exist.

Perhaps these additional abortions do exist and are, by their clandestine nature, impossible to prove. If so, they would also be impossible to prove if HB 1373 is enacted. Passage of HB 1373 would, therefore, accomplish nothing while destroying years of hard work to build a culture of life in North Dakota.

We realize that this may be a very difficult issue for those who oppose abortion. We all want abortion to come to an end. However, we cannot embrace the proposal recommended in this bill. It is misguided, legally flawed, built upon faulty premises, ultimately pointless, and harmful. Anyone who is genuinely pro-life can, in good conscience, oppose this bill.

We urge a **Do Not Pass** recommendation on House Bill 1373.

¹ The exception to save the life of the mother in HB 1373 is broader than the exception in our existing law.

² Other problems with the claim, which comes from *Babies Unprotected: An Analysis of Self-Induced Abortion Numbers in States with “Bans”* by the Foundation to Abolish Abortion, include:

- The authors rely on Aiken ARA, Starling JE, Scott JG, Gomperts R. *Requests for Self-managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the Dobbs v Jackson Women’s Health Organization Decision*. JAMA. 2022;328(17):1768–1770. doi:10.1001/jama.2022.18865. That study was designed to measure the increase in requests for the abortion pill and the reasons for the requests during the two months following *Dobbs*. It was not designed to determine actual numbers.
- Extrapolating from those two months does not account for the “panic effect” of women thinking that abortions would be immediately banned and, therefore, decided to “stock up” on the pills.
- The reasons collected by the researchers indicate that the requestors were motivated not by an immediate desire to have an abortion, but by fears of a possible ban in their states.
- The authors claim that 88% of requests result in abortions, but they refer to a study from Abigail Aiken, et al. using 2019 numbers, when abortion was mostly legal. They then state Abigail Aiken, et al. confirmed those numbers in a 2024 study, but that study merely stated that the abortion provider reports were consistent with the 2019 and older studies.
- Aiken’s 2024 publication actually states that “it is likely that a substantial number of people continued their pregnancies” after making the abortion drug request. Citing other research, she goes to write: “Indeed, data on birth counts for the first half of 2023 suggest an increase of approximately 2.3% in states with total abortion bans in place relative to states without such restrictions.” This directly contradicts the Foundation to Abolish Abortion’s claim that abortion bans increase, rather than decrease, abortions.

³ The five year average for abortions for North Dakota residents before *Dobbs* was 836. (NDDHHS, Vital Statistics.) An additional 221 abortions would be a 26% increase.

⁴ <https://www.nationalreview.com/corner/cdc-releases-new-abortion-data-for-2022/>. If, as the bill’s proponents claim, pro-life laws and pro-life court decisions increase, rather than decrease, abortions, HB 1373 would also increase abortions in North Dakota.

May 12, 2022

An Open Letter to State Lawmakers from America's Leading Pro-Life Organizations

To all State Legislators in the United States of America,

With the leak of a draft U.S. Supreme Court opinion written by Justice Samuel Alito in *Dobbs v. Jackson's Women's Health Organization* that appears to show a majority of the Court may be in favor of reversing *Roe v. Wade* and *Planned Parenthood v. Casey*, there has been increasing news coverage of state-level momentum to enact laws that protect mothers and their unborn children from the tragedy of abortion.

Over the past 50 years, under the shadow of *Roe v. Wade* and *Doe v. Bolton*, abortion has taken the lives of more than 63 million unborn American children¹. But the tragedy of abortion isn't limited to the unborn child who loses her life. The mother who aborts her child is also *Roe's* victim. She is the victim of a callous industry created to take lives; an industry that claims to provide for "women's health," but denies the reality that far too many American women suffer devastating physical and psychological damage following abortion.

The abortion industry tries to dismiss reports and studies of post-abortive trauma. But even as far back as the 1980s, scientific researchers and the mainstream media were documenting the reality of abortion's consequences.

Studies examining the records of over 50,000 California Medicaid patients from 1989-1994 found women who underwent abortions experienced 2.6 times more psychiatric admissions in the first 90 days following pregnancy than women who gave birth, and 17% higher mental health claims over the following four years.²

¹ National Right to Life estimate based on data reported by the U.S. Centers for Disease Control and Prevention through 2019 and the Guttmacher Institute through 2017. See *The State of Abortion in the United States, 2022*, updated release May 5, 2022, www.nrlc.org/uploads/communications/stateofabortion2022.pdf.

² Priscilla Coleman, et al, "State-Funded Abortions vs. Deliveries: A Comparison of Outpatient Mental Health Claims Over 4 Years," *American Journal of Orthopsychiatry* Vol. 72, No. 1 (2002), pp. 141-152 compared claims for first time outpatient mental health treatment in California between 14,297 aborting women and 40,122 women who gave birth four years after the event and found the rate of care 17% higher among the aborting group. Another study by P. Coleman and colleagues, "Psychiatric admissions of low-income women following abortion and childbirth," *Canadian Medical Association Journal*, Vol. 168, No. 10 (May 13, 2003), available at www.cmaj.ca/cgi/content/full/168/10/1253, looked at the records of 56,741 women in the California Medical system and found aborting women having 2.6 times more psychiatric admissions than women giving birth in the 90 days following the event.

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A 1989 *Los Angeles Times* survey³ found 56% of women who had abortions felt guilty about them, and 26% mostly regretted the abortion. Subsequent studies suggest that these numbers may be low, reporting that adverse emotional and psychological effects are sometimes delayed, not surfacing for 5 or even 10 years after the abortion⁴.

Despite promises from her partner to the contrary, a woman's relationship will often dissolve following an abortion^{5,6}. The clinic staff is gone, and the woman has no desire to return to the place she associates with failure⁷. Even friends who know about the abortion hesitate to bring up the subject. When this happens, she is left to deal with her pain, her doubts, her questions all alone⁸.

Women are victims of abortion and require our compassion and support as well as ready access to counseling and social services in the days, weeks, months, and years following an abortion.

As national and state pro-life organizations, representing tens of millions of pro-life men, women, and children across the country, let us be clear: We state unequivocally that we do not support any measure seeking to criminalize or punish women and we stand firmly opposed to include such penalties in legislation.

³ George Skelton, "Abortion often causes guilt, poll finds," *The Sacramento Bee*, March 19, 1989, p. A7.

⁴ J. Trybulski warns about uncomfortable emotions and thoughts that surfaced months or years later following a woman's abortion in "Women and abortion: the past reaches into the present," *Journal of Advanced Nursing*, Vol. 54, No. 6 (June 2006), pp. 683-90.

⁵ Winfried Barnett, et al, "Partnership After Induced Abortion: A Prospective Controlled Study," *Archives of Sexual Behavior*, Vol. 21, No. 5 (October 1992), pp. 443-455. Barnett and colleagues found that 20 out of the 92 aborting couples, or 22%, in their study group had separated after one year. Among the 2,000 plus cases of post abortion trauma that Theresa Burke worked with, she encountered several women whose marriage dissolved as a consequence of their abortions. See Theresa Burke, *Forbidden Grief* (Springfield, IL: Acorn Books, 2002), pp. 208, 212, 217.

⁶ Linda Bird Francke gives classic accounts on pp. 74 and 97 of *The Ambivalence of Abortion*. Burke offers examples from cases in *Forbidden Grief* on pp. 34, Ann Speckhard's study of thirty high stress aborters in *Psychosocial Stress following Abortion* (Kansas City, MO: Sheed & Ward, 1987) found 46% of her subjects reporting a subsequent break up with her impregnating partner, Speckhard observes: As the male partner was often the only other one who knew of the abortion, ending the relationship left a large void in the subject's life, which contributed to feelings of loneliness, isolation, and alienation (p. 54).

⁷ Even forty years after her abortion, "Elsa" tells Linda Bird Francke that "even now I have trouble driving by the 72nd Street entrance to the West Side Highway in New York where his office was." Linda Bird Francke, *The Ambivalence of Abortion* (New York: Dell, 1978), p. 313. Burke quotes a woman in *Forbidden Grief* who says "I just can't go near that place. It freaks me out. I'd rather drive a hundred miles than have to pass that place. I just can't do it. It makes me sick" (p. 94; see also pp. 38-39). Also see Magyari, et al, 1987.

⁸ An example of such isolation is found in Burke's *Forbidden Grief*, p. 189.

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If the Supreme Court does overturn *Roe v. Wade*, they will be honoring the unambiguous division of powers described in the Constitution, returning abortion policymaking back to our elected state and federal legislators. This will be a tremendous opportunity for states to create durable policy that can stand the test of time. But in seizing that opportunity, we must ensure that the laws we advance to protect unborn children **do not harm their mothers.**

We are America's leading advocates for life. We come from very different backgrounds and perspectives, but we are united in our mission to protect unborn children and American women from the greed of the abortion industry. We have been in this fight for decades – many of us have dedicated our lives to this cause. We understand better than anyone else the desire to punish the purveyors of abortion who act callously and without regard to the dignity of human life. But turning women who have abortions into criminals **is not the way.**

In 1977, then-National Right to Life President Dr. Mildred Jefferson observed in her welcome letter to those attending the annual National Right to Life Convention:

The fight for the right to life is a people's fight for its existence and its continuity. It is a country's fight for its survival and its future. The right-to-life cause is not the concern of only a special few but it should be the cause of all those who care about fairness and justice, love and compassion and liberty with law.

Our charge as a movement has not strayed from those words written by Dr. Jefferson. In fighting for our country's future generations, we are called to act with love and compassion as we seek fairness, justice, and liberty for unborn children and their mothers.

Criminalizing women is antithetical to this charge.

We will continue to oppose legislative and policy initiatives that criminalize women who seek abortions, and we will continue to work for initiatives that protect unborn children and policies that provide and strengthen life-affirming resources for abortion-vulnerable women.

We call upon all pro-life legislators to stand with us. We ask you to continue to act with love and compassion toward abortion-vulnerable women. We urge you to reject any measure that seeks to criminalize women who have abortions.

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Sincerely, for Life,

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