STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Case Type: Civil/Other Misc.

Dr. Jane Doe, et al.,

Plaintiff,

Court File No. 62-CV-19-3868
Judge Thomas Gilligan, Jr.

vs.

State of Minnesota, et al.,

Defendants,

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

and

Mothers Offering Maternal Support,

Defendant-Intervenor.

INTRODUCTION

Mothers Offering Maternal Support ("MOMS") is an unincorporated association comprised of Minnesota mothers who have minor daughters. Declaration of Jessica Chastek ¶ 2, Dkt. Index No. 389. MOMS seeks to intervene and protect the constitutional and statutory rights of its members and of all Minnesota parents to be notified when their minor daughters are seeking abortions. MOMS also seeks to protect the interests of the minor daughters of its members to receive statutorily-required information regarding pregnancy, abortion, and support available for pregnant girls and women, followed by adequate time to evaluate and reflect upon the information with their parents before the performance of an abortion by a qualified physician.

MOMS filed its Notice of Intervention, Dkt. Index No. 386, as soon as it become clear that the interests of its members were not and are not adequately represented in this litigation. This Court's Order of July 11, 2022, Dkt. Index No. 357, revealed that Defendants had failed to

adequately represent the interests of MOMS. Defendants' failure to provide evidence rebutting many of Plaintiffs specious allegations, and evidence supporting the state's and parents' many interests in assuring that minors' decisions to obtain abortions are voluntary, informed, and deliberate. These interests are advanced through Minnesota laws requiring parental notification, Minn. Stat. § 144.343, subds. 2–6, and informed consent, Minn. Stat. § 145.4242(a)-(c). Defendants also failed to provide evidence of the state's and parents' interests in requiring that abortions are performed safely by a physician. Minn. Stat. § 145.412, subd 1(1). The subsequent announcement that Defendants would take no further action, whether seeking reconsideration or appeal of this Court's July 13 judgment, eliminated any possibility that MOMS interests would be adequately protected by Defendants.

This Court's ruling does not merely impair or impede the constitutional and statutory rights of the members of MOMS and their minor daughters – the Order completely extinguishes them. *Doe v. State of Minnesota*, 2022 WL 2662998 (judgment rendered July 13, 2022). Abortion providers now may legally provide secret abortions to minors without providing any notice to parents, and they no longer need share statutorily required information with the minors themselves before allowing non-physicians to perform abortions at any gestational age of the pregnancy. *Id*.

MOMS is entitled to intervene in this case.

ARGUMENT

Minnesota Rule of Civil Procedure 24.01 establishes the circumstances when an intervenor must be allowed to intervene by right:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, MOMS must show: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) that the intervening party is not adequately represented by existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986).

The Minnesota Supreme Court has declared a "policy of encouraging all legitimate interventions." *Costley v. Caromin House, Inc*., 313 N.W.2d 21, 28 (Minn. 1981), and "technicalities should not be invoked to defeat intervention." *Engelrup v. Potte*r, 224 N.W.2d 484, 488 (Minn. 1974). Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor. *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438 (Minn. App. 2013), *see also United States v. Union Electric Co*., 64 F.3d 1152, 1158 (8th Cir.1995). Rule 24.01 does not require a potential intervenor to show a likelihood or probability of success on the merits. *Miller v Miller*, 953 N.W.2d 489, 494 (Minn. 2021).

As detailed below MOMS application to intervene meets all requirements of Minn. R. Civ. P. 24.01. The motion to intervene should be granted.

I. MOMS application to intervene is timely.

The timeliness of a motion to intervene is determined by "the particular circumstances involved and such factors as how far the suit has progressed, the reason for any delay in seeking intervention, and any prejudice to the existing parties because of a delay." *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986).

A. Intervention is timely based on the circumstances of this case.

Two years ago, this Court rejected a motion to intervene by the Ninety-First Minnesota State Senate (the "Senate"), observing at that time, "Defendants have been zealous in their defense

of this case." Order of November 2, 2020, Dkt. Index No. 159, at p. 23. No doubt this conclusion was predicated in part by Defendants' multiple claims and assurances of providing a vigorous defense of the laws being challenged in this case. *See* Defendants' Memorandum in Opposition to [Senate] Motion to Intervene, Dkt. Index No. 376, at pp. 2 ("Attorney General's vigorous defense") , 6 n. 4 ("rigorous" defense"), 13 ("vigorous litigation").

Defendants' subsequent conduct of the case, however, has turned out to be anything but zealous or vigorous. Judgment was entered on cross-motions for summary judgment. To survive Plaintiffs' motion for summary judgment, Defendants only needed to provide enough evidence to establish that a genuine dispute regarding the material facts existed. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). This standard would have been satisfied if Defendants had merely provided sufficient evidence that reasonable persons would draw different conclusions regarding Plaintiffs' claims. 566 N.W.2d at 71. Yet, as this Court notes multiple times in its Opinion of July 11, 2022, Defendants provided little to no evidence to rebut the Plaintiffs' claims. *Doe v. State of Minnesota*, 2022 WL 2662998 at *11, 28, 42, 45, 47-48, 51-52. MOMS stands ready to provide this Court with such evidence.

No trial has occurred in this case. MOMS Notice of Intervention was filed within the time for appeal from the judgment and within 43 days of the Attorney General's announcement that Defendants would not appeal. It was only upon the happening of these two events that it became clear that the interests of MOMS would not be (and had not been) protected by Defendants.

The fact that this case was commenced three years ago is not determinative of whether MOMS' motion to intervene is timely. In applying the federal counterpart of Minn. R. Civ. P. 24.01 and allowing intervention, the U.S. Supreme Court recently reiterated " 'the point to which [a] suit has progressed is ... not solely dispositive,'" *Cameron v EMW Women's Surgical Ctr.,*

P.S.C., 142 S Ct 1002, 1012 (2022). As the Court noted, "the most important circumstance relating to timeliness" is that a proposed intervenor seeks to intervene as soon as it becomes clear that the intervenor's interests would no longer be protected by the parties in the case. *Id*. *citing United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Here, that time did not come until the Court ruled on Defendants' summary-judgment efforts and found them inadequate.

Erickson v Bennett, 409 NW2d 884, 887 (Minn. Ct. App. 1987) ("*Erickson*") applies the same standard to cases in Minnesota state courts:

> [T]imeliness does not turn on when St. Paul first became aware of the action, but rather on how quickly it acted once it learned that its interests were not protected by the existing parties. *See id*. at 264. Aware that its interests were not being adequately represented, St. Paul acted promptly to intervene, filing its motion within the time period in which Bennett could have taken an appeal.

Id. at 887, *citing United Airlines, Inc. v. McDonald*, 432 U.S. 385, 398 (1977). *See also Engelrup v. Potter*, 224 N.W.2d 484, 488 (Minn. 1974) (intervention is allowable even "several years after commencement of suit"). While Defendants in the case at bar did not default, as did the defendant in the *Erickson* case, the damage done to the interests of MOMS and all Minnesota parents is no different than if Defendants had defaulted. In both situations, the interests of proposed intervenors would be destroyed if intervention were not permitted.

B. Intervention will not substantially prejudice the parties.

Attorney fees and other costs of litigation are insufficient to amount to substantial prejudice precluding intervention. *Westfield Ins. Co. v Wensmann, Inc*., 840 NW2d 438, 449 (Minn. App. 2013). Nor is this a case where the government has acted on the judgment and induced the plaintiffs to change their legal position. *See Omegon, Inc. v City of Minnetonka*, 346 N.W.2d 684, 687 (Minn. App. 1984, *review denied* (Minn. June 12, 1984) (intervention not timely where defendant had already issued a conditional use permit based on the judgment and plaintiff had acted in reliance

on the permit). Finally, whether permitting MOMS to intervene complicates the case is not a factor for consideration when evaluating intervention by right. *Norman v. Refsland*, 383 N.W.2d 673, 677 (Minn. 1986).

Any weight given to such concerns is certainly outweighed by the fact that MOMS members will lose fundamental constitutional rights if not allowed to intervene. *Cf. Erickson*, 409 N.W.2d at 887-888. *See also United Airlines, Inc. v. McDonald*, 432 U.S. at 395. MOMS motion to intervene was filed within the time the parties could have taken an appeal. Because the motion was filed as soon as it became clear that MOMS' interests were not and would no longer be protected by the Defendants in the case, the motion is timely.

II. As representative of its members' interests, MOMS has a legally recognized interest of constitutional stature in the continuing validity of the Minnesota statutes challenged by Plaintiffs in this case.

To evaluate whether MOMS has an interest in the subject of the act this Court must accept the allegations in the pleadings as true, absent sham or frivolity. *Miller v. Miller*, 953 N.W.2d 489 (Minn. 2021).

The parental right to care for their children includes the right to participate in decisions regarding the health care of one's daughters. *See Parham v. J.R.*, 442 U.S. 584, 603 (1979). *Accord SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007); *Justice v Marvel, LLC*, 965 N.W.2d 335, 341-42 (Minn. App. 2021) (*rev'd on other grounds Justice v. Marvel, LLC*, 979 N.W.2d 894 (2022)). Because of the stature of this right under both the state and federal constitutions, the Minnesota Supreme Court has commanded that there be no state interference with this right except for "grave and weighty reasons." *In re Welfare of Children of Coats*, 633 N.W.2d 505, 514 (Minn. 2001) (*quoting In re Welfare of H.G.B.*, 306 N.W.2d 821, 825 (Minn. 1981)).

State statutes receive the benefit of a presumption of constitutionality, and the judicial power "to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary."*Walker v Itasca County Auditor*, 624 NW2d 599, 601 (Minn. App. 2001), *aff'd sub nom. Walker v Zuehlke*, 642 NW2d 745 (Minn. 2002). By a bipartisan vote in 1981 the Minnesota legislature enacted the Parental Notification Act, Minn. Stat. § 144.343, subds. 2–6. The Act reflects the Minnesota legislature's determination of a constitutional balance between the interests of minors who desired abortions, a right that had been recognized in federal constitutional law at the time, *Danforth v. Planned Parenthood*, 428 U.S. 52 (1976), and the constitutional rights of parents to care for their minor daughters, *Parham v J. R*., 442 U.S. 584 (1979).[1] While subject to certain exceptions, the Act requires a physician to notify a pregnant minor's parents 48 hours before performing an abortion on their daughter.

Before the Parental Notification Act took effect, it was challenged by Dr. Jane Hodgson and others as violating then existing federal caselaw creating a minor's right to abortion. *Hodgson v State of Minn.*, 648 F Supp 756, 760 (D. Minn. 1986), *rev'd*, 853 F2d 1452 (8th Cir 1988), *aff'd sub nom*. *Hodgson v Minnesota*, 497 U.S. 417 (1990). After five years of intense trial court litigation, and four years of careful appellate review, the U.S. Supreme Court upheld the constitutionality of the 48-hour waiting period and the two-parent notification requirement with judicial bypass. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

The *Hodgson* ruling was largely predicated on the state's interest in *both* assuring that a minor's decision to obtain an abortion is "knowing, intelligent, and deliberate", *id*. at 448, 450 and

[1] It is important to note that both U.S. Supreme Court decisions and the statutes challenged in this case predate *Doe v. Gomez*, 542 N.W.2d 17 (1995).

protecting the parent's right to direct the care of their minor children. *Id*. at 445-56. [1] Both of these interests are at stake in this case. MOMS seeks to protect them.

Intervention "is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. App. 1987) (citation omitted); *Luthen v. Luthen,* 596 N.W.2d 278, 281 (Minn. App.1999).

While some interests of MOMS are similar to those of some Defendants, they are distinguishable from the general interests of Defendants in enforcing state laws, and more particularized than Defendants' general interests in protecting the health and safety of all Minnesotans. *See Jacobson v Commonwealth of Massachusetts,* 197 U.S. 11, 25, (1905) ("[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."). MOMS members have *concrete and direct* interests in protecting and caring for their minor daughters.

> [O]ur constitutional system long ago rejected any notion that a child is 'the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.

Parham v J. R., 442 U.S. 584 (1979) (internal citations omitted) *quoting Pierce v Soc'y. of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

[1] *Dobbs v. Jackson Women's Health Org.*, 142 S Ct 2228, 2242 (2022) held that there is no federal constitutional right to abortion. The constitutional right of a parent to care for her child and the state's interest in assuring, in the rare case when a minor is authorized to self-consent to care, that such consent be knowing, intelligent, and deliberate, were not before the Court, and remain unquestioned in the law.

The harms to the constitutional rights of parents and their minor daughters from this Court's enjoining Minn. Stat. § 144.343, subds. 2–6, the Two-Parent Notification Law, and the resulting secret abortions, are grave. These harms are exacerbated by the Court's decision striking down Minn. Stat. § 145.4242(a)-(c) which required all patients receive statutory information regarding their pregnancy and abortion, with at least 24-hours to reflect upon that information prior to the performance of abortions.

III. MOMS is unable to protect the interest of its members unless it is a party to the action.

"Rule 24.01 is designed to protect nonparties from having their interests adversely affected by litigation conducted without their participation." *BE & K Const. Co. v. Peterson*, 464 N.W.2d 756, 758 (Minn. App. 1991) (*citing Gruman v. Hendrickson*, 416 N.W.2d 497, 500 (Minn. App. 1987)).

As described in Section IV, *infra*, this Court has found that Defendants failed to present evidence establishing the benefits of Minnesota's two-parent notification law and rebutting many of Plaintiffs' claims regarding putative harms from requiring parental involvement, as well as adequate information to allow girls and their parents to make informed decisions, and sufficient time to reflect together about the best response to an unexpected pregnancy. Absent intervention MOMS will be denied the ability to move this Court for relief from the judgment and provide missing evidence and arguments that would have been provided if the interests of MOMS and their minor daughters had been adequately represented.

IV. The interest of MOMS was not adequately represented by existing parties.

Defendants' representation of the interest of MOMS was fatally deficient. Legally the Defendants failed to raise parents' *constitutional* rights to direct and protect the wellbeing of their children, characterizing it only as an "interest." In responding to Plaintiffs' evidence of alleged

burdens, harms, and inadequacies of the challenged laws, it is indisputable that Defendants failed to adequately represent Defendants' interests from this Court's multiple findings that Defendants 1) provided **no** evidence to rebut many factual claims of Plaintiffs' experts (*Doe* at *28, 42, 45, 47-48, 52) (emphasis added); 2) provided only **equivocal** evidence in support of some state interests (*id*. at *11, 52) (emphasis added); and 3) **little or no** evidence of other compelling state interests furthered by the laws (*id*. at *51) (emphasis added).

Of the two experts proffered by Defendants, Dr. Wothe, a perinatologist, offered no opinion regarding adolescent medical decision-making and parental involvement laws. As to the other laws at issue in this case, his opinions ranged from attacks on the statutes (*e.g., id.* at 11) to ambivalent or uninformed (*e.g., id*. at 6, 12, 30, 52). Similarly, Defendants' other expert, Dr. Lindo, as an economist, lacked expertise to address a multitude of Plaintiffs' factual allegations. As summarized by this Court, Dr. Lindo merely opined "empirical data from Minnesota 'casts doubt' on whether there are 'substantial effects on abortion rates' because of the enactment of the Challenged Laws". *Id*. at 39, *but see id*. at 9, n. 14).

In place of evidence, Defendants offered tepid characterization of parental rights as mere "interests", while attempting to rely upon the legal conclusions of *Hodgson v. Minnesota*, 497 U.S. 417 (1990), a Supreme Court case upholding the Minnesota parental notification law based in part on a well-developed evidentiary record created during a 5-week trial. *Id*. at 430. Given the approach of Minnesota courts to the application of federal constitutional law when interpreting the state constitution, the best such a weak strategy could hope for is that the court would find *Hodgson* persuasive. *Cf. State v Fuller*, 374 N.W,2d 722, 727 (Minn. 1985) ("a decision of the United States Supreme Court interpreting a comparable provision of the federal constitution that, as here, is

textually identical to a provision of our constitution, is of inherently persuasive, although not necessarily compelling, force").

A. Defendants Failed to Provide Adequate Evidentiary Support for the Challenged Laws.

In determining the facts of this case, the Court relied on the twelve expert declarations submitted by Plaintiffs. In sharp contrast Defendants offered only two expert reports, one by Dr. Wothe, M.D., and the second by an economist, Dr. Jason Lindo, Ph.D., both providing only tepid or equivocal support for the challenged laws.

The report by Dr. Wothe is entirely silent on the Parental Notification Law (ECF No. 240, Ex. A), and equivocal regarding the benefits of laws requiring abortion-related informed consent ("mandatory disclosures"), a waiting period between patients' receipt of the information and the performance of an abortion ("mandatory delay"), and limiting the performance of abortions to physicians and physicians in training ("physician-only law").

Dr. Lindo, Dkt. Index No. 240, Ex. D, due to the limited scope of his expertise, offered no opinion upon many of the alleged facts before the Court, instead evaluating historical data to determine whether the challenged laws reduced abortions in the state, and identifying shortcomings in the evidence offered by some of Plaintiffs' experts.

His report failed to dispute Plaintiffs' mischaracterization of the state's interests in the challenged laws and was ambiguous regarding his opinion on the benefits and utility of the laws. For example, in addressing the Parental Notification Law, Dr. Lindo notes the existence of evidence showing that such laws reduce risky sexual behavior that often results in teen pregnancies (*id*. at ¶ 23). Yet in the section entitled *Parental Involvement Laws*, beginning at ¶ 43, Dr. Lindo opens with the following statement: "Empirical evidence on the causal effects of parental involvement laws is rather mixed" (¶ 43). His conclusion is no better, "As a whole, this evidence

makes it rather unclear how Minnesota's two-parent notification requirement should be viewed" (¶ 48). His refusal to offer a firm support of such laws is troubling given that he approvingly identifies empirical studies establishing that the Minnesota law reduced teen pregnancies, increased contraceptive use among sexually active teens, and an association with a reduction in teen suicide. Dkt. Index No. 240, Ex. D, ¶ 48.

If allowed to intervene MOMS stands ready to provide evidence from multiple experts on the wide range of issues before this Court. Some of the evidence MOMS will offer is contained in the ten expert declarations filed simultaneously with MOMS Notice of Intervention. Dkt. Index Nos. 389-399. These declarations present the following facts:

1. Abortion is unique among gynecological and obstetric procedures, Calvin Decl. ¶ 18 (Dkt. Index No. Index No. 391; and Valley Decl. ¶ 20 (Dkt. Index No. 397);
2. Parental notification is well supported by peer-reviewed studies regarding differences in adult and adolescent decision-making, Coleman Decl. ¶¶ 25-36 (Dkt. Index No. 397); and Moschella Decl. ¶¶ 21-24 (Dkt. Index. 296);
3. Extensive structural changes that occur in the brain starting at age twelve and continuing through young adulthood contribute to the differences between adolescent and adult decision making, Moschella Decl. ¶¶ 17-20 (Dkt. Index No. 296), Valley Decl. ¶¶ 13-14 (Dkt. Index No. 397);
4. Differences in adult and adolescent decision-making become more pronounced in stressful situations, Moschella Decl. ¶¶ 19-21 (Dkt. Index No. 296) and Reardon Decl. ¶¶ 22-27 (Dkt. Index No. 405);
5. Parental notification protects against coercion by adult sexual partners of adolescents and provides a safeguard against sex trafficking and other illegal conduct, Coleman

Decl. ¶¶ 69-77 (Dkt. Index No. 390), Moschella Decl. ¶¶ 34-35 (Dkt. Index No. 296), and Reardon Decl. at ¶¶ 18, 42, 56 (Dkt. Index No. 405);

6. Parental notification laws facilitate pregnancy avoidance and reduce risky sexual behavior among adolescents, Valley Decl. ¶¶ 15-16 (Dkt. Index No. 397) and Coleman Decl. ¶ 33 (Dkt. Index No. 390);
7. Parental notification laws are not associated with unnecessary delays in securing abortions and are essential to protecting and preserving the well-being of adolescents in the state, Coleman Decl. ¶¶ 25-45 (Dkt. Index No. 390) and Valley Decl. ¶¶ 15-16 (Dkt. Index No. 397);
8. Many girls and women seeking abortions are ambivalent about the decision and reflection periods facilitate sound decision-making, Coleman Decl. ¶¶ 79-111 (Dkt. Index No. 390), Reardon Decl. ¶¶ 22-37 (Dkt. Index No. 405), and Calvin Decl. ¶ 30 (Dkt. Index No. 391);
9. Many girls and women seeking abortions are in crisis situations and more subject to manipulation and coercion by others, Reardon Decl. ¶¶ 12-27 (Dkt. Index No. 405);
10. Some girls and women seeking abortions are overwhelmed by shame or fear, becoming less capable of providing informed consent, Reardon Decl. ¶¶ 28-37 (Dkt. Index No. 405);
11. Requirements of mandatory disclosures and waiting periods provide girls and women who are uncertain or being coerced a greater opportunity to reject an unwanted abortion, Reardon Decl. ¶¶ 38-43 (Dkt. Index No. 405);
12. Parents are often aware of additional medical and psychosocial history of the minor seeking an abortion that would be necessary to provide the best care, Calvin Decl. ¶ 28

Dkt. Index No. Index No. 391) and Moschella Decl. ¶ 31 (Dkt. Index No. Index No. 396);

13. The tremendous medical, psychological, social, and moral implications of the abortion decision require an adequate period of time to ensure that a patient has the necessary information and opportunity for reflection with important people in her life, Calvin Decl. ¶ 30 (Dkt. Index No. Index No. 391) and Moschella Decl. ¶ 36 (Dkt. Index No. Index No. 396);
14. Abortion is an established risk factor for post-abortion trajectories including negative emotional responses and mental health declines that are often serious and enduring, that are ameliorated by informed consent laws and statutory waiting periods, Coleman Decl. ¶¶ 132-144 (Dkt. Index No. 390), Moschella Decl. ¶¶ 25-35 (Dkt. Index No. Index No. 396), and Reardon Decl. ¶¶ 11, 44-58 (Dkt. Index No. Index No. 405);
15. Parental notification laws have been associated with lower suicide rates specifically in the population most affected by the laws, Moschella Decl. ¶ 33 (Dkt. Index No. 396);
16. Women receiving adverse prenatal diagnosis benefit from informed consent laws and reflection periods Kellett Decl. ¶¶ 27-29 (Dkt. Index No. 391, Calvin Decl. ¶ 24 (Dkt. Index No. 391);
17. Accurate data on the comparative risk of abortion and continuing a pregnancy is unreliable due to the lack of a uniform reporting requirement in the United States and differing definitions of abortion mortality and maternal mortality, Valley Decl. ¶ 17 (Dkt. Index No. 397);
18. Current medical literature and the practices of fetal surgery and fetal anesthesia establish the existence of fetal pain, Wright Decl. ¶¶15-17 (Dkt. Index No. 398);

19. 160 studies that show an increased risk of preterm delivery after elective abortion, Valley Decl. ¶ 27 (Dkt. Index No. 397);
20. A majority of peer-reviewed studies find abortion places women at increased risk of breast cancer, especially when the abortion is obtained at earlier ages, Moschella Decl. ¶ 24 (Dkt. Index No. 396) and Valley Decl. ¶¶ 24-26 (Dkt. Index No. 397);
21. Advanced Practice Nurses (APRN) and Certified Nurse Midwives (CNM) do not have the training and surgical skills to manage severe bleeding complications from abortion, Valley Decl. ¶¶ 21-23 (Dkt. Index No. 397);
22. Since territorial times, Minnesota has had a continuous public policy of disfavoring abortion and favoring childbirth, Linton Decl.) ¶¶ 4-20 (Dkt. Index No. 395;
23. Abortion has been criminalized or disfavored in the Anglo-American legal tradition from early common law until judicial creation of a right to abortion, Dellapenna Decl.) ¶¶ 8-47 (Dkt. Index No. 392);
24. For over a century, leading feminists have understood the exploitation of women that abortion can occasion, Bachiochi Decl. ¶¶ 36-51 (Dkt. Index No. 393);
25. Requirements of informed consent is a safeguard against such exploitation, Reardon Decl. ¶¶ 17, 41 (Dkt. Index No. 405), Bachiochi Decl. ¶ 64)Dkt. Index No. 393, and Coleman Decl. ¶ 47 (Dkt. Index No. 390).

As this partial proffer of evidence demonstrates allowing intervention and relieving MOMS from the judgment would be "a beneficial addition allowing for a more informed decision by the court." *Snyder's Drug Stores, Inc. v Minnesota State Bd. of Pharm*., 301 Minn. 28, 34, 221 N.W. 2d 162, 166 (1974).

B. Defendants failed to assert compelling constitutional interests supporting the challenged laws.

The inadequacy of the defense is also evident in Defendants' failure to raise the constitutional stature of parents' rights to direct the care and upbringing of their children, instead treating these rights merely as state interests recognized by the United States Supreme Court in *Hodgson v. Minnesota*, 497 U.S. 417. *Doe* at 95-96.[1] The United States Supreme Court has recognized and protected parents' rights for almost a century. *Pierce v. Society of Sister*s, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations…"); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (power of parents to direct education of their children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978) (numerous recognitions that "the relationship between parent and child is constitutionally protected"). And while the *Hodgson* decision predates *Doe v. Gomez*, the constitutional right of parents to direct the upbringing of their children has been affirmed after *Doe* by both the U.S. and the Minnesota supreme courts. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) and *SooHoo v Johnson*, 731 N.W.2d 815, 820 (Minn. 2007).

[1] In *State v. Hassan*, 977 N.W.2d 633, 643 n. 8 (Minn. 2022) the Court determined it must "decline to invalidate a law based on conflicting science [regarding brain development in adolescence] and leave it to the Legislature to assess the evidence and enact policy accordingly."

Of the many federal cases protecting parents' rights perhaps *Parham v. J. R.,* 442 U.S. 584 (1979) is the most directly applicable to this case. In approving a Georgia law authorizing voluntary admission of minor children to mental hospitals by parents or guardians, the Court wrote:

> Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Parham v J. R., 442 U.S. 584, 603 (1979).

Minnesota courts also protect the rights of parents. "[T]o make decisions concerning the care, custody, and control of his or her children is a protected fundamental right." *SooHoo v Johnson*, 731 N.W.2d 815, 820 (Minn. 2007). *See also Justice v Marvel*, LLC, 965 N.W.2d 335, 341-42 (Minn. App .2021) (discussing parental authority to make medical decisions in context of parental authority to agree to an exculpatory clause on behalf of a minor child that can be binding after adulthood); *In re Welfare of J.L.Y*., 596 N.W.2d 692, 695 (Minn. App. 1999) (court order of medical treatment for minor permitted only upon findings that such treatment is necessary and parents unwilling to provide treatment).

Parental rights to direct the health care of their minor children is also deeply embedded in Minnesota statutory law. *See, e.g.* Minn. Stat. § 260.185, subd. 1(g). Minn. Stat. § 144.341 (2020) (a minor child "may give effective consent to personal medical, dental, mental and other health services" *only* if the minor child is "living separate and apart from parents or legal guardian ... and is managing personal financial affairs); Minn. Stat. § 144.344 (2020) (health-care provider may give emergency treatment to a minor child without parental consent *only* if "the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement

of consent would result in delay or denial of treatment."); Minn. Stat. § 518.003 subd. 3(a) (recognizing a custodial guardian's "right to determine the child's upbringing, including education, health care, and religious training.").

By relying exclusively of *Hodgson*'s characterization of parental rights as state interests instead of constitutional rights Defendants effectively conceded the case to Plaintiffs. Unlike the vigorous factual and legal defense of the Minnesota Parental Notification Act in *Hodgson*, (*see Hodgson v State of Minn*., 853 F.2d 1452, 1455 (8th Cir. 1988) aff'd sub nom. *Hodgson v Minnesota*, 497 U.S. 417 (1990) (noting the trial lasted five weeks)), the Attorney General in this case relied almost exclusively on judicial statements of interests while providing little to no evidentiary or constitutional support for the existence of those "interests".

Justice requires that this Court allow the intervention of MOMS and seek relief from the judgment to correct the deficient representation of the state's interests and the interests of Minnesota parents, including members of MOMS supporting the laws at issue in this case.

V. MOMS satisfies all requirements for permissive intervention as well as intervention by right.

Rule 24.02 provides for permissive intervention, stating: "Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a common question of law or fact. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Intervention as of right requires that the intervening party has an interest in the subject of the specific litigation, while permissive intervention only requires that the intervening party has a claim or defense that shares a common question of law or fact with the main action. *Westfield Ins. Co. v. Wensmann, Inc*., 840 N.W.2d 438 (Minn. App. 2013).

As this Memorandum makes clear, MOMS intended defenses and the main action have common questions of law and facts.

Intervention at this time will no doubt delay the finality of the judgment in this case, but such delay is not undue if the judgment is based on an inadequate defense harming the constitutional rights of the members of MOMS.

Refusing permissive intervention is reversible error when there is a legitimate concern that "absent intervention . . . the parties on both sides of [a] lawsuit" may represent similar interests." *Snyder's Drug Stores, Inc*., 221 N.W.2d at 166). In this case, the Attorney General has provided evidence that its office has "never initiated a prosecution alleging a violation of any of the states at issue in this case." Declaration of David Voigt (ECF 177) ¶4. The Attorney General failed to provide any evidence disputing a multitude of key predicate facts that that this Court relied upon in declaring the laws at issue unconstitutional. MOMS is prepared to correct this grievous deficiency.

Defendant Intervenor, MOMS, meets the standard for permissive intervention in this case.

CONCLUSION

Defendants failed to assert and protect parents' fundamental constitutional rights in their defense of the Minnesota laws requiring that 1) both parents be notified before their minor daughter undergoes an abortion; 2) women and girls be provided with essential information regarding an abortion procedure; 3) families have at least 48 hours and women have at least 24 hours to reflect on the truthful and relevant information required by the state; and 4) women and girls receive abortion services only from licensed physicians. This failure is sufficient to establish MOMS' right to intervene in this action. MOMS' right to intervene is particularly compelling given Defendants' failure to provide evidence rebutting most of Plaintiffs factual claims, culminating in the adverse

summary judgment that deprives Minnesota parents and their daughters of essential rights and protections. If this Court refuses to allow MOMS to intervene and seek relief from the judgment to provide adequate representation of the fundamental rights of parents and their daughters, these rights will go unvindicated and justice will be denied. It is necessary and just to allow the intervention.

For all of the foregoing reasons, the MOMS' Motion to Intervene should be granted.

Dated: November 14, 2022

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* Motion for admission pro hac vice pending before this court. Dkt. Record No. 404.