Statement on Misleading Representations About Measure 1 and End-of-Life Care Decisions

Opponents of Measure 1 on the North Dakota November ballot, also known as the Human Life Amendment, have made various claims about the amendment and alleged potential impacts on end-of-life care decisions, including the use of advance health care directives. These are important issues and we write to set the record straight. Passage of the amendment will not impact health care decisions and end-of-life care in North Dakota.

We come from various legal, medical, advocacy, caregiving, and religious backgrounds, but are united in our concern for treating incapacitated and dying persons with dignity and compassion. Our purpose is not to collectively express an opinion in favor or against the proposed amendment. Our purpose is to clarify some misunderstandings about current law and correct statements that the passage of the amendment could impact those laws. We want North Dakotans to have a better understanding of their right to make health care decisions and to feel comfortable using health care directives as a means to ensure that their wishes are respected.

The proposed amendment states: “The inalienable right to life of every human being at any stage of development must be recognized and protected.” The measure was placed on the ballot by the Legislative Assembly with bipartisan support. Some opponents of the measure have claimed that passage of the measure will nullify advance directives in the state and negatively impact end-of-life care.¹ These claims reflect a misunderstanding of both state and federal laws concerning constitutional amendments, patient autonomy, and end-of-life care — misunderstandings that, if not corrected, could confuse or mislead North Dakotans and their families, discouraging the use of advance health care directives and ultimately disrespecting the dignity of patients facing the end of their lives.

Claims that passage of Measure 1 will impact the use of advance directives and end-of-life care are incorrect for several reasons.

(1) North Dakota Law Explicitly Recognizes the Right to Use Advance Directives and other Provisions Concerning End-of-Life Care

North Dakota Century Code section 23-06.5-01 states: “Every competent adult has the right and responsibility to make the decisions relating to the adult’s own health care, including the decision to have health care provided, withheld, or withdrawn.” To that end, Chapter 23-6.5 of the Code explicitly authorizes the use of “health care directives” that either give health care instructions, appoint someone to make those decisions for the patient, or both.

¹ The North Dakota Coalition for Privacy in Health Care web site states: “Because the amendment requires the protection of life at any stage, it may impact end-of-life care. It could nullify living wills and advance directives that instruct caregivers to stop life support. Prolonging life support beyond a desired point would be costly to families and affect organ donation.”
North Dakota law also explicitly states that the administration of medications and procedures for the sole purpose of and necessary to relieve a person's pain or discomfort do not constitute homicide or assisted suicide. Similarly, pursuant to state law the withholding or withdrawal of life-prolonging treatment is not considered causing death. (N.D.C.C. sec. 12.1-16-06). This principle is also recognized in the chapter on health care directives. (N.D.C.C. sec. 23-06.5-13(9) ["Death resulting from the withholding or withdrawal of health care pursuant to a health care directive in accordance with this chapter does not constitute, for any purpose, a suicide or homicide"]; N.D.C.C. sec. 23-06.5-01, ["This chapter does not condone, authorize, or approve mercy killing, or permit an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying."])

North Dakota law also provides that persons close to the patient, not doctors or the government, make health care decisions when the patient cannot speak for himself or herself, when there is no health care directive. (N.D.C.C. sec. 23-12-13.)

Chapter 19-03.3 of the Century Code explicitly allows physicians to treat acute or chronic pain with controlled substances.

Finally, North Dakota law explicitly recognizes a person’s desire to become an organ donor with the Uniform Anatomical Gift Act (N.D.C.C. chp. 23-06.6) and section 23-06.3-01 of the Code expressly designates when death is deemed to have occurred.

**Measure 1 does not repeal any of these statutes.** It merely states: “The inalienable right to life of every human being at any stage of development must be recognized and protected.” It does not mention, much less repeal, any existing statutes.

Nor would the amendment implicitly repeal these laws. Like most constitutional provisions, Measure 1 is not self-executing. The North Dakota Supreme Court has repeatedly held that amendments to the state constitution cannot implicitly repeal a statute unless the amendment expressly states that it is self-executing so that no further action by the legislature would be necessary or the amendment is in such direct and specific conflict with the statute so as to create “invincible repugnancy.” Agnew v. Schneider, 253 N.W.2d 184 (N.D. 1977). Because the amendment does not reference any existing statutes, much less conflict with them, it cannot repeal the existing statutes by implication.

**(2) Claims Irresponsibly Confuse Killing with Natural Death**

We are especially troubled by the potential consequences of these claims. They are premised on the idea that legitimate treatment options, such as withdrawing futile care or providing pain relief, are acts of killing, albeit a killing allowed by the law.

Legally, medically, and ethically these are not acts of killing. There is a difference between intentionally and knowingly killing a human being and actions - such as withdrawal of ineffective treatment or providing pain relief - that have as their object something other than killing. It is a distinction recognized by the U.S. Supreme Court in Vacco v. Quill, 521 U.S. 793 (1997) and expressly recognized in North Dakota law.
As persons involved in caregiving for both individuals facing end-of-life issues and their families, we know that clarity about the difference between actively killing and letting natural death take its course is an essential part of providing care with dignity and compassion. Claims about the Human Life Amendment based on false and misleading information about the differences are irresponsible and potentially damaging to efforts to ensure that North Dakotans at the end of life are treated with dignity and compassion.

(3) Existing Constitutional Provisions Dispositive

We need only to look at existing constitutional provisions to see that these claims are meritless. The Human Life Amendment does not create a constitutional right to life. A right to life already exists in the state constitution. Article I, section 1 states: “All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . .” The proposed Human Life Amendment clarifies this language rather than creating a new right.

If the mere existence of a right to life in the North Dakota Constitution nullified health care directives and laws concern end-of-life care, the existing laws would be unconstitutional. The North Dakota Supreme Court, however, has recognized a patient’s right to direct their own health care as “fundamental” and “well-established and has upheld those existing laws. State ex rel. Schuetzle v. Vogel, 537 N.W.2d 358 (N.D. 1995) at 360.

The Human Life Amendment only clarifies the right to life that already exists in the North Dakota Constitution. It does not, and cannot, negate a person’s right to direct their own health care during that life.

(4) Human Life Amendment Cannot Trump Federal Rights

Even if the Human Life Amendment was self-executing - which it is not - and even if the provisions patently conflicted with the existing statutes so much as to implicitly repeal them - which it cannot - the right of North Dakotans to determine their own health care, as well as the difference between killing and natural death, is recognized by the United States Supreme Court. (See, Cruzan v. Director, Mo. Dept. of Health, 497 U. S. 261, 278 (1990); Vacco v. Quill, 521 U.S. 793 (1997)) No act by the State of North Dakota can trump these rights recognized under the federal constitution.

Conclusion

Claims that passage of Measure 1 on the November ballot, the Human Life Amendment, by the people of North Dakota would nullify health care directives and interfere with end-of-life health decisions are without merit. More concerning is that
such misrepresentations could give North Dakotans a false understanding of existing laws and whether their health care directives will be honored. North Dakotans should know that, no matter what the outcome of the vote on the Human Life Amendment, their right to determine health care decisions will be respected and that their right to be treated with dignity will remain intact.

North Dakota has made great strides to protect the dignity and autonomy of people facing end-of-life decisions while also protecting their right to life. Measure 1 will not change that. False and irresponsible claims about the measure, however, could create confusion, leading to a reluctance to use advance directives and to make legitimate health care decisions that respect a person’s right to die naturally and with dignity.

Rather than jeopardize the progress North Dakota has made with end-of-life care, opponents of Measure 1 should cease their baseless and misleading charges.

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