STATE OF MINNESOTA
IN COURT OF APPEALS

A23-0620

DR. JANE DOE, et al.,

Plaintiffs-Respondents,

vs.

STATE OF MINNESOTA, et al.,

Defendants-Respondents,

and

MOTHERS OFFERING MATERNAL SUPPORT

Proposed Intervenor-Appellant.

BRIEF OF PLAINTIFFS-RESPONDENTS

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- *How the Issue Was Raised in the Trial Court:* Appellant's Notice of Intervention (Index No. 386); Notice of Motion and Motion (Index No. 413); and Memorandum in Support of Motion to Intervene (Index No. 414).
- *The Trial Court's Ruling:* The district court denied intervention as of right by order dated March 14, 2023. Order & Memorandum at 7-25 (Index No. 431) ("Slip Op.").
- *How the Issue Was Preserved for Appeal:* Appellant's Notice of Appeal (Index No. 438).
- *Most Apposite Authorities:*
    - Minnesota Rule of Civil Procedure 24.01;
    - *State Automobile and Casualty Underwriters v. Lee*, 257 N.W.2d 573 (Minn. 1977);
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    - *Blue Cross/Blue Shield of Rhode Island v. Flam ex rel. Strauss*, 509 N.W.2d 393 (Minn. Ct. App. 1993); and
    - *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013).

(2) Whether the denial of permissive intervention is reviewable when based on findings that it would be untimely; prejudice the rights of the original parties; and disserve the public's interest in judicial economy, and if so, whether the district court abused its discretion.

- *How the Issue Was Raised in the Trial Court:* Appellant's Notice of Intervention (Index No. 386); Notice of Motion and Motion (Index No. 413); and Memorandum in Support of Motion to Intervene (Index No. 414).

- *The Trial Court's Ruling:* The district court denied permissive intervention by order dated March 14, 2023. Slip Op. at 25-29 (Index No. 431).

- *How the Issue Was Preserved for Appeal:* Appellant's Notice of Appeal (Index No. 438).

- *Most Apposite Authorities:*

    - Minnesota Rule of Civil Procedure 24.02; and

    - *State v. Deal*, 740 N.W.2d 755 (Minn. 2007).

INTRODUCTION

This appeal concerns the fourth attempt by nonparties to intervene in a case concerning a hot-button issue—abortion. But feeling passionately about an issue is not a ground for intervention. If it were, courts would be unable to manage their dockets.

The proposed intervenor this time around asserts an interest in the case based on the fact that its members have minor children who may someday become pregnant and seek an abortion in Minnesota. This deeply personal and highly speculative interest is not legally cognizable for intervention purposes. Moreover, the proposed intervenor waited until after the district court entered final judgment to seek intervention and now wants a second bite at the apple in a case that was sharply contested for three years.

The district court properly concluded that the proposed intervenor is not entitled to intervene as of right, and its sound exercise of discretion in denying permissive intervention is not reviewable.

STATEMENT OF THE CASE

On July 13, 2022, after more than three years of litigation, Judge Thomas A. Gilligan, Jr., of the Ramsey County District Court entered final judgment in this case, Notice of Entry of J. (Index No. 359), holding unconstitutional certain laws restricting access to sexual and reproductive healthcare, including a law prohibiting

pregnant minors from obtaining abortion care unless they first notify *both* of their parents, Minn. Stat. § 144.343, subds. 2-6 ("Two-Parent Notification Requirement"); *see generally Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998, at *1 (Minn. Dist. Ct. July 11, 2022). Two months later, Mothers Offering Maternal Support ("MOMS") gave notice of its intent to intervene to relitigate the case in the district court. Notice of Intervention (Index No. 386). The district court denied MOMS' motion for intervention on March 14, 2023. Order & Memorandum (Index No. 431) ("Slip Op."). MOMS now appeals from that order. Notice of Appeal (Index No. 438).

STATEMENT OF FACTS

I. Relevant Procedural History

On May 29, 2019, Plaintiffs filed this case to challenge the constitutionality of certain laws restricting access to sexual and reproductive healthcare, including the Two-Parent Notification Requirement (collectively, the "Challenged Laws"). Compl. ¶¶ 58–245 (Index No. 1). They named as Defendants the State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing (collectively, the "State"). *Id.* ¶¶ 10–15. The Office of the Attorney General appeared on behalf of all Defendants and represented them

throughout the proceedings. *See* Notice of Appearance of Liz Kramer (Index No. 22) (appearance of Minnesota Solicitor General).

The litigation entailed extensive discovery and motion practice. *Doe v. State*, No. 62-CV-19-3868, 2022 WL 2662998, at *3–5 (Minn. Dist. Ct. July 11, 2022). Following the close of discovery, the parties litigated three rounds of summary judgment motions pursuant to an agreed upon schedule. First Am. Scheduling Order (Mar. 15, 2021) (Index No. 166). On November 22, 2021, the district court issued a ruling on the State's first summary judgment motion, which concerned jurisdictional defenses, granting the motion in part and denying it in part. Order & Mem. on Defs.' First Mot. for Summ. J. (Index No. 227). The State filed an interlocutory appeal. Notice of Interlocutory Appeal to Ct. of Appeals (Index No. 289). In response, Plaintiffs agreed to dismiss the claims for which standing was contested on appeal. *See* Order at 1, June 7, 2022 (Index No. 340); Order at 1, June 24, 2022 (Index No. 353) ("Order Dismissing Appeal"). Plaintiffs then filed a Second Amended Complaint reflecting the stipulated dismissals,[1] Second Am. Compl. (Index No. 347), and this Court dismissed the appeal as moot, Order Dismissing Appeal.

[1] MOMS' assertion that Our Justice joined the case as a Plaintiff on June 13, 2022, is incorrect. Appellant's Br. at 9. Our Justice joined the case two years earlier, on August 1, 2019, when Plaintiffs filed their First Amended Complaint. First Am. Compl. (Index No. 47).

On July 11, 2022, the district court issued a ruling on the parties' remaining summary judgment motions, which addressed the merits of Plaintiffs' constitutional claims. *Doe*, 2022 WL 2662998, at *2. It declared some of the Challenged Laws, including the Two-Parent Notification Requirement, unconstitutional and permanently enjoined their enforcement. *Id.* at *1. The district court entered final judgment on July 13, 2022. Notice of Entry of J.[2]

On August 4, 2022, Matthew Franzese, the Traverse County Attorney ("County Attorney"), moved for post-judgment intervention. Notice of Intervention (Index No. 361); Notice of Mot. and Mot. and Request for Accelerated Review (Index No. 362). The district court denied his motion on September 6, 2022.[3] Order Den. Intervention & Mem. at 1, 16 (Index No. 382). This Court affirmed the denial on April 3, 2023. *Doe v. State*, No. A22-1265, 2023 WL 2763167, at *1 (Minn. Ct. App. Apr. 3, 2023) (nonprecedential opinion). Notably, it reviewed only the part of the district court's order denying the County Attorney's request for intervention as

[2] Of the Challenged Laws that were held unconstitutional, all but the Two-Parent Notification Requirement were subsequently repealed by the Minnesota Legislature. *See* Omnibus Health Appropriations 2023, Minn. 93rd Leg. Reg. Session, ch. 70, art. 4, § 113.

[3] Before final judgment, the district court denied two other motions for intervention, one by private organizations and one by the 91st Minnesota Senate. *See* Order Denying Intervention & Mem. at 13, 14 (Index No. 95); Order Den. 91st Sen. Intervention & Mem. at 24–25 (Index No. 159). This Court affirmed the district court's denial of the private organizations' intervention request. *Doe v. State*, No. A20-0273, 2020 WL 6011443, at *3 (Minn. Ct. App. Oct. 12, 2020), *rev. denied* (Minn. Dec. 29, 2020). The Senate did not appeal the district court's ruling.

of right, holding that the denial of permissive intervention was not appealable. *Id.* at *1 n.1. On May 3, 2023, the County Attorney filed a petition for review by the Minnesota Supreme Court, Pet. for Review (Index No. 435). The Minnesota Supreme Court denied the petition on July 18, 2023. Order, July 18, 2023 (Index No. 440).

II. MOMS' Motion To Intervene

MOMS is an unincorporated association of Minnesota mothers with minor daughters. Decl. of Jessica Chastek on Behalf of MOMS ("Chastek Decl.") at ¶ 2 (Index No. 389). It formed in response to the district court's entry of final judgment in this case. Appellant's Br. at 7. On September 12, 2022, two months after the district court entered final judgement and nearly six weeks after the County Attorney gave notice of his intent to intervene, MOMS notified the parties and the district court of its intention to intervene. Notice of Intervention (Index No. 386); Mem. in Supp. of Notice of Intervention ("Initial MOMS Mem.") (Index No. 387). Both Plaintiffs and Defendants filed objections to MOMS' Notice of Intervention on October 12, 2022 (Index Nos. 408, 409). MOMS filed a motion to intervene on November 11, 2022 (Index No. 413), and a memorandum of law in support on November 14, 2022 ("MOMS Mem.") (Index No. 414).

MOMS sought intervention as of right, and in the alternative, permissive intervention. MOMS Mem. at 2, 18. MOMS asserted that, if the district court

granted its motion, it would seek to vacate the final judgment, reopen discovery, and introduce testimony from at least ten expert witnesses, essentially restarting the case from scratch. *Id.* at 9, 12–15; Tr. of Jan. 5, 2023, Hearing ("Hearing Tr.") at 24:12-26-15. MOMS estimated that it would take between 18 and 24 months to complete the new proceedings. Hearing Tr. at 25:23-26:6.

III. The District Court's Order Denying MOMS' Motion To Intervene

On March 14, 2023, the district court entered an order denying MOMS' motion to intervene. Slip Op. Addressing intervention as-of-right, the district court first held that MOMS' motion was untimely. *Id.* at 10-17. After noting that post-judgment intervention is "strongly disfavored," *id.* at 11, the district court explained that MOMS took an impermissible "wait-and-see" approach to intervention. *Id.* at 14 ("[K]nowing that your interest is at risk, assuming that interest will be protected, failing to assess whether that interest is actually being protected until after an adverse and final decision is reached, is a quintessential 'wait-and-see' approach to intervention."). Additionally, the district court found that MOMS' untimely intervention would prejudice the original parties by requiring them to expend substantial time and resources relitigating issues that had already been resolved and creating uncertainty about the scope of lawful abortion care available in Minnesota. *Id.* at 15-16.

Second, the district court held that MOMS lacks an interest in the subject of the litigation sufficient to warrant intervention as of right. *Id.* at 17-20. It explained that, under controlling precedent, MOMS' asserted interest in "the parental right of its members to participate in decisions regarding the health care of their daughters" is the type of personal and familial interest that is not cognizable under Rule 24.01. *Id.* at 17-18 (citing *Valentine v. Lutz*, 512 N.W.2d 868, 870 (Minn. 1994)). Additionally, the district court rejected MOMS' contention that it is entitled to intervene as of right because the Two-Parent Notification Requirement grants its members a private right of action, holding that "MOMS' members ability to maintain a civil lawsuit" under the statute is "speculative and remote and cannot provide a sufficient interest for MOMS to intervene as of right." *Id.* at 20.

Third, the district court held that, "[b]ecause MOMS lacks an interest in the subject of the action, it also lacks an interest which is subject to protection." *Id.* at 21.

Fourth, the district court held that any interest MOMS may have had in the litigation was adequately represented by Defendants. *Id.* at 22-25. It declared: "From this court's view, after spending countless hours analyzing the sophisticated and well-researched arguments made by Defendants, it is clear that their representation of the interests of all Minnesotans, including MOMS' members, was adequate." *Id.* at 25. It rejected MOMS' arguments to the contrary as post-hoc

disagreements with Defendants' litigation strategy, *id.* at 23-24, and explained that "[a]dequacy of representation does not assess whether the current party to the litigation would present the quality and quantity of evidence in the same manner as the proposed intervenor; rather it assesses whether the representation of the proposed intervenor's *interests* was adequate." *Id.* at 24 (emphasis added); *see also id.* at 25 ("Though this court ultimately denied most of the relief requested by Defendants, they fought for years to uphold the constitutionality of the Challenged Laws—the same litigation goal of MOMS.").

With respect to permissive intervention, the district court denied MOMS' request to intervene because it was untimely and it would unduly delay and prejudice the adjudication of the original parties' rights. *Id.* at 27-28. In addition, the district court concluded that permitting post-judgment intervention following three years of litigation would disserve the public's interest in judicial economy. *Id.* at 29.

On April 28, 2023, MOMS filed a notice of appeal, seeking review of the district court's order denying its motion for intervention. Notice of Appeal (Index No. 438). MOMS' attempts to perfect this appeal have been riddled with deficiencies, evidencing a complete disregard for the rules of the Court and unnecessarily prolonging the proceedings. On May 1, 2023, the clerk of the appellate courts directed MOMS to file proof of filing a copy of the notice of appeal with the district court administrator. *See* Order at 1, May 17, 2023. On May 17,

2023, after MOMS failed to comply with this directive, this Court ordered MOMS to remedy the deficiency by May 30, 2023. *Id.* On June 12, 2023, the clerk rejected MOMS' principal brief because it was late and lacked a signature. Order at 1, June 20, 2023. The Court subsequently granted MOMS permission to file a late brief and extended the briefing schedule for all parties accordingly. *Id.* at 2-3.

SUMMARY OF ARGUMENT

The district court properly denied MOMS' request for intervention as of right because MOMS failed to satisfy any of the requirements of Minnesota Rule of Civil Procedure 24.01.

First, MOMS' request for intervention is untimely because some of its members were aware of the lawsuit from its inception but waited more than three years to seek intervention to see if the State's defense of the Challenged Laws would be successful. *Infra* at 14-16. Moreover, given that MOMS seeks to vacate the final judgment; reopen discovery; and introduce testimony from at least ten additional expert witnesses, the burden, expense, and delay that intervention would impose on the original parties would substantially prejudice their rights. *Infra* at 16-18.

Second, MOMS' asserted interests in the litigation, which derive from its members' interests as parents in directing the care and upbringing of their daughters and its members' interest in preserving a private right of action under the Two-Parent Notification Requirement, are not legally cognizable interests for purposes of Rule

24.01. *Infra* at 19-23. The Minnesota Supreme Court previously held that a "personal and family interest[]" in the upbringing of a child cannot serve as a basis for intervention. *Valentine*, 512 N.W.2d at 870; *see infra* at 20. And MOMS' interest in the private right of action is too speculative to support intervention given that none of its members have accrued a claim to date, and their ability to sue under the statute in the future would depend on a lengthy chain of contingent events—including that one of their children becomes pregnant before age eighteen; seeks an abortion in Minnesota; declines to seek a court order authorizing the abortion, which is a statutory alternative to parental notification; and obtains the abortion without notifying their parents. *Infra* at 21-23.

Third, MOMS' members have alternate means of protecting their asserted interests, which include proactively engaging their minor children in communication about sex and pregnancy, and making clear to their children that it would be safe to disclose an unplanned pregnancy to them if one ever occurred. *Infra* at 23-24.

Fourth, Defendants adequately represent MOMS' interests given that they share the goal of upholding the Two-Parent Notification Requirement against Plaintiffs' constitutional challenge. *Infra* at 24-27. MOMS' disagreement with Defendants' litigation strategy and tactics does not constitute inadequate representation. *Infra* at 24-25.

The district court's denial of MOMS' request for permissive intervention under Rule 24.02 is not reviewable because it is not based on a finding that MOMS lacks a protectable interest in the litigation. *Infra* at 27-28. And even if it were reviewable, it is not an abuse of discretion given the timing of the intervention motion, the prejudice to the rights of the original parties that MOMS' intervention would cause, and the manner in which intervention would disserve the public's interest in judicial economy. *Infra* at 28-30.

ARGUMENT

I. The District Court Properly Denied MOMS' Request For Intervention As Of Right.

Minnesota Rule of Civil Procedure 24.01 establishes four requirements for intervention as of right: (1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) a showing that the applicant's interest is not adequately represented by existing parties. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). "Each requirement must be met." *Schroeder v. Simon*, 950 N.W.2d 70, 76 (Minn. Ct. App. 2020). This Court reviews orders concerning intervention as of right *de novo*. *Id*.

Here, the district court properly held that MOMS is not entitled to intervene in this action as of right. While the failure to satisfy even one Rule 24.01 requirement is fatal, MOMS fails to satisfy any of them.

A. MOMS' Motion To Intervene Is Untimely.

"'Timeliness' of an application to intervene is determined on a case-by-case basis and depends on factors such as (1) how far the subject suit has progressed; (2) the reason for delay in seeking intervention; and (3) any prejudice to existing parties because of the delay." *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 446 (Minn. Ct. App. 2013) (citation omitted). As a general matter "[t]he policy of encouraging intervention whenever possible is favored by courts, and the rule should be liberally applied," but "[p]osttrial intervention . . . is not viewed favorably." *Blue Cross/Blue Shield of R.I. v. Flam ex rel. Strauss*, 509 N.W.2d 393, 396 (Minn. Ct. App. 1993); *accord Brakke v. Beardsley*, 279 N.W.2d 798, 801 (Minn. 1979) (dismissing appeal on the ground that post-judgment intervention was untimely) ("[W]e have previously indicated disfavor for intervention after trial because of the delay involved and potential prejudice to the parties . . . .").

"Intervention should not be allowed where circumstances show that the would-be intervenor was aware of the suit and permitted the trial to proceed, waiting to see if the outcome would be favorable to its interests." *Blue Cross/Blue Shield of R.I.*, 509 N.W.2d at 396. That is precisely what happened here, except that the case was decided by summary judgment motions rather than trial. MOMS' designated representative admitted under penalty of perjury that some MOMS' members were aware of this case from the outset and chose to "rel[y] upon the state's representation

of our parental rights as well as the health and safety of our daughters" rather than seek intervention to protect those interests themselves. Chastek Decl. ¶ 7; *accord* Hearing Tr. at 11:21-25 ("There are some members of the association that read the front-page news in the various state newspapers that occurred either the day of or following the day that the Plaintiffs filed their complaint."). MOMS' members waited until entry of an unfavorable judgment to seek a second bite at the apple. They now contend that they are dissatisfied with the job that the State did in representing their interests, but that is the gamble they took by relying on the State to litigate this case rather than seeking to intervene at the outset. *Cf. Omegon, Inc. v. City of Minnetonka*, 346 N.W.2d 684, 687 (Minn. Ct. App. 1984) (finding post-judgment intervention untimely where the proposed intervenor initially chose to rely on the City of Minnetonka to represent its interests).

As the district court explained, MOMS' actions embody "a quintessential 'wait-and-see' approach to intervention" that has long been disfavored by the Minnesota Supreme Court. *See supra* at 8. In *State Automobile and Casualty Underwriters v. Lee*, 257 N.W.2d 573, 576 (Minn. 1977), for example, the Minnesota Supreme Court affirmed the district court's denial of post-judgment intervention as untimely. The Court held that the proposed intervenor's "motion cannot be considered timely where judgment has been entered and satisfied; it knew about commencement of the action; [and] no reasons for its delay in bringing the

motion were put forward." *Id.* It further held that the proposed intervenor "should not now, having waited to see if the decision would be favorable to its interests, be allowed to appeal a judgment binding upon and satisfactory to the parties to the action." *Id.* So too here. *Cf. SST, Inc. v. City of Minneapolis,* 288 N.W.2d 225, 230 (Minn. 1979) (affirming a district court order denying post-judgment intervention in substantial part) ("[T]his is not a case where the intervenor was unaware until judgment that his interests were about to be prejudiced and made prompt motion to intervene once he became aware of that possibility."); *Harbal v. Fed. Land Bank of St. Paul*, 449 N.W.2d 442, 448 (Minn. Ct. App. 1989) (affirming district court denial of post-judgment intervention where the proposed intervenor "clearly had notice of the litigation and had reason to presume that its rights would be directly implicated").[4]

Further, "intervention is untimely if the rights of the original parties will be substantially prejudiced." *Omegon, Inc.*, 346 N.W.2d at 687. Here, it is manifest that intervention at this late stage of the proceedings would substantially prejudice the original parties. Plaintiffs and Defendants spent three years litigating this case.

[4] MOMS' contention that "ordinary citizens" like its members should not be required to "constantly monitor the legal work of government officials" to ensure that it meets their standards for adequate representation, Appellant's Br. at 16, is just another way of saying that they should be permitted to "wait and see" how successful the State's defense of a lawsuit turns out to be before deciding whether to intervene. The controlling precedents cited above squarely reject that position.

The proceedings included extensive discovery and motion practice, more than a dozen expert witnesses, three rounds of summary judgment briefing, and an interlocutory appeal by Defendants. *See generally* Slip Op. at 2-5. The district court ultimately rendered a split decision, striking down many, but not all, of the Challenged Laws. *Doe*, 2022 WL 2662998, at *1-2. Both sides accepted this decision and opted not to appeal the final judgment.

Granting MOMS' motion for intervention and permitting it to relitigate issues that have already been sharply contested and decided would impose substantial burdens and costs on the original parties. Moreover, it would delay the finality of judgment in the proceedings by eighteen months to two years by MOMS' estimate. Hearing Tr. at 25:23-26:6. This would leave not just the parties, but the public, mired in uncertainty about whether and under what conditions minors can exercise their constitutional right to obtain abortion care in Minnesota at a time of national disruption in access to abortion services. *See Women of the State of Minn. ex rel. Doe v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) ("We can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities. We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to

decide to terminate her pregnancy."); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade,* 410 U.S. 113 (1973)). This additional burden, cost, and delay amounts to substantial prejudice. *See SST, Inc.*, 288 N.W.2d at 230 (finding substantial prejudice where the original parties acted expeditiously; delay would impose significant financial costs; and intervention would force the parties to reopen settlement negotiations that had been concluded); *Omegon, Inc.*, 346 N.W.2d at 687 (finding substantial prejudice where the rights between the parties had already been fully adjudicated and the parties were acting in reliance on the court's judgment).

MOMS' reliance on *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), is misplaced. There, the Court held that a post-judgment motion for intervention was timely when filed by a putative class member for the purpose of appealing the denial of class certification. 432 U.S. at 394-96. Here, in contrast, MOMS was never an unnamed member of a defendant class. And importantly, MOMS is not seeking "post-judgment intervention for the purpose of appeal." *Id.* at 395. Instead, it is seeking post-judgment intervention to take a second bite at the apple in the district court. *See supra* at 7-8, 14-18.

In sum, the district court correctly held that MOMS' motion for intervention is untimely.

B. MOMS Lacks A Legally Cognizable Interest In The Subject Of The Lawsuit.

"Not every alleged interest in a lawsuit supports intervention as a matter of right." *Schroeder*, 950 N.W.2d at 76. A proposed intervenor must have a protectable interest that will be directly affected by the lawsuit. *See id.*; *see also Valentine*, 512 N.W.2d at 870 (holding that former foster parents lacked a legally cognizable interest in a child custody proceeding); *Heller v. Schwan's Sales Enters., Inc.*, 548 N.W.2d 287, 292 (Minn. Ct. App. 1996) (holding that a consumer concerned about the price of ice cream lacked a legally cognizable interest in a class action products liability suit against an ice cream manufacturer); *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (holding that a prospective intervenor's interests must be "direct, significant and legally protectable"). "[I]f a judgment will not affect a proposed intervenor's legal rights, the proposed intervenor is generally not entitled to intervene as a matter of right." *Schroeder*, 950 N.W.2d at 76 (citing *Koski v. Chicago & Nw. Transp. Co.*, 386 N.W.2d 282, 284-85 (Minn. Ct. App. 1986)); *see also League of Women Voters Minn.*, 819 N.W.2d at 642-43 (denying intervention to an advocacy group whose only interest in a proposed ballot initiative was that it advocated for its enactment).

Here, MOMS asserts two interests in the subject of the lawsuit: (1) its members' interest in directing the care and upbringing of their daughters and (2) its members' interest in preserving a private right of action under the Two-Parent

Notification Requirement. Appellant's Br. at 19-20. Neither interest supports intervention as of right.

First, MOMS' asserted interest in directing the care and upbringing of its members' daughters is not a legally cognizable interest for intervention purposes. *See Valentine*, 512 N.W.2d at 870. In *Valentine*, the Minnesota Supreme Court explained that the personal nature of the interest of a foster parent in the upbringing of their foster child "is inconsistent with the language of Rule 24.01," which concerns "interests relating to . . . property or transaction[s] . . . ." *Id.* (quoting Minn. R. Civ. P. 24.01). For that reason, it held that former foster parents were not entitled to intervene in a child custody proceeding. *Id.* Thus, although a parent undoubtedly has a vital interest in the care and upbringing of their child, it is not the type of interest that can support intervention as of right. *Id.* ("[W]e hold that the type of interaction between foster parents and child is not an interest that allows intervention under Rule 24.01.").

MOMS seeks to avoid this conclusion by arguing that "the elimination of parental notification regarding their minor daughter's intention to procure and abortion strike as the heart of the constitutional right of parents to care for their minor children." Appellant's Br. at 21 (typographical and grammatical errors in original). But this is pure hyperbole, divorced from fact and precedent. MOMS cites no legal authority establishing that Minnesota has a constitutional obligation to mandate

parental notification as a condition for minors to obtain abortion care from private medical practitioners, and federal precedent casts doubt on this proposition. *See Diamond v. Charles*, 476 U.S. 54, 65 (1986) (holding that, where the State of Illinois declined to appeal a judgment holding an abortion restriction unconstitutional, a private-party intervenor lacked standing to maintain an appeal) ("Diamond's attempt to maintain the litigation is . . . simply an effort to compel the State to enact a code in accord with Diamond's interests. But 'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State . . . . [T]he State alone is entitled to create a legal code . . . ." (citations omitted)). Further, invalidation of the Two-Parent Notification Requirement will not prevent MOMS' members from providing guidance to their children on any topic or fostering the kind of relationship with their children that would encourage frank discussion in the event of an unintended pregnancy.

Second, MOMS' asserted interest in preserving a private right of action under the Two-Parent Notification Requirement is too attenuated to support intervention as of right. The statute provides that "[p]erformance of an abortion in violation of this section . . . shall be grounds for a civil action by a person wrongfully denied notification." Minn. Stat. § 144.343, subd. 5. But MOMS has not shown that any of its members currently have grounds to bring an action under the statute, or that they are likely to have grounds to do so in the future. Indeed, MOMS has not even

alleged that any of its members' minor children are pregnant, much less that MOMS has reason to believe they would seek an abortion without notifying their parents. Moreover, the Two-Parent Notification Requirement provides a mechanism for minors to obtain abortion care without notifying their parents. It states:

> If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

Minn. Stat. § 144.343, subd. 6(c)(1). MOMS' members would not have a cause of action under the statute if their children utilized this procedure.

Ultimately, MOMS' interest in preserving the Two-Parent Notification Requirement is no different than the interest of any parent with minor children anywhere in the United States who may (or may never) seek an abortion in Minnesota. This interest is simply too general and speculative to support intervention as of right. *Cf. Keith*, 764 F.2d at 1271 (affirming district court's denial of intervention to members of an anti-abortion association seeking to defend

abortion restrictions because, *inter alia*, their interests as potential adoptive parents of fetuses were "too speculative").

In sum, the district court correctly held that MOMS lacks a legally cognizable interest in the subject of the lawsuit.

C. MOMS Need Not Intervene to Protect Its Asserted Interests.

Given that MOMS lacks a legally cognizable interest in the subject of the lawsuit, the remaining requirements for intervention as of right—an inability to protect its interests absent intervention, and inadequate representation of its interests by Defendants—are not applicable here. *See* Minn. R. Civ. P. 24.01.

But assuming for the sake of argument that MOMS' asserted interests are legally cognizable, MOMS has other ways to protect them besides intervening in the lawsuit. For example, MOMS' members could proactively engage their minor children in communication about sex and pregnancy, and make clear to their children that it would be safe to disclose an unplanned pregnancy to them if one ever occurred. As the district court found, most adolescents confide in their parents about unplanned pregnancies. *Doe*, 2022 WL 2662998, at *10. The ones who do not fear damaging their relationships with their parents as well as abuse and abandonment by their parents. *Id.* Fostering healthy communication about sex and pregnancy *before* a crisis arises would be a potent way for MOMS' members to build trust with their children and encourage them to confide in their parents in the event they

experience an unplanned pregnancy, obviating the need for a coercive statute and civil cause of action.

D. MOMS' Asserted Interests Are Adequately Represented By Defendants.

"Although intervention requires only a 'minimal' showing of inadequate representation, when the prospective intervenor and the named party have the same goal, a 'presumption [exists] that the representation in the suit is adequate.'" *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (citations omitted). "The prospective intervenor then must rebut that presumption and show that some conflict exists." *Id.* Here, Defendants and MOMS share the same litigation goal: to uphold the Two-Parent Notification Requirement against Plaintiffs' constitutional challenge. MOMS does not contend that its interests are in any way adverse to Defendants' interests, and no conflict of interests is evident in the record. All of MOMS' arguments about the alleged inadequacy of Defendants' representation boil down to a single claim: that Defendants could have done a better job defending the statute. But in the absence of a demonstrated conflict of interest, "post-hoc quibbles with the state's litigation strategy" do not equate to inadequate representation. *Id.*; *cf. Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) ("[A]ppellants have done little more than identify reasonable litigation decisions made by the Attorney General with which they disagree. Such differences of opinion cannot be sufficient to warrant intervention as of right, for . . . the harms that the contrary rule would inflict upon

the efficiency of the judicial system and the government's representative function are all-too-obvious.").

Moreover, it is indisputable that Defendants acted in good faith to mount a robust defense of the Challenged Laws. As the district court recounted:

> Over the course of three years, Defendants engaged in discovery, hired their own expert witnesses, and cross-examined each of the Plaintiffs' expert witnesses. They submitted voluminous briefs and record evidence in support of their own motions for summary judgment, and in opposition to the motions for summary judgment of the Plaintiffs. They moved to exclude consideration by this court of most of Plaintiffs' expert witnesses.

Slip Op. at 24-25. That MOMS, in hindsight, thinks a different slate of expert witnesses would have been more persuasive is pure speculation.

Nor is the fact that the district court ultimately held the Two-Parent Notification Requirement unconstitutional evidence that Defendants' representation was deficient. The nation's leading associations of practitioners who care for pregnant adolescents—the American Academy of Pediatrics ("AAP"); the American Medical Association ("AMA"); the Society for Adolescent Health and Medicine ("SAHM"); the American Public Health Association ("APHA"); and the American College of Obstetricians and Gynecologists ("ACOG")—all oppose laws mandating parental involvement in minors' abortion decisions because the great weight of scientific evidence shows that such laws fail to promote positive family communication and expose some pregnant adolescents to significant health and

safety risks.[5] For this reason and others, courts across the country in states as blue as Massachusetts and as red as Alaska have invalidated such laws under their state constitutions. *See, e.g.*, *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122 (Alaska 2016); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *Planned Parenthood League of Mass., Inc. v. Att'y Gen.*, 677 N.E.2d 101 (Mass. 1997); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000). In Minnesota, abortion restrictions are subject to strict scrutiny, *see Gomez*, 542 N.W.2d at 19, which means that Defendants had to show not just that the Two-Parent Notification Requirement serves a compelling state interest, but that it is the least restrictive means of doing so, *see State v. Casillas*, 952 N.W.2d 629, 640 (Minn. 2020). That was always going to be a tall order, given that the statute requires notification of *both* of a minor's parents, regardless of the family's circumstances.

[5] AAP, Comm. on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 150 Pediatrics e2022058780 (2022), https://doi.org/10.1542/peds.2022-058780; Oscar W. Clarke et al., AMA, Council on Ethical & Jud. Affs., *Mandatory Parental Consent to Abortion*, 269 JAMA 82 (1993), https://doi.org/10.1001/jama.1993.03500010092039; Carol Ford et al., *Confidential Health Care for Adolescents: Position Paper of the Society for Adolescent Medicine*, 35 J. Adolescent Health 160 (2004), https://www.adolescenthealth.org/SAHM_Main/media/Advocacy/Positions/Aug-04-Confidential_Health_Care_for_Adolescents.pdf; *Ensuring Minors' Access to Confidential Abortion Services*, APHA (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/03/11/14/ensuring-minors-access-to-confidential-abortion-services; *Policy Priorities: Adolescent Health*, ACOG, https://www.acog.org/advocacy/policy-priorities/adolescent-health#:~:text=ACOG%20advocates%20for%3A,care%20without%20parental%2Dinvolvement%20mandates (last visited July 19, 2023).

See Minn. Stat. § 144.343, subd. 3(a).[6] In short, the district court's decision to declare the Two-Parent Notification Requirement unconstitutional is not unprecedented and does not, by any means, imply that Defendants were derelict in their duty to defend the law.

In sum, the district court correctly held that any interests MOMS may have in the subject of the lawsuit are adequately represented by Defendants.

II. The District Court Properly Denied MOMS' Request For Permissive Intervention.

Minnesota Rule of Civil Procedure 24.02 gives a court broad discretion to permit intervention provided that three criteria are met: (1) the motion is timely; (2) intervention will not unduly delay or prejudice the rights of the existing parties; and (3) the applicant's claim or defense has "a common question of law or fact" with the existing action. Minn. R. Civ. P. 24.02; *accord State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007). Generally, an order denying permissive intervention is not appealable. *Deal*, 740 N.W.2d at 760. An appellate court may review the denial of permissive intervention only when it is "based on a finding that the applicant 'had no protectable interest in the litigation.'" *Id.* (quoting *Thibault v. Bostrom*, 134 N.W.2d 308, 310 n.1 (Minn. 1965)). "When reviewed, denial of a request to

[6] In cases where notification is mandated, an exception to the two-parent requirement is provided only when a parent is dead or cannot be located through "reasonably diligent effort." Minn. Stat. § 144.343, subd. 3(a).

permissively intervene will be reversed only when 'a clear abuse of discretion is shown.'" *Id.* (citing *SST, Inc.,* 288 N.W.2d at 231).

A. The District Court's Decision On Permissive Intervention Is Not Appealable.

The district court's denial of permissive intervention was not based on a finding that MOMS lacks a protectable interest in the litigation. *See* Slip Op. at 25-29. Instead, the district court based its decision on three factors: (1) MOMS' intervention motion is untimely, *id.* at 27; (2) intervention would unduly delay and prejudice the rights of the existing parties, *id.* at 28; and (3) intervention would disserve the public's interest in judicial economy, *id.* at 29. Accordingly, the district court's decision to deny permissive intervention is not appealable. *See Deal*, 740 N.W.2d at 760.[7]

B. The District Court Did Not Abuse Its Discretion.

Alternatively, should the Court find that the denial of permissive intervention is reviewable, it should affirm the district court's decision because the district court did not abuse its discretion. "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

[7] In a non-precedential opinion issued earlier in this case, this Court declined to review the district court's denial of the County Attorney's request for permissive intervention because the denial was not based on a finding that he lacked a protectable interest in the litigation. *Doe*, No. A22-1265, 2023 WL 2763167, at *1 n.1.

For the reasons explained above, the district court's conclusion that MOMS' intervention is untimely is not based on an erroneous view of the law and is not contrary to logic or the factual record. *See supra* at 14-18. MOMS' assertion that it is inconsistent with *Cameron v. EMW Women's Surgical Center*, 142 S. Ct. 1002 (2022), is incorrect. In *Cameron*, the Court permitted the Kentucky Attorney General to intervene in a case on appeal for the purpose of filing a petition for rehearing en banc and/or a writ of certiorari where he moved for intervention two days after learning that the State defendants would not seek further appellate review. 142 S. Ct. at 1012. The Court's analysis relied heavily on "[r]espect for state sovereignty," which in the Court's view requires that "a State's opportunity to defend its laws in federal court should not be lightly cut off," and that federal courts "take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests." *Id.* at 1011. Here, as noted repeatedly, MOMS is not seeking to intervene for the purpose of appellate review, so the timeliness inquiry should focus on the time that elapsed from when MOMS first learned about the subject of the lawsuit—three years—and not the time that elapsed from when MOMS learned that the State would not appeal the district court's final judgment—six weeks.[8] *See supra* at 7-8, 14-18; Appellant's Br. at 28. Further, permitting MOMS to intervene would not promote respect for state

[8] Even this delay is inexcusable.

sovereignty. To the contrary, it would undermine it given that MOMS is not a state actor and the State Defendants oppose intervention.

Additionally, the district court's determinations that permissive intervention would be unduly prejudicial and disserve judicial economy are well supported by precedent, logic, and the factual record. *See supra* at 4-8, 14, 10, 16-18. It is of no consequence that, following enactment of the repeal statute, *see supra* at 6 n.2, MOMS now claims it will focus exclusively on defending the Two-Parent Notification Requirement, *compare* Appellant's Br. at 29, *with* MOMS Mem. at 19, *and* Initial MOMS Mem. at 2. Vacating the final judgment, reopening discovery, and adding at least ten new expert witnesses to the case would impose significant burden, cost, and delay on the original parties and the court, regardless.

Accordingly, if this Court determines that the district court's denial of permissive intervention is appealable, it should affirm the district court's decision as a sound exercise of discretion.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's order as to intervention as of right and decline to review the district court's order as to permissive intervention. Alternatively, this Court should affirm the district court's order in its entirety.

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Respectfully submitted,

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